NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXIX Number 3 August–November 2014

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

State Agrees to Settle Public Defense Lawsuit; Five Counties to Receive Help, Others Seek Statewide Reform

Counsel for the class action plaintiffs in *Hurrell-Harring v State of New York*, the New York Civil Liberties Union (NYCLU) and Schulte Roth & Zabel LLP, have announced a settlement with New York State and the five county defendants (Onondaga, Ontario, Schuyler, Suffolk, and Washington counties). The settlement agreement, released on Oct. 21, 2014, is available on the NYCLU website at www.nyclu.org/files/releases/10.21.14_hurrellharring_settlement.PDF.

The settlement focuses on four areas of public defense services in criminal proceedings: counsel at arraignment, caseload relief, initiatives to improve the quality of public defense, and eligibility standards for representation. Assuming full compliance by the parties, the settlement agreement will expire in 7½ years.

- Counsel at arraignment: The State has agreed to ensure, within 20 months of the date the agreement is approved by the court, "that each criminal defendant within the Five Counties who is eligible for publicly funded legal representation … is represented by counsel in person at his or her Arraignment. A timely Arraignment with counsel shall not be delayed pending a determination of a defendant's eligibility." Steps to achieve this outcome, which the Court of Appeals has already said is required throughout New York State (*see Hurrell-Harring v State of New York* [15 NY3d 8, 20 (2010)]), are outlined in section III of the agreement. The Governor is required to seek Legislative approval for the appropriation of $1 million in the 2015/2016 state fiscal year (SFY) to implement this part of the agreement.

- Caseload relief: Within six months, the Indigent Legal Services (ILS) Office must ensure that the caseload/workload of each attorney providing mandated representation in the five counties can be accurately tracked and reported, including private practice caseloads/workloads. The agreement provides $500,000 in state funds for the creation of a tracking system that, to the extent practicable, can be used across the state. The ILS Office must also set caseload/workload standards for trial and appellate cases in the five counties. Details appear in section IV of the agreement.

- Initiatives to improve the quality of public defense: The ILS Office must establish, within 6 months of the agreement's approval, written plans to improve the quality of public defense representation in the five counties and implement them using state funds, $2 million in each of the 2015/2016 and 2016/2017 SFYs. Details appear in section V of the agreement.

- Eligibility standards for representation: Within 6 months of the agreement's approval, the ILS Office must "issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation." A list of the minimum requirements of the standards appears in section VI of the agreement. This is the only portion of the agreement that will apply to all counties outside the City, not just the five defendant counties.

While the State has already signed the settlement agreement, the governing body of each of the five counties must agree to join the settlement; those decisions are expected in the coming weeks. After that, the court will hold a fairness hearing on the settlement and decide whether to accept the parties' agreement. As noted in the June-July 2014 issue of the *REPORT*, the plaintiffs had

Contents

already reached a settlement with Ontario County, and at the end of September, the plaintiffs announced a settlement with Schuyler County. The individual settlements with Ontario and Schuyler counties provide that in the event of a settlement with the State, the parties shall engage in good faith negotiation regarding whether that settlement should alter the terms of the individual settlements.

ILS Office Requests Increased Budget to Implement the Settlement

The ILS Office, with approval of the ILS Board, has submitted a 2015/2016 SFY budget request that includes $950,000 for it to implement and monitor compliance with the settlement agreement. The ILS Office's statement about the settlement is available here.

U.S. Department of Justice Filed Statement of Interest in Hurrell-Harring

Less than a month before the settlement was announced, the U.S. Department of Justice (DOJ) filed a Statement of Interest in *Hurrell-Harring*. The filing is intended to provide the Albany County Supreme Court "with a framework to assess the plaintiffs' claim of constructive denial of counsel," according to the DOJ press release. The Statement asserts:

> It is the position of the United States that constructive denial of counsel may occur in two, often linked circumstances:
>
> (1) When, on a systemic basis, lawyers for indigent defendants operate under substantial structural limitations, such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices; and/or
>
> (2) When the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case—are absent or significantly compromised on a system-wide basis.
>
> Under either or both of these circumstances, a court may find that the appointment of counsel is superficial and, in effect, a form of non-representation that violates the Sixth Amendment guarantee of counsel.

While DOJ officially took no position as to the merits of *Hurrell-Harring*, appended to its Statement of Interest is a similar document that was filed in *Wilbur v City of Mount Vernon*, a case decided in the federal Western District of Washington State last year. DOJ noted that the *Wilbur* court found for the plaintiffs and ordered increased resources for public defense services, establishment of controls for defenders' workloads, and monitoring of representation to ensure that public defenders are carrying out the traditional markers of constitutional representation. On Nov. 13, 2014, ILS Office Director William Leahy sent a letter to Attorney General Holder thanking him for the action taken by DOJ in *Hurrell-Harring* and noting how the Statement of Interest "played a significant and positive role toward" the settlement.

NYSDA and Others Push for Broader Reform

Although the settlement focuses on representation in the five counties, the settlement sparked discussion about statewide reform of the public defense system. NYCLU's lead counsel on the case, Corey Stoughton, was quoted in the NYCLU's press release as saying: "This agreement is a template by which New York can establish equal justice for all in every single county and should serve as a model for the rest of the country." And NYCLU Associate Legal Director Christopher Dunn said: "This settlement marks what we hope and expect to be the beginning of sweeping reforms of New York's broken public defense system."

NYSDA's statement on the settlement commended the Governor and the plaintiffs' counsel for a settlement that lays the foundation for statewide reform and noted that the "settlement underscores the need for Governor Cuomo to introduce legislation to create a statewide Independent Public Defense Commission and provide justice in every county of the state." Executive Director Jonathan E. Gradess is quoted as saying that "[w]hile this settlement begins to address serious problems in a quintet of counties, there is an entire orchestra of 57 remaining counties without justice," and while the settlement "is a good beginning, the state's job is not done until every per-

Public Defense Backup Center REPORT
A PUBLICATION OF THE DEFENDER INSTITUTE
Volume XXIX Number 3 August–November 2014

Managing Editor Charles F. O'Brien
Editors Susan C. Bryant, Mardi Crawford
Contributors Stephanie Batcheller, Yasmin Davis, Lucy McCarthy, Al O'Connor, Ken Strutin

The REPORT is published throughout the year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone 518-465-3524; Fax 518-465-3249. Our web address is http://www.nysda.org.

son who cannot afford a lawyer in every county has access to a fair trial with a competent lawyer."

Fifteen counties, including Schuyler County, have called on the Governor and the State to take over the funding for all public defense services. As noted in a *Watertown Daily Times* article, the counties' joint press release, which was issued days before the settlement was announced, stated: "Eventually state takeover should mean full state funding and responsibility and relief for localities, a consolidation of widely disparate services, the creation of economies of scale and the administration by an independent public defense commission that contracts with existing offices and plans or creates new ones." NYSDA will engage with these and other New York counties, the public defense community, and the public, as well the three branches of New York State's government, about how the settlement drives statewide reform.

Cost of Curbing Excessive Caseloads Outside NYC: Millions

To bring public defense caseloads handled in 2013 outside New York City into compliance with the numerical caseload limits imposed on the City by state legislation in 2010 would have cost at least $105,199,248, the Indigent Legal Services (ILS) Office reported in September. The new publication, "Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York—2013 Update," is available on the ILS website.

Among the facts noted in the ILS report's bulleted Executive Summary are the following:

- In 2013, the 57 upstate counties of New York State spent $174,948,057, largely from county funds, to provide legally mandated representation to indigent persons under NY County Law Article 18-B. This was an increase of over $9 million, or 5.4%, on the $165,934,692 spent in 2012.
- The findings of this report demonstrate that despite modest progress in 2013, upstate caseloads continue to exceed maximum national limits by an unconscionable margin; indeed they far exceed even the caseloads that existed in New York City in 2009, which caused the State of New York to provide funding to bring those caseloads into compliance with maximum national caseload limits.

The report was cited in news coverage of the settlement announced in the NYCLU's lawsuit against the State and five counties over deficiencies in public defense (discussed above). From the *Daily Mail* to the *Times Union*, journalists took note of the costs of solving the caseload problem statewide while setting out the financial provisions contained in the settlement.

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

The Right to Appeal, Ineffective Assistance of Counsel, and Waivers

In 2010, the Court of Appeals held that defendants who were unaware of their lawyers' failure to file requested notices of appeal may seek relief through coram nobis procedures after missing the one-year period for requesting permission to file a late notice of appeal under CPL 460.30. *People v Syville*, 15 NY3d 391 (10/14/2010). The Court recently cited *Syville* in finding that a defendant had established his entitlement to such relief. In *People v Perales* (24 NY3d 939 [9/16/2014]) [summary on p. 10], trial counsel failed to file a notice of appeal after the defendant at sentencing made an unsuccessful challenge to his guilty plea, the defendant wrote letters to counsel which yielded no results, and the defendant only learned of the failure by inquiring of the Appellate Division. To avoid prejudicing clients, and findings of being ineffective, trial lawyers' job does not end at the close of sentencing proceedings.

Trial attorneys know that even if clients have waived appeal, counsel must advise them in writing of their right to appeal, and, if the client wants to appeal, counsel must serve and file a notice of appeal. *See* 22 NYCRR 606.5(b)(1) [1st Dept]; 22 NYCRR 671.3(a) [2nd Dept]; 22 NYCRR 821.2(a) [3rd Dept]; and 22 NYCRR 1022.11(a) [4th Dept].

Of course, just because clients *can* appeal despite a waiver does not always mean they should; there can be risks. For example, in appeals from guilty pleas, challenges resulting in resentencings may put clients at risk of having their plea bargains fall if prosecutors' agreements to the pleas were based on imposition of the challenged sentence. *See People v Hamilton*, 49 AD3d 1163 (4th Dept 3/14/2008) [discussed in a post on the Indignant Indigent blog]. For further discussion of risks, see the post on the New York Criminal Defense blog entitled "What Should Asssigned Appellate Counsel Do When the Only Issues Risk Worse Outcomes for the Client?"

For defendants in the federal system, at least in the Third Circuit, the risk may be high if they received valuable government promises in return for their waivers of appeal. A post on the Sentencing Law and Policy blog highlights *United States v Erwin* (765 F3d 219 [3rd Cir 8/26/2014]), which held that the defendant's appeal, within the scope of his knowing and voluntary appellate waiver, was a breach of his plea agreement. The case was

sent back for de novo resentencing at which the government would be excused from its agreement to move for a downward departure from the sentencing guidelines.

On a happier waiver note, the Department of Justice (DOJ) announced on Oct. 14, 2014, that federal prosecutors "will no longer ask criminal defendants who plead guilty to waive their right to bring future claims of ineffective assistance of counsel." The move by outgoing Attorney General Eric Holder was tied to other DOJ efforts to protect the right to counsel and enhance due process, according to Deputy Attorney General James M. Cole. He added that, "'As reflected in our recent intervention to secure greater public defender services in New York, the criminal justice system is best served when parties have competent and unbiased legal representation.'" That intervention, the Statement of Interest filed in the *Hurrell-Harring* lawsuit, is discussed above.

Guilty pleas grounded on waivers of the right to later claim ineffective assistance of counsel raise not only policy and justice issues, but also ethical questions. David M. Siegel, Professor at New England Law, noted in the "Continuing Duty" blog when the DOJ policy was issued that strong arguments exist that waivers of IAC claims "pose a fundamental conflict of interest analogous to malpractice waivers, and that they necessarily involve prosecutors in inducing defense lawyers to violate their own ethical obligations …." Siegel noted that many state ethics bodies have found such waivers improper—a position taken by the Kentucky Supreme Court. A link to that decision, *United States v Kentucky Bar Association* (439 SW3d 136 [8/21/2014]), can be found on the National Association of Criminal Defense Lawyers website.

Absence of Counsel Reviewed, Plea Overturned

The Appellate Division recently found that a defendant's guilty plea should be vacated and the indictment dismissed where he had been arraigned without counsel, indicted within hours of receiving written notice of the grand jury presentation, and assigned counsel only when arraigned on the indictment three days later. The appellate court noted that the defendant had a right to counsel at the critical stage of initial arraignment, citing the Court of Appeals decision overturning summary dismissal of the lawsuit challenging New York's deficient public defense system, *Hurrell-Harring v State of New York* (15 NY3d 8, 20 [2010]). The issue was reviewed despite the defendant's eventual guilty plea and failure to preserve the counsel issue when challenging the validity of the grand jury notice. *People v Chappelle*, 2014 NY Slip Op 07014 (3rd Dept 10/16/2014).

Bronx Defenders Releases Updated Collateral Consequences Manual

The Bronx Defenders has released an update to its manual, "The Consequences of Criminal Proceedings in New York State," which provides details about "the hundreds of consequences in New York State that flow from a criminal arrest or conviction." The manual is a valuable resource for criminal defense attorneys, civil legal services providers, and reentry advocates. According to a press release about the update, "[e]very section has been updated with expanded citations to case law and useful practice tips. The manual also added comprehensive sections on abuse and neglect proceedings in Family Court, civil forfeiture, commercial motor vehicle licenses, firearm license, and military service." The manual is available for free on the Reentry Net/NY website.

Eyewitness Identification Validity and Reliability

The National Academy of Sciences recently released a report titled "Identifying the Culprit: Assessing Eyewitness Identification." The report may be downloaded for free or ordered from the National Academies Press. Information about the meetings conducted by the committee that produced the report, including the materials presented by various eyewitness identification experts to the committee, is available here. The report provides a good discussion of the basic research on vision and memory and applied eyewitness identification research.

As noted by the Innocence Project, the report "endorsed numerous best practices as a means to reducing the likelihood of wrongful convictions, including that lineups be conducted 'blindly,' meaning the officer who conducts the procedure be unaware of the identity of the suspect and that police collect a confidence statement from the witness at the time he or she makes an identification." Other recommendations for law enforcement include training staff "on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols," developing easily understood standardized instructions for witnesses, and videotaping the witness identification process. Recommendations for use of identification evidence in court include judicial discretion in allowing expert testimony on "relevant precepts of eyewitness memory and identifications" and giving "clear and concise jury instructions as an alternative means of conveying information regarding the factors that the jury should consider." The report also recommends further research on the strengths and limitations of eyewitness identification procedures in the field.

The New York Court of Appeals has addressed the use of eyewitness identification experts in several cases.

See People v Santiago, 17 NY3d 661 (2011); People v Abney, 13 NY3d 251 (2009); People v LeGrand, 8 NY3d 449 (2007). More information about these decisions and related issues is available in the Jan.-Mar. 2012 and the Nov.-Dec. 2012 issues of the *REPORT.* Attorneys with questions about eyewitness identification and the use of experts can contact the Backup Center for assistance.

Risk Assessment Instruments: Insulating Systemic Disparities, Unconstitutionally Punishing Status at Sentencing—but Sometimes Helping Clients

The use of risk assessment instruments (RAIs) in making decisions about individuals at many points in the criminal justice system appears to be not only well established but also growing. In New York State, RAIs may be employed in a variety of circumstances, ranging across pretrial determinations including bail, parole release, Sex Offender Registration Act (SORA) risk levels, investigation and supervision by probation in DWI cases, and, perhaps, sentencing if an RAI is included or influenced the recommendations in a presentence investigation report.

Constitutional and ethical issues as well as methodological and other practical questions about such instruments abound. Defense attorneys faced with RAIs relating to their clients may find themselves challenging the validity of an instrument or relying on its results, depending on the type of instrument, the nature of the proceedings, and the individual case.

For example, advocates continue to attack the Parole Board's failure to use an RAI known as the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) instrument in parole release decisions. Use of COMPAS, even if it has flaws, is believed to be preferable to having panels of the Board rely primarily on their own subjective risk assessment. The last two issues of the *REPORT* have addressed the Parole Board situation. Appellate challenges are meeting with mixed success; see examples of Second Department victories in the case summaries in this issue [*Matter of Symes v New York State Bd. of Parole* and *Matter of Ramirez v Evans*].

On the other hand, critics of the type of information used in determining SORA risk levels want to see the instruments now in use changed. For instance, the purpose of a bill introduced in the Assembly in 2013 and not acted upon, A.4591A, was to "update the guidelines of the sex offender risk assessment instrument and require use of a validated instrument." The bill memo for the proposed legislation details many problems.

RAIs in Sentencing

National attention has focused recently on use of RAIs in sentencing following the U.S. Attorney General's criticism of so-called "evidence-based sentencing" on the ground that using risk assessments to shape penalties "'may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.'" Eric Holder's August address to the National Association of Criminal Defense Lawyers was not the Justice Department's first foray into the topic; in July, a DOJ letter to the federal Sentencing Commission noted that while the use of "analytics in risk and needs assessments and otherwise in furtherance of effective reentry" is exciting, the use of such tools to determine "how long an individual will be imprisoned for a criminal conviction" is troubling.

The letter noted that the "use of group-based characteristics and suspect classifications in the analytics" raises constitutional questions. It further observed that "[c]riminal accountability should be primarily about prior bad acts proven by the government before a court of law," that using RAIs to determine prison sentences "will have a disparate and adverse impact on offenders from poor communities already struggling with many social ills," undermining the principle of equal justice, and that RAI use will erode "certainty in sentencing." The DOJ called on the Sentencing Commission to study risk assessment tools and their uses.

After Holder's speech, University of Michigan Professor of Law Sonja B. Starr published an op-ed in *The New York Times* calling "the new, profiling-based sentencing regimen" a well-intentioned but misguided approach. "Punishment profiling will exacerbate [ ] disparities—including racial disparities—because the risk assessments include many race-correlated variables," Starr noted. Her constitutional arguments are more fully explored in a 2013 article for the Standard Law Review, "Evidence-Based Sentencing and the Scientific Rationalization of Discrimination." Other critiques of RAIs in sentencing and other areas include one entitled "Moneyball Sentencing," by Dawinder S. Sidhu; one on Gawker.com, "How We Imprison the Poor For Crimes That Haven't Happened Yet"; and one six months ago by Glenn E. Martin, founder of JustLeadershipUSA. On August 22, Jessica Eaglin of the Brennan Center posted an article, "May the Odds Be (Never) in Minorities' Favor? Breaking Down the Risk-Based Sentencing Divide."

Bias Incorporated into RAIs

The concerns raised by DOJ and others, including an article on Vox, about RAIs institutionalizing racial and other biases are not limited to instruments used in sentencing. Decision-making at many points in the system are fraught with racial and class biases; as noted on the

Rethinking Reentry blog, "how these tools are constructed and used is worthy of continued discussion and research."

A fuller discussion on the topic can be found in a post on the Urban Institute's Metro Trends blog entitled "Could risk assessment contribute to racial disparity in the justice system?" It includes this observation: "As disparate treatment accrues in the justice system, subjective decisions at earlier points become objective factors at later stages." The post cites the authors' "multi-site study of racial and ethnic disparity in probation revocation outcomes," among other references. While the post offers no specific advice to defense lawyers about evaluating or challenging bias in risk assessment instruments, it issues a challenge; everyone involved must be "be clear-eyed about the potential of our prediction instruments, at sentencing or any other point in our justice processes, to contribute to racial disparity in the justice system."

Even supporters of RAIs acknowledge that the instruments alone cannot suffice for imposing sentence or making other individualized decisions about people in the system. As one federal legislator noted, "risk-assessment tools, *when coupled with appropriate in-prison programs*, can help inmates prepare to re-enter society with less likelihood that they'll reoffend," [emphasis added]. (There is growing pressure to adopt assessments that look beyond risks alone. In its September 2012 report, "New York State COMPAS-Probation Risk and Needs Assessment Study: Examining the Recidivism Scale's Effectiveness and Predictive Accuracy," the Division of Criminal Justice Services Office of Justice Research and Performance said that the COMPAS-Probation tool adheres to the risk-needs-responsivity model.)

While much of the current furor is focused on federal sentencing—one commentator noted that Holder's position "appears to be at odds with the Congress"—the use of RAIs in any proceeding may present the opportunity and need for advocacy about their limitations.

Concerns Exist about RAIs in Family Court

In addition to some of the same criticisms raised about use of RAIs in criminal cases, their use in Family Court raises particular specters. As one United Kingdom forensic psychiatrist has observed, echoing problems noted above, the use of actuarial RAIs "is problematic, as the expert is transferring probability data from a group to an individual in the group." In family court, the critique continues, the result of misjudgment falls directly on the person the system is focused on helping:

> In the family court, if a judge gets his risk assessment wrong, not only will a child potentially be placed with the wrong caregiver, he will be separated from a really loving one to whom he may have a strong attachment. Disruptions of childhood attachments have negative long-term effects on children's psychosocial development and are just as damaging as any form of abuse.

In any given case, whether in Family Court or a criminal matter, a lawyer must focus on how to use or challenge a RAI to the client's advantage. But in broader contexts, lawyers, courts, and experts themselves need to examine carefully the strengths and weaknesses of particular RAIs and their use, seeking to ensure that they do not undermine the very justice they are touted as advancing.

PTSD Not Limited to Clients Who are Military Veterans

The incidence of post-traumatic stress disorder (PTSD) among veterans who experienced trauma during military service presents difficulties and opportunities for defense counsel representing veterans who have been criminally charged. NYSDA's Veterans Defense Program can assist public defense counsel with clients in this situation.

But PTSD may affect other clients as well, and not always those for whom it would be most obvious:

> When people think of post-traumatic stress disorder, they often focus on military veterans. But there's growing evidence that PTSD is also a serious problem for American civilians, especially those exposed to violence in their own neighborhoods. Researchers in Atlanta found that 1 out of 3 inner-city residents they interviewed had experienced symptoms consistent with PTSD at some point in their lives.
>
> Lois Beckett, Some of the Best Reporting on PTSD in Children Exposed to Violence (9/19/2014).

The link in the Beckett quote above at "growing evidence" refers to studies and articles about violence in cities across the country—from California to Chicago and on to Philadelphia—from 1989 to the present. The resources mentioned include "Community Violence: Effects on Children and Teens," which can be found on the U.S. Department of Veterans Affairs website.

Lawyers and clients alike may not recognize the possibility that PTSD has played a role in the behavior leading to the client's case in criminal or family court. The potential for uncovering PTSD is one reason that it is important for lawyers to learn about clients' backgrounds, not just the facts immediately surrounding the incidents presented in their cases. The disorder can strike anyone, of any age, according to the National Institutes of Mental Health PTSD web page, not only veterans but "survivors of physical and sexual assault, abuse, accidents, disasters, and many other serious events." And not only individuals whose experience brings them into the system as clients, but also family members of clients, or witnesses are at

risk. First responders and others whose work exposes them to trauma are among the groups whose members can develop PTSD, as noted in a recent posting on The Crime Report.

Many professionals, including not just police but attorneys and others who work with people involved with trauma, are also at risk of vicarious or secondary trauma, the symptoms of which can mimic PTSD. Defense attorneys should be aware of this risk to themselves and to defense team members including social workers and investigators. NYSDA's annual Basic Trial Skills Program recognizes that vicarious trauma—its symptoms, measures to avoid it, and ways to deal with it—is something defense lawyers in criminal and family court need to address.

NYSDA Training: 79 CLE Credits in Four Months, Investigator Event Held

From the beginning of its Annual Conference in July to a Special Chief Defender Convening on Sex Trafficking Parts on Oct. 27, NYSDA provided—sometimes in partnership with other organizations—79 hours of Continuing Legal Education (CLE) on a wide range of topics. NYSDA is an accredited provider of Mandatory CLE. Its well-received training events offer high-quality, affordable CLE relevant to the practice of public defense lawyers across the state.

Those who attended all sessions at the Annual Conference in Saratoga Springs received a full year's worth of MCLE credits. Regional training events were held from Rochester to New York City, and co-sponsors included the Monroe County Public Defender's Office; the NYS Indigent Legal Services Office; the St. Lawrence County Public Defender Office, Conflict Defender Office, and Assigned Counsel Program; and the National Immigration Project of the National Lawyers Guild, Immigrant Defense Project, and NYU School of Law Immigrant Rights Clinic.

Veterans Defense Program Training Events

NYSDA's Veterans Defense Program presented a full day of training in Albany on representing clients with a military background. The Program also presented two shorter training sessions in Olean and Rochester.

Public Defense Investigation Support Project Offers Training

On Sept. 26-27, 2014, the Public Defense Investigation Support Project held a one-day event in Batavia, NY, co-sponsored with the Ontario County Public Defender Office. Almost thirty investigators who work with public defense lawyers attended, most from western New York and a few from as far away as the Bronx. And recently, the Project announced an investigator training event to be held in New York City on Dec. 12, 2014. The Project's training events are supported, in part, by The New York Bar Foundation.

Upcoming CLE events being presented by NYSDA and others are listed at p. 9. Lawyers can also check www.nysda.org for training updates.

Attorneys, NPR Correspondent Honored at Annual Meeting

At NYSDA's 2014 Annual Conference, the Association recognized NPR Correspondent Joseph Shapiro for his national report, "Guilty and Charged." At the same event, Alan Rosenthal, retiring from years of service at the Center for Community Alternatives (CCA), received NYSDA's Wilfred R. O'Connor Award and Rylan Richie, an Assistant Public Defender in Albany County, was given the Kevin M. Andersen Memorial Award, which was created by the Genesee County Public Defender Office.

Joseph Shapiro's stories about poor people being locked up for failure to pay increasingly onerous fees imposed by courts, aired by NPR, brought public attention to what defense lawyers already know. NYSDA presented its Service of Justice Award to Shapiro for highlighting the issue outside courtrooms.

Alan Rosenthal's work for justice over a long career has touched countless people—lawyers, clients, and others impacted by the justice system. He has applied his expertise in a wide range of legal topics—through direct assistance to clients and assistance to lawyers and advocates at both case and policy levels. The list of papers on the CCA publication list that carry his name is one concrete measure of his contributions; the award presentation revealed many more contributions, including the intangible gift of his time, sharing insights, and thinking through difficult issues and policies with others.

Rylan Richie demonstrated an eagerness to represent public defense clients while still in law school. The award presented to her in Saratoga lauded her outstanding legal skills, sense of humor, work ethic, and ability to acquire information about and develop valuable insight into the upbringing of clients affecting their lives and cases.

The keynote address at the awards, "Advocacy from the Inside," presented by Andrea C. James, provided insight into the roles of defender and client from someone who has experienced both. James, Executive Director of Families for Justice as Healing in Roxbury, MA, focused on the circumstances of women she met in prison —women serving long mandatory sentences for drug offenses—and the impact of their incarceration on them, their families, and communities.

More about the awards ceremony can be found in the press release issued following the conference. ⚖

Post-Conviction Relief for Immigrant Defendants

By Dawn Seibert*

Immigration and Customs Enforcement (ICE) continues to deport immigrants based on convictions incurred long ago. There is no statute of limitations for the filing of a Notice to Appear (NTA)—ICE's charging document that begins a deportation case. When immigrants with old convictions return from travel abroad, attempt to get or renew their green cards, or interact with law enforcement, they face a high risk of detection by ICE and deportation. Often these old convictions—even some misdemeanors and violations—trigger detention during the pendency of the immigration case. Because many immigrants are barred from seeking relief in immigration court due to these convictions, relief pursuant to a Criminal Procedure Law (CPL) article 440 motion is often the only means of avoiding banishment from the U.S., permanent separation from family, friends, and, for many, the only home they have ever known.

Padilla v Kentucky (559 US 356 [2010]) held that a noncitizen may raise a claim of ineffective assistance of counsel if her defense attorney failed to provide accurate and complete advice regarding the immigration consequences of a guilty plea. However, on June 30, 2014, the N.Y. Court of Appeals held, in *People v Baret*, 2014 NY Slip Op 04872 (6/30/2014), that *Padilla* is a "new rule" that does not apply retroactively to New York State convictions that were final before *Padilla*. *Baret* impairs the ability of an immigrant defendant to achieve vacatur of a pre-*Padilla* conviction but it does not render such a feat impossible.

Various strategies exist to vacate pre-*Padilla* convictions for immigrant defendants despite the *Baret* decision. Several of these strategies are detailed in an advisory by the Immigrant Defense Project (IDP), *Strategies to Achieve Post-Conviction Relief for Immigrant Defendants in New York after* People v. Baret (hereinafter *Baret* Advisory) (available at http://immigrantdefenseproject.org/court-appeals-padilla-not-retroactive). This article highlights some of the more promising strategies.

- Initially, the 440 attorney or pro se litigant should seek to establish that the conviction was not final when *Padilla* was decided. It is beyond question that a judgment (determined by date of sentencing) entered on or after March 1, 2010 was not final when *Padilla* was decided on March 31, 2010. The Court of Appeals recently granted leave in *People v Varenga* (115 AD3d 684 [2nd Dept 2014]), which held that a conviction is not final until the time for filing a late appeal under CPL 460.30 has expired. Under *Varenga*, any judgment entered on or after March 1, 2009 was not final when *Padilla* was decided. Unless another Department issues a contrary decision, or the Court of Appeals reverses *Varenga*, practitioners statewide should consider filing a 440 motion based on *Padilla* in any case where the defendant was sentenced on or after March 1, 2009.
- Assuming that the conviction was final when *Padilla* was decided, the most important 440 strategy is for an immigrant defendant to elicit District Attorney consent to vacatur of the conviction. *See Baret* Advisory at 7.
- A promising approach to vacatur is to argue that the immigrant defendant was misadvised regarding the immigration consequences of the plea in violation of the Sixth Amendment. *See People v McDonald*, 1 NY3d 109 (2003). The contours of this type of claim remain largely undefined, leaving room for vigorous advocacy for a broad range of conduct constituting "inaccurate" or "misleading" advice. *See Baret* Advisory at pp. 7-11.
- Another fertile area may be a claim for failure to negotiate effectively to avoid or mitigate immigration consequences, including the failure to negotiate to avoid exposure to mandatory immigration detention. *See id* at 16-19.
- The Advisory describes additional claims that may provide a basis to successfully challenge a pre-*Padilla* conviction in an individual case, depending on the facts presented. *See id* at 12-15, 19-21.

IDP's website includes a post-conviction relief page with model briefing on various *Padilla* issues as well as legal updates. http://immigrantdefenseproject.org/criminal-defense/padilla-pcr. Practitioners may also contact IDP Staff Attorney Dawn Seibert (dawn@immdefense.org) for strategic and technical support on 440 motions for immigrant clients. Additionally, IDP is working toward a robust interpretation of *Padilla* to establish broad access to post-conviction relief for immigrant defendants. To that end, IDP offers amicus briefing in select appellate cases; practitioners are encouraged to alert IDP to *Padilla* cases in the appellate courts. ⚖

---

*__Dawn Seibert__ *is a Staff Attorney at the Immigrant Defense Project (IDP). Dawn works with IDP's litigation team to protect the U.S. Supreme Court's* Padilla v Kentucky *decision by monitoring and supporting post-conviction relief litigation to remedy uninformed pleas. She consults with practitioners on trial strategy in post-conviction relief cases, provides model post-conviction relief materials and sample briefs, and intervenes as amicus in impact cases regarding the scope and retroactivity of* Padilla.

Conferences & Seminars

Sponsor: National Association of Criminal Defense Lawyers
Theme: 35th Annual Advanced Criminal Law Seminar
Dates: January 11-16, 2015
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2015 Midwinter Meeting & Seminar: Big Easy Cross
Dates: February 18-21, 2015
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 Legal Aid & Defenders Association
Theme: 2015 National Appellate Defense & Persuasive Writing Skills Institute
Dates: January 22-25, 2015
Place: New Orleans, LA
Contact: NLADA: tel (202) 452-0620; website www.nlada100years.org/events-and-trainings

Sponsor: New York State Defenders Association
Theme: 29th Annual Metropolitan Trainer
Date: March 14, 2015
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: Making Sense of Science VIII
Dates: April 16-19, 2015
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: 48th Annual Meeting & Conference
Dates: July 26-28, 2015
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org ⚖

Rylan Richie (l) received the Kevin M. Andersen Memorial Award created by the Genesee County Public Defender Office; her family was present at the Awards Banquet at the Annual Meeting to celebrate the recognition with her.

Alan Rosenthal (r) is pictured here with his wife, Kate Radway, during the Defender Reception preceding the Awards Banquet at the 2014 NYSDA Annual Conference, where he received the Wilfred R. O'Connor Award.

NPR Correspondent Joseph Shapiro (l) received this year's Service of Justice Award, which was presented by Edward J. Nowak (r), President of NYSDA's Board of Directors.

Andrea C. James, Executive Director of Families for Justice as Healing in Roxbury, MA, gave the keynote address at NYSDA'S 2014 Awards Banquet.

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

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

New York Court of Appeals

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

Appeals and Writs (Notice of Appeal) (Time)

Counsel (Competence/Effective Assistance/Adequacy)

People v Perales, 24 NY3d 939, 994 NYS2d 39 (9/16/2014)

The defendant is entitled to coram nobis relief in the form of leave to file a late notice of appeal where the defendant unsuccessfully challenged his guilty plea at sentencing and the court told defense counsel he could file an appeal on the defendant's behalf; counsel then failed to do so despite inquiries from the defendant about the status of the appeal; the defendant only learned of the failure after inquiring of the Appellate Division; and the defendant, pro se, then sought permission to file a late notice of appeal after the one-year deadline of CPL 460.30 and also filed a CPL 440 motion that was denied because the issue was apparent from the record.

Narcotics (Penalties)

Sentencing (Resentencing)

People v Coleman, 2014 NY Slip Op 07010 (10/16/2014)

The Drug Law Reform Act of 2009 exclusion that denies resentencing to offenders ineligible to receive merit time applies "only to offenders who have been convicted of one or more of the serious crimes that automatically render merit time allowances unavailable under Correction Law § 803 (1) (d) (ii) …." It does not apply to offenders who have no such conviction but are ineligible for merit time due to recidivist sentencing adjudications. As the split in the Departments on this issue shows, the statute is ambiguous; of the two plausible readings of the statute, that offered by the defendant is more consistent with the statute's remedial purpose. It also fits into the overall character of the statute's various exclusions. The defendant here is eligible for resentencing.

Search and Seizure (Warrantless Searches [Emergency Doctrine])

People v Jenkins, 2014 NY Slip Op 07007 (10/16/2014)

The exigent circumstances exception to the requirement that police obtain a search warrant did not apply here. Officers entering an apartment building after hearing gunshots and seeing muzzle flashes from the roof heard another shot inside; saw the defendant holding a gun in a hallway; chased him and another into an apartment where they were eventually discovered under a bed and removed in handcuffs to the living room where other apartment occupants were under police supervision; returned to the bedroom after a search of the defendant disclosed no weapon; and opened a silver box on the floor exposing the gun that the defendant was then charged with possessing. At the time the box was searched, police were in complete control of the residence and there was no danger that the gun would be hidden or destroyed or danger to public safety or that of the police. The physical evidence should be suppressed and the indictment dismissed.

Appeals and Writs (Question of Law and Fact)

Search and Seizure (Warrantless Searches [Emergency Doctrine])

People v Rossi, 2014 NY Slip Op 07006 (10/16/2014)

There is record support for the conclusion of the Appellate Division majority that the search of a backyard revealing a gun was justified by the emergency doctrine, precluding this Court's review of this mixed question of law and fact. Evidence showed that police had responded to a 911 call after the defendant shot himself in the hand but neither he nor his wife disclosed the location of the gun and there were children in the residence, which was searched by police.

Continuances (Speedy Trial)

Speedy Trial (Appeal Delay) (Prosecutor's Readiness for Trial) (Statutory Limits)

People v Wells, 2014 NY Slip Op 07012 (10/16/2014)

"The mere lapse of time, following the date on which [an] order occasioning a retrial becomes final, does not in

NY Court of Appeals *continued*

itself constitute a reasonable period of delay resulting from an appeal within the meaning of CPL 30.30 (4) (a)." To the extent that *People v Vukel* (263 AD2d 416 [1st Dept 1999], lv denied 94 NY2d 830 [1999]) says otherwise, it should not be followed. Here, the prosecution sought leave to appeal a March 2010 reversal by the Appellate Term and on May 10, the trial court adjourned the matter to June 21; due to a clerical error, the case was not calendared on that date, which the prosecutor discovered in July, after which a new calendar date of August 23 was set; the prosecution did not declare ready between May 14, when leave was denied, and August 23 and the court granted the defendant's motion to dismiss on speedy trial grounds; the Appellate Term reversed that dismissal and leave to appeal was granted. The Appellate Term is reversed because the prosecution provided no record justification for the delay.

Appeals and Writs (Prohibition) (Time)

Article 78 Proceedings

Double Jeopardy (Mistrial) (Time)

Matter of Smith v Brown, 2014 NY Slip Op 07090 (10/21/2014)

The four-month limitation period for filing CPLR article 78 prohibition proceedings (see CPLR 217[1]) applies to petitions asserting double jeopardy grounds as a bar to a retrial of a criminal case; the "continuing harm" tolling of such limitation is rejected here. Once the prosecution "definitively demonstrated their intent to re-prosecute and the court began to calendar the case for eventual trial," the defendant needed to initiate the challenge within the four-month time frame.

Concurrence: [Lippman, CJ] The test set out by the majority for determining when a determination is final and binding for article 78 purposes "is at best uncertain and can only engender unnecessary, protracted litigation …." The prosecutor's assertion of authority to retry an accused should be considered a continuing wrong.

The petition should have been rejected on its merits, as declaration of a mistrial was manifestly necessary after one of the deliberating jurors obtained advice from a lawyer friend about the issue of gun possession and recounted it to the entire jury.

Counsel (Competence/Effective Assistance/Adequacy)

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

People v Blake, 2014 NY Slip Op 07086 (10/21/2014)

While failure to request a jury instructing allowing, but not requiring, the jury to infer that the content of an unjustifiably missing surveillance tape would not have been favorable to the prosecution may have supported an ineffective assistance of counsel claim had it arisen after *People v Handy* (20 NY3d 663 [2013]), trial here occurred in 2009. At that time, no legal authority existed that absolutely entitled the defendant to such an instruction. Failure to request the charge, if it was a mistake, was not such an obvious and unmitigated error to support an ineffectiveness claim standing alone. On the facts here, there is no reason to suppose that the charge would have availed the defendant if requested and given; there was evidence that the defendant tried to bribe police to destroy the very videotapes whose absence he later complained of, and other evidence existed that contradicted the self-defense claim he offered.

Evidence (Sufficiency)

Witnesses

People v Horton, 2014 NY Slip Op 07088 (10/21/2014)

The defendant's fourth-degree witness tampering conviction was supported by sufficient evidence where the defendant's best friend was arrested for selling drugs to a confidential police informant and the defendant was present at the sale; the friend told the defendant about his arrest and provided a copy of a videotape showing the transaction; the informant reported soon thereafter that the defendant had revealed her informant status on Facebook and uploaded clips from the tape; the clips led to comments from the defendant and others denouncing snitches, including the particular informant, and conveying warnings such as "'Snitches get stiches'"; and the defendant was also in Facebook contact with the informant and her mother. The jury could reasonably infer that the Internet communications were coded threats intended to induce the informant not to testify.

Confessions (Counsel)

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

People v McLean, 2014 NY Slip Op 07085 (10/21/2014)

Police did not violate the defendant's right to counsel by questioning him about a murder after obtaining his uncounseled waiver of having an attorney present. Earlier, a lawyer who represented the defendant on an unrelated robbery case accompanied the client to a police interview about this killing, and the defendant provided information he hoped would lead to a reduced sentence for the robbery. When the lawyer was asked by the police before the interrogation here about the status of the lawyer's representation of the client, he replied that the

NY Court of Appeals *continued*

robbery case for which he had represented the client was over. While the police could have done more, such as explain to the lawyer why they wanted to talk to the defendant, or ask the defendant if the attorney client relationship was over, they were not required to do so.

Dissent: [Lippman, CJ] The limited inquiry made of the lawyer was not designed to elicit an informed response. Asking the defendant himself if he was represented before proceeding with waiver of counsel is "the bare-bones minimum that should be expected of the police," but the police here did not do so.

Counsel (Right to Counsel)

People v O'Daniel, 2014 NY Slip Op 07087 (10/21/2014)

The defendant's right to retain counsel of his choice, which is qualified and must cede, in some circumstances, to the efficient administration of justice, was not violated here. After his attorney's health problems required adjournments of trial in March and April 2010, another attorney (who had represented the defendant at arraignment) was identified by counsel in the fall to stand in if counsel's health again worsened. On September 30, the defendant's file was delivered to the stand-in attorney, who appeared at an October 5 conference a week before trial (which had been delayed at the prosecution's request) and sought an adjournment because his client felt the system was being unfair due to his counsel's health problems. The stand-in attorney said he was confident the case would be ready for trial without an adjournment, but on October 12, the date of trial, he sought a further adjournment because the defendant felt more time was needed. While it is better practice to do so, the court's denial of the adjournment without an inquiry as to whether the delay was for preparation or for retaining new counsel did not violate the defendant's constitutional rights.

Dissent: [Lippman, CJ] It was clear that the relieving attorney was not appearing at the defendant's behest but rather at counsel's request for the purpose of meeting court "Standards and Goals." Whether or not CPLR 321 applies in criminal matters, the defendant's reliance on it provided notice that the defendant wanted a chance to decide for himself who would represent him at trial; forcing him to trial forthwith was not a permissible alternative.

Evidence (Hearsay) (Instructions)

People v Cullen, 2014 NY Slip Op 07202 (10/23/2014)

The court did not err by permitting the prosecution "to elicit testimony about the fact and timing of complainant's revelations," which concerned sexual acts by the defendant, "for the nonhearsay purpose of explaining the events kicking off the investigative process that led to" the criminal charges at issue. The jury could consider the circumstances of the complainant's delayed disclosure; she had passed up many opportunities to report the alleged conduct and the defense claimed her accusations were retaliatory.

Concurrence: [Lippman, CJ] While the majority's reasoning is rejected, as noted in the dissent in *People v Ludwig* (2014 NY Slip Op 07201), decided today, the error here was harmless.

Evidence (Presumptions)

Narcotics (Evidence) (Possession)

People v Kims, 2014 NY Slip Op 07196 (10/23/2014)

The trial court improperly charged the jury on the presumption found in Penal Law 220.25(2), which applies to defendants found on premises where drugs are discovered, because the defendant was not in close proximity to the drugs, which the statute requires. The defendant was arrested after he was ordered out of the car that he entered following his exit from the house. "[T]he proximity determination requires careful consideration of the underlying facts related to the defendant's location on the premises when the drugs are found," and while the presumption may apply where a defendant has left the premises, "the boundary is such cases is not limitless." Here, there was no evidence that the defendant was in immediate flight from the house, and the officers who found the drugs did so several minutes later. The prosecution's contention that the presumption applies as long as a defendant is under continuous surveillance after leaving the premises "fails to provide appropriate guidance as to how far an officer may pursue a defendant before reaching the outer expanse of the statute." The error was not harmless.

Permitting testimony about the defendant's alleged gang affiliation, which was not relevant to any material issue, was harmless error.

Evidence (Hearsay)

Sex Offenses (Sexual Abuse)

People v Ludwig, 2014 NY Slip Op 07201 (10/23/2014)

The trial court did not err in allowing the prosecution to elicit testimony about prior consistent statements by the complainant in this child sexual abuse case or in precluding testimony about an alleged prior inconsistent statement by the complainant. The prior consistent statement testimony "was admissible for the nonhearsay purpose of explaining to the jury how and when the sexual abuse came to light, resulting in an investigation and

NY Court of Appeals *continued*

defendant's eventual arrest …." The alleged prior inconsistent statement testimony "was inadmissible hearsay not subject to any exception." Claiming that the complainant's saying "she only tells what her mother tells she can say" when discussing whether her mother was pregnant showed the complainant to be "untruthful or uncommonly biddable seriously distorts its meaning."

Concurrence: [Smith, J] The facts here "are substantially identical, in relevant ways, to those in *People v Rosario* (17 NY3d 501 [2011])" and its companion case but with opposite results. "Despite what I consider to be flaws in the majority's reasoning, I welcome the rule that this case seems to establish: that, at least in child sex abuse cases, testimony to the victim's out-of-court disclosure of the abuse will be admissible where it is relevant to the victim's credibility." This rule is limited to prior statements of a testifying witness.

Dissent: [Lippman, CJ] "The majority eviscerates the hearsay rule and allows wholesale circumvention of the prompt outcry rule by countenancing the admission of prior consistent statements that provide a 'narrative' or 'investigative purpose' even where the investigative purpose is not in issue."

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

People v Moore, 2014 NY Slip Op 07203 (10/23/2014)

As the prosecution concedes, the defendant's guilty plea must be vacated where, at the plea proceedings, there was only a brief discussion among defense counsel, the prosecutor, and the court as to disposition; the court failed to address the defendant, who did not speak; and the defendant was not advised of any constitutional rights he was giving up.

Sentencing (Post-Release Supervision)

People v Turner, 2014 NY Slip Op 07200 (10/23/2014)

Where the defendant pleaded guilty with the understanding that she would be sentenced to 15 years' imprisonment, the court did not mention post-release supervision (PRS) during the plea proceedings, and PRS was discussed at the sentencing hearing at the instigation of the prosecutor, with the defendant responding affirmatively that she understood she would be on parole supervision for five years and wished to go forward, reversal of the plea is required. "[T]he court must notify defendant of a term of PRS sufficiently in advance of its imposition that defendant has an opportunity to object to the deficiency in the plea proceeding." Failure to seek to withdraw the plea or vacate the judgment did not preclude review.

Dissent: [Abdus-Salaam, J] The defendant's argument as to PRS required preservation. While the judge should have more directly discussed with the defendant at sentencing the parameters of the plea and sentence, based on the colloquy in which the defendant acknowledged she had talked to counsel about PRS, understood it, and wished to continue, the court had "no reason to believe that defendant should be offered her plea back or that she intended to withdraw her plea."

Sex Offenses (Civil Commitment)

Matter of State of New York v Donald DD., 2014 NY Slip Op 07295 (10/28/2014)

Evidence that a person suffers from antisocial personality disorder (ASPD) cannot, alone, support a finding of mental abnormality under Mental Hygiene Law (MHL) 10.01(i) in a MHL article 10 civil commitment trial. It is rarely—if ever—possible to establish solely from the facts of a sex offense whether "the offender had great difficulty in controlling his urges or simply decided to gratify them" despite a significant risk of arrest and punishment. "As Donald DD.'s counsel expressed the objection, ASPD is 'not a sexual disorder.'"

The case of Kenneth T. does not present a compelling justification for overruling *Matter of State of New York v Shannon S.* (20 NY3d 99 [2012]) as to use of a diagnosis of paraphilia not otherwise specified (NOS). As in *Shannon S.*, no *Frye* hearing was requested or held on the issue of whether paraphilia NOS has received general acceptance in the psychiatric community. But there was insufficient evidence "that Kenneth T. had 'serious difficulty in controlling' his sexual misconduct within the meaning of § 10.03(i)."

Dissent and Concurrence: [Graffeo, J] "ASPD may be a viable predicate for a determination of mental abnormality in certain cases since such a diagnosis is consistent with the statutory definition and its use in the article 10 context does not offend principles of substantive due process." The majority's statutory misreading unfortunately means that offenders cannot be compelled to participate in strict and intense supervision and treatment on the basis of ASPD.

The evidence was legally sufficient to show that Kenneth T. has serious difficulty controlling his behavior, but, "assuming without deciding that paraphilia NOS, nonconsenting, is a valid diagnosis, the evidence presented was insufficient."

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

Prosecutors

NY Court of Appeals *continued*

People v Dunbar, 2014 Slip Op 07293 (10/28/2014)

The *Miranda* warnings ultimately given to the defendants here were undermined by the delivery of a scripted preamble, given at central booking by an assistant district attorney and detective investigator as part of the Queens County District Attorney's pre-arraignment interview program, which included the statement that the interviews were the suspects' only opportunity to tell the DA's office their stories before going in front of a judge. Just as no set litany is required by *Miranda* and its progeny, no set litany will satisfy the *Miranda* requirements in every set of circumstances. The preamble, which contained statements such as "'give me as much information as you can …,' 'this is your opportunity to tell us your story …,' and [you] 'have to tell us now,'" was "at best confusing and at worst misleading," rendering "the subsequent *Miranda* warnings inadequate and ineffective …." The preamble undercut all four required warnings. Suspects "might well have concluded, after having listened to the preamble, that it was in [their] best interest to get out [their] side of the story—fast."

Dissent: [Smith, J] The purpose of *Miranda* "is not undermined when police or prosecutors persuade a properly-informed suspect to waive his or her rights," which is what happened here. The wording of the preamble is not perfect—the phrase "you have to" would be better replaced with "please" in the statement "'If there is something you need us to investigate about this case, you have to tell us now so that we can look into it ....'" But the preamble might help innocent people being arraigned for crimes, even though its purpose is to persuade guilty people to speak, and the Fifth Amendment "protects suspects against government coercion, not against their own foolishness."

Appeals and Writs (Judgments and Orders Appealable) (Question of Law and Fact)

People v Polhill, 2014 NY Slip Op 07294 (10/28/2014)

The Appellate Division's determination that identification evidence should have been suppressed because the police lacked reasonable suspicion to support stopping and detaining the defendant on the street enjoys record support. As the issue presents a mixed question of law and fact, that order is not appealable.

Contempt

Double Jeopardy (Punishment)

People v Sweat, 2014 NY Slip Op 07292 (10/28/2014)

"[W]here a court subjects a defendant to conditional imprisonment in an attempt to compel defendant to testify, and does not otherwise adjudicate defendant to be in criminal contempt or impose punishment that is criminal in nature, double jeopardy will not bar a subsequent prosecution for contempt under the Penal Law." The provisions of Judiciary Law article 19 and Penal Law 215.50 et seq allow a person to be subjected to punishment for contempt under both sections. For double jeopardy purposes, labels of "civil" or "criminal" contempt do not control. "[W]hat matters is the 'character and purpose' of the actions of the court imposing contempt." The court here did not summarily adjudicate and impose a punitive sentence on the defendant, who received transactional immunity and testified against his brother at grand jury proceedings; refused to testify at trial and was cited for civil contempt and taken into custody; consulted with assigned counsel and was given opportunities to testify that he refused; and remained in custody until his brother was acquitted, at which point he was released. The defendant was later charged by information with second-degree criminal contempt; dismissal of the charge based on double jeopardy is reversed.

Double Jeopardy (Mistrial)

Trial (Mistrial)

Matter of Gorman v Rice, 2014 NY Slip Op 07923 (11/18/2014)

A court may rescind a declaration of mistrial up until the jury has been discharged. No specific language formally rescinding the mistrial ruling is required. Here, after defense counsel announced outside the jury's presence that he intended to file a complaint against the judge for pro-prosecution rulings, the court declared a mistrial, then went off the record, came back and held a discussion, including defense counsel's statement that he was not consenting to the mistrial, and said that that it was up to the defendant and defense counsel to make a decision. After a recess for an attorney-client consultation, the court "declared a mistrial 'at the request of [defendant]' …." This record makes clear that the court left the mistrial decision up to the defense, and that the defendant consented to the mistrial, so that double jeopardy does not bar a retrial.

Appeals and Writs (Counsel)

Counsel (Right to Counsel)

Post-Judgment Relief (CPL § 440 Motion)

People v Grubstein, 2014 NY Slip Op 07924 (11/18/2014)

Defendants who fail to assert on direct appeal that they were deprived of their right to counsel when they pleaded guilty while acting pro se are not barred from

NY Court of Appeals *continued*

raising that claim by way of a Criminal Procedure Law 440.10 motion. Applying such a procedural bar where the ground a defendant seeks to raise is the deprivation of the right to counsel would create an obvious risk of unfairness. The bar applies only where the failure to appeal is "'unjustifiable.'" Where a defendant was deprived of the right to counsel, "that very deprivation may well have led him either not to appeal or not to have presented the issue to an appellate court." Someone denied a lawyer "can hardly be blamed for failing to follow customary legal procedures." Here, the town court failed to advise the defendant of his right to appeal at the time of his pro se plea, as required by 22 NYCRR 671.5, making the defendant's failure to appeal even more justifiable.

Impeachment (Of Defendant [Including *Sandoval*])

Self-Incrimination (Conduct and Silence)

People v Hill, 2014 NY Slip Op 07925 (11/18/2014)

"Absent 'unusual circumstances,' evidence of a defendant's silence at the time of arrest is generally inadmissible under common-law evidentiary principles (*People v Conyers*, 52 NY2d 454, 459 [1981]). And the use for impeachment purposes of a defendant's silence after receiving *Miranda* warnings has been deemed impermissible as a matter of due process (*see Doyle v Ohio*, 426 US 610, 619 [1976]). Under the circumstances presented, we conclude that defendant did not open the door to evidence of his post-*Miranda* silence and, therefore, Supreme Court erred in permitting its introduction at trial. Nor can the error be viewed as harmless in this case."

Appeals and Writs (Preservation of Error for Review)

Sentencing (Appellate Review)

People v Caza, 2014 NY Slip Op 08058 (11/20/2104)

"The order of the Appellate Division should be affirmed. Defendant's argument that County Court erred in enhancing her sentence by departing from its conditional promise to make her two terms of imprisonment run concurrently, is unpreserved for our review (*see* CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 491-493 [2008])."

Appeals and Writs (Preservation of Error for Review)

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

People v Davis, 2014 NY Slip Op 08057 (11/20/2014)

"Defendant failed to bring a motion to withdraw his plea under CPL 220.60 (3) or a motion to vacate the judgment of conviction pursuant to CPL 440.10. Nor did his factual recitation negate the intent element of the crime to which he pleaded guilty. His plea therefore does not qualify for the 'rare case' exception to the preservation requirement under *People v Lopez* (71 NY2d 662, 666 [1988]). Consequently, defendant's challenge to the factual sufficiency of his allocution 'was properly rejected by the Appellate Division and its order upholding the plea and conviction should be affirmed' (*People v Toxey*, 86 NY2d 725, 726 [1995])."

Discrimination

Homicide (Manslaughter [Instructions])

Lesser and Included Offenses (Instructions)

Trial (Repugnant Verdicts)

People v DeLee, 2014 NY Slip Op 08212 (11/24/2014)

Because "[a]ll of the elements of first-degree manslaughter are included in the elements of first-degree manslaughter as a hate crime," acquitting the defendant of first-degree manslaughter "necessarily means that at least one of the elements of first-degree manslaughter as a hate crime was not proven beyond a reasonable doubt" and therefore the jury's verdict here "was inconsistent, and thus repugnant." The prosecution's theory, supported by an affidavit from the jury foreperson, that the jury concluded "that ordinary first-degree manslaughter was akin to a lesser included offense of the hate crime, such that a conviction of the hate crime rendered a conviction of ordinary first-degree manslaughter superfluous," is unpersuasive in light of the instructions the jury received and the affidavit reflecting the opinion of only one juror.

As to remedy, "[t]here is no constitutional or statutory provision that mandates dismissal for a repugnancy error." Because a jury may extend leniency to a defendant, "a repugnant verdict does not always signify that a defendant has been convicted of a crime on which the jury actually found that he did not commit an essential element." Where mercy is the basis for a repugnant verdict, dismissing the repugnant conviction would provide an even greater windfall than the defendant has already received, and a reviewing court cannot know the basis for a repugnancy. Therefore, the prosecution here may resubmit first-degree manslaughter as a hate crime to a new grand jury. "Finally, we again emphasize that where 'a trial court finds that an announced verdict is repugnant, it may explain the inconsistency to the jurors and direct them to reconsider their decision," and indeed, must do so under CPL 310.50(2).

Concurrence: [Abdus-Salaam, J] To avoid repugnant verdicts in cases involving hate crimes and regular charges stemming from the same incident, courts should, at the very least, unequivocally inform juries that they

NY Court of Appeals *continued*

cannot convict defendants of the hate crimes and acquit them of the corresponding ordinary crime, but rather must acquit on both, convict on both, convict on the hate crime and not reach a verdict on the corresponding non-hate crime, or convict only of the non-hate, lesser included crime. Amici propose a variety of proposed instructions on deliberating in cases involving charges of hate crimes and related non-hate crimes, all of which are plausible (other than use of a special verdict sheet, which is disfavored under the law). "[C]ourts would provide particularly clear and legally correct guidance on this subject by telling the jury to treat a non-hate crime as a lesser included offense of an equivalent hate crime allegedly committed via the same criminal acts."

Appeals and Writs (Preservation of Error for Review)

Juries and Jury Trials (Deliberation)

People v Silva, 2014 NY Slip Op 08215 (11/24/2014)

While not every violation of Criminal Procedure Law 310.30 is immune from normal principles of preservation, failing to apprise counsel of a deliberating jury's substantive note violates the fundamental tenants of the statute and amounts to a mode of proceedings error. Because reviewing courts may not assume that proper procedures were followed, compliance with procedures under *People v O'Rama* (78 NY2d 270 [1991]) must be reflected in the record; the "'presumption of regularity'" relied on by the prosecution cannot salvage error in this regard. "These mandates were not satisfied in the two cases now before us since the substantive jury notes, marked as court exhibits, were neither revealed to the attorneys nor addressed by the courts"; the "defendants are entitled to new trials."

Dissent and Concurrence: [Smith, J] "We have never previously applied the automatic-reversal rule of *People v O'Rama* … in a case where the jury sent a note to which the trial court never responded." Where the jury requested read-back of critical testimony, and it cannot be said the failure to respond did not prejudice the jury, a new trial is in order, but where there is no significant possibility under all the circumstances that failure to respond to a jury's note prejudiced the defendant, the conviction should be affirmed. The *O'Rama* holding should be reconsidered in a proper case, but not here.

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.

Identity Theft (Elements)

Possession of Stolen Property (Elements)

People v Barden, 117 AD3d 216, 983 NYS2d 534 (1st Dept 4/10/2014)

In this identity theft case, the prosecution failed to establish that the defendant assumed the identity of another person when he used that person's credit card at a hotel where the hotel knew that the defendant was not the cardholder. Assumption of identity is a separate element of identity theft and "is not necessarily accomplished when a person uses another's personal identifying information. The use of that information can be accompanied by an implicit assumption of identity, but that will not always be the case," as in the circumstances here. The defendant's conduct more squarely falls under the offenses of unlawful possession of personal identification information and theft of services.

The defendant was properly convicted of criminal possession of stolen property for constructively possessing another's stolen credit card number. "[W]e have determined that the legislature intended intangibles, including credit card numbers, to fall within the ambit of" this offense. (Supreme Ct, New York Co)

[***Ed. Note:*** *Leave to appeal was granted on Sept. 23, 2014 (24 NY3d 959.)*]

Arrest (Identification) (Probable Cause)

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

People v Blanding, 116 AD3d 498, 983 NYS2d 266 (1st Dept 4/10/2014)

The court erred in denying the defendant's motion to suppress where, at the time he stopped the defendant, the arresting officer did not have probable cause to arrest him based solely on the radio transmission describing the defendant and his location. It was only after the undercover officer who purchased the drugs radioed his confirmatory identification that there was probable cause for the arrest. "Although the use of handcuffs is not dispositive of whether an investigatory detention on reasonable suspicion has been elevated to an arrest," handcuffing must be justified by the circumstances, which were missing here; the police had no reason to believe that the defendant was armed or dangerous or might flee and there was no record evidence that he resisted before being handcuffed. (Supreme Ct, New York Co)

Assault (Elements) (Instructions)

First Department *continued*

Discovery (*Brady* Material and Exculpatory Information) (Prior Statements of Witnesses)

Juries and Jury Trials (Deliberation)

People v Lee, 116 AD3d 493, 983 NYS2d 524 (1st Dept 4/10/2014)

The defendant's second-degree intentional assault conviction must be reversed where the court erred in telling the jury, in response to a jury note, that a person is guilty of assault if the person intends to assault another, but the gun discharges accidentally before he intended to shoot. "[T]he court's response erroneously allowed the jury to find defendant guilty of intentional assault without finding that the intent element of that crime existed beyond a reasonable doubt." While the hypothetical in the jury's note may have supported liability for a crime with a mens rea less than intentional, the defendant was not charged with such a crime.

The court did not err in denying the defendant's request for an adverse instruction based on the prosecution's failure to produce the lost handwritten notes of the police officer who interviewed the accuser at the hospital, even though those notes constituted *Rosario* and *Brady* material, where the defendant was not prejudiced by the "'nonwillful, negligent loss or destruction'" of the notes. "Defense counsel had ample opportunity to show the jury that the [accuser]'s testimony as to the identity of his shooter was fabricated …." Nor does failure to disclose other *Rosario* material, a testifying detective's follow-up DD5 reports, justify reversal. (Supreme Ct, New York Co)

Sentencing (Resentencing) (Youthful Offenders)

People v Flores, 116 AD3d 644, 985 NYS2d 22 (1st Dept 4/29/2014)

The defendant's sentence must be vacated and the case remanded for resentencing, including a youthful offender determination. "Although defendant was convicted of an armed felony, he still could have received a youthful offender adjudication if the court made the applicable findings under CPL 720.10(3)." "In reaching this decision, we respectfully disagree with the opinion of the Third Department in *People v Woullard* (115 AD3d 1053 [3d Dept 2014]), which reached the opposite conclusion." (Supreme Ct, New York Co)

Appeals and Writs

Non-Citizens (Deportation)

Sex Offenses (Sex Offender Registration Act)

People v Edwards, 117 AD3d 418, 985 NYS2d 43 (1st Dept 5/1/2014)

The defendant's appeal of his risk level in this Sex Offender Registration Act proceeding will not be dismissed on the ground that he has been deported. The location of a civil appellant is not normally a reason for dismissal and the fugitive disentitlement doctrine does not apply where the defendant was involuntarily deported. And the prosecution failed to show that the defendant's absence renders the appeal moot. Considering the merits, the court properly declined to grant a downward departure where the defendant "did not demonstrate any mitigating factors not taken into account by the risk assessment instrument that would warrant a downward departure" given the serious underlying conduct against a child. (Supreme Ct, Bronx Co)

Juveniles (Custody) (Parental Rights)

Melissa C.D. v Rene I.D., 117 AD3d 407, 985 NYS2d 28 (1st Dept 5/1/2014)

The court improperly awarded the mother sole custody of the middle child, who had been living with the father, and, with respect to the oldest child, who lives with the father, joint decision-making authority as to that child's education and serious medical care and final decision-making authority if the parents cannot agree or the father fails or refuses to communicate with the mother. "[T]he court erred by placing undue emphasis on a single factor, the father's alleged alienation of [the oldest and middle children] …." The court did not give sufficient weight to the mother's role in alienating the children's affections, "her inability to accept any responsibility for the deterioration of her relationship with them," and her behavior at visits that undermined the children's trust, including lying and criticizing the father. A change in custody may be warranted where the custodial parent deliberately frustrates, denies, or interferes with the noncustodial parent's rights, but "even egregious conduct in this regard must be viewed within the context of the child's best interests …." (Supreme Ct, New York Co)

Motions (Suppression)

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

People v Wynn, 117 AD3d 487, 985 NYS2d 77 (1st Dept 5/8/2014)

The court erred in summarily denying the defendant's motion to suppress where, "given defendant's complete lack of relevant information, that portion of her motion papers alleging a 'lack of probable cause to arrest the defendant based on the unreliability of the informa-

First Department *continued*

tion provided to the police and/or the insufficiency of the description,' while conclusory, was sufficient to state a basis for suppression and raise a factual issue requiring a hearing …." The prosecution gave the defendant information about the crime itself and the proof to be offered at trial, but nothing that connected the defendant to the crime, such as how she became a suspect and the basis for her arrest hours after the crime at a different location. (Supreme Ct, New York Co)

Discovery (Matters Discoverable)

Juveniles (Abuse)

Witnesses (Credibility)

Matter of Dean T., 117 AD3d 492, 985 NYS2d 518 (1st Dept 5/13/2014)

The court improperly denied the respondent father's motion to subpoena the mental health records of the child he is accused of abusing without conducting an in camera review of the records to determine their relevancy to the central issue of the child's credibility. There is no physical evidence of or witnesses to the alleged abuse; the respondent claims the allegations were retaliation against him for hitting the mother, who may be coaching the child, given that the allegations followed the respondent's cross-petition for custody; and the child received counseling before the alleged abuse. The argument that the child waived the psychologist-patient privilege by stating that the abuse caused him to feel depressed is rejected; although the child's mental health status may be relevant, his mental state is not in controversy under to CPLR 3121. Such contention "fails to take into account both the balancing test required by Family Court Act § 1038 (d) and the restrictions placed on the release of mental health records by Mental Hygiene Law § 33.13 (c), which allows for the disclosure of clinical records only in select circumstances." (Family Ct, Bronx Co)

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

People v Cole, 120 AD3d 72, 987 NYS2d 373 (1st Dept 6/5/2014)

The court did not make a searching inquiry before allowing the defendant to proceed pro se where the court gave only generalized warnings such as saying that self-representation "was a course 'fraught with problems,'" completely failing to advise the defendant "of the benefits of being represented by counsel," did not impress upon the defendant the dangers and disadvantages of giving up the fundamental right to counsel, and failed to explain the importance of an attorney in the adversarial system. (Supreme Ct, New York Co)

Search and Seizure (Arrest/Scene of the Crime Searches) (Warrantless Searches [Emergency Doctrine])

People v Febres, 118 AD3d 489, 987 NYS2d 133 (1st Dept 6/10/2014)

The court erred in denying the defendant's motion to suppress the marijuana found in a closed bag the defendant was carrying where the prosecution failed to establish exigent circumstances justifying a search of the bag incident to his arrest for violating Transit Authority regulations. "The officers did not testify that they feared for their safety, or that they were concerned that the bag contained evidence that defendant could destroy, and the circumstances did not suggest that any exigency required an immediate search." The defendant was not suspected of any other crimes, he was fully cooperative and voluntarily placed the bag on the ground without displaying a threatening demeanor or actions, and there was no indication that he might try to grab or kick the bag, which was no longer in his possession. Furthermore, "there was no indication that the bag might contain a weapon" and there was no possibility that the bag could contain evidence to support the transit violations. That the officer smelled marijuana after he opened the bag did not justify the search. (Supreme Ct, New York Co)

Guilty Pleas (Vacatur)

Sentencing (Concurrent/Consecutive)

People v Dinkins, 118 AD3d 559, 988 NYS2d 165 (1st Dept 6/17/2014)

The defendant's plea to grand larceny must be vacated because it was induced by the court's promise that the larceny sentence would run concurrently with a sentence in another case and the conviction in the other case was reversed. However, the defendant is not entitled to vacatur of his bail jumping plea, even though it was part of the same plea agreement, because the agreement provided that the defendant would receive a sentence that would run concurrently with the larceny sentence, but consecutively to the sentence in the other case, as required by Penal Law 70.25(2-c). "Here, the reversal nullified a benefit that had been an inducement to the plea, but only as to the concurrent sentence, not the consecutive sentence." The larceny and bail jumping "pleas are severable, and each should be treated in accordance with its own legal status." (Supreme Ct, New York Co)

Guilty Pleas (Vacatur)

First Department *continued*

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

People v Singletary, 118 AD3d 610, 987 NYS2d 843 (1st Dept 6/24/2014)

The defendant is entitled to vacatur of his plea where the court failed to advise the defendant that if he violated the terms of his plea agreement, not only could he be sentenced to up to nine years, but that the sentence would include a term of post-release supervision (PRS). The court must tell the defendant that an enhanced sentence would include PRS and specify the length of the term of PRS. "The prosecutor's mention of PRS immediately before sentencing was not the type of notice under *People v Murray* (15 NY3d 725 [2010]) that would require defendant to preserve the issue …." (Supreme Ct, New York 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.

Appeals and Writs (Preservation of Error for Review)

Juries and Jury Trials (Deliberation)

People v Giraldo, 116 AD3d 711, 983 NYS2d 101 (2nd Dept 4/2/2014)

The court's summarizing and misquoting of the second jury note instead of reading it verbatim on the record deprived defense counsel of meaningful notice of the note's contents and "an opportunity to suggest appropriate responses in accordance with CPL 310.30 and *People v O'Rama* (78 NY2d 270 [1991])." Mischaracterizing the note as a mere request for readback of the elements of the offenses charged, when it actually indicated an erroneous impression "that proof of a single element of each crime was sufficient to render a guilty verdict," denied counsel a chance to participate in formulating a response. This was a mode of proceedings error requiring reversal despite the absence of an objection. (Supreme Ct, Queens Co)

Sex Offenses (Sex Offender Registration Act)

People v Marsh, 116 AD3d 680, 983 NYS2d 91 (2nd Dept 4/2/2014)

The court erred in assessing points for drug abuse under risk factor 11 of the Sex Offender Registration Act Risk Assessment Guidelines and Commentary where there is no evidence that the defendant ever abused marijuana; possession by itself does not constitute drug abuse. The evidence supports a downward departure from a level two risk where the accuser's lack of consent was based solely on her age, there is no indication that the defendant intended for her to get pregnant, and the defendant travels a distance to visit the child and pays child support, indicating that he has taken responsibility for the consequences of his crime. (Supreme Ct, Kings Co)

Dissent: That the defendant was 11 years older than the accuser, combined with the fact that a pregnancy resulted and the defendant's subsequent violation of probation, illustrates the defendant's propensity to put his interests above those of society; that he ultimately acknowledged paternity and meets the legal obligation to pay child support is not a mitigating factor.

Defenses (Intoxication)

Instructions to Jury (Intoxication)

Sex Offenses (Elements)

People v Velcher, 116 AD3d 799, 982 NYS2d 905 (2nd Dept 4/9/2014)

The requested jury charge on intoxication should have been given where the evidence showed the offense occurred four days after the accuser's mother ended a 17-year relationship with the defendant, who began to drink heavily, and who testified that before committing the charged acts he drank a great deal and began to feel out of his mind and out of control, and the accuser said he acted weird and didn't seem to be thinking when he committed the acts against her. Intent is an element of first-degree criminal sexual act. (Supreme Ct, Kings Co)

Evidence (Weight)

Weapons (Evidence) (Possession)

People v Battle, 116 AD3d 782, 983 NYS2d 314 (2nd Dept 4/9/2014)

The defendant's second-degree weapon possession conviction was against the weight of the evidence; objective facts, never adequately explained, cast doubt on the credibility of police testimony that the defendant threw an object under a car where a gun was then found and later determined to be loaded and operable. The arresting officer's memo book was lost; ammunition said to be from the gun was not submitted for analysis until five days later; a photograph of the gun was exhibited at the precinct with a caption referring to a white lie; and the witness who called the police said the wrong man had been arrested. (Supreme Ct, Queens Co)

Juveniles (Jurisdiction) (Neglect)

Second Department *continued*

Matter of Tekiara F., 116 AD3d 852, 983 NYS2d 446 (2nd Dept 4/16/2014)

The court erred by dismissing a Family Court Act article 10 petition on the grounds it lacked subject matter jurisdiction after the subject children were placed with their maternal grandmother out of state pursuant to the Interstate Compact of the Placement of Children (ICPC). The ICPC provides that foster children remain under New York jurisdiction "'until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state ....'" Social Services Law 374-a (1), art V(a). Mere relocation did not extinguish jurisdiction. (Family Ct, Kings Co)

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

Juries and Jury Trials (Deliberation)

People v Nealon, 116 AD3d 886, 985 NYS2d 91 (2nd Dept 4/16/2014)

A mode of proceedings error requiring reversal despite a lack of objection occurred where the record shows the court read the contents of three jury notes for the first time in the jury's presence and immediately provided a response without giving counsel an opportunity to suggest appropriate responses. The requests for clarification of the difference between first- and second-degree robbery required substantive, not merely ministerial, responses. Portions of the respondent's brief that refer to matters outside the record are stricken and were not considered. (Supreme Ct, Queens Co)

[***Ed. Note:*** *Leave to appeal was granted on Aug. 15, 2014 (2014 NY Slip Op 98472[U]).*]

Identification (Show-ups) (Suggestive Procedures)

People v Ward, 116 AD3d 989, 984 NYS2d 123 (2nd Dept 4/23/2014)

The prosecution failed to establish that the show-up at which the accuser identified the defendant was not unduly suggestive where the accuser, who was crying uncontrollably, did not attempt to identify the defendant at an initial show-up but did so at a second show-up that was preceded by an officer saying "he wanted to 'see if she could recognize anybody,'" other officers pulling the defendant to a standing position and bringing him to within about 25 feet of the accuser, and the first officer asking "'[d]o you know this man?' …." A review of the other evidence shows that the error was harmless. (County Ct, Nassau Co)

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

People v Maldonado, 116 AD3d 980, 983 NYS2d 635 (2nd Dept 4/23/2014)

The court erred in rejecting, on the basis that no relief was available even if the claim was meritorious, the defendant's contention a month before he pleaded guilty that he had been denied effective representation when initial assigned counsel "failed to adequately inform him of an earlier, more lenient, plea offer …." A month after the defendant's guilty plea, the U.S. Supreme Court held that failure to advise a client of a beneficial plea offer constitutes ineffective assistance where there was a reasonable probability the defendant would have accepted the offer and the prosecution or court would not have prevented implementation of the offer, and a harsher penalty was then imposed. (Supreme Ct, Queens Co)

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) (Warrantless Searches)

People v Laviscount, 116 AD3d 976, 984 NYS2d 394 (2nd Dept 4/23/2014)

A gun and bullet recovered from a passenger's purse and items from the defendant's car should have been suppressed; the officer failed to articulate at the hearing any reason for approaching the defendant's legally parked car other than that it was early morning, cars generally did not park there, and the defendant may have taken something from the dash and thrown it on the floor. Further, the officer admitted that after the inquiry began, he looked into the car with a flashlight and saw nothing illegal or unusual. Without the physical evidence, there could not be sufficient evidence of guilt. (Supreme Ct, Queens Co)

Family Court (Family Offenses)

Juveniles (Family Offenses) (Hearings) (Jurisdiction)

Matter of Aslan v Senturk, 116 AD3d 952, 983 NYS2d 815 (2nd Dept 4/23/2014)

In a family offense proceeding the court erred by permitting the Court Attorney Referee to hear and decide the matter. The Court Attorney Referee lacked jurisdiction to issue an order that denied the petition and dismissed the proceeding because the court had only referred the matter for the Court Attorney Referee to hear and report. The matter is remitted to the Family Court for further pro-

Second Department *continued*

ceedings in which it is to treat the Referee's decision as a report. (Family Ct, Richmond Co)

Post-Judgment Relief (CPL § 440 Motion)

People v Taylor, 116 AD3d 1074, 984 NYS2d 414 (2nd Dept 4/30/2014)

The motion court erred by denying without a hearing the defendant's motion to vacate two judgments; there is no time limit on 440.10 motions and the moving papers were sufficient. The prosecution conceded that a supplementary police report and four witness statements constituted *Rosario* material and that one of the statements was also *Brady* material, the defendant's sworn affidavit alleged that the material was not provided, and the prosecution's response to the defendant's omnibus motion and a review of the transcript support the contention that the documents were not disclosed. (County Ct, Suffolk Co)

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

Post-Judgment Relief (CPL § 440 Motion)

People v Baker, 116 AD3d 1058, 985 NYS2d 112 (2nd Dept 4/30/2014)

After this matter was remitted to the resentencing court for hearings and new determinations on the defendant's motion to vacate his convictions and to set aside his sentence, the court failed to follow instructions. While no hearing was required as to the persistent violent felony offender adjudication once the parties and court agreed the defendant was a second violent felony offender, a hearing was still required as to the claim that the convictions should be vacated on ineffective assistance of counsel grounds and the more favorable terms of a previously vacated plea restored. The court also failed to explore the adequacy of the defendant's waiver of a potential conflict of interest as to counsel's continued representation upon remittitur. (County Ct, Dutchess Co)

Arrest (Resistance)

Evidence (Sufficiency) (Weight)

Trespass (Elements)

People v Vines, 117 AD3d 760, 984 NYS2d 609 (2nd Dept 5/7/2014)

The evidence "was insufficient to establish that the defendant lacked license or privilege to enter and remain in the" dwelling belonging to his father where the power of attorney given by the father to the defendant's sister did not confer on her the authority to make informal, personal decisions such as prohibiting the defendant from entering the dwelling; no other evidence was offered showing the defendant lacked permission to be in his father's home. But while the second-degree trespass conviction must be reversed, the resisting arrest conviction stands, as the police had probable cause to arrest the defendant, who attempted to prevent an authorized arrest. (County Ct, Rockland Co)

Lesser and Included Offenses (Instructions)

People v Bennett, 117 AD3d 747, 984 NYS2d 607 (2nd Dept 5/7/2014)

The court erred by submitting as a lesser included offense the crime of attempted second-degree possession of a forged instrument, where the defense objected and there was no reasonable view of the evidence that "support[s] a finding that merely an attempt and not the completed crime had occurred …." That count of the indictment must be dismissed. (Supreme Ct, Kings Co)

Juveniles (Custody) (Parental Rights) (Visitation)

Matter of Hamad v Rizika, 117 AD3d 736, 984 NYS2d 605 (2nd Dept 5/7/2014)

The court erred in directing a mother to deliver her child's passport to the court where there was no evidence in the record suggesting that the mother intended to remove the child from the country without court approval. In this Family Court Act article 6 visitation matter the mother, who had custody of the child with visitation for the father, moved to modify the order to require supervision of the visits and the father cross-filed for increased visitation. The court directed that neither parent leave the country with the child; the father not apply for an Egyptian passport for the child; and the mother turn the child's passport in to the court. (Supreme Ct, Kings Co)

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)

Rape (Evidence) (Instructions)

People v Jean, 117 AD3d 875, 985 NYS2d 669 (2nd Dept 5/14/2014)

The defendant's unpreserved contention that multiple counts of second-degree rape and second-degree incest arising from the same incidents involving his younger daughter were multiplicitous is reviewed in the interest of justice. Where the jury instructions as to the two sets of charges were essentially identical, and one

Second Department *continued*

cannot commit second-degree incest as charged to the jury under Penal Law 255.26 without simultaneously committing second-degree rape under Penal Law 130.30, those second-degree incest convictions must be vacated. Certain counts of second-degree rape were duplicitous where the accuser said the defendant had intercourse with her once a week during the first three weeks of each of several months, but the jury convicted the defendant of only one or two counts for a particular month, and there was no way to determine if the jury was unanimous as to the defendant's guilt of a particular incident. (Supreme Ct, Nassau Co)

Due Process (Fair Trial)

Evidence (Uncharged Crimes)

People v Harris, 117 AD3d 847, 985 NYS2d 643 (2nd Dept 5/14/2014)

In this case involving alleged witness bribery with regard to three witnesses against the defendant's brother in a murder trial, the defendant was not deprived of a fair trial by the court's evidentiary rulings allowing the prosecutor to offer evidence that a fourth witness was killed a week before he was to testify against the defendant's brother and that the defendant had said he wanted to speak to that witness shortly before. The murder was interwoven with the narrative of the charges against the defendant, in that the three witnesses he was said to have bribed recanted their initial identification of the brother, and sought protection from law enforcement after the other witness was killed, after which they testified in accordance with their initial statements. Jurors are presumed to have followed the court's limiting instructions. (Supreme Ct, Kings Co)

Dissent: Allowing introduction of evidence of the murder, with which the defendant was not charged, had a great impact on the instant trial, turning into a "trial within a trial"; the court ignored the prospect of prejudice when it decided to allow admission of the evidence, which was an abuse of discretion. The claim that the defense opened the door to this evidence represents a significant expansion of existing law.

[***Ed. Note:*** *Leave to appeal was granted on July 8, 2014 (23 NY3d 1045).*]

Accomplices (Accessories)

Evidence (Weight)

Robbery (Elements) (Evidence)

People v Davis, 117 AD3d 840, 986 NYS2d 185 (2nd Dept 5/14/2014)

The defendant's conviction of second-degree robbery based on accessorial liability was against the weight of the evidence. The accuser testified to a dispute between himself and another driver, Sancho, employed by a van rental company, which ended with Sancho taking the accuser's van, someone else returning it, the defendant being present at that scene, bumping fists with Sancho, and saying into a phone that someone "is here," and Sancho then striking the accuser when he tried to call 911, taking his phone, and mocking him as he fled. This did not show beyond a reasonable doubt that the defendant shared Sancho's intent to rob the accuser of his phone or aided Sancho in forcibly taking or retaining the phone. (Supreme Ct, Queens Co)

Admissions (*Miranda* Advice)

Robbery (Elements) (Evidence)

People v Hiraeta, 117 AD3d 964, 986 NYS2d 217 (2nd Dept 5/21/2014)

The defendant's statement regarding gang affiliation, made in response to questioning by a detective, when the defendant was in custody but before *Miranda* warnings were given, did not constitute pedigree information and should have been suppressed, but the failure to do so was harmless.

The evidence was legally insufficient as to the robbery counts where the accuser and a friend were assaulted by the defendant and others and the accuser's necklaces disappeared during the incident but no evidence indicated any of the attackers displayed an interest in the jewelry before or during the incident, or touched the necklaces. (Supreme Ct, Queens Co)

Discrimination (Race)

Juries and Jury Trials (Challenges)

People v Chery, 117 AD3d 962, 985 NYS2d 909 (2nd Dept 5/21/2014)

The defendant's showing that the only two prospective jurors who were black (the same race as the defendant) were excluded by prosecution peremptory challenges was sufficient to create an inference of purposeful discrimination; the court should have proceeded to take the further steps required in a *Batson* inquiry. The matter is remitted for a hearing and report on the defendant's challenge. (Supreme Ct, Queens Co)

Parole (Release [Consideration for (Includes Guidelines)])

Second Department *continued*

Matter of Symes v New York State Bd. of Parole, 117 AD3d 959, 985 NYS2d 895 (2nd Dept 5/21/2014)

The petitioner is entitled to a new parole hearing and determination where the Parole Board, at the time of the petitioner's hearing in 2012, had not yet begun to use the Correctional Offender Management Profiling for Alternative Sanction (COMPAS) assessment tool that had been adopted by the Parole Board in response to the 2011 amendment of Executive Law 259-c(4). (Supreme Ct, Orange Co)

Insanity (Post-Commitment Actions)

Matter of Marvin P., 120 AD3d 160, 986 NYS2d 190 (2nd Dept 5/21/2014)

Where the respondent, who challenged Office of Mental Health applications for his continued retention in a secure psychiatric facility, "refused to allow the Commissioner's examiners to interview him for their forensic psychiatric reports to the court on his mental condition," and where differing diagnoses and evaluations of the respondent's condition were offered by his examiners and those called by the Commissioner, the record shows that the order reflecting the Supreme Court's conclusion that the appellants had not proven the respondent to be dangerously mentally ill should be reversed and continued retention granted. (Supreme Ct, Orange Co)

Dissent in Part, Concurrence in Part: Without regard to the respondent's case, the appellants failed to make a prima facie showing that the respondent, whose only violent history was quite dated and whose recent provocation of other patients did not demonstrate physical danger to himself, had a dangerous mental disorder; they did demonstrate he was mentally ill, so that a retention order should be issued but the respondent should be transferred to a nonsecure psychiatric facility.

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

Evidence (Sufficiency)

People v Mazariego, 117 AD3d 1082, 986 NYS2d 235 (2nd Dept 5/28/2014)

The defendant's conviction of first-degree gang assault is reduced to attempted first-degree gang assault due to insufficiency of evidence of a "'serious physical injury'" to the accuser to whom that charge relates; the accuser's stab wounds to the right flank required no stitches, the small laceration of his kidney was not shown to have caused permanent damage, and there was no description of what if an limitations the accuser suffered as a result of the injury which did leave a painful scar. The evidence did support a finding that the defendant attempted to commit the offense. (County Ct, Nassau Co)

Assault (Evidence)

Evidence (Sufficiency)

Weapons (Possession)

People v Frazier, 117 AD3d 1077, 986 NYS2d 249 (2nd Dept 5/28/2014)

Where the defendant was not charged under an accomplice theory, and there was not legally sufficient evidence to establish that he, rather than another shooter, fired the bullet that caused serious physical serious injury to the accuser, the first-degree assault conviction must be vacated. The defendant must be resentenced on second-degree possession of a weapon. (Supreme Ct, Kings Co)

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

Non-Citizens (Deportation)

People v Charles, 117 AD3d 1073, 986 NYS2d 228 (2nd Dept 5/28/2014)

Where the record does not show that the court mentioned the possibility of deportation as a consequence of the defendant's guilty plea, or that the defendant was otherwise aware of that possibility, the matter is remitted "to afford the defendant an opportunity to move to vacate his plea upon a showing that there is a 'reasonable probability' that he would not have pleaded guilty" had the court provided the requisite advice with regard to deportation. (County Ct, Suffolk Co)

Juveniles (Hearings) (Visitation)

Matter of New v Sharma, 117 AD3d 1061, 986 NYS2d 622 (2nd Dept 5/28/2014)

The court must hold a hearing on the petitions before the court. The original visitation order allowed the father to have overnight visits, but required that a social worker pre-approve the location of the visits and monitor exchanges of the child. The father sought to modify the order to eliminate the social worker approval requirement, and the attorney for the child requested that the visits be short in duration and at specific locations. The court erred in failing to give the father an opportunity to present evidence of a material change in circumstances to justify modification. It was also error to limit the hearing to whether to require supervised visitation where neither the father's petition nor the attorney for the child's application for reduced visits asked for such relief. (Family Ct, Nassau Co)

Second Department *continued*

Evidence (Weight)

Weapons (Possession)

Matter of Shamik M., 117 AD3d 1056, 986 NYS2d 566 (2nd Dept 5/28/2014)

The court's fact-finding adjudicating the appellant a juvenile delinquent based on acts that would constitute weapons possession offenses was against the weight of the evidence. One of two officers who testified that they saw the appellant take a firearm from his waistband and toss it down before fleeing was impeached by the admission that a jury had found the officer liable for false arrest and malicious prosecution in another matter where he claimed he had seen a defendant take a gun from his waistband and throw it into the street and by his internal affairs complaint history; the appellant presented evidence that another person threw the weapon in question. (Family Ct, Kings Co)

Juveniles (Custody) (Hearings) (Jurisdiction)

Matter of Katz v Katz, 117 AD3d 1054, 986 NYS2d 611 (2nd Dept 5/28/2014)

The court erred in dismissing the father's petition for custody, filed after the mother took the child to the Dominican Republic without his permission. Instead of determining jurisdiction under the Uniform Child Custody and Enforcement Act, codified by Domestic Relation Law article 5-A, the court deferred to a court in the Dominican Republic that had denied the father's application for return of the child, filed in accordance with the Convention of the Civil Aspects of International Child Abduction. (Family Ct, Queens Co)

Juveniles (Grandparents) (Hearings) (Visitation)

Matter of Feldman v Torres, 117 AD3d 1048, 986 NYS2d 565 (2nd Dept 5/28/2014)

The court erred in denying the maternal grandfather's visitation petition without a hearing. The grandfather's showing as to the nature and extent of his relationship with the child and his efforts to maintain it established standing to seek visitation, the first of the requisite two-part inquiry. As to the second part, the court "improvidently exercised its discretion in dismissing the petition … based on the grandfather's admission that the mother harbored animosity toward him"; the record does not reflect the nature and basis for the animosity, and such animosity alone cannot provide a basis for denial of visitation. (Family Ct, Kings Co)

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)

Rape (Elements) (Evidence) (Instructions)

People v Jagdharry, 118 AD3d 722, 987 NYS2d 91 (2nd Dept 6/4/2014)

One count of second-degree rape must be dismissed as to the defendant, and a new trial held on other counts of rape and endangering the welfare of a child. The charge in the dismissed count was multiplicitous with another as both charged the same offense based on the same act of intercourse; while the defense used the word "duplicitous" in arguing for dismissal, the substance and context of the argument clearly meant "multiplicitous" (charging a single offense in more than one count). Further, in instructing the jury, the court said that to find the element of intercourse, they must find the defendant engaged in intercourse personally or acting in concert with another who was so engaged, but the instructions provided no way for the jury to distinguish one count from another, which suggested that if the defendant was guilty of any of the rape counts they should convict on all. The instructions on endangering the welfare of a child were similarly flawed. (Supreme Ct, Queens Co)

Due Process

Evidence (Hearsay)

Sex Offenses (Civil Commitment)

Matter of State of New York v Walter R., 118 AD3d 714, 987 NYS2d 104 (2nd Dept 6/4/2014)

In this civil proceeding regarding civil management of the defendant sex offender, admission of expert testimony by the State's experts violated the defendant's right to due process where the experts relied upon hearsay evidence concerning unproven acts, found in probation reports and other documents but not shown to be reliable, rather than on personal knowledge. The error was not harmless given the cumulative impact of such hearsay testimony, notwithstanding the court's limiting instruction and absence of any opposing expert testimony. (Supreme Ct, Orange Co)

Counsel (Advice of Right to)

Sex Offenses (Civil Commitment)

Matter of State of New York v Raul L., 120 AD3d 52, 988 NYS2d 190 (2nd Dept 6/4/2014)

"[D]ue process requires that a sex offender's waiver of the statutory right to counsel in a Mental Hygiene Law article 10 proceeding be unequivocal, voluntary, and intelligent." Where appointed counsel sought to withdraw,

Second Department *continued*

apparently over a disagreement with the client as to an adjournment, and the defendant said, in response to an advisement that replacement counsel would need several months to prepare, that he would like to "'fight' his own case," and the court responded to the assistant attorney general's concern that a broader inquiry was required by saying that all the court had to do was place on the record that the defendant did not want an attorney and would represent himself, the appellant's waiver of his statutory right to counsel was ineffectual. (Supreme Ct, Orange Co)

Parole (Release [Consideration for (Includes Guidelines)])

Matter of Ramirez v Evans, 118 AD3d 707, 987 NYS2d 415 (2nd Dept 6/4/2014)

While the Parole Board's decision to deny release to the petitioner referred to the petitioner's institutional record, "it is clear that the Board denied release solely on the basis of the seriousness of the offense …." The Board set forth its explanation for such denial in conclusory terms, contrary to law; at the new hearing, the Board should utilize the Correctional Offender Management Profiling for Alternative Sanction (COMPAS) assessment tool, which was adopted in response to a statutory amendment before the petitioner's hearing but was not yet in use. (Supreme Ct, Orange Co)

Juveniles (Custody) (Parental Rights)

Matter of Morant v Rogers, 118 AD3d 703, 986 NYS2d 346 (2nd Dept 6/4/2014)

The court should not have, in effect, summarily denied this proceeding in which the mother sought to revoke an agreement surrendering her children to their great aunt and uncle where the mother's claims that she was 17 years old, unrepresented, and under the influence of drugs when she executed the agreement were sufficient allegations that she was under duress at the time. (Family Ct, Suffolk Co)

Sex Offenses (Civil Commitment)

Matter of State of New York v Todd L., 118 AD3d 805, 987 NYS2d 207 (2nd Dept 6/11/2014)

The order directing that the appellant be committed to a secure treatment facility for care, treatment, and control until he no longer requires confinement as a dangerous sex offender is reversed because the verdict sheet asked the jury to determine whether the appellant's commission of second-degree assault *or* second-degree promoting prostitution *or* third-degree promoting prostitution constituted a sexually motivated offense but the last-listed offense is not a designated offense within the meaning of Mental Hygiene Law article 10. The error was so fundamental it warrants review despite being unpreserved. (Supreme Ct, Queens Co)

Search and Seizure (Arrest/Scene of the Crime Searches) (Warrantless Searches [Emergency Doctrine])

People v Thompson, 118 AD3d 922, 988 NYS2d 209 (2nd Dept 6/18/2014)

The gun found in the defendant's backpack during a warrantless search after the defendant was subdued and arrested more than 35 feet away should have been suppressed. The prosecution failed to show exigent circumstances justifying the search as the pack was outside the defendant's control, the circumstances did not support a reasonable belief that it contained a weapon or that the search was necessary to protect against destruction of evidence, claims not asserted by the officer at the hearing, and the claim that they were searching for evidence of the drug crime for which the defendant was arrested was not raised prior to appeal. (Supreme Ct, Queens Co

Juries and Jury Trials (Alternate Jurors) (Deliberation)

People v Canales, 121 AD3d 14, 988 NYS2d 212 (2nd Dept 6/18/2014)

The defendant's consent to substitution of an alternate juror for a juror who became ill on the third day of deliberations was not shown to be knowing, intelligent, and voluntary where there was a delay in bringing the defendant to the courthouse; the court made the substitution upon consent of counsel alone, over the prosecution's objection, to avoid further delay in the proceedings; and upon the defendant's arrival obtained the defendant's consent without revealing to him or defense counsel that the jury had already reached a verdict. "[E]xpediency does not justify abandoning standards of due process." The unpreserved issue is reached in the interest of justice. (County Ct, Nassau Co)

Juveniles (Custody)

Non-Citizens

Matter of Saul A.F.H. v Ivan L.M., 118 AD3d 878, 988 NYS2d 230 (2nd Dept 6/18/2014)

The court erred by dismissing the guardianship petitions, filed under Family Court Act article 6, and essentially denying the petitioner's motion for the issuance of an order making the requisite declaration and special findings needed for the children to apply for Special Immigrant Juvenile Status (SIJS) pursuant to 8 USC

Second Department *continued*

1101(a)(27)(J). The court failed to declare that the children are dependent on the Family Court and failed to make specific findings that they are unmarried and under 21 years of age, reunification with their father is not viable due to abandonment, and it would not be in their best interests to be returned to their previous country of nationality and last habitual residence. (Family Ct, Nassau Co)

Juveniles (Abuse)

Matter of Jaylin C., 118 AD3d 872, 990 NYS2d 212 (2nd Dept 6/18/2014)

Testimony by the petitioner's expert that the four-month-old child Janelle P., examined due to swelling above her left ear, suffered "a millimeter-sized subdural hematoma and 'encephalo hematoma' caused by blunt force trauma" that could have been from a fall, and that the child felt no pain and seemed happy when examined, did not establish a prima facie case of abuse of Janelle or derivative neglect of two other children. (Family Ct, Kings Co)

Counsel (Competence/Effective Assistance/Adequacy)

Defenses (Diminished Capacity)

People v Henderson, 118 AD3d 1020, 990 NYS2d 214 (2nd Dept 6/25/2014)

The defendant's conviction must be reversed for ineffective assistance of counsel where the defense expert, testifying in support of the diminished capacity defense, had diagnosed the defendant with schizophreniform disorder exacerbated by marijuana use and said the defendant's actions during the charged stabbing of the accuser, including "the random nature" of the accuser's wounds, were consistent with that diagnosis, but acknowledged on cross examination that he had not seen the medical records of the accuser's wounds or been told that a motivation for the attack existed. Counsel's so-called strategic decision to withhold information from the expert "was not consistent with the actions of a reasonably competent attorney." (Supreme Ct, Queens Co)

Juveniles (Custody) (Hearings) (Jurisdiction)

Matter of Rodriguez v Rodriguez, 118 AD3d 1011, 987 NYS2d 632 (2nd Dept 6/25/2014)

The order transferring to a Florida court the mother's petition to modify a Florida custody order to give the mother sole custody of the nonparty appellant child, is reversed and remitted for further proceedings. The court below found the mother, who alleged verbal and physical abuse by the father as well as drug dealing in the child's presence, had established a prima facie showing of imminent risk of harm, but erred in finding that Florida was the proper venue for determining that issue. (Family Ct, Rockland Co)

Family Court (Family Offenses) (Orders of Protection)

Matter of Margary v Martinez, 118 AD3d 1004, 989 NYS2d 78 (2nd Dept 6/25/2014)

Despite the expiration of a protective order, the petitioner's appeal challenging the issuance of the order, in her favor, as being issued for an too brief a period is not academic and it is reviewed. The Family Court determined that the respondent had committed the family offense of second-degree menacing "by displaying a gun and threatening the petitioner with it …." The court "improvidently exercised its discretion in fixing the term … at … only six months" where the record supported an aggravating circumstances finding based on the use of a dangerous instrument. Further, the court erred by declining to order the respondent to stay away from the petitioner's home and other areas she frequented. (Family Ct, Kings Co)

Juveniles (Custody) (Hearings) (Jurisdiction)

Matter of Locklear v Andrews, 118 AD3d 1001, 989 NYS2d 92 (2nd Dept 6/25/2014)

The court erred in finding, based on a brief inquiry of the mother in the absence of the father, who was incarcerated but not produced by video as the court had directed, that jurisdiction over custody of the parties' child lies in Pennsylvania, where the mother had moved with the child. Allegations by the father that the mother and child lived in New York contradicted the mother's in-court statement, and a parent in prison "'has a right to be heard on matters concerning [his or] her child'" where there has been no waiver of appearance or willful refusal to appear." (Family Ct, Kings Co)

Juveniles (Custody) (Hearings) (Parental Rights)

Matter of Fallo v Tallon, 118 AD3d 991, 989 NYS2d 80 (2nd Dept 6/25/2014)

The award of sole legal and physical custody to the father is reversed; the court "failed to give sufficient weight to the fact that the mother had been the primary caregiver for the subject children for their entire lives, and the father had a limited involvement with the children until the pendency of these proceedings ...." The court also gave undue deference to testimony regarding conflict between the parties and a single letter to the oldest child's school, from the mother, which incorrectly asserted that

Second Department *continued*

the child needed special food privileges to address a medical condition. There was no evidence of "parental alienation" instigated by the mother and the attorney for the children recommended custody to the mother. (Family Ct, Suffolk Co)

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

Family Court (Family Offenses)

Matter of Cerquin v Visintin, 118 AD3d 987, 989 NYS2d 57 (2nd Dept 6/25/2014)

Where the appellant was advised of his right to counsel at his first court appearance, but was told at the next appearance that he would have to represent himself after the court found him ineligible for assigned counsel, and the appellant requested counsel at the hearing that resulted in a finding that he had committed family offenses, the court erred in failing at that hearing to determine whether the appellant wanted to proceed pro se, advise him of the dangers of doing so, or tell him he could seek an adjournment to secure counsel. The matter is remitted for a new hearing at which he either appears with counsel or provides a knowing, intelligent, and voluntary waiver of counsel. (Family Ct, Queens Co)

Third Department

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

Burglary (Elements) (Evidence)

Due Process (Fair Trial)

Witnesses (Cross Examination)

People v DeFreitas, 116 AD3d 1078, 984 NYS2d 423 (3rd Dept 4/3/2014)

As to the second-degree burglary count, the prosecution failed to establish that the October 2007 offense occurred at a dwelling. The testimony of the property's owners that no one lived there in 2007 and 2008, nor stayed there overnight except one or two nights in July 2007, failed to show that the building had an occupant, and therefore did not show a corresponding intent to return, which is one requirement for proving that a property is a residential dwelling.

The court's rulings restricting the defense presentation of testimony and cross-examination of prosecution witnesses regarding a police investigator's work in this child sex abuse case were not an abuse of discretion and did not impair the defendant's ability to present a defense; to the extent that the record may reveal some impropriety, any error was harmless. (County Ct, Schoharie Co)

Trial (Presence of Defendant [Trial in Absentia])

People v June, 116 AD3d 1094, 983 NYS2d 348 (3rd Dept 4/3/2014)

When the defendant failed to appear on the morning of trial, after receiving warnings that the trial could proceed in his absence, the court pronounced its decision to proceed with trial, noting that delay "'would be tantamount to tearing up the *Parker* admonishment.'" The record does not show that the court considered any of the appropriate factors, such as the likelihood of locating the defendant reasonably quickly, or the difficulties presented by adjourning the trial and issuing a bench warrant. (Supreme Ct, Albany Co)

Accomplices (Corroboration) (Instructions)

People v Medeiros, 116 AD3d 1096, 983 NYS2d 329 (3rd Dept 4/3/2014)

The court erred in failing to instruct the jury that the person to whom the defendant was alleged to have sold a gun, and to have later threatened for having named the defendant as the seller, was an accomplice as to the weapons possession and sale charges, requiring corroboration of his testimony. The buyer of the gun had no license to possess the purchased gun and was chargeable —and charged—with fourth-degree criminal possession. The evidence corroborating the accomplice's testimony was, however, legally sufficient; a new trial must be held. (County Ct, Otsego Co)

Juveniles (Parental Rights)

Prisoners (Family Relationships)

Matter of Bayley W., 116 AD3d 1109, 983 NYS2d 655 (3rd Dept 4/3/2014)

The court's order revoking a suspended judgment and terminating the respondent father's parental rights without a hearing after the mother surrendered her parental rights is reversed and the matter remitted for further proceedings. The incarcerated respondent's affidavit in opposition to the petition asserted that he had provided the names of his mother and two others as alternative resources willing and able to provide placement for the

Third Department *continued*

children, and issues of fact exist as to the timeliness of disclosure of these alternate resources. It is unclear whether the timeliness issue should be considered in relation to the suspended judgment, the mother's surrender, or other circumstances. (Family Ct, Delaware Co)

Sex Offenses (Sex Offender Registration Act)

People v Ross, 116 AD3d 1171, 983 NYS2d 364 (3rd Dept 4/10/2014)

The court's acceptance of an assessment of 15 points under risk factor 11, history of drug or alcohol abuse, by the Board of Examiners of Sex Offenders was error where the record does not show that drugs or alcohol played a role in the offense here or in the defendant's prior sex offense. Widely spaced incidents of third-degree drug sale (1992), seventh-degree drug possession (2002), neither of which prove drug use, and driving while ability impaired (2009) did not establish a pattern of drug or alcohol use by clear and convincing evidence. (County Ct, Broome Co)

Menacing (Elements) (Evidence)

Robbery (Elements) (Evidence)

People v Colon, 116 AD3d 1234, 984 NYS2d 438 (3rd Dept 4/17/2014)

The cashier's testimony that the defendant said "gun" when demanding money, but did not describe any action by the defendant constituting display of a firearm nor indicate that she believed the defendant had a firearm, did not establish the firearm display element of second-degree robbery and second-degree menacing. However, another witness's somewhat contradictory testimony that when he chased the defendant leaving the scene, the defendant brandished what looked like a handgun, possibly a BB gun, and the witness ducked to avoid the possibility of being shot, was legally sufficient as to the display element. The convictions were not against the weight of the evidence. (County Ct, Montgomery Co)

Ethics (Prosecution)

Grand Jury

People v Gryner, 116 AD3d 1247, 983 NYS2d 740 (3rd Dept 4/17/2014)

The court properly denied the defendant's motion to disqualify the District Attorney's office; the grand juror who became an employee of the prosecutor's office did so only after the defendant was indicted, and there was no evidence that his presence affected the grand jury's integrity. (County Ct, Columbia Co)

Guilty Pleas

Probation and Conditional Discharge (Decisionmaking) (Revocation)

People v Hall, 116 AD3d 1249, 983 NYS2d 697 (3rd Dept 4/17/2014)

The court's imposition of a prison sentence in 2012 for the defendant's August 2010 violation of probation deprived the defendant of the benefit of his September 2010 bargain. At that time, the defendant entered an admission to the violation as part of an agreement that if he successfully completed a drug treatment program he would be restored to probation, but he was then placed in another program, rather than restored to probation, for testing positive for opiates after completing the first program; a subsequent arrest on unrelated charges led to a hearing and the instant sentence on the 2010 violation. (County Ct, Broome Co)

Admissions (*Miranda* Advice)

Counsel (Waiver)

People v Jemmott, 116 AD3d 1244, 984 NYS2d 443 (3rd Dept 4/17/2014)

The defendant's statements to a detective at the police station should have been suppressed because his waiver of counsel without the presence of counsel was ineffective. Questioning of the defendant at the scene of his arrest ended when he said he was thinking of talking to a lawyer; after he asked to speak to the detective at the station, he answered "yeah" when asked if he had said earlier he wanted to talk to a lawyer. (County Ct, Ulster Co)

Forensics (DNA)

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

People v Walker, 117 AD3d 1094, 985 NYS2d 166 (3rd Dept 5/1/2014)

"The DNA evidence taken from defendant in April 2010 via a no-knock search warrant issued without notice to him when he was a suspect should have been suppressed." No factual allegations were asserted to justify the lack of notice, the language in the warrant application relating to dangers that the evidence would be destroyed could not apply, and the prosecution's later speculation that the defendant might have fled lacked factual support. While the issue could have been more clearly articulated, it was sufficiently preserved among the defendant's many challenges to the DNA evidence offered against him. (County Ct, Rensselaer Co)

Third Department *continued*

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

People v Bass, 118 AD3d 1033, 986 NYS2d 709 (3rd Dept 6/5/2014)

The court improperly denied without a hearing the defendant's motion to withdraw her plea to possession of drugs made on the grounds that she had lacked the required mental capacity. While the motion papers "were far from compelling," the record raised legitimate questions about the defendant's ability to validly enter the plea; the court was well aware of the defendant's long-standing mental health issues, she was on painkillers as a result of a recent injury, the case was adjourned after she said she was unable to attend to her own personal needs without assistance but shortly thereafter she appeared and entered the plea, but repeated that her psychotropic medications were not working. (County Ct, Schenectady Co)

Counsel (Competence/Effective Assistance/Adequacy)

People v Russ, 118 AD3d 1039, 986 NYS2d 364 (3rd Dept 6/5/2014)

The defendant received ineffective assistance of counsel where he moved to withdraw his guilty plea claiming innocence and coercion by counsel, the matter was adjourned for him to obtain new counsel, which he did, but his new counsel affirmatively stated in court that the plea allocution reflected that the plea had been voluntary. (Supreme Ct, Ulster Co)

Fourth Department

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

Accusatory Instruments (Sufficiency)

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

People v Aung, 117 AD3d 1492, 984 NYS2d 733 (4th Dept 5/2/2014)

The superior court information (SCI) was jurisdictionally defective because "[t]he two counts charged in the SCI were not offenses for which defendant was held for action of a grand jury (*see* CPL 195.20), i.e., those two counts were not included in the felony complaint, and they were not lesser included offenses of an offense charged in the felony complaint …." The defendant did not need to preserve the issue and it survived his guilty plea and waiver of the right to appeal. (Supreme Ct, Erie Co)

Counsel (Competence/Effective Assistance/Adequacy)

Evidence (Hearsay) (Newly Discovered)

Post-Judgment Relief (CPL § 440 Motion)

People v Becoats, 117 AD3d 1454, 984 NYS2d 720 (4th Dept 5/2/2014)

The court properly found that the defendant established that his counsel lacked a strategic or other legitimate reason for failing to take adequate steps to secure the presence of a federal prisoner as a witness where, more than three weeks before trial, the prosecution reported to defense counsel that the prisoner said that he saw the accused being beaten and that the defendant was not present; defense counsel confirmed that the witness's testimony would be helpful, but waited until the last business day before trial to request an adjournment to secure the witness's attendance; and defense counsel stated in an affidavit that the adjournment request "'was not a ploy or stratagem,'" and that he did not remember why he did not initiate the proper proceeding to arrange for the prisoner's appearance. The denial of the defendant's CPL 440.10 motion must be reversed and the matter remanded for a determination of whether counsel's error amounted to ineffective assistance of counsel.

The codefendant's statement at his later plea colloquy that he acted alone and that the defendant was not present is inadmissible hearsay because it is not an admission against the codefendant's penal interest. However, given the federal prisoner's purported observations, it cannot be concluded that there is no reasonable possibility that the codefendant's statements are true; the trial court must determine the codefendant's availability to testify and if available, assess his credibility. (Supreme Ct, Monroe Co)

Homicide (Felony Murder)

Sentencing (Concurrent/Consecutive)

People v Glover, 117 AD3d 1477, 984 NYS2d 726 (4th Dept 5/2/2014)

The sentences imposed on the two robbery counts regarding the surviving victim must run concurrently with the felony murder count because the indictment did not specify which robbery count served as the predicate for the felony murder count. (County Ct, Monroe Co)

Fourth Department *continued*

Instructions to Jury (Burden of Proof) (Witnesses)

Juries and Jury Trials (Deliberation)

Trial (Verdicts)

People v Mack, 117 AD3d 1450, 984 NYS2d 768 (4th Dept 5/2/2014)

The court erred by accepting the verdict without first responding to three notes from the jury, which asked for a readback of part of the testimony of the one witness, out of the approximately 75 to 100 people who may have seen the incident, who identified the defendant as a participant in the assault; for instructions on the importance of a single witness versus multiple witnesses; and for an instruction on the meaning of reasonable doubt. While defense counsel failed to object to the court's acceptance of the jury verdict, preservation is not required because the court's failure to provide a meaningful response to the jury's substantive requests constitutes a mode of proceedings error. The failure was a violation of the core requirements of CPL 310.30 and seriously prejudiced the defendant. Although the jury may have resolved the issue of whether the witness testified that she saw the defendant leave the scene, the readback requests showed that the jury had confusion and doubts about crucial issues and the jury was entitled to the court's guidance on these matters. (County Ct, Monroe Co)

[***Ed. Note:*** *Leave to appeal was granted on June 30, 2014 (23 NY3d 1027).*]

Sentencing (Youthful Offenders)

People v Middlebrooks, 117 AD3d 1445, 985 NYS2d 365 (4th Dept 5/2/2014)

The court was not required to make a youthful offender determination under *People v Rudolph* (21 NY3d 497) where, because the defendant was convicted of first-degree robbery, an armed felony offense under CPL 720.10(2)(a), he was eligible to be adjudicated a youthful offender only if the court found mitigating circumstances that bear directly on the manner in which the offense was committed or if the defendant was not the sole participant and the defendant's participation was relatively minor, and the defendant did not offer any evidence of mitigating circumstances or relatively minor participation. "Defendant did not dispute the circumstances of the crimes as alleged," and "there was no basis for the court itself to conclude that defendant was a minor participant in the crimes" where his DNA was found on items used to bind multiple victims. (County Ct, Erie Co)

[***Ed. Note:*** *Leave to appeal was granted on June 25, 2014 (23 NY3d 1022).*]

Contempt (Elements)

Matter of Schmitt v Piampiano, 117 AD3d 1478, 984 NYS2d 526 (4th Dept 5/2/2014)

The court erred in finding the petitioner criminal defense attorney in contempt where the attorney asked a prosecution witness whether he was convicted of robbery after the court held that the attorney could question the witness about his youthful offender robbery adjudication because the witness opened the door to that that testimony, but did not unequivocally mandate that the attorney was precluded from asking whether he was "'convicted' of robbery." This was summary criminal contempt, not a civil contempt, where the $500 fine was ordered solely to punish the attorney for disobeying a court order.

Prisoners (Disciplinary Infractions and/or Proceedings)

Matter of Trapani v Annucci, 117 AD3d 1473, 984 NYS2d 722 (4th Dept 5/2/2014)

The determination after the tier III hearing finding that the petitioner violated inmate rules must be annulled where the hearing officer violated 7 NYCRR 254.5(b) by failing to provide an explanation for why the testimony of a nurse administrator witness the petitioner requested was taken outside the petitioner's presence.

Sentencing (Post-Release Supervision)

People v Bryant, 117 AD3d 1551, 985 NYS2d 808 (4th Dept 5/9/2014)

The court imposed an illegal sentence by ordering a seven year term of post-release supervision where the minimum period for first-degree rape for someone with a prior nonviolent felony conviction is 10 years. The matter is remanded for resentencing and both parties must have an opportunity to withdraw from the plea agreement. (County Ct, Monroe Co)

Evidence (Newly Discovered)

Identification (Eyewitnesses)

Post-Judgment Relief (CPL § 440 Motion)

People v Bryant, 117 AD3d 1586, 986 NYS2d 287 (4th Dept 5/9/2014)

One of two witnesses offered in support of the defendant's CPL 440.10 motion said she saw the shooting, identified the shooter as someone she knew other than the

Fourth Department *continued*

defendant, and said the defendant was not present. Only the accuser, who initially said he could not identify his attacker, testified at trial that the defendant was the shooter. Where the police, who had canvassed the neighborhood after the shooting, did not mention the witness noted above in their reports, it was not unreasonable for defense counsel to conclude, in light of the limited resources available, that a further canvass would not yield new and relevant information. The information from that witness meets all the requisite factors for newly discovered evidence, and when combined with other evidence, "would probably change the result if a new trial were granted." (Supreme Ct, Monroe Co)

Dissent: Where the hearing court had ample specific and legitimate reason for its determination that the witness in question was not credible, its ruling cannot be said to be clearly erroneous.

[***Ed. Note:*** *On the same day, in the direct appeal from the defendant's guilty plea, the judgment below was modified in accordance with this decision.* People v Bryant, *117 AD3d 1552 (4th Dept 5/9/2014).*]

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)

Evidence (Sufficiency)

People v Casiano, 117 AD3d 1507, 984 NYS2d 781 (4th Dept 5/9/2014)

In this matter arising from alleged public assistance fraud stemming from the defendant's daycare operation, eight counts of the indictment are duplicitous and multiplicitous "as they are based on 'distinct but not identifiable vouchers,'" the same time period, and same vendor number with "no way to identify which voucher refers to which count …."

Two other counts must be reversed and dismissed because no evidence supports the conviction thereunder; while this contention was unpreserved, it is reached in the interest of justice.

Four additional counts were rendered duplicitous by evidence at trial, as there is no way to tell if jurors voted to convict the defendant on these counts for billing for hours when children were watched by uncertified assistants or for billing for hours when children were not at the daycare at all.

The grand larceny count, alleging obtaining money by false pretenses, must also fall because submitting vouchers for services rendered by an uncertified assistant does not appear to constitute larceny and the "alleged regulatory violation cannot form the basis for criminal liability …." The reference to criminal prosecution in 18 NYCRR part 413 et seq does not criminalize the violation of daycare regulations but only reserves the right to seek prosecution for conduct that is otherwise criminal. The prosecution's other theory, that the defendant billed for services not rendered, would fall under larceny by false pretenses, but where both theories were argued and supported by the production of evidence, it cannot be determined if the verdict rested on non-criminal acts or was not unanimous. (Supreme Ct, Erie Co)

Search and Seizure (Warrantless Searches [Unreasonable Force]) (Weapons-frisks)

People v Daniels, 117 AD3d 1573, 986 NYS2d 731 (4th Dept 5/9/2014)

The officer's continuing use of force by pinning the defendant against his vehicle with a forearm while asking the same question repeatedly—whether the defendant "had anything on him"—rendered the defendant's eventual admission to possessing drugs involuntary. Assuming arguendo that there were grounds for reasonable suspicion of criminal activity justifying the pat down that preceded the questioning, that search revealed no weapons so there were no grounds for the officer to fear for his safety. While the initial stop of the defendant's vehicle, which matched that of one used in a nearby robbery, was lawful based on its excessively tinted windows, and the demand that the defendant get out was lawful based on that traffic violation even in the absence of reason to believe the defendant was armed or had committed a crime, the court properly suppressed the drugs ultimately found in the defendant's pocket. (Supreme Ct, Erie Co)

Appeals and Writs (Notice of Appeal)

Forensics (DNA)

Post-Judgment Relief (CPL § 440 Motion)

People v Flax, 117 AD3d 1582, 985 NYS2d 396 (4th Dept 5/9/2014)

The court erred by denying the defendant's motion under CPL 440.30(1-a) for DNA testing of semen found on the jumpsuit that the accuser in this rape case had been wearing. The accuser identified the defendant based on his voice after hearing her attacker speak only three words and on seeing the attacker's profile from three houses away as he fled in the dark; she gave equivocal accounts of later comments by the defendant that might or might not have constituted an admission. This was not such overwhelming evidence of the defendant's guilt that a different verdict would not have resulted if he was excluded as the source of the semen.

Fourth Department *continued*

As to procedural questions, while the notice of appeal incorrectly stated that the defendant appealed from the judgment, rather than from the order denying his post-judgment motion, the notice is treated as valid. Denial of the motion, the defendant's second under 440.30(1-a), was not required but rather only permitted under 440.10(3)(b), made applicable by 440.30(2). (Supreme Ct, Erie Co)

Sentencing (Post-Release Supervision) (Presence of Defendant and/or Counsel) (Pronouncement) (Resentencing)

People v Mills, 117 AD3d 1555, 985 NYS2d 381 (4th Dept 5/9/2014)

The contentions in the defendant's pro se supplemental brief as to the original judgment of conviction are not properly before the court on this appeal from a resentence that was conducted to rectify a *Sparber* error with respect to post-release supervision (PRS). Where the only question at resentencing was whether PRS would be imposed, and the prosecution had indicated in writing that they would consent to reimposition of the original sentence without PRS, the defendant was not adversely affected by the resentence being conducted in his absence and without counsel.

The defendant failed to notify the Attorney General that he would raise a claim that Penal Law 70.85 is an unconstitutional ex post facto law. The issue is not properly before the court, and was rejected in a prior proceeding. (County Ct, Genesee Co)

Dissent: A defendant must be personally present when sentence is pronounced, under CPL 380.40(1), and counsel for the defendant, and the defendant personally, must have an opportunity to speak at sentencing, under CPL 380.50(1). "[T]he legislature built no exception for futility or arrogance—which is a fair characterization of defendant's behavior—into [the statutes], and I do not believe that we should find one here."

Appeals and Writs (Waiver of Right to Appeal)

Sentencing (Restitution)

People v Schultz, 117 AD3d 1560, 985 NYS2d 388 (4th Dept 5/9/2014)

The defendant's valid waiver of the right to appeal did not encompass her challenge to the imposition of a surcharge of 10% of the total restitution amount where the court did not advise the defendant before she waived appeal of the potential range of surcharge that could be imposed. This unpreserved claim is reviewed in the interest of justice. Where no affidavit was filed by someone designated pursuant to CPL 420.10(8) demonstrating that the actual collection and administration costs would exceed 5% of the entire amount or of that actually collected, imposition of the 10% surcharge was error. (County Ct, Oneida Co)

Misconduct (Juror)

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

People v Tucker, 117 AD3d 1581, 984 NYS2d 789 (4th Dept 5/9/2014)

The court erred in summarily denying the defendant's CPL 330.30(2) motion to set aside the verdict where his moving papers contained sworn allegations that he learned after conviction that a juror, who had reportedly been "'holding out,'" contacted a relative of the defendant between deliberation days "and discussed the likelihood of a guilty verdict when the jury reconvened the following morning …." A hearing must be held to determine whether a substantial right of the defendant was prejudiced by the alleged juror misconduct. Case held, decision reserved, and matter remitted. (Supreme Ct, Onondaga Co)

Evidence (Burden of Proof)

Trial (Presence of Defendant)

People v Walker, 117 AD3d 1578, 985 NYS2d 394 (4th Dept 5/9/2014)

The trial court erred by imposing on the defendant at a reconstruction hearing ordered by the Court of Appeals the "'burden of coming forward with substantial evidence establishing his absence' at the *Sandoval* hearing" that was the subject of the reconstruction proceedings. The Court of Appeals had already found that the "defendant had rebutted the presumption of regularity …." The prosecution had the burden at that point, and failed to establish the facts by a preponderance of the evidence. The *Sandoval* transcript shows that the defendant was absent when proceedings began due to the loss of his clothes by the jail, the court declined "'to spend my day waiting for clothes,'" and the hearing was held; the first indication that the defendant was present was after the hearing concluded. At the reconstruction hearing, the defendant denied being present and trial counsel could not recall. (Supreme Ct, Monroe Co)

Counsel (Competence/Effective Assistance/Adequacy)

Double Jeopardy (Jury Trials)

Evidence (Sufficiency)

Fourth Department *continued*

Homicide (Murder [Intent])

People v Archie, 118 AD3d 1292, 988 NYS2d 312 (4th Dept 6/13/2014)

This is one of the rare cases in which both intentional and depraved indifference murder and assault charges could be brought properly, and the evidence of depraved indifference was legally sufficient at the first trial so that double jeopardy did not bar retrial. The evidence at both trials showed the defendant, angry after being attacked by individuals from a housing development, got a gun, went to that development, fired shots at a group of people, and went home, later saying he had "aired out" the area.

While no legitimate strategy supported defense counsel's stipulation to evidence at the retrial regarding an incident three days after the above shooting, the attorney's performance was not otherwise deficient and the one error was not so egregious as to deny the defendant a fair trial. (Supreme Ct, Onondaga Co)

Counsel (Competence/Effective Assistance/Adequacy) (Standby and Substitute Counsel)

Evidence (Weight)

Search and Seizure (Standing to Move to Suppress)

Sentencing (Concurrent/Consecutive)

People v Bradford, 118 AD3d 1254, 987 NYS2d 727 (4th Dept 6/13/2014)

The defendant's conviction of tampering with physical evidence was against the weight of the evidence where the record establishes only that he "may have cleaned part of the scene of the crime."

Where the sentencing minutes are silent as to whether the sentences for counts one and two are to run concurrently or consecutively so that by law they would be concurrent, but the certificate of conviction indicates they are consecutive, leaving open the possibility that the court's silence on the record as to this was accidental, there must be a resentencing on those counts.

Defense counsel's failure to seek suppression of certain items taken from the former marital residence did not render counsel's representation ineffective given that an order of protection barring the defendant from the premises meant he had no expectation of privacy there nor standing to challenge the search. The court did not err in denying the defendant's requests for substitute counsel. (County Ct, Steuben Co)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Conway, 118 AD3d 1290, 988 NYS2d 337 (4th Dept 6/13/2014)

While the defendant's claim of actual innocence raised in his CPL 440.10(1)(h) motion was properly rejected without a hearing based on his statements during his plea colloquy, nonrecord facts may support his contention that ineffective assistance of counsel rendered his plea involuntary. Although he cited only the federal constitution, his reliance on New York jurisprudence shows his intent to rely on the greater protection of the state constitution. While a hearing may reveal that counsel made reasonably diligent efforts to find two alibi witnesses, the affidavits of those witnesses and that of a former attorney on the case raise factual questions requiring a hearing. (Supreme Ct, Erie Co)

Appeals and Writs (Record)

Discovery (Matters Discoverable)

People v Fullen, 118 AD3d 1297, 987 NYS2d 290 (4th Dept 6/13/2014)

The record does not permit review of the contention that the defendant was improperly denied access to the accuser's psychiatric records where those records were reviewed by the court in camera but are not included in the record on appeal. The matter is remitted for a reconstruction hearing with respect to those missing records. (Supreme Ct, Monroe Co)

Counsel (Competence/Effective Assistance/Adequacy)

Lesser and Included Offenses (Instructions)

People v Gottsche, 118 AD3d 1303, 987 NYS2d 736 (4th Dept 6/13/2014)

Where the record is clear that the defendant did not want the jury to be instructed on lesser-included offenses, but is not clear whether counsel agreed with or acceded to that position, or disagreed with the defendant, the record cannot be said to show that the defendant was denied counsel's expert judgment. Counsel indicated when the prosecution rested that he intended to request lesser included offenses but wanted to confirm that with the defendant; he said during the charge conference that after talking it over with the defendant for weeks, it was counsel's understanding that a lesser offense would not be requested. Other, similar statements, followed. (Supreme Ct, Erie Co)

Fourth Department *continued*

Sentencing (Excessiveness) (Youthful Offenders)

People v Mobley, 118 AD3d 1336, 988 NYS2d 323 (4th Dept 6/13/2014)

The court did not abuse its discretion by denying the defendant youthful offender status, nor is the sentence unduly harsh or severe, where the defendant, among other things, perjured herself by claiming at a codefendant's trial that she could not recall details of the burglary, including her own involvement, and said her codefendants had nothing to do with the stolen credit card she used and that her earlier statements to the contrary were made to protect her brother, who gave her the card. She "made a mockery of the criminal justice system" and violated a very beneficial plea agreement. (County Ct, Onondaga Co)

Dissent: While the court did not abuse its discretion in denying youthful offender status, the determinate seven-year sentence plus five years' post-release supervision is unduly harsh and severe where the 18-year-old defendant had no prior convictions, had attended college, and the codefendants she was protecting were her brothers.

Juveniles (Adoption) (Parental Rights)

Matter of Anastasia I., 118 AD3d 1480, 989 NYS2d 204 (4th Dept 6/20/2014)

The order authorizing the mother of the subject child to consent to the child's adoption without consent or further notice to the father is reversed where termination of the father's paternal rights was sought under Social Services Law 384-b, which applies to "destitute or dependent children," which the subject child was not. Neither the mother nor the Department of Social Services may invoke this provision to terminate the father's rights. The mother may seek to dispense with the father's consent under Domestic Relations Law 111(2)(a). (Family Ct, Wayne Co)

Defenses (Affirmative Defenses Generally)

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

People v Brewer, 118 AD3d 1409, 988 NYS2d 752 (4th Dept 6/20/2014)

The court did not err in denying, without a hearing, dismissal of the intentional murder count, which the defendant asserted was barred by a cooperation agreement later terminated by the prosecution, where the record shows the prosecutor made a good-faith determination that the defendant failed to provide truthful information.

There must be a new trial on that count where the court, in response to a jury request for instruction on a last-minute change of intent, charged the jury, over objection, as to the affirmative defense of renunciation. The imposition of the burden of proof associated with the renunciation defense, where the defendant had repeatedly advanced only a defense carrying no burden, seriously prejudiced the defendant. Appropriate responses to the type of jury inquiry here could include that an affirmative defense of renunciation existed but the jury had not been instructed concerning it and it was therefore not applicable. (Supreme Ct, Monroe Co)

Sentencing (Restitution)

People v Connolly, 118 AD3d 1449, 988 NYS2d 791 (4th Dept 6/20/2014)

The hearing upon remittal concerning the amount of restitution to be imposed was not inadequate where the evidence was limited to the transcript and exhibits of an earlier hearing before a judicial hearing officer to whom the court had erroneously delegated its responsibility. The evidence was relevant and could be considered "'"regardless of its admissibility under the exclusionary rules of evidence"' …."

The defendant did not preserve for review the contention that the delay in imposing restitution divested the court of jurisdiction on remittal. (County Ct, Genesee Co)

Counsel (Competence/Effective Assistance/Adequacy)

Witnesses (Credibility)

People v Gross, 118 AD3d 1383, 988 NYS2d 733 (4th Dept 6/20/2014)

The defendant's claim that his attorney failed to object to testimony of certain non-expert witnesses that bolstered the accuser's testimony at his trial for sexual conduct against a child lacks merit in light of decisions allowing such testimony to explain how the abuse was disclosed and an investigation begun. The accuser's testimony about reporting abuse at age 6 and at age 14 did not constitute impermissible repetition of prior consistent statements to which counsel should have objected. Counsel's failure to consult with a medical expert was not error where the abuse occurred years earlier, no expert testimony was offered in post-conviction proceedings to indicate physical manifestations would still exist, and counsel offered other reasons for not consulting with an expert. (County Ct, Wayne Co)

Fourth Department *continued*

Dissent: Testimony of a doctor who examined the accuser for the prosecution and reported comments she made about being abused impermissibly bolstered the accuser's testimony, as did other testimony. The issue was adequately preserved.

[***Ed. Note:*** *Leave to appeal was granted on Sept. 18, 2014 (2014 NY Slip Op 98757[U]).*]

Evidence (Burden of Proof) (Sufficiency)

Weapons (Possession)

People v Holes, 118 AD3d 1466, 988 NYS2d 375 (4th Dept 6/20/2014)

The second-degree possession of a weapon conviction is reversed where the prosecution failed to prove beyond a reasonable doubt that the defendant's possession of a handgun was not temporary and innocent. The gun was handed to the defendant, a gainfully employed 35-year-old with no criminal record, by her half-brother when she tried to stop him from starting an altercation, she "did not use the weapon in a dangerous manner, and she did not have a sufficient opportunity to dispose of it lawfully." (County Ct, Erie Co)

Evidence (Hearsay)

Self-Incrimination (Conduct and Silence)

People v Mulligan, 118 AD3d 1372, 988 NYS2d 354 (4th Dept 6/20/2014)

The court committed harmless error in admitting, under the present sense impression hearsay exception, testimony of a witness as to the identity of the person who shot the accuser where the witness did not see the shooting and confirmed the defendant's identity as the shooter only after questioning the accuser. The accuser's statements on the 911 recording were properly admitted as excited utterances.

The prosecutor's questioning of the defendant as to his failure to contact police after the shooting did not focus on the defendant's silence but on his actions in fleeing and not seeking help for the accuser and their child. (County Ct, Monroe Co)

Evidence (Rebuttal)

People v Nicholson, 118 AD3d 1423, 988 NY2d 765 (4th Dept 6/20/2014)

Where a defense witness denied that she and the defendant were romantically involved at the time of trial, saying they "had been friends 'all along,'" the court did not err in allowing the prosecution to call as a rebuttal witness the defendant's ex-wife, who had married the defendant after the ending of the defendant's romantic relationship with the defense witness. The affirmance here is not on a different ground from that used by the court. (Supreme Ct, Monroe Co)

Dissent: The rebuttal witness's testimony, that the defendant and defense witness did not have contact after 2003, contrary to the defense witness's testimony that they remained friends after their breakup, served only to show untruthfulness on a collateral matter. The evidence was not overwhelming and the error was not harmless.

[***Ed. Note:*** *Leave to appeal was granted on Aug. 12, 2014 (23 NY3d 1070).*]

Sentencing (Excessiveness)

People v Prial, 118 AD3d 1498, 987 NYS2d 788 (4th Dept 6/20/2014)

The sentence of imprisonment imposed following revocation of the defendant's probation was not unduly harsh or severe where she had many misdemeanor convictions and she repeatedly violated probation by using drugs, failed to complete drug treatment or to comply with her drug court contract, left her children, and absconded from supervision. (County Ct, Allegany Co)

Dissent: Where the defendant's class B felony was a nonviolent one arising from sale of five morphine pills, her criminal history includes no prior felonies, and her codefendant husband received a more lenient sentence, a sentence of five years' incarceration is not just. ⚖

M. Chris Fabricant, Director of Strategic Litigation (Joseph Flom Special Counsel) at the Innocence Project in New York City, presented a CLE session on the topic Challenging "Scientific" Evidence at the Annual Conference, offering succinct advice including that shown on the slide behind him.

NEW YORK STATE DEFENDERS ASSOCIATION
194 Washington Ave., Suite 500, Albany, NY 12210-2314

Non-Profit Organization
U.S. Postage
PAID
Albany, NY
Permit No. 590

NYSDA MEMBERSHIP APPLICATION

I wish to join the **New York State Defenders Association** and support its work to uphold the constitutional and statutory guarantees of legal representation to all persons regardless of income and to advocate for an effective system of public defense representation for the poor.

Enclosed are my membership dues: ☐ $75 Attorney ☐ $40 Non-Attorney ☐ $15 Student ☐ $15 Prisoner

Name _____ Firm/Office _____

Office Address _____ City _____ State ____ Zip _____

Home Address _____ City _____ State ____ Zip _____

County _____ Phone (Office) (___) _____ (Fax) (___) _____ (Home) (___) _____

E-mail (Office) _____ (Home) _____

At which address do you want to receive membership mail? ☐ Office ☐ Home

Please indicate if you are: ☐ Assigned Counsel ☐ Public Defender ☐ Concerned Citizen
☐ Legal Aid Attorney ☐ Private Attorney ☐ Student ☐ Prisoner

Attorneys and law students please complete: Law School_____ Degree _____

Year of graduation _____ Year admitted to practice _____ State(s) _____

I have also enclosed a tax-deductible contribution: ☐ $500 ☐ $250 ☐ $100 ☐ $50 ☐ Other $_____

Checks are payable to **New York State Defenders Association, Inc.** Please mail coupon, dues, and contributions to: New York State Defenders Association, 194 Washington Ave., Suite 500, Albany, NY 12210-2314.

To pay by credit card: ☐ Visa ☐ MasterCard ☐ Discover ☐ American Express

Card Billing Address: _____

Credit Card Number: __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ __ Exp. Date: __ __ / __ __

Cardholder's Signature: _____