NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXVIII Number 2 May–July 2013

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Defender News

Developments in Sentencing Law

From the U.S. Supreme Court and New York's highest tribunal to the Appellate Divisions, courts dealt with a variety of constitutional and statutory sentencing issues in the last several weeks. Several are discussed below. Also below is a note that the determinate sentencing laws remain unchanged, as "sunset dates" have been extended.

U.S. Supreme Court Addresses Sentencing Issues

Among the cases decided by the U.S. Supreme Court was *Alleyne v United States* (No. 11-9335 [6/17/2013]), in which the Court overruled *Harris v United States* (536 US 545 [2002]) and held that, under *Apprendi v New Jersey* (530 US 466 [2000]), facts used to increase the mandatory minimum are elements that "must be submitted to the jury and found beyond a reasonable doubt." (Summary on p. 12.)

In *Peugh v United States* (No. 12-62 [6/10/2013]), the Court found that sentencing a defendant under sentencing guidelines promulgated after the defendant's crime and providing a higher sentencing range violated the Ex Post Facto Clause of the federal Constitution. (Summary on p. 12.)

And a third case dealt with determining whether a past conviction can be considered to increase the sentence of a defendant under the Armed Career Criminal Act, 18 USC 924(e). *Descamps v United States*, No. 11-9540 (6/20/2013) (summary on p. 13).

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

Court of Appeals Clarifies Post-Release Supervision Questions

Variations on post-release supervision (PRS) themes were heard and decided by the Court of Appeals.

The Court resisted expanding the advice judges must give defendants about PRS. In *People v Monk* (21 NY3d 27 [4/30/2013]), the Court said that because the effects of violating post-release supervision are classic "collateral consequences," courts are under no obligation to explain those consequences to defendants taking guilty pleas. Judge Jenny Rivera dissented. (Summary on p. 15.)

The Court also rejected the contention that courts cannot impose, at resentencing, PRS on defendants still serving aggregated sentences calculated under Penal Law 70.30 that included determinate sentences subject to PRS provisions. The Court found that defendants still serving the aggregate sentence had no legitimate expectation of finality in the determinate sentences, so courts did not violate the prohibition against double jeopardy by adding at resentencing mandatory PRS periods that had been omitted when the determinate sentences were imposed. *People v Brinson*, 2013 NY Slip Op 04758 (6/26/2013) (summary on p. 20).

State Courts Address YO Issues

The Court of Appeals held on June 27, 2013 that sentencing judges must determine whether eligible youths should receive youthful offender (YO) treatment even absent a defense request and in the face of a purported waiver of YO treatment as part of a plea bargain. The Court noted that the ruling would be available for all eligible youths whose convictions are still pending on direct appeal, but would not apply retroactively to

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cases on collateral review. The Court also advised of a potentially significant limitation, saying that prosecutors could "bargain for the right to withdraw consent to the plea bargain" if the court determines that YO treatment is warranted. *People v Rudolph*, 2013 NY Slip Op 04840 (6/27/2013).

Meanwhile, the Third Department has said determinate sentences for YO adjudications are illegal where the underlying crime was a felony sex offense. A prison sentence for a YO felony sex offense must be one "authorized to be imposed upon a person convicted of a Class E felony." Penal Law 60.02(2). The appellate court concluded that overall legislative design indicates the section refers to indeterminate sentences, not determinate ones. *Matter of Jorge D.*, 2013 NY Slip Op 3879 (3d Dept 5/30/2013).

No Sentencing Input from Survivor Where Defendant was Acquitted in Homicide, Convicted for the Gun

A defendant acquitted of manslaughter and negligent homicide but convicted of third-degree weapons possession was awarded a resentencing because the decedent's mother was allowed to speak at sentencing. The evidence showing the defendant to have possessed a firearm after being convicted of a crime was wholly separate from the circumstances of the homicide, it appeared the court improperly attributed the decedent's death to the defendant, and the mother had described the defendant "as a 'killer' who 'got away with murder.'" *People v Sheppard*, 2013 NY Slip Op 04633 (3d Dept 6/20/2013).

No State Determinate Sentencing Law Changes on September First

As usual, the current edition of *New York Criminal Statutes and Rules,* a/k/a *The Graybook,* includes two versions of many sentencing statutes, one supposedly to become effective after the other expires on Sept. 1, 2013. But the Legislature has extended the sunset dates to Sept. 1, 2015 (L 2013, ch 55, Part E), so the determinate sentencing laws will not lapse for at least another two years.

Changes to Length of Probation Terms, PSI Changes in NYC Expected

The Legislature has passed a bill (S4664-A) that amends Penal Law 65.00(3) to give judges discretion in setting the term of probation for unclassified misdemeanors and most felonies and class A misdemeanors. For felonies listed in 65.00(3)(a)(i), the court will be able to choose a period of probation of three, four, or five years; for class A misdemeanors other than sexual assault, and for unclassified misdemeanors, the court will be able to impose a probation term of two or three years. The bill also amends Penal Law 65.00(4) to provide that, if during a period of probation less than the maximum term, an alleged violation is sustained and the court continues or modifies the sentence, "the court may extend the remaining period of probation up to the maximum term authorized by [65.00]." These amendments will apply to offenses that are committed on or after the date the bill is signed, as well as offenses committed before that date where sentence has not yet been imposed.

The bill also amends CPL 390.20(5) to provide that, in New York City, a pre-sentence investigation and report shall not be required where a negotiated prison term of one year or less has been mutually agreed upon by the parties with the judge's consent, as a result of a conviction or revocation of a probation sentence. This part of the bill will take effect 90 days after it is signed.

Legal Issues May Arise, or Continue, After Sentencing

A variety of entities and proceedings may affect clients after they have been sentenced in state courts. Local and state probation officials and proceedings, prison rules and conditions, parole decisions and supervision, post-conviction proceedings, and federal immigration actions impact many clients. To keep lawyers up to date, so they can advise clients about what is likely to occur after sentencing and help avoid as many negative consequences as possible, information on developments in these areas is presented below.

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COMPAS Used By Probation & DOCCS

All 57 county probation departments outside of New York City use the risk and needs assessment tool COMPAS-Probation (Correctional Offender Management Profiling for Alternative Sanctions) for purposes such as gauging a defendant's risk of failing to appear if released before trial, making presentence recommendations, and determining probation supervision levels. Beginning this year, COMPAS tools will also to be used by the Department of Corrections and Community Supervision (DOCCS) at a variety of points, from inmate reception to re-entry.

A recent Division of Criminal Justice Services (DCJS) analysis found that the COMPAS-Probation Recidivism Scale substantially over-estimated the risk of any rearrest for probationers with Vehicle and Traffic Law convictions and also over-estimated the likelihood of rearrest for probationers in their mid-forties or older. The analysis can be found at http://criminaljustice.state.ny.us/crimnet/ojsa/opca/compas_probation_report_2012.pdf.

COMPAS Practitioner's Guide Available

Northpointe, Inc., developer of COMPAS, recently revised the Practitioner's Guide to COMPAS, available at www.northpointeinc.com/files/technical_documents/FieldGuide2_012813.pdf. The slides from a presentation about COMPAS given at the 2012 annual meeting of the New York State Probation Officers' Association can be downloaded at http://criminaljustice.state.ny.us/opca/poa-2012.htm.

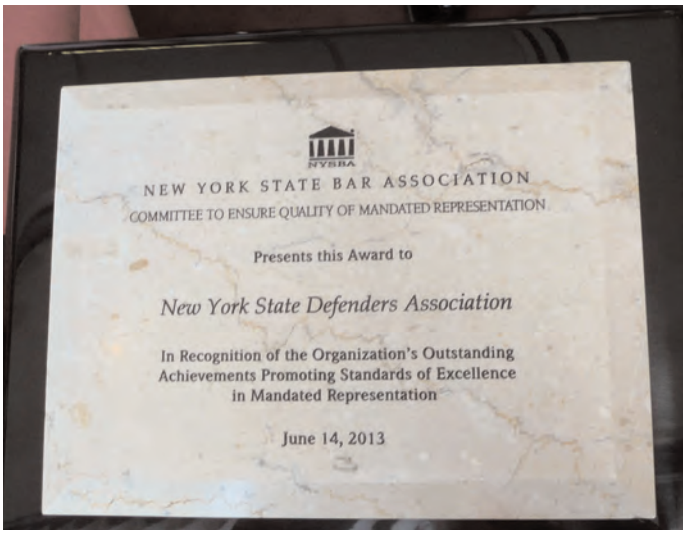
Parole Board Improperly Delayed Use of COMPAS

The Board of Parole has been using the COMPAS instrument since February 2012, though it should have started using it in October 2011, according to the Third Department. In *Matter of Garfield v Evans* (2013 NY Slip Op 05029 [3d Dept 7/3/2013]), the Third Department held that there was no justification for the Parole Board's failure to use the COMPAS instrument during the petitioner's parole release hearing in October 2011. The amendments to Executive Law 259-c(4), which require the Board to incorporate risk and needs principles into its decision-making process, took effect on Oct. 1, 2011 and the Board was trained how to use the instrument before the petitioner's hearing.

Parole Told It Must Comply with a Related Part of the 2011 Law

A Supreme Court Justice has told the Board of Parole it must comply with a 2011 amendment to Executive Law § 259-c(4) requiring the Board to establish "written procedures for its use in making parole decisions." Despite the legislation's effective date of Oct. 1, 2011, the Board never issued the required written procedures. In *Matter of Morris v New York State Department of Corrections and Community Supervision* (2013 NY Slip Op 23135 [Supreme Ct, Columbia Co 4/12/2013] *amended* by 2013 NY Slip Op 50604 [Supreme Ct, Columbia Co 4/15/2013]), Supreme Court Justice Richard Mott ordered a new hearing for the prisoner whose CPLR article 78 petition put the issue before him, and held that the Board of Parole is required to comply with the State Administrative Procedure Act when issuing the written procedures.

The decision came several months after another judge similarly gave a prisoner a new parole release hearing. *Matter of Cotto v Evans*, 2013 NY Slip Op 30222(U) (Supreme Ct, St. Lawrence Co 1/22/2013); *but see Matter of Partee v Evans*, 2013 NY Slip Op 23216 (Supreme Ct, Albany Co 6/28/2013).



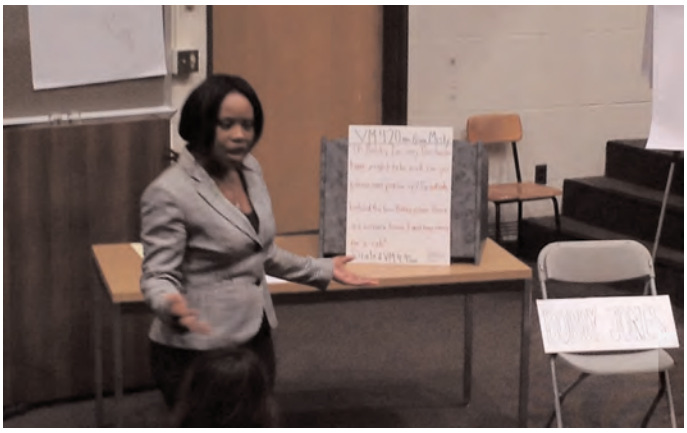
NYSDA's dedicated Backup Center staff appreciates the recognition of the Association's work that this award represents (see p. 9), and continues its efforts to improve the quality of public defense services statewide.

New DOCCS Directives for Merit Time and Limited Credit Time Allowances

DOCCS may grant merit termination of a sentence for persons serving parole, conditional release, or post-release supervision in many situations pursuant to Correction Law 205. A new directive, No. 9221, details the eligibility criteria and procedure for granting of merit terminations of sentence.

Another new DOCCS directive, No. 4792, deals with limited credit time allowances, which allows inmates serving sentences for homicide offenses and many violent felonies (except first-degree murder and sex offenses) to earn a modest six month reduction in the first parole eligibility date or conditional release date.

Attorneys who would like copies of these directives may contact the Backup Center. A number of other DOCCS directives, including directives about each facility,



Participants in the Defender Institute Basic Trial Skill Program (see p. 10) engage in hands-on learning of skills from initial client interviews to closing arguments. Here, a lawyer in the 2013 program puts her knowledge into practice.

are available on its website at www.doccs.ny.gov/directives.html.

Updated Contact Information for DOCCS and DCJS

An updated list of DOCCS correctional facility contacts, including superintendents, deputy superintendents, stewards, program administrators, and captains, is available at www.nyscopba.org/files/contact/DOCS_Agency_Contact.pdf.

As part of its relocation, DCJS has issued a consensus rulemaking to update its address for Freedom of Information Law requests. The DCJS website reflects the new address: Records Access Office, NYS Division of Criminal Justice Services, Alfred E. Smith Building, 80 South Swan Street, Albany, NY 12210; email foil@dcjs.ny.gov. www.criminaljustice.ny.gov/crimnet/mail.htm.

Other changes that are part of the proposed rulemaking include: people can no longer make FOIL requests at the DCJS office in Manhattan; FOIL requests for Office of Probation and Correctional Alternatives records must be submitted to the DCJS Records Access Office; FOIL appeals will be handled by the Deputy Commissioner and Counsel, not the Commissioner; and requests under the Personal Privacy Protection Law must be sent to the Privacy Compliance Officer at the New York State Division of Criminal Justice, Alfred E. Smith Building, 8th Floor, South Swan Street, Albany, NY 12210. The proposed rulemaking notice appeared in the June 5, 2013 issue of the State Register; the public comment period was 45 days.

Caution: searching the Internet for the FOIL address may lead to confusion. At least as of July 9, 2013, the Comptroller's office website had the old FOIL address for DCJS.

New Parole Board Chairwoman, Commissioners Appointed, Others Reappointed

In June, Governor Cuomo announced the confirmation of Tina Stanford as Chairwoman of the Board of Parole. Most recently, Stanford was the Director of the New York State Office of Victim Services and had been the Chairwoman of the Crime Victims Board since June 2007. Before that, Stanford was a prosecutor in Erie County. Three others were appointed Parole Board Commissioners: Gail Hallerdin, who was most recently a hearing officer for the NYS Office of Temporary Disability Assistance; Julie Smith, who has been the Director of the Genesee County Probation Department; and Milton Johnson, who has worked as a special agent with the U.S. Drug Enforcement Administration. Three others were reappointed as Parole Board Commissioners: Walter William Smith, Jr., who has been with the Board since 1996; Sally Velasquez-Thompson, a Commissioner since 2007; and Lisa Elovich, also a Commissioner since 2007. (www.governor.ny.gov/press/06192013-appointments-announced.)

State Police DMV Query to Yield Probation/Parole Info Too

As announced by the Office of Probation and Community Alternatives (OPCA) on May 20, 2013, information about people under supervision by probation or parole will be available to State Police during traffic stops. The "Roadside Stop-Probation/Parole Inquiry Response Program" will operate whenever a police officer submits a query to the Department of Motor Vehicles (DMV).

The name, gender, and DOB returned from DMV will be sent to DCJS and compared with the probation, parole, and Wanted/Missing persons files. A ranked list of possible matches will be returned to the police officer; selecting a possible match will yield, if that person is under supervision, information including the offense for which the person is being supervised and the contact information for the supervising department. A disclaimer provided with the list tells police that the subject should not be searched, detained, or arrested based solely on that information; the police officer will be asked to contact the supervising agency should the subject be arrested for a new offense, or if the subject is determined to be traveling outside the jurisdiction of the supervising probation department. The OPCA memorandum announcing the program is available at http://criminaljustice.state.ny.us/opca/pdfs/2013-10-roadside-stop-probation-inquiry-response.pdf.

Millions of Rap Sheet Errors Noted

A recently-issued publication highlights the likelihood that DCJS criminal histories — rap sheets — of clients (or others, such as witnesses) may contain errors.

See The Problem of RAP Sheet Errors: An Analysis by the Legal Action Center (LAC) (2013), available at www.lac.org. A *New York Times* article about the report noted the harm such errors can cause. Data in the LAC report underscore the need for attorneys to get clients' rap sheets and seek to correct errors in, or seal, histories as warranted. *See* "Obtain Clients' & Witnesses' Criminal Histories — the Earlier, the Better," on NYSDA's website, www.nysda.org. The Legal Action Center report recommends, as partial remedies to the overall problem, legislative actions such as suppressing old, incomplete case records on DCJS and Office of Court Administration reports; allowing DCJS to remove misinformation regarding bench warrants from rap sheets; and allowing sealing of dismissals and violations over 20 years old.

U.S. Supreme Court Extends Habeas Ruling

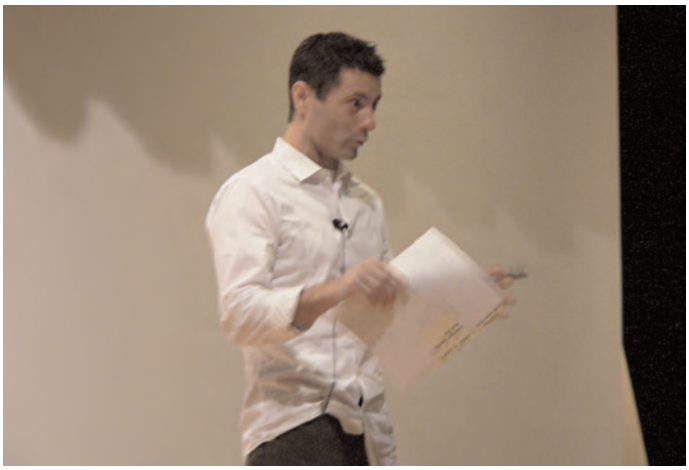
The Supreme Court has extended the habeas corpus ruling of *Martinez v Ryan* (566 US 1 [2012]). *Martinez* held that in states where state law required claims of trial ineffective assistance of counsel (IAC) to be raised initially in post-conviction proceedings rather than on direct appeal, the convicted individual should have an opportunity to challenge as ineffective his post-conviction attorney's assertion that no colorable claims could be raised. In *Trevino v Thaler* (133 SCt 1911 [5/28/2013]), the Court applied the same ruling to a Texas case because, while Texas law appears to permit but not require trial IAC claims to be raised on direct review, in practice the law made raising such claims on initial appeal almost impossible. While there was little doubt that *Martinez* applied to New York, *Trevino* should make it clear.

Among other federal habeas developments, the Court also issued *McQuiggin v Perkins* (133 SCt 1924 [5/28/2013]), which allows a prisoner to seek habeas relief despite procedural bars or statutes of limitation if the case involves proven, actual innocence. (Summaries of *Trevino* and *Perkins*, as well as other Supreme Court decisions, including other habeas cases, appear in the Case Digest beginning at p. 11.)

VTL and DMV Regulations Amended

Points and Fines for Texting and Cell Phone Violations Increased

The points for violations of Vehicle and Traffic Law (VTL) 1225-c (use of a mobile phone) and 1225-d (use of portable electronic devices) have been increased from three to five, effective June 1, 2013. The notice of emergency adoption and proposed rule making appears in the June 19, 2013 issue of the *State Register* (pp. 13-14). The emergency rule expires on Aug. 28, 2013, but it can be extended if the rule is not adopted as a final rule before that date.



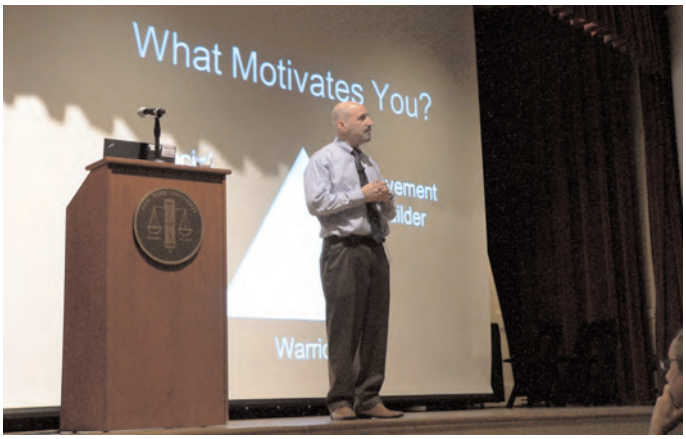
Reviews are in for Erik Teifke's presentation on "Cross of the Child Witness" back in March in New York City ("great speaker, great content"). The NYU program, like other NYSDA trainings including the Annual Conference approaching as the REPORT goes to press, offers high-quality CLE credit on topics relevant to public defense representation.

By increasing the point values, the DMV has transformed these violations into "high-points driving violations," which can have significant consequences for individuals with prior "alcohol- or drug-related driving convictions or incidents" under the new 15 NYCRR Part 132 and the amended 15 NYCRR Part 136. These regulations were discussed in the Jan.-Apr. 2013 issue of the *REPORT*. The point value change also triggers other potential legal and administrative action, including under VTL 503 (driver responsibility assessment imposed when a person accumulates six or more points in an 18 month period) and 15 NYCRR 131.4 (administrative action upon the accumulation of certain point totals within specified time periods).

For violations of VTL 1225-c and 1225-d committed on or after July 26, 2013, the fines will be: first violation —between $50 and $150; second violation in 18 months—between $50 and $200; and third or subsequent violation in 18 months—between $50 and $400.

Substantive Provisions of Texting and Cell Phone Laws Amended

Effective Oct. 28, 2013, there will be several substantive changes to VTL 1225-c and 1225-d, most of which relate to the use of cell phones and electronic devices by commercial vehicle drivers. The definition of portable electronic device in VTL 1225-d(2)(a) will include "any other electronic device when used to input, write, send, receive, or read text for present or future communication." And the term "using" in 1225-d(2)(b) will be defined as "holding a portable electronic device while viewing, taking, or transmitting images, playing games, or, for the purpose of present or future communication: performing a command or request to access a world wide web page, composing, sending, reading, viewing, accessing,



Jonathan Rapping, shown here at NYSDA's annual training event at NYU, is the mentor of the young lawyers who appear in the documentary "Gideon's Army." The film, which aired on HBO on July 1st, is part of the year-long observance of the 50th anniversary of *Gideon v Wainwright*. See www.nysda.org/Gideon2013-50.html.

browsing, transmitting, saving or retrieving e-mail, text messages, instant messages, or other electronic data" (underlined text is new). (L 2013, ch 58, Part C).

Suspension of Probationary and Junior Licenses for Texting and Cell Phone Violations

On July 1, 2013, Governor Cuomo signed a bill that amends the laws governing probationary and junior licenses to require license suspension upon conviction for VTL 1225-c and 1225-d violations. (L 2013, ch 91). Chapter 91, which took effect immediately, amended VTL 510-b and 510-c(2).

Ignition Interlock Updates

Ignition Interlock Manufacturer/Vendor Terminated from List of Approved Vendors, Other Contract Updates

Earlier this year, DCJS terminated its contract with Interceptor Ignition Interlock after discovering that the company was diverting cellular payments to other purposes, resulting in the termination of cell service needed for real-time data transmission from the company's ignition interlock devices (IIDs). Interceptor stopped providing service in New York at the end of May and defendants with Interceptor interlocks were transitioned to other vendors. DCJS has amended the Request for Applications for the provision of ignition interlock services in New York State to include, among other things, clearer language regarding contract termination in the event of vendor noncompliance and a provision that will allow manufacturers to make certain minor changes to devices, such as an upgrade to camera software, without having to go through the full contract amendment process. The original contracts with vendors, which were awarded in 2010, are set to expire in mid-August; DCJS is currently in contract negotiations with vendors. More information about the ignition interlock manufacturer contracts is available at www.criminaljustice.ny.gov/opca/pdfs/amendments-to-rfa-cjs-2012-03-provision-of-ignition-interlock-services-in-nys.pdf.

Nationwide Availability of Ignition Interlock Devices

Attorneys with clients who live out of state or who may be moving out of state should be aware of the updated version of the New York Ignition Interlock Nationwide Availability of Qualified IID Manufacturers chart (dated July 1, 2013), which is available at www.criminaljustice.ny.gov/opca/pdfs/nationwide-qualified-iid-manufacturers-july2013.pdf. According to the new chart, at least one of New York's qualified manufacturers operates in each state in the country.

Affordability of Ignition Interlock Devices

The Office of Probation and Correctional Alternatives has been instructing probation departments to get a financial disclosure report from the defendant during the presentence investigation so that they can make recommendations regarding the defendant's ability to afford the costs of an ignition interlock device, and OPCA has recommended that courts first consider full payment and then possible payment plans, including specified percentages of installation, monthly, and subsequent fees, before granting a defendant a fee waiver. OPCA forms introduced last year, including the Monitor Notification of Ignition Interlock Order form (DCJS-OPCA 510-IIN), reflect this approach to financial affordability. OPCA is concerned that courts are granting fee waivers in too many cases, thereby exceeding the estimated 10% waiver of fees that manufacturers were told to consider when setting their fee schedules. The regulations governing the ignition interlock program provide that manufacturers may request rate adjustments if waivers exceed 10%. Data on payment plans and fee waivers are available on the OPCA website, www.criminaljustice.ny.gov/opca/.

Changes to Form Orders and Conditions for Probation and Conditional Discharge

OPCA also made changes to its form Orders and Conditions of Adult Probation and Orders and Conditions of Conditional Discharge. Both forms include a new special condition: "VIOLATIONS of the Ignition Interlock Program include: failure to have device installed on required vehicle(s); failure to comply with a service visit requirement; inspection or device reports any attempt or actual tampering or circumvention of the IID device; a device reports a LOCK-OUT mode—a failed start-up or missed retest or failed rolling or missed retest;

a device indicates a failed test or re-test where the BAC was .05% or higher; any violation of any other condition of the sentence." Defense counsel should carefully review the proposed terms and conditions of a probation or conditional discharge sentence and advocate elimination of or changes to this type of condition. Imposition of this condition raises a number of questions about the purpose of the ignition interlock condition, is overly onerous, and may be counterproductive.

Information about changes to the ignition interlock forms is available on the OPCA website, including a link to the slides from OPCA's presentation to the New York State Association of Drinking Driver Programs (May 9, 2013), posted on the OPCA website on May 13, 2013. Attorneys with questions about these changes and/or information about how the ignition interlock program is being implemented in their area may contact the Backup Center.

New Ignition Interlock Data from OPCA

OPCA is now providing data on the "negative events" reported by ignition interlock vendors, including missed service visits, failed or missed start-up re-tests, failed or missed rolling re-tests, lock-outs, vehicles disabled, and attempted circumvention or tampering. The data is reported by county and by vendor.

Decisions in Family Court Cases

Decisions from the Court of Appeals and Appellate Divisions in 2013 have included several regarding Family Court matters. In addition to those described below, several others appear in the Case Digest for this issue.

Conferences & Seminars

Sponsors: National Association of Criminal Defense Lawyers, Reilly Pozner LLP & the Foundation for Criminal Justice
Theme: America's First National Criminal Defense Forum on Forensic Mental Health and the Law
Dates: September 19-20, 2013
Place: Denver, CO
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

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Sponsors: National Association of Criminal Defense Lawyers & National College for DUI Defense
Theme: 17th Annual DWI Means Defend with Ingenuity Conference: A Recipe for Success
Dates: October 3-5, 2013
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

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Sponsor: National Association of Criminal Defense Lawyers
Theme: Defending the Unthinkable: Zealous Advocacy in Sexual Assault & Child Victims Cases
Dates: October 16-19, 2013
Place: Savannah, GA
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

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Sponsor: **New York State Defenders Association**
Theme: **Winning Criminal Defense Strategies**
Date: **November 1, 2013**
Place: **Poughkeepsie, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: National Legal Aid & Defender Association
Theme: 2013 Annual Conference
Dates: November 6-9, 2013
Place: Los Angeles, CA
Contact: NLADA: tel (202) 452-0620; fax (202) 872-1031; website www.nlada.org/Training

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Sponsor: National Association of Criminal Defense Lawyers
Theme: 6th Annual Drug Seminar—"Defending the Modern Drug Case"
Dates: November 21-22, 2013
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

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Sponsor: National Association of Criminal Defense Lawyers
Theme: 34th Annual Advanced Criminal Law Seminar
Dates: January 12-17, 2014
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings ⚖

Isaiah "Skip" Gant, currently an assistant federal public defender in Tennessee, shares insights about representing clients with participants at the 2013 Defender Institute Basic Trial Skills Program; he has been on the BTSP faculty since the program's inception.

Court of Appeals Affirms Incarcerated Father's Visitation

Finding that the Appellate Division properly upheld a Family Court's determination that visitation with the incarcerated father was in his child's best interest, the Court of Appeals has reaffirmed that "[a] rebuttable presumption that a noncustodial parent will be granted visitation is an appropriate starting point in any initial determination regarding custody and/or visitation." That includes cases in which the parent seeking visitation is incarcerated, although "the possibility that a visit to an incarcerated parent would be harmful to the child must be considered, together with other relevant facts."

The Court also found that the Appellate Division correctly ruled that the effect of the father's having been moved to a different prison should be first considered by the Family Court by way of a modification petition. *Matter of Granger v Misercola*, 21 NY3d 86 (4/30/2013).

Court's Failure to Ensure Proper Waiver of Counsel Requires New Hearing

In *Matter of Belmonte v Batista* (102 AD3d 682 [2d Dept 1/9/2013]) (summary on p. 23), the Appellate Division ordered a new hearing on custody and visitation, finding that the Family Court failed to determine that the father's confused statement with regard to proceeding without counsel during the first, brief hearing represented a knowing, intelligent, and voluntary waiver of his right to counsel as a respondent in a custody proceeding. The court did not even elicit an answer about the waiver of counsel at the second, even briefer hearing that resulted in a final order of custody and visitation.

Court's Failure to Sign Subpoena Was Error

A mother's appeal from an order granting physical custody to the father yielded her a remittal for a new hearing and determination because Family Court had "improvidently exercised its discretion when it did not sign a subpoena proffered by the mother" as to medical treatment records relevant to whether paternal custody was in the child's best interest. The subpoena was intended to permit the mother the opportunity to present the records "to rebut the allegations asserted against her." *Matter of Murphy v Lewis*, 106 AD3d 1091 (2d Dept 5/29/2013).

Taking DNA Sample Before Conviction OK'd By Supreme Court

The nation's highest court has upheld a state law allowing collection and processing of a DNA sample from a person who has been arrested and arraigned on violent crime charges, including burglary, or attempts to commit such crimes. The opinion stresses the non-invasive nature of buccal swabs and finds that several "legitimate government interests" are served by ensuring the identification of arrestees. The majority opinion goes beyond the statute before it, opening the possibility of extreme expansion of DNA sampling, and assuring much litigation to follow. *Maryland v King*, 133 SCt 1958 (6/3/2013) (summary at p. 11).

Justices Scalia, Ginsburg, Sotomayor, and Kagan dissented. Among the dissent's many concerns is that "the Court's holding will result in the dumping of a large number of arrestee samples — many from minor offenders — onto an already overburdened system: Nearly one-third of Americans will be arrested for some offense by age 23."

Issues Arising in King*'s Wake*

The justices in *King* said nothing about any racial impact of the ruling, but almost simultaneously with *King*'s release the American Civil Liberties Union (ACLU) issued a new report that relates to the Scalia quote above. *The War on Marijuana in Black and White* details with data what those working in the criminal justice system already know from experience — while whites in the U.S. use marijuana at similar rates as blacks, blacks are "3.73 times more likely to be arrested for marijuana possession"

nationally, and 4.52 times more likely in New York. Taking DNA samples from those arrested will, therefore, disparately impact blacks.

Soon after the *King* decision appeared, the *New York Times* reported that "a growing number of local law enforcement agencies across the country have moved into what had previously been the domain of the F.B.I. and state crime labs — amassing their own DNA databases of potential suspects, some collected with the donors' knowledge, and some without it." The article predicted that the trend will grow following *King*. www.nytimes.com/2013/06/13/us/police-agencies-are-assembling-records-of-dna.html. Security and privacy concerns may in some ways be greater when DNA samples are in local hands; in any event, the more entities that collect such personal information, the greater the risk of misuse.

That the *King* opinions included discussions about DNA science and technology, and likely future developments therein, serves as a reminder that keeping up with forensic science — real and imagined — is vital for defense lawyers. Webinars may provide one way to gain information. The Forensic Science Initiative at West Virginia University has been presenting a series of forensic science webinars for legal professionals; information about upcoming programs and archived webinars are available at http://fsi.research.wvu.edu/training/onsite-training/legal-professionals. NYSDA will continue to strive to keep its members and all public defense lawyers informed of forensic science developments and training opportunities. Attorneys with questions about specific areas should contact the Backup Center.

Two Departments Retract Padilla *Retroactivity*

Last month, a panel of the First Department cited the U.S. Supreme Court decision in *Chaidez v United States* (133 SCt 1103 [2013]) and rejected Appellate Division precedent finding the holding of *Padilla v Kentucky* (559 US 356 [1010]) retroactive. The order vacating the defendant's conviction based on *Padilla*'s holding that counsel has a duty to accurately advise a client who is not a U.S. citizen about the immigration consequences of a guilty plea was reversed and the judgment of conviction was reinstated. *People v Verdejo*, 2013 NY Slip Op 4913 (1st Dept 6/27/2013). Another case out of the First Department, *People v Baret* (99 AD3d 408 [1st Dept 2012]), which held that *Padilla* is retroactive, is currently pending in the Court of Appeals. The Third Department has now joined the First in repudiating retroactivity in the wake of *Chaidez*, without addressing the issue under state law. *People v Bent*, 2013 NY Slip Op 05250 (3d Dept 7/11/2013).

In other news regarding the intersection of immigration law and criminal cases, a new practice advisory is available, entitled "*Moncrieffe v Holder*: Implications for Drug Charges and Other Issues Involving the Categorical Approach." Parsing the decision in *Moncrieffe v Holder* (133 SCt 1678 [2013]), the advisory can be found at http://immigrantdefenseproject.org/wp-content/uploads/2013/05/Moncrieffe-PA-5-1-13-FINAL.pdf.

Materials and Information of Interest

Speedy Trial Manual Available

Drew DuBrin, Special Assistant Public Defender, Appeals Section, Monroe County Public Defender's Office, has made available to NYSDA the 2013 Edition of his "Criminal Procedure Law Section 30.30 (1) Manual." The manual provides a concise and coherent review of the often confusing world of 30.30 jurisprudence, including explanations of such topics as readiness, post-readiness delay, and excludable time. It can be downloaded at library.constantcontact.com/download/get/file/1111756213471-18/DuBrin+30+30+2013+update2.pdf.

Statement of Client's Rights Amended

The Statement of Client's Rights, which every attorney with an office in New York State must post in that office, was amended by the Departments of the Appellate Division effective on April 15, 2013. NYSDA has created a printable version of the new Statement, available at library.constantcontact.com/download/get/file/1111756213471-19/Statement+of+Client+Rights+eff+2013.pdf.

Attorney Registration Pro Bono Reporting Requirements Added

Effective May 1, 2013, attorneys must include on their biennial registration forms the number of hours they voluntarily spent providing unpaid legal services to poor and underserved clients in the prior registration period and the amount of voluntary financial contributions they made to organizations primarily or substantially engaged in providing legal services to such clients. www.courts.state.ny.us/ATTORNEYS/probono/reportingreqs-intro.shtml.

Reportable work includes "professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation." www.courts.state.ny.us/ATTORNEYS/probono/reportingreq-faqs.shtml#02.

NYSDA, Others, Receive New York State Bar Association Public Defense Awards

On June 14, the New York State Bar Association Committee to Ensure Quality of Mandated Representation honored NYSDA's work. Executive Director Jonathan E. Gradess accepted an award for "Outstanding

Achievements in Promoting Standards of Excellence in Mandated Representation" on NYSDA's behalf, with many NYSDA staff members on hand in the audience. readme.readmedia.com/NYS-Defenders-Association-Recognized/6567782.

As noted on NYSDA's Gideon Day blog, "[r]eceiving such recognition during the 50th anniversary year of *Gideon v Wainwright* is, like the anniversary itself, bittersweet. Tempering any celebration of *Gideon*'s promise of justice for all and of NYSDA's ardent efforts to see that promise fulfilled is the blunt fact that both have fallen short." nysdablog.blogspot.com/2013/06/playing-gideons-trumpet-not-tooting-our.html.

The State Bar Association honored others on the 14th as well. The Appeals Bureau of the Monroe County Public Defender's Office and Majer Gold, Chief Assistant Public Defender in Ulster County, received Denison Ray Criminal Defender Awards. The New York Civil Liberties Union Foundation and Schulte Roth & Zabel, who filed the pending public defense lawsuit, *Hurrell-Harring v State of New York*, were recognized for their "Outstanding Achievement in Promoting Standards of Excellence in Quality Mandated Representation." readme.readmedia.com/State-Bar-Committee-to-Ensure-Quality-of-Mandated-Representation-Announces-Award-Winners/6706860.

BTSP 2013 Successfully Completed

Forty-two lawyers came to the RPI campus in Troy the third week of June for the Defender Institute Basic Trial Skills Program. They practiced examining witnesses, interviewing clients, questioning potential jurors, and doing effective opening statements and closing arguments, assisted by a faculty of skilled lawyers and communications experts. Most importantly, they learned the value of client-centered representation, which boosts lawyer effectiveness and client satisfaction. Read more about this year's BTSP at readme.readmedia.com/NYSDA-Defender-Institute-Completes-2013-Basic-Trial-Skills-Program/6678608.

Failure to Get and Examine Client Mental Health Records is IAC

The Court of Appeals recently held that a trial lawyer's failure "to conduct an appropriate investigation of records critical to the defense" constituted ineffective assistance of counsel requiring a new trial. *People v Oliveras*, 2013 NY Slip Op 04040 (6/6/2013). At issue were the psychiatric records of a client who was found competent to proceed but had mental health issues, which were noted in the CPL article 730 examination reports. The lawyer did not execute subpoenas for the client's psychiatric records or otherwise review such records, eventually and unsuccessfully sought to serve a late notice of intent to offer psychiatric evidence, and at trial sought to undermine the voluntariness of the client's admissions to police without ever looking at the records. The Court stated:

> [T]his is a case of a lawyer's failure to pursue the minimal investigation required under the circumstances. Given that the People's case rested almost entirely on defendant's inculpatory statements, trial counsel's ability to undermine the voluntariness of those statements was crucial. The strategy to present defendant's mental capacity and susceptibility to police interrogation could only be fully developed after counsel's investigation of the facts and law, which required review of records that would reveal and explain defendant's mental illness history, and defendant's diagnosis supporting his receipt of federal SSI benefits.

DSM-5 Now Available

The American Psychiatric Association (APA) has released the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5). More information about the DSM-5 is available on the APA website at www.dsm5.org. It is not yet clear what effect the changes in the diagnostic criteria of certain mental disorders and the addition or removal of other disorders will have on cases in criminal and family court or Mental Hygiene Law (MHL) article 10 cases. However, as noted in the Nov.-Dec. 2012 issue of the *REPORT*, the Court of Appeals has held that the definition of mental abnormality in MHL 10.03(i) does not refer to or require that a diagnosis be one enumerated in the DSM. *Matter of State of New York v Shannon S.*, 20 NY3d 99 (2012). We will continue to report on developments regarding the DSM and mental health issues.

Third Department Reverses for IAC at Trial Following Failed Plea

An attorney failed to provide effective assistance of counsel in a bench trial, the Third Department ruled last month in *People v Bush* (2013 NY Slip Op 4848 [3d Dept 6/27/2013]). While noting that the lawyer "undoubtedly was presented with a difficult case to defend," the court examined many factors frequently considered in ineffective assistance of counsel cases, and, in the language of New York ineffective assistance of counsel caselaw, found that cumulative defects in the attorney's performance deprived the client of meaningful representation. Some of those defects include failing to give an opening statement, not objecting when the prosecutor asked objectionable questions, not objecting to the prosecution's exhibits, including one admitted after the close of proof, not calling any witnesses, and failing to file pretrial motions to suppress or limit certain evidence. ⚖

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

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

United States Supreme Court

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

Habeas Corpus (Federal)

Retroactivity

Metrish v Lancaster, 569 US __, 133 SCt 1781 (5/20/2013)

The Sixth Circuit erred by granting the petitioner habeas relief on due process grounds where, between the petitioner's initial conviction of first-degree murder and his retrial, the state Supreme Court had disapproved of the previously well-established diminished-capacity defense used at the first trial, which holding was applied to the petitioner's retrial. The diminished-capacity defense was first recognized by the Michigan Court of Appeals in 1973; two years later the Legislature passed a comprehensive statutory scheme addressing defenses based on mental illness or retardation that did not specifically mention diminished capacity. The state Court of Appeals found such defense to fall within the new codified definition of insanity in 1978. In 1994, a year after the killing here, the Legislature amended the statute with regard to the burden of proof as to insanity. In a case challenging the burden of proof as to diminished capacity, the state Supreme Court said instead that the defense was not available at all under the statutory scheme. The state Court of Appeals ruling that due process did not prohibit retroactive application of that holding to the petitioner did not constitute an unreasonable application of clearly established federal law.

Habeas Corpus (Federal)

McQuiggin v Perkins, 569 US __, 133 SCt 1924 (5/28/2013)

Proven actual innocence allows a petitioner to seek habeas corpus relief on a constitutional claim despite a procedural bar or expiration of a statute of limitations; the standard of proof is high, and the timing of the petition is a factor bearing on the reliability of the evidence put forward as to innocence. Here, the district court found the habeas petition to be untimely under 28 USC 2244(d)(1)(D) as it was filed more than a year after the last of three affidavits in support of the petitioner's claim had been signed and no exceptional circumstances were shown. The court also found that in any event the petitioner had not met the required burden as to actual innocence. The Sixth Circuit held that the actual innocence allegations allowed the petition to be filed as if timely. On remand, the district court's finding that the instant petition failed to meet the actual innocence standard should govern, absent a basis, not apparent here, for the Sixth Circuit to overturn it.

Dissent: [Scalia, J] This Court has no power to create an exception to the federal statute of limitation established by Congress. Actual innocence has previously been an exception only to judicial barriers to habeas relief, or a way of directing statutorily-conferred judicial discretion.

Counsel (Competence/Effective Assistance/Adequacy)

Habeas Corpus (Federal)

Trevino v Thaler, 569 US __, 133 SCt 1911 (5/28/2013)

While Texas law appears on its face to permit but not require a convicted person to raise ineffective assistance of counsel claims on direct appeal, the structure and design of the Texas system makes presentation of such claims on direct review almost impossible. The holding in *Martinez v Ryan* (566 US 1 [2012]) applies to this procedural regime, as what the state law in *Martinez* explicitly prohibited is precluded in Texas practice as a matter of course.

Dissent: [Roberts, CJ] The majority's decision "throws over the crisp limit we made so explicit just last Term" and will result in state-by-state litigation of endless questions.

Forensics (DNA)

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

Maryland v King, 569 US __, 133 SCt 1958 (6/3/2013)

The Maryland statute under which a DNA sample was collected from the respondent after arrest and then processed is not unconstitutional. The statute authorizes state law enforcement collection of DNA samples from

US Supreme Court *continued*

persons charged with violent crimes or burglary as well as attempts to commit a violent crime or burglary, and authorizes processing of those samples once the person in question is arraigned or consents. Samples are destroyed if the charges are found unsupported by probable cause, if the criminal action does not result in a conviction, if a conviction is finally overturned without a new trial being permitted, or if the person receives an unconditional pardon. Only identifying information is to be collected and stored, and use of the sample to obtain other information is prohibited. Test for familial matches are prohibited. The respondent's DNA was collected via buccal swab, a quick and painless procedure involving touching the inside of the mouth that poses no health or safety threat; the processing reveals no genetic traits, and the statute contains privacy protections. The procedure constitutes a search for Fourth Amendment purposes, but one that is reasonable. The statute serves well-established legitimate government interests: 1) to safely and accurately process and identify persons taken into custody; 2) to identify possible risks to custodians of an arrestee or others; 3) to ensure "'that persons accused of crimes are available for trials'"; 4) to assess danger posed by pretrial release; and 5) to free persons wrongfully imprisoned for an offense committed by the arrestee. "A suspect's criminal history is a critical part of his identity ...." The only difference between comparing evidence in other cases to DNA identification information and comparing it to fingerprint information "is the unparalleled accuracy DNA provides."

Dissent: [Scalia, J] No noninvestigative motive exists for taking the DNA sample; it amounts to a constitutionally forbidden suspicionless search for evidence.

Habeas Corpus (Federal)

Impeachment

Nevada v Jackson, 569 US __, 133 SCt 1990 (6/3/2013)

The Ninth Circuit's holding, that the state court's refusal to allow admission of extrinsic evidence of prior allegations by the accuser constituted an unreasonable application of clearly established Supreme Court precedent, was error. No decision of this Court has clearly established that requiring written notice before using evidence of an accuser's prior sexual assault complaints is unconstitutional. Nor has this Court clearly said that excluding such evidence, when found to have little impeachment value and to have the potential to confuse the jury, unfairly embarrass the complainant, surprise the prosecution, and unduly prolong the trial, violates the Constitution. The Ninth Circuit collapsed the distinction between unreasonable application of federal law and incorrect application, which would defeat the deference requirements of the Antiterrorism and Effective Death Penalty Act.

Sentencing (Ex Post Facto Punishment) (Guidelines)

Peugh v United States, No. 12-62 (6/10/2013)

Sentencing a defendant under U.S. Sentencing Guidelines promulgated after the commission of the defendant's crime, where the new guidelines provide a higher sentencing range, constitutes a violation of the Ex Post Facto Clause of the Constitution, which covers more than legislative acts. District courts must give respectful consideration to the Guidelines. That a court may impose a sentence outside the Guidelines range "does not deprive the Guidelines of force as the framework for sentencing." A retrospective increase in the applicable range "creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation."

Dissent: [Thomas, J] The punishment affixed to the petitioner's crime was not altered by the retroactive application of the Guidelines; there was no ex post facto violation.

Federal Law (Procedure)

Guilty Pleas (Vacatur)

United States v Davila, No. 12-167 (6/13/2013)

A federal magistrate judge's violation of the Federal Rules of Criminal Procedure bar to judicial participation in plea discussions does not require vacatur of the plea where the record shows no prejudice from the violation regarding the defendant's decision to plead guilty. Nothing in the text of Rule 11 indicates that automatic vacatur, without regard to a case's specific circumstances, is required when Rule 11(c)(1) is violated. Where three months elapsed between the violation and the plea here, the judge accepting the plea is not shown to have known of the violation, and the defendant denied that he had been pressured to plead guilty, automatic vacatur was improper. On remand, the violation should be assessed in light of the full record.

Concurrence in Part: [Scalia, J] The text of Rule 11(h) regarding harmless error is clear; there is no need to rely on notes of the Advisory Committee to unearth Rule 11's design.

Appeals and Writs (Scope and Extent of Review)

Due Process (Miscellaneous Procedures)

Juries and Jury Trials (Constitution—right to) (Findings)

Sentencing (General) (Mandatory)

Alleyne v United States, No. 11-9335 (6/17/2013)

US Supreme Court *continued*

The distinction drawn between facts that increase a statutory maximum sentence and facts that increase only a statutory minimum is inconsistent with *Apprendi v New Jersey* (530 US 466 [2000]); *Harris v United States* (536 US 545 [2002]) is overruled. Facts that increase the mandatory minimum are elements that "must be submitted to the jury and found beyond a reasonable doubt." This does not mean that any fact influencing judicial sentencing discretion must be so treated.

Concurrence: [Sotomayor, J] The special justification needed when departing from precedent exists here; the force of *stare decisis* is reduced when dealing with procedural rules "that do not govern primary conduct and do not implicate the reliance interest of private parties," governmental reliance interest is minimal, and *Harris* has stood on weak ground from the beginning, as a majority of the Court expressly disagreed with the plurality's rationale.

Concurrence in Part: [Breyer, J] While continuing to disagree with *Apprendi*, I think the "law should no longer tolerate the anomaly that the *Apprendi/Harris* distinction creates."

Dissent: [Roberts, CJ] "Our holdings that a judge may not sentence a defendant to more than the jury has authorized properly preserve the jury right as a guard against judicial overreaching," but "no such risk of judicial overreaching" exists here.

Dissent: [Alito, J] "The Court overrules a well-entrenched precedent with barely a mention of *stare decisis*," and the "decision creates a precedent about precedent that may have greater precedential effect than the dubious decisions on which it relies."

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

Salinas v Texas, No. 12-246 (6/17/2013)

Judgment of Court and Opinion: [Alito, J] Where a police officer investigating a murder interrogated the petitioner, who was not in custody and voluntarily answered several questions but balked when asked if ballistic tests would show shells at the scene to match his gun, the prosecution's argument at trial that the petitioner's "reaction to the officer's question suggested that he was guilty" did not constitute a violation of the Fifth Amendment because the petitioner did not "expressly invoke the privilege against self-incrimination."

Concurrence: [Thomas, J] The petitioner's "claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony."

Dissent: [Breyer, J] "In my view the Fifth Amendment here prohibits the prosecution from commenting on the petitioner's silence in response to police questioning."

Federal Law

Sentencing (Aggravated Penalties)

Descamps v United States, No. 11-9540 (6/20/2013)

To determine whether a past conviction can be considered to increase the sentence of a defendant under the Armed Career Criminal Act (ACCA), 18 USC 924(e), a court may not, as to past crimes that have a single, indivisible set of elements, consult documents that can permissibly be used under the "modified categorical approach" approved for evaluating "divisible" prior convictions. The petitioner argued that his prior California burglary conviction, under a statute that "goes beyond the normal, 'generic' definition of burglary" because it includes lawful entry with intent to commit a crime, could not be considered for ACCA purposes even if court records showed his crime to have involved breaking and entering. "The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one."

Concurrence: [Kennedy, J] "[T]he concerns well expressed by the Court persuade me that it reaches the correct result." However, the effect of the majority's decision "is that an unspecified number, but likely a large number, of state criminal statutes … now must be amended by state legislatures." Congress could act to "pursue its policy in a proper and efficient way without mandating uniformity among the States with respect to their criminal statutes…."

Concurrence: [Thomas, J] "I have previously explained that ACCA runs afoul of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) …." "[B]ecause today's opinion at least limits the situations in which courts make factual determinations about prior convictions, I concur in the judgment."

Dissent: [Alito, J] "When it is clear that a defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary, the conviction should qualify" for ACCA purposes.

Federal Law (Procedure)

Habeas Corpus (Federal)

Ryan v Schad, No. 12-1084 (6/24/2013)

"[T]he Ninth Circuit abused its discretion when it neglected to issue its mandate" in this case as is "normally required by Federal Rule of Appellate Procedure 41(d)(2)(D)" and "instead, *sua sponte*, construed respondent's motion to stay the mandate pending the Ninth

US Supreme Court *continued*

Circuit's decision in a separate en banc case as a motion to reconsider a motion that it had denied six months earlier," which was "to vacate its judgment and remand to the District Court for additional proceedings in light of this Court's decision in *Martinez v. Ryan*, 566 U. S. 1 (2012)."

Federal Law (Crimes)

Sex Offenses (Sex Offender Registration Act)

United States v Kebodeaux, No. 12-418 (6/24/2013)

The Necessary and Proper Clause of the Constitution gives Congress adequate power to enact the Sex Offender Registration and Notification Act (SORNA), 42 USC 16901 et seq., which "requires those convicted of federal sex offenses to register in the States where they live, study, and work," and to apply those requirements to a federal offender who was in the military at the time of the offense and "had completed his sentence prior to the time of SORNA's enactment" but "was subject to the federal Wetterling Act, an Act that imposed upon him registration requirements very similar to those that SORNA later mandated."

Concurrence: [Roberts, CJ] The majority discusses "the general public safety benefits of the registration requirement," which "are irrelevant for our purposes. Public safety benefits are neither necessary nor sufficient to a proper exercise of the power to regulate the military." A federal police power is not just immaterial to the result here but "*could not* be material to the result in this case—because it does not exist." (Emphasis in original.)

Concurrence: [Alito, J] "I concur in the judgment solely on the ground that the registration requirement at issue is necessary and proper to execute Congress' power" to regulate the military. "Because the exercise of military jurisdiction may … create a gap in the laws intended to maximize the registration of sex offenders—it is necessary and proper for Congress to require the registration of members of the military who are convicted of a qualifying sex offense in a military court."

Dissent: [Scalia, J] The majority assumes that the registration requirements of the Wetterling Act are a valid exercise of federal power, which is dubious, and that SORNA is designed to execute the Wetterling Act, which is untrue.

Dissent: [Thomas, J] SORNA does not execute "any of the federal powers enumerated in the Constitution" but rather "usurps the general police power vested in the States."

Equal Protection (Procedures)

Hollingsworth v Perry, No. 12-144 (6/26/2013)

After passage of a ballot initiative amending the California constitution to limit "the official designation of marriage to opposite-sex couples," suit was brought in federal court challenging it as violative of federal equal protection and due process rights; state officials named as defendants refused to defend the law and petitioners here, the official proponents of the initiative, were allowed to intervene. But having not suffered an injury in fact, they lack standing to appeal the district court's finding that the initiative is unconstitutional.

Dissent: [Kennedy, J] The state supreme court's ruling that the proposition's proponents had authority to defend it is binding here, and provides standing.

Federal Law (Crimes)

Sekhar v United States, No. 12-357 (6/26/2013)

To be subject to extortion, property must be transferable — "capable of passing from one person to another." Attempting to make others recommend that their employers approve an investment does not constitute "'the obtaining of property from another' under 18 U. S. C. §1951(b)(2)."

Concurrence: [Alito, J] The item alleged to have been extorted — an internal recommendation relating to a government decision about property — does not constitute "property."

Equal Protection (Procedures)

United States v Windsor, No. 12-307 (6/26/2013)

While the Government declines to defend the federal Defense of Marriage Act (DOMA) here, it has also refused to pay the tax refund ordered below, so that a justiciable controversy exists, meeting the standing requirements of Article III. The "sharp adversarial presentation of the issues" by the Bipartisan Legal Advisory Group of the House of Representatives satisfies the more flexible rules of prudential standing. DOMA violates the Fifth Amendment because no legitimate purpose overcomes its "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."

Dissent: [Roberts, CJ] I agree with Justice Scalia's dissent on the issue the Court decides, and emphasize that while challenges to state definitions of marriage relating to same-sex couples may come to this Court, no such challenge is present here, jurisdiction being lacking to consider it in *Hollingsworth v Perry*, No. 12-144, decided today.

Dissent: [Scalia, J] We have no power to decide this case, and if we did, we lack the power "to invalidate this democratically adopted legislation."

New York Court of Appeals

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

Defenses (Agency)

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

Trial (Public Trial)

People v Echevarria, 21 NY3d 1, __ NYS2d __ (4/30/2013)

The limited courtroom closures in these buy-and-bust cases during testimony of undercover officers comported with constitutional public trial principles. An absence of explicit on-record discussions regarding alternatives to closure is not fatal "where the record in a buy-and-bust case otherwise suffices to establish the need to close a particular portion of the proceeding." The record here supports the implication that the courts found no lesser alternative would have sufficed to protect the officers. Courts are advised that "closure is not available just for the asking in buy-and-bust cases."

An erroneous jury charge on the agency defense requires reversal in one case. The court limited its charge to only two of the six Criminal Jury Instruction factors, both unfavorable to the defendant, and erroneously said the lack of a prior relationship between the defendant and buyer would negate the defense.

Dissent in Part: [Lippman, CJ] The majority's holding in defendant Johnson's case "eviscerates the substance of *Presley v Georgia* (558 US 209 [2010])" and will allow courtroom closure issues to escape meaningful appellate review.

Juveniles (Visitation)

Prisoners (Family Relationships)

Matter of Granger v Misercola, 21 NY3d 86, __ NYS2d __ (4/30/2013)

In awarding the petitioner, an incarcerated father, periodic four-hour visits with his child, "the lower courts used the appropriate legal standard, applying the presumption in favor of visitation and considering whether respondent rebutted the presumption through showing, by a preponderance of the evidence, that visitation would be harmful to the child."

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

Sentencing (Post-Release Supervision)

People v Monk, 21 NY3d 27, __ NYS2d __ (4/30/2013)

The consequences of violating post-release supervision are classic "collateral consequences" of a guilty plea. They depend on defendants' behavior in relation to conditions that are imposed after sentencing by an entity other than the court and tailored to their circumstances, and so are uncertain at the time of a guilty plea. Further, the parole board, not the court, determines whether a parole violation has occurred and what the remedy for a violation is. Courts are under no obligation to explain these collateral consequences to defendants pleading guilty.

Dissent: [Rivera, J] The defendant, a second violent felony offender, needed to know that he could "be incarcerated more time than suggested by that part of the sentence mandating postrelease supervision …."

Defense Systems (Assigned Counsel Systems) (Client Eligibility) (Compensation Systems [Attorney Fees])

Roulan v County of Onondaga, 21 NY3d 902, __ NYS2d __ (4/30/2013)

The attorney who filed suit challenging rules and regulations of the Assigned Counsel Program, Inc. (ACP) in Onondaga County, and sought review of his claim for declaratory relief after his complaint was dismissed in its entirety on a motion for summary judgment, "lacks standing to challenge how the ACP Plan deals with the provision of counsel to unemancipated minors in adult criminal court … and the assignment of attorneys who were retained by a client who later becomes indigent …." Because he lacked standing to challenge these sections of the assigned counsel plan, "which, at least in theory and as he interprets them, may have caused him to be assigned fewer cases," "the Appellate Division should not have issued any declaration as to the validity of these provisions or features of the Plan." The remaining claims lack merit. "In particular, the ACP Plan does not take away from the courts the ultimate authority to determine assigned counsel's compensation; it merely provides for a preliminary review and recommendation, which individual trial judges are free to accept or reject." The defendants did not cross-appeal the Appellate Division's declaration of invalidity as to section D(2) of the assigned counsel plan.

[***Ed. Note:*** *Chief Judge Lippman took no part in this matter.*]

NY Court of Appeals *continued*

Homicide (Manslaughter) (Murder [Degrees and Lesser Offenses] [Intent])

People v Bell, 21 NY3d 915, __ NYS2d __ (5/2/2013)

"On review of submissions pursuant to section 500.11 of the Rules, order modified by reducing defendant's conviction of depraved indifference murder in the second degree to manslaughter in the second degree and remitting to County Court, Orange County, for resentencing …."

[***Ed. Note:*** *The Appellate Division decision,* People v Bell *(82 AD3d 997 [2d Dept 2011]) dealt with the sufficiency and weight of the evidence, among other issues.*]

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

Jurisdiction

Prisoners

Matter of Bezio v Dorsey, 21 NY3d 93, __ NYS2d __ (5/2/2013)

The court order allowing the State to feed the respondent, a state prisoner and serial hunger striker, via a nasogastric tube when his condition became life-threatening, did not violate his right to make choices about what nourishment and medical treatment to accept. Where the respondent resumed eating solid food after the order was issued but pursued an appeal, the Appellate Division correctly found that the core issue, whether the State could secure a feeding order where the respondent asserted he did not intend to kill himself but only to bring attention to claims of maltreatment and to obtain a transfer to a different facility, warranted review as an exception to the mootness doctrine. The decision to allow the State to intervene to prevent the respondent's death withstands scrutiny as it was reasonably related to legitimate penological objectives.

Dissent: [Lippman, CJ] The range of interesting, important, and somewhat novel issues addressed by the majority are not properly before the court as they "were never raised, much less decided, at nisi prius" and assigned counsel never argued at the hearing that the respondent had a right to refuse treatment. The issues are also "irredeemably moot"; the selective application of the mootness exception severed logically intertwined issues and allowed consideration of issues at an abstract level incompatible with the common law method.

Counsel (Competence/Effective Assistance/Adequacy)

People v Oathout, 21 NY3d 127, __ NYS2d __ (5/2/2013)

While "what constitutes effective assistance of counsel varies according to the particular circumstances of each case," the "test cannot be so weak as to deny a defendant adequate due process"; here, counsel's failures were so significant that the representation, viewed in totality, was not meaningful. The pro bono attorney had little criminal law experience, demonstrating a lack of basic knowledge of requisite procedures during pretrial proceedings that caused the defendant and the prosecutor to question counsel's representation. The court took little action, and at trial, counsel's performance was similarly inadequate, including repeated failures to object to evidence of uncharged crimes, to prosecutorial vouching for a witness during summation, and to references in summation with regard to the defendant's observed left-handedness, which was not in evidence, as well as to unpreparedness for the charge conference.

Juries and Jury Trials (Deliberation)

People v Mejias, 21 NY3d 73, __ NYS2d __ (5/7/2013)

The trial court did not err in failing to conduct a probing inquiry of a juror who wrote a note seeking additional information before the jury was charged but after jurors, with the parties' consent, had begun reviewing exhibits, of which there were over 200, and had been admonished not to discuss the trial. The court, over objection, did not inquire of the note-writing juror, but advised the entire jury that, despite the use of the word "we" in the note asking a question, the court was assuming that jurors had not yet discussed the case amongst themselves. The court asked to be advised if that was not the case, and added that jurors in New York may not ask questions. As premature deliberation does not, alone, render a juror grossly unqualified, no inquiry was required. A second theory proffered by the defendants on appeal was not preserved.

Dissent: [Lippman, CJ] Precedential caselaw did not permit the court to resolve the issue of the juror's note in the way that the court did.

Accusatory Instruments (Amendment)

People v Milton, 21 NY3d 133, __ NYS2d __ (5/7/2013)

The superior court information here was not jurisdictionally defective; adding the names of banks as victims of the defendant's mortgage fraud did not render the offense a different one, as the specific properties and sales prices involved were identified in the felony complaint even though the ultimate victims were not.

NY Court of Appeals *continued*

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

People v Prescott, 21 NY3d 925, __ NYS2d __ (5/7/2013)

The writ of coram nobis sought by the appellant based on ineffective assistance of counsel is granted. The appellant retained a lawyer for his appeal without being told of or consenting to a conflict of interest based on the lawyer's overlapping representation of a co-defendant at sentencing where the lawyer argued for leniency based on, among other things, the co-defendant's "cooperation with the prosecution and testimony against [the] defendant."

Counsel (Competence/Effective Assistance/Adequacy)

Trial (Presence of Defendant [Trial in Absentia])

People v Diggins, 2013 NY Slip Op 03872 (5/30/2013)

While a defendant's willful absence from trial hampers defense counsel's ability to provide adequate representation and must be taken into consideration when assessing an ineffective assistance of counsel claim, ineffectiveness has been shown here by counsel's lack of participation during the trial when the record shows a reasonable basis for a defense and the defendant had cooperated with counsel in formulating a defense before absconding.

Judges

Misconduct (Judicial)

Matter of George, 2013 NY Slip Op 03869 (5/30/2013)

Glen R. George, Justice of the Middletown Town Court, Delaware County, is suspended with pay effective immediately.

[***Ed. Note:*** *A Determination issued on May 1, 2013 by the State Commission on Judicial Conduct regarding Glen R. George can be found at www.scjc.state.ny.us/Determinations/G/George.Glen.R.2013.05.01.DET.pdf*]

Courts (Interpreters)

Ethics

People v Lee, 2013 NY Slip Op 03865 (5/30/2013)

The trial court did not abuse its discretion by refusing to replace a state-employed court interpreter who advised the court that he was "a friend" of the complainant husband who had introduced the interpreter's father to business loan officials and who the interpreter knew had been in federal prison; the interpreter also knew the complainant wife. The interpreter said he was not familiar with the facts of the case and would not be uncomfortable translating for the complainant wife. The interpreter had taken an oath to interpret; it can be presumed he knew his obligation to translate testimony verbatim.

Dissent: [Rivera, J] A court interpreter's prior personal or pecuniary relationship with a complainant in a criminal matter creates, "at a minimum, a substantial claim of an appearance of bias, if not actual bias."

Defenses (Agency)

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

Juries and Jury Trials (Deliberation)

People v Williams, 2013 NY Slip Op 03866 (5/30/2013)

The court did not commit mode of proceedings errors by: 1) delegating a court officer to respond to a jury note asking for a written copy of the court's instructions by saying none was allowed; or 2) calling the jury into the courtroom after receiving another note, reading the note, and responding directly, all without objection by defense counsel, who had notice of the note and failed to object when the error could have been cured. The requested agency charge was properly denied as there was no reasonable view of the evidence indicating that the defendant acted as an agent for the undercover buyers with whom he had no prior relationship, where he knew instantly how to respond to the buyers' inquiry about anyone being "out," and, while covering his mouth with his hand in his shirt, directed them around the corner to a seller.

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

Counsel (Advice of Right to) (Right to Counsel)

People v Guilford, 2013 NY Slip Op 03932 (6/4/2013)

The passage of eight hours, during which it is not shown that the defendant had any opportunity to sleep or eat before arraignment, did not attenuate, and may have exacerbated, the taint of the initial, uncontestedly coercive interrogation. That the defendant had counsel for arraignment and post-arraignment questioning could not have neutralized the effects of the prior coercion where the defendant agreed to divulge information after two full days of questioning in large part in exchange for getting the lawyer he had a right to, the record does not show he had the ability to usefully confer with counsel, and counsel "knew little about the investigation and nothing about the immediately preceding flagrantly illegal interrogation." Nothing shows that the interposition of counsel

NY Court of Appeals *continued*

allowed the defendant to make a decision that was not the product of compulsion. The trial court should have suppressed not only the results of the initial interrogation but the defendant's subsequent inculpatory statements.

Judges (Powers)

Trial (Trial Order of Dismissal)

People v Hampton, 2013 NY Slip Op 03936 (6/4/2013)

"Judiciary Law § 21 does not bar a substitute judge from deciding a question of law presented in a motion argued orally before another judge so long as a transcript or recording of the prior argument is available for review, and 'the substitute indicates on the record the requisite familiarity with the proceedings and no undue prejudice occurs ….'" Here, the motion for a trial order of dismissal, pending at the time that the trial judge recused himself upon learning of the decedent's ties to the judge's church, involved a matter of law and the substitute judge had a record on which to decide the motion; that the original judge expressed some reservations about the proof is not enough to show prejudice.

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

People v Sanchez, 2013 NY Slip Op 03933 (6/4/2013)

While the defendant has established that his trial counsel had a potential conflict of interest, having represented a man named as a potential suspect during the police investigation and having information about connections between that former client and another man whose fingerprints were found at the crime scene, the record does not establish as a matter of law that the conflict actually affected the defense of misidentification or impaired counsel's performance. The defendant is not precluded from raising this issue in a 440 proceeding at which he can supplement the record with additional facts.

Instructions to Jury (Missing Witnesses)

People v Thomas, 2013 NY Slip Op 03934 (6/4/2013)

The trial court erred by sustaining, on the basis that counsel had not sought a missing witness instruction, an objection to defense counsel's comment in summation that the jury should consider the absence from trial of a police officer whom the accuser testified on redirect had failed to write down her allegation of anal rape during the lengthy domestic violence incident under investigation because the officer said no one would believe it. The Appellate Division erred by relying on "the alternative grounds that the officer's testimony may have been cumulative and defendant failed to make an offer of proof." However, the error was harmless.

Counsel (Attachment) (Right to Counsel)

People v Augustine, 2013 NY Slip Op 04041 (6/6/2013)

Assuming without deciding that the defendant's indelible right to counsel was violated when he was questioned twice without an attorney about this murder while in jail on a probation violation for which he had counsel, "any error was harmless beyond a reasonable doubt...."

Counsel (Competence/Effective Assistance/Adequacy)

Investigation (Pretrial)

People v Oliveras, 2013 NY Slip Op 04040 (6/6/2013)

Trial counsel's failure "to conduct an appropriate investigation of records critical to the defense" constituted ineffective assistance of counsel. Counsel did not execute subpoenas for the client's psychiatric records or otherwise review such records before moving to suppress the client's statement as involuntary based solely on the report concerning the client's competency. Nine months later counsel unsuccessfully sought "permission to serve and file late notice of intent to proffer psychiatric evidence." Building a defense based on a claim that the client's mental weakness undermined the voluntariness of his admissions without knowledge of the client's records compromised the client's right to a fair trial.

Dissent: [Smith, J] While counsel's failure to get and review the records was deficient performance, there was no prejudice because the records would have hurt, not helped, the client's case.

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

People v Padilla, 2013 NY Slip Op 04042 (6/6/2013)

The prosecution met its burden of establishing that the inventory search of the defendant's vehicle after his arrest for driving under the influence was valid where an officer testified that removal of owner-installed audio speakers was protocol, where the primary objectives of the search were met even though the written procedure did not cover giving the defendant's sister some contents of the vehicle as the officer did, and where checking seat panels that were askew was a reasonable part of the inventory search not invalidated by the officer's admitted knowledge that contraband is often hidden in such panels.

Dissent: [Rivera, J] The search "exceeded the bounds of a permissible warrantless search" where the officer's testimony showed he turned the search into a typical war-

NY Court of Appeals *continued*

rantless search for drugs. Given his flagrant digressions from the inventory search guidelines, more than his statements that he was following protocol should be required for the dismantling of the trunk's contents.

Counsel (Competence/Effective Assistance/Adequacy)

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

People v Barboni, 2013 NY Slip Op 04269 (6/11/2013)

Evidence that the decedent child suffered multiple injuries at the defendant's hand including skull fractures and eye injuries consistent with shaking, that the defendant failed to summon medical assistance, and that he ultimately dispassionately reported the child was not breathing, was sufficient to support the conviction of "depraved indifference murder as well as first degree manslaughter." There was no evidence that the defendant intended to cause serious physical injury or death, rather than recklessly disregarding the substantial and unjustifiable risk that such injury or death would occur. As a person is implied to intend the natural and probable consequences of their acts, the jury could rationally infer that the defendant intended to injure the child.

Defense counsel's acquiescence to participation on the jury of a person who had expressed uncertainty about whether he would apply a different credibility standard to the testimony of police officers did not constitute ineffective assistance of counsel where there could be a strategic explanation. Nor did the defendant show lack of a strategic explanation for counsel's agreement to the seizure of the defendant's clothing, which revealed traces of the child's blood. The question of whether *People v Claudio* (83 NY2d 76) is still good law as to the State's lack of responsibility for guaranteeing effective representation before commencement of formal criminal proceedings need not be addressed here.

Concurrence: [Smith, J] A severe beating that kills an infant "is a justified, narrow exception to the rule … that a depraved indifference murder conviction" is unsustainable unless the jury could find the defendant to have been literally indifferent as to whether the child lived or died.

Speech, Freedom of

People v Lam, 2013 NY Slip Op 04275 (6/11/2013)

The Appellate Term reasonably found, after considering the manner of display and low, uniform price of t-shirts containing artistic images offered for sale in Union Square Park, that the dominant purpose of the shirts was utilitarian and that they constituted primarily commercial goods requiring a vendors license rather than constitutionally protected expression.

Appeals and Writs (Scope and Extent of Review)

Evidence (Weight)

People v Mason, 2013 NY Slip Op 04276 (6/11/2013)

The Appellate Division's order indicates a lack of appreciation of its power to review the defendant's weight of the evidence claim; the matter is reversed and remitted for consideration of the claim.

Counsel (Competence/Effective Assistance/Adequacy)

Guilty Pleas (Withdrawal)

People v Mitchell, 2013 NY Slip Op 04274 (6/11/2013)

Defendant Deliser's case must be remitted for consideration of his plea withdrawal motion after assignment of new counsel. He moved pro se to withdraw his plea because of undue pressure by trial counsel among other things, and the court denied the motion after reading portions of the plea minutes and hearing counsel. The attorney explained actions taken on Deliser's behalf, said the prosecution had a strong case, and believed the plea was knowing and in Deliser's best interest. Where counsel takes a position adverse to the client, a conflict of interest arises requiring that new counsel be heard on the motion.

The denial of defendant Mitchell's motion to withdraw his plea prior to sentencing on the basis, among other things, that defense counsel coerced the plea is affirmed where trial counsel said, as to the motion, only that he did not "adopt the merits or factual assertions" of it and was concerned that if he didn't respond the court might think there was merit to the claims; further, the court proceeded on the motion only after new counsel was appointed.

Evidence (Hearsay)

Impeachment (Of Defendant [Including *Sandoval*])

People v Cantave, 2013 NY Slip Op 04723 (6/25/2013)

"[A] defendant with a conviction pending appeal may not be cross-examined in another matter about the underlying facts of that conviction until direct appeal has been exhausted." This *Sandoval* issue was preserved where defense counsel, after both parties had rested but before closing arguments, asked the court to reconsider its ruling, which would violate the right against self-incrimination; the defendant "remained at risk of self-incrimination until he exhausted his right to appeal …."

The defendant did not meet the requisite burden to show that his 911 call qualified as an excited utterance,

NY Court of Appeals *continued*

and there is no evidence that his uncorroborated statements were made as the events unfolded, as is necessary for the present sense impression exception.

Identification (Lineups)

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

People v Jones, 2013 NY Slip Op 04722 (6/25/2013)

While the initial arrest of the defendant lacked probable cause, the question of whether subsequent identification evidence was sufficiently attenuated is a mixed question of law and fact, and there is sufficient evidence on the record to support the Appellate Division's attenuation finding. A detective had gathered enough evidence before the sergeant illegally arrested the defendant to establish probable cause, and when that information was obtained by the sergeant within 30 minutes, he had probable cause to hold the defendant for a lineup.

Dissent: [Lippman, CJ] "The illegal arrest was the very event that facilitated the arresting officer's acquisition of information tying Mr. Jones to the robbery." The majority's conclusion that the pretext arrest was made in good faith erodes a basic Fourth Amendment tenet.

Search and Seizure (Standing to Move to Suppress

People v Leach, 2013 NY Slip Op 04724 (6/25/2013)

"[W]e cannot say there was no record support for the lower courts' determination that defendant failed to establish a legitimate expectation of privacy in the guest bedroom" necessary to seek suppression of a gun found there, where the defendant's grandmother testified that she had the only key to the apartment, that the defendant stayed in a different bedroom, and the bedroom where the gun was found was reserved for use by other grandchildren.

Double Jeopardy (Punishment)

Sentencing (Post-Release Supervision) (Resentencing)

People v Brinson, 2013 NY Slip Op 04758 (6/26/2013)

The defendants had no legitimate expectation of finality in their determinate sentences where they were still serving aggregated sentences calculated under Penal Law 70.30 that included the determinate ones, so the courts did not violate the prohibition against double jeopardy by adding at resentencing mandatory periods of post-release supervision that had been omitted when the determinate sentences were imposed. *Matter of State of New York v Rashid* (16 NY3d 1 [2010]), holding that 70.30 cannot be used to bring a sex offender under Mental Hygiene Law Article 10 "because that article contains its own rules for determining which crimes count for eligibility under the statute," is distinguishable.

Counsel (Competence/Effective Assistance/Adequacy)

Evidence (Photographs and Photography)

People v Marra, 2013 NY Slip Op 04755 (6/26/2013)

"We cannot say the judge abused his discretion by allowing" into evidence, over objection, photographs taken of the accuser at the hospital that depicted red marks and bruises, given the circumstances of the case including the prosecution's theory of the accuser's physical helplessness. The alleged failings of defense counsel, such as failure to object to the prosecutor's comment about condom use, did not constitute ineffective assistance of counsel.

Search and Seizure (Search Warrants [Affidavits, Sufficiency of]) (Suppression)

People v Chisholm, 2013 NY Slip Op 04841 (6/27/2013)

The suppression court erred by not examining "the transcript of the confidential informant's testimony before the magistrate to determine whether the search warrant was issued upon probable cause" and whether CPL 690.40(1) was complied with, where the supporting affidavit of the officer contained no factual averments on which to judge the informant's credibility, the details provided by the informant were not corroborated by police, and compliance with the statute is not shown.

Guilty Pleas (Errors Waived By)

Sentencing (Youthful Offenders)

People v Rudolph, 2013 NY Slip Op 04840 (6/27/2013)

The requirement of CPL 720.20(1) that a sentencing court must determine whether a defendant eligible for youthful offender (YO) treatment is to be so treated cannot be dispensed with even if a defendant fails to request YO status or purports to waive the right to request it; *People v McGowen* (42 NY2d 905 [1977]), incorrectly interpreted the statute and is overruled. "The judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be sacrificed in plea bargaining." This holding should be limited to cases still on direct review. Prosecutors remain free to make courts aware of reasons YO treatment would be inappropriate,

NY Court of Appeals *continued*

or bargain for the right to withdraw consent to a plea if YO status is granted.

Concurrence: [Graffeo, J] *McGowen* should be overruled and eligible youth should not be found to have waived YO consideration by mere silence, but eligible youth should be able to expressly waive YO status in a negotiated plea.

Dissent: [Read, J] The majority should not overrule its prior interpretation of the statute.

First Department

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

People v Reid, 104 AD3d 58, 957 NYS2d 332 (1st Dept 1/3/2013)

Even though the police officer admitted that he did not plan to arrest the defendant when he asked him to get out of his car and patted him down, revealing a switchblade knife, his search of the defendant was permissible where an objective review of the facts showed there was probable cause to arrest the defendant for driving while intoxicated. "[E]ven if the police are incorrect in their assessment of the particular crime that gives them grounds to conduct the search, or if they incorrectly assess the level of police activity that is justified by their knowledge, where the facts create probable cause to arrest, a search must be permissible." (Supreme Ct, New York Co)

Evidence (Business Records)

Lesser and Included Offenses

Possession of Stolen Property (Elements) (Evidence) (Instructions)

People v King, 102 AD3d 434, 958 NYS2d 101 (1st Dept 1/8/2013)

The defendant was not entitled to a lesser included offense charge of fifth-degree criminal possession of stolen property where he was charged with fourth-degree possession and he failed to elicit evidence that controverted the evidence that the stolen property was worth $1,000 or more. "While generally a defendant has no obligation to present evidence, here, the defendant was required to demonstrate entitlement to the lesser offense." The court properly admitted as a business record a "training receipt" where one of the complainant's employees testified that a receipt is created every time an employee detains an alleged shoplifter, the receipt is used to identify and memorialize the property that was stolen, it is the regular course of business to create such receipts, and the receipt is created within minutes of apprehension. (Supreme Ct, New York Co)

Forensics (DNA)

Witnesses (Confrontation of Witnesses) (Experts)

People v Rios, 102 AD3d 473, 961 NYS2d 14 (1st Dept 1/15/2013)

The defendant failed to preserve his specific right to confrontation argument, making only general references to confrontation, information "'someone else has provided,'" bolstering, and related matters, and never claiming that the DNA analyst's expert testimony "should be excluded under the Confrontation Clause unless the analysts who provided the underlying information also testified." Defense counsel appeared to be objecting to the admission of the nontestifying analysts' reports, but the reports were never before the jury. The defendant's post-verdict motion did not preserve the issue. Alternatively, the defendant's confrontation right was not violated where the analyst's testimony was based on her independent comparison of the defendant's DNA profile and the DNA recovered from semen stains. (Supreme Ct, New York Co)

Sex Offenses (Civil Commitment)

Matter of State of New York v Steur, 102 AD3d 481, 961 NYS2d 12 (1st Dept 1/15/2013)

The court property concluded that the respondent is likely to commit persistent sexual abuse where the respondent did not dispute that he is likely to commit three qualifying misdemeanors in a 10-year period, but argued that the State failed to establish that he is likely to be convicted of two predicate offenses and to commit a third in that period. "We find it unlikely that the Legislature intended to exempt individuals who commit serial sex offense misdemeanors from classification as dangerous sex offenders unless and until they have been successfully prosecuted for two such offenses and then commit a third. … [W]e hold that when the State seeks to prove that a respondent in a Mental Hygiene Law article 10 proceeding is likely to commit the felony of persistent sexual abuse, it need only establish, by clear and convincing evidence, that the respondent is likely to engage in conduct that would support a conviction." (Supreme Ct, New York Co)

First Department *continued*

Due Process (Fair Trial)

Search and Seizure (Automobiles and Other Vehicles) (Electronic Searches) (Warrantless Searches)

People v Lewis, 102 AD3d 505, 958 NYS2d 348 (1st Dept 1/17/2013)

The warrantless attachment of a global positioning system (GPS) on the defendant's car for about three weeks and the limited GPS surveillance was permissible under *People v Weaver* (12 NY3d 433 [2009]), where the device was only functional for two weeks, it did not continually track the defendant, and the police only accessed it "on two days to enhance their visual surveillance." Even assuming this violated state law or the federal constitution, it was harmless error as the evidence derived from using the GPS played a minimal role in the case.

By not objecting until deliberations had started, the defendant failed to preserve his claim that having to wear jail-issued orange shoes impinged on his right to testify. Further, the defense never contradicted the court's statement that the jurors could not see the defendant's shoes from the jury box and the defendant did not follow through on the court's two offers to sign orders to compel the corrections department to allow the defendant to wear his own shoes or propose an alternative. (Supreme Ct, New York Co)

[***Ed. Note:*** *Leave to appeal was granted on Mar. 28, 2013 (20 NY3d 1101).*]

Reckless Endangerment (Elements) (Evidence)

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

People v Green, 104 AD3d 126, 958 NYS2d 138 (1st Dept 1/22/2013)

The jury's determination that the circumstances evincing a depraved indifference to human life element of first-degree reckless endangerment was proven comports with the weight of the evidence; the defendant "could not have failed to appreciate what was likely to happen" when he threw bottles and plates from a 26th-floor hotel balcony above a major street near Penn Station, but did not care whether people were harmed or not. His seeming lack of intent to harm anyone does not negate the depraved indifference finding. While the defendant claimed he was intoxicated at the time, other evidence, including videos, showed that his physical coordination was not significantly impaired, he admitted that he knew he should temporarily stop throwing objects when he saw police in the area, and he remembered everything the next day.

Exigent circumstances justified the warrantless entry into the defendant's hotel room where a woman told the police she was just raped by a foreign visitor who was staying there, the police had reason to believe the defendant was still in the room, there was a risk that he could return home, and there was reason to believe a drug used during the alleged rape may be disposed of. Further, after the police entered the room using a key, the defendant gave written consent to a search. (Supreme Ct, New York Co)

Dissent in Part: "Defendant's conduct reflected stupidity and drunken thoughtlessness, rather than 'wickedness, evil or inhumanity,' and the throwing of bottles and plates falls short of the 'brutal, heinous and despicable acts' required to establish depraved indifference."

Forgery (Elements) (Evidence)

Speech, Freedom of

People v Golb, 102 AD3d 601, 960 NYS2d 66 (1st Dept 1/29/2013)

The terms "injure" and "defraud" in the crimes of forgery and criminal impersonation are not limited to tangible harms such as financial harm. There is no evidence that the defendant, who used emails to impersonate actual persons, intended the emails to be parodies; the evidence instead showed that he intended that readers believe that the purported authors were the actual authors and that reliance on that deception would harm the purported authors and benefit the defendant or his father, a scholar who the purported authors disagreed with. "The fact that the underlying dispute between defendant and his father's rivals was a constitutionally-protected debate does not provide any First Amendment protection for acts that were otherwise unlawful." (Supreme Ct, New York Co)

[***Ed. Note:*** *Leave to appeal was granted on Mar. 11, 2013 (20 NY3d 1099).*]

Grand Jury (Procedure)

People v Smith, 103 AD3d 430, 958 NYS2d 334 (1st Dept 2/7/2013)

The court erred in denying the defendant's motion to dismiss the drug sale counts where the prosecution did not seek court authorization to re-present those charges to a second grand jury after the charges were effectively dismissed by the first grand jury's failure to indict after a full presentation of the case. That the prosecution allowed the first grand jury's term to expire, instead of formally withdrawing the drug charges, is irrelevant. "[T]he prosecu-

First Department *continued*

tion's noncompliance with CPL 190.75(3) was a jurisdictional defect …." (Supreme Ct, New York Co)

Double Jeopardy (Mistrial)

Witnesses (Cross Examination)

Matter of Morris v Livote, 105 AD3d 43, 962 NYS2d 59 (1st Dept 2/21/2013)

Retrial of the petitioner is barred by the double jeopardy clauses of the federal and state constitutions because defense counsel's improper questioning of a detective did not constitute a manifest necessity for a mistrial; while counsel's disregard of the court's decision on the motion in limine and its instructions were "blameworthy and understandably angered the court, the cross-examination did not rise to the level of the gross misconduct" needed to allow a retrial. The prosecution was not prejudiced because the detective's testimony was not material and the court could have provided more specific curative instructions or polled the jurors to determine if they could render an impartial verdict.

Appeals and Writs (Briefs) (Counsel)

Attorney/Client Relationship

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

People v Bueno, 104 AD3d 519, 960 NYS2d 429 (1st Dept 3/14/2013)

Defense counsel's letter to the defendant explaining the expected consequences of his brief asserting that the appeal was wholly frivolous was inadequate because it was written in English while the record shows that the defendant had an interpreter at his plea proceeding and there is no indication that the defendant understood the letter or that counsel did anything to communicate with him in Spanish. The brief fails to address all the pertinent facts or analyze issues that appear in the record of the plea and sentencing proceedings, particularly regarding events that occurred right before the plea colloquy. Without expressing an opinion on the merit of any possible issue, there may be issues about the voluntariness of the defendant's plea that would not be wholly frivolous. Counsel is relieved and new counsel is assigned. (Supreme Ct, New York Co)

Sex Offenses (Sex Offender Registration Act)

People v Staley, 104 AD3d 583, 961 NYS2d 431 (1st Dept 3/26/2013)

The defendant became subject to the Sex Offender Registration Act requirements when he was transferred from state to federal prison to serve a federal sentence because the requirements are triggered when an inmate is released from any state or local correctional facility, hospital or institution, even if the individual will be incarcerated or subject to supervision in another jurisdiction. (Supreme Ct, New York Co)

Second Department

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Counsel (Right to Counsel)

Juveniles (Custody) (Hearings) (Visitation)

Matter of Belmonte v Batista, 102 AD3d 682, 961 NYS2d 174 (2nd Dept 1/9/2013)

The court, while it did advise the parties of their right to counsel, failed to determine that the father's waiver of counsel was knowing, intelligent, and voluntary given the confusion in the father's response when asked at the first hearing, which was only 11 minutes in duration, whether he was proceeding without counsel; the court did not even elicit an answer as to the waiver of counsel at the second, eight-minute hearing that resulted in a final order of custody and visitation. There was not the requisite "searching inquiry" needed to be reasonably certain that the father "understood the dangers and disadvantages of giving up the fundamental right to counsel …." (Family Ct, Kings Co)

Domestic Violence

Juveniles (Hearings) (Neglect)

Matter of Kevin M.H., 102 AD3d 690, 958 NYS2d 175 (2nd Dept 1/9/2013)

After the family court found that sufficient facts existed to sustain the neglect petition against the father, released the appellants to the mother's custody, placed the father under Department of Social Services (DSS) supervision, and limited his contact with the appellants to supervised visitation, and later extended the supervision and order of protection, the matter was transferred to the Integrated Domestic Violence Court, which erred by granting DSS's application to withdraw the petition to further extend supervision and in effect denying without a hearing the appellants' motion to modify and extend the

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order of disposition and related order of protection. (Supreme Ct, Suffolk Co)

Evidence (Weight)

Identification (Eyewitnesses) (Lineups)

People v Bailey, 102 AD3d 701, 958 NYS2d 173 (2nd Dept 1/9/2013)

Based on a combination of factors negatively affecting the complainant's identification of the defendant as the person who pointed a gun at him and pulled the trigger, including the complainant's intoxication, focus on the gun, and lack of recollection of whether the perpetrator had facial hair or scars, which the defendant had, and the fact that the lineup occurred two months after the incident, an acquittal would not have been unreasonable and the verdict was against the weight of the evidence. (Supreme Ct, Kings Co)

Guilty Pleas (Withdrawal)

Sentencing (Enhancement)

People v Downes, 102 AD3d 705, 956 NYS2d 897 (2nd Dept 1/9/2013)

Where there was no indication that the defendant violated the terms of his plea agreement, which included imposition of a one- to three-year sentence if he committed no further crimes before sentencing and cooperated in the preparation of the presentence report, and there was nothing in the plea agreement about the defendant's subsequent entry into and failure to complete a drug treatment program, the unpreserved claim on appeal that the imposition of a two-to-four-year sentence without an opportunity to withdraw the plea is reviewed and the sentence is vacated. (County Ct, Orange Co)

Juveniles (Neglect)

Matter of Ariel P., 102 AD3d 795, 957 NYS2d 736 (2nd Dept 1/16/2013)

While a "parent's unwillingness to follow a recommended course of psychiatric treatment which results in the impairment of a child's emotional health may support a finding of neglect," here there "was no evidence that the mother's concerns regarding the medication recommended by the child's doctors, and her preference that the child be discharged to a private hospital, were anything but reasonable and appropriate …." The finding of neglect is reversed. (Family Ct, Queens Co)

Prisoners (Disciplinary Infractions and/or Proceedings)

Matter of Benito v Calero, 102 AD3d 778, 961 NYS2d 190 (2nd Dept 1/16/2013)

The hearing officer erred by denying the petitioner's request at his Tier III disciplinary hearing to call two witnesses, prisoners who allegedly were present when his cell was searched and alcohol was found, without permitting the petitioner to fully explain why he sought their testimony; the hearing officer had no way to determine whether the proposed testimony would be relevant. He further erred by refusing to allow the petitioner to question a witness about the conclusion that the substance found was alcohol.

Defense Systems (Client Eligibility [Partial Payment])

Juveniles (Support Proceedings)

Matter of Cherrez v Lazo, 102 AD3d 782, 957 NYS2d 889 (2nd Dept 1/16/2013)

The record supports the support magistrate's finding that the father had the financial ability to pay the full cost of representation provided to him; the magistrate did not err by denying the father's objections to the determination directing him to pay the lawyer "the difference between the amount the attorney would charge a privately retained client for the services rendered and the amount the attorney claimed from the assigned counsel plan." (Family Ct, Queens Co)

Juveniles (Custody) (Support Proceedings)

Matter of Tafuro v Tafuro, 102 AD3d 877, 958 NYS2d 202 (2nd Dept 1/23/2013)

The father's objection to the awarding of child support arrears for child H. should have been granted; the award of arrears, from the date of a letter signed by the mother agreeing she would not seek support as to H., who had begun living with the father, must be vacated. The mother's express waiver of future child support for H. was valid and enforceable. However, evidence adduced below does not support a conclusion that the mother waived future child support as to the other two children. A mere change in custody is insufficient to constitute waiver of support. (Family Ct, Orange Co)

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

People v Bristol, 102 AD3d 881, 958 NYS2d 215 (2nd Dept 1/23/2013)

Where the defendant indicated before trial that he did not want his assigned counsel to continue representing him, was given the options of proceeding pro se or keep-

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ing assigned counsel, said he had no objection to representing himself, and was permitted to proceed pro se, there was insufficient inquiry as to whether he understood the dangers and disadvantages of proceeding without counsel. As his waiver of the right to counsel was insufficient, he is entitled to a new trial. (Supreme Ct, Nassau Co)

Appeals and Writs (*Anders* Brief)

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

People v Hernandez, 102 AD3d 888, 957 NYS2d 897 (2nd Dept 1/23/2013)

Independent review of the record in this case, in which appellate counsel filed an *Anders* brief, indicated that there are nonfrivolous issues, including "whether the County Court's failure to pronounce sentence in the defendant's presence at the sentencing hearing rendered the sentence illegal"; new counsel is assigned. (County Ct, Westchester Co)

[***Ed. Note:*** *On June 26, 2013, the Second Department held that the trial court erred in pronouncing sentence outside the defendant's presence in violation of CPL 380.20, vacated the sentence, and remitted for resentencing (2013 NY Slip Op 04828).*]

Misconduct (Judicial)

Trial (Presence of Defendant [Trial in Absentia])

People v Rivera, 102 AD3d 893, 958 NYS2d 222 (2nd Dept 1/23/2013)

The court erred by receiving and answering a series of questions relating to substantive legal and factual issues "from a juror inside the robing room and outside the presence of the defendant, defense counsel, the prosecutor, and the other jurors …." This mode of proceedings error does not require preservation and harmless error analysis is not appropriate in these circumstances. (Supreme Ct, Kings Co)

Burglary (Elements) (Evidence)

Evidence (Sufficiency)

People v Rumley, 102 AD3d 894, 958 NYS2d 200 (2nd Dept 1/23/2013)

Where the defendant forced his way into the apartment of his estranged girlfriend's friend to speak with his girlfriend, and became angry after the girlfriend refused to renew their relationship, breaking a telephone and making threats, there was insufficient evidence to support a finding that he entered the building intending to commit a crime there. The convictions of second-degree burglary must be reduced to second-degree criminal trespass. (Supreme Ct, Queens Co)

Evidence (Sufficiency)

Larceny (Elements) (Evidence) (Grand Larceny) (Petty Larceny)

People v Sutherland, 102 AD3d 897, 961 NYS2d 198 (2nd Dept 1/23/2013)

Where telephones altered for display at a retail store had no market value, the prosecution could establish their value through replacement cost, but the evidence here was legally insufficient to prove the phones' value was over $3000, as the store manager testifying about the range of values she would assign to the phones failed to provide any basis of knowledge and there was no other specific proof of replacement cost for any particular phone. The defendant's third-degree grand larceny conviction for theft of the phones must be reduced to petit larceny and the matter remanded for sentencing on that offense, even though the defendant has already served the maximum that could be imposed for that offense. (Supreme Ct, Kings Co)

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

Sentencing (Pre-sentence Investigation and Report)

People v Abdul, 102 AD3d 976, 958 NYS2d 605 (2nd Dept 1/30/2013)

Appellate counsel's *Anders* brief fails to demonstrate that counsel performed as an active advocate for his client, and independent review of the record shows the existence of nonfrivolous issues including whether the court "properly denied the appellant's motion to strike or redact certain portions of the presentence investigation report …, and whether a valid waiver of the right to appeal precludes appellate review of this issue …." New counsel must be appointed. (Supreme Ct, Suffolk Co)

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

People v Kitt, 102 AD3d 984, 958 NYS2d 481 (2nd Dept 1/30/2013)

While the dissent is correct that plea allocutions should not be taken lightly, the defendant's unpreserved claim that allocution was inadequate here is not reviewed in the interest of justice where the plea agreement was

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very favorable to the defendant, there was no question that his driving caused serious injury to another, he and counsel were very aware of the merits of a claim regarding suppression of the breathalyzer results, and the defendant was aware of and opted to forego the right to a trial, including the right to call witnesses. (Supreme Ct, Kings Co)

Dissent: The plea colloquy here was virtually nonexistent. Counsel's involvement was minimal, and the record does not show that the defendant was actually aware of the rights he was waiving. Nonfrivolous issues existed to be litigated at trial.

Admissions (Interrogation) (*Miranda* Advice)

Counsel (Right to Counsel)

People v Lloyd-Douglas, 102 AD3d 986, 958 NYS2d 744 (2nd Dept 1/30/2013)

A videotaped statement made during a prearraignment interview of the defendant conducted pursuant to a program of the Queens County District Attorney in which a script was read to the defendant before he was given *Miranda* warnings should have been suppressed; the procedure employed was "was not effective to secure the defendant's fundamental constitutional privilege against self-incrimination and right to counsel …." (Supreme Ct, Queens Co)

[***Ed. Note:*** *In this case and the following case, NYSDA, along with others, signed on to an amicus brief submitted by the New York Civil Liberties Union Foundation. In both cases, leave to appeal was granted on May 20, 2013 (2013 NY Slip Op 97785[U]; 2013 NY Slip Op 97817[U]).*]

Admissions (Interrogation) (*Miranda* Advice)

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

People v Polhill, 102 AD3d 988, 958 NYS2d 762 (2nd Dept 1/30/2013)

The videotaped statement by the defendant should have been suppressed as the procedures used pursuant to the Queens County District Attorney's prearraignment interview program were insufficient to secure the defendant's self-incrimination right and because "the police had lacked reasonable suspicion to stop and detain the defendant on the street." Descriptions given by the accuser of two men who robbed him as "'wearing dark clothing,'" one with a hood, did not provide reasonable suspicion to detain the defendant, standing alone dressed in dark gray and dark green camouflage jacket 20 blocks away. (Supreme Ct, Queens Co)

Sentencing (Concurrent/Consecutive) (Credit for Time Served)

People ex rel Ryan v Cheverko, 102 AD3d 990, 958 NYS2d 505 (2nd Dept 1/30/2013)

The judgment dismissing the instant habeas corpus petition is reversed, and the petitioner must be released forthwith. Upon conviction of two counts of petit larceny and a count of fifth-degree possession of stolen property, the petitioner was sentenced to definite concurrent sentences of one year each for the petit larcenies, and a consecutive one-year definite sentence on the possession of stolen property. Upon subsequent conviction of second-degree escape and fourth-degree grand larceny for incidents prior to the above convictions, he was sentenced to terms of one year each, to run consecutive to each other and to the terms he was already serving. The respondents calculated his release date based on an aggregate period of four years, but Penal Law 70.30(2)(b) says that someone serving multiple consecutive definite sentences who commits no other offense while serving them faces an aggregate period limited to two years. Credit for time served or good-time credit (which the defendant had in the amount of 106 days and 486 days respectively) must be calculated based on a two-year aggregate term. Properly calculated, the petitioner's release date has passed and he is being illegally detained. (Supreme Ct, Westchester Co)

[***Ed. Note:*** *Leave to appeal was granted on May 7, 2013 (2013 NY Slip Op 72948).*]

Juveniles (Parental Rights) (Permanent Neglect)

Matter of Jalil U., 103 AD3d 658, 958 NYS2d 791 (2nd Dept 2/6/2013)

The record does not show that the Department of Social Services (DSS) established by a preponderance of the evidence that the mother failed to comply with the terms and conditions of a suspended judgment that had been entered upon the mother's consent to a finding of permanent neglect; the mother had continued therapy and made what the court called "'amazing progress,'" and no time limits for enrolling in or completing classes on the special needs of her younger children, which DSS alleged she failed to do, had been set. The order having been issued over 15 months ago, a new dispositional hearing must be held to ascertain if a suspended judgment is in the best interests of the children; one should not be entered if those best interests require termination of parental rights. (Family Ct, Suffolk Co)

Appeals and Writs (Preservation of Error for Review)

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Sentencing (Appellate Review) (Excessiveness)

People v Andreu, 103 AD3d 661, 958 NYS2d 621 (2nd Dept 2/6/2013)

The defendant's excessive sentence claim did not require preservation for review, as the "power to review a sentence as harsh or excessive stems not from our power to review questions of law (*see* CPL 470.15 [1]), but from our interest of justice jurisdiction (*see* NY Const, art VI, § 30; CPL 470.15 [3] [c]; [6] [b] …." The sentences here were the minimum authorized by statute or otherwise not excessive. (County Ct, Suffolk Co)

Appeals and Writs (Briefs)

Evidence (Photographs and Photography)

Juries and Jury Trials (Deliberation)

People v McGhee, 103 AD3d 667, 960 NYS2d 436 (2nd Dept 2/6/2013)

The court erred in disclosing two different jury notes to counsel and the prosecutor only in the presence of the jury and immediately providing a formal response; the court should have heard argument from both parties and carefully crafted its response to the note requesting further explanation of intent, a substantive communication. This was a mode of proceedings error unaffected by defense counsel's failure to object.

The court improvidently exercised its discretion by admitting an exhibit depicting two identical photographs of the decedent's head after death despite the defense offer to stipulate to the identity of the decedent as the person upon whom an autopsy was performed. The motion to strike portions of the respondent's brief because they contained matters outside the record is granted. (Supreme Ct, Queens Co)

Juveniles (Support Proceedings)

Matter of Braun v Abenanti, 103 AD3d 717, 960 NYS2d 145 (2nd Dept 2/13/2013)

Where the father was obligated by court order to pay 100% of the child's heath care expenses not covered by insurance, the court properly limited payment to the mother to the amount she showed she had paid; as Family Court Act 413(1)(c)(5)(v) authorizes the court to direct payment of reasonable health expenses, the court should have directed the father to pay directly to the provider the remaining outstanding amount.

The support magistrate, which found the mother had failed to establish grounds for an upward modification of the father's child support obligation, considered only the mother's failure to show that her income plus existing support was not sufficient to meet the child's needs; the significant increase in the father's income and in the child's expenses warranted a new determination of child support. (Family Ct, Suffolk Co)

Prisoners (Disciplinary Infractions and/or Proceedings)

Matter of Marshall v Fischer, 103 AD3d 726, 958 NYS2d 800 (2nd Dept 2/13/2013)

The petitioner, an inmate in state prison subjected to a tier III disciplinary hearing, "was improperly deprived of his right to certain relevant documentary evidence, specifically, the instructions for operation of the testing machine" that rendered the urinalysis results underlying the charges that the petitioner had used drugs. The article 78 petition is granted.

Juveniles (Abuse)

Matter of Tyler S., 103 AD3d 731, 960 NYS2d 438 (2nd Dept 2/13/2013)

The testimony of an expert that all injuries to the mother's infant were consistent with having been sustained in the same accidental fall that the mother reported when the child was brought to the hospital and that the expert had seen similar injuries from a fall, along with testimony of other witnesses that the mother was a loving, caring parent with no prior history with child protective agencies, constituted sufficient satisfactory evidence to rebut the petitioner's allegations of abuse that were based on the testimony of other experts. (Family Ct, Kings Co)

Evidence (Prejudicial) (Uncharged Crimes)

People v Agina, 103 AD3d 739, 959 NYS2d 275 (2nd Dept 2/13/2013)

Upon remittitur from the Court of Appeals for consideration of issues not determined, the judgment is reversed. "[A]lthough the evidence of the prior crime was probative on the issue of identity" under the Court of Appeals ruling, the evidence should not have been admitted because its probative value "was outweighed by its unfair prejudicial effect." The charges against the defendant were based on allegations by his wife that he violently assaulted her over 12 hours, which he denied, saying they only argued; the probative value of testimony by his former wife that he had similarly assaulted her was low as to the issue of identity, and the risk that the jury would be encouraged to infer he had a propensity to commit violent acts against women in his life was high. The court's "inaccurate and confusing instruction" and the prosecutor's improper summation remarks that the former wife's testimony showed a propensity to abuse

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women compounded the error in admitting the testimony and was not harmless. (Supreme Ct, Queens Co)

Sentencing (Excessiveness)

People v Daniels, 103 AD3d 807, 962 NYS2d 177 (2nd Dept 2/20/2013)

The sentences imposed for ten counts of first-degree burglary and first-degree assault were not excessive, where "the defendant participated in a series of late-night home invasions in which the victims were aroused from sleep and threatened with a shotgun …, had their homes ransacked, and in some instances, were tied with duct tape." (County Ct, Suffolk Co)

Concurrence in Part, Dissent in Part: The aggregate sentence of 50 years imposed on the defendant when he was 21, for crimes committed at 19, which was 30 years higher than the determinate sentence he was offered in plea negotiations, is excessive. The principles of criminal sanctions can be achieved with an aggregate sentence of 25 years, which would also be consistent with protection of the public. This defendant had no prior record and has expressed remorse, in contrast to his codefendant who received the same aggregate sentence.

Confessions (Advice of Rights) (Interrogation) (*Miranda* Advice)

People v Jackson, 103 AD3d 814, 959 NYS2d 540 (2nd Dept 2/20/2013)

The defendant, charged with possession of marijuana found in a car he occupied along with two others and taken into custody after giving the officer a small bag of the drug, admitted at the scene that two other bags found under the driver's seat were his, then declined to speak with a detective at the precinct after being given his *Miranda* rights, and was told two hours later that if no one confessed to owning a gun also found in the vehicle all would be charged. He then asked to speak to a detective, to whom he admitted after being re-Mirandized that the gun was his. As he was in custody when he confessed that the marijuana under the seat was his, and was not administered *Miranda* warnings, that evidence should have been suppressed. His statement about the gun should have been suppressed as well, as he had invoked his privilege against self-incrimination after being initially Mirandized and was then deliberately engaged in conversation by an officer to induce further statements. (County Ct, Westchester Co)

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

People v Salgado, 103 AD3d 819, 959 NYS2d 287 (2nd Dept 2/20/2013)

Independent review of the appellate record shows the existence of nonfrivolous issues "including, but not necessarily limited to, the validity of the appellant's waiver of his right to appeal and, if such waiver is found to be invalid, whether the sentence imposed was excessive." New counsel is appointed. (Supreme Ct, Rockland Co)

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

People v Weber, 103 AD3d 822, 959 NYS2d 736 (2nd Dept 2/20/2013)

The court erred in denying the defense challenge for cause to a prospective juror who, while saying she could be fair and would follow the court's instructions, also said she would not want herself on a jury because she didn't "'think that [she] would be fair'" and never unequivocally said she would be impartial. (Supreme Ct, Kings Co)

Appeals and Writs (Counsel)

Counsel (*Anders* Brief)

People v King, 103 AD3d 918, 962 NYS2d 273 (2nd Dept 2/27/2013)

"The brief submitted by the appellant's assigned counsel pursuant to *Anders v California* (386 US 738 [1967]), is deficient because it fails to contain an adequate statement of facts and fails to adequately analyze potential appellate issues or highlight facts in the record that might arguably support the appeal …. Since the brief does not demonstrate that assigned counsel acted 'as an active advocate on behalf of his ... client' … or that he diligently examined the record, we must assign new counsel to represent the appellant …." (County Ct, Suffolk Co)

Sex Offenses (Sex Offender Registration Act)

People v Taylor, 103 AD3d 867, 962 NYS2d 278 (2nd Dept 2/27/2013)

In designating the defendant a level three sexually violent offender, the court failed to set forth the requisite findings of fact and conclusions of law; while the court considered the risk assessment instrument (RAI), it "failed to state whether its determination was based upon the automatic override or the points assessed in the RAI, and failed to make findings with respect to the contested risk factors" and also "failed to recognize a misstatement of the prosecutor to the effect that the court was without

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discretion in determining the risk level in light of the automatic override factor." The matter is remitted for a new determination with the required bases placed on the record. (Supreme Ct, Queens Co)

Robbery (Elements)

Sentencing (Second Felony Offender)

People v Thomas, 103 AD3d 923, 959 NYS2d 740 (2nd Dept 2/27/2013)

The court erred in adjudicating the defendant a second felony offender based on a 1977 New Jersey robbery conviction where neither of the subsections under which he was charged — New Jersey Statutes Annotated 2C:15-1 (a) (1) or (2) — is the equivalent of robbery in New York. The New Jersey statute is broader, punishing "the knowing use of force in the course of attempting to commit a theft or in the immediate flight from the attempt or the commission of the theft, while the New York statute … punishes only the use of force that is for the purpose of preventing resistance to the taking or retention of property or compelling the owner to deliver up the property …." (Supreme Ct, Kings Co)

Sentencing (Hearing) (Restitution)

People v Ward, 103 AD3d 925, 962 NYS2d 276 (2nd Dept 2/27/2013)

A hearing and new determination of restitution is required where, after pleading guilty to attempted evasion of cigarette taxes in exchange for, among other things, a specific prison term and restitution of $9,042,437.50, the defendant objected at sentencing to the restitution amount, as there is no evidence in the record from which restitution can be properly determined. That the defendant's plea agreement provided for a set amount does not relieve the prosecution of establishing a record basis for it. (County Ct, Suffolk Co)

Third Department

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

Juveniles (Custody) (Family Offenses)

Matter of Christina MM. v George MM., 103 AD3d 935, 959 NYS2d 758 (3rd Dept 2/14/2013)

The court properly dismissed the family offense petition as the petitioner mother's testimony that the father yelled at her each of the four or five times he picked up the children, and talked about the evidence he would bring to court on the custody matter, which upset her, failed to establish second-degree harassment by a preponderance of the evidence. The grant of primary physical custody to the father "has a sound and substantial basis in the record" where neither parent was unfit, but the mother had placed her own interests above those of the children by moving without them to a different school district, then enrolling them there despite believing they should remain in their original school, and had a varying work schedule while the father's was consistent and he provided more stability. (Family Ct, Essex Co)

Juveniles (Custody) (Jurisdiction)

Matter of Frank MM. v Lorain NN., 103 AD3d 951, 960 NYS2d 232 (3rd Dept 2/14/2013)

There is sound and substantial basis for finding New York to be an inconvenient forum under Domestic Relations Law 76-f(1) as to the petition regarding the older child, where Pennsylvania authorities are monitoring that child's progress in foster care after removal from the home for sexually abusing the younger child and the mother and children have lived in Pennsylvania for nearly a year. But the court should have stayed dismissal of the petition regarding the younger child "on the condition that an appropriate proceeding be commenced in Pennsylvania regarding [that] child to resolve the issues raised in that petition" where the record is unclear and "the attorney for the younger child expressed concerns that this child's best interests were not being addressed in the Pennsylvania court …." (Family Ct, Otsego Co)

Sex Offenses (Sex Offender Registration Act)

People v Hazen, 103 AD3d 943, 962 NYS2d 367 (3rd Dept 2/14/2013)

Because "the procedural requirements of Correction Law § 168-o were not met," denial of the defendant's motion — which should have been a petition — for modification of his designation as a risk level three under the Sex Offender Registration Act must be reversed. The court failed to request an updated recommendation from the Board of Examiners of Sex Offenders and was required to conduct a hearing even though the defendant did not request one. (County Ct, Delaware Co)

Family Court (Orders of Protection)

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Juveniles (Custody)

Matter of Melody M. v Robert M., 103 AD3d 932, 962 NYS2d 364 (3rd Dept 2/14/2013)

The court's grant of sole custody to the father was proper where the mother, who sought to change the agreed-upon joint custody arrangement, had posted derogatory remarks about the older child on her Facebook page, often had the father come get the child before the end of the mother's visiting time, and did not participate in counseling sessions with the child's therapist, while the father dealt more appropriately with that child, was steadily employed, and provided a stable and nurturing environment for the children. The court had the authority to issue an order of protection against the mother in the absence of a request for one, and sufficient evidence existed to support prohibiting the mother from, among other things, posting communications to or about the children on social media. (Family Ct, St. Lawrence Co)

Juveniles (Custody)

Scott VV. v Joy VV., 103 AD3d 945, 959 NYS2d 298 (3rd Dept 2/14/2013)

The court's "determination that permitting the child to relocate to California would not be in her best interests" is supported by a sound and substantial basis in the record. While "denial of the mother's motion, following the close of all proof, to stay the relocation proceeding based upon her claim that the child had recently disclosed that the father had sexually abused her in the past causes us concern," the court "immediately converted the motion to a petition to modify the father's visitation and scheduled a prompt psychological evaluation of the child." The motion was made six weeks after proof closed and on the eve of a decision about relocation. Given all the circumstances of this case, the court's actions were not an improvident exercise of discretion. (Supreme Ct, Saratoga Co)

Speedy Trial (Statutory Limits)

People v Lowman, 103 AD3d 976, 959 NYS2d 568 (3rd Dept 2/21/2013)

Contrary to the defendant's argument that all four counts of the superseding indictment charging first-degree rape for incidents allegedly occurring over the course of four months "should relate back to the filing of the felony complaint because the victim's supporting deposition" referred to multiple incidents, the prosecution was "free to seek an indictment against defendant as they saw fit based upon the crime(s) they believed had been committed." As only count one relates back to the felony complaint, and the other three relate back to the indictment, the court properly dismissed only that count on speedy trial grounds. (County Ct, Chemung Co)

Discovery (*Brady* Material and Exculpatory Information)

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

People v Kulk, 103 AD3d 1038, 962 NYS2d 408 (3rd Dept 2/28/2013)

The court did not err by refusing to admit into evidence the .06 results of an alco-sensor preliminary breath test, a test that may be used to support probable cause but is not generally accepted in the scientific community as establishing intoxication. A sufficient foundation was laid for admission of breathalyzer test results, and the court properly barred cross-examination of the test's administrator as to the effect of time on breath test results as he was not shown to be an expert. A video taken from the dashboard camera of the backup police vehicle that responded after the defendant was stopped, which was not turned over to the defense at trial but was provided to appellate counsel and this court, is not part of the record so that *Brady* claims regarding it would be better raised in CPL article 440 proceedings. (County Ct, Franklin Co)

Due Process

Juveniles (Custody) (Parental Rights)

Matter of Whiteford v Jones, 104 AD3d 995, 960 NYS2d 555 (3rd Dept 3/14/2013)

Where no evidence shows that the father, who had been committed to civil confinement following a prison term several months before, received notice of or an opportunity to be heard at the July 2010 custody hearing that resulted in full custody being given to the mother and a continued bar on any contact between the children and the father, the order must be reversed and the matter remitted for further proceedings consistent with this decision. (Family Ct, Greene Co)

Counsel (Competence/Effective Assistance/Adequacy)

Narcotics (Evidence)

Post-Judgment Relief (CPL § 440 Motion)

People v Johnson, 104 AD3d 1057, 962 NYS2d 459 (3rd Dept 3/28/2013)

While failure to have the weight of drugs allegedly possessed by a client independently tested is not necessarily ineffective representation, where the client averred by affidavit that he consistently told counsel the drugs did

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not weigh 16 grams, the attorney said on the record that he had told the client the weight had been independently verified to be 16 grams, but evidence at a co-defendant's trial showed the same drugs to have weighed less than a half-ounce, the court erred in dismissing without a hearing the defendant's CPL article 440 motion to vacate his plea to the top count. (County Ct, Albany Co)

Counsel (Conflict of Interest)

Guilty Pleas (Vacatur)

People v Lynch, 104 AD3d 1062, 961 NYS2d 605 (3rd Dept 3/28/2013)

Where counsel for a co-defendant was of counsel in the small law firm of the defendant's retained lawyer, and counsel for the co-defendant negotiated a favorable settlement that included the co-defendant's agreement to testify against the defendant, an actual conflict of interest with a substantial relationship to the conduct of the defense existed, which defendant did not waive. The conflict requires vacatur of the defendant's guilty plea. (County Ct, Delaware Co)

Grand Jury (Procedure) (Witnesses)

Motions (Omnibus)

People v Sutherland, 104 AD3d 1064, 962 NYS2d 463 (3rd Dept 3/28/2013)

The court erred in granting the branch of the defendant's omnibus motion, filed six weeks after arraignment on the indictment, seeking review of the grand jury minutes and dismissing the indictment on the ground that the defendant was denied his right to testify before the grand jury, as a motion to dismiss on such grounds must be filed no later than five days after arraignment. The five-day time limit "cannot be circumvented by framing the purported error as one impairing the integrity of the grand jury proceeding …." (County Ct, Madison Co)

Burglary (Elements) (Evidence)

Criminal Mischief (Elements) (Evidence)

Evidence (Sufficiency)

People v Beauvais, 105 AD3d 1081, 962 NYS2d 764 (3rd Dept 4/4/2013)

The evidence was not legally sufficient to support a finding that the defendant "possessed the necessary 'contemporaneous intent' to commit a crime" where she entered a residence after her friend went in, knowing the friend had an ongoing dispute with the occupant; her conviction for first-degree burglary must be reduced to second-degree criminal trespass. Her conviction of third-degree criminal mischief must be reduced to fourth-degree criminal mischief as there is no record evidence sufficient to prove damaged property exceeded $250 in value. (County Ct, Franklin Co)

Confessions (Corroboration)

Sex Offenses (Corroboration)

Speedy Trial (Statutory Limits)

People v Bjork, 105 AD3d 1258, 963 NYS2d 472 (3rd Dept 4/25/2013)

The defendant was not denied his statutory right to a speedy trial as to counts that an initial grand jury deadlocked on where the prosecution declared ready 10 days after the felony complaint was filed, and again declared ready on the second indictment 38 days after the first indictment was dismissed; the time did not continue to run as to the charges on which the first grand jury deadlocked after the first declaration of readiness. "These charges were 'directly derived' from the first accusatory instrument (CPL 1.20 [16] [b]), and as they are 'sufficiently related to apply the same commencement date, they are likewise sufficiently related for purposes of applying excludable time' …."

The convictions for criminal sexual act that were based solely on the defendant's uncorroborated admissions of oral sex cannot stand, as evidence that he was at the scene does not constitute corroboration of the acts, as what was at issue was "not his identity or connection to the crime but, instead, whether the crimes occurred at all" and "there was no corroborating proof 'of whatever weight,'" that the charged acts occurred.

Admitting testimony of a police officer that he found the accuser's locked door could be opened with a credit card was error, but harmless. (County Ct, St. Lawrence Co)

Fourth Department

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

Search and Seizure (Arrest/Scene of the Crime Searches) ("Poisoned Fruit" Doctrine) (Warrantless Searches [Abandoned Objects])

People v Cady, 103 AD3d 1155, 959 NYS2d 321 (4th Dept 2/1/2013)

Fourth Department *continued*

The defendant's motion to suppress the handgun he discarded while being chased by the police should have been granted where although the police properly approached him on the street and tried to speak with him about a police shooting in the area, when the defendant turned away from them, gestured with his arms toward his waistband, and started running, the police did not have reasonable suspicion to pursue him as there was no indication the defendant had a weapon and the defendant was merely in the general area of the shooting about eight hours after it occurred. The defendant's statements following his unlawful seizure should have been suppressed as fruit of the poisonous tree. (Supreme Ct, Monroe Co)

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

Police

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

People v McGrew, 103 AD3d 1170, 958 NYS2d 561 (4th Dept 2/1/2013)

Because the Syracuse City police officer was outside the geographical area of his employment when he stopped and questioned the defendant, the physical evidence obtained during that illegal stop must be suppressed.

The court abused its discretion in refusing to entertain the joint peremptory challenge by counsel for the defendant and co-defendant of a prospective juror where the parties had to consider prospective jurors in groups, counsel for the defendants had to agree on each challenge, and there was approximately one minute between when the prospective juror was seated and the time at which the jury was sworn; there was no indication of undue delay caused by the momentary oversight by the attorneys that would justify the court's action. (County Ct, Onondaga Co)

Counsel (Right to Counsel)

Sex Offenses (Sex Offender Registration Act)

People v Wilson, 103 AD3d 1178, 960 NYS2d 276 (4th Dept 2/1/2013)

The defendant's waiver of his statutory right to counsel in a Sex Offender Registration Act (SORA) proceeding was invalid because the court did not conduct the required searching inquiry to ensure that the waiver was unequivocal, voluntary, and intelligent where the court did not ask about the defendant's age, experience, intelligence, education, or exposure to the legal system, and did not explain the dangers of proceeding pro se and the advantages of representation by counsel, other than to say that the defendant might be better served by having counsel. (County Ct, Steuben Co)

Driving While Intoxicated (Ignition Interlock Devices)

Sentencing (Modification)

People v Bush, 103 AD3d 1248, 959 NYS2d 361 (4th Dept 2/8/2013)

The portion of the defendant's sentence for felony driving while intoxicated imposing a three-year conditional discharge and an ignition interlock device condition is illegal because the defendant committed the offense prior to November 18, 2009, the effective date of the amendments to Vehicle and Traffic Law 1198 (L 2009, ch 496). (County Ct, Ontario Co)

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

People v Carr, 103 AD3d 1194, 962 NYS2d 520 (4th Dept 2/8/2013)

The defendant's motion to suppress the weapon found in his car should have been granted because the police officer did not have founded suspicion that criminality was afoot when the officer asked the defendant whether there was anything in his car that the officer "should be aware of" where the evidence only showed that the defendant was in his illegally parked car in a "high-crime" area and appeared nervous, and the officer could not recall whether the defendant admitted he was seeking a prostitute before or after the officer asked about the contents of the vehicle. (County Ct, Monroe Co)

Search and Seizure (Weapons-frisks)

People v Johnston, 103 AD3d 1202, 959 NYS2d 343 (4th Dept 2/8/2013)

The court erred in suppressing the weapon found in the defendant's waistband during a weapons-frisk because the officer had a reasonable basis for believing the defendant was armed where: the officer saw the defendant and the co-defendant walking from the driveway of a home toward a car in a public parking lot; there had been a number of daytime residential burglaries; the men were dressed heavily for the mild day; in response to the officer's approach and question, "what's up guys?," the defendant slid down the side of the car away from the officer and the co-defendant put his hands in the pocket of his hooded sweatshirt; and when the officer asked the co-defendant to remove his hands from his pocket, the officer saw the outline of a handgun. (County Ct, Yates Co)+

Fourth Department *continued*

Assault (Attempt) (Evidence) (Serious Physical Injury)

People v Madera, 103 AD3d 1197, 959 NYS2d 337 (4th Dept 2/8/2013)

Reviewed as a matter of discretion in the interest of justice, the defendant's first-degree assault conviction must be reduced to attempted first-degree assault because there is no evidence that the accuser suffered serious physical injury where the testimony and medical records showed that a bullet entered and exited his body around his right nipple, it was not near any vital organs, and it grazed his right arm, there was no evidence that the tiny fragment of the bullet that remained in the accuser's chest posed any risk to him, and the accuser did not need sutures, had a low level of pain, and remained in the hospital the day after the incident only because he said he planned to retaliate against the defendant. (Supreme Ct, Monroe Co)

Counsel (Conflict of Interest)

People v McGillicuddy, 103 AD3d 1200, 959 NYS2d 341 (4th Dept 2/8/2013)

The defendant was deprived of effective assistance of counsel based on a potential conflict of interest where the prosecution planned to introduce in evidence a recorded conversation between the defendant and defense counsel's former client, who was recently convicted of murder, and a statement the defendant gave to the police about the former client. After defense counsel brought the issue to the court's attention, the court erred in failing to determine whether the defendant knew of the potential risk and knowingly chose to continue being represented by his retained lawyer. And the conflict operated on counsel's representation where counsel stated he could not cross-examine the police officer about the defendant's statement about the former client, he stipulated that it was his former client's voice on the recording so he did not have to confront the former client about it, and he did not call the former client to testify about the recorded conversation. Further, given the prosecutor's references to the former client, the court gave a curative instruction to the jury that it could not infer that the defendant was involved in the murder of which the former client was convicted. (County Ct, Oswego Co)

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)

People v Quinn, 103 AD3d 1258, 962 NYS2d 527 (4th Dept 2/8/2013)

The two counts of first-degree offering a false instrument for filing are multiplicitous because they are based on the same instrument and that instrument was offered for filing one time; as a matter of discretion in the interest of justice, the defendant's conviction of first-degree offering a false instrument for filing under count eight of the indictment is reversed and the count is dismissed. (County Ct, Erie Co)

Accusatory Instruments (Sufficiency)

Dismissal

People v Vanalst, 103 AD3d 1227, 959 NYS2d 356 (4th Dept 2/8/2013)

Dismissal of the indictment was improper because it was based on the court's determination of a suppression issue, namely that the police were not justified in pursing the defendant when he fled and then dropped the controlled substance he was charged with possessing. The matter must be remitted for a determination of whether the grand jury evidence was legally sufficient to support the indictment without regard to any alleged violations of the defendant's rights under the Fourth Amendment or article I, § 12 of the New York Constitution. (County Ct, Ontario Co)

Admissions (Instructions) (Voluntariness)

Instructions to Jury (Intoxication)

People v Wolff, 103 AD3d 1264, 962 NYS2d 529 (4th Dept 2/8/2013)

The court erred in refusing to give an intoxication charge because there was sufficient evidence to meet the relatively low threshold for that charge where the accuser testified that several hours before the defendant harassed her, in violation of an order of protection, she and the defendant used marijuana and heroin and the defendant drank alcohol, and she was still "high" at the time of the incident, and the defendant gave similar testimony about the use of drugs and alcohol. The court also erred in refusing to give a voluntariness charge regarding his statements to the police based solely on its ruling at a pretrial *Huntley* hearing that the statements were admissible at trial. (County Ct, Ontario Co)

Appeals and Writs (Briefs) (Counsel)

Counsel (*Anders* Brief)

Sentencing (Appellate Review)

People v Cecce, 104 AD3d 1264, 960 NYS2d 690 (4th Dept 3/15/2013)

Fourth Department *continued*

Appellate counsel filed a brief asking to be relieved as counsel, claiming the appeal is frivolous. A review of the record shows that there is a nonfrivolous issue regarding the legality of the defendant's sentence of concurrent indeterminate terms of 1⅔ to 5 years for felony aggravated driving while intoxicated and felony driving while intoxicated. Counsel is relieved and new counsel is assigned to brief this issue and any others counsel may find. (County Ct, Ontario Co)

Contempt (Elements)

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

People v Coleman, 104 AD3d 1134, 960 NYS2d 769 (4th Dept 3/15/2013)

The defendant's plea to first-degree criminal contempt must be vacated where statements made during his plea colloquy negated essential elements of the crime "inasmuch as his colloquy indicated that the order of protection was not issued pursuant to the statutory sections set forth in Penal Law § 215.51 (c), and that the predicate conviction was not based upon a violation of such an order of protection," and the court failed to inquire further to ensure that the plea was knowingly, voluntarily, and intelligently entered. (County Ct, Monroe Co)

Article 78 Proceedings

Prisoners (Disciplinary Infractions and/or Proceedings)

Matter of Cookhorn v Fischer, 104 AD3d 1197, 960 NYS2d 798 (4th Dept 3/15/2013)

The punishment imposed for the petitioner's violation of various inmate rules, *ie*, confinement in the Special Housing Unit (SHU) for four years and loss of privileges and four years of good time, is so disproportionate to the violations that it shocks one's sense of fairness. Considering that the petitioner was only 17 years old at the time and in light of all the circumstances surrounding the incident and the respondent's disciplinary guidelines, the punishment must be reduced to 18 months in the SHU and a loss of 18 months' good time credit and phone, commissary, and package privileges.

The part of the proceeding seeking an order declaring, among other things, that the respondent must consider the age of 16 and 17 year old prisoners housed in state adult correctional facilities as a mitigating factor in all disciplinary proceedings was improperly transferred to this court; the declaratory judgment action is severed and remitted to the Erie County Supreme Court for further proceedings.

Appeals and Writs (Judgments and Orders Appealable) (Scope and Extent of Review)

Identification (*Wade* Hearing)

Motions (Pre-trial)

People v Dark, 104 AD3d 1158, 960 NYS2d 779 (4th Dept 3/15/2013)

Because the record does not indicate that the court ruled on the defendant's motion for a *Wade* hearing regarding the identification procedures referenced in the prosecution's CPL 710.30 notice, the case is held, decision is reserved, and the matter is remitted for a determination of the defendant's hearing request. (County Ct, Erie Co)

Driving While Intoxicated (Ignition Interlock Devices)

Sentencing (Conditional Discharge) (Cruel and Unusual Punishment) (Excessiveness)

People v Dexter, 104 AD3d 1184, 960 NYS2d 773 (4th Dept 3/15/2013)

The defendant failed to preserve his claim that his sentence to an indeterminate term of 1 to 3 years' incarceration and a consecutive one-year period of conditional discharge with an ignition interlock device requirement are unconstitutional multiple punishments, and his sentence is not unconstitutionally disproportionate to the offense of felony driving while intoxicated. Because he was convicted of a felony, the defendant should have been sentenced to a three-year conditional discharge term. While not raised before the sentencing court or on appeal, this Court cannot allow the defendant's illegal sentence to stand; the sentence is vacated and the matter is remitted for the court to give the defendant the opportunity to accept an amended lawful sentence or to withdraw his plea. (County Ct, Cattaraugus Co)

Habeas Corpus (State)

Sentencing (Post-Release Supervision) (Pronouncement)

People ex rel Finch v Brown, 104 AD3d 1133, 960 NYS2d 669 (4th Dept 3/15/2013)

The Department of Corrections and Community Supervision lacked the authority to impose a one-year term of post-release supervision. The sentencing court failed to pronounce a period of post-release supervision as required by CPL 380.20 and 380.40(1) when it stated, at sentencing, that the supervisory period under the violent felony offender statute will be five years and that the petitioner will be on parole for five years at the end of his ten year sentence. (County Ct, Livingston Co)

Fourth Department *continued*

Assault (Evidence) (Lesser Included Offenses)

Burglary (Degrees and Lesser Offenses) (Evidence)

Misconduct (Prosecution)

People v Haynes, 104 AD3d 1142, 960 NYS2d 572 (4th Dept 3/15/2013)

There is legally insufficient evidence of physical injury to sustain convictions of first-degree burglary and second-degree assault where the accuser testified that: he was hit in the arm, neck, and head with a baseball bat; he got a bruise on his arm that did "'[n]ot [last] at all'" and did not appear in a picture of his arm taken shortly after the incident; his neck was bruised and he had a bump on his head, neither of which was visible in the photo in the record; he was examined by medical personnel at the hospital, "'but it wasn't serious'"; and "his injuries hurt only '[a] little bit,' and that the pain lasted 'a couple of days, no longer than a week.'"

By not objecting to most of the prosecutor's alleged improper statements made during voir dire and throughout the trial, the defendant failed to preserve for review his claim that he was denied a fair trial; although certain comments by the prosecutor were improper, they did not deprive the defendant of a fair trial when viewed in the totality of the circumstances of the case. (County Ct, Ontario Co)

Jurisdiction

Probation and Conditional Discharge (Revocation)

People v Julius, 104 AD3d 1204, 960 NYS2d 881 (4th Dept 3/15/2013)

Unlike probation violation petitions under the Family Court Act and accusatory instruments under the CPL, there is no requirement in CPL article 410 that statements in violation of probation petitions in criminal court contain nonhearsay allegations. Assuming there was such a requirement, the lack of nonhearsay allegations in a violation petition would not constitute a jurisdictional defect because the court's jurisdiction is not founded on the petition; the petition does not start a new proceeding, it is a new step in an existing one. (Supreme Ct, Erie Co)

Driving While Intoxicated (Ignition Interlock Devices)

Probation and Conditional Discharge (Revocation)

Sentencing (Conditional Discharge)

People v Panek, 104 AD3d 1201, 960 NYS2d 801 (4th Dept 3/15/2013)

Upon revoking the defendant's probation sentence, the court correctly sentenced the defendant to a 1 to 3 year indeterminate term of incarceration and, pursuant to Penal Law 60.21, a post-incarceration term of conditional discharge with an ignition interlock device requirement. The defendant's argument that the sentence violated 60.01(2)(d) is without merit as 60.21 applies notwithstanding 60.01(2)(d). Even assuming that the court should have advised the defendant of the conditional discharge term before he admitted to violating his probation, the proper remedy would be vacatur of the admission and not the striking of the conditional discharge. (County Ct, Cayuga Co) ⚖

This year's traditional "group photo" of participants, faculty, and NYSDA staff at the Basic Trial Skills Program.

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