NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

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Defender News

Founded Suspicion Needed to Ask If Occupants of Stopped Car Have Weapons

The Court of Appeals, applying the graduated framework in *DeBour/Hollman* to traffic stops, has held that for the police to ask the occupants of a lawfully stopped car if they have any weapons requires founded suspicion that criminality is afoot. *People v Garcia*, 2012 NY Slip Op 08670 (12/18/2012). The Court distinguished this type of questioning from the rule that police "may, as a precautionary measure and without particularized suspicion, direct the occupants of a lawfully stopped vehicle to step out of the car …." The case was remanded for consideration of the prosecution's inevitable discovery claim. A summary of the case appears at p. 25.

Rejection of Certain Mental Diagnoses by APA Doesn't Preclude Use in Civil Commitment Proceedings

The Court of Appeals, in a 4-3 decision, held that the definition of a mental abnormality in Mental Hygiene Law 10.03(i) does not refer to or require that a diagnosis be one enumerated in the Diagnostic and Statistical Manual of Mental Disorders (DSM) of the American Psychiatric Association (APA). Therefore, the fact that a diagnosis of a mental disorder or defect is not in the DSM does not preclude its use in civil commitment proceedings. *Matter of State of New York v Shannon S.*, 2012 NY Slip Op 07228 (10/30/2012). In *Shannon S.*, the respondent had been diagnosed with, among other things, paraphilia not otherwise specified (NOS) and hebephilia, an attraction to pubescent girls. The majority noted that other courts have found paraphilia NOS to be a viable mental disorder or defect and concluded that issues surrounding the reliability of that condition must be resolved by the factfinder. The professional debate over the reliability of paraphilia NOS must be subjected to the adversarial process, which would expose the strengths and weaknesses of the medical opinions offered.

Judge Smith, joined by Chief Judge Lippman and Judge Pigott, dissented. They highlighted the problems with paraphilia NOS and hebephilia, noting that these diagnoses are not supported by the current DSM-IV-TR. Judge Smith expressed doubt that the diagnoses would survive a *Frye* hearing (no such hearing was held in *Shannon S.*). Of particular concern was that the diagnoses do not provide a way to distinguish between a "'dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil confinement from the dangerous but typical recidivist convicted in any ordinary criminal case' …."

A hebephilia diagnosis is not just an issue in civil commitment proceedings. The Board of Examiners of Sex Offenders, in its June 2012 position statement on the scoring of child pornography cases, stated that the Board "[w]ill recommend an automatic override to Level 3 in cases where clinical documentation exists detailing a mental abnormality that decreases the ability to control impulsive sexual behavior, such as Pedophilia or Hebephilia …." This position is in line with statements in the Board's Sex Offender Registration Act Risk Assessment Guidelines and Commentary (2006).

In early December, the Board of Trustees for the APA approved the new version of the DSM, DSM-5, which is expected to be published in May 2013. Despite the efforts of "psychology's

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burgeoning sex offender processing industry, the Board of Trustees of the [APA] rejected the proposed diagnosis [of hebephilia] outright ….” (http://forensicpsychologist.blogspot.com/2012/12/apa-rejects-hebephilia-last-of-three.html.) More information about the DSM-5 is available at www.dsm5.org/Pages/Default.aspx.

New Address for DCJS, Related State Offices & Parole Appeals

The NYS Division of Criminal Justice Services, including the Office of Probation and Correctional Alternatives and the Office of Sex Offender Management and the Sex Offender Registry, has moved. The agency’s new mailing address is: New York State Division of Criminal Justice Services, Alfred E. Smith Building, 80 South Swan Street, Albany, NY 12210. All DCJS telephone numbers remain the same. The Office of Victim Services has also moved into the Alfred E. Smith Building and can be reached by mail at AE Smith Building, 80 South Swan Street, 2nd Floor, Albany, NY 12210.

The new address for parole appeals is Parole Board Adjudication/Appeals, New York State Department of Corrections and Community Supervision, 1220 Washington Avenue, Bldg 2, Albany, NY 12226. The phone number remains the same.

Practicing Law without a License May Now be a Felony

The Governor has signed legislation making the unlicensed practice of law a felony in some instances. The measure, Chapter 492 of the Laws of 2012, provides for punishing unlicensed practice of law as an E felony where it results in “monetary loss or damages exceeding one thousand dollars or other material damage resulting from impairment of a legal right….” The law is intended, in part, to “provide consistency within the law regarding the unauthorized practice of a profession,” according to the bill memo. (http://assembly.state.ny.us/leg/?default_fld=&bn=A05700&term=2011&Summary=Y&Memo=Y.)

News sources not only in New York but outside the state took note of the legislation. It was reported in Michigan (http://sbmblog.typepad.com/sbm-blog/2012/12/its-easy-to-fake-being-a-lawyer.html) just two days after news accounts appeared about a man who pleaded guilty in Detroit to defrauding family members of people incarcerated in several states by charging for legal services that never materialized. (www.freep.com/article/20121212/NEWS05/312120150/Man-pleads-guilty-in-scheme-that-bilked-prisoners-families-of-millions.) Others particularly vulnerable to fraud by individuals pretending to be lawyers include members of immigrant communities. See, for example, www.dos.ny.gov/deferredact/.

Full-Time Government Employees Need Permission to Act as Attorneys for Children

The Third Department has amended its rules to preclude lawyers who are employed full time by any government agency from being on attorneys for children panels, unless the lawyers secure the written permission of their employers, the family court, and the Appellate Division, Office of Attorneys for Children. Lawyers assigned in an ongoing matter at the time of the change were required to obtain the requisite permission or have the matter reassigned. The amended rule is 835.2(a)(1) of the Rules of the Supreme Court, Appellate Division, Third Judicial Department (22 NYCRR 835.2). (www.nycourts.gov/ad3/OAC/Alerts/835_10-19-2012.pdf.)

Commission of Forensic Science Meetings Reveal Information about Labs

Recent meetings of the New York State Commission of Forensic Science have focused on the accreditation of labs throughout the state and the standards used by accreditation organizations, such as ASCLD/LAB. But each meeting also includes discussions of different labs around the state, issues that have been identified during assessments and reviews of those labs, and lab disclosures, such as missing and damaged evidence. Video of the most recent meetings, along with the agendas, reports,

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and other meeting materials are available on the Division of Criminal Justice Services' website at www.criminaljustice.ny.gov/pio/openmeetings.htm.

At the Commission's Dec. 11, 2012 meeting, some commission members raised concerns about the ASCLD/LAB International Organization for Standardization (ISO) assessment of the Suffolk County Crime Laboratory. In particular, questions were raised about the lab's failure to include limiting statements in its hair analysis reports, which is contrary to the lab's standard operating procedures and the 1984 National Symposium on hair microscopy. Several commission members asked that DCJS survey labs to determine how they have been reporting positive hair association and microscopy results. Other labs discussed at that meeting include the Onondaga County Center for Forensic Sciences, the Westchester County Department of Laboratories & Research, Division of Forensic Toxicology, and the Yonkers Police Department Forensic Laboratory. In the discussion of the Westchester County lab, when the Director was asked about the lab's proficiency test records, she responded that the test records were stored indefinitely and "are available for court, but neither the defense nor district attorneys have ever requested them." (http://criminaljustice.state.ny.us/pio/open-meetings/12-19-2012-cfs/minutes.pdf.)

Inspector General Recommendations Discussed

The Commission held a special meeting on Dec. 19 to review the State Inspector General's report on the now-closed Nassau County Police Department Forensic Evidence Bureau and the report's statewide recommendations. The report noted that the Commission has followed "the easier path" by deferring to ASCLD/LAB's standards and suggested that the Commission "consider developing its own minimum standards to improve the practice of forensic testing in New York State." Other recommendations included establishing uniform reporting templates and procedures and mandating continuing forensic science education programs. The Inspector General suggested that district attorneys consider providing staff with mandatory continuing legal education courses on scientific analysis and stated that "the public and private defense bar should take steps to educate themselves about forensic oversight in New York State, lab accreditation, and the underlying forensic testing." (www.criminaljustice.ny.gov/pio/open-meetings/10-29-2012-cfs/ig-recommendations.pdf.) A letter from NYSDA's Executive Director to the Commission in March regarding the Inspector General's recommendations is available at www.criminaljustice.ny.gov/pio/open-meetings/10-29-2012-cfs/mr-gradess-letter-3-9-12.pdf.

Challenges to NYC OCME's New Forensic Statistical Tool

The New York City Office of the Chief Medical Examiner (OCME) has developed a Forensic Statistical Tool (FST), a software application used to analyze mixed DNA samples, compare them to DNA profiles of known samples, and assign statistical weight to the comparisons. (www.nyc.gov/html/ocme/html/hss/hssservices_provided.shtml.) The Legal Aid Society is challenging the introduction of the FST results in several boroughs; at least one *Frye* hearing was held in a Brooklyn case in mid-December. (www.nytimes.com/2012/12/16/nyregion/a-forensic-tool-helps-decide-guilt-or-innocence.html?pagewanted=all&_r=0.) As noted in the *New York Times* article, the FST was approved by the Commission on Forensic Science and the DNA subcommittee, but at least one former member of the subcommittee had concerns about the formula being based on assumptions, not practice, but said that he eventually voted for approval, "in part because he said the technical discussions became 'tedious.'"

While a great deal of attention has been given to challenges to older forms of forensic science, such as fingerprints, ballistics, and bite mark comparisons, new forensic science techniques and technologies are being developed all the time and attorneys must be prepared to challenge them as well.

Researching Forensics and Resources for Finding Experts

Many resources are available for attorneys who are handling cases involving forensic or technological evidence. In addition to resources previously highlighted in the *REPORT*, including *DNA for the Defense Bar* (www.nij.gov/pubs-sum/237975.htm) and *The Fingerprint Sourcebook* (www.nij.gov/pubs-sum/225320. htm), defenders researching forensics issues can take advantage of the resources available on the National Clearinghouse on Science, Technology, and the Law's website, including its free, searchable database with legal and scientific publications, caselaw, news, and other materials, as well as links to other organizations and resources. (www.ncstl.org.) Also, the National Institute of Justice offers online training programs on a wide variety of forensics topics, many of which are free and open to the public: www.nij.gov/nij/training/forensic.htm. Area-specific resources are also available, such as the recent article by NYSDA's Director of Legal Information Services on arson investigation, "Arson and the Science of Fire," which compiles key materials, including investigation guides, treatises, investigator certifications, articles, and databases. (www.llrx.com/features/arsonsciencefire.htm.)

Locating Experts and Getting Funds to Hire Them

NYSDA's website offers a searchable expert witness database (www.nysda.org/ExpertDatabase.html), and that page also includes links to several other expert witness lists and professional associations. Members of the Backup Center's legal staff can help attorneys locate experts. Attorneys who find new experts could easily help colleagues by forwarding the experts' contact information to NYSDA; also, please notify NYSDA of any problems with experts listed in the database. And those who need help getting money to hire expert witnesses should be sure to read this issue's Practice Tip, by Staff Attorney Stephanie Batcheller, which provides detailed information about applications for expert witness funding under County Law 722-c. Defenders looking for further assistance can always contact the Backup Center.

Keep Pressing Weaknesses of Eyewitness Identification

The testimony of expert witnesses about scientifically-based or technologically-aided evaluations of evidence may appear, in some respects, to share no characteristics with the testimony of eyewitnesses to a crime or family event. Experts receive requests to evaluate evidence and appear in court because of a knowledge or skill they deliberately developed; they are witnesses by choice, and while they may have a preference as to the outcome of the matter they are testifying in, their involvement is generally professional. Eyewitnesses, on the other hand, testify about information they received due to some unexpected turn of events, often of a disturbing nature; their involvement and, usually, their desire for a particular outcome are personal.

Yet, their testimony does share some common traits. "'Scientific evidence is like eyewitness testimony—evidence can be tainted by mistakes, prejudice, and corruption,'" as law professor and former FBI agent Alicia Hilton noted in a Rutgers Law Review article. (www.rutgerslawreview.com/wp-content/uploads/archive/commentaries/2012/Hilton_GuiltyUntilInnocent.pdf.) Furthermore, an expertise has developed around the reliability—actually, the unreliability—of eyewitness evidence. Challenging the reliability of such identifications, which juries tend to believe, is a crucial defense role. Finding ways to present expert evidence to a court and jury, and preserving any federal constitutional issues that may be involved, are vital parts of that role.

2nd Circuit Upholds Habeas Grant in Eyewitness Case

For an example of how important defense persistence, and scientific substantiation of possible flaws in eyewitness identification, can be, see *Young v Conway* (698 F3d 69 [2nd Cir 10/16/2012]). The only witness to eventually identify Rudolph Young as the disguised, axe-wielding person who invaded a home had been shown Young's photograph a day before she picked him out of a lineup following his unconstitutional arrest. In upholding a grant of federal habeas corpus, the federal appellate court referenced "an extensive body of scientific literature presented to us by *amicus curiae* the Innocence Project in support of affirmance." Because this information had not been presented in state court, the federal court's conclusion that the in-court identification lacked an independent source was said to be "reinforced, but not compelled or controlled by," that literature. Key aspects of the *Young* case are noted at http://newyorkcriminaldefense.blogspot.com/2012/10/important-decision-by-second-circuit.html.

Several States Seek to Curb Overreliance on Eyewitness Testimony

The Oregon Supreme Court has adopted a new standard for resolving whether eyewitness identification evidence should be admitted. The prosecution will now bear the burden of showing the proffered testimony to be reliable rather than the defense being required to show it is not. This is similar to a move taken by New Jersey in 2011. *See* Skye Nickals, "The Catch-22 of Eyewitness ID," *Slate* (12/18/2012). (www.slate.com/articles/news_and_politics/jurisprudence/2012/12/oregon_supreme_court_on_eyewitness_ids_they_re_often_unreliable.html.) And the Florida Supreme Court has introduced new eyewitness identification jury instructions. http://lawfl.net/news/eyewitness-identification-jury-instruction-introduced-by-florida-supreme-court/. These state efforts to avoid wrongful identifications and convictions sharply contrast with U.S. Supreme Court inaction in this area. See, for example, www.concurringopinions.com/archives/2012/12/judicial-reforms-and-eyewitness-testimony.html. *See also* *REPORT*, Vol. XXVII, No. 1 (Jan-Mar. 2012), at p. 8.

Body of Literature on Eyewitness Evidence Growing

Online, as elsewhere, literature about reforming the use of eyewitness evidence continues to grow in both the mainstream media and specialized arenas. A few examples since the *REPORT* last covered eyewitness ID issues can be found at:

- www.psmag.com/legal-affairs/litigating-lineups-47504/;
- www.nytimes.com/2012/12/06/opinion/a-check-on-bad-eyewitness-identifications.html?pagewanted=print#h;

- www.americanbar.org/newsletter/publications/youraba/201209article02.html; and
- www.innocenceproject.org/Content/What_Wrongful_Convictions_Teach_Us_About_Racial_Inequality.php.

Appeal Granted in False Confession Case

Court of Appeals Judge Robert Smith granted leave to appeal in a case where police deception may have induced an involuntary or false confession. (www.nylj.com, 10/24/2012; www.nycourts.gov/ctapps/Filings/2012/IID4512.pdf.) In *People v Thomas* (93 AD3d 1019 [3d Dept 2012]), the Third Department upheld the denial of defense testimony by a social psychologist on police interrogation tactics and false confessions. The jury had seen videotapes of the police interrogation in which, among other things, the defendant was told that doctors needed whatever information he could provide to assist the treatment of his infant son, who police already knew would not survive. As the *Law Journal* article above noted, a recent Second Department case, decided just days before Judge Smith granted leave in *Thomas*, appears to be in conflict with the Third Department ruling. *See People v Aveni*, 953 NYS2d 55 (2nd Dept 10/17/2012) (summary on p. 35).

Lying by members of law enforcement in ostensible efforts to obtain the truth—and a confession by their suspect—has long been excused and even approved by the judiciary. Decades after *Frazier v Cupp* (394 US 731 [1969]), "a decision that to this day has been interpreted by police and the courts as a green light to deception," the Court of Appeals could use *Thomas* to rein in this all-too-common interrogation technique. Hope for such a change is fueled by the growth of social science literature identifying and explaining factors contributing to false confessions. For one example, from which the above quote is drawn, see Saul M. Kassin, et al, "Police-Induced Confessions: Risk Factors and Recommendations," 34 Law & Human Behavior 3 (2010); *see also* www.thejuryexpert.com/2012/11/only-the-guilty-would-confess-to-crimes%E2%80%A8-understanding-the-mystery-of-false-confessions/. Deceptive interrogations are repeatedly permitted, however, despite recognition over a century ago that false confessions not only exist but "abound" in criminal jurisprudence. See Judge Bartlett's opinion in *People v Buffom*, 214 NY 53, 57 (1915).

Whatever the Court of Appeals does in *Thomas*, the need to challenge confessions resulting from deception (and other interrogation "techniques") will undoubtedly recur.

Specialty Courts: Still Here, Still Proliferating

Ten years ago, the biggest news about "specialty courts" was the increasing number of drug courts, with at least one implemented or planned in nearly every county in the state. (*REPORT*, Vol. XVII, No. 3 [May-June 2002]). Other types—"integrated" domestic violence courts, community courts, veterans' courts, teen courts, mental health courts, sex offense courts, and more—have been suggested and implemented to varying degrees. *See, e.g.*, *REPORT*, Vol. XV, No. 1 (Jan.-Feb 2000); *REPORT*, Vol. XVIII, No. 1 (Jan.-Feb. 2003) and *REPORT*, Vol. XXIV, No. 3 (June-Aug. 2009). Drug courts, which appear to be here to stay, vary greatly from court to court in operation; their effectiveness is not universally acknowledged. *See, e.g.*, *REPORT*, Vol. XXVI, No. 2 (April-May 2011). This year saw the implementation of a pilot project creating adolescent diversion parts in nine urban courts, and developments in other types of courts; more information on some of these developments follows. Staffing these courts remains an ongoing challenge for defenders.

Adolescent Diversion Program Report Published

The Adolescent Diversion Program, begun by Chief Judge Jonathan Lippman and implemented in early 2012, heard hundreds of cases involving 16- and 17-year-olds in nine courts in New York City and Nassau, Westchester, Onondaga, and Erie counties this year. (http://newsandinsight.thomsonreuters.com/Legal/News/2012/08_-_August/Spotlight_on_experimental__courts_after_juvenile_crime_law_falters/.) It is one aspect of a growing movement to change how New York deals with offenders in this age group; serious efforts by the New York Center for Juvenile Justice and others to raise the age of criminal responsibility in New York State continue after the New York State Legislature failed to pass related legislation. (www.pewstates.org/projects/stateline/headlines/new-york-courts-revisit-juvenile-justice-85899377384.)

The Center for Court Innovation (CCI) has published a report, *The Adolescent Diversion Program in New York: A Reform in Progress*, on this initiative. The report profiles the first six months of the Program's projects in Brooklyn and Nassau County by offering the impressions of former judge Richard Ross regarding how the pilots depart from standard practice and highlighting key elements of the program model. For instance, the voluntary program requires the involvement of parents/guardians and involves direct communication by judges with those appearing in court, which was said to impress some parents. But the report does not address the possibility that by emphasizing parental involvement, the program is simply "cherry-picking" the youth most likely to succeed because they have family willing and able to assist.

One feature noted as to the Nassau County program is that the "District Attorney's Office has agreed that any statement made by a defendant to the … Probation Department during the YASI [Youth Assessment and Screening Instrument] interview will not be used in any criminal proceeding brought against the defendant." In Brooklyn, no such formal assessment occurs. While felony charges do not exclude participation in the project, most defendants in the program have misdemeanor or violation top charges.

The report's conclusion notes that resources necessary for the program to work, and questions about the costs associated with those resources, are among the issues that must be addressed by the Legislature as it ponders changes to the age of responsibility. (www.courtinnovation.org/sites/default/files/documents/ADP_FINAL.pdf.)

CCI Presents Podcasts on Families and the Courts

In addition to the report noted above, CCI has produced a series of "New Thinking podcasts on kids, parents, and the criminal justice system." The series presents interviews with experts and practitioners on a wide range of topics including the Adolescent Diversion Program and youth courts and restorative justice. (www.courtinnovation.org/research/families-and-courts-new-thinking-podcasts-kids-parents-and-criminal-justice-system?url=research%2Fbrowse%2Fall%2Flatest&mode=browse&type=all&sort=latest)

Veterans' Courts Expand; Veterans' Needs Grow

The observance of Veterans Day in November led to news coverage of "Veterans Courts" nationally and in New York. In a *Newsday* op-ed piece, former Chief Judge Sol Wachtler discussed the growing need to address the results of combat trauma on the thousands of military personnel who have been deployed to Iraq and Afghanistan. Noting that when mental health problems stemming from service are compounded by self-medication with drugs and alcohol leading to addiction, interaction with the criminal justice system will follow, Wachtler lauded the Veterans Courts established by the Unified Court System in Kings, Queens, Nassau, and Suffolk counties. (www.newsday.com/opinion/oped/wachtler-compassion-in-the-courts-for-veterans-1.4279448.) The federal Department of Veterans Affairs also takes credit for metropolitan New York veterans treatment courts. Its website touts the graduation of five vets from the Brooklyn Treatment Court Veteran's Track on Dec. 6, 2012, and the start-up of a program in collaboration with The Legal Aid Society for referrals and treatment plans. (www.nyharbor.va.gov/services/vjo.asp.)

On the other side of the state, the Buffalo Veterans Treatment Court—the nation's first—continues serving veterans who are struggling with addiction and/or mental illness and model procedures for other courts. (www.ncsc.org/Topics/Problem-Solving-Courts/Veterans-Court/Resource-Guide.aspx; www.buffaloveteranscourt.org/.) But recognition of the need to judicially address the unique circumstances of veterans whose post-combat behavior brings them into contact with the justice system has not led to the establishment of a veterans court in every jurisdiction. Nor does the existence of a veterans court automatically ensure that every veteran who is arrested will benefit from such courts. Counsel with clients who are current or former members of the armed forces must be alert to how every client's circumstances may affect their case.

The New York State Bar Association has approved the *Report and Recommendations of Special Committee on Veterans*, issued on Sept. 5, 2012, which seeks, among other goals, "to facilitate the means by which every veteran in New York State may gain access to a Veterans Court." The report calls for prosecutors and defense lawyers to "work with the criminal court to determine appropriate candidates for participation" in veterans court and for counsel to explain the goals and option of participating in such courts. Among appendices to the report is the Veterans Treatment Court Mentor Program Handbook, which includes a list of key operational standards, such as that attorneys working in veterans courts should promote public safety while protecting the due process rights of the veterans who participate.

NYSDA advocates, from a defense perspective, for reform of criminal justice practices relating to cases in which past military experiences may have played a role. Besides continuing efforts to create a Military and Veterans Defense Project, NYSDA's Backup Center has provided information and consultation to lawyers with military or veteran clients.

Human Trafficking Court Part, Other Programs

In February 2012, a "human trafficking court part" was announced in Nassau County, with an opening set for later in the year. (www.ncccba.com/HumanTrafficking.pdf; http://libn.com/2012/03/01/attorneys-prep-for-nassau-human-trafficking-court/.) Whatever the status of the Nassau part, efforts to assist trafficking victims who become involved in criminal proceedings as defendants are proceeding in other venues. The Legal Aid Society's Criminal Practice operates a "Trafficking Victims Legal Defense and Advocacy Project" in its Manhattan Criminal Office. As was reported at last summer's Chief Defender Convening, the project provides legal assistance to human trafficking victims, including litigation to help young women by vacating their prostitution convictions. (www.legal-aid.org/en/mediaandpublicinformation/inthenews/legalaidpraisedbyabapresidentforitswork

withhumantraffickingvictims.aspx.) The Society hopes to expand the project to other boroughs. And lawyers whose clients may be trafficking victims may find helpful information in a publication released last year by the First Department and the New York State Judicial Committee on Women in the Courts, the *Lawyer's Manual on Human Trafficking: Pursing Justice for Victims*.

National Drug Court Online Learning System Available

CCI has announced the availability of a free National Drug Court Online Learning System, which was created in collaboration with the New York State court system and the Bureau of Justice Assistance. The course is intended for judges, attorneys, law enforcement, and treatment personnel, and includes 10 lessons, 3 virtual drug court visits, practitioner FAQs, and a resource library. NYSDA's then-Criminal Defense Immigration Project Director, Joanne Macri, is the presenter for the Legal Representation of the Non-Citizen lesson. (www.drugcourtonline.org.) CCI plans to add a veterans court section to the Online Learning System in the near future.

Standards for Conflict Cases Apply to All Public Defense Cases in 2013

Any concern that equal protection principles and general fairness would be violated by applying statewide public defense standards only to conflict cases has been ended by the announcement that the conflict standards promulgated by the Indigent Legal Services (ILS) Office after approval by its Board, effective last July 1, apply to all public defense representation effective Jan. 1, 2013. Regardless of the type of program(s) chosen by localities from the options in County Law 722, no program should lack the resources needed to meet those standards on the basis that the program provides primary, rather than conflict, services.

The memo from the ILS Office Director to the Board recommending extension of the standards to all trial-level public defense cases reiterated recognition that attaining compliance with the standards "is a process that may take time." "[T]he intent of the Office and Board is not only to set performance measures, but also to establish the foundation for State support that will contribute toward the achievement of those goals." (www.ils.ny.gov/files/Board%20Meeting%20092812.pdf.)

ILS Office Issues RFP for Counsel at First Appearance Efforts

Another major public defense issue facing counties and providers across the state is the provision of counsel at arraignment. It is reflected in the Request for Proposals issued by the ILS Office on Nov. 30, 2012 that solicits applications for a "Counsel at First Appearance Demonstration Grant." Questions about the RFP are due Jan. 9, 2013, and proposals must be submitted by eligible counties by Feb. 15, 2013. Intended "to make demonstrable and measureable improvements in the delivery of indigent defense services to eligible persons at a defendant's first appearance before a judge," the RFP cites, among other authorities, *Hurrell-Harring v New York* (15 NY3d 8 [2010]). The RFP and questions and answers are available online at www.ils.ny.gov/content/counsel-first-appearance.

Video Arraignments Are Not the Answer

Concerns about the cost of providing counsel at first appearance have led to the resurfacing of an old idea that has consistently met failure. Albany County is said to be mulling video arraignments in which someone accused of a crime would communicate with the court via video monitor from the jail. www.timesunion.com/local/article/Albany-County-mulls-video-arraignments-4116959.php#ixzz2F2MeLru4.

NYSDA opposes any such remote participation by clients in critical proceedings against them. It impairs the ability of the court to fully observe or interact with the person whose liberty is at issue. And there is the question of where the lawyer should be—having counsel in the physical presence of the client may facilitate attorney-client communication, but limits counsel's ability to confer with and observe the other participants, while having the lawyer in court without the client precludes quick, confidential communication. The statement opposing video arraignments is available on NYSDA's website, www.nysda.org.

The RFP issued by the ILS Office, above, specifically requires that proposals include "the physical presence of counsel with the client in court."

No Settlement in Hurrell-Harring

The Albany *Times Union* reported on Dec. 11, 2012 that no deal had emerged from a settlement conference in the NYCLU suit against the State and five counties for deficiencies in the provision of public defense services. An October trial is now scheduled. www.timesunion.com/local/article/No-deal-in-public-defender-lawsuit-4110086.php#ixzz2Eqo8tl5T.

The case is having an effect even prior to disposition; as noted above, the ILS Office Counsel at First Appearance RFP grew in part out of the Court of Appeals decision upholding the trial court's denial of the defendants' motion to dismiss.

Public defense providers across the state have discussed the issue among themselves at Chief Defender Convenings and elsewhere, talked to their county officials, and in some instances begun efforts to increase the number of courts in which counsel is available at first appearance. The need to address this issue may be underscored by litigation filed in California at the end of December. A "long-standing practice of assigning defense attorneys to indigent criminal defendants after—and not at—their initial court appearance has resulted in a federal class action lawsuit against" Contra Costa County's Public Defender. (www.contracostatimes.com/california/ci_22289366/contra-costa-public-defender-sued-over-right-an.)

Hurrell-Harring *Plaintiffs Featured in Video*

Meanwhile, the NYCLU has made public defense issues the topic of one of its television shows. The 25-minute video, which features two of the lead plaintiffs, Kimberly Hurrell-Harring and Jackie Winbrone, is available on the ACLU website at www.aclu.org/blog/criminal-law-reform-capital-punishment/project-liberty-takes-indigent-defense.

Institutional Providers Can Handle Conflict Cases, Court of Appeals Says

A variety of public-defense related developments in New York State and around the nation arose in the months leading up to 2013—which is the 50th anniversary of *Gideon v Wainwright*.

Here in New York, many of those developments involve representation in conflict of interest cases. At the end of October, the Court of Appeals decided the lawsuit brought two years ago by several bar associations against New York City over proposed changes to public defense representation in cases that a primary provider could not handle due to conflicts of interest. The Court held "that the City may assign conflict cases to institutional providers, that its ability to do so is not contingent on the consent of the county bar associations and that the City's proposed indigent defense plan does not run afoul of the County Law or Municipal Home Rule Law," contrary to the bar associations' claims. The opinion leaves New York City free to contract with nonprofit institutional providers to handle cases that have historically gone to private attorneys on assigned counsel panels. *New York County Lawyers' Assn v Bloomberg*, 19 NY3d 712 (10/30/2012). (Summary on p. 22.)

Legal Aid Programs Can Provide Conflict Services

Closely watched by a variety of individuals and entities with an interest in public defense, the *Bloomberg* case may affect public defense not only in the City but also the rest of the state. One issue with statewide implications is the Court's rejection of the argument that, because provision of conflict counsel is addressed only in subsections (3) and (4) of County Law 722, counsel in conflict cases can only be assigned pursuant to bar association plans (that may or may not include conflict defender offices) or by the judiciary (when no plan is in effect). The ruling will presumably allow creation of—and validate existing—nonprofit programs that handle conflict cases.

However, there is no basis in the opinion for counties to contract with private lawyers or law firms to provide public defense services, as a few have suggested since the decision was issued. References in *Bloomberg* to "private attorneys," "private counsel," and "private practitioners" clearly relate to assigned counsel representation through a bar association plan. And a New York Association of Counties press release about the decision's impact refers to the use of legal aid societies and offices of conflict defender, not contracts with individual attorneys or firms. (http://nysac.org/news/press-room/counties-to-see-new-administrative-flexibility-from-state-court-of-appeals-decision/.) NYSDA continues to oppose private law firm contracts, which are not provided for in article 18-B. National experience shows such contracts are too often let on a "low-bid" basis that deprives lawyers of the time and resources needed to perform the functions required by applicable standards. If your county is considering a contract with an entity other than those described in County Law 722(2), please contact the Backup Center.

Dutchess and Ulster Counties Consider Taking Each Other's Conflict Cases

The Dutchess County Executive included an inter-county pilot project for conflict cases in his 2013 county budget, announced in early November. Under the proposal, Dutchess and Ulster Counties would each provide public defense representation in conflict cases for the other, with the hope of reducing the costs associated with having private counsel assigned in such cases.(www.dailyfreeman.com/articles/2012/11/06/news/doc509867844e0ee372783494.txt.) In December, the County Executives for these two counties separated by the Hudson River announced an agreement to bring the plan to their respective county legislatures. (www.poughkeepsiejournal.com/ article/20121220/NEWS01/121220010/Dutchess-Ulster-share-public-defender-services.)

ILS Office Adds Staff

The ILS Office will begin 2013 with the full staff of 10 that is currently authorized for its many statewide responsibilities. Risa Gerson is the new Director of Quality Enhancement for Appellate Representation, and Joanne Macri is leaving NYSDA to become the ILS Office's Director of Regional Initiatives.

As noted in *The First Annual Report of the Indigent Legal Services Board*, covering the period of Feb. 22, 2011 through Mar. 31, 2012, delays in fully staffing the ILS Office impeded its progress in fulfilling its responsibilities. (www.ils.ny.gov/files/First%20Annual%20Report%20Nov%2028%202012.pdf.)

Backup Center Welcomes Felipe Alexandre and John Cutro

The sadness engendered by the departure of Joanne Macri as Director of NYSDA's Criminal Defense Immigration Project (CDIP) is tempered not only by the realization that her work at the ILS Office will benefit public defense clients and providers statewide, but also by the pleasure of welcoming Felipe Alexandre as the new CDIP Director. Felipe comes to the Backup Center from the Monroe County Public Defender's Office where he was an Equal Justice Fellow. The experience he gained there with regard to the intersection of criminal law and immigration law and the challenges faced by public defense providers in New York State, along with his many valuable skills and qualities, make him a welcome addition to the NYSDA staff.

Public Defense Investigation Project Launched

The Backup Center also welcomes John Cutro, who has joined the office on a part-time basis as the Director of the new Public Defense Investigation Support Project. Cutro, a private investigator licensed in NY and VT, was a Capital Case Homicide Investigator and Victim Liaison at the Capital Defender Office. He is also a serious offense restorative practitioner and has been active in violence prevention programs, teaches at Sage College of Albany, and brings a variety of experiences to NYSDA and its newest endeavor. John was introduced to those attending the Nov. 8, 2012 training event, "Criminal Defense Investigator Training eDiscovery Seminar: Paper, Acrobat, iPad & Beyond," in Albany.

The Public Defense Investigation Support Project Director will conduct outreach and assist public defense providers to enhance their investigation capacity, and reach out to public defense providers and county officials to learn about their specific investigative needs and help identify ways to address them. The Project will present training events and host convenings for public defense investigators. The primary objective of the Project is to increase the quality and quantity of investigative services available to public defense clients across New York.

Darryl King of NYSDA Client Advisory Board Honored

Darryl King, a member of NYSDA's Client Advisory Board, received the Eddie Ellis Life Time Achievement Award on November 30th. Created by Citizens Against Recidivism, Inc., the award honors the accomplishments of people who were formerly incarcerated. The Association's press release about the award is available online. (http://readme.readmedia.com/NYSDAs-Client-Advisory-Board-Member-King-to-Receive-Life-Time-Achievement-Award/5117616.) Photographs and more information about the award program are available at http://citizensinc.org/the-2012-awards-program.html.

NYSDA Mourns Lenore Banks

NYSDA was saddened to learn that Lenore Banks, liaison between NYSDA and the League of Women Voters of New York State and member of NYSDA's Client Advisory Board, died in October at the age 80.

Having honed her analytical aptitude, and her belief in justice for all, during years of League advocacy for court reorganization and other reforms, Lenore exuberantly brought her time and talents to bear on the need to overhaul New York's public defense system. At its Annual Meeting and Conference in 2000, NYSDA awarded Lenore special recognition for being a continuing and major force in the League's work with the Association, gathering information about public defense in New York State and planning ways to improve it. From the dais at joint NYSDA/League fact-finding hearings on public defense over several years Lenore asked wide ranging and relevant questions.

Lenore joined other members of NYSDA's Client Advisory Board in activities such as participating in the 2004 Black and Puerto Rican Caucus weekend, speaking to passers-by about public defense issues; a series of "Gideon Day" observances; and chief defender convenings. In the Client Advisory Board meetings that she attended for nearly a decade—as in all her work with

(continued on page 19)

Getting the Expert Funds You Need Under County Law § 722-c

by Stephanie Batcheller*

The right to expert and auxiliary services for those charged with crimes and unable to secure these services on their own is a matter of due process, fundamental fairness, and equal protection. *See Ake v Oklahoma*, 470 US 68 (1985); *Tyson v Keane*, 991 F Supp 314 (SDNY 1997) (magistrate judge's report and recommendation). It has been held that the assistance of experts and other ancillary services may be considered among the "basic tools" needed for meaningful representation. *Tyson*, 991 F Supp 314 (*citing Britt v North Carolina*, 404 US 226, 227 [1971]).

In New York, the right is governed by provisions of County Law § 722-c. This section does not limit funding to litigation in criminal cases. It also applies to the application for funds for expert assistance for persons described in Family Court Act §§ 249 (minors represented by Attorneys for the Child) and 262 (adult respondents in Family Court); Corrections Law article 6-c (litigants in Sex Offender Registration Act proceedings); and Surrogate's Court Procedure Act § 407 (respondents in proceedings involving the voluntary or involuntary surrender of children into foster care; parents in adoption proceedings; parents in custody proceedings). While many of the cases discussed herein are criminal cases, and therefore the text used to describe some issues centers on criminal defense, this article is intended to help lawyers and litigants in all applicable cases and courts.

The statute does not restrict the availability of funds for expert services to those defendants represented by appointed counsel. Any defendant who cannot afford supplemental services, even those represented by retained counsel, may receive funding under § 722-c with the proper showing. *See People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982); *see also* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 and commentary at 22 (3d ed 1992).

I. Standards of Review

The threshold for obtaining funds is the need for the services and financial inability to pay. *Johnson v Harris*, 682 F2d 49 (2d Cir 1982); *People v Dove*, 287 AD2d 806 (3d Dept 2001). Applications for § 722-c services are left to the discretion of the trial court. *Johnson*, 682 F2d 49; *but see People v Christopher*, 65 NY2d 417, 425 (1985) (in most circumstances, the number of experts on an issue to be heard will be a matter of discretion, but refusal to hear any expert witness on behalf of the defendant in competency hearing is a violation of the statutory requirement, not a matter of discretion).

Denials of applications for expert services are reviewable on appeal for abuse of discretion. *People v Cronin*, 60 NY2d 430 (1983); *People v Mooney*, 76 NY2d 827 (1990). A trial court's error in granting an application for funds under § 722-c is subject to harmless error analysis. *Tyson*, 991 F Supp 314. Denial of access to an expert is not necessarily reversible under the federal constitution. *Tyson v Keane*, 159 F3d 732 (2d Cir 1998).

Generally, CPLR article 78 proceedings for orders mandating the granting of a motion for § 722-c funds will not lie. *Brown v Rohl*, 221 AD2d 436 (2d Dept 1995) (mandamus will not lie to compel a trial court to grant funds in excess of the statutory limit); *De Jesus v Armer*, 74 AD2d 736 (4th Dept 1980) (review on direct appeal is an adequate remedy for propriety of denial of § 722-c funds; therefore action under article 78 will not lie).

II. The Application Process

The procedure for authorizing funding for expert or other auxiliary services in New York is set forth in County Law § 722-c:

> Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant or other person described in section two hundred forty-nine or section two hundred sixty-two of the family court act, article six-C of the correction law or section four hundred seven of the surrogate's court procedure act, is financially unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant or such other person. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of one thousand dollars per investigative, expert or other service provider.
>
> Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

The basic requirements are that the application must be made in an ex parte proceeding; must be in writing; must demonstrate the financial inability of the person to pay for the expert services; must demonstrate the necessity of the requested services; and should identify the

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projected costs of obtaining expert assistance, including hourly rates or full cost and existing extraordinary circumstances if it is anticipated that funds over the statutory cap will be required. Each of these factors is discussed below.

A. *The Importance of Ex Parte Applications*

The statute specifically authorizes an ex parte application for expert and auxiliary services. This is an important feature because an accused cannot be forced to choose between obtaining services needed to prepare an adequate defense and safeguarding the confidentiality of emerging defense strategy. *See Marshall v United States*, 423 F2d 1315, 1318 (10th Cir 1970) ("The manifest purpose of requiring that the inquiry be ex parte is to insure that the defendant will not have to make a premature disclosure of his case.").

Ex parte applications generally take the form of a motion, with a Notice and Affirmation of Counsel supported by any other pertinent documentation, such as an affidavit from the expert or the expert's curriculum vitae. Written applications are not only required by the statute, but also ensure that the application is complete and preserves all issues for later review if such application is denied. Samples of applications are available from the Backup Center. Counsel should request an ex parte hearing at which issues can be further addressed. Counsel may also wish to ask the court to seal the application and order in the court's files to protect the continuing confidentiality of the defense strategy. Judiciary Law § 2-b(3).

B. *The Application Must be in Writing and Should be Prior to Engagement of Services*

Applications for funds under § 722-c must be made in writing and oral requests may be denied. *Dove,* 287 AD2d 806; *Matter of Brittenie K.*, 50 AD3d 1203 (3d Dept 2008).

Further, although the statute provides for the availability of *nunc pro tunc* authorization where circumstances require, attorneys should seek authorization prior to hiring the expert or risk the denial of compensation. *People v Barber*, 60 AD2d 747 (4th Dept 1977) (absent showing that expenses incurred for expert witnesses and investigation were necessary and that the timely procurement of such services could not await prior authorization, the court did not err in denying defendant's post-trial application for the payment of such expenses by the county).

C. *Specific Showing of Financial Inability to Obtain Services*

The right to funds under § 722-c is not limited to defendants who have appointed counsel. Any defendant who cannot afford the services may invoke the statutory mechanism for obtaining them. *People v Ulloa*, 1 AD3d 468 (2d Dept 2003); *Smith*, 114 Misc 2d 258. It is necessary to demonstrate that the client's financial status is such that the client cannot afford to pay for the services of the expert, even if counsel may have been retained. *People v Pinney*, 136 AD2d 573 (2d Dept 1988); *People v Hatterson*, 63 AD2d 736 (2d Dept 1978).

When counsel has been assigned, presenting the court with a copy of the Order of Assignment may suffice in demonstrating financial inability. However, the assignment of counsel will not always suffice to establish financial need. *People v Jackson*, 80 Misc 2d 595 (County Ct, Albany Co 1975); *People v Lowery,* 7 Misc 3d 1032A (White Plains City Ct 2005); *but see* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 and commentary at 23 (3d ed 1992) ("Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses.").

Whether institutional assigned counsel may apply for § 722-c funding is somewhat unclear. Most public defender offices and legal aid societies will have funds budgeted for the hiring of experts, but if the occasion arises where the funds are depleted or a provider does not have such a budget item, the wording of the statute is open to some interpretation. The issue presented itself in *People v Stott*, 137 Misc 2d 896 (County Ct, Sullivan Co 1987), with mixed results. The County Court initially granted § 722-c funds to the local Legal Aid Society to obtain a transcript for an appeal, but when the allotted amount proved to be too little and the Court was asked for additional funds to meet the difference, the Court reversed itself finding that the section was directed only at attorneys working with an Assigned Counsel Plan and that the Legal Aid Society was required to pay the expense from their own budget. The statute provides that where a defendant is financially unable to obtain necessary services "the court shall authorize counsel, whether or not assigned in accordance with a plan" to procure such services. This language is not as clear as the Sullivan County Court suggests. If an institutional provider is unable to independently hire a needed expert, it would seem to be a matter for the attorney-in-charge to seek the funds either directly from the county administration or the court. If the county fails to grant the funds, the court should protect the defendant's rights by authorizing the funds under § 722-c. Public defenders have succeeded in obtaining funds via § 722-c when institutional budgets could not cover the cost of hiring a necessary expert.

Local rules and practice may impact what the court requires for applications for § 722-c services by assigned counsel and whether it is necessary to file any supplemental financial information. Where counsel has been retained, at the very least, a financial statement that demonstrates the client's lack of additional funds to hire an expert is required. In any event, an affirmation of coun-

sel asserting the client's financial need is not sufficient. The application must include a verified statement of financial need submitted by the client. *See Cynthia H. v James H.*, 117 Misc 2d 474 (Family Ct, Queens Co 1983); *People v Powell*, 101 Misc 2d 315 (County Ct, Tompkins Co 1979); *Jackson*, 80 Misc 2d 595. In this regard, it should be the defendant's financial status that is dispositive in assessing ability to afford auxiliary services, not the resources of friends or relatives: "[I]ndigence is personal. The State is not entitled to treat the funds of others, over which a defendant has no control, as assets of the defendant." *Fullan v Commissioner of Corrections*, 891 F2d 1007, 1011 (2d Cir 1989); *Ulloa*, 1 AD3d 468.

D. *Showing of Necessity*

A thorough knowledge of the case is key to making the requisite showing of necessity. The most common reason for the denial of a § 722-c motion, and the affirmance of such denials on review, is the failure to demonstrate necessity for the particular expert. To avoid denial based on failure to establish necessity, papers must be carefully and thoroughly drafted, and should provide "specific factual details which show to a reasonable probability that the forensic services would aid in the defense or produce relevant evidence." *Lowery*, 7 Misc 3d 1032A.

The pleadings must show that the need for the expert assistance is relevant to a significant issue at trial. *See People v Lewis,* 93 AD3d 1264 (4th Dept 2012) (defense counsel's failure to call ballistics expert not ineffective assistance of counsel given failure to demonstrate expert's testimony would have assisted the trier of fact or that the defendant was prejudiced by the absence of such testimony); *People v Oquendo*, 250 AD2d 419 (1st Dept 1998) (denial of the application for an expert to testify at trial regarding hand-to-hand drug transactions upheld where the request failed to establish that the testimony was relevant to a significant issue at trial).

Bare bones allegations of relevance or helpfulness to the defense are not sufficient to establish necessity. *People v Rockwell*, 18 AD3d 969 (3d Dept 2005) (no error in denying funds for investigator where the defendant only asserted that an investigator would be helpful); *Matter of Jack McG.*, 223 AD2d 369 (1st Dept 1996) (denial of funds to hire a defense psychiatrist affirmed where the claim that such testimony might "add insight" into the court-appointed psychiatrist's evaluation was insufficient to require granting of request); *People v Gallow*, 171 AD2d 1061 (4th Dept 1991) (the fact that proposed testimony would be relevant to issue in case is not by itself sufficient, a showing must be made that expertise is necessary for resolution of the issue); *People v Moore*, 125 AD2d 501 (2d Dept 1986) ("Since the defendant did not demonstrate the necessity for the appointment of a fingerprint expert on his behalf under County Law § 722-c, the trial court did not abuse its discretion in denying his request to appoint such expert."); *People v Pride*, 79 Misc 2d 581 (Supreme Ct, Westchester Co 1974) ("[D]efendant's moving papers are of little help to the court in the resolution of [the] question [of necessity].").

Pleadings must establish that there are challengeable conclusions made by witnesses or to be drawn from evidence that is material to the defense. In *Hatterson*, 63 AD2d 736, the court held that the denial of funds under § 722-c for a physician and a psychiatrist was an improvident exercise of discretion where the prosecution offered expert psychological testimony in the case in chief and on rebuttal regarding duress the victim endured and the defense sought to hire an expert to challenge these assertions.

Denials of requests for expert assistance have been authorized based on findings that there already exists sufficient information to proceed without employing another expert *See, e.g., People v Brand*, 13 AD3d 820 (3d Dept 2004) (not necessary to provide second defense expert where the defendant was able to challenge prosecution's assertions through testimony of the first defense psychiatric expert); *c.f. People v Seavey*, 305 AD2d 937 (3d Dept 2003); *People v Paro*, 283 AD2d 669 (3d Dept 2001).

Denials have also been authorized where the issue is determined to be not significant or material enough to warrant the funding of an independent expert. *See, e.g., Johnson,* 682 F2d 49 (The prosecution's expert testimony on hair identification was brief, communicated in non-technical language, and readily understandable by the defense and the jury. In addition, upon cross-examination by the defense, the prosecution's expert stated that no hair comparison can prove identity positively.); *People v King*, 111 AD2d 1043 (3d Dept 1985) (since the prosecution called a witness who saw the defendant endorse the check, there was no error in denial of funds for a handwriting expert); *People v Stamp*, 120 Misc 2d 48 (Starkey Town Ct 1983) (court denied request for expert to testify as to inadequacies of breath test machine where issues raised of improperly tested breathalyzer instrument, outdated ampoules, and inaccuracies attendant to readings are not uncommon and counsel is fully capable of thoroughly exploring any anomalies which may have been present during the breathalyzer test and to bring them to the attention of the jury through cross-examination).

Despite possible resistance to applications for expert assistance by courts seeking to safeguard funds or expedite proceedings, counsel should not be discouraged from moving for funds by presuming that an application will fail. Much of the case law related to denials presents situations where the applications were inadequate or abandoned. Perseverance and carefully drawn pleadings will often overcome perceived obstacles, and also preserves any denial for appellate review.

In *People v Jones*, 210 AD2d 904 (4th Dept 1994) *affd* 85 NY2d 998 (1995), the Appellate Division held that the County Court abused its discretion in denying the defendant's application for authorization to have neurological testing conducted based on reports that, as a child, the defendant sustained a traumatic head injury that caused permanent brain damage where the defendant's expert physician recommended tests based upon his belief that the defendant's cognitive limitations were a result of brain damage and a 30-year history of alcoholism. In that case such testing was crucial to the defendant's asserted defense of justification. In *People v Keane*, 209 AD2d 354 (1st Dept 1994), the Appellate Division held that the trial court erred in denying the defendant's application to hire an expert in voice identification because expert testimony proving that the defendant was not the person heard on the tape admitting to the crime would seriously damage the complainant's credibility, obviously a key issue in a date rape case.

"Likelihood of success" is an erroneous standard for deciding § 722-c applications. In *People v Vale*, 133 AD2d 297 (1st Dept 1987), the First Department reversed the defendant's conviction, deeming the denial of the defendant's § 722-c application for psychiatric assistance "most improvident." Citing *Ake v Oklahoma*, the court stated:

> [W]hen a state undertakes to prosecute an indigent defendant, it must also take whatever measures are necessary to assure that the defendant is able to participate meaningfully in the proceeding. The proceeding will otherwise be fundamentally unfair and offensive to the due process guarantees of the Fourteenth Amendment …. [A]n indigent need not show that an insanity defense "might succeed" to obtain access to expert psychiatric assistance, but only that the issue of the defendant's sanity will be an important factor at trial.

Vale, 133 AD2d at 299-300.

Admissibility may become an issue in determining necessity, although the ultimate admissibility of, or the intent to introduce, expert testimony should not be dispositive of the request. Since expert assistance may be critical to the evaluation of evidence and counsel's understanding of the import of evidence in preparation of the defense case, not just to secure testimony at trial, funding should not be denied simply because particular evidence ultimately may be deemed inadmissible at trial or because the use of the expert is not necessarily intended to develop evidence to be admitted at trial. *But see People v Brown*, 136 AD2d 1 (2d Dept 1981) (court did not err in denying the defendant's request to retain the expert services at public expense where it appropriately exercised discretion in determining that desired expert testimony on the defendant's behalf would be inadmissible); *People v Hinson*, 2001 NY Slip Op 40357U (Supreme Ct, Kings Co 9/4/2001) (denial of funds for polygraph expert based on the defendant's failure to establish that lie detector tests have gained general scientific acceptance).

Where necessity or viability has not been settled under *Frye*, or has been called into question, especially in circumstances where the issue is new, it may be helpful to submit a Memorandum of Law setting forth the fundamental elements of the forensic issues and ask for a hearing to establish the validity of the use of expert testimony. In recent years, traditional forms of forensic evidence that have been accepted virtually without challenge for decades have received some judicial scrutiny, and the number of successful defense challenges is starting to grow. *See, e.g.*, *Maryland v Rose*, Case No. K06-0545 (Circuit Ct, Baltimore Co 10/19/2007); *Commonwealth v Patterson*, 445 Mass. 626 (Mass 2005) (fingerprints); and *United States v Green*, 405 F Supp 2d 104 (D Mass 2005) (ballistics); *United States v Hines*, 55 F Supp 2d 62 (D Mass 1999) (handwriting analysis). Further, in light of the National Academy of Sciences study and report set forth in *Strengthening Forensic Science in the United States: A Path Forward* (2009) ("NAS report"), in any case where so-called "forensic sciences" are implicated, the defense should seek the assistance of an expert to determine whether the science involved is truly valid and what procedures must be followed for application of that science or expertise in the particular case to be reliable.

E. *Investigators and Necessity*

Establishing necessity is an especially critical task when seeking funds to employ an independent investigator. In such instances, the application should explain the circumstances supporting necessity, including that there are no reasonable alternatives or that all other reasonable alternatives have been exhausted. *See, e.g., Rockwell*, 18 AD3d 969 (denial of funds not an abuse of discretion where the "defendant only asserted that an investigator would be helpful.… Moreover, County Court adjourned the impending trial to allow defense counsel additional time to conduct whatever investigation he deemed necessary."); *People v Allen,* 28 Misc 3d 1226A (Albany City Ct 2010) (affidavit failed to demonstrate that the defense has exhausted other investigative avenues).

Examples of the requisite necessity for the services of an investigator may include the fact that there are too many witnesses to be located and interviewed by counsel; or that it is important that counsel has independent corroboration of witness interviews; or there is evidence that must be located and retrieved and counsel does not have time, resources, or investigative expertise to do so; or there are witnesses and/or evidence outside the jurisdiction that require an independent investigator to travel and investigate. In many cases, the cost of hiring and deploy-

ing an investigator will be more cost-effective than compensating counsel for the work at assigned counsel rates.

It may also be helpful in securing the services of an investigator to include in the application information such as the nature and difficulty of the problems and issues involved; the professional and/or educational qualifications of the investigator, and whether or not the investigator is licensed in the State of New York. *See People v Baker*, 69 Misc 2d 882 (Supreme Ct, New York Co 1972).

F. *Necessity and Forensic Consultants*

Necessity for expert assistance may be legitimately established to assist in the review and understanding of evidence or records in preparing for confrontation or investigation. In *Matter of Rosalie S.*, 172 Misc 2d 176, 177 (Family Ct, Kings Co 1997), the court stated that "the ability to consult with experts to prepare a complete defense is a key element of due process. To undermine the ability of litigants freely to engage experts in a confidential manner would have a chilling effect on their use and, therefore, impair the fundamental fairness of the litigation process." *See also Lisa W. v Seine W.,* 9 Misc 3d 1125A (Family Ct, Kings Co 2005) (§ 722-c application granted to hire expert to act as consultant and conduct peer review of the opposing party's expert report); *People v Roraback*, 174 Misc 2d 641 (Supreme Ct, Sullivan Co 1997) (§ 722-c order authorizing consult with an expert in infrared microscopy in preparation for *Frye* hearing challenging the prosecution's expert); *People v Santana*, 80 NY2d 92 (1992), *quoting Ake*, 470 US at 82 ("'[W]ithout the assistance of a psychiatrist to … present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high'….").

This is especially true in regard to forensic fields. For example, when a case involves medical reports of physical injuries or an autopsy report in a homicide the defense should be entitled to an expert to help interpret the full import of the details of the records. *See, e.g., People v Bryce,* 287 AD2d 799 (3d Dept 2001) ("[T]he failure of the defense experts to timely examine this critical evidence prevented timely disclosure of 'a serious flaw' in the prosecution's case …."). Similarly, when a case involves DNA evidence, the defense should be entitled to consult with an expert to review, interpret, and prepare to confront the prosecution's evidence, even if the expert may not be called as a defense witness. *But see People v Robinson*, 70 AD3d 728 (2d Dept 2010) (The defendant failed to demonstrate the necessity of the appointment of a DNA expert.).

In *Tyson v Keane*, 159 F3d 732 (2d Cir 1998) *affg* 991 F Supp 314 (SDNY 1998), the Second Circuit discussed the nature of expert assistance in cases where forensic analysis is the basis for seeking expert assistance. Citing *Ake v Oklahoma* and *United States v Durant*, 545 F2d 823, 829 (2d Cir 1976), the Court acknowledged that the importance of providing such experts rests on the fact that experts in these circumstances offer information and analysis that a non-expert cannot provide:

> Although the jury remains the ultimate judge of sanity, without expert assistance "the risk of an inaccurate resolution of sanity issues is extremely high." Ake, 470 U.S. at 82. Similarly, a jury cannot discern whether a fingerprint from the scene matches defendant's prints without expert assistance.

Tyson, 159 F3d at 738.

The more critical the forensic evidence is to proving the case, the greater the need for expert assistance to help the defense interpret and assess the evidence.

G. *The Rate and Projected Cost of Retaining the Expert*

A § 722-c application is not statutorily required to include the amount of funds necessary, but be aware that the statutory cap is $1,000.00, and if the final compensation will exceed that amount extraordinary circumstances must be established, if not at the outset then at the end when a voucher is submitted. Local practice will dictate whether an initial application must include the actual amount requested if less than the statutory cap. If it is anticipated from the outset that more funds will be required, or simply to strengthen the application, it may be best to include as much information as possible about the exact amount needed and to explain any attendant extraordinary circumstances. *People v Dearstyne,* 305 AD2d 850 (3d Dept 2003) ("In order to prevail on a motion pursuant to County Law § 722-c, a defendant must show both necessity and, if the compensation sought is in excess of [the statutory limit], extraordinary circumstances….").

The statute does not define extraordinary circumstances, nor is there any case law on point. By common usage of the term, extraordinary circumstances may include factors such as the need for a great amount of time to review and assess the evidence, that the expertise is unique and specialists are rare, or that the only available expert is from a distant jurisdiction. *See Dove,* 287 AD2d 806, 807 (The "application failed to address details concerning the necessity for the expert, the time to be expended by the expert, the precise services to be rendered by the expert, or the extraordinary circumstances which would warrant expenditure in excess of [the statutory limit].").

Working with the court may increase the likelihood of ultimately gaining the needed funds. There are cases in which the trial court's initial denial without prejudice or leave to renew was affirmed, the issue being lost on appeal because the defense failed to follow up. *Id.* ("[A]lthough the initial application was denied, defendant failed to seek an adjournment of the trial in order to locate an expert who could examine the recordings at a

more reasonable sum …."); *see also Matter of Brittenie K.*, 50 AD3d 1203; *People v Graves*, 238 AD2d 754 (3d Dept 1997); *People v Lane*, 195 AD2d 876 (3d Dept 1993).

Where a court is hesitant to grant funds, obtaining more information to satisfy the prongs of nexus and necessity and thereafter renewing a request can often turn the tide. Locating an expert closer to the jurisdiction, providing more details as to a particular expert's credentials where a specialty is in question, better defining how the expert will be used; any of these may be enough to persuade a court to grant an application previously denied. *See People v Koberstein*, 262 AD2d 1032 (4th Dept 1999) (Before his prior trial, "defendant received $1,150 to retain an odontologist who was never called as an expert witness at that trial. Although the court initially denied defendant's request for funds [in the amount of $4,200], when defense counsel renewed his request for the lesser amount of $3,000, the court noted that it was 'receptive' and told defendant to confer with the court prior to making any expenditures. Defendant never raised the issue again. In the circumstances of this case, the court did not abuse its discretion in denying defendant's inflated request to retain a new expert after the court had previously allocated funds to obtain the services of an expert who did not testify at defendant's prior trial …. Moreover, defendant never pursued the matter after the court expressed its receptiveness to the retention of an expert at a more reasonable cost ….").

If the assistance sought is outside the bounds of reasonableness, the court will likely deny the § 722-c application. In *People v Thomas*, 139 Misc 2d 158 (County Ct, Schoharie Co 1988), the defense sought an order directing the county to pay for costs associated with transporting the defendant to Ottawa for a particular examination to obtain an expert opinion relative to his culpability, including having the sheriff provide transportation over a 72-hour period. The court found that "[t]he cost would not only be extraordinary, but phenomenal…., and [the] application fails to sufficiently convince the court that such expert services are truly necessary within the meaning and intent of County Law § 722-c. In addition, because of the logistics, security risk, and huge expense involved, this court holds and determines that the defendant's application should be and is hereby denied in all respects." *Id.* at 160.

This situation presents the opportunity for counsel to persevere in prevailing upon the court to reconsider where the expertise is critical and there are no other available alternatives. Some issues where an expert is needed may be novel or complex and therefore qualified experts may not be readily accessible. Counsel should not abandon efforts in this regard, but rather continue to seek assistance and return to the court with renewed and updated requests where it can be shown that costs can be reduced or qualified experts have refused to accept the case because the fees are unacceptably low. As discussed above, making a record for appeal to establish on review the importance of the expertise and diligent efforts to secure assistance will avoid findings of abandonment of the issue and may help to gain a reversal where the expert was denied.

III. Stages of Proceedings

Section 722-c does not limit expert or other assistance to certain types of cases, levels of seriousness, or to any particular stage of the proceedings (*e.g.*, only after arraignment on indictment). *But see Stamp*, 120 Misc 2d 48 (request for expert assistance on breath test machine inadequacies denied in non-felony DWI case). *Stamp* stands alone and in the years since that decision, the collateral consequences of even less serious convictions such as non-felony DWI can be devastating. Where an application is resisted because of an asserted lack of importance of the case or potential conviction, it is incumbent upon counsel to press the issue as a matter of due process and fundamental fairness to ensure that a person does not suffer undue consequences for the lack of ability to thoroughly examine the evidence and present a defense.

The importance of being allowed to hire experts in the early stages of a case relates to their use as consultants: the need for assistance in evaluating evidence to make reasonable strategic decisions, including whether to accept or reject a plea offer. *See People v Bennett*, 29 NY2d 462 (1972) (It is well settled that the defendant's right to effective representation entitles him to have counsel "'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial.'"); *People v Reed*, 152 AD2d 481 (1st Dept 1989) (noting counsel's obligation to convey accurate information in consideration of plea negotiation). The United States Supreme Court's 2012 decisions in *Lafler v Cooper*, 566 US __, 132 S Ct 1376 (2012) and *Missouri v Frye*, 566 US __, 132 S Ct 1399 (2012), regarding the critical nature of effective assistance counsel in plea cases, underscores how important it is that attorneys seek to use every available resource to investigate and properly counsel clients in the disposition of their cases.

Similarly, the use of mitigation experts has been accepted in cases where a defendant's history presents issues requiring evaluation. *See People v Louis*, 161 Misc 2d 667 (Supreme Ct, New York Co 1994) (approval of fees in excess of statutory amount based on extraordinary circumstances for mitigation expert in pre-plea investigation).

IV. Types and Independence of Experts

The defense entitlement to funding for experts is not limited to the same types of experts being used by the prosecution. In *Smith*, 114 Misc 2d 258, the court granted

§ 722-c funds to the defense in accordance with the Special Prosecutor's intent to use experts in particular fields. This case by no means should be considered to stand for the proposition that the defense is *only* entitled to the same types of experts that the prosecution intends to use. The need for expertise must be determined in accordance with the evidence and demands of the defense case, which may include assistance in refuting expert testimony presented by the prosecutor, but may also be needed to explore other issues that the defense can identify. Prosecutors may well not seek experts relating to potential defenses until after the defense makes these defenses known. Examples include mental health defenses; challenges to eyewitness testimony, and challenges to the prosecution's theory of how an incident unfolded (which may require a scene reconstruction expert, an expert on the physical limitations imposed by a defendant's disability, or one of many other types of experts).

Ample support exists for the proposition that the right to experts to assist the defense can only be meaningful if the experts employed have sole allegiance to the defense. "The essential benefit of having an expert in the first place is denied the defendant when the services ... must be shared with the prosecution." *United States v Sloan*, 776 F2d 926, 929 (10th Cir 1985); *Cowley v Stricklin*, 929 F2d 640, 644 (11th Cir 1991); *Smith v McCormick*, 914 F2d 1153 (9th Cir 1990); *Marshall v United States*, 423 F 2d 1315, 1319 (10th Cir 1970) (an expert who shares "both a duty to the accused and a duty to the public interest" is burdened by an "inescapable conflict of interest"); *People v McLane*, 166 Misc 2d 698 (Supreme Ct, New York Co 1995).

There is some case law that holds where the issues have been addressed by court-ordered experts or by experts previously engaged in the matter, the court may refuse funds to hire an additional expert solely for use by the defense. *Matter of Garfield M.*, 128 AD2d 876 (2d Dept 1987) (The court did not abuse its discretion in concluding that there was no need to provide an independent psychological expert because of "the extensive evaluation and psychological examination of the appellant by the Family Court Mental Health Services and the Probation Department."). However, it is critical to review such evidence carefully to determine whether independent expertise is necessary to assess the reliability of previous expert review.

Sometimes it is not possible to find an independent expert who has the expertise needed. In such instances, a court may order public experts to assist the defense as a matter of due process. In *People v Evans*, 141 Misc 2d 781 (Supreme Ct, New York Co 1988), the trial court ordered the New York Police Department Auto Crimes Unit experts to assist the defense in examining non-public Vehicle Identification Numbers. Finding that the expertise did not widely exist elsewhere and that the defense had exhausted efforts to obtain cooperation from private sources, the court held that "[w]hether or not [the defendant] has funds to hire an expert, if the only source of expertise that may reasonably be necessary to his defense resides with the government, the government must give him access. This is the essence of fairness. Due process mandates no less." *Id.* at 784.

V. Raiding the Public Treasury

Courts may cite the desire to preserve government funds as a basis for denying applications for services under § 722-c. *See, e.g., Pride*, 79 Misc 2d at 582 (stating that the defense should not be allowed to "raid the public treasury"). However, where the defense makes the appropriate showing of financial inability and necessity, budgetary constraints cannot form the sole basis for denial of funds. *See Ake*, 470 US at 78-80; *Matter of Director of Assigned Counsel Plan of the City of New York*, 159 Misc 2d 109, 123 (Supreme Ct, New York Co 1993) *affd sub nom People v Townsend*, 207 AD2d 307 (1st Dept 1994) *affd* 87 NY2d 191 (1995) (Economic issues "cannot be the overriding concern when the ability of the court to carry out its essential function of assuring justice and due process is implicated.").

VI. § 722-c and Systemic Reform

From a systemic standpoint, § 722-c motions for auxiliary services can be utilized as a means of developing authority supporting parity of resources for the defense. In the area of forensics, the NAS report decrying the scientific validity of forensic evidence as a whole should lay the groundwork for a standard practice of obtaining expert assistance in any case where the prosecution intends to use forensic evidence. Prosecutors have access to state forensic services and law enforcement databases to assist in the preparation of cases. To ensure that a person accused of a crime has a fair opportunity to meet and challenge this wide range of evidence, defenders must be diligent in seeking similar qualified assistance.

It has been held that a defense attorney is not excused from adequately investigating a client's case even though an investigator was not available. *Thomas v Kuhlman*, 255 F Supp 2d 99 (EDNY 2003). Where counsel cannot adequately perform the required investigation because time and resources prevent it, an application for investigative assistance should be made and renewed as necessary. Defenders in offices without investigators, and other assigned counsel working under onerous conditions of limited resources and overly burdensome caseloads, should cite overall constraints of time and resources as part of the showing of necessity.

This strategy serves a twofold purpose. First, it makes a solid record on appeal if the lack of investigative assistance plays a part in preventing the preparation and pres-

entation of a defense. Second, the regular filing of such applications will help establish the systemic need to ensure that needful clients and assigned counsel have investigators and other expert assistance available to fulfill their constitutional rights and obligations.

The ability to secure qualified expert assistance to examine, assess, and prepare a defense is bound up with the constitutional right to present a defense. Once counsel carefully investigates cases, reviews evidence, and develops definitive theories and themes of defense, § 722-c applications for experts may virtually write themselves. It then becomes the task of defenders to encourage judges and the trial and appellate courts to fulfill the demands of due process and fundamental fairness by granting these applications. ⚖

Quick Reference List: Cases Supporting § 722 Funds for Particular Experts

The following are cases that may provide support for, or a starting point for research about, requests for specific types of experts:

Ballistics expert *People v Jenkins*, 98 NY2d 280 (2002) (preclusion of prosecution ballistics evidence not warranted where defense declined opportunity to obtain independent expert); *Barnard v Henderson*, 514 F2d 744 (5th Cir 1975)

Battered woman's syndrome *Dunn v Roberts*, 963 F2d 308 (10th Cir 1992)

Prepleading Report Preparer *People v Louis*, 161 Misc 2d 667 (Supreme Ct, New York Co 1994)

"EEG" examination *United States v Hartfield*, 513 F2d 254 (9th Cir 1975) (to determine if the defendant has epilepsy)

Eyewitness reliability *People v LeGrand*, 8 NY3d 449 (2007)

Fingerprint expert *United States v Patterson*, 724 F2d 1128, 1130-31 (5th Cir 1984); *United States v Durant*, 545 F2d 823 (2d Cir 1976)

Firearms expert *People v Hull*, 71 AD3d 1336 (3d Dept 2010)

Forensic medicine *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Forensic pathologist *Williams v Martin*, 618 F2d 1021 (4th Cir 1980) (on cause of death); *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Handwriting expert *People v Mencher*, 42 Misc 2d 819 (Supreme Ct, Queens Co 1964) (authorized under former Code of Criminal Procedure § 308)

Hypnotic expert *Little v Armontrout*, 835 F2d 1240 (8th Cir 1987); *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Infrared Microscopy [Fourier Transform Infrared Spectrophotometry or FTIR] *People v Roraback*, 174 Misc 2d 641 (Supreme Ct, Sullivan Co 1997)

Interpreters/Translators

- **—Right to assistance at any stage of criminal proceeding** *People v Robles*, 86 NY2d 763 (1995)
- **—Right to meaningfully participate in trial and assist in defense** *People v Ramos*, 26 NY2d 272 (1970)
- **—Right to assistance to review documents in preparation for trial** *People v Rodriquez*, 247 AD2d 841 (4th Dept 1998) (denial abuse of discretion)

Investigator *People v Irvine*, 40 AD2d 560 (2d Dept 1972); *Marshall v United States*, 423 F2d 1315 (10th Cir 1970)

Narcotics *People v Mencher*, 42 Misc 2d 819 (Supreme Ct, Queens Co 1964) (authorized under former Code of Criminal Procedure § 308)

Neurological testing for Traumatic Brain Injury *People v Jones*, 210 AD2d 904 (4th Dept 1994) *affd* 85 NY2d 988 (1995)

Second neurologist *People v McClane*, 166 Misc 2d 698 (Supreme Ct, New York Co 1995) (to assist defense counsel and psychiatrist who admitted he lacked ability to evaluate relationship between brain structure, behavior, and emotions)

Odontologist *People v Koberstein*, 262 AD2d 1032 (4th Dept 1999)

Photogrammetry experts *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Physician and psychotherapist *People v Hatterson*, 63 AD2d 736 (2d Dept 1978)

Psychological automatism *People v Brand*, 13 AD3d 820 (3d Dept 2004)

Psychiatric expert on ability to form requisite intent following drug and alcohol consumption *People v Cronin*, 60 NY2d 430 (1983); *People v Donohue*, 123 AD2d 77 (3d Dept 1987)

Psychiatric expert to assist with seeking SORA downward depature *People v Linton,* 94 AD3d 962 (2d Dept 2012)

Second validator in child sex abuse case *Matter of Tiffany M.*, 145 Misc 2d 642 (Family Ct, Queens Co 1989)

Social worker *Matter of Director of Assigned Counsel Plan of the City of New York*, 159 Misc 2d 109 (Supreme Ct, New York Co 1993) *affd sub nom People v Townsend*, 207 AD2d 307 (1st Dept 1994) 134 Misc 2d 34 *affd* 87 NY2d 191 (1995)

Transcript in lieu of testimony to avoid fee *Palma S. v Carmine S.*, 134 Misc 2d 34 (Family. Ct, Kings Co 1986) (Court denied funds to pay witness fees to compel opinion testimony but granted § 722-c funds to order and admit transcript of expert's testimony in a prior proceeding.)

[***Ed. Note**: The decision in this case disappointingly, but unequivocally expresses the trial court's lack of interest in the particular expert testimony, but the holding is worthy in its support for the granting of funds for transcripts and the statement that "this court will not penalize a party for whom it has appointed counsel for her financial inability to pay a witness' fee …."*]

VIN Inspection by Auto Crime Division of New York City Police Department to assist in defense of car arson case *People v Evans*, 141 Misc 2d 781 (Supreme Ct, New York Co 1988)

Voice spectrography *People v Tyson*, 209 AD2d 354 (1st Dept 1994) ⚖

Quick Reference List: State and National Standards on Defense Access to and Funding for Experts

Below is a list of New York and national standards regarding public defender access to independent experts, including investigators, interpreters/translators, forensic scientists, and medical and mental health professionals, and funding to retain such experts.

New York Standards

New York State Office of Indigent Legal Services, *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest* (eff. July 1, 2012, January 1, 2013 [standards and criteria made applicable to all mandated representation])
www.ils.ny.gov/files/Conflict%20Defender%20Standards%20and%20Criteria.pdf
"Counties must ensure, through their plans for providing public defense representation and other provisions, that attorneys and programs providing mandated legal services in conflict cases: … 4. Have access to and use as needed the assistance of experts in a variety of fields including mental health, medicine, science, forensics, social work, sentencing advocacy, interpretation/translation, and others. See *NYSBA Standard* H, Support Services/Resources."

Indigent Defense Organization Oversight Committee (First Department), *General Requirements for all Organized Providers of Defense Services to Indigent Defendants* (July 1, 1996 [as amended May 2011])
www.nycourts.gov/courts/ad1/Committees&Programs/IndigentDefOrgOversightComm/general%20_requirements.pdf
"VII.B.3.a: Lawyers should have access to the professional services of psychiatrists, forensic pathologists and other experts at all stages of the case, and should be able to rely upon such experts not only to serve as trial witnesses, but also to provide pre-trial analysis and advice. Quality representation requires that defense lawyers have the services of interpreters to assist in communicating with their non-English speaking clients and witnesses at all stages of the case."

New York State Bar Association, *Revised Standards for Providing Mandated Representation* (2010)
www.nysba.org/AM/Template.cfm?Section=Special_Committee_to_Ensure_Quality_Mandated_Representation_Home&Template=/CM/ContentDisplay.cfm&ContentID=54163
"H-5. Assigned counsel plans shall ensure that assigned counsel have the investigatory, expert, and other support services, including, but not limited to, social work, mental health and other relevant social services, and facilities necessary to provide quality legal representation…."

"H-6. Because persons eligible for mandated representation have the right to all appropriate investigatory and expert services, courts should routinely grant requests for such services made by assigned counsel. In Family Court expert services, including social worker, family treatment, and forensics, are often crucial at the outset and should be requested by counsel prior to fact finding…."

See also Standard H-1.

NYSDA, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004)
www.nysda.org/docs/PDFs/Pre2010/04_NYSDAStandards_ProvidingConstitutionallyStatutorilyMandatedReprsntatn.pdf
VII. "E. Publicly-funded services, including but not limited to transcription of court proceedings, investigators, interpreters, and experts, should not be denied to a person who is financially eligible for publicly-provided legal services but is represented by counsel acting pro bono or paid by a third person. Nor should publicly-funded auxiliary services be denied to a person whose financial condition after payment of a reasonable fee to retained counsel makes that person unable to obtain necessary auxiliary services without substantial hardship to themselves or their families."

VIII.A. "6. Unless inconsistent with the best interest of the client, counsel should conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible. Counsel should secure the assistance of investigators and/or other experts, including providers of social services, whenever needed for preparing any aspect of the defense, including but not limited to bail applications, pretrial motions, plea negotiations, defense at trial including developing an understanding of or rebuttal of the prosecution's case, and sentencing."

VIII.A.8. "c. Should fully prepare for pretrial proceedings and trial …. Counsel should obtain expert assistance whenever it is needed for any aspect of case preparation and presentation, including but not limited to the assistance of mental health experts, forensic scientists, and persons knowledgeable about any aspect of the case that counsel cannot adequately understand or present without assistance."

See also Standards VIII.B.6 and VIII.B.8.c, which are Family Court counterparts to the two standards above. And see also Standard III "C. …Salaries and fees should be sufficient to compensate attorneys, other professionals (such as investigators, social workers, sentencing experts, expert witnesses, and consultants), and support staff commensurate with their qualifications and experience, and should be at least comparable to compensation of their counterparts in the justice system…."

National Standards

American Bar Association (ABA), *Ten Principles of a Public Defense Delivery System* (2002)
www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf
"8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system." *See* Commentary to this standard, which says in relevant part: "There should be parity of workload, salaries and other resources (such as … access to forensic services and experts) between prosecution and public defense …." [Endnote omitted]

ABA, *Standards for Criminal Justice: Providing Defense Services*, 3d ed., (1990, 1992)
www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html#1.4
"Standard 5-1.4 Supporting services
The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process. In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services."

See also Standard 5-3.3 Elements of the contract for services, subparagraph (x).

National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976)
www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems#threeone
Guideline "3.1 Assigned Counsel Fees and Supporting Services …Funds should be available in a budgetary allocation for the services of investigators, expert witnesses and other necessary services and facilities…."

See also Guidelines 1.5, 3.4, 4.3, and 5.8.

National Advisory Commission on Criminal Justice Standards and Goals — *Courts, Chapter 13, The Defense* (1973)
www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense
Standard 13.14
"The budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police. The budget should include:
…
3. Funds for the employment of experts and specialists, such as psychiatrists, forensic pathologists, and other scientific experts in all cases in which they may be of assistance to the defense …." ⚖

Defender News *continued from page 9*

NYSDA—she contributed both shrewd advice and a much-needed element of fun. Those at NYSDA who

worked with Lenore will miss her greatly, and offer sympathy to her family, colleagues at the League, and all who loved her.

Ciulla Retiring as Saratoga County Public Defender

John Ciulla announced in December that he is stepping down as Saratoga County Public Defender, a position he has held since 1989. Ciulla became a member of NYSDA's Board of Directors in 1992, and currently serves as its Treasurer. Our Executive Director said, on hearing the news:

> John has been a tireless worker for justice and a politically able champion on behalf of the poor. His departure from the Public Defender Office will leave a large hole in the Saratoga legal landscape after his more than 2 decades shaping the face of justice there. NYSDA takes solace in the fact that we anticipate his continued presence on our Board of Directors as he begins this new phase of life—a phase for which we wish him great joy and health.

The *Saratogian* showcased Ciulla's retirement announcement at http://saratogian.com/articles/2012/12/17/news/doc50cfe3a1c3383918010827.txt?viewmode=fullstory. ⚖

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.

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.

Evidence (Hearsay) (Instructions)

Instructions to Jury

People v Harris, 19 NY3d 679, __ NYS2d __ (10/18/2012)

Holding: The court erred by denying defense counsel's for-cause challenge of a prospective juror who said "she had 'an opinion slightly more in one direction than the other'" as to the defendant's guilt or innocence and who said during counsel's follow-up questioning that while her feelings would not be the only thing that would affect her as a juror, it would form some "'*slight part*' of what she would consider (emphasis supplied)." The court failed to conduct its own inquiry.

The court also erred by failing to give a requested jury instruction limiting the use of hearsay statements made by the decedent to third parties. Admitted for the purpose of allowing the jury to evaluate the defendant's reaction when confronted with these hearsay accusations of having threatened the decedent, the statements could have been improperly used in this circumstantial evidence case for their truth.

Evidence (Sufficiency)

Organized Crime

People v Western Express Intl. Inc., 19 NY3d 652, __ NYS2d __ (10/18/2012)

Holding: The enterprise corruption count of the indictment against the defendants was properly dismissed for failure to show "an enduring structurally distinct symbiotically related criminal entity with which appellants were purposefully associated." The grand jury evidence showed that three defendants repeatedly bought stolen credit card data and used that information for fraudulent purposes, and a fourth individual defendant facilitated transactions by which the stolen data was transferred, through the defendant entity Western Express, which he controlled.

Dissent: [Pigott, J] "Criminal organizations operating on the Internet do so without any notion of a hierarchy or any formalized decision-making process" and the parties "acted in an organized way, or, in other words by an 'ascertainable structure', which allowed the members to be more successful in effecting their criminal purpose and to avoid detection from law enforcement for several years."

Burglary (Elements) (Evidence)

Sentencing (Orders of Protection)

People v Cajigas, 19 NY3d 697, __ NYS2d __ (10/23/2102)

Holding: An act that would otherwise be legal can constitute a crime when an order of protection is in place, and the intent to commit that crime inside a building may be used to prove a burglary charge. While such charge might be considered disproportionate to some qualifying conduct, selecting appropriate charges from a spectrum of seriousness is a "fundamental component of the District Attorney's inherent discretion . . . ."

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

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

People v Colville, 2012 NY Slip Op 07047 (10/23/2012)

Holding: "[T]he decision whether to seek a jury charge on lesser-included offenses is a matter of strategy and tactics which ultimately rests with defense counsel."

Dissent: [Jones, J] The court did not abrogate the defendant's right to counsel by not giving a lesser-included offense charge after the defendant, having fully consulted with counsel and being repeatedly advised by the court and counsel that such a charge was in his best interest, decided he did not want that charge submitted to the jury.

Rape (Evidence)

NY Court of Appeals *continued*

Sex Offenses (Incest) (Sexual Abuse)

People v Halter, 2012 NY Slip Op 07052 (10/23/2012)

Holding: Where the judge allowed the defense sufficient latitude to develop the theory that the accuser had substantial reasons to fabricate—to end her father's interference in her life or avoid being sent to an institution for troubled teens—application of the Rape Shield Law to prevent questioning about the accuser's provocative clothing and internet postings, and her sexual relationship with another teen, was not an abuse of discretion.

Dissent: [Pigott, J] The trial court did not adequately explain its evidentiary ruling and appeared to mistakenly believe that it had no authority to admit evidence about the sexual conduct of the accuser, the defendant's daughter, where the evidence did not meet the specifically enumerated exceptions of the Rape Shield Law.

Dissent: [Smith, J] "I believe that the majority is erroneously affirming a conviction in a case where the defendant may be innocent."

Evidence (Circumstantial Evidence) (Prejudicial) (Uncharged Crimes)

Robbery (Evidence)

People v Alfaro, 2012 NY Slip Op 07140 (10/25/2012)

Holding: It was not error to allow into evidence a cigarette lighter that looked like a gun, and novelty handcuffs and keys, that had been found on the defendant when he was apprehended shortly after the charged assault and robbery in an elevator.

Dissent: [Lippman, CJ] Where intent was not at issue, and the items at issue were not used in the incident, their admission was not permissibly probative as to whether the defendant was the perpetrator and "would only encourage a conviction impermissibly rooted in the supposition that robbery was defendant's line—the sort of thing he did."

Accusatory Instruments (Sufficiency)

Traffic Infractions

People v Fernandez, 2012 NY Slip Op 07145 (10/25/2012)

Holding: While titled "'Complaint/Information,'" the accusatory instrument in this aggravated unlicensed operation of a motor vehicle case "was sufficient to serve as a simplified traffic information because it was substantially in the form prescribed by the Commissioner of Motor Vehicles." "Although we hold that according to the technical specifications of the regulations, Procedure 209-11 substantially complies with 15 NYCRR § 122.2, and is therefore sufficient as a simplified traffic information, a new more carefully drawn form would better service the city and the public."

Dissent: [Pigott, J] "[O]ver the years[,] importantly different documents have been conflated into one to the benefit of no-one." The accusatory instrument here "was not a simplified traffic information with some unnecessary factual detail . . . but an insufficient misdemeanor information."

Sentencing (Second Violent Felony Offender) (Youthful Offenders)

People v Meckwood, 2012 NY Slip Op 07147 (10/25/2012)

Holding: That the defendant would have been eligible for youthful offender (YO) status had he committed his 1999 burglary in New York State rather than in Pennsylvania, where he was not YO eligible, does not preclude using the burglary as a basis for adjudicating him a second violent felony offender following his conviction for an attempted first-degree robbery in 2010. As for his challenge to the look-back provisions of the statute, "[w]hile the tolling provision, as applied to persons with differing years of incarceration, may result in disparate punishment, there is no equal protection violation under our Constitution."

Juries and Jury Trials (Voir Dire)

Trial (Public Trial)

People v Alvarez, 2012 NY Slip Op 07227 (10/30/2012)

Holding: Whether exclusion of a defendant's family from the courtroom during part of voir dire was a denial of the right to a public trial is an issue that requires preservation for review on appeal; it is not a mode of proceedings claim. Where counsel objected as soon as he learned that his client's family had been excluded from the morning's voir dire proceedings to provide more seating for prospective jurors, the court apparently considered no other alternatives to exclusion, and only five jurors had been selected when the objection was raised, the appropriate remedy would have been the declaration of a mistrial so that jury selection could begin anew.

Appeals and Writs (Scope and Extent of Review)

Sex Offenses (Civil Commitment)

Matter of State of New York v Daniel F., 2012 NY Slip Op 07221 (10/30/2012)

NY Court of Appeals *continued*

Holding: Review of the record to resolve a factual disagreement between the trial court and Appellate Division shows that the trial court's finding that the "respondent is not a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law § 10.11 (d)" more nearly comports with the weight of the evidence.

Juries and Jury Trials (Competence) (Deliberation)

People v Herring, 2012 NY Slip Op 07226 (10/30/2012)

Holding: The trial judge did not abuse her discretion by deciding that a juror was fit to serve after asking the juror about her health following a fellow juror's report that the juror had been sleeping during deliberations, which the juror denied. Other issues raised lacked merit.

Defense Systems (Assigned Counsel Systems) (Legal Aid Systems) (New York State Law [Statutes])

Matter of New York County Lawyers' Assn. v Bloomberg, 19 NY3d 712, __ NYS2d __ (10/30/2012)

Holding: The 2010 plan fashioned by New York City for providing public defense services "constitutes a valid combination plan under County Law § 722 (4)" where the plan "allows for the defense of indigent criminal defendants by the Legal Aid Society, other institutional providers and the private bar," and under it the assigned counsel "panels created by the 1965 Bar Plan remain in place. . . ." The ability of the City to assign conflict cases to institutional providers "is not contingent on the consent of the county bar associations . . . ." The assertion that 722(3) reserves the assignment of representation in conflict cases exclusively to the county bar associations or the judiciary is rejected, as are the other claims by the petitioner bar associations.

Dissent: [Lippman, CJ] The issue posed is not whether the City had the power to shift the conflict defense function from assigned counsel panel lawyers to institutional public defense providers but whether the combination plan chosen was a permissible means. Because no bar association agreed to use of the original 1965 bar plan in the "dramatically different context" of greatly expanded use of institutional providers under subsection 2, there is no actual bar association (subsection 3) plan, but "simply a plan of the City attributable to a bar association only by highhanded assertion."

Sex Offenses (Civil Commitment)

Matter of State of New York v Shannon S., 2012 NY Slip Op 07228 (10/30/2012)

Holding: On the particular facts of this case, including the respondent's extensive criminal record from age 19 to 30 that contains "various sexual offenses involving nonconsenting or underage, adolescent victims"; the diagnosis by a licensed psychologist and psychiatric examiner, after examination of the respondent, of paraphilia not otherwise specified (paraphilia NOS), antisocial personality disorder, and alcohol abuse; and another examiner's determination that the respondent "satisfied the diagnostic criteria for paraphilia NOS and reflected an apparent attraction to pubescent girls—a form of paraphilia known as hebephilia," there was legally sufficient evidence that the respondent suffers a mental abnormality. While the latter is not found in the Diagnostic and Statistical Manual of Mental Disorders (DSM), and controversy exists as to paraphilia NOS, as was brought out by the respondent's expert, "we find no basis to disturb the affirmed findings of the lower court."

Dissent: [Smith, J] While the respondent appears to be a very bad actor whose continuation behind bars might make the community safer, "to put him there on the fiction that he has some sort of mental condition other than a tendency to commit the crimes for which he was convicted (and has served his time) is and should be constitutionally unacceptable."

Conflict of Interest

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

People v Solomon, 2012 NY Slip Op 07223 (10/30/2012)

Holding: Where the defendant's attorney simultaneously represented, in a civil matter, the police detective who testified at a *Huntley* hearing and at trial that the defendant admitted having sex with the accuser, and the court inquired only whether the defendant agreed with the attorney's statement that the defendant was waiving any conflict that existed from the dual representation, the waiver was not effective. As it was in the defendant's interest to discredit the detective's testimony or otherwise show that the alleged admission was obtained by improper means, an actual conflict existed. "[W]e have never held, and decline now to hold, that the simultaneous representation of clients whose interests actually conflict can be overlooked so long as it seems that the lawyer did a good job."

Appeals and Writs (Judgments and Orders Appealable)

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

People v Boyland, 2012 NY Slip Op 07852 (11/19/2012)

NY Court of Appeals *continued*

Holding: "Whether a protective sweep is justified under particular circumstances involves a mixed question of law and fact." As record support exists for the Appellate Division's resolution of this question, the issue is beyond review here.

Motor Vehicles (Driver's License)

Search and Seizure (Automobiles and Other Vehicles [Impound Inventories])

People v Walker, 2012 NY Slip Op 07851 (11/19/2102)

Holding: The officer who arrested the defendant for driving with a revoked license did not have to ask if the passenger could drive the car, which was not registered to either of them, before impounding it. "We make no attempt to answer all the questions that may be raised in such cases." The search of the car thereafter was a valid inventory search where the written policy regarding such searches was described but not introduced into evidence and defense counsel did not demand its production. A driver's reasonable expectation of privacy in a car is significantly diminished when it is impounded.

Due Process (Fair Trial)

People v Best, 2012 NY Slip Op 07855 (11/20/2102)

Holding: "[T]he rule governing visible restraints in jury trials applies with equal force to non-jury trials and . . . District Court erred in failing to state a basis on the record for keeping defendant handcuffed . . . ." Here, the error was harmless.

Dissent: [Lippman, CJ] "The unwarranted shackling of defendants strikes at the heart of the right to be presumed innocent . . . ." There should be a clear rule that the court's failure to make a record justifying the use of restraints at trial necessitates a new trial, even in the context of bench trials.

Defenses (Justification)

Evidence (Prejudicial) (Uncharged Crimes)

People v Bradley, 2012 NY Slip Op 07858 (11/20/2102)

Holding: While it may be appropriate to allow the prosecution to adduce evidence of uncharged conduct tending to show the necessary mens rea where a defendant's culpability is at issue, the evidence offered here that "at some remote, indeterminate time" the defendant "had stabbed an unidentified man in the thigh" in no way disproved the defendant's claim that when she stabbed the decedent she reasonably believed he was about to injure her.

Dissent: [Smith, J] Where the defendant "essentially presented her autobiography as her defense," the prosecution was entitled "to introduce a bit of her history that casts her in a less favorable light." The idea of excluding "propensity" evidence loses its meaning where a defendant's justification defense is based on a "claim that she had a propensity, instilled in early childhood, to fear violence."

Audio/Video Materials

Evidence (Chain of Custody)

Grucci v Grucci, 2012 NY Slip Op 07856 (11/20/2012)

Holding: Where the plaintiff in this malicious prosecution case made no attempt to show who had recorded a conversation nine years previously or what equipment was used, and established no chain of custody, but offered only to "identify the voices on the tape and state 'whether or not the tape recording [was] fair and accurate,'" the court did not err in precluding admission of the tape, through which the plaintiff sought to show that his ex-wife had not been afraid of him when she put in motion criminal charges of first-degree criminal contempt for placing her in fear of death or injury by telephone.

Dissent: [Pigott, J] It was error to preclude the plaintiff from presenting evidence of what the defendant told the plaintiff's brother and it was not harmless as it was "the most powerful evidence in his case."

Juries and Jury Trials (Constitution – right to)

Sex Offenses (Civil Commitment)

Matter of State of New York v Myron P., 2012 NY Slip Op 07859 (11/20/2012)

Holding: The respondent, a convicted sex offender, was not entitled to a jury trial on whether he should be civilly committed at the end of his prison term where Mental Hygiene Law (MHL) article 10 proceedings were instituted while MHL article 9 proceedings were pending. Respondents under article 9 are not similarly situated to those subject to proceedings under article 10, so the State Legislature appropriately treated them differently; the equal protection claim fails. Nor does New York Constitution, Article I, section 2, guarantee a jury trial as to civil confinement here.

Trial (Public Trial)

People v Torres, 2012 NY Slip Op 07860 (11/20/2012)

NY Court of Appeals *continued*

Holding: Closure of the courtroom during jury selection at the defendant's trial was not trivial, and he adequately preserved the argument that his right to a public trial was violated when his wife was excluded.

Search and Seizure (Search Warrants [Issuance] [Suppression])

People v Gavazzi, 2012 NY Slip Op 08054 (11/27/2012)

Holding: Where a Village Justice's illegible signature appeared on a search warrant allowing Village of Greene Police officers to search a house in Greene, but included no designation of the court, no seal, and a caption that refers to a nonexistent town, the warrant does not substantially comply with CPL 690.45(1) and suppression of evidence found in the search was proper.

Dissent: [Smith, J] The warrant complied with CPL 690.45(4) and (5) by describing the place to be searched and the things to be seized; these are the parts of the statute designed to protect constitutional rights.

Appeals and Writs (Judgments and Orders Appealable)

Confessions (Counsel)

People v Harris, 2012 NY Slip Op 08058 (11/27/2012)

Holding: "There is support in the record for the Appellate Division's determination that defendant unequivocally invoked his right to counsel while in custody, and that mixed question of law and fact is beyond our further review." The hearing court's failure to suppress the defendant's statements was not harmless beyond a reasonable doubt.

Article 78 Proceedings

Conflict of Interest

Prosecutors (Special Prosecutors)

Matter of Soares v Herrick, 2012 NY Slip Op 08055 (11/27/2012)

Holding: The County Court judge exceeded his authority under County Law 701 by disqualifying the District Attorney's office from prosecuting out-of-state defendants who had brought a civil action against the District Attorney and staff in a federal district court in Florida. Designation of a special prosecutor was not appropriate where "there is no record support for the conclusion that the defendants suffered actual prejudice or any risk thereof in connection with petitioner's prosecution of the criminal case." Granting prohibition was an appropriate remedy.

Appeals and Writs (Counsel)

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

People v Townsley, 2012 NY Slip Op 08056 (11/27/2012)

Holding: A writ of error coram nobis sought on the basis of the ineffectiveness of appellate counsel claim was properly denied. There is no merit to the argument that the defendant's trial lawyers had a conflict of interest due to the prosecutor's questioning and argument about the lawyers' meeting with an individual not called at trial; reasonable appellate counsel could conclude that the lawyers had no reason to testify and so to relinquish representation. While the prosecutor's closing argument implying that there was something improper in the defense lawyers interviewing a witness warranted a rebuke from the court, appellate counsel could reasonably conclude that reversal based on this issue was highly unlikely.

Dissent: [Ciparick, J] The defendant demonstrated ineffective assistance of appellate counsel based on the failure to argue on direct appeal that the trial attorneys were ineffective.

Arrest (Probable Cause)

Driving While Intoxicated (Evidence)

People v Vandover, 2012 NY Slip Op 08170 (11/29/2012)

Holding: Both the justice court and Appellate Term applied the correct standard—whether it is more probable than not that a defendant arrested for driving while intoxicated was actually impaired—as to the probable cause hearing. "The conclusion that no probable cause existed to arrest defendant is a mixed question of law and fact for which there is support in the record . . . ."

Criminal Facilitation (Defenses)

Defenses (Agency)

Narcotics

People v Watson, 2012 NY Slip Op 08169 (11/29/2012)

Holding: A claim of agency is not a defense to facilitating a drug sale. "From a textual perspective . . . the facilitation statute plainly was intended to cover the type of conduct engaged in" here; the defendant brought an undercover officer to where the dealer was, providing him with the opportunity to intentionally sell cocaine, which aided the commission of that felony. The purpose

NY Court of Appeals *continued*

of the agency doctrine, to reduce the culpability of a buyer's agent, is not applicable because facilitation, like possession, is a misdemeanor. Applying the agency defense to sales only reduces the culpability; applying it to facilitation would allow the agent to escape criminal liability altogether by not personally possessing the drugs.

Dissent: [Lippman, CJ] "[A]n agent acting as the buyer's proxy cannot be guilty of facilitating a criminal sale of drugs as he is acting on behalf of a party who has been absolved of the crime of facilitation." [Footnote omitted.]

Counsel (Right to Counsel)

Sex Offenses (Civil Commitment)

Matter of State of New York v John P., 2012 NY Slip Op 08440 (12/11/2012)

Holding: The appellant had no statutory right to counsel at a psychiatric examination held as part of the process for identifying cases in which civil commitment proceedings should be commenced under Mental Hygiene Law article 10, the Sex Offender Management and Treatment Act, before a petition was filed or the case referred to the attorney general. Whether there is a constitutional right to counsel in article 10 proceedings similar to the right in criminal cases need not be decided here, as no adversary judicial proceedings had been initiated.

Evidence (Sufficiency)

Homicide (Murder [Intent])

Terrorism (Elements) (Intent)

People v Morales, 2012 NY Slip Op 08439 (12/11/2012)

Holding: The "'intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping' (Penal Law § 490.25 [1])" required for a "crime of terrorism" does not "cover the illegal acts of a gang member committed for the purpose of coercing or intimidating adversaries." The terrorism conviction is reversed; a new trial is required on the underlying offenses.

Defenses (Capacity)

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

Insanity

People v Mox, 2012 NY Slip Op 08441 (12/11/2012)

Holding: The court should have inquired further as to whether the defendant, in pleading guilty, was making an informed decision to waive an insanity defense where his allocution included statements that he was "'in a psychotic state' and 'hearing voices' on the day of the crime" and the court asked only one question verifying that the defendant had discussed the defense with his attorney and opted not to assert it.

Dissent: [Smith, J] Requiring a court to resolve questions about a defendant's mental state to satisfy the requirement that "an allocution may never cast 'significant doubt upon the defendant's guilt'" is unworkable; that the defendant consulted with counsel about the potential insanity defense was enough.

Double Jeopardy (Jury Trials) (Lesser Included and Related Offenses) (Mistrial)

Narcotics (Possession)

People v McFadden, 2012 NY Slip Op 08565 (12/13/2012)

Holding: Double jeopardy did not bar retrial of the defendant on a charge of third-degree possession of drugs where a prior jury had deadlocked on that charge but convicted the defendant of the lesser included offense of seventh-degree possession of drugs.

Due Process (Fair Trial)

Impeachment

Witnesses (Defendant as Witness)

People v Spencer, 2012 NY Slip Op 08567 (12/13/2012)

Holding: It was error to preclude the defendant from testifying based on first-hand knowledge that the accuser, who testified that that defendant punched him and brandished a firearm, was a close friend of a third party who according to the defendant had been the person brandishing the gun. The error was harmless.

Search and Seizure (Automobiles and Other Vehicles)

People v Garcia, 2012 NY Slip Op 08670 (12/18/2012)

Holding: The *DeBour/Hollman* framework for evaluating police-citizen encounters through escalating levels, with measures of suspicion needed to justify each, applies during lawful traffic stops; a police officer may not ask occupants of a lawfully stopped vehicle if they have any weapons in the absence of founded suspicion of criminality. The matter is remanded for consideration of the prosecution's alternative claim "that officers would have inevitably discovered the disputed physical evidence."

NY Court of Appeals *continued*

Dissent: [Smith, J] The majority needlessly expands the already hyper-stringent *DeBour/Hollman* rule.

Homicide (Murder [Definition] [Instructions] [Intent])

People v Martinez, 2012 NY Slip Op 08668 (12/18/2012)

Holding: Following an altercation with the decedent, the defendant got a gun, chased the decedent down, and fired repeatedly at him at very close range. Because these acts are inconsistent with the elements of depraved indifference murder, the conviction under that count is vacated and dismissed.

Concurrence: [Smith, J] Because this case "is, fortuitously, still on direct appeal 17 years after it was tried" reversal is required where defense counsel's argument to the trial court that "no evidence 'would indicate that the defendant committed the crime with reckless disregard'" sufficiently preserved the issue; counsel was not required "'to take an exception to the court's depraved indifference murder charge' . . . ."

Dissent: [Pigott, J] Where the defendant fired into a vestibule occupied by the decedent and two others, hitting one of the others as well as the decedent, "'(a) rational jury could reasonably conclude that the defendant did not care whether harm would result when he commenced his shooting spree . . . .'"

Evidence (Exhibits)

Juries and Jury Trials (Deliberation)

Videotapes

People v Mays, 2012 NY Slip Op 08671 (12/18/2012)

Holding: Where trial counsel was aware of jurors' comments made during their requested playback of a videorecording of one of two robberies with which the defendant was charged and did not object to the ministerial comments made by the prosecutor during the playback, the judge was present and active in the playback discussion, and the defendant was acquitted of the recorded robbery, the defendant's conviction of the other robbery is affirmed.

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

Evidence (Sufficiency)

People v Riley, 2012 NY Slip Op 08674 (12/18/2012)

Holding: Upon reargument, the decision of June 28, 2012 dismissing the prosecution's appeal is adhered to. Contrary to the contention on reargument, "CPL 470.15 (4) (b) does not alter, for issues of legal sufficiency of the evidence, the well-settled rule that an order reversing or modifying on an unpreserved issue is an exercise of discretion in the interest of justice and not appealable to this Court . . . ."

Dissent in Part: [Smith and Pigott, JJ] The appeal should be retained for reasons set out in the prior dissent and "the further reason that the modification by the Appellate Division, on an unpreserved issue of legal sufficiency of the evidence, should be deemed to be upon the law . . . and appealable" by the prosecution.

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.

Admissions (*Miranda* Advice) (Voluntariness)

Witnesses (Experts)

Matter of Ariel R., 98 AD3d 414, 950 NYS2d 17 (1st Dept 8/7/2012)

The court abused its discretion by refusing to allow the respondent's treating psychiatrist to testify regarding the respondent's ability to understand *Miranda* warnings. The psychiatrist did not perform a "*Miranda* competency test," but he could rely on evidence, including his evaluations of the respondent's receptive communication skills and IQ, to form an opinion as to whether the respondent had adequate language and cognitive skills to understand the warnings. (Family Ct, New York Co)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Villegas, 98 AD3d 427, 949 NYS2d 664 (1st Dept 8/14/2012)

The defendant received ineffective assistance of counsel at the suppression hearing where his attorney failed to cross-examine the arresting officers using evidence disclosed by the prosecution that was completely contradictory to the officers' testimony that they successfully called back the anonymous informant. The indictment is not dismissed because the prosecution's failure to timely notify the court of the inaccurate testimony "was due to inadvertence rather than fraudulent conduct." (Supreme Ct, New York Co)

First Department *continued*

Aliens (Deportation)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Hernandez, 98 AD3d 449, 950 NYS2d 268 (1st Dept 8/21/2012)

In two separate concurring decisions, the majority held that the defendant failed to establish that he was prejudiced by defense counsel's failure to properly advise him of the immigration consequences of his guilty plea, as required by *Padilla v Kentucky* (130 S Ct 1473 [2010]). The court declined to decide whether *Padilla* applies retroactively. (Supreme Ct, New York Co)

Dissent: The defendant established prejudice based on his assertions that he was unaware of the immigration consequences, he pleaded guilty because he thought it was the best way to minimize his separation from his six children, and had he known it would result in automatic deportation, he would have gone to trial.

Evidence (Weight)

Identification (Expert Testimony) (Eyewitnesses) (Misidentification)

People v Russell, 99 AD3d 211, 950 NYS2d 130 (1st Dept 9/4/2012)

The verdict was against the weight of the evidence in this single witness first-degree robbery case for several reasons, *ie*, no corroborating evidence, the apparent lack of a financial motive, the 15-day gap between the event and the identification, the physical discrepancies between the defendant and the person seen on the videotape, and the high degree of stress the accuser experienced, aggravated by the presence of what appeared to be a gun. While the court gave a single witness identification charge, cautioning about the risk of inaccuracy and wrongful conviction and noting issues such as the length of time the accuser viewed the robber, lighting conditions, suggestibility, and memory, the court did not mention the time gap, weapon focus or stress, or the possibility of transference where the defendant worked in the area near the complainant's store. No expert testimony on identification was offered. (Supreme Ct, Bronx Co)

Dissent: The complainant had ample time to observe the two men before the robbery and the record evidence does not include expert testimony regarding witness fallibility.

Burglary (Elements) (Evidence)

Evidence (Prejudicial) (Relevancy)

People v Gardner, 98 AD3d 901, 950 NYS2d 910 (1st Dept 9/27/2012)

The court properly exercised its discretion in allowing the prosecution to introduce in this burglary case three trespass notices the defendant received after prior shoplifting incidents to show that the defendant knew he was legally prohibited from entering the store. The defendant failed to preserve his claim that a single notice was sufficient; furthermore, the number of notices was highly probative of the defendant's knowledge, particularly since his counsel stated it would be a contested issue. The court's thorough limiting instruction minimized any potential prejudice and the error was harmless. (Supreme Ct, New York Co)

Juveniles (Custody) (Grandparent)

Matter of Louis N., 98 AD3d 918, 952 NYS2d 1 (1st Dept 9/27/2012)

The mother's unpreserved claim that the custody order was an unauthorized disposition would be rejected if reviewed because the Interstate Compact on the Placement of Children does not apply where custody was awarded to the out-of-state grandmother pursuant to Family Court Act article 6. A preponderance of the evidence showed extraordinary circumstances justifying giving custody to a nonparent and that such custody was in the child's best interests where the 10-year-old learning disabled child has been living with his grandparents for 2½ years and they have met all his needs and addressed his health and emotional problems, where his mother was absent from court proceedings for over a year and failed to show remorse or insight into her shortcomings as a parent. (Family Ct, New York Co)

Competency to Stand Trial

Counsel (Waiver)

People v Stone, 98 AD3d 910, 951 NYS2d 145 (1st Dept 9/27/2012)

The court properly allowed the defendant to proceed pro se. The holding in *Indiana v Edwards* (554 US 164 [2008]) is limited to situations where the court denies a trial-competent defendant's application to proceed pro se because mental illness renders the defendant incapable of self-representation. Whether there are situations where the court must insist on representation by counsel is not decided because the record does not show that the defendant was mentally incapable of representing himself at the time of trial. And the court did not abuse its discretion in denying defense counsel's mistrial motion, made after the defendant abandoned his pro se defense, because the

First Department *continued*

record does not show that he seriously damaged his case while representing himself. (Supreme Ct, New York Co)

Aliens (Deportation)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Baret, 99 AD3d 408, 952 NYS2d 108 (1st Dept 10/2/2012)

The decision in *Padilla v Kentucky* (130 S Ct 1473 [2010]) should be applied retroactively, at least as to pleas taken after 1995, because it was not a new rule; "it followed from the clearly established principles of the guarantee of effective assistance of counsel under *Strickland*, and 'merely clarified the law as it applied to the particular facts' . . . ." A hearing must be held on the defendant's CPL 440.10 motion. (Supreme Ct, Bronx Co)

Evidence (Sufficiency)

Matter of Miguel R., 99 AD3d 419, 951 NYS2d 516 (1st Dept 10/2/2012)

Sufficient evidence supports the second-degree obstructing governmental administration charge where the respondent attacked his teacher while the teacher was writing him up for a disciplinary infraction, as it was part of the teacher's official function to enforce school rules and it can be inferred from the respondent's conduct that he intended to interfere with the teacher's performance of his duties. (Family Ct, New York Co)

Family Court (Violation of Family Court Orders)

Juveniles (Visitation)

Matter of Samuel A. v Aidarina S., 99 AD3d 420, 951 NYS2d 157 (1st Dept 10/2/2012)

The court properly suspended the petitioner father's visitation until he complies with the court's order to reveal to the mother where he takes the children during visitation. "Under these exceptional circumstances, petitioner has forfeited his right to visitation . . . ." (Family Ct, Bronx Co)

Double Jeopardy (Punishment)

Sentencing (Post-Release Supervision)

People v Cintron, 99 AD3d 439, 952 NYS2d 20 (1st Dept 10/4/2012)

Because the maximum expiration date of the defendant's sentence has passed, double jeopardy bars the court from adding a term of post-release supervision (PRS). (Supreme Ct, Bronx Co)

Admissions (*Miranda* Advice) (Spontaneous Declaration)

People v Cooper, 99 AD3d 453, 952 NYS2d 23 (1st Dept 10/4/2012)

The defendant failed to preserve his claim that *Miranda* warnings were required because police involvement with store security created a police-dominated atmosphere, which is different than his trial argument that the store employees were police agents. The claim is rejected on the merits where the police turned him over to the store security to perform the store's routine procedures, including giving the defendant a trespass notice, and the police were not involved with the store employees' actions. Further, the defendant's statements were spontaneous. (Supreme Ct, New York Co)

Juveniles (Parental Rights) (Permanent Neglect)

Motions (Vacate)

Matter of Diamond Lee P., 99 AD3d 451, 951 NYS2d 396 (1st Dept 10/4/2012)

Denial of the mother's motion to vacate the order of disposition, upon her default, terminating her parental rights was proper where she failed to give a reasonable excuse for her default and a meritorious defense to the termination petition. The mother did not explain why she did not notify her attorney, the court, or the petitioner that she could not appear due to a delay at her methadone clinic. (Family Ct, Bronx Co)

Admissions (Evidence)

Evidence (Other Crimes)

People v Gholam, 99 AD3d 441, 951 NYS2d 526 (1st Dept 10/4/2012)

The court properly admitted the defendant's videotaped statements about his activities with his accomplices before and immediately after the assault, some of which were illegal, because that information was relevant to the issue of whether he was aided by two or more persons when he swung at but missed the accuser, which is an element of second-degree gang assault. (Supreme Ct, New York Co)

Dismissal

Grand Jury (Witnesses)

First Department *continued*

People v Torres, 99 AD3d 429, 951 NYS2d 522 (1st Dept 10/4/2012)

The second indictment must be dismissed, with leave to represent, because the prosecution failed to show that they provided the defendant with actual notice of the grand jury presentation; the prosecution claimed that they mailed a written notice to defense counsel, but the letter was marked with an "/S/" in the signature line, and they did not identify who mailed the notice or provide an affidavit of service. (Supreme Ct, New York Co)

Evidence (Business Records)

Forensics (DNA)

Witnesses (Confrontation of Witnesses) (Experts)

People v Vargas, 99 AD3d 481, 952 NYS2d 41 (1st Dept 10/9/2012)

The defendant's right of confrontation was not violated by testimony of the prosecution's DNA expert that referred to data gathered by technicians who did not testify. The court erred in admitting class sign-in sheets under the business records exception because there was no evidence that the records were kept regularly, systematically, and routinely, or if they were kept in the regular course of business, they were needed and relied on by the business. (Supreme Ct, New York Co)

Aliens (Deportation)

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

People v Chacko, 99 AD3d 527, 952 NYS2d 160 (1st Dept 10/11/2012)

Denial of the defendant's post-conviction motion, which raised a *Padilla* claim, must be reversed where the defendant alleged that his attorney did not ask about his citizenship and a *Padilla* claim is not limited to cases where the client volunteers that he is not a citizen; it is the attorney's responsibility to ask the client about citizenship. (Supreme Ct, New York Co)

Counsel (Competence/Effective Assistance/Advocacy)

People v Gordian, 99 AD3d 538, 952 NYS2d 46 (1st Dept 10/11/2012)

The defendant received ineffective assistance of counsel where counsel focused on a legally irrelevant fact during the trial and counsel's legal arguments demonstrated a lack of understanding of the elements of the offense. Defense counsel could not have properly advised the defendant about the plea offer and the record shows that counsel could have pursued a more appropriate defense if she understood the elements of the offense. (Supreme Ct, Bronx Co)

Juveniles (Custody) (Hearings) (Right to Counsel) (Visitation)

Matter of Mora v Alatriste, 99 AD3d 540, 952 NYS2d 440 (1st Dept 10/11/2012)

The order granting the father's petition to modify a prior custody and visitation order must be reversed because the court failed to advise the respondent mother of her right to assigned counsel, hold an evidentiary hearing before modifying the prior order, or give the mother a chance to testify, cross-examine, or present evidence. (Family Ct, Bronx Co)

Evidence (Privileges)

People v Rivera, 99 AD3d 535, 952 NYS2d 438 (1st Dept 10/11/2012)

The defendant's treating psychiatrist should not have been allowed to testify about the defendant's admissions of sexual abuse where, although the psychiatrist properly disclosed the abuse under *Tarasoff*, the disclosure did not operate as a waiver of the physician-patient privilege and the privilege does not include a general public interest exception. (Supreme Ct, New York Co)

Juveniles (Adoption)

Matter of Yary, __ AD3d __, 952 NYS2d 514 (1st Dept 10/11/2012)

Where a foster care agency has guardianship and custody of a child, there is no living parent or other person with the right to consent to an adoption, and the agency declines to consent to adoption by the petitioner, the court must deny the adoption petition. The Domestic Relations Law does not allow for a private placement adoption without the agency's consent. (Family Ct, Bronx Co)

Sentencing (Persistent Violent Felony Offender) (Post-Release Supervision) (Resentencing)

People v Sanders, 99 AD3d 575, 952 NYS2d 537 (1st Dept 10/18/2012)

The date of the defendant's resentencing, to add a period of post-release supervision, controls whether the conviction meets the sequentiality requirement for sentencing as a persistent violent felony offender. Since the resentencing was after the commission of the offense at

First Department *continued*

issue, the defendant was properly adjudicated a second violent felony offender. (Supreme Ct, New York Co)

Concurrence: The two-judge concurrence affirms based on prior First Department precedent, but notes that the Second Department has reached the opposite conclusion and urges the Court of Appeals to provide guidance on this issue.

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

Sex Offenses (Elements)

People v Johnson, 99 AD3d 591, 952 NYS2d 547 (1st Dept 10/23/2012)

That the defendant's plea allocution did not address how the accuser became intoxicated does not warrant vacatur where the circumstances surrounding the plea to second-degree rape showed that the defendant knew the nature of the charges against him. (Supreme Ct, New York Co)

Dissent: "[T]he failure of the court to explain to defendant the critical element of 'mentally incapacitated,' and to make further inquiry to ensure that defendant understood the nature of the charge and the plea requires vacatur of the plea . . . especially under these circumstances where the technical, statutory definition of the crime does not conform with its common-sense meaning."

Sex Offenses (Sex Offender Registration Act)

People v Johnson, 99 AD3d 615, 952 NYS2d 873 (1st Dept 10/25/2012)

The defendant "demonstrated an extremely high risk of recidivism, and the type of misconduct in which he habitually engages is sufficiently serious to warrant an upward departure to level three . . . ." Although persistent sexual abuse was not classified as a violent felony for sentencing purposes until 2007, the offense is listed as a crime requiring classification as a sexually violent offense. (Supreme Ct, New York Co)

Assault

Defenses (Self-Defense)

People v Morgan, 99 AD3d 622, 952 NYS2d 556 (1st Dept 10/25/2012)

The prosecution failed to disprove the defendant's self-defense claim beyond a reasonable doubt where the testimony of the defendant and two security guards showed that the defendant stabbed the accuser in the cheek after the accuser punched her in the face, forced her up against a wall, and repeatedly punched her in the face and neck while she tried to fight him off and the guards tried to restrain him. Even assuming the defendant was the initial aggressor, the accuser admitted that the defendant put away the knife before he hit her. (Supreme Ct, New York Co)

Second Department

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Juveniles (Support Proceedings)

Marano v Marano, 97 AD3d 548, 947 NYS2d 597 (2nd Dept 7/5/2012)

Money judgment for child support arrears and counsel fees in matrimonial action reversed where the court awarded arrears based on records of the county support collection unit instead of applying the formula provided in the parties' stipulation of settlement. (Supreme Ct, Nassau Co)

Sentencing (Pronouncement)

People v Flowers, 97 AD3d 693, 947 NYS2d 886 (2nd Dept 7/11/2012)

The court improperly considered at sentencing a charge dismissed for lack of sufficient evidence. (Supreme Ct, Kings Co)

Counsel (*Anders* Brief)

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

Sentencing (Restitution)

People v Poznanski, 97 AD3d 701, 948 NYS2d 359 (2nd Dept 7/11/2012)

In an *Anders* brief, counsel must act as an active advocate on the client's behalf. There is a potentially nonfrivolous issue as to imposition of restitution that may not have been part of the plea agreement. (County Ct, Nassau Co)

Homicide (Manslaughter [Evidence]) (Murder [Intent])

People v Santiago, 97 AD3d 704, 949 NYS2d 78 (2nd Dept 7/11/2012)

Second Department *continued*

Evidence that the defendant covered the infant's nose and mouth to quiet its crying supports a finding of recklessness rather than an intent to cause death. (County Ct, Dutchess Co)

Speedy Trial (Waiver)

Witnesses (Competency)

People v Wisdom, 98 AD3d 241, 948 NYS2d 351 (2nd Dept 7/11/2012)

Failure to swear the accuser before she testified in a videotaped examination presented to the grand jury was not cured by a second videotaped examination in which the accuser swore that she had testified truthfully at the original exam. The defendant waived his speedy trial claim where he failed to provide the prosecution with reasonable notice of the motion. (Supreme Ct, Kings Co)

[***Ed. Note:*** *Leave to appeal was granted on October 5, 2012 (2012 NY Slip Op 98955[U])*].

Family Court

Juveniles (Neglect)

Matter of Tahanie S., 97 AD3d 751, 948 NYS2d 407 (2nd Dept 7/18/2012)

Where father in neglect proceeding appeared for prior court dates and submitted evidence that his one-day delay in appearing was due to notification error as to the often-changed date for the hearing, and contested the facts presented in his absence, default should have been vacated. (Family Ct, Kings Co)

Family Court

Juveniles (Custody) (Neglect) (Parental Rights)

Matter of Eric W., 97 AD3d 833, 949 NYS2d 158 (2nd Dept 7/25/2012)

The mother, having consented to custody of her child being given to an aunt and having then moved out of state with a friend who later sought custody when neglect proceedings were brought against the aunt, lacked standing to seek civil contempt against the Administration for Children's Services and others for "failing to timely complete paperwork for implementation of a transfer of custody" to the friend. (Family Ct, Kings Co)

Attorney/Client Relationship

Counsel (Right to Counsel)

Ethics (Defense)

Matter of Madris v Oliviera, 97 AD3d 823, 949 NYS2d 696 (2nd Dept 7/25/2012)

The court erred by granting the mother's motion to disqualify the father's counsel for engaging in improper ex parte communications with the subject child and the Department of Social Services where the court placed the burden on the father (the opponent of disqualification) rather than on the mother (the movant) "and failed to consider the evidence in the light most favorable to the nonmoving party. . . ." (Family Ct, Nassau Co)

Narcotics (Marijuana) (Possession)

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

People v Jasmin, 98 AD3d 525, 949 NYS2d 195 (2nd Dept 8/1/2012)

Suppressing evidence found in a vehicle by police who stopped it after pulling up next to it at a light and seeing the defendant rolling what appeared to be marijuana was error because the police had a reasonable suspicion that the defendant, on the highway, was committing the misdemeanor of possessing marijuana in a public place. (Supreme Ct, Nassau Co)

Family Court

Juveniles (Jurisdiction) (Visitation)

Matter of Martinborough v Martinborough, 98 AD3d 511, 949 NYS2d 462 (2nd Dept 8/1/2012)

The Court Attorney Referee had no authority to grant on default a petition suspending visitation where "the order of reference referred the matter to the Referee to hear and report only, not to hear and determine." (Family Ct, Richmond Co)

Evidence (Sufficiency)

Weapons (Possession)

People v Rodriguez, 98 AD3d 530, 949 NYS2d 441 (2nd Dept 8/1/2012)

The evidence was insufficient to sustain the second-degree criminal possession of a weapon counts for a gun found in a bag and crate in the rear cargo area of a vehicle that did not belong to the defendant where the defendant was not in the vehicle when he was apprehended and no other evidence was offered to show he had dominion or control of the gun. (Supreme Ct, Kings Co)

Second Department *continued*

Juveniles (Hearings) (Visitation)

Matter of Ross v Morrison, 98 AD3d 515, 949 NYS2d 186 (2nd Dept 8/1/2012)

The determination that the father "failed to make a prima facie showing of changed circumstances warranting modification of the prior visitation order is not supported by the record" where the father testified that the mother prevented visitation with the subject children and he and the mother no longer communicate absent exigent circumstances. (Family Ct, Kings Co)

Forensics (DNA)

Speedy Trial (Burden of Proof) (Cause for Delay) (Prosecutor's Readiness for Trial)

People v Wearen, 98 AD3d 535, 949 NYS2d 170 (2nd Dept 8/1/2012)

The prosecution's claim in this CPL 30.30 case that an 85-day delay should be excused because it was needed to "obtain a confirmatory DNA sample from the defendant, conduct genetic testing, and obtain the results" is rejected where there was no explanation of the need for the sample and no expert evidence to support the claim. (Supreme Ct, Queens Co)

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

People v Smith, 98 AD3d 590, 949 NYS2d 474 (2nd Dept 8/8/2012)

Where an officer stopped a vehicle for failure to signal, did not smell marijuana or see any smoke coming from the vehicle but saw an open beer bottle, ordered the defendant out for a field sobriety test that was never given, and searched the defendant's mouth after smelling marijuana on his person and observing him spit but found nothing, the evidence found during an impound search of the bottom of the vehicle's console must be suppressed. (County Ct, Westchester Co)

Article 78 Proceedings

Freedom of Information

Prisoners (Access to Courts and Counsel)

Matter of Baez v Brown, 98 AD3d 609, 949 NYS2d 730 (2nd Dept 8/15/2012)

The CPLR article 78 petition brought against the District Attorney regarding documents sought under the Freedom on Information Law (FOIL) should not have been dismissed as time-barred where no evidence was offered as to when the petitioner prisoner's mailed request for poor person relief was received by the clerk of the court, which is the point at which an index number should have been assigned. (Supreme Ct, Queens Co)

Juveniles (Custody) (Visitation)

Matter of Eddington v McCabe, 98 AD3d 613, 949 NYS2d 734 (2nd Dept 8/15/2012)

The court erred by conditioning a grant of custody to the mother upon her remaining in an area in which she could not afford to live on Social Security disability payments where the move was due in part to domestic violence and was to a location where the mother had extended family resources, and a liberal visitation schedule would allow a meaningful relationship between the father and child. (Family Ct, Orange Co)

Witnesses (Confrontation of Witnesses)

People v McCune, 98 AD3d 631, 949 NYS2d 747 (2nd Dept 8/15/2012)

Excluding the defendant from a *Sirois* hearing during the testimony of a witness who claimed to have been threatened and did not want to testify at trial was error that was not cured by the defendant's presence at the hearing during the hearsay testimony of others nor excused by the meritless claim that the hearing was about holding the witness as a material witness rather than whether the defendant procured the witness's absence through misconduct. (Supreme Ct, Kings Co)

Burglary (Elements) (Evidence)

Evidence (Weight)

People v Freeman, 98 AD3d 682, 949 NYS2d 771 (2nd Dept 8/22/2012)

The defendant's conviction for third-degree burglary was against the weight of the evidence where the accuser's testimony about seeing the defendant near a miter saw in the unlocked garage was inconsistent, no burglar's tools or stolen property were found in the defendant's possession, the defendant did not flee police and told them he was homeless, and no credible evidence negated his claim that he was in garage to seek shelter from the rain. (Supreme Ct, Nassau Co)

Dissent: The jury's implicit finding that the defendant intended to commit a crime in the garage was justified

Second Department *continued*

given evidence such as that suggesting he handled property in the garage.

Family Court

Grand Jury

Juveniles (Abuse) (Hearings)

Matter of Jaiden J., 98 AD3d 667, 949 NYS2d 757 (2nd Dept 8/22/2012)

Where the respondent was alleged to have abused a child who did not testify at the hearing, and hearsay evidence of the child's account was admitted, the court improvidently exercised its discretion by precluding the respondent from presenting the child's grand jury testimony from a companion criminal proceeding to show inconsistencies with the hearsay testimony. (Family Ct, Suffolk Co)

Juveniles (Custody)

Sano v Sano, 98 AD3d 659, 949 NYS2d 780 (2nd Dept 8/22/2012)

Evidence presented by the husband "regarding the wife's interest in spiritual and paranormal phenomena . . . did not establish a change in circumstances contrary to the best interests of the child." Evidence concerning "an isolated accidental injury of the child while in the wife's care was an insufficient basis on which to change the custodial arrangement . . . ." (Supreme Ct, Nassau Co)

Guilty Pleas (Vacatur)

Search and Seizure (Arrest/Scene of the Crime Searches [Scope]) (Stop and Frisk) (Weapons-frisks)

People v Shuler, 98 AD3d 695, 949 NYS2d 758 (2nd Dept 8/22/2012)

Police responding to an unrelated call who saw the defendant prying off a bicycle lock with a screwdriver had reason to suspect he was committing a crime, but lacked grounds to frisk him where he immediately put down the screwdriver and did not reach for his pockets, as the ball-shaped bulge in his pocket did not resemble a weapon. (County Ct, Dutchess Co)

Juveniles (Abuse) (New York State Central Register of Child Abuse and Maltreatment)

Matter of Brian M. v New York State Off. of Children & Family Servs., 98 AD3d 743, 951 NYS2d 158 (2nd Dept 8/29/2012)

On review in this CPLR article 78 proceeding, the New York State Office of Children and Family Services determination "deny[ing] the petitioner's application to amend and seal an indicated report maintained by the New York State Central Register of Child Abuse and Maltreatment" is annulled because the petitioner's actions did not constitute maltreatment.

Accomplices (Corroboration) (Instructions) (Witnesses)

Alibi

Appeals and Writs (Preservation of Error for Review)

Instructions to Jury (Witnesses)

Witnesses (Cross Examination)

People v Shelton, 98 AD3d 988, 951 NYS2d 69 (2nd Dept 9/12/2012)

The court erred by failing to give a jury instruction on accomplice corroboration as to a witness whose actions could be interpreted as facilitating the crime, and by allowing the prosecutor to cross-examine a defense alibi witness as to the witness's failure to come forward earlier with exculpatory information without a proper foundational showing of when the witness learned of the charges. (Supreme Ct, Queens Co)

Family Court

Juveniles (Disposition) (Hearings) (Neglect)

Matter of Giovanni S., 98 AD3d 1054, 950 NYS2d 777 (2nd Dept 9/19/2012)

Grant of an untimely cross-motion for summary judgment by the Administration for Children's Services (ACS) in the midst of the fact-finding hearing after ACS presented its case and before the mother presented a case or rested was error that cannot be deemed waived by the mother's failure to seek a continuance or object on procedural grounds "in light of the Family Court Judge's imminent retirement and statements implying that it was impossible for the mother to present a case. . . ." (Family Ct, Kings Co)

Sentencing (Aggravated Penalties) (Habitual Criminals) (Persistent Felony Offender) (Second Felony Offender)

People v Grist, 98 AD3d 1061, 950 NYS2d 782 (2nd Dept 9/19/2012)

Imposing a term of imprisonment under the enhanced sentencing provision of Penal Law 70.10(2) rather than the much lower term authorized for a second felony

Second Department *continued*

offender under Penal law 70.06 was not an improvident exercise of discretion or imposition of an "'unduly harsh or severe'" sentence. Any statutory inequity should be remedied by the Legislature, not the courts. (Supreme Ct, Kings Co)

Concurrence in Part, Dissent in Part: The defendant's sentence should be reduced in the interest of justice because, while he is clearly a career criminal, he is also clearly nonviolent, and the sentence of 15 years to life is substantially higher than the maximum permissible term of four years to life available if he was "a persistent *violent* felony offender convicted of a class E violent felony offense . . . ." [Emphasis in original.]

Family Court (Family Offenses) (Orders of Protection)

Jurisdiction (Subject Matter)

Matter of Jose M. v Angel V., 99 AD3d 243, 951 NYS2d 195 (2nd Dept 9/26/2012)

The Family Court had subject matter jurisdiction over family offense proceedings instituted by the father on behalf of his nine-year-old daughter against the live-in boyfriend of the mother; under the facts here, "the child and the boyfriend were in an 'intimate relationship' within the meaning of Family Court Act § 812 (1) (e) . . . ." (Family Ct, Kings Co)

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

People v Rafikian, 98 AD3d 1139, 951 NYS2d 226 (2nd Dept 9/26/2012)

The suppression court, while it advised the defendant that proceeding without counsel was an "extraordinary" decision and "extraordinarily dangerous," and that pro se defendants were rarely successful, did not advise him of the importance of the attorney's role in the adversarial system or of the dangers of representing himself; the trial court also failed to ask about self-representation at trial. The waiver of counsel was not knowing and voluntary. (Supreme Ct, Queens Co)

Jurisdiction (Subject Matter)

Juveniles (Custody)

Dalcollo v Dalcollo, 99 AD3d 656, 952 NYS2d 63 (2nd Dept 10/3/2012)

New York has subject matter jurisdiction as to child custody where the father sued for divorce soon after the child was born in Maryland, while the mother was relocating from New York to South Carolina, the mother produced the child in New York pursuant to a court order, and a South Carolina court stayed custody proceedings begun there by the mother after the father filed this action, finding that while that state is the child's home, New York was an appropriate forum. (Supreme Ct, Suffolk Co)

Prisoners (Disciplinary Infractions and/or Proceedings)

Matter of Farooq v Fischer, 99 AD3d 709, 951 NYS2d 579 (2nd Dept 10/3/2012)

There was insufficient evidence to support charges that "the petitioner's two requests for information from the prison librarian regarding magazine subscriptions that were available on the Internet constituted solicitations of 'goods and services'" or "that the petitioner's mere presence in the library, absent any communication with the prison librarian, constituted harassment of prison staff as prohibited" by prison rules.

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

Evidence (Newly Discovered)

Forensics

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

People v Marino, 99 AD3d 726, 951 NYS2d 740 (2nd Dept 10/3/2012)

The defendant's challenge to her convictions for driving with an illegally high blood alcohol content based on evidence discovered after trial of problems at the Nassau County Crime Lab fails because "the defendant failed to meet her burden of establishing that the new evidence would probably change the result if a new trial is granted . . . ." (Supreme Ct, Nassau Co)

Guilty Pleas

Sentencing (Restitution)

People v Murdock, 99 AD3d 732, 951 NYS2d 401 (2nd Dept 10/3/2012)

Because the plea minutes do not show that restitution was included in the negotiated terms of the defendant's guilty plea, the provision of his sentence requiring payment of restitution is vacated. (Supreme Ct, Nassau Co)

Evidence (Weight)

Homicide (Manslaughter [Evidence])

Second Department *continued*

People v Sergio, 99 AD3d 734, 951 NYS2d 576 (2nd Dept 10/3/2012)

The weight of the evidence does not support the defendant's first-degree manslaughter conviction for the death of her newborn child where the prosecution's evidence did not eliminate the possibility that others in the home were culpable; the defendant, too weak to walk on her own, was taken to a hospital hours before the body was found. (Supreme Ct, Kings Co)

Evidence (Sufficiency)

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

People v Young, 99 AD3d 739, 951 NYS2d 735 (2nd Dept 10/3/2012)

The defendant's conviction of second-degree robbery must be reduced to third-degree robbery where the accuser received only Tylenol at the hospital and testified to experiencing only generalized pain and soreness that worsened upon return to work a week later, as the evidence would not support an inference that the accuser suffered the requisite substantial pain or impairment of physical condition as a result of the defendant punching or pushing her to the ground. (Supreme Ct, Kings Co)

Arrest (Police Officers)

Civil Practice

Petrychenko v Solovey, 99 AD3d 777, 952 NYS2d 575 (2nd Dept 10/10/2012)

Summary judgment for the police in this false arrest case is reversed because triable issues exist as to whether there was probable cause to arrest the plaintiff for second-degree custodial interference, where, among other things, they were told that the plaintiff had visitation with the children on that weekend and his current wife attempted to show them a copy of the Family Court order.

Due Process

Juveniles (Custody) (Hearings)

Matter of Thomson v Battle, 99 AD3d 804, 952 NYS2d 251 (2nd Dept 10/10/2012)

The Court Attorney Referee failed to ensure the mother a full and fair opportunity to be heard in this custody matter by abruptly concluding the hearing before the mother's case, after failing to appropriately limit the father's inquiry where the father sought "to prolong the hearing, inflame the situation, and interfere with the mother's right to be heard by engaging in an extended direct examination filled with irrelevant details and unsubstantiated accusations . . . ." (Family Ct, Queens Co)

Lesser and Included Offenses (Instructions)

People v Urbina, 99 AD3d 821, 951 NYS2d 753 (2nd Dept 10/10/2012)

The court's decision, over objection, to submit to the jury only the top count of attempted first-degree rape was an improvident exercise of discretion as the noninclusory concurrent count of attempted first-degree sexual abuse would have helped the jury reach a fair verdict and the error was compounded by the prosecutor's remark in summation that only that count was offered "'because [the defendant] attempted to rape the [complainant].'" (Supreme Ct, Westchester Co)

Admissions (Voluntariness)

Confessions (Duress) (Interrogation) (Voluntariness)

Due Process

People v Aveni, __ AD3d __, 953 NYS2d 55 (2nd Dept 10/17/2012)

While police deception during interrogation is not alone enough to render a resulting statement involuntary, the detectives here coerced the defendant's confession; they not only repeatedly deceived the defendant by saying that his girlfriend was still alive but implicitly threatened that his silence would lead to a homicide charge because doctors would not be able to properly treat her absent information about what he had done. (Supreme Ct, Westchester Co)

Sentencing (Second Violent Felony Offender)

People v Ballinger, 99 AD3d 931, 952 NYS2d 272 (2nd Dept 10/17/2012)

The unpreserved contention that the defendant's Connecticut conviction for third-degree burglary did not qualify as a predicate New York felony, which the prosecution concedes, is reviewed in the interest of justice and his adjudication as a second violent felony offender and the sentence for weapons possession are vacated; resentencing on a separate count is also required because the belief that he had a prior violent felony may have influenced that sentence also. (Supreme Ct, Kings Co)

Due Process (Fair Trial)

Evidence (Hearsay)

Second Department *continued*

Impeachment

Witnesses

People v Bradley, 99 AD3d 934, 952 NYS2d 260 (2nd Dept 10/17/2012)

Proffered testimony that the accuser told others that the bedroom door was accidentally shut on her hand substantially contradicted her trial testimony that the defendant intentionally slammed the door on her and "went directly to the heart of the most contested aspect of this case—the defendant's intent"; preclusion of this evidence denied the defendant a fair trial. (Supreme Ct, Westchester Co)

Dissent: The defendant failed to specify dates and recipients of the accuser's alleged statements, making the evidentiary foundation inadequate. Preclusion did not violate the right to present a defense; the proffered evidence was not "reliable hearsay evidence that another person had admitted committing the crime . . . ."

Appeals and Writs (Preservation of Error for Review)

Sentencing (Second Violent Felony Offender)

People v Cosme, 99 AD3d 940, 952 NYS2d 269 (2nd Dept 10/17/2012)

The defendant's unpreserved contention that he was improperly adjudicated a second violent felony offender based on a prior federal conviction for bank robbery that the prosecution concedes does not constitute a predicate violent felony is reviewed in the interest of justice and the adjudication is vacated. (Supreme Ct, Kings Co)

Discrimination (Race)

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

People v Hurdle, 99 AD3d 943, 952 NYS2d 297 (2nd Dept 10/17/2012)

That the prosecutor exercised a peremptory challenge to strike a black female retired police officer but did not challenge a white male retired officer was enough to raise an inference of discriminatory purpose; the court's ruling that the defendant had to show a pattern of discrimination to meet the initial burden for a *Batson* challenge was error; the matter must be remitted for a hearing and report. (Supreme Ct, Queens Co)

Probation and Conditional Discharge (Revocation)

People v Robeck, 99 AD3d 946, 952 NYS2d 292 (2nd Dept 10/17/2012)

Where the defendant pleaded guilty and agreed to pay restitution by the end of his period of probation, then sought a change in the payment schedule less than a month later, the court erred, as the prosecution concedes, by revoking the defendant's probation on the grounds that he knew at his plea that he could not comply with the condition and would soon violate it, without complying with CPL article 410 and in the absence of any probation violation. (Supreme Ct, Queens Co)

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

People v Rossi, 99 AD3d 947, 952 NYS2d 285 (2nd Dept 10/17/2012)

The court properly denied suppression of a gun that police found in the backyard after the defendant, in the house, accidentally shot himself in the hand, as officers responding to the 911 call knew there were children in the home and the gun's location was not disclosed. (Supreme Ct, Nassau Co)

Dissent: Search of the backyard after police had frisked the defendant and knew that the children present did not have the gun exceeded the scope and duration allowed by the emergency doctrine, nor was there the required nexus between the area searched and the emergency.

Family Court (Family Offenses)

Harassment (Evidence)

Matter of Testa v Strickland, 99 AD3d 917, 951 NYS2d 910 (2nd Dept 10/17/2012)

The evidence did not establish by a fair preponderance that the appellant's sending of several text messages to the parties' son constituted second-degree aggravated harassment, the family offense that the court found on the record, which controls when a conflict exists between a decision and order; in any event the evidence was insufficient as to second-degree harassment as well, the offense contained in the order. (Family Ct, Orange Co)

Driving While Intoxicated (Breathalyzer) (Chemical Test [Blood, Breath, or Urine]) (Test Refusal)

Harmless and Reversible Error (Harmless Error)

People v Williams, 99 AD3d 955, 952 NYS2d 281 (2nd Dept 10/17/2012)

As the prosecution concedes, the court erred in denying the defendant's motion to suppress evidence that he refused to take a breathalyzer test where he was not

Second Department *continued*

advised "that his refusal could be used against him at a trial, proceeding, or hearing resulting from the arrest . . . ." (Supreme Ct, Kings Co)

Third Department

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Homicide (Murder [Aggravated Vehicular Homicide])

Instructions to Jury (Intoxication)

People v Goldblatt, 98 AD3d 817, 950 NYS2d 210 (3rd Dept 8/30/2012)

In instructing the jury on the reckless driving element of aggravated vehicular homicide, the court improperly failed to instruct that intoxication, absent more, does not establish reckless driving. Evidence of intoxication and how it may have affected the defendant's ability to perceive or react to common driving risks, however, is relevant and admissible to establish the element of recklessness. (County Ct, Warren Co)

Concurrence: Juries should be instructed not to consider a defendant's intoxicated condition while weighing the reckless driving element.

Juveniles (Support Proceedings)

Matter of Chemung County Commr. of Social Servs. v Beard, __ AD3d __, 953 NYS2d 705 (3rd Dept 10/18/2012)

Whether health insurance benefits are available for child support purposes under Family Court Act article 4 "is not always discernible by a simple mathematical calculation, and the statute implicates judicial involvement in that determination." The court properly ordered the respondent father to notify the petitioner if there are any changes to the health benefits available to him. (Family Ct, Chemung Co)

Juveniles (Custody) (Right to Counsel)

Matter of Dolson v Mitts, 99 AD3d 1079, 951 NYS2d 920 (3rd Dept 10/18/2012)

The court deprived the respondent father of his fundamental right to counsel where, although it properly advised him of his rights to counsel, to seek an adjournment to confer with counsel, and to assigned counsel if financially qualified, the court refused to adjourn the proceedings when the father said he was confused and asked for an attorney and granted the mother's custody petition without an evidentiary hearing. (Family Ct, Albany Co)

Juveniles (Custody)

Matter of Hamilton v Anderson, 99 AD3d 1077, 952 NYS2d 788 (3rd Dept 10/18/2012)

In this custody modification proceeding, the court did not abuse its discretion in concluding that the petitioner father showed the requisite change in circumstances where the mother changed residences twice in three months and the child, who was struggling in school and needs structure and consistency, lost ground academically as a result of the moves. (Family Ct, Broome Co)

Due Process

Witnesses (Defendant as Witness)

People v Harden, 99 AD3d 1031, 953 NYS2d 689 (3rd Dept 10/18/2012)

In this first-degree assault case involving a justification defense, the court wrongfully denied the defendant's request to testify, which the defendant made after the close of proof but before summations. The defendant has the authority to decide whether to testify, and after he invoked that right, he did not waive it; further, the prosecution did not claim prejudice and the court did not explain why it denied the request. (County Ct, Albany Co)

Juveniles (Parental Rights) (Visitation)

Matter of Ruple v Harkenreader, 99 AD3d 1085, 953 NYS2d 701 (3rd Dept 10/18/2012)

The court erred in directing that the incarcerated father receive domestic violence counseling before he would be allowed unsupervised contact with his child after his release; a court "may not impose such a requirement as a condition of future access to the child . . . ." And since there was no showing that it would not be in the child's best interests for the father to have access to the child's medical and school records, he is granted such access, at his expense, and the mother must advise the father of any significant changes in the child's health. (Family Ct, Otsego Co)

Attorney/Client Relationship (Confidences)

Counsel (Conflict of Interest) (Multiclient Representation)

Third Department *continued*

Matter of Urda, 99 AD3d 1165, 953 NYS2d 707 (3rd Dept 10/25/2012)

"[W]hile representing a client in a criminal matter, an attorney-client relationship was created during a phone conversation between respondent and his client's girlfriend who had accused the client of criminal activity." The evidence supports the determination "that by using information gleaned during the phone call to cross-examine the girlfriend, respondent used information related to the representation of the client to the detriment of the client, engaged in a conflict of interest by offering to represent the girlfriend, and initially communicated with an unrepresented person without advising her to seek independent counsel though her interests had a reasonable possibility of being in conflict with his client's interests (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.7 [a] [1]; 1.8 [b]; 4.3)."

Fourth Department

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Article 78 Proceedings

Prisoners (Disciplinary Infractions and/or Proceedings)

Matter of Murphy v Graham, 98 AD3d 833, 949 NYS2d 842 (4th Dept 8/17/2012)

The court conducting a CPLR article 78 review of a determination that the petitioner violated a prison rule properly determined that the respondent correctional facility violated its own directives, so evidence found in the petitioner's cell should not have been considered, but evidence found on his person supports the determination. That the facility violated its own directive did not terminate the proceeding, which should have been transferred to this Court pursuant to CPLR 7804(g). (Supreme Ct, Cayuga Co)

Family Court

Juveniles (Neglect)

Matter of Bradley M.M., 98 AD3d 1257, 951 NYS2d 604 (4th Dept 9/28/2012)

The father's failure to appear at the scheduled family court appearance was not a default where his attorney told the court that he was authorized to proceed in the father's absence and objected to the entry of a default order. Without a fact-finding hearing, there was no factual support for finding that the father's child was neglected. (Family Ct, Oneida Co)

Appeals and Writs (Arguments of Counsel) (Briefs)

Counsel (*Anders* Brief)

People v Judd, 98 AD3d 1329, 951 NYS2d 433 (4th Dept 9/28/2012)

Where the court said during the plea proceeding "that a five-year determinate sentence was 'mandatory,'" but "the mandatory minimum determinate sentence for a second felony offender convicted of a class D violent felony is three years . . . , a nonfrivolous issue exists as to whether defendant's guilty plea was knowing, voluntary and intelligent"; new appellate counsel should brief that and any other issues. (County Ct, Orleans Co)

Appeals and Writs (Arguments of Counsel) (Briefs)

Counsel (Competence/Effective Assistance/Adequacy)

People v Robinson, 98 AD3d 1324, 951 NYS2d 417 (4th Dept 9/28/2012)

Review of the record shows that there may be merit to the defendant's contention that he was denied effective assistance of appellate counsel given counsel's failure to argue that the plea colloquy negated the elements of the crime so that the defendant's guilty plea was not voluntary and knowing. The matter will be reviewed de novo.

Evidence (Hearsay) (Uncharged Crimes)

Post-Judgment Relief (CPL § 440 Motion)

Search and Seizure (Warrantless Searches)

Self-Incrimination (Conduct and Silence)

People v Castor, 99 AD3d 1177, 952 NYS2d 318 (4th Dept 10/5/2012)

The 440 court erred in determining that the issue of the alleged attachment of the defendant's indelible right to counsel before she was questioned by police could have been raised in the direct appeal where that record did not show whether her attorney represented her in this criminal case. The issues raised on direct appeal are rejected, unpreserved, or harmless. (County Ct, Onondaga Co)

Due Process (Fair Trial)

People v Schrock, 99 AD3d 1196, 951 NYS2d 819 (4th Dept 10/5/2012)

While trial counsel's failure to object to placing a stun belt on the defendant during his jury trial, which was

Fourth Department *continued*

done by the sheriff without the court's approval, was not ineffective assistance of counsel, as it predated the seminal stun belt decisions, such use of the stun belt was error and not subject to harmless error analysis. (County Ct, Cattaraugus Co)

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)

People v Casado, 99 AD3d 1208, 951 NYS2d 797 (4th Dept 10/5/2012)

The evidence proved "only a single act of attempted aggravated murder and attempted aggravated assault as against" the police officer named in the indictment, and that act occurred when the defendant fired two shots directly at the named officer. Counts one and two were not rendered duplicitous by trial testimony about a separate act that involved shooting toward a vehicle containing the named officer and others. (Supreme Ct, Monroe Co)

Evidence (Hearsay) (Sufficiency)

Sex Offenses (Elements)

People v Justice, 99 AD3d 1213, 951 NYS2d 802 (4th Dept 10/5/2012)

The evidence was insufficient to support the defendant's conviction of counts one and three, charging third-degree rape and third-degree criminal sexual act, which each alleged the accuser was younger than 17 and the defendant older than 21, where the only evidence offered of the defendant's age was the objected-to hearsay testimony of an officer that he learned the month and year of the defendant's birth, establishing that he was 35. (Supreme Ct, Erie Co)

Juveniles (Support Proceedings)

Matter of Commr. of Social Servs. v Turner, 99 AD3d 1244, 951 NYS2d 814 (4th Dept 10/5/2012)

Suspension of the defendant's hunting and fishing licenses for failure to pay child support was error because the statute providing for the suspensions does not apply to individuals receiving supplemental security income (SSI), which the defendant does; the suspensions are vacated upon review in the interest of justice of this unpreserved claim. (Family Ct, Wayne Co) ⚖

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