



Public Defense Backup Center REPORT

Volume XXIX Number 1

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Defender News

NYSDA Launches Veterans Defense Program

In April, NYSDA [announced](#) the launch of its Veterans Defense Program. The goal of this initiative is to engender informed representation of military personnel and veterans who become involved in state criminal or family court matters. The Program constitutes the most recent and far-reaching result of long-standing NYSDA efforts to address the specific needs of clients with military backgrounds. It will initially focus on six areas:

- developing protocols and procedures for the identification and representation of veterans;
- training defense lawyers in identifying and presenting evidence connected to clients’ military experience and resulting cognitive and behavioral consequences;
- providing backup for lawyers representing veterans;
- providing direct litigation support;
- providing assistance to public defense programs in developing partnerships with community resources for veterans; and
- developing veteran-specific restorative justice programs.

Gary A. Horton, who recently retired as Genesee County Public Defender, is the Program’s Director. Horton’s public defense career—for which he [recently received](#) the Genesee County Bar Association’s Unsung Hero Award—provides a foundation for his new duties. As President of the Board of Directors of the Genesee

Veterans Support Network, Horton has worked to bring about projects such as the Veterans Service Coordination and Mentoring Program of the Batavia Drug Court.

Joining Horton in the Program’s new Batavia office as Administrative Assistant is Dee Quinn Miller. She was previously the Executive Director of the Genesee Veterans Support Network, a non-profit organization assisting veterans residing in Genesee County. Miller also coordinated The Forgotten Victims of Attica, a group that successfully sought recognition of and recompense for the suffering of prison workers who were injured or died during the historic Attica prison uprising in 1971. Horton served as pro bono counsel in these efforts.

The Veterans Defense Program Legal Director, Art Cody, retired from military service after a decorated and varied 30-year career. A 1982 West Point graduate, Cody served as a helicopter pilot in the US Army. After completing active duty service, he transitioned to the Navy Reserve, where he flew strike rescue and special operations missions and participated in a variety of combat operations that include those aboard the USS Enterprise immediately after the September 11, 2001 attacks. In 2011 he was mobilized for Operation Enduring Freedom, serving for a year as Staff Director of the Interagency Rule of Law Section at the United States Embassy in Kabul, Afghanistan. Details about Cody’s military career, as well as his civilian pro bono death penalty defense work and other background, may be found in the [press release](#) issued by NYSDA on the readMedia newswire at <http://readme.readmedia.com/defend>.

The Veterans Defense Program phone number is 585-219-4862. Defense lawyers seeking assistance in the representation of clients with military backgrounds, public defense programs seeking to improve their ability to identify and assist clients whose military

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COMING SOON

Registration for NYSDA’s 47th Annual Meeting and Conference on July 20-22, 2014 at the Gideon Putman Resort in Saratoga Springs

experience may be relevant to their cases, and organizations seeking to expand veterans services to those who have become involved in criminal or family court matters are encouraged to call.

Backup Center Adds Staff

Deepening its advocacy capacity on many fronts, NYSDA not only opened its Veterans Defense Program recently but also hired new staff at the Backup Center.

Jay Coleman—Client Coordinator

John “Jay” Coleman joined the Backup Center staff this month as Client Coordinator. NYSDA continually strives to include the client community in developing its systemic advocacy and to address issues and concerns that members of the client community raise. The Client Advisory Board, creation of which is required by the Association’s bylaws, works with the Executive Director and reports to the Board of Directors annually. By adding a Client Coordinator to the staff, the Backup Center will be able to expand NYSDA Client Advisory Board activities and NYSDA programmatic services within and for the client community. Among the first ventures Coleman will be pursuing is the development of a “Pre-entry Program” designed to help prison-bound individuals prepare not just for incarceration but for using their incarceration period to ensure successful reentry into society upon release.

Coleman became a member of the Client Advisory Board in 2006, and stepped in as its Chair a few years later. His work at NYSDA and other successes led to his [receipt in 2010](#) of the Citizens Against Recidivism Inc.’s Eddie Ellis Life Time Achievement Award honoring contributions by formerly incarcerated persons.

Anne Rabe—Organizing Coordinator

In April, Anne Rabe began work at the Backup Center as its Organizing Coordinator. NYSDA advocates in many arenas for the rights and interests of public defense clients and public defense attorneys; the Backup Center educates and informs the executive, judicial, and legislative branches of government at both the state and local levels, as well as the public, about public defense issues. This policy advocacy can take many forms, including preparation of legislative testimony or memoranda and media work. As the new Organizing Coordinator, Rabe is streamlining, expanding, and coordinating the Association’s many advocacy efforts.

Rabe has substantial experience in organizations engaged in policy work. Most recently, she spent eleven years at the Center for Health, Environment & Justice, based in Falls Church, VA. NYSDA anticipates that Rabe’s experience there as a campaign consultant will greatly

benefit continuing efforts to reform New York public defense statewide.

Todd Baremore—PDCMS Programmer

The Public Defense Case Management System (PDCMS) software that NYSDA installs and supports in public defense offices across the state is now in 62 sites located in 44 counties. With the newest version now in all but a couple of those sites, and a more advanced version in development, there is much work for the PDCMS team. Programmer Todd Baremore joins the current PDCMS development team of Director Darlene Dollard, Information Systems Specialist Michael Mayer, and consultant programmer Marcos Leite supporting the information management needs of defender offices across the state.

Frank Zarro—Director of Development and Special Projects

The Association engages in a variety of efforts in support of its mission to improve the quality and scope of publicly supported legal representation to low income people. NYSDA must address both long-standing needs and new developments affecting public defense clients, lawyers, and systems. Frank Zarro, who is now NYSDA’s Director of Development and Special Projects, brings fresh viewpoints, including a business background, to planning ways to advance our goals.

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THE REPORT IS PRINTED ON RECYCLED PAPER

Bar Foundation Grant Award Supports Defense Investigation Project

At the NYSDA Board meeting on April 25, 2014, The New York Bar Foundation presented a \$5,000 grant award check for the Public Defense Investigation Support Project. The Association greatly appreciates the Foundation's continuing support of this Project. The Bar Foundation has posted a [photo](#) of the check presentation on its Facebook page; please "like" it!

Nominations Sought for 2014 Andersen and O'Connor Awards

Don't let your heroes remain unsung! Nominate them today for awards to be presented at NYSDA's 47th Annual Meeting and Conference, July 20 to 22, 2014 (see p. 5).

Kevin M. Andersen Memorial Award

Kevin M. Andersen was a lifelong public defender. Those who worked with him knew him to have the ability to be angered to his core by injustice, the will to fight ferociously for his client, and the compassion to grant the client the dignity each deserved as a human being despite whatever human frailties they might present. Following his death in 2004, the Genesee County Public Defender's Office created the Kevin M. Andersen Memorial Award to remember and honor his dedication to public defense work. This award is presented to an attorney who has been in practice less than fifteen years, practices in the area of indigent defense, and exemplifies the sense of justice, determination, and compassion that were Kevin's hallmarks. Forward nominations, with supporting materials, to the Genesee County Public Defender's Office, One West Main Street, County Building, Batavia NY 14020.

Wilfred R. O'Connor Award

Wilfred R. O'Connor was a founding member and long-time President of the New York State Defenders Association. He served as a legal aid lawyer in Brooklyn and Queens, as director of the Queens Legal Aid office, as a member of Legal Aid's Attica Defense Team, as director of the Prison Legal Assistants Program, and as president of NYSDA from 1978 to 1989. He went on to complete his career as a judge in New York City. His beliefs were clear: every defendant, regardless of race, color, creed, or economic status, deserves a day in court and zealous client-centered representation. The NYSDA Board of Directors created the Wilfred R. O'Connor Award to remember Bill and honor his sustained commitment to the client-centered representation of the poor. This award will be presented to an attorney who has been in practice fifteen or more years, practices in the area of public defense, and

exemplifies the client-centered sense of justice, persistence, and compassion that characterized Bill's life. Forward nominations, with supporting materials, to the New York State Defenders Association, 194 Washington Avenue, Suite 500, Albany, NY 12210-2314.

Recent Decisions from the Court of Appeals

As the *REPORT* went to press, the Court of Appeals issued decisions on a range of issues. Among them were cases where the Court:

- upheld a trial court's suppression of breath test results, finding that "the statutory right to legal consultation applies when an attorney contacts the police before a chemical test for alcohol is performed and the police must alert the subject to the presence of counsel, whether the contact is made in person or telephonically." [People v Washington](#), 2014 NY Slip Op 03190 (5/6/2014);
- found the Appellate Division failed to apply the correct legal standard when reviewing convictions for enterprise corruption (Penal Law article 450), requiring a reassessment of the weight of the evidence. [People v Kancharla](#), 2014 NY Slip Op 03295 (5/8/2014);
- held that "where a defendant has unsuccessfully argued before trial that the facts alleged by the People do not constitute the crime charged, and the court has rejected the argument, defendant need not specifically repeat the argument in a trial motion to dismiss in order to preserve the point for appeal." Three judges dissented. [People v Finch](#), 2014 NY Slip Op 03424 (5/13/2014);
- held that Criminal Procedure Law 330.20 does not prohibit including a mandatory "effective-evaluation provision" in an order of conditions issued with regard to a defendant found not responsible by reason of mental disease or defect who "fails to comply with the conditions of his release and refuses to undergo voluntary examination." Dissenting judges said that the "contention, now made law by a vote of judges, that an insanity acquittee may be securely psychiatrically committed on the basis of mere allegations of non-compliance with mandated treatment or monitoring, significantly undermines the substantive due process and procedural protections of CPL 330.20 (14)" [Matter of Allen B. v Sproat](#), 2014 NY Slip Op 03427 (5/13/2014); and
- addressed several charges brought against a defendant who launched an Internet campaign to "attack the integrity and harm the reputation" of certain individuals in academia; among the findings are that "a person who impersonates someone with the intent to harm the reputation of another may be found guilty of" second-

degree criminal impersonation, but someone who merely creates email accounts in someone else's name cannot be convicted of that crime, and that Penal Law 240.30(1)(a), second-degree aggravated harassment, is unconstitutionally vague and overbroad. [People v Golb](#), 2014 NY Slip Op 03426 (5/13/2014).

Summaries of the new decisions will appear in a future issue. Summaries of other cases decided by the Court of Appeals this year begin at p. 9 of this issue.

Supreme Court Decisions Address IAC, Gun Possession after Domestic Violence

Among decisions issued by the U.S. Supreme Court so far this year (see summaries beginning on p. 6) are one addressing ineffective assistance of counsel and another dealing with gun possession by a person convicted of a domestic violence misdemeanor.

Counsel Must Know the Law on Available Resources

The performance of defense counsel who mistakenly thought state law limited expert witness fees to \$1,000 when a client was financially eligible for public funding, and so retained a firearms and toolmark expert that counsel himself believed to be inadequate, fell below an objective standard of reasonableness. [Hinton v Alabama](#) (No. 13-6440 [2/24/2014]). New York, like Alabama, imposes a limit on expert fees but provides for additional funding in some instances. The test for such added funding in New York is "extraordinary circumstances." See County Law 722-c. A guide to County Law 722-c applications, written by Staff Attorney Stephanie Batcheller, can be found in the [Nov.-Dec. 2012 issue](#) of the *REPORT* (beginning on p. 10).

Misdemeanor Domestic Violence Conviction Can Bar Gun Possession

The Supreme Court has applied the common-law meaning of "force," *i.e.*, offensive touching, to the federal law barring gun and ammunition possession by people who have been convicted of misdemeanor domestic violence charges involving "use or attempted use of physical force." While this ruling will have consequences for many, which counsel should know in advising clients, a recent "Practice Advisory" indicates that the ruling should not have a negative impact on immigration law if the Department of Homeland Security tries to expand the reach of removal grounds in the ruling's wake. See "Why *United States v Castleman* Does Not Hurt Your Immigration Case and May Help It," by the Immigrant Defense Project and National Immigration Project of the National Lawyers Guild (4/7/2014), at [\[project.org/wp-content/uploads/2014/04/Castleman_advisory-FINAL-4-7-14.pdf\]\(http://project.org/wp-content/uploads/2014/04/Castleman_advisory-FINAL-4-7-14.pdf\).](http://immigrantdefense</p></div><div data-bbox=)

Court of Appeals to Hear Cases Questioning the Parole Board's Compliance with 2011 Amendment to Law on Parole Decision-Making

The Court of Appeals recently granted leave to appeal in two cases concerning whether the Parole Board has failed to comply with the 2011 amendment to Executive Law 259-c(4) that requires the Board to establish "written procedures for its use in making parole decisions" by promulgating a regulation under the State Administrative Procedure Act. (L 2011, ch 62, part C, subpart A.) See [Matter of Linares v Evans](#), 2014 NY Slip Op 68296 (4/3/2014) and [Matter of Montane v Evans](#), 2014 NY Slip Op 71974 (5/13/2014). As noted in the [Nov.-Dec. 2013 issue](#) of the *REPORT*, the Board proposed a regulation in December, but it does not include "written procedures" governing the use of the Board's COMPAS risk assessment instrument. The Board has not responded to the comments and criticism it received on the proposal from Assemblymembers Daniel O'Donnell and Kenneth Zebrowski, former Board member Thomas Grant, and a host of organizations, including the Center for Community Alternatives, the Correctional Association of New York, the Legal Action Center, and NYSDA. Some of the comments submitted are available on the Correctional Association's [website](#).

In [Montane](#) (2014 NY Slip Op 01659 [3/13/2014]), the Third Department held that the 2011 law did not require the Board to issue a regulation, finding that if the Legislature had intended the Board to issue a regulation "it could have explicitly said so." The court also held that an Oct. 5, 2011 memo from then Board chairwoman Andrea Evans informing Board members that they had previously "been trained ... in the usage of" COMPAS was sufficient to satisfy the statutory directive for "written procedures." In [Linares](#) (112 AD3d 1056 [12/5/2013]), the Third Department held that the "[p]etitioner is entitled to a new parole hearing due to the Board's failure to use a 'COMPAS Risk and Needs Assessment' instrument, which is a document created and intended to bring the Board into compliance with recent amendments to Executive Law § 259-c(4)" *Linares* is one of a handful of cases in which the Third Department granted a new parole hearing based on the Board's failure to use the COMPAS instrument. See *e.g.* [Matter of Garfield v Evans](#), 108 AD3d 830 [3rd Dept 7/3/2013].

Montane is represented by Orlee Goldfeld and Linares is represented by NYSDA Staff Attorney Al O'Connor. The cases should be fully briefed by the early fall.

Justice System Continues to Confront Youth, Brain Development Issues

In the 2014 [State of the Judiciary](#) address, Chief Judge Jonathan Lippman continued his call for raising the age of adult criminal responsibility—for nonviolent offenses—to 18. He noted the growing, science-supported realization that treating youth as adults does not work. Political and legal developments regarding youth are noted below.

Cuomo Appoints Commission

Chief Judge Lippman appreciatively noted Governor Andrew Cuomo’s reference to the “raise the age” issue in this year’s [State of the State](#). On April 9, the Governor [announced](#) appointments to his Commission on Youth, Public Safety & Justice, tasked to “provide concrete, actionable recommendations regarding youth in New York’s criminal and juvenile justice systems by the end of this calendar year.” The appointments include two district attorneys and several members of law enforcement, along with representatives of a variety of advocacy groups focused on children or on communities whose youth are disproportionately impacted by the current law. Commission members also include several public officials.

No public defense providers were appointed, even though their criminal clients currently include the 16- and 17-year-olds being discussed and public defense lawyers representing adults in Family Court see that system firsthand. Public defense lawyers have experience that bears on the issue, and the public defense system will be

impacted by any “raise the age” change, as noted in the last issue of the *REPORT*.

Piecemeal Age Changes Proceed

Some non-systemic changes have already been made with regard to how at least some teens of specific ages are treated in the criminal justice system.

Prostitution-Related Offenses May Be Converted to PINS Proceedings

A bill noted in the 2013 Legislative Review published in the last *REPORT* was signed into [law](#) by Governor Cuomo in January. (L 2013, ch 555.) The new Criminal Procedure Law 170.80 allows criminal court judges to convert prostitution or loitering for the purposes of prostitution charges against defendants who were 16 or 17 years old at the time of the alleged offense(s) and keep the cases as person in need of supervision (PINS) proceedings. The Legal Aid Society noted in a [press release](#) that “the law puts the onus on the courts, prosecutors and defense counsels to make sure the PINS option is used as often as possible for the several thousands of 16- and 17-year-olds [estimated to be] arrested on prostitution-related charges in New York each year.” A *New York Law Journal* [article](#) on May 7, 2014 observed that a PINS conversion deprives prosecutors of the power to determine dispositions in such cases and removes the possibility of jail and bail. Such analysis presupposes that all of FCA article 7 is incorporated by reference into 170.80.

(continued on page 43)

CONFERENCES & SEMINARS

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

Sponsor: National Association of Criminal Defense Lawyers
Theme: 57th Annual Meeting & Seminar, “Let Freedom Ring: Persuasion Techniques for Preserving Your Client’s Liberty”
Dates: July 30–August 2, 2014
Place: Philadelphia, PA
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: DWI Means Defend With Ingenuity and Defending the Modern Drug Case
Dates: September 11–13, 2014
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Child Abuse Defense & Resource Center
Theme: Child Abuse Allegations: The Law, the Science, the Myths, the Reality
Dates: October 16-18, 2014
Place: Las Vegas, NV
NCADRS: tel (419) 865-0513; website www.falseallegation.org/ 

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

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

United States Supreme Court

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

Narcotics (Evidence) (Penalties) (Sale)

Sentencing (Mandatory)

[Burrage v United States](#), 571 US __, 134 S Ct 881 (1/27/2014)

At least where use of a drug distributed by a defendant is not an independently sufficient cause of the death or serious bodily injury of the person who used the drug, the defendant cannot be held liable under the federal mandatory sentencing provisions regarding distribution of drugs "when 'death or serious bodily injury results from the use of such substance.'"

Counsel (Competence/Effective Assistance/Adequacy)

Witnesses (Experts)

[Hinton v Alabama](#), 571 US __, 134 S Ct 1081 (2/24/2014)

Assigned counsel's performance was inadequate where, knowing that the expert he had retained was inadequate, he failed to ask for additional funding for another expert because he believe that state law would not allow further spending. While the selection of an expert is a strategic choice that courts should not examine, failing to understand the resources available and, as a result, employing an expert counsel deemed inadequate, was

unreasonable. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance" The courts below found that counsel's performance was adequate because he introduced expert testimony that, if believed, would have aided the defendant, but that expert was not believed. "[T]he threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts ... is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law." The matter is remanded for reconsideration of whether counsel's deficient performance was prejudicial under *Strickland*.

Counsel (Right to Counsel)

Forfeiture

[Kaley v United States](#), 571 US __, 134 S Ct 1090 (2/25/2014)

Defendants in criminal cases who challenge the pre-trial freezing under a forfeiture statute of funds they want to use to hire counsel cannot relitigate the grand jury's determination of probable cause. The government has a strong interest in recovering forfeitable assets, and pre-trial restraint of such assets is proper where there is probable cause to believe that 1) a defendant committed an offense that permits forfeiture and 2) the property in question has the necessary connection to that crime. The precedents in *United States v Monsanto* (491 US 600 [1989]) and *Caplin & Drysdale, Chartered v United States* (491 US 617 [1989]) govern here. The probable cause findings of a grand jury can support infliction of grave consequences, including pretrial restraint of a person's liberty, without judicial review; such findings need not be judicially reviewed where the consequence is an infringement on property. Even if the balancing test of *Mathews v Eldridge* (424 US 319 [1976]) was applied here, it tips against the defendants.

Dissent: [Roberts, CJ] While this court has previously held that the government may freeze assets a defendant needs to retain an attorney the defendant selects and trusts, the majority now goes further and holds that this may occur without an opportunity for the defendant to challenge the decision to freeze. While a defendant has no right to choose counsel when the defendant cannot afford to hire a lawyer, that and other limits on the right to counsel of choice are not imposed at the unreviewable discretion of the prosecution that seeks to win against the defendant at trial. At bail hearings, defendants may contest the weight of the evidence against them despite a finding of probable cause. The majority's decision "pays insufficient

US Supreme Court *continued*

respect to the importance of an independent bar as a check on prosecutorial abuse and government overreaching.”

Search and Seizure (Consent [Third Persons, by])

Fernandez v California, 571 US __, 134 S Ct 1126 (2/25/2014)

The holding in *Georgia v Randolph* (547 US 103 [2006]) that the consent of one occupant of jointly-occupied premises is insufficient to support a search if another occupant is present and objects does not extend to the situation here, where police had seen a man enter a building after a robbery, and, “where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared.” Requiring police to apply for a search warrant entails delay, and a lawful occupant of a residence “should have the right to invite the police to enter the dwelling and conduct a search.”

Concurrence: [Scalia, J] The argument that the defendant had a right under property law to exclude the police must be considered, but the authorities cited by the amicus raising the issue “fail to establish that a guest would commit a trespass if one of two joint tenants invited the guest to enter and the other tenant forbade the guest to do so.”

Concurrence: [Thomas, J] The court’s opinion faithfully applies *Georgia v Randolph* (547 US 103 [2006]), with which I disagree. Analyzing this case consistent with the dissent in *Randolph* would be preferable. It should be enough that the cotenant’s consent was voluntary and there is no assertion that the cotenant lacked common authority over the premises.

Dissent: [Ginsburg, J] The police here could easily have obtained a warrant. The majority decision tells police they can dodge the Fourth Amendment requirement for a warrant. As in *Randolph*, the defendant refused the police request to come in. Social norms as to enforcement of one person’s obligations to another are of little help in analyzing police investigation. Further, requiring continuous physical presence to effectuate consent poses practical problems.

Civil Practice**Forfeiture****Jurisdiction (Personal)**

Walden v Fiore, 571 US __, 134 S Ct 1115 (2/25/2014)

A federal court in Nevada could not exercise personal jurisdiction over a Georgia police officer for allegedly tortious conduct in Georgia on the basis that the officer knew that his conduct would delay the return of seized funds to

the plaintiffs with ties to Nevada, causing them harm. Whether the defendant’s actions connected him with Nevada, not just to the plaintiffs, is the proper inquiry.

Juveniles (Custody) (Parental Rights)

Lozano v Montoya Alvarez, 571 US __, 134 S Ct 1224 (3/5/2014)

“When a parent abducts a child and flees to another country, the Hague Convention on the Civil Aspects of International Child Abduction generally requires that country to return the child immediately if the other parent requests return within one year,” but requests made after a year are subject to, among other things, a determination of whether “the child is now settled in its new environment.” The one-year period is not subject to equitable tolling based on the abducting parent concealing the child’s location from the other parent.

Concurrence: [Alito, J] “In short, I believe the power of a court, in the exercise of its sound discretion, to return even a settled child prevents the inapplicability of equitable tolling to Article 12’s 1-year limit from encouraging parents to flee to the United States and conceal their children here.”

Accomplices (Aiders and Abettors)**Weapons (Firearms)**

Rosemond v. United States, 571 US __, 134 S Ct 1240 (3/5/2014)

Where the prosecution’s theory is that a defendant aided and abetted (18 USC 2) the crime of using or carrying a firearm “‘during and in relation to any crime of violence or drug trafficking crime’” under 18 USC 924(c), “the Government makes its case by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime’s commission.” The trial court’s instructions that the defendant was guilty if he “‘knew his cohort used a firearm’” in the drug deal and “‘knowingly and actively participated’” in that crime was erroneous because it failed to convey the need for advance knowledge that another participant would be armed.

Concurrence in Part, Dissent in Part: [Alito, J] A portion of the Court’s opinion, which says a defendant may continue participating in a crime after discovering that an accomplice has a gun if walking away would create a greater risk of violence than continuing, converts an affirmative defense into a part of mens rea.

US Supreme Court *continued*

Domestic Violence

Federal Law (Crimes)

Weapons (Possession)

United States v Castleman, 571 US __, 134 S Ct 1405 (3/26/2014)

“[T]he misdemeanor offense of having ‘intentionally or knowingly cause[d] bodily injury to’ a person with whom the defendant shares a child in common ‘qualifies as a ‘misdemeanor crime of domestic violence’” under 18 USC 922(g)(9), which prohibits possession of firearms by anyone convicted of domestic violence. The common-law meaning of “force,” ie, offensive touching, must be applied to the phrase “‘use or attempted use of physical force’” in the definition of a “misdemeanor crime of domestic violence,” so that a common-law battery conviction satisfies the physical force requirement.

Concurrence in Part, Concurrence in the Judgment: [Scalia, J] The term “physical force” should have the same meaning as it does in 18 USC 924, namely “force capable of causing physical pain or injury.” *Johnson v United States*, 559 US 133 (2010). Saying that “an act need not be violent to qualify as ‘domestic violence’” is an absurdity.

Concurrence in the Judgment: [Alito, J] The phrase “physical force” should “incorporate[] the well-established meaning of ‘force’ under the common law of battery, which d[oes] not require violent force.”

Driving While Intoxicated

Search and Seizure (Arrest/Scene of the Crime Searches [Automobiles and Other Vehicles] [Probable Cause (Informants)])**Navarette v California, No. 12-9490 (4/22/2014)**

The traffic “stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated” where a 911 caller reported that a vehicle ran her off the road and the police found the vehicle the caller identified. Although an anonymous tip will not usually demonstrate the individual’s basis of knowledge or veracity, under certain circumstances there can be “sufficient indicia of reliability” to support an investigatory stop. The statement given here necessarily indicates that the caller knew the other car was being driven dangerously, and there are reasons for believing the caller was telling the truth, including the vehicle’s discovered location in relation to where the caller said the incident occurred and that the call was akin to a present sense impression; further, the caller used the 911 emergency system, which can

identify, trace, and record calls. The driver’s alleged behavior, viewed from the perspective of an objectively reasonable police officer, “created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated incident of past recklessness.”

Dissent: [Scalia, J] “The Court’s opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness.” Malevolent callers may assert a traffic violation resulting in a police stop—forcible if necessary—and suffer no consequences if the stopped driver is not drunk “(which will almost always be the case).”

Sentencing (Restitution)

Sex Offenses (Child Pornography)

Victims (Compensation)

Paroline v United States, No. 12-8561 (4/23/2014)

“Restitution is ... proper under [18 USC] §2259 only to the extent the defendant’s offense proximately caused a victim’s losses.” However, it is difficult to determine the “full amount” of the victim’s losses, if any, that are the proximate result of a particular defendant’s possession of two pornographic images of the victim where the defendant is one of thousands who have or will possess images of the victim, but have no other connection to her. In such cases, “a court applying §2259 should [use its discretion and sound judgment to] order restitution in an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s general losses.”

Dissent: [Roberts, CJ] Although the victim should receive restitution, the language used in the restitution statute makes it impossible to award relief in this case. The majority may have developed a sensible approach, but it “is not the one Congress adopted.”

Dissent: [Sotomayor, J] In such cases, defendants should be held “jointly and severally liable for the indivisible consequences of their intentional, concerted conduct.” To the extent that awarding the full amount of a victim’s losses may arouse “fears of unfair treatment for particular defendants,” courts are authorized “to order ‘partial payments’ on a periodic schedule if the defendants financial circumstances or other ‘interest[s] of justice’ so require.”

Death Penalty (Penalty Phase)

Habeas Corpus (Federal)

Instructions to Jury

US Supreme Court *continued***White v Woodall, No. 12-894 (4/23/2014)**

The Circuit Court erred by granting a writ of habeas corpus in this death penalty case where the state's highest court held that the trial court did not violate the respondent's Fifth Amendment privilege against self-incrimination by refusing to give the jury a no-adverse-inference instruction during the penalty phase; the state high court's decision did not constitute an unreasonable application of clearly established federal law. While such a holding may be the next logical step from prior Court decisions, this Court has not "taken that step, and there are reasonable arguments on both sides—which is all Kentucky needs to prevail in this AEDPA case."

Dissent: [Breyer, J] "This Court's decisions in *Carter v. Kentucky*, 450 U.S. 288 (1981), and *Estelle v. Smith*, 451 U.S. 454 (1981), clearly establish that a criminal defendant is entitled to a requested no-adverse-inference instruction in the penalty phase of a capital trial."

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.

Counsel (Anders Brief) (Competence/Effective Assistance/Adequacy)**Sentencing (Post-Release Supervision)****People v Beaty, 22 NY3d 490, 982 NYS2d 820 (1/16/2014)**

The Appellate Division erred in affirming the defendant's resentence and granting appellate counsel's motion to be relieved where the defendant pleaded guilty to manslaughter in 2000; was given a determinate 23-year sentence without mention of post-release supervision (PRS); had a five-year period of PRS added by the then-Department of Correctional Services, which the defendant learned of in 2002; had her conviction affirmed in 2003; sought to vacate her plea and sentence in 2009 (see *People v Catu*, 4 NY3d 242 [2005]); was resentenced to 23 years' incarceration without PRS pursuant to Penal Law 70.85; appealed the resentence and was told by appellate counsel of *People v Boyd* (12 NY3d 390 [2000]), which left open the question of 70.85's constitutionality; and filed a pro se supplemental brief after appellate counsel filed his motion arguing that no non-frivolous issues existed. Reversal and remittal for a de novo appeal is warranted.

Appeals and Writs (Prosecution, Appeals by) (Scope and Extent of Review)**Evidence (Weight)****People v Russell, 22 NY3d 1055, 981 NYS2d 361 (1/16/2014)**

"On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), appeal dismissed upon the ground that the reversal by the Appellate Division was not 'on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal' (CPL 450.90[2][a])."

[*Ed. Note:* Decision below, *People v Russell*, 99 AD3d 211 (1st Dept 9/4/2012), was summarized in *REPORT*, Vol. XXVII, No. 4 (Nov-Dec 2012), p 27; verdict found against the weight of the evidence.]

Counsel (Conflict of Interest)**Evidence (Prejudicial)****People v Cortez, 22 NY3d 1061, 981 NYS2d 651 (1/21/2014)**

The Appellate Division correctly affirmed the defendant's conviction.

Concurrence: [Lippman, CJ] The lawyer acting as second chair for the defendant was being prosecuted on an indictment by the same prosecutor's office as the defendant, simultaneously, and a *Gomberg* hearing was held. *United States v Curcio* (680 F2d 881, 888-890 [2d Cir 1982]), which requires a more searching inquiry than required by *People v Gomberg* (38 NY2d 307 [1975]), would be prudently followed in cases like this but need not adopted here. The colloquy between the defendant and court did not provide the assurance required under *Gomberg* that the defendant understood and freely assumed the conflict and its risks; the defendant was never told of his entitlement to conflict-free representation, the judge said as to the conflict that she wasn't sure she "saw it" and she failed to provide an admonition "as to the fairly palpable risks co-counsel's continue representation could hold for" the defendant. However, because the defendant cannot show that the conflict operated on his defense, his conflict-based claim of ineffective assistance of counsel fails.

Admission into evidence of entries in the defendant's journals, written three to six years earlier, about two prior girlfriends and his thoughts of murderous revenge against them using knives, in this case where the decedent was a woman he had believed to be his girlfriend and who was stabbed to death, was not permissible *Molineux* evidence. But while admission of the inflammatory evidence was not benign, other proof pointed overwhelmingly to the defendant as the assailant.

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Concurrence: [Abdus-Salaam, J] Both the deficient inquiry into the conflict of interest and the erroneous admission of the challenged journal entries constituted error, and both were harmless. This opinion expresses the “view that resolution of this case need not rest upon our adoption of a federal ‘protocol’ governing a trial court’s inquiry into an attorney’s potential conflict of interest, or the novel expansion of the *Molineux* doctrine proposed in the Chief Judge’s opinion.”

[*Ed. Note: Judge Rivera took no part in this decision.*]

Homicide (Mental Condition) (Murder [Defenses] [Instructions])

Insanity (Defense of) (Instructions)

[People v Gonzalez](#), 22 NY3d 539, 983 NYS2d 208 (2/13/2014)

The notice of intent to offer evidence in connection with the affirmative defense of extreme emotional disturbance (EED) required under CPL 250.10 need not be given “where the defendant offers no evidence at trial but requests an EED jury charge based solely upon evidence presented by the” prosecution. If the Legislature had intended to require notice when “a defendant intends simply to *rely upon* an EED defense ... it would not have removed comparable language from the statute” [Emphasis in original.] A defendant may not know at the early point set out in 250.10 what evidence the prosecution will admit, and requiring notice in this circumstance would lead most defendants to file late notice. As notice was not required, the court erred in conditioning the EED instruction on allowing the prosecution to use evidence of a psychiatric examination of the defendant; a new trial is ordered.

Sex Offenses (Sex Offender Registration Act)

[People v Moss](#), 22 NY3d 1094, 982 NYS2d 55 (2/13/2014)

“Both Supreme Court and the Appellate Division failed to articulate a proper legal basis for adjudicating the defendant a risk level three sex offender under the Sex Offender Registration Act (Correction Law § 168 *et seq.*.” The “conclusion that an automatic override increased defendant’s presumptive risk level two designation to risk level three” had no basis in law.

Homicide (Felony Murder)

Robbery (Elements) (Evidence)

[People v Reed](#), 22 NY3d 530, __ NYS2d __ (2/13/2014)

From evidence that the decedent had \$40,000 in a brand-name grocery bag tied with double knots about an hour before his death, that the defendant had arranged for the decedent to travel to a location near the defendant’s father’s house and had fled with others from where the decedent was killed, that one of those men had bent over the decedent’s body before getting into the car in which they drove away, and a double-knotted bag of the same brand was found, torn and empty in that same car, a rational jury could have inferred beyond a reasonable doubt that \$40,000 had been stolen from the decedent by the defendant and others.

Dissent: [Lippman, CJ] The prosecution failed to prove that a forcible taking of property occurred, a requisite element of felony murder and the two counts of first-degree robbery. Seven witnesses to the killing and immediate aftermath saw nothing but a gun in the shooter’s hands.

Evidence (Sufficiency)

Videotapes

[People v Schreier](#), 22 NY3d 494, 982 NYS2d 822 (2/13/2014)

The evidence was sufficient to sustain a conviction of second-degree unlawful surveillance, which requires that the recording be surreptitious. The defendant stood on the front step of his neighbor’s residence before dawn and used a compact video camera with zoom feature and adjustable focus to film the accuser, who was naked in the second-floor bathroom with the door open; a police officer of the same six feet, two inch height as the defendant testified that to obtain images of the bathroom from in front of the house through the decorative window near the top of the front door, he had to hold the camera over his head. A recording need not be “entirely imperceptible to all members of the general public” for it to be surreptitious; the common meaning of that term is “something done ‘by stealth’ or ‘clandestinely’”

As to the accuser’s expectation of privacy in her surroundings, there is no indication that she “had any inkling that she could be seen from outside”; she closed the bathroom door immediately upon noticing a red light and seeing a black-gloved hand holding a camera. While the defendant urges an evaluation of this issue based on Fourth Amendment jurisprudence, concerns with protection “from unreasonable *government* intrusions in their private matters would appear to have limited relevance” here. [Emphasis in original.]

NY Court of Appeals *continued***Robbery (Elements) (Evidence)**

People v Smith, 22 NY3d 1092, 982 NYS2d 437
(2/13/2014)

Given that “[t]hreats alone can satisfy the statutory definition of ‘force’ (see Penal Law § 160.00),” the prosecution established here that forcible robbery, not just larceny by trick, was committed where the defendant and his brother impersonated police officers, restrained the accuser, “and conveyed the impression that disobeying their directives could result in imminent physical repercussions, which caused the victim to submit to their false assertion of legal authority.” They also engaged in physical contact with the accuser, frisking him and removing items from his pockets, to accomplish the theft.

Counsel (Right to Self-Representation) (Waiver)

People v Stone, 22 NY3d 520, __ NYS2d __
(2/13/2014)

“On this record, it cannot be said that the trial court abused its discretion in failing to undertake a particularized assessment of defendant’s mental capacity when resolving defendant’s request to proceed *pro se*.” When the defendant sought to represent himself, “the court had no reason to question his mental health, much less a basis to believe that defendant suffered from an illness severe enough to impact his ability to waive counsel and proceed” That a competency issue arose while the defendant was awaiting sentencing was not a basis, absent more, to question his competency during earlier proceedings. His reference to “‘paranoia’” during the *Faretta* inquiry, repeated distrust of his attorney, and comments that he believed conviction was inevitable were not “‘red flags’ that should have put the court on notice of a severe mental illness since defendants who wish to proceed *pro se* often express similar views.” Apparently defense counsel viewed the comments this way, as counsel supported the request to proceed *pro se* rather than raise questions about the defendant’s mental capacity to represent himself.

Discovery (Prior Statements of Witnesses)

People v Martinez, 22 NY3d 551, __ NYS2d __
(2/18/2014)

The trial court did not abuse its discretion in declining to give an adverse inference jury charge as to the loss of a complaint report (a “scratch 61”) handwritten by a police officer responding to a 911 call regarding the incident that led to the defendants’ convictions of robbery-related offenses. “[N]onwillful, negligent loss or destruction of

Rosario material does not mandate a sanction unless the defendant establishes prejudice,” which the defendants here did not do. Prejudice could be established here only if the available, typed version of the report differed from the scratch 61, omitting information that contradicted some material information the accuser provided on the stand or in statements made known to the jury. Allowing conjecture “built on a foundation of fortuity” to establish prejudice would make loss of *Rosario* material *per se* prejudicial, contrary to the legislative intent of Criminal Procedure Law 240.75.

Dissent in Part: [Lippman, CJ] “[W]hen the document at issue is in fact unavailable, it may be difficult for the defendant to articulate a concrete claim of prejudice, since he cannot know what information the lost document contained” Failure to give the requested adverse inference instruction was harmless error as to one defendant but not as to the other.

**Appeals and Writs (Judgments and Orders Appealable)
(Prosecution, Appeals by) (Scope and Extent of Review)****Confessions (Interrogation) (Voluntariness)**

People v Aveni, 22 NY3d 1114, __ NYS2d __ (2/20/2014)

The Appellate Division’s determination, that the potential of deception used by interrogating police to overwhelm the defendant’s free will was realized, was one of fact. The appeal from the decision must be dismissed.

Dissent: [Piggott, J] While “the Appellate Division paid lip service to the totality of circumstances standard ... it failed to apply that standard in this case.” Police conduct should be evaluated by reviewing the entire case, not cherry picking a phrase or two from an interrogation wherein police lied as to the decedent’s status, and finding the phrase to be an implied threat to charge the defendant if he did not reveal what drugs the decedent had used. The matter should be remanded “for appropriate application of the totality of the circumstances test.”

Confessions (Interrogation) (Voluntariness)

People v Thomas, 22 NY3d 629, __ NYS2d __
(2/20/2014)

While not all deception by police during interrogation of a person suspected of crime is coercive, “in extreme forms it may be.” What happened during the defendant’s interrogation permits but one legal conclusion, ie, that the interrogation undermined his right not to incriminate himself. Interrogators cannot permissibly threaten that asserting the right against self-incrimination “will result in harm to the interogee’s vital interests.” Threatening the defendant that if he continued to deny responsibility for his baby’s injury, his wife would be arrested and taken from the baby’s hospital bedside was inconsistent with

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that rule. Also “patently coercive” was the representation to the defendant that disclosure of how he injured the child was vital to efforts to save the child’s life. Whether or not such representation was likely to yield a false confession does not matter, as the “falsely incriminate” language of CPL 60.45(2)(b)(i) “does not, and indeed cannot, displace the categorical constitutional prohibition on the receipt of coerced confessions, even those that are probably true” False assurances of no reprisal for confessing—the defendant was told 67 times that what happened was an accident, 14 times that no arrest would follow, and eight times that he would go home—were also patently coercive representations. The defendant’s statements were involuntary.

The defendant’s argument that the evidence before the jury was insufficient to support a depraved indifference murder conviction was correctly rejected. Since the trial, it has become settled law that such conviction will lie for a one-on-one killing of a helpless infant.

Grand Jury (Procedure) (Witnesses)

[People v Thompson](#), 2014 NY Slip Op 01205 (2/20/2014)

While prosecutorial overreaching in the grand jury is a concern, “and the prosecutors here should have shown greater sensitivity” to the defendant’s request for a particular witness to be called, under the totality of the circumstances, the prosecutors’ comments to the grand jury on “the vagaries of defendant’s request” and the irrelevancy of the requested testimony did not impair the integrity of the grand jury proceeding “or otherwise warrant dismissal of the indictment.” The comments here did not meet the “very precise and very high” test of overall, pervasive bias and misconduct required to dismiss an indictment; the grand jury actively questioned witnesses and at least one pressed the prosecutor as to issues including his assertions as to the irrelevance of the requested witness, demonstrating that “the grand jurors fully exercised their independent decision-making authority” That the lead prosecutor initially denied knowing the identity of the witness was due to concern about the witness’s safety and the secrecy of the first grand jury.

Dissent: [Lippman, CJ] “The prosecutors’ misstatements of fact and law were inconsistent with the People’s obligations of candor and fair dealing as officers of the court and advisers to the grand jury”

Juries and Jury Trials (Voir Dire)

Trial (Presence of Defendant [Trial in Absentia])

[People v Flinn](#), 2014 NY Slip Op 01260 (2/25/2014)

The defendant validly waived his right to be present at bench conferences during which prospective jurors were voir dired. The judge said on the record that the defendant was welcome to attend any bench conferences and that it was up to the defendant and his lawyer as to whether he did so. Defense counsel said at the bench outside the defendant’s hearing that he and his client had discussed the right to be present and the defendant was waiving that right.

Dissent: [Rivera, J] The court did not tell the defendant he had a fundamental statutory right to be present. To say that he was “welcome” to come up is no more than “a mere invitation, subject to revocation by the person who extended it.” To say that it was up to the defendant and his lawyer suggests that the defendant did not have the sole authority to waive the right. Counsel’s waiver outside his client’s presence and without his client’s confirmation was not enough.

Accusatory Instruments (Sufficiency)

Sex Offenses (Elements) (Sexual Abuse)

[People v Guaman](#), 2014 NY Slip Op 01264 (2/25/2014)

Allegations in an information that the defendant rubbed his groin area and exposed penis against the accuser’s buttocks were sufficient to fulfill the “forcible component” of forcible touching, and a sworn allegation that the accuser did not consent to any sexual contact was sufficient to support the lack of consent element. The defendant’s argument that if “forcibly touches” is the same as “any touching,” then “any conduct establishing the ‘lesser offense’ of third-degree sexual abuse would necessarily also establish” the more serious offense of forcible touching presupposes a non-existent relationship between the two offenses. “[T]hird-degree sexual abuse is not ‘the lesser crime’ as compared to forcible touching” Further, “any bodily contact involving the application of some level of pressure to the victim’s sexual or intimate parts qualifies as a forcible touch” under the statute here.

Concurrence: [Lippman, CJ] If requiring “some level of pressure” means “any pressure,” I disagree.”

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

[People v Jimenez](#), 2014 NY Slip Op 01262 (2/25/2014)

The prosecution failed to show the existence of exigent circumstances for searching the defendant’s purse without a warrant when police responding to a report of a burglary involving two males stopped the defendant and a man with her, and after she gave contradictory and equivocal answers as to why she was in the building, and a nearby witness gestured at her and a companion, arrested her for trespassing. A bag in the immediate control of a suspect at arrest cannot be searched without a warrant unless the cir-

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cumstances support a reasonable belief that the arrestee “may gain possession of a weapon or be able to destroy evidence located in the bag” No officer here testified that they feared for their safety or thought evidence might be destroyed, the defendant offered no resistance, at least four if not eight officers were present, and “the unremarkable fact that a woman’s purse appeared heavy is insufficient, on its own, to support a reasonable belief that it contains either a weapon or destructible evidence.”

Dissent in Part: [Abdus-Salaam, JJ] There is record support for the lower courts’ finding that this search was reasonable; the conviction should be affirmed.

Confession (Corroboration)**Counsel (Competence/Effective Assistance/Adequacy)****Trial (Summations) (Trial Order of Dismissal)****People v Santiago, 2014 NY Slip Op 01261 (2/25/2014)**

Counsel’s failure to renew a motion to dismiss on the ground that that the defendant’s confession was not properly corroborated was not ineffective assistance of counsel given the pathologist’s testimony that a child of the decedent’s age and size would have pulled away an object like the bag found in front of her face if it was obstructing her breathing. The waiver holding of *People v Hines* (97 NY2d 56), which the defendant seeks to overturn, need not be decided.

Counsel cannot be said to have provided less than meaningful representation as to letters from the defendant to another person incarcerated with her, admitted to establish their trusting relationship in support of the other person’s testimony that the defendant confessed to killing the child. Given the court’s limiting instruction, there would have been no different result on appeal had counsel sought further redactions.

It is not clear whether the court would have had to sustain an objection to the prosecution’s presentation of a photograph of the decedent, fading away during a six-minute PowerPoint presentation with captions illustrating points of medical testimony with regard to death by suffocation. The failure to object to the presentation cannot be said to have amounted to ineffective assistance of counsel.

Dissent: [Rivera, JJ] Given the egregious nature of the failure to object to the PowerPoint presentation, “I disagree with the majority’s conclusion that defendant received meaningful representation.”

Double Jeopardy (Punishment)**Sentencing (Post-Release Supervision) (Resentencing)****People v Cintron, 2014 NY Slip Op 02099 (3/27/2014)**

Where the defendant was conditionally released from prison before a period of post-release supervision (PRS) was imposed at the first resentencing, but the maximum term of his prison sentence did not expire until after the resentencing; he moved to set aside the resentence arguing that imposing PRS constituted double jeopardy; the court granted resentencing and reimposed the terms of the completed initial sentence; and the prosecution appealed, double jeopardy is not violated by correcting the illegal resentence and imposing a term of PRS. There is no legitimate expectation of finality in an erroneous sentence subject to correction on appeal.

Accusatory Instruments (Sufficiency)**People v Kasse, 2014 NY Slip Op 02103 (3/27/2014)**

Allegations that the arresting officer saw the defendant, “at a specified time and public location,” standing by a suitcase containing handbags that he offered to sell to various people, and the “defendant failed to produce a vendor’s license at the officer’s request,” constituted sufficient facts to establish reasonable cause to believe he engaged in unlicensed general vending for pleading purposes.

Counsel (Competence/Effective Assistance/Adequacy)**Post-Judgment Relief (CPL § 440 Motion)****People v Zeh, 2014 NY Slip Op 02097 (3/27/2014)**

The courts below erred in denying the defendant an evidentiary hearing where, on direct appeal, the Appellate Division that affirmed his conviction noted that collateral review of the adequacy of counsel would be prudent, the defendant began an article 440 proceeding on that ground, and the facts set out in the appellate record along with the 440 motion raised sufficient questions of law as to whether the third lawyer on the case, who filed an affidavit claiming he made a strategic decision to not make a suppression motion as to the defendant’s statements to police during a 26-hour interrogation during which he may have been shackled and denied counsel, had adequate explanations for his alleged deficiencies.

Arrest (Probable Cause)**Disorderly Conduct****Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause])****People v Johnson, 2014 NY Slip Op 02217 (4/1/2014)**

The police allegation that the defendant and others reputed to be gang members stood on a street corner and

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refused to move when police asked them to was not a sufficient basis for a disorderly conduct arrest, which requires intent to cause, or reckless creation of a risk of causing, public inconvenience, annoyance, or alarm. “It is not disorderly conduct ... for a small group of people, even people of bad reputation, to stand peaceably on a street corner.” The cocaine found in a post-arrest search must be suppressed.

Accomplices (Instructions)

People v Sage, 2014 NY Slip Op 02214 (4/1/2014)

The trial evidence created a factual issue as to whether the prosecution’s key witness was an accomplice, and failure to give a requested “accomplice-in-fact” instruction was reversible error. The forensic evidence established that the decedent received multiple blows, it could not be said which particular blow was the cause of death, and the decedent could have remained conscious for some time after the fatal blow. Where the key witness admitted punching the decedent in the head and neck, moving the decedent to the location where he claimed to have seen the defendant then strike the decedent with a mop handle, and taking actions like changing out of his bloodstained clothes and delaying communications with police that could show consciousness of guilt, evidence existed from which to infer that the witness participated in the murder. The prosecution may resubmit the charges of first-degree manslaughter to a grand jury.

Dissent: [Pigott, J] The error was harmless because sufficient corroborating evidence existed tending to connect the defendant to commission of the murder and the evidence of his guilt was overwhelming.

Appeals and Writs (Counsel) (Time)

People v Perez, 2014 NY Slip Op 02326 (4/3/2014)

Of four cases involving “criminal appeals that were not pursued for more than a decade—in one case more than two decades—after the filing of a notice of appeal,” dismissal on the prosecution’s motion was proper in three because “the delays were extremely long, and the defendants did not have a good excuse for them.” The other case should not have been dismissed before counsel was assigned on the appeal and given an opportunity to review the record.

Dissent (in two cases): [Rivera, J] The majority opinions violate two defendants’ fundamental rights to appeal their appellate convictions and, as a consequence, ... undermine public confidence in the legal profession and our system of justice.”

Juveniles (Delinquency) (Detention) (Persons in Need of Supervision)

Matter of Gabriela A., 2014 NY Slip Op 02376 (4/8/2014)

A person in need of supervision (PINS) “who resists being restrained or transported back to a placement facility is not resisting arrest within the meaning of Penal Law § 205.30.” Because “a PINS’s disobedience and obstruction of ‘lawful authority’ is not necessarily the same as an adult’s” and the Family Court Act “forbid[s] placement of a PINS in a secure facility, the legislature” cannot be said to intend that behavior such as that leading to a PINS designation could be the basis for secure detention by means of an obstructing governmental administration conviction. The Appellate Division’s factual findings that the behavior here fell within the PINS statute rather than Penal Law 195.05 more nearly comport with the weight of the evidence.

Dissent: [Pigott, J] The test resulting from the majority’s decision is unworkable.

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

People v Rivera, 2014 NY Slip Op 02379 (4/8/2014)

The court properly denied the defense request for an instruction on second-degree manslaughter; nothing in the record provided an identifiable, rational basis for the jury to reject the pathologist’s testimony as to the three penetrating stab wounds that were inconsistent with the defendant’s pretrial statements that he aimlessly swung a knife in a group of people during a bar fight.

Dissent: [Lippman, CJ] The majority opinion erroneously assesses the forensic evidence as conclusive on the issue of the defendant’s intent. Notwithstanding the medical evidence, the jury could reasonably have found reckless rather than intentional homicide where the decedent “was stabbed during a late-night barroom brawl between two groups of intoxicated men,” the defendant’s recollection was open to doubt given his intoxication, and the distinction between the context, and number and type of wounds here compared to those in cases in which forensic evidence has been found dispositive of intent.

Speedy Trial (Prosecutor’s Readiness for Trial) (Statutory Limits)

People v Sibblies, 2014 NY Slip Op 02377 (4/8/2014)

The defendant’s speedy trial motion should have been granted.

Concurrence: [Lippman, J] “The Court is unanimous in holding” that the misdemeanor information should be

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dismissed because the prosecution failed to meet its CPL 30.30 obligation to be ready for trial. While an off-calendar statement of readiness can prevent having an entire adjournment period charged to the prosecution, “[w]e would hold” that the period between an off-calendar declaration of readiness and a statement of unreadiness at the next court appearance may not be excluded unless the later unreadiness “is occasioned by an exceptional fact or circumstance.” The delay here was based on the prosecution’s desire to strengthen their case by obtaining additional evidence and should be charged to the prosecution.

Concurrence: [Grafteo, J] Less than 10 days after declaring readiness, the prosecution ordered a copy of the injured police officer’s medical records in this case involving an altercation during a traffic stop. Where there was no explanation for the change in circumstances between the initial readiness declaration and the later admission that the prosecution was not ready, the initial statement of readiness did not accurately reflect the prosecution’s position, so the presumption that the initial statement of readiness was truthful and accurate was rebutted.

Counsel (Competence/Effective Assistance/Adequacy)**Instructions to Jury (Verdict Sheet)****Search and Seizure (Automobiles and Other Vehicles)
(Electronic Searches) (Warrantless Searches
[Moveable Objects])****People v Lewis, 2014 NY Slip Op 02969 (5/1/2014)**

The verdict sheet that “listed the count number, the offense charged, the date of the alleged offense, and either the name of the store where the alleged offense occurred or the name of the bank that issued the credit card” in this case involving 26 counts stemming from creation and use of fake credit cards did not improperly go beyond the information permitted under CPL 310.20(2). The narrow reading of the statute put forth by the defendant “would unnecessarily restrict trial courts from providing clarification on a verdict sheet in cases like this one where there are multiple counts of identical offenses alleging similar conduct over a period of time.”

The warrantless installation of a GPS device on the defendant’s car violated *United States v Jones* (565 US ___, 132 S Ct 945 [2012]), which was decided while this case was on appeal. The issue was adequately preserved where the court rebuffed defense counsel’s effort to alert the court to the use of the GPS before trial and his citation before summations to the then-pending case of *People v Weaver* (52 AD3d 138 [3d Dept 2008], *lv granted* 10 NY3d 966 [2008]), later decided at 12 NY3d 433 [2009]). But the error was harmless.

Concurrence: [Grafteo, J] The GPS issue was not adequately preserved, as no motion was made. The argument that counsel’s failure to properly seek suppression constituted ineffective assistance of counsel fails because the defendant has not shown the failure “prejudiced him or deprived him of meaningful representation in the context of the entire case”

**Discovery (*Brady* Material and Exculpatory Information)
(Matters Discoverable)****Witnesses (Confrontation of Witnesses) (Credibility)****People v McCray, 2014 NY Slip Op 02970 (5/1/2014)**

The trial court did not abuse its discretion by disclosing to the defense, after in camera review, only a few of the accuser’s voluminous mental health records. Information in the disclosed records that was heard by the jury included the accuser’s multiple diagnoses of mental illness and disorders; her status at the time of the incident of being in treatment and on medications, which she sometimes failed to take; and a variety of behaviors, including visualizing dead people, cutting herself with sharp objects, being “explosive and angry” and “physically strik[ing] out at people,” and suicide attempts both before and after this incident. While the undisclosed records included prior complaints of sexual abuse by the 18-year-old complainant, with one exception there was nothing to indicate the claims were untrue or involved claims of violence, which this case did; that one exception was far removed in time and substance from the accusation here.

Dissent: [Rivera, J] “[W]hether analyzed as a violation of the defendant’s confrontation rights, or rights protected under *Brady*, I would find the trial court’s denial of the documents constituted an abuse of discretion.” While the disclosed documents included information about the complainant’s mental health useful to the defendant, “they did not reveal the full range of medical and behavioral issues that implicate the complainant’s credibility.”

Witnesses (Confrontation of Witnesses)**People v Smart, 2014 NY Slip Op 02972 (5/1/2014)**

“[T]he record supports the findings of the courts below that defendant procured a witness’s unavailability by wrongdoing and thereby forfeited his constitutional entitlement to the exclusion of the witness’s grand jury testimony at trial.” Recorded telephone conversations showed that the defendant threatened the witness “with violence in response to her avowed willingness to testify” and encouraged her to disappear, and also urged his mother to take the witness out of state. While his intention to prevent the witness’s testimony may have sometimes wavered, the record indicates that his misconduct was

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committed to keep the witness from testifying “had its intended effect insofar as it convinced her not to appear in court” for some time. The record also suggests that the defendant influenced the eventual decision by the witness, who had been given transactional immunity, “to come to court and take the Fifth.” Whether or not she had grounds to claim the privilege against self-incrimination is not relevant.

Concurrence: [Lippman, CJ] Once the witness appeared in court, the trial court made no direct inquiry of the witness, failing to focus on whether her “refusal to testify was due to defendant’s misconduct.”

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.

Family Court (Family Offenses)

[Matter of Opportune N. v Clarence N.](#), 110 AD3d 430, 972 NYS2d 275 (1st Dept 10/1/2013)

The court’s subject matter jurisdiction in a family offense proceeding is not limited by geography, so it could receive evidence and make findings of fact regarding incidents that occurred out-of-state before the petitioner moved to New York. (Family Ct, New York Co)

Article 78 Proceedings

Double Jeopardy (Mistrial)

[Matter of Smith v Williams](#), 111 AD3d 121, 973 NYS2d 104 (1st Dept 10/1/2013)

Double jeopardy prohibits the retrial of the defendant where the court improperly declared a mistrial during defense counsel’s summation because, as the prosecution concedes, the statement made by counsel that prompted the court’s declaration “was not overly prejudicial and provided no basis for a mistrial on ‘manifest necessity’ or ‘ends of public justice’ grounds.”

Juveniles (Neglect)

[Matter of Destiny M.](#), 110 AD3d 438, 972 NYS2d 258 (1st Dept 10/3/2013)

In this neglect proceeding, there was insufficient evidence that the child would be at risk if returned to the

respondent mother where, although the mother’s judgment was impaired immediately after the child’s unexpected birth, “she provided a reasonable explanation based on her medical history and weight for not realizing she was pregnant, and immediately sought appropriate medical treatment for the newborn following delivery.” (Family Ct, New York Co)

Defenses (Affirmative Defenses generally)

Homicide (Murder [Defenses] [Instructions])

[People v Minor](#), 111 AD3d 198, 973 NYS2d 43 (1st Dept 10/3/2013)

The court erred in giving an instruction for the affirmative defense of assisted suicide “substantially beyond the statutory language and the [Criminal Jury Instruction] charge” and denying the defendant’s request to respond to a jury question by reading the standard CJI charge. “[T]he portion of the court’s instruction that the assisted suicide defense is not made out if defendant ‘actively’ caused the decedent’s death, along with the expansive definition of the word ‘active’ given in the supplemental charge, was confusing and conveyed the wrong standard.” (Supreme Ct, New York Co)

Search and Seizure (Automobile and Other Vehicles [Roadblocks])

[People v Velez](#), 110 AD3d 449, 972 NYS2d 40 (1st Dept 10/3/2013)

“The suspicionless vehicle checkpoint stop that led to the recovery of contraband in this case was constitutionally impermissible because the primary purpose of the checkpoint was ‘essentially to serve the governmental interest in general crime control’” The primary reason for the checkpoint—to control automobile theft—is not distinguishable from crime control generally, and the secondary goal of promoting highway safety is not a justification for a checkpoint stop. (Supreme Ct, New York Co)

Competency to Stand Trial

Speedy Trial (Cause for Delay)

[People v Brown](#), 110 AD3d 481, 973 NYS2d 118 (1st Dept 10/8/2013)

In denying the defendant’s speedy trial motion, the court properly excluded the periods of reasonable delay related to competency proceedings and the time when the defendant was incompetent. The time between when the psychiatrists opined that the defendant was no longer incompetent and the court’s determination that the defendant was no longer incapacitated must be excluded as

First Department *continued*

competency is a legal, not a medical determination. (Supreme Ct, New York Co)

Computer Crime**Evidence (Sufficiency)**

[People v Puesan](#), 111 AD3d 222, 973 NYS2d 121
(1st Dept 10/8/2013)

There was legally sufficient evidence to support convictions for computer trespass, third-degree computer tampering, first-degree unlawful duplication of computer related material, and criminal possession of computer related material. After noting the paucity of case law addressing crimes under Penal Law article 156, the Appellate Division analyzed definitions of various terms in these computer-related offenses, including “without authorization,” “computer material,” and “altered.” (Supreme Ct, New York Co)

Evidence (Hearsay) (Mobile Devices and Phones)**Possession**

[People v Rodriguez](#), 110 AD3d 456, 973 NYS2d 49
(1st Dept 10/8/2013)

The defendant’s conviction for second-degree possession of marijuana and fourth-degree possession of a weapon based on constructive possession was proper, even if there was no evidence of intent to exercise dominion and control, as “[t]here is no element of intent in constructive possession.” The court committed harmless error by refusing to admit nonhearsay statements in text message conversations found on the codefendant’s cell phone. (Supreme Ct, New York Co)

Juries and Jury Trials (Challenges) (Qualifications) (Selection)

[People v Tavaréz](#), 110 AD3d 473, 973 NYS2d 59
(1st Dept 10/8/2013)

“The court erred in denying defendant’s challenge for cause to a prospective juror who stated his belief and concern that he recognized defendant from his neighborhood, along with his fear that he would ‘run into’ defendant or his friends. After being apprised of defendant’s address, the panelist expressed an increased concern The panelist also expressed a ‘feeling of defendant’s guilt,’ because he believed the neighborhood was ‘infected with drugs and drug dealers[.]’ After further inquiry ... the panelist ... ultimately stated, ‘I’ll try.... I can’t promise you anything.’ Viewing his statements in context and as a

whole, they did not amount to an unequivocal assurance of impartiality” (Supreme Ct, Bronx Co)

Discrimination**Driving While Intoxicated (Field Sobriety Tests)****Due Process**

[People v Salazar](#), 112 AD3d 5, 973 NYS2d 140
(1st Dept 10/10/2013)

“[T]he failure of the police to administer a physical coordination test to a non-English speaking defendant of Hispanic origin arrested for driving while intoxicated [does not] violate equal protection and due process, [even] where such tests are routinely administered to English-speaking defendants[.]” (Supreme Ct, Bronx Co)

Assault (Evidence) (Serious Physical Injury)

[People v Everett](#), 110 AD3d 575, 973 NYS2d 207
(1st Dept 10/24/2013)

There was legally sufficient evidence of a serious physical injury where the accuser permanently lost four front teeth, despite the fact that she was fitted with a prosthetic device, because she can no longer eat with the lost teeth and when she removes the device, her disfigurement is readily apparent. While the damage to a bodily organ that has been successfully repaired may affect the seriousness of the injury, this does not apply when an organ is permanently lost. (Supreme Ct, New York Co)

Family Court**Jurisdiction****Juveniles (Custody)**

[Matter of Sara Ashton McK v Samuel Bode M.](#),
111 AD3d 474, 974 NYS2d 434 (1st Dept 11/14/2013)

The court erred in declining jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act based on an inconvenient forum where, although the child was conceived in California, the mother, a New York State resident, relocated here before the child was born and this is the child’s home state, the father appears to have a better financial position than the mother, and there is a significant distance between the two states. The referee’s finding that the mother engaged in “unjustifiable conduct” to get jurisdiction in New York and suggestion that the mother “needed to somehow arrange her relocation with the father with whom she had only a brief romantic relationship” are rejected. “Putative fathers have neither the right nor the ability to restrict a pregnant woman from her constitutionally-protected liberty” (Family Ct, New York Co)

First Department *continued*

Aliens

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

People v Hernandez, 111 AD3d 513, 975 NYS2d 340 (1st Dept 11/19/2013)

The court properly entertained the “defendant’s motion to dismiss in the interest of justice after the 45-day deadline had expired, and in granting the motion Regardless of the ... defendant’s immigration status, all of the factors contained in CPL 170.40 (1), which were considered by the court below, justified dismissal, including that the sole remaining charge was second-degree harassment, that defendant had been a law-abiding citizen since entering this country legally when she was eight years old, that the incident resulted from a long-standing dispute between two neighbors, which had led to the complainant’s conviction of harassing defendant in a prior incident, and that defendant had since moved out of the neighborhood.” (Supreme Ct, Bronx Co)

Appeals and Writs (Counsel) (Record)

Counsel (Anders Brief)

Matter of Wilda C. v Miguel R., 111 AD3d 525, 975 NYS2d 333 (1st Dept 11/19/2013)

In this appeal from the dismissal of petitions to modify custody on the ground of lack of jurisdiction, counsel’s motion to be relieved is denied without prejudice to renewal after counsel communicates with the appellant regarding: any issues she may want to raise; her right to directly raise any issue she believes is meritorious; the possibility of assigning new counsel if the Court finds an issue warranting consideration on the merits; and the deadline for filing a pro se supplemental brief. Counsel must also file a complete record or explain why that is not possible. (Family Ct, New York Co)

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

Sentencing (Post-Release Supervision)

People v Carashane B., 111 AD3d 550, 975 NYS2d 54 (1st Dept 11/21/2013)

The defendant’s plea must be vacated where the court failed to advise the defendant that if he violated a condition of his treatment program or was rearrested, he may receive a sentence that includes post-release supervision (PRS); the court mentioned the possibility of jail or prison time, but not PRS. (Supreme Ct, New York Co)

Counsel (Conflict of Interest)

Guilty Pleas (Withdrawal)

People v Christian, 112 AD3d 414, 975 NYS2d 674 (1st Dept 12/3/2013)

The matter is remitted for the appointment of new counsel to represent the defendant on his motion to withdraw his guilty plea. It was improper to allow the defendant’s attorney to continue to represent him where the defendant’s motion included accusations against the attorney and the attorney took a position clearly adverse to his client by making a lengthy factual recitation refuting the defendant’s claims. (Supreme Ct, Bronx Co)

Evidence (Hearsay)

Witnesses (Confrontation of Witnesses) (Experts)

People v Acevedo, 112 AD3d 454, 976 NYS2d 82 (1st Dept 12/5/2013)

The defendant’s confrontation right was not violated by the introduction of an autopsy report prepared by a former medical examiner through the testimony of another medical examiner as the report was not testimonial. The question of whether the report should have been redacted to exclude the author’s opinions as to the cause and manner of death was not preserved because the defendant never requested a redaction and alternatively, there is no basis for reversal because those opinions were not contested at trial. (Supreme Ct, New York Co)

Evidence (Hearsay)

People v Soto, 113 AD3d 153, 976 NYS2d 87 (1st Dept 12/10/2013)

In this DWI case, the court improperly excluded the statement of the car’s driver; the statement constituted a declaration against penal interest even though the driver’s apprehension in making the statement included fear her parents would find out she was involved with the defendant and her exposure to criminal liability was relatively minor, where the driver had expressed concern that she could get in trouble for her conduct and repeatedly asked about consulting a lawyer. The driver, a 19-year-old with no criminal history and only a learner’s permit, admitted to a defense investigator that she, and not the defendant—who she had met only hours earlier—was driving the car when it hit another car, but refused to testify at trial on Fifth Amendment grounds. (Supreme Ct, Bronx Co)

Dissent: The statement was properly excluded where the hearing evidence showed “that the declarant was not aware that the statement was adverse to her penal interest

First Department *continued*

at the time it was made, and the statement was not sufficiently reliable.”

Family Court (Family Offenses) (Orders of Protection)

Matter of Nakia C. v Johnny F.R., 112 AD3d 538, 978 NYS2d 129 (1st Dept 12/24/2013)

“The court erred in concluding that there were no aggravating circumstances that would permit it to impose longer than a two-year duration in the order of protection, based on its finding that respondent did not use his car as a dangerous instrument because he did not intend to make or threaten dangerous contact using the car A dangerous instrument is ‘any instrument, article or substance, including a “vehicle” as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury’ There is no requirement that the person using the instrument intend to cause serious physical injury.” (Family Ct, Bronx Co)

Driving While Intoxicated (Breathalyzer)**Motions (Pre-trial)**

People v Rosa, 112 AD3d 551, 977 NYS2d 250 (1st Dept 12/31/2013)

In this DWI case, “[t]he court properly denied defendant’s request for a pretrial hearing to determine whether the [breathalyzer] test, administered two hours after the arrest, was sufficiently reliable to be admissible. Although there are trial court opinions to the contrary ..., we agree with the analysis set forth in *People v D.R.* (23 Misc 3d 605 [Sup Ct, Bronx County 2009]), which held that such a hearing is not required. While a defendant may challenge the reliability of the test at trial, we see no reason to conduct a pretrial hearing every time testing occurs more than two hours after arrest.” (Supreme Ct, Bronx Co)

Second Department

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Narcotics (Penalties)**Sentencing (Hearing) (Second Felony Offender)**

People v Gonzalez, 109 AD3d 485, 970 NYS2d 90 (2nd Dept 8/7/2013)

The defendant’s adjudication as a second felony offender and the sentence thereon is vacated and the matter remitted for a hearing on whether a 2003 third-degree drug possession conviction constitutes a predicate felony. The defendant contended below that in 2003, charged with a class A-I drug felony, he could only plead guilty to the B felony of third-degree possession if he was adjudicated a youthful offender, which he was not. He contended further that he was improperly prosecuted on a superior court information, which in 2003 was prohibited by statute for those charged with an A felony. The court erred in sentencing the defendant without a hearing on the questions regarding the predicate felony. (Supreme Ct, Queens Co)

Evidence (Missing Witnesses)**Insanity (Post-Commitment Actions) (Psychiatrists and Psychologists)**

Matter of Adam K., 110 AD3d 168, 970 NYS2d 297 (2nd Dept 8/14/2013)

The court properly drew an adverse inference against the petitioner psychiatric center for failure to present testimony of the treating psychiatrist for an involuntarily committed patient in proceedings concerning the petitioner’s request for permission to medicate over the patient’s objection. (Supreme Ct, Queens Co)

Concurrence: The petitioner failed to meet the requisite burden even without the adverse inference for failure to call the treating psychiatrist.

Sex Offenses**Witnesses (Child) (Confrontation of Witnesses)**

People v Beltran, 110 AD3d 153, 970 NYS2d 289 (2nd Dept 8/14/2013)

The court properly found the child here to be a vulnerable witness, where, at seven, “she was ‘particularly young’”; the defendant, who was her great uncle by marriage, was responsible for her care at the time of the offense and had frequent contact with her, and therefore occupied a position of authority; and the record showed that the emotional trauma the child experienced while trying to testify in open court about the offense “substantially impaired her ability to communicate with the jury.” The court’s observation of the witness’s terror and inability to speak and the testimony of a social worker supported the requisite finding that placing her in the same room as the defendant during testimony would contribute to a likelihood of “‘severe mental or emotional harm’ (CPL 65.20 [11]),” and her live, televised testimony did not

Second Department *continued*

deprive him of his constitutional right to confront witnesses. (Supreme Ct, Kings Co)

Appeals and Writs (Counsel)

Counsel (Anders Brief)

[Filippi v Filippi](#), 109 AD3d 509, 970 NYS2d 464 (2nd Dept 8/14/2013)

In this appeal from an order regarding modification of custody provisions in a matrimonial action, assigned appellate counsel’s brief pursuant to *Anders v California* (386 US 738 [1967]) “is deficient because it fails to analyze any potential appellate issues or highlight facts in the record that might arguably support the appeal” and new counsel is assigned. (Supreme Ct, Suffolk Co)

Guilty Pleas (Withdrawal)

Sentencing (Restitution)

[People v Pettress](#), 109 AD3d 555, 970 NYS2d 466 (2nd Dept, 8/14/2013)

While a court may reserve the right to order restitution as part of a plea agreement, the record here does not indicate that the negotiated terms included restitution; either the defendant should have been given an opportunity at sentencing to withdraw his plea or accept the enhanced sentence including both restitution and a prison term or the court should have imposed the agreed-upon sentence. (County Ct, Suffolk Co)

Bail and Recognizance (Pretrial Release and Services)

Habeas Corpus (State)

[People ex rel Lavallee o/b/o Persaud v New York State Attorney General’s Office](#), 109 AD3d 564, 970 NYS2d 702 (2nd Dept 8/15/2013)

Habeas corpus relief is granted to the extent that the bail condition limiting the petitioner’s travel to his attorney’s office and to the homes of family members in another county is replaced with a condition allowing the petitioner to travel anywhere that the electronic monitoring device he wears is functional within a 100-mile radius of his home. (Supreme Ct, Nassau Co)

Appeals and Writs (Waiver of Right to Appeal)

[People v Edmunson](#), 109 AD3d 621, 970 NYS2d 635 (2nd Dept 8/21/2013)

The pre-printed form waiver of appeal below contained an over-broad explanation of what the waiver encompassed, including an erroneous statement that the waiver precluded any claim that the plea was not knowing, voluntary, and intelligent. Written waivers containing such inaccurate statements should not be used in future cases, but the use here did not, standing alone, render the defendant’s waiver involuntary; the court sufficiently advised him of the nature of the right to appeal and the record establishes that the waiver was sufficient. (County Ct, Rockland Co)

Narcotics (Penalties)

Sentencing (Resentencing)

[People v Golo](#), 109 AD3d 623, 970 NYS2d 604 (2nd Dept 8/21/2013)

The defendant’s convictions of two counts of first-degree robbery did not constitute “exclusion offenses” that barred resentencing under the 2009 Drug Law Reform Act, because he committed them after the offences for which resentencing was sought. However, denial of the defendant’s motion for resentencing was a provident exercise of discretion, despite his completion of programming while in prison, given his violent felony convictions, parole violations, and prison disciplinary record. (Supreme Ct, Queens Co)

Civil Practice

Preemption

Sex Offenses (Sex Offender Registration Act)

Statute of Limitations

[Matter of Mary K. v Levy](#), 109 AD3d 587, 970 NYS2d 616 (2nd Dept 8/21/2013)

The court erred in dismissing the cause of action that “sought a judgment declaring that Local Law No. 12-2006 of the County of Suffolk is preempted by state law.” Declaratory judgment, not a CPLR article 78 proceeding, is proper where the constitutionality of legislation, not particular administrative conduct taken under the legislation, is at issue, and no period of limitation applies. The other causes of action, challenging the requirement that the plaintiff register under the Sex Offender Registration Act, were properly dismissed. (Supreme Ct, Suffolk Co)

Due Process (Fair Trial)

Identification (Eyewitnesses) (Misidentification)

Witnesses (Competency)

Second Department *continued*

People v Thompson, 111 AD3d 56, 970 NYS2d 620
(2nd Dept 8/21/2013)

Precluding the defense from offering evidence that the victim repeatedly and consistently identified someone else as the perpetrator following the incident violated the defendant's constitutional right to present a defense. Nothing in the conditional examination statute makes failure to seek such an exam an independent legal basis for excluding evidence obtained by other means; evidence from the diary of the victim, who suffered from dementia at least at the time of trial, should not have been barred on this basis. The prosecution's "carefully controlled and abbreviated presentation of the defense theory of this case did not render the evidence proffered by the defendant repetitive" Additional errors, considered cumulatively with this error, would require reversal even if this error alone was considered harmless. (Supreme Ct, Kings Co)

Post-Judgment Relief (CPL § 440 Motion)**Sentencing (Resentencing)**

People v Bens, 109 AD3d 664, 972 NYS2d 576
(2nd Dept 8/28/2013)

The prosecution having conceded that the defendant met the requirements for relief under CPL 440.46(3), the question before the court was whether substantial justice dictated denial of the motion for resentencing, and the defendant was improperly denied an opportunity to be heard where he was brought to court but a justice had already issued a decision based on written submissions and the defendant was not allowed to address the court, presided over by a different justice on the appearance date. (Supreme Ct, Queens Co)

Family Court (Family Offenses)

Matter of Kondor v Kondor, 109 AD3d 660,
971 NYS2d 21 (2nd Dept 8/28/2013)

The order of protection issued in this family offense proceeding is modified by adding a finding of aggravating circumstances, based on, among other things, the use of a dangerous weapon against the petitioner; in such instances, "the 'immediate and ongoing danger' requirement does not apply (Family Ct Act § 827 [a] [vii] ...)." That requirement only applies to the fifth type of aggravating circumstances. Any language in *Matter of Clarke-Golding v Golding* (101 AD3d 1117, 1118) that "might suggest that the 'immediate and ongoing danger' requirement pertains to the other four situations" in the statute "is not to be construed as such." (Family Ct, Queens Co)

Juveniles (Custody)

Matter of Ender M. Z.-P., 109 AD3d 834, 973 NYS2d 221
(2nd Dept 9/11/2013)

As the preference for keeping siblings together "may be overcome where the best interests of each child lie in residing apart," and no presumption favoring a child's biological family exists once parental rights have terminated, the court erred in finding that the child Orienne Z., who had never shared a household with her siblings, should move to the home of her maternal uncle from the home of her foster family, where she had lived since infancy, for the purpose of adoption.

The court lacked sufficient evidence to make a determination as to the custody of Darryl A.H. where the record lacks a full forensic evaluation of the maternal uncle's fitness as a custodial parent and the suitability of his home. (Family Ct, Queens Co)

Juveniles (Custody) (Grandparents)

Matter of Noonan v Noonan, 109 AD3d 827,
971 NYS2d 158 (2nd Dept 9/11/2013)

While petitioner maternal grandparents demonstrated extraordinary circumstances necessitating a determination of the children's best interests, the record does not contain a sound and substantial basis for awarding them sole custody of one child (James) and joint custody, with the child's father, of the other child (Vanessa). The court, which found that the mother and Vanessa's father had been "clean and sober" for three years, and there had been no reports of domestic violence, put undue emphasis on a nearly two-year-old forensic evaluation, and the court failed to adequately consider James' wishes. (Family Ct, Kings Co)

Arrest (Probable Cause) (Resistance)**Evidence (Weight)**

People v Small, 109 AD3d 842, 971 NYS2d 212
(2nd Dept 9/11/2013)

The verdict of guilt on the charge of second-degree obstructing governmental administration was against the weight of the evidence where the court determined that "the initial chase of the defendant by the police was not supported by reasonable suspicion" and, further, the defendant was acquitted of the possession of a weapon charges; "the evidence, when properly weighed, did not prove, beyond a reasonable doubt, that the officer was performing an official function authorized by law when he tried to disarm the defendant" after the chase. (Supreme Ct, Kings Co)

Second Department *continued*

Search and Seizure (Consent [Evidence and Burden of Proof]) (Parolees and Probationers)

[People v Marcial](#), 109 AD3d 937, 971 NYS2d 328 (2nd Dept 9/18/2013)

The prosecution showed only that the defendant acquiesced to the entrance into his home of his parole officer for a search related to his parole supervision, as required by the conditions of his parole; this did not sustain the burden of proving that the defendant freely and voluntarily consented to the entry of police officers accompanying the parole officer for the purpose of investigating burglaries that the defendant was suspected of committing. (Supreme Ct, Kings Co)

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

Sentencing (Post-Release Supervision)

[People v Divalentino](#), 109 AD3d 999, 971 NYS2d 342 (2nd Dept 9/25/2013)

The defendant's contention in his pro se supplemental brief that his plea was not knowing, voluntary, and intelligent because the court failed to advise him of the period of post-release supervision (PRS) that would be part of his sentence is not foreclosed by his failure to make a post-allocation motion to withdraw the plea. While the defendant had been told that his exposure on the top count included PRS, he was not informed that PRS would be a part of the agreed-upon sentence or that PRS was required for all determinate prison sentences. (County Ct, Orange Co)

Dissent: Although the court's specific sentencing promise omitted mention of PRS, it did not contradict the early colloquy during which the defendant acknowledged that he understood the PRS component.

Appeals and Writs (Jurisdiction) (Stay Pending Appeal)

Article 78 Proceedings

[Matter of Hock v Brennan](#), 109 AD3d 994, 972 NYS2d 74 (2nd Dept 9/25/2013)

The respondent justice is prohibited from enforcing his order vacating a prior order that stayed, pending appeal, execution of a judgment convicting the petitioner of violating Agriculture and Markets Law 353, 356, and 359 in connection with the treatment of 69 cats. The order staying execution of the judgment, under which the petitioner was sentenced to 60 days in jail plus three years of probation, included a condition that the petitioner not

own or have control over any animals until the matter was resolved. Under CPL 460.50(4), the Appellate Term obtained jurisdiction over the stay when it exercised its authority to continue the stay after the initial 120-day period had lapsed; there is a clear legal right for the petitioner to have only that court consider the prosecution's request to revoke the stay. (Supreme Ct, Kings Co)

Homicide (Murder [Defenses])

[People v Sepe](#), 111 AD3d 75, 972 NYS2d 273 (2nd Dept 9/25/2013)

The defendant, who had a long history of psychiatric illness and presented evidence that his mental state had been deteriorating due to financial setbacks and at the same time as plans for a large family gathering had increased his anxiety, leading to a breaking point when the decedent rebuffed his suggestion to cancel the party, sustained his burden of proving his extreme emotional disturbance defense by a preponderance of the evidence and the jury's failure to reduce his murder conviction to first-degree manslaughter was against the weight of the evidence. (County Ct, Westchester Co)

Dissent: Even if the defendant proved the first, subjective element of the defense, ie, that he "actually suffered from 'a mental infirmity not rising to the level of insanity at the time of the homicide'" the jury was entitled to reject his proffered excuse for his claimed extreme emotional disturbance as unreasonable.

Evidence (Weight)

Rape (Sentence)

Sentencing (Concurrent/Consecutive)

Sex Offenses (Sentencing)

[People v Singh](#), 109 AD3d 1010, 971 NYS2d 544 (2nd Dept 9/25/2013)

The conviction on second-degree coercion was against the weight of the evidence where there was no evidence that the accuser was coerced into conduct by threats of the defendant to post nude photographs of her online; the prosecution cannot assert for the first time on appeal that the accuser was induced to meet him, rather than to engage in sex, based on his threats.

The illegal consecutive sentences imposed for multiple counts of rape, criminal sexual act, and sexual abuse are reviewed despite lack of preservation. The defendant's actus reus in concert with others of luring the 16-year-old accuser to an apartment, and leaving her alone and naked for his codefendants to take turns in having sex with her, "was 'a single, inseparable act'" (Supreme Ct, Queens Co)

Second Department *continued***Counsel (Competence/Effective Assistance/Adequacy)**

[People v Canales](#), 110 AD3d 731, 972 NYS2d 316
(2nd Dept 10/2/2013)

The trial court “erroneously applied the federal standard for ineffective assistance of counsel to the defendant’s state constitutional claim” and independent review of the record shows the defendant was “denied ‘meaningful representation’” as to the weapons possession count as well as to the murder conviction that was overturned pursuant to the defendant’s motion under CPL 440.10. The 440 court did not reach allegations of prosecutorial misconduct given the denial of effective assistance of counsel under both state and federal constitutions. While there was strong evidence that the defendant did possess a loaded firearm during the incident, a new trial is warranted on the weapon possession charge because the defendant was denied the right to counsel, impacting the fairness of the trial process as a whole. (Supreme Ct, Kings Co)

Arrest (Police Officers) (Warrantless)

[People v Gonzales](#), 111 AD3d 147, 972 NYS2d 642
(2nd Dept 10/2/2013)

The court should have granted the defendant’s motion to suppress his statement where the defendant had opened his apartment door when police knocked, then tried to close it when the accuser, who accompanied the police, said he was the one who assaulted her; his attempt to shut the door “was not ‘akin’ to ‘fleeing’” as he had not stepped to the threshold and so “had never left the constitutionally protected interior of his home” The dissent would replace the bright line of precedent with an amorphous “inquiry into a suspect’s ‘intentions and expectations ...’” (Supreme Ct, Queens Co)

Dissent: The defendant voluntarily exposed himself to the view of anyone outside his residence when he opened his door to the knock of police investigating a complaint. They were authorized to arrest him upon probable cause shortly thereafter; he “was not entitled to thwart a lawful arrest by closing the door and retreating into the constitutionally protected area of his home.”

Search and Seizure (Standing to Move to Suppress) (Suppression)

[People v Jennings](#), 110 AD3d 738, 972 NYS2d 104
(2nd Dept 10/2/2013)

A hearing was required on the defendant’s motion to suppress a gun that police alleged he threw to the ground

when they approached him after he got out of a vehicle, where the motion “contained the requisite sworn allegations of fact” He was not required to demonstrate a legitimate expectation of privacy at the site of the gun’s recovery because under both his and the prosecution’s versions of what happened, “the dispositive issue was whether the gun was recovered as a direct result of unlawful police action” The matter is remitted for a hearing and new determination as to suppression of physical evidence. (County Ct, Suffolk Co)

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

[People v Jimenez](#), 110 AD3d 740, 972 NYS2d 100
(2nd Dept 10/2/2013)

Vacatur of the defendant’s plea to second-degree assault is required where, during plea proceedings, the defendant said he had little recollection of the event but admitted he was guilty based on photographs and other evidence; the court acknowledged that the defendant’s lack of recall was due to having been drinking, which could negate the requisite intent element; and the court made no further inquiry where defense counsel said the defendant understood, after discussion with counsel, that an intoxication defense was a possibility. (County Ct, Dutchess Co)

Appeals and Writs (Waiver of Right to Appeal)**Sentencing (Youthful Offender)**

[People v Tyler](#), 110 AD3d 745, 972 NYS2d 632
(2nd Dept 10/2/2013)

Review of the court’s failure to consider youthful offender (YO) treatment was not encompassed by the defendant’s waiver of appeal. The sentence must be vacated and the matter remitted for a determination of whether the defendant is a YO where, after the prosecution reserved the right to withdraw consent to the plea if the defendant was deemed eligible for YO status and the court said in that event it would reinstate the defendant’s not guilty plea, the court “imposed sentence without regard to the defendant’s eligibility for youthful offender status” Further, CPL 720.20(1) requires a YO determination even if the defendant does not request it or agrees to forego it. (County Ct, Suffolk Co)

Juveniles (Support Proceedings)

[Matter of Zengling Shi v Shenglin Lu](#), 110 AD3d 729,
972 NYS2d 641 (2nd Dept 10/2/2013)

Second Department *continued*

The family court improperly rejected the support magistrate's offsetting of child support arrears by the amount of an overpayment made by the father toward child care expenses; credit should have been given retroactive to the date of the father's petition seeking termination of his obligation to pay part of such expenses. (Family Ct, Queens Co)

Family Court

Juveniles (Custody)

[Matter of Archibald M. v Georgette S.](#), 110 AD3d 811, 972 NYS2d 671 (2nd Dept 10/9/2013)

The matter must be remitted for a hearing where the order granting the father custody incorrectly stated that a hearing had been held on the father's petition when in fact no hearing was held; the court did not examine the parties or inquire into whether granting custody to the father was in the best interests of the children; and the court prohibited the mother from offering evidence. Certain statements by the court and its "demand that the mother make an offer of proof before refusing to allow her to testify ... gave the appearance of a lack of impartiality"; further proceeding should be before a different judge. (Family Ct, Kings Co)

Sentencing (Enhancement) (Resentencing)

[People v Blades](#), 110 AD3d 823, 971 NYS2d 902 (2nd Dept 10/9/2013)

The trial court erred in imposing an enhanced sentence for the defendant's delay of several hours in appearing for sentencing where there is nothing on the record showing that the defendant was told what time to appear on the relevant date. Given the defendant's request on appeal to have the initially-promised sentence imposed rather than withdrawing his plea, he should be resentenced in accordance with the plea agreement. (Supreme Ct, Kings Co)

Narcotics (Penalties)

Sentencing (Resentencing)

[People v Green](#), 110 AD3d 826, 973 NYS2d 273 (2nd Dept 10/9/2013)

Denying the defendant resentencing under CPL 440.46 was an improvident exercise of discretion because the defendant's criminal record, consisting mainly of low-level drug crimes and no recent convictions that involved violence or weapons, and parole violations, which are

only one factor to consider, were not sufficient to overcome the statutory presumption in favor of resentencing. (Supreme Ct, Queens Co)

Sex Offenses (Sex Offender Registration Act)

[People v Game](#), 110 AD3d 861, 973 NYS2d 701 (2nd Dept 10/16/2013)

The defendant was deprived of his right to due process where the court conducted a risk assessment hearing and made a risk level determination immediately after sentencing instead of waiting until 30 days before the defendant's release as required under the Sex Offender Registration Act. The defendant should have had an opportunity to submit information to the Board of Examiners of Sex Offenders, which is to provide courts with risk level recommendations but could not do so given the timing of the determination. That the defendant did not explicitly object to the procedure did not show he knowingly and intelligent waived his rights or failed to preserve the issue for review. (Supreme Ct, Queens Co)

Evidence (Weight)

Robbery (Evidence)

[People v Johnson](#), 110 AD3d 920, 972 NYS2d 699 (2nd Dept 10/16/2013)

The defendant's conviction of third-degree robbery following a nonjury trial was against the weight of the evidence. His acquittal of second-degree burglary could only be based on the prosecution's failure to prove that he "positioned his hand in his pocket in a manner intended to convey to the complainants the impression that he was holding a gun," given that he had admitted entering the building with intent to commit a crime therein. Therefore, there was no basis on which to conclude that "holding his hand in his pocket constituted a threat to use immediate physical force upon the complainants in order to overcome their resistance." (Supreme Ct, Queens Co)

Evidence (Weight)

[People v McMitchell](#), 110 AD3d 923, 973 NYS2d 706 (2nd Dept 10/16/2013)

"Given the contradictory and inconsistent testimony of the prosecution's witnesses, ... the evidence does not credibly support the defendant's conviction" beyond a reasonable doubt on any of the charges stemming from allegations by two stepdaughters that he committed sexual acts against them. (Supreme Ct, Kings Co)

Second Department *continued***Juveniles (Custody) (Neglect)**

**Matter of Eric W., 110 AD3d 1000, 973 NYS2d 746
(2nd Dept 10/23/2013)**

Where a maternal aunt had been awarded custody of the subject child, a neglect proceeding was then brought against the aunt and the child placed in foster care, the mother sought leave to intervene in the dispositional phase of the neglect proceeding, and the court in effect granted that application and then determined it was in the best interest of the child to be placed with Social Services until the next permanency hearing and referred the mother's petition for custody to a referee, the mother is entitled to appeal from that order. The court did not err in making no finding with regard to the existence of extraordinary circumstances with regard to the superior right to of a parent to custody in the context of the neglect proceeding. (Family Ct, Kings Co)

Driving While Intoxicated (Prior Convictions)**Guilty Pleas**

**People v Valerio, 110 AD3d 1015, 973 NYS2d 349
(2nd Dept 10/23/2013)**

A prior conviction of operating a motor vehicle while under the influence of alcohol or drugs is an essential element of the felony charge of operating a vehicle while under the influence and must be proven; an agreement to dismiss the felony charge and allow the misdemeanor charge of operating a vehicle while under the influence to stand if the defendant completed the treatment program was not illegal, contrary to his contention on appeal. (Supreme Ct, Queens Co)

Juveniles (Abuse)

**Matter of David T.-C., 110 AD3d 1084, 974 NYS2d 506
(2nd Dept 10/30/2013)**

The court's determination that the Administration for Children's Services (ACS) failed to establish by a preponderance of the evidence that the mother had abused and derivatively abused her children was supported by the record. While the ACS's board-certified pediatric expert opined that the deceased child had suffered, within 24 hours of death, a brain injury requiring a tremendous amount of force to inflict, the mother's expert forensic pathologist testified the injury could have been sustained due to blunt force trauma or accidental asphyxiation during sleep, and could have occurred a few days to a week before death, during which time the child was not in the exclusive care of the mother. (Family Ct, Richmond Co)

Juries and Jury Trials (Deliberations)

**People v Gadson, 110 AD3d 1098, 973 NYS2d 768
(2nd Dept 10/30/2013)**

Where the court did not disclose to the prosecutor and defense counsel the contents of the jury's fourth note, concerning accomplice liability, "until serially reading, and immediately responding to, the questions contained therein in the presence of the jury," the "court's failure to meaningfully comply with CPL 310.30" requires a new trial. (Supreme Ct, Queens Co)

Aliens (Immigration)**Appeals and Writs (Judgments and Orders Appealable)
(Prosecution, Appeals by)**

**People v Tony C., 110 AD3d 1093; 974 NYS2d 503
(2nd Dept 10/30/2013)**

No appeal by the prosecution lies from the court's order sua sponte vacating the defendant's conviction and adjudicating him a youthful offender, which followed a denial of the defendant's motion to vacate his conviction on the basis that his attorney failed to advise him of the immigration consequences of his plea prior to the decision in *Padilla v Kentucky* (559 US 356 [2010]). The proper vehicle would be a CPLR article 78 proceeding in the nature of prohibition. (Supreme Ct, Queens Co)

Juveniles (Custody) (Visitation)

**Counihan v Bishop, 111 AD3d 594, 974 NYS2d 137
(2nd Dept 11/6/2013)**

Where the same-sex couple here went to Connecticut to be married in 2009 and returned home to New York, and had a child in 2010 whose birth certificate lists the plaintiff as the second mother, the court erred in determining that the plaintiff lacked standing to seek custody or visitation with the child when commencing a divorce action. While "New York had not yet enacted the Marriage Equality Act ... affording comity to the parties' Connecticut marriage" when the child was born, "the Supreme Court should have recognized the plaintiff as the child's parent under New York law" (Supreme Ct, Suffolk Co)

Family Court**Juveniles (Hearings)**

**Matter of Dashawn N., 111 AD3d 640, 974 NYS2d 509
(2nd Dept 11/6/2013)**

An order issued by a court attorney referee approving the permanency goal of adoption must be reversed where

Second Department *continued*

it was issued before this court's decision and order were released reversing orders issued by the same referee relating to determinations following the permanency hearing and remitting the matter for a new hearing before and determination by a different court attorney referee. (Family Ct, Westchester Co)

Counsel (Right to Counsel) (Waiver)

Sex Offenses (Sex Offender Registration Act)

**[People v Edney](#), 111 AD3d 612, 974 NYS2d 293
(2nd Dept 11/6/2013)**

The order designating the defendant a level three sex offender is reversed and the matter remanded for a new risk assessment hearing because the defendant's waiver of counsel was invalid where the "court improperly concluded that the application of a presumptive override was mandatory," the defendant was not timely notified of his opportunity to submit to the Board of Examiners of Sex Offenders," before it issued a report and recommendation, "any information which he believed was relevant for its review," and he "was not properly advised of his statutory right to counsel at the hearing" (Supreme Ct, Nassau Co)

Juveniles (Neglect)

**[Matter of Gemiyah T.](#), 111 AD3d 644, 974 NYS2d 514
(2nd Dept 11/6/2013)**

The court should have granted the mother's motion to vacate the order denying her application for the return of her children based on newly discovered evidence. The court had found incredible the mother's testimony that she tested positive for opiate use after the children were removed because she had taken legally prescribed drugs for pain after hand surgery, and the newly discovered evidence consists of a note confirming her testimony; as the petitions resulting in the removal of the children had not alleged abuse of drugs or alcohol in connection with the alleged neglect, there was no reason to present the evidence in the first instance. (Family Ct, Kings Co)

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

**[People v Campbell](#), 111 AD3d 760, 974 NYS2d 555
(2nd Dept 11/13/2013)**

The defendant's contention in his pro se supplemental brief regarding a challenge for cause to a prospective juror was unpreserved but is reviewed in the interest of justice and reversal is required where the prospective juror never

said that he would render an impartial verdict and his verdict would not be influenced by the prior state of mind evinced in his statement during voir dire that "my upbringing tells me that the police saw fit to arrest and the District Attorney saw fit to prosecute, so that automatically renders my opinion." (Supreme Ct, Nassau Co)

Sex Offenses (Sex Offender Registration Act)

**[People v Holmes](#), 111 AD3d 686, 974 NYS2d 558
(2nd Dept 11/13/2013)**

The only facts elicited at the defendant's guilty plea were that he touched his daughter's breasts once for sexual gratification; allegations that he engaged in ongoing sexual misconduct, made in connection with his classification under the Sex Offender Registration Act (SORA), were contained in documents dating from the time the charges were filed and from sentencing. The SORA hearing court "erred in precluding the defendant from offering into evidence affidavits from his daughter recanting the underlying allegations of sexual abuse" and refusing to permit the daughter to testify at the SORA hearing. (Supreme Ct, Nassau Co)

Evidence (Newly Discovered)

Post-Judgment Relief (CPL § 440 Motion)

**[People v Singh](#), 111 AD3d 767, 974 NYS2d 578
(2nd Dept 11/13/2013)**

The court properly granted, after a hearing, the defendant's motion to vacate his convictions of murder and related charges where the case against the defendant rested on the testimony of two eyewitnesses whose motivation and veracity were called into question by newly discovered evidence of, among other things, a conspiracy to pay them to implicate the defendant and pressure to falsely implicate the defendant because of a longstanding feud between rival factions in the community. (Supreme Ct, Queens Co)

Confessions (Co-defendants)

Misconduct (Prosecution)

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

**[People v Singleton](#), 111 AD3d 769, 974 NYS2d 548
(2nd Dept 11/13/2013)**

After the court denied the defendant's motion to sever, saying the codefendant's confession implicating the defendant could be sufficiently redacted to avoid the prohibition on use of a nontestifying codefendant's confession, the prosecutor engaged in conduct warranting a new trial. In his opening statement the prosecutor implied that

Second Department *continued*

the codefendant had implicated the defendant; the court denied a defense motion for mistrial but admonished the prosecutor, who nonetheless repeated the conduct in summation, unequivocally suggesting that the unnamed accomplice said by the codefendant to have had a gun was the defendant. The prosecutor also defied other court rulings. “We recount these examples of the prosecutor’s misconduct ‘in the hope that our disfavor will be noted and that those charged with the duty of participating as advocates in criminal trials will approach their responsibility in an appropriate manner’” On retrial, the confession should be properly redacted, avoiding blank spaces that also directly point to the defendant. (Supreme Ct, Queens Co)

Flight**Search and Seizure (Arrest/Scene of the Crime [Probable Cause]) (Entries and Trespasses [Trespasses])**

People v Nunez, 111 AD3d 854, 975 NYS2d 125 (2nd Dept 11/20/2013)

The court properly adhered to its decision to suppress evidence where the defendant matched an extremely vague description given by an informant “of someone who would conduct a drug transaction somewhere in the vicinity, sometime later that day,” justifying at most a level one request for information but not pursuit of the defendant when he fled; such pursuit precipitated the defendant’s throwing of an object, which was properly suppressed, and was compounded when the police entered the residence into which the defendant had retreated, without consent or probable cause and exigent circumstances. (Supreme Ct, Queens Co)

Juveniles (Custody)

Matter of Shannon J. v Aaron P., 111 AD3d 829, 975 NYS2d 152 (2nd Dept 11/20/2013)

The determination that the child’s best interests would be served by remaining in the physical custody of the father had no sound and substantial basis in the record where the mother only intended the father to have custody while she had surgery and relocated from one state to another with her current husband; the mother had been the child’s primary caregiver while the father had limited involvement until that transfer of custody; the child had thrived with the mother, and there was no evidence either that the frequent relocations due to military transfers had been detrimental to the children or caused parental alienation. The court failed to give sufficient

weight to the child’s relationship with half-siblings residing with the mother. (Family Ct, Dutchess Co)

Juveniles (Hearings) (Paternal Rights)

Matter of Timmia S., 111 AD3d 838, 975 NYS2d 746 (2nd Dept 11/20/2013)

The family court should have held a hearing on allegations that the parents failed to comply with drug-treatment conditions of disposition orders suspending termination of parental rights. The parents did not admit violations; the court found failure to comply based on the father’s positive test for marijuana use and the mother’s refusal to take a drug test, which may constitute circumstantial evidence of failure to successfully complete treatment, but failure to complete must be established by a preponderance of the evidence, and even if violations were established, an inquiry into the children’s best interests must also be conducted before parental rights are terminated. (Family Ct, Suffolk Co)

Juveniles (Support Proceedings)

Matter of Dimaio v Dimaio, 111 AD3d 933, 976 NYS2d 133 (2nd Dept 11/27/2013)

The father, who testified that he that he lost his dual position as manager and head waiter in a restaurant and obtained a new job as manager at a lesser salary but could not find another dual-capacity position, demonstrated a “substantial and unanticipated change in circumstances” and “a good faith effort” to get a new job “commensurate with his qualifications and experience” so that the support magistrate’s determination that he had not established an inability to pay the child support obligation in the divorce judgment is not supported by the evidence. (Family Ct, Queens Co)

Narcotics (Penalties)**Sentencing (Resentencing)**

People v Duke, 111 AD3d 955, 975 NYS2d 466 (2nd Dept 11/27/2013)

Because the defendant was not brought before the court prior to its determination that, while he met the eligibility requirements for resentencing under CPL 440.46, substantial justice dictated denial of his motion for resentencing, and the record does not show he was advised of his statutory right to be present or that he effectively relinquished that right, there must be a new determination of his motion after he is afforded an opportunity to appear and, if necessary, for a hearing to be held. (Supreme Ct, Queens Co)

Second Department *continued*

Sentencing (Post-Release Supervision) (Resentencing)

**People v Robinson, 111 AD3d 963, 975 NYS2d 464
(2nd Dept 11/27/2013)**

At the defendant's sentencing in 2000 on multiple sex offense convictions, the court failed to pronounce required periods of post-release supervision (PRS). At a Sept. 1, 2011 resentencing, the court imposed PRS, directing that the three-year period for the second sexual abuse conviction run consecutive to the five-year period for the sodomy conviction. When the court amended the sentence on Nov. 22, 2011, directing that the PRS periods run concurrently with each other, the defendant was not present, which violated CPL 380.40(1). The matter is remitted for resentencing in accordance with Penal Law 70.45(2-a) and (5)(c). (County Ct, Dutchess Co)

Juveniles (Support Proceedings)

**Matter of Briggs v McKinney-Mays, 112 AD3d 622,
976 NYS2d 169 (2nd Dept 12/4/2013)**

The father's averments as to income, supported by documentation of disability payments he received, warranted a hearing to determine whether his income for the period in question was equal to or below the level in the poverty income guidelines; if so, child support arrears for the period must be capped at \$500. "To the extent this Court's decision in *Matter of Martinez v Torres* (26 AD3d 496 [2006]) indicates that arrears cannot be capped at \$500 pursuant to Family Court Act § 413 (1) (g), for periods preceding the filing of a party's petition, it should not be followed." (Family Ct, Nassau Co)

Juveniles (Support Proceedings)

**Matter of Lecei v Lecei, 112 AD3d 629, 975 NYS2d 774
(2nd Dept 12/4/2013)**

The court erred by in effect adjudicating the father in willful violation of his child support obligations where his testimony that he had been unemployed for at least two years, had repeatedly searched for work, had no savings or assets, and relied on family and friends for his support was uncontroverted. While the father has completed the 90-day jail sentence imposed, the matter is not academic and the order of commitment is reversed. (Family Ct, Orange Co)

Search and Seizure (Warrantless Searches)

**People v Malave, 112 AD3d 651, 975 NYS2d 909
(2nd Dept 12/4/2013)**

Where a police officer who arrested the defendant for contraband found inside the defendant's jacket pocket already had the defendant's driver license and claimed to be looking for the defendant's vehicle registration and insurance card as the defendant was lying semi-conscious on an ambulance stretcher, the hearing court properly suppressed the physical evidence and the defendant's statement made as a result of the unlawful arrest. (Supreme Ct, Queens Co)

Parole (Release [Consideration for])

**Matter of Perfetto v Evans, 112 AD3d 640,
976 NYS2d 183 (2nd Dept 12/4/2013)**

While the Board of Parole's written determination denying the petitioner's release on parole mentioned his institutional record, "it is clear that the Parole Board denied the petitioner's request to be released on parole solely on the basis of the seriousness of the offense" and its "explanation for doing so was set forth in conclusory terms, which is contrary to law" The petitioner is entitled to a new hearing and determination. (Supreme Ct, Orange Co)

Sentencing (Restitution)

**People v Pordy, 112 AD3d 654, 976 NYS2d 184
(2nd Dept 12/4/2013)**

The court properly entered an amended order of restitution under Penal Law 60.27; there is no statutory requirement that a defendant's ability to pay restitution be determined when a probationary sentence is imposed, and the court in any event "considered the defendant's ability to pay in fashioning the amended order of restitution," basing the monthly payments "on certain discretionary expenses reported by the defendant." If he is unable to pay as ordered, he may seek resentencing. (County Ct, Rockland Co)

Identification (Lineups) (Photographs) (Suggestive Procedures)

**People v Dobbins, 112 AD3d 735, 976 NYS2d 213
(2nd Dept 12/11/2013)**

The prosecution failed to rebut the presumption of suggestiveness regarding the photo array that arose from its failure to preserve the array. The testifying detective said "he did not memorialize and could not recall" any specific information entered into the computer system that generated the photographic array, the number of photos the accuser viewed, or how long the accuser viewed the photographs. A subsequent lineup was also suggestive, with many fillers being much older than the defendant and no evidence of their age or other pedigree infor-

Second Department *continued*

mation, so the question of whether that lineup was sufficiently attenuated from the photo identification procedure need not be addressed. (Supreme Ct, Queens Co)

Juveniles (Hearings) (Paternity)

Matter of Jerome W. v Wendy E., 112 AD3d 728, 977 NYS2d 275 (2nd Dept 12/11/2013)

Instead of dismissing the petitioner's petition, which sought to establish that he was the father of the subject child, when the mother was unable to appear at a hearing due to medical complications of her pregnancy, the court should have either allowed the mother to testify by telephone as the parties requested or granted an adjournment until the mother recovered. (Family Ct, Westchester Co)

Juveniles (Support Proceedings)

Matter of Granberg v Granberg, 112 AD3d 714, 976 NYS2d 396 (2nd Dept 12/11/2013)

The court should have denied the father's petition to adjudicate the mother in willful violation of a child support order where the record sufficiently showed that the mother was on public assistance, had recently been evicted, and "was unable to pay the amounts required by the child support order which had been entered, on her default, approximately six years earlier." (Family Ct, Richmond Co)

Juveniles (Custody) (Visitation)

Matter of Orellana v Orellana, 112 AD3d 720, 978 NYS2d 236 (2nd Dept 12/11/2013)

The mother's petition to reduce the father's alternating weekend visits, which were from 6:00 p.m. Friday to 6:00 p.m. Sunday, to only 6:00 p.m. Friday to 8:00 p.m. Saturday should have been denied, as viable alternatives existed, such as having the child spend portions of the father's visits completing her homework. The court properly permitted the mother to travel with the child to the mother's country of origin, where two of the child's half-siblings lived. (Family Ct, Suffolk Co)

Sex Offenses (Sex Offender Registration Act)

People v Pelaez, 112 AD3d 684, 976 NYS2d 226 (2nd Dept 12/11/2013)

The court improperly assessed the defendant 20 points in determining him a level two offender under the Sex Offender Registration Act for having directed his offense at a stranger or someone he had purposely estab-

lished a relationship with to victimize her. The initial contact between the developmentally disabled 19-year-old defendant and the 12-year-old accuser occurred inadvertently when the accuser answered the defendant's phone call to her older sister, and they communicated frequently after that via phone and Internet but there was no evidence of conversations of a sexual nature. (Supreme Ct, Kings Co)

Admissions (Miranda Advice)

People v Santos, 112 AD3d 757, 976 NYS2d 565 (2nd Dept 12/11/2013)

The prosecution failed to establish that the defendant, a Spanish-speaking 17-year-old from the Dominican Republic with a tenth-grade education and no prior experience with law enforcement, "comprehended 'the immediate import' of the *Miranda* warnings" read to him in English from a form. In response to direct questioning, the defendant said "he did not understand English 'that much.'" It would have required only minimal effort to give the defendant a *Miranda* card written in Spanish or have the Spanish-speaking detective who questioned him after an initial interrogation in English advise him in Spanish of his rights. (Supreme Ct, Nassau Co)

Evidence (Sufficiency)**Narcotics (Sale)**

People v Curry, 112 AD3d 843, 976 NYS2d 571 (2nd Dept 12/18/2013)

An undercover officer told a codefendant that he had \$200 to buy crack, leading the codefendant to use the officer's cell phone "to call 'his man'" at a prepaid cell phone never shown to have belonged to the defendant, then walk out of sight. After hearing a car door open and close, the officer waited a few more seconds and then walked to where he could see the defendant in the driver's seat of a vehicle with a passenger in the front and the codefendant in the back. The officer went back to his original position, where the codefendant appeared and gave him crack in exchange for the money. Shortly thereafter the officer saw the codefendant extend his hand through the driver's seat window where the defendant was sitting, but did not see an exchange of money. The defendant's conviction of third-degree sale of drugs was against the weight of the evidence because the rational inferences from the evidence do not support the conviction beyond a reasonable doubt. (Supreme Ct, Richmond Co)

Sex Offenses (Sex Offender Registration Act)

Second Department *continued*

People v Green, 112 AD3d 801, 977 NYS2d 77
(2nd Dept 12/18/2013)

Thirty points should be subtracted from the defendant’s total risk assessment score under the Sex Offender Registration Act where 20 points were erroneously given for having entered into a relationship with the accuser for the primary purpose of victimization but the summary by the Board of Examiners of Sex Offenders indicated the relationship was “‘unknown” and no other record documents show the requisite purpose, and where only five, rather than 15, points should have been assessed for release with supervision. (Supreme Ct, Kings Co)

Due Process

Evidence

Witnesses (Credibility)

People v Lyons, 112 AD3d 849, 978 NYS2d 47
(2nd Dept 12/18/2013)

Where the defendant’s son testified about his observation of the incident in which the defendant allegedly hit the accuser with a metal cane, as well as about statements the accuser made to the son by phone concerning the incident, the court erred by striking the son’s entire testimony. While the defense failed to lay a proper foundation as to the testimony about the phone conversation, striking the relevant and material testimony about the son’s own alleged observations of the incident in question because the court found it to be fabricated deprived the defendant of his constitutional right to present a defense. (Supreme Ct, Queens Co)

Misconduct (Prosecution)

People v Mehmood, 112 AD3d 850, 977 NYS2d 78
(2nd Dept 12/18/2013)

“[T]he cumulative effect of the prosecutor’s improper comments during summation requires a new trial” where the prosecutor improperly referred to defense evidence intended to establish a motive for the accusers to lie as “‘an elaborate attempt to distract [the jury] from the real issues in this case,” inaccurately characterized the defendant’s request for clarification about whether a question referred to his paramour, the mother of the accusers, as needing “‘a clarification about which child’s vagina he did or did not touch,” impugned the defendant’s right to testify, and “‘impermissibly vouched for the credibility of a witness” (Supreme Ct, Kings Co)

Appeals and Writs (Remittiturs)

Family Court (Violations of Family Court Orders)

Matter of Cunha v Urias, 112 AD3d 923, 978 NYS2d 296
(2nd Dept 12/26/2013)

After the family court found the mother to be in contempt of court for willfully failing to obey provisions of a visitation order and ordered her to serve six months in jail, “‘unless sooner discharged according to law,” and the order was modified on appeal upon a determination that the punishment was excessive and the jail term should be 30 days, the family court erred by directing that the mother not receive time allowances for good behavior. (Family Ct, Nassau Co)

Juveniles (Support Proceedings)

Matter of Gardner v Maddine, 112 AD3d 926,
977 NYS2d 745 (2nd Dept 12/26/2013)

Where the father quickly petitioned for a downward modification of a support order entered on his default, saying his income was lower than the court used in entering the order, and noting that he was married to another woman whose ability to contribute to the family earnings was circumscribed and he had four other children including one under a year old, and the court granted a downward modification but ordered basic child support computed in accordance with the Child Support Standards Act, that statutorily-calculated amount was unjust and inappropriate; in such instances, the support amount is to be set in an amount that the court finds is just and appropriate. (Family Ct, Kings Co)

Juveniles (Paternity)

Matter of Sidney W. v Chanta J., 112 AD3d 950,
978 NYS2d 274 (2nd Dept 12/26/2013)

The petitioner met his initial burden of establishing that his acknowledgement of paternity (AOP) was signed by reason of material mistake of fact by testifying that when he signed the AOP, he and the mother were having sexual relations, she represented that he was the father, and it was only after signing the AOP that he learned from others that another man could be the father. Equitable estoppel should not be applied to preclude genetic testing to determine paternity where the petitioner and the mother never lived together during the child’s life, his visitation with the child stopped when the child was less than eight months old, and he had no relationship with the child. (Family Ct, Westchester Co)

Accusatory Instruments (Sufficiency) (Variance of Proof)

People v Siminions, 112 AD3d 974, 977 NYS2d 91
(2nd Dept 12/26/2013)

Second Department *continued*

The superior court information (SCI) under which the defendant pleaded guilty to second-degree and third-degree assault, after waiving indictment, was jurisdictionally defective because there are factual discrepancies between the SCI and the felony complaint in that they charge assault of two different victims and lack enough surrounding facts to show the charges refer to the same incident. “The defendant having served her sentence and, under the circumstances of this case, we decline to remit the matter for further proceedings on the felony complaint” (Supreme 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.

Driving While Intoxicated**Probation and Conditional Discharge (Conditions and Terms)**

[People v Donaldson](#), 110 AD3d 1120, 972 NYS2d 114 (3rd Dept 10/3/2013)

Where the defendant violated conditions of probation imposed for driving while intoxicated that prohibited owning and operating vehicles without a driver’s license, the imposition of additional probationary conditions, including that he dispose of three vehicles he owned, was not an abuse of discretion. (County Ct, St. Lawrence Co)

Appeals and Writs (Preservation of Error for Review)**Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) (Withdrawal)**

[People v Beniquez](#), 110 AD3d 1143, 973 NYS2d 427 (3rd Dept 10/17/2013)

The defendant never “actually entered a guilty plea pursuant to the plea agreement” on the record; the court posed no questions and did not read the indictment or explain the offense or its elements. The conviction is reversed in the interest of justice; counsel may have been dissuaded from moving to vacate the conviction by the court’s statement during the colloquy that if the defendant violated the conditions of release—which he later did—he would not be allowed to withdraw his plea. (County Ct, Ulster Co)

Family Court**Juveniles (Support Proceedings)**

[Matter of Chemung County Dept of Social Servs. v Crane](#), 112 AD3d 90, 973 NYS2d 825 (3rd Dept 10/17/2013)

While Family Court Act 449(2) is ambiguous as to tense, it would be incongruous to read the provision to constrict recovery of public assistance funds permitted by other parts of that Act and Social Services Law; “a proceeding to recoup public assistance can be commenced after the assistance has stopped.”

Family Court was not the appropriate forum under the narrow facts of the case here; there was no Family Court involvement as to the teenage children before the year that they received public assistance, no order regarding current or future support is sought, and the beneficiary of the proceeding is the public fisc, not the children. Dismissal of the petition is without prejudice to seeking the requested relief in an appropriate court. (Family Ct, Chemung Co)

Evidence (Hearsay)**Juveniles (Parental Rights) (Permanent Neglect)**

[Matter of Dakota F.](#), 110 AD3d 1151, 974 NYS2d 594 (3rd Dept 10/17/2013)

There was no clear and convincing evidence that the mother has a mental illness rendering her unable to care for the children where the psychologist appointed to conduct the statutorily required mental evaluation opined that the respondent mother did not have a mental condition that prevented her from providing adequate care to her children, and the report of the psychologist who performed a parenting assessment and mental health evaluation following an earlier permanency hearing was not admissible because it contained inadmissible hearsay; the report included statements by individuals who were not subject to cross-examination at the termination hearing and there was no evidence that the information gleaned from the interviews “was professionally accepted as reliable in performing mental health evaluations.” (Family Ct, St. Lawrence Co)

Counsel (Competence/Effective Assistance/Adequacy)**Speedy Trial (Burden of Proof) (Prosecutor’s Readiness for Trial) (Statutory Limits)**

[People v Devino](#), 110 AD3d 1146, 973 NYS2d 372 (3rd Dept 10/17/2013)

Where the defendant moved to withdraw his guilty plea on the basis of the ineffectiveness of trial counsel in failing to advise him of a meritorious speedy trial claim

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and to move to dismiss the indictment on that basis, the claim survives the waiver of appeal. The prosecution concededly was not ready for trial within the required six months and failed to show due diligence in trying to locate the defendant, who had moved to another county where he registered his address with state, local, and federal entities as well as other bodies. (County Ct, Washington Co)

Juveniles (Custody) (Grandparents) (Parental Rights)

[Matter of Mildred PP. v Samantha QQ.](#), 110 AD3d 1160, 973 NYS2d 418 (3rd Dept 10/17/2013)

Custody was properly granted to the mother rather than to the petitioner grandmother as the grandmother failed to establish the extraordinary circumstances required to overcome a biological parent's superior claim; while the child had visits with the grandmother lasting weeks and even three months once, this was not the requisite prolonged period showing a complete abdication of parental rights and responsibilities, and there was no evidence that the mother's frequent moves and questionable relationships negatively impacted the child so as to establish extraordinary circumstances. (Family Ct, Madison Co)

Arrest (Probable Cause)

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

[People v Small](#), 110 AD3d 1138, 973 NYS2d 428 (3rd Dept 10/17/2013)

The court's concededly correct finding that the defendant's arrest for disorderly conduct was unlawful required suppression of cocaine seized from him at the police station for all purposes, including use related to the counts of intentional and felony assault and obstruction arising from an incident at the station that occurred when the defendant refused a directive to remove what turned out to be cocaine from his mouth. The prosecution offered no evidence proving that acquisition of the evidence was attenuated from the illegal arrest. (County Ct, Broome Co)

Juveniles (Adoption) (Custody) (Hearings) (Neglect)

[Matter of Victoria XX.](#), 110 AD3d 1168, 976 NYS2d 235 (3rd Dept 10/17/2013)

A niece and nephew were placed by the Family Court of Tompkins County with their aunt and uncle, the respondents, upon being freed for adoption due to permanent neglect by the children's parents, and thereafter resided with the respondents in Schuyler County. When Family Court Act (FCA) article 10 proceedings were com-

menced alleging the respondents had neglected the niece and nephew as well as their own children, no hearing was required under FCA 1027 as to the motion to remove made as part of the original permanent neglect proceedings in Tompkins County because no adoption proceedings had been commenced at the time of the motion.

The determination that the respondents had neglected the nephew by using a disciplinary method inappropriate to his special needs, as to which they lacked insight, had a sound and substantial basis in the record. Evidence of a worsening of the nephew's symptoms, combined with earlier inappropriate responses to his needs, support the determination that continued placement with the Department of Social Services pending placement for adoption was in his best interest. (Family Ct, Schuyler & Tompkins Cos)

Juveniles (Neglect)

Sex Offenses

[Matter of Hannah U.](#), 110 AD3d 1258, 974 NYS2d 149 (3rd Dept 10/24/2013)

Family Court Act article 10 proceedings against both parents resulted in appeals by each from findings of neglect; this court already reversed the neglect finding as to the father. On appeal, the father's status as a registered sex offender, predating his relationship with the mother, was deemed insufficient to support a neglect finding. As the finding of neglect against the mother was premised on her having allowed the father to have unsupervised contact with the children despite his history, that finding, and dispositions with respect to it, are reversed. (Supreme Ct, Clinton Co)

Juveniles (Visitation)

[Matter of Nicolette I.](#), 110 AD3d 1250, 974 NYS2d 144 (3rd Dept 10/24/2013)

A sound and substantial basis can be found in the record for the determination that placing the subject child with the aunt was in the child's best interests, but the court erred with regard to visitation; giving the aunt sole discretion to determine any limitations on the parents' visits improperly delegated the court's non-delegable responsibility to determine whether visitation conditions are in a child's best interests. (Family Ct, Schuyler Co)

Family Court (Family Offenses)

Jurisdiction

[Matter of Scott KK v Patricia LL](#), 110 AD3d 1260, 974 NYS2d 152 (3rd Dept 10/24/2013)

Third Department *continued*

While the bulk of the mother's allegations in the family offense petition concerned a child from a different relationship who was not alleged to be a member of the same family or household as required by Family Court Act 812(1)(a)-(e), the added, though somewhat conclusory, contention that the father "'threatened other people with a gun in front of [the mother's] children'" (emphasis added [below]), which would necessarily include [the subject child] ... provided Family Court a sufficient basis to exercise its jurisdiction to issue a temporary protective order, and the father's willful failure to appear in court has left the contention unchallenged." Finding the incarcerated father in default was not error where his attorney reported that the father would not appear other than at a trial on his petitions. (Family Ct, Warren Co)

Auxiliary Services (County Law § 722-c) (Investigators) (Other)**Counsel (Competence/Effective Assistance/Adequacy)****Forensics (DNA)****People v Clarke, 110 AD3d 1341, 975 NYS2d 194 (3rd Dept 10/31/2013)**

While the defendant correctly contends that his claim of indigency with regard to a County Law 722-c request for funds to hire a DNA expert was not defeated by a relative's payment of retained counsel for the defendant, the court did not abuse its discretion in denying the defendant's broad application for multiple investigators and experts that included no statement of "a 'distinct necessity' for the assistance of a DNA expert other than the People's use of DNA evidence" (County Ct, Sullivan Co)

Evidence (Sufficiency)**Juveniles (Abuse) (Molestation)****Sex Offenses (Corroboration)****Matter of Dezarae I., 110 AD3d 1396, 974 NYS2d 615 (3rd Dept 10/31/2013)**

Petitioner Department of Social Services failed to meet its burden of showing that the mother's boyfriend sexually abused the mother's daughter in 2010 when she was four years old. The daughter did not testify, no medical evidence was offered, nor any expert testimony to validate the daughter's account. The only evidence was the testimony of four people who said the daughter disclosed abuse and who described their observations of her during the same period; repetition of claims of abuse, however believable and consistent, is not enough to corroborate such out-of-court statements. (Family Ct, Schoharie Co)

Homicide (Felony Murder)**People v Henderson, 110 AD3d 1353, 973 NYS2d 863 (3rd Dept 10/31/2013)**

Where the defendant and the decedent had fought over the defendant's claim that the decedent stole drugs from him, the defendant left, got a knife, returned and stabbed the decedent during a struggle, the felony murder conviction based on burglary as the predicate felony is valid; "[a] felony murder conviction ... may properly be based on a burglary as the predicate felony where the intent at the time of entry is to commit an assault or murder" (County Ct, Warren Co)

Domestic Violence**Juveniles (Neglect)****Matter of Lydia DD., 110 AD3d 1399, 974 NYS2d 169 (3rd Dept 10/31/2013)**

Dismissal of the neglect petition is affirmed where the only proof offered that the children were neglected as a result of, among other things, an alleged incident of domestic violence between the respondent father and mother was a caseworker's testimony about what the mother told him. (Family Ct, Broome Co)

Aliens (Deportation)**Counsel (Competence/Effective Assistance/Adequacy)****People v Obeya, 110 AD3d 1382, 974 NYS2d 613 (3rd Dept 10/31/2013)**

The court's denial of the defendant's motion to vacate his conviction due to erroneous advice by counsel concerning the immigration consequences of pleading guilty to a count of petit larceny is affirmed. Testimony that trial counsel said a misdemeanor conviction "'most likely'" would not lead to deportation left deportation open as a possibility. Such an experience-based assessment was not misleading "and the record as a whole falls short of establishing" advice deficient enough to satisfy the first prong of an ineffectiveness claim. (Supreme Ct, Albany Co)

Diversion**People v Powell, 110 AD3d 1383, 973 NYS2d 870 (3rd Dept 10/31/2013)**

To the extent that the defendant did not abandon, by failing to request a hearing, his claim regarding denial of his application for participation in a judicial diversion program, review of the record reflects that the denial was based on "his extensive criminal history and threat to

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public safety” and was not an abuse of discretion. (County Ct, Chemung Co)

Driving While Intoxicated

Probation and Conditional Discharge

People v O’Brien, 111 AD3d 1028, 975 NYS2d 219 (3rd Dept 11/14/2013)

The court’s imposition of interim probation prior to the defendant’s sentencing was authorized by CPL 390.30(6)(a), and the court was required to consider the defendant’s violation of the conditions of that probation in determining the appropriate sentence for the charge of felony driving while intoxicated to which the defendant had pleaded guilty. Imposing a consecutive period of probation to follow the defendant’s prison sentence was proper under Penal Law 60.21, which specifically “applies ‘notwithstanding’ Penal Law § 60.01 (2) (d)” (County Ct, St. Lawrence Co)

Sex Offenses (Sex Offender Registration Act)

People v Weihrich, 111 AD3d 1032, 974 NYS2d 663 (3rd Dept 11/14/2013)

Where the defendant “possessed pornographic material depicting more than three different children, clear and convincing evidence supports Supreme Court’s assessment of 30 points under” the risk factor for multiple victims. The court was not bound by the recommendation of the Board of Examiners of Sex Offenders, and the record supports the assessment of the other challenged points. (Supreme Ct, Albany Co)

Motions (Suppression)

Search and Seizure (Suppression)

People v Atkinson, 111 AD3d 1061, 975 NYS2d 227 (3rd Dept 11/21/2013)

The court erred in denying the defendant’s request for a suppression hearing as to cocaine recovered from his mouth after he was tased more than once. “[T]he motion papers raised a factual dispute concerning the use of a taser and whether it might be considered excessive force, giving rise to a potentially unreasonable search and seizure that may require suppression of the evidence” The prosecution did not respond substantively to that claim. Appeal held in abeyance pending a hearing. (County Ct, Tompkins Co)

Juveniles (Support Proceedings)

Matter of Baltes v Smith, 111 AD3d 1072, 975 NYS2d 782 (3rd Dept 11/21/2013)

The amendment to Family Court Act 451, providing that incarceration is not necessarily a bar to finding a substantial change in circumstances warranting a downward modification of child support, did not apply here. The amendment applies to support orders entered after its effective date, October 13, 2010; the order here was entered in May 2010. (Family Ct, Clinton Co)

Double Jeopardy (Punishment)

Sentencing (Resentencing)

Sex Offenses (Sentencing)

People v DePerno, 111 AD3d 1058, 975 NYS2d 226 (3rd Dept 11/21/2013)

Where the defendant pleaded guilty to sex offenses in 2010 and was sentenced according to the plea agreement to an aggregate determinate prison term of 10 years and 10 years of post-release supervision, which was found on appeal to be illegal under the law in existence at the time of the offenses, the imposition on resentencing, held after the defendant had served two years of the 10-year term, of a maximum term greater than that agreed upon at the time of the plea violated double jeopardy principles. (County Ct, Cortland Co)

Forensics (DNA)

Freedom of Information

Matter of Karimzada v O’Mara, 111 AD3d 1088, 975 NYS2d 248 (3rd Dept 11/21/2013)

The petitioner, in prison, sought, under the Freedom of Information Law, “lab reports, raw data, logbook entries, chain of custody forms and other documentation related to the taking of the blood sample and transporting of the sample and results” pertaining to “a blood sample obtained from petitioner while he was incarcerated,” which the State Police wrongly claimed were exempt from disclosure under Executive Law 995-c. As most of the requested items were not the “DNA record” as defined in Executive Law 995(8), which the petitioner had obtained from the Division of Criminal Justice Services, the exception in Executive Law 995-c(6) did not apply and the petitioner is entitled to receive the other requested documents. (Supreme Ct, Sullivan Co)

Driving While Intoxicated

Sentencing (Fines)

Third Department *continued*

People v Olmstead, 111 AD3d 1063, 975 NYS2d 359
(3rd Dept 11/21/2013)

The defendant's challenge to the imposition of a \$1,000 fine following his plea to misdemeanor driving while intoxicated survived his guilty plea as it implicates the right to be sentenced according to law, and, given the sentencing court's reference during plea proceedings to a fine being "mandatory," the matter is remitted for the court to exercise its discretion as to whether to impose a fine under Vehicle and Traffic Law 1193(1)(b). (County Ct, St. Lawrence Co)

Freedom of Information

Matter of Rose v Albany County District Attorney's Office, 111 AD3d 1123, 975 NYS2d 258
(3rd Dept 11/21/2013)

Because an agency bears the burden in an article 78 proceeding of stating particularized, specific justifications for initial denial of requests made under the Freedom of Information Law, the Supreme Court did not err in considering belated submissions by the respondent District Attorney concerning documents relating to the criminal investigation leading to the conviction. Post-petition assertions regarding a ground not raised in the initial denial—that disclosure of some documents could endanger prosecution witnesses—may be considered despite the principle that review of an administrative determination is generally limited to ground invoked at the time of that determination, as "confidentiality rights of third parties not before the court" were implicated. An in camera review of those documents is needed to determine if they may be released, redacted or not, without compromising any witness's safety. As the record is unclear as to whether some documents may contain nonexempt factual or statistical information, the matter is remitted for in camera review of those documents and disclosure after redaction as appropriate. If additional disclosures are ordered, the court should consider whether the petitioner is entitled to counsel fees. (Supreme Ct, Albany Co)

**Counsel (Competence/Effective Assistance/Adequacy)
(Right to Counsel) (Self-Representation)****Sex Offenses (Civil Commitment)**

Matter of State v Timothy BB., 113 AD3d 18,
975 NYS2d 237 (3rd Dept 11/21/2013)

Assuming without deciding that a defendant in a Mental Hygiene Law article 10 proceeding regarding civil commitment as a dangerous sex offender "has the same right of self-representation as a criminal defendant," the

defendant here failed to meet two prongs of the test; requesting to proceed pro se two business days before trial was not timely, and his stated intentions to, eg, "throw a monkey wrench in the proceeding" and defend himself in an "entertaining" way, indicated he would try "to disrupt or prevent the orderly conduct of the trial"

The test for ineffective assistance of counsel is applicable in this civil proceeding because "the indefinite and involuntary nature of confinement that may result in this type of proceeding constitutes ... an extraordinary circumstance" The defendant did not receive ineffective assistance; counsel cannot be faulted for not foreseeing that licensing problems would arise as to a selected expert due to delays caused by a mistrial. (Supreme Ct, Warren Co)

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

People v Zaorski, 111 AD3d 1054, 976 NYS2d 581
(3rd Dept 11/21/2013)

The defendant should have been given new counsel to pursue the motion to withdraw the defendant's guilty plea based on claims that existing counsel coerced the plea by failing to communicate with the defendant, telling the defendant that counsel did not want to represent him, and saying that the defendant had to take the plea offer; existing counsel took a position adverse to his client, specifically refuting the defendant's assertions on the record, which refutations the defendant said were untrue. (County Ct, Ulster Co)

Double Jeopardy (Punishment)**Driving While Intoxicated**

People v Brainard, 111 AD3d 1162, 975 NYS2d 498
(3rd Dept 11/27/2013)

As "the Legislature intended to impose cumulative punishments for a single offense " in Penal Law § 60.21, which requires imposition of probation or conditional discharge in addition to any fine or period of incarceration, the double jeopardy prohibition against multiple punishment for one crime is not implicated here. The maximum term of imprisonment, a fine, and a consecutive term of five years probation were imposed after the defendant violated the terms of his interim probation, and, after he was released and remained under parole supervision until expiration of his prison term, the probation was vacated and a three-year period of conditional discharge including a requirement was imposed. Should the defendant violate the ignition interlock condition, the court could vacate the conditional discharge and impose another sentence. (County Ct, St. Lawrence Co)

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Juveniles (Support Proceedings)

Matter of Broome County Dept of Social Servs. v Meaghan XX., 111 AD3d 1174, 976 NYS2d 272 (3rd Dept 11/27/2013)

Where the monthly child support of \$25 imposed on the respondent mother, who is developmentally disabled and employed part-time at a sheltered workshop, represents roughly half of her earnings after subtracting her Supplemental Security Income benefits and public assistance payments, the support award is “unjust and inappropriate” per Family Ct Act 413 (1)(f). (Family Ct, Broome Co)

Misconduct (Prosecution)

Trial (Summation)

People v Forbes, 111 AD3d 1154, 975 NYS2d 490 (3rd Dept 11/27/2013)

The prosecutor’s comments in summation as to what the jury would have to believe in order to acquit the defendant arguably shifted the burden of proof to the defendant. References to having to find “a conspiracy against” the defendant were in no way fair comment on the evidence, for while the defendant testified that the accomplice testimony was untrue, he did not suggest that the prosecution witnesses and others were engaged in a conspiracy to wrongly convict him. Additionally, comments that the jury could only believe the defendant if it also believed that the trial judge had allowed perjury and otherwise engaged in misconduct, pitting the defendant against the judge, were inexcusable. The summation operated to deny the defendant a fair trial despite prompt objection and appropriate curative instructions. While not all comments were challenged by objection, the conduct warrants corrective action in the interest of justice. (County Ct, Albany Co)

Competency to Stand Trial

Post-Judgment Relief (CPL § 440 Motion)

People v Hennessey, 111 AD3d 1166, 975 NYS2d 502 (3rd Dept 11/27/2013)

In this appeal by right from a plea-based conviction of second-degree harassment as a hate crime and appeal by leave from denial without a hearing of a CPL 440.10 motion, the proof shows that this was the 58-year-old defendant’s only conviction, the acts appear to have been out of character, and he “suffers from a mental illness and was taking psychotropic medications” at the time of plea;

further record development “is required to determine the extent to which his mental capacity was impaired and whether this rendered him unable to enter a knowing, voluntary and intelligent guilty plea.” (County Ct, Albany Co)

Prisoners (Disciplinary Infractions and/or Proceedings)

Matter of Jeckel v New York State Department of Corrections, 111 AD3d 1180, 975 NYS2d 697 (3rd Dept 11/27/2013)

While persons in prison have no right to counsel, retained or appointed, in disciplinary hearings, they are entitled to a reasonable opportunity to obtain the assistance of attorneys, which was denied to the defendant here when prison officials barred both telephonic and personal contact between the petitioner and retained counsel; this deprived the petitioner of the right to marshal facts and prepare his defense, requiring dismissal of the charge and expungement from his prison record.

Evidence (Sufficiency) (Weight)

Strangulation (Physical Injury)

People v Carte, 113 AD3d 191, 976 NYS2d 594 (3rd Dept 12/5/2013)

The defendant’s challenge to the sufficiency and weight of the evidence supporting his conviction of second-degree strangulation is rejected where a trooper testified that the defendant admitted placing his hand over the accuser’s mouth and rubbing pizza in her face; several people testified that the accuser said on the night of the incident that the defendant had choked her, contrary to her trial testimony after she and the defendant had reconciled; medical records and testimony regarding the accuser’s treatment at a hospital on the night of the incident indicated that she had abrasions and tenderness on her face and on the right side of her neck, some consistent with strangulation; and the accuser complained of painful breathing, nausea, and shortness of breath and was treated for substantial pain. (County Ct, Clinton Co)

Due Process (Vagueness)

Evidence (Sufficiency)

Sex Offenses (Elements)

People v Piznarski, 113 AD3d 166, 977 NYS2d 104 (3rd Dept 12/5/2013)

The defendant’s contention that the second-degree unlawful surveillance statute does not apply to recording of consensual sexual activity by one of the parties involved without the knowledge or consent of the other party is rejected. That the camera used here was in plain sight does

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not prevent a finding that the recording was surreptitious, where the evidence shows that the defendant adjusted the camera while an accuser was outside the room and turned it on when another accuser had her eyes closed. The statutory phrase “no legitimate purpose” is not unconstitutionally vague. That the recording occurred in the defendant’s bedroom invoked a rebuttable presumption that there was no legitimate purpose; evidence at trial supported a finding of more nefarious purposes.

While a forensics computer expert should not have remained in the grand jury room after his own testimony, the prosecution having asked that he be present as a technician to play video clips during the testimony of an accuser, there is no showing that the integrity of the grand jury was compromised. (County Ct, Madison Co)

Discovery (Matters Discoverable) (Procedure [Subpoena Duces Tecum]) (Right to Discovery)**Juveniles (Neglect)**

Matter of Ameillia RR., 112 AD3d 1083, 977 NYS2d 762 (3rd Dept 12/12/2013)

The court properly granted, without prejudice, a protective order sought by the father, appearing in this neglect proceeding as a nonrespondent parent after being served by the respondent mother with a notice of deposition and a subpoena duces tecum. The father said he had turned over to the petitioner everything sought in the subpoena, and the mother could have sought disclosure from him later if she learned that he had information necessary to her not available from another source.

While proof that a child has a medical condition that causes bruising could be important to a respondent’s defense, not every request for a medical exam must be granted; the opinion in a physician’s affidavit that a child with an unexplained history of bruising should be examined was based only on facts provided by the respondent’s counsel and did not say what screening would be required. (Family Ct, St. Lawrence Co)

Appeals and Writs (Judgments and Orders Appealable)**Article 78 Proceedings**

People v Lavare, 112 AD3d 1074, 976 NYS2d 417 (3rd Dept 12/12/2013)

There is no statutory basis for an appeal from a modification of probation conditions, here the addition of internet limitations required by the Electronic Security and Targeting of Online Predators Act. To challenge the new conditions, the defendant should have brought a

CPLR article 78 proceeding in the nature of prohibition. (County Ct, St. Lawrence Co)

Counsel (Right to Counsel) (Right to Self-Representation)**Juveniles (Right to Counsel) (Support Proceedings)**

Matter of Madison County Support Collection Unit v Feketa, 112 AD3d 1091, 977 NYS2d 434 (3rd Dept 12/12/2013)

The defendant, appearing by telephone from a correctional facility in a hearing on imposition of punishment for contempt for failure to pay child support arrears, was not shown to have effectively waived his right to counsel. He initially asked for counsel, then asked how the process would work if he had no lawyer, and in subsequent exchanges with the court admitted nonpayment and asked to continue without counsel; no searching inquiry was provided and the defendant asked questions indicating he did not understand the proceeding’s nature or parameters. (Family Ct, Madison Co)

Dissent: The defendant repeatedly waived his right to counsel and the totality of circumstances indicates the waiver was knowing, intelligent, and voluntary.

Juveniles (Support Proceedings)

Matter of McDonald v McDonald, 112 AD3d 1105, 976 NYS2d 338 (3rd Dept 12/12/2013)

The court erred in confirming the Support Magistrate’s recommendation to reduce the father’s child support where there was no assertion that the amount set in the 2003 separation agreement was unfair or inequitable, and the only proven change in circumstances was the child’s receipt of Social Security survivors benefits following the death of his biological father, which are intended to supplement a child’s existing resources and did not affect the financial situation of the father here, who is the child’s legal father. (Family Ct, Broome Co)

Juveniles (Support Proceedings)

Matter of Zibell v Zibell, 112 AD3d 1101, 976 NYS2d 625 (3rd Dept 12/12/2013)

The statute allowing modification of child support obligations when a party’s income has changed by fifteen percent or more did not apply because the support order incorporated but not merged into the parties’ divorce agreement predated the effective date of the relevant statutory provision. The mother’s petition to modify the father’s support obligation did not meet the requirements for seeking to modify orders predating the statutory amendment. The court erred in basing the penalty, imposed on the father for failure to provide the mother

Third Department *continued*

with specified financial information, on the amount of support that might have been imposed had the income change been timely disclosed; a fine may be imposed limited to the mother's costs and expenses plus \$250. (Family Ct, Albany Co)

Juries and Jury Trials (Challenges) (Deliberations) (Qualifications)

People v Cridelle, 112 AD3d 1141, 976 NYS2d 713 (3rd Dept 12/19/2013)

A new trial is warranted due to errors during the jury's deliberations where the jury requested that one juror be removed, that juror stated on the record her inability to render a decision, the court stated that the juror was grossly unqualified to serve but did not remove her, and the juror was, the next day, given instructions similar to an *Allen* charge and allowed to remain on the jury after she said could continue. Reversal is also required because the jury clearly deliberated with fewer than 12 members for a period of time, where the first-questioned juror professed no knowledge of discussion by the jury about the facts of the case that gave rise to questioning of a second juror by the court. (County Ct, Schenectady Co)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Diallo, 113 AD3d 199, 976 NYS2d 732 (3rd Dept 12/19/2013)

The court improperly denied without a hearing the defendant's motion to vacate his conviction based on affirmative misstatements by his counsel with regard to deportation consequences of his plea where the motion, made while a direct appeal was pending, established that the record was insufficient to permit adequate review of the right to counsel claim, requiring further development of facts pursuant to CPL 440.10(2)(b). (County Ct, Clinton Co)

Juveniles (Visitation)

Matter of Fish v Fish, 112 AD3d 1161, 976 NYS2d 727 (3rd Dept 12/19/2013)

In dismissing the mother's petition to modify custody and visitation, the court "did not address the necessity or justification for continuing the current visitation arrangement or make any findings that the once-weekly highly restrictive supervised visitation continued to be in the children's best interests or 'that unsupervised visitation would be inimical to the child[ren]'s welfare" No

apparent consideration was given to important factors that established a change in circumstances warranting at least a reassessment of visitation requirements. The order allowing changes to visitation upon the parties' agreement was an improper delegation of the court's authority. (Family Ct, Broome Co)

Family Court

Juveniles (Custody)

Matter of Evan E., 114 AD3d 149, 978 NYS2d 381 (3rd Dept 12/26/2013)

The Court Appointed Special Advocate program (CASA) lacked standing to seek an order requiring the Department of Social Services (DSS) to provide certain information and stop telling the foster parents and service providers not to talk to the CASA volunteer appointed to assist the court. The motion is construed as a report to the court, and the order directing the volunteer to take certain actions and directing others to release information to the volunteer construed as being made sua sponte. The court properly directed DSS to stop telling the foster parents not to speak to CASA, "but the court otherwise exceeded its authority in several respects." (Family Ct, Ulster Co)

Juries and Jury Trials (Challenges) (Qualifications)

People v Greenfield, 112 AD3d 1226, 977 NYS2d 486 (3rd Dept 12/26/2013)

The court erred in denying the defense challenge for cause of a prospective juror who, as an agent with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives, had not only worked closely on several occasions with the District Attorneys office prosecuting this case but was presently actively investigating a case with that office. This "current law enforcement cooperative relationship with the prosecuting agency 'create[d] the perception that the accused might not receive a fair trial before an impartial finder of fact'" (County Ct, Rensselaer Co)

Motions (Adjournment)

Sex Offenses (Sex Offender Registration Act)

People v Lashway, 112 AD3d 1235, 977 NYS2d 491 (3rd Dept 12/26/2013)

The court did not err by denying the defendant's motion to adjourn the hearing on his request for a modification of his Sex Offender Registration Act classification where he had delayed for some time in seeking disclosure of all documents listed as having been reviewed by the Board of Examiners of Sex Offenders when making a recommendation. Most of the documents were disclosed, the defendant did not contest the Board's assertion that the

Third Department *continued*

remaining documents were in storage and could take weeks to locate, the Board did not explicitly rely on those documents, and there is no showing that the court had access to, much less used, the documents in making its determination. (County Ct, Clinton Co)

Dissent: The defendant was denied due process by the failure to ensure the defendant access to all documents reviewed and listed by the Board in its report strongly opposing his request for a downward departure.

[*Ed. Note: Leave to appeal was granted on April 3, 2014 (112 AD3d 1235).*]

Civil Practice**Sentencing (Post-Release Supervision)**

[Moulton v State of New York](#), 114 AD3d 115, 977 NYS2d 797 (3rd Dept 12/26/2013)

The claimant's false imprisonment claim should not have been dismissed, and he should have been granted summary judgment on it. Confinement of the claimant for violation of an administratively-imposed period of post-release supervision that was a nullity under controlling law following the decision in *Matter of Garner v New York State Dept. of Correctional Servs.* (10 NY3d 358 [2008]) was not privileged. "[The] defendant does not have immunity for the actions of its parole officials" who acted outside the scope of colorable authority and in the absence of all jurisdiction. No apparent measures were taken to have the claimant lawfully resentenced after a statutory mechanism for doing so was created. The claimant also stated a cause of action for malicious prosecution, although he was not entitled to summary judgment thereon. (Court of Claims)

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.

Evidence (Exclusionary Rule) (Motive) (Prejudicial)**Harmless and Reversible Error (Reversible Error)****Juries and Jury Trials (Deliberation)**

[People v Cornell](#), 110 AD3d 1443, 972 NYS2d 674 (4th Dept 10/4/2013)

The court "committed a mode of proceedings error when it responded to a jury note off the record, in the jury room, and outside the presence of defendant, with no indication that defendant had waived his right to be present."

Also, "the court improperly afforded defense counsel a standing objection with respect to testimony concerning defendant's prior bad acts while affording the prosecutor the opportunity to ask one of the victims of the arson, who was defendant's neighbor, about defendant's prior bad acts over a period as long as 10 years before the arson. It was particularly improper to allow the witness to testify that, as a result of defendant's prior bad acts, he had concerns about the safety of his children and pets." While the defendant's acts in the days before the arson may be relevant as to motive and intent, the other prior bad acts were irrelevant and prejudicial. (County Ct, Chautauqua Co)

Grand Jury (Witnesses)**Sex Offenses (Sexual Abuse)****Witnesses (Child) (Competency)**

[People v Eloff](#), 110 AD3d 1477, 972 NYS2d 796 (4th Dept 10/4/2013)

The court improperly dismissed the indictment based on prosecutorial misconduct that compromised the integrity of grand jury proceedings. Although the prosecutor failed to establish that the four-year old accuser could provide unsworn testimony and violated the unsworn witness rule during an attempt to get the child to testify about the incident, "the prosecutor did not thereby engage in conduct that was fraudulent in nature, nor was the prosecutor's conduct so egregious as to impair the integrity of the grand jury proceedings"

The remaining evidence in this predatory sexual assault against a child case, based on first-degree rape, was legally sufficient despite the absence of direct testimony of penetration; there was testimony of a prompt complaint, the child's vaginal area showed signs of injury, and there was semen with DNA consistent with the defendant's DNA on the child's underwear. (County Ct, Onondaga Co)

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

[People v Lee](#), 110 AD3d 1482, 974 NYS2d 676 (4th Dept 10/4/2013)

The court erred in denying the defendant's motion to suppress tangible evidence found in the car he was driving and his subsequent statement to police. The police saw the defendant sitting in a car while a man with a satchel walked back and forth from the car to a group of 10 or 20 people standing outside a bar; the man talked and shook hands with people in the group "in a manner consistent with hand-to-hand drug transactions," talked on a cell phone, and reached into the satchel multiple times; and the car's headlights occasionally flashed on and off. Despite these observations, their experience in drug

Fourth Department *continued*

investigations, and that the defendant drove away when the police announced their presence, because the police did not see any “telltale signs” of narcotics, such as a glassine baggie or an exchange of money, they did not have probable cause to arrest the defendant before they found a dagger and baggie containing white residue in plain view in the car. (County Ct, Ontario Co)

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

[People v Mhina](#), 110 AD3d 1445, 972 NYS2d 767 (4th Dept 10/4/2013)

The court’s *Molineux* ruling constitutes reversible error because the defendant’s prior convictions and an investigation that did not result in criminal charges, regarding the defendant’s conduct in writing checks on accounts that he knew were closed or had insufficient funds, were not relevant to prove the absence of mistake in the defendant’s possession of forged checks. The issues at trial were whether the defendant knew the checks were forged and whether he knowingly participated in or was an innocent victim of a fraudulent check scheme. Evidence that the defendant was familiar with check fraud and the ability to defraud people using bank schemes is inadmissible propensity evidence and is also inadmissible because there is no specialized crime exception to the *Molineux* rule. (County Ct, Onondaga Co)

Search and Seizure (Appellate Review) (Warrantless Searches [Abandoned Objects])

[People v Rainey](#), 110 AD3d 1464, 972 NYS2d 782 (4th Dept 10/4/2013)

The case must be remanded as the court, in denying the defendant’s motion to suppress drugs he allegedly dropped, failed to rule on the threshold issues of “whether the police engaged in a pursuit and, if so, whether the pursuit was legal, i.e., supported by a reasonable suspicion that defendant had committed or was about to commit a crime” The court must rule on those issues in the first instance. (County Ct, Monroe Co)

Confessions (*Huntley* Hearing) (Notice of Use at Trial) (Voluntariness)

[People v Roberts](#), 110 AD3d 1466, 972 NYS2d 784 (4th Dept 10/4/2013)

The defendant must be given an opportunity to challenge the admissibility of statements that were not included in the initial CPL 710.30 notice, which was served after

the original indictment, but were included in the 710.30 notice served after the superseding indictment, as the only issue before the court at the *Huntley* hearing conducted in connection with the original indictment was whether the statements should be precluded because they were not in the initial 710.30 notice; the voluntariness of the additional statements was not at issue during the hearing, and the “defendant had no reason or opportunity to explore the issue of spontaneity or the effect of the previously-given *Miranda* warnings, or to raise any other issues regarding the admissibility of those statements.” (County Ct, Onondaga Co)

Juries and Jury Trials (Challenges) (Selection)

Witnesses

[People v Rosario-Boria](#), 110 AD3d 1486, 972 NYS2d 798 (4th Dept 10/4/2013)

The court abused its discretion in refusing to allow the defendant to exercise a peremptory challenge against a prospective juror where, almost immediately after exercising peremptory challenges to the first group, defense counsel realized he meant to challenge another prospective juror in the group and immediately asked to do so. There was no discernible interference or undue delay; because the right to exercise peremptory challenges is a substantial right, reversal is required.

There was legally insufficient evidence to support the third-degree intimidating a witness count where the defendant “approached the witness in a grocery store and said, ‘I’m not that stupid as you may think’ [as] [t]here was no evidence tending to support the inference that defendant’s statement was a threat intended to prevent the witness from communicating with the police, the courts or the grand jury” (County Ct, Onondaga Co)

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

[People v Sykes](#), 110 AD3d 1437, 972 NYS2d 758 (4th Dept 10/4/2013)

The court erred in denying suppression of the gun recovered from the car the defendant was driving where, during a lawful traffic stop, a police officer asked the defendant if there were any drugs or weapons in the car and when the defendant admitted to having marijuana on him, the officer asked him to get out of the car, and after a passenger was acting suspiciously, the officer searched the car and found a gun in plain view, because the court did not decide “whether the officer had the requisite founded suspicion of criminal activity to justify an inquiry ... about drugs or weapons.” The matter must be remanded for such a determination. (Supreme Ct, Erie Co)

Fourth Department *continued***Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)****Assault (Instructions)****Reckless Endangerment (Instructions)****People v Flanders, 111 AD3d 1263, 974 NYS2d 692 (4th Dept 11/8/2013)**

The defendant's convictions of first-degree assault and first-degree reckless endangerment, alleged in the indictment to have been committed with a pistol and a rifle, are affirmed. The court's instruction that the jury could convict if they found that either or both of the weapons were involved did not render the indictment duplicitous where the trial evidence showed that the multiple shots fired from each weapon constituted a single, uninterrupted incident, and the reckless endangerment count, which was based on endangering the life of the accuser's fiancée who was near the accuser when the defendant was shooting at the accuser, constituted a continuing offense that can encompass multiple acts. (County Ct, Oneida Co)

Dissent in Part: Regarding the assault, the defendant acted on separate impulses with an abeyance between them, so the court's instruction rendered the count duplicitous. Regarding the reckless endangerment count, "it is not possible to know whether the jurors, individually or collectively, based their verdict upon the use of the pistol, the rifle, or both."

[*Ed. Note: Leave to appeal was granted on Jan. 28, 2014 (22 NY3d 1092).*]

Juveniles (Adoption) (Parental Rights) (Visitation)**Matter of Kaylee O., 111 AD3d 1273, 975 NYS2d 829 (4th Dept 11/8/2013)**

The court properly dismissed the petition to enforce the agreement providing for post-judicial surrender visitation between the petitioner and the child after the child was adopted because it was not incorporated into the terms and conditions of the court-ordered adoption agreement, as provided in Domestic Relations Law 112-b. And enforcement was not proper as there was a sound and substantial basis for finding that enforcement of the agreement was not in the child's best interests. (Family Ct, Erie Co)

Grand Jury (Procedure)**Evidence (Uncharged Crime)****Jails****Motions (Omnibus)****People v Koonce, 111 AD3d 1277, 974 NYS2d 207 (4th Dept 11/8/2013)**

The court erred in not ruling on the defendant's renewed motion for a determination of whether the grand jurors who voted to indict were present for all the testimony presented on the case. The matter must be remitted for such a determination.

The court properly admitted a portion of the defendant's jailhouse telephone call; even though there was no specific warning that law enforcement may use his statements, he was warned that calls may be monitored or recorded and thus impliedly consented to the recording. And his statements did not amount to the admission of evidence of an uncharged crime as they dealt with only the present offense. (County Ct, Erie Co)

Evidence (Sufficiency)**Misconduct (Prosecution)****Narcotics (Possession)****Possession of Stolen Property (Elements) (Evidence)****People v Morgan, 111 AD3d 1254, 974 NYS2d 687 (4th Dept 11/8/2013)**

The defendant's conviction must be reversed based on prosecutorial misconduct on summation; "[d]espite our prior admonition on defendant's first appeal, the prosecutor on retrial repeated some of the improper comments from the first summation and made additional comments that we conclude are improper. The prosecutor improperly denigrated the defense and defense counsel, repeatedly characterizing the defense as 'noise,' 'non-sense' and a 'distraction [],' and arguing that defense counsel was fabricating facts and attempting to mislead the jury" The prosecutor also "misstated the evidence and the law ..., made an inappropriate 'guilt by association' argument ... and improperly characterized the case as 'about finding the truth and it is as simple as that'"

There was insufficient evidence that the stolen property had a value over \$3,000, so the third-degree larceny count must be dismissed. And there was legally insufficient evidence of seventh-degree criminal possession of a controlled substance where the only evidence of possession was the testimony of a witness and the defendant's statement that they smoked crack cocaine on the date alleged in the indictment, but at different times. (Supreme Ct, Erie Co)

Post-Judgment Relief (CPL § 440 Motion)**Sentencing (Appellate Review) (Concurrent/Consecutive) (Modification)**

Fourth Department *continued*

[People v Povoski](#), 111 AD3d 1350, 974 NYS2d 210 (4th Dept 11/8/2013)

The court erred in denying the defendant's CPL 440.20 motion on the ground that the issue could have been raised on direct appeal because mandatory denial of a 440.20 motion is required only when the issue was previously decided on the merits in a direct appeal. The defendant's sentences for second-degree robbery and second-degree forgery must be modified to run concurrently where the indictment and jury charge provided that either count could be a predicate for second-degree felony assault. (County Ct, Ontario Co)

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

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

[People v Frysinger](#), 111 AD3d 1397, 974 NYS2d 860 (4th Dept 11/15/2013)

The court improperly denied the defendant's motion to vacate his guilty plea to first-degree unlawfully dealing with a child, based on providing alcohol to persons under 21, where the defendant never admitted to providing alcohol during his brief factual colloquy and he preserved the issue by moving to withdraw his plea under CPL 220.60(3). And the defendant's appeal waiver was invalid because, although he and his attorney signed a written waiver, the court did not ask the defendant any questions about the waiver or his understanding of it. (County Ct, Steuben Co)

Discovery (*Brady* Material and Exculpatory Information)

Post-Judgment Relief (CPL § 440 Motion)

[People v Gayden](#), 111 AD3d 1388, 975 NYS2d 295 (4th Dept 11/15/2013)

The court should have granted the defendant's CPL 440.10 motion where the prosecution failed to comply with their *Brady* obligation to disclose that an essential prosecution witness was a paid informant. The "defendant made a specific request for *Brady* material including agreements between the People and their witnesses, disclosure of whether any information was provided by an informant, and the substance of that informant's information," which meets the materiality element of the test in *People v Fuentes* (12 NY3d 259). And the defendant met the other two elements of that test by showing that the evidence was favorable to him and that the prosecution suppressed it. (County Ct, Monroe Co)

Evidence (Sufficiency)

Weapons (Evidence) (Possession)

Witnesses

[People v Griffin](#), 111 AD3d 1413, 975 NYS2d 306 (4th Dept 11/15/2013)

There is legally insufficient evidence to support the third-degree criminal possession of a weapon and second-degree intimidating a witness convictions. Regarding the weapon count, there was insufficient evidence that the defendant knew his coconspirator had a knife or that he intended to use it unlawfully against another. Regarding the intimidating conviction, there was insufficient evidence to show that the defendant shared his coconspirator's intent to cause physical injury to the accuser during the burglary and robbery. (County Ct, Onondaga Co)

Gun Control

Licenses and Permits

Weapons (Pistols)

[Matter of Peters v Randall](#), 111 AD3d 1391, 975 NYS2d 297 (4th Dept 11/15/2013)

The revocation of the petitioner's pistol permit, after a domestic incident involving his wife, was neither arbitrary or capricious or an abuse of discretion where the police report indicates that the petitioner twice grabbed his wife by the arms and pushed her against the wall, warning that there would be trouble if she called the police, and that there is a prior history of domestic violence. The petitioner did not dispute the facts, arguing only that it was an isolated incident. Also, the revocation did not violate the Second Amendment.

Sentencing (Concurrent/Consecutive) (Youthful Offenders)

[People v Tajene J.](#), 111 AD3d 1412, 974 NYS2d 865 (4th Dept 11/15/2013)

The defendant's sentence to three terms of 1 1/3 to 4 years, with two to run consecutively to each other, for an aggregate sentence of 2 2/3 to 8 years, is illegal because the defendant was adjudicated a youthful offender and he cannot be sentenced to consecutive sentences in excess of four years. The sentences must run concurrently with respect to each other. (Supreme Ct, Erie Co)

Juveniles (Juvenile Offender)

Robbery (Degrees and Lesser Offenses)

Fourth Department *continued*

People v Tyler L., 111 AD3d 1416, 974 NYS2d 866
(4th Dept 11/15/2013)

The court did not have the authority to accept the defendant's guilty plea to two counts of second-degree robbery because the defendant, as a juvenile offender who was 15 years old at the time of the offenses, cannot be held criminally responsible for second-degree robbery under Penal Law 160.10(1). The defendant's plea to the two other counts of second-degree robbery under 160.10(2)(a) is affirmed. (County Ct, Ontario Co)

AIDS**Evidence (Sufficiency)****Reckless Endangerment (Elements) (Evidence)**

People v Williams, 111 AD3d 1435, 974 NYS2d 742
(4th Dept 11/15/2013)

The court properly found that the grand jury evidence was not legally sufficient to establish the depraved indifferent element of first-degree reckless endangerment where the evidence showed that the defendant had unprotected sex with the accuser two to four times without disclosing his HIV positive status; after the relationship ended the defendant told the accuser that a former sexual partner tested positive for HIV and urged the accuser to be tested, and several months later, the accuser tested positive; and that the defendant loved the accuser and apologized for his actions because he was so upset and felt terrible. While this may constitute indifference to the accuser's health, it was not evidence that the defendant acted with wanton cruelty, brutality or callousness. And there was insufficient evidence that the defendant's conduct presented a grave risk of death to the accuser. (Supreme Ct, Onondaga Co)

[*Ed. Note: Leave to appeal was granted on Jan. 22, 2014 (22 NY3d 1091).*]

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

People v Slotman, 112 AD3d 1332, 977 NYS2d 832
(4th Dept 12/27/2013)

The court erred in designating the defendant a "sexually violent offender" because he was not convicted of a sexually violent offense as defined in Correction Law 168-a(7)(b). The order is modified accordingly, despite the defendant's failure to preserve the error for review. However, the court properly treated the defendant's statements in the presentence report, as clarified by defense counsel during the risk level hearing, as reliable hearsay in assessing points under risk factors 4 and 8. (County Ct, Erie Co)

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

People v Vaillancourt, 112 AD3d 1375, 978 NYS2d 517
(4th Dept 12/27/2013)

In this sex offender risk level proceeding, the Board of Examiners of Sex Offenders' case summary was sufficient to support the court's determination that the defendant is a level three risk where the defendant did not dispute the facts in the case summary; defense counsel's statement that the court should not rely solely on the case summary is not equivalent to disputing the facts in the summary. The court properly departed upward based on factors that tend to show a higher likelihood of reoffense or danger to the community, including "the number of defendant's prior sex-related offenses, committed in a variety of settings and spanning nearly a quarter of a century, his diagnosis of voyeurism, his admission to committing additional sex acts for which he was not prosecuted, his prior violations of community-based supervision, and his earlier failures to complete sex offender treatment." (Supreme Ct, Monroe Co) ♪

Defender News *(continued from page 5)***Jails Can Now House 18-Year-Olds with Adults**

The State Commission of Correction (SCOC) issued a [memo](#) on April 4 notifying sheriffs and others that Correction Law 500-b has been amended to bring state law into line with the federal Prison Rape Elimination Act (PREA) and standards thereunder. The federal provisions generally require inmates under 18 to be housed separately from those over 18. New York State law previously mandated classification of those under 19 separately from those 19 and above. The state/federal dichotomy forced jails "to establish three separate age classifications, those being 16-17, 18, and 19 and above," according to the SCOC. Now, 18-year-olds may be housed with adults.

David Hess Mourned

C. David Hess, whose achievements include being co-founder of USA FAIR (Families Advocating an Intelligent Registry) and founder of the SO Hopeful NY support group website for former offenders, died in March. In the words of NYSDA Staff Attorney Al O'Connor, Hess was "a tireless advocate for sanity in sex offender registration/residence laws." In a [final act of advocacy](#), Hess wrote to his state senator shortly before his death from lung cancer, telling his own story as a level one sex offender and as an "advocate for evidence based sex offender laws and policies." NYSDA offers condolences to his family, friends, congregation, and many admirers. ♪

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