NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT
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# Defender News

## Litigation on NYC's Stop and Frisk Policies: A Roller-Coaster Ride

Hopes and fears concerning New York City's stop-and-frisk policies have risen and fallen in the year since an item appeared in Defender News about ongoing litigation and media attention concerning the use of this police tactic. *REPORT*, Vol. XXVII, No. 3 (Aug.-Oct. 2012), at p. 9.

### 2nd Circuit Stays Stop-and-Frisk Remedies, Removes Judge from Case

The most startling development occurred just as this issue of the *REPORT* went to press. A panel of the Second Circuit Court of Appeals not only stayed, pending appeal, remedies implemented by Judge Shira Scheindlin on Aug. 12, 2013, but removed the judge from the two cases that have been pending before her in the Federal District Court in Manhattan for a long time. The panel said that Scheindlin had given the appearance of impropriety in interviews with reporters and in the way she came to preside over one of the cases. *Lingon v City of New York, Floyd v City of New York*, Nos. 13-3123, 13-3088 (2nd Cir 10/31/2013). According to the *New York Law Journal*, Southern District Court Judge Analisa Torres was subsequently assigned for the purpose of implementing the circuit court's order. What might happen to a third stop-and-frisk case still before Scheindlin, *Davis v City of New York* (10 Civ. 0699), remains to be seen. www.newyorklawjournal.com, 11/4/2013.

Reports of, and comments on, the ruling appeared in both mainstream media and the blawgosphere immediately. An Oct. 31, 2013 post on the Constitutional Law Prof Blog noted that "[w]hile the Second Circuit's panel opinion includes the disclaimer that the judges 'intimate no view on the substance or merits of the pending appeals, which have yet to be fully briefed and argued,' it certainly expresses deep disapproval." http://lawprofessors.typepad.com/conlaw, 10/31/2013. The *New York Times* editorial board called the stay unwise and characterized removal of the judge as overreaching. www.nytimes.com, 11/1/2013.

The New York Civil Liberties Union announced it would appeal the Circuit Court's decision. www.nyclu.org, 10/31/2013. The Center for Constitutional Rights issued a statement that said, "We are dismayed that the Court of Appeals saw fit to delay the long-overdue process to remedy the NYPD's unconstitutional stop-and-frisk practices, and we are shocked that they cast aspersions on the professional conduct of one of the most respected members of the federal judiciary and reassigned the case." http://ccrjustice.org, 10/31/2013.

### NY City Council Passes Legislation Aimed at Curbing Practices

Soon after the District Court's opinion was issued, the City Council passed legislation creating a new "watchdog" entity and making it easier for people to file lawsuits alleging racial profiling by New York City police. The Council "overrode mayoral vetoes amid applause from supporters and angry warnings from opponents." http://bigstory.ap.org/, 8/22/2013.

### Are Courts Looking More Closely at Police Stops?

Among public discussions about stop-and-frisk generated by the litigation was an exchange in the *New York Law*

**JOB LISTINGS**
**are available on NYSDA's website at**
**www.nysda.org/Jobs.html**
**Find: Recent job postings and links to detailed information**

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*Journal*. Professor Steven Zeidman of the City University of New York Law School wrote about a perceived indifference in New York City Criminal Court to questions about the legality of stops in cases heard there at arraignment. www.newyorklawjournal.com, 8/28/2013 [subscription required]. The Administrative Judge for the Criminal Courts of the City of New York, Barry Kamins, responded that it is not the job of judges to "'monitor' police officers, nor [to] 'encourage suppression hearings.'" www.newyorklawjournal.com, 8/29/2013.

Whether or not the high-profile debates about stop-and-frisk in New York City have raised court consciousness of this and related issues, a number of opinions in 2013 did find suppression of evidence resulting from police stops appropriate. The Legal Aid Society has posted about one such decision on its website, stating the case "stands for the proposition that the Fourth Amendment applies in the New York City Housing Authority, which in light of over-policing in recent years is an important protection to reinforce." The case is *People v Johnson*, 2013 NY Slip Op 05723 (1st Dept 8/27/2013).

### *Visualize the Stops*

In a final note about stops in New York City, sometimes it is hard to really understand what the data actually show. When it comes to stop-and-frisk data compiled by the NYCLU, The Atlantic Cities says the best way to visualize it can be found at http://bklynr.com/all-the-stops/.

## *NY Courts Address Many Issues*

As is always true, the New York appellate decisions summarized in this issue of the *REPORT* address a variety of issues. Several cases involve ineffective assistance of counsel (IAC) claims, procedures in jury trials, and questions regarding appeals, from preservation of issues to scope of review. The more unique issues addressed include a probationer's ability to state a claim against a laboratory for negligent drug testing and judges' power to admit defendants to judicial diversion. The summaries begin on p. 10.

### *Drug Testing Lab Owes Duty to Probationer*

A slim majority of the Court of Appeals has found that a complaint against a laboratory for alleged negligent testing of a saliva sample used in efforts to revoke the plaintiff's probation should not be dismissed for failure to state a cause of action. The majority said that strong policy arguments support a finding that the laboratory's contract with the county to conduct biological testing created a duty to the probationer whose sample was tested. Judge Pigott's dissenting opinion said the probationer's claim was against the county, and that the lab could be sued by the county in a third-party action for contract breach. In a separate dissent, Judge Smith said that the relief for false reports that one tested positive for drugs should be sought in a defamation claim. *Landon v Knoll Lab. Specialists, Inc.*, 2013 NY Slip Op 06597 (10/10/2013).

### *Appellate Review Issues Addressed Along with Substantive Questions*

An August memorandum opinion from the Court of Appeals is a stark reminder that issues not properly preserved will likely die unreviewed. The court turned away unpreserved allegations that a defendant did not receive the necessary 20 days' notice before his sex offender designation proceeding, and that due process required an adjournment of unspecified duration. *People v Rodriguez*, 21 NY3d 1030 (8/27/2013).

Some exceptions to the preservation requirement exist. One narrow exception permitting review arises "when a sentence's illegality is readily discernible from the trial record," as the Court noted in *People v Santiago* (2013 NY Slip Op 06635 [10/15/2013]). The *Santiago* court found that a 1993 Pennsylvania conviction was improperly used to sentence the defendant as a second felony offender where the defendant's young age would have prevented his conviction of the equivalent offense in New York.

Failure to preserve issues at the trial level has plagued appellate defense lawyers—and their clients—for years. At a Chief Defender Convening in 1999, the need to train lawyers on preserving issues was raised with then-Chief Judge Kaye, who noted that if issues were not preserved, a case would not accepted for review. To lawyers frustrated by the low number of cases in which leave to appeal

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was granted in that era, she reiterated that "[we] need preserved issues of some significance." While the number of criminal cases heard by the Court of Appeals has risen in recent years (*see, e.g.*, www.newyorklawjournal.com, 4/25/2011), preservation problems continue, with clients being denied relief because errors in their cases were not preserved.

In New York's intermediate appellate courts, some unpreserved issues may be reviewed by the court in its discretion in the interest of justice. *See* CPL 470.15(1), (3), (6). The unpreserved issues reviewed in cases summarized in this issue include:

- failure to instruct a jury on the permissive nature of a statutory presumption (*People v Cioffi*, 105 AD3d 971 [2nd Dept 4/17/2013]);
- failure to show compliance with the statutorily-required procedures for adjudicating a defendant a second felony offender (*People v Puca*, 106 AD3d 758 [2nd Dept 5/1/2013]); and
- vacatur of a second-degree unlawful imprisonment conviction based on the merger doctrine (*People v McFarlane*, 106 AD3d 836 [2nd Dept 5/8/2013]).

But trial counsel should never assume that such review will happen; it is vital to "duly protest" errors when they occur.

Failure to object may prevent review even before a case reached the Appellate Division. As noted in *Matter of Hubbard v Barber* (107 AD3d 1344 [3rd Dept 6/27/2013]), failure to file objections to a support magistrate's order, or portions of an order, deprives the Family Court of authority to review such order or portions of an order.

Errors that were sufficiently preserved below may still avoid review in the Appellate Division if a client pleads guilty and waives the right to appeal. However, trial courts have somewhat frequently failed to obtain these waivers properly; in one case summarized in this issue, the Appellate Division noted with what appears to be some frustration, "We again remind the courts that the better practice is to secure a written waiver, along with a thorough colloquy to ensure the defendant's understanding of its contents …." *People v Oquendo*, 105 AD3d 447 (1st Dept 4/4/2013).

In another case, the trial court erred by advising the defendant that if he went to trial and was convicted, he could appeal "improprieties that took place during the trial," advice which was improperly limited. *People v Taylor*, 105 AD3d 778 (2nd Dept 4/3/2013). In *Taylor*, although the waiver of appeal was found invalid, the issue raised on appeal was rejected.

Another issue involving appellate review that is addressed in the summarized cases is the requirement that a ruling must have been adverse to the party bringing the appeal. Where a trial court ruled on remittal that a pre-trial identification was the fruit of an illegal detention of the defendant, the propriety of that determination, challenged by the prosecution, could not be reviewed in the defendant's appeal as the ruling was not adverse to the defendant. *People v Adams*, 106 AD3d 1496 (4th Dept 5/3/2013).

**Readers of the print version of the *REPORT* may access the hyperlinked cases, articles, and other resources using the web version of the issue, which is posted at www.nysda.org/TheReport.html.**

### *Family Court Issues Reviewed*

Of the Family Court cases summarized in this issue of the *REPORT*, several dealt with default issues, including:

- A parent's standing to challenge an order of protection entered on default where the Department of Social Services had failed to file an affidavit of service and no other evidence appeared in the record to show that the court had jurisdiction over the parent. *Matter of Anna B.*, 105 AD3d 1399 (4th Dept 4/26/2013);
- Error in refusing to vacate a default custody judgment where the mother submitted an affidavit, supported by a letter from a mechanic and a receipt, concerning her car's breakdown on the way to court. *Matter of Brown v Eley*, 107 AD3d 1334 (3rd Dept 6/27/2013); and
- Error in automatic dismissal of a custody modification petition for the father's failure to appear where the father's lawyer had not told the father that his appearance was necessary. *Matter of Freedman v Horike*, 107 AD3d 1332 (3rd Dept 6/27/2013).

Another Family Court issue addressed is the need to obtain a modification of a County Court order of protection in favor of a mother before entering a Family Court order that the mother facilitate, through the respective attorneys, presenting the incarcerated father's written communications to their child. *Matter of Samantha WW. v Gerald XX.*, 107 AD3d 1313 (3rd Dept 6/27/2013). In that case, the County Court order of protection did not state that it was subject to modification by the Family Court. In contrast, the Second Department has held that Family Court judges have authority to modify criminal court orders of protection that expressly indicate they are "subject to Family Court." Thus, a Family Court judge could award custody to a parent who was otherwise prohibited from having contact with a minor child, so long as the criminal court order expressly contemplated modification

by Family Court. *Matter of Brianna L.*, 103 AD3d 181 (2d Dept 2012).

Other Family Court decisions summarized in this issue can be easily identified by the headings such as "Family Court" and "Juveniles," and by the court designation at the end of each summary.

## Legislative Highlights

Below are some of the laws that have been recently signed by Governor Cuomo. Because there are a number of bills that have been passed, but not yet sent to the Governor, Al O'Connor's annual *Legislative Review* will appear in the next issue of the *REPORT*.

### Criminal Law

- Chapter 7 (A196): Amends CPL 730.40(1) and 730.50(1) to require, upon the issuance of a final order of observation, the district attorney to send to the Commissioner of the Office of Mental Health or the Commissioner of the Office for Persons with Developmental Disabilities a list of names and contact information of persons who may reasonably be expected to be the victim of any assault, violent felony offense, or offense listed in CPL 530.11 that would be carried out by the committed person. Also makes conforming amendments to CPL 730.40(2), 730.50(1), and 730.60(6) and Mental Hygiene Law 29.11. Effective: 3/15/2013.
- Chapter 162 (S1079-A): Adds Penal Law 195.06-a, making it a class E felony to intentionally kill a police work dog or police work horse while the dog or horse "is in the performance of its duties and under the supervision of a police officer." Effective: 11/1/2013.
- Chapter 169 (A2285-A): Amends several provisions of the ignition interlock parts of Leandra's Law. Amends Vehicle and Traffic Law (VTL) 511(3)(a)(iv) to make it first-degree aggravated unlicensed operation of a motor vehicle to operate a motor vehicle while holding a conditional license issued pursuant to VTL 1196(7)(a) and while under the influence of alcohol or a drug in violation of VTL 1192(1)-(5). Also amends VTL 1196(1)(b), (c) to apply the ignition interlock requirement to youthful offenders; extend the minimum ignition interlock period to 12 months, but allow the court to terminate the period earlier if the person provides proof that a device was installed and maintained for at least 6 months; and provide that the interlock period starts from the earlier of the date of sentencing or the date a device was installed in advance of sentencing. Amends VTL 1198(4)(a) to provide that good cause for failure to install a device may include a finding that the defendant does not own a motor vehicle if the defendant states under oath that he/she does not own a motor vehicle and will not operate one during the ignition interlock period; and to give the term "owner" the same meaning as in VTL 128. Effective: 11/1/2013.
- Chapter 172 (A2632-A): Amends Penal Law 120.12 to expand the look-back period for prosecutions of aggravated assault upon a child less than eleven. Before the amendment, a defendant 18 years old or older could be charged with this Class E felony if he or she committed third-degree assault against a child less than eleven and had previously been convicted of such crime against a child less than eleven within the preceding three years. The new look-back period is ten years. Effective: 7/29/2013.
- Chapter 180 (A1394-A): Amends Penal Law 240.32 to add throwing the contents of a toilet bowl to actions that constitute aggravated harassment of an employee by an inmate. Effective: 11/1/2013.
- Chapter 259 (S4160-A): Amends Penal Law 120.05(3) and (11) to make it a class D felony to assault a prosecutor with the intent to prevent the prosecutor from performing a lawful duty. Effective: 1/27/2014.
- Chapter 368 (S4248-A): Amends Executive Law 221-a to give employees of local correctional facilities and the Department of Corrections and Community Supervision who are responsible for monitoring, supervising, or classification of inmates or parolees access to the statewide registry of orders of protection and warrants issued in domestic violence cases and the ability to disclose information about such orders of protection and warrants under specified circumstances. Effective: 10/27/2013.
- Chapter 437 (A5008-B): Amends the Penal Law and Correction Law to allow local jails to provide routine medical, dental, and mental health services to inmates under 18 years of age who have not received consent from a parent or guardian. The bill requires the court to ask whether the defendant's parents or legal guardian, if present at sentencing, will give the defendant the capacity to consent to such routine care. If consent is not obtained before commitment, the commitment order will be deemed to give the defendant the capacity to consent and the sheriff will not need to get judicial consent for routine care; the bill does not preclude a parent or legal guardian from objecting to treatment. Effective: 10/23/2013.

### Family Court

- Chapter 371 (S5609-A): Amends Domestic Relations Law (DRL) 240 to create a rebuttable presumption that it is not in a child's best interests to be placed in the custody of or to visit with a person who has been con-

victed of one or more of the specified sex offenses in this state or the equivalent of such offenses in another state when the child was conceived as a result of first- or second-degree rape, first-degree course of sexual conduct against a child, predatory sexual assault, or predatory sexual assault against a child, and also amends DRL 111-a and Social Services Law (SSL) 384-c to provide that the notice provisions shall not include such a person. Effective: 9/27/2013.

- Chapter 402 (S4644-C): Amends Family Court Act (FCA) 516-a and Public Health Law 4135-b to provide that when a person under age 18 signs a voluntary acknowledgement of paternity, that person can file a petition to vacate the acknowledgment at any time up to 60 days after reaching the age of 18 or up to 60 days after the date on which the respondent must answer a petition relating to the child if the respondent is advised of the right to file a petition to vacate, whichever is earlier. Effective: 1/19/2014.
- Chapter 430 (A2600): Amends FCA 1051(e) to provide that, in cases where the court makes a finding of abuse and chooses to enter a finding, based on clear and convincing evidence, of severe or repeated abuse, as defined in SSL 384-b(8)(a)(i)-(iii) or (8)(b)(i) or (ii), the court does not need to also make findings regarding diligent efforts. Also amends SSL 384-b(8)(a) and (b) to add Penal Law 130.95 and 130.96 to the list of sex offenses and other felonies that constitute severe abuse. Effective: 10/23/2013.

## New York Creates Human Trafficking Court Parts

In September, Chief Judge Jonathan Lippman announced that the state court system is launching the Human Trafficking Intervention Initiative, which will have dedicated court parts within the criminal court system, similar to the existing specialty courts, that will "intervene in the lives of trafficked human beings." The Initiative "seeks to promote a just and compassionate resolution to cases involving those charged with prostitution—treating these defendants as trafficking victims, likely to be in dire need of medical treatment and other critical services." Pilot trafficking courts are located in Queens, mid-Manhattan, and Nassau County. Trafficking courts will be opened in the three other NYC boroughs, as well as Erie, Monroe, Onondaga, Suffolk, and Westchester counties. In early October, the Seventh Judicial District announced that the Rochester City Court has a human trafficking part that will serve the eight-county judicial district (www.nydailyrecord.com, 10/3/2013), and the Buffalo City Court recently announced that it will have a Human Trafficking Intervention Part. (www.buffalonews.com, 10/31/2013.)

The new initiative will require evaluation, by the judge, defense attorney, and prosecutor, of those charged with prostitution and individuals who appear to be trafficking victims will be connected to services. While the press release (available at www.nycourts.gov/press/PR13_11.pdf) states that there will be regularly assigned defense attorneys, nothing is mentioned about the potential impact on public defense budgets. One resource defense counsel should be aware of the *Lawyer's Manual on Human Trafficking*, which was released by the Appellate Division, First Department and the New York State Judicial Committee on Women in the Courts in 2011 and is available at www.nycourts.gov/ip/womeninthecourts/LMHT.pdf. Defense attorneys are encouraged to contact the Backup Center with questions or information about local human trafficking courts.

A couple of months before Chief Judge Lippman's announcement, the *New York Law Journal* featured an article about The Legal Aid Society's defender-based Trafficking Victims Advocacy Program, directed by Kate Mogulescu, which started a couple of years ago and receives funding from the NoVo Foundation.

Around the same time, the Queens County Criminal Court granted a defendant's motion to vacate two convictions under CPL 440.10(1)(i), which was added in 2010 to allow "defendants to vacate their prior convictions which resulted from their experiences as victims of human trafficking …." *People v L.G.*, 2013 NY Slip Op 23276 (Criminal Ct, Queens Co 7/12/2013). In that case, the defendant was forced into prostitution when she was 12 years old and had two convictions, one for disorderly conduct and the other for fourth-degree criminal possession of a weapon, which involved a knife that was recovered incident to her prostitution-related activity. Other cases where courts have granted CPL 440.10(1)(i) motions include *People v S.S.* (36 Misc 3d 610 [Criminal Ct, New York Co 2012]), *People v Doe* (34 Misc 3d 237 [Supreme Ct, Bronx Co 2011]), and *People v Gonzalez* (32 Misc 3d 831 [Criminal Ct, New York Co 2011]).

## Bronx Defenders to Receive 2013 Clara Shortridge Foltz Award

The National Legal Aid and Defender Association (NLADA) and the American Bar Association Standing Committee on Legal Aid and Indigent Defendants will present the 2013 Clara Shortridge Foltz Award to The Bronx Defenders during NLADA's Annual Conference in Los Angeles in November. The Bronx Defenders' influential work in providing and training others in the provision of holistic representation addresses not only the strictly legal aspects of a client's case but entwined consequences

that affect the client's life but were once considered outside the realm of lawyers' assistance.

The Clara Shortridge Foltz award, which commends a public defender program or defense delivery system for outstanding achievement in the provision of indigent defense services, is named for California's first woman lawyer. Clara Shortridge Foltz introduced a bill at the 1893 Congress of Jurisprudence and Law Reform, held in Chicago, proposing a defender system. A new academic paper discussing Foltz just appeared on Oct. 11, 2013. *See* Barbara Babcock, "Women's Rights, Public Defense, and the Chicago World's Fair," which will be published at 87 Chicago-Kent Law Review 481 (2013). Foltz is mentioned, along with pioneering New York lawyer Carolyn Barteau (Dissaway), another proponent of creating a public defender counterpart to public prosecutors, in a post on NYSDA's Gideon Anniversary Blog. http://nysdablog.blogspot.com, 6/28/2013.

## Noteworthy Resources

### Probation and Ignition Interlock Devices

- As part of the implementation of the new probation supervision rule, 9 NYCRR Part 351 (effective June 1, 2013), the Office of Probation and Correctional Services (OPCA), part of the Division of Criminal Justice Services, released a *Practice Commentary* on Part 351 and a supervision rule chart. The Practice Commentary provides a step-by-step guide to the new rule, which emphasizes the need for positive and negative responses that are consistent, swift, predictable, and proportionate.
- Beginning on Nov. 1, 2013, there is a new ignition interlock classification system and a new list of devices with the fee/charge schedule; an updated nationwide availability of qualified ignition interlock device manufacturers chart has also been released. Additional information about the OPCA ignition interlock program can be found on its website at www.criminaljustice.ny.gov/opca/ignition.htm. Also, as noted above, changes to the statutes governing ignition interlock devices (VTL 511, 1193, and 1198) took effect on November 1.

### Department of Corrections and Community Supervision (DOCCS)

- A list of county re-entry task forces, with the names of the coordinator, county co-chair(s), and DOCCS co-chair was recently updated.
- DOCCS Directives
  - —Community Supervision (No. 9000): provides an overview of the DOCCS community supervision operation, including the location of its seven regional administrative offices, and its specialized units, such as the Bureau of Special Services, the Sex Offender Management Unit, the Executive Clemency Bureau, the Parole Violations Unit, and the Re-entry Services Unit.
  - —Parental Contact Protocol (No. 9601): addresses situations where DOCCS has or is considering imposing a condition limiting or prohibiting contact with a biological or adoptive child under the age of 18 by an individual who is, or is expected to be, under community supervision.

### Forensics, Crime Scenes, and Evidence Collection

- The National Forensic Science Technology Center has issued an updated version of the *Crime Scene Investigation: A Guide for Law Enforcement*, which provides a step-by-step process for crime scene investigation, from the arrival at the scene and prioritization of efforts to processing the scene, including collecting a variety of evidence; additional topics include equipment used at a crime scene and approaches to dealing with crime scenes in correctional facilities and limited-time crime scenes.
- The National Institute of Standards and Technology, Technical Working Group on Biological Evidence Preservation has released *The Biological Evidence Preservation Handbook: Best Practices for Evidence Handlers*, which gives specific recommendations for the handling of biological evidence. While designed for crime scene technicians, law enforcement officers, healthcare professionals, and forensic scientists, it also provides practical information for experts and defense attorneys representing clients in cases involving biological or other forensic evidence. Related resources on evidence collection are available at www.nist.gov/oles/forensics/bioev.cfm.
- The U.S. Department of Justice has issued a new and revised edition of *A National Protocol for Sexual Assault Medical Forensic Examinations*. Information about the New York State Sexual Offense Evidence Collection Kit is available at www.criminaljustice.ny.gov/ofpa/evidencekit.htm.
- The U.S Department of Justice, in response to the 2009 Presidential Memorandum on Scientific Integrity and the Office of Science and Technology Policy Memorandum on Scientific Integrity, has released its *Scientific and Research integrity Policy*, which "is intended to supplement, and does not supersede, applicable federal laws and rules on scientific, technological, research and scholarly integrity …."

### *New York SAFE Act*

- The New York State Police, Office of Division Counsel has released a *Guide to the New York Safe Act for Members of the Division of State Police*. The *Guide* includes information about the new statewide license and record database (Penal Law 400.02 [effective Jan. 15, 2014]), the new definition of assault weapon, new and amended Penal Law offenses, police and retired police exemptions, gun sales, pistol permits, and the new Mental Hygiene Law 9.46.

### *Intersection of Immigration and Criminal and Family Court Matters*

- Immigration and Customs Enforcement (ICE) issued a memorandum (Directive No. 11064.1: *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities*) outlining its new policy regarding the monitoring, placement, and removal of non-citizen parents. The Directive supplements existing policy regarding enforcement priorities and prosecutorial discretion and places heavy emphasis on the exercise of favorable discretion on behalf of non-citizen parents or legal guardians who: 1) have a U.S. Citizen or Legal Permanent Resident child; 2) have a direct interest in a family court proceeding where a child is involved; or 3) are primary caretakers irrespective of the child's immigration status.
- The Immigration and Customs Enforcement (ICE) has introduced a verification process that defense lawyers may use to request information from ICE that can be used to verify that immigration enforcement caused the client's failure to meet a court-related obligation. To get this verification, defense attorneys must submit a "Request for Certification of Alien Custody, Removal, or Departure for Use in Criminal Legal Proceedings" form to ICE authorities. ICE will subsequently issue a Certification Form in response to the attorney's request. A fact sheet about the verification process is available here.

Attorneys with questions about immigration matters, including the parental interests memo and the verification process, may contact the Backup Center.

### *Veterans*

- The Veterans Treatment Courts Online Learning System, available through the Center for Court Innovation's National Drug Court Online Learning System (http://drugcourtonline.org), includes training on a number of subjects, including post-traumatic stress disorder (PTSD), PTSD and depression, the neurophysiology of trauma, trauma-informed care, and the workings of veterans treatment courts.
- The National Center for PTSD, a part of the U.S. Department of Veterans Affairs, offers a variety of different resources about PTSD on its website, www.ptsd.va.gov. A separate website from the Center, AboutFace, includes first-hand accounts of veterans with PTSD.

## *NYSDA's 46th Annual Conference in* Gideon*'s 50th Year*

For over four and a half decades, NYSDA members and others have gathered at the Association's Annual Meeting and Conference for training and discussion about issues important to public defense lawyers and their clients.

### *Chief Defender Convening*

This July, as has been the case for many years, the conference began with a Chief Defender Convening that offered those heading public defender offices, legal aid offices, and assigned counsel programs the chance to share information and hear news about pressing issues relating to local defense practice, program management, and statewide public defense developments. An opening round of discussion on "what good things are happening" yielded optimistic reports of county cooperation, staff teamwork, and improvements made possible with funding from the Indigent Legal Services Office. But later agenda topics revealed familiar problems, including caseload and budget issues that interfere with attorney/client relationships and remain all too common fifty years after the United States Supreme Court issued its right to counsel decision in *Gideon v Wainwright.*

The convening offered chief defenders the opportunity to discuss a wide range of substantive, procedural, and office administration issues. Among them: confidentiality and file retention requirements, pro bono reporting requirements, bail funds, recorded proceedings in local courts, delay in appointment of counsel and in obtaining necessary paperwork, including basics such as the accusatory instrument, efforts to meet the requirement that counsel be provided at all arraignments, and access to criminal histories.

**See You "Soon" in Saratoga!**

NYSDA's Annual Meeting and Conference will return to the Gideon Putnam in Saratoga Springs again next year. Mark your calendar now — **July 20-22, 2014.**

### A Year's Worth of Quality CLE

On July 22 and 23, the conference featured training sessions offering a total of 12 continuing legal education (CLE) credits. Nearly 280 lawyers attended, listening to presentations on the corrupting effects of confessions on criminal investigations and prosecutions, and strategies for developing challenges to the voluntariness of clients' confessions; Internet investigative techniques; resources available when cases involve clients who have served in the military; and much more.

### Feting a "Rockstar," a Mentor, and an Activist

During the conference, three defenders were recognized for their work and dedication to clients and justice.

Described as "a rockstar appellate attorney and legal writer" as well as a dedicated up-and-coming trial lawyer, the kind of lawyer we need to keep in public defense, Angela Kelley received the 2013 Kevin M. Andersen Memorial Award created by the Genesee County Public Defender Office in 2004.

Ronald Valentine, a former Wayne County Public Defender who began in that job shortly after *Gideon v Wainwright* came down, received the Association's Wilfred R. O'Connor Award; V. Bruce Chambers, who nominated him, said that to Valentine, "the client was everything" and that Valentine "taught me that patience was one of the skills one needed to succeed at public defense, the patience to gain the trust of a client, the patience to negotiate with a prosecutor or judge who probably had a different view of the case, and the patience to develop the facts of the case for trial."

NYSDA's Service of Justice Award went to Albany attorney and activist Kathy Manley, for work that has not always been received well in the press. She was recognized for her dedication to full legal rights and protections for Muslim Americans, embodied in her representation and advocacy on behalf of Imam Yassin Aref, who remains convicted of money laundering and related arms dealing charges; her litigation and advocacy challenging undue limitations and restrictions on the ability of people convicted of sex offenses to live in society; and actions on behalf of many other marginalized or unpopular people and causes.

More information about Kelley, Valentine, and Manley is available online, in press releases on the ReadMedia Newswire. ⚖

**NYSDA's Annual Conference CLE presenters included Julie Cianca and John Bradley of the Monroe County Public Defender's Office, who offered insights, during the formal presentation and in response to questions afterward, about handling some of the most difficult cases defense lawyers face.**


**Computer expert Jerry Grant's presentation at the Annual Conference posed—then answered—many questions, including, for the less Internet savvy, "what is P2P and how does it work?"**

# Conferences & Seminars

**Sponsor:** National Association of Criminal Defense Lawyers
**Theme:** Defending the Modern Drug Case
**Dates:** November 21-22, 2013
**Place:** Las Vegas, NV
**Contact:** NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

**Sponsor:** New York State Association of Criminal Defense Lawyers
**Theme:** Weapons for the Firefight
**Date:** December 13, 2013
**Place:** Brooklyn Heights, NY
**Contact:** NYSACDL: tel (518) 443-2000; fax (888) 239-4665; website www.nysacdl.org

**Sponsor:** National Association of Criminal Defense Lawyers
**Theme:** Advanced Criminal Law: Winning Strategies for the Defense
**Dates:** January 12-17, 2014
**Place:** Aspen, CO
**Contact:** NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

**Sponsor:** **New York State Defenders Association**
**Theme:** **28th Annual Metropolitan Trainer**
**Date:** **March 22, 2014**
**Place:** **New York, NY**
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

**Sponsor:** **New York State Defenders Association**
**Theme:** **47th Annual Meeting & Conference**
**Dates:** **July 20-22, 2014**
**Place:** **Saratoga Springs, NY**
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org** ⚖

**Kathy Manley, of the Albany law firm Kindlon and Shanks, was the 2013 Service of Justice Award recipient in recognition of her important pro bono work and activism on behalf of people and causes too often marginalized, criticized, and even despised.**

**Ron Valentine, Former Wayne County Public Defender (r), received NYSDA's 2013 Wilfred O'Connor Award; he is shown with NYSDA President Ed Nowak, who presented the award.**

**Angela Kelley of the Albany County Public Defender Office received the 2013 Kevin M. Andersen Memorial Award.**

**New NYSDA Directors Cynthia Conti-Cook and Rick Greenberg exuded enthusiasm at the first Board meeting following their election.**

***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.**

**Misconduct (Judicial)**

**Matter of Alexander, 21 NY3d 1021, __ NYS2d __ (8/22/2013)**

"On the Court's own motion, it is determined that Honorable Robert E. Alexander is suspended, with pay, effective immediately, from the office of Justice of the Pembroke Town Court, Genesee County, pursuant to NY Constitution, article VI, § 22 and Judiciary Law § 44(8)."

[***Ed. Note:*** *The Court of Appeals extended the suspension on Sept. 17, 2013 (2013 NY Slip Op 05853).*]

**Prosecutors**

**Matter of Hoerger v Spota, 2013 NY Slip Op 05708 (8/22/2013)**

Because a county lacks "the power to regulate the number of terms the district attorney may serve," the order finding designating petitions valid is affirmed. "Permitting county legislators to impose term limits on the office of district attorney would have the potential to impair the independence of that office because it would empower a local legislative body to effectively end the tenure of an incumbent district attorney whose investigatory or prosecutorial actions were unpopular or contrary to the interests of county legislators."

**Dissent:** [Smith, J] Neither the state constitution nor state statutes prevent a county "from imposing a limit on the number of consecutive years that a district attorney may serve."

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

**People v Rodriguez, 21 NY3d 1030, __ NYS2d __ (8/27/2013)**

The defendant "failed to preserve his claim that he did not receive 20 days' notice prior to his sex offender designation proceeding as required under Correction Law § 168-n (3). His argument that an adjournment of unspecified duration was required as a matter of due process is similarly unreviewable."

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

**People v McFarlane, 21 NY3d 1034, __ NYS2d __ (8/29/2013)**

"[W]hether a defendant has consented to a search 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 this Court's further review …."

**Juries and Jury Trials (Deliberation)**

**People v Alcide, 2013 NY Slip Op 06598 (10/10/2013)**

Where two jury notes requesting readback of two witnesses' testimony were disclosed in open court before the judge responded to them; the judge explained exactly how the readbacks would be conducted, with the court and court reporter reading the questions and answers; and defense counsel did not object, no mode of proceedings error occurred. That the judge read questions put by the prosecutor, and then the prosecution witnesses' answers on cross-examination, did not rise to the level of fundamental error found in the cases cited by the defense, although as the Second Department observed, as a general matter judges should shun participation in readbacks.

**Witnesses (Cross Examination) (Experts)**

**People v Daryl H., 2013 NY Slip Op 06601 (10/10/2013)**

The Appellate Division properly concluded that defense challenges to certain court evidentiary rulings lacked merit. The doctor who interviewed the defendant after he assaulted another patient at the hospital psychiatric ward did not give opinion testimony on direct examination concerning the defendant's mental state, but elaborated on redirect after she testified on cross-examination that her recommendation that the defendant be arrested was based in part on her assessment of the defendant's capacity to understand his actions. The defense did

## NY Court of Appeals *continued*

not preserve with specificity its challenge to the court's refusal to allow cross-examination of the accuser's father about a lawsuit the father filed against the county that counsel alleged showed the father thought the hospital bore some responsibility for his son's injuries.

**Civil Practice**

**Narcotics (Drug Testing)**

**Probation and Conditional Discharge**

**Landon v Kroll Lab. Specialists, Inc., 2013 NY Slip Op 06597 (10/10/2013)**

The plaintiff's complaint against the defendant drug testing laboratory for alleged negligent testing of a saliva sample that resulted in efforts to revoke the plaintiff's probation for falsely claiming he had not used drugs or alcohol is sufficient to withstand the defendant's motion to dismiss for failure to state a cause of action. A duty to the plaintiff arose from the contract between the defendant and the county for biological testing and there are strong policy reasons for finding such a duty. Allegations of the plaintiff's loss of freedom when his probation was extended, and resulting emotional and psychological harm, constitute cognizable harm.

**Dissent:** [Pigott, J] The majority opinion defines duty too broadly. The plaintiff's primary complaint actually concerns what the Probation Department did with negative independent tests results. When the plaintiff sued the county, the county could have commenced a third party action against the defendant alleging contract breach.

**Dissent:** [Smith, J] Defamation law provides a remedy for claims that a plaintiff has been falsely reported to test positive for drugs; the plaintiff here did not plead a defamation claim, and the statute of limitations on such a claim had expired. Further, the common interest privilege protects the defendant.

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

**Juries and Jury Trials (Challenges)**

**People v Thompson, 2103 NY Slip Op 06599 (10/10/2013)**

Defense counsel's failure to peremptorily challenge a juror who was on a first-name basis with the prosecutor and occasionally socialized with him did not constitute ineffective assistance of counsel. Counsel's overall performance was competent; a verdict of manslaughter rather than murder in the face of the evidence "seems something of an achievement." Unconventional choices or acting on hunches does not establish ineffectiveness absent a showing that the actions impaired the fairness of the trial. While counsel's actions also deprived the defendant of an appellate challenge of the court's refusal to excuse the juror for cause, they did not constitute "'egregious and prejudicial' error" amounting to a denial of counsel.

**Evidence (Hearsay) (Uncharged Crimes)**

**Instructions to Jury (Cautionary Instructions)**

**People v Morris, 2013 NY Slip Op 06633 (10/15/2013)**

On the record here, the trial court did not abuse its discretion by allowing, with limiting instructions, the prosecution to introduce a recording of a 911 call, and police testimony about a resulting radio run, including the dispatcher's relay of the 911 caller's description of the person committing an uncharged gunpoint robbery and the officers' determination that the defendant seemed to match the description, as background information explaining police actions when they approached the defendant.

**Dissent:** [Rivera, J] "The majority's decision extends a limited exception for background and narrative evidence to the well established rule prohibiting admission of uncharged crimes." Where the defendant said he would not challenge the lawfulness of the police stop of him, there was no ambiguity to clarify with the 911 tape, which was powerful evidence of criminal propensity and danger to the community. "[T]he limiting instructions failed to cabin the jurors' consideration of the 911 evidence."

**Dissent:** [Smith, J] The 911 tape was inadmissible under the hearsay rule. "I find it impossible to believe that any jury, on the facts of this case, could limit its consideration of the tape to the non-hearsay purpose for which it was purportedly offered."

**Licenses and Permits**

**Weapons (Firearms)**

**Osterweil v Bartlett, 2013 NY Slip Op 06637 (10/15/2013)**

The following certified question is answered in the affirmative: "[W]hether an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere is eligible for a New York handgun license in the city or county where his part-time residence is located." As Penal Law 400(3)(a) does not preclude someone with a permanent domicile in another state and a part-time residence here from applying for a license, the constitutionality of a contrary law need not be determined.

## NY Court of Appeals *continued*

**Sentencing (Second Felony Offender)**

**People v Santiago, 2013 NY Slip Op 06635 (10/15/2013)**

Sentencing the defendant as a second felony offender in 2008, following his conviction for first-degree sexual abuse, based on a 1993 Pennsylvania conviction when the defendant was 15, was improper because the defendant could not have been prosecuted for the equivalent offense in New York due to his age. The issue is reviewed although unpreserved because the illegality is readily discernible from the trial record. That the Pennsylvania offense of third-degree murder and the New York offense of second-degree manslaughter have equivalent statutory elements is assumed but not determined on this appeal.

**Evidence (Hearsay)**

**People v Shabazz, 2013 NY Slip Op 06634 (10/15/2013)**

Where male codefendants and a female codefendant were stopped by police and charged with second-degree weapon possession after a loaded handgun was seen in a handbag near the rear seat where the woman had been seated, the court erred in ruling inadmissible testimony by the former attorney of one of the male codefendants that the woman said the gun was hers. The evidence shows that at the time she made the statement, which was prior to her separate trial at which she testified that the gun was not hers, the statement was against her penal interest.

**Dissent:** [Pigott, J] The court cannot be said to have abused its discretion in ruling the statement inadmissible on the ground that the defense did not establish the woman was unavailable to testify.

**Defenses (Intoxication)**

**Instructions to Jury (Intoxication)**

**People v Beaty, 2013 NY Slip Op 06728 (10/17/2013)**

The court did not err in denying the defense request for an intoxication charge. The defendant's bare assertions of his intoxication at the time of the charged rape and burglary, and the accuser's testimony that she smelled alcohol on the defendant's breath, did not constitute a sufficient basis for reasonable doubt, based on intoxication, as to the element of intent. The record showed purposeful conduct including cutting a hole in a screen to enter the house, telling the accuser to be quiet, covering the accuser's head with a blanket, and stealing her cell phone.

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

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

**People v Doll, 2013 NY Slip Op 06726 (10/17/2013)**

That the defendant was found covered in fresh wet blood while walking on a public road, gave inconsistent answers to reasonable police inquiries about the source of the blood, and refused to say if the blood was animal or human supported a reasonable belief that someone may have been seriously injured and required emergency assistance. The applicability of the emergency doctrine, a mixed question of law and fact, is beyond review here because this record evidence supports the findings of the lower courts that an emergency existed to justify questioning of the defendant in custody without *Miranda* warnings or after the right to counsel has attached.

Where a friend came to the police station and asked to speak to the defendant, and after being initially rebuffed was allowed to do so by an investigator who said he would be taking notes but would not participate in their conversation, the defendant's comments to his friend about getting what he deserved and being unable to say that someone wasn't dead were properly found voluntary and admitted at trial.

**Concurrence:** [Rivera, J] "[A]fter the emergency ended, the police continued to act in disregard of defendant's prior demands to speak with his lawyer and undermined his right to counsel." However, the defendant's comments to his friend cannot be said to be of a type that might have contributed to the conviction.

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

**Misconduct (Judicial)**

**People v Glynn, 2013 NY Slip Op 06730 (10/17/2013)**

Where the County Court judge informed the parties at a hearing that he may have represented or prosecuted the defendant in the past, continued to preside without objection, and rejected a later defense request that he recuse himself, saying that he did not recall prior representations of the defendant, who had been arrested 39 times and had many lawyers over time, that refusal was not error. The judge's comments about information from the presentence report concerning the defendant's character and background did not demonstrate bias or prejudice.

Any harm to the defendant from his original defense lawyer's unnecessary revelation to the court that the defendant had not been cooperative with counsel and comment that the court had been '"abundantly fair'" to the defendant was remedied by replacement of that lawyer. Alleged egregious comments and behavior by the

## NY Court of Appeals *continued*

defendant's second attorney, including verbal personal attacks on the judge that served no purpose or strategy, were made outside the jury's presence, and counsel otherwise provided meaningful representation. The defendant was not denied effective assistance of counsel.

**Dissent:** [Abdus-Salaam, J] The second defense attorney abandoned the defendant's interests at critical junctures in the case "to settle a longstanding personal dispute with the judge, and otherwise undermined his client's defense."

**Appeals and Writs (Counsel)**

**Counsel (Right to Counsel)**

**People v Kordish, 2013 NY Slip Op 06734 (10/17/2013)**

"[T]he Appellate Division erroneously failed to assign counsel to represent defendant before dismissing his first-tier appeal as of right based on his failure to timely perfect it." Despite a rule mandating automatic dismissal of untimely perfected appeals, the decision to dismiss remained a discretionary determination on the merits of a threshold issue, not an automatic bar. The defendant was entitled to a lawyer to enable him to contest the court's motion to dismiss his appeal.

**Accomplices (Corroboration)**

**People v Rodriguez, 2013 NY Slip Op 06733 (10/17/2013)**

The evidence corroborating the testimony of the defendant's accomplices was insufficient under *People v Hudson* (51 NY2d 233 [1980]). While *Hudson* was later overruled by *People v Reome* (15 NY3d 188 [2010]), the prosecution failed to object to jury instructions setting forth the more demanding *Hudson* test, and therefore accepted that test.

**Assault (Evidence)**

**Evidence (Sufficiency)**

**Homicide (Manslaughter [Evidence] [Vehicular])**

**People v Asaro, 2013 NY Slip Op 06805 (10/22/2013)**

In this second-degree manslaughter and assault case, there was sufficient evidence that the defendant acted recklessly, by consciously disregarding the risk he created, rather than negligently, by failing to perceive the risk, where the testimony showed that the defendant was familiar with the curve in the road where the car crash occurred having driven on that section of the road a number of times and, on the day of the crash, having two people warn him about speeding in that section, and despite that, the defendant stopped his car, revved the engine, shifted into gear, and then accelerated to a high rate of speed while heading into the curve before crossing the double line and hitting another car head-on.

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

**Search and Seizure (Arrest/Scene of the Crime Searches) (Motions to Suppress [CPL Article 710])**

**People v Clermont, 2013 NY Slip Op 06806 (10/22/2013)**

The defendant received ineffective assistance of counsel in connection with the suppression motion and hearing where, in the written motion, counsel incorrectly stated that the defendant was involved in a motor vehicle stop, not a street encounter; at the hearing, counsel did not marshal the facts or make a legal argument; counsel did not submit a post-hearing memorandum or provide the court with a legal rationale for granting suppression; and failed to move to reargue or otherwise correct the apparent factual errors in the decision denying suppression. Before the hearing, counsel asked to be relieved because his associate had quit, he was overwhelmed with work, and could not competently represent the defendant, but the court required counsel to complete the hearing before relieving him and assigning new counsel. Counsel's many errors substantially undermine "our confidence in the fairness of the proceeding …." The merits of the suppression claim, a close issue, need not be addressed to decide the claim of ineffectiveness; the matter is remitted for further proceedings on the suppression motion.

**Dissent:** [Rivera, J] Defense counsel was ineffective; the indictment should be dismissed because the record establishes that, as a matter of law, suppression of the evidence on which the defendant was convicted is warranted where the sole witness at the hearing, the arresting officer, testified that he: saw the defendant and another man walking in a "gang location"; observed the defendant constantly adjusting the his right waistband area; showed the defendant his shield and identified himself, whereupon the defendant ran away; ran after him and saw the defendant take a gun from his waistband and throw it on the ground; and arrested the defendant and then retrieved the gun.

**Evidence (Relevancy)**

**Sex Offenses (Civil Commitment)**

**Witnesses (Experts)**

**Matter of State of New York v Enrique D., 2013 NY Slip Op 06807 (10/22/2013)**

## NY Court of Appeals *continued*

The respondent is entitled to a new trial in this Mental Hygiene Law (MHL) article 10 proceeding where the court abused its discretion in denying the respondent's request to call a former girlfriend to testify about whether the respondent ever committed a sexual offense against her or crossed any sexual boundaries with her, which was relevant to the petitioner's expert's diagnosis of paraphilia NOS—non-consent and opinion that the respondent could not control himself; the testimony would have addressed whether the respondent had a longstanding fixation on non-consenting women and whether he had difficulty controlling his sexual behavior. The court stated that the respondent's expert could testify about any information the girlfriend had provided that the expert relied on in reaching a diagnosis and opinion. However, MHL 10.08(g) does not limit a respondent to expert witnesses; a witness, expert or lay, may testify about material and relevant evidence concerning an issue to be resolved.

## First Department

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**Appeals and Writs (Waiver of Right to Appeal)**

**People v Oquendo, 105 AD3d 447, 963 NYS2d 71 (1st Dept 4/4/2013)**

The defendant's appeal waiver was invalid where the court's only statement about it was that the waiver was part of the sentence. Although the defendant signed a written appeal waiver, that is not a complete substitute for an on-the-record demonstration that the waiver was knowing, intelligent, and voluntary. "We again remind the courts that the better practice is to secure a written waiver, along with a thorough colloquy to ensure the defendant's understanding of its contents …. It would be best if the court made clear that this is a separate and important right being waived, and that by signing the waiver, the plea and sentence are final, and the defendant agrees to accept the sentence imposed. The court cannot rely solely on defense counsel to explain the significance of the written waiver." (Supreme Ct, Bronx Co)

**Guilty Pleas (Vacatur)**

**Sentencing**

**People v Seck, 105 AD3d 502, 963 NYS2d 191 (1st Dept 4/11/2013)**

The court properly exercised its discretion in vacating the defendant's original plea, taken before a justice who only briefly presided over the case after the initial judge rejected youthful offender treatment; the defendant's participation in a rehabilitation program between plea and sentencing does not constitute "the type of detrimental reliance that would entitle him to specific performance of the original plea bargain as a matter of fairness …." (Supreme Ct, New York Co)

**Juveniles (Support Proceedings)**

**Rubin v Della Salla, 107 AD3d 60, 964 NYS2d 41 (1st Dept 4/18/2013)**

"We conclude that based on the plain language of the Child Support Standards Act [CSSA], its legislative history, and its interpretation by the Court of Appeals, a custodial parent who has the child a majority of the time cannot be directed to pay child support to a noncustodial parent." The court does not have discretion to alter the CSSA methodology based on the mother's financial need where the father is the custodial parent. (Supreme Ct, New York Co)

**Dissent in Part:** The CSSA should not be strictly applied in a rare case like this one where the statute's arithmetic formula "forces the child to bear the economic burden of his parents' decisions, even where, as here, the child, whose father is a millionaire, is in danger of living in poverty, solely to preserve uniformity and predictability in child support awards."

**Evidence (Prejudicial) (Relevancy)**

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

**People v Bartholomew, 105 AD3d 613, 963 NYS2d 630 (1st Dept 4/23/2013)**

In this promoting prison contraband case involving a knife, the court erred in allowing the prosecution to introduce through cross-examination of the defendant irrelevant and prejudicial evidence that had no bearing on the defendant's credibility, including times when she was unemployed and on public assistance and the criminal history and gang membership of the defendant's boyfriend, who she was visiting in jail. The prosecution did not need to introduce the evidence about the boyfriend to establish that the knife constituted dangerous contraband. And the defendant's receipt of public assistance is irrelevant and "cannot constitute a 'prior bad act' for purposes of cross-examination …." A new trial is required. (Supreme Ct, New York Co)

## First Department *continued*

**Dissent:** The rulings on the scope of the prosecution's cross-examination of the defendant, even assuming they were actually erroneous, are harmless.

**Sentencing (Second Violent Felony Offender)**

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

**People v Franco, 106 AD3d 417, 963 NYS2d 865 (1st Dept 5/2/2013)**

Although risk factor 9 of the Sex Offender Registration Act (SORA) Risk Assessment Guidelines and Commentary relies on the definition of "violent felony" in Penal Law 70.02(1), the sequentiality requirement in the recidivist sentencing statutes in Penal Law article 70 does not apply because SORA registration is not a criminal sentence. (Supreme Ct, New York Co)

**Narcotics (Penalties)**

**Sentencing (Second Felony Offender)**

**People v Lynes, 106 AD3d 433, 963 NYS2d 873 (1st Dept 5/2/2013)**

The court erred in adjudicating the defendant a second felony drug offender with a prior violent felony conviction where the prior conviction for second-degree murder does not constitute a violent felony offense under Penal Law 70.70(1), and the court will not rewrite the statute. On remand, the prosecution can allege a different prior felony or violent felony conviction. (Supreme Ct, New York Co)

**Bail and Recognizance (Appeal)**

**Habeas Corpus (State)**

**People ex rel Watters v Warden, 106 AD3d 415, 963 NYS2d 864 (1st Dept 5/2/2013)**

The court erred when, acting as a habeas court to review another court's bail determination, it "made no express or implied finding that the bail court abused its discretion, and instead engaged in an improper de novo interpretation of bail conditions." (Supreme Ct, Bronx Co)

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

**People v Ascher, 106 AD3d 448, 965 NYS2d 54 (1st Dept 5/7/2013)**

It is appropriate for the court to reevaluate the defendant's Sex Offender Registration Act risk level in light of the Board of Examiners of Sex Offenders' June 1, 2012 position statement regarding child pornography cases, which notes that "scoring every child pornography case for a stranger relationship produces an anomalous result because the majority of offenders convicted of child pornography offenses will be scored the same even though there are vast differences among these types of offenders." The position statement was also intended to address the concerns in *People v Johnson* (11 NY3d 416) and to give a more accurate determination of an individual's risk of recidivism and public safety threat. (Supreme Ct, New York Co)

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

**People v Barnes, 106 AD3d 600, 965 NYS2d 488 (1st Dept 5/23/2013)**

In this controlled substance case, the defendant received ineffective assistance of counsel where his attorney argued that the bags recovered from his client did not match the bags purchased by the undercover officer, which was the heart of the defense, and encouraged the jury to compare the bags for themselves without having taken steps to confirm that the bags were actually different. This is a rare case in which ineffective assistance of counsel can be raised on a direct appeal because it is clear on the record that the only reason counsel made this argument was that he did not have a chance to compare the two sets of bags and he would not have made the argument if he knew that the bags matched. "This self-sabotage of counsel's defense strategy, albeit inadvertent, was inherently unreasonable and prejudiced defendant's right to a fair trial under New York law …." (Supreme Ct, New York Co)

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

**Lesser and Included Offenses (Instructions)**

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

**People v Malave, 106 AD3d 657, 966 NYS2d 74 (1st Dept 5/30/2013)**

The court did not have to appoint new counsel in connection with the defendant's pro se motion to set aside the verdict because the defendant's right to conflict-free counsel was not violated where the defendant's attorney generally adopted the motion, but conceded that there was no merit to the portion that asserted that the court should have submitted third-degree sex abuse as a lesser included offense, because there was no prejudice to the defendant and a change of attorneys would not have made a difference. "Since counsel did not request a submission of a lesser included offense prior to jury deliberations, 'the

## First Department *continued*

court's failure to submit such offense does not constitute error,'" an unpreserved error cannot be raised in a CPL 330.30 motion, and if the defendant is alleging ineffective assistance of counsel, it cannot be raised in such a motion as it involves matters of strategy outside the record.

When assessing the defendant's risk level, the court properly assessed points for failure to genuinely accept responsibility where, although he participated in sex offender treatment while incarcerated, the defendant's trial testimony and statements to probation constituted denials of the underlying conduct. (Supreme Ct, New York Co)

**Double Jeopardy (Punishment)**

**Sentencing (Ex Post Facto Punishment)**

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

**People v Parilla, 109 AD3d 20, 970 NYS2d 497 (1st Dept 5/30/2013)**

The amendments to the Sex Offender Registration Act (SORA) since 1996, which imposed more stringent registration and notice requirements, have not rendered it a punitive statute; therefore, retroactive application of SORA to the defendant does not violate the Ex Post Facto Clause or double jeopardy protections under the state and federal constitutions. The amendments the defendant relies on were intended to improve the "strength, efficiency and effectiveness of SORA as a civil statute," not to punish sex offenders. "Although lifetime registration and Internet notification may have deterrent effects and promote community condemnation of offenders, they serve a valid regulatory function by providing the public with information related to community safety."

The court erred in assessing 10 points for the victim of an earlier offense for which 30 points was already assessed for a prior violent sex offense, and also erred in assessing 20 points for the age of one of the victims where the grand jury testimony of the other victim did not indicate how she knew the victim's age, which she equivocally said was "about 16." (Supreme Ct, Bronx Co)

## Second Department

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

**Evidence (Hearsay)**

**People v Li, 104 AD3d 704, 960 NYS2d 215 (2nd Dept 3/6/2013)**

A statement made by arraignment counsel as part of an argument for lower bail was not admissible into evidence as a present sense impression; the record shows it was made after time to reflect and that counsel was describing events in the past, not events she observed as they occurred. (Supreme Ct, Kings Co)

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

**Matter of Savoca v Bellofatto, 104 AD3d 695, 960 NYS2d 212 (2nd Dept 3/6/2013)**

The appellant respondent father was effectively denied his statutory right to counsel in this custody matter where the court, while acknowledging at the beginning of the proceeding that the father's lawyer had sought an adjournment "'to at least consider whether she want[ed] to continue representing'" him, proceeded without advising the father of his right to an attorney or of his right to an adjournment to obtain new counsel. While a lawyer from the office of the father's attorney was present, "she did not appear to be representing the father."

While language in the order is to the effect that a hearing was held, none occurred, and the court "did not conduct an examination of the parties or obtain a forensic report from an expert"; the grant of custody to the mother was not shown to be an informed determination consistent with the child's best interests. (Family Ct, Suffolk Co)

**Misconduct (Judicial)**

**People v Facey, 104 AD3d 788, 960 NYS2d 490 (2nd Dept 3/13/2013)**

The defendant's unpreserved contention, reviewed in the interest of justice, that the court's participation in reading back certain trial testimony was error, is correct. "We take this opportunity to emphasize" that a judge assuming a role of witness or lawyer in the readback of testimony may convey an alignment of the judge with the role assumed. However, the error here was harmless. (Supreme Ct, Kings Co)

**Juveniles (Neglect)**

**Matter of Kayden H., 104 AD3d 764, 961 NYS2d 252 (2nd Dept 3/13/2013)**

The neglect petition against the mother and grandmother should have been dismissed even though neglect was shown in that they briefly left the child unattended in a sink where the child was burned when the temperature of the water spiked. After this isolated incident the mother completed programing required of her, the grandmother

## Second Department *continued*

attended parenting class though not requested to do so, they took steps to ensure the child was not left unattended again, and water pipes in the building were replaced to end temperature fluctuation. (Family Ct, Kings Co)

**Concurrence in Part, Dissent in Part:** The incident occurred due to lack of common sense, not lack of training; the court's responsibility to the child would be best fulfilled by an order of supervision.

**Burglary (Elements) (Evidence)**

**Due Process (Fair Trial)**

**Evidence (Sufficiency)**

**Menacing (Elements) (Evidence)**

**People v Morillo, 104 AD3d 792, 960 NYS2d 224 (2nd Dept 3/13/2013)**

Conviction on the counts of first-degree burglary and second-degree menacing must be vacated and those counts dismissed where, as the prosecution concedes, "the evidence that the defendant displayed a taser or stun gun was legally insufficient to establish the 'dangerous instrument' element" of these two crimes.

Where the defendant wore shackles hidden by black bunting throughout trial, and no bunting appeared at the prosecution table, it cannot be said the jury did not infer the bunting hid shackles, and the court did not articulate an adequate justification for the shackling. However, the error was harmless. (County Ct, Suffolk Co)

**Family Court**

**Jurisdiction (Subject Matter)**

**Juveniles (Support Proceedings)**

**Matter of O'Dell v O'Dell, 104 AD3d 770, 961 NYS2d 481 (2nd Dept 3/13/2013)**

"Family Court had jurisdiction to consider and determine the father's petition for a downward modification of his maintenance and child support obligations as set forth in the parties' judgment of divorce" where the judgment, which provided for concurrent jurisdiction of the Supreme and Family Courts as to provisions capable of specific performance, was silent as to jurisdiction over modifications. The mother's objections to an order granting the downward modification were improperly granted. (Family Ct, Suffolk Co)

**Instructions to Jury**

**People v Brown, 104 AD3d 864, 961 NYS2d 293 (2nd Dept 3/20/2013)**

At the defendant's trial relating to a loaded firearm and marijuana found, along with a Virginia concealed weapons permit, in the minivan he was driving, the court rejected a prosecution request to take judicial notice, and instruct the jury, that a Virginia gun permit is not valid in New York, but allowed the prosecutor to comment during summation on the permit's invalidity. This surrender of the court's "nondelegable judicial responsibility" to instruct the jury requires reversal. (Supreme Ct, Kings Co)

**Due Process (Fair Trial)**

**Endangering the Welfare of a Child**

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

**People v Fisher, 104 AD3d 868, 963 NYS2d 122 (2nd Dept 3/20/2013)**

There must be a new trial as to count six because cumulative errors denied the defendant a fair trial. These included rulings that: a question by defense counsel opened the door to cross-examination about comments the defendant allegedly made in 1996, despite a *Sandoval* ruling that a very similar question would not open the door; the defense could not ask an accuser about her statements indicating she had sex with the defendant's brother, where the defense asserted calls and messages were made by the brother using the defendant's phone; and the defense could not present character witnesses.

The conviction as to count five, endangering the welfare of a child, was against the weight of the evidence. (Supreme Ct, Kings Co)

**Juveniles (Neglect)**

**Matter of Mylasia P., 104 AD3d 856, 961 NYS2d 531 (2nd Dept 3/20/2013)**

"The petitioner was not barred from commencing and maintaining the instant Family Court Act article 10 proceeding against the mother based on the same set of facts contained in a report deemed unfounded and sealed by the New York State Office of Children and Family Services …." (Family Ct, Westchester Co)

**Evidence (Weight)**

**Sex Offenses (Elements)**

**People v Ross, 104 AD3d 878, 961 NYS2d 299 (2nd Dept 3/20/2013)**

The conviction of first-degree criminal sexual act was against the weight of the evidence, as the prosecution failed to prove anal sexual conduct by forcible compul-

## Second Department *continued*

sion where the accuser said the defendant repeatedly ordered her to put his penis in or on her vagina, but she instead twice put it on her anus before finally complying. (Supreme Ct, Kings Co)

**Counsel (*Anders* Brief)**

**People v Heller, 104 AD3d 922, 961 NYS2d 583 (2nd Dept 3/27/2013)**

In this appeal from an order designating the defendant "a level three sex offender, a sexually violent felony offender, and a predicate sex offender pursuant to the Sex Offender Registration Act" (SORA), the *Anders* brief filed by appellate counsel lacks "an adequate statement of facts," does not discuss applications made by defense counsel at the SORA hearing, "and fails to analyze potential appellate issues or highlight facts in the record that might arguably support the appeal...." New counsel is appointed. (County Ct, Suffolk Co)

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

**Matter of Lew v Lew, 104 AD3d 946, 961 NYS2d 579 (2nd Dept 3/27/2013)**

Denial of meaningful visitation "is so drastic that it must be based on substantial evidence that visitation would be detrimental to" the child's welfare, and the court erred in dismissing without a hearing the father's petition to enforce the supervised visitation provisions in the judgment of divorce, where the court lacked adequate relevant information to determine that visitation was not in the child's best interests. The court also erred in determining that the father could file no further petitions regarding his visitation rights before completing programming required by the court. (Family Ct, Nassau Co)

**Evidence (Hearsay)**

**People v Andujar, 105 AD3d 756, 963 NYS2d 667 (2nd Dept 4/3/2013)**

As the prosecution concedes, the court erred by allowing, over objection, testimony about a nontestifying codefendant's statement that the defendant was in his vehicle on the night of the incident; compounding the error, the prosecutor argued in summation that this testimony established the defendant's presence at the scene. The error was not harmless as other evidence identifying the defendant as one of the assailants was not overwhelming. The defendant having been convicted of a lesser included offense of the second-degree murder count and acquitted on other charges, the indictment must be dismissed without prejudice to appropriate charges being represented to the grand jury. (Supreme Ct, Queens Co)

**Confessions (Interrogation)**

**Due Process (Fair Trial)**

**Evidence (Hearsay)**

**People v Jin Cheng Lin, 105 AD3d 761, 963 NYS2d 131 (2nd Dept 4/3/2013)**

Precluding the defense from introducing a videotaped interview by an assistant prosecutor for the purported purpose of showing the defendant's appearance and demeanor after several days of interrogation was not error, as his physical appearance had no relevance to a material issue. The offer to let the jury view a still photograph taken from the tape provided a meaningful method to show the defendant's appearance on the date in question. (Supreme Ct, Queens Co)

**Dissent:** The defendant's statements to law enforcement should have been suppressed, and he was deprived of his right to present a defense and denied a fair trial. Nearly four days of interrogation must have led the defendant to feel police had "'all the time in the world' to question him...." Precluding introduction of the videotape was error; it was not hearsay offered to prove the truth of any statements made. A defendant may challenge at trial the voluntariness of a statement that a court has not suppressed.

[***Ed. Note:*** *Leave to appeal was granted on June 13, 2013 (21 NY3d 1012).*]

**Contempt**

**Juveniles (Custody)**

**Matter of Smith v De Paz, 105 AD3d 749, 962 NYS2d 631 (2nd Dept 4/3/2013)**

Where the court ordered the parents in this custody dispute to submit to hair follicle testing, and in response to the mother's request that the father be directed not to cut his hair until the testing was done, the court said that the person doing the test would find a hair somewhere on the father's body to test, there was no order saying the father should not shave his body hair; holding him in contempt for doing so was error. (Family Ct, Nassau Co)

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

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

## Second Department *continued*

**People v Taylor, 105 AD3d 778, 961 NYS2d 788 (2nd Dept 4/3/2013)**

The court misstated the law as to waiving an appeal by advising the defendant that if he went to trial and lost he would have the right to appeal "'to determine *if any improprieties took place during the trial*'" [emphasis in opinion], suggesting that the right is limited to trial errors. While the waiver was invalid, the defendant's sentence was not excessive. (Supreme Ct, Nassau Co)

**Burglary (Elements)**

**Evidence (Sufficiency)**

**People v Woodson, 105 AD3d 782, 962 NYS2d 629 (2nd Dept 4/3/2013)**

The court erred in finding that the evidence presented to the grand jury as to first- and second-degree burglary was legally insufficient to establish that the defendant knowingly entered or remained unlawfully in a dwelling where he allegedly physically attacked the accuser as she stood in the doorway of her apartment. (Supreme Ct, Nassau Co)

**Juveniles (Visitation)**

**Matter of Pinsky v Botnick, 105 AD3d 852, 962 NYS2d 668 (2nd Dept 4/10/2013)**

The court improvidently exercised its discretion by granting the grandmother's petition for visitation, which she had automatic standing to seek following the death of her son, the children's father, where the evidence showed that visitation was not in the children's best interests at the time. The grandmother first began demanding access to the children while efforts were being made to resuscitate their father, invoking legal proceedings even though the mother offered some visitation; expert and other testimony indicated the children were adversely affected by the grandmother's actions. (Family Ct, Nassau Co)

**Juveniles (Custody) (Hearings)**

**Matter of Schyberg v Peterson, 105 AD3d 857, 962 NYS2d 671 (2nd Dept 4/10/2013)**

Where the court became involved in this proceeding, in which a custody and parenting agreement had been reached, only after the prior judge retired, the court erred in denying the father's petition for sole custody and sua sponte awarding sole physical custody to the mother, without a hearing. The recommendations of an expert, such as those that were available to the court, are not determinative. (Family Ct, Westchester Co)

**Narcotics (Penalties)**

**Sentencing (Resentencing)**

**People v Allen, 105 AD3d 969, 963 NYS2d 335 (2nd Dept 4/17/2013)**

Denial without a hearing of the defendant's motion under CPL 440.46 for resentencing on his third-degree drug sale conviction was error where the defendant was not brought before the court nor is there any indication that he effectively relinquished that right, and, as the prosecution concedes, the defendant met the statutory requirements for relief. (County Ct, Suffolk Co)

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

**People v Cioffi, 105 AD3d 971, 963 NYS2d 317 (2nd Dept 4/17/2013)**

"[T]he trial court's failure to instruct the jury that the statutory presumption contained in Lien Law § 79-a is permissive violated the defendants' constitutional rights to due process" and reversal is granted on this unpreserved issue in the exercise of the interest of justice jurisdiction. (County Ct, Rockland Co)

**Juveniles (Support Proceedings)**

**Matter of Gowda v Reddy, 105 AD3d 957, 963 NYS2d 353 (2nd Dept 4/17/2013)**

The Suffolk County, New York, court had jurisdiction to modify a Pennsylvania (PA) child support order as none of the parties live in PA, the petitioner mother does not live in New York, and the respondent father was subject to personal jurisdiction in Suffolk County at all relevant times. The father's objection to the part of the order issued in 2011 that calculated his arrears from Jan. 20, 2005 through May 26, 2009, the date on which the support order was registered in Suffolk County, should have been granted. The arrears must be recalculated only as to the period from Aug. 6, 2008, the date on which the mother's petition to modify the obligation, filed in PA, was dismissed with prejudice, through May 26, 2009. (Family Ct, Suffolk Co)

**Article 78 Proceedings**

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

**Matter of Smith v Brown, 105 AD3d 965, 962 NYS2d 713 (2nd Dept 4/17/2013)**

## Second Department *continued*

Where one juror on a deliberating panel was discharged after revealing that an attorney friend had said the only issue the jury should focus on was whether they believed there had been a gun in the car, and the court declared a mistrial over repeated defense objection without conducting an inquiry of the entire panel after the prosecution refused to consent to going forward with the remaining jurors, relief in the nature of prohibition is granted.

This Article 78 proceeding is not time-barred, although it was brought more than four months after the mistrial, because the harm—violation of double jeopardy protection—is ongoing and continuous.

**Counsel (Right to Counsel)**

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

**Motions (Suppression)**

**People v Washington, 107 AD3d 4, 964 NYS2d 176 (2nd Dept 4/17/2013)**

Where police knew that an attorney retained by the defendant's family had appeared in the matter before a chemical breath test to which the defendant consented began, and the prosecution did not show that notifying the defendant of the attorney's appearance would interfere with timely administration of the test, the court properly suppressed the results of the test because police did not make a reasonable effort to notify the defendant of counsel's appearance. (Supreme Ct, Nassau Co)

**Dissent:** The majority's opinion "goes too far in expanding the previously established limited right to counsel to assist the defendant in determining whether to exercise the qualified statutory right to refuse a chemical test under Vehicle and Traffic Law § 1194."

[***Ed. Note:*** *Leave to appeal was granted on June 19, 2013 (21 NY3d 1012).*]

**Juveniles (Support Proceedings)**

**Matter of Anderson v Pappalardo, 105 AD3d 1043, 963 NYS2d 595 (2nd Dept 4/24/2013)**

Where the mother had appeared only twice, and briefly, before the support magistrate, the record is silent as to any directives given to the mother about the financial disclosure affidavit that she failed to complete or other documents she must provide to show she was unable to work full time, and the support magistrate did not advise the mother that failure to provide the completed affidavit would result in an award of support based on the child's needs rather than the mother's income, awarding support based solely on the child's needs was error. (Family Ct, Richmond Co)

**Juries and Jury Trials (Deliberation)**

**People v Fenton, 105 AD3d 1057, 963 NYS2d 709 (2nd Dept 4/24/2013)**

The court committed a mode of proceedings error, which need not be preserved and which requires reversal, by failing to fulfill its core responsibilities under CPL 310.30. The prosecution's motion to resettle the record would not provide an appropriate remedy, and in any event, "showing that the contents of the jury notes were revealed to and discussed with counsel off the record" would not satisfy the requirements that written jury communications be read into the record in counsel's presence and that counsel be given "a full opportunity to suggest appropriate responses …." [Internal quotation marks omitted.] (Supreme Ct, Queens Co)

**Jurisdiction (Subject Matter)**

**Juveniles (Custody) (Jurisdiction)**

**Matter of Milagro T. v Manyolin G.P., 105 AD3d 1052, 963 NYS2d 590 (2nd Dept 4/24/2013)**

Where there was no competent proof of an existing child custody determination by a court in another state, and where the court did not consider whether it would be appropriate to exercise its statutory temporary emergency jurisdiction if such custody determination existed, the court erred by sua sponte dismissing the guardianship petition for lack of subject matter jurisdiction. (Family Ct, Nassau Co)

**Juveniles (Custody) (Visitation)**

**Matter of Tracy A.G. v Undine J., 105 AD3d 1046, 963 NYS2d 383 (2nd Dept 4/24/2013)**

Where the mother showed that she could not meet the family's expenses in this state, the father failed to make regular child support payments, and if she relocated to Florida, she would accept a job offer in her field and receive financial assistance from family members, she established that relocation was in the children's best interests. The desires of the children, though properly considered, do not control. (Family Ct, Kings Co)

**Assault (Evidence)**

**Evidence (Sufficiency)**

## Second Department *continued*

**People v Boley, 106 AD3d 753, 963 NYS2d 726 (2nd Dept 5/1/2013)**

There was insufficient evidence that the accuser sustained a "physical injury" as required for third-degree assault where he testified to sustaining "bruising and scraping to his right arm, neck, and back" but provided no details corroborating his subjective description of pain, took no pain medication, sought no medical treatment, and missed no work. (Supreme Ct, Kings Co)

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

**Sentencing (Enhancement) (Second Felony Offender)**

**People v Puca, 106 AD3d 758, 963 NYS2d 734 (2nd Dept 5/1/2013)**

The court adjudicated the defendant a second felony offender without any showing of compliance with the statutorily-required procedures or indication that the defendant had notice and an opportunity to be heard; the matter is remitted for resentencing on the basis of this unpreserved issue, reviewed in the interest of justice. The claim that the defendant's plea should be vacated because the court did not inquire, before imposing the enhanced sentence, as to any legitimate basis for the defendant's post-plea arrest lacks merit, but if the arrest's validity is challenged on remitter, an inquiry should be conducted and a determination made as to the arrest's validity, and the defendant sentenced thereafter. (County Ct, Suffolk Co)

**Juveniles (Custody) (Hearings)**

**Matter of Stramezzi v Scozzari, 106 AD3d 748, 964 NYS2d 585 (2nd Dept 5/1/2013)**

In the absence of in camera interviews with the subject children, there is insufficient record evidence to make a fully informed determination of the best interests of the children in awarding custody where they "are old enough to provide insight as to their interaction with each parent, and the impact of separating them from their older half-brother, who resides with the mother and with whom they have a close relationship." Their preference, while not determinative, could be indicative of their best interests. (Family Ct, Nassau Co)

**Lesser and Included Offenses**

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

**Unlawful Imprisonment**

**People v McFarlane, 106 AD3d 836, 964 NYS2d 626 (2nd Dept 5/8/2013)**

Review in the interest of justice of the unpreserved contention that the defendant's second-degree unlawful imprisonment conviction should be vacated pursuant to the merger doctrine indicates that the merger doctrine applies. The defendant was convicted of second-degree robbery and the restraint of the accuser "was essentially incidental to and inseparable from the robbery …." (Supreme Ct, Queens Co)

**Arrest (Warrantless)**

**Probation and Conditional Discharge**

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

**People v Miranda-Hernandez, 106 AD3d 838, 964 NYS2d 638 (2nd Dept 5/8/2013)**

The evidence found in the defendant's wallet and in the car he had occupied at the time of arrest should have been suppressed as the arresting detective lacked authority to arrest based on information that there was an out-of-state probation violation warrant for the defendant. The detective failed to obtain a warrant from a local court, and the statute allowing warrantless arrests refers to reasonable information that a person is charged in another state with a crime carrying certain punishment; a probation violation is not a crime. (Supreme Ct, Queens Co)

**Juveniles (Custody) (Hearings) (Visitation)**

**Nusbaum v Nusbaum, 106 AD3d 791, 964 NYS2d 628 (2nd Dept 5/8/2013)**

The father made the showing necessary to entitle him to a hearing on the branches of his motion to modify the stipulation of settlement as to custody where he alleged that the mother had operated a motor vehicle while impaired, and the record does not show that the court had adequate relevant information on which to make an informed and provident determination as to the children's best interests without a hearing. Pending a hearing and determination on those branches of the father's motion in which he seeks sole legal custody and suspension of the mother's unsupervised visits, visitation by the mother shall be set at two-hour visits on two days per week, and the mother is not to operate a motor vehicle with the children as passengers. (Supreme Ct, Westchester Co)

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

**Matter of Skyler C., 106 AD3d 816, 964 NYS2d 616 (2nd Dept 5/8/2013)**

## Second Department *continued*

Contrary to the mother's contention in this derivative neglect proceeding, the court properly found that the Administration for Children's Services (ACS) established that the mother's parental rights as to a sibling of the subject child were terminated "involuntarily" and that given this enumerated circumstance, ACS should be relieved of its obligation to make reasonable efforts to reunite the mother and child. As the other Appellate Division departments have previously held, Family Court Act 1039-b does not place the burden on ACS to establish the inapplicability of the exception to the rule that if an enumerated circumstance exists, the agency need not make reasonable efforts, and the mother failed to prove that such efforts should still be required here. (Family Ct, Queens Co)

**Evidence (Business Records) (Hearsay)**

**Juveniles (Family Offenses)**

**Matter of Chu Man Woo v Qiong Yun Xi, 106 AD3d 818, 964 NYS2d 647 (2nd Dept 5/8/2013)**

The court erred by considering police reports related to the alleged family offenses given the lack of information as to the source of the information therein and whether the officer was under a business duty to make it or whether any other hearsay exception would apply. Contrary to the court's determination, the petitioner showed that the respondent committed second-degree harassment where credible evidence established that the respondent engaged in behavior such as throwing cups and other objects at the petitioner on at least two occasions that had no legitimate purpose and served to "'alarm or seriously annoy'" the petitioner. (Family Ct, Kings Co)

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

**People v Garrett, 106 AD3d 929, 964 NYS2d 652 (2nd Dept 5/15/2013)**

The court erred by denying without a hearing the defendant's CPL 440.10 motion alleging that the prosecution failed to fulfill its *Brady* obligations by not disclosing that the police officer who took the defendant's statement, which the defendant said was involuntary because he was assaulted, had been named in a civil suit by another for physical assault during interrogation. This allegedly suppressed evidence was clearly *Brady* material, nondisclosure may have denied the defendant a possible investigation leading to impeaching or exculpatory evidence, and there is "a 'reasonable probability' that disclosure" would have changed the outcome. A hearing must be held to determine if the prosecution had sufficient knowledge of the lawsuit to trigger its *Brady* duty. (Supreme Ct, Suffolk Co)

[***Ed. Note:*** *Leave to appeal was granted on Aug. 19, 2013 (2013 NY Slip Op 98406[U]).*]

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

**People v Larmond, 106 AD3d 934, 964 NYS2d 661 (2nd Dept 5/15/2013)**

That three men were standing in the roadway on a dead-end street, talking and making hand gestures at 6:00 p.m., did not constitute a sufficient basis for officers to approach and ask for information. The court properly granted suppression of physical evidence and the defendant's statement obtained during the encounter. (Supreme Ct, Queens Co)

**Double Jeopardy (Mistrial)**

**Trial (Mistrial)**

**Matter of Gorman v Rice, 106 AD3d 1000, 965 NYS2d 601 (2nd Dept 5/22/2013)**

The court below erred in dismissing the action against the petitioner and barring prosecution on the charges therein on the basis of double jeopardy where a mistrial was declared midtrial but was then rescinded before the jury was discharged and a mistrial was then declared on the petitioner's consent. The determination that the court did not retain the discretion to rescind its initial mistrial declaration prior to discharge of the jury was error. (Supreme Ct, Nassau Co)

[***Ed. Note:*** *On Oct. 22, 2013, the Court of Appeals denied leave to appeal as unnecessary and granted a motion to stay (2013 NY Slip Op 88886).*]

**Evidence (Weight)**

**Narcotics (Cocaine) (Evidence) (Sale)**

**People v McFadden, 106 AD3d 1020, 965 NYS2d 582 (2nd Dept 5/22/2013)**

While the defendant's acquittal on third-degree sale of drugs does not necessarily render his conviction of third-degree possession of drugs against the weight of the evidence, the record is devoid of evidence of an intent to sell other than the testimony of police officers that they saw an exchange of something between the defendant and another person, which was apparently rejected by the jury. The defendant was found in possession of four packets of "Seal" cocaine and a $20 bill; the other person was found to possess marijuana and one packet of "Seal" cocaine but testified for the defense that he purchased the

## Second Department *continued*

cocaine from someone else earlier that day and not from the defendant. (Supreme Ct, Queens Co)

**Dissent:** The evidence, which included a detective's testimony that street-level sales often involve one to five bags of cocaine priced at $20 each, should permit the verdict to stand.

**Juveniles (Hearings) (Neglect)**

**Matter of Amier H., 106 AD3d 1086, 966 NYS2d 182 (2nd Dept 5/29/2013)**

Where the petitions alleged that the mother abused or neglected the children based on a single incident, and the evidence as to that incident did not support a finding of neglect, the court erred in relying on evidence relating to additional incidents of domestic disputes in the home without amending the petitions or allowing the mother time to prepare a response to the additional allegations. (Family Ct, Kings Co)

**Assault (Evidence)**

**Evidence (Sufficiency)**

**People v Hurdle, 106 AD3d 1100, 965 NYS2d 626 (2nd Dept 5/29/2013)**

The evidence was insufficient to establish the "lawful duty" element of assault on a police officer where police questioned the defendant, then blocked him from leaving by moving a police car in front of his vehicle, apparently by mistake, all without observing any activity that was criminal in nature or would arouse reasonable suspicion, and the defendant then sought to drive away, injuring an officer in the process. Regarding the first-degree assault charge, the injury that resulted from the defendant's effort to get away from the unlawful questioning stemmed not from the direct crash of the defendant's vehicle into the police car but by that car's subsequent pivoting, all of which happened in an instant; "'the evidence did not establish the degree of depravity and indifference to human life required for depraved indifference [assault]' …." (Supreme Ct, Queens Co)

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

**People v Kennebrew, 106 AD3d 1107, 965 NYS2d 622 (2nd Dept 5/29/2013)**

Suppression of a gun found on the defendant and his statement at that time was properly granted. Even if the police were justified in conducting a level-two common law inquiry, they lacked the necessary reasonable suspicion to pat the defendant down after stopping him on the suspicion that he was illegally selling cigarettes, which he denied, and obtaining his admission that he was a member of the Bloods gang. He refused to answer when asked if he had a weapon; an unidentifiable bulge is readily susceptible of innocent as well as guilty explanation. (Supreme Ct, Queens Co)

**Juveniles (Custody)**

**Subpoenas and Subpoenas Duces Tecum**

**Matter of Murphy v Lewis, 106 AD3d 1091, 966 NYS2d 175 (2nd Dept 5/29/2013)**

On the facts in this custody dispute, the court "improvidently exercised its discretion when it did not sign a subpoena proffered by the mother so as to permit her the opportunity to present certain medical treatment records to rebut the allegations asserted against her"; such records were relevant to whether award of physical custody to the father was in the child's best interests. (Family Ct, Westchester Co)

**Domestic Violence (Spousal Abuse)**

**Sentencing (Mitigation)**

**People v Sheehan, 106 AD3d 1112, 965 NYS2d 633 (2nd Dept 5/29/2013)**

While the court could have used Penal Law 60.12 to impose an indeterminate sentence on the defendant, a domestic violence victim, it was not an improvident exercise of discretion, under the particular circumstances here, for the court to decline to do so. The court's view that deterrence of others from engaging in violent behavior as a form of self-help was an overriding sentencing principle cannot be said to be erroneous, nor does the interest of justice call for a reduction of the determinate prison sentence of five years for second-degree possession of a weapon. (Supreme Ct, Queens Co)

**Concurrence in Part, Dissent in Part:** The compassionate exception to the 1998 laws lengthening authorized prison terms for first-time violent felons should have been applied here, where the defendant was the victim of her husband's abuse for almost two decades. "If not now, when?"

**Evidence (Sufficiency)**

**Unlawful Imprisonment (Elements) (Evidence)**

**Matter of Terry J.P., 106 AD3d 1092, 966 NYS2d 200 (2nd Dept 5/29/2013)**

The accuser's testimony "that the appellant grabbed her by the waist and spun her around, and that, when she

## Second Department *continued*

ordered him to release her, he immediately complied" did not constitute legally sufficient evidence that the appellant restricted her "'movements intentionally and unlawfully in such manner as to interfere substantially with [her] liberty'" as is required for second-degree unlawful imprisonment. The evidence was sufficient to support a determination that the appellate committed acts that, if he were an adult, would constitute second-degree obstructing governmental administration. (Family Ct, Queens Co)

## Third Department

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

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

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

**People v Boler, 106 AD3d 1119, 964 NYS2d 688 (3rd Dept 5/2/2013)**

The warrantless search of a purse on the hood of a car cannot be justified as a search incident to the defendant's arrest where the search was done after the defendant was handcuffed, put in a police car, under police control, and not near the purse. And the search cannot be justified under the automobile exception because the purse was not found inside the car. The defendant's response to the police officer's question about who owned another purse found inside the car must be suppressed because the officer asked the question at a time when a reasonable person would believe that she was not free to leave, but before *Miranda* warnings were given. However, based on the totality of the circumstances, the statement was voluntary and can be used to impeach the defendant if she testifies. (Supreme Ct, Ulster Co)

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

**People v Fazio, 106 AD3d 1291, 964 NYS2d 915 (3rd Dept 5/16/2013)**

The court properly assessed 30 points under risk factor 3, the number of victims, because "[c]hildren depicted in pornography images may be found to constitute multiple separate victims for purposes of the Sex Offender Registration Act …." And the defendant did not dispute that there were three or more children depicted in the material he possessed. (County Ct, Albany Co)

[***Ed. Note:*** *In a footnote, the court referred to the June 2012 position statement issued by the Board of Examiners of Sex Offenders regarding the scoring of defendants in child pornography cases and cited* People v Marrero, *37 Misc 3d 429 (Supreme Ct, New York Co 2012). Leave to appeal in* Fazio *was granted on Oct. 15, 2013 (2013 NY Slip Op 88258).*]

**Search and Seizure (Electronic Searches) (Search Warrants)**

**Sex Offenses (Child Pornography)**

**People v Vanness, 106 AD3d 1265, 965 NYS2d 227 (3rd Dept 5/16/2013)**

There was probable cause for the search warrant to search the defendant's house for computers and related equipment where the warrant application included sworn statements from the defendant and a 14-year-old accuser establishing that the defendant used his cell phone to send the accuser a picture of his penis, the accuser sent the defendant pictures of herself in her underwear, and that they had some communications of a sexual nature using an instant messenger service. Contrary to the defendant's argument that the computers should not have been searched because the images were sent by cell phones, "[i]n this digital age where pictures and information are easily transferred by and among various electronic media, and considering the information in the warrant application, there was a 'likelihood that police would find evidence in different forms and on different devices' …." (County Ct, Warren Co)

**Jurisdiction**

**Sentencing (Resentencing) (Split Sentences)**

**People v Dick, 106 AD3d 1332, 965 NYS2d 666 (3rd Dept 5/23/2013)**

That the sentencing court transferred supervision of the defendant's probation to another county did not divest the court of jurisdiction to issue an arrest warrant when the defendant failed to appear to begin serving the intermittent portion of his split sentence and to resentence him because a CPL 410.80 transfer is only a transfer of probation and the defendant was charged with violating the intermittent sentence, not probation. (County Ct, Columbia Co)

**Sentencing (Youthful Offenders)**

**Sex Offenses (Sentencing)**

## Third Department *continued*

**People v Jorge D., 109 AD3d 16, 966 NYS2d 272 (3rd Dept 5/30/2013)**

"Penal Law § 60.02(2) does not authorize the imposition of a determinate sentence for a youthful offender …." When the youthful offender statute was enacted, there was no violent felony category and determinate sentences were not permitted for felony sex offenses. "If the Legislature intended that the sentence for a youthful offender should be based upon the classification of the felony committed, it could have amended Penal Law § 60.02(2) to indicate such when it subsequently modified the sentencing provisions for class E felony sex and drug offenses and added the violent Class E felony category." (County Ct, Essex Co)

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

**Guilty Pleas (Withdrawal)**

**People v McCray, 106 AD3d 1374, 966 NYS2d 271 (3rd Dept 5/30/2013)**

New counsel must be assigned to represent the defendant on his pro se motion to withdraw his plea where defense counsel, in response to the court's question about whether there was any legal basis for the motion, stated that "she found no 'legal basis' for his motion." This response "'affirmatively undermined arguments [her] client wished the court to review' … 'thereby depriving defendant of effective assistance of counsel' …." (County Ct, Ulster Co)

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

**Reckless Endangerment (Elements)**

**People v Estella, 107 AD3d 1029, 967 NYS2d 195 (3rd Dept 6/6/2013)**

The defendant's convictions of six counts of first-degree reckless endangerment must be dismissed as duplicitous where the indictment, charging seven counts of reckless endangerment, did not distinguish between each count either temporally or by physical evidence. The prosecution attempted to remedy the defect by amending the indictment to name an intended victim for each count, but the offense is "conduct-specific, rather than victim-specific" and "the conduct underlying each count of the indictment remained unclear, as none of the seven shots fired hit any of the individuals named in the indictment" and there was "no way to match each count of the indictment with the specific underlying conduct of defendant that would insure that the jury had reached a unanimous verdict with regard to each count …." (County Ct, Schenectady Co)

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

**People v Grimm, 107 AD3d 1040, 967 NYS2d 189 (3rd Dept 6/6/2013)**

The court did not exceed its authority under the Sex Offender Registration Act (SORA) by determining the defendant's risk level without a risk assessment instrument prepared by the Board of Examiners of Sex Offenders where the statutory procedures for getting the Board's recommendation before the defendant's release could not be followed as the defendant was sentenced to time served on the day of his conviction. The court's obligation to determine the defendant's risk level "necessarily includes the authority to determine the appropriate procedure for a risk level determination where, as here, the circumstances are not fully addressed by the SORA statutory scheme."

The court erred in assessing points for the number of victims by including victims of the defendant's prior sexual offenses because that category focuses on the instant conviction; it was also error to assess points under risk factor 7, relationship with the victim, where there was no proof of any of the types of relationships listed in the Risk Assessment Guidelines. (County Ct, Sullivan Co)

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

**Witnesses (Credibility)**

**People v Johnson, 107 AD3d 1161, 967 NYS2d 217 (3rd Dept 6/13/2013)**

Even if the prosecution failed to meet its *Brady* obligation by failing to disclose that one witness's cooperation agreement required the witness to testify not only against the defendant, but also against another person in an unrelated prosecution and, as with the testimony in the defendant's case, the testimony in the other case was based on admissions allegedly made by the person to the witness while they were incarcerated, there is no reasonable possibility that the trial result would have been different had the material been disclosed. (Supreme Ct, Schenectady Co)

**Sentencing (Hearing) (Resentencing)**

**Victims**

**People v Sheppard, 107 AD3d 1237, 967 NYS2d 498 (3rd Dept 6/20/2013)**

## Third Department *continued*

The court abused its discretion when it allowed the mother of a man the defendant allegedly shot to speak at the sentencing hearing because there was no victim of the crime of conviction, third-degree criminal possession of a weapon. The defendant's conviction "was supported by evidence wholly separate from the circumstances surrounding [the man's] death …." It appears from the sentencing transcript that the court may have considered the homicide charges the defendant was acquitted of, and the mother's statement at sentencing that the defendant was a "'killer' who 'got away with murder,'" when sentencing the defendant to the statutory maximum term; resentencing is required. (County Ct, Tompkins Co)

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

**Sentencing (Post-Release Supervision)**

**People v Brown, 107 AD3d 1303, 967 NYS2d 538 (3rd Dept 6/27/2013)**

The defendant's guilty plea is vacated because the plea agreement, which set forth a specific prison term and mentioned post-release supervision (PRS), failed to include the promised or potential duration of PRS and the court did not otherwise advise the defendant. Therefore his plea was not knowing, voluntary, and intelligent. (County Ct, Schenectady Co)

**Family Court (Default Judgments)**

**Juveniles (Custody) (Hearings)**

**Matter of Brown v Eley, 107 AD3d 1334, 969 NYS2d 190 (3rd Dept 6/27/2013)**

The court erred in denying the respondent mother's motion to vacate the default judgment in the custody modification proceeding where the mother's affidavit about her car breaking down on the way to court, supported by a letter from her mechanic and a receipt, "was sufficient to demonstrate a reasonable excuse …." And the court improperly granted the modification petition without holding a full hearing so that it could determine the best interests of the children. (Family Ct, Montgomery Co)

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

**People v Bush, 107 AD3d 1302, 967 NYS2d 779 (3rd Dept 6/27/2013)**

Defense counsel's conduct deprived the defendant of effective assistance of counsel where counsel did not pursue pretrial efforts to suppress or limit evidence, including the defendant's statement to police and evidence about uncharged conduct; did not give an opening statement; did not object to any of the prosecutor's questions, despite some objectionable questions; did not object to the prosecutor's exhibits, including one admitted after the close of proof; conducted cursory cross-examination; did not call any witnesses; and delivered a four-sentence summation that started with a comment that the reason for the trial was that the defendant could not successfully enter a guilty plea by providing an adequate colloquy. (County Ct, Chemung Co)

**Family Court (Default Judgments)**

**Juveniles (Custody)**

**Matter of Freedman v Horike, 107 AD3d 1332, 969 NYS2d 193 (3rd Dept 6/27/2013)**

The court erred in dismissing the father's petition for a custody modification for his failure to appear as the nonappearance of a party does not automatically result in default and the father's attorney stated that the father chose not to appear, but did not say that counsel told the father that his appearance was necessary, and no effort was made to contact the father. The court also erred in dismissing the modification petition for failure to state a claim where the father alleged that he became disabled after the custody order was issued, his ability to travel was restricted, and his reduced income made the daughter's specified transportation to and from visitation unworkable and the father provided proof that he has difficulty sitting for long periods and started receiving supplemental security income after the custody order was issued. (Family Ct, Columbia Co)

**Evidence (Weight)**

**Forensics (DNA)**

**People v Graham, 107 AD3d 1296, 967 NYS2d 531 (3rd Dept 6/27/2013)**

The defendant's conviction of second-degree criminal possession of a weapon is against the weight of the evidence where, even accepting as true the testimony of the prosecution's witnesses, no one saw the defendant with the gun, he was just near where it was found and his DNA was on it, and the defendant was seen 20 to 30 feet away from where the gun was found while the person the defendant was with was seen near where it was found. This does not prove that the defendant possessed the gun in that location at that time; based on the testimony, it is possible that the other person could have left the gun there at that time and the defendant's DNA could have been on the gun from having previously handled it or through secondary transfer. (Supreme Ct, Albany Co)

## Third Department *continued*

**Family Court**

**Juveniles (Support Proceedings)**

**Matter of Hubbard v Barber, 107 AD3d 1344, 968 NYS2d 245 (3rd Dept 6/27/2013)**

The court lacked the authority to review the support magistrate's order dismissing the mother's first modification petition because no objections to it had been filed, and the court exceeded its authority when it reviewed parts of the support magistrate's order as to the second petition to which the father had not objected. The matter must be remitted for an appropriately limited review. (Family Ct, Schuyler Co)

**Juveniles (Abuse)**

**Matter of Nicholas S., 107 AD3d 1307, 968 NYS2d 654 (3rd Dept 6/27/2013)**

The court erred in finding that two children in the home were derivatively severely abused by the respondent where the court did not make the requisite determinations, as set forth in *Matter of Dashawn W.* (21 NY3d 36), *ie*, that the child is an abused child as a result of reckless or intentional acts of a parent committed under circumstances evincing a depraved indifference, which resulted in serious physical injury, and that the "petitioner 'made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the respondent, when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future' (Social Services Law § 384[8][a][iv])." (Family Ct, St. Lawrence Co)

**Family Court (Orders of Protection)**

**Juveniles (Visitation)**

**Matter of Samantha WW. v Gerald XX., 107 AD3d 1313, 969 NYS2d 180 (3rd Dept 6/27/2013)**

The mother's appeal is not moot with respect to the court's order that the mother facilitate presenting the father's written communications to their child, through their respective attorneys, because that part of the order was not limited to the duration of the father's incarceration. Because there is an existing county court order of protection in favor of the mother and that order does not exempt communications by the father related to the child or make it subject to later family court orders, the father must obtain a modification of the county court order before the family court would be authorized to order the mother to facilitate the communications. On remand, the family court must determine if there is a suitable person that could be designated to screen and present the father's communications to the child. (Family Ct, Saratoga Co)

## Fourth Department

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

**Article 78 Proceedings**

**Diversion (Eligibility)**

**Narcotics (Diversion)**

**Matter of Doorley v DeMarco, 106 AD3d 27, 962 NYS2d 546 (4th Dept 3/22/2013)**

This original hybrid CPLR article 78 proceeding and declaratory judgment action under CPLR 3001 was begun within four months of the decisions granting each of the individual defendants admission to judicial diversion and so is timely. "[A]s a court's duties under CPL article 216 are not ministerial in nature, mandamus to compel does not apply." Where the prosecution cannot appeal a judicial diversion eligibility determination, and the determinations diverted the individual defendants from normal criminal proceedings, prohibition is available to the petitioner prosecutor. Because the individual defendants "were not charged with any offenses under Penal Law article 220 or 221, or any specified offense in CPL 410.91," they were not eligible for diversion. That the individual defendants were not ineligible for diversion based on the exclusions in CPL 216.00(1)(a) and (b) did not provide the court discretion to find them eligible without meeting the statutory criteria. That prosecutors' charging authority gives them control over eligibility for diversion does not allow courts to exceed their legal authority for determining eligibility. The respondent judges are prohibited from taking further action on the individual defendants' cases in judicial diversion. "Further, a judgment should be entered declaring that respondent judges admit only those defendants meeting the criteria set forth in CPL 216.00 (1) into the judicial diversion program."

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

**Evidence (Weight)**

**People v Evans, 104 AD3d 1286, 960 NYS2d 829 (4th Dept 3/22/2013)**

The defendant's conviction for second-degree assault was against the weight of the evidence, where one witness

## Fourth Department *continued*

said the defendant was picking up the sawed-off shotgun when "'it just went off'" and no witness said the defendant pointed it at the accuser; evidence that a deadly weapon was at a park and serious physical injury occurred did not prove beyond a reasonable doubt that the defendant engaged in actions constituting recklessness, *ie*, bringing a loaded sawed-off shotgun to a park, possessing it in proximity to others, and pointing it at another while "imbibing alcohol, disregarding the risk that it might misfire." (Supreme Ct, Onondaga Co)

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

**Trial (Verdicts)**

**People v Montgomery, 104 AD3d 1291, 960 NYS2d 835 (4th Dept 3/22/2013)**

Where police, executing a search warrant after seeing the defendant enter a residence while engaging in conduct indicative of a drug transaction, found a bag containing individually packaged cocaine in the entryway and a jacket with a quantity of uncut cocaine in an occupied apartment, but the grand jury did not find there was sufficient evidence to charge the defendant with the uncut cocaine, the indictment was rendered duplicitous when the prosecution offered evidence at trial that the defendant constructively possessed both quantities of cocaine. It is not clear that the jury reached a unanimous verdict as to constructive possession of the bag of cocaine. The conviction is reversed without prejudice to representation to another grand jury. (County Ct, Monroe Co)

**Juries and Jury Trials (Deliberation)**

**Trial (Mistrial)**

**People v Proctor, 104 AD3d 1290, 960 NYS2d 833 (4th Dept 3/22/2013)**

The court properly denied the defendant's motion for a mistrial based on the alleged omission of critical testimony in a readback in response to a jury note where defense counsel did not raise the issue until the jury had recommenced deliberation, the court took immediate steps to have the testimony in question read, and when the jury announced it had a verdict before the additional testimony could be read back, the court established a procedure to not accept the verdict until that testimony could be read and the jury directed to continue deliberations. (Supreme Ct, Erie Co)

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

**Matter of Singletary v Fischer, 104 AD3d 1274, 960 NYS2d 822 (4th Dept 3/22/2013)**

Where the only evidence at the Tier III disciplinary hearing that the prisoner petitioner conspired to have marijuana smuggled in during a prison visit was correspondence with his girlfriend, who did not smuggle drugs in or attempt to do so, and no evidence was presented that the superintendent had requested documentation to determine if there were sufficient grounds to have opened the petitioner's mail, the determination that the petitioner violated prison rules must be annulled.

**Evidence (Prejudicial)**

**People v Woods, 104 AD3d 1309, 960 NYS2d 837 (4th Dept 3/22/2013)**

The court failed to consider the appropriate factors when it determined only the voluntariness of the defendant's grand jury testimony before allowing the jury to hear parts of that testimony that referred to his parole, incarceration for bank robbery, and selling drugs; the court did not consider the relevance or probativeness of those portions, nor whether their probative value exceeded the potential for prejudice. Any error in admitting the evidence was harmless. (County Ct, Monroe Co)

**Family Court (Orders of Protection)**

**Jurisdiction (Personal)**

**Matter of Anna B., 105 AD3d 1399, 964 NYS2d 804 (4th Dept 4/26/2013)**

The father has standing to challenge the validity of an order of protection entered on default at the same time as the termination of his parental rights; the court improperly dismissed his petition, as the Department of Social Services failed to file an affidavit of service to prove the court had jurisdiction over the father and the record contains no evidence that he was served with either the DSS petition or the order of protection itself. (Family Ct, Erie Co)

**Arrest (Warrantless)**

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

**People v Boyson, 105 AD3d 1364, 963 NYS2d 786 (4th Dept 4/26/2013)**

The defendant's warrantless arrest inside his home in the absence of exigent circumstances was unlawful, and

## Fourth Department *continued*

the small quantity of drugs seized from his person during a search incident to the arrest should have been suppressed. Suppression was properly denied as to a larger quantity found in his apartment during a search pursuant to a valid search warrant obtained based on information predating and independent of the illegal entry. Customs agents reasonably suspected, based on its size and weight, that the package from Paraguay was imported contrary to law, and in any event, suppression was not required as opening a package from overseas constituted a border search not requiring probable cause or a warrant. (Supreme Ct, Onondaga Co)

**Assault (Evidence)**

**Double Jeopardy (Collateral Estoppel)**

**Endangering the Welfare of a Child**

**People v Brandi E., 105 AD3d 1341, 964 NYS2d 355 (4th Dept 4/26/2013)**

Collateral estoppel did not bar introduction of evidence, at the defendant's new trial on one count each of endangering the welfare of a child and assault, concerning two assaults of which she was acquitted, where the evidence in question had also been in part the basis of the reversed endangering the welfare of a child conviction and that jury could reasonably have found that the defendant was involved in the incidents in question but did not evince the depraved indifference to human life required for the acquitted assault counts. (Supreme Ct, Onondaga Co)

**Accusatory Instruments (Sufficiency)**

**Juveniles (Delinquency)**

**Matter of Brandon A., 105 AD3d 1365, 964 NYS2d 328 (4th Dept 4/26/2013)**

The petition alleging the respondent to have committed acts constituting sale of drugs failed to include "sufficient nonconclusory factual allegations to establish reasonable cause and a prima facie case for the crime charged" where it alleged only that he sold Adderall, and was supported only by the conclusory statements of a classmate and an officer that the substance was Adderall, with no evidentiary facts to form the basis for that conclusion. (Family Ct, Livingston Co)

**Appeals and Writs (Counsel)**

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

**Lesser and Included Offenses (Instructions)**

**People v Brown, 105 AD3d 1466, 963 NYS2d 907 (4th Dept 4/26/2013)**

Because there may be merit to the contention that the defendant was denied effective assistance of appellate counsel due to counsel's failure to raise on direct appeal that the trial court's deference to the defendant's decision to forgo a lesser-included offense jury instruction denied the defendant the expert judgment of counsel, the appeal is to be considered de novo after the filing of the record and briefs. (County Ct, Niagara Co)

**Search and Seizure (Warrantless Searches)**

**People v Coles, 105 AD3d 1360, 966 NYS2d 288 (4th Dept 4/26/2013)**

The court erred in finding exigent circumstances justifying entry of the police into the defendant's apartment upon probable cause but without a warrant where the defendant had sold drugs in the residence earlier in the day, and again outside later, and was arrested driving toward the residence 45 minutes before the search. This did not support a reasonable belief that contraband was about to be removed, or destroyed by accomplices, or that police would be in danger guarding the residence. The matter is remitted for a determination of whether the evidence and statement were the fruit of the illegal entry, as the court did not rule on the prosecution's independent source theory. (County Ct, Ontario Co)

**Appeals and Writs (Counsel)**

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

**People v Forsythe, 105 AD3d 1430, 964 NYS2d 363 (4th Dept 4/26/2013)**

Retained trial counsel did not make an appearance in the Appellate Division or file a brief in opposition to the prosecutor's appeal of an order dismissing drug charges against the defendant, which appeal resulted in reinstatement of the charges without a determination of whether the defendant had counsel or had waived counsel on the appeal, and there is no showing that the defendant was advised of his rights regarding the prosecution appeal. The defendant's current appeal from an order denying a CPL 440.10 motion is converted to a motion for writ of error coram nobis, which is granted, and the prosecution's appeal is to be considered de novo. (County Ct, Oneida Co)

**Juries and Jury Trials (Deliberation)**

## Fourth Department *continued*

**People v Kahley, 105 AD3d 1322, 963 NYS2d 487 (4th Dept 4/26/2013)**

The court failed to follow several of the procedures required when notes are received from deliberating juries, and while failing to mark such notes as exhibits and to read them into the record does not constitute mode of proceedings errors that must be reviewed even if unpreserved, the defendant's contention that the court failed to advise him of the contents of an apparent first note from the jury cannot be resolved on the existing record. If the jury requested only a portion of witnesses' testimony, so that defense input would have been helpful in determining what to include in the readback, failure to notify the defense of the note would have been a mode of proceedings error; the matter is remitted for a reconstruction hearing. (County Ct, Monroe Co)

**Dissent:** The notes at issue were not substantive in nature and so did not implicate the court's core responsibilities.

**Sentencing (Restitution)**

**People v Kirkland, 105 AD3d 1337, 963 NYS2d 793 (4th Dept 4/26/2013)**

Issues regarding surcharges imposed on restitution under Penal Law 60.27(8) must be preserved, and the defendant's contention that the probation officer's affidavit here is insufficient to warrant an additional 5% surcharge above the mandatory 5% does not warrant review in the interest of justice. (County Ct, Ontario Co)

**Concurrence:** Because the defendant cannot be deemed to have waived the right to be sentenced according to law, the merits of his contention regarding the affidavit's sufficiency should be addressed.

**Federal Law**

**New York State Agencies (Health, Department of) (Law, Department of)**

**Preemption**

**People v Miran, 107 AD3d 28, 964 NYS2d 309 (4th Dept 4/26/2013)**

The New York State Attorney General (AG) had authority under Executive Law 63(3) to prosecute crimes involving Medicare where the State Commissioner of Health (COH) requested in 2002 that the AG investigate and prosecute Medicaid fraud and any crimes "arising out of such investigation or prosecution" or joinable with the Medicaid offenses enumerated in the request. The provisions of 63(3) confer on the AG "'the broadest of powers,'" nothing in that provision prohibits joint federal and state collaborations such as the one that developed here after the AG learned of a federal Office of Inspector General and FBI investigation regarding the defendants, and the defendants' claims that this case had no relation to Medicaid fraud was forfeited by their guilty pleas.

Review in the interest of justice of the unpreserved claim that Executive Law 63(3) is expressly preempted by 42 USC 1396b(q)(3) leads to the conclusion that no clear and manifest purpose of preempting state law is found on the face of the statute.

Nor does the theory of "conflict preemption" bar prosecution here. The AG was acting as a Medicaid Fraud Control Unit and compliance with the applicable state and federal laws was not impossible, and the state law did not impede "accomplishment and execution of the full purposes and objective of Congress...." (Supreme Ct, Monroe Co)

**Evidence (Hearsay)**

**Juveniles (Neglect)**

**Matter of Nicholas C., 105 AD3d 1402, 964 NYS2d 806 (4th Dept 4/26/2013)**

Out-of-court statements by the mother to a police officer and caseworker about a domestic dispute, which constituted nearly all the evidence offered in support of the neglect petition against the father, were not admissible under Family Court Act article 10, and alternate theories for their admission were not advanced at the fact-finding hearing. The non-hearsay evidence offered was insufficient to establish that the father's conduct impaired the child's physical, mental, or emotional condition or put the child in imminent danger of such impairment. (Supreme Ct, Onondaga Co)

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

**Arrest (Identification)**

**Motions (Suppression)**

**People v Adams, 106 AD3d 1496, 964 NYS2d 840 (4th Dept 5/3/2013)**

The trial court having determined upon remittal that the accuser's pretrial identification was the fruit of an illegal detention or arrest, and the prosecution's contention that the determination was erroneous not being reviewable in an appeal by the defendant because it was not adverse to him, the defendant is entitled to a new trial where the identification of the defendant "was critical to the prosecution and there was no evidence at the suppression hearing to permit a determination whether the

## Fourth Department *continued*

in-court identification had an independent source ….” An independent source hearing should be held before the new trial. (Supreme Ct, Erie Co)

**Due Process**

**Evidence (Motive) (Relevancy)**

**People v Arena, 106 AD3d 1445, 964 NYS2d 383 (4th Dept 5/3/2013)**

The court erred by precluding the testimony of a prospective defense witness expected to say that the defendant did not threaten or assault him when the defendant accused him of telling the police about the marijuana for which the defendant had been arrested, where the prosecution alleged that the defendant assaulted the accuser here weeks later for having been the informant responsible for the arrest. There was no showing the offer of proof as to the testimony was in bad faith, and the proposed testimony was relevant to motive. (Supreme Ct, Monroe Co)

**Dissent:** The right to present a defense does not automatically and invariably outweigh other interests such as the danger that the probative value of proposed evidence would mislead the jury.

[***Ed. Note:*** *Leave to appeal was granted on June 24, 2013 (21 NY3d 1012).*]

**Discovery**

**Evidence (Newly Discovered)**

**People v Madison, 106 AD3d 1490, 964 NYS2d 820 (4th Dept 5/3/2013)**

The defendant is entitled to a new trial on the counts of criminal contempt based on newly discovered evidence suggesting that the only testimony supporting those charges may have been fabricated or mistaken. The evidence includes telephone numbers the accuser did not recognize appearing in her phone records at the times the defendant was alleged to have called her in violation of orders of protection, and other phone record evidence. The prosecutor’s refusal to specify precise times of the calls and delay in turning over the accuser’s phone records hampered the defendant’s ability to obtain the evidence before trial. (Supreme Ct, Erie Co)

**Search and Seizure (Consent)**

**Sentencing (Persistent Felony Offender) (Resentencing) (Second Felony Offender)**

**People v Purdy, 106 AD3d 1521, 964 NYS2d 376 (4th Dept 5/3/2013)**

Where police testimony at the suppression hearing indicated that an investigation had led them to actively look for the defendant, but did not reveal any evidence that the defendant may have been involved in the burglary, the prosecution failed to show the legality of police conduct leading to the defendant’s in-custody consent to a vehicle search. Evidence found as a result should have been suppressed; the error was not harmless as to the burglary and larceny counts. The defendant must be resentenced on the remaining conviction where the certificate of conviction incorrectly shows the defendant was sentenced as a persistent felony offender but the court had declined to impose such a sentence and the existing sentence is only legal if imposed on the defendant as a second felony offender, which is not stated in the record. (County Ct, Wayne Co)

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

**People v Sims, 106 AD3d 1473, 964 NYS2d 380 (4th Dept 5/3/2013)**

The court erred in suppressing physical evidence and statements obtained after an officer in a high-crime area—having observed the defendant staring at police while riding his bicycle into a porch, falling, and running up on the porch—approached the defendant, asked if he lived there and sought identification, then grabbed the defendant’s hand when the defendant failed to obey directives to keep his hands out of his pocket. (County Ct, Erie Co)

**Dissent:** The officer lacked justification to escalate the encounter to a level three, patting down the defendant after he repeatedly put his hand in his pocket, where there was no indication the defendant had a weapon or that he committed a crime.

[***Ed. Note:*** *Leave to appeal was granted on June 28, 2013 (21 NY3d 1012).*]

**Evidence (Prejudicial)**

**Narcotics (Marijuana) (Penalties)**

**People v Hirsh, 106 AD3d 1546, 965 NYS2d 266 (4th Dept 5/17/2013)**

Admitting marijuana stalks and leaves into evidence was not error because this evidence was relevant to the charge of growing cannabis without a license, and its probative value outweighed the potential to mislead the jury as to the marijuana possession counts or prejudice the defendant. The determinate sentence of two and a half years for second-degree possession of marijuana was unduly harsh and severe, and is reduced to a term of one and a half years. (County Ct, Oswego Co) ⚖

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