NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXVIII Number 4 November–December 2013

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Defender News

Court of Appeals Rules on a Number of Significant Criminal Cases

The Court of Appeals issued well over 25 decisions in criminal cases from Nov. 14 to Dec. 17, summarized in this issue of the *REPORT*. Topics of the decisions ranged across a wide spectrum, including:

- consecutive sentences are authorized for charges of simple gun possession and crimes committed later with the same gun (*Brown*);
- the controlling sentencing date for determining the sequence of past and current convictions under the sentence enhancement statutes "is the original date on which the defendant received a lawful prison term" regardless of whether post-release supervision was properly imposed with that prison term (*Boyer*);
- a police officer's testimony about an accuser's description of a perpetrator may be admissible under *People v Huertas* (75 NY2d 487) where it does not tend to mislead the jury (*Smith*); and
- failure to advise a defendant of any of the constitutional rights waived by a guilty plea, where there was no record indication that defendant spoke with counsel about the constitutional consequences, warranted reversal, though there is still no "mandatory catechism" for taking a plea (*Tyrell*).

Credit Calculation for Consecutive Definite Sentences Clarified

The Court also issued a decision in a case in which NYSDA and the Center for Community Alternatives filed an amicus brief. The Court agreed that for people serving consecutive definite sentences that in the aggregate exceed the two-year cap set by Penal Law 70.30(2)(b), any jail and good time credits should be deducted from the two years set by the cap, not from the full aggregated sentences as has been the practice in some local jails, which had effectively required people in this situation to serve two full calendar years, denying them any tangible benefit from jail and good time credits. *People ex rel Ryan o.b.o. Shaver v Cheverko*, 2013 NY Slip Op 07760 (11/21/2013).

Oddone *Decision Contains Three Evidentiary Rulings of Note*

The Court addressed three significant evidentiary issues in a first-degree manslaughter case out of the Second Department, as noted in a Dec. 19, 2013 post on the New York Criminal Defense blog, written by Jill Paperno of the Monroe County Public Defender Office.

Reversing the conviction in *People v Oddone* (2013 NY Slip Op 08291 [12/12/2013]), the Court said that the trial court erred by disallowing defense counsel's effort to refresh a defense witness's recollection about the length of time a portion of the incident lasted. The witness's testimony implied that her recollection could benefit from being refreshed, and, the Court of Appeals said, it was unfair to let the jury hear her testimony without letting the defense make use of an earlier, more favorable statement. Underlying the decision is *Chambers v Mississippi* (410 US 284 [1973]). In the blog post, Paperno notes:

> In *Chambers* the United States Supreme Court held that a state's evidentiary rule is trumped by and cannot preclude a defendant [from introducing] reliable evidence consistent with his right to present a defense. Subsequently, the Court, citing *Chambers*, rul[ed] that "the hearsay rule may not be applied mechanistically to defeat the ends of justice" (*Green v Georgia*, 442 US 95, 97 [1979]). And now the New York Court of Appeals has cited *Chambers* for this same proposition. This is a holding that one would be wise to keep in the pocket for a rainy day or for your next trial.

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Reversal on that ground rendered academic a further question: did the court err in not allowing a defense expert to testify about the tendency of witnesses to overestimate the duration of short events? The Court advised that should the issue recur on retrial, the trial court should take into consideration factors such as whether it would be unfair to deprive the jury of expert testimony about the reliability of eyewitness observations, the emphasis the prosecution puts on duration testimony, and whether expert testimony might obscure the main issue in the jury's mind.

Finally, the Court of Appeals found no error in the trial court allowing a deputy medical examiner to testify based on his personal experience about how long it would take for certain medical symptoms to occur when someone was placed in a headlock, but cautioned that not all expert testimony that is "prefaced by the words 'in my experience'" is admissible.

Padilla *Issues Addressed, More to Come*

The Court rejected a contention that the U.S. Supreme Court had set a new rationality standard as to the *Strickland* prejudice requirement for ineffective assistance of counsel for failure to inform a defendant of deportation consequences of a guilty plea as called for by *Padilla v Kentucky*. *People v Hernandez*, 2013 NY Slip Op 07658 (11/19/2013).

In *People v Peque* (2013 NY Slip Op 07651 [11/19/2013]), a majority made up of different judges on different aspects of the decision written by Judge Abdus-Salaam held that trial courts must apprise defendants that if they are not United States citizens they may be deported as a result of pleading guilty to a felony. A portion of *People v Ford* (86 NY2d 397) was overruled, while *Ford*'s central holding on the distinction between direct and collateral consequences of a plea was specifically reaffirmed. The Court also set out a requirement that defendants seeking to overturn a conviction based on lack of the now-required judicial advice will have to show a reasonable probability that if such advice was given, the defendant would have chosen to go to trial. An analysis of the decision by the Immigrant Defense Project (IDP) is available on their website.

Pending before the Court is a case that raises the question of whether, under the State Constitution, the requirements of *Padilla* regarding counsel's advice about immigration consequences should be applied retroactively. Leave to appeal was granted on June 5, 2013 in *People v Baret* (99 AD3d 408 [1st Dept 2012] *lv granted* 21 NY3d 1002 [2013]). A grant of leave to appeal in *People v Andrews* (108 AD3rd 727 [2nd Dept 2013]) [summarized on p. 28] in November was not on the retroactivity issue unsuccessfully raised in a 440 motion but as to a coram nobis denial. The U.S. Supreme Court has held *Padilla* not retroactive under federal constitutional law. *Chaidez v United States*, 133 SCt 1103 (2013).

NYSDA Assists with Immigration Issues in Criminal and Family Court Cases

NYSDA, which had signed onto an amicus brief in *Chaidez*, reported on that decision earlier this year. Through its Criminal Defense Immigration Project, NYSDA continues to offer training and assistance to lawyers about the intersection of immigration and criminal and family law. A New York Crimes & Immigration Seminar held on Nov. 2, 2013, in New York City was co-sponsored by NYSDA, IDP, National Immigration Project of the National Lawyers Guild, NYU School of Law Immigrant Rights Clinic, and Law Offices of Norton Tooby. Attorneys with questions about immigration matters in the context of criminal or family court matters may contact the Backup Center.

Decision Offers Reminder to Carefully Review Accusatory Instruments

In *People v McGinnis* (2013 NY Slip Op 23353 [Criminal Ct, New York Co 10/15/2013]), the court dismissed an accusatory instrument as facially insufficient, finding that the totality of the facts alleged in the instrument and those that could be extrapolated from the boilerplate check-off-type supporting deposition failed to set forth sufficient facts to support the charge of loitering for the purpose of prostitution. The court concluded: "The lengthy analysis of the weaknesses in the pre-fabricated form was not done to suggest that forms should not be used at all or that officers should not rely upon their training and experience in eval-

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uating street situations. Rather, it was done with an eye towards emphasizing the need for an individualized recitation of facts which set forth the elements of an offense based upon the actual observations of the deponent in a given case." This decision serves as a practice reminder about the importance of carefully reviewing check-the-box and other bare bones accusatory instruments.

Parole and Probation Updates

Assembly Committee on Correction Holds Hearing on Parole

On Dec. 4, 2013, the Assembly Standing Committee on Correction held a public hearing that "focus[ed] on the implementation and effectiveness of the processes utilized by the Board of Parole in determining who should be released from prison and who should remain incarcerated." Many of the witnesses who testified at the hearing criticized the Parole Board, including its use of video conferencing for parole release hearings and its failure to comply with the 2011 law that required the Board to establish "written procedures for its use in making parole decisions." (L 2011, ch 62, part C, subpart A.) A number of witnesses emphasized the need for reform, such as the enactment of the SAFE Parole Act (S.1128/A.4108).

Written testimony of the Department of Corrections and Community Supervision (DOCCS) Acting Commissioner Anthony J. Annucci and Board of Parole Chairwoman Tina Stanford are available on the DOCCS website, and testimony of a few witnesses are also posted online: Correctional Association of New York, Release Aging People in Prison Campaign, and Professor Philip Genty (Director of the Prisoners and Families Clinic at Columbia Law School). The agenda for the Dec. 4 meeting, along with video and audio of the hearing are available on the Assembly's archived video web page.

Parole Board Issues Proposed Regulation—Procedures for Parole Decisions

Two days before the Assembly hearing, the Board of Parole submitted a notice of proposed rulemaking to the Secretary of State; the text of the proposed regulation appears on the DOCCS website and the notice was published in the Dec. 18, 2013 issue of the State Register. However, the proposed regulation was not made public until a couple of days after the hearing.

The proposed regulation purports to comply with the 2011 law noted above and discussed in the May-July 2013 issue of the *REPORT*. But it does not specify any "procedures" for use of the Parole Board's COMPAS risk assessment instrument; it merely states that Board members must consider "the most current risk and needs assessment that may have been prepared by [DOCCS] pursuant to [Correction Law 71-a]," along with 11 other factors, when making parole release decisions.

The proposal has already received criticism from the Center for Community Alternatives and the Correctional Association of New York, and NYSDA will be submitting comments on the proposal in the coming weeks. The deadline for comments is Feb. 1, 2014; comments should be submitted to Terrence X. Tracy, Counsel, Board of Parole, Dept. of Corrections & Community Supervision, Parole Board, The Harriman State Campus- Bldg. #2, 1220 Washington Avenue, Albany, New York 12226-2050, email terrence.tracy@doccs.ny.gov. If you submit comments, please send a copy of them to the Backup Center.

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

State Probation Starts Justice Mental Health Collaboration Program in Five Counties

The Office of Probation and Correctional Alternatives (OPCA) has started a new Justice Mental Health Collaboration Grant Program that will be implemented in up to 10 Operation IMPACT counties. The program, which is being funded by a $250,000 grant from the U.S. Department of Justice, Bureau of Justice Assistance (BJA), is designed to "reduce crime and achieve more successful outcomes for individuals with mental illness engaged in the criminal justice system." The first phase of the program will be implemented in Monroe, Nassau, Rensselaer, Schenectady, and Westchester counties. OPCA is partnering with the Office of Mental Health (OMH) to implement the program and OMH has announced that it will give $100,000 to county mental health departments in the five counties "to work on screening, assessment, treatment and pre-release planning for individuals detained and sentenced in local jails." More information about the program is available in the Dec. 17, 2013 issue of OPCA's e-Focus and the BJA website, as well as the Council of State Government's website.

NYSDA, Others, Criticize Sentencing Commission Proposals

NYSDA and ten other criminal defense and re-entry organizations signed on to a letter in November criticizing a Sept. 12 proposal by the New York State Permanent Commission on Sentencing for converting sentences for

non-violent felony offenses from indeterminate to determinate. Citing problems with the Sentencing Commission's methodology and data, the coalition stated its deep concern "that if enacted into law the Commission's latest proposal will, on balance, result in harsher sentences." Copies of the letter and proposal are available from the Backup Center.

Family Law Updates

Latest Issue of The New York Children's Lawyer *Now Available*

The December 2013 issue of *The New York Children's Lawyer* is now available. The newsletter, a publication of the Attorneys for Children programs in the four Judicial Departments, is now an online-only publication that will be available tri-annually in April, August, and December. Prior issues of the publication are available through the websites of the Office of Attorneys for Children for the Third Department and the Attorneys for the Child Program for the Fourth Department.

Child Welfare Court Improvement Project Announces Upcoming Training

The Unified Court System's Child Welfare Court Improvement Project will be hosting two training programs in Queens at the beginning of next year. The first trainer, titled "Working with traumatized children and families in Family Court — Theoretical and clinical considerations," will be held on Jan. 9, 2014. The second program, scheduled for Feb. 6, 2014, will focus on cultural trauma. Video from prior training programs is available on the Project's training video archive page.

Factsheet on Disclosure of Confidential Child Abuse and Neglect Records

The U.S. Department of Health and Human Services, Children's Bureau has released a factsheet on "Disclosure of Confidential Child Abuse and Neglect Records," which provides details about state laws governing who may access confidential records of child abuse and neglect reports and investigations, under what circumstances information may be disclosed and how it may be used, as well as summaries of the applicable law in each state and U.S. territory.

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

Forensic Lab Deficiencies and Need for Oversight Discussed by State and NYC

Investigation of NYC's Office of the Chief Medical Examiner

Earlier this month, the State Office of the Inspector General released a report on its investigation into the Forensic Biology Department of the New York City Office of the Chief Medical Examiner (OCME). The report details problems at the department, including the deputy director's resignation earlier this year for failing to follow lab protocol and the continued employment of a lab technician despite the technician's consistently poor reviews and underperformance; during the technician's employment, several significant errors went undetected.

Recommendation for Forensic Labs in NY

The report includes a recommendation that labs throughout the state

> consider protocols to document and report significant disagreement surrounding data analyses and conclusions. In that vein, testing and case notes that reflect such dissension should be maintained in the case file. The New York State Commission on Forensic Science, as part of the statutory requirement to 'develop minimum standards' in order to 'increase and maintain the effectiveness, efficiency, reliability, and accuracy of forensic laboratories, including forensic DNA laboratories' throughout New York State, should determine what is deemed 'significant disagreement,' thereby requiring memorialization of such dissension in final reports.

NYC Passes Laws to Increase Oversight of OCME

The New York City Council has enacted two laws that increase oversight and transparency of the OCME. Local Law 85, which takes effect in April 2014, requires the OCME to conduct root cause analysis and under certain circumstances, to report the results to the prosecution and defense. The other law, Local Law 86, requires the OCME to post a number of documents on its website, including the newly required annual proficiency testing report and copies of current and former manuals, guidelines, and other documentation of procedures or protocols. The OCME has posted current manuals and protocols on evidence and case management, forensic mitochondrial DNA analysis, forensic STR analysis, quality assurance and quality control, and serology.

Commission on Forensic Science Meetings Are a Valuable Resource

The state Commission on Forensic Science meets approximately three times a year to review lab accreditation requests, disclosures by laboratories, and other issues affecting labs around the state. The agenda and other

meeting documents are usually posted on the DCJS Open Meetings page in advance of the meeting and video and meeting minutes are available shortly after the meeting. These meetings are a source of valuable information for public defense attorneys who handle cases that involve forensic science evidence. The meeting documents often contain details about corrective action requests made by accrediting organizations and other issues at individual labs and provide ideas for the types of documents and information counsel should request during discovery.

The most recent Commission meeting was held on Dec. 11, 2013. At that meeting, the Commission discussed the Inspector General's report about the OCME, reviewed the State Police Crime Laboratory's request for accreditation, and discussed documents provided by the Erie County Central Police Services Forensic Laboratory about its remediation efforts. Other meeting documents included the self-evaluations done by seven labs for the American Board of Forensic Toxicology; the evaluations include information about each lab's forensic toxicology testing procedures and policies.

During that meeting, the Commission also voted to have the DCJS Office of Forensic Services survey latent fingerprint examiners; under current Executive Law 995(1), agencies that perform latent fingerprint comparisons are exempt from state accreditation requirements. The survey will request information about the number of entities and analysts performing these comparisons, the level of training for analysts, the volume of work, and participation in statewide or other proficiency testing. The survey was requested by Commission member Kathleen Corrado who sent a letter to Commission members noting her concern about the "significant disparity in requirements for latent print examinations performed in an accredited laboratory and by non-accredited entities within the state."

Quality of Public Defense Services Addressed Near Year's End

As 2013 ended, improving the quality of public defense services — which is NYSDA's mission — was an issue in state and local proposals around New York, and in court decisions here and elsewhere.

Federal Court Finds Washington Municipalities Fail to Provide Quality

The federal District Court in Seattle found that the public defense systems in two Washington municipalities deprived clients facing misdemeanor charges of the right to effective assistance of counsel. The findings of fact in *Wilbur v City of Mt. Vernon* (No. C11-1100RSL [WD Wash 12/4/2013]) begin with the statement that plaintiffs showed "defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation." Information about the case can be seen on the website of the American Civil Liberties Union of Washington State, which brought the litigation.

Case Discussed on New Public Defense Website

The *Wilbur* case is also discussed on the website of the newly formed National Association for Public Defense (NAPD). NAPD is described as "a national organization of men and women: public defenders; assigned counsel; mitigation specialists; social workers; investigators; sentencing advocates; IT; administrative support; trainers and educators; and other disciplines singularly devoted to promoting the policies and ideals of strong and effective public defense services."

Trial in Hurrell-Harring *to Begin on Last Day of* Gideon *Anniversary Year*

Here in New York, the class action suit by the New York Civil Liberties Union (NYCLU) and a private law firm moved toward trial after Albany County Supreme Court Justice Eugene Devine, on Dec. 17, denied summary judgment motions by both sides. Trial is set for Mar. 17, 2014 — the day before *Gideon*'s 51st anniversary. That leaves time for the parties in *Hurrell-Harring v State of New York* to agree to a settlement in this 50th anniversary year of the landmark right to counsel case.

NYSDA has urged Governor Cuomo to use his leadership to settle the case in a way that advances public defense quality statewide. This point has been made, among other places, on NYSDA's Gideon Anniversary blog. If the case does go to trial, it would be a first; as lead counsel for the plaintiffs, Corey Stoughton of the NYCLU, noted in a *Times Union* article, similar systemic suits in Montana, Michigan, and Georgia all settled before trial.

ILS Office Publishes Estimate of Cost for Upstate Compliance with Caseload Standards

The Indigent Legal Services (ILS) Office issued a report on Dec. 11, 2013, entitled "An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York." The report concludes that "a minimum of an additional $111,214,533 is required to bring the upstate counties of New York State into compliance with maximum national caseload limits." According to the report and its Executive Summary and transmittal memo, the analysis addresses caseloads outside New

York City's five boroughs because that area is not covered under existing state law and funding for caseload reduction for the City's institutional public defense providers. A Request for Proposals for an Upstate Quality Improvement and Caseload Reduction Grant, issued by the ILS Office in August, will provide up to $4 million per year for three years, which is nowhere near the estimated amount the ILS Office concluded would be necessary to bring non-NYC counties into compliance with even the too-high maximum national caseload limits. Announcement of the grant awardees is expected in Jan. 2014.

Ulster County Public Defenders Put Racial Disparity on the Record

According to a *Kingston Times* article, after Kingston police conducted a drug sweep that placed 21 people under arrest, public defenders appearing at arraignment with clients from the sweep asked that the record reflect the race of each black client being arraigned. "We simply wanted to establish the racial disparity that exists in the criminal justice system," Ulster County Public Defender Andrew Kossover explained in the article, adding, "That unwarranted disparity causes a range of collateral consequences for marginalized communities of color."

Conversation and activism have arisen around the systemic issues underlying those blatant racial disparities, both in the Lower Hudson Valley and nationwide. The End the New Jim Crow Action Network in Kingston, discussed in the article, is but one of many groups sparked by the resonance of Prof. Michelle Alexander's book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness.*

Stop-and-Frisk Policies Continue to Get Attention

The stop-and-frisk controversy in New York City (see *REPORT*, Vol. XXVIII, No. 3 (Aug-Oct. 2013, p. 1) is bringing race issues in the criminal justice system to the fore. In November, the Civil Rights Division of the Attorney General's Office issued "A Report On Arrests Arising From The New York City Police Department's Stop-And-Frisk Practices." It notes that "stop-and-frisk data confirm that racial disparities documented in stops continue through arrest, disposition, and sentencing."

And where a stop is found to have a legitimate basis, challenging it on the basis that it was a "pretext" — racial or otherwise — is hard in New York State. As noted in a post on the New York Criminal Defense Blog, New York law unfortunately "permits pretext stops and turns a blind eye to the racial disparity in how the stops are conducted (*People v. Robinson*, 97 N.Y.2d 341, 346 [2001])."

Raise-the-Age Proposals Raise Questions

An example of the complex interests involved in almost any change to the criminal and/or family court system appeared in a recent *Watertown Daily Times* article discussing an on-going effort to raise the age of criminal responsibility in New York to 18. New York is currently one of only two states that currently set the age of criminal responsibility at 16, as the notice of a Dec. 6, 2013 Assembly hearing pointed out.

The *Daily Times* said that at the hearing, the president of the County Attorneys' Association of the State of New York expressed "concerns that, if the prosecution of 16- and 17-year-olds was shifted from County Court to Family Court, county attorneys would be responsible for the cases instead of district attorneys." County attorneys, he noted, don't receive state aid-to-prosecution funds, which district attorney offices get, and generally do not have large staffs. Public defense programs that suffer from the lack of parity with prosecutors may be interested to see similar disparity issues arise between District Attorneys and County Attorneys.

Potential Effects on Public Defense

Public defense providers would be affected by a change in the age as well. As St. Lawrence County Public Defender Stephen Button pointed out, according to the *Daily Times*, moving 16- and 17-year-olds from criminal court to family court would likely affect the number of cases handled by public defender offices.

While such a change could provide welcome caseload relief if not accompanied by a budget reduction, public defense programs providing representation at county expense under County Law article 18-B understandably worry that dropping 16- and 17-year-old clients will lead to budget cuts that would make current underfunding worse.

Juveniles who appear in Family Court on delinquency petitions are represented by lawyers designated "attorneys for the child," formerly known as law guardians. *See* Family Court Act 249. While county assigned counsel panels may be utilized in assigning these lawyers, administration and compensation of attorneys for the child falls to the Appellate Divisions. *See* Family Court Act 243 and 245, Judiciary Law 35. *See also* the Unified Court System website, at, among others Attorney for the Child Contracts, First Department Office of Attorneys for Children; Second Department Attorneys for Children Program; Third Department Office of Attorneys for Children; and Fourth Department Attorneys for Children Program.

Some aspects of New York State's provision of attorneys for children might offer the possibility of improving the representation justice-involved 16- and 17-year old youth receive. State funding and stricter training require-

ments than are available to public defense lawyers are among those advantages. However, housing the defense function in the judiciary does not provide the independence that relevant standards require of government-funded legal representation.

Good Policy vs. Fiscal Policy?

Lewis County Undersheriff James M. Monnat noted in the *Daily Times* article that new evidence on child development and cognitive thinking has led to the reconsideration of where and how proceedings for justice-involved youth should occur. But addressing the issue in a way that leads to greater unfunded mandates is not acceptable to county officials. Through entities like the New York State Association of Counties, counties "oppose state imposed unfunded mandates and cost shifts to localities" in any form.

The cost of reform is the major battle that proponents of raise-the-age face. Proponents include the New York Center for Juvenile Justice — whose goal is "Judging Children as Children" — and its founder, former Judge Michael Corriero. "Despite all the evidence supporting reform, Corriero has struggled to convince others. 'It's a tough sell when nobody is talking about spending money,'" Corriero has said. The article, "Raising the Age: One Step Towards Fixing The Juvenile Criminal System," detailing Corriero's efforts to reform the juvenile system appeared in The Bronx Ink. ⚖

Representatives from NYSDA who attended the 2013 Annual Conference of the National Legal Aid and Defender Association in Los Angeles met informally with representatives of Silicon Valley De-Bug, "a media, community organizing, and entrepreneurial collective" working to advance the rights of those impacted by the criminal justice system and others. Raj Jayadev of De-Bug (far end of table in white shirt) was the keynote speaker at the Defender Caucus.

Conferences & Seminars

Sponsor: National Association of Criminal Defense Lawyers
Theme: Collateral Consequences Conference & Midwinter Meeting
Dates: March 5-8, 2014
Place: New Orleans, LA
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Association for Public Defense (NAPD)
Theme: Litigating Junk Science
Dates: March 10-11, 2014
Place: Dayton, OH
Contact: NAPD: website http://publicdefenders.us/?q=node/41

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

Sponsor: National Association of Criminal Defense Lawyers
Theme: 7th Annual Forensic Science & the Law Conference & Spring Meeting
Dates: May 15-18, 2014
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

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

By Susan Bryant*

Weapons and Ammunition—NY SAFE Act

➢ **Chap. 1 (S.2230) (New York Secure Ammunition and Firearms Enforcement Act). Effective: Varies (as amended by Chap. 57, Part FF and Chap. 98)**

The New York Secure Ammunition and Firearms Enforcement Act of 2013 (NY SAFE Act) includes multiple amendments and additions to the Criminal Procedure Law (CPL), Penal Law, Family Court Act (FCA), Domestic Relations Law (DRL), and Mental Hygiene Law.

New crimes include:

- Criminal possession of a firearm (Penal Law § 265.01-b), a class E felony;
- Aggravated criminal possession of a weapon (§ 265.19);
- Aggravated enterprise corruption (§ 460.22);
- Safe storage of rifles, shotguns, and firearms when the owner lives with a person who is prohibited from possessing such weapons (§ 265.45);
- Unlawful possession of a large capacity ammunition feeding device (§ 265.36);
- Unlawful possession of certain ammunition feeding devices (§ 265.37); and
- "Mark's Law," which creates a new category of aggravated murder when the intended victim was a first responder (§ 125.26) and adding that category to the list of victims under first-degree murder (§ 125.27).

Other offenses have been upgraded and amended and the definitions of assault weapons (Penal Law § 265.00[22]) and large capacity ammunition feeding devices (§ 265.00[23]) have been amended.

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

A section-by-section summary of the NY SAFE Act (chapters 1 and 57) is available by contacting the Backup Center. The state has created a website about the SAFE Act, which is available at www.governor.ny.gov/nysafe-act/gun-reform.

Chapter 98 amends Penal Law §§ 265.00, 265.20, and 400.00 to create a limited exception to the limitations on possession of large capacity ammunition feeding devices and assault weapons for qualified retired New York or federal law enforcement officers.

Penal Law

➢ **Chap. 162 (S.1079-A) (Intentional killing of police dog or horse). Effective: November 1, 2013.**

Adds Penal Law § 195.06-a, making it a class E felony to intentionally kill a police work dog or police work horse while the dog or horse "is in the performance of its duties and under the supervision of a police officer."

➢ **Chap. 172 (A.2623-A) (Aggravated assault upon a child — look-back period extended). Effective: July 29, 2013.**

Amends Penal Law § 120.12 to expand the look-back period for prosecutions of aggravated assault upon a child less than eleven. Before the amendment, a defendant 18 years old or older could be charged with this Class E felony if he or she committed third-degree assault against a child less than eleven and had previously been convicted of such crime against a child less than eleven within the preceding three years. The new look-back period is ten years.

➢ **Chap. 180 (A.1394-A) (Aggravated harassment of employee by inmate — throwing contents of toilet bowl). Effective: November 1, 2013.**

Amends Penal Law § 240.32 to add throwing the contents of a toilet bowl to actions that constitute aggravated harassment of an employee by an inmate.

➢ **Chap. 186 (A.3180-A) (Unlawful manufacture, production, or reproduction of VINs). Effective November 1, 2013.**

Adds a new subdivision (4) to Penal Law § 170.65 that provides that a person is guilty of forgery of a vehicle identification number (VIN) when:

> "He or she, with the intent to defraud, knowingly manufactures, produces or reproduces a vehicle identification number label, sticker or plate which was not manufactured, produced or reproduced in accordance with the rules and regulations promulgated by the United States National Highway Safety Administration and/or in accordance with the provisions of the state vehicle and traffic law." (Class E felony).

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*Susan Bryant is a Backup Center Staff Attorney and the co-editor of the Backup Center REPORT.

➢ **Chap. 259 (S.4160-A) (Second-degree assault of a prosecutor). Effective: January 27, 2014.**

Amends Penal Law § 120.05(3) and (11) to make it a class D felony to assault a prosecutor, as defined in CPL § 1.20(31), with the intent to prevent the prosecutor from performing a lawful duty or with the intent to cause physical injury while the prosecutor is performing an assigned duty.

➢ **Chap. 356 (S.337-A) (Restitution for volunteer fire companies). Effective: September 27, 2013.**

Amends Penal Law § 60.27(10) to add volunteer fire companies to the list of victims that may receive restitution for out-of-pocket losses in first-, second-, and third-degree arson cases.

➢ **Chap. 525 (A.7182) (Refund of surcharges or fees — procedure). Effective: December 18, 2013.**

Amends Penal Law § 60.35(4) to conform the law on refunds of surcharges or fees to the current practice so that applications for such refunds are sent to the department, agency, or court that collected the surcharge or fee, except in town and village court cases, rather than the State Comptroller. Applications for refunds of surcharges or fees collected in a town or village court still must be made to the Comptroller.

➢ **Chap. __ (S.4664-A) (Graduated probation sentences, pre-sentence investigations in NYC). Effective: Upon Governor's signature, with exceptions noted below.**

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 also extend the remaining period of probation up to the maximum term authorized by [65.00];" a similar amendment is made to CPL § 410.70(5). 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.

Note: This bill was passed by the Senate and Assembly on June 19, but has not been sent to the Governor for signature.

Criminal Procedure Law

➢ **Chap. 7 (A.196) (Final order of observation — transmission of names of possible victims). Effective: March 15, 2013.**

Amends CPL §§ 730.40(1) and 730.50(1) to require, upon the issuance of a final order of observation, the district attorney to send to the Commissioner of the Office of Mental Health or the Commissioner of the Office for Persons with Developmental Disabilities a list of names and contact information of persons who may reasonably be expected to be the victim of any assault, violent felony offense, or offense listed in CPL § 530.11 that would be carried out by the committed person. Also makes conforming amendments to CPL §§ 730.40(2), 730.50(1), and 730.60(6) and Mental Hygiene Law § 29.11.

➢ **Chap. 287 (S.5125) (Local criminal court jury selection). Effective: July 31, 2013 (applies to trials commenced on or after that date).**

Amends the first sentence of CPL § 360.20 to provide: "If no challenge to the panel is made as prescribed by section 360.15, or if such challenge is made and disallowed, the court must direct that the names of not less than six members of the panel be drawn and called." [Underlined text is new.]

➢ **Chap. 480 (A.6547-B) (Order of protection — person in whose favor the order is issued may not be charged with/arrested for violating the order). Effective: November 13, 2013.**

Amends CPL § 140.10(4) to provide that the person in whose favor an order of protection or temporary order of protection is issued "may not be held to violate an order issued in his or her favor nor may such protected party be arrested for violating such order." Also amends CPL § 530.12(6), (8) to require that such orders state that they will "remain in effect even if the protected party has, or consents to have, contact or communication with the party against whom the order is issued" and can only be modified or terminated by the court, and that a protected party cannot be charged with or arrested for violating such an order. Makes similar amendments to DRL §§ 240(3)(b) and 252(2) and FCA §§ 155(3), 168(3), 446, 551, 656, 759, 842, 846, and 1056. The amendments to the DRL, FCA § 168(3), and CPL § 530.12(6) are effective January 12, 2014 and apply to orders issued on or after that date.

➢ **Chap. __ (A.8071-A) (16- and 17-year old charged with a prostitution offense — conversion to PINS proceeding). Effective: Upon Governor's signature.**

Adds a new CPL § 170.80, Proceedings regarding certain prostitution charges; certain teenagers, which provides:

> Notwithstanding any other provision of law, when a person is arrested for prostitution or loitering for the purposes of prostitution and such offense allegedly occurred when the person was sixteen or seventeen years of age:
>
> 1. unless, after consultation with counsel a knowing and voluntary plea of guilty has been entered to such charge, any judge or justice hearing any stage of such case may, upon consent of the defendant after consultation with counsel, convert such charge and retain it as a person in need of supervision proceeding for all purposes and shall have the authority to grant any relief available under article seven of the family court act.
>
> 2. Any adverse finding and all records of the investigation and proceedings relating to such charge shall be promptly expunged upon the person's eighteenth birthday or the conclusion of the proceedings on the charge before the court, whichever occurs later. In the event of a conviction or plea of guilty to such charge or charges of prostitution or loitering for the purposes of prostitution as described in the opening paragraph and subdivision one of this section, the court must find that the person is a youthful offender and proceed in accordance with article seven hundred twenty of this chapter, provided, however, that where the conviction for which the youthful offender finding is substituted is loitering for the purposes of prostitution as defined in section 240.37 of the penal law, the available sentence shall be the sentence that may be imposed for a violation as defined in the penal law.

Note: This bill was passed by the Senate and Assembly on June 21, but has not been sent to the Governor for signature.

Vehicle and Traffic Law

➢ **Chap. 169 (A.2285-A) (Ignition interlock device laws expanded). Effective: November 1, 2013.**

Amends several provisions of the ignition interlock provisions of Leandra's Law:

- VTL § 511(3)(a) is amended to add subparagraph (iv) to make it first-degree aggravated unlicensed operation of a motor vehicle to operate a motor vehicle while holding a conditional license issued pursuant to VTL § 1196(7)(a) and while under the influence of alcohol or a drug under VTL § 1192(1)-(5).
- VTL § 1193(1)(b), (c) is amended to:
  - — apply the ignition interlock requirement to youthful offenders;
  - — extend the minimum ignition interlock period to 12 months, but allow the court to terminate the period earlier if the person provides proof that a device was installed and maintained for at least 6 months; and
  - — provide that the interlock period starts from the earlier of the date of sentencing or the date a device was installed in advance of sentencing.
- VTL § 1198(4)(a) is amended to provide that good cause for failure to install a device may include a finding that the defendant does not own a motor vehicle if the defendant states under oath that he/she does not own a motor vehicle and will not operate one during the ignition interlock period; and to give the term "owner" the same meaning as in VTL § 128.

➢ **Chap. 55 (S.2605-D, Part C) (Fines for texting and cell phone violations). Effective: July 26, 2013.**

Increases the fines for violations of VTL §§ 1225-c (use of mobile telephones) and 1225-d (use of portable electronic devices): 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. Also amends VTL § 1809-e(1) to increase the surcharge to $28 (up from $20) and § 1809(2) to increase the maximum total of the crime victim assistance fees and mandatory surcharges to $196 (up from $180), and adds a new VTL § 1809-aa that imposes a mandatory surcharge of $25 for certain parking violations (VTL §§ 1200, 1201, and 1202).

➢ **Chap. 58 (S.2608-D, Part C) (Texting and cell phone use by commercial drivers, expands definitions). Effective: October 28, 2013.**

Amends the definition of portable electronic device in VTL § 1225-d(2)(a) to 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) is now 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, browsing, transmitting, saving or retrieving e-mail, text messages, instant messages, or other electronic data" (underlined text is new).

Also makes amendments to VTL §§ 510-a(4)(a), 1225-c, and 1225-d regarding the use of cell phones and portable electronic devices when driving commercial motor vehicles.

➢ **Chap. 91 (S.5656) (Suspension of probationary and junior licenses — texting and cell phone violations). Effective: July 1, 2013.**

Amends VTL §§ 510-b(1) and 510-c(2), the laws governing probationary and junior licenses, to require license suspension upon conviction for VTL §§ 1225-c and 1225-d violations.

Parole and Corrections

➢ **Chap. 368 (S.4248-A) (Access to statewide registry of orders of protection and arrest warrants). Effective: October 27, 2013.**

Amends Executive Law § 221-a to give employees of local correctional facilities and the Department of Corrections and Community Supervision who are responsible for monitoring, supervising, or classification of inmates or parolees access to the statewide registry of orders of protection and warrants issued in domestic violence cases and the ability to disclose information about such orders of protection and warrants under specified circumstances.

➢ **Chap. 437 (A.5008-B) (Routine health care services to local jail inmates under 18 years of age). Effective: October 23, 2013.**

Amends the Penal Law and Correction Law to allow local jails to provide routine medical, dental, and mental health services to inmates under 18 years of age who have not received consent from a parent or guardian. The bill requires the court to ask whether the defendant's parents or legal guardian, if present at sentencing, will give the defendant the capacity to consent to such routine care. If consent is not obtained before commitment, the commitment order will be deemed to give the defendant the capacity to consent and the sheriff will not need to get judicial consent for routine care; the bill does not preclude a parent or legal guardian from objecting to treatment.

Agriculture and Markets Law

➢ **Chap. 531 (S.2665-B) (District Attorney — authority to petition on behalf of impounding organizations in connection with animal cruelty and animal fighting convictions). Effective: March 19, 2014.**

Authorizes a district attorney who is prosecuting charges under Agriculture and Markets Law § 353-d, 373, or 375 (animal cruelty or animal fighting) to file and obtain, on behalf of an "impounding organization" (*ie*, a society for the prevention of cruelty to animals, humane society, pound, or animal shelter), an order requiring the person from whom the animal is seized or the owner of the animal to post a security for the reasonable expenses expected to be incurred by the organization.

Family Court

➢ **Chap. 371 (S.5609-A) (Visitation and custody orders — children conceived during sex offense). Effective: September 27, 2013.**

Amends DRL § 240 to create a rebuttable presumption that it is not in a child's best interests to be placed in the custody of or to visit with a person who has been convicted of one or more of specified sex offenses in this state or the equivalent of such offenses in another state when the child who is the subject of the proceeding was conceived as a result of such offense or offenses, and also amends DRL § 111-a and Social Services Law (SSL) § 384-c to provide that the notice provisions in those sections shall not apply to such a person.

➢ **Chap. 402 (S.4644-C) (Petition to vacate voluntary acknowledgement of paternity). Effective: January 19, 2014.**

Amends FCA § 516-a and Public Health Law (PHL) § 4135-b to provide that when a person under age 18 signs a voluntary acknowledgement of paternity, that person can file a petition to vacate the acknowledgment at any time up to 60 days after reaching the age of 18 or up to 60 days after the date on which the respondent must answer a petition relating to the child if the respondent is advised of the right to file a petition to vacate, whichever is earlier.

➢ **Chap. 430 (A.2600) (Severe or repeated abuse and diligent efforts). Effective: October 23, 2013.**

Amends FCA § 1051(e) to provide that, in cases where the court makes a finding of abuse and chooses to enter a finding, based on clear and convincing evidence, of severe or repeated abuse, as defined in SSL § 384-b(8)(a)(i)-(iii) or (8)(b)(i) or (ii), the court does not need to also make findings regarding diligent efforts in order for the severe or repeated abuse finding to be admissible in a later termination of parental rights proceeding. Also amends SSL § 384-b(8)(a) and (b) to add Penal Law §§ 130.95 and 130.96 to the list of sex offenses and other felonies that constitute severe abuse.

➢ **Chap. 526 (A.7400) (Family offenses — larceny and coercion added). Effective: December 18, 2013.**

Amends FCA § 812(1) to give the Family Court concurrent jurisdiction over proceedings concerning acts between certain family or household members that constitute identity theft (first, second, or third degree), grand larceny (third or fourth degree), or second-degree coercion as set forth in Penal Law § 135.60(1), (2), or (3). Also makes conforming amendments to FCA §§ 821, 446, 551, 656, 842, and 1056, DRL §§ 240 and 252, and CPL § 530.11 and 530.12.

Judiciary

➢ **Chap. 283 (S.5078) (Attorneys — reporting of criminal convictions). Effective: July 31, 2013 (applies to convictions on or after that date).**

Amends Judiciary Law § 90(4)(c) [Admission to and removal from practice by appellate division; character committees] to require that attorneys report a conviction of a crime in a town or village court (a court not of record) to the Appellate Division.

➢ **Chap. 548 (A.6552-B) (City Court judgeship modifications). Effective: April 1, 2014.**

The bill changes existing judgeships from part-time to full-time or from quarter-time to half-time in Albany, Auburn, Binghamton, Buffalo, Cortland, Ithaca, Jamestown, Kingston, Lockport, Middletown, New Rochelle, Norwich, Oneida, Oneonta, Port Jervis, Rome, Rye, Salamanca, Saratoga Springs, Watertown, and White Plains.

On January 1, 2015, the following courts will get an additional full-time judge: Buffalo City Court (will have 14 full-time judges), Newburgh (will have 3 full-time judges), Rochester (will have 10 full-time judges), Schenectady (will have 4 full-time judges), Syracuse (will have 9 full-time judges), Troy (will have 2 full-time judges), and Yonkers (will have 7 full-time judges).

The bill also makes the existing part-time judgeships in Binghamton, Ithaca, and Lockport elected positions; currently the judges in those courts are appointed. And it expands the residency requirement for one city court. A table of the changes appears as Appendix A in the memorandum in support of the bill, which can be found at the link above.

Miscellaneous

➢ **Chap. 201 (A.6378-B) (Sale of counterfeit or non-functional airbag). Effective: November 1, 2013.**

Adds a new section 349-e to the General Business Law, to make it a class A misdemeanor to knowingly: make, offer to distribute, distribute, offer to sell, sell, install or reinstall a counterfeit or non-functional airbag; offer to do so so that "the readiness indicator light … falsely displays that the airbag is in proper working order"; or represent to another that a counterfeit or non-functional airbag installed or reinstalled in a motor vehicle is an airbag. The bill also provides for a separate civil proceeding and fines.

➢ **Chap. 341 (S3469-A) (Adds "bath salts" to Schedule I). Effective: December 11, 2013.**

Amends PHL § 3306 to add substituted cathinones ("bath salts"), which are chemically related to methamphetamines and ecstasy, to the list of Schedule I stimulants.

Sunset Dates Extended

As part of the state budget, the Legislature has extended the sunset dates of the determinate sentencing laws and other provisions of the CPL, Correction Law, Penal Law, and VTL from September 1, 2013 to September 1, 2015. L 2013, ch 55, Part E. ⚖

Chief Defender Convening Dec. 5, 2013

NYSDA hosted a Chief Defender Convening in Albany in early December. The morning agenda item was an update by the Indigent Legal Services Office. In the afternoon, a variety of topics put on the agenda by Chief Defenders were discussed, including budgetary issues, discovery reform, raising the age of criminal responsibility (see p. 6) and confronting the racial disparities found in the justice system (see "Ulster County Public Defenders Put Racial Disparity on the Record" on p. 6).

Chief Defenders and NYSDA staff await the start of the Convening discussions.

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.

Civil Rights Actions (USC §1983 Actions)

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

Stanton v Sims, 571 US __, 134 SCt 3 (11/4/2013)

A police officer pursing a man who allegedly committed a misdemeanor and who disappeared into a third person's yard after the officer ordered the man to stop was entitled to qualified immunity in a suit filed by the third person for injuries sustained when the officer kicked in the gate to her yard. Whether or not the officer's entry into the yard was constitutional, the law as to its constitutionality was not clear at the time; in thinking he could lawfully enter, the officer may have been mistaken, but was not "plainly incompetent."

Counsel (Competence/Effective Assistance/Adequacy)

Habeas Corpus (Federal)

Burt v Titlow, 571 US __, 134 SCt 10 (11/5/2013)

The Circuit Court erred by failing to apply, in this federal habeas challenge to a state conviction, the requisite "doubly deferential standard of review that gives both the state court and the defense attorney the benefit of the doubt." [Internal quote marks omitted.] The ineffective assistance claim that the respondent's second lawyer, hired to replace one who had negotiated a favorable plea agreement, provided ineffective assistance of counsel by failing to learn about and realize the strength of the State's evidence before advising withdrawal of the plea, is rejected. That the second lawyer said the withdrawal was based on the State's offer being higher than the state sentencing guidelines was not inconsistent with an assertion of innocence; the record "readily supports" the state court's finding that the second lawyer advised plea withdrawal only after the respondent proclaimed innocence. The Circuit Court's *Strickland* analysis cannot be sustained, as it turns the strong presumption of effective assistance on its head; while the second lawyer did not retrieve the respondent's file from the first lawyer before the plea withdrawal, "he may well have obtained copies of the critical materials from prosecutors or the court." That he also may well have violated rules of professional conduct by accepting publication rights as partial payment and waiting weeks before consulting with the first lawyer does not make him per se ineffective.

Concurrence: [Sotomayor, J] This decision is of limited scope; the respondent failed to carry the burden of overcoming two presumptions. "But our statement about the facts of this case does not imply that an attorney performs effectively in advising his client to withdraw from a plea whenever the client asserts her innocence and has only a few days to make the decision."

Concurrence: [Ginsburg, J] "While I join the Court's judgment, I find dubious" the state court's conclusion that the second lawyer acted reasonably in light of the respondent's protestations of innocence.

Evidence (Rebuttal)

Self-Incrimination

Kansas v Cheever, No. 12-609 (12/11/2013)

The 5th Amendment does not prohibit introduction of evidence from a criminal defendant's court-ordered mental evaluation to rebut that defendant's defense of voluntary intoxication offered through expert testimony. That Kansas law narrowly defines "mental disease or defect" in a way that excludes voluntary intoxication does not preclude such rebuttal; rebuttal testimony of the type at issue here is permitted under constitutional precedent when mental-status defenses are raised, which includes voluntary intoxication. The state Supreme Court did not address whether the challenged testimony exceeded the scope of permissible rebuttal and that is not addressed here.

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.

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

People v Boyer, 2013 NY Slip Op 07515 (11/14/2013)

For determining the sequence of past and current convictions under the sentence enhancement statutes, the controlling sentencing date for prior convictions "is the original date on which the defendant received a lawful prison term upon a valid conviction for that prior crime, regardless of whether the defendant or the government seeks resentencing on that conviction to correct the error described in [*People v*] *Sparber* [(10 NY3d 457)]." Read together, *Sparber* and its progeny establish that resentencing to correct the flawed imposition of post-release supervision does not vacate the original sentence in favor of an entirely new one but merely corrects a clerical error, leaving the original sentence and its date of imposition undisturbed.

Dissent: [Rivera, J] "A rule that recognizes that the lawful sentence is the one imposed in accordance with all of the statutory elements of the Penal Law, and that only a lawful sentence counts under the enhancement statutes, is just as clear, if not clearer, as one that draws the line at the date when the court imposed the unlawful sentence."

Sentencing (Concurrent/Consecutive)

Weapons (Possession)

People v Brown, 2013 NY Slip Op 07514 (11/14/2013)

Where the defendants completed the crime of "simple" knowing, unlawful possession of a loaded weapon independently of the commission of later crimes, consecutive sentences were permissible. "So long as a defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed …." In one case here, the defendant possessed the gun in his van well before the gun was fired at a different location following an argument. In a second case, the defendant possessed the gun for at least twenty minutes before he was fortuitously encountered by the person he then shot. In the third case, the defendant's simple possessing a gun (one he knew was to be used in a robbery) occurred during a break in the action; only after that break, when he chased down the decedent, did his possession of the weapon become for the purpose of intentional murder.

Harmless and Reversible Error (Reversible Error)

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

People v Wells, 2013 NY Slip Op 07511 (11/14/2013)

The admission of evidence found during the illegal inventory search of the crashed stolen car in which the defendant was found asleep in the driver's seat visibly inebriated and was arrested for driving while intoxicated should not have been found to be harmless error. The defendant pleaded guilty only after the trial court erroneously ruled that the search was proper, and his comments to the court indicated that he might not have taken the plea had the crack pipe and open bottle of rum found in the car been suppressed.

Dissent: [Pigott, J] There is not a reasonable possibility that the defendant would have gone to trial had the physical evidence been suppressed; the prosecution could still have introduced the defendant's admissions of drinking and smoking cocaine for days.

Due Process (Miscellaneous Procedures)

Evidence (Hearsay)

Sex Offenses (Civil Commitment)

Matter of State of New York v Floyd Y., 2013 NY Slip Op 07653 (11/19/2013)

The Due Process Clause requires reversal and a new trial where the court allowed, over objection, introduction of expert testimony that included unreliable basis hearsay into evidence at a trial to determine whether the appellant suffers from a mental abnormality qualifying him for civil sex offender management after his release from prison. A psychologist opined that the appellant suffered from mental disorders including pedophilia that together increased the likelihood he would reoffend; the opinion was based "on victim affidavits, police reports, court records" and reports by the State's statutory examiner and the appellant's expert, as well as the witness's own personal experience as the appellant's treating psychologist. Accusers' statements helped shape the expert's opinion, including an accusation that resulted in acquittal, which the expert said made no difference. The state's examiner also testified based in part on clinical records and written reports about past incidents. The due process that governs this civil commitment proceeding, which can lead to indefinite detention, requires that evidence "meet a test of reliability and substantial relevance." Of four allegations here that the appellant abused prepubescent children, two were based on hearsay that violated due process.

Concurrence: [Smith, J] I would reverse on hearsay grounds without reaching the constitutional question. The majority, in saying that the hearsay basis of expert opin-

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ions is crucial to jury understanding, misses the basic point that reliance on hearsay is a weakness, not a strength; the majority "seems to create a special rule for cases brought against detained sex offenders," but there is "no reason to be more tolerant of hearsay in article 10 cases than in others." As to the constitutional issue, "I would hold that a respondent in a proceeding under article 10 of the Mental Hygiene Law is constitutionally entitled to the same right of confrontation as a defendant in a criminal case."

Aliens (Deportation) (Immigration)

Counsel (Competence/Effective Assistance/Adequacy)

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

People v Hernandez, 2013 NY Slip Op 07658 (11/19/2013)

There is support in the record for the lower courts' determination that the foreign national defendant "failed to show a reasonable probability that, if counsel had informed him that he was certain to be deported as a result of his guilty plea, he would not have pleaded guilty and would have gone to trial …." The decision in *Padilla v Kentucky* (559 US 356 [2010]) did not delineate a new standard as to the showing of prejudice needed to support an ineffective assistance of counsel claim under *Strickland v Washington* (466 US 668 [1984]); the defendant here seizes on "rationality" language from *Padilla* that appears to be only a rephrasing of the *Strickland* rule.

Dissent: [Pigott, J] While not setting out a new standard, "*Padilla* clearly recognizes the importance of considering whether 'a decision to reject the plea bargain would have been rational' … when determining whether such a 'reasonable probability' was shown." The Appellate Division dissent appropriately found no record support for rejecting the defendant's claim that he would not have pleaded guilty had he been warned of the deportation consequence of doing so.

Constitutional Law (United States Generally)

Weapons (Possession)

People v Hughes, 2013 NY Slip Op 07654 (11/19/2013)

Punishing the crime of criminal possession of a loaded weapon in the home as a class C felony does not violate the defendant's Second Amendment right to keep and bear arms. The defendant's prior misdemeanor conviction, without which he would have been guilty here only of a class A misdemeanor, defeats his constitutional claim. If any constitutional scrutiny is warranted, it is intermediate scrutiny. The challenged statute bears a substantial relationship to the important governmental objective of preventing criminal use of firearms and bars only unlicensed possession of a weapon; the defendant, whose prior resisting arrest conviction would not have prevented him from obtaining a license, did not have one.

Accusatory Instrument (Sufficiency)

Appeals and Writs (Prosecution, Appeals by)

Weapons (Possession)

People v Jones, 2013 NY Slip Op 07655 (11/19/2013)

The Appellate Division correctly reinstated a charge of second-degree possession of a weapon where the indictment, based on evidence that a loaded firearm was found in the defendant's bathroom, alleged that the defendant possessed a loaded firearm and a special information filed with the indictment indicated that the defendant had previously been convicted of first-degree possession of a controlled substance. Legislative history indicates that an amendment to the statute was intended to increase the penalty for possessing a loaded firearm in the home by someone previously convicted of a crime.

The prosecution's appeal from the Supreme Court's reduction of the charge to third-degree possession was not untimely where the defendant failed to serve the order in question on the prosecution; it does not matter that the court gave copies of the order to the parties in open court.

That the indictment itself did not allege the defendant's prior conviction did not render the indictment insufficient; the defendant's previous conviction was not an element of the charged offense, as the prior offense did not make the statute factually inapplicable, unlike where the possession took place somewhere other than the home or business.

Aliens (Deportation)

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

People v Peque, 2013 NY Slip Op 07651 (11/19/2013)

A majority of the court, made up of different members of the court on different points, holds that: 1) "due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony" [footnote omitted]; 2) the portion of *People v Ford* (86 NY2d 397) holding that a court's failure to advise a defendant about potential deportation consequences never affects the validity of a guilty plea is overruled; 3) the central holding of *Ford* regarding the distinction between direct and collateral consequences of a guilty plea is reaf-

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firmed; and 4) a defendant seeking to overturn a plea on the basis that no judicial advice about deportation was given must establish the existence of a reasonable probability that had such advice been given, the defendant would have rejected the plea.

Defendant Diaz's unpreserved claim is reviewed under the narrow exception to the preservation rule that exists when a defendant had no practical ability to object to a plea allocution error that is clear on the face of the record. In this and future cases like it, the case is to be remitted to allow filing of a motion to vacate the plea.

Defendant Thomas entered his plea in 1992, when deportation was a far less certain consequence of most guilty pleas, and the court had every reason to believe he could avoid deportation; he is not entitled to vacatur.

Defendant Peque knew of his potential deportation and could have sought to withdraw his plea on that ground; his failure to do so bars review.

Concurrence in Part, Dissent in Part: [Pigott, J] The decision here leaves us where we were before, and the remedial majority's analysis provides no practical benefit to defendants that they don't already have from *Padilla v Kentucky*. The plurality that treats deportation as sui generis "fails to do justice to the severity of collateral consequences such as SORA registration and SOMTA confinement."

Dissent: [Lippman, CJ] I agree "that deportation is such an important plea consequence that 'it must be mentioned by the trial court to a defendant as a matter of fundamental fairness' …." "I would reverse in each of the cases before us."

Speedy Trial (Due Process)

People v Velez, 2013 NY Slip Op 07656 (11/19/2013)

A 43-month delay in the prosecution of the defendant for burglary did not deprive him of his due process right to prompt prosecution where the charges "were filed within the statute of limitations period and no special circumstances exist impairing his right to a fair trial" and good cause was established for the delay, *ie* that for 14 months the police department did not have a latent print examiner to match the fingerprints found at the crime scene and, after the defendant was identified as a suspect once the prints were matched, the prosecutor learned that the defendant was already serving a life sentence that was later placed in jeopardy by a partially successful appeal.

Appeals and Writs (Preservation of Error for Review)

People v Feliciano, 2013 NY Slip Op 07764 (11/21/2013)

Because the defendant did not move to dismiss, upon his discharge, based on events he now claims constituted performance of his original plea agreement, his contention that he was entitled to dismissal of the indictment based on completion of the terms of that agreement is not preserved for review.

Defenses (Intoxication)

Driving While Intoxicated

Homicide (Murder [Intent])

People v Heidgen, 2013 NY Slip Op 07757 (11/21/2013)

"Although intoxicated driving cases that present circumstances evincing a depraved indifference to human life are likely to be few and far between, we find that the evidence in each of these unusually egregious cases was legally sufficient to support the convictions."

Someone like defendant Heidgen, whose blood alcohol level was said to have caused delayed reaction time but not to have rendered him incapable of reacting at all, drove the wrong way on an expressway and appeared to "track" the oncoming headlights "in what amounts to a high speed game of chicken, with complete disregard for the value of the lives that are thereby endangered, is undoubtedly an individual whose culpability is the equivalent of an intentional murderer."

Defendant Taylor, who "buckled her seat belt and set out to drive as fast as she could," speeding without lights and obviously frenzied, but aware of her surroundings, could be found to have "recklessly engaged in conduct that created a grave risk of death to others, with an utter disregard for whether any harm came to those she imperiled."

Defendant McPherson failed to establish that he received ineffective assistance of counsel; while counsel should have moved to dismiss the charge of depraved indifference murder, such motion would not have been successful where the defendant had become enraged, fired several gunshots, then driven at excessive speeds the wrong way on a parkway for about five miles in a manner that evidence showed to be in complete disregard for the lives of others.

The Heidgen and Taylor juries rejected the conclusion that these defendants were too drunk to form the required intent and could rationally have found that the defendants appreciated that they were "engaging in conduct presenting a grave risk of death and totally disregarded that risk, with catastrophic consequences."

Dissent: [Smith, J] The evidence was insufficient in each of these cases to support murder convictions. Heidgen and McPherson were unquestionably guilty of second-degree manslaughter but the records contain no more than hints that they were in a state of mind to commit suicide or were prey to a delusion that all other cars would get out of their way. As for defendant Taylor, the

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words "depravedly indifferent to human life… simply cannot be applied to someone so unhinged."

Dissent: [Read, J] The majority has essentially resurrected the standard of *People v Register* (60 NY2d 270 [1983]), overruled in *People v Feingold* (7 NY3d 288 [2006]), for cases where drunk drivers kill innocent people. But "the new crime of aggravated vehicular homicide, a class B felony with a penalty of up to 25 years in prison," passed after *Feingold,* addresses the proper standards for assessing the culpability of drunk drivers who kill and the proper measurement of punishment.

Appeals and Writs (Preservation of Error for Review)

Guilty Pleas (Alford Plea)

People v Heidgen, 2013 NY Slip Op 07758 (11/21/2013)

"Defendant's argument that his *Alford* plea should not have been accepted because the record does not contain strong evidence of his actual guilt is unpreserved for our review as he has neither moved to withdraw his plea nor to vacate the judgment of conviction …."

Search and Seizure (Motions to Suppress [CPL Article 710])

People v Kevin W., 2013 NY Slip Op 07761 (11/21/2013)

A judge may not reopen a pretrial suppression hearing to give the prosecution "an opportunity to shore up their evidentiary or legal position absent a showing that they were deprived of a full and fair opportunity to be heard." Here, the Judicial Hearing Officer did not require as a matter of law that a second police officer who was present during the challenged search testify, but rather found that the testimony of the one officer who did testify did not satisfy the prosecution's burden of justifying the stop and seizure. "[N]othing about the initial hearing robbed the People of a full and fair opportunity to justify the stop and seizure…. The prosecutor certainly knew what his evidentiary burden was and had full access to all the evidence available to establish it …."

Dissent: [Smith, J] "[T]o forbid trial courts from allowing a second chance is to introduce unnecessary rigidity into the system." The risk of tailored evidence being produced at a re-opened pretrial hearing is not as great as in a hearing held as a result of an appellate ruling.

Prisoners (Good Time)

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

People ex rel. Ryan v Cheverko, 2013 NY Slip Op 07760 (11/21/2013)

"[W]hen Penal Law § 70.30 (2) (b) limits consecutive definite sentences to an aggregate term of two years imprisonment, jail time credit and good time credit should be deducted from that two-year aggregate term rather than the aggregate term imposed by the sentencing court." This follows from reading together the directives of 70.30(2)(b) and 70.30 (3)(b) and (4)(b), which "provide that, where a prisoner is serving consecutive definite sentences, jail time and good time credit must be applied against the prisoner's *aggregate term* of imprisonment (… [emphasis added]), although good time credit may not exceed one-third of that aggregate term (*see id.* at [4] [b]; Correction Law § 804 [1])." Withholding credit when the two-year aggregate term applies would unfairly disadvantage pre-trial detainees, who would serve longer sentences than identically-situated incarcerated people who had been released pre-trial. And every person who earns good time, which serves as an incentive to follow rules and excel in rehabilitative programming, is entitled to benefit from it.

[***Ed. Note:*** *NYSDA filed/joined an amicus brief in this case.*]

Appeals and Writs (Preservation of Error for Review)

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

Rape (Elements)

People v Worden, 2013 NY Slip Op 07763 (11/21/2013)

The defendant's factual plea allocution to third-degree rape was not sufficient to support the conviction where both parties and the court all misunderstood the required lack of consent element; the defendant's affirmative answers to questions asked during the allocution, focusing on lack of capacity to consent, negated an element of the crime. The unusual circumstances of this case bring it within a narrow exception to the requirement that errors be preserved for review, as the court should have been aware of the allocution insufficiency.

Evidence (Sufficiency)

Juries and Jury Trials (Deliberations)

Trial (Verdicts [Inconsistent Verdicts])

People v Abraham, 2013 NY Slip Op 7825 (11/26/2013)

That the jury acquitted the defendant of third-degree arson did not show there was insufficient evidence to support the prosecution's theory that the defendant defrauded an insurance company by filing a claim as to a building

NY Court of Appeals *continued*

that was destroyed by fire without indicating that the fire was a result of arson. "[A]n acquittal is not a preclusive finding of any fact, in the same trial, that could have underlain the jury's determination." The evidence was sufficient to support the second-degree insurance fraud count where one of defendant's companies had been unable to meet payroll at least twice, acquired the property in question at almost no cost, and insured it for $475,000, after which it burned down following the defendant's purchase of four gallons of flammable liquid and 18 Duraflame logs, empty containers for such items being found at his home, and he reported the building's loss without saying he had burned it down.

Whether or not the court had the authority to instruct the jury to stop deliberating after acquitting the defendant of arson, it was not required to do so.

Dissent: [Pigott, J] "I would hold that the trial court committed reversible error by denying defendant's request to instruct the jury to stop deliberating if it found him not guilty of arson."

Counsel (Competence/Effective Assistance/Adequacy)

Identification (Show-ups)

Robbery (Elements) (Evidence)

People v Howard, 2013 NY Slip Op 07824 (11/26/2013)

On this record, the defendants "were not deprived of effective representation at trial by, among other alleged omissions, counsel's failure to assert as an affirmative defense that one of two weapons allegedly displayed during the robbery 'was not a loaded weapon from which a shot, readily capable of producing death or serious physical injury, could be discharged ….'" "[D]efendants may raise their ineffective assistance claims in CPL 440.10 motions."

As for the show-up, held about 45 minutes after the defendants were stopped — five miles from the scene over an hour after the robbery — for having open containers of alcohol, and were found to have a wallet insert containing identification in the accuser's name, it cannot be said that no record support exists for the unanimous determination below that this showup was reasonable and not unduly suggestive. "[S]howups are by their nature fact-specific; no two are ever going to be exactly alike."

Dissent: [Lippman, CJ] "Inasmuch as this highly suggestive showup was not a constitutionally permissible surrogate for a fairly constituted lineup identification procedure, I would reverse …."

Sex Offenses (Civil Commitment)

Matter of Nelson D., 2013 NY Slip Op 07827 (11/26/2013)

Involuntary commitment to an inpatient facility of a convicted sex offender found to suffer from a mental abnormality as set out in Mental Hygiene Law article 10 constitutes confinement. Based on the plain language of article 10, the statute provides for only two dispositional outcomes, confinement or an outpatient strict and intensive supervision and treatment (SIST) regime. The statute does not permit confinement as part of SIST, and involuntary commitment under this provision deprives the appellant "of the statutorily proscribed procedures mandated for confinement under article 10." There is no need to address the appellant's substantive constitutional arguments.

Dissent: [Pigott, J] "[T]he majority's decision will have the effect that more, rather than fewer, article 10 sex offenders will be judged to be 'dangerous sex offender[s] requiring confinement' in a designated secure treatment facility (MHL § 10.07 [f]), even when they might be successfully supervised and treated in the community under SIST."

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

People v Sims, 2013 NY Slip Op 07831 (11/26/2013)

"On review of submissions pursuant to section 500.11 of the Rules, appeal dismissed upon the ground that the reversal by the Appellate Division was not 'on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal' (CPL 450.90[2][a])."

Instructions to Jury (Circumstantial Evidence)

Narcotics (Possession)

People v Santiago, 2013 NY Slip Op 07829 (11/26/2013)

A circumstantial evidence instruction should have been given upon the defendant's request, as evidence of his alleged constructive possession of the drugs was wholly circumstantial where the minivan that was lawfully stopped and searched belonged to the codefendant who was driving it, the recovered drugs were hidden in a locked compartment under the front passenger floor mat, the defendant was not the target of the surveillance operation that led to the stop, and there was no direct evidence that he knew of the compartment or exercised dominion and control over the drugs.

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Ethics (Judicial)

Misconduct (Judicial)

Matter of Doyle, 2013 NY Slip Op 08196 (12/10/2013)

"On the Court's own motion, it is determined that Honorable Cathryn M. Doyle is suspended with pay, effective immediately, from the office of Surrogate of Albany County, pending disposition of her request for review of a determination by the State Commission on Judicial Conduct."

[***Ed. Note:*** *The Nov. 12, 2013 Determination of the State Commission on Judicial Conduct can be found at http://www.cjc.ny.gov/Determinations/D/Doyle.Cathryn.M.2013.11.12.DET.pdf.*]

Ethics (Judicial)

Misconduct (Judicial)

Matter of George, 2013 NY Slip Op 08195 (12/10/2013)

Removal is the appropriate sanction for the misconduct found and sustained here. The petitioner, a non-lawyer town court justice, presided over a traffic matter involving a defendant with whom he had an extensive social and professional relationship without adjourning it in order to disclose that relationship to the prosecution, which was not present in court, and without notifying the prosecution or the State Police, who were also not present, that he dismissed the violation. In another matter, the justice injected himself into a conversation between a prospective litigant and the court clerk, after which the prospective litigant did not complete the process to initiate a claim against a neighbor well-known to the petitioner; several months later, the justice answered a telephone call from the same person, and again discussed the merits of the matter, causing the prospective litigant to again not pursue his claim under the impression that the petitioner was biased against his position. These events follow a Letter of Dismissal and Caution to the petitioner regarding his presiding over cases involving the then-daughter-in-law of the traffic litigant here.

Dissent: [Pigott, J] The prior private reproof by the Commission as to presiding over cases involving the traffic litigant's family was years earlier and did not elevate the justice's lapse in judgment here to "'truly egregious' conduct warranting removal." And the majority fails to give any serious consideration to a lesser sanction.

Evidence (Privileges)

News Media (Shield Laws)

Subpoenas and Subpoenas Duces Tecum

Matter of Holmes v Winter, 2013 NY Slip Op 08194 (12/10/2013)

For a New York court to issue a subpoena directing a New York news reporter to appear in another state at a judicial proceeding at which there is a substantial likelihood that the reporter will be directed to disclose the names of confidential sources or face contempt would violate New York policy embodied in the Shield Law of 1970. The present case is distinguishable from *Matter of Codey (Capital Cities, Am. Broadcasting Co.)* (82 NY2d 521) in three important ways: the reporter here is relying on New York's Shield Law, not the other state's; New York's law is significantly more protective than that of the other state here, while in *Codey* there was no claimed disparity; and a subpoena is sought here solely for the purpose of requiring the reporter to disclose the identity of anonymous sources, while in *Codey* information was sought because an identified source could not recall all that was said to the reporter. The circumstances here form a limited exception to the continuing rule that absent threatened violation of an extremely strong and clear New York public policy, New York courts adjudicating applications for subpoenas under CPL 640.10(2) should refrain from resolving admissibility claims including privilege, leaving them for the demanding state.

Dissent: [Smith, J] Public policy could justify in a proper case a refusal to issue a subpoena under the Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Cases, but where the allegedly privileged communications occurred in the other state, New York's Shield Law does not apply.

Accusatory Instruments (Sufficiency)

Narcotics (Cocaine)

People v Jennings, 2013 NY Slip Op 08197 (12/10/2013)

The accusatory instrument alleging seventh-degree possession of a controlled substance was sufficient where it referred, as did the laboratory report, to visible cocaine residue in a glass pipe that was of sufficient quantity and character as shown by the work of a criminalist who removed a portion of it for testing, and where the arresting officer indicated she had seen the defendant with the pipe, which the officer recognized as an instrument for smoking crack.

Double Jeopardy (Collateral Estoppel)

People v O'Toole, 2013 NY Slip Op 08193 (12/10/2013)

On the facts here, the defendant's acquittal of first-degree robbery based on the alleged display of a gun barred introduction at a retrial on second-degree robbery

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of evidence that a gun was displayed. Where a jury was not convinced beyond a reasonable doubt of the truth of certain evidence, the doctrine of collateral estoppel bars presentation of that evidence by the prosecution in a later trial.

Concurrence: [Rivera, J] The majority's suggestion "'that collateral estoppel should be applied sparingly in criminal cases'" runs counter to the "wisdom of a prohibition against anyone being forced to defend against charges or factual allegations which [he or she] overcame in [an] earlier trial …." [Internal quotes omitted.]

Dissent: [Pigott, J] The first jury could have acquitted the defendant on the basis of grounds other than finding that no apparent gun was displayed.

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

Sentencing (Resentencing)

People v Collier, 2013 NY Slip Op 08287 (12/12/2013)

After being initially sentenced to consecutive terms of 25 and five years, plus post-release supervision, the defendant was resentenced because the five-year sentence was illegal; the resentencing to concurrent terms of 25 and 10 years, plus post-release supervision, "comported with defendant's reasonable expectation that he would receive a minimum determinate prison term of 25 years and a maximum determinate prison term of 30 years in exchange for his plea." His contention that the "aggregate" sentence is irrelevant because the two sentences are independent of one another and he should be allowed to withdraw his plea is rejected. "When, as here, the defendant possesses sufficient information about his promised sentence to make an informed choice at the time of the plea allocution, 'the defendant's guilty plea is voluntary [and] so either the plea's vacatur or specific performance of the promise is appropriate.'"

Dissent: [Lippman, CJ] The constitutional principle that a plea cannot be deemed knowing, voluntary, and intelligent without knowledge of the direct consequences of that plea should apply where a plea bargain includes an illegal sentence without regard to the constitutionally irrelevant question of whether the illegal sentence stood alone or was "part of a package deal," because "'the constitutional defect lies in the plea itself and not in the resulting sentence' …."

Evidence (Uncharged Crimes)

People v Myers, 2013 NY Slip Op 08292 (12/12/2013)

"Under the facts of this case, the admission of evidence of an uncharged crime allegedly committed by defendant for the purpose of establishing defendant's identity constituted an abuse of discretion (*see People v Robinson*, 68 NY2d 541, 549-550 [1986]; *People v Molineux*, 168 NY 264, 293 [1901]). Because the evidence of defendant's guilt is not overwhelming, the error is not harmless."

Identification (Expert Testimony) (Eyewitnesses)

Witnesses (Direct Examination) (Experts)

People v Oddone, 2013 NY Slip Op 08291 (12/12/2013)

The trial court erred in disallowing defense counsel's effort to refresh a defense witness's recollection about the length of time a portion of the incident lasted; the witness's testimony that it "'could have' lasted 'a minute or so,'" and "'I don't know,'" implied that the witness's recollection could benefit from being refreshed, and it was unfair to let the jury hear the testimony without letting the defense make use of an earlier, more favorable statement.

Reversal on that ground renders academic the further question of whether the court erred in not allowing a defense expert to testify about the tendency of witnesses to overestimate the duration of short events. If a similar question arises on retrial, the court should address it in light of factors such as whether it would be unfair to deprive the jury of expert testimony about the reliability of eyewitness observations, in light of, for example, how much emphasis the prosecution put on duration testimony, and whether expert testimony might obscure the main issue in the jury's mind.

The court did not err in allowing a deputy medical examiner to testify based on his experience about how long it would take for certain medical symptoms to occur when someone was placed in a headlock.

Conflict of Interest

Counsel (Conflict of Interest)

People v Payton, 2013 NY Slip Op 08289 (12/12/2013)

That defense counsel was under investigation or prosecution by the same prosecutor's office that prosecuted the defendant does not require automatic reversal, but here, where the trial court denied without a hearing a motion to set aside the conviction based on an actual conflict of interest arising from execution of a search warrant by the prosecution at defense counsel's office before trial, there must be a hearing at which the defendant has the burden of showing that the conflict of interest affected his defense or operated on the representation he received.

NY Court of Appeals *continued*

Guilty Pleas (Vacatur)

Sentencing (Post-Release Supervision) (Resentencing)

People v Pignataro, 2013 NY Slip Op 08286 (12/12/2013)

The defendant's argument, that vacatur of his plea is the only remedy for failure to tell him during guilty plea proceedings that imposition of post-release supervision as part of the resulting sentence was mandatory, is mistaken. The Legislature did not lack power to create a statutory remedy for such error. Penal Law "70.85 is a constitutionally permissible legislative remedy for the defectiveness of the plea."

Appeals and Writs (Preservation of Error for Review)

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

People v Tyrell, 2013 NY Slip Op 08288 (12/12/2013)

Because the records in these guilty plea cases are silent as to the defendant's waiver of the federal constitutional rights that must be voluntarily and intelligently waived under *Boykin v Alabama* (395 US 238 [1969]), the pleas must be vacated. No uniform catechism is required in taking guilty pleas, but there must be an affirmative showing, on the record, that defendants waived their constitutional rights. Here, "the records do not affirmatively demonstrate defendant's understanding or waiver of his constitutional rights. In each case, there is a complete absence of discussion of any of the pertinent constitutional rights; none are addressed by the court, defense counsel or defendant. Nor is there any indication that defendant spoke with his attorney regarding the constitutional consequences of taking a plea — in fact, these cases were both resolved during arraignment within days of arrest. Put simply, the records in these cases are inadequate to uphold the judgments of conviction …."

While a motion to withdraw a plea is generally required to raise claims that that the plea was invalid, even for some challenges to the voluntariness of the plea, preservation is not required "'where a defendant has no practical ability to object to an error … which is clear from the face of the record ….'" Here, the defendant could not have brought a CPL 220.60(3) motion to withdraw his plea because sentencing followed the plea in the same proceeding; he could not have filed a CPL 440.10 motion because the error is clear on the record; and "the complete absence of any indication that defendant waived his *Boykin* rights could also be viewed as a mode of proceedings error for which preservation is not required"; the *Boykin* claims here are clearly reviewable.

Dissent: [Smith, J] The chief advantage of reciting *Boykin* rights on the record is to prevent later false claims by defendants who change their mind, and it is unlikely that a defendant, told about the right to a trial by jury, has ever said that the plea deal is off because that fact hadn't been known up to then.

Evidence (Hearsay)

Identification (Eyewitnesses)

People v Smith, 2013 NY Slip Op 08371 (12/17/2013)

"We held in *People v Huertas* (75 NY2d 487 [1990]) that a crime victim could testify to her own description of her attacker, given to the police shortly after the crime. We now hold that a police officer's testimony to a victim's description, where it does not tend to mislead the jury, may also be admissible under the *Huertas* rule." The description is not hearsay when the declarant testifies to it not for its truth or accuracy but to help the jury evaluate the witness's opportunity to observe and the reliability of the witness's memory when making a corporeal identification; it does not become hearsay when someone else testifies to it for the same purpose. "Our holding today should not be interpreted as giving carte blanche to the presentation of redundant police testimony that accomplishes no useful purpose." The court has discretion to exclude prior consistent statement testimony when it reasonably determines that it is more prejudicial than probative.

Dissent: [Rivera, J] The testimony of a police officer of an accuser's description of the perpetrator constitutes bolstering of the accuser's testimony and should not be admitted.

First Department

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

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

People v Diaz, 107 AD3d 401, 966 NYS2d 413 (1st Dept 6/4/2013)

The search of the defendant's backpack after he was arrested and handcuffed was illegal where the backpack was no longer in the defendant's control, but was not in the exclusive control of the police, because the prosecution failed to establish an objectively reasonable basis for believing that the backpack contained something that might pose a danger to the police or that there was a legit-

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imate concern for the preservation of evidence thought to be in the backpack. (Supreme Ct, Bronx Co)

Assault (Evidence) (Lesser and Included Offenses)

People v Miller, 107 AD3d 406, 966 NYS2d 88 (1st Dept 6/4/2013)

There was sufficient evidence that the defendant acted with depraved indifference to human life, either under the *Register* standard or the new *Feingold* standard, where the defendant, attempting to avoid the police, drove at high speeds, swerved in and out of traffic, ignored traffic signals, drove the wrong way down a one-way street, repeatedly rammed his car into a police vehicle, then drove onto a crowded sidewalk, accelerated toward and hit the complainant, continued to accelerate until hitting a parked car, and got out of his car and fled, almost colliding with the complainant. (Supreme Ct, New York Co)

Guilty Pleas (Withdrawal)

People v Bennett, 107 AD3d 577, 967 NYS2d 717 (1st Dept 6/20/2013)

The defendant was entitled to withdraw his plea where the plea "was induced in large part by the court's specific representation that defendant was resolving two pending prosecutions" and the indictment in the other case was dismissed, with finality, before sentencing in this case, so the promised resolution of two prosecutions could not be fulfilled. (Supreme Ct, New York Co)

Aliens (Deportation) (Immigration)

Constitutional Law (United States Generally)

Post-Judgment Relief (CPL § 440 Motion)

People v Verdejo, 109 AD3d 138, 967 NYS2d 729 (1st Dept 6/27/2013)

The rule announced in *Padilla v Kentucky* (559 US 356 [2010]), which "merely prescribe[es] a duty imposed on counsel," should not be applied retroactively. This court previously held to the contrary (*People v Baret*, 99 AD3d 408 [1st Dept 2012] *lv granted* 21 NY3d 1002 [2013]), but a later ruling by the Supreme Court in *Chaidez v United States* (133 S Ct 1103 [2013]) determined that "*Padilla* announced new law, by which this Court is bound [and] dictates the conclusion that it has no retroactive application." (Supreme Ct, Bronx Co)

Dismissal (In the Interest of Justice [Clayton Hearing])

Weapons (Firearms) (Possession)

People v Rivera, 108 AD3d 452, 969 NYS2d 55 (1st Dept 7/9/2013)

The court properly dismissed the second-degree possession of a weapon counts in the furtherance of justice where the court noted, among other factors, that the defendant had a license to carry concealed handguns in his home state of Connecticut, has a "very respectable educational, employment and family background," was in the military, does not have a criminal history, and voluntarily turned over the weapons when he was stopped by the police; the court also found that the defendant inadvertently possessed the weapons in New York. Dismissal of the felony charges does not absolve the defendant of criminal liability since he still faces two counts of fourth-degree criminal possession of a weapon. (Supreme Ct, Bronx Co)

Evidence (Newly Discovered)

Forensics (DNA)

Post-Judgment Relief (CPL § 440 Motion)

People v Jones, 109 AD3d 402, 970 NYS2d 509 (1st Dept 8/6/2013)

The court properly denied the defendant's CPL 440.10 motion without a hearing because the defendant failed to establish that newly discovered DNA evidence was of a character to create a probability that its admission at trial would have led to a more favorable verdict. Explanations other than the defendant's innocence exist for the presence of three hair fragments on a hat recovered at the scene that did not come from the defendant and for the presence of DNA other than the defendant's beneath the fingernails of the decedent, and the identification of the defendant by the witness who said the defendant raped her during the incident was strong. (Supreme Ct, New York Co)

Dissent: None of the physical evidence presented at trial connected the defendant to the crimes in this single-eyewitness case. The defendant has consistently maintained his innocence since 1981, both in prison and since his release on parole. The court accepted the prosecution's criticisms of the lab results presented. The court should have granted mitochondrial DNA testing of the remaining 15 hair fragments and a hearing.

Trial (Presence of Defendant [Trial in Absentia]) (Public Trial)

First Department *continued*

People v Moise, 110 AD3d 49, 970 NYS2d 220 (1st Dept 8/6/2013)

The defendant's right to a public trial was violated where a court officer and the sergeant inside the courtroom excluded defense counsel's colleague from the courtroom during the trial testimony of the undercover officer where the court had previously stated it would allow associates from defense counsel's office to attend. The court had the obligation to ensure that its order closing the courtroom was properly carried out, and the attorney seeking entrance did not bear the burden of taking additional action. "[T]here is a per se rule of reversal when the right to a public trial is violated, regardless of prejudice …." The attorney's exclusion was not inconsequential where the undercover was the critical witness and counsel told the court that he shared an office with the attorney, with whom he consulted about the case, and the attorney was an experienced criminal defense lawyer.

"[W]e are satisfied that exceptional circumstances justified defendant's exclusion from the courtroom during the *Wade* hearing, and that the exclusion did not violate defendant's constitutional or statutory right to be present." (Supreme Ct, New York Co)

Search and Seizure (Stop and Frisk)

People v Johnson, 109 AD3d 449, 970 NYS2d 550 (1st Dept 8/27/2013)

The court should have granted suppression because the police did not have an objective, credible reason to initiate a level one request for information where the arresting officer testified that: while in the lobby of the city housing authority building, which he said was a "drug-prone" location, he saw the defendant coming down the stairs and when the defendant saw the police, the defendant stopped and appeared to head back up the stairs; the defendant complied with the officer's request to come downstairs; when asked if he lived in the building, the defendant said yes, but when asked for identification, he clarified that he was visiting his girlfriend; and after saying his identification was in his pocket, the defendant moved to get it, but the officer's partner grabbed the defendant's arm, pulled his hand behind his back, and then saw a handgun inside the pocket. "The right of police to patrol inside NYCHA buildings does not eliminate the requirement that each level of intrusion be supported by the corresponding level of suspicion." (Supreme Ct, Bronx Co)

Dissent: "Defendant's abrupt, halting, and furtive movements provided the police with an objective credible reason for asking defendant if he was a resident of the … building, and subsequent events led to a lawful stop and frisk."

Discovery (Witnesses)

Witnesses (Credibility)

People v Rodney, 109 AD3d 439, 970 NYS2d 872 (1st Dept 8/27/2013)

"[W]hether the dismissal of the weapon charge against the witness affected the witness's cooperation in this prosecution is not ascertainable on this record. In addition, the witness's subjective belief whether such dismissal was a benefit may also bear on the issue of bias, requiring further inquiry. A hearing is required to clarify the circumstances surrounding the dismissal of the weapon charge and whether the witness believed he was receiving a favorable result as a consequence of his testimony in this case." (Supreme Ct, Bronx Co)

Appeals and Writs (Preservation of Error for Review)

Grand Jury (Procedure)

People v McCoy, 109 AD3d 708, 974 NYS2d 6 (1st Dept 9/17/2013)

The defendant's conviction must be reversed where the prosecution violated CPL 190.75(3) by re-presenting charges to a grand jury, without court authorization, after a previous grand jury adjourned without taking affirmative action on those charges. The defendant's conviction was initially affirmed based on his failure to preserve that issue, but later decisions of this court have held that a CPL 190.75(3) claim of error need not be preserved. The defendant's motion for reargument, while otherwise untimely, is heard because there was an interim change in the law and the defendant timely sought leave to appeal to the Court of Appeals. (Supreme Ct, New York Co)

Organized Crime

People v Keschner, 110 AD3d 216, 973 NYS2d 7 (1st Dept 9/24/2013)

A criminal enterprise, as defined in the enterprise corruption statute (Penal Law 460.10[3]), does not need to be structured "as to permit it to continue its existence without the involvement of one or more key participants." The statutory language refers to continuity beyond the scope of individual criminal incidents, not criminal participants. (Supreme Ct, New York Co)

Juveniles (Visitation)

Matter of Luis F. v Dayhana D., 109 AD3d 731, 971 NYS2d 292 (1st Dept 9/24/2013)

First Department *continued*

While the court properly determined that it is not in the child's best interest to award the father unsupervised visitation, the court erred in precluding the father from seeking modification of that order until "the end of 2013" because a custody or visitation order may be modified at any time upon a showing of a change of circumstances and that modification is in the best interest of the child. (Family Ct, Bronx Co)

Speedy Trial (Prosecutor's Readiness for Trial)

People v Morales, 109 AD3d 759, 971 NYS2d 752 (1st Dept 9/26/2013)

The prosecution's filing of a superseding information that changed the theory of the case "did not render their earlier declaration of readiness illusory," so any periods of delay after the declaration should be governed by the rules governing postreadiness delay. (Supreme Ct, Bronx Co)

Second Department

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

Narcotics (Penalties)

Sentencing (Resentencing)

People v Garcia, 107 AD3d 738, 965 NYS2d 895 (2nd Dept 6/5/2013)

As the prosecution concedes in this appeal from resentences imposed in 2010 upon the defendant's 2005 drug convictions, the court should have entered initial orders "specifying the determinate sentences it would impose prior to imposing" resentences under the Drug Law Reform Act (DLRA) of 2004 and 2005; on remittal, the court is to enter such orders and inform "the defendant that, unless he withdraws his motion or appeals from the initial DLRA orders," his original sentences will be vacated and the proposed resentences imposed. (County Ct, Orange Co)

Family Court (Family Offenses) (Orders of Protection)

Matter of Gould v Gould, 107 AD3d 713, 966 NYS2d 480 (2nd Dept 6/5/2013)

The stay-away order of protection must be reversed and the family offense petition denied where the petitioner failed to establish by a fair preponderance of the evidence that the appellant harassed the petitioner by asking the appellant's attorney to ask the petitioner's attorney for the key to the marital residence occupied by the petitioner. (Family Ct, Queens Co)

Juveniles (Neglect) (Visitation)

Matter of Jacob P., 107 AD3d 719, 967 NYS2d 89 (2nd Dept 6/5/2013)

The court "improvidently exercised its discretion in failing to provide the mother with any visitation … since there were no extraordinary circumstances justifying the denial of the mother's right to reasonable visitation …. " The finding that the mother derivatively neglected one child by striking the child's sibling several times with a belt is supported by a preponderance of the evidence. (Family Ct, Westchester Co)

Juveniles (Custody) (Family Offenses) (Visitation)

Matter of James A.-S. v Cassandra A.-S., 107 AD3d 703, 967 NYS2d 99 (2nd Dept 6/5/2013)

While the father failed to establish the allegations in his family offense petitions by a fair preponderance of the evidence, the court should have granted his petition for sole physical custody and denied the mother's cross petition where a forensic mental health evaluation not only substantiated the father's claim that a founded report existed showing the man with whom the mother was living to have engaged in inappropriate sex acts with his own 14-year-old stepdaughter but also that the man and the mother "exhibited a 'dismissive attitude' with regard to" the founded report and to the inappropriate relationship that the man had begun with the mother when she was 12 and he was 31. Pending further order of the court, the mother shall have visitation provided that the children are never left alone with the man she lives with. (Family Ct, Westchester Co)

Homicide (Murder [Intent])

People v Dubarry, 107 AD3d 822, 967 NYS2d 132 (2nd Dept 6/12/2013)

Where more than one person was present at a shooting, submitting to the jury counts of intentional murder and attempted murder as well as counts of depraved indifference murder was not error, as a defendant may act with specific intent as to one person and at the same time act recklessly as to another. To the extent that the Third Department held to the contrary in *People v Molina* (79 AD3d 1371), "we disagree and decline to follow that holding." (Supreme Ct, Kings Co)

Second Department *continued*

Counsel (Right to Counsel)

Juveniles (Neglect)

Matter of Jaylynn R., 107 AD3d 809, 967 NYS2d 129 (2nd Dept 6/12/2013)

The finding of neglect against the mother was not supported by a preponderance of the evidence; the petitioner did not establish that the failure of the baby to thrive and adequately gain weight resulted from the mother's failure to properly feed the child. The court violated the mother's due process rights by instructing her not to consult with her lawyer during a two-month adjournment. (Family Ct, Kings Co)

Appeals and Writs (Preservation of Error for Review)

Evidence (Privileges)

Motions (Suppression)

People v Newman, 107 AD3d 827, 967 NYS2d 122 (2nd Dept 6/12/2013)

"There is no merit to the defendant's claim that CPLR 4547 should have barred the introduction into evidence of the written statement and the payments the defendant made to the complainants," as that statute — assuming without deciding that it applies to criminal trials — "only applies to evidence of attempts 'to compromise'" a disputed claim and the defendant admitted taking funds from the complainants without authorization. The defendant waived his right to a judicial determination of whether his statement was involuntarily made, as he did not move to suppress before the trial commenced or show good cause for his failure to timely do so. (Supreme Ct, Westchester Co)

Juveniles (Paternity)

Matter of Oscar X. F. v Ileana R. H., 107 AD3d 795, 967 NYS2d 117 (2nd Dept 6/12/2013)

The court erred in dismissing proceedings to vacate an acknowledgment of paternity where, as the respondent acknowledges, the petitioner demonstrated "that he executed the acknowledgment of paternity based upon a material mistake of fact" where he was not aware when he signed it that during the relevant time period the respondent had sex with another man as well as with him and a later DNA test excluded the petitioner as the child's biological father. On remittal there must be a hearing to determine whether the child's best interest requires that the petitioner be estopped from vacating the paternity acknowledgment. (Family Ct, Queens Co)

Sentencing (Post-Release Supervision)

People v Dallas, 107 AD3d 912, 966 NYS2d 872 (2nd Dept 6/19/2013)

The court "misapprehended, and therefore, failed to impose, the promised period of postrelease supervision"; this unpreserved error is reviewed in the interest of justice, and the matter remitted to allow the court to 1) impose the promised three and a half year sentence with a one and a half year period of postrelease supervision, 2) give the defendant an opportunity to accept the initially imposed sentence, "including the enhanced period of postrelease supervision," or 3), allow the defendant to withdraw his guilty plea. (County Ct, Dutchess Co)

Juveniles (Neglect)

Matter of Joshua J., 107 AD3d 893, 968 NYS2d 140 (2nd Dept 6/19/2013)

The Department of Social Services (DSS) failed to prove by a preponderance of the evidence that the father neglected the child where the child appeared clean, healthy, and safe after DSS workers forcibly gained entry into the apartment, although the child was seen to have a small bruise under his eye the next day. The father had agreed to unannounced DSS visits, and the DSS workers arrived at the apartment door at around 9:00 p.m., after someone else let them into the building, following a report filed just before 5:00 p.m. expressing concern about the behavior of the father when he picked the child up from daycare; the father explained his refusal to open the door at night, and the presence of a baseball bat and kitchen knife under his bed, by saying he had been robbed in the past. (Family Ct, Westchester Co)

Sentencing (Post-Release Supervision)

Matter of Dow v Tomei, 107 AD3d 986, 968 NYS2d 155 (2nd Dept 6/26/2013)

The petition in this CPLR article 78 proceeding is granted, and respondents Supreme Court Justice and prosecutor are prohibited from seeking, enforcing, or adding a period of post-release supervision (PRS) to the petitioner's sentence. On Nov. 17, 2008, before the petitioner's original sentence of a term of imprisonment expired, a five-year period of PRS was added to that sentence based on a *Sparber* error (*see People v Sparber*, 10 NY3d 457 [2008]). An order issued on May 10, 2010, which vacated the period of PRS, was reversed by this Court on Mar. 27, 2012. This Court's order reinstated the period of PRS imposed on Nov. 17, 2008, and did not remit the matter for resentencing or further action by the trial court; therefore, prohibition lies as to a Dec. 6, 2012 oral order compelling the petitioner, who has relocated to North

Second Department *continued*

Carolina, to appear for resentencing to add a period of PRS, and any other effort to add further PRS. (Supreme Ct, Kings Co)

Defenses (Affirmative Defenses generally)

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

People v Grason, 107 AD3d 1015, 966 NYS2d 882 (2nd Dept 6/26/2013)

Given "the defendant's known history of mental illness, and the finding within six days after commission of the instant sex offense that the defendant was suffering from psychotic symptoms attributable to bipolar disorder, for which he required hospitalization, certain statements made during the defendant's plea allocution — specifically, statements regarding the complainant's impression that, at the time of incident, the defendant was 'very very much mentally unwell' — 'signaled that [the defendant] may have been suffering from a mental disease or defect' when the offense was committed, thereby triggering the Supreme Court's duty to inquire …." As the court failed to conduct any inquiry as to a potential affirmative defense, the plea must be vacated despite his failure to preserve the error. (Supreme Ct, Queens Co)

Family Court (Family Offenses)

Matter of Konstatine v Konstatine, 107 AD3d 994, 968 NYS2d 166 (2nd Dept 6/26/2013)

Evidence that the respondent came to the petitioner's apartment in the capacity of an employee of his father, who owned the building, and demanded that the petitioner, his step-grandmother, vacate the apartment for failure to pay rent, then threated to call the police and shoved the petitioner backwards onto the floor when she refused, demonstrated that the respondent acted with the intent to alarm. The court erred in determining that the family offense of second-degree harassment had not been proven, and properly concluded that the family offenses of third-degree assault and disorderly conduct had not. (Family Ct, Queens Co)

Juveniles (Neglect)

Sex Offenses (Sexual Abuse)

Matter of Monica C.M., 107 AD3d 996, 968 NYS2d 143 (2nd Dept 6/26/2013)

"[G]iven the limited duration and nature of the sexual abuse, as well as the remoteness in time between when Monica C.M. was abused and when Joshua A., the appellant's biological son, was born more than four years later, there was insufficient evidence to support the Family Court's determination that Arnold A. derivatively neglected Joshua A. …." (Family Ct, Queens Co)

Juveniles (Visitation)

Matter of Grunwald v Grunwald, 108 AD3d 537, 968 NYS2d 575 (2nd Dept 7/3/2013)

After an order in 2010 setting a visitation schedule for the mother that specified certain dates "and 'additional visitation as the parties agree,'" the father agreed to almost no visitation other than that specified, admitted leaving the child with relatives when he traveled rather than giving the mother more visitation time, and required the child to take a long bus ride from school to the father's before allowing the mother's weekend visitation time to begin. The parents could not agree on the exact time for specified holiday visitation to start. This record, without a further hearing, shows a change of circumstances warranting modification of visitation. A hearing should be held on other branches of the mother's petition. (Family Ct, Rockland Co)

Counsel (Right to Self-Representation)

Family Court

Pro Se Representation

Matter of Massey v Van Wyen, 108 AD3d 549, 969 NYS2d 464 (2nd Dept 7/3/2013)

Where the father had a college education, was going to finance and economics classes, had worked in the mortgage-loan industry for 20 years, had been a pro se litigant in both state and federal courts, with varying success, and acknowledged the perils of proceeding pro se and wanted to do so, and a searching inquiry by the court showed the father to knowingly, intelligently, and voluntarily waive his right to counsel, the court erred in refusing the request as a matter of policy. The court 'forc[ed] a lawyer upon'" the father, chastising him for not consulting assigned "advisory" counsel before filing a motion, and dismissing the petition for failure to prosecute because the father had no attorney. The matter is remitted for a new hearing before a different judge. (Family Ct, Suffolk Co)

Appeals and Writs (Arguments of Counsel)

Counsel (Competence/Effective Assistance/Adequacy)

Trial (Verdicts [Repugnant Verdicts])

People v Morales, 108 AD3d 574, 968 NYS2d 580 (2nd Dept 7/3/2013)

Second Department *continued*

The defendant correctly contends that he was denied the effective assistance of appellate counsel where counsel failed to raise numerous serious trial errors and trial counsel's ineffectiveness "in failing to properly contest most of those errors." The prosecution concedes that the jury issued repugnant verdicts as to the burglary and escape counts; the record shows that the court failed to give required preliminary jury instructions and committed numerous other omissions and errors in instructing the jury, that the prosecutor made improper remarks in opening and closing statements, and that there was no objectively reasonable and legitimate strategy for trial counsel's failure to object to these errors. The defendant having already served his sentences for those counts not dismissed for repugnancy, the indictment should be dismissed in its entirety.

Family Court

Juveniles (Jurisdiction) (Visitation)

Matter of Ramirez v Gunder, 108 AD3d 563, 968 NYS2d 183 (2nd Dept 7/3/2013)

"Since the initial visitation determination in this matter was made as part of a stipulation of settlement entered into during the parties' divorce proceedings before the Supreme Court, it was error for the Family Court to summarily decline to sign the order to show cause on jurisdictional grounds. Instead, the Family Court should have signed the order to show cause and then directed the parties to submit evidence on the issue of whether the Family Court retained exclusive, continuing jurisdiction over the visitation issues …." (Family Ct, Suffolk Co)

Double Jeopardy (Mistrial)

Trial (Mistrial)

Matter of Taylor v Dowling, 108 AD3d 566, 968 NYS2d 556 (2nd Dept 7/3/2013)

The court improvidently exercised its discretion in determining that a mistrial declared over the petitioner's objection was manifestly necessary. The court had dismissed the attempted second-degree murder count on the grounds of insufficient evidence and warned defense counsel not to refer to the dismissal in summation. Counsel's argument that the complainant had a motive to lie because under the petitioner's account of events, it was the complainant who would have been arrested for attempted murder, did not violate the court's directive and in any event the court did not evaluate the actual harm or whether a curative instruction would have sufficed. Retrial is precluded.

Juveniles (Neglect)

Matter of Tyreek A., 108 AD3d 527, 969 NYS2d 101 (2nd Dept 7/3/2013)

The court erred in denying summary judgment as to allegations that the father neglected the child where the petitioner satisfied its burden of establishing that the father's criminal conviction was for the same conduct alleged in the neglect petition and the father failed to raise a triable issue of fact. (Family Ct, Queens Co)

Due Process (Fair Trial)

Witnesses (Child) (Confrontation of Witnesses)

People v Tohom, 109 AD3d 253, 969 NYS2d 123 (2nd Dept 7/10/2013)

Upon a determination that the presence of a therapeutic "comfort dog" at trial may provide emotional support for a witness testifying as a crime victim, the presence of such an animal is permitted under the broad dictates of Executive Law 642-a regarding child witnesses under 16 years of age and in the exercise of the court's inherent power and discretion to control trial proceedings. Here, while the hearing held was not in accordance with *Frye*'s dictates, the defense did not request a *Frye* hearing. The court allowed the dog's presence but recognized defense concerns that the dog's presence would prejudice the jury; the defense declined to submit proposed limiting and curative instructions when invited to do so. The defendant's due process and confrontation rights were not violated. (County Ct, Dutchess Co)

Juveniles (Custody) (Grandparents)

Matter of Finlay v Plummer, 108 AD3d 671, 969 NYS2d 532 (2nd Dept 7/17/2013)

The court erred in granting the child's motion, joined by the maternal grandmother, to dismiss the father's custody petition under Domestic Relations Law 72 where the child was placed in the temporary custody of the grandmother upon a finding of neglect by the mother, a neglect petition against the father was subsequently withdrawn, and the father filed a petition for custody after permanency hearings had been held, the third of which led to an approved permanency goal of permanent placement with the grandmother as a fit and willing relative. The statute did not apply where the grandmother had only temporary custody and did not file a custody petition; res judicata was not applicable as there was no permanent custody determination in the permanency proceedings. (Family Ct, Dutchess Co)

Second Department *continued*

Juveniles (Abuse) (Right to Counsel)

Matter of Amber A., 108 AD3d 664, 969 NYS2d 162 (2nd Dept 7/17/2013)

The stepfather's contention that the attorney for the child representing his stepdaughter lacked statutory authority to file a child abuse petition on the stepdaughter's behalf, after the Department of Social Services withdrew the petition that it had filed, is rejected; the court did not err in directing the attorney for the child to determine whether the stepdaughter wanted the attorney to file the new petition. (Family Ct, Suffolk Co)

Aliens (Deportation) (Immigration)

Counsel (Competence/Effective Assistance/Adequacy)

Retroactivity

People v Andrews, 108 AD3d 727, 970 NYS2d 226 (2nd Dept 7/24/2013)

The requirements of *Padilla v Kentucky* (559 US 356 [2010]) that counsel advise foreign national clients about immigration consequences of their cases, found by the United States Supreme Court not to be retroactive, are also not retroactive under the New York constitution. The *Padilla* rule concentrates on defendants' appreciation of immigration consequences that may flow from a plea allocution, and does not go to the heart of a reliable determination of guilt or innocence. There was reliance on the prior rule, that ineffective assistance claims regarding immigration advice in criminal cases required a showing of incorrect advice and prejudice. And retroactive application could potentially lead to an influx of post-conviction motions to vacate the convictions properly entered under the old standard, adversely affecting the criminal justice system. (Supreme Ct, Kings Co)

Disorderly Conduct

Family Court (Family Offenses)

Matter of Cassie v Cassie, 109 AD3d 337, 969 NYS2d 537 (2nd Dept 7/24/2013)

While under Family Court Act 812(1) disorderly conduct can occur "not in a public place," the family offense of disorderly conduct does require a showing "that the challenged conduct was intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm." Here, a number of family offenses were alleged based on the wife's claim that during an argument the husband tried to push the wife down stairs, twisted her arm enough to cause pain, and pushed her against a wall. The court found the husband to have engaged in disorderly conduct in the home by fighting with the wife. But there was no evidence that anyone else might have been subjected to inconvenience, annoyance, or alarm. The order of protection is reversed. (Family Ct, Kings Co)

Juveniles (Custody)

Matter of Ellis v Burke, 108 AD3d 764, 970 NYS2d 251 (2nd Dept 7/31/2013)

The court's determination that the father had not demonstrated a sufficient change in circumstances to warrant modification of an existing custody arrangement was not supported by a sound and substantial basis in the record. The father was given temporary custody when a child protective petition was filed against the mother, the petition was dismissed after the Department of Social Services amended its initial report to "unfounded," the father then sought sole residential custody, and the evidence "established that, while living with the father …, the child, who has special needs, had thrived both at home and in school[, i]t would be disruptive to remove the child from the father's house and his established routine … [, t]he father is ensuring that the child maintains a strong and continuing relationship with the mother … [and] the attorney for the child supports" the father's petition. (Family Ct, Westchester Co)

Family Court

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

Matter of Feliciano v King, 108 AD3d 703, 970 NYS2d 554 (2nd Dept 7/24/2013)

Where, on the third day of a hearing on the mother's petition for sole legal and physical custody and only supervised visitation by the father with the children, the mother sought to substitute privately retained counsel for the court-appointed lawyer who was representing her, the court erred by denying new counsel's request for a one-week adjournment and giving the mother the choice of continuing with one or both lawyers, immediately proceeding without counsel, or having the court "make a decision based on the incomplete record." (Family Ct, Suffolk Co)

Juveniles (Custody)

Matter of Hirtz v Hirtz, 108 AD3d 712, 969 NYS2d 553 (2nd Dept 7/24/2013)

The father's relocation petition based on his military reassignment from New York to North Carolina was denied because the relocation would negatively impact the children's relationship with the mother; the denial has

Second Department *continued*

a sound and substantial basis in the record where the mother and father had joint legal custody, the father had primary physical custody, the children had developed relationships, with friends, doctors, therapists, and a church community, that could be maintained if they remain in New York with the mother, who had been their exclusive caregiver during the father's three overseas deployments, and the attorney for the children opposed relocation as not in the children's best interests. A liberal visitation schedule and the mother's declaration "that she will make sure that the children have as much access to the father as possible" will allow a continuing meaningful relationship between the children and the father. The court should not have modified legal custody or set forth a custodial plan to cover future moves where the parties did not raise these issues. (Family Ct, Orange Co)

Family Court

Juveniles (Custody) (Jurisdiction)

Matter of McClarin v Valera, 108 AD3d 719, 968 NYS2d 899 (2nd Dept 7/24/2013)

Review of the record shows that, despite the recitation in the administrative order of reference that upon the parties' consent the court authorized a court attorney referee to hear and determine custody and visitation, the mother did not stipulate to such reference; mere participation in the proceedings without requesting the matter to be tried before a judge did not constitute consent. Therefore, the court attorney referee could only hear and report, but not make determinations. (Family Ct, Queens Co)

Third Department

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Due Process (Fair Trial)

Juries and Jury Trials (Deliberation)

People v Clark, 108 AD3d 797, 968 NYS2d 249 (3rd Dept 7/3/2013)

The procedures used by the court to respond to the jury's request "for 'a copy of the charges and [the] law'" and a later request for a read back of the complainant's testimony regarding his confrontation with the defendant deprived the defendant of a fair trial. In the first instance, the court failed to determine whether the jury was asking for the previously promised portion of the written charge or some other materials and thus did not provide a meaningful response to the jury. In the second instance, the court directed the stenographer to read back the direct testimony, which was not fully done, and failed to direct the read back of testimony elicited on cross-examination that either impeached the direct testimony or that attacked the witness's credibility in general; requests for read backs are generally assumed to include these. (County Ct, Saratoga Co)

Article 78 Proceedings

Parole (Release [Consideration for (includes guidelines)])

Matter of Garfield v Evans, 108 AD3d 830, 968 NYS2d 262 (3rd Dept 7/3/2013)

The petitioner is entitled to a new parole hearing because the Board of Parole, in violation of Executive Law 259-c(4), failed to use a COMPAS Risk and Needs Assessment instrument at the petitioner's hearing in October 2011. (Supreme Ct, Sullivan Co)

[***Ed. Note:*** *The Third Department has decided a number of cases on the same grounds, including* Matter of Warmuth v New York State Division of Parole *(110 AD3d 1136, 972 NYS2d 925 [3rd Dept 2013]) and* Matter of Shark v New York State Division of Parole Chair *(110 AD3d 1134, 972 NYS2d 741 [3rd Dept 2013]).*]

Constitutional Law (New York State generally)

New York State Legislation

Weapons (Firearms)

Schulz v State of New York Executive, 108 AD3d 856, 969 NYS2d 195 (3rd Dept 7/3/2013)

In this state constitutional challenge to the Secure Ammunition and Firearms Enforcement (SAFE) Act (L 2013, ch 1), the court properly denied the motion for a preliminary injunction because the plaintiff failed to demonstrate a likelihood of success on the merits where the primary claim relates to whether the Governor's message of necessity comports with the state constitution; the message of necessity is not subject to judicial review as the Governor provided factual statements to support the message. (Supreme Ct, Albany Co)

Narcotics (Penalties)

Sentencing (Persistent Felony Offender) (Resentencing)

Third Department *continued*

People v Coleman, 110 AD3d 76, 970 NYS2d 329 (3rd Dept 8/1/2013)

The defendant is eligible for resentencing under CPL 440.46 because, although he was sentenced as a persistent felony offender and that sentence precludes him from earning merit time, he was not convicted of an offense for which merit time is not available. "Defendant's offense and his sentence are thus two separate components that we decline to conflate for purposes of depriving an otherwise eligible person of the benefits of the remedial legislation that we are tasked with interpreting here." This Court declines to follow the Second Department's holding to the contrary in *People v Gregory* (80 AD3d 624 [2d Dept 2011]). (County Ct, Sullivan Co)

Dissent: Because the defendant is serving a sentence on a conviction for an exclusion offense for which merit time is not available, he is not eligible for resentencing.

[***Ed. Note:*** *Leave to appeal was granted on Sept. 17, 2013 (21 NY3d 1078).*]

Confession (Counsel)

Counsel (Attachment)

Post-Judgment Relief (CPL § 440 Motion)

People v McLean, 109 AD3d 670, 970 NYS2d 332 (3rd Dept 8/8/2013)

The defendant's right to counsel was not violated where the police confirmed, prior to questioning the defendant about a murder, that the attorney who previously represented the defendant in connection with the murder investigation, in an effort to obtain a reduced sentence in a robbery case, was no longer representing him. The attorney's testimony at the post-conviction hearing that he now believes that he still represented the defendant is based upon a misreading of *People v Callicutt* (85 AD3d 1326 [3rd Dept 2011]). The attorney's representation of the defendant in the murder case was not independent of the representation in the robbery case. (County Ct, Schenectady Co)

Dissent: "[T]he police did not meet their burden of resolving ambiguity regarding defendant's representation by counsel prior to questioning him, thereby violating his indelible right to counsel …." The right to counsel indelibly attached when his attorney went with the defendant when he gave a statement to the police about the murder and advised the defendant about not answering certain questions and also was present when the defendant viewed a photo array, told the police where to look for the murder weapon, and testified before a grand jury that was investigating the murder. And the attorney could not "unilaterally end[] representation without the defendant's knowledge." "[I]t is incredible to believe that this seasoned defense attorney would explicitly give the police his blessing to question an uncounseled client or former client, even with the limited information that was provided." [Footnote omitted.]

[***Ed. Note:*** *Leave to appeal was granted on Sept. 18, 2013 (21 NY3d 1078).*]

Forgery (Elements) (Evidence)

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

People v Morehouse, 109 AD3d 1022, 972 NYS2d 729 (3rd Dept 9/19/2013)

The defendant's challenge to the voluntariness of his second-degree forgery plea is reviewed, despite his failure to preserve the issue and his appeal waiver, where he made a statement during the allocution that cast doubt on his guilt, namely that when he used other people's credit cards to purchase items, he signed his own name, not the name on the card, on the receipts. Second-degree forgery is not committed "when the ostensible maker and the actual maker are the same person," and "defendant's signing of his own name to the credit card receipts would render him both the actual and ostensible maker of the instrument …." The court failed to inquire further after the defendant made this statement. (County Ct, Warren Co)

Fourth Department

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Trial (Confrontation of Witnesses)

Witnesses (Confrontation of Witnesses)

People v Arena, 107 AD3d 1440, 967 NYS2d 301 (4th Dept 6/7/2013)

The defendant's right to confrontation was not violated where a prosecution witness stated he wanted to testify as a female and the prosecutor referred to the witness using a female name, but the witness had been sworn as a male and acknowledged that his legal name was male; this did not constitute testifying in disguise. In this bench trial, the court "was not prevented from seeing the face or eyes of the witness or from observing the demeanor of the witness …." (County Ct, Monroe Co)

Fourth Department *continued*

Larceny (Automobiles) (Defenses) (Evidence)

People v Rios, 107 AD3d 1379, 966 NYS2d 626 (4th Dept 6/7/2013)

The fourth-degree grand larceny conviction must be vacated where the prosecution failed to "establish[] beyond a reasonable doubt that defendant did not have a subjective, good faith basis for believing that the Jeep was his" where the defendant's former girlfriend signed the title of her Jeep over to him, but later told him "the deal was off"; the girlfriend took the title out of the Jeep without the defendant's knowledge, but left the defendant at her house with the Jeep and did not take the license plates, proof of insurance, or keys with her; and the girlfriend testified "that defendant believed that he had the right to possess the Jeep and that she did not inform him otherwise." (County Ct, Niagara Co)

Accusatory Instruments (Variance of Proof)

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

Misconduct (Prosecution)

People v Williams, 107 AD3d 1391, 967 NYS2d 288 (4th Dept 6/7/2013)

The first-degree criminal impersonation conviction must be vacated, although the contention was not preserved, where the court's jury instruction regarding that crime "permitted the jury to convict him upon a theory not charged in the indictment, and thus violated his right to be tried for only those crimes charged in the indictment, as limited by the bill of particulars …." The court's instructions allowed the jury to convict the defendant if they found he had committed any felony in the course of pretending to be a police officer, not just the crime of first-degree rape that was alleged in the indictment.

The prosecutor made improper comments during opening and closing statements and improperly elicited testimony regarding the defendant's post-arrest silence and the court erred in allowing such testimony, but the error was harmless. (County Ct, Onondaga Co)

Appeals and Writs (Preservation of Error for Review) (Waiver of Right to Appeal)

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

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

People v Robinson, 107 AD3d 1582, 966 NYS2d 721 (4th Dept 6/14/2013)

The defendant's plea to depraved indifference murder must be vacated where statements he made during the plea colloquy regarding his struggle with his wife for control of the knife and his recklessness when he stabbed her "suggest that he did not act with the requisite 'depraved indifference state of mind,'" and the court failed to conduct further inquiry to ensure that the defendant's plea was knowing and voluntary. Preservation of the issue was not required and his voluntariness survives his appeal waiver under the circumstances. The more recent standard regarding the depraved indifference element, set forth in *People v Feingold* (7 NY3d 288 (2006)]) is applied because the defendant's direct appeal was pending when *Feingold* was decided. (County Ct, Niagara Co)

Accusatory Instruments (Amendment)

Appeals and Writs (Preservation of Error for Review) (Waiver of Right to Appeal)

People v Stevenson, 107 AD3d 1576, 966 NYS2d 717 (4th Dept 6/14/2013)

As the prosecution concedes, the superior court information is jurisdictionally defective where the SCI was amended to charge the defendant with the forcible rape of an individual other than the individual named in the felony complaint; the "defendant was not held for action of a grand jury on the charge in the SCI inasmuch as 'it was not an offense charged in the felony complaint or a lesser-included offense of a crime charged in the felony complaint …." This issue need not be preserved and survives the defendant's valid appeal waiver. (County Ct, Erie Co)

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

Sentencing (Post-Release Supervision)

People v Turner, 107 AD3d 1543, 966 NYS2d 779 (4th Dept 6/14/2013)

Although the defendant was not informed of the post-release supervision (PRS) component of her sentence at the plea allocution, the prosecutor did raise the issue before the court imposed sentence, the court noted that it planned to impose 5 years' PRS, and the defendant indicated that she understood that PRS was part of her sentence, that she would be on parole supervision for 5 years, and that she still wanted to go forward with the sentencing. Because the defendant could have sought relief before sentencing was imposed, the rationale behind the Court of Appeals decisions that authorize dispensing with the

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preservation requirement does not apply. (County Ct, Monroe Co)

Dissent: The defendant's plea was not knowing, voluntary, and intelligent where the court did not advise her at the time of her plea of the PRS component, and there was no indication the defendant was given an alternative to proceeding with sentencing.

[***Ed. Note:*** *Leave to appeal was granted on Aug. 6, 2013 (21 NY3d 1047).*]

Sentencing (Pre-sentence Investigation and Report) (Sentencing Plans by Defense) (Weapons) (Youthful Offenders)

People v Amir W., 107 AD3d 1639, 969 NYS2d 289 (4th Dept 6/28/2013)

The defendant should have been given youthful offender status in this second-degree criminal possession of a weapon case where the defendant was 16 years old at the time of the offense; had no criminal record; cooperated with the police and admitted guilt and expressed remorse; said that he had been assaulted by a group of people with wooden boards; police and jail records note injuries, including mild head trauma and a small hematoma on his scalp; he said that he fired a shot into the porch of his attackers' house when no one was home to send a message to them to leave him alone; and the presentence report and a defense sentencing memorandum detail the defendant's childhood, including abuse by his multiple adults and his father's incarceration, and recommend youthful offender treatment. "[D]espite defendant's difficult upbringing, he has the potential to lead a law-abiding life." (County Ct, Onondaga Co)

Appeals and Writs (Counsel)

Counsel (Competence/Effective Assistance/Adequacy)

Evidence (Weight)

People v Tuff, 107 AD3d 1646, 967 NYS2d 847 (4th Dept 6/28/2013)

The defendant's motion for a writ of error coram nobis is granted where his claim of ineffective assistance of appellate counsel, for failure to raise the issue of whether the jury's verdict was against the weight of the evidence, may have merit. (County Ct, Oneida Co)

Statute of Limitations (Burden of Proof) (Computation of Period) (Tolling of)

People v Burroughs, 108 AD3d 1103, 968 NYS2d 773 (4th Dept 7/5/2013)

The third-degree rape and first- and third-degree sodomy counts should have been dismissed because the defendant, who was arrested in 2010, was not charged within the five-year statute of limitations applicable in 2002, when the offense occurred. And the statute of limitations was not tolled where the prosecution failed to explain why the defendant's identity could not have been ascertained sooner using due diligence where the defendant's DNA was in the statewide databank since 1998 and the alleged perpetrator's DNA was entered in the databank in January 2003. The first-degree rape count was not untimely where the legislature eliminated the statute of limitations for that offense in 2006 and that change applied to offenses that were not yet time-barred. The statute of limitations was also eliminated for first-degree sodomy, but not until 2008, about nine months after expiration of the five-year limitation applicable here. (Supreme Ct, Erie Co)

Evidence (Hearsay) (Newly Discovered)

Post-Judgment Relief (CPL § 440 Motion)

People v McFarland, 108 AD3d 1121, 969 NYS2d 295 (4th Dept 7/5/2013)

The court should have held a hearing on the defendant's CPL 440.10 motion to the extent that it raised a newly discovered evidence claim where, several years after the conviction and direct appeal, the defendant's appellate counsel received an affidavit in the mail from a person who stated that a third party confessed to shooting and killing the decedent and that this information was given to investigators on two occasions. There are questions of fact regarding the unavailability of the third party and the admissibility of the statements as declarations against penal interest, but depriving a defendant of presenting such evidence may be a denial of the fundamental right to present a defense. (Supreme Ct, Monroe Co)

Evidence (Weight)

Reckless Endangerment (Elements) (Evidence)

People v Stanley, 108 AD3d 1129, 970 NYS2d 136 (4th Dept 7/5/2013)

The first-degree reckless endangerment verdict is against the weight of the evidence where the trial evidence showed that the defendant stood on a street corner and fired up to five shots from a handgun, but no evidence was introduced that anyone was in or near the line

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of fire, which was needed to establish the element of a grave risk of death to another person. (County Ct, Onondaga Co)

Arrest (Felonies) (Police Officers) (Vehicle and Traffic Law)

Jurisdiction

People v Twoguns, 108 AD3d 1091, 969 NYS2d 337 (4th Dept 7/5/2013)

The court should have dismissed the traffic infraction charges where the police officer exceeded his geographic jurisdictional authority by arresting the defendant more than 100 yards outside of the village limits. But the defendant's arrest for felony DWI and resisting arrest were proper because CPL 140.10(3) authorizes a police officer to arrest a person for a crime, even if the crime was not committed in the geographical area of the officer's employment, and the arrest can be made anywhere in the state. (Supreme Ct, Erie Co)

Contempt (Elements)

Sentencing (Orders of Protection)

People v Webb, 108 AD3d 1064, 968 NYS2d 771 (4th Dept 7/5/2013)

The defendant's first-degree criminal contempt conviction, for violating an order of protection issued for the benefit of the mother of the defendant's child that directed him to not talk to her by phone, is reversed where, even assuming there is legally sufficient evidence that the defendant repeatedly called the mother, the evidence is insufficient to establish that the defendant intended to harass, annoy, threaten, or alarm her, with no purpose of legitimate communication when the only inference that can be drawn from the evidence is that he called to discuss child support and visitation issues. (County Ct, Genesee Co)

Dissent in Part: There is legally sufficient evidence of first-degree contempt where the evidence showed that the defendant called the mother five times in an eight-day period, three of the calls occurred in the course of an hour, and during the calls, he cursed at her, told her he did not plan to pay child support, and threatened to embarrass her in the child support violation proceeding.

[***Ed. Note:*** *Leave to appeal was granted on Aug. 28, 2013 (21 NY3d 1047).*]

Trial

Subpoenas and Subpoenas Duces Tecum

Witnesses

People v Baxter, 108 AD3d 1158, 969 NYS2d 678 (4th Dept 7/19/2013)

In this second-degree criminal possession of a weapon case, the court erred in denying the defendant's request for an order to produce a proposed inmate witness at trial where the defendant showed that the witness talked to the driver of the vehicle in which the defendant was a passenger just before the defendant's arrest, the witness was between 20 feet and 20 yards from the vehicle at the time of the arrest, there was no fingerprint evidence, and the "issue of defendant's guilt turned largely on the testimony of two police detectives. We cannot countenance the court's refusal to allow defendant to present the testimony of a witness who might have supported defendant's version of events." The court's denial was based largely on the contents of a letter the defendant wrote to the proposed witness about the witness's expected trial testimony, but the witness never received the letter and knew nothing about it and the record evidence does not allow for a determination about whether the defendant was trying to suborn perjury or was providing a truthful reflection of his version of events. (County Ct, Onondaga Co)

Dissent: The defendant failed to show that the proposed witness had material information where the defendant merely indicated that the witness may give character testimony and may have information about the facts and the defendant had not communicated with the witness about his possible testimony; the witness's presence at the scene does not establish that he had material information.

Juveniles (Parental Rights) (Permanent Neglect)

Matter of Cayden L.R., 108 AD3d 1154, 969 NYS2d 674 (4th Dept 7/19/2013)

The court properly found the petitioner made diligent efforts to reunite the mother with her child where the petitioner arranged for a psychological assessment and therapy sessions for the mother and services for the child, provided parenting, budgeting, and nutrition education training and supervised and unsupervised visitation, and arranged for a child psychologist to visit the mother at home to provide parenting training. The failure to plan for the child's future determination was also proper where the evidence showed the mother could not provide an adequate, stable home for the child and parental care. (Family Ct, Jefferson Co)

Dissent: Because the medical professionals misdiagnosed both the mother and child, and the petitioner's efforts to strengthen the parent-child relationship were based on those misdiagnoses, the petitioner failed to show it made diligent efforts that were specifically tailored to overcome the mother's particular problems. The mother availed herself of all the provided services, sought out

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mental health services on her own, and corrected the problems that led to the child's removal.

Homicide (Manslaughter [Elements] [Instructions])

Trial (Verdicts [Inconsistent Verdicts])

People v DeLee, 108 AD3d 1145, 969 NYS2d 350 (4th Dept 7/19/2013)

The first-degree manslaughter as a hate crime conviction must be reversed because, based on a review of the elements of the offenses charged to the jury, it is inconsistent with the acquittal for first-degree manslaughter. This issue was preserved when counsel raised it before the jury was discharged, but the court chose to discharge the jurors and did not direct them to reconcile the verdict. First-degree manslaughter is not a lesser included offense of first-degree manslaughter as a hate crime because both are class B violent felonies. (County Ct, Onondaga Co)

Dissent: The verdict is not inconsistent where the jury decided that the defendant shot the decedent and that it constituted a hate crime and that the defendant did not shoot the decedent for a non-hate reason or no reason at all.

[***Ed. Note:*** *Leave to appeal was granted on Aug. 14, 2013 (21 NY3d 1047).*]

Evidence (Exclusionary Rule Exceptions) (Other Crimes) (Relevancy) (Prejudicial)

Identification

People v Larkins, 108 AD3d 1210, 969 NYS2d 700 (4th Dept 7/19/2013)

The court erred in granting the prosecution's motion to present, as *Molineux* evidence for the purpose of proving identity, that the defendant committed an attempted robbery of a hotel clerk in one city shortly before committing the robbery of a hotel clerk at issue in this case where the court failed to determine the relevancy of the identification evidence of the attempted robbery and failed to properly balance the prejudicial effect against the probative value. Further, there is no record evidence that the court found that the defendant's identity as the person who committed the attempted robbery was established by clear and convincing evidence. Even though the trial evidence, without the inadmissible identification evidence, is legally sufficient and the verdict is not against the weight of the evidence, the *Molineux* ruling constitutes reversible error. (County Ct, Cayuga Co)

Due Process (Fair Trial)

Post-Judgment Relief (CPL § 440 Motion)

People v Schrock, 108 AD3d 1221, 969 NYS2d 668 (4th Dept 7/19/2013)

The improper use of a stun belt, which was directed by the sheriff and not the court, did not constitute a mode of proceedings error where the court did not know the defendant was wearing the stun belt, there was no evidence that the defendant wore it at trial other than during the rebuttal testimony of the prosecution's expert, it is undisputed that the jury could not see it, and there is no evidence that it caused the defendant discomfort or inhibited his communication with his attorney. Because the issue was unpreserved, reversal of the judgment is not required under CPL 440.10(1)(f). (County Ct, Cattaraugus Co)

Dissent: The sheriff's usurpation of the court's authority to decide whether a stun belt is necessary, which is no different from the delegation of the court's power, is a mode of proceedings error. "We cannot allow court personnel or law enforcement officers to exercise powers reserved to the court …."

Search and Seizure (Motions to Suppress [CPL Article 710])

People v Battle, 109 AD3d 1155, 971 NYS2d 627 (4th Dept 9/27/2013)

While the court erred in holding that the defendant needed to submit an affidavit in support of her suppression motion to be entitled to a hearing and in suggesting that the defendant had to deny participation in the crime, the court properly denied the motion without a hearing because there were insufficient factual assertions in the defendant's moving papers where the documents given to the defendant, including the search warrant application, provided sufficient information for her to make a proper motion. (County Ct, Ontario Co)

Appeals and Writs (Counsel)

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

People v Brooks, 109 AD3d 1218, 971 NYS2d 727 (4th Dept 9/27/2013)

The motion for a writ of coram nobis is granted where a review of the motion papers shows that the defendant's assertion of ineffective appellate counsel, which is based on the failure to raise on appeal the claim that the "defendant was denied effective assistance of counsel because trial counsel failed to provide conflict-free representation," may have merit. (Supreme Ct, Monroe Co)

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Grand Jury (Procedure) (Witnesses)

Dismissal

People v Brumfield, 109 AD3d 1105, 972 NYS2d 136 (4th Dept 9/27/2013)

The court erred in denying the defendant's motion to dismiss the indictment because he was denied his right to testify before the grand jury where the defendant served the proper notice requesting appearance and appeared at the specified time and place, but was denied the right to testify after he deleted three paragraphs of the waiver of immunity form before signing it before a notary public; because the portion of the notice that the defendant left intact complied with the requirements of CPL 190.45(1), the defendant had a right to testify. (County Ct, Monroe Co)

Sentencing (Persistent Felony Offender)

People v Jones, 109 AD3d 1108, 971 NYS2d 595 (4th Dept 9/27/2013)

The persistent felony offender statute does not require that a prior out-of-state conviction be a crime that would constitute a felony in New York or that the elements of the foreign crime be equivalent to the elements of a New York crime, provided that the defendant was sentenced to a term of imprisonment in excess of one year. This is in contrast to the second felony offender statute that requires the out-of-state or federal felony be recognized as a felony in New York to qualify as a predicate felony. (County Ct, Monroe Co)

Sentencing (Appellate Review) (Enhancement) (Resentencing)

People v Rhodes, 109 AD3d 1102, 972 NYS2d 134 (4th Dept 9/27/2013)

The court's resentencing of the defendant to a term of incarceration that was three years longer than the original sentence was impermissibly vindictive. The court failed to rebut the presumption of vindictiveness by establishing that the increase was based on identifiable conduct that occurred after the original sentence was imposed where the court stated that the increase was based on the defendant's continued failure to take full responsibility for his actions and was minimizing the nature of the crime, but the original presentence report "indicated that the defendant asserted his innocence, questioned the veracity of the prosecutor's witnesses and apparently lied about how he came into possession of the firearm when he was interviewed for the report," and an updated presentence report noted that the defendant admitted his conduct, but questioned whether he deserved the original 12-year sentence, and that the defendant did not have any disciplinary infractions since he was originally sentenced. (County Ct, Allegany Co) ⚖

NYSDA Client Advisory Board Member Works for Peace with Pete

Chuck Culhane, long-time member of NYSDA's Client Advisory Board, works for peace and justice in many ways. He was instrumental in bringing Pete Seeger to perform at the annual dinner of The Western New York Peace Center in November.

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