NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

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Defender News

Ontario County Settles Hurrell-Harring, *Trial Set for Remaining Defendants*

On June 26, the New York Civil Liberties Union (NYCLU) announced a settlement agreement with Ontario County in *Hurrell-Harring v State of New York*. The suit, filed in 2007 by the NYCLU and Schulte Roth & Zabel LLP, challenges the State's failure to provide adequate public defense services.

Under the settlement, Ontario County, one of five counties added as defendants to the suit, agrees to several terms. These include maintaining without budget cuts the Public Defender Office created in 2010 as well as a Conflict Defender Office currently in formation, enforcing caseload/workload standards, and taking other steps regarding, for example, counsel at first appearance—*if* state or other outside funding is obtained.

The settlement agreement and publicity surrounding it make clear that the State's failure to adequately support public defense is the real issue. And with trial set for the fall, calls upon Governor Andrew Cuomo to bring about fundamental public defense reform have intensified. An op-ed by *Hurrell-Harring* lead counsel Corey Stoughton in the July 2, 2014 *Times Union* highlighted not just the Ontario County agreement but resolutions passed by legislatures in other counties asking the Governor to act. And an online form created for contacting the Governor on this issue is available here or at bit.ly/1iRcerB.

NYSDA has been calling on the Governor to settle *Hurrell-Harring* for some time, most recently in a *Times Union* op-ed.

As the Director of the Indigent Legal Services (ILS) Office, Bill Leahy, noted in email to Chief Defenders, the announced settlement as to Ontario County must be approved by the court and the Ontario County legislature to become effective. Leahy also noted that while he and the ILS Office "play absolutely no part in the litigation strategy of either the plaintiff class or the state," they have consistently said "that the State of New York has a serious responsibility to correct the by now notorious deficiencies in the county-based indigent defense system which has been in place since 1965, and which has suffered from the State's neglect throughout its existence."

Addressing Rights At and After Arrest

Constitutional and policy constraints on police actions at and after arrest have been addressed recently by a variety of authorities. The nation's high court told police they have to get a warrant to search the information stored on cell phones seized at arrest, while New York's Court of Appeals said police have to tell a suspect about a lawyer's telephonic intervention before administering a breath test. The federal Department of Justice is now saying that federal law enforcement should record interrogations, and use of body-worn cameras by police officers appears to be on the rise, including a pilot program in New York City ordered by the federal judge in a stop-and-frisk lawsuit.

To Search Cell Phone Info, Get a Warrant

Among the end of term decisions issued by the United States Supreme Court is *Riley v California* (No. 13-132 [6/25/2014]). The Court unanimously held "that officers must generally secure a warrant before conducting" searches of data on cell phones. Declining to extend the "search incident to arrest" doctrine to digital phone data, the court noted that a phone can be examined for features that could cause physical harm, but once police secure the phone, access to information it may provide must wait for warrant approval. The decision is summarized at p. 12.

The same day as *Riley* was decided, Tony Mauro said in the *New York Law Journal*: "In tone and substance, Roberts' decision seemed aimed at giving the court's acknowledgement, if not blessing, to a new

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American era—much as *Reno v. ACLU* in 1997 commemorated the birth of the Internet, comparing it then to the colonial 'town crier' deserving of full First Amendment protection."

An analysis of *Riley* was posted on Federal Evidence Review blog (http://federalevidence.com/blog) on June 30, 2014: "Supreme Court Watch: Ten Key Issues From The Riley Opinion Protecting Cell Phone Data Seized During An Arrest." Numerous other news sites and blogs also discussed *Riley*; the Pace Criminal Justice Center Blog (http://pcjc.blogs.law.pace.edu) has compiled a list.

Consent, Technical Issues Not Included

Riley does not address other issues often involved in cell phone searches, such as alleged consent by the suspect. And while the court did acknowledge some technical issues, such as methods to protect seized phones from "remote wiping" of information, seizures of cell phones may encompass a variety of technical details not at issue in that case. Last March, NPR reported on some of those technical questions and also talked about consent and precautions that phone owners may take to avoid effectual police snooping. On July 2, 2014, The Forensic Resources blog of the North Carolina Office of Indigent Defense Services (http://ncforensics.wordpress.com) posted an item on yet another cell phone related issue, "Using cell tower data to track a suspect's location." A follow up post on cell phone tracking addressed the use of cell site simulators, which are known by a variety of names, including IMSI ("international mobile subscriber identity") catchers or cell site emulators, or brand names, such as StingRays and Kingfishers. That post links to a new guide for criminal defense attorneys, "StingRays: The Most Common Surveillance Tool the Government Won't Tell You About," from the ACLU of Northern California. According to the guide, "[a]n IMSI catcher masquerades as a wireless carrier's base station, thereby prompting cell phones to communicate with it as though it were actually the carrier's base station." The ACLU has an interactive map that provides information about law enforcement agencies that have cell site simulators.

Police Must Tell DWI Suspect that Attorney Called

The Court of Appeals issued *People v Washington* on May 6, 2014, in which the Court considered "the extent to which the police are obligated to advise a drunk driving suspect about an attorney's telephonic intervention before the administration of such a test." The Court found that where a lawyer contacted by an arrested driver's family called the sheriff's department and said that he represented the driver and asked a sergeant to tell officers not to question or test his client, the Breathalyzer results from a test given after the lawyer's call, which the driver was not told of, were properly suppressed. Judge Read dissented. A summary of the decision appears at p. 13.

Marijuana Breathalyzer Prototype Hits Canada; Medical Marijuana Coming to NY

Even as defense lawyers continue to battle the results of alcohol breath tests on several fronts, a whole new set of problems may be on the horizon. A device called the Cannabix, now pending patent and further field testing in Canada, is said to be "a step in the direction long awaited by law enforcement: a bright line test for DUI of marijuana," according to Lawrence Taylor's DUI Blog. With the passage of a medical marijuana law (L 2014, ch 90) here in New York, constricted as it may be, defense lawyers may have to start learning about a whole new set of impaired driving issues. As if problems with the Breathalyzer weren't enough.

DOJ: Federal Officers Should Record Interrogations; Practice Varies in NY

Once a suspect is in custody, the limits on legal interrogation often become an issue. As of July 11, federal suspects, at least, are likely to have their questioning electronically recorded. The Department of Justice has quietly announced that recording is presumed to be the norm. The federal policy change was noted by defense-oriented entities from the National Association of Criminal Defense Lawyers to the law firm Mayer Brown.

Here in New York, practice varies. Back in 2011, the *REPORT* asked on page 4 of the Jan-Mar issue, "What is Happening in YOUR County About Videotaping of Interrogations?," and noted that secret recording of interrogations was something defense lawyers might need to

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ask about. In the June-July 2011 issue, we reported on page 5 that the Division of Criminal Justice Services (DCJS) had announced grants to 22 counties to allow video recording of interrogations. Last November, the Governor announced nearly $700,000 would be made available for the purchase of video interrogation equipment. In January of this year, DCJS sent a memo to "New York State Criminal Justice Executives" announcing that the Municipal Police Training Council has adopted a model policy for recording police interrogations, available to law enforcement through the eJusticeNY Integrated Justice Portal. Yet as far as the Backup Center can determine, recording practices still vary; attorneys with information about recording of interrogations in their jurisdictions are invited to let the Backup Center know.

Certainly the 2008 interrogation of Adrian Thomas was recorded, and provided the record on which the Court of Appeals reversed his conviction in February based on the numerous, repeated lies told to Thomas in the over nine hours of recorded questioning. Whatever the short-term effect the not guilty verdict at Thomas's retrial might have on electronic recording of interrogations, the trend toward mandated electronic recording of custodial questioning, which NYSDA's Board of Directors has formally supported since 2003, appears to continue.

Body-Worn Cameras

Recording of police interactions with suspects (and others) in arenas other than interrogation has drawn press attention and raised legal issues for more than a decade. In 2001, *Newsday* reported on a proposal to equip Nassau patrol cars with video and audio recording equipment following allegations of sexual abuse by officers; the proposal received a "mixed" reaction at best. Now, a webpage intended to help police departments get grant funding for a different form of police recording—body-worn cameras—notes that police "departments have been using the in-car cameras for years …." Nassau County is one site of a pilot program requiring use of body-worn cameras, according to a June 4, 2014 article in *Newsday*; the federal judge in a civil suit challenging New York City's stop-and-frisk policies has ordered the police department there to start a body-worn camera pilot program as well. Responding to the increased interest in body-worn cameras, the Sensor, Surveillance, and Biometric Technologies Center of Excellence has released a market survey of almost 20 cameras to help agencies compare the camera models.

Use of this equipment is not limited to police. Some county probation departments use body-worn cameras for home visits and other field work; the practice was discussed briefly at the Apr. 23, 2014 Probation Commission meeting. Also, some defense investigators use these devices. Attorneys employing those investigators should develop policies regarding the appropriate use of such cameras and other similar devices.

Recording of Police Action by Civilians

When civilians rather than the police themselves record police activity, other issues arise that may wind up in defense attorneys' hands. As one commentator has noted, while "it seems a legal no-brainer that citizens have the right to film and record police officers performing their official duties in public places and to disseminate the resulting images to others as they see fit," police do not always see it that way. "'[P]eople are still being arrested for recording police officers.'" A website, Photography is Not a Crime, posts such instances. This in spite of a Department of Justice letter in 2012 stating the need for policy and training requirements consistent with important First, Fourth, and Fourteenth Amendment rights.

Recently, a federal court said in a civil case that "a traffic stop does not extinguish an individual's right to film," although "[r]easonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them." *Gericke v Begin*, No. 12-2326 (1st Cir 5/23/2014). The "reasonable restrictions" phrase may constitute "a huge loophole" for police, as the Simple Justice blog asserts. But a $200,000 settlement recently reached between Suffolk County and a journalist who was arrested for filming a police chase may give officers pause. Whether such ruling will protect even Harlem stop-and-frisk activist Jazz Hayden, who was arrested on weapons charges—later dismissed—for a pen-knife and commemorative ball bat found in his car by officers who knew he had been filming police encounters and posting them on the Copwatch page of his "All Things Harlem" website, remains to be seen.

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

Federal Civil Action Against Police Officer Not Brady

The Court of Appeals has ruled that a prosecutor's failure to disclose to the defense that a homicide detective who interrogated the defendant was named in a sealed federal civil action alleging police misconduct in an unrelated case did not violate *Brady v Maryland* (373 US 83 [1963]). Three separate opinions were filed in *People v Garrett* (2014 NY Slip Op 04876 [6/30/2014]). Chief Judge

Lippman concurred on the ground that the impeachment evidence in question was not material. He asserted, however, that the detective's knowledge of the pending suit should be imputed to the prosecution; the majority had found the knowledge was not imputed. Judge Smith wrote a concurrence to address his dislike of *People v LaFontaine* (92 NY2d 470 [1998]) dealing with the Court's authority to rule on issues decided in an appellant's favor or not ruled on. A summary of *Garrett* appears at p. 19. A description of the case is posted on the New York Criminal Defense blog (http://newyorkcriminaldefense.blogspot.com).

Parole Issues Continue

In the final 2013 issue of the *REPORT* we noted that proposed regulations had been submitted by the Board of Parole that purported to comply with 2011 legislation requiring the Board to establish written procedures for making decisions about parole release. The proposed regulations received extensive criticism, as the *REPORT* noted at page 3. The Board approved the proposed rule, with no changes, at its Apr. 21, 2014 business meeting. The rule will take effect upon publication in the New York State Register, which had not occurred as of July 9, 2014.

Meanwhile, as noted in the last issue of the *REPORT*, the Court of Appeals will hear cases this fall concerning whether the Board has failed to comply with the 2011 legislation. The brief on behalf of Jorge Linares in *Matter of Linares v Evans* is available through the Court of Appeals' Public Access and Search System (Court-PASS), at https://www.nycourts.gov/ctapps/courtpass.

Recently, a Supreme Court justice in Albany County vacated a Parole Board determination and remanded for a new hearing. The court reviewed, among other items, the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) instrument prepared in conjunction with the petitioner's Parole Board appearance. The Board interview had noted the prisoner's many positive efforts toward rehabilitation, availability of a family living situation upon release, and a risk assessment showing him to be at a low risk of violence or recidivism, but the determination denying release was based only on a finding that the petitioner's crimes had included murder during a robbery and his plea had resolved other robbery cases. The Supreme Court found that "[a]lthough the determination parrots the applicable statutory language, the Board does not even attempt to explain the disconnect between [its] conclusion and petitioner's rehabilitation efforts and his low risk scores." [Footnote omitted.] *Matter of Stokes v Stanford*, 2014 NY Slip Op 50899(U) (Supreme Ct, Albany Co 6/9/2014).

The *Stokes* case, as well as the fight over Parole Board regulations, illustrates the long-standing concern about the Parole Board's practice of effectively "re-sentencing" people in prison for their original crime, giving no credit for progress and change during incarceration. As lawyers and people acting pro se continue to fight for justice in individual cases, advocates for parole justice also seek broader reform. The 2011 legislation has not cured the problem; advocates seek passage of the SAFE Parole Act (S1128/ A4108), which NYSDA has endorsed.

Developments in Family Court and Youth Justice

Changes in Family Courts may impact public defense providers who practice there, their clients, and perhaps others as well.

New Family Court Judgeship Sites Designated

Effective Jan. 1, 2015, nine new Family Court judgeships in New York City—at least one per borough—will come into being; 11 new positions will also be on the ballot this November in Albany, Broome, Chautauqua, Franklin, Nassau, Oneida, Oswego, Schenectady, Suffolk, Ulster, and Westchester counties. An additional five Family Court judgeships will be available upstate (in Delaware, Dutchess, Erie, Monroe, and Warren counties) effective Jan. 1, 2016. The new law, signed by the Governor (L 2014, ch 44), was among those passed in the annual end-of-session rush.

Proponents of the new judgeships hope the change will help alleviate case backlogs and allow more timely resolution of the many types of cases Family Court judges hear, from child welfare and custody to juvenile justice. Ending docket-driven adjournments that work to the disadvantage of parents seeking to reunite their families would certainly be a welcome change. However, if public defense providers lack the attorneys or resources to comply with expected stricter adherence to court Standards and Goals deadlines while performing necessary investigation and other preparation, clients will not be well served. As NYSDA's Executive Director observed to the Daily Gazette on Apr. 13, 2014, the resource needs in Family Court go beyond judges, extending to public defense lawyers representing parents: "'Their case-loads are through the ceiling and there's no relief for them,' Gradess said."

Adolescent Diversion Pilot Programs Evaluated

The Center for Court Innovation just released a report evaluating the court system's Adolescent Diversion Program that was piloted in the five NYC boroughs and four other counties (Erie, Nassau, Onondaga, and Westchester) starting in 2012. Findings include:

- Most counties limited eligibility to misdemeanor offenses, with only two counties (Erie and Nassau)

accepting some defendants charged with felonies; Erie County eligibility included select violent felonies. However, "[l]imiting reforms to misdemeanor defendants will have a minimal effect on reducing criminal conviction and incarceration rates, since the statewide analysis demonstrated that only 4% of misdemeanor defendants receive a criminal conviction and only 4% receive a jail or prison sentence."

- Even controlling for defendant background, on average, the semi-rural/rural regions had the most severe penalties and New York City had significantly lighter penalties than elsewhere.
- "[A]fter controlling for other characteristics, black/African-American and Hispanic defendants faced significantly more severe penalties than white defendants or defendants from other racial/ethnic subgroups."
- Diversion, while effective for high-risk youth, may be counter-productive for low-risk youth and lead to a higher risk of re-arrest.
- "Linking high-risk youth to services in lieu of traditional penalties is strengthened by the statewide analysis, which indicates that convicting 16- and 17-year-old defendants, or sentencing them to jail or prison, does *not* deter future crime."

The issue of how to improve the justice system response to 16- and 17-year-olds in New York was the focus of a Cardozo Law School Symposium, "In Search of Meaningful Systemic Justice for Adolescents in New York," held in April 2013; several articles produced as part of the symposium were published in the Feb. 2014 issue of the Cardozo Law Review, including one by Lisa Schreibersdorf, Executive Director of Brooklyn Defender Services, titled "Bringing the Best of Both Worlds: Recommendations for Criminal Justice Reform for Older Adolescents."

Community-Based Programs Better for Youth than Incarceration

A new report by Youth Advocate Programs says that keeping youth out of detention centers works. Intensive community-based programs that build services around what an individual young person needs and include a crisis/safety plan, individualized services, and ways for youth and their families to have "a voice and choice" demonstrated that incarceration of youth is not the answer. Youth involved in the study ranged in age from 11 to 18.

Discussion of such reports is another reminder that public defense lawyers assigned to represent 16- and 17-year-olds in criminal court are dealing with clients who need to be treated as the youth they are rather than the adults that the system designates them as for criminal charging purposes.

Padilla *Not Retroactive in New York*

Dealing a blow to immigration advocates and attorneys representing clients in post-conviction proceedings, the New York Court of Appeals has held that the US Supreme Court's decision in *Padilla v Kentucky* (559 US 356 [2010]), which requires counsel to advise foreign national clients about the immigration consequences of their cases, does not apply retroactively in New York. *People v Baret*, 2014 NY Slip Op 04872 (6/30/2014). Chief Judge Lippman and Judge Rivera issued strong dissenting opinions, both asserting that fundamental fairness requires that *Padilla* be applied retroactively. As noted in the Jan-Apr 2013 issue of the *REPORT*, the Supreme Court held that *Padilla* did not apply retroactively to convictions that were final before Mar. 31, 2010. *Chaidez v United States*, 133 SCt 1103 (2013). But advocates had hoped the Court of Appeals would apply broader retroactively principles. NYSDA joined a number of other organizations, including the Immigrant Defense Project, and public defense providers in an amicus brief in *Baret*. States are split on retroactivity, with the New Mexico Supreme Court being the most recent high court to hold *Padilla* retroactive. *Ramirez v State of New Mexico*, No. 33,604 (6/19/2014). A summary of *Baret* appears on p. 19.

Sex Offender Registration Act Updates

Second Circuit Rejects Constitutional Challenges to 2006 Amendments to SORA

Last month, the Second Circuit ruled that two parts of New York's 2006 amendments to the Sex Offender Registration Act, specifically the extension of the sex offender registration requirement for level-one sex offenders from 10 years to a minimum of 20 years and the elimination of the ability of level-one offenders to petition for relief from registration, did not violate the plaintiff's constitutional rights, even though the amendments were enacted after his conviction. *Doe v Cuomo*, No. 12-4288 (2nd Cir 6/16/2014).

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

Board of Examiners Position Statement on Risk Assessments in Child Pornography Cases Did Not Amend the Guidelines

In June 2012, the Board of Examiners of Sex Offenders released a Position Statement regarding the scoring of risk factors 3 (number of victims) and 7 (stranger relationship) in child pornography cases, as noted in the Aug-Oct 2012 issue of the *REPORT*. The Court of Appeals has concluded that the Position Statement did not amend the existing SORA Risk Assessment Guidelines and courts are not barred from assessing points under those two risk factors. Courts may assign points under risk factor 3 "based on the number of different children depicted in the child pornography files possessed by an offender," but in evaluating an application for a downward departure, "a SORA court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score and without departing downward might lead to an excessive level of registration." *People v Gillotti*, 2014 NY Slip Op 04117 (6/10/2014). A summary of *Gillotti* appears at p. 16.

Legislative Updates

As the Legislative session drew to a close, the Senate and Assembly passed a number of bills, most of which have not been sent to Governor Cuomo yet. Those bills include an amended version of second-degree aggravated harassment that was enacted in response to the Court of Appeals' decision in *People v Golb* finding that Penal Law 240.30(1) was unconstitutional (A10128).

In addition to the medical marijuana law and the law authorizing new Family Court judgeships discussed above, the Governor has signed a group of bills that is designed to combat the increasing use and abuse of heroin and opioids around the state (L 2014, chs 31-42). The chapter laws include provisions establishing new treatment programs and public health education initiatives regarding use of such drugs and authorizing health care providers to issue non-patient specific prescriptions of naloxone, a heroin overdose antidote, to certified training programs and pharmacies. The following additions to the CPL and Penal Law took effect on June 23, 2014:

- Chapter 31: adds criminal sale of a controlled substance by a practitioner or pharmacist to Penal Law 220.65;
- Chapter 36: creates a new crime of fraud and deceit related to controlled substances (Penal Law 178.26); and
- Chapter 37: adds "criminal sale of a controlled substance by a practitioner or pharmacist" to the enterprise corruption statute (Penal Law 460.10) and the eavesdropping law (CPL 700.05).

A forthcoming issue of the *REPORT* will include the annual Legislative Review.

NYSDA Adds to its Services

Two new staff members have joined the Backup Center, enhancing the services available to public defense lawyers and furthering the Association's mission of improving the quality and scope of public defense services. The approach of our 47th Annual Meeting and Conference (July 20-22) provides an opportunity for NYSDA members and others to meet the new staff and learn about our growing capabilities.

Family Court Staff Attorney- Lucy McCarthy

Lucy J. McCarthy spent a decade in both Criminal and Family Court practice for the Office of the Defender General (Vermont) before taking on the newly-created position of Family Court Staff Attorney. NYSDA is pleased to provide expanded support to attorneys who represent parents in family court.

Public Defense Investigation Support Project- Yasmin Davis

Yasmin Davis is the new, full-time Director of the Public Defense Investigation Support Project. A Bronx native, Yasmin worked as a staff attorney at The Legal Aid Society, Criminal Defense Practice in their Bronx and Staten Island offices and as a staff attorney at the Public Defender Service for District of Columbia before arriving at NYSDA. Prior to law school, she spent three years as an investigator for the Bronx Defenders. Yasmin is picking up the work of the Investigation Support Project where former Director John Cutro left off.

Restorative Practice

John is now NYSDA's Restorative Practitioner, helping NYSDA and others learn ways in which restorative practice can provide better outcomes for clients and those who have been harmed by their actions. Deploying his extensive background in trauma-informed restorative justice work, John has been the key to NYSDA's presentation of "Facilitating Restorative Processes" training as well as aiding public defense clients and lawyers directly.

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The GERD Defense in a DWI Case (Getting Enough Reasonable Doubt)

By Steven B. Epstein*

Gastroesophageal reflux disease, commonly referred to as GERD, is a digestive disorder that affects an estimated 30 million Americans annually.[1] Attorneys who handle DWI cases should screen clients for GERD since GERD can compromise a person's ability to give a forensically reliable breath sample.

Most individuals charged with DWI offenses in New York will be asked to submit to a breath test to measure their blood alcohol concentration (BAC). Breath testing requires the collection and testing of a sample of deep lung or alveolar air. Simply stated, a person who has GERD is unable to provide an uncontaminated sample of alveolar air. That contamination causes falsely high BAC measurements.

This article will address the science of the disease, discuss how it affects the reliability of a breath test, and suggest ways the DWI practitioner can utilize it as a defense at trial.

What GERD Does to the Digestive System

GERD affects the lower esophageal sphincter (LES), the ring of muscle between the esophagus and stomach. In normal digestion, the LES opens to allow food to pass into the stomach and closes to prevent solids, liquids, and gases from flowing back into the esophagus. Gastroesophageal reflux occurs when the LES is weak or relaxes inappropriately, allowing the stomach's contents to flow up into the esophagus. Common symptoms of the disease include heartburn or acid indigestion. However, the passage of gases, liquids, or solids from the stomach into the oral cavity occurs continuously, regardless of the presence of symptoms such as heartburn.

Impact on Breath Test Results

GERD is relevant in evaluating the reliability of a breath test result because the alveolar air sample collected from a person with GERD who has consumed a quantity of alcohol may be contaminated with gas from the stomach, and may be contaminated with liquid or, even worse, solids that have a vastly higher concentration of alcohol than the alveolar air. The result is an artificially inflated BAC.

The New York State Department of Health, which promulgates rules and regulations concerning breath analysis techniques and methods, has long recognized the importance of obtaining a sample of uncontaminated air. Specifically, 10 NYCRR 59.5 (Breath analysis; techniques and methods) requires that, before collecting a breath sample, the tester observe the subject for a minimum period of 15 minutes (the "deprivation period") to be certain the subject has not ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked or been allowed to place anything in his or her mouth. This is done so that the breath sample of alveolar air is free of contamination from any other source. But those with GERD cannot have a successful deprivation period because they are not able to completely close their esophageal or laryngeal sphincter muscle and thus experience continuous regurgitation.

It is essential that any attorney representing a client on a DWI case where a breath test was administered ask the client if he has ever been diagnosed with GERD and, if so, obtain the client's complete medical records. In doing so, attorneys should be sure to determine whether an endoscopy was ever performed, as this test "has long been the primary tool used to evaluate the esophageal mucosa in patients with symptoms suspected due to GERD."[2] An endoscopy will also show the amount of deterioration of the lower or upper esophageal sphincters. Deterioration of the upper esophageal sphincter is also of concern since it is closer to the air sample collected. Since GERD is a chronic condition, endoscopy results are relevant regardless of whether the endoscopy was done contemporaneously with the client's arrest, so long as it predates the breath test. If an endoscopy has not been done, the attorney should review the client's medical records to determine if the client was examined by a physician and prescribed a course of medications based on a diagnosis of GERD.

Though GERD is a continuous process that compromises a person's ability to provide an uncontaminated sample of alveolar air, there are things that can exacerbate reflux, including the ingestion of alcohol, obesity, and the stress attendant to the client's arrest, which further affects the reliability of the sample obtained.

Also of note in any breath test involving a subject with GERD is the pressure caused by a forced exhalation of breath attendant with giving a breath sample. The client is instructed to take a deep breath and then forcefully exhale into the breath tube until near maximum exhalation. This forced exhaled volume is necessary to collect an acceptable breath sample. Forced exhalation occurs via abdominal muscle contraction, which increases pressure surrounding the stomach. When applied to breath testing, Boyle's Law, which describes the inverse relationship between the pressure and volume of gas, shows that the increasing pressure around the stomach causes a volume of ethanol vapors within the stomach to flow out. Additionally, the external pressure on the

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stomach caused by having to lean over to give a breath sample can be an additional aggravating factor.[3]

Presenting GERD Evidence

From an evidentiary perspective, attorneys must be prepared to meet the challenges of a prosecutor for failure to comply with discovery obligations. Any medical records you intend to introduce may be discoverable pursuant to Criminal Procedure Law 240.30(a).

Also be prepared to address any challenges by the prosecutor seeking to preclude testimony related to GERD on the basis that the evidence, although technically relevant, is too "'slight, remote, or conjectural to have a legitimate influence in determining the fact in issue' …." *People v Lent*, 29 Misc 3d 14 (App Term, 2d Dept 2010).

Since the subject of the proffered testimony concerns human physiology and the effects of diseases on the respiratory system, the reliability of the principle or protocols used to arrive at conclusions in the scientific community at large is not at issue. The testimony is: (1) relevant to an issue in the case; (2) proffered by a qualified expert; (3) on a topic beyond the ken of the average juror; and (4) based on principles that are generally accepted as reliable by the scientific community, which include published studies by experts in their field. *People v LeGrand*, 8 NY3d 449 (2007).

Despite meeting the above mentioned requirements for expert testimony, those without a scientific understanding of GERD may attempt to misstate the issue. The issue is not whether the client can establish as a foundation that he had "an episode" of GERD at the time of the breath test. So long as you can show that the client had been diagnosed with GERD prior to the breath test, an expert who reviews the client's medical records can testify, preferably along with the treating physician, that: (a) reflux occurs continuously in a patient with GERD; (b) continuous reflux is, in essence, the equivalent of regurgitation specifically referenced in 10 NYCRR 59.5; and (c) the defendant is, therefore, an unsuitable breath test candidate.

Police officers often testify that the client's breath smelled of alcohol at the time of the breath test. This testimony can support the defense theory because it suggests that alcohol still in the client's stomach in liquid and gas forms was going back into the esophagus and mouth, indicating that the LES was open at the time of the breath test.

The National Highway Traffic and Safety Administration formally recognized the scientific community's acknowledgment of the issue of GERD and how it can affect breath testing. In its second edition of *Claims and Responses to Common Challenges and Defenses in Driving While Impaired Cases*, it advised prosecutors to argue that "[t]he defendant should have a diagnosis of GERD before the defense is even relevant," which is an admission that a GERD diagnosis can be relevant in cases involving a breath test.[4]

Several studies conducted by professionals in the field of forensic toxicology have concluded that esophageal reflux causes considerable distortion of the breath alcohol value. *See, eg*, David Wells and John Farrar (Office of Forensic Medicine, and Drager Australia, Melbourne, Victoria Australia), *Breath-Alcohol Analysis of a Subject with Gastric Regurgitation*, 11th International Conference on Alcohol, Drugs, and Traffic Safety, Chicago (1989); Alan W. Jones, *Gastric Reflux, Regurgitation, and the Potential Impact of Mouth-Alcohol on the Results of Breath-Alcohol Testing*, 22 DWI Journal, Law & Sci 1 (2007). A.W. Jones, one of the leading experts in the field of breath testing, wrote in his article *Reflections on the GERD Defense*, which appeared in the September 2005 issue of DWI Journal, Law & Science[5]: "The most compelling evidence that GERD might be a potential problem in connection with evidential breath-alcohol testing is related to the so-called 'mouth-alcohol effect.'"

But attorneys should be aware of a 1999 study about the reliability of breath tests in individuals with GERD that prosecutors sometimes rely on to rebut the expert testimony, which involved a total of 10 subjects, five male and five female. The study concluded:

> [T]he risk of a person experiencing gastric reflux during the time he or she participates in a breath-alcohol test procedure is very low. Even if reflux does occur, our study shows that it is not very likely that an abnormally high BrAC reading will be obtained. However, the mandatory 15 min observation period still remains an important element of the evidential breath-alcohol test protocol because this can help to rebut allegations that gastric reflux occurred. Likewise the routine practice of analyzing duplicate breath samples is an additional safeguard in this respect ….[6]

While there appear to be no published decisions in New York directly on the issue of whether expert testimony on GERD is admissible, the issue of mouth alcohol certainly is relevant. *See People v McDonough*, 132 AD2d 997 (4th Dept 1987).

States other than New York have admitted expert testimony specifically related to GERD. *See State v Rebisz*, No. A-0058-08T4, 2009 WL 2223475, 2009 NJ Super Unpub LEXIS 1964 (NJ Super Ct App Div July 28, 2009); *State v Moroney*, No. 94,087, 2006 WL 3877558, 2006 Kan App Unpub LEXIS 449 (Kan Ct App December 29, 2006). Notably in an Illinois case, *People v Bonutti* (817 NE2d 489, 492 [Ill Sup Ct 2004]), the defendant presented medical testimony to support his claim that he suffered from and had been treated for GERD. The court found that the expert's testimony confirmed that GERD causes acid and fluid from the stomach to travel up the esophagus to the back of the throat, that reflux episodes are often silent and

unnoticeable to an outside observer, and that "reflux" is synonymous with "regurgitation." On the basis of this testimony, the trial court concluded that the defendant met his burden of demonstrating that the breath-alcohol test results were unreliable. Accordingly, those test results were suppressed, and suppression was affirmed by the Illinois Supreme Court. *Id*. at 492-494.

Conclusion

Complications of GERD can include difficulty swallowing, regurgitation, discomfort, and an increased risk of cancer. These symptoms typically result in seeing a doctor for care. A doctor can treat this disease once it is diagnosed, but a lawyer representing a client who has GERD can do nothing about it unless he is aware of the diagnosis, knows its impact on the reliability of the breath sample, and can utilize that knowledge to **G**et **E**nough **R**easonable **D**oubt! ⚖

Endnotes

1. American Society for Gastrointestinal Endoscopy, *ASGE Encourages Patients to See a Physician if They Experience Symptoms Suggestive of GERD* ("It is estimated that GERD affects up to 30 million people in the U.S., with 10 percent of those individuals experiencing symptoms on a daily basis."), available at http://www.asge.org/press/press.aspx?id=4090; American College of Gastroenterology, Patient Education & Resource Center, *Acid Reflux* ("Over 60 million Americans experience acid indigestion at least once a month and some studies have suggested that over 15 million Americans experience acid indigestion daily."), available at http://patients.gi.org/topics/acid-reflux/.

2. American College of Gastroenterology. *Practice Guidelines, Diagnosis and Management of Gastroesophageal Reflux Disease, Establishing the Diagnosis of GERD, Recommendations*, available at http://gi.org/guideline/diagnosis-and-managemen-of-gastroesophageal-reflux-disease/.

3. Henry L. Bockus, *Gastroenterology*, Chapter 5 "Heartburn, Regurgitation, and Dysphagia" (4th ed. 1985).

4. National Highway Traffic Safety Administration, *Challenges and Defenses II: Claims and Responses to Common Challenges and Defenses in Driving While Impaired Cases* (March 2013), available at www.nhtsa.gov/staticfiles/nti/pdf/811707.pdf.

5. Alan W. Jones, *Reflections on the GERD Defense*, 20 DWI Journal, Law & Science 3 (September 2005).

6. Stergios Kechagias et al., *Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease*, 44 J Forensic Sci 814 (1999).

Conferences & Seminars

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/duimeeting

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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
Contact: NCADRS: tel (419) 865-0513; website www.falseallegation.org/

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Convictions of the Innocent
Dates: September 19, 2014
Place: Manhattan
Contact: NYSACDL: tel (518) 443-2000 (Jennifer Van Ort); website www.nysacdl.org

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Sponsor: **New York State Defenders Association**
Theme: **North Country Trainer**
Date: **September 26, 2014**
Place: **Canton, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: National Legal Aid and Defender Association
Theme: Annual Conference—Blueprint for Justice: Designing a New Paradigm for Impact
Dates: November 12–15, 2014
Place: Arlington, VA
Contact: NLADA: tel (202) 452-0620; website www.nlada.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: Zealous Advocacy in Sexual Assault & Child Victims Cases
Dates: November 20–21, 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 ⚖

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.

Appeals and Writs (Scope and Extent of Review)

Civil Practice

Police (Misconduct)

Tolan v Cotton, 572 US __, 134 SCt 1861 (5/5/2014)

"[T]he court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion" in this lawsuit alleging excessive police force, and the lower court opinion "reflects a clear misapprehension of summary judgment standards in light of our precedents." The judgment is vacated "so that the court can determine whether, when [the plaintiff's] evidence is properly credited and factual inferences are reasonably drawn in his favor, [the defendant police sergeant's] actions [in shooting the plaintiff] violated clearly established law."

Concurrence in the Judgment: [Alito, J] Granting review on one case from the very large category of cases in which the question is whether evidence "is just enough or not quite enough to support a grant of summary judgment" sets a precedent that could "very substantially alter the Court's practice."

Sentencing (Restitution)

Robers v United States, 572 US __, 134 SCt 1854 (5/5/2014)

Where the defendant submitted fraudulent loan applications that led banks to loan him money and take mortgages on properties, and the banks foreclosed on the mortgages when the defendant failed to make payments, the fact that the banks took title to the properties did not constitute "return" of "any part of the property" under the federal Mandatory Victims Restitution Act of 1996. "[A] sentencing court must reduce the restitution amount by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it." It did not matter that, due to a falling market, the houses were worth more when the banks took title than when they were sold.

Concurrence: [Sotomayor, J] This analysis applies only where a victim intends to sell but encounters reasonable delay, not where "a victim chooses to hold collateral rather than to reduce it to cash within a reasonable time …."

Death Penalty (Penalty Phase) (States [Florida])

Developmentally Disabled (Defenses)

Hall v Florida, 572 US __, 134 SCt 1986 (5/27/2014)

Florida's rigid rule that an IQ score above 70 forecloses further exploration of whether execution of a prisoner is constitutionally barred under the Eighth and Fourteenth Amendments "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." The rule "disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities … while refusing to recognize that the score is, on its own terms, imprecise." Most states reject the strict cutoff at 70. Experts have agreed for years that IQ scores should be read not as a fixed number but as a range, and there is a consistent trend to consider a test's standard error of measurement (SEM).

Prior opinions of the Court have used the term "mental retardation" in discussion of this issue; this opinion uses the term "intellectual disability" in recognition of changing terminology.

Dissent: [Alito, J] Under *Atkins v Virginia* (536 US 304 [2002]) no single method for identifying intellectually disabled defendants was found to be mandated by the Eighth Amendment; today the court adopts a conceptually unsound uniform national rule likely to result in confusion.

Appeals and Writs (Judgments and Orders Appealable)

Double Jeopardy (Jury Trials)

US Supreme Court *continued*

Judgment (Acquittal)

Martinez v Illinois, 572 US __, 134 SCt 2070 (5/27/2014)

Where the prosecution, which was not prepared for trial, declined to present any evidence after the court swore in the jury, leading the court to grant a directed verdict of not guilty, the Illinois Supreme Court manifestly erred in allowing the prosecution's appeal from that verdict given the bright line rule that jeopardy attaches when a jury is sworn. The trial court's entry of directed findings of not guilty—acquitting the defendant—ended the trial in a way that barred his retrial; an acquittal cannot be reviewed without putting a defendant twice in jeopardy. Had the prosecution accepted the court's invitation to move for dismissal before swearing of the jury, double jeopardy would not have barred recharging the defendant here.

[***Ed. Note:*** *At the hyperlinked site, the per curiam opinion in this case begins on p. 12.*]

Civil Practice

Police (Misconduct)

Plumhoff v Rickard, 572 US __, 134 SCt 2012 (5/27/2014)

While denial of summary judgment is usually not a final decision immediately appealable, that rule does not apply to claims of qualified immunity. The denial of summary judgment to police officers who were sued after they shot the driver of a vehicle who fled from a traffic stop resulting in a high-speed chase is reversed; "the officers did not violate the Fourth Amendment." Alternatively, the officers "were entitled to qualified immunity because they violated no clearly established law"; at the time of the incident, "it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger."

Civil Rights Actions

Speech, Freedom of

Wood v Moss, 572 US __, 134 SCt 2056 (5/27/2014)

Assuming without deciding that "the First Amendment give[s] rise to an implied right of action for damages against federal officers who violate" it, review of the Ninth Circuit decision here reveals error. The court found that Secret Service agents lacked qualified immunity in a lawsuit claiming unconstitutional viewpoint-based discrimination, but no "clearly established" law existed that would control the agents' actions when the President's motorcade took a detour. A "'valid, even … overwhelming, interest in protecting the safety of'" the President exists, and the protesters' argument that the agents lacked any valid security reason for moving the protesters warrants rejection. A map of the locations at issue undermines the claim that viewpoint discrimination was the sole reason that the agents removed protesters, after they moved near a restaurant to which the President had unexpectedly repaired, to a location two blocks away ("beyond handgun or explosive reach") while the President's supporters were allowed to remain across the street only a half-block away. For some period, "the protesters were at least as close to the President as were the supporters …."

Constitutional Law (United States Generally)

Federal Law (Crimes)

Bond v United States, 572 US __, 134 SCt 2077 (6/2/2014)

"Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and" accordingly "does not cover the unremarkable local offense at issue here," ie "an amateur attempt by a jilted wife to injure her husband's lover" resulting in nothing more than "a minor thumb burn readily treated by rinsing with water." The assumption that Congress usually preserves the constitutional balance between the federal and state governments is grounded on the constitution's very structure; "'[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.'" The "global need to prevent chemical warfare does not require the Federal Government … to treat a local assault with a chemical irritant as the deployment of a chemical weapon."

Concurrence in the Judgment: [Scalia, J] The Court shirks its duty to say what the law, including the constitution, is and performs instead Congress's job of defining a crime and ordaining its punishment. As unsettling as the law here is, its meaning is plain and the Court has no authority to amend it; I would hold that its application to Bond's behavior was unconstitutional.

Concurrence in the Judgment: [Thomas, J] The statute at issue "regulates local criminal conduct that is subject to the powers reserved to the States." The Necessary and Proper Clause should not be read to defy the principle that the federal government is one of limited powers. And the treaty power is itself limited. It "can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs."

US Supreme Court *continued*

Concurrence in the Judgment: [Alito, J] Insofar as the Chemical Weapons Convention "may be read to obligate the United States to enact domestic legislation criminalizing conduct … which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power."

Federal Law (Crimes)

Weapons (Firearms)

Abramski v United States, No. 12–1493 (6/16/2014)

Someone buying a gun from a federally-licensed gun dealer who falsely reports on Form 4473, which purchasers must fill out, that the gun is not being purchased on behalf of another, may be punished for violation of federal statutory law regarding false statements in connection with firearm transactions, ie, 18 USC 922(a)(6) and 924(a)(1)(A). The argument that federal law looks only at whether the at-the-counter purchaser may legally acquire a gun "would virtually repeal" the core provisions of the gun law. That the hidden purchaser is eligible to own the gun does not make the punishment of the straw purchaser's falsehood improper. And a false answer on the form does pertain to information a licensed dealer is required to maintain, so the falsification provisions apply.

Dissent: [Scalia, J] No provision of the gun law prohibits one person, eligible to receive and possess a gun, from buying a firearm for another who is also eligible under the law; the false statement at issue is therefore not a material one. The agency that enforces the gun law read it not to apply in this type of situation for 25 years, and the rule of lenity also defeats application of the false statement provision here. The law did not require the dealer to record the statement as to buying the gun for someone else, so the punishment provision aimed at false statements regarding information that is required to be recorded and maintained did not apply.

Federal Law (Crimes)

Fraud

Loughrin v United States, No. 13–316 (6/23/2014)

The government need not show that a defendant charged with violating 18 USC 1344(2), a provision of the federal bank fraud statute, intended to defraud a bank. A defendant must be shown to have intended to obtain, by false or fraudulent pretenses, representations, or promises, moneys or property owned, controlled, or in the custody of a financial institution. The word "or" separates 1344(2) and 1344(1), which exists specifically to prohibit defrauding financial institutions; the defendant's reading of 1344(2) would make it a mere subset of 1344(1), and also controverts more general canons of statutory interpretation. The interpretation of similar language in the mail fraud statutes involved very different textual differences and historical circumstances. And applying 1344(2) here does not extend it to cover every fraud that happens to involve a check. Convincing a victim to pay for fraudulent merchandise using a perfectly valid check would not be covered; here, the use of altered checks met the "by means of" language of 1344(2).

Concurrence in Part, Concurrence in the Judgment: [Scalia, J] "I certainly agree that this statute must be interpreted, if possible, in a manner that will not make every fraud effected by receipt of a check a federal offense. But deciding this case does not require us to identify that manner, and I would leave that for another case."

Concurrence in Part, Concurrence in the Judgment: [Alito, J] Dicta in the Court's opinion indicates that the statute requires a "*mens rea* of purpose." But "[t]he statute requires only that the objective of the *scheme* must be the obtaining of bank property, not that the *defendant* must have such an objective." But in large criminal ventures, an individual's purpose may diverge from the objective of the overall scheme.

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

Riley v California, No. 13–132 (6/25/2014)

Police officers must generally secure a warrant before searching the information on a cell phone found in the possession of a person at the time of arrest. The physical attributes of the phone can permissibly be examined for threats to officer safety, but digital data on such phones "cannot itself be used as a weapon to harm" officers or effectuate escapes. Threats from outside the arrest scene, such as information that an arrestee's confederates are approaching, are better addressed through case-specific exceptions like that involving exigent circumstances, not a broad exception for cell phones. Arguments regarding "remote wiping" of information and data encryption as grounds for allowing warrantless searches of digital information on cell phones failed to show these problems are prevalent. It is not clear that warrantless searches would be effective against the latter, and the former can be avoided through the use of "Faraday bags" that isolate phones from radio waves. The information on modern cell phones implicates privacy concerns far beyond those addressed in precedents regarding searches of physical items—phones store many different types of information, enormous quantities of information, and information dating far into the past. "Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional [physical records] case." Further, cell phones

US Supreme Court *continued*

may access information not stored on the devices themselves. Proposed government options are flawed and contravene the preference for categorical rules.

Concurrence in Part, Concurrence in the Judgment: [Alito, J] Searches of arrested individuals serve the need to obtain probative evidence, not just to protect police and preserve evidence. Still, the capabilities of cell phones call for "a new balancing of law enforcement and privacy interests." The question here may be reconsidered if legislation is enacted drawing reasonable distinctions based on information categories or other variables.

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 (Right to Counsel)

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

People v Washington, 2014 NY Slip Op 03190 (5/6/2014)

The limited statutory right of people facing alcohol-related driving charges 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." Where a lawyer intervened by phone on the defendant's behalf before breathalyzer testing had begun, the police should have told the defendant about the lawyer's call and the test was administered in violation of *People v Gursey* (22 NY2d 224 [1968]).

Dissent: [Read, J] In the absence of strong public policy reasons, none of which are advanced or apparent here, the holding in *Gursey* should not be extended beyond circumstances where the defendant requests the assistance of counsel. This decision trades "a limited and clear rule for a broader one bound to complicate and delay time-sensitive testing and generate questions of fact …."

Contempt

Evidence (Sufficiency)

People v Webb, 23 NY3d 937, 986 NYS2d 878 (5/6/2014)

Viewed in the light most favorable to the prosecution, "the evidence was legally insufficient to establish a conviction for" first-degree criminal contempt.

[***Ed. Note:*** *This decision affirms* People v Webb *(108 AD3d 1064 [4th Dept 7/5/2013]).*]

Evidence (Sufficiency) (Weight)

White Collar Crime

People v Kancharla, 2014 NY Slip Op 03295 (5/8/2014)

The Appellate Division failed to properly consider the elements of enterprise corruption under controlling caselaw, the evidence sufficiently established the defendants' commission of that crime, and the weight of the evidence determination must be reassessed under the applicable statutory standards. Members of the alleged criminal enterprise, the "Testwell Group," consisting of Testwell Laboratories and a number of its officers and employees, were alleged to have committed, or allowed some employees to engage in, many illegal acts—"falsification of test results, improper inspections of construction projects and double-billing of clients." Five "distinct, but interrelated, criminal schemes related to five categories of Testwell Laboratories' material testing services," were alleged. The Appellate Division's conclusion "that 'the People failed to introduce any evidence of a leadership structure, overall planning of the criminal enterprise, or any communication between Kancharla, Barone, and any of the Testwell employees in furtherance of the criminal enterprise'" was erroneous as a matter of law. The "weight of the evidence analysis was infected by the same error of law …."

Evidence (Hearsay)

Sex Offenses (Civil Commitment)

Matter of State of New York v Charada T., 2014 NY Slip Op 03293 (5/8/2014)

Allowing an expert witness to present unreliable hearsay about a crime with which the respondent in this Mental Hygiene Law article 10 proceeding was never charged constituted error. That the information came from a presentence report did not make it inherently reliable, and the allegations were not supported by any other evidence. The error was harmless; the State focused its case on three violent rapes of which the respondent was convicted and the jury determining that the respondent suffers from a mental abnormality heard only limited testimony about the additional, uncharged rape.

The respondent's argument that statements in sex offender treatment evaluations constituted unreliable hearsay was not preserved; trial counsel made only a general, pro forma objection.

NY Court of Appeals *continued*

Evidence (Hearsay) (Prejudicial)

Sex Offenses (Civil Commitment)

Matter of State of New York v John S., 2014 NY Slip Op 03292 (5/8/2014)

Allowing, at a Mental Hygiene Law article 10 trial, hearsay testimony that an expert considered allegations from 1968 of criminal behavior in forming an opinion was not error. While there was ultimately no valid adjudication of guilt on the old allegations, as the respondent's convictions of the charges were overturned and he was not reprosecuted, the respondent was never acquitted and the evidence providing probable cause for the indictment was not called into question; the hearsay could be found sufficiently reliable, especially as the allegations involved five different accusers and a similar pattern. The article 10 court reasonably found the probative value of the hearsay substantially outweighed its prejudicial effect, and also took steps to limit the latter.

It was not error for the record of those allegations to be unsealed. Provisions of the sealing statute do not apply, as Mental Hygiene Law 10.08(c), supersedes Criminal Procedure Law 160.50 and 160.60.

The court committed harmless error in allowing basis hearsay testimony about uncharged allegations of a 1978 rape culled from a presentence report and supported by no other evidence.

The claim that the "evidence was insufficient to show that antisocial personality disorder is currently impacting him in a manner that results in both a predisposition to commit sex offenses and a serious difficulty controlling the behavior" is rejected.

Dissent: [Rivera, J] Admission of hearsay related to criminal records sealed after a conviction was vacated for violation of the respondent's constitutional rights violated due process. "In essence, the majority treats the lack of an acquittal as the functional equivalent of proof of guilt."

Dissent: [Smith, J] Being constrained to apply *Matter of State of New York v Floyd Y.* (22 NY3d 95 [2013]), I join Judge Rivera's dissent.

The respondent did not present what would seem to be a strong argument, ie "that a civil commitment under Mental Hygiene Law article 10 may not be based solely on a diagnosis of antisocial personality disorder."

Insanity (Post-commitment Actions)

Matter of Allen B. v Sproat, 2014 NY Slip Op 03427 (5/13/2014)

Criminal Procedure Law 330.20 does not bar inclusion of 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 has been moved out of secure confinement. That provision allows the New York State Office of Mental Health to seek judicial approval of a mandatory psychiatric evaluation in a secure facility if the defendant "fails to comply with the conditions of his release and refuses to undergo voluntary examination."

Dissent: [Lippman, CJ] 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) ...."

Appeals and Writs (Preservation of Error for Review)

Trespass (Defenses) (Evidence)

People v Finch, 2014 NY Slip Op 03424 (5/13/2014)

Where a defendant argued before trial that the facts alleged by the prosecution do not constitute the charged crime, and the court definitively rejected that argument, the "defendant need not specifically repeat the argument in a trial motion to dismiss in order to preserve the point for appeal." Neither authority nor common sense support requiring a defendant to make an already-rejected argument whenever a new count is added. The cases relied on by the dissent do not address the precise issue here, and the decision here reaffirms the importance of the preservation rule while avoiding an overbroad application that could harm factually innocent defendants. The argument made by the defendant has merit; his conviction for resisting arrest must be reversed. The mother of the defendant's child had a right to invite the defendant onto the grounds of the housing property where she lived and the prosecution was well aware that this was the substance of the defense offered to the charges against the defendant. There is no need to reconsider here the decision in *People v Hines* (97 NY2d 56 [2001]). While "[t]he question of when non-residents of public housing may be treated as trespassers is complicated," the arresting officer here had been advised of facts showing that the defendant was not a trespasser at this location a month earlier.

Dissent: [Abdus-Salaam, J] "[T]he majority seems to believe that defendant specifically argued that his future arrest would be unlawful, and that he would be blameless for resisting it, weeks before it happened."

Dissent: [Read, J] "I am optimistic that today's adventure in result-oriented decisionmaking will be looked upon in retrospect as an aberration, not a harbinger."

Constitutional Law (New York State Generally) (United States Generally)

NY Court of Appeals *continued*

Harassment (Defenses) (Elements) (Evidence)

Speech, Freedom of

People v Golb, 2014 NY Slip Op 03426 (5/13/2014)

The defendant's Internet campaign to "attack the integrity and harm the reputation" of certain individuals in academia led to the defendant's conviction of 30 of 31 counts submitted to the jury, including identity theft, criminal impersonation, forgery, unauthorized use of a computer, and aggravated harassment; the convictions on 10 counts are vacated and the counts dismissed. "[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 and does not use the accounts cannot be convicted of that crime. One email sent from one such account that merely asked the recipient her opinion on differing theories and whether she planned to answer an academic critique did not prove the requisite intent to harm.

The second-degree aggravated harassment statute, Penal Law 240.30(1)(a), is unconstitutionally vague and overbroad.

As to the unauthorized use of a computer counts, the defendant argued that as an alumnus and member of a library program he had permission to access university computers while the prosecution argued that using the computers to commit a crime could not be authorized use; the statutory language does not appear to encompass the conduct here.

Damning emails sent in another's name to NYU addresses did "not constitute the creation or falsification of an NYU business record" as that term is defined for use here.

Dissent in Part, Concurrence in Part: [Lippman, CJ] "[T]he particular counts of identity theft with which defendant was charged in the indictment's top two counts were not sufficiently proved." However, I disagree "with the majority as to its dismissal of only some of the indictment's criminal impersonation counts and its determination to leave defendant's third-degree forgery convictions undisturbed." The impersonation statute as written criminalizes a vast amount of constitutionally protected speech.

Juveniles (Delinquency)

Weapons (Defenses) (Possession)

Matter of Antwaine T., 2014 NY Slip Op 04042 (6/5/2014)

The Appellate Division erred in finding the delinquency petition defective; while a machete has utilitarian purposes, "the arresting officer's description of the 'machete', with its 14-inch blade, being carried by respondent late at night on a street in Brooklyn, adequately states 'circumstances of … possession' … that support the charge that defendant was carrying a weapon" within the meaning of Penal Law 265.05, proscribing "a juvenile's possession of 'any dangerous knife.'"

Accusatory Instruments (Sufficiency)

People v Dumay, 2014 NY Slip Op 04038 (6/5/2014)

Defense counsel's statement, "'So waive,'" made when the court asked at the plea whether the defendant waived prosecution by information, effectively communicated the defendant's choice to waive the right to ensure a legally sufficient case could be made against him as to the charged misdemeanor. Nothing in the Criminal Procedure Law or caselaw supports the contention that a defendant cannot waive prosecution by information when the case was initiated by information rather than by complaint. Allowing a defendant to later appeal a sufficiency argument abandoned by guilty plea through an appellate challenge to the information after waiving prosecution thereby would undermine the finality of convictions. A misdemeanor complaint need not meet the standard of an information but "need only set forth facts that establish reasonable cause to believe that the defendant committed the charged offense …." The averment of the arresting officer here "supplies enough evidentiary facts to provide reasonable cause to believe that defendant obstructed a police officer from performing an official function."

Dissent: [Pigott, J] Because "[a] reasonable person would not readily infer from the accusatory instrument that he stood accused of a crime involving the intent to prevent a police officer from carrying out his official duties," the facts in "the accusatory instrument failed to give defendant notice sufficient to enable preparation of a defense."

Driving While Intoxicated (Evidence)

Evidence (Instructions)

People v Fratangelo, 2014 NY Slip Op 04041 (6/5/2014)

The opinion of a defense expert, given in a prosecution for drunken driving, that the defendant's blood alcohol content (BAC) was below the statutory threshold, based on the defendant's testimony as to when she finished drinking and the rate alcohol is absorbed into the bloodstream, is not "prima facie evidence" that the defendant was not intoxicated; therefore, the defendant was not entitled to the "prima facie evidence" instruction she requested. A defendant is entitled to a requested instruc-

NY Court of Appeals *continued*

tion that the jury may find that the defendant was not intoxicated if it "finds that the BAC was as the expert testified …." The difference between this formulation and the prima facie evidence instruction requested by this defendant "is substantive, not just verbal … as [t]he 'prima facie' charge instructs the jury on the weight to be given certain evidence—an instruction that is appropriate only when the evidence consists of chemical tests."

Guilty Pleas

Rape (Elements)

People v Johnson, 2014 NY Slip Op 04039 (6/5/2014)

Where there was no indication that the accuser in this rape case "was incapacitated by anything other than voluntary intoxication," and the defendant admitted during allocution at his guilty plea that he knew the accuser '"was mentally incapacitated apparently from drinking,'" but made no statement supporting the idea that the accuser was mentally incapacitated as the statute in question defines the term, his conviction of second-degree rape based on sexual intercourse with a person incapable of consent due to being mentally incapacitated must be overturned. While a defendant may enter a negotiated plea to crimes that do not exist or to a lesser offense without establishing a factual basis for it, "we simply cannot countenance a conviction that seems to be based on complete confusion by all concerned …." On a record like this, it is impossible to be confident that the defendant "had a clear understanding of what he was doing when he entered his plea."

Grand Jury (Procedure) (Witnesses)

Motions (Pre-trial)

People v Wisdom, 2014 NY Slip Op 04040 (6/5/2014)

The defendant's motion to dismiss the indictment was timely where the defendant was unaware of the operative facts until after his omnibus motion was filed and there was record support for finding he had good cause to seek dismissal after receiving the videos upon which the motion was based. The prosecution had presented to the grand jury a videotaped, unintentionally unsworn statement by a severely injured accuser and later, seeking to cure the failure to administer an oath, presented another videotaped examination, authorized by the court, in which the accuser said under oath her original statement was truthful; while an oath should have been administered during the first testimonial recording, "the error does not meet the 'very precise and very high' statutory standard of impairment for grand jury proceedings …." Oversight, not nefarious design, led to the failure, the grand jury saw both videos and was instructed that the second was made because the accuser had not taken an oath before the first, and these circumstances do not establish "a possibility of prejudice justifying the exceptional remedy of dismissal of the indictment …."

Sex Offenses (Child Pornography) (Sex Offender Registration Act)

People v Gillotti, 2014 NY Slip Op 04117 (6/10/2014)

Three issues are decided here. 1) In Sex Offender Registration Act (SORA) cases, factor three of the SORA risk assessment guidelines promulgated by the Board of Examiners of Sex Offenders (Board), based on the number of victims of an offender's crime, "permits the scoring of points based on the number of different children depicted in the child pornography files possessed by an offender …." 2) A recent Board document, described as a position statement on evaluating child pornography cases under SORA, does not bar the assignment of points under factor three or under factor seven ("which accounts for the increased risk of sexual recidivism posed by an offender whose crime is directed at a stranger") in child pornography cases. 3) "[A]n offender must prove the facts supporting a downward departure by a preponderance of the evidence." The Board has not translated its apparent skepticism about scoring points in child pornography cases under factors three and seven into a bright line bar, and a SORA court is not bound by any practice of the Board but is free to classify an offender at a higher level than that recommended by the Board.

Dissent in Part: [Smith, J] "[T]he majority opinion is flawed in its discussion of guidelines factors 3 and 7 and of the Board of Examiners' Position Statement." And, overall, SORA registration will not stop consumers of child pornography from downloading images, so "[t]he resources that go into the more intensive monitoring of level two and level three SORA registrants can be more usefully expended in keeping track of so-called 'contact offenders' …."

Juries and Jury Trials (Deliberation)

Trials (Presence of Defendant [Trial in Absentia])

People v Rivera, 2014 NY Slip Op 04115 (6/10/2014)

Under the circumstances of this case, the trial court's violation of the "defendant's right to be present during a supplemental jury instruction to a single juror constitutes a mode of proceedings error" requiring a new trial. There is no indication in the record that the defendant was present for, or aware of, an off-the-record bench conference which led to defense counsel's acquiescence to the court hearing an individual juror's concerns outside the pres-

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ence of counsel and the defendant. Only after the juror and judge engaged in recorded dialogue did the court, realizing the defendant was absent, have him returned to the courtroom where he was given a condensed version of the discussion and told the transcript was available. The exchange between the judge and juror about the juror's request for further substantive instruction on the application of the justification defense—a primary issue at trial—was not ministerial, and so "affects the mode of proceedings prescribed by law and presents an error of law for our review" even absent objection or in the face of counsel's consent; the defendant is entitled to a new trial.

Dissent: [Abdus-Salaam, J] The trial court committed only a de minimis violation of the right to be present. This decision "risks encouraging gamesmanship without promoting the interests underlying the right to be present."

Appeals and Writs (Judgments and Orders Appealable)

New York State Agencies (Judicial Conduct, State Commission on)

Records (Sealing)

Matter of New York State Commn. on Jud. Conduct v Rubenstein, 2014 NY Slip Op 04118 (6/10/2014)

"[T]he New York State Commission on Judicial Conduct [SCJC] is authorized, pursuant to the Judiciary Law and its constitutional mandate to investigate judicial misconduct, to request and receive records sealed under Criminal Procedure Law § 160.50 for use in its investigations."

"[T]he Appellate Division erred by dismissing as moot appellant's challenge to the Commission's authority." Where the appellant and a judge were acquitted of criminal charges relating to campaign contributions and the records sealed, and the SCJC sought access to the records as part of an investigation into the judge's conduct, which the Supreme Court granted, and the appellant, whom the SCJC planned to redepose, moved to vacate the ex parte order releasing the sealed records, which motion was pending when the judge agreed to a censure and the SCJC posted its written determination recommending censure, along with related documentation, the written determination referring to him and his alleged misconduct constitute enduring consequences to the appellant flowing from use of the sealed records.

Article 78 Proceedings

Prosecutors (Special Prosecutors)

Matter of Working Families Party v Fisher, 2014 NY Slip Op 04116 (6/10/2014)

An article 78 proceeding in the nature of prohibition was the appropriate vehicle for challenging "an order relieving a district attorney at his own request, and appointing a special district attorney to conduct an investigation in his place." A special prosecutor was validly appointed where the district attorney "had a good faith, reasonable basis for his view that he is disqualified from pursuing the investigation within the meaning of County Law § 701 (1)." While the procedures of Section 200.15 of the Uniform Rules for the New York State Trial Courts should have been more meticulously followed, the irregularities here do not justify nullifying the appointment of the special prosecutor and returning the investigation to square one.

Appeals and Writs (Counsel) (Notice of Appeal)

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

People v Andrews, 2014 NY Slip Op 04233 (6/12/2014)

A criminal defendant who pleaded guilty and waived the right to appeal, then sought to file a late notice of appeal under CPL 460.30 before expiration of the one-year grace period alleging ineffective assistance of counsel with regard to advice and filing of a notice of appeal, does not thereafter have recourse to common law coram nobis relief.

A request for a late appeal was properly rejected as to a defendant who "made only perfunctory claims that he asked his lawyer to file a timely notice of appeal and that it was impossible to discover the omission with reasonable diligence," and did not counter the response by the lawyer or try to explain why the defendant had waited over two years after obtaining counsel to help with collateral review to seek coram nobis relief.

A defendant who sought to file an untimely criminal leave application (CLA) in the Court of Appeals is not entitled to coram nobis relief solely on the basis of counsel's failure to file a CLA, as there is no federal constitutional entitlement to counsel for such an application, and the defendant did not premise his ineffectiveness claim on an independent state constitutional ground.

Dissent in One Case: [Rivera, J] "Denial of the opportunity to exhaust all available avenues for State appellate review has negative consequences that affect defendant's rights, and potentially forecloses judicial correction of trial and appellate errors." Where the defendant sought permission to submit a late CLA to this court, "I would allow the writ to be used for this limited purpose."

Evidence (Sufficiency)

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Robbery (Elements) (Evidence)

People v Gordon, 2014 NY Slip Op 04227 (6/12/2014)

That no stolen property was recovered from the defendant does not forestall the prosecution's ability to establish that the defendant's threat or use of force was intended to prevent or overcome resistance to taking or retention of stolen property. Testimony about the suspicious behavior of the defendant while in the department store, and the jury's independent observations of surveillance video of that behavior, along with testimony about the defendant's violent and threatening conduct at the exit and in the parking lot, provided ample evidence supporting a reasonable inference that she stole merchandise and threatened or used force to thwart resistance to her continuing possession of it.

Dissent in Part: [Lippman, CJ] The evidence did not prove that the defendant retained stolen property at the time she aimed violent and threatening behavior at store employees; the property could have been transferred to someone else or left in the store. "[T]here is no social or penal justification for treating as a class b or c felony what is, without the benefit of considerable imaginative embellishment, a petit larceny followed at some temporal remove by an assault."

Burglary (Degrees and Lesser Offenses) (Elements) (Evidence)

Evidence (Sufficiency)

People v McCray, 2014 NY Slip Op 04232 (6/12/2014)

"[G]enerally, if a building contains a dwelling, a burglary committed in any part of that building is the burglary of a dwelling; but an exception exists where the building is large and the crime is committed in a place so remote and inaccessible from the living quarters that the special dangers inherent in the burglary of a dwelling do not exist." While the statutory provisions as to burglary have changed since the "*Quinn*" rule (*Quinn v People* [71 NY 561 (1878)]) and subsequent "Astor House exception" were established, both are reaffirmed. Here, the defendant committed one burglary in a locker room for hotel employees, leaving by way of a stairway that could be used to reach floors where hotel guests slept. The *Quinn* rule clearly applies. He then went to another part of the building that houses a wax museum and committed a second burglary; had he entered and left there from the street, the Astor House exception may have applied, but as he could have left there by the stairwell providing access to hotel rooms, the evidence—just barely—supports a finding that this too was first-degree burglary.

Appeals and Writs (Preservation of Error for Review)

Juries and Jury Trials (Deliberations)

People v Walston, 2014 NY Slip Op 04229 (6/12/2014)

While preservation of error is required for some violations of the procedures set out in *People v O'Rama* (78 NY2d 270 [1991]) for dealing with notes from juries, deviations that involve a court's failure to fulfill the core *O'Rama* responsibilities constitute mode of proceedings errors not subject to preservation requirements. Here, there is no indication that defense counsel was told that the jury's message seeking directions on manslaughter and second-degree murder included the notation "(Intent)." The first-degree manslaughter conviction is vacated with leave to represent. As the note did not address an element relative to the weapon possession count, that conviction stands.

Concurrence: [Smith, J] "[W]e should be willing to consider in the future an argument, not made here, that the cases" holding *O'Rama* deviations to be mode of proceedings errors should be overruled.

Parole (Release [Conditions for—Included Guidelines]) (Rescission)

Matter of Costello v New York State Bd. of Parole, 2014 NY Slip Op 04805 (6/26/2014)

While parole rescission proceedings were properly initiated here, and the Board of Parole is required to consider any victim impact statement (VIS) in deciding to grant or deny parole release, "under the particular circumstances of this case, the Board improperly rescinded petitioner's parole release, which should be reinstated." This does not minimize the importance of VISes generally or the evidence of grief and loss here; "we hope that our decision will impel both parole boards and district attorneys to comply fully with the letter and spirit of Executive Law § 259-i (2)(c)(A)(v) and CPL 440.50 (1), so that the effect of a crime on the victim and his or her family can be considered fully before a decision is made."

Ethics (Judicial)

Misconduct (Judicial)

Matter of Doyle, 2014 NY Slip Op 04801 (6/26/2014)

The determination by the State Commission on Judicial Conduct (SCJC) that the petitioner be removed from office is upheld. The relevant events here occurred after the petitioner had been censured for misleading and evasive testimony in connection with an SCJC investigation of her role in a fund to help pay legal expenses that her close friend and counsel incurred in challenging certain provision of the code of judicial conduct and SCJC

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actions. The clear thrust of precedent since at least 1994 has been that a Surrogate should recuse even from "'routine, non-contested or administrative' matters involving attorneys with whom he or she has a relationship that could give rise to an appearance of impropriety or raise a question as to the judge's impartiality …." The petitioner should have disqualified herself from matters involving the three individuals described in the formal written complaint.

Dissent: [Pigott, J] "[C]ensure is the more appropriate sanction."

Evidence (Presumptions)

Weapons (Firearms) (Possession)

People v Galindo, 2014 NY Slip Op 04803 (6/26/2014)

The statutory presumption that possession of a firearm is presumptive evidence of intent to use it unlawfully against another was not improperly invoked and the evidence supporting the conviction of two counts of second-degree weapon possession was legally sufficient. Testimony showed that the defendant admitted shooting the accuser by accident when showing him a loaded gun on a public street and no proof suggested the defendant's possession of the gun was for a lawful purpose.

Dissent in Part: [Pigott, J] Proof was presented that the defendant possessed a loaded firearm outside his home or business, constituting a class C felony under Penal Law 265.03(3). There was no connection here between the facts shown and the presumed fact of intent to use the gun unlawfully against another. The law does not contemplate nor permit a defendant to be convicted twice for one possession.

Search and Seizure (Stop and Frisk)

People v Johnson, 2014 NY Slip Op 04807 (6/26/2014)

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

[***Ed. Note:*** *The decision below was* People v Johnson *(109 AD3d 449 [1st Dept 8/27/2013]).*]

Aliens (Deportation) (Immigration)

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

Retroactivity

People v Baret, 2014 NY Slip Op 04872 (6/30/2014)

The United States Supreme Court decision in *Padilla v Kentucky* (559 US 356 [2010]), requiring defense counsel to advise foreign national clients about the immigration consequences of conviction, does not apply retroactively under federal or state retroactivity principles. The ruling below that *Padilla* did not establish a new rule but merely applied effective assistance of counsel precedent, so that it applied retroactively under federal habeas law, predated *Chaidez v United States* (133 SCt 1103 [2013]), which held *Padilla* not to be retroactive. The defendant's argument that as a matter of state law, through any one of three theories, "*Padilla* applies in collateral challenges to convictions in New York courts occurring between 1996, when Congress 'severely tightened' immigration laws, and March 31, 2010, when *Padilla* was handed down," is rejected.

Dissent: [Lippman, CJ] "A guilty plea by a noncitizen defendant is not knowing and voluntary where the defendant entered the plea unaware that it carried a substantial risk of deportation. This is the case regardless of whether the defendant entered the plea before or after … *Padilla* …."

Dissent: [Rivera, J] "Retroactive application of *Padilla* … to collateral review of criminal convictions would ensure the essential fairness of our criminal justice system and the just treatment of defendants, regardless of immigration status." "New York's criminal defense bar has long regarded providing advice on the immigration consequences of a guilty plea as part of its professional obligation."

Appeals and Writs (Scope and Extent of Review)

Discovery (*Brady* Material and Exculpatory Information) (Matters Discoverable) (Right to Discovery)

People v Garrett, 2014 NY Slip Op 04876 (6/30/2014)

The prosecution's failure to disclose the existence of a federal civil action alleging police misconduct by one of their police witnesses did not constitute a violation of *Brady v Maryland* (373 US 83 [1963]). While the civil allegations were favorable to the defendant as impeachment evidence, he did not show that the prosecution suppressed that information or that its nondisclosure prejudiced him. The allegations did not arise from the detective's work as a part of the prosecution team in this case and were not directly related to this prosecution. And there was no reasonable probability that disclosure of the allegations would have changed the result in the defendant's case. The defendant asserted in unsuccessfully seeking suppression of his confession that it was false and involuntarily made, while police witnesses said he was advised of his *Miranda* rights and confessed without being coerced; a prosecution objection to defense cross-exami-

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nation of a detective about involvement in another homicide case involving a false confession was sustained at the suppression hearing and at trial on relevance grounds.

Concurrence: [Lippman, CJ] The impeachment evidence at issue here is not material under *Brady.* However, the detective's knowledge of the federal allegations pending against him should be imputed to the prosecution; the majority's interpretation patently contravenes *Kyles v Whitley* (514 US 419 [1995]) and subverts the fundamental need to insure that accused people receive a fair trial.

Concurrence: [Smith, J] The trial court denied the defendant's CPL 440.10 motion solely based on the ground that the prosecution lacked actual or constructive knowledge of the federal allegations, and did not address the materiality of those allegations, while the Appellate Division considered materiality. The majority makes a puzzling distinction between this and what was considered error in *People v LaFontaine* (92 NY2d 470 [1998]), which held that appellate courts could not consider issues not ruled on (or decided in the appellant's favor) below. Such limitation on, or effective overruling of, *LaFontaine,* is welcome.

Evidence (Best and Secondary Evidence)

People v Haggerty, 2014 NY Slip Op 04874 (6/30/2104)

The defendant's assertion that testimony regarding the source of the fraudulently-obtained funds underlying his charges of grand larceny and money laundering violated the best evidence rule lacks merit. At trial, the then-mayor of New York City testified about funding a $1.1 million ballot security operation based on representations by the defendant to the staff of the mayor's re-election campaign; on cross examination, the mayor "admitted a lack of personal knowledge concerning specifics of the fund transfers and the details of the … project." Campaign and political party staff testified about transfers of money related to the ballot security plan; the defense refused to stipulate to the mayor's ownership of certain funds and the prosecution relied on testimony of the principal drafter of the Michael R. Bloomberg Revocable Trust, which provided money to the political party for use in ballot security. The defendant's best evidence rule challenge to the failure to produce the trust instrument came only after testimony that tended to prove ownership; further, the testimony of the trust drafter was not so prejudicial as to deny the defendant a fair trial.

Homicide (Murder [Intent])

Motor Vehicles (Reckless Driving)

People v Maldonado, 2014 NY Slip Op 04878 (7/1/2014)

Because the high-speed vehicular chase here did not fit within the narrow category of cases in which facts evince an utter disregard for human life, the defendant's conviction for depraved indifference murder is reduced to second-degree manslaughter. Driving well above the 30-miles-per-hour speed limit and violating numerous traffic rules including red lights and one-way directional signs, the defendant fled from police in a stolen vehicle, struck a woman in a crosswalk, continued on, and crashed into a parked car. His swerving to miss other vehicles, "the antithesis of a complete disregard for the safety of others," establishes a lack of depraved indifference.

Dissent: [Pigott, J] There was no evidence that the defendant slowed at intersections or otherwise adjusted his reckless driving even after almost hitting one pedestrian before his collision with the decedent, showing that he did not care "whether a pedestrian died or was grievously injured as a result of his reckless driving."

Constitutional Law (United States Generally)

Speech, Freedom Of

People v Marquan M., 2014 NY Slip Op 04881 (7/1/2014)

Albany County's cyberbullying statue contains criminal prohibitions of alarming breadth, and "in its broadest sense criminalizes 'any act of communicating . . . by mechanical or electronic means . . . with no legitimate . . . personal . . . purpose, with the intent to harass [or] annoy . . . another person.'" On its face, it covers communication aimed not just school-age children but at adults and entities; it includes "every conceivable form of electronic communication" that is meant to "'harass, annoy … taunt … [or] humiliate' any person or entity," criminalizing "a broad spectrum of speech outside the popular understanding of cyberbullying, including, for example: an email disclosing private information about a corporation or a telephone conversation meant to annoy an adult." To employ the severance doctrine to the extent suggested to save the statute would not be a permissible use of judicial authority. The defendant's online actions were no doubt "repulsive and harmful to the subjects of his rants, and potentially created a risk of physical or emotional injury," and may not be protected by the First Amendment, but the text of the law is overbroad and facially invalid, and the conviction must be reversed and the accusatory instrument dismissed.

Dissent: [Smith, J] The admittedly invalid portions of the law could be readily severed and the remainder interpreted in a way to render it constitutionally valid.

First Department

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

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

People v Major, 115 AD3d 1, 978 NYS2d 165 (1st Dept 1/14/2014)

The court erred in denying the defendant's motion to suppress where the police action "went beyond a level two intrusion and constituted a level three stop and detention." A police officer pulled over a car, the driver had a nervous demeanor, and the officer learned that the driver's license was suspended; the officer then saw the defendant approach the stopped car, take a bag from the driver, and walk away. The officer approached the defendant, loudly ordered him to stop several times and ordered him to turn over the bag, and after two other officers arrived in a police car with the lights and siren on and approached the defendant from a different direction, the defendant threw the bag onto the trunk of a nearby parked car. (Supreme Ct, New York Co)

Dissent: The defendant's refusal to comply with the first officer's order to stop and his brisk pace and nervous appearance provided sufficient additional information to justify denying suppression.

Sentencing (Youthful Offenders)

People v Smith, 113 AD3d 453, 979 NYS2d 26 (1st Dept 1/14/2014)

The court must conduct a new sentencing proceeding and make a clear determination on the record as to the defendant's eligibility for youthful offender status. The defendant's appeal was pending at the time of the Court of Appeals decision in *People v Rudolph* (21 NY3d 497 [2013]), which mandated that courts make youthful offender determinations in all cases when the defendant is eligible, even if the defendant does not request it or agrees to forgo the status as part of a plea agreement. (Supreme Ct, New York Co)

Juries and Jury Trials (Discharge)

People v Ventura, 113 AD3d 443, 978 NYS2d 178 (1st Dept 1/14/2014)

The court erred in not conducting "an inquiry, in which defense counsel could participate, because the disclosure indicated a possible issue related to [a] juror's continued ability to serve in an impartial manner" where the juror told a court officer that she had been "invited to a breakfast at which the New York County District Attorney was a speaker," and the officer told the court that he confirmed that the juror did not have a personal relationship with the District Attorney and that she understood she could not go to the breakfast because she is on this jury. The court did not tell defense counsel which juror was involved and improperly rejected defense counsel's request to question the juror. By accepting the hearsay statements of the court officer and failing to make a direct inquiry, the court left unanswered many questions relevant to whether the juror could be fair and impartial, such as whether the juror concluded she could not attend independent of anything the court officer said, what type of organization was running the breakfast, and whether the breakfast was for supporters of the District Attorney or was sponsored by a law enforcement organization. (Supreme Ct, New York Co)

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

Flight

People v Brown, 115 AD3d 38, 978 NYS2d 206 (1st Dept 1/16/2014)

The court erred in denying the defendant's motion to suppress where the police did not have a reasonable suspicion that the defendant or his companion was involved in a felony or misdemeanor where the police saw the two men running across a street in the early morning, looking over their shoulders, but no crime had been reported, no one was seen chasing the men, and they were not carrying visible contraband. "The officers' knowledge of defendant's prior criminality in the same neighborhood was not sufficient to give rise to reasonable suspicion justifying a level three intrusion." (Supreme Ct, New York Co)

Dissent: While prior criminality or flight on its own is insufficient for reasonable suspicion, "the officers' observations here were of conduct by defendant and [his companion] that was inherently suspicious, which, in light of the officers' prior knowledge of them, justified the reasonable belief that the two men were probably running from the area near [a local] nightclub, and that they had just engaged in criminal activity there."

[***Ed. Note:*** *The companion case is* People v Thomas *(115 AD3d 69 [1st Dept 1/16/2014). Leave to appeal in both cases was granted Mar. 13, 2014 (2014 NY Slip Op 66368(U); 2014 NY Slip Op 66369(U) [1st Dept]).*]

Evidence (Missing Witnesses)

Harmless and Reversible Error (Reversible Error)

First Department *continued*

Instructions to Jury (Missing Witnesses)

People v Manzi, 113 AD3d 481, 978 NYS2d 202 (1st Dept 1/16/2014)

During his testimony, the defendant referred to a friend who was with him at certain relevant times. When the prosecution requested a missing witness charge, the court should have given the defendant a chance to avoid the charge by calling the witness, but instead denied the defendant's request for a one-day adjournment to secure the witness's presence, "which effectively rendered the witness unavailable, thus negating the availability requirement for a missing witness charge." This abuse of discretion was not harmless error where the jury had to "make a credibility determination regarding conflicting testimony given by police witnesses and by defendant, who was unfairly burdened by a missing witness charge." (Supreme Ct, New York Co)

Appeals and Writs (Waiver of Right to Appeal)

Arrest (Probable Cause)

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

People v McCree, 113 AD3d 557, 979 NYS2d 67 (1st Dept 1/28/2014)

The court erred in denying the defendant's motion to suppress where, "under the facts presented the handcuffing of defendant elevated his seizure to an arrest requiring probable cause, and probable cause was absent at the time of the handcuffing." It was not until after the police handcuffed the defendant and his companion that the defendant, in response to being told that they were stopped because the defendant had a stolen credit card, said he found the card and a subsequent search revealed the card.

The defendant's appeal waiver was not knowing, intelligent, and voluntary where the court and defense counsel did not make clear on the record that the defendant understood that his right to appeal was separate from the rights forfeited upon pleading guilty and the written waiver did not "cure any ambiguity in the on-the-record discussion, as it did not ensure that defendant understood this concept …." (Supreme Ct, New York Co)

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

People v Miller, 113 AD3d 573, 979 NYS2d 522 (1st Dept 1/30/2014)

The defendant's conviction is reversed and the accusatory instrument dismissed in the interest of justice where the court failed to inform the defendant of any of his constitutional rights under *Boykin v Alabama* (395 US 238 [1969]). "The only question that the judge asked was whether 'anybody force[d] [him] to plead guilty.'" (Supreme Ct, New York Co)

Counsel (Right to Self-Representation)

Pro Se Representation

People v Lewis, 114 AD3d 402, 980 NYS2d 389 (1st Dept 2/4/2014)

The court deprived the defendant of his constitutional right to represent himself when it denied his repeated requests to proceed pro se without any inquiry. At a pretrial hearing, the defendant asked the court to assign new counsel, asserting that his attorney did not have information about his case and did not know his side of the story, or, in the alternative, to allow him to represent himself. "The fact that defendant's request to proceed pro se had been preceded by an unsuccessful request for new counsel did not render the request equivocal." (Supreme Ct, New York Co)

Freedom of Information

Investigation

Witnesses

Matter of the Exoneration Initiative v New York City Police Department, 114 AD3d 436, 980 NYS2d 73 (1st Dept 2/6/2014)

Disclosure, under the Freedom of Information Law, of the name of a passerby and the contact information of that person and a witness who testified for the prosecution, which appears in DD5s completed in connection with the homicide investigation that resulted in Richard Rosario's second-degree murder conviction, is not required where the respondent showed that disclosure could potentially endanger the witnesses' safety and would be an unwarranted invasion of their privacy. Information about other people who did not give statements to the police was properly withheld under the invasion of privacy exception. However, the respondent failed to show that disclosure of the tax registration number of the detective who recorded the unnamed informant's statement would be an invasion of privacy or that the pages regarding the unnamed informant were covered by the confidentiality exemption. (Supreme Ct, New York Co)

Dissent: "[A]ny intrusion into individuals' privacy is outweighed by the possibility that Rosario is actually innocent and that evidence of actual innocence may be revealed." And the determination that disclosure of information about the passerby and the testifying witness,

First Department *continued*

which may help to prove Rosario's innocence, would endanger them is conclusory.

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Pina, 114 AD3d 449, 979 NYS2d 798 (1st Dept 2/6/2014)

The court erred in denying the defendant's CPL 440.10 motion without a hearing where there are factual questions regarding defense counsel's competence immediately before and at the time of the defendant's plea. Before his plea, the defendant raised concerns about counsel's competence and counsel was later suspended from the practice of law due to symptoms of mild cognitive impairment exhibited several months before the plea, which later resulted in an Alzheimer's disease diagnosis. A review of counsel's medical records that were previously provided to the disciplinary committee shows that they may contain information relevant to the defendant's motion and thus, must be made available in determining whether counsel was competent when he represented the defendant. (Supreme Ct, Bronx Co)

Motions (Adjournment)

Sex Offenses (Sex Offender Registration Act)

People v Cameron, 114 AD3d 522, 980 NYS2d 117 (1st Dept 2/18/2014)

In this Sex Offender Registration Act proceeding, the court abused its discretion in denying the defendant's second request for a brief adjournment so he could get documentation from the Department of Corrections and Community Supervision (DOCCS) that was relevant to his risk level determination, particularly his request for a downward departure. "The record shows that counsel moved expeditiously to obtain the relevant documentation from DOCCS and was unable to do so due to no fault of her own, that she received misinformation from DOCCS that significantly delayed her ability to obtain the relevant documentation, and that she sought only a brief adjournment that would have still permitted a timely determination of defendant's risk level." (Supreme Ct, New York Co)

Evidence (Other Crimes) (Prejudicial) (Relevancy)

Kidnapping (Elements)

Prior Convictions (Evidence)

People v Denson, 114 AD3d 543, 980 NYS2d 434 (1st Dept 2/18/2014)

There was sufficient evidence of attempted second-degree kidnapping where the defendant attempted to get the 10-year-old accuser, who he knew, based on observation of the accuser and her mother, would be walking home from school alone, to take his keys and enter his apartment. This evidence establishes that the defendant intended to secrete or hold the accuser in a place she was not likely to be found and satisfies the definition of restraint, which for a child under 16, "encompasses movement or confinement by 'any means whatever,' including the acquiescence of the child …." The court properly admitted, as probative of the defendant's intent to abduct the child, evidence of his motive to sexually molest the child and, given the unusual circumstances of this case, his prior conviction of a sex crime committed against his stepdaughter and its underlying facts. (Supreme Ct, New York Co)

Dissent in Part: "Even a convicted sexual predator like defendant—one who committed a sex crime against his young stepdaughter more than 20 years ago—is entitled to protection from an overcharged prosecution arising from accusations that defendant had begun to focus his attention on another young girl. The conviction … was not supported by sufficient evidence, since defendant's conduct did not bring the intended crime dangerously near to completion. Rather, it relies primarily on what amounts to propensity evidence, essentially reasoning that based on defendant's prior act of molesting a child, we can expect that he would do it again."

[***Ed. Note:*** *Leave to appeal was granted on May 15, 2014 (2014 NY Slip Op 72251[U]).*]

Accusatory Instruments

Constitutional Law (New York State Generally)

Sentencing (Persistent Violent Felony Offender)

People v Byrdsong, 114 AD3d 604, 980 NYS2d 761 (1st Dept 2/27/2014)

Prosecution of the defendant by superior court information did not violate the constitutional provision against waiver of indictment by a person charged with an offense punishable by life imprisonment where, at the time he waived indictment, the highest charge against him was a class B felony that carried a maximum sentence of 25 years, even though he was ultimately sentenced to life as a persistent violent felony offender. "A conviction could have become the basis for a life sentence only upon completion of the procedures set forth in CPL article 400." (Supreme Ct, Bronx Co)

First Department *continued*

Forensics (DNA)

Identification

Post-Judgment Relief (CPL § 440 Motion)

People v Hicks, 114 AD3d 599, 981 NYS2d 81 (1st Dept 2/27/2014)

The court properly exercised its discretion in granting the defendant's motion to vacate his attempted first-degree rape and sodomy convictions under the new CPL 440.10(1)(g-1), which allows a court to grant the motion where DNA testing is performed after the conviction and the court finds "'that there exists a reasonable probability that the verdict would have been more favorable to the defendant.'" Testing of the DNA material found under the accuser's fingernails revealed male genetic material, but did not match the defendant's DNA, and the "underlying conviction was based solely on the resolution of a close and vigorously contested factual question regarding the attacker's identity." The court did not need to hold a hearing where it could resolve the motion based on the facts presented at trial and the prosecution did not request a hearing. (Supreme Ct, Bronx Co)

Juveniles (Neglect)

Matter of Brianna R., 115 AD3d 403, 981 NYS2d 95 (1st Dept 3/4/2014)

The petitioner failed to show by a preponderance of the evidence that the respondent's 15-year-old daughter was educationally neglected where, although the child had an excessive number of absences, there was evidence that the mother faced obstacles in getting her daughter to go to school, including that she "was defiant, violent, and had a history of lying and threatening to harm herself when the mother did not allow her to do what she wanted"; "suffered from mood disorder, and had continuous hallucinations that made sleep difficult"; was hospitalized and diagnosed with several psychiatric conditions; and her prescribed medication made her drowsy and disoriented. The record also shows that the mother took steps to get her daughter to go to school, and that when the child was in the petitioner's custody, she absconded and did not attend school and the school had difficulty controlling her. (Family Ct, Bronx Co)

Dissent: There was sufficient evidence of educational neglect where the unrefuted testimony showed that the child missed 83 days during one school year and missed 63 days and was late five days in the first half of the next school year, and the respondent failed to "show that she exercised a minimum degree of care so as not to impose a risk of impairment to the child or place the child in imminent danger of impairment ...."

Appeals and Writs (Record) (Scope and Extent of Review)

Counsel (Competence/Effective Assistance/Adequacy)

People v Holland, 115 AD3d 492, 981 NYS2d 425 (1st Dept 3/11/2014)

"Defendant's ineffective assistance of counsel claim may be reviewed on direct appeal since this Court is able to determine from the record that there was no conceivable purpose for counsel's conduct ...." Defense counsel's theory was that the defendant could not be convicted of a drug sale unless he directly sold drugs to the undercover officer, rather than an intermediary, and in arguing this to the court and jury, counsel essentially admitted that the defendant did sell drugs. And counsel did not make this argument to appeal to the jury for sympathy or nullification since the record shows that counsel made the same argument to the court outside the jury's presence. Counsel's lack of familiarity with the applicable criminal law prejudiced the defendant. (Supreme Ct, New York Co)

Juveniles (Custody) (Parental Rights)

Matter of Johanys M. v Eddy A., 115 AD3d 460, 982 NYS2d 30 (1st Dept 3/11/2014)

The referee erred in awarding custody to the petitioner mother "on the grounds that she no longer worked outside the home and thus was 'fully available' to care for the child (and a newborn), while respondent worked outside the home, and that respondent's testimony about petitioner was less than fully credible because it was 'globally negative.'" The record shows that it is in the child's best interest for the parties to have joint legal custody where there was no evidence that they were unable to resolve custody and visitation disputes themselves and they appear to agree about the child's best interests, even though they cannot communicate directly with each other. It is improper to deny the respondent father a decision-making role in his child's life because he cannot care for the child full time; the father has an active role in his child's life and arranged for child care while he worked. (Family Ct, Bronx Co)

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

People v Gathor, 115 AD3d 612, 986 NYS2d 327 (1st Dept 3/27/2014)

"In light of the Court of Appeals' recent decision in *People v Boyer* (22 NY3d 15 [2013]), we find that defendant was not entitled to relief under CPL 440.20 from his origi-

First Department *continued*

nal sentencing as a second violent felony offender since the resentencing proceeding to correct the failure to impose postrelease supervision does not alter the original date of sentence." (Supreme Ct, Bronx Co)

Accusatory Instruments (Sufficiency)

Jurisdiction

People v Matthews, 115 AD3d 625, 982 NYS2d 753 (1st Dept 3/27/2014)

"Based on *People v McNamara* (78 NY2d 626 [1991]), we are constrained to conclude that the informations charging defendant with public lewdness … and exposure of a person … were jurisdictionally defective, because they failed to establish the statutory element that defendant's acts were committed in a public place. As in *McNamara*, the lewd acts here were allegedly committed in a parked car, but the informations did not allege objective circumstances to establish that the car was situated in a place where it was likely that the acts would be observed by casual passersby, which is an essential allegation under these circumstances …. This deficiency was not cured by the informations' conclusory allegations that the lewd acts occurred in public places, or the allegations that they took place in front of specific addresses, which 'could as readily refer to a private driveway as to a residential street' …." (Supreme Ct, Bronx Co)

Second Department

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Speedy Trial (Burden of Proof) (Prosecutor's Readiness for Trial)

People v Allard, 113 AD3d 624, 977 NYS2d 904 (2nd Dept 1/8/2014)

Where the defendant sustained his initial burden in a claim for CPL 30.30 speedy trial relief by alleging the unexcused lapse of more than six months, and the prosecution "failed to conclusively demonstrate with 'unquestionable documentary proof' that they satisfied" the statute's requirements, the motion should not have been summarily denied. The matter must be remitted for a hearing; no other issues are decided at this juncture. (Supreme Ct, Kings Co)

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

People v Baksh, 113 AD3d 626, 977 NYS2d 407 (2nd Dept 1/8/2014)

While the officer who stopped the defendant's car after a man matching the radioed description of a robbery suspect was seen talking to the car's occupants, but was not seen holding a bag or handing anything to the occupants, had probable cause to stop the car for an observed traffic violation, the officer's subsequent search of the car's back seat for an item seen in the robber's possession, revealing a gun in an open air vent, was illegal. The car's occupants had been removed and there was no testimony indicating a substantial likelihood a weapon was present or that the officer perceived an actual, specific threat to officer safety. (Supreme Ct, Queens Co)

Counsel (Right to Counsel)

Juries and Jury Trials (Discharge)

People v Otigho, 113 AD3d 637, 978 NYS2d 325 (2nd Dept 1/8/2014)

"[R]eversal is required based upon defense counsel's absence from an in camera interview with a sworn juror and the court's subsequent failure to disclose to the defense" that the juror said a third person had described the defendant in derogatory terms, including that the defendant "was someone he 'should avoid.'" The court's report to the defense that the juror had lied to the court was not enough. The "'inherently prejudicial'" error requires a new trial. (Supreme Ct, Kings Co)

Post-Judgment Relief (CPL § 440 Motion)

People v Hamilton, 115 AD3d 12, 979 NYS2d 97 (2nd Dept 1/15/2014)

"[A] 'freestanding' claim of actual innocence is cognizable in New York, and [] a defendant who establishes his or her actual innocence by clear and convincing evidence is entitled to relief under the statute" that authorizes courts to vacate judgments obtained in violation of defendants' constitutional rights. "Federal courts have not resolved whether a prisoner may be entitled to habeas corpus relief based upon a freestanding claim of actual innocence"; New York's due process clause "provides 'greater protection than its federal counterpart as construed by the Supreme Court' ...." That the defendant was released on parole does not bar assertion of an actual innocence claim. A constitutional violation based on actual innocence, as opposed to a specific constitutional violation, "occurs only if there is clear and convincing evidence that the defendant is innocent …." The defendant here

Second Department *continued*

made the requisite prima facie showing "'"of possible merit to warrant a fuller exploration"' …." If, at a hearing, he meets the requisite standard of establishing his actual innocence, the indictment must be dismissed. His ineffective assistance of counsel claim should also be considered "'in the interest of justice and for good cause shown,'" despite the discretionary procedural bar. (Supreme Ct, Kings Co)

Impeachment (Of Defendant [Including *Sandoval*])

Misconduct (Judicial)

Self-Incrimination (Conduct and Silence) (Comment)

People v Theodore, 113 AD3d 703, 978 NYS2d 357 (2nd Dept 1/15/2014)

The court "erred when it permitted the prosecutor to question the defendant about his post-arrest silence," impeaching the defendant "with his failure to offer an exculpatory version of the events to the police."

In light of intemperate remarks by the court at sentencing that suggested the sentence was based on a crime for which the defendant was acquitted, and the court's refusal to consider a plea agreement during trial based on the judge's individual policy unrelated to this case and the defendant's circumstances, the matter is remitted for retrial before a different justice. (Supreme Ct, Kings Co)

Insanity

Juveniles (Disposition) (Fitness) (Hearings) (Parental Rights)

Matter of Christina L.N., 113 AD3d 777, 979 NYS2d 350 (2nd Dept 1/22/2014)

While a separate dispositional hearing is not necessarily required in every case involving termination of parental rights based on mental illness, the court improvidently exercised its discretion by denying the mother's motion for such a hearing here. The parties should have an opportunity to introduce evidence as which possible dispositional alternative would be in the best interests of the child where the mother "consistently continued her treatment, successfully completed parenting classes, and regularly visited the subject child," who is now 13 and has long opposed adoption and wants to maintain a close mother-daughter relationship. (Family Ct, Kings Co)

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

Guilty Pleas (Withdrawal)

People v Duart, 113 AD3d 788, 978 NYS2d 369 (2nd Dept 1/22/2014)

When the defendant moved to withdraw his guilty plea as to the charge of attempted use of a child in a sexual performance, "[a]ssigned counsel expressed his opinion that the defendant should 'maintain his plea' and informed the court that he didn't 'feel that [he] could represent [the defendant] at any further proceedings,'" thereby taking a position adverse to his client's and adversely affecting the defendant's right to counsel. The court should have assigned a different lawyer before resolving the withdrawal issue. The matter is remitted for a hearing for which new counsel shall be appointed. (County Ct, Suffolk Co)

Narcotics (Penalties)

Parole

Sentencing (Resentencing)

People v Brown, 115 AD3d 155, 979 NYS2d 367 (2nd Dept 1/29/2014)

A parolee is in the custody of the Department of Corrections and Community Supervision (DOCCS) "within the meaning of CPL 440.46 (1), which allows a person serving a sentence for a class B drug felony committed prior to 2005 to apply for resentencing." Legislation in 2011 merged the Division of Parole and the Department of Correctional Services into the new DOCCS, and the language of CPL 440.46(1) was amended to apply to any person in the custody of the new agency. The term "custody" is not limited to actual incarceration; Executive Law 259-i(2)(b) says a parolee is "in the 'legal custody' of DOCCS until" they are returned to imprisonment, among other possibilities. That "custody" under Penal Law 70.30(3) is limited to actual confinement is not determinative here. Including parolees under 440.46(1) is consistent with its remedial objective. (Supreme Ct, Queens Co)

[***Ed. Note:*** *Leave to appeal was granted on May 9, 2014 (2014 NY Slip Op 97636[U]).*]

Evidence (Sufficiency)

Motor Vehicles (Driver's License)

People v Francis, 114 AD3d 699, 979 NYS2d 687 (2nd Dept 2/5/2014)

The court correctly determined that the evidence, viewed in the light most favorable to the prosecution, "was legally insufficient to establish the defendant's guilt of aggravated unlicensed operation of a motor vehicle in the third degree pursuant to Vehicle and Traffic Law § 511 (1) (a)" where the testimony of an employee from a coun-

Second Department *continued*

ty office of the Department of Motor Vehicles showed a lack of personal knowledge of the procedures used in mailing out notices of pending and actual suspension of the defendant's drivers license. (Supreme Ct, Kings Co)

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

People v Rogers, 114 AD3d 707, 979 NYS2d 673 (2nd Dept 2/5/2014)

The "[c]ourt's remarks that it would have 'no problem' imposing the maximum sentence if the defendant were convicted after trial, which '[would] be basically the end of [the defendant's] life,' were impermissibly coercive, rendering the defendant's plea involuntary …." (Supreme Ct, Queens Co)

Arrest (Warrantless)

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

People v Riffas, 114 AD3d 810, 979 NYS2d 706 (2nd Dept 2/13/2014)

Where police knocked on the defendant's door just before 7:00 a.m. without a warrant, and the defendant answered the door naked from the waist down and appeared "half asleep," after which he "only partially opened the door, was never in full view of the police, [] never crossed the threshold of his apartment," and tried to shut the door when police told him to step into view, police violated his 4th Amendment rights by pushing the door open, pulling the defendant into the public hallway, and arresting him. (Supreme Ct, Kings Co)

Search and Seizure (Warrantless Searches [Emergency Doctrine])

People v Theodore, 114 AD3d 814, 980 NYS2d 148 (2nd Dept 2/13/2014)

Where a police detective responding to a radio call about a residential fire (the location of which was a matter of some confusion) discovered the address he had been sent to was part of a block-long vacant lot, approached a house across the street that seemed to be closest to the address he sought, walked along its side for 30 feet, turned into the rear yard, observed an occupied parked car, and upon closer approach found the defendant holding a marijuana "blunt," the physical evidence seized thereafter should have been suppressed. The rear yard was within the curtilage of the home, and there was no basis to believe any "direct relationship" existed between the report of the fire and the address behind which the defendant was found. (Supreme Ct, Queens Co)

Instructions to Jury

Sex Offenses (Civil Commitment)

Matter of State of New York v Adrien S., 114 AD3d 862, 980 NYS2d 558 (2nd Dept 2/19/2014)

The court's refusal to give an expanded jury charge as to the meaning of "sex offense" in this Mental Hygiene Law (MHL) article 10 proceeding was error. The jury in such a proceeding must make a finding of whether a convicted sex offender suffers from a mental abnormality, which is defined as a condition, disease, or disorder that, among other things, predisposes the person "'to the commission of conduct constituting a sex offense ….'" As used in this context, "sex offense" relates only to specific offenses listed in MHL 10.03(p). The evidence offered here largely dealt with sexually inappropriate acts that would not constitute "sex offenses" as statutorily defined; the error was not harmless. (Supreme Ct, Nassau Co)

Narcotics (Penalties)

Sentencing (Concurrent/Consecutive) (Excessiveness) (Resentencing)

People v Cole, 114 AD3d 869, 980 NYS2d 551 (2nd Dept 2/19/2014)

The defendant sought resentencing in 2011 under the Drug Law Reform Act of 2004 on five counts of first-degree criminal sale of drugs, for which he had originally received five consecutive sentences of 25 to life. The resentencing court reduced the drug-sale sentences to 20 years to life. While the court correctly determined it could not make the drug sentences concurrent, it should have considered the consecutive nature of the sentences in evaluating appropriate terms of imprisonment to impose; the resentence, which amounted to 100 years in prison, was excessive. (Supreme Ct, Kings Co)

Juveniles (Support Proceedings)

Matter of Jurgielewicz v Johnston, 114 AD3d 945, 981 NYS2d 733 (2nd Dept 2/26/2014)

"[T]he father met his burden of establishing that the subject child[, who had turned 18,] was constructively emancipated" by showing that he consistently made a serious effort to maintain a relationship with the child, his regular calls to the child at the mother's home being consistently unanswered or rejected, his offers to participate in counseling with the child being turned down, gifts and cards left for the child not being accepted, and his suggestion of therapeutic visitation with the child being rejected.

Second Department *continued*

The petition to terminate the father's child support obligation should have been granted. (Family Ct, Suffolk Co)

Impeachment (Of Defendant [Including *Sandoval*])

Trial (Presence of Defendant [Trial in Absentia])

People v Potter, 114 AD3d 968, 980 NYS2d 582 (2nd Dept 2/26/2014)

Where a written record of the defendant's criminal history was presented to the court, the court set forth the scope of cross-examination of the defendant that would be allowed with regard to alleged prior bad acts and aliases, to which defense counsel objected, and the court noted on the record that there had been an earlier discussion in chambers, but that discussion—held outside the defendant's presence—did not include any argument as to the prosecution's *Sandoval* application, the court failed to conduct a *Sandoval* hearing in the defendant's presence.

As a new trial is required, other contentions are not reached, but it is noted that the defendant was shackled during trial without the required explanation on the record. (County Ct, Suffolk Co)

Appeals and Writs (Record)

Juveniles (Custody) (Parental Rights)

Matter of Leval B. v Kiona E., 115 AD3d 665, 981 NYS2d 449 (2nd Dept 3/5/2014)

Where, in this matter regarding termination of parental rights and custody and visitation petitions, "the Family Court's best-interest determinations rested, in large part, on the evidence that the subject children had been with the same preadoptive foster family for three years and apparently were doing very well," but "[i]t has been brought to our attention … that … while these related appeals were pending, the [Department of Social Services] removed the children from the preadoptive foster family's care," the record is now insufficient to determine what would be in the best interests of the children. The matter is remitted for a new, expedited hearing. (Family Ct, Westchester Co)

Aliens (Deportation)

Counsel (Competence/Effective Assistance/Adequacy)

Retroactivity

People v Varenga, 115 AD3d 684, 981 NYS2d 750 (2nd Dept 3/5/2014)

Where the defendant, a foreign national, pleaded guilty to second-degree assault, then sought to vacate the conviction on the ground that his attorney failed to advise him of the deportation consequences of his plea, citing *Padilla v Kentucky* (559 US 356 [2010]), which was decided on Mar. 31, 2010, the court erred in denying the motion to vacate without a hearing. While the US Supreme Court has held *Padilla* not retroactive as to convictions that became final before it was decided, the defendant's conviction was not yet final on that date; he had until June 14, 2010 to seek leave to file a late notice of appeal. The defendant submitted sufficient evidence in support of his motion to vacate to warrant a hearing. (Supreme Ct, Suffolk Co)

Counsel (*Anders* Brief)

Double Jeopardy (Punishment)

People v Cardenas, 115 AD3d 756, 981 NYS2d 577 (2nd Dept 3/12/2014)

Upon an independent review of the record in this matter, in which counsel has filed an *Anders* brief, "we conclude that a nonfrivolous issue exists as to whether the defendant was subjected to double jeopardy (*see People v Brinson*, 21 NY3d 490, 494 [2013]) when the County Court purported to pronounce a sentence of four months' incarceration on the conviction of criminal trespass in the second degree on February 14, 2012, and more than one month later, pronounced the definite sentence of one year of incarceration on the same charge, which the defendant now appeals." (County Ct, Westchester Co)

Sentencing (Concurrent/Consecutive)

People v Harris, 115 AD3d 761, 981 NYS2d 451 (2nd Dept 3/12/2014)

Imposing consecutive prison terms for the attempted second-degree murder and second-degree possession of a weapon charges was improper, as there was no evidence that the defendant possessed a gun "separate and distinct from his shooting of the victim"; surveillance images taken in and around the premises where the shooting took place showed no gun in the defendant's possession until he was seen removing a gun from his shirt seconds before appearing to shoot at the vehicle in question, nor was there evidence showing he possessed a gun afterward. The sentences on those convictions must run concurrently. (Supreme Ct, Kings Co)

Misconduct (Prosecution)

Witnesses (Confrontation of Witnesses)

Second Department *continued*

People v Lloyd, 115 AD3d 766, 981 NYS2d 792 (2nd Dept 3/12/2014)

The defendant's unpreserved contention that allowing the prosecutor to create the impression that a nonwitness had implicated the defendant is reviewed in the interest of justice and has merit. "[T]he defendant's constitutional right to be confronted with the witnesses against him was violated" during the prosecutor's cross-examination of the defendant's sister about a third person (who had testified at the initial trial but did not identify the defendant as being present at the scene) in a way that implied the nonwitness had implicated the defendant. The error was exacerbated in summation, where the prosecutor argued that the sister acted in a way that reflected concern that the nonwitness implicated the defendant, and the court legitimized that improper argument by overruling a defense objection. (Supreme Ct, Kings Co)

Dissent: Other evidence of the defendant's guilt was overwhelming, and while the jury deliberated for four days, the first day of deliberation was only about an hour. The errors complained of were harmless.

Guilty Pleas (Vacatur) (Withdrawal)

Sentencing (Concurrent/Consecutive) (Enhancement) (Resentencing)

People v Moore, 115 AD3d 880, 983 NYS2d 272 (2nd Dept 3/19/2014)

The defendant is entitled to resentencing on the two indictments here. If the sentencing court determines that the sentences may legally run concurrently, the court must adhere to the promise made on the second indictment to make the sentences concurrent or, if it finds that concurrent sentences are not in the interest of justice, it must give the defendant an opportunity to either withdraw the plea to the second indictment or accept consecutive sentences. Confusion as to what the defendant was told at his plea to the first indictment about sentencing in the event the defendant violated the plea agreement, resulting actions by the judge taking the plea to the second indictment, and subsequent actions by the original judge at sentencing, led to error; to include in a list of possible actions that the court might vacate the defendant's plea to the second indictment in the absence of a request to withdraw the plea was error. Contrary to the defendant's position, he is not entitled to concurrent sentences that do not comply with Penal Law 70.25(2-b). (Supreme Ct, Kings Co)

Burglary (Elements) (Evidence)

Evidence (Weight)

People v Taufiq, 115 AD3d 887, 982 NYS2d 146 (2nd Dept 3/19/2014)

The weight of the evidence does not support a finding that the defendant knowingly entered or remained unlawfully in a dwelling, as is required for first-degree burglary, where he remained in a vestibule area that: had no intercom, buzzer, or "no trespassing" sign; did contain utility meters, which are often located in public spaces; included a glass front entry door that had been a storefront and had stickers on it with the names of credit card companies and an alarm company; and was completely free of personal items. There was no proof the entry door, which had not been visibly tampered with, was locked at the time, and the accuser, who the defendant lured out of his apartment by a ruse, testified that he never asked the defendant how he entered the vestibule and did not ask him to leave. (Supreme Ct, Richmond Co)

Admissions (Evidence)

Misconduct (Prosecution)

People v King, 115 AD3d 873, 981 NYS2d 804 (2nd Dept 3/19/2014)

The court "erroneously admitted into evidence a portion of an audiotape of a nearly 15-minute telephone call made by the defendant to a friend while the defendant was incarcerated pending trial" in which he compared the plea offer he received to a more favorable one made to another defendant charged with gun possession. "[C]ounsel and the court correctly agreed that the telephone call could not properly be admitted in its entirety," and introduction of an excerpt that appeared to show the defendant knew the gun was in the car was misleading and unduly prejudicial. Further errors were committed in the prosecutor's summation. (Supreme Ct, Queens Co)

Appeals and Writs (Waiver of Right to Appeal)

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

People v Loper, 115 AD3d 875, 981 NYS2d 806 (2nd Dept 3/19/2014)

Where the defendant insisted during a discussion of a plea offer as to two unrelated indictments that he wanted to retain the right to appeal denial of the suppression motion as to the drug case, his waiver of appeal as to disposition of all charges was unenforceable because the court's extensive discussion of the appeal waiver, including the comment that "that certain 'technicalities' survived appeal waivers," which the defendant relied on in accepting the plea offer, formed a record that did not reflect an awareness by the defendant that the waiver would foreclose review of the suppression claim.

Second Department *continued*

At the time the police stopped the defendant's car by blocking its movement, they lacked reasonable suspicion that a crime had been, was being, or was about to be committed. They did not see what items were exchanged between the defendant and a pedestrian, described no furtive conduct, and did not see money pass; their "observations supported only a 'founded suspicion that criminal activity [was] afoot' …." (Supreme Ct, Queens Co)

Aliens (Deportation)

Appeals and Writs

Post-Judgment Relief (CPL § 440 Motion)

People v Harrison, 115 AD3d 980, 982 NYS2d 544 (2nd Dept 3/26/2014)

The prosecution's motion to dismiss this appeal on the ground that the defendant has been deported and is unavailable to obey the mandate of the court is granted without prejudice to a motion to reinstate the appeal should the defendant return. Unlike the defendants in *People v Ventura* (17 NY3d 675 [2011]), who were pursuing direct appeals as of right that would result in either affirmance or outright dismissal and therefore did not implicate any inability to obey the mandate of the court, the defendant here has appealed by permission from denial of a CPL 440.10 motion to vacate his conviction. If he prevails, his continued participation in further proceedings would be required. (Supreme Ct, Queens Co)

Counsel (Competence/Effective Assistance/Adequacy)

Investigation (Pretrial)

Post-Judgment Relief (CPL § 440 Motion)

People v Jones, 115 AD3d 984, 982 NYS2d 770 (2nd Dept 3/26/2014)

Where the court denied the defendant's fourth 440.10 motion to vacate his conviction on the merits rather than on discretionary procedural grounds, the prosecution's assertion here that the claim should be denied under 440.10(3)(c) is rejected. The application of 440.10(3)(c) was not determined adversely to the defendant, the appellant here, and there is no jurisdiction to review it.

The court should have held a hearing on the ineffective assistance of counsel claim, premised in part on allegations of failure to interview alibi witnesses. On remittal, the court should also hold a hearing addressing the claim of actual innocence. (Supreme Ct, Kings Co)

Juries and Jury Trials (Deliberation)

People v Thomas, 115 AD3d 995, 982 NYS2d 584 (2nd Dept 3/26/2014)

During jury deliberations, the jury sent several notes to the court, including one asking for clarification of the second-degree weapon possession counts; by omitting the word "clarification" when describing the note to counsel as a request to have the counts read, the court failed to give meaningful notice, ie, the actual, specific content of the request, preventing counsel from effectively participating in the response. This was a mode of proceedings error requiring reversal. (Supreme Ct, Queens Co)

Third Department

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Defenses

Evidence (Hearsay) (Prejudicial)

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

People v Demagall, 114 AD3d 189, 978 NYS2d 416 (3rd Dept 1/9/2014)

The defendant was deprived of his right to a fair trial in this murder case where the prosecution elicited testimony from its psychiatric expert regarding the contents of psychiatric hospital records about the defendant's earlier hospitalization and his competency to stand trial and statements made by the hospital psychiatrist to the expert, and his reliance on that hearsay evidence, without the promised testimony of the hospital psychiatrist. The expert's direct basis hearsay testimony prejudiced the defendant as it was "undeniably damaging to defendant's affirmative defense and affected the jury's ability to properly assess the testimony of the expert witnesses." The restrictions on the defendant's cross-examination of the expert and the expert's testimony on redirect that he won an award for an article he wrote about the defendant's first trial also was unduly prejudicial. Had the defendant objected to the expert's testimony that the defendant asked for counsel while in police custody, it would have been found on review that the defendant's invocation of the right to counsel was being used against him to infer consciousness of guilt. (County Ct, Columbia Co)

Speedy Trial (Consent to Delay) (Prosecutor's Readiness for Trial)

Third Department *continued*

People v Miller, 113 AD3d 885, 978 NYS2d 412 (3rd Dept 1/9/2014)

The defendant's statutory speedy trial right was violated where, although the prosecution answered ready seven days before the speedy trial clock would have run, the subsequent 21-day adjournment granted in response to the prosecution's request for more time for witness preparation counts as post-readiness delay. While the decision to seek a superseding indictment and an adjournment did not negate the presumed accurate, truthful statement of readiness, the prosecution failed to make an adequate record on which to base an informed decision as to whether the time should be charged. Since the record does not indicate the length of the adjournment requested by the prosecution, the entire 21 days must be charged to the prosecution. Defense counsel's failure to object to the adjournment cannot be deemed to constitute consent. (County Ct, Chemung Co)

Family Court

Juveniles (Support Proceedings)

Matter of Porter v D'Adamo, 113 AD3d 908, 979 NYS2d 407 (3rd Dept 1/9/2014)

The support magistrate erred by depriving the father of an opportunity to present his direct case in this child support modification proceeding where, after the mother rested her case, in response to the magistrate's question about whether the father wanted to present witnesses or renew his earlier motion, the father's attorney said he wanted to renew the motion and also move to dismiss the modification petition, and the magistrate took this to mean that he did not want to present witnesses. Despite the father's immediate objection to the magistrate's closing of the hearing after reserving decision on the motions, the support magistrate said that the ruling had been made and the family court erred by not granting the father's objection on this ground. (Family Ct, Albany Co)

Accusatory Instruments

Guilty Pleas (Vacatur)

Jurisdiction

People v Price, 113 AD3d 888, 978 NYS2d 409 (3rd Dept 1/9/2014)

The superior court information charging the defendant with fourth-degree conspiracy was jurisdictionally improper where the defendant was originally charged by misdemeanor complaint with the lesser offense of fourth-degree criminal solicitation; reversal is required despite the defendant's plea and waiver of appeal. The defendant's first-degree criminal sexual act plea must be vacated where it was induced by the court's promise that his sentence on that charge would run concurrently with the sentence in the conspiracy case. (County Ct, Ulster Co)

Article 78 Proceedings

Judges (Powers)

Prosecutors (Decisionmaking)

Matter of Soares v Carter, 113 AD3d 993, 979 NYS2d 201 (3rd Dept 1/23/2014)

The court properly granted the prosecution's CPLR article 78 petition and prohibited the respondent judge from requiring the prosecutor "to call witnesses or put in proof at the suppression hearings." The Criminal Procedure Law does not require that the prosecution call witnesses at a suppression hearing and the court properly noted "some of the potential serious problems that would arise if a trial court required a district attorney to do so …." A prosecutor cannot unilaterally terminate a pending prosecution. However, "[w]here a district attorney decides not to pursue a pending case and it is not one of the rare instances where the defendant objects, or even rarer occurrences where bad faith is implicated, then avenues exist under the CPL for dismissal—some of which are more respectful than others of the taxpayers who are funding the Judiciary and the prosecutor (as well as often the defense counsel via assignment)." (Supreme Ct, Albany Co)

[***Ed. Note:*** *Leave to appeal was granted on June 10, 2014 (2014 NY Slip Op 74490).*]

Juveniles (Custody) (Grandparents) (Visitation)

Matter of Aida B. v Alfredo C., 114 AD3d 1046, 980 NYS2d 601 (3rd Dept 2/20/2014)

The court properly found extraordinary circumstances supporting the award of custody to the petitioner grandmother where the children did not live with the respondent father for more than 2½ years after he and the respondent mother separated and they lived with the petitioner continuously for at least 18 months; the father had sporadic supervised visits; he did not participate in the children's medical care or schooling, provide financial support for them, or send them gifts or cards for their birthdays. However, the court erred in making the respondent father's visitation "subject to conditions of supervision set at the sole discretion of petitioner." The court must determine visitation based on the best interests of the children and the schedule must allow the noncustodial parent to have "frequent and regular access," and it

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may not delegate its decision-making authority to a party. (Family Ct, Schenectady Co)

Evidence (Prejudicial) (Uncharged Crimes)

People v Brown, 114 AD3d 1017, 981 NYS2d 154 (3rd Dept 2/20/2014)

In this child sexual abuse trial, the accuser's mother should not have been permitted to testify, over defense counsel's objection, that the defendant admitted that he called the mother by the name of a 13-year-old girl while the defendant and the mother were having sex because he once had sexual contact with that child. Evidence of this uncharged crime or prior bad act cannot be admitted solely to prove criminal propensity, the record does not show that the act falls within a recognized *Molineux* exception, and the obvious prejudice to the defendant far outweighs its possible probative value. Further, the prosecution failed to get a ruling from the court about the admissibility of this evidence before questioning the mother in their case-in-chief and did not try to show the relevance of the evidence. (County Ct, Essex Co)

Juveniles (Custody)

Matter of Kiernan v Kiernan, 114 AD3d 1045, 980 NYS2d 620 (3rd Dept 2/20/2014)

The court erred in dismissing the father's petition to modify the prior custody arrangement set forth in an open court stipulation where, although the father admitted he knew about the mother's issues with alcohol at the time of the stipulation, evidence of the mother's continuing and escalating problems and her alcohol-related arrests and indicated child protective services reports was sufficient to show a change in circumstances. The court must make a determination of the child's best interests. (Supreme Ct, Cortland Co)

Juveniles (Neglect)

Matter of Karm'ny QQ., 114 AD3d 1101, 981 NYS2d 217 (3rd Dept 2/27/2014)

The court improperly granted summary judgment in favor of the petitioner in this derivative neglect proceeding where there are triable issues of fact. "While proof that respondent previously neglected three other children was admissible on the issue of whether he neglected [a child born almost three months after the respondent consented to a neglect finding as to three children] …, such proof alone typically is not sufficient to establish derivative neglect …." The recent neglect finding was "sufficiently proximate so as to give rise to an inference that the conditions leading to such determination still existed," but there was testimony that raised questions of fact about whether the respondent was dealing with those conditions. The respondent testified that an employee of the petitioner told him he did not need substance abuse treatment, he did not enroll in a certain anger management course because he could not afford it, he provided reasons for missing visits with his child, and he had a home and a job. (Family Ct, Washington Co)

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

Matter of Montane v Evans, 116 AD3d 197, 981 NYS2d 866 (3rd Dept 3/13/2014)

"[W]e conclude that the 2011 amendment to Executive Law § 259-c(4) does not require promulgation of formal rules or regulations, and thus the failure to file the requisite 'writing procedures' does not render the parole decision in violation of lawful procedure, arbitrary or capricious." [Footnote omitted.] Further, the October 2011 memo from the Board Chair satisfied the required "procedures for 'incorporat[ing] risk and needs principles' into the process of making parole release decisions …." The Board's decision to deny parole did not rely exclusively on the seriousness of the petitioner's crime and instead considered other relevant statutory factors, including his COMPAS assessment. (Supreme Ct, Albany Co)

Concurrence: "I write separately as I do not agree with the brief, but in my view critically important, portion of the majority's determination that incorporates and continues to apply previously-established precedent regarding our limited review of the Board of Parole's analysis of the factors underlying its determinations. My concern is that the resulting constraint upon effective judicial review may impede progress toward implementing the 2011 amendments to the Executive Law."

[***Ed. Note:*** *Leave to appeal was granted on May 13, 2014 (2014 NY Slip Op 71974).*]

Juveniles (Custody) (Visitation)

Matter of Moore v Palmatier, 115 AD3d 1069, 982 NYS2d 191 (3rd Dept 3/13/2014)

The court erred in modifying the prior custody and visitation order without holding a fact-finding hearing regarding whether the petitioner mother has shown a change in circumstances that reflects a need for modification to ensure the best interests of the child. While the information presented in support of the petition could, if established at a hearing, justify modification of the order, "there was not enough information before Family Court to make an independent assessment as to whether it is in

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the child's best interests to attend both preschool programs at the expense of the father's weekday visitation." (Family Ct, Chenango Co)

Discovery (*Brady* Material and Exculpatory Information) (Matters Discoverable)

Post-Judgment Relief (CPL § 440 Motion)

People v Page, 115 AD3d 1067, 982 NYS2d 188 (3rd Dept 3/13/2014)

The court improperly denied the defendant's CPL 440.10 motion without a hearing where the defendant offered the affidavit of an individual that asserted that he had seen someone other than the defendant sell drugs to one of the two people the defendant was convicted of shooting, the defendant was not in the area, and the seller later confessed to the shooting. Given the practicalities of the situation and limited resources available where the 16-year-old defendant was incarcerated and represented by assigned counsel, "there is no indication that defendant's failure to discover this witness was the result of a lack of due diligence …." The confession of the seller was material to the defendant's guilt or innocence and the defendant has a fundamental right to present the admission of another to the crime at issue.

Even assuming that the ballistics report was *Brady* material, there was no reasonable probability the outcome of the trial would have been different where the report later proffered by the defendant "simply stated that the bullets recovered from the two victims lacked sufficient microscopic detail to determine whether they were fired from the same weapon" so there is no reasonable probability that its use to challenge the prosecution's theory that one gun fired both bullets would make a difference as to the outcome of the trial. (County Ct, Schenectady Co)

Sentencing (Youthful Offenders)

People v Woullard, 115 AD3d 1053, 981 NYS2d 850 (3rd Dept 3/13/2014)

The court properly sentenced the defendant without making a youthful offender determination where the defendant was not eligible for such status because, although he was less than 19 at the time the crime was committed, he was convicted of an armed felony. "We recognize that an age-eligible defendant who has been convicted of an excluded felony may seek youthful offender treatment by demonstrating 'mitigating circumstances that bear directly upon the manner in which the crime was committed' …. However, where, as here, no such showing was made, the defendant is not an eligible youth …." (County Ct, Ulster Co)

Fourth Department

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

Identification (Show-ups) (Suggestive Procedures)

People v Burnice, 113 AD3d 1115, 978 NYS2d 554 (4th Dept 1/3/2014)

The court erred in denying the defendant's motion to suppress the showup identification testimony where the "procedure was conducted in the parking lot of a police station, approximately 90 minutes after the occurrence of the crime, while defendant was handcuffed and while uniformed police officers and ambulance personnel were in the parking lot. The totality of the circumstances of this showup identification procedure presses judicial tolerance beyond its limits …." (County Ct, Monroe Co)

Alibi

Counsel (Competence/Effective Assistance/Adequacy)

People v Jarvis, 113 AD3d 1058, 978 NYS2d 522 (4th Dept 1/3/2014)

Defense counsel provided ineffective assistance by failing to move for a mistrial or object when the prosecutor elicited testimony regarding an alleged threat by the defendant that he would shoot the witness "if she 'knew what happened' with respect to the murders herein" which counsel had successfully gotten the court to preclude. This was not a strategy decision and "was sufficiently egregious by itself to deny defendant a fair trial ...." Counsel also erred in presenting an alibi defense for the wrong day of the week "as offering patently erroneous alibi testimony cannot be construed as a plausible strategy …." (County Ct, Monroe Co)

Dissent: There are possible strategic reasons why counsel did not object to the prosecution witness's testimony and the direct testimony of alibi witnesses provided an alibi for the time of the crime, though cross-examination called into question the testimony of one of the alibi witnesses.

[***Ed. Note:*** *Leave to appeal was granted on Mar. 20, 2014 (22 NY3d 1160).*]

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Sentencing (Youthful Offenders)

People v Koons, 113 AD3d 1063, 977 NYS2d 643 (4th Dept 1/3/2014)

The court erred in sentencing the defendant, after finding that he violated the terms of his interim probation, without determining whether he was a youthful offender. The court must make a determination even if, as in this case, the defendant received the sentence set forth in his plea agreement. (County Ct, Steuben Co)

Dissent: The court made a youthful offender determination when it told the defendant that he would not be adjudicated a youthful offender if he violated the terms of his interim probation and, at sentencing, stated that the promised sentence was appropriate and noted several factors that supported the decision to deny youthful offender status; the court does not need to use "the words 'youthful offender' or invoke any other particular phrase …."

Attempt

Evidence (Sufficiency)

Robbery (Elements) (Evidence)

People v Lamont, 113 AD3d 1069, 977 NYS2d 540 (4th Dept 1/3/2014)

The evidence was sufficient to support the intent element of attempted second-degree robbery where intent to forcibly steal property, as opposed to intent to commit another crime, can reasonably be inferred from the defendant's actions and the surrounding circumstances, including that the defendant and another man, wearing masks and gloves and holding BB guns that looked like pistols, knocked at the back door of a fast food restaurant before it opened for the day, none of the restaurant's employees knew the defendant, and the defendant had a backpack into which stolen property could be put. "Although it is possible … that he intended to commit a crime other than robbery …, we conclude that there is 'not a reasonable possibility' that he intended to do so …." (County Ct, Monroe Co)

Dissent: The evidence is legally insufficient to establish beyond a reasonable doubt that the defendant intended to forcibly steal property from a restaurant employee; neither the defendant nor the other male admitted "their acts were committed with a specific criminal purpose," and because this is an attempt case, it is not possible to look only at the act and its natural consequences to determine intent.

[***Ed. Note:*** *Leave to appeal was granted on Mar. 27, 2014 (22 NY3d 1160).*]

Defenses

Evidence (Hearsay)

People v McArthur, 113 AD3d 1088, 977 NYS2d 545 (4th Dept 1/3/2014)

The court did not violate the defendant's right to present a defense by precluding the defendant from presenting hearsay statements of the accomplice in a letter and at plea proceedings that "he took 'full responsibility for what occurred,'" where the statements did not constitute declarations against penal interest and were unreliable. The statement at the plea colloquy was made in an attempt to avoid being viewed as a "snitch," and the accomplice changed his account after the court advised him that he could receive a longer sentence if he gave untruthful testimony; and the letter was signed a week after the plea colloquy. (County Ct, Onondaga Co)

Dissent: "[T]he accomplice's declarations against his penal interest were supported by evidence establishing a reasonable possibility that they might be true, and the court therefore erred in refusing to admit them in evidence ...." This was an infringement on the defendant's "weighty interest in presenting exculpatory evidence …."

Discovery (*Brady* Material and Exculpatory Information)

Due Process (Fair Trial)

People v Carver, 114 AD3d 1199, 979 NYS2d 752 (4th Dept 2/7/2014)

The prosecution's delayed disclosure of a 911 recording constituted a *Brady* violation where the recording "includes the voice of an unidentified person referring to a white male suspect, and defendant herein is a black male. Although defendant received the 911 recording … on the first day of trial, he was not 'given a meaningful opportunity to use the exculpatory evidence' …." The trial was brief, the prosecution gave counsel no reason to believe that the recording contained exculpatory evidence, counsel had difficulty hearing the recording, and, when counsel realized it contained *Brady* material, the court denied counsel's request for an adjournment to subpoena witnesses, thereby denying meaningful use of the recording. (County Ct, Monroe Co)

Evidence (Objections) (Prejudicial)

Juries and Jury Trials (Selection)

People v Collier, 114 AD3d 1136, 979 NYS2d 726 (4th Dept 2/7/2014)

In this murder case, the defendant "was deprived of a fair trial by references to his nickname, 'Killer,' made by two prosecution witnesses and by the prosecutor five

Fourth Department *continued*

times during summation"; this unpreserved issue is reviewed because defense counsel was ineffective by not objecting when the prosecutor elicited the testimony and repeated it on summation. The testimony had little to no probative value as the witnesses knew the defendant's given name and it was highly prejudicial. By dismissing the entire first jury panel after defense counsel expressed concern that the court was frustrated with the excuses of several jurors and that it may negatively influence other members of the panel, "without questioning the ability of the individual prospective jurors to be fair and impartial …, the court deprived defendant of a jury chosen 'at random from a fair cross-section of the community' …." (Supreme Ct, Monroe Co)

Counsel (Competence/Effective Assistance/Adequacy)

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

Post-Judgment Relief (CPL § 440 Motion)

People v Hill, 114 AD3d 1169, 979 NYS2d 737 (4th Dept 2/7/2014)

The court erred in denying without a hearing the defendant's CPL 440.10 motion, in which he claimed that his plea was not knowing, voluntary, and intelligent due to ineffective assistance of counsel, where the motion tends to support the facts necessary to the claim, his allegations are not contradicted by the record and are supported by other affidavits, and it is reasonably possible they are true. The defendant claims that counsel, who told him that if he pleaded guilty and cooperated with the prosecution, he would receive a maximum sentence of 5 years, "miscommunicated to him the level of cooperation necessary for the [prosecution] to recommend a lesser sentence and misled him concerning what his sentence would be if he entered a plea to the indictment." (County Ct, Onondaga Co)

Appeals and Writs (Preservation of Error for Review)

Impeachment (Of Defendant [Including *Sandoval*])

Unlawful Imprisonment (Elements)

People v James, 114 AD3d 1202, 980 NYS2d 645 (4th Dept 2/7/2014)

The defendant's second-degree unlawful imprisonment conviction should be dismissed pursuant to the merger doctrine because that offense was incidental to and inseparable from the second-degree assault offense where the defendant's grabbing the accuser and pulling him outside the dwelling "was 'merely "preliminary, preparatory, or concurrent action" in relation to the ultimate crime [of assault]' …." This unpreserved issue is reviewed as a matter of discretion in the interest of justice.

The court committed harmless error in failing to determine that the probative value of the defendant's prior convictions of criminal contempt and resisting arrest on the issue of his credibility outweighed the potential prejudice and in finding the defendant opened the door to the prosecution's cross-examination of a defense witness about the defendant's prior third-degree assault conviction. (County Ct, Ontario Co)

Counsel (Competence/Effective Assistance/Adequacy)

People v Layou, 114 AD3d 1195, 979 NYS2d 723 (4th Dept 2/7/2014)

Where the only viable defense strategy was to seek suppression of the evidence, the defendant was denied the effective assistance of counsel when his lawyer failed to move to suppress the knife and drugs found in the defendant's vehicle and the defendant's statement about the knife, and made no argument in support of suppression at the hearing granted on the defendant's pro se motion. Counsel did not meet once with the defendant in approximately six months. Suppression was granted as to the statement and otherwise denied, in part on the basis that the officer was justified in approaching the defendant's vehicle because it was in a no-parking area. New counsel was later appointed, and submitted an affirmation in support of a motion to withdraw the plea taken in the meantime, which asserted that the "no parking" sign at the scene was not visible at the time of the search. (County Ct, Onondaga Co)

Misconduct (Prosecution)

Post-Judgment Relief (CPL 440 § Motion)

People v Parsons, 114 AD3d 1154, 979 NYS2d 893 (4th Dept 2/7/2014)

The court erred in denying without a hearing the motion to vacate the defendant's conviction where the defendant submitted affidavits from a prosecution witness tending to substantiate the essential facts supporting the defendant's claims that material evidence at his trial was false and known by the prosecutor to be false, and the prosecution "submitted nothing in opposition to the motion that would require or indeed allow the court to deny the motion without a hearing …." (County Ct, Monroe Co)

Counsel (Right to Counsel)

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Post-Judgment Relief

People v Rohadfox, 114 AD3d 1217, 979 NYS2d 758 (4th Dept 2/7/2014)

The court abused its discretion in refusing to grant the defendant's request for an adjournment to obtain new counsel after counsel retained by the defendant's family had, without the defendant's knowledge or consent, withdrawn the defendant's suppression motion and sought an expedited trial. The court properly set aside the verdict on that basis as reversal on that ground on appeal would have been required as a matter of law. (Supreme Ct, Onondaga Co)

Juveniles (Custody) (Foster Care)

Matter of Washington v Stoker, 114 AD3d 1147, 980 NYS2d 186 (4th Dept 2/7/2014)

The court properly dismissed the petition of the respondent former foster parents seeking custody of the child of the respondent father where the child was in the father's care and custody at the commencement of the proceeding and the former foster parents did not have standing to bring their own custody proceeding, assert on behalf of the child the child's right to maintain a relationship with them, or intervene in the custody proceeding brought by the petitioner. The court correctly found "that evidence of the father's arrest and incarceration, without more, did not meet the former foster parents' burden of establishing … extraordinary circumstances …." (Family Ct, Oneida Co)

Appeals and Writs (Preservation of Error for Review)

Sentencing (Appellate Review) (Orders of Protection)

People v Wood, 114 AD3d 1140, 979 NYS2d 886 (4th Dept 2/7/2014)

The defendant failed to preserve his claim that the court violated CPL 530.10 by issuing an order of protection in favor of a person who was not a victim of nor a witness to the crime of conviction and "this case does not fall within '"the narrow exception to the preservation rule" … where a court exceeds its powers and imposes a sentence that is illegal in a respect that is readily discernible from the trial record' …." (Supreme Ct, Monroe Co)

Juveniles (Custody) (Right to Counsel)

Matter of Bly v Hoffman, 114 AD3d 1275, 980 NYS2d 864 (4th Dept 2/14/2014)

The court deprived the petitioner mother of her fundamental right to counsel when it sua sponte dismissed her petition to modify an existing custody order in the absence of her attorney. (Family Ct, Cattaraugus Co)

Counsel (Competence/Effective Assistance/Adequacy)

Evidence (Best and Secondary Evidence)

People v Case, 114 AD3d 1308, 980 NYS2d 695 (4th Dept 2/14/2014)

The court erred in admitting summary exhibits under the voluminous writings exception to the best evidence rule where the defendant was not given the data underlying the exhibits before trial and the exhibits were not based solely on information already in evidence. The error was not harmless as the evidence against the defendant was not overwhelming. Defense counsel's failure to review the summary exhibits or object to their admission in evidence constitutes ineffective assistance. (County Ct, Genesee Co)

Appeals and Writs (Scope and Extent of Review)

Evidence (Sufficiency) (Weight)

Homicide (Murder [Intent])

People v Heatley, 116 AD3d 23, 980 NYS2d 701 (4th Dept 2/14/2014)

While the defendant failed to preserve for review a contention that the evidence was legally insufficient as to an intent to kill, and did not raise that contention on appeal, the elements of the crime must be considered in a weight of the evidence review, which the defendant raised as to the intent element without making an actual weight of the evidence argument. Viewed in the light most favorable to the prosecution, the jury could not logically conclude that the prosecution sustained its burden of proof as to the intent to kill element of second-degree murder despite the number of the decedent's wounds including one to the heart.

The indictment is not dismissed; the conviction is reduced to first-degree manslaughter and remitted for resentencing. The statute that provides authority to reduce a conviction based on a claim of legal insufficiency is silent as to the remedy upon a weight of the evidence claim. Where, as here, an analysis of legal sufficiency occurs solely in the context of a weight of the evidence claim, dismissal is not the appropriate remedy. (County Ct, Erie Co)

Concurrence: The evidence was legally sufficient with regard to intent. The murder verdict was against the weight of the evidence, and the history and context of the provisions controlling remedy allow reduction of the con-

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viction from second-degree murder to first-degree manslaughter upon weight of the evidence review.

Dissent: The majority and concurring opinions would effectively eliminate any distinction between legal sufficiency and weight of the evidence review on intermediate appellate review.

Appeals and Writs (Prosecution, Appeals by)

Search and Seizure (Arrest/Scene of the Crime Searches) (Motions to Suppress [CPL Article 710]) (Stop and Frisk)

People v Ingram, 114 AD3d 1290, 980 NYS2d 653 (4th Dept 2/14/2014)

A tip from an unknown arrestee about guns being stashed behind a given address was not shown to be reliable where there was no specific information about the exact location or type of guns or who placed them there and the officer had not met or received reliable information from the arrestee before. The officers had no more than an objective, credible reason to ask for information when they approached the defendant and his companion who were in proximity to the address given in the tip, which was in a "high crime" area. That the defendant moved away from the officers while reaching for his jacket pocket, which did not appear to bulge, did not give rise to reasonable suspicion of a crime or support pursuit of the defendant. (Supreme Ct, Erie Co)

Dissent: The combination of specific circumstances provided the officers with the requisite reasonable suspicion to pursue the defendant.

Sentencing (Pre-sentence Investigation and Report)

People v James, 114 AD3d 1312, 980 NYS2d 698 (4th Dept 2/14/2014)

The court failed to give the defendant an opportunity to challenge the contents of the presentence report where the court denied defense counsel's request to correct alleged inaccuracies, including the defendant's criminal history and statements that he had a history of assaulting women and is at the highest risk of violent recidivism, because the court did not know the procedure for correcting that information. (County Ct, Cattaraugus Co)

Arrest (Probable Cause) (Warrantless)

Evidence (Sufficiency)

People v Laboy, 114 AD3d 1254, 980 NYS2d 215 (4th Dept 2/14/2014)

There was legally insufficient evidence of resisting arrest and related charges to show that the deputy sheriff's arrest of the defendant was lawful where the deputy did not have reasonable cause to believe the defendant committed an offense in her presence. When the deputy responded to a call of possible family trouble, she knew that earlier in the day the accuser signed an information charging the defendant with second-degree harassment, the defendant allegedly caused red marks on the accuser's hand or arms, the information was not filed with the court, and there was no arrest warrant. Due to a language barrier, the accuser was able to tell the deputy only where the defendant was; when the deputy entered that room with her gun drawn and told the defendant that he was under arrest, an altercation ensued. (County Ct, Ontario Co)

Larceny (Grand Larceny)

Statute of Limitations (Computation of Period)

People v Perry, 114 AD3d 1282, 980 NYS2d 225 (4th Dept 2/14/2014)

The court erred in finding the statute of limitations had expired on the charge of second-degree grand larceny based on the defendant's receipt from Feb. 17, 2005 through Feb. 28, 2012 of retirement disability benefits to which he was not entitled, and for which he applied in 2004 or 2005. The offense was properly characterized as a continuing crime, and the statute did not begin to run until the final taking in February 2012. (County Ct, Steuben Co)

Accusatory Instruments

People v Randle, 114 AD3d 1268, 980 NYS2d 686 (4th Dept 2/14/2014)

The third felony DWI count in the superior court information is "jurisdictionally defective pursuant to CPL 195.20 because defendant was not held for action of the grand jury on that charge, nor is it a joinable offense pursuant to that statute or caselaw." That count was not charged in the felony complaint and is not a lesser included offense of the offense of first-degree aggravated unlicensed operation, which was charged in the complaint. The count would have been joinable to the unlicensed operation charge, pursuant to CPL 200.20(2)(a), but CPL 195.20 requires that the SCI include at least one offense that was in the felony complaint. (County Ct, Erie Co)

Appeals (Waiver of Right to Appeal)

Guilty Pleas

Fourth Department *continued*

Sentencing

People v Trinidad-Ayala, 114 AD3d 1229, 980 NYS2d 849 (4th Dept 2/14/2014)

The defendant's appeal waiver is not valid where, by telling the defendant that if he did not sign the written waiver, the court did not have to honor the promised 15 year sentence, and where the maximum sentence was 25 years, the court "implicitly threatened a penalty of 10 years of additional incarceration in the event that defendant did not sign the waiver." (County Ct, Onondaga Co)

Counsel (Competence/Effective Assistance/Adequacy)

Discovery (*Brady* Material and Exculpatory Information)

People v Bernard, 115 AD3d 1214, 982 NYS2d 264 (4th Dept 3/21/2014)

Counsel's failure to request a limiting instruction as to certain *Molineux* evidence was not ineffective assistance of counsel where the record shows that counsel declined such an instruction after a discussion with the court and it was part of legitimate strategy.

The prosecution failed to turn over *Brady* material to the defense in a timely manner, but reversal is not required where disclosure of the evidence before jury selection as part of *Rosario* material afforded the defendant "a 'meaningful opportunity' to use the information during cross-examination …." (County Ct, Monroe Co)

Appeals and Writs (Prosecution, Appeals by)

Grand Jury (Procedure)

People v Grimes, 115 AD3d 1194, 982 NYS2d 253 (4th Dept 3/21/2014)

Where the grand jury had voted a true bill on the charge of second-degree assault, but the indictment had not been filed, the prosecutor did not need to get at least 12 members of the grand jury to vote to vacate the earlier vote and reopen the proceedings before presenting additional evidence to support the higher charge of first-degree assault. Since this was not a second presentment of the second-degree assault charge, the grand jury did not have to vacate its earlier vote. (County Ct, Onondaga Co)

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

People v Holmes, 115 AD3d 1179, 982 NYS2d 239 (4th Dept 3/21/2014)

Where the vehicle driven by the defendant was lawfully stopped based on the report of an identified citizen that a man had been forced at gunpoint into that vehicle, the defendant's license was found to be suspended, and the identified citizen was at the scene and said one of the other occupants of the vehicle had pointed a gun earlier, the court erred in suppressing the gun found in the car during an inventory search after the defendant was arrested for driving without a license; the police had probable cause to believe a gun was in the vehicle. (Supreme Ct, Monroe Co)

Forensics (DNA)

Misconduct (Prosecution)

People v Wright, 115 AD3d 1257, 982 NYS2d 219 (4th Dept 3/21/2014)

The claim that the prosecutor's misconduct on summation denied the defendant a fair trial is unpreserved. The evidence supporting the verdict of second-degree murder was not legally insufficient nor against the weight of the evidence where several witnesses said the defendant was with the decedent in her car before her death, the defendant's DNA could not be excluded from various pieces of recovered evidence, the defendant was seen with the decedent's car the night of the killing, and the defendant took a witness to the car's location the next morning. (Supreme Ct, Monroe Co)

Dissent: The prosecutor's summation, in which DNA evidence linking the defendant to the decedent's murder was mischaracterized, should be reviewed in the interest of justice and the conviction reversed. The testimony as to DNA testing done referred to mitochondrial DNA analysis and YSTR DNA analysis, but the prosecution's expert did not speak at length about a third, preferred type—autosomal. None of the DNA evidence tying the defendant to the murder was backed by any statistical calculations, and was said only to not exclude the defendant, the decedent's husband, or an accomplice. Yet the prosecutor argued that the defendant and the accomplice "'left their DNA all over the crime'" and made other misleading comments, to which defense counsel failed to object.

[***Ed. Note:*** *Leave to appeal was granted on Apr. 28, 2014 (22 NY3d 1204).*]

Sex Offenses (Sex Offender Registration Act)

People v Moore, 115 AD3d 1360, 982 NYS2d 684 (4th Dept 3/28/2014)

In this Sex Offender Registration Act proceeding, the court erred in increasing the defendant's risk level from a level two to a level three based on an automatic override

Fourth Department *continued*

for a prior felony sex crime conviction. As the Court of Appeals held in *People v Moss* (22 NY3d 1094), there is no legal basis for an automatic override. (County Ct, Onondaga Co)

Appeals and Writs (Preservation of Error for Review)

Juries and Jury Trials (Deliberation)

People v Roberites, 115 AD3d 1291, 983 NYS2d 377 (4th Dept 3/28/2014)

The court committed a mode of proceedings error by providing exhibits to the jury without notice to the defendant in response to a jury note. The jury had been told that admitted exhibits were available upon request, but the court never placed on the record whether the defendant, who proceeded pro se, waived his right to be present when such a request was made or was advised that requested exhibits would be sent to the jury without reconvening. No record was made of a discussion referred to when the court disclosed the jury's note before the verdict was received. (County Ct, Livingston Co)

Dissent: The defendant failed to preserve this issue, and no mode of proceedings error occurred. The jury's inquiry was purely ministerial in nature.

Defender News *(continued from page 6)*

Race is Still a Factor in Manhattan Case Outcomes, Vera Finds

Soon after his 2010 election, New York County District Attorney Cyrus R. Vance, Jr. invited the Vera Institute of Justice to partner on a two-year study on race. Specifically, the study set out to identify "how the exercise of discretion by prosecutors at key points in the life of a case can contribute to racially and ethnically disparate outcomes." The newly-released Research Summary reports that "race remained a statistically significant independent factor in most of the discretion points that were examined as part of the research," although other factors—"such as charge seriousness, prior record, and offense type—were those that best predicted case outcomes."

> The study found that DANY [the District Attorney of New York] prosecutes nearly all cases brought by the police, with no noticeable racial or ethnic differences at case screening. For subsequent decisions, disparities varied by discretionary point and offense category. For all offenses combined, compared to similarly situated white defendants, black and Latino defendants were more likely to be detained at arraignment (remanded or have bail set, but not met), to receive a custodial sentence offer as a result of the plea bargaining process, and to be incarcerated, but they were also more likely to have their cases dismissed.

In addition to the Research Summary, the Technical Report and Partnership Report issued about the study are available on the Vera website.

Type of Defense Counsel Said to Also Play a Role In Outcomes

According to the Research Summary, the type of legal representation received by Manhattan defendants also plays a role in case outcome. A sidebar reads:

> This study also yielded significant information about how criminal justice practitioners' characteristics influence case outcomes—findings that may have racial implications. Blacks and Latinos were much less likely to be represented by private counsel and much more likely to be represented by court-assigned defense attorneys (commonly known as 18(b) counsel), with the former showing the most favorable and the latter the least favorable outcomes for defendants. Moreover, defense attorney type trumped race as a predictive factor in pretrial detention, sentence offers, and sentence outcomes. These findings suggest a need for additional research that looks at the quality of legal representation.

The technical report expands on the final sentence above, adding at page xvi, in addition to looking at the quality of representation, study is needed as to "how prosecutors and other courtroom actors view different types of defense counsel …."

The Vera reports were released just as the *REPORT* was going to press, and NYSDA staff are in the process of reviewing the findings. But clearly, this newest report highlights the continuing problem of racial and ethnic disparities in the justice system. Race is inextricably entangled with many criminal justice issues, from New York City's stop-and-frisk policies (*see, eg,* page 6 of the Nov.-Dec 2013 *REPORT*) to the taking of DNA samples from arrestees (*see, eg,* page 8 of the May-July 2013 *REPORT*). NYSDA recently compiled information at the request of the New York State Legislative Caucus of Black, Puerto Rican, Hispanic and Asian Legislators on racial and ethnic disparities in arrests and convictions in counties represented by Caucus members. And racial disparities in the foster care system also demand attention. *See, eg,* Tanya Asim Cooper, "Racial Bias in American Foster Care: The National Debate," 97 Marquette Law Review 215 (Winter 2013). ⚖

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