



Public Defense Backup Center  
**REPORT**

Volume XXVIII Number 1

January–April 2013

A PUBLICATION OF THE DEFENDER INSTITUTE

## Defender News

### U.S. High Court: Padilla Not Retroactive

On Feb. 20, 2013, the U.S. Supreme Court delivered a disheartening blow to those non-citizens wishing to collaterally attack their convictions based on defense counsel’s failure to properly advise them of the deportation consequences of their criminal matter. In *Chaidez v United States* (133 SCt 1103 [2013]), the Court held that the holding in *Padilla v Kentucky* (559 US 356 [2010]), which required defense attorneys to affirmatively advise clients of the immigration consequences of their pleas, does not apply retroactively to convictions that were final before *Padilla’s* holding on Mar. 31, 2010.

Roselva Chaidez, a Mexican citizen who became a Lawful Permanent Resident in 1977, was charged in 2003 with a federal offense that immigration law clearly places under the deportation category known as an “Aggravated Felony.” This is the absolute worst deportation category that a criminal conviction can fall under. The consequences are numerous and include: 1) Direct deportation under Immigration and Nationality Act (INA) § 237(a)(2)(A)(iii); 2) Ineligibility for cancellation of removal for legal permanent residents under INA § 240A(a)(3); 3) Mandatory detention until conclusion of the immigration proceeding under INA § 236(c)(1)(B); 4) Permanent ineligibility for U.S. citizenship under INA § 101(f)(8); and 5) Permanent ineligibility to return to the United States following deportation based on this ground under INA § 212(a)(9)(A)(II).

However, Chaidez’s attorney never advised her of these consequences. She took a plea in ignorance of the disaster that lay ahead. Sentenced to four years of proba-

tion and payment of restitution, she went undetected by immigration authorities and completed probation while living with her family. Believing that her conviction was innocuous for immigration purposes, she filed a citizenship application. Immigration authorities not only denied her application but also initiated deportation proceedings. She sought to apply *Padilla* to her 2004 conviction. The District Court held that *Padilla* did not announce a new rule of criminal procedure and therefore could be applied retroactively, but the Seventh Circuit reversed and the U.S. Supreme Court affirmed.

Justice Kagan’s opinion emphasized *Teague v Lane* (489 US 288 [1989]), which held that a new rule of criminal procedure cannot be applied retroactively to convictions that are final before the announcement of that rule. The Court found that the analysis in *Padilla* did not simply involve how to apply the holding in *Strickland* to immigration advice in criminal cases but rather required the court to decide whether to apply *Strickland* in the first place. Kagan pointed out that the Court had never stated that the Sixth Amendment *required* attorneys to tell non-citizen clients about a guilty plea’s deportation consequences. It took *Padilla* to hold that advice regarding immigration consequences of criminal cases was now required, which altered the law of most jurisdictions.

It seems that the Court’s holding is limited to cases where counsel remains silent regarding the immigration consequences of the client’s case and apparently does not apply to cases where counsel provides affirmative misadvice. Therefore, cases involving affirmative misrepresentation as opposed to silence might enjoy a better fate under this ruling. For more information on Post-*Chaidez* strategies, see the following advisory by the Immigrant Defense Project: <http://immigrantdefenseproject.org/>

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**JOB LISTINGS**  
are available on NYSDA’s website at  
[www.nysda.org/Jobs.html](http://www.nysda.org/Jobs.html)  
Find: Recent job postings and links to  
detailed information

[wp-content/uploads/2013/03/Chaidez-advisory-FINAL-201302281.pdf](http://wp-content/uploads/2013/03/Chaidez-advisory-FINAL-201302281.pdf).

It remains to be seen whether the New York Court of Appeals will apply broader state retroactivity principles as permitted by the Supreme Court in *Danforth v Minnesota* (552 US 264 [2008]). The Bronx District Attorney's Office has asked the Court to hear *People v Baret* (99 AD3d 408 [1st Dept 2012]), which held that *Padilla* did not announce a new rule and could therefore be applied retroactively. Should it choose to hear the case, one of the issues that will be before the Court is whether the administrative and law enforcement burdens associated with these claims outweigh a non-citizen's right to the effective assistance of counsel.

NYSDA signed on to an amicus brief in *Chaidez*. View it online at [www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs/11-820\\_petitioneramcunacdletal.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-820_petitioneramcunacdletal.authcheckdam.pdf). Attorneys with questions about this and other criminal defense/immigration issues should contact NYSDA's Criminal Defense Immigration Project Director, Felipe Alexandre, at the Backup Center.

### ***“Counsel of Choice” Language Used in Public Defense Case***

Generally, people who cannot afford to hire a lawyer have more limited rights to counsel of their choice than people of means. But, in this 50th anniversary year of *Gideon v Wainwright*, the Court of Appeals used “counsel of choice” language in holding for a public defense client — though the landmark *Gideon* decision itself is not cited: “While the right to counsel of choice is qualified, and may cede, under certain circumstances, to concerns of the efficient administration of the criminal justice system, we have made clear that courts cannot arbitrarily interfere with the attorney-client relationship, and interference with that relationship for purpose of case management is not without limits, and is subject to scrutiny.” *People v Griffin*, 2013 NY Slip Op 02161 (4/2/2013) (summary on p. 26). The high court noted that provision of a new lawyer cannot cure a counsel of choice violation. It further found that the Appellate Division did not abuse its discretion or make an error of law by substituting its discretion for trial court's and saying denial of an adjournment to a Legal Aid lawyer who took over the case for another who had resigned was an abuse of discretion. The court made clear, however, that “we do not decide that the removal of counsel in this case necessarily violated a constitutional right.”

### ***NYSDA Honors Gideon by Highlighting Need for Reform***

NYSDA, the New York State Bar Association, The Legal Aid Society of New York City, The Innocence Project, 5Boro Defenders, New York Civil Liberties Union, Bronx Defenders, and Brooklyn Defender Services joined several leaders of the Black, Puerto Rican, Hispanic and Asian Caucus at a press conference on the 50th anniversary of *Gideon v Wainwright*. They called for the Governor to lead public defense reform in New York State to fulfill, at long last, the right to counsel envisioned in *Gideon*. The event was the first of many ways NYSDA is seeking to galvanize action to reform public defense this year. For information on other past and future *Gideon* Anniversary news, see the webpage on the NYSDA website: <http://www.nysda.org/Gideon2013-50.html>. Also check out NYSDA's *Gideon* Blog: <http://nysda.blog.blogspot.com/>.

### ***Mental Health Issues Affecting Clients' Cases Abound***

Mental disabilities may generate a variety of legal issues affecting clients in both criminal and family court cases. Some topics are currently being noted in the mainstream media and on blogs, including mandated reporting aspects of the new NY SAFE Act, discussed below, and

#### ***Public Defense Backup Center REPORT***

A PUBLICATION OF THE DEFENDER INSTITUTE

Volume XXVIII Number 1 January–April 2013

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The *REPORT* is published throughout the year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone 518-465-3524; Fax 518-465-3249. Our web address is <http://www.nysda.org>. All rights reserved. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that its contents do not constitute the rendering of legal or other professional services. All submissions pertinent to public defense work in New York State and nationwide are welcome.

THE REPORT IS PRINTED ON RECYCLED PAPER

the use and effect of extreme isolation (solitary confinement). See for example, Landriscina, “New York Prisons: A Human Rights Crisis in Our Own Backyard,” (NYCLU, 2/13/2013), [www.aclu.org/blog/prisoners-rights/new-york-prisons-human-rights-crisis-our-own-backyard](http://www.aclu.org/blog/prisoners-rights/new-york-prisons-human-rights-crisis-our-own-backyard). And legal principles concerning mental illness continue to develop rapidly in several areas, such as civil confinement of sex offenders under Mental Hygiene Law article 10.

NYSDA helps lawyers keep up to date on developments related to the representation of clients with mental health issues, and representation in cases where the mental health of a third party affects clients’ best interests. The Backup Center provides training and publishes information on related topics. In the past year, three presentations about representing clients with mental health issues were given at NYSDA training events: “To Plea or Not to Plea: Pitfalls of the Insanity Defense,” “Representing Clients with Mental Health Issues: Ethics and Practical Considerations,” and “Representing Clients with Mental Health Issues.”

### **Practice Tips on Criminal Defense from MHLS**

The Practice Tips article in this issue of the *REPORT* is by Sheila Shea, Director of the Mental Hygiene Legal Service (MHLS) for the Third Judicial Department. The article addresses issues surrounding representation of clients with mental disabilities who are accused of crime and illuminates the complexities of CPL article 730 in depth (p. 8).

### **Summarized Cases Deal with Many Mental Health Issues**

The case summaries in this issue of the *REPORT* include a variety of decisions concerning mental illness. For example, in *People v McCray* (p. 42), the Third Department found, over a strong dissent by Judge McCarthy, that the trial court’s refusal to turn over to the defense certain portions of the accuser’s mental health records did not violate the defendant’s confrontation rights.

Some decisions do not directly involve criminal proceedings but implicate information defense counsel needs to advise a client fully about potential consequences of a criminal case involving mental health issues. The Second Department decision in *Matter of Robert T. v Sproat*, (p. 33) deals with procedures affecting persons found not responsible by reason of mental disease or defect and eventually granted a release order and order of conditions. A First Department case, *People v Christopher B.* (p. 27), considers proceedings held after a defendant has been found incompetent to proceed; it holds that the prosecution has standing to participate in a CPL 730.50(2) retention hearing to represent the public interest. Fourth Department decisions include *People v Diaz* (p. 44), on the consideration given mental illness in determining a sex

offender’s risk level under the Sex Offense Registration Act (SORA), and *Matter of State of New York v Lashway* (p. 43), saying that the court had continuing subject matter jurisdiction over all Mental Hygiene Law article 10 proceedings concerning a respondent found to be a dangerous sex offender requiring civil commitment who was transferred from a secure treatment facility to a state prison after violating his parole. The Third Department also addressed a SORA issue in *Matter of Charles A. v State of New York* (p. 42), finding that the court erroneously relied on information that the final stage of sex offender treatment was not available to the defendant in prison, which the State had no opportunity to refute, when directing his release under strict and intensive supervision.

### **Competency Requirements Apply in Parole and Probation Revocations**

In *Matter of Lopez v Evans* (summary on p. 28), the First Department found last December that due process prohibits going forward with a parole revocation proceeding where the parolee has been found incompetent to stand trial in a criminal prosecution based on the same charges.

More recently, another appellate court determined that a lower court erred in revoking probation and sentencing a defendant without holding a competency hearing. Counsel had objected to proceeding, citing the client’s lack of capacity; two psychologists had opined that the defendant was “a schizophrenic with auditory hallucinations who was lacking the cognitive capacity to understand the court proceedings and to assist his counsel with the defense.” While the defendant was resentenced to time served, an exception to the mootness doctrine was invoked, as the issue is of importance to the criminal justice system and likely to recur but to evade review. [People v Concepcion](#), 2013 NY Slip Op 23115 (App T, 2nd Dept 4/8/2013).

### **Mental Health Issues Can Affect Family Court Cases**

The mental health of parents and their children can affect the course of various family court proceedings, including visitation matters. For example, the recent case of *Matter of Burrell v Burrell* (summary on p. 40), held that a trial court properly limited a mother’s visitation because she had taken no steps to learn how to handle her child, whose mental disorders led to violent and destructive outbursts. Counsel for parents must understand and help clients address the mental health needs of the clients’ children.

In other types of proceedings, parents’ attorneys may need to understand and advocate for their clients’ rights with regard to their children’s mental and other health. For example, as noted in [Standards of Practice for Attorneys Representing Parents in Abuse and Neglect](#)

**Cases** (American Bar Association 2006), when children are in foster care but “decision-making rights remain, the parent’s attorney should assist the parent in exercising his or her rights to continue to make decisions regarding the child’s medical, mental health and educational services.” (Action under Standard 3.)

Parents’ own mental health may present legal issues that counsel need to recognize and analyze when parental rights are at stake. As to one very complicated issue — a client’s ability to assist counsel — the above standards say lawyers must “[b]e aware of the client’s mental health status and be prepared to assess whether the parent can assist with the case.” (Standard 18.) But suggesting that a Guardian Ad Litem should be provided is problematic, especially where the issue is the client’s mental fitness to parent his or her children.

### **Few New York Standards Guide Attorneys Representing Parents**

Counsel seeking guidance in providing representation of parents in cases involving mental health issues (or others) may turn to the ABA standards above, as few New York specific standards exist in the area of parent representation. NYSDA’s *Standards for Providing Constitutionally and Statutorily Mandated Representation in New York State* (2004) contain a section devoted to family court counsel. A few general mentions are made of mental health evaluations, treatment, and experts. The standards are posted on the NYSDA website. [www.nysda.org/docs/PDFs/Pre2010/04\\_NYSDAStandards\\_ProvidingConstitutionallyStatutorilyMandatedReprsntatn.pdf](http://www.nysda.org/docs/PDFs/Pre2010/04_NYSDAStandards_ProvidingConstitutionallyStatutorilyMandatedReprsntatn.pdf). The New York State Bar Association’s standards make occasional reference to their applicability to custody matters, and the Performance sections contain a short subsection about abuse and neglect matters. [www.nysba.org/AM/Template.cfm?Section=Special Committee to Ensure Quality Mandated Representation Home&Template=/CM/ContentDisplay.cfm&ContentID=54163](http://www.nysba.org/AM/Template.cfm?Section=Special%20Committee%20to%20Ensure%20Quality%20Mandated%20Representation%20Home&Template=/CM/ContentDisplay.cfm&ContentID=54163). William Leahy, Director of the Indigent Legal Services (ILS) Office, said during a presentation at the Chief Defender Convening hosted by NYSDA in February that setting standards for parent representation is among the many tasks the Office will be undertaking.

### **Mental Disabilities as Statutory Grounds for Taking Children**

In New York, mental disabilities are statutorily enshrined as grounds for the state to take guardianship and custody of children where parents are “presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year ....” Social Services Law 384-b(4)(c). Whether or not such cases are

common, some advocates for people with mental disabilities have sought to eliminate these statutory grounds. See for example, “Termination of Parental Rights Bill Update” at [www.mhanys.org/publications/mhupdate/updatelatest.htm](http://www.mhanys.org/publications/mhupdate/updatelatest.htm).

### **Disabilities are Grounds for Advocacy, Not Giving Up**

Whether in cases involving termination of parental rights, custody and visitation, or abuse and neglect, clients’ mental disabilities provide challenges to lawyers. That clients have such disabilities may necessitate even more aggressive advocacy and a need to seek resources (see below), advice of experienced colleagues, and training.

A report from the National Council on Disability, [Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children](#), includes chapters on the Rehabilitation Act of 1973 and the Americans with Disabilities Act. Information on the application of those laws to parental rights may be helpful to lawyers representing parents. Other, more general resources are noted below.

NYSDA hopes to work with others to plan training about the intersection of mental health law, the Americans With Disabilities Act, and child welfare law.

### **Counsel’s Presence at a Parent’s Mental Health Evaluation**

A mental health issue recently arising in some matters involving parental representation is counsel’s presence at the mental health evaluation of a client. A court in New York County concluded several years ago that a mother did not have the right to have her lawyer present “at a mental health evaluation conducted in furtherance of the dispositional hearing in a Family Court Act Article 10 neglect proceeding,” finding that such evaluation was not a critical stage. In the event of a later termination of parental rights proceeding, the court said, the mother’s “constitutional right to the effective assistance of counsel would be scrupulously honored by the mere exclusion from evidence and judicial consideration of the instant mental health evaluation.” *Matter of Admin. for Children’s Servs. v Y.B.*, 242 NYLJ 23, 2009 NY Misc LEXIS 2560 (Supreme Ct, New York Co 2009).

The *Y.B.* decision was discussed late last year in an unpublished opinion dealing not with neglect proceedings, but with custody issues in a disputed matrimonial matter. See [M.A.M. v M.R.M.](#), 37 Misc 3d 1232(A) (Supreme Ct, Monroe Co 2012). The *M.A.M.* opinion arose from the husband’s request to have counsel present when the court-selected evaluator conducted a psychological evaluation. The court noted that “considerable professional literature [exists] in the field ... which suggest that the presence of attorneys (or other third

parties) has significant potential for undesirable influence on the interactions, behavior, and statements of the individual being evaluated.”

The *M.A.M.* court observed that New York courts have, historically and with exceptions, allowed attorneys to attend court-ordered evaluations in custody cases. The lengthy exposition on New York law included citing *Matter of Alexander L.* (60 NY2d 329 [1983]) for the proposition that the Court of Appeals “extended the right to counsel in the Family Court Act to require that counsel be present in an examination required as part of a termination of parental rights proceeding”; *Alexander L.* was then distinguished. Citing many types of cases involving counsel’s presence at examinations, including personal injury matters, the judge in *M.A.M.* observed that many seemed based on a “judicial gloss” on CPLR 3121, and that New York law appeared to be moving from a presumption that a valid reason must be shown to exclude counsel from mental health examinations to a requirement that justification must be shown for having counsel attend.

The trial-level decision in *M.A.M.* may serve, if nothing else, as a research starting point for parents’ lawyers dealing with any question of counsel’s presence at a mental health evaluation. Attorneys who do not have access to this unpublished opinion can contact the Backup Center.

### ***Clients’ Psychiatric Records Not to be Automatically Disclosed***

Turning to another legal issue that may arise when a parent has a mental illness, the Second Department said in *Matter of Worysz v Ratel*, (summary on p. 36) that the lower court should have examined the mother’s psychiatric records in camera before deciding the father’s motion to compel disclosure of them. The records might “contain embarrassing or potentially damaging material” irrelevant to her fitness as a parent, the court noted.

### ***Resources Exist to Help Attorneys with Mental Health Issues***

When a case presents potential mental health issues, attorneys have a wide range of resources to turn to, from training materials and experts identified in NYSDA or other CLE training events to published articles.

As just the title of an article from the National Association of Criminal Defense Lawyers shows, lawyers who need to look behind mental health assessment test scores to see if an assessment was appropriate, and appropriately done, do not face an easy task. The article, while often focusing on capital cases, provides some guidance for other lawyers on this jargon-filled topic. See John T. Philipsborn, “Reviewing Mental Health Assessment and Testing-Related Literature and Test Manuals is a Key to

Effectively Preparing and Examining Mental Health Experts” (*The Champion*, Jan.-Feb. 2013).

Specific assessment instruments have garnered particular attention. The Forensic Psychologist blog has addressed a number of issues regarding the Static-99, an instrument used in New York civil commitment proceedings. Most recently, the blog humorously addressed a serious problem with the Static-99, at <http://forensicpsychologist.blogspot.com/2013/03/miracle-of-day-80-year-old-man.html>.

A publication that may be considered a resource, or may be considered a reason to consult *other* resources, is the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders (DSM)*. Diagnoses included in (or, sometimes, excluded from) the DSM can play a role in legal proceedings, from those dealing with commitment of sex offenders to criminal and family court proceedings involving alleged child abuse. The fifth edition is expected to be published in May 2013. [www.dsm5.org/Pages/Default.aspx](http://www.dsm5.org/Pages/Default.aspx). As noted in the last issue of the *REPORT*, a diagnosis excluded from the *DSM-5* may still affect proceedings. [www.nysda.org/docs/PDFs/TheReport/2012-Nov-Dec-BackupCenterREPORT-XXVII\\_4.pdf](http://www.nysda.org/docs/PDFs/TheReport/2012-Nov-Dec-BackupCenterREPORT-XXVII_4.pdf).

Many other resources exist. Lawyers with questions about particular mental health issues may contact the Backup Center.

### ***Mental Health Advocates Raise Concerns About Mandated Reporting Sections of NY SAFE Act***

Advocates for effective mental health policies that benefit people with mental illness and society at large immediately spoke out about portions of the swiftly-passed NY SAFE legislation discussed below. The law is intended to cut down on gun violence, but, they say, its mandated reporting requirements will have negative consequences. Glenn Liebman, CEO of the Mental Health Association in New York State Inc. (MHANYS), told the Associated Press soon after the law passed that requiring doctors, nurses, therapists, and social workers to report to authorities patients they believe are likely to harm themselves or others stigmatizes people with mental illness, who may then refrain from seeking mental health services. [www.dailygazette.net/standard/ShowStoryTemplate.asp?Path=SCH/2013/01/16&ID=Ar00102&Section=National](http://www.dailygazette.net/standard/ShowStoryTemplate.asp?Path=SCH/2013/01/16&ID=Ar00102&Section=National). He added in a radio interview his hope that discussions will now turn to making treatment and services for people with mental illness more appealing and less stigmatizing. [www.northcountrypublicradio.org/news/story/21276/20130117/new-gun-law-prompts-mental-health-concerns](http://www.northcountrypublicradio.org/news/story/21276/20130117/new-gun-law-prompts-mental-health-concerns).

## **New and Amended Laws on Guns, Ammunition, and Related Matters**

The beginning of the year brought the passage of the New York Secure Ammunition and Firearms Enforcement Act of 2013 (NY SAFE Act) [L 2013, ch 1], along with controversy and confusion over its various provisions, including multiple amendments and additions to the CPL, Penal Law, Family Court Act (FCA), Domestic Relations Law (DRL), and as referenced above, the Mental Hygiene Law. Amendments to the SAFE Act to correct some of the law's problems came in the state's budget, which was enacted in late March [L 2013, ch 57, part FF].

New crimes include criminal possession of a firearm (Penal Law § 265.01-b), a class E felony; aggravated criminal possession of a weapon (§ 265.19); aggravated enterprise corruption (§ 460.22); safe storage of rifles, shotguns, and firearms when the owner lives with a person who is prohibited from possessing such weapons (§ 265.45); unlawful possession of a large capacity ammunition feeding device (§ 265.36); unlawful possession of certain ammunition feeding devices (§ 265.37); and "Mark's Law," which creates a new category of aggravated murder when

the intended victim was a first responder (§ 125.26) and adds that category to the list of victims under first-degree murder (§ 125.27). Some offenses have been upgraded and amended and the definitions of assault weapons (Penal Law § 265.00[22]) and large capacity ammunition feeding devices (§ 265.00[23]) have been amended.

Other changes relate to the mandatory suspension or revocation of a person's firearms license when a court grants a temporary order of protection or order of protection under CPL § 530.14(1)-(3), upon a finding of a substantial risk that the defendant may use or threaten to use a firearm unlawfully against the person or persons protected by the order. Similar amendments have been made to DRL §§ 240(3) and 252(9) and FCA §§ 842-a, 846-a, and new sections of the FCA have been added, §§ 446-a, 552, 656-a, and 780-a, and 1056-a. The law also makes amendments to licensing, creates a statewide license and record database, and adds new sections on sellers of ammunition and reporting of theft or loss of a firearm, rifle, or shotgun.

NYSDA has produced a section-by-section summary of the NY SAFE Act, as amended in March, which is available by contacting the Backup Center. The state has created a website about the SAFE Act, which is available at [www.governor.ny.gov/nysafeact/gun-reform](http://www.governor.ny.gov/nysafeact/gun-reform).

## CONFERENCES & SEMINARS

**Sponsor:** New York State Defenders Association  
**Theme:** Family Court Trainer  
**Date:** June 8, 2013  
**Place:** Rochester, NY  
**Contact:** NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Appellate Advocacy  
**Date:** June 14, 2013  
**Place:** Brooklyn, NY  
**Contact:** NYSACDL: tel (212) 532-4434; website [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** New York State Defenders Association  
**Theme:** 46th Annual Meeting & Conference  
**Dates:** July 21-23, 2013  
**Place:** Saratoga Springs, NY  
**Contact:** NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** 56th Annual Meeting & Seminar- Real Lawyers, Real Defenses

**Dates:** July 24-27, 2013  
**Place:** San Francisco, CA  
**Contact:** NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email [vsejas@nacdl.org](mailto:vsejas@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

**Sponsor:** Forensic Science Initiative, West Virginia University & National Institute of Justice  
**Theme:** Basic Crime Scene Investigation for Legal Professionals  
**Dates:** July 29-August 1, 2013  
**Place:** Morgantown, WV  
**Contact:** FSI: tel (304) 293-6215; email [fsi@mail.wvu.edu](mailto:fsi@mail.wvu.edu); website <http://fsi.research.wvu.edu/training>

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** 15th Annual Making the Case For Life- Mitigation & Jury Selection in Capital Cases  
**Dates:** August 22-24, 2013  
**Place:** Las Vegas, NV  
**Contact:** NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email [vsejas@nacdl.org](mailto:vsejas@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

## DMV Adopts Regulations on Licensing and DWI

On Feb. 13, the DMV adopted two regulations: (1) amending 15 NYCRR § 3.2 to establish a new driver's license restriction, the A2-problem driver restriction; and (2) adopting a new Part 132 of Title 15 of the NYCRR regarding "Dangerous Repeat Alcohol or Drug Offenders." Notices of adoption for the two regulations appear in the [February 13, 2013 issue](#) of the State Register (pp. 48-50). On May 1, the DMV adopted regulations amending Part 134 (Drinking Driver Program) and Part 136 (Problem Driver Restriction and Relicensing after Permanent Revocation). Notices of adoption appear in the

[May 1, 2013 issue](#) of the State Register (pp. 13-16). The amendments to 3.2 and Parts 134 and 136 originally took effect as emergency regulations on Sept. 25, 2012, though the text of these amendments have changed slightly since September. Some of those changes were in response to comments the DMV received, including the comments submitted by NYSDA. The DMV's assessment of public comments on the Part 136 amendments is available at [www.dmv.ny.gov/forms/dwiassess.pdf](http://www.dmv.ny.gov/forms/dwiassess.pdf).

The text of the adopted regulations is available at [www.dmv.ny.gov/problem.htm](http://www.dmv.ny.gov/problem.htm). Defense attorneys with questions about the regulations should contact the Backup Center. ⚡

### ***Celebrating the Life of Former NYSDA Board Member Norman Shapiro***

Members of NYSDA's staff and Board, saddened to learn that Norman Shapiro died on April 13th, take comfort in remembering him and his many contributions to this community.

The services held on April 17th reflected the love and laughter that marked Norm's relationship with his family, friends, and colleagues. Past *Backup Center REPORT*s and other NYSDA chronicles reflect his low-key, high-influence participation in the work of this Association since its inception.

He was one of NYSDA's founding members, and became a Vice President of its Board in 1980, serving in that position until he stepped down from the Board in 2011. But Norm "did not receive NYSDA's Service of Justice Award on the basis of longevity or even just for loyalty to the Association," as the press release about the 2011 award noted. He received it "for his continued efforts to improve the quality of public defense representation statewide, his determined efforts to give his own clients the best possible representation, and his dedication to the idea that mastering forensic evidence and other skills was necessary to prevent injustice in criminal matters."

That heartfelt, accurate accolade in no way captured the essence of the man in question. He was funny. He was smart. He cared about details. Factual details that could win an argument or a trial. Procedural details to ensure that a legal victory resulted in a client's freedom as soon as possible. And grammatical details, as shown by the running joke at the services following his death about his dislike of sentences ended with a preposition.

Norm wrote "a recollection" of NYSDA in 1997 for its thirtieth anniversary. Even as "a little group, with no bucks and less clout," he said, the early Association "had some say ... in the revision of the Penal Law and the Code of Criminal Procedure." There is no doubt Norm had a role in that "say."

The Division of Criminal Justice Services had started developing standards and goals for the defense function, Norm recalled; Jonathan Gradess got NYSDA involved — and then got involved in NYSDA. But Norm didn't add that he himself chaired the Standards and Goals Committee set up by the NYSDA Board in 1983 — or that completing the standards was his idea, as reflected in Board minutes. Seven years after Norm's thirtieth anniversary recollection in *The Defender* magazine, NYSDA's Board adopted statewide standards that in turn influenced standards promulgated by the New York State Bar Association; those State Bar standards were relied on by the Indigent Legal Services Office to create statewide standards just last year. Long in coming, those standards owe their existence in part to Norm Shapiro.

Norm became an expert on forensics, a topic that he pushed long before the National Academies of Science recognized that most forensic "evidence" is really junk, not science. He shared his expertise generously with his colleagues.

He also generously gave of his time to more mundane matters that are nonetheless vital to the work of an Association. Nominations to the NYSDA Board were quickly and humorously announced at the Annual Meeting every year because Norm was willing to do this thankless task.

He will be missed at this year's Annual Meeting and beyond. He will be missed at every Board meeting. And his accomplishments will live on.

## Representing Clients with Mental Disabilities

By Sheila E. Shea\*

*"It is to the Court a finding of phantom fitness with no more substance than a bubble on a baby's wand."<sup>1</sup>*

In *People v A.S.*,<sup>2</sup> the Supreme Court, Kings County, rejected the opinion of a state's psychologist that A.S., a developmentally disabled client, had been restored to capacity. The case of A.S. highlights the challenges associated with representing a defendant who is mentally disabled. Charged with arson in the second degree at the age of sixteen, A.S. was intellectually disabled and unable to read beyond a first grade level. He had barely achieved a passing score on the Standardized Competency Assessment for Standing Trial for Defendants with Mental Retardation (CAST\*MR) after multiple attempts during his eight year confinement at a secure developmental center. The defendant's psychiatric examiner opined that a trial would cause A.S. debilitating stress. The witness called on behalf of the Commissioner of what is now known as the Office for People with Developmental Disabilities (OPWDD) agreed; nonetheless, the Commissioner persisted in her position that A.S. was competent to stand trial. After weighing the conflicting expert testimony, the Court determined that A.S. was not competent to stand trial, seizing upon his "fragile, brittle state." Further, the Court granted the defense motion for "Jackson" relief<sup>3</sup> on the grounds that it was not likely that the defendant would attain capacity in the foreseeable future.

The case of A.S. is but one of an estimated 60,000 annually where competency evaluations are ordered in the United States. Roughly 12,000 defendants are found incompetent to stand trial each year in courts across the country.<sup>4</sup> Major mental illness, intellectual disability, or other cognitive limitations are the most frequent causes of adjudicative incompetence.

In New York, a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his or her own defense cannot be prosecuted for a criminal offense. Founded upon common law principles, New York's statutory scheme governing fitness to proceed can be traced back to an 1828 statute which provided that "no insane person can be tried, sentenced to any punishment, or punished for any crime or offense while he continues in that state."<sup>5</sup> Over time, sporadic attention to the laws governing mentally disabled defendants was said to generate "incredible

confusion" over two fundamental issues: (1) how to examine the defendant and (2) what disposition to make of a defendant found unfit to proceed.

The results of this confusion led to egregious consequences in some cases. For instance, upon undertaking law reform in 1968, the Association of the Bar of the City of New York in cooperation with Fordham Law School observed that the former Code of Criminal Procedure made it possible for an uneducated nineteen-year-old defendant accused of committing a burglary in Brooklyn in 1901 to be confined beyond his 83rd birthday in a maximum security institution operated by the Department of Corrections without ever being afforded an opportunity to prove his innocence. Characterized as a "forgotten man," this defendant was denied a speedy trial and periodic judicial review of his condition, and was confined decades longer than even proof of his guilt would have supported in an overcrowded, understaffed state correctional institution.

Many of the deficiencies of the prior Code of Criminal Procedure were cured in 1970 upon the enactment of the Criminal Procedure Law (CPL),<sup>6</sup> but the process for determining fitness to proceed, as well as the various alternatives available to the court to address the circumstances of an incapacitated defendant, engender confusion to this day. This article will attempt to demystify CPL article 730,<sup>7</sup> offer practice tips, and explore alternatives to criminal incarceration for defendants with mental disabilities.

### Practice Tip 1: Back to Basics.

Crucial to understanding article 730 is familiarity with terms of art applied throughout the statute. The meanings of nine essential terms as used in article 730 are set out in the sidebar (p. 11) for easy reference by attorneys who do not regularly work with the statute.

### Practice Tip 2: Understand the Distinctions between Psychiatric Illnesses, Developmental Disabilities, and Neurological Injuries or Disorders Which Can All Impede a Client's Capacity.

While not defined in article 730, a mental disease or defect may encompass a major mental illness, an intellectual or developmental disability, or other cognitive limitation which impedes the ability of defendants to understand the proceedings against them or assist in their own defense. The Mental Hygiene Law (MHL) defines "mental illness" as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation."<sup>8</sup> Schizophrenia and other psychotic disorders are mental illnesses within the meaning of the law. The definition of mental illness is also broad enough

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to encompass neurological disorders or conditions which impact upon brain functioning.<sup>9</sup>

The definition of “developmental disability” is somewhat cumbersome to those unfamiliar with the MHL or clinical practice. MHL 1.03(22) identifies six specific conditions which constitute developmental disabilities within the meaning of the law: mental retardation, cerebral palsy, epilepsy, neurological impairment, familial dysautonomia, and autism. A developmental disability also includes *any other condition* of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of a person who is mentally retarded. In addition, to properly diagnose a developmental disability, the person’s condition must originate before the age of twenty-two, continue or be expected to continue indefinitely, and constitute a substantial handicap to such person’s ability function normally in society.<sup>10</sup>

Psychiatric examiners should engage in a contextual and functional analysis of the defendant’s abilities when assessing that person’s capacity to stand trial<sup>11</sup> and the clinical assessment tools utilized by the psychiatric examiner during a competency evaluation will also vary depending upon the nature of the defendant’s disability. For example, the MacArthur Competence Assessment Tool (Mac CAT) and CAST\*MR noted above are two commonly used instruments which assess knowledge, understanding, and reasoning pertaining to court proceedings. The Mac CAT has been validated with three groups of criminal defendants with varying competence levels and mental illness treatments histories. The CAST\*MR is a standardized instrument used to assess competence for persons with mental retardation.

If a defendant is remanded for commitment following a finding that she is an incapacitated person, it is imperative that the defendant be remanded to the custody of the proper state official. This will either be the Commissioner of Mental Health (OMH), for those defendants who are mentally ill, or the Commissioner of the OPWDD, for those defendants who are developmentally disabled.<sup>12</sup> In some cases, a defendant will be dually diagnosed, requiring fact finding and clinical opinion as to the disorder or condition primarily contributing to the defendant’s incapacity. For those clients with multiple disabilities, defense counsel may want to retain an expert who is a clinical psychologist, as opposed to a psychiatrist, in order to fully assess the client’s intellectual abilities. And for clients with neurological conditions, defense counsel may want to retain a psychologist or physician with a background in neurology.

## I. 730.20 — Fitness to proceed: generally

The standard to be applied in determining whether a defendant has the capacity to stand trial is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”<sup>13</sup> The mechanics involved in having a defendant examined for the purpose of determining his or her capacity are set forth in CPL 730.20.

The appropriate director to whom a criminal court issues an order of examination must designate two qualified psychiatric examiners to evaluate the defendant. The statute was amended in 1989 to eliminate the requirement that psychiatrists be designated to examine the defendant.<sup>14</sup> Thus, examinations may now be conducted by two psychiatrists, two psychologists, or one from each discipline.<sup>15</sup>

The examination may be conducted at the place the defendant is held in custody, which is typically a local correctional facility or a hospital. If the defendant is not in custody, the examination may be conducted on an outpatient basis.<sup>16</sup> Significantly, unless the defendant has been admitted to a hospital, psychiatric examiners are either on the staff of or retained by the local (county or city) department of mental health. CPL 730.10(4).

### **Practice Tip 3: *The court may authorize a psychologist or psychiatrist retained by the defendant to be present at the psychiatric examination of the defendant (CPL 730.20[1]).***

The right to counsel attaches at a competency examination conducted pursuant to CPL article 730 and counsel may observe the psychiatric examination of his or her client.<sup>17</sup> There is, however, no reciprocal or corresponding right of the district attorney to either observe or videotape the examination.<sup>18</sup> CPL 730.20(6) makes it clear that statements made by the defendant in the course of the examination cannot be introduced as evidence against the defendant at trial on any issue other than that of the defendant’s mental condition.

## II. 730.30 — Fitness to proceed; order of examination

As noted in Professor Peter Preiser’s *Practice Commentaries* to CPL 730.30, a defendant is presumed competent to proceed and is not entitled as a matter of right to have his or her mental capacity determined by examination and hearing. Entitlement to a hearing depends upon the court’s awareness of some basis for questioning the defendant’s capacity. This may appear from the defendant’s prior history combined with the circumstances of the crime brought to the attention of the court by counsel; it may be apparent from the defendant’s actions in the courtroom that the court should initiate an

inquiry into fitness *sua sponte*. Most importantly, the issue for the court is not prior or subsequent incompetence, but present fitness.<sup>19</sup>

The examination procedure may be initiated by any court in which a criminal proceeding is pending and at any time from initial arraignment through sentencing. CPL 730.30(1). Subdivisions two, three, and four set forth the rules governing the action of the court after receipt of examination reports. The question of whether a defendant is fit to proceed calls for a judicial determination, not a medical one, and the court need not accept the conclusions of the examiners irrespective of whether they unanimously conclude that the defendant is or is not an incapacitated person.<sup>20</sup>

In the 2011 case of *People v Philips*,<sup>21</sup> the Court of Appeals addressed the manner in which the court should weigh competing evidence presented on the issue of a defendant's fitness for trial. This often involves, as the Court recites, "extensive medical conclusions presented as well as the representations of defense counsel regarding his or her client's fitness for trial."<sup>22</sup> "[W]hile the testimony of experts and the assertions of counsel may be readily ascertained, there are other indicia of trial fitness considered by the court that may escape the record, but nonetheless evince a defendant's understanding of the proceedings. For example, the manner in which the defendant interacts with the court, communicates with defense counsel, or physically reacts to a question or piece of testimony cannot adequately be captured by the record, but has a bearing on the issue of fitness for trial and can be perceived and evaluated by the trial judge."<sup>23</sup> As noted above, while the representations of defense counsel are no doubt important in the court's exercise of determining fitness, they are not dispositive, but merely a factor to be considered by the trial court. A "defense counsel's observations and representations, without more, do not and should not serve as an automatic substitute for the court's statutory discretion...."<sup>24</sup>

Regardless, however, of the court's discretion to hold a hearing, one is required if the examiners are not unanimous in their opinions or if a hearing is requested by motion of either the defendant or the prosecutor. CPL 730.30. When a defendant's capacity is in question, the burden is on the prosecution to establish that the defendant is fit to proceed by a preponderance of the evidence and that the defendant is not eligible for *Jackson* relief.<sup>25</sup>

Representing a client with diminished capacity presents particular challenges for the defense attorney. The Rules of Professional Conduct, specifically Rule 1.14, require an attorney to maintain as far as reasonably possible a conventional relationship with the client. That said, at least some judges recognize the ethical difficulties attendant to discharging representational responsibilities for a profoundly disabled client.<sup>26</sup> Often the attorney and

the client will be aligned in asserting incapacity, but in other situations the client will claim to be fit to proceed while the defense attorney has severe doubts or cannot agree that proceeding to a hearing on fitness is in the client's best legal interests. In those cases where clients are committed and alleged to be incapacitated, but nonetheless wish to proceed to a hearing to establish fitness, representation may be assumed in some cases by the Mental Hygiene Legal Service, which avoids the ethical dilemma for defense counsel.<sup>27</sup>

### III. 730.40 — Fitness to proceed; local criminal court accusatory instrument

Section 730.40 sets forth the procedure for the disposition of a local criminal court accusatory instrument and the commitment of the defendant to the custody of OMH or OPWDD when the court has determined that the defendant is an incapacitated person. The commitment mechanisms are either a "final order of observation" or a "temporary order of observation."

If the examiners are of the opinion that the defendant is incapacitated, the proceeding is founded on a local criminal court accusatory instrument, and the charge is other than a felony, a final order of observation must be issued. If the charge is a felony, then a temporary order of observation is issued, unless the District Attorney consents to a final order being issued.<sup>28</sup> Subdivision 1 prescribes that both the final and the temporary order can require the defendant to remain in the custody of OMH or OPWDD for a period not to exceed 90 days. The statute also requires that the local accusatory instrument be dismissed with prejudice when the court issues a final order of observation. In cases where the court issues a temporary order of observation, the felony complaint remains open for the duration of the order; the complaint must be dismissed upon certification that the defendant was in the custody of the Commissioner when the temporary order expired.<sup>29</sup>

#### **Practice Tip 4: The automatic ninety day commitment following the issuance of a 730.40 final order of observation has been found to be unconstitutional.**

In 1988, the Westchester County Supreme Court struck down the automatic 90-day commitment in the case of *Ritter v Surles*.<sup>30</sup> The state elected not to appeal the order entered in *Ritter*. Instead, OMH instituted a policy in its hospitals requiring a defendant to be discharged within 72 hours following remand by the criminal court unless the defendant meets the criteria for either a voluntary or an involuntary admission to the hospital pursuant to article 9 of the MHL.<sup>31</sup>

OMRDD (now OPWDD), in contrast did not adopt any published policy concerning the admission and treatment of defendants remanded to the Commissioner's cus-

## Definitions of Nine Essential Terms Used in Criminal Procedure Law article 730<sup>a</sup>

1. "Incapacitated person" means a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense.
2. "Order of examination" means an order issued to an appropriate director by a criminal court wherein a criminal action is pending against a defendant, or by a family court pursuant to section 322.1 of the family court act wherein a juvenile delinquency is pending against a juvenile, directing that such person be examined for the purpose of determining if he is an incapacitated person.
3. "Commissioner" means the state commissioner of mental health or the state commissioner of mental retardation and developmental disabilities (now known as the Office for People with Developmental Disabilities).
4. "Director" means (a) the director of a state hospital operated by the office of mental health or the director of a developmental center operated by the office of mental retardation and developmental disabilities, or (b) the director of a hospital operated by any local government of the state that has been certified by the commissioner as having adequate facilities to examine a defendant to determine if he is an incapacitated person, or (c) the director of community mental health services.
5. "Qualified psychiatrist" means a physician who:
  - (a) is a diplomate of the American board of psychiatry and neurology or is eligible to be certified by that board; or,
  - (b) is certified by the American osteopathic board of neurology and psychiatry or is eligible to be certified by that board.
6. "Certified psychologist" means a person who is registered as a certified psychologist under article one hundred fifty-three of the education law.
7. "Psychiatric examiner" means a qualified or certified psychologist who has been designated by a director to examine a defendant pursuant to an order of examination.
8. "Examination report" means a report made by a psychiatric examiner wherein he sets forth his opinion as to whether the defendant is or is not an incapacitated person, the nature and extent of his examination and, if he finds that the defendant is an incapacitated person, his diagnosis and prognosis and a detailed statement of the reasons for his opinion by making particular reference to those aspects of the proceedings wherein the defendant lacks capacity to understand or to assist in his own defense. The state administrator and the commissioner must jointly adopt the form of the examination report; and the state administrator shall prescribe the number of copies thereof that must be submitted to the court by the director.<sup>b</sup>
9. "Appropriate institution" means (a) a hospital operated by the office of mental health or a developmental center operated by the office for people with developmental disabilities; or (b) a hospital licensed by the department of health which operates a psychiatric unit licensed by the office of mental health, as determined by the commissioner provided, however, that any such hospital that is not operated by the state shall qualify as an "appropriate institution" only pursuant to the terms of an agreement between the commissioner and the hospital. Nothing in this article shall be construed as requiring a hospital to consent to providing care and treatment to an incapacitated person at such hospital.

<sup>a</sup> These definitions appear in CPL 730.10.

<sup>b</sup> 22 NYCRR Part 111. Procedure Under CPL article 730.

tody pursuant to CPL 730.40. Following *Ritter*, a federal lawsuit was commenced against both OMH and OMRDD asserting that even a temporary hold for evaluation for admission violated the plaintiffs' constitutional rights.<sup>32</sup> The Second Circuit ruled against the plaintiffs, however, and determined that the state needed some reasonable time to decide whether to initiate civil commitment proceedings and a 72-hour confinement is not excessive to accomplish an evaluation. Thus, both OMH and OPWDD should evaluate persons remanded for admission from criminal courts within 72 hours to determine if the admission criteria are satisfied. The Mental Hygiene Law also requires that MHLS receive notice of *all* admissions to psychiatric hospitals and schools for the developmentally disabled, so any individuals who are admitted to the custody of OMH or OPWDD as a consequence of a 730.40 final order of observation will have the assistance of MHLS and receive notice of their status and rights.<sup>33</sup>

A defendant remanded for evaluation for admission pursuant to 730.40 will most likely be received at a state-operated psychiatric hospital. However, a 2008 amendment to article 730 does permit the admission of the defendant to a private hospital licensed by OMH, provided the hospital agrees to receive the defendant.<sup>34</sup> The amendment offers flexibility to the Commissioner in ascertaining the most appropriate treatment setting for the defendant, but most likely the statutory change was driven by the inordinately high cost of maintaining a person in a state-operated psychiatric bed. Whatever the rationale, the amendment furthers the right of the defendant to treatment in the least restrictive environment consistent with public safety and the defendant's clinical needs.<sup>35</sup>

For those defendants who are committed to the custody of the Commissioner of OMH pursuant to article 730, there is a strict regulatory framework governing their care and treatment while under an order of commitment from a criminal court and the regulations apply even after the

patient's conversion to civil status.<sup>36</sup> These regulations require, in part, that before clinical discretion is exercised to release, change status, or grant furloughs to a patient remanded to OMH custody by a criminal court, there must be a review of the decision by the hospital forensic committee.<sup>37</sup> The application of these more stringent regulations to patients remanded to custody of the Commissioner of OMH on final orders of observation has been the subject of long-standing federal litigation, *Monaco v Hogan*, 98-CV-3386 (EDNY), which is near settlement.<sup>38</sup> Under the terms of the settlement, OMH and its facilities may subject individuals remanded to OMH facilities pursuant to final orders of observation to a formal or informal review before granting them privileges or discharging them, but only if a clinical reason justifies such review. In determining whether there is clinical reason for referring such a patient for a formal, informal, or heightened review of proposed privileges or discharge, the patient's treatment team may take into consideration the nature of the charges and the circumstances which formed the basis for the charges which were dismissed when the patient was sent to the OMH facility pursuant to a final order of observation, but not simply that a patient was charged with a crime. A hearing to determine whether the settlement should be approved is set for May 16, 2013 in Federal District Court for the Eastern District of New York.

#### IV. 730.50 — Fitness to proceed; indictment

When a defendant is arraigned on an indictment, the superior court will proceed in accordance with CPL 730.30 to determine whether the person is an incapacitated person. If the court is satisfied that the person is not incapacitated, the criminal action against her proceeds. If the court is satisfied that the defendant is an incapacitated person, it must issue a final order of observation or an order of commitment.

If there is an indictment for a non-felony, then a final order of observation will be issued and the indictment dismissed. If the indictment is for a felony, then a commitment order is issued for a period of up to one year.

First and subsequent orders of retention may be issued upon application by the facility director where it is alleged that the defendant continues to be an incapacitated person. The court may adjudicate the defendant an incapacitated person and issue an order of retention following a hearing, initiated by the defendant or the Mental Hygiene Legal Service or upon the Court's own motion, or if no demand for a hearing is made, upon the papers.<sup>39</sup> In practice, the retention application is filed by OMH or OPWDD on official forms promulgated by the Office of Court Administration<sup>40</sup> and the MHLS attorney who receives the application will meet with the client and explain her right to a hearing. A hearing must be demand-

ed within ten days of the date that notice of the application was given to the defendant and the Mental Hygiene Legal Service. If a hearing is requested, the MHLS attorney will transmit the demand to the criminal court that issued the original commitment order and the hearing will be held in that county. Recent litigation has focused on whether the district attorney has the right to participate in the hearing. While the prosecutor is not entitled to statutory notice of the proceeding, such notice is built into the official forms and the Appellate Division, First Department has just held that the prosecutor has standing to participate in the proceeding.<sup>41</sup>

An indicted incapacitated defendant may be held in the custody of the Commissioner indefinitely without achieving dismissal of the indictment, depending on the maximum prison term that defendant faces. The defendant can be held so long as the aggregate periods of retention prescribed in the temporary order of commitment, the first order of retention, and any subsequent order do not exceed two-thirds of the authorized maximum term of imprisonment for the highest class of felony charged in the indictment.<sup>42</sup> If the defendant is in the custody of the Commissioner and reaches the "2/3 maximum" the indictment against him must be dismissed and the dismissal constitutes a bar to any further prosecution of the charge or charges contained in the indictment.<sup>43</sup> If the defendant is released prior to that time, though, upon a finding that she is no longer an incapacitated person, the criminal action against her must proceed.<sup>44</sup> During the period of confinement in the custody of the Commissioner, the quality of the defendant's representation can be enhanced if defense counsel and attorneys for the Mental Hygiene Legal Service communicate with each other periodically toward measuring whether the defendant is making progress toward restoration of fitness and to determine whether any motions should be made which do not require the defendant's personal participation.<sup>45</sup>

**Practice Tip 5: If a defendant is afforded Jackson relief and converted to civil status, the time spent in custody on an MHL article 9 or 15 legal status does not count toward calculation of the two-thirds maximum for purposes of CPL 730.50(3) & (4).**

Where a court finds that there is no substantial probability a defendant will attain capacity in the foreseeable future, it may afford relief to the defendant in the form of conversion to civil status without dismissal of the indictment.<sup>46</sup> Conversion to civil status typically has advantages for the defendant in terms of obtaining increased privileges or possible release from the hospital. As a result of the Court of Appeals decision in *People v Lewis*,<sup>47</sup> however, conversion to civil status may have adverse consequences for the defendant as the time in custody on civil

status will not count toward the two-thirds maximum and dismissal of the indictment.

**Practice Tip 6: Under CPL 730.50 an incapacitated defendant may be subjected to either inpatient or outpatient commitment, but outpatient commitment may only be authorized by order of a superior court with the consent of the District Attorney (L 2012, ch 56).**

Prior to 2012, a superior court was required to commit an incapacitated defendant to an appropriate institution. The 2012 amendment to the CPL permitting outpatient commitment was supported by the rationale that only 20% of defendants committed to OMH or OPWDD custody for restoration of capacity are deemed to otherwise be in need of hospitalization. It was also noted that 35 states provide for outpatient restoration of capacity and that community-based restoration would result in significant cost savings. The amendment furthers the right of the defendant to treatment in the least restrictive environment consistent with public safety and the defendant's treatment needs.<sup>48</sup> Since the amendment of the statute, the Mental Hygiene Legal Service has successfully advocated for outpatient commitment in two cases in the trial courts in the Third Department. Both cases involved developmentally disabled clients committed to the custody of OPWDD. Applications for continued retention were filed in these cases, but upon the clinical recommendation of OPWDD and the consent of the prosecutors, the court authorized outpatient commitment. The courts' orders will permit both clients to continue to receive appropriate care and treatment while residing in community residences. See also *People v Betty Y.*, 2013 NY Slip Op 23063 (Supreme Ct, Kings Co 3/7/2013).

## V. CPL 730.60 — Fitness to Proceed; procedure following custody by the Commissioner

This section of the CPL deals with custody following commitment under a CPL 730 order of observation.<sup>49</sup> The criminal proceeding is suspended while the defendant is incapacitated. Notwithstanding the suspension of the criminal action, the defendant may make any motion appropriate to preserve his or her rights which is susceptible of fair determination without his or her personal participation. This would, for instance, include a motion for dismissal of the indictment based upon an error in its procurement or filing.<sup>50</sup> A defendant who has been in custody for two or more years under a commitment order may also move for dismissal of the indictment upon the consent of the district attorney and upon a finding that dismissal of the indictment is consistent with the ends of justice and continued custody under an order of commitment is not necessary for the protection of the public or the treatment of the defendant.<sup>51</sup> Defense counsel are

encouraged to contact the Mental Hygiene Legal Service to discuss the possibility of filing a CPL 730.60(5) motion.

Subdivision six of this section codifies notice requirements which provide, in essence, that any person committed to the Commissioner's custody pursuant to any section of article 730 may not be discharged, released on condition, or placed on any less restrictive status unless four days' notice (excluding weekends and holidays) is provided to law enforcement officials, including the district attorney, and any potential victim of an assault or other violent felony. The constitutionality of section 730.60(6) as applied to final-order defendants was challenged in *Ritter v. Surles*,<sup>52</sup> discussed above. According to the court's decision, the Commissioner may still notify persons listed in CPL 730.60(6) of an upcoming release or change in status, but the release may not be delayed for the purpose of notification. The court also held that the district attorney no longer has criminal jurisdiction over the final-ordered defendant since all criminal charges have been dismissed.

## VI. Dispositional Alternatives for the Incapacitated Defendant

### • Civil Admission

Commitment to a psychiatric hospital or developmental center for any purpose constitutes a significant deprivation of liberty.<sup>53</sup> For those clients who are subject to orders of commitment under CPL 730.50, both OMH and OPWDD operate secure facilities where the clients will likely be confined. The OMH secure facilities which receive article 730 defendants are located at Kirby (Manhattan) and Mid-Hudson (Orange County) Psychiatric Centers or the Northeast or Rochester Regional Forensic Units.<sup>54</sup> Individuals who are subject to final orders of observation and remanded to the custody of the Commissioner for evaluation for admission as civil patients would likely be admitted to non-secure state or local psychiatric hospitals.<sup>55</sup> For developmentally disabled clients, in particular, the in-patient facilities available to receive them are few in number since OPWDD is in the process of significantly downsizing its institutional capacity.<sup>56</sup> Thus, a defendant subject to a CPL 730.50 commitment, for instance, would likely be committed to a secure developmental center (often the Sunmount Developmental Center in Franklin County) where it may be difficult for counsel to maintain contact with her client.

Where the purpose of an article 730 commitment is restoration of capacity, an ancillary benefit to the client is that during the period of commitment the client may receive desperately needed treatment for a psychiatric illness or support and habilitation for a developmental disability. If the objective of the attorney is to secure therapeutic treatment and services for a client and the client will voluntarily accept services, another alternative is to

pursue legal remedies which *could* result in a dismissal of the accusatory instrument, particularly when the client is charged with low level offenses, while at the same time affording the client essential services from OMH or OPWDD operated or licensed providers. As noted previously, the psychiatrists or psychologists appointed to complete an examination ordered pursuant to CPL 730.30 are typically either on the staff of or retained by the county mental health commissioner. These same individuals have the authority and responsibility to assist in a civil admission, particularly when the civil admission would be more appropriate than a criminal commitment. The detailed provisions governing admission and retention in hospitals and developmental centers pursuant to articles 9 and 15 are beyond the scope of this article, but the Mental Hygiene Legal Service can serve as a resource to the defense in explaining the operation of the statutory scheme. It is also fair to say that securing community-based (as opposed to in-patient) treatment services for mentally ill and developmentally disabled clients can be very challenging, particularly for clients who may need services to address developmental disabilities, but whose eligibility for such services has not been previously established. Mechanisms exist within OPWDD to seek eligibility determinations, however, and administrative remedies are available should eligibility be denied.<sup>57</sup> Again, the Mental Hygiene Legal Service can assist the defense bar in understanding eligibility criteria and advocating for appropriate services.

Less commonly utilized processes also permit a court itself to initiate a civil admission for a person brought before the tribunal. MHL 9.43(a) provides a procedure to bring an individual before a court and then, if certain standards are met, the judge may order the individual transported to a psychiatric emergency room for examination and possible admission. Criminal courts are also vested with the authority under MHL 9.43(b) to dismiss a criminal action and remand a person to a hospital for evaluation for admission. For 9.43(b) to apply, the person before the court must appear “to have a mental illness which is likely to result in serious harm to himself or others” and the court must find either that the crime has not been committed or that there is not sufficient cause to believe that such person is guilty.

- **Not Guilty by Reason of Mental Disease or Defect — CPL 330.20**

CPL article 730 addresses the fitness of the defendant to stand trial. The provisions of article 730 and the statute’s purpose must be distinguished from the procedures invoked to determine the defendant’s mental capacity at the time of the commission of the criminal act. The latter involves the affirmative defense of mental disease or defect,<sup>58</sup> a plea or verdict of not responsible,<sup>59</sup> and the post

plea or verdict procedures applicable to persons found not responsible by reason of mental disease or defect.<sup>60</sup> While commentators have observed that the test for competency to stand trial requires a greater degree of mental illness than that which is necessary to mount a successful insanity defense, substantially more defendants are found incompetent to stand trial than are acquitted by reason of mental disease or defect.<sup>61</sup> Indeed, the number of “NGRI”<sup>62</sup> admissions to OMH custody has declined over the past three decades from a high of 77 in 1982 to a low of 22 in 2008.<sup>63</sup>

- **Practice Tip 7: Defendants committed to the custody of the Commissioner pursuant to CPL 330 have significantly longer length of stay than may be warranted by their clinical condition.**

As with article 730 of the CPL, defense counsel may pursue the insanity defense to remove the client from the criminal justice system while ensuring that a client receives essential services. Counsel assisting clients with severe and persistent mental illnesses or developmental disabilities should be aware, however, that defendants committed to the custody of the Commissioner pursuant to CPL 330.20 have significantly longer lengths of stay than might be warranted by their clinical condition. Furthermore, for those defendants found to have a dangerous mental disorder at the time of their initial hearing, the prosecutor will have standing to appear in all future proceedings, the commitment standard is relaxed (the need for retention can be established by a mere preponderance of the evidence), and clinical discretion to grant furloughs, conditionally release, or discharge the defendant may only be exercised by court order.<sup>64</sup>

Counsel advising the mentally disabled defendant should also consider that a commitment under CPL 330.20 could result in a lifetime of supervision. That is because even upon conditional release from the hospital, court-imposed conditions of supervision may be applied indefinitely upon a mere finding of “good cause shown.”<sup>65</sup> Thus, in cases where the defendant is charged with a misdemeanor, in particular, invoking the insanity defense could result in a much longer period of confinement and supervision for the defendant than a sentence imposed after a finding of guilt. The better alternative if the defendant is restored to capacity may be to dispose of the criminal charges by plea with a definitive sentence and address the need for treatment under MHL article 9 or 15.

- **Assisted Outpatient Treatment — MHL 9.60**

Assisted outpatient treatment is codified at MHL 9.60 and is popularly known as Kendra’s Law. Assisted outpatient treatment or “AOT” may, in some cases, provide a civil dispositional alternative for mentally ill defendants. AOT consists of court-ordered services which are deliv-

ered in accordance with a treatment plan developed by a physician in consultation with the patient. Such treatment must include either case management services or assertive community treatment team<sup>66</sup> services through which the patient's care is coordinated and monitored. Court orders may also include any of the following categories of services, as appropriate: medication:

- periodic blood tests and urinalysis to determine compliance with prescribed medications and individual or group therapy;
- day or partial-day programming activities, and educational and vocational training and activities;
- alcohol and substance abuse treatment; and
- supervision of living arrangements.

There are detailed procedural requirements for the initiation of a Kendra's Law proceeding and factual predicates which must precede the application, *i.e.*, the petition must plead and establish that the subject of the petition has a history of lack of compliance with treatment for mental illness. If a person who has been ordered to participate in assisted outpatient treatment fails to comply, he may be brought to a hospital and evaluated for admission on an involuntary basis pursuant to MHL article 9.

#### • Mental Health Courts

Mental Health Courts handle criminal cases involving defendants with mental illness and seek alternatives to incarceration and diversion into treatment. The courts feature a designated judge, specially-trained staff, resource coordination, and collaboration between the court, community stakeholders, local mental health departments, and mental health and social service providers. The first mental health court in New York State opened in Kings County in 1982. As of August 1, 2012, there were 28 mental health courts operating upon the approval of the Presiding Justices of the Appellate Division.<sup>67</sup> Significantly, a defendant's decision to participate in a mental health court should be voluntary and based upon an informed choice. Courts should establish procedures for ensuring that each participant understands the terms of participation, including the impact upon his or her criminal case and the proposed treatment options. In particular, mental health courts must address issues of competence prior to enrollment of a mentally ill defendant in the program.

#### Conclusion

Representing mentally disabled individuals can be a challenging, but, with knowledge and preparation, a rewarding endeavor. Article 730 of the CPL offers critical procedural and substantive due process protections for defendants unable to understand the proceedings against them or assist in their own defense. Knowledge of the

mechanics of article 730 is critical to provide effective representation to mentally disabled defendants. However, counsel also needs a full appreciation of the spectrum of remedies available under civil statutes to protect the rights and interests of the mentally disabled to further clients' objectives and lead to better treatment options in less restrictive, community-based environments. ☺

#### Endnotes

1. *People v A.S.*, 30 Misc 3d 1220(A) (Supreme Ct, Kings Co 2011).
2. *Id.*
3. *Jackson v Indiana*, 406 US 715 (1972). In *Jackson*, the United States Supreme Court held "that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed at trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain capacity in the foreseeable future." *Id.* at 738; *People v Schaffer*, 86 NY2d 460 (1995). *Jackson* relief exists parallel to, but is not codified within, CPL 730. See *People v Elizabeth P.*, 34 Misc 3d 647, 653 (Sup Ct, New York Co 2011). The Commissioner having custody of the client (Office of Mental Health [OMH] or OPWDD), defense counsel or the Mental Hygiene Legal Service may seek *Jackson* relief and the procedural mechanism utilized is most typically a motion or writ of habeas corpus. See *id.* (citing *People ex rel. Trujillo v Ardito*, 109 Misc 2d 1009 [Supreme Ct, Kings Co 1981]). An application for *Jackson* relief may be initiated at any time, but is most often initiated in conjunction with the expiration of a CPL 730.50 retention order and an application to extend the commitment on the grounds that the client remains incapacitated. If granted, the client will be converted to "civil status" or released, but the indictment will not be dismissed. *People v Schaffer*, 86 NY2d 460 (1995).
4. Mental Competency — Best Practices Model, The National Judicial College (2011-2012), available at [www.mentalcompetency.org/pdf/BP-Model.pdf](http://www.mentalcompetency.org/pdf/BP-Model.pdf).
5. 2 Rev Stat 697 at § 2 (1828); *Mental Illness, Due Process and the Criminal Defendant*, Fordham University Press (1968), at 73.
6. L 1970, ch 996.
7. CPL article 730, Mental Disease or Defect Excluding Fitness to Proceed.
8. MHL 1.03(20).
9. See *People v Phillips*, 16 NY3d 510 (2011) (where the client suffered from transcortical motor aphasia as a consequence of a series of debilitating strokes).
10. MHL 1.03(22); see OPWDD Advisory Guideline — Determining Eligibility for Services: Substantial Handicap and Developmental Disability, <http://www.opwdd.ny.gov/node/1055> [accessed 02/19/2013].
11. Mental Competency — Best Practices Model, at 9.
12. CPL 730.10(3); *People v Santos*, 127 Misc 2d 63 (Supreme Ct, New York Co 1985).
13. *Dusky v United States*, 362 US 402 (1960); *People v Francabandera*, 33 NY2d 429, 436 (1974).
14. L 1989, ch 693.
15. Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 730.20 at 280.
16. CPL 730.20(2), (3).

17. *People v Perkins*, 166 AD2d 737 (3d Dept 1990); see *Ughetto v Acrish*, 130 AD2d 12 (2d Dept 1987).

18. *People v Chang Rong Zhao*, 35 Misc 3d 439 (Supreme Ct, Queens Co 2012).

19. *People v Peterson*, 40 NY2d 1014 (1976).

20. CPL 730.30(2), (3); see *People v Tortorici*, 249 AD2d 588 (3d Dept 1998), *aff'd*, 92 NY2d 757 (1999); *People v Grisset*, 118 Misc 2d 450 (Supreme Ct, Queens Co 1983); *People v Grieco*, 82 Misc 2d 500 (Supreme Ct, Westchester Co 1975).

21. 16 NY3d 510 (2011).

22. *Id.* at 517.

23. *Id.*

24. *People v Morgan*, 87 NY2d 878, 880 (1995).

25. *People v Mendez*, 1 NY3d 15 (2003); *People v Santos*, 43 AD2d 73 (2d Dept 1973); *People ex rel. Ardito v Trujillo*, 109 Misc

2d 1009 (Supreme Ct, Richmond Co 1981).

26. See *People v Phillips*, 16 NY3d 510 (2011) (Lippman, CJ, dissenting).

27. See, e.g., *People v D.J.H.*, 32 Misc 3d 1231(A) (Supreme Ct, Queens Co 2011).

28. CPL 730.40(1).

29. CPL 730.40(2).

30. 144 Misc 2d 945 (Supreme Ct, Westchester Co 1988).

31. *Charles W. v Maul*, 214 F3d 350 (2d Cir 2000).

32. *Id.*

33. MHL 9.07, 15.07.

34. L 2008, ch 231. A similar amendment was inserted in sections 730.50(1) and 730.60(1), (3).

35. *Bernstein v Pataki*, 233 Fed Appx 21 (2d Cir 2007).

36. 14 NYCRR Part 540.

## Additional Resources

Resources set out in this article and in the list below can help attorneys be more comfortable and capable in representing clients who are mentally disabled. Counsel can seek opportunities to consult with Mental Hygiene Legal Service Attorneys, and contact the Backup Center for assistance.

### New York State

- NYS Office of Mental Health, The Mental Health Resource Handbook for Human Service Personnel Serving the Local Correctional Population  
<http://www.omh.ny.gov/omhweb/forensic/manual>, particularly Chapter 6: MHL, CL, and CPL Commitments and Examinations: Procedures  
<http://www.omh.ny.gov/omhweb/forensic/manual/html/chapter6.htm>
- National Alliance for the Mentally Ill (NAMI) New York State and Urban Justice Center Mental Health Project, How to Help When a Person With Mental Illness is Arrested (2001)  
[http://www.naminys.org/images/stories/Documents/person\\_arrested\\_mental\\_illness.pdf](http://www.naminys.org/images/stories/Documents/person_arrested_mental_illness.pdf)
- Urban Justice Center, When a Person with Mental Illness Goes to Prison, How to Help: A Guide for Family Members and Friends (2010)  
[http://www.urbanjustice.org/pdf/publications/mhp\\_08\\_sept10.pdf](http://www.urbanjustice.org/pdf/publications/mhp_08_sept10.pdf)

### Mental Hygiene Legal Service

- *First Department*:  
[www.courts.state.ny.us/courts/ad1/Committees&Programs/MHLS/index.shtml](http://www.courts.state.ny.us/courts/ad1/Committees&Programs/MHLS/index.shtml)  
Departmental Office: 41 Madison Avenue, 26th Floor, New York, NY 10010, (646) 386-5891
- *Second Department*:  
[www.courts.state.ny.us/courts/ad2/mhls\\_mainpage.shtml](http://www.courts.state.ny.us/courts/ad2/mhls_mainpage.shtml)  
Departmental Office: 170 Old Country Road, Suite 500, Mineola, NY 11501, (516) 746-4545

### Third Department:

[www.courts.state.ny.us/ad3/MHLS/Index.html](http://www.courts.state.ny.us/ad3/MHLS/Index.html)

Departmental Office: 40 Steuben Street, Suite 501, Albany, NY 12207, (518) 451-8710

### Fourth Department:

[www.nycourts.gov/courts/ad4/MHLS/MHLS-index.html](http://www.nycourts.gov/courts/ad4/MHLS/MHLS-index.html)

Departmental Office: M. Dolores Denman Courthouse, 50 East Avenue, Suite 402, Rochester, NY 14604, (585) 530-3050

### National

- ABA Criminal Justice Standards, Mental Health  
[http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_mentalhealth\\_toc.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html)
- National Judicial College, Mental Competency Best Practices Model  
<http://mentalcompetency.org>
- Kentucky Department of Public Advocacy, Mental Health & Experts Manual (8th ed. 2005)  
<http://dpa.ky.gov/NR/rdonlyres/14438F9F-FA43-4B80-B7DE-E2EAA6AF8A62/0/2005MentalHealthManual.pdf>
- Bazelon Center for Mental Health Law, Diversion from Incarceration and Reentry  
<http://www.bazelon.org/Where-We-Stand/Access-to-Services/Diversion-from-Incarceration-and-Reentry.aspx>

### Mental Illnesses and Developmental Disabilities

- NAMI, Specific Mental Illnesses  
[http://www.nami.org/Template.cfm?Section=By\\_Illness](http://www.nami.org/Template.cfm?Section=By_Illness)
- Centers for Disease Control and Prevention, Developmental Disabilities  
<http://www.cdc.gov/ncbddd/developmentaldisabilities/index.html>
- NYS Office for People with Developmental Disabilities, Facts about Developmental Disabilities  
[http://www.opwdd.ny.gov/opwdd\\_resources/publications/documents/brochures\\_factsaboutdd](http://www.opwdd.ny.gov/opwdd_resources/publications/documents/brochures_factsaboutdd)



37. 14 NYCRR 540.1 *et seq.*
38. *Monaco v Hogan*, 98-CV-3386 (EDNY).
39. CPL 730.50(2); *Matter of Thomas C.*, 196 AD2d 393 (2d Dept 1994).
40. 22 NYCRR subtitle D, ch VI (Forms for Use in Courts Exercising Criminal Jurisdiction).
41. *People v Christopher B.*, 102 AD3d 115 (1st Dept 2012). An application for leave to appeal to the Court of Appeals is pending.
42. CPL 730.50(3), (4); Preiser, *Practice Commentaries*, at 362.
43. CPL 730.50(4).
44. CPL 730.50(2).
45. CPL 730.60(4).
46. *Jackson v Indiana*, 406 US 715 (1972); *People v Schaffer*, 86 NY2d 460 (1995).
47. 95 NY2d 539 (2000).
48. *Bernstein v Pataki*, 233 Fed Appx 21 (2d Cir 2007).
49. Peter Preiser, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 11A, CPL 730.60 at 374.
50. *Id.*
51. CPL 730.60(5).
52. 144 Misc 2d 945 (Supreme Ct, Westchester Co 1988).
53. *Humphrey v Cady*, 405 US 504 (1972).
54. Populations Served in OMH Forensic and SOTP Facilities, [www.omh.ny.gov/omhweb/forensic/populations\\_served.htm](http://www.omh.ny.gov/omhweb/forensic/populations_served.htm).
55. CPL 730.40(1).
56. OPWDD, Statewide Comprehensive Plan: 2012-2016, [www.opwdd.ny.gov/opwdd\\_about/strategic\\_plan/home](http://www.opwdd.ny.gov/opwdd_about/strategic_plan/home)

- [accessed 2/19/2013].
57. OPWDD, Guidance Documents, [www.opwdd.ny.gov/regulations\\_guidance/guidance\\_documents](http://www.opwdd.ny.gov/regulations_guidance/guidance_documents) [accessed 2/19/2013].
58. Penal Law 40.15.
59. CPL 220.15.
60. CPL 330.20.
61. Nancy Halleck & John Carroll, *Chapter 22—The Mentally Disabled in the Criminal Justice System*, in *Representing People with Disabilities* (3d ed 2007 revision).
62. Not guilty by reason of insanity. Not technically accurate, but commonly used to connote not responsible by reason of mental disease or defect, an affirmative defense. See Am Jur 2d Criminal Law § 76.
63. Richard Miraglia & Donna Hall, *The Effect of Length of Hospitalization of Re-arrest Among Insanity Plea Acquittes*, J Am Acad Psychiatry Law, 39(4), 524-534 (2011).
64. CPL 330.20(8), (9), (10), (12), (13); *Matter of Michael RR.*, 233 AD2d 30 (3d Dept 1997) *lv to appeal dismissed* 91 NY2d 921 (1998).
65. CPL 330.20(1)(o).
66. Authorized pursuant to MHL 7.17(f), the “assertive community treatment” or ACT teams are operated on the county level and serve high need, high priority individuals with severe mental illnesses. Services may be offered through a mobile crisis team and are inter-disciplinary in nature, typically reaching people with co-concurring disorders such as alcohol or substance abuse.
67. [www.nycourts.gov/courts/problem\\_solving/mh/home.shtml](http://www.nycourts.gov/courts/problem_solving/mh/home.shtml) [accessed 09/06/2012].



NYSDA's President, Edward J. Nowak (r), and Public Defense Investigation Support Project Director John Cutro (c), accept a \$5,000 grant awarded by the New York Bar Foundation; the check was presented by the Chair of the Fellows of the Bar Foundation, Jim Ayers (l), during the April 26 NYSDA Board Meeting.



Cake! The Backup Center's staff celebrated the latest installation of the Public Defense Case Management System in March; that installation brought the number of offices using PDCMS to 50.

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

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

## United States Supreme Court

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

### Counsel (Right to Counsel)

#### Habeas Corpus (Federal)

[Ryan v Valencia Gonzales](#), 568 US \_\_, 133 Sct 696 (1/8/2013)

Neither 18 USC 3599 nor 18 USC 4241 provides that a state prisoner's incompetence requires suspending federal habeas corpus proceedings. And "the assertion that the right to counsel implies a right to competence is difficult to square with our constitutional precedents." Trying an incompetent defendant violates due process, not the 6th Amendment. Most federal habeas proceedings are backward looking and record based; in such cases, refusal to grant a stay is not error, as counsel can read the record. "Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment."

### Conspiracy (Withdrawal)

#### Instructions to Jury (Burden of Proof)

#### Statute of Limitations (Burden of Proof) (Pleading of)

[Smith v United States](#), 568 US \_\_, 133 Sct 714 (1/9/2013)

Where the defendant was charged with conspiracy, and moved to dismiss those charges on the grounds that a five-year statute of limitations barred conviction because he had spent the last six years of the conspiracy in prison,

the court did not err in instructing the jury that the burden of proving withdrawal from the conspiracy was on the defendant once the government had proven his membership therein.

### Search and Seizure (Detention) (Search Warrants [Execution])

[Bailey v United States](#), 568 US \_\_, 133 Sct 1031 (2/19/2013)

Where a person left the site identified in a search warrant before the search began, was not shown to have knowledge of the impending search, and was detained by surveillance officers only after he was almost a mile away, the three law enforcement interests that justify detention of occupants of premises being searched — officer safety, facilitating the completion of the search, and preventing flight — were not implicated. No established principle allows the arrest of someone away from the premises but likely to return; if they do come back, the police would be justified in preventing their entry and detaining them. If grounds exist "to believe the departing occupant is dangerous, or involved in criminal activity," police may conduct a *Terry* stop. If detaining a departing occupant was allowed to prevent alerting of remaining occupants, anyone in the neighborhood might be detained without individualized suspicion. Occupants who are absent do not present risks of interference with the search or destruction of evidence. The concern that someone will flee a search site relates to potential damage to the integrity of the search. "The interest in preventing escape from police cannot extend this far without undermining the usual rules for arrest based on probable cause or a brief stop for questioning under standards derived from *Terry*." Furthermore, detaining individuals away from their homes is more intrusive than requiring them to remain.

**Concurrence:** [Scalia, J] The categorical exception to the requirement of probable cause set forth in *Michigan v Summers* (452 US 692 [1981]), which allows detention of search premises occupants, does not apply to a person seized a mile away. "The *Summers* exception is appropriately predicated *only* on law enforcement's interest in carrying out the search unimpeded by violence or other disruptions." [Emphasis in original.]

**Dissent:** [Breyer, J] The Court of Appeals determination that the detention here was reasonable should be upheld.

### Federal Law

#### Juveniles (Custody) (Jurisdiction)

[Chafin v Chafin](#), 568 US \_\_, 133 Sct 1017 (2/19/2013)

Appeals from orders requiring return of children to their countries of habitual residence under the Hague

**US Supreme Court** *continued*

Convention on the Civil Aspects of International Child Abduction are not rendered moot by the mere fact that the children have been returned as ordered. Courts continue to have jurisdiction to adjudicate claims where, as here, “there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent.”

**Concurrence:** [Ginsburg, J] “This case highlights the need for both speed and certainty in Convention decision-making.” “For future cases, rulemakers and legislators might pay sustained attention to the means by which the United States can best serve the Convention’s aims ....”

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

**[Florida v Harris](#), 568 US \_\_, 133 Sct 1050 (2/19/2013)**

Establishing a strict evidentiary checklist for evaluating the reliability of a drug-detection dog’s alerts is antithetical to the totality-of-circumstances approach to determining the existence of probable cause. The decision below would require introduction of a dog’s field record, which may contain explainable discrepancies or fail to reveal the dog’s skill; alerts that lead to no evidence may stem from detection of residual odors or the scent of contraband too well hidden to be located, while the number of missed scents will not be known because no search will be conducted. Controlled testing environments are a better measure of reliability. A defendant must have an opportunity to challenge a detection dog’s reliability, through cross-examination of the testifying officer or by introducing a fact or expert witness. Here, the defendant failed to rebut the proof offered to show the dog’s reliability in detecting drugs.

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

**[Chaidez v United States](#), 568 US \_\_, 133 Sct 1103 (2/20/2013)**

Under the principles of *Teague v Lane* (489 US 288 [1989]), the holding in *Padilla v Kentucky* (559 US 356 [2010]) does not apply retroactively. The threshold question in *Padilla*, whether advice about deportation was “‘categorically removed’ from the scope of the Sixth Amendment right to counsel ....,” was unsettled before *Padilla* was decided. Finding that the test in *Strickland v Washington* (466 US 668 [1984]) applied to deportation advice was a new rule.

**Concurrence:** [Thomas, J] *Padilla* was wrongly decided; a *Teague* analysis should be unnecessary because the 6th Amendment does not apply to advice about collateral consequences, including deportation.

**Dissent:** [Sotomayor, J] “*Padilla* did nothing more than apply the existing rule of *Strickland* ... in a new setting ....” For at least 15 years before *Padilla*, professional norms required attorneys to advise clients on the deportation consequences of guilty pleas. *Padilla* did not embrace a distinction between direct and collateral consequences, but focused on the unique and severe nature of deportation. That a decision is momentous or consequential does not control in the *Teague* analysis.

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**Double Jeopardy (Dismissal)**
**Judgment (Acquittal)**

**[Evans v Michigan](#), 568 US \_\_, 133 Sct 1069 (2/20/2013)**

A trial court’s erroneous dismissal order issued at the close of the State’s case based on a lack of evidence as to something that was not a required element of the offense was still an acquittal for double jeopardy purposes. It was a merits-based rather than procedural dismissal. That the acquittal was on the defendant’s motion does not affect the double jeopardy bar; to find waiver “would undercut the adversary assumption on which our system of criminal justice rests ....” The invitation to reconsider past decisions is declined. States may refuse to afford trial courts the power to grant a midtrial acquittal, but where such power is given, states must bear the risk that some will be granted in error.

**Dissent:** [Alito, J] The majority decision does not serve the purposes of the double jeopardy prohibition, and deprives the state “of its right to have one fair opportunity to convict petitioner ....”

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

**[Henderson v United States](#), 568 US \_\_, 133 Sct 1121 (2/20/2013)**

When a legal question that was unsettled at the trial level in federal court becomes settled in the defendant’s favor before the case is final — during the direct appellate review — an action at the trial level that violated the now-settled law may be “plain error” under Fed Rule Crim Proc 52(b). Therefore, the federal Court of Appeals can review such error even if it was not brought to the trial court’s attention.

**Dissent:** [Scalia, J] “Plainness” for purposes of the exception to the requirement that error be preserved for review means “plainness” at the time the order or ruling

US Supreme Court *continued*

was made or sought unless the law was settled against the defendant at that time.

Habeas Corpus (Federal)

Juries and Jury Trials (Challenges) (Qualifications)

[Johnson v Williams](#), 568 US \_\_, 133 Sct 1088 (2/20/2013)

“[W]hen a defendant convicted in state court attempts to raise a federal claim, either on direct appeal or in a collateral state proceeding, and a state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question ... [a] federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits.” Here, the petitioner treated her state and federal claims regarding the dismissal of a juror for bias after deliberations had begun “as interchangeable, and it is hardly surprising that the state courts did so as well.” It being exceedingly unlikely that the state court overlooked the federal claim, “the Ninth Circuit’s judgment to the contrary is reversed.”

**Concurrence:** [Scalia, J] That a federal claim was “inadvertently overlooked” should not be grounds that can be relied on for rebuttal. Rebuttal should require a showing based on the explicit text of the decision, or on standard practice and understanding in the jurisdiction as to the meaning of ambiguous text, “that the judgment *did not purport* to decide the federal question.” [Emphasis in original.]

Search and Seizure (Entries and Trespasses [Trespasses])

[Florida v Jardines](#), 569 US \_\_, 133 Sct 1409 (3/26/2013)

Police physically entering and occupying the curtilage of a home for purposes of conducting a search — here, bringing a dog trained in drug detection onto the front porch — is beyond the express or implied license allowing visitors to approach a home and knock on the door, and is subject to constitutional limitations. The state court’s suppression of evidence obtained during execution of the search warrant obtained as a result of the dog’s alert is affirmed.

**Concurrence:** [Kagan, J] Use of any sense-enhancing equipment, whether animal or mineral, to learn from the front porch of a home details of the occupant’s life that the occupant discloses to no one is a search “on privacy as well as property grounds.”

**Dissent:** [Alito, J] Neither trespass law nor the expectation of privacy justify a finding that a search occurred when the police dog and its handler approached the home

in daylight via the path any visitor would use and were present for about a minute or two. This behavior is indistinguishable from the constitutionally permissible police “knock and talk” approach. A dog sniff is distinguishable from the use of new forms of technology.

Civil Practice

Federal Law

Prisons (Civil Liabilities) (Federal)

[Millbrook v United States](#), 569 US \_\_, 133 Sct 1441 (3/27/2013)

This case involves the Federal Tort Claims Act (28 USC 1346[b], 2671–2680), which “waives the United States’ sovereign immunity for certain intentional torts committed by” federal law enforcement officers. “We hold that the waiver effected by the law enforcement proviso extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest.”

Counsel (Right to Counsel) (Right to Self-Representation) (Scope of Counsel)

Habeas Corpus (Federal)

[Marshall v Rodgers](#), 569 US \_\_, 133 Sct 1446 (4/1/2013)

California’s approach to resolving the tension between the 6th Amendment right to counsel at all critical stages and the concurrent right to proceed without counsel — so long as waiver is voluntary and intelligent — cannot be said to be contrary to or an unreasonable application of existing constitutional law. The 9th Circuit’s contrary decision in this habeas case rests in part “on the mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.” The instant analysis assumes without deciding that, following a valid waiver of the right to counsel at trial, a post-trial, pre-appeal motion for new trial is a critical stage of the proceedings. No view is expressed as to the merits of the claim that the state courts violated the respondent’s 6th Amendment right by not providing a lawyer to help with his new-trial motion.

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

Search and Seizure (Warrantless Searches [Emergency Doctrine])

**US Supreme Court** *continued***Missouri v McNealey, 569 US \_\_, 133 SCt 1552 (4/17/2013)**

The natural metabolization of alcohol in the bloodstream does not present a per se exigency justifying an exception in all drunk-driving cases to the requirement that a warrant be obtained for nonconsensual blood testing. Exigency must be determined on a case-by-case basis. While an individual's alcohol level gradually declines soon after the person stops drinking, so that "a significant delay in testing will negatively affect the probative value of the results," in circumstances "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Facts including "technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency." However, the arguments and record here do not provide "an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant."

**Concurrence in Part:** [Kennedy, J] That every case be determined by its own circumstances should not be interpreted to signify that the issue "is not susceptible of rules and guidelines that can give important, practical instruction to arresting officers ...."

**Concurrence in Part, Dissent in Part:** [Roberts, CJ] The "imminent but ongoing destruction of critical evidence" by way of the "natural dissipation of alcohol in the bloodstream" would qualify as an exigent circumstance, except when there is time to obtain a warrant before blood can be drawn. "I would vacate and remand for further proceedings in the Missouri courts."

**Dissent:** [Thomas, J] The inevitable destruction of evidence constitutes an exigent circumstance; therefore, warrantless blood draws do not violate the Fourth Amendment.

**Aliens (Deportation)****Narcotics (Marijuana)****Moncrieffe v Holder, No. 11-702 (4/23/2013)**

The provisions of the Immigration and Nationality Act (INA) that bar discretionary relief from removal to foreign nationals convicted of "aggravated felonies," including drug trafficking offenses, do not apply to convictions for violating the state criminal statute here that prohibits the social sharing of a small amount of marijuana for no remuneration. To satisfy the "categorical

approach" used in determining whether a state offense is comparable to one listed in the INA, a state drug statute must necessarily criminalize conduct that is an offense under the federal Controlled Substances Act (CSA) and the CSA must necessarily require felony punishment for that conduct. The CSA criminalizes possession of marijuana with intent to distribute it and treats it as a felony, but treats distribution of small amounts for no remuneration as simple drug possession, a misdemeanor. Therefore, the state "conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA." The government's position that only the elements of the offense should be considered would categorically deem a conviction under New York Penal Law 221.35, and federal misdemeanor convictions, aggravated felonies. "This cannot be." The alternate proposal that the facts of the offense be considered in deportation proceedings is rejected.

**Dissent:** [Thomas, J] For federal sentencing purposes, the petitioner's offense would constitute a felony "unless he could prove that he distributed only a small amount of marijuana for no remuneration."

**Dissent:** [Alito, J] The majority's decision means that in about half the states, immigrants convicted of drug trafficking for participating in large-scale distribution of marijuana may petition to remain here, and that the consequences of conviction will vary radically depending on where the case is presented.

**Continuances (Counsel)****Defense Systems (Compensation Systems [Funding])****Speedy Trial (Cause for Delay)****Boyer v Louisiana, No. 11-9953 (4/29/2013)**

"The writ of certiorari is dismissed as improvidently granted."

**Concurrence:** [Alito, J] The question on which certiorari was granted in this case — "[w]hether a state's failure to fund counsel for an indigent defendant for five years, particularly where failure was the direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy trial purposes" — was premised on a breakdown in Louisiana's system for paying public defense counsel for the petitioner, an indigent defendant, that "caused most of the lengthy delay between his arrest and trial. Because the record shows otherwise, I agree that the writ of certiorari was improvidently granted."

**Dissent:** [Sotomayor, J] The Louisiana Court of Appeal rejected the petitioner's claim that delay violated his right to a speedy trial, finding that "most of the delay in Boyer's case was caused by the State's failure to pay for his defense due to a "funding crisis" experienced by the State of Louisiana." As States should "understand that

## US Supreme Court *continued*

they have an obligation to protect a defendant’s constitutional right to a speedy trial,” the question on which certiorari was granted should be addressed.

## New York Court of Appeals

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### Counsel (Right to Counsel) (Right to Self Representation)

#### Sentencing (Post-Release Supervision) (Resentencing)

[People v Johnson](#), 20 NY3d 990, 960 NYS2d 55 (1/8/2013)

“The Appellate Division correctly held that the resentencing court’s error in allowing defendant to proceed pro se was harmless in these narrow circumstances, where the proceeding involved a single question of law and standby counsel argued that issue on defendant’s behalf ....”

Where, after the prosecution consented to a sentence without a period of postrelease supervision (PRS), and the defendant then sought an adjournment which the court granted while holding its resentencing decision in abeyance, the prosecution was free to withdraw its consent and the court was statutorily required to impose PRS.

### Juveniles (Paternity)

[Matter of Commissioner of Social Servs. v Julio J.](#), 20 NY3d 995, 961 NYS2d 363 (1/10/2013)

The question here is whether the best interests of the child support a finding that the respondent should be collaterally estopped from denying paternity. The evidence more nearly comports with the family court’s determination that ordering paternity DNA testing at this point would be detrimental to the child than to the Appellate Division’s reversal “on the law” that relied on different factual findings to support its determination that the Commissioner of Social Services failed to prove by clear and convincing evidence that the respondent should be so estopped.

### Disorderly Conduct (Disturbing the Peace)

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

[People v Baker](#), 20 NY3d 354, 960 NYS2d 704 (2/7/2013)

There is no record basis for a finding that the defendant’s disorderly conduct arrest was supported by probable cause because there was no evidence of any “public harm” mens rea, which is the distinguishing element of this offense compared to offenses that have similar requirements but involve disputes of a more personal nature. The defendant’s 15-second outburst, consisting of two abusive statements to a police officer in a patrol car, was accompanied by no menacing conduct and was not shown to make the officer — who got out of his car during the outburst, while another officer was on the scene — feel threatened. While a crowd did gather, no one expressed an inclination to become involved in the dispute. The convictions based on evidence found incident to the arrest are reversed.

### Defenses (Justification)

[People v Watson](#), 20 NY3d 1018, \_\_ NYS2d \_\_ (2/7/2013)

Where a justification defense was offered based on testimony that the defendant panicked and shot the decedent when the decedent reached for his waistband, but there was no evidence that the decedent had a gun and so could not be found to be the initial aggressor, any prior convictions or violent acts of the decedent unknown to the defendant would be irrelevant to the defendant’s reasonable belief that the decedent was attacking him. This case does not present the issue of whether a defendant claiming justification may offer an accuser’s prior violent acts unknown to the defendant to show propensity for violence or that case law on this issue should be reconsidered.

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

#### Prior Convictions (Collateral Consequences)

#### Sentencing (Concurrent/Consecutive) (Second Felony Offender)

[People v Belliard](#), 20 NY3d 381, \_\_ NYS2d \_\_ (2/12/2013)

That a prison term imposed on a second felony offender must run consecutively to a previously-imposed undischarged sentence, pursuant to Penal Law 70.25(2-a), is a collateral consequence of the conviction for purposes of determining a plea allocution’s adequacy.

**Dissent:** [Lippman, CJ] The “legally mandated, automatically attaching, penalty enhancing sentence attribute” at issue cannot be characterized as anything other than a direct consequence of the guilty plea. A plea that

**NY Court of Appeals** *continued*

“entails incarceration beyond that expressly agreed to ... cannot be ascertainably knowing, intelligent and voluntary unless that entailment is first disclosed ....”

**Appeals and Writs (Arguments of Counsel)****Counsel (Competence/Effective Assistance/Adequacy)****Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])**

[People v Lassalle](#), 20 NY3d 1024, 960 NYS2d 724 (2/12/2013)

The defendant has not shown on this record that appellate counsel lacked a legitimate reason for not challenging the court’s failure to advise the defendant at his 2006 guilty plea that his 15-year sentence would also include five years of post-release supervision. It could be that if other grounds for the appeal were unsuccessful, the defendant did not want to withdraw his plea. If the defendant files a new coram nobis petition that points to clear error on the face of the record, the Appellate Division should consider whether available avenues for more fully exploring meritorious claims should be followed.

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

[People v Palmer](#), 20 NY3d 373, 960 NYS2d 719 (2/12/2013)

The proof in these two cases failed to meet the requisite standard for assessing points for the drug or alcohol abuse risk factor of the Sex Offender Registration Act (SORA) Guidelines. Points can be assessed for offenders with a drug or alcohol abuse history or consumption of sufficient quantities of drugs or alcohol to demonstrate substance abuse. Moderate drinking does not suffice. “Clear and convincing evidence of alcohol abuse at the time of the offense might consist of proof of an excessive quantity of alcohol imbibed, proof that the offender was impaired, or proof that there was a direct link between [the] offender’s drinking and his sex predation.”

**Trial (Joinder/Severance of Counts and/or Parties)**

[People v Warren](#), 20 NY3d 393, 960 NYS2d 716 (2/12/2013)

A codefendant’s waiver of a jury in a jointly-tried case created “a situation akin to trial by dual juries, which we have called ‘at root, a modified form of severance’ ....” Had the codefendant not waived a jury, the defendant could have made a strong case for severance on the basis of irreconcilable defenses. The prosecution could not have

forced the codefendant to testify against the defendant. The court could easily have excused the jury when the codefendant testified on his own behalf. The error of letting the defendant’s jury hear the codefendant’s testimony was not harmless, as the codefendant’s “vivid account may well have sealed” the defendant’s fate.

**Evidence****Sentencing (Concurrent/Consecutive)**

[People v Abreu](#), 20 NY3d 1040, 961 NYS2d 372 (2/14/2013)

The defendant “completed the offense of second-degree weapon possession, with the requisite intent, before committing the act constituting first-degree felony murder. Accordingly, the sentences for those crimes could be run consecutively ....” Alleged evidentiary errors would be harmless in the light of the overwhelming evidence.

**Driving While Intoxicated (Breathalyzer)****Evidence (Business Records)****Search and Seizure (Automobiles and Other Vehicles)****Witnesses (Confrontation of Witnesses)**

[People v Pealer](#), 20 NY3d 447, \_\_ NYS2d \_\_ (2/19/2013)

“[R]ecords pertaining to the routine inspection, maintenance and calibration of breathalyzer machines” are nontestimonial evidence, and so not subject to the Confrontation Clause, and therefore may be offered into evidence without testimony from those who created them. The certificates in question were not directly inculpatory and did not prove an essential element of the charges, as does a certification of an accused’s alcohol reading. The defendant’s other issues are unpreserved or lack merit.

**Dissent in Part:** [Pigott, J] The stop of the defendant by the officer for having a college sticker on the back window, a de minimis violation of Vehicle and Traffic Law 375(1)(b)(i), was not objectively reasonable.

**Concurrence:** [Smith, J] The dissent’s position, while attractive in this case, erodes the certainty and predictability resulting from *Whren v United States* (517 US 806 [1996]) and *People v Robinson* (97 NY2d 341 [2001]).

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

[Matter of New York State Off. of Victim Servs. v Raucci](#), 20 NY3d 1049, \_\_ NYS2d \_\_ (2/19/2013)

## NY Court of Appeals *continued*

The question of whether the Son of Sam Law, Executive Law § 632-a, creates an exception to “Retirement and Social Security Law § 110(2), which says that a ‘pension . . . or retirement allowance . . . [s]hall not be subject to execution, garnishment, attachment, or any other process whatsoever . . . ’” is not preserved for review here. The state petitioner argued that the Son of Sam Law trumped another statute, CPLR 5205(c), but not section 110.

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

#### Identification (Eyewitnesses)

[People v Vasquez](#), 20 NY3d 461, \_\_ NYS2d \_\_ (2/19/2013)

Whether a CPL 710.30 violation occurred where the prosecution notified the defense of intent to offer testimony of the accuser, who had identified the defendant at a “point-out,” but did not mention that the accuser had told a police officer a few minutes later that he was sure of his identification, is not decided. If defense counsel erred in failing to object to certain evidence regarding the accuser’s identification of the defendant, the error was harmless.

### Prisoners (Conditions of Confinement) (Family Relationships)

[Matter of Duarte v City of New York](#), 2013 NY Slip Op 01871 (3/21/2013)

Appeal from the Appellate Division’s decision, which found that the New York City Department of Corrections arbitrarily and capriciously denied the petitioner’s application to enter a nursery program at Rikers Island, is dismissed as moot where the petitioner’s child is now too old to participate. The mootness exception is not invoked in light of a revised Nursery Order effective Feb. 11, 2013.

### Admissions (Corroboration) (Spontaneous Declaration)

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

#### Evidence (Sufficiency)

[People v McGee](#), 2013 NY Slip Op 01867 (3/21/2013)

Sufficient evidence, independent of the defendant’s spontaneous statement after his apprehension that he had been only the driver, established that a crime was committed and that the defendant was the person driving a vehicle from which a passenger had fired multiple shots at people including a police officer. Defense counsel was not ineffective for failing to raise other sufficiency arguments relating to the requisite intent and whether attempt

to commit a crime had been shown, for failing to request a jury instruction on the lesser included offense of attempted assault as to the attempted murder count, or for failing to seek severance of the defendant’s trial from that of his codefendant.

### Narcotics (Penalties)

#### Sentencing (Concurrent/Consecutive) (Resentencing)

[People v Norris](#), 2013 NY Slip Op 01869 (3/21/2013)

In each of these two cases, the Appellate Division held that a court resentencing a defendant under the Drug Law Reform Act (DLRA) of 2009 (CPL 440.46) is not authorized to alter originally-consecutive sentences to run concurrently; the decisions are affirmed. Resentencing under the DLRA constitutes alteration of an existing sentence, not imposition of a new or additional one, so that Penal Law 70.25(1), which authorizes courts to direct either concurrent or consecutive sentences, does not apply.

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

#### Sex Offenses (Child Pornography)

[People v DeProspero](#), 2013 NY Slip Op 01992 (3/26/2013)

Even if the State’s illegal retention of property that was originally lawfully seized may be redressable as a violation of the 4th Amendment, such redress is not available here. The defendant had no expectation of privacy in computer memory cards and other devices that were, “pursuant to the warrant and warrant return, to be retained by the police for an unspecified period ‘for the purpose of further analysis and examination.’” The basis for the warrant’s issuance and the eventual examination authorized by the warrant was not diminished by the fact that no forensic examination of the items was done until after the defendant had pleaded guilty, served the sentence imposed for possessing a sexual performance of a child based on a single image found on his computer at the time of the search, and then sought return of the devices. As probable cause to believe the seized property contained illegal images continued, return of the property would have been conditioned on scrutinizing it as contemplated by the warrant, which is what occurred.

### Impeachment

#### Sex Offenses (Sexual Abuse)

#### Witnesses (Experts)

[People v Diaz](#), 2013 NY Slip Op 01994 (3/26/2013)



**NY Court of Appeals** *continued*

The court did not abuse its discretion by allowing an expert to testify about the behavior of sexual abusers, which could help the jury understand an accuser's unusual behavior. But the court erred in refusing the proffered testimony of the father of the accuser's younger brother that the accuser had, two years earlier, accused him of sexual abuse; the accuser had denied in her testimony that she had made such an accusation and the accuser's mother testified she was unaware of any such accusation.

**Concurrence:** [Rivera, JJ] The expert testimony improperly bolstered the accuser's testimony.

**Assault (Evidence) (Instructions) (Lesser Included Offenses)****Counsel (Competence/Effective Assistance/Adequacy)****Lesser and Included Offenses (Instructions)****[People v Nesbitt](#), 2013 NY Slip Op 01990 (3/26/2013)**

The record reveals a good-faith basis for arguing that the complainant's injuries did not result in serious, and protracted or permanent, disfigurement, so that defense counsel's statement out of the jury's hearing that the defendant had no defense to first-degree assault was mistaken. The consequent failure to request a jury charge on the lesser included offense of second-degree assault and the decision to argue to the jury during summation that they should acquit as to attempted murder and make the "right decision" as to assault constituted ineffective assistance of counsel.

**Sex Offenses (Sexual Abuse)****Witnesses (Experts)****[People v Williams](#), 2013 NY Slip Op 01995 (3/26/2013)**

While expert testimony as to child sexual abuse accommodation syndrome (CSAAS) is permissible to explain unusual behavior of child abuse victims, and testimony about typical behavior of abusers may be relevant to explain the CSAAS, the testimony here "exceeded permissible bounds when the prosecutor tailored the hypothetical questions to include facts concerning the abuse that occurred in this particular case." But the error was harmless.

**Conflict of Interest****Ethics (Prosecution)****Prosecutors (Special Prosecutors)****[People v Adams](#), 2013 NY Slip Op 02107 (3/28/2013)**

This case constitutes one of the rarely-occurring situations in which removal of a prosecutor to avoid an appearance of impropriety is warranted. A city court judge was the accuser, testimony given in support of disqualifying the prosecutor indicated that the district attorney's office was taking an unusually hardline approach in the case, and the prosecutor's office failed to rebut the allegations with any example of another case in which plea bargaining was similarly curtailed.

**Evidence****Witnesses (Confrontation of Witnesses)****[People v Cornelius](#), 2013 NY Slip Op 02104 (3/28/2013)**

Assuming without deciding that the contents of five-year-old notices to the defendant that his entry into any Duane Reade store would be grounds for arrest were testimonial, so that admission of the notices without the testimony of those who prepared and issued them would violate the right of confrontation, their admission here was harmless. A witness testified about personally issuing a similar notice to the defendant just months before the incident underlying this case.

**Evidence (Destruction) (Preservation)****Instructions to Jury****[People v Handy](#), 2013 NY Slip Op 02103 (3/28/2013)**

"[U]nder the New York law of evidence, a permissive adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the State." Where jail surveillance camera images portraying one of the incidents underlying this case were destroyed before the defendant was indicted, and defense counsel had requested preservation of video images "as soon as we could," the adverse inference charge regarding the video's unavailability requested by defense counsel should have been given. This holding is not in tension with that of *Arizona v Youngblood* (488 US 51, 58 [1988]), which dealt with dismissal of an indictment, and the defense request for an interpretation of the New York Constitution more favorable to defendants than the *Youngblood* holding is not addressed.

**Appeals and Writs (Preservation of Error for Review)****Kidnapping****[People v Hanley](#), 2013 NY Slip Op 02106 (3/28/2013)**

A defense claim that a kidnapping count merged with the reckless endangerment offense must be preserved for

**NY Court of Appeals** *continued*

appellate review. The merger doctrine rectifies the problem of prosecutors charging kidnapping along with other crimes, with less severe sentences, that include some form of restraint. Merger is not jurisdictional in nature nor does it implicate “fundamental constitutional concerns that strike at the core of the criminal adjudicatory process.” Merger claims are not akin to those classified as mode of proceedings errors, and, as all four Appellate Divisions have held, must be raised at the trial level to be reviewed.

**Attorney/Client Relationship**

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

**Guilty Pleas (Errors Waived By)**

**People v Griffin, 2013 NY Slip Op 02161 (4/2/2013)**

By pleading guilty, the defendant did not forfeit his argument that the trial court interfered with his right to counsel when it removed the Legal Aid Society as his counsel after his attorney requested an adjournment because the attorney had recently submitted his resignation and the legal aid attorney who would take over needed time to prepare for trial. “[T]he claim to counsel is so deeply intertwined with the integrity of the process in Supreme Court that defendant’s guilty plea is no bar to appellate review. A claim that removal of counsel was part of the court’s disparate, unjustifiable treatment of defense counsel goes to the fundamental fairness of our system of justice.” Unlike an ineffective assistance of counsel claim, “a counsel of choice violation cannot be cured by new counsel.” It cannot be said, based on the record, that the Appellate Division abused its discretion or committed an error of law when it found that the trial court’s denial of the adjournment was an abuse of discretion.

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

**Forgery (Checks) (Possession of a Forged Instrument)**

**Instructions to Jury**

**People v Ippolito, 2013 NY Slip Op 02159 (4/2/2013)**

The second-degree criminal possession of a forged instrument convictions must be reversed where the defendant, who had unlimited power to sign the accuser’s name on written instruments based on a statutory short-form durable general power of attorney, signed checks using the accuser’s name without adding his own signature or otherwise noting the principal-agency relationship, because “where the ostensible maker or drawer of a written instrument is a real person, a signature is not forged unless unauthorized ....”

Assuming that CPL 310.30 applies, the defendant’s claim that the judge committed reversible error by immediately responding to an oral question of one of the jurors just as the court was starting to charge the jury is not preserved for review because defense counsel did not make a timely objection.

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

**Sentencing (Resentencing)**

**People v Monroe, 2013 NY Slip Op 02160 (4/2/2013)**

Because the defendant’s plea to conspiracy was induced by the judge’s assurance that his minimum term of incarceration would be extended by a year and a half only, and that promise can no longer be fulfilled, the court erred in denying the defendant’s motion to vacate the plea. At the time of the plea, the defendant was serving two concurrent indeterminate sentences of 4½ to 9 years for class B drug felonies, but after enactment of the 2009 Drug Law Reform Act (DLRA), the defendant was resentenced to concurrent determinate sentences of three years with two years’ post-release supervision. As the gap between the minimum terms of incarceration went from one and a half years to three years, it cannot be said based on the record here that the defendant would not have refused the conspiracy plea absent the assurance that incarceration would only be extended one and a half years.

**Juveniles (Abuse) (Parental Rights)**

**Matter of Dashawn W., 2013 NY Slip Op 02774 (4/25/2013)**

“We hold that the phrase ‘circumstances evincing a depraved indifference to human life’ does not mean the same thing for purposes of Social Services Law § 384-b (8) (a) (i) as it does under the Penal Law. Second, a showing of diligent efforts to encourage and strengthen the parental relationship is not prerequisite to a finding of severe abuse under Family Court Act § 1051 (e) where the fact-finder determines that such efforts would be detrimental to the best interests of the child.”

**Misconduct (Judicial)**

**Matter of Hedges, 2013 NY Slip Op 02773 (4/25/2013)**

While it is troubling that the allegations leading the State Commission on Judicial Conduct to sustain a charge of judicial misconduct against the petitioner and determine that he should be removed from office were “based solely on conduct that occurred 40 years ago — 13 years before petitioner was elevated to the bench,” the behavior alleged, that the petitioner engaged in sexual misconduct

**NY Court of Appeals** *continued*

with a five-year-old child, “is grave by any standard” and concern about fading witness memories is tempered by the petitioner’s admissions. The petitioner has resigned, but “the effect of the Judge’s conduct on and off the Bench upon public confidence in his [or her] character and judicial temperament” must be considered; the determined sanction is accepted.

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**Constitutional Law (New York State Generally)  
(United States Generally)**
**Harmless and Reversible Error (Harmless Error)****People v Byer, 2013 NY Slip Op 02777 (4/25/2013)**

To the extent that testimony about alleged prior bad conduct by the defendant was erroneously placed before the jury, it did not rise to the level of constitutional injury and is subject to a harmless error analysis; given the overwhelming evidence against the defendant, there is no probability that he would have been acquitted had the evidence not been admitted.

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**Appeals and Writs (Preservation of Error for Review)**
**Trial (Public Trial)****People v Floyd, 2013 NY Slip Op 02779 (4/25/2013)**

“Mere courtroom overcrowding is not an overriding interest justifying courtroom closure, and the trial judge failed to consider reasonable alternatives before excluding defendant’s mother from the courtroom.... This violation is per se prejudicial and requires a new trial.” The error was preserved for review; “[d]efense counsel properly preserved his objection by raising the issue to the trial court when given the opportunity to ‘make a record’ before jury selection. His statements ‘unquestionably apprised’ the trial judge of the constitutional rights at issue and the obligation to consider reasonable alternatives ....”

**First Department**

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**Evidence (Hearsay)****Sex Offenses (Civil Commitment)****Witnesses (Experts)****Matter of State of New York v Floyd Y., 102 AD3d 80, 953 NYS2d 566 (1st Dept 11/8/2012)**

**Holding:** The court erred in allowing the petitioner’s expert to testify regarding two accusations, one of which resulted in an acquittal and the other lacked sufficient evidence or corroboration, “because neither was supported by evidence establishing the reliability of the out-of-court material ... and the acts therefore were of questionable probative value ....” The error was harmless where the jury was aware that the accusations were not convictions, the hearsay was only a small part of the evidence considered by the expert, and the court gave limiting instructions, which were not objected to by the respondent nor did the respondent request further limiting instructions. That the petitioner’s expert was also one of the respondent’s treatment providers does not preclude the expert from testifying; such evidence is authorized under Mental Hygiene Law 10.08(c). (Supreme Ct, New York Co)

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**Counsel (Advice of Right to) (Waiver)**
**Family Court (Family Offenses)****Matter of Melissa H. v Shameer S., 100 AD3d 535, 955 NYS2d 3 (1st Dept 11/20/2012)**

**Holding:** In this family offense proceeding, the court failed to ensure that the respondent knowingly, intelligently, and voluntarily waived his statutory right to counsel and erred in determining the respondent ineligible without reviewing any financial documentation. The court merely asked if the respondent wanted an adjournment to retain counsel, to which the respondent gave a negative response. The court erred in immediately moving to the fact-finding hearing without informing the respondent that the proceeding had changed. And the court improperly assured the respondent that it would not hold his statements against him in family court, but did just that. (Family Ct, Bronx Co)

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**Competency to Stand Trial**
**Subpoenas and Subpoenas Duces Tecum****People v Christopher B., 102 AD3d 115, 957 NYS2d 4 (1st Dept 11/27/2012)**

**Holding:** “[T]he denial of the motion to quash the subpoena is a nonappealable order.” If the claims were reviewed, the following findings would be made. The prosecution had standing to participate in a CPL 730.50(2) retention hearing and was entitled to subpoena the defendant’s psychiatric records, for the time period from his initial restoration to fitness to the present, in the interest of justice pursuant to Mental Hygiene Law 33.13(c). The

## First Department *continued*

prosecutor's role at a retention hearing is to represent the public interest. (Supreme Ct, New York Co)

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

**People v Marisela N. v Lacy M.S., 101 AD3d 425, 955 NYS2d 322 (1st Dept 12/4/2012)**

**Holding:** The court properly issued an order of protection after finding that the respondent committed the family offense of second-degree harassment. The order of protection is valid despite the court's failure to conduct a dispositional hearing because Family Court Act article 8 does not explicitly mandate such a hearing and the respondent did not demand a hearing or object to the lack of one. Since there is no other legal remedy available for the harassment finding, a separate dispositional hearing was unnecessary. (Family Ct, Bronx Co)

### Sentencing (Persistent Violent Felony Offender) (Resentencing)

**People v Snipes, 101 AD3d 472, 955 NYS2d 50 (1st Dept 12/11/2012)**

**Holding:** When the defendant is resentenced at the request of the Division of Parole for the purpose of imposing post-release supervision, the resentencing date controls whether the conviction meets the sequentiality test for persistent violent felony offender status. However, because the defendant's resentencing on one of his prior convictions was a nullity under *People v Williams* (14 NY3d 198 [2010]), he was properly sentenced as a persistent violent felony offender. (Supreme Ct, New York Co)

### Juveniles (Abuse)

**Matter of Matthew O., 103 AD3d 67, 956 NYS2d 31 (1st Dept 12/13/2012)**

**Holding:** Expert testimony is not needed for the court to find that a child's injuries constitute abuse under Family Court Act 1012(e)(ii); the testimony of the child's pediatrician that the six-month old child had seven different fractures that were inflicted on her was sufficient to support a finding of abuse. The petitioner did not need to establish the time and date of each injury and link it an individual respondent; since the three respondents shared responsibility for the child's care during a period of several months, the petitioner established a prima facie case against all three of them. And none of the respondents showed that the child was not in his or her care at the time of the injuries. (Family Ct, Bronx Co)

### Assault (Defenses)

#### Defenses (Justification)

**People v Molina, 101 AD3d 577, 955 NYS2d 514 (1st Dept 12/20/2012)**

**Holding:** The court should have instructed the jury on justification pertaining to the use of nondeadly physical force, not just the use of deadly physical force; although the prosecution argued that the defendant attacked the accuser with scissors, there was a reasonable view of the evidence, viewed in the light most favorable to the defendant, that after the accuser punched him in the face, the defendant grabbed the accuser, causing him to fall on the floor and sustain injuries. (Supreme Ct, Bronx Co)

#### Evidence (Sufficiency)

#### Organized Crime

**People v Barone, 101 AD3d 585, 958 NYS2d 18 (1st Dept 12/27/2012)**

**Holding:** The convictions for enterprise corruption must be vacated. The defendants' sentences on the remaining counts, which were meted out in a way that ensured the aggregate sentences would remain the same without the enterprise corruption counts, are modified, "as a matter of discretion in the interest of justice," to run concurrently. (Supreme Ct, New York Co)

**Concurrence in Part, Dissent in Part:** The prosecution failed to establish the elements of enterprise corruption; "it is one thing to draw inferences from the facts and another thing for the [prosecution] to simply invent facts in an attempt to satisfy the [*People v Western Express*] [19 NY3d 652 (2012)] standard." The remaining convictions should be reversed for evidentiary errors.

**Concurrence in Part, Dissent in Part:** There was ample evidence to support the enterprise corruption convictions.

#### Competency to Stand Trial

#### Parole (Revocation Hearings [Due Process])

**Matter of Lopez v Evans, 104 AD3d 105, 957 NYS2d 59 (1st Dept 12/27/2012)**

**Holding:** Due process prohibits going forward with a parole revocation proceeding where the parolee has been found incompetent to stand trial in a criminal case based on the same charges as those at issue in the revocation proceeding. Until the Legislature establishes procedures and schedules to govern competency issues in parole revocation proceedings, there is no statutory or constitutional impediment to the Board of Parole, "upon ascertaining

**First Department** *continued*

that the parolee's competence is in question, receiving evidence on the parolee's mental condition and ruling on his or her competence at the outset of the revocation hearing." (Supreme Ct, Bronx Co)

**Concurrence:** The Board of Parole is not authorized to determine a parolee's competence.

**Sentencing (Appellate Review) (Concurrent/Consecutive) (Modification)**

**People v Walsh, 101 AD3d 614, 957 NYS2d 96 (1st Dept 12/27/2012)**

**Holding:** "Considering the nonviolent nature of his criminal conduct, his age and poor health (Crohn's disease, epilepsy, and asthma), and his expressions of remorse," the court modified the defendant's sentences to the extent of running them concurrently, thereby reducing the aggregate sentence from 6 to 12 years to 3 to 6 years. (Supreme Ct, New York Co)

**Dissent:** Precedent provides that a reviewing court should rarely reduce a sentence that resulted from a negotiated plea, and the circumstances cited by the majority in support of the modification "are, tragically, all too ordinary ...." The court should not reduce a defendant's sentence "based solely upon sympathy. This is not our role."

**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](http://www.nycourts.gov/reporter/Decisions.htm).

**Juveniles (Abuse) (Custody) (Neglect)**

**Matter of Eric Z., 100 AD3d 646, 953 NYS2d 644 (2nd Dept 11/7/2012)**

Where the parents had no prior criminal or family court history and had complied with all services ordered by the court following temporary removal of the child, a suspended judgment as requested by the parents rather than continued supervision as was imposed at the request of the petitioner would be in the child's best interests. Three doctors opined that the child's injuries — "left fronto-parietal subdural hematoma and a few bilateral retinal hemorrhages" — observed at a hospital after the parents said the child fell from his bed, did not stem from abuse. (Family Ct, Queens Co)

**Guilty Pleas****Sentencing (Restitution)**

**People v Esquivel, 100 AD3d 652, 953 NYS2d 163 (2nd Dept 11/7/2012)**

Where the plea minutes give no indication that the defendant's plea agreement included restitution, and the prosecution concedes that restitution was not part of the plea bargain, the defendant should have had the opportunity to accept the addition of restitution to his negotiated sentence or withdraw his plea. His waiver of the right to appeal did not preclude review of this issue. As the only relief sought is to have the restitution provision vacated, and the prosecution consents, the matter need not be remitted to give the defendant a chance to withdraw the plea. (County Ct, Nassau Co)

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

**People v Felice, 100 AD3d 609, 953 NYS2d 295 (2nd Dept 11/7/2012)**

"In light of this Court's recent holding in *People v Campbell* (98 AD3d 5 [2012]), the defendant's prior juvenile delinquency adjudication should not have been considered in determining his appropriate risk level designation under SORA." Recalculation of the defendant's risk score would make him a presumptive level two offender. Because the record shows that the prosecution would have sought an upward departure had the defendant been scored at the lower level, the matter is remitted for consideration of such a departure. (County Ct, Dutchess Co)

**Freedom of Information**

**Matter of Porco v Fleischer, 100 AD3d 639, 953 NYS2d 282 (2nd Dept 11/7/2012)**

The appellant's request under the Freedom of Information Law for "the makes, models, and colors of vehicles registered to E-ZPass customers that passed through certain highway exits at specific times in November 2004" (request for colors later abandoned) was improperly denied by the Thruway Authority. As no identifying details were requested, the privacy of E-ZPass users was not implicated; the claim that a particular person's driving habits could be determined from the information is speculative. The "contention that disclosure is precluded by Public Officers Law § 89 (2) (b) (iv) and (v) is not properly before this Court ...." (Supreme Ct, Albany Co [appeal transferred])

**Second Department** *continued*

**Juveniles (Custody) (Hearings)**

**Witnesses (Confrontation of Witnesses)**

**Matter of Rodriguez v Bello, 100 AD3d 641, 953 NYS2d 269 (2nd Dept 11/7/2012)**

In this custody matter, “[t]he Family Court erred in admitting into evidence the report of the Mental Health Assessment Team, since the report was not submitted under oath and the expert was not ‘present and available for cross-examination’ (22 NYCRR 202.16 [g] [2] ...).” As “a sound and substantial basis exists in the record to support the Family Court’s determination,” however, that determination need not be disturbed. (Family Ct, Orange Co)

**Driving While Intoxicated (Ignition Interlock Devices)**

**Probation and Conditional Discharge (Conditions and terms)**

**People v Vidaurrazaga, 100 AD3d 664, 953 NYS2d 290 (2nd Dept 11/7/2012)**

After sentencing the defendant in this felony driving under the influence of alcohol case to a one-year conditional discharge during which the defendant was to maintain an ignition interlock device on his vehicle, the court determined that Penal Law 65.05(3)(a) requires a three-year conditional discharge period and resented the defendant accordingly, but it is not clear that the court exercised discretion when extending the ignition interlock device requirement to the same period. The more natural reading of Vehicle and Traffic Law 1193(1)(c)(iii), as well as the rule of lenity, leads to the conclusion that the ignition interlock requirement need not extend through the full conditional discharge period; the matter is remitted for resentencing with no opinion as to the appropriate duration of the requirement in this case. (Supreme Ct, Nassau Co)

**Evidence (Prejudicial)**

**Misconduct (Prosecution)**

**Narcotics (Evidence) (Sale)**

**People v Aziziandavidi, 100 AD3d 765, 954 NYS2d 132 (2nd Dept 11/14/2012)**

Testimony that the 32 pounds of drugs found in the defendant’s suitcases could be converted into heroin, and that the heroin would have been worth about \$4.5 million, was not of sufficient probative value as to intent to sell and knowing possession to outweigh the prejudicial

impact of such testimony. The prosecutor’s reference to it in summation, along with references “to the defendant as a ‘player’ in the ‘game’ of international heroin trafficking” also constituted error. These unpreserved errors, reviewed in the interest of justice, were harmless. (Supreme Ct, Queens Co)

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

**People v DeDona, 102 AD3d 58, 954 NYS2d 541 (2nd Dept 11/14/2012)**

The defendant did not preserve his claim that the court erred in accepting the 60 points assigned by the New York State Board of Examiners of Sex Offenders (Board) on its risk assessment instrument, for risk factors 3 (number of victims), 5 (age of victims), and 7 (relationship with the victims), based on internet contacts, including plans to meet in person, with someone who was actually an undercover officer. In any event, the ruling was not error. *People v Costello* (35 AD3d 754), which disallowed points for a fictitious victim, addressed risk factor 4, which requires physical sexual contact with the victim, which the factors here do not. The defendant’s conduct of setting up a meeting and traveling to another state with the intent to engage in illicit sexual conduct with two people under 18 years of age led to a conviction under 18 USC 2423(b) despite the fictitious nature of the persons in question. The rationale of courts that have disallowed the imposition of points for fictitious victims is rejected. Nor did the upward departure to level two constitute error. Assessing no points for sexual contact under-assesses the actual risk to the public in this scenario; the defendant “poses as much of a danger to the community as an offender who succeeds in engaging in sexual activity” with an underaged person targeted through the Internet. (County Ct, Westchester Co)

**Search and Seizure (Arrest/Scene of the Crime Searches [Time]) (Consent) (Entries and Trespasses) (Warrantless Searches [Emergency Doctrine])**

**People v Harper, 100 AD3d 772, 954 NYS2d 127 (2nd Dept 11/14/2012)**

Where the altercation to which police responded ended by the time they arrived, the injured accuser said she was attacked by two women from upstairs, and the defendant and the other alleged assailant were then arrested, no emergency existed to justify the subsequent warrantless search of the defendant’s apartment from which she had been removed; there was no indication that any other victim existed or that the apartment held a third party who posed a threat of any kind. Where police asked the handcuffed defendant if they could check her home for other people, her assent was not shown to be a volun-

**Second Department** *continued*

tary consent to search. Admission of the recovered evidence was not harmless error; the only eyewitnesses were the complainant, who gave a conflicting account, and her fiancé, who was not present when the fight began. (Supreme Ct, Queens Co)

**Family Court (Family Offenses)****Juveniles (Custody)**

**[Matter of Hassan v Silva](#), 100 AD3d 753, 953 NYS2d 677 (2nd Dept 11/14/2012)**

The court providently exercised its discretion in declining jurisdiction over the father's custody petition on the ground that New York is an inconvenient forum where the subject children have lived in Pennsylvania since 2010 and the court there, which is familiar with the family and pending issues, is willing to exercise jurisdiction. However, dismissing the father's family offense proceeding, which was not "a 'child custody proceeding' within the meaning of the [Uniform Child Custody Jurisdiction and Enforcement Act]," was error; all of the acts complained of occurred in New York. (Family Ct, Kings Co)

**Speedy Trial (Burden of Proof) (Cause for Delay) (Statutory Limits)**

**[People v Headley](#), 100 AD3d 775, 954 NYS2d 121 (2nd Dept 11/14/2012)**

The motion to dismiss on speedy trial grounds under CPL 30.30(1)(a) was timely, as it was made before trial commenced, and the prosecution's claim as to timeliness did not preserve for review the further claim that they were not given proper notice of the motion. The court should have added an additional 38 days to the 182 days charged to the prosecution as there was no showing that the prosecutor's call to jury duty "constituted an exceptional circumstance under CPL 30.30 (4) (g) ...." This renders academic the contention that the first 22 days of an adjournment period should have been excluded because a bench warrant as to the defendant was stayed. (Supreme Ct, Queens Co)

**Endangering the Welfare of a Child****Evidence (Sufficiency)**

**[People v Kanciper](#), 100 AD3d 778, 954 NYS2d 146 (2nd Dept 11/14/2012)**

The evidence was insufficient to show that the defendant endangered the welfare of a child when she injected

a dog with tranquilizers in the child's presence where there was no evidence that the child, who had observed injections for treatment of a pet's diabetes, was upset by the act or knew at the time that the defendant intended to euthanize the dog later. (County Ct, Suffolk Co)

**Search and Seizure (Warrantless Searches [Emergency Doctrine])**

**[People v Mormon](#), 100 AD3d 782, 954 NYS2d 152 (2nd Dept 11/14/2012)**

The prosecution did not meet its burden of showing that a warrantless search was justified under the emergency doctrine where the search occurred 45 minutes after police arrived outside the defendant's apartment in response to a reported shooting that had occurred even earlier. A neighbor told the arriving police that she had heard a loud bang, which she later deduced was a shot, coming from the defendant's apartment where he lived with his girlfriend and their children, but the police did not recall the girlfriend's response when asked where the children were, and the defendant said he had been shot on the street a block away. The physical evidence seized in the apartment was properly suppressed. (Supreme Ct, Queens Co)

**Sentencing (Second Felony Offender) (Second Violent Felony Offender)**

**[People v Nelson](#), 100 AD3d 785, 953 NYS2d 673 (2nd Dept 11/14/2012)**

In the unique circumstance here, where the predicate felony statement filed by the prosecution contained allegations sufficient to support a finding that the defendant had a predicate felony conviction but insufficient to support a finding that he had a predicate violent felony conviction, and where the court adjudicated the defendant a second violent felony offender but sentenced him as a second felony offender, and where defendant does not contend that the sentence was illegal or excessive, the sentence does not need to be vacated, but the judgment is modified to reflect that the defendant is a second felony offender. (Supreme Court, Queens Co)

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

**[People v Payton](#), 100 AD3d 786, 955 NYS2d 72 (2nd Dept 11/14/2012)**

Where the District Attorney's office prosecuting the defendant executed a search warrant at the office of the defendant's lawyer 15 days before trial, which was not

**Second Department** *continued*

made known to the trial court until after the defendant was convicted, at which point the court assigned new counsel at the defendant's request, denial of subsequent motions for a new trial, made first under CPL 330.30 and then under article 440 on the basis of ineffective assistance of counsel, was not error. The defendant did not present "any evidence establishing that the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation." (County Ct, Suffolk Co)

**Dissent:** The lawyer's failure to meet his ethical duty to disclose matters that unquestionably bore on his ability to serve the defendant with undivided loyalty must have been rooted in the lawyer's desire to protect his own interests even at the expense of his client's ability to make an informed choice about who represented him. The defendant tried but was unable to place facts as to the conflict on the record due to the court's refusal to hold a hearing and trial counsel's refusal to provide an affidavit; the defendant submitted evidence showing that only two months after he was sentenced, his trial lawyer received a sentence with several unusually favorable aspects.

[*Ed. Note: Leave to appeal was granted on Jan 10, 2013 (20 NY3d 1015).*]

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

**Auxiliary Services (Interpreters)**

**People v Pelaez, 100 AD3d 803, 954 NYS2d 554 (2nd Dept 11/14/2012)**

The defendant's waiver of the right to appeal was invalid where the court's statements at the plea suggested that waiving the right was mandatory rather than something the defendant was being asked to do voluntarily, the court elicited no acknowledgment that the defendant was voluntarily waiving the right, the record lacks any indication that the defendant understood the distinction between the right to appeal and other trial rights he forfeited by pleading guilty, and there is no showing that the written waiver was translated for the Spanish-speaking defendant. The claims raised on appeal, however, are unpreserved and lack merit. (Supreme Ct, Queens Co)

**Sentencing (Restitution)**

**People v Posner, 100 AD3d 805, 954 NYS2d 118 (2nd Dept 11/14/2012)**

Under the circumstances here, the court did not conduct an adequate inquiry into whether the defendant's failure to timely make a \$50,000 restitution down payment was willful, and the court lacked sufficient informa-

tion make that determination. Further, the court erred in requiring the defendant to file a confession of judgment as part of restitution. (County Ct, Putnam Co)

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

**People v Witherspoon, 100 AD3d 809, 953 NYS2d 657 (2nd Dept 11/14/2012)**

Where the defendant was sentenced as a second felony offender in 1996 pursuant to the prosecution's CPL 400.21 second felony offender statement based on a non-violent conviction in the defendant's record, rather than as a second violent felony offender as all now agree he should have been, and did not object to that designation at the time or until now, he cannot now use resentencing on the 1996 offense simply to alter the sentencing date to affect the utility of that offense as a predicate for the imposition of enhanced punishment on a current one. Resentencing was properly denied. (County Ct, Suffolk Co)

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

**Matter of Andrea M. v New York State Off. of Children & Family Servs., 100 AD3d 899, 955 NYS2d 116 (2nd Dept 11/21/2013)**

Upon review in this article 78 proceeding of the denial, by the Commissioner of the New York State Office of Children and Family Services, of a petition to amend and seal an indicated report maintained by the New York State Register of Child Abuse and Maltreatment, the petition is granted; the determination of maltreatment by the petitioner was not supported by substantial evidence where the record shows the petitioner, while holding her infant son, struck back when she was attacked by a step-daughter.

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

**People v Julien, 100 AD3d 925, 954 NYS2d 201 (2nd Dept 11/21/2012)**

The defendant's motion to suppress a credit card found in his pocket during a pre-arrest search that was based on an observable bulge should have been granted as the prosecution failed to adduce sufficient evidence that the officer feared for his safety; the inevitable discovery exception does not apply as the card constituted primary, not secondary evidence. The fourth-degree convictions of grand larceny and possession of stolen property premised on that card are vacated and dismissed. (Supreme Ct, Rockland Co)



**Second Department** *continued***Impeachment****Misconduct (Prosecution)**

**People v Mattocks, 100 AD3d 930, 954 NYS2d 210  
(2nd Dept 11/21/2012)**

The prosecutor's improper impeachment of her own witness, in violation of CPL 60.35, and "her improper use of such impeachment material during summation, together with related errors of the court with respect to the impeachment material, had the cumulative effect of depriving the defendant of his due process right to a fair trial...." (Supreme Ct, Kings Co)

**Juveniles (Support Proceedings)**

**Matter of McNair v Fenyn, 100 AD3d 903,  
954 NYS2d 197 (2nd Dept 11/21/2012)**

Because a party seeking reimbursement for payments to a third party that are part of the other parent's child support obligation must show that the sums were actually paid, the court should have included in the calculation of arrears for tuition and unreimbursed medical and other expenses "only those sums for which the mother submitted proof of actual payment to the third-party provider." Under the circumstances of this case, directing the father to satisfy substantial child support arrears in only six bimonthly payments was an improvident exercise of discretion. (Family Ct, Westchester Co)

**Family Court (Family Offenses) (General)**

**Matter of Muhammadu v Barcia, 100 AD3d 904,  
955 NYS2d 123 (2nd Dept 11/21/2012)**

Where, on the date scheduled for trial on the family offense petition, the appellant's court-appointed attorney appeared, said he had spoken with the appellant two days previously, and did not know why his client was not there, and where there had been discussions earlier about having the trial set for a later date, the court erred in denying an adjournment, proceeding with the hearing, and issuing a final order of protection. (Family Ct, Queens Co)

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

**People v Velez, 100 AD3d 847, 954 NYS2d 192  
(2nd Dept 11/21/2012)**

Where the court at the defendant's Sex Offender Registration Act redetermination hearing "apparently committed a clerical error by designating the defendant a sexually violent offender, as the *Doe v Pataki* stipulation

provides that the redetermination court "shall neither consider nor render a determination" regarding whether a defendant is to be designated a sexually violent offender, the order must be modified by deleting the words "sexually violent." (Supreme Ct, Nassau Co)

**Sentencing (Hearing) (Pronouncement)**

**People v Francis, 100 AD3d 1017, 954 NYS2d 626  
(2nd Dept 11/28/2012)**

Where the court's comments at sentencing demonstrate improper speculation that the defendant tried to kidnap the accuser and intended to burglarize his residence, the court sentenced the defendant, in part, "on the basis of materially untrue assumptions or misinformation"; the defendant was denied due process, and must be resentenced. (County Ct, Westchester Co)

**Article 78 Proceedings****Insanity (Civil Commitment) (Post-commitment Actions)**

**Matter of Robert T. v Sproat, 102 AD3d 176,  
955 NYS2d 134 (2nd Dept 11/28/2012)**

The petitioner, found not responsible by reason of mental disease or defect and remanded to the custody of the State Office of Mental Health Commissioner, was eventually released pursuant to a release order and order of conditions, and later he consented to an extension of the order of conditions but objected to the addition of the provision at issue in this CPLR article 78 proceeding. The provision required the Commissioner, in the event that the petitioner failed to comply with any condition and refused to appear for or comply with a psychiatric examination, to "apply to the court for a Temporary Confinement Order for the purpose of conducting an effective psychiatric examination in a secure facility." Prohibition of enforcement of that provision is warranted because the "Supreme Court does not have authority to issue a 'Temporary Confinement Order' without notice until there is an application for recommitment—temporary or otherwise—on notice, in its current form."

**Dissent:** "[T]he petitioner has failed to establish that the disputed provision is not authorized."

*[Ed. Note: Procedures relating to criminal defendants who are found not responsible are discussed in the Practice Tips article that begins on p. 8.]*

**Appeals and Writs (Arguments of Counsel)****Counsel (Anders Brief)**

**People v Duarte, 101 AD3d 747, 956 NYS2d 69  
(2nd Dept 12/5/2012)**

**Second Department** *continued*

New appellate counsel must be appointed. Assigned counsel filed an *Anders* brief containing “no reference whatsoever to the plea and sentencing proceedings” regarding the attempted use of a child in a sexual performance conviction, “and merely referred to the defendant’s plea of guilty to attempted use of a child in a sexual performance ... and to his admission of violating the terms or conditions of his probation,” without addressing the parties’ arguments regarding the defendant’s motion to withdraw his guilty plea. The record reveals possible nonfrivolous issues with regard to denial of that motion. (County Ct, Suffolk Co)

**Counsel (Right to Counsel)**

**Juveniles (Neglect) (Right to Counsel) (Visitation)**

[Matter of Forrest S.-R.](#), 101 AD3d 734, 954 NYS2d 482 (2nd Dept 12/5/2012)

“[T]he order dated August 12, 2012, must be reversed. That order granted relief requested when the mother’s counsel was not present and could not respond, in violation of the mother’s right to counsel ....” (Family Ct, Kings Co)

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

**Misconduct (Prosecution)**

**Self-Incrimination (Conduct and Silence) (Comment)**

[People v McArthur](#), 101 AD3d 752, 956 NYS2d 71 (2nd Dept 12/5/2012)

The unpreserved claim that the prosecutor denied the defendant a fair trial by commenting in summation about the defendant’s post-arrest silence and demeanor as not being those of an innocent person is reviewed in the interest of justice and warrants reversal. Mere denial of involvement in the shooting did not constitute a waiver of the right to remain silent, and ambiguous statements at the police station did not constitute a narration of the defendant’s involvement. He was denied the effective assistance of counsel when his attorney failed to object to the improper remarks and also when counsel questioned prosecution witnesses about a separate shooting, opening the door to admission of the defendant’s guilty plea in that matter. (County Ct, Suffolk Co)

**Juries and Jury Trials (Deliberation)**

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

**People v Powell**, 101 AD3d 756, 955 NYS2d 608 (2nd Dept 12/5/2012)

Where the suppression hearing court specifically based its finding of probable cause for the defendant’s arrest on the fellow-officer rule, the issue was preserved. Suppression of the fruits of the arrest is granted because, while the prosecution showed that certain officers obtained information from an eyewitness sufficient to establish probable cause, no evidence was presented to show that the information was communicated to the arresting officers before they stopped and detained the defendant.

Reversal is also required because the record lacks evidence that the court provided defense counsel with information about a jury note and tally sheet indicating a deadlock, the prosecution’s motion for resettlement of the record was not to correct a clerical error or conform the record to the truth, but “to create a new portion of the record, which could have been, but was not, created at trial,” and evidence that the court provided counsel with information about the note off the record did not fulfill the requirements of case law interpreting CPL 310.30. (Supreme Ct, Queens Co)

**Juveniles (Custody)**

[Matter of Sidorowicz v Sidorowicz](#), 101 AD3d 737, 955 NYS2d 194 (2nd Dept 12/5/2012)

The court’s determination, including awarding sole legal and residential custody to the father, lacked a sound and substantial record basis. The court did not give sufficient weight “to the children’s need for stability and to the impact of uprooting them” from their mother’s residence and the locale in which they have lived since 2007, or to undisputed evidence of a “strained relationship between the father and one of the children,” or to “that child’s clearly expressed preference to remain” with the mother. The father did not show that circumstances had so changed that the best interests of the children required a modification in the existing custody arrangement. (Family Ct, Suffolk Co)

**Evidence (Hearsay)**

**Witnesses (Confrontation of Witnesses)**

[People v Wilson](#), 101 AD3d 764, 955 NYS2d 362 (2nd Dept 12/5/2012)

Admission of an eyewitness’s hearsay testimony that he learned later from his girlfriend that the coworker he identified as the shooter was named “Rahman,” which is the defendant’s name, rather than “Ramel” as he thought at the time of the shooting, was error. It was admitted not to complete the narrative but “for its truth, i.e., to prove

**Second Department** *continued*

that the person the eyewitness saw shoot the victim was, in fact, Rahman.” However, the error was harmless; it did not violate the defendant’s right to confront witnesses as the testimony did not imply that the girlfriend identified the defendant as the shooter but only supplied his correct name. (Supreme Ct, Kings Co)

**Burglary (Elements) (Evidence)****Evidence (Sufficiency)****People v Brown, 101 AD3d 895, 956 NYS2d 109 (2nd Dept 12/12/2012)**

Where the prosecution provided evidence that the defendant broke a set of doors and locks at the accuser’s dwelling, but no evidence that any part of the defendant’s body entered that dwelling, the evidence was legally insufficient to support the second-degree burglary conviction. (Supreme Ct, Westchester Co)

**Evidence (Business Records) (Hearsay)****Juveniles (Support Proceedings)****Matter of Fortunato v Murray, 101 AD3d 872, 955 NYS2d 206 (2nd Dept 12/12/2012)**

The support magistrate erroneously based a finding of inadmissibility of records on the lack of certification showing they were identical to those before her in 2008; the issue is whether the documents currently before the court are admissible. The father filed for downward modification of child support based on having sustained injuries that hampered his ability to work; trial and appellate proceedings resulted in a 2010 remand for a hearing to determine whether certain documents subpoenaed from the father’s physician’s office were admissible as business records or inadmissible because they contained medical opinions; and after the records in the court clerk’s office were destroyed, the father subpoenaed the records again from the same office. Remitted for new determinations on admissibility and of the petition. (Family Ct, Nassau Co)

**Juveniles (Support Proceedings)****Matter of Jasen v Karassik, 101 AD3d 874, 956 NYS2d 92 (2nd Dept 12/12/2012)**

“[T]he award of child support arrears should have included an award of interest at the rate of 6% per annum” as the Ontario, Canada, order directs. Equitable principles in the Uniform Interstate Family Support Act (Family Court Act article 5-B), which does not allow

another state to modify an issuing state’s order of child support unless the issuing state no longer has continuing, exclusive jurisdiction or the parties consent, and common-law principles, require enforcement of foreign support orders absent fraud or strong public policy not implicated here. (Family Ct, Rockland Co)

**Juveniles (Custody)****Matter of Supangkat v Torres, 101 AD3d 889, 954 NYS2d 915 (2nd Dept 12/12/2012)**

Where “the court gave inexplicably little weight to its own findings regarding the father’s domestic violence against the mother and his startling lack of judgment on several occasions with respect to the parties’ child” and “gave undue weight to the mother’s temporary housing situation,” the “award of custody to the father lacked a sound and substantial basis in the record.” (Family Ct, Queens Co)

**Sex Offenses (Sex Offender Registration Act)****People v Tineo-Morales, 101 AD3d 839, 955 NYS2d 213 (2nd Dept 12/12/2012)**

The court should not have rejected the Board of Examiners of Sex Offenders recommendation of a downward departure from risk level two to risk level one where it was based on mitigating factors supported by a preponderance of the credible evidence and where a number of factors that reduce the defendant’s risk of reoffending are present. Those include the defendant’s lack of a prior criminal record, his consensual relationship with the accuser, that the accuser chose to maintain the relationship into adulthood, and the defendant’s closeness to his family. (County Ct, Suffolk Co)

**Evidence (Sufficiency)****Fraud****Larceny (Credit Cards) (Fraud)****People v Ukasoanya, 101 AD3d 911, 957 NYS2d 153 (2nd Dept 12/12/2012)**

Where the defendant was accused of using a fraudulently obtained credit card on 10 occasions to have merchandise from a store delivered to his warehouse, but he was convicted only as to the single instance in which the merchandise in question had not yet been delivered to him, the evidence was insufficient to support the conviction of first-degree scheme to defraud because the prosecution “failed to prove that the defendant ‘obtain[ed] property’ worth more than \$1,000 as a result of the alleged scheme ....” (Supreme Ct, Kings Co)

## Second Department *continued*

### Juveniles (Custody) (Fitness) (Parental Rights)

**Matter of Worysz v Ratel, 101 AD3d 893, 957 NYS2d 151 (2nd Dept 12/12/2012)**

The court should have examined the mother's psychiatric records in camera before deciding the father's motion to compel disclosure of them; while parties in a contested custody proceeding put their physical and mental conditions at issue, the potential for abuse of medical records about such conditions is great and the court has broad power to limit disclosure. Here, "the mother's psychiatric records may contain embarrassing or potentially damaging material" irrelevant to her fitness as a parent and should be reviewed. (Family Ct, Suffolk Co)

### Admissions (Interrogation) (Miranda Advice) (Voluntariness)

#### Article 78 Proceedings

#### Ethics (Prosecution)

**Matter of Brown v Blumenfeld, 103 AD3d 45, 957 NYS2d 171 (2nd Dept 12/19/2012)**

Where the court found that the actions of the prosecutor did not render the defendant's resulting statements involuntary, a writ of prohibition in this CPLR article 78 proceeding, barring enforcement of the court's order precluding use of the defendant's videotaped statement at trial, is warranted. The court exceeded its authority by determining that it could preclude the defendant's statement, under Judiciary Law 2-b(3) and its inherent authority, upon finding that the prosecution's act of telling the defendant "If there is something you would like us to investigate concerning this incident, you must tell us now so we can look into it" was "misleading and deceptive" in violation of Rule of Professional Conduct 8.4(c).

### Juveniles (Parental Rights) (Right to Counsel)

**Matter of Dashawn N., 101 AD3d 1013, 958 NYS2d 396 (2nd Dept 12/19/2012)**

The court attorney referee violated the right to counsel and to due process by holding the continuation of a permanency hearing in the absence of the mother and the mother's attorney, and refusing to vacate the resulting determination upon the attorney's motion made on the same day, in which he asserted he had arrived at 9:43 for the 9:30 hearing, saw and was seen by the assistant county attorney representing the petitioner, moved to a different waiting area to read the file and did not hear the case called, which a court officer told him was at 9:50. A new

hearing must be held before a different referee. (Family Ct, Westchester Co)

### Aliens (Deportation)

#### Due Process (Notice)

#### Sex Offenses (Sex Offender Registration Act)

**People v Gutierrez-Lucero, 103 AD3d 89, 956 NYS2d 131 (2nd Dept 12/19/2012)**

The defendant's right to due process was violated where he was determined to be a level one sex offender under the Sex Offender Registration Act following a hearing of which he had no notice, did not attend due to having been deported, and did not waive his right to attend, after both the prosecutor and defense counsel argued that the hearing could not proceed without a waiver. That the defendant was assigned the lowest possible risk level did not, as the prosecution contends on appeal in contrast to its concern below, render the hearing requirement unnecessary. (Supreme Ct, Kings Co)

### Family Court

#### Juveniles (Custody)

**Matter of Lebron v Lebron, 101 AD3d 1009, 956 NYS2d 125 (2nd Dept 12/19/2012)**

The court erred in granting attorney's fees to the mother where the father sought modification of a custody order, alleging that the mother was planning to move with their children beyond the 50-mile range contained in their divorce stipulation of settlement and that the move was not in the children's best interest. While the court dismissed the petition once the proposed move was shown to be just over 49 miles, it cannot be said that there was no merit in fact or law to the argument that the relocation would not be in the children's best interests, and there is no showing that the father was trying to delay or prolong the litigation or harass or injure the mother or that he asserted false material facts. (Family Ct, Queens Co)

### Discrimination (Gender)

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

**People v Marcus, 101 AD3d 1046, 956 NYS2d 167 (2nd Dept 12/19/2012)**

The court erred in seating a juror that defense counsel sought to peremptorily challenge where, after the court made a *Batson* finding that counsel had been using peremptories to challenge male jurors, counsel exercised a peremptory as to a male chiropractor who expressed doubts about his ability to be fair, saying he knew about his conscious mind but didn't know about his subcon-

**Second Department** *continued*

scious — which the court criticized as being “technical.” The juror’s comments were a non-pretextual basis for a challenge, and, furthermore, a medical background was related to the facts of the case, which involved DNA, but the court did not examine the juror on that point. (Supreme Ct, Queens Co)

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

**People v October, 101 AD3d 975, 956 NYS2d 148  
(2nd Dept 12/19/2012)**

The court providently exercised its discretion in declining to depart downwardly from the presumptive risk level two sexually violent offender designation assigned to the defendant under the Sex Offender Registration Act, but erred in upwardly departing where the court did so on its own initiative without prosecution request, the defendant’s score placed him at the lower end of the level two scoring range, and some factors cited by the court, including the defendant’s alleged lack of remorse, were adequately taken into account by the Guidelines scoring. (Supreme Ct, Kings Co)

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

**People v Olin, 101 AD3d 977, 955 NYS2d 528  
(2nd Dept 12/19/2012)**

The order designating the defendant a level three sexual predator under Correction Law article 6-C must be reversed where defense counsel’s failure to commence a CPLR article 78 proceedings challenging the Board of Examiners of Sex Offenders determination that the defendant must register as a sex offender in New York constituted ineffective assistance of counsel under the circumstances; the defendant’s “underlying California offense could not serve as a basis for eligibility....” (Supreme Ct, Kings Co)

[*Ed. Note: On May 3, 2012, the Court of Appeals held that “[a] determination by the Board of Examiners of Sex Offenders that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender’s risk level.”* *People v Liden*, 19 NY3d 271 (2012).]

**Juries and Jury Trials (Deliberation)**

**People v Stocks, 101 AD3d 1049, 957 NYS2d 356  
(2nd Dept 12/19/2012)**

The court failed to comply with CPL 310.30 and *People v O’Rama* (78 NY2d 270) and denied the defendant an opportunity to participate meaningfully in a critical stage

where the court read a jury note, which included a request for clarification of the difference between the two second-degree robbery counts, not just a ministerial read-back of the jury charge, for the first time in the jury’s presence and responded, rather than reading it into the record and giving counsel an opportunity to make suggestions about the appropriate response. Reversal is required. (Supreme Ct, Queens Co)

**Counsel (Competence/Effective Assistance/Adequacy)****Sex Offenses (Sex Offender Registration Act)**

**People v Willingham, 101 AD3d 979, 956 NYS2d 165  
(2nd Dept 12/19/2012)**

The defendant was denied effective assistance of counsel at his Sex Offender Registration Act hearing where his lawyer did not controvert any of the points that the prosecution sought to assess, particularly the egregious and prejudicial failure to challenge 30 points under risk factor 1, or litigate any aspect of the proceeding, but rather remained silent “except for making two statements which showed an apparent misunderstanding as to how to challenge a SORA determination.” (Supreme Ct, Kings Co)

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

**Matter of Clarke-Golding v Golding, 101 AD3d 1117,  
956 NYS2d 553 (2nd Dept 12/26/2012)**

While there was not a fair preponderance of the credible evidence to support the determination that the appellant committed the family offense of third-degree assault, there was such a preponderance to support the finding of third-degree menacing. Where the court failed to place “any finding of aggravating circumstances ‘on the record and upon the order’” as required for an order of protection that exceeds two years, and insufficient evidence was presented as to aggravating circumstances, with no demonstration of “‘immediate and ongoing danger to the petitioner,’” the order cannot exceed two years and is so modified. (Family Ct, Queens Co)

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

**People v Ginyard, 101 AD3d 1095, 958 NYS2d 154  
(2nd Dept 12/26/2012)**

The defendant has shown that his due process rights to be present at a Sex Offender Registration Act (SORA) hearing were violated where a hearing was held in his absence after an adjournment following defense counsel’s objection to the inadequate written waiver apparently prepared by the then-Department of Correctional

**Second Department** *continued*

Services. Counsel reported that she had been unable to speak with her client due to, among other things, restrictions on his ability to call from prison. There is no record evidence that the defendant knew of the rights he would be waiving and of the consequences of not appearing before he expressed, by letter, a desire to confer with counsel but asked the lawyer to proceed since a SORA risk level designation was required for him to be released. (Supreme Ct, Kings Co)

**Counsel (Competence/Effective Assistance/Adequacy)  
Impeachment (Of Defendant [Including *Sandoval*])**

**[People v Delgado](#), 101 AD3d 1144, 956 NYS2d 579  
(2nd Dept 12/26/2012)**

The defendant was deprived of the effective assistance of counsel by his attorney’s errors with regard to use of the defendant’s prior convictions to impeach him. The *Sandoval* hearing requested in the defendant’s omnibus motion had not been held when the defendant waived a jury in favor of a bench trial, and when the prosecution sought a ruling, counsel asked the court to wait until the defendant finished his direct testimony, thereby depriving the defendant, who testified, of advance knowledge of what cross-examination to expect. Counsel did not object when the prosecutor questioned the defendant about the facts of his prior burglary convictions, which were similar to the charge here. (County Ct, Suffolk Co)

**Juveniles (Grandparents) (Visitation)**

**[Matter of Gray v Varone](#), 101 AD3d 1122,  
956 NYS2d 573 (2nd Dept 12/26/2012)**

Where the petitioner grandmother “established a prima facie case of standing to seek visitation with the subject child” and the child’s parents objected to visitation solely on the basis of animosity between the parties, which is not alone enough to deny visitation rights, the court erred in dismissing the petition at the end of the petitioner’s case. The hearing on standing must be continued and, if warranted, a hearing held on whether visitation is in the child’s best interest. (Family Ct, Suffolk Co)

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

**Juveniles (Neglect)**

**[Matter of Michael O. F.](#), 101 AD3d 1121, 955 NYS2d 895  
(2nd Dept 12/26/2012)**

“[T]he appellant [mother] is not aggrieved by the order directing the State Office of Children and Family

Services or Lincoln Hall to notify the petitioner, Administration for Children’s Services, when the child Joseph O.A. is released from its custody, and, accordingly, her appeal must be dismissed.” (Family Ct, Richmond Co)

**Third Department**

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**Counsel (Competence/Effective Assistance/Adequacy)  
Evidence (Other Crimes)**

**[People v Wilson](#), 100 AD3d 1045, 952 NYS2d 837  
(3rd Dept 11/1/2012)**

Where the prosecutor elicited testimony about the defendant’s prior bad acts after defense efforts to portray a prosecution witness as the real drug dealer, and the prior drug sales were probative of knowing possession and intent to sell, no error occurred. That the attorney who represented the defendant at a bail application later represented the confidential informant was not error where the lawyer did not recall acting on the defendant’s behalf and it was not clear that there was an actual overlap in representation. (County Ct, Greene Co)

**Ethics (Judicial) (Prosecution)**

**Prosecutors (Special Prosecutors)**

**[Matter of Czajka v Koweek](#), 100 AD3d 1136,  
953 NYS2d 394 (3rd Dept 11/8/2012)**

A judge who presided over preliminary aspects of a criminal case, then resigned and became District Attorney in the same county, is barred by Judiciary Law 17 from prosecuting that case. The order of a county court judge disqualifying the District Attorney’s office and appointing a special prosecutor is reviewable in an article 78 proceeding.

**Sentencing (Fines) (Mandatory)**

**[People v Duquette](#), 100 AD3d 1105, 952 NYS2d 909  
(3rd Dept 11/8/2012)**

The court’s use of the word “mandatory” when imposing fines on the defendant appeared to indicate that the court believed it lacked discretion as to imposing the fine. This was, as the prosecution conceded, error as to driving while intoxicated, but was not error as to first-degree aggravated unlicensed operation, as a fine is

**Third Department** *continued*

mandatory for conviction of that offense. (County Ct, Clinton Co)

**Aliens (Deportation) (Immigration)****Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])****Post-Judgment Relief (CPL § 440 Motion)****People v Cruz, 100 AD3d 1146, 953 NYS2d 720  
(3rd Dept 11/15/2012)**

The defendant is not entitled to relief on the basis of inadequate advice as to immigration consequences of her guilty plea where the written statement submitted in support of her motion to vacate the judgment appears to have been prepared in relation to deportation proceedings and lacked sworn allegations at least tending to substantiate this claim, and the record shows she was told the plea “may have some impact” on her immigration status. (County Ct, Albany Co)

**Sentencing (Enhancement) (Pre-sentence Investigation and Report)****People v Stanley, 100 AD3d 1152, 954 NYS2d 234  
(3rd Dept 11/15/2012)**

The defendant’s unpreserved contention that the court erroneously enhanced his sentence because he missed a presentence investigation interview is reviewed in the interest of justice. Cooperation with the Probation Department was not an express condition of the plea, nor did the *Parker* warnings given to him make such a reference. The defendant must be given an opportunity to withdraw his plea before the sentence can be enhanced. (Supreme Ct, Albany Co)

**Aliens (Deportation) (Immigration)****Counsel (Competence/Effective Assistance/Adequacy)****Post-Judgment Relief (CPL § 440 Motion)****People v Rajpaul, 100 AD3d 1183, 954 NYS2d 249  
(3rd Dept 11/21/2012)**

While failure to inform a foreign national of immigration consequences is not ineffective assistance where counsel has no reason to question the client’s citizenship, the police report here indicated that the defendant is Guyanese and the presentence report shows that he was eager to show he is legally in this country. Indications that the evidence against him was not overwhelming support his contention that he would have gone to trial rather than

plead guilty if he had been told of the immigration consequences of a plea. (County Ct, Schenectady Co)

**Juveniles (Custody) (Parental Rights) (Permanent Neglect)****Matter of Arianna L., 100 AD3d 1281, 955 NYS2d 413  
(3rd Dept 11/29/2012)**

The mother permanently neglected her children but immediate termination of her parental rights is not in the children’s best interest. She met visitation requirements, contact with her had a beneficial impact on the children, and she obtained proper housing and expressed willingness to meet the petitioner’s requirements. The petitioner made little effort to promote a relationship between one child and her incarcerated father; the petition against him is dismissed. (Family Ct, Cortland Co)

**Counsel (Competence/Effective Assistance/Adequacy)****Narcotics (Marijuana)****Prisoners (Crimes)****People v Ariosa, 100 AD3d 1264, 955 NYS2d 244  
(3rd Dept 11/29/2012)**

The marijuana underlying the charges here was appropriately deemed dangerous contraband. While amounts of 25 grams or less may not be so deemed, the amount here was 29 grams and the facts show a well-organized scheme to introduce the drug into a maximum security prison with intent to distribute, creating a substantial probability of threats to safety or security. Failure to seek an expert to challenge the weight was not ineffective assistance of counsel. (County Ct, Washington Co)

**Arraignment****Speedy Trial (Prosecutor’s Readiness for Trial)  
(Statutory Limits)****People v Prunier, 100 AD3d 1269, 954 NYS2d 689  
(3rd Dept 11/29/2012)**

The defendant’s statutory speedy trial rights were not violated where the felony complaint was filed on Jan. 26, 2010, the indictment and prosecution’s statement of readiness were filed on Friday, July 23, 2010, with arraignment set for August 2, and the defense was notified on Monday, July 26, that arraignment would occur on July 27 — the last day of the statutory period — which it did. The statutory provision that arraignment be held on “at least two days notice” is met by holding an arraignment on the second counted day after notice was given, and the original notice was provided more than two days before the actual arraignment. (County Ct, Chemung Co)

## Third Department *continued*

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

#### Juveniles (Custody) (Persons in Need of Supervision)

**Matter of Bridget PP. v Richard QQ.**, 101 AD3d 1186, 956 NYS2d 602 (3rd Dept 12/6/2012)

The appeal of a denial of an ex parte order and dismissal of the underlying custody modification petition is treated as an application for review under CPLR 5704(a) and the summary dismissal is reversed. The petitioner mother not only pointed out that the respondent father had the parties' son designated a person in need of supervision, but also alleged physical and verbal abuse, drug use, and interference with the petitioner's parenting time by the respondent. (Family Ct, St. Lawrence Co)

#### Juveniles (Custody) (Visitation)

**Matter of Burrell v Burrell**, 101 AD3d 1193, 954 NYS2d 713 (3rd Dept 12/6/2012)

Granting the father's petition to modify a custody order by, among other things, limiting the mother's visitation to daytime supervision for two hours on Sunday, was not error where the mother, despite having joint custody, took no steps to learn how to handle the child, who has mental disorders, which lead to violent and destructive outbursts. The mother called the father to control the child when such outbursts occurred, and the mother's spouse injured the child. (Family Ct, Broome Co)

### Evidence (Sufficiency)

#### Robbery (Elements) (Evidence)

**People v Gordon**, 101 AD3d 1158, 955 NYS2d 430 (3rd Dept 12/6/2012)

Where no stolen property was found in the possession of the defendant or her accomplices after the defendant threatened one store employee and injured another when they sought to detain the defendant, there was legally insufficient evidence as to the element of robbery requiring that use of force be for the purpose of taking or immediately retaining property, not merely to escape. (Supreme Ct, Albany Co)

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

**People v Nehma**, 101 AD3d 1170, 954 NYS2d 706 (3rd Dept 12/6/2012)

Statements that the defendant made at the police station, not just those in a police car, should have been suppressed where police who asked to speak with him then

handcuffed him and put him in the car when he became agitated, did not give him *Miranda* warnings before asking questions, and gave only incomplete warnings at the station. In light of the defendant's limited English proficiency and other factors, no attenuation occurred. (Supreme Ct, Albany Co)

### Jurisdiction (Subject Matter)

#### Probation and Conditional Discharge (Revocation)

**People v Roberts-Alexandrov**, 102 AD3d 219, 955 NYS2d 437 (3rd Dept 12/6/2012)

Washington County Court had jurisdiction to hear a violation of probation petition where the defendant, a Washington County resident, had been placed on probation in Albany County and probation had been transferred to Washington County in an order listing the receiving court as the Easton Town Court. The error in the order did not deprive County Court, an appropriate criminal court under CPL 410.80 as amended in 2007, of jurisdiction. (County Ct, Washington Co)

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

#### Defenses (Notice of Defense)

#### Insanity (Defense of)

**People v Wells**, 101 AD3d 1250, 955 NYS2d 684 (3rd Dept 12/13/2012)

Counsel erred by failing to give notice of intent to offer psychiatric evidence under CPL 250.10 where extreme emotional disturbance (EED) was the only viable defense, the controlling case of *People v Diaz* (15 NY3d 40) was cited to counsel repeatedly, and counsel sought an EED defense charge at the close of proof. But the defendant's testimony and behavior justified denial of the charge on alternate grounds. Other error did not warrant reversal. (County Ct, Chemung Co)

### Juveniles (Custody) (Parental Rights)

**Matter of Cadence SS.**, 103 AD3d 126, 956 NYS2d 639 (3rd Dept 12/20/2012)

The petitioner mother, who, as a fit parent, has inherent, constitutional custody of her child, lacks statutory authority to institute proceedings to terminate the respondent father's parental rights under Social Services Law 384-b(3)(b). The purpose of allowing nonparents with legal custody to seek termination of parental rights is to free children for adoption, which is not the case here. (Family Ct, Albany Co)



**Third Department** *continued***Confessions (Voluntariness)****Counsel (Competence/Effective Assistance/Adequacy)**

[People v Carnevale](#), 101 AD3d 1375, 957 NYS2d 746  
(3rd Dept 12/20/2012)

Defense counsel's failure to seek suppression of the defendant's statements to police or to argue to the factfinder that they were involuntary, and other deficiencies, deprived the defendant of a fair trial. The protracted, only partially recorded interrogation of a 20-year-old beginning late at night, and her possible pain or drug withdrawal, should have been explored. (County Ct, Broome Co)

**Concurrence in Part, Dissent in Part:** The recording of the interrogation shows no basis for suppression. Counsel was otherwise prepared.

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

[Matter of Clark v Clark](#), 101 AD3d 1394, 956 NYS2d 645  
(3rd Dept 12/20/2012)

Allowing the respondent to proceed without counsel as to allegations that he was in violation of a child support order was error. The respondent: refused representation by the local public defender office because he was raising ineffective assistance against them in another matter; unsuccessfully sought appointment of counsel from the neighboring county; agreed to appear pro se only to avoid representation by a lawyer from the county where the matter was proceeding; and appeared unlikely to effectively act on his own behalf. (Family Ct, Schenectady Co)

**Forensics (DNA)****Search and Seizure (Search Warrants [Issuance] [Suppression])**

[People v Fomby](#), 103 AD3d 28, 956 NYS2d 633  
(3rd Dept 12/20/2012)

The search warrant application to take a buccal swab from the defendant, who was suspected of a robbery at the scene of which blood samples were found, was made without notice to him and, as the prosecution concedes, no exigent circumstances existed that prevented such notice. The resulting DNA evidence must be suppressed. (County Ct, Chemung Co)

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

[People v Mariano](#), 101 AD3d 1367, 956 NYS2d 291  
(3rd Dept 12/20/2012)

Where defense counsel asked for an instruction on justification after the jury requested the definition of self-defense and asked whether the defendant had a right to defend himself, declining to give the requested charge was error. The testimony of the defendant's friends that he was backing away when the accuser attacked him and then fell to the ground acting as if she was the one being attacked could lead the jury to decide the defendant's acts were justified. (County Ct, Albany Co)

**Instructions to Jury****Juries and Jury Trials (Competence) (Qualifications) (Selection) (Voir Dire)**

[People v McGuire](#), 101 AD3d 1386, 956 NYS2d 635  
(3rd Dept 12/20/2012)

Where the male defendant was charged with sexual offenses involving a male youth, the court should have asked additional questions to obtain unequivocal assurances that a juror, who gave ambiguous responses as to his feelings about homosexual teachers and belief that children tell the truth 99% of the time, could be impartial. The court also erred by responding to a juror's question about unanimity without consulting counsel and in a way that was coercive. (County Ct, Warren Co)

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

[People v Powell](#), 101 AD3d 1369, 956 NYS2d 294  
(3rd Dept 12/20/2012)

The court erred by denying a requested justification charge where the African-American defendant and his Caucasian girlfriend testified that they were leaving a sports event at which racial epithets were being made when someone threw a plastic cup of beer, shattering it, near them, they continued leaving after a brief confrontation, and the defendant threw his own beer cup, which hit the accuser, to impede pursuers. The nature of the force with which the defendant threw his cup was a jury issue. (Supreme Ct, Albany Co)

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

[People v Walker](#), 101 AD3d 1350, 956 NYS2d 306  
(3rd Dept 12/20/2012)

The defendant did not receive effective assistance of counsel where the new attorney assigned for sentencing

**Third Department** *continued*

in this case, as well as on new charges, said he had spoken at length to the defendant, but had not represented him at the guilty plea leading to the sentencing, and left the defendant to speak for himself. There were not only factual issues but legitimate and complex legal issues to raise regarding sentence enhancement based on the new charges. (County Ct, Ulster Co)

**Sex Offenses (Civil Commitment)**

**Matter of Charles A. v State of New York,**  
**101 AD3d 1535, 956 NYS2d 686 (3rd Dept 12/27/2012)**

The petitioner having sought discharge under Mental Hygiene Law 10.09(a), (f) from confinement as a dangerous sex offender suffering from a mental abnormality, the court directed his release under strict and intensive supervision (SIST), erroneously relying on allegations, which the State lacked opportunity to refute, that Phase IV, the final stage of the sex offender treatment program, was not available to the defendant. A new hearing must be held. (Supreme Ct, St. Lawrence Co)

**Parole (Rescission) (Release [Considerations for])**

**Matter of Costello v New York State Board of Parole,**  
**101 AD3d 1512, 957 NYS2d 486 (3rd Dept 12/27/2012)**

It was within the Parole Board’s discretion to rescind its grant of release to the petitioner on the basis of victim impact statements that had not been submitted on any of the occasions when release was considered.

**Dissent:** The record does not support the Board’s decision to order a rescission hearing, nor was there substantial evidence justifying rescission. “[T]hose who oppose petitioner’s parole release openly advocate the recurring position that an inmate convicted for the death of a law enforcement officer — even a nonshooter convicted of felony murder, as here — should *never* be released on parole. It bears emphasis that this was not and is not the law.” [Emphasis in original.]

**Search and Seizure (Automobile and Other Vehicles)  
 (Stop and Frisk)**

**People v Driscoll,** 101 AD3d 1466, 957 NYS2d 476  
 (3rd Dept 12/27/2013)

There was insufficient justification for a frisk of the defendant’s person where police had probable cause to stop his vehicle and arrest him for “playing his car stereo too loudly in violation of a local noise ordinance,” learned that he was on parole for drugs and that his parole officer

wanted to talk to him, and observed his initial refusal followed by compliance with an order to get out of the car. The frisk was not related to his parole status, nor was it a search incident to arrest since it was done before he was arrested. (County Ct, Chemung Co)

**Evidence (Hearsay)**

**Grand Jury (Procedure)**

**People v Gordon,** 101 AD3d 1473, 956 NYS2d 674  
 (3rd Dept 12/27/2012)

Where identification was the major issue, the integrity of the grand jury proceedings was so impaired by the admission of hearsay regarding the defendant’s name that reversal with leave to re-present is required. The accuser was allowed to say multiple times in the grand jury that he had been told the person who robbed him was Kevin Gordon, other hearsay testimony came in including references to other crimes, and a confusing instruction was given as to the purpose for which the testimony could be considered. (County Ct, Albany Co)

**Discovery (Matters Discoverable) (Witnesses)**

**Witnesses (Confrontation of Witnesses)**

**People v McCray,** 102 AD3d 1000, 958 NYS2d 511  
 (3rd Dept 1/17/2013)

The court, which reviewed the accuser’s medical records in camera and released only some to the defense, “properly balanced defendant’s 6th Amendment right to cross-examine an adverse witness and his right to any exculpatory evidence against the countervailing public interest in keeping certain matters confidential ....” (County Ct, Albany Co)

**Dissent:** The court’s failure to turn over to the defense certain mental health records regarding the accuser violated the defendant’s confrontation rights. “More records should have been provided ... addressing all of the victim’s relevant mental health issues, so that defense counsel could fully investigate, prepare and advocate for defendant.”

**Fourth Department**

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**Sex Offenses (Civil Commitment)**

**Fourth Department** *continued***Venue (Change of Venue)**

**Matter of State of New York v Carter, 100 AD3d 1438, 953 NYS2d 794 (4th Dept 11/9/2012)**

In this Mental Hygiene Law article 10 proceeding, the petitioner failed to establish good cause for changing the venue from Livingston County to Broome County where the petitioner's counsel stated that the accusers and police witnesses who were located in Broome County "may" be called to testify, "if necessary," and made a conclusory statement that the respondent had the greatest ties to Broome County. (Supreme Ct, Livingston Co)

**Due Process (Fair Trial)****Misconduct (Prosecution)**

**People v Hicks, 100 AD3d 1379, 953 NYS2d 770 (4th Dept 11/9/2012)**

During cross-examination, the prosecutor engaged in misconduct by repeatedly asking the defendant "to characterize prosecution witnesses as liars" and the court overruled defense counsel's eventual objection to that line of questioning. The resulting harm was exacerbated by the prosecution's statement in summation that "the defense theory was that 'the police are liars.'" The defendant did not open the door to these tactics, as his direct testimony did not suggest that the police made up their testimony. The prosecutor also improperly stated during summation that there was no evidence of a plea bargain; while no evidence of an offer was introduced at trial, the record shows that the defendant had rejected a written offer. "[T]he cumulative effect of the prosecutor's cross-examination and summation errors deprived defendant of a fair trial' ...." (Supreme Ct, Erie Co)

**Dissent:** Even assuming that the prosecutor engaged in misconduct, it was not "so pervasive or egregious as to deny defendant his right to a fair trial ...."

**Evidence (Sufficiency)****Homicide (Murder [Degrees and Lesser Offenses])**

**People v Jones, 100 AD3d 1362, 953 NYS2d 416 (4th Dept 11/9/2012)**

There was insufficient evidence to support the defendant's depraved indifference murder conviction where, in this one-on-one killing, the defendant did not abandon the decedent, but instead called 911, administered CPR, and was there when emergency personnel arrived, and there was no evidence of torture or a prolonged attack on a particularly vulnerable person. The conviction is

reduced to second-degree manslaughter. (County Ct, Oswego Co)

**Jurisdiction (Subject Matter)****Sex Offenses (Civil Commitment)**

**Matter of State of New York v Lashway, 100 AD3d 1372, 953 NYS2d 434 (4th Dept 11/9/2012)**

The court had continuing subject matter jurisdiction over all Mental Hygiene Law (MHL) article 10 proceedings where the respondent has been found to be a dangerous sex offender requiring civil commitment, even though the respondent was transferred from a secure treatment facility to a state prison after violating his parole. The court properly suspended the annual review under MHL 10.09 pending the respondent's release from prison. (Supreme Ct, Oneida Co)

**Juveniles (Juvenile Offender)****Sentencing (Fees)**

**People v Stump, 100 AD3d 1457, 953 NYS2d 441 (4th Dept 11/9/2012)**

Penal Law 60.10(1) "does not permit the imposition of any fines or fees on a juvenile offender and, because section 60.10 is the sole provision that applies to juvenile offenders, the court erred in imposing the DNA databank and sex offender registration fees." (County Ct, Genesee Co)

**Judges (Disqualification)****Sentencing****Victims (Rights)**

**People v Warren, 100 AD3d 1399, 954 NYS2d 289 (4th Dept 11/9/2012)**

This is a rare case in which the judge should have disqualified himself in an effort to maintain the appearance of impartiality. The judge had been the subject of a grievance filed by the defendant's girlfriend after she accused the judge of threatening her with jail time for wearing a t-shirt supporting the judge's reelection opponent, and the defendant was referenced in the grievance. Although the grievance was ultimately denied, the defendant asserted that his ability to present a defense would be hindered because the judge's status as presiding judge may affect his decision whether to call his girlfriend as a witness, particularly if he requested a bench trial, and the judge would be in a position to sentence the defendant. The defendant must receive a new trial before a different judge.

Because there is no right of confrontation or cross-examination at sentencing, the defendant's rights are not

## Fourth Department *continued*

violated when an accuser makes a CPL 380.50 statement via electronic recording. (County Ct, Oswego Co)

**Dissent:** The judge did not abuse his discretion in denying the defendant’s recusal motion.

### Evidence (Sufficiency)

#### Sex Offenses (Sexual Abuse)

#### Strangulation (Obstruction of Breathing or Blood Circulation) (Physical Injury)

[People v White](#), 100 AD3d 1397, 953 NYS2d 423 (4th Dept 11/9/2012)

The court properly reduced the second-degree strangulation count of the indictment to criminal obstruction of breathing or blood circulation as there was insufficient evidence that the defendant caused stupor or loss of consciousness or that the accuser sustained a physical injury where he testified that the defendant squeezed his throat for approximately three seconds, that it was painful, and his throat felt “tingly” that night and during the next day, but that he did not need medical assistance. There was legally sufficient evidence of forcible compulsion to support the first-degree sexual abuse count where that accuser testified that she could not get away because the defendant straddled her mid-section while she was lying on the floor. (Supreme Ct, Monroe Co)

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

[People v Beard](#), 100 AD3d 1508, 953 NYS2d 805 (4th Dept 11/16/2012)

The court violated the defendant’s state and federal constitutional right to counsel where the defendant made sufficiently serious, specific complaints about his assigned attorney “to trigger the court’s duty to engage in an inquiry regarding those complaints ....” The defendant told the court that he had not talked to the attorney before the trial, was not told that his trial would start that day, and was not told about certain pretrial hearings conducted in his absence. The court made no inquiry about these uncontradicted claims but interrupted the defendant for an off-the-record conversation with the attorneys and proceeded to trial because bringing a confidential witness from Texas had cost a lot of money and there were 50 prospective jurors at the courthouse. (County Ct, Oneida Co)

#### Due Process (Fair Trial) (Misconduct)

### Misconduct (Prosecution)

#### Witnesses

[People v Bounds](#), 100 AD3d 1523, 954 NYS2d 321 (4th Dept 11/16/2012)

The prosecution did not commit misconduct by arranging for the arrest of a woman who was in court to testify for the defendant; because defense counsel decided not to call the woman as a witness, there was no showing that her testimony would have been exculpatory. And the arrest was clearly lawful. The defendant’s right to call the witness does not mean that the police had to wait until after she testified to arrest her. (County Ct, Monroe Co)

### Assault (Lesser Included Offenses)

[People v Burnett](#), 100 AD3d 1561, 954 NYS2d 391 (4th Dept 11/16/2012)

The court should have granted the defendant’s request to charge second-degree assault under Penal Law 120.05(2) and (4) as lesser included offenses of first-degree assault under Penal Law 120.10(1); the jury could reasonably have concluded that the defendant intended to cause physical injury, not serious physical injury, or that he recklessly caused physical injury. The defendant testified that the taller and heavier accuser threatened and assaulted the defendant, who, while pinned on the ground and being threatened with death, used a pocket knife to stab the accuser to free himself, and the accuser finally gave up and drove himself to the hospital where he was treated for eight stab wounds and two lacerations, only one of which could have been life threatening if left untreated. (Supreme Ct, Monroe Co)

### Insanity (Evidence)

#### Sex Offenses (Sex Offender Registration Act)

[People v Diaz](#), 100 AD3d 1491, 954 NYS2d 338 (4th Dept 11/16/2012)

In this Sex Offender Registration Act (SORA) risk assessment proceeding, the court erred in granting an upward departure from a level two risk to a level three risk where the departure was based on factors already taken into account by the risk assessment instrument, *ie*, “the short period of time between defendant’s offenses and defendant’s pattern of touching the victims under their clothing, targeting strangers and using forcible compulsion.” It was also error to base the departure on the defendant’s alleged mental illness where there was no admissible evidence on the record of such illness nor that such illness is related to the risk of re-offense. (County Ct, Monroe Co)

**Fourth Department** *continued*

**Dissent:** The court properly relied on the defendant's serious mental disorder when granting the upward departure, and it was appropriate for the court to consider the unsigned case summary that implied a connection between the defendant's schizophrenia and his risk of reoffending.

**Juries and Jury Trials (Discharge)****Trial (Mistrial) (Verdicts)**

[People v Members](#), 100 AD3d 1543, 954 NYS2d 374 (4th Dept 11/16/2012)

The court improperly accepted the verdict from 11 jurors after the twelfth juror had to be rushed to the hospital following a seizure where the defendant did not waive the constitutional right to a determination by 12 jurors and the court could have called a recess over the weekend and reconvened for the verdict or asked the defendant if he wanted to waive that right. Because a new trial is granted, the defendant's claim regarding the court's ex parte communications with the twelfth juror is not addressed. (County Ct, Monroe Co)

**Sentencing (Appellate Review) (Excessiveness) (Persistent Felony Offender)**

[People v Smart](#), 100 AD3d 1473, 954 NYS2d 322 (4th Dept 11/16/2012)

While the defendant's sentence is within the permissible statutory range for a persistent felony offender, it is unduly harsh and severe because the defendant, in committing the violent felony offense of second-degree burglary, did not use actual violence, and his criminal record, with the possible exception of two misdemeanors and one felony, did not reflect use or threatened use of violence. In the interest of justice, the sentence is reduced from 20 years to life to 15 years to life. (County Ct, Monroe Co)

**Dissent in Part:** The majority's position that the lack of actual violence justifies a sentence reduction "not only usurps the discretion of the trial court in imposing a sentence, but also usurps the authority of the Legislature in categorizing offenses."

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

[People v Weathers](#), 100 AD3d 1521, 954 NYS2d 382 (4th Dept 11/16/2012)

The court properly suppressed the evidence found at the defendants' residence because the police lacked exigent circumstances to enter the residence without a war-

rant where there was no reason to believe that anyone was at the residence since the police waited 30 minutes after arresting a person suspected of buying cocaine there before entering, the police did not keep the residence under surveillance during that time, and there was no evidence that the police reasonably believed that any contraband was going to be removed or that anyone with contraband was aware of the police activity. (Supreme Ct, Oneida Co)

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

[People v Carno](#), 101 AD3d 1663, 955 NYS2d 786 (4th Dept 12/21/2012)

The written waiver of the right to appeal signed by the defendant is invalid because "there was no colloquy between County Court and defendant regarding the waiver of the right to appeal to ensure that it was knowingly, voluntarily and intelligently entered ...." (County Ct, Onondaga Co)

**Misconduct (Prosecution)****Trial (Summations)**

[People v Epolito](#), 101 AD3d 1603, 957 NYS2d 518 (4th Dept 12/21/2012)

"[T]he cumulative effect of the prosecutor's improper comments during summation deprived defendant of his right to a fair trial, requiring reversal...." (Supreme Ct, Onondaga Co)

**Appeals and Writs (Retroactivity)****Juveniles (Parental Rights) (Visitation)**

[Matter of Elsa R.](#), 101 AD3d 1688, 956 NYS2d 767 (4th Dept 12/21/2012)

The court erred in ordering post-termination visitation between the respondent mother and her children; the Court of Appeals decision in *Matter of Hailey ZZ*. (19 NY3d 422 [2012]) should be applied retroactively since it did not announce a new rule of law and cases on direct appeal should be decided in accordance with the law as it exists at the time the appeal is decided. (Family Ct, Monroe Co)

**Counsel (Competence/Effective Assistance/Adequacy) (Scope of Counsel [Entry])****Forensics (DNA)**

## Fourth Department *continued*

### Search and Seizure (Inevitable Discovery)

[People v Garcia](#), 101 AD3d 1604, 959 NYS2d 571  
(4th Dept 12/21/2012)

The court erred in relying on the inevitable discovery doctrine to deny suppression of evidence obtained from a buccal swab of the defendant where the swab was taken after he invoked his right to counsel and thus could not consent to the seizure without counsel. The inevitable discovery doctrine does not apply when the evidence subject to the motion to suppress is the actual evidence obtained during the illegal seizure. However, the prosecution's failure to get a court order to compel the defendant to give a DNA sample was harmless error.

The court did not abuse its discretion in denying a defense adjournment where counsel knew of the trial date more than five months in advance, providing sufficient time to prepare, and there was no showing that the defendant was prejudiced by the denial. (County Ct, Ontario Co)

### Appeals and Writs (Record)

#### Juveniles (Disposition) (Parental Rights)

[Matter of Gena S.](#), 101 AD3d 1593, 958 NYS2d 546  
(4th Dept 12/21/2012)

The respondent mother lacks standing to participate in and appeal from the permanency hearing where her parental rights have been terminated.

With regard to the respondent's daughter's appeal from the termination of her mother's parental rights, the matter is remitted for a new dispositional hearing to determine the best interests of the daughter, who was one month shy of her 14th birthday when the court ordered termination and during that proceeding she clearly and consistently stated that she wanted to be reunited with her mother. New facts and allegations indicate that the record is no longer sufficient to determine whether termination is in the daughter's best interests, including her continued refusal to consent to adoption and the petitioner's acknowledgement that she does not have a bond with anyone other than her mother and her sisters and is highly unlikely to be adopted. (Family Ct, Genesee Co)

### Computer Crime

#### Evidence (Mobile Devices and Phones)

#### Sex Offenses (Elements)

[People v Holmes](#), 101 AD3d 1632, 956 NYS2d 365  
(4th Dept 12/21/2012)

"[S]ending telephone text messages falls within the conduct proscribed by section 235.22 [first-degree disseminating indecent material to minors]." While this issue has not been addressed by any appellate courts, one lower court has held that a telephone falls within the statutory definition of a computer in Penal Law 156.00. In light of *People v Johnson* and the Court of Appeals' approval of "constructions of Penal Law § 235.22 that 'criminalize the use of any sexually explicit *communications*' intended to lure children into sexual contact" in *People v Kozlow* (8 NY3d 554, 561 [2007]), the indictment charging a violation of 235.22 is not jurisdictionally defective. [Emphasis in original.] (County Ct, Genesee Co)

### Article 78 Proceedings

#### Search and Seizure

[Matter of James v Cattaraugus County](#), 101 AD3d 1674,  
956 NYS2d 379 (4th Dept 12/21/2012)

The court properly dismissed the petitioner's CPLR article 78 proceeding seeking return of money and property seized from him in the course of a criminal investigation that resulted in a conviction in 1994 where the petitioner failed to file a notice of claim, and the petitioner's claims are barred by the laches doctrine because he did not provide an excuse for the more than 14-year delay in demanding the return of his money and property. (Supreme Ct, Cattaraugus Co)

### Juries and Jury Trials (Alternate Jurors) (Competence)

#### Reckless Endangerment (Elements) (Evidence)

[People v Jean-Philippe](#), 101 AD3d 1582, 956 NYS2d 709  
(4th Dept 12/21/2012)

Upon learning that a juror had fallen asleep and missed some part of the trial testimony, the court should have dismissed that juror, even though dismissal would have required a mistrial due to a lack of alternate jurors.

There was legally insufficient evidence to support the first-degree reckless endangerment conviction because the evidence showed recklessness, but no depraved indifference to human life, where the defendant led police on a chase through heavy traffic, frequently travelling above the posted speed limit, ran red lights, and hit several vehicles before he was arrested. (Supreme Ct, Monroe Co)

**Dissent in Part:** The conviction for first-degree reckless endangerment should be reduced to the lesser included offense of second-degree reckless endangerment; double jeopardy precludes the prosecution from charging the defendant with second-degree reckless endangerment.

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

**Fourth Department** *continued*

(Record) (Scope and Extent of Review)

**Speedy Trial****Trial (Trial Order of Dismissal)****People v Youngs, 101 AD3d 1589, 956 NYS2d 775 (4th Dept 12/21/2012)**

Where the record is inadequate to allow for appellate review of whether a speedy trial motion would have been successful and whether defense counsel's failure to make such a motion deprived the defendant of meaningful representation, the defendant's claim is properly raised in a CPL 440 motion, and to the extent that *People v Manning* (52 AD3d 1295 [4th Dept 2008]), states otherwise, it should no longer be followed.

The defendant failed to preserve his claim that the evidence is legally insufficient to support his first-degree rape conviction because he "failed to renew his motion for a trial order of dismissal after presenting proof ...." (County Ct, Steuben Co)

**Appeals and Writs (Retroactivity)****Witnesses (Confrontation of Witnesses)****People v Dean, 101 AD3d 1781, 958 NYS2d 247 (4th Dept 12/28/2012)**

The Court of Appeals decision in *People v Reid* (19 NY3d 382 [2012]), which held that "the door could be opened to evidence that was otherwise inadmissible under the Confrontation Clause" should be applied retroactively. (County Ct, Ontario Co)

**Appeals and Writs (Preservation of Error for Review)****Trial (Trial Order of Dismissal)****Weapons (Evidence) (Firearms)****People v Depaul, 101 AD3d 1735, 955 NYS2d 907 (4th Dept 12/28/2012)**

The defendant failed to preserve for review his claim that the evidence is legally insufficient to show that the BB gun used during the incident was loaded or operable where his motion for a trial order of dismissal did not specifically identify this alleged deficiency in the prosecution's proof. Further, the prosecution did not need to prove that the BB gun was loaded or operable because the defendant was charged with possession of an imitation pistol, not a firearm. (County Ct, Oneida Co)

**Competency to Stand Trial****Sentencing****People v Moore, 101 AD3d 1780, 957 NYS2d 805 (4th Dept 12/28/2012)**

The court erred in failing sua sponte to order a competency hearing before sentencing where the defendant suffered a traumatic brain injury between her guilty plea and sentencing, defense counsel requested a CPL article 730 examination, two examination reports were inconclusive on competency, the court ordered a third examination, but upon defense counsel's request, proceeded to sentencing even though counsel acknowledged that there was not conclusive proof of the defendant's competency. Also, there was no indication on the record that the court had an opportunity to assess her capacity by interacting with and observing her before sentencing. (County Ct, Genesee Co)

**Homicide (Manslaughter) (Murder [Degrees and Lesser Offenses] [Evidence])****People v Santiago, 101 AD3d 1715, 957 NYS2d 535 (4th Dept 12/28/2012)**

There was insufficient evidence to establish the depraved indifference to human life element of second-degree murder, which requires a showing of wickedness, evil, or inhumanity that renders the defendant as culpable as a person who intends to kill, where the defendant suffocated her almost two-year-old son who was crying by putting a comforter over his face and staying in the room until he "passed out" and did not return to his room until almost 19 hours later. The conviction is reduced to second-degree manslaughter. (County Ct, Monroe Co)

**Instructions to Jury (Verdict Sheet)****Trial (Summations) (Verdicts)****People v Williams, 101 AD3d 1728, 957 NYS2d 783 (4th Dept 12/28/2012)**

The defendant's convictions must be reversed because the court added an improper annotation to the verdict sheet regarding the check number corresponding to count two, under which the defendant was convicted of second-degree possession of a forged instrument. Because count four was factually related to count two, the conviction on a lesser included offense under count four must also be reversed.

The court also improperly limited the part of defense counsel's summation that impugned the credibility of the defendant's alleged accomplice by suggesting that the witness testified only to get a shorter sentence where the prosecution elicited testimony about the witness's cooperation agreement and sentencing promise. (County Ct, Ontario Co) ⚖

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