



Public Defense Backup Center
REPORT

Volume XXX Number 3

August–October 2015

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

**INSIDE—Pull-Out:
New York
Lesser Included Offenses
August 2015**

**Preindictment Delay Dooms
Pornography Prosecution**

After seizing a man’s computer in January 2007 and questioning him the next day, police finally got a search warrant seven months later to analyze the computer’s contents. Two years after the original seizure, the matter was taken to federal prosecutors, but preindictment plea negotiations failed and no federal prosecution was instituted. In November 2013, police took the file to the local prosecutor and the defendant was indicted before the end of the year. After his motion to dismiss based on the preindictment delay was denied—the court refused to hold a hearing despite the prosecution’s consent to one—the defendant pleaded guilty while reserving his right to appeal the delay. The Third Department found that the prosecution failed “to establish good cause as to why they delayed in exercising their own jurisdiction to proceed with prosecution for nearly five years from the date of defendant’s alleged crime to the date of the indictment.” Reversing the conviction and dismissing the indictment despite lack of any actual prejudice to the defendant from the delay, the Appellate Division noted that the preindictment plea negotiations did not vitiate the obligation to ensure prompt prosecution. *People v Montague*, 130 AD3d 1100, 12 NYS3d 376 (3rd Dept 7/2/2015).

Presiding Justice Karen K. Peters dissented. While the delay was protracted, she stated, the record was insufficient to determine whether the delay was justified; she would remit for a *Singer* hearing. *People v Singer*, 44 NY2d 241 (1978).

DWI News

**Probation Practitioner Handbook for
Management of DWI Offenders**

The NYS Office of Probation and Correctional Alternatives (OPCA) has issued the [New York State Probation Practitioner Handbook for the Management of the DWI Offender](#). The handbook “covers all the steps in which a probation officer may have contact with a DWI offender from the pretrial stage through supervision to completion of probation,” and also addresses issues such as management of underage and female DWI offenders, laws and regulations governing driver’s licenses and relicensing, supervision technology, and ignition interlock devices (IIDs).

According to the OPCA Director’s accompanying [memorandum](#), “a growing number of probation departments have indicated their intention to develop written policies concerning probation DWI practice in their respective communities and have reported that the Probation Practitioner Handbook can help inform their work.” Attorneys who receive copies of local probation department policies are encouraged to share them with the Backup Center.

Other DWI resources for practitioners include the OPCA [Summary of Alcohol-Related Risk Assessment Instruments](#) and [Ignition Interlock web page](#); DMV web pages on the [Drinking Driver Program](#) and other resources discussed below; and the OASAS web page on [Impaired Driver Services](#).

**DMV Rules on Relicensing of Drivers with
Multiple DWI Convictions Upheld by Third
Department**

In a 3-2 decision, the Third Department upheld the DMV regulations that severely restrict the relicensing of drivers after three or more DWI

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convictions. *Matter of Acevedo v NYS Department of Motor Vehicles*, 2015 NY Slip Op 06467, 14 NYS3d 790 (3rd Dept 8/6/2015). The majority held that the DMV Commissioner did not exceed the bounds of her regulatory authority when amending 15 NYCRR Part 136, “but rather implemented the Legislature’s policies of promoting highway safety and reducing instances of impaired and intoxicated driving.” It also found that the DMV’s denial of the petitioner’s application for a new license did not violate the Ex Post Facto Clause of the U.S. Constitution, which “applies only to penal statutes and not to regulations such as those at issue here” The dissent concluded: “By adopting a policy creating an automatic stay [of relicensure applications] in all cases absent ‘unusual, extenuating and compelling circumstances,’ the Commissioner has ‘impose[d] a solution of [her] own’ to address the public safety issue created by recidivist drivers”

According to a Sept. 28, 2015 [press release](#), in the three years since the regulations took effect, the DMV has permanently denied licenses to over 4,300 people and has imposed a five-year denial of licenses for another 3,800 individuals. After the five years, those individuals can apply for a problem driver restricted license.

When representing clients on an alcohol/drugged driving charge, attorneys should get a copy of their clients’ [lifetime driving record](#) from the DMV so they can properly advise their clients about whether a new conviction will or may result in driver’s license restrictions or a permanent denial of a driver’s license under 15 NYCRR Part 136. More information about driver’s license penalties for multiple convictions is available on the DMV [website](#).

Audit Criticizes NYC Probation Department’s Monitoring of IIDs

The State Comptroller’s Office has released an [audit](#) of the New York City Department of Probation’s oversight of individuals who are subject to an IID condition. The auditors found that between Aug. 15, 2010 and Dec. 31, 2014, just over five percent of all individuals who had an IID condition and were under NYC Probation supervision actually installed an IID; the statewide installation rate is currently approximately 26 percent. Other findings include that probation officers did not perform DMV database checks to determine whether individuals had any vehicles registered in their name or failed to adequately document those checks, and the Probation Department did not comply with the provisions of NYC’s Ignition Interlock Program Plan.

The Probation Department’s response noted that all individuals under supervision who have an IID condition either installed devices or did not own a vehicle and asserted that they would not operate a vehicle during the IID period. The Department also indicated that, “going

forward, [it] will begin documenting false positives and IID vendor responses in [its] case management system, as well as assure notification to the courts and other stakeholders that will include the Department’s response to the alert.”

New National Report on Drug-Impaired Driving

The Governors Highway Safety Association (GHSA) and the Foundation for Advancing Responsibility recently issued a report, “[Drug-Impaired Driving: A Guide for What States Can Do](#).” The report, which focuses on marijuana and illegal drugs, provides a variety of statistics from the National Highway Traffic and Safety Administration’s Fatality Analysis Reporting System (FARS), such as post-accident alcohol and drug test results, and data from roadside surveys and studies, as well as links to related reports and studies. The report’s author, Dr. Jim Hedlund, [noted](#) that the report “highlights how much remains unknown,” including that “we still don’t know with certainty how much of a specific drug will cause impairment or if such a relationship can even be defined. Many states do not have the data to measure their drug-impaired driving scope or characteristics.” A webinar about the report and the presentation slides are available on the GHSA website at the above link to the report.

On his [DUI blog](#), Lawrence Taylor offered a simple summary: “But what about driving under the influence of drugs or marijuana? How do you measure the amounts in the blood? At what levels is a driver ‘under the influence’? Answer: No one knows.”

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THE REPORT IS PRINTED ON RECYCLED PAPER

Guide on the Impact of Mellouli v Lynch on Immigrant Clients' Drug Cases

The Immigrant Defense Project (IDP) recently released an [advisory](#), titled "A Guide for New York Criminal Defense Attorneys: How *Mellouli v. Lynch* Impacts Controlled Substances Cases for Your Immigrant Clients." In *Mellouli* (135 S Ct 1980 [6/1/2015]), the U.S. Supreme Court held that to trigger removal, the prosecution must connect an element of an immigrant's controlled substance conviction to a drug listed on the federal controlled substances schedules. The advisory states: "In cases where your immigrant client cannot avoid a disposition under Article 220 ... of the New York Penal Law ..., *Mellouli* provides that your client *may* still avoid future immigration consequences if you can negotiate a tailored plea agreement and/or allocution. This advisory details what such a plea agreement and/or allocution would look like." A national practice advisory, prepared by IDP and the National Immigration Project of the National Lawyers Guild, is also available on IDP's website, <http://immigrantdefenseproject.org>.

Resources on the Rights of Parents and Prospective Parents with Disabilities

The U.S. Department of Health and Human Services (HHS) and the U.S. Department of Justice (DOJ), Civil Rights Division, Disability Rights Section have issued a new resource: "[Protecting the Rights of Parents and Prospective Parents with Disabilities](#): Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act." According to an HHS [press release](#), the instrument:

provides an overview of Title II of the ADA and Section 504 and examples about how to apply them in the child welfare system, including child welfare investigations, assessments, guardianship, removal of children from their homes, case planning, adoption, foster care, and family court hearings, including termination of parental rights proceedings. It also underscores that Title II and Section 504 prohibit child welfare agencies from acting based on unfounded assumptions, generalizations, or stereotypes regarding persons with disabilities.

It also addresses issues such as what the disability nondiscrimination laws require of child welfare agencies and courts and how aggrieved persons can file a complaint.

The problem of discrimination based on disability was highlighted by the 2012 National Council on Disability report, "[Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children](#)," and subsequently demonstrated in the case of a mother in

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

Massachusetts, known by the pseudonym Sara Gordon, who filed a complaint against the MA Department of Children and Families. The DOJ Civil Rights Division and HHS issued a [report](#) after investigating the complaint. While the mother was reunited with her child, it is not likely that her case was unusual, as noted in a Mar. 13, 2015 [article](#) on TODAY (NBC).

Other resources for assisting parents with disabilities include the Bazelon Center for Mental Health Law's [page](#) on the parental rights of parents with mental disabilities and the website for the non-profit [Through the Looking Glass](#).

Because All Families Matter, New York's First Ever Statewide Parent Representation Conference

NYSDA, the Office of Indigent Legal Services, and the Child Welfare Court Improvement Project are co-sponsoring New York's first CLE Conference for the hundreds of NY attorneys and other support staff who provide representation to parents in Family Court Act article 10 matters. In addition to hearing from nationally acclaimed authorities on child welfare, this two-day event will provide opportunity to foster relationships with other providers in the field, including institutional providers, public defenders, conflict defenders, and assigned counsel. The program is [online](#), or available by emailing a request to Diane Geary at: DGeary@nysda.org. The registration form is available at: <http://www.nyparentdefense.com/registration>.

NYLJ Publishes Article on ILS Appellate and Post-Conviction Standards

The Aug. 27, 2015 edition of the *New York Law Journal* carried an article on the "Standards and Best Practices for Appellate and Post-Conviction Representation" issued in January by the Indigent Legal Services Office (ILS). The article's authors focused on four standards whose promulgation triggered discussion among members of the bar and judiciary. The four are: (IV) Mandatory Brief Review; (IX) Meeting with the Client; (XX) Collateral Litigation: CPL Article 440 Motions; and (XXII) Issue Selection.

The ILS appellate [standards](#) and the [article](#) can be read on the ILS website.

Co-authors of the article were Risa Gerson, Director of Quality Enhancement for ILS, who chaired the working group that drafted the standards, and Tammy Feman, Deputy Chief of the Nassau County Legal Aid Society's Appeals Bureau and a member of the working group, who chaired the working group subcommittee on parent representation.

They briefly described the goals of the standards and the process through which the standards emerged. They noted that concerns raised about paying for tasks required by the standards that public defense budgets do not currently cover can be addressed by seeking funding through ILS. The authors also noted that the 22 standards not discussed in the article had generated little discussion.

NYSDA Presents Statement About Eligibility Determination

The Executive Director of the Association, Jonathan E. Gradess, testified at one of the eight hearings held by the Indigent Legal Services Office (ILS) on criteria and procedures for determining client eligibility for mandated representation. NYSDA's [written statement](#) submitted at the hearing can be found on the home page of the NYSDA [website](#).

As noted in the last issue of the *REPORT*, ILS scheduled hearings in each of the judicial districts outside New York City seeking input on what eligibility criteria and procedures should—and should not—include. NYSDA's statement responded to specific queries posed in the notice, which emanated from the *Hurrell-Harring* settlement also described in the last two issues of the *REPORT*. The statement also addressed head-on the issue of public defense funding, which should not be a factor in determining eligibility, but which will be affected by adherence to equitable criteria and procedures fulfilling the right to counsel. **"The State should provide additional funding to cover the increased costs to counties that will result from having defender systems function with legally appropriate eligibility standards,"** the statement notes.

It also calls on ILS, defenders, judges, county officials, the private bar, and the client community to "join forces to demand the adequate financing of defender systems appropriately finding eligible those who legally deserve the appointment of counsel." Furthermore, it notes, "all three branches of New York State government must become fully responsive to this need, funding it appropriately."

ILS is expected to issue its eligibility criteria and procedures in November.

Legislative Updates

Below are some of the recent criminal law and family court bills signed by Governor Cuomo. A summary of a number of bills signed earlier this year appeared in the [May-July 2015 issue](#) of the *REPORT*, and a full review of the laws enacted during the 2015 legislative session will appear in a forthcoming issue.

- [Chapter 240](#) (S.4340-B/A.1797-A): Effective Oct. 22, 2015, the law amends CPL 530.12 and 530.13 to require that, in sexual assault cases where probation is imposed (as provided in Penal Law 65.00[3]), the order of protection expires six years from the date of sentencing for misdemeanors and 10 years from the sentencing date for felonies.
- [Chapter 242](#) (S.2957-A/A.4085-A): Effective Nov. 22, 2015, the law creates a new class E felony, concealment of a human corpse (Penal Law 195.02), which is violated when a person, having a reasonable expectation that a human corpse or a part thereof will be produced for or used as physical evidence in an official proceeding, an autopsy or an examination by law enforcement as part of a criminal investigation, alone or in concert with another, conceals, alters, or destroys such corpse or part thereof with the intent to prevent its production, use, or discovery.
- [Chapter 250](#) (S.3203-A/A.4969-B): Effective Nov. 1, 2015, this law expands the crime of forcible touching (Penal Law 130.52) to include when a person intentionally, and for no legitimate purpose:
 2. Subjects another person to sexual contact for the purpose of gratifying the actor's sexual desire and with intent to degrade or abuse such other person while such other person is a passenger on a bus, train, or subway car operated by any transit agency, authority or company, public or private, whose operation is authorized by New York state or any of its political subdivisions.
- [Chapter 258](#) (S.4239-B/A.6255-B): Effective Sept. 25, 2015, the law amends the judicial diversion statute (CPL 216.05) to specify that defendants who need treatment for opioid abuse or dependence "may participate in and receive medically prescribed drug treatments under the care of a health care professional licensed or certified under [Education Law title 8], acting within his or her lawful scope of practice" and may not be deemed to have violated a release condition for participating in such drug treatments.

More information about medication-assisted treatment is available from the Legal Action Center at <http://lac.org/resources/substance-use-resources/medication-assisted-treatment-resources>.

- [Chapter 270](#) (S.4905/A.7814): Effective Oct. 25, 2015, the law amends Correction Law 74 to give the Commissioner of the Department of Corrections and Community Supervision the discretion to advance the release date of an inmate who is scheduled to be released on a Friday to a Thursday so that the person can report on Friday to the appropriate community supervision location.
- [Chapter 272](#) (S.5533-B/A.7939-A): Effective Sept. 25, 2015, this law amends Judiciary Law 390, now titled “Equal access to court proceedings for deaf or hard of hearing person,” to give the courts authority to, on request of a person (party, witness, juror, or prospective juror) who is deaf or hard of hearing or on its own motion, and in lieu of appointing an interpreter, “provide an assistive listening device, a stenographer who can furnish communication access real-time translation or any other appropriate auxiliary aid or service.”

More information about the range of court interpretation services is available on the Court System’s website at <http://www.nycourts.gov/courtinterpreter/index.shtml>. Information about how individuals with disabilities who need accommodations to assure accessibility to the courts can make such a request, and a list of local Americans with Disabilities Act liaisons, may be found at <http://www.nycourts.gov/accessibility/index.shtml>.

- [Chapter 321](#) (S.5023-A/A.7656-A): Effective Sept. 25, 2015, the law amends Correction Law 500-a and 500-c to allow the Livingston County jail to be used for pre-arraignment detention.
- [Chapter 347](#) (S.5685-B/A.7636-B): Effective Jan 1, 2016, the bill repeals the existing Family Court Act article 5-b (Uniform Interstate Family Support Act [UIFSA]) and replaces it with a new article 5-b that includes the 2008 amendments to UIFSA.

The Assembly [Sponsor’s Memo](#) provides some details about the changes to article 5-b. Information about the national adoption of the 2008 amendments is available on the Uniform Law Commission’s [website](#), and the U.S. Department of Health and Human Services, Office of Child Support Enforcement website at <http://www.acf.hhs.gov/programs/css/resource/uniform-inter>

[state-family-support-act-2008-and-hague-treaty-provisions](#).

Information Available on Risk Assessment Instruments

A July report entitled “[Risk & Needs Assessments: What Defenders and Chief Defenders Need to Know](#)” addresses the use of such instruments in a variety of criminal justice settings, from bail determinations through sentencing and in parole and probation supervision. When announcing the report, the National Legal Aid and Defender Association (NLADA) and American Council of Chief Defenders [noted](#) that the paper is just a “starting point”—further understanding is needed of how these risk and needs assessments may affect clients.

Also in July, the Congressional Research Service [issued](#) “Risk and Needs Assessment in the Criminal Justice System.” The report’s primary audience is Congress, for whom it sets out selected issues: “Should risk and needs assessment be used in federal prisons? Should certain inmates be excluded from earning additional time credits? Should risk assessment be incorporated into sentencing? Should there be a decreased focus on punishing offenders?” But aspects of those policy issues, as well as the report’s description of risk and needs assessment and critiques such as the potential for discriminatory effects, may also be of interest for those working in state criminal justice settings.

A number of assessment instruments are currently used in New York State, including [YASI](#) (Youth Assessment Screening Instrument); specialized DWI instruments (NYS Office of Probation and Correctional Services [State Director’s Memorandum 2014-4 & summary](#)); [Static-99](#), the often-criticized Sex Offender Registration Act (SORA) [Risk Assessment Instrument](#), which [has never been validated](#); and [COMPAS](#) (Correctional Offender Management Profiling for Alternative Sanction).

Revised guidance from the Division of Criminal Justice Services (DCJS) on the [use of COMPAS](#), sent to probation, alternatives to incarceration programs, and residential stabilization centers in August 2015, can be found on the [DCJS website](#). The publication includes basic information about COMPAS and guidelines for its proper use in such matters as pre-trial release recommendations, interim probation, deferred sentencing, and pre-plea and pre-sentence report investigations. It also includes a sample completed risk assessment.

How and whether the Parole Board actually uses COMPAS assessments in determining whether to release a parole-eligible person from prison has been a contentious issue for some time. On Sept. 8, 2015, the Court of Appeals heard argument in *Matter of Evans v Linares*, a case that [involves COMPAS](#). The *New York Times* published an [edi-](#)

[torial](#) on the Friday before the argument, highlighting the Board's resistance to using the instrument.

Last year the [REPORT](#) published, in the Oct.-Sept. issue, information about risk assessment instruments and how they can hurt and help clients (beginning on p. 5).

Framing the Shot to Frame Someone? Camera Angles, Viewers' Perspectives Can Matter

Can the angle of a camera, or the philosophical perspective of a viewer, skew the interpretation of recorded events? Recent articles say "yes."

Perception Rooted in the Beholder

Eight years ago, justices of the United States Supreme Court watched a video recording of a high speed chase filmed by a camera mounted on a police car dashboard. They were reviewing a 42 USC 1983 action brought by the driver of the pursued vehicle for injuries that followed his vehicle being deliberately rammed from behind. Based on the video, the Court found that the officer driving the police car had not violated the plaintiff's rights. As summarized in the [March-May 2007 REPORT](#), [Scott v Harris](#) said that no reasonable jury could have accepted the version of events offered by the injured plaintiff when his version was compared to the video.

The Court took the unusual step of posting a link to the video for public viewing. As reported on Slate in August of this year, "a group of law professors decided to test the Supreme Court's conclusion that 'no reasonable juror' could watch the footage of the chase that left Victor Harris paralyzed and see Victor's evasion of the police as anything but extremely dangerous and the cause of the eventual crash." Examining the responses after 1,350 people were asked to watch the video and offer their impressions, the study found "clear rifts in perception along ideological, cultural, and other lines concerning the key issues in the case," [the article](#) says. For example, "[a] less affluent, liberal, highly educated black woman with egalitarian and communitarian views was far more likely than a wealthy, conservative white man supportive of existing social hierarchies and individualism to see Officer Scott and the police as the primary culprits."

Camera Perspective Can Affect Viewers' Reactions

The same article also describes another, older study, one related to the current trend of videotaping interrogations. Interviews were recorded using three cameras—one directed at the interrogator, one directed at the person being questioned, and one showing both parties; footage from only one camera was then shown to subjects of the

study. Shifting the viewpoint significantly affected the number of people who thought the viewed confession was coerced. Such research was referenced briefly in a 2009 paper, "[Police-Induced Confessions: Risk Factors and Recommendations](#)," at page 27, making the point that "it is important not only that entire sessions be recorded, triggered by custodial detention, but that the camera adopt a neutral 'equal focus' perspective that shows both the accused and his or her interrogators."

In 2010, the leading expert on such research, G. Daniel Lassiter, published "Psychological Science and Sound Public Policy: [Video Recording of Custodial Interrogations](#)" in *American Psychologist*. That article included a section on psychological science implications for video recording practices that covers camera perspective bias and other issues. More recently, the National Science Foundation released a [video](#) of an interview with Lassiter about the phenomenon.

With the advent of more videotaped interrogations (see for example a news item in the June-July 2014 [issue](#) of the *REPORT*), defense attorneys will confront more recorded client statements. Lawyers will need to review carefully not only those recordings but also social science research and other information regarding potentially biasing effects of given types of interrogations and recordings on viewers. Further, there should be efforts to ensure that recordings of interrogations minimize already-known biasing effects.

In North Carolina, current home of researcher Lassiter, legislation governing electronic recording of interrogations specifies camera placement that records both the person being interrogated and the interrogator. See North Carolina General Statutes 15A-211(c)(2).

Policy and Practice Should Be Modified to Ensure Unbiased Positioning of Interrogation Cameras

No New York statute or court rule currently governs recording of in-custody interrogations. The Division of Criminal Justice Services has released the Municipal Police Training Council's "Recording of Custodial Interrogations [Model Policy](#)." It does not prohibit, and may encourage, focus on the person being interrogated:

"H. Camera Position and Field of View: To the extent practicable, the camera positioning and field of view should be set to capture as much of the room and occupants as possible while still maintaining a frontal high angle view of the interrogated subject."

In light of the research discussed here, that policy, and the practice employed in the field, should be modified. At least generally, cameras should be positioned to show both the interrogator and person being interrogated in profile.

But, like much in life and the law, “it’s complicated.” Lassiter’s 2010 article noted that where the interrogator is white and the person being interrogated is not, racial salience bias has to be taken into account. “[H]aving an equal-focus camera perspective as the standard for video-recorded interrogations may not be sufficient to guarantee equal justice for all as intended, particularly for minorities, who already encounter a system of justice that, intentionally or not, frequently treats them inequitably.”

In the words of the *Slate* article’s author, Adam Benforado, “once we understand how footage can influence perception, we can change how we use cameras to address that distortion.” Recordings from a single perspective “shouldn’t be used in a conclusive fashion, as it was in *Scott v Harris*, he adds. Or alternatively, defense consent could be required before admission of video showing only some key events or the perspective of only one participant. Defense lawyers can advocate for such legal protections and mitigation of bias in their clients’ cases.

They may need experts to advocate effectively before courts or juries.

Increase and Broaden Use of Expert Testimony in Confession Cases

Lawyers, and courts, are increasingly recognizing the need for defense counsel to consult with and possibly place on the stand one or more experts when confronting an alleged inculpatory statement by a client.

For example, the Second Department found in September that a trial court erred by denying a defense motion to introduce expert testimony about false confessions. In *People v Day*, 2015 NY Slip Op 06731 (9/2/2015), the court recounted the growing awareness of false confession issues and particularly the use of expert testimony in confession cases. After noting that under prior Court of Appeals decisions, “it cannot be said that psychological studies bearing on the reliability of a confession are, as a general matter, ‘within the ken of the typical juror,’” the Appellate Division looked at proffered testimony about individual and situational factors that could create a heightened risk that the client’s confession was false. In *Day*, those factors included the client’s intellectual impairment, compliancy, and psychiatric disorder, as well as interrogation techniques used in his questioning. That the interrogation was not recorded was also considered.

The need to record interrogations is the focus of a case now pending in the Court of Appeals, with [argument scheduled](#) as the *REPORT* went to press. In *People v Everett M. Durant*, the Monroe County Public Defender’s Office asserts that the defense is entitled to an adverse inference charge to the jury when police fail to videotape a confession when they had the capability to do so.

Where a confession *has* been recorded, counsel may want to consult with experts about the limitations of recordings and possible psychological effects on fact-finders. When a recorded confession is challenged as false, an expert on camera perspective bias for example could counter assertions that the existence of a recording vitiates the need for the more typical *Day* expert. Perhaps expert testimony could be offered in support of barring use of a recording with a biased camera angle. And, in a system that remains infected with racism and implicit racial bias, consulting an expert on any race implications of a particular recording or interrogation should be considered as well.

Research indicates that defense lawyers should not necessarily shy away from showing the recording of a client’s confession as part of the defense attack on the confession’s validity. In one study described in Lassiter’s 2010 article, “When an initial assumption of guilt was completely discredited but participants did not view the video interrogation a second time, final verdicts were still skewed toward guilty. However, when discrediting information was accompanied by a second viewing of the video, final verdicts moved significantly toward not guilty.”

Back to Police Dashboard and Body Cameras

Some of the research discussed above as to recording of interrogations may be limited in application, while some may have broader applications. Certainly issues of how viewers’ personal backgrounds and perspectives affect what they believe and recall after seeing a particular video, and how that affects decision-making, have ramifications for many types of video evidence.

Last year, a professor and doctoral candidate [published](#) “More Than Meets the Eye: How Video Evidence Alters Our Decision Making” on a Huffington Post blog. They described a study in which they had monitored eye movement in study subjects watching video recordings of an altercation. The researchers “found that people actually watch [video] evidence in different ways, which polarizes their judgments about guilt and innocence.” Citing other research, they noted that “video may encourage bias and impair accurate understanding of case facts.” And they referred to the U.S. Supreme Court decision in *Scott v Harris* and the study it inspired, described at the beginning of this article.

What they propounded as a take-away was not an effort to block the growing use of video evidence, but a recommendation that “more scrutiny be given to how jurors actually watch the evidence,” and discovering whether bias promoted from viewing video evidence could be reduced by “directing attention” to the problem.

NYSDA and the *REPORT* seek to keep defense lawyers apprised of developments regarding video and

other forms of recorded evidence. In turn, lawyers who have confronted these issues are invited to share with the Backup Center information on arguments, materials, and experts that they have used, successfully or unsuccessfully, to challenge the new wave of video evidence.

48th Annual Conference: Saratoga, CLE, and Celebrating Advocacy

The Association's forty-eighth annual conference in Saratoga Springs in July brought public defense lawyers and others from around the state together to celebrate with colleagues being recognized for both their skill and commitment to clients. Attending lawyers obtained a year's worth of relevant and affordable mandatory continuing legal education (CLE) credits.

From substantive legal updates on search and seizure issues and appellate cases in general to demonstrations and discussion of specific skills like cross-examining a child witness and litigating accusatory instruments, the two days of CLE training engaged almost 300 attendees. One session focused on the specific forensic issues raised in defending "shaken baby" cases, while another addressed more generally the use of experts to help lawyers understand forensic or other evidence outside the ken of jurors (and many attorneys). Ensuring that the interests of clients are not obscured in a flurry of legal issues, the program also included information on early release programs for which clients sentenced to state prison may—or may not—be eligible.

On Monday evening, July 27, [three advocates for justice](#) received recognition. Marsha Weissman, Executive Director of the Center for Community Alternatives and long-time NYSDA Board member, received the Service of Justice Award for effectively promoting alternatives to incarceration and sentencing advocacy as key components of justice. Roger Brazill, First Assistant Public Defender in Monroe County, accepted the 2015 Wilfred R. O'Connor Award for exemplifying a client-centered approach in his work with clients and for sharing his legal expertise throughout his career of over 35 years. And Luke Nebush, a First Assistant Public Defender in Oneida County, was chosen as recipient of the 2015 Kevin M. Andersen Memorial Award for his zeal and devotion in practicing effective, client-centered representation, his diligence in honing his skills, and his collegial approach. Press releases with more information about each award and honoree—[Weissman](#), [Brazill](#), and [Nebush](#)—were issued after the event.

A Chief Defender Convening held during the conference allowed those who head public defense programs to hear about developments affecting public defense statewide as well as specific substantive or procedural issues. ☞

Roger Brazill received the 2015 Wilfred R. O'Connor Award at NYSDA's Annual Conference in Saratoga Springs. Monroe County Public Defender Timothy P. Donaher wrote in support of Brazill's nomination that "through word and deed, [he] exemplifies client-centered representation each and every day."



The Service of Justice Award was presented to Marsha Weissman. In the words of Executive Director Jonathan E. Gradess, "By exemplifying the role of client advocate, bringing to bear both careful analysis and a passion for justice, Weissman has helped judges, lawyers, and policy makers see the value of alternatives to incarceration—and the value of every client."



Biomechanical Engineer Chris Van Ee (right), seen here with Yasmin Davis, Director of NYSDA's Public Defense Investigation Support Project, appeared as a presenter in the CLE session on "Defending Shaken Baby Cases" at the Annual Conference in Saratoga in July.



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NEW YORK LESSER INCLUDED OFFENSES (AUGUST 2015)

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [I] = Implied
100.05(1), Criminal Solicitation 4th	PL 100.00, Criminal Solicitation 5th	Yes	<i>People v Dossinger</i> , 106 AD2d 661 (2nd Dept 1984) [I]
105.10(1), Conspiracy 4th	PL 105.00, Conspiracy 6th	Yes	<i>People v Crea</i> , 126 AD2d 556 (2nd Dept 1987) <i>People v Sieteski</i> , 241 AD2d 926 (4th Dept 1997)
	PL 105.05(1), Conspiracy 5th	Yes	<i>People v Crea</i> , 126 AD2d 556 (2nd Dept 1987)
105.15, Conspiracy 2nd	PL 105.00, Conspiracy 6th	Yes	<i>People v Vizzini</i> , 183 AD2d 302 (4th Dept 1992)
	PL 105.05(1), Conspiracy 5th	Yes	<i>People v Sica</i> , 163 AD2d 541 (2nd Dept 1990) [I] <i>People v Vizzini</i> , 183 AD2d 302 (4th Dept 1992)
	PL 105.10, Conspiracy 4th	Yes	<i>People v Sica</i> , 163 AD2d 541 (2nd Dept 1990) <i>People v Vizzini</i> , 183 AD2d 302 (4th Dept 1992)
105.17, Conspiracy 1st	PL 105.10(2), Conspiracy 4th	Yes	<i>People v Theriault</i> , 75 AD2d 971 (3rd Dept 1980) (abrogated on other grounds by <i>People v Ely</i> , 68 NY2d 520 [1986])
	PL 105.13, Conspiracy 3rd	Yes	<i>People v Theriault</i> , 75 AD2d 971 (3rd Dept 1980) (abrogated on other grounds by <i>People v Ely</i> , 68 NY2d 520 [1986])
Art 120, Assault/ attempted assault, any degree, intentional	PL 240.25(1), Harassment 1st	Yes (for pleas)	CPL 220.20(1)(f) [“Where the crime charged is assault or attempted assault, in any degree, allegedly committed by intentionally causing or attempting to cause physical injury to a person by the immediate use of physical force against him ... the offense of harassment, as defined in [Penal Law 240.25(1)], is deemed to constitute a lesser included offense.”]
120.00(1), Assault 3rd (attempt)	PL 240.26, Harassment 2nd	No	<i>People v Repanti</i> , 24 NY3d 706 (2015)
120.00(1), Assault 3rd	PL 240.25, Harassment 1st	No	<i>People v Moyer</i> , 27 NY2d 252 (1970)
120.04-a(4), Aggravated Vehicular Assault 1st	PL 120.05(4), Assault 2nd	No	<i>People v Joseph</i> , 75 AD3d 1080 (4th Dept 2010)
	VTL 1192(4-a), Driving While Ability Impaired	No	<i>People v Joseph</i> , 75 AD3d 1080 (4th Dept 2010)
120.05(1), Assault 2nd	PL 120.00(1), Assault 3rd	Yes	<i>People v Snipes</i> , 112 AD2d 810 (1st Dept 1985)
	PL 120.00(2), Assault 3rd	Yes	<i>People v Funchess</i> , 284 AD2d 478 (2nd Dept 2001) [I]
	PL 120.20, Reckless Endangerment	No	<i>People v Bryant</i> , 85 AD2d 575 (1st Dept 1981)
120.05(2), Assault 2nd	PL 120.00(1), Assault 3rd	Yes	<i>People v Claramunt</i> , 121 AD2d 237 (1st Dept 1986) <i>People v Zayas</i> , 140 AD2d 395 (2nd Dept 1988)

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			<i>People v Richard</i> , 30 AD3d 750 (3rd Dept 2006)
	PL 120.00(2), Assault 3rd	Yes	<i>People v Nealy</i> , 143 AD2d 1057 (2nd Dept 1988) <i>People v Walker</i> , 151 AD2d 980 (4th Dept 1989) [I]
	PL 120.00(3), Assault 3rd	Yes	<i>People v Beckford</i> , 49 AD3d 547 (2nd Dept 2008) [I] <i>People v Winbush</i> , 165 AD2d 909 (3rd Dept 1990)
	PL 265.01(2), Criminal Possession of a Weapon 4th	No	<i>People v Mitchell</i> , 216 AD2d 863 (4th Dept 1995)
120.05(3), Assault 2nd (attempt)	PL 205.30, Resisting Arrest	No	<i>People v Roberts</i> , 99 AD2d 761 (2nd Dept 1984) [Note: attempted 120.05[3] is a legal impossibility- <i>People v Campbell</i> , 72 NY2d 602 [1988]]
120.05(3), Assault 2nd	PL 120.00(1), Assault 3rd	No	<i>People v Praetz</i> , 115 AD2d 624 (2nd Dept 1985) <i>People v Winslow</i> , 153 AD2d 965 (3rd Dept 1989)
	PL 195.05, Obstructing Governmental Administration 2nd	Yes	<i>People v Nisselbeck</i> , 85 AD3d 1206 (3rd Dept 2011) <i>People v Sullivan</i> , 284 AD2d 917 (4th Dept 2001)
	PL 205.30, Resisting Arrest	No	<i>People v Winslow</i> , 153 AD2d 965 (3rd Dept 1989) <i>People v Ranieri</i> , 144 AD2d 1006 (4th Dept 1988)
120.05(4), Assault 2nd	PL 120.00(2), Assault 3rd	Yes	<i>People v Ryan</i> , 55 AD3d 960 (3rd Dept 2008) [I]
	PL 120.00(3), Assault 3rd	Yes	<i>People v Brown</i> , 17 NY3d 863 (2011)
120.05(6), Assault 2nd	PL 120.00(1), (2), Assault 3rd	No	<i>People v Miguel</i> , 53 NY2d 920 (1981) <i>People v Miller</i> , 176 AD2d 824 (2nd Dept 1991)
120.05(7), Assault 2nd	PL 120.00(1), Assault 3rd	Yes	<i>People v Diaz</i> , 175 AD2d 412 (3rd Dept 1991)
	PL 120.00(2), Assault 3rd	Yes	<i>People v Artis</i> , 63 AD3d 1174 (2nd Dept 2009) <i>People v Thomas</i> , 56 AD3d 1241 (4th Dept 2008)
120.06, Gang Assault 2nd	PL 120.00, Assault 3rd	Yes	<i>People v Terry</i> , 44 AD3d 1157 (3rd Dept 2007)
120.07, Gang Assault 1st	PL 120.00, Assault 3rd	Yes	<i>People v Sanchez</i> , 57 AD3d 1 (1st Dept 2008), <i>affd</i> 13 NY3d 554 (2009) <i>People v Corea</i> , 25 AD3d 563 (2nd Dept 2006)
	PL 120.05, Assault 2nd	Yes	<i>People v Sanchez</i> , 57 AD3d 1 (1st Dept 2008), <i>affd</i> 13 NY3d 554 (2009)
	PL 120.06, Gang Assault 2nd	Yes	<i>People v Sanchez</i> , 57 AD3d 1 (1st Dept 2008), <i>affd</i> 13 NY3d 554 (2009) <i>People v Ali</i> , 32 AD3d 522 (2nd Dept 2006)
120.10, Assault 1st (attempt)	PL 265.03, Criminal Possession of a Weapon 2nd	No	<i>People v Fournier</i> , 70 AD2d 491 (2nd Dept 1979)
120.10(1), Assault 1st	PL 120.00(2), Assault 3rd	Yes	<i>People v Ryan</i> , 55 AD3d 960 (3rd Dept 2008)
	PL 120.00(3), Assault 3rd	Yes	<i>People v Arzu</i> , 240 AD2d 217 (1st Dept 1997) [I] <i>People v Beckford</i> , 49 AD3d 547 (2nd Dept 2008) [I] <i>People v Leonardo</i> , 89 AD2d 214 (4th Dept 1982), <i>affd</i> 60 NY2d 683 (1983)
	PL 120.05(2), Assault 2nd	Yes	<i>People v Aruz</i> , 253 AD2d 592 (1st Dept 1998) <i>People v Beckford</i> , 49 AD3d 547 (2nd Dept 2008) <i>People v Ryan</i> , 55 AD3d 960 (3rd Dept 2008) [I]

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			<i>People v Burnett</i> , 100 AD3d 1561 (4th Dept 2012)
	PL 120.05(4), Assault 2nd	Yes	<i>People v Moore</i> , 66 AD3d 707 (2nd Dept 2009), <i>affd on other grounds</i> 15 NY3d 811 (2010) <i>People v Ryan</i> , 55 AD3d 960 (3rd Dept 2008) [I] <i>People v Leonardo</i> , 89 AD2d 214 (4th Dept 1982), <i>affd</i> 60 NY2d 683 (1983) <i>People v Burnett</i> , 100 AD3d 1561 (4th Dept 2012)
120.10(3), Assault 1st	PL 120.00(2), Assault 3rd	Yes	<i>People v Van Norstrand</i> , 85 NY2d 131 (1995) <i>People v Swinton</i> , 7 NY3d 776 (2006)
	PL 120.05(4), Assault 2nd	No	<i>People v White</i> , 38 AD3d 320 (1st Dept 2007)
	PL 120.25, Reckless Endangerment 1st	Yes	<i>People v Macon</i> , 14 AD3d 413 (1st Dept 2005) <i>People v Gutierrez</i> , 105 AD2d 754 (2nd Dept 1984) <i>People v Cotton</i> , 214 AD2d 994 (4th Dept 1995)
120.10(4), Assault 1st	PL 120.05(1), Assault 2nd	No	<i>People v Strawder</i> , 78 AD2d 810 (1st Dept 1980)
	PL 120.05(6), Assault 2nd	Yes	<i>People v Fuller</i> , 286 AD2d 910 (4th Dept 2001)
120.14(1), Menacing 2nd	PL 240.26(1), Harassment 2nd	No	<i>People v Bartkow</i> , 96 NY2d 770 (2001)
120.15, Menacing 3rd	PL 240.25(1), Harassment 1st	Yes (for pleas)	CPL 220.20(1)(f)
120.25, Reckless Endangerment 1st	PL 120.20, Reckless Endangerment 2nd	Yes	<i>People v Corliss</i> , 51 AD3d 79 (1st Dept 2008) <i>People v Zephirin</i> , 47 AD3d 649 (2nd Dept 2008) <i>People v Mitchell</i> , 288 AD2d 622 (3rd Dept 2001) <i>People v Leonardo</i> , 89 AD2d 214 (4th Dept 1982), <i>affd</i> 60 NY2d 683 (1983)
	PL 145.05, Criminal Mischief 3rd	No	<i>People v Sicurella</i> , 149 AD2d 983 (4th Dept 1989)
120.55(2), Stalking 2nd	PL 120.45(2), Stalking 4th	No	<i>People v Brown</i> , 77 AD3d 1190 (3rd Dept 2010)
121.12, Strangulation 2nd	PL 120.00(1), Assault 3rd	No	<i>People v Peterson</i> , 118 AD3d 1151 (3rd Dept 2014)
125.10, Criminally Negligent Homicide	VTL 1190, Reckless Driving	No	<i>People v Boice</i> , 89 AD2d 33 (3rd Dept 1982)
125.12, Vehicular Manslaughter 2nd	PL 125.10, Criminally Negligent Homicide	Yes	<i>People v Grove</i> , 272 AD2d 480 (2nd Dept 2000)
	VTL 1192, Driving While Intoxicated	Yes	<i>People v Grove</i> , 272 AD2d 480 (2nd Dept 2000) <i>People v Peryea</i> , 68 AD3d 1144 (3rd Dept 2009) <i>People v Osborne</i> , 60 AD3d 1310 (4th Dept 2009)
125.15(1), Manslaughter 2nd	PL 125.10, Criminally Negligent Homicide	Yes	<i>People v Heide</i> , 84 NY2d 943 (1994)
125.20, 485.05(1), Manslaughter 1st as a hate crime	PL 125.20, Manslaughter 1st	Yes	<i>People v DeLee</i> , 24 NY3d 603 (2014)
125.20(1), Manslaughter 1st	PL 120.00, Assault 3rd	Yes	<i>People v Sanchez</i> , 182 AD2d 458 (1st Dept 1992)
	PL 125.10, Criminally Negligent Homicide	Yes	<i>People v Helliger</i> , 96 NY2d 462 (2001)

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	PL 125.15(1), Manslaughter 2nd	Yes	<i>People v Evans</i> , 232 AD2d 275 (1st Dept 1996) <i>People v James</i> , 284 AD2d 549 (2nd Dept 2001) <i>People v Shaut</i> , 261 AD2d 960 (4th Dept 1999)
125.20(2), Manslaughter 1st	PL 120.10(1), Assault 1st	No	<i>People v Reome</i> , 101 AD2d 632 (3rd Dept 1984)
125.20(4), Manslaughter 1st	PL 125.15(1), Manslaughter 2nd	No	<i>People v Leak</i> , 129 AD3d 745 (2nd Dept 2015)
125.25(1), Murder 2nd (attempt)	PL 120.00(1), Assault 3rd (attempt)	Yes	<i>People v Saunders</i> , 210 AD2d 164 (1st Dept 1994) [!]
	PL 120.05(1) Assault 2nd (attempt)	Yes	<i>People v Cabassa</i> , 79 NY2d 722 (1992) <i>People v Smith</i> , 13 AD3d 1121 (4th Dept 2004)
	PL 120.05(2), Assault 2nd (or attempt)	No	<i>People v Martinez</i> , 134 AD2d 458 (2nd Dept 1987) <i>People v Hopkins</i> , 95 AD2d 870 (3rd Dept 1983) <i>People v Smith</i> , 13 AD3d 1121 (4th Dept 2004)
	PL 120.10(1), Assault 1st (or attempt)	No	<i>People v Lind</i> , 173 AD2d 179 (1st Dept 1991), <i>affd on other grounds sub nom.</i> , <i>People v Cabassa</i> , 79 NY2d 722 (1992) <i>People v Littlejohn</i> , 141 AD2d 850 (2nd Dept 1988)
	PL 120.25, Reckless Endangerment 1st	No	<i>People v Ramirez</i> , 55 NY2d 708 (1981)
125.25(1), Murder 2nd	PL 120.05(1), Assault 2nd	Yes	<i>People v Umana</i> , 158 AD2d 492 (2nd Dept 1990)
	PL 120.10(1), Assault 1st	No	<i>People v Alvarez</i> , 38 AD3d 930 (3rd Dept 2007) <i>People v Wyant</i> , 98 AD3d 1277 (4th Dept 2012)
	PL 125.10, Criminally Negligent Homicide	Yes	<i>People v Brooks</i> , 163 AD2d 832 (4th Dept 1990)
	PL 125.15(1), Manslaughter 2nd	Yes	<i>People v Ford</i> , 66 NY2d 428 (1985) <i>People v Sullivan</i> , 68 NY2d 495 (1986)
	PL 125.20(1), Manslaughter 1st	Yes	<i>People v Ford</i> , 66 NY2d 428 (1985) <i>People v Oliveri</i> , 29 AD3d 330 (1st Dept 2006) <i>People v Faison</i> , 265 AD2d 422 (2nd Dept 1999)
	PL 125.20(2), Manslaughter 1st	Yes	<i>People v Mox</i> , 84 AD3d 1723 (4th Dept 2011), <i>affd</i> 20 NY3d 936 (2012) [affirmative defense of extreme emotional disturbance]
125.25(2), Murder 2nd	PL 120.00(1), Assault 3rd	No	<i>People v Ashraf</i> , 186 AD2d 1057 (4th Dept 1992)
	PL 125.10, Criminally Negligent Homicide	Yes	<i>People v Ducasse</i> , 273 AD2d 399 (2nd Dept 2000)
	PL 125.15(1), Manslaughter 2nd	Yes	<i>People v Atkinson</i> , 7 NY3d 765 (2006)
125.25(3), Murder 2nd	PL 115.00(1), Criminal Facilitation 2nd	No	<i>People v Cable</i> , 96 AD2d 251 (1st Dept 1983), <i>revd on other grounds sub nom.</i> , <i>Matter of Anthony M.</i> , 63 NY2d 270 (1984)
	PL 125.10, Criminally Negligent Homicide	No	<i>People v Langlois</i> , 17 AD3d 772 (3rd Dept 2005)
	PL 125.15(1), Manslaughter 2nd	No	<i>People v Langlois</i> , 17 AD3d 772 (3rd Dept 2005)

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [I] = Implied
	Underlying felony	Yes (for pleas)	CPL 220.20(1)(g)
125.25(4), Murder 2nd	PL 125.10, Criminally Negligent Homicide	Yes	<i>People v Rodriguez</i> , 69 AD3d 143 (2nd Dept 2009)
	PL 125.15(1), Manslaughter 2nd	No	<i>People v Mora</i> , 57 AD3d 571 (2nd Dept 2008) <i>People v Heslop</i> , 48 AD3d 190 (3rd Dept 2007) <i>People v Robinson</i> , 278 AD2d 798 (4th Dept 2000)
	PL 125.20(4), Manslaughter 1st	No	<i>People v Baker</i> , 14 NY3d 266 (2010)
125.27 (1)(a), Murder 1st (attempt)	PL 120.05(2), Assault 2nd (attempt)	No	<i>People v Carter</i> , 38 AD3d 1291 (4th Dept 2007)
	PL 120.10(1), Assault 1st (attempt)	No	<i>People v Carter</i> , 38 AD3d 1291 (4th Dept 2007)
125.27 (1)(a)(vi), Murder 1st	PL 115.00, Criminal Facilitation 4th	No	<i>People v Powell</i> , 304 AD2d 410 (1st Dept 2003)
125.27(1)(a)(vii), Murder 1st	PL 125.25(3), Murder 2nd	Yes	<i>People v Miller</i> , 6 NY3d 295 (2006)
130.25(2), Rape 3rd	PL 130.20(1), Sexual Misconduct	Yes	<i>People v Aglio</i> , 112 AD2d 440 (2nd Dept 1985) [I]
130.30, Rape 2nd	PL 130.65, Sexual Abuse 1st	No	<i>People v Holt</i> , 8 AD3d 1044 (4th Dept 2004)
130.30(1), Rape 2nd	PL 130.60, Sexual Abuse 2nd	No	<i>People v Gibson</i> , 2 AD3d 969 (3rd Dept 2003)
	PL 260.10, Endangering the Welfare of a Child	No	<i>People v Scott</i> , 67 AD3d 1052 (3rd Dept 2009), <i>affd on other grounds</i> 16 NY3d 589 (2011)
130.35, Rape 1st	PL 115.00(1), Criminal Facilitation 4th	No	<i>People v Simpson</i> , 175 AD2d 851 (2nd Dept 1991)
	PL 130.25(3), Rape 3rd	Yes/ No	CPL 300.50(6): PL 130.25(3) is not a lesser of any offense, but may be submitted as a lesser when (i) a reasonable view of the evidence supports a finding that the defendant committed the lesser and not the greater offense and (ii) both parties consent to its submission.
130.35(1), Rape 1st	PL 120.00, Assault 3rd	No	<i>People v Gillis</i> , 67 AD2d 1008 (2nd Dept 1979)
	PL 130.20, Sexual Misconduct	No	<i>People v Maxwell</i> , 260 AD2d 653 (3rd Dept 1999)
	PL 130.60(1), Sexual Abuse 2nd	No	<i>People v Shaw</i> , 115 AD2d 305 (4th Dept 1985)
	PL 130.65(1) Sexual Abuse 1st	No	<i>People v Wheeler</i> , 67 NY2d 960 (1986)
	PL 135.10, Unlawful Imprisonment	No	<i>People v Ploss</i> , 105 AD2d 1031 (3rd Dept 1984)
	PL 135.60, Coercion 2nd	No	<i>People v Tiedemann</i> , 111 AD2d 280 (2nd Dept 1985) <i>People v Catron</i> , 143 AD2d 468 (3rd Dept 1988) <i>People v Thurston</i> , 167 AD2d 964 (4th Dept 1990)
130.40(3), Criminal Sexual Act 3rd	PL 130.20(2), Sexual Misconduct (attempt)	Yes	<i>Matter of Justin D.</i> , 114 AD3d 941 (2nd Dept 2014)

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(attempt)			
130.45, Criminal Sexual Act 2nd	PL 130.40(2), Criminal Sexual Act 3rd	No	<i>People v Rivera</i> , 261 AD2d 709 (3rd Dept 1999)
	PL 130.65, Sexual Abuse 1st	No	<i>People v Holt</i> , 8 AD3d 1044 (4th Dept 2004)
130.50, Criminal Sexual Act 1st	PL 130.40(3), Criminal Sexual Act 3rd	Yes/ No	CPL 300.50(6)- PL 130.40(3) is not a lesser of any offense, but may be submitted as a lesser when (i) a reasonable view of the evidence supports a finding that the defendant committed the lesser and not the greater offense and (ii) both parties consent to its submission.
	PL 130.65, Sexual Abuse 1st	No	<i>People v Ford</i> , 76 NY2d 868 (1990)
130.50(1), Criminal Sexual Act 1st	PL 130.20(2), Sexual Misconduct	No	<i>People v Bruce</i> , 216 AD2d 913 (4th Dept 1995) (finding the elements of the offenses are identical)
	PL 130.40(2), Criminal Sexual Act 3rd	No	<i>People v Thompson</i> , 132 AD2d 885 (3rd Dept 1987), <i>revd on other grounds</i> 72 NY2d 410 (1988)
	PL 130.45(1), Criminal Sexual Act 2nd	No	<i>People v Bacchus</i> , 175 AD2d 248 (2nd Dept 1991)
130.65(1), Sexual Abuse 1st	PL 130.55, Sexual Abuse 3rd	Yes	<i>People v Del Campo</i> , 281 AD2d 279 (1st Dept 2001) [I] <i>Matter of Justin D.</i> , 114 AD3d 941 (2nd Dept 2014) <i>People v Fuller</i> , 50 AD3d 1171 (3rd Dept 2008) <i>People v Felton</i> , 145 AD2d 969 (4th Dept 1988)
	PL 130.60(2), Sexual Abuse 2nd	No	<i>People v Hughes</i> , 220 AD2d 529 (2nd Dept 1995)
	PL 130.60(2), Sexual Abuse 2nd	No	<i>People v Beecher</i> , 225 AD2d 943 (3rd Dept 1996)
130.65(3), Sexual Abuse 1st	PL 260.10(1), Endangering the Welfare of Child	No	<i>People v Berlin</i> , 39 AD3d 351 (1st Dept 2007)
130.75(1)(a), Course of Sexual Conduct against a Child 1st	PL 130.65(3), Sexual Abuse 1st	No	<i>People v Baker</i> , 123 AD3d 1378 (3rd Dept 2014)
130.75(1)(b), Course of Sexual Conduct against a Child 1st	PL 260.10(1), Endangering the Welfare of Child	No	<i>People v Beauharnois</i> , 64 AD3d 996 (3rd Dept 2009)
130.91, Sexually Motivated Felony	Underlying felony (e.g., PL 140.25, Burglary 2nd; PL 120.10, Assault 1st)	Yes	<i>People v Judware</i> , 75 AD3d 841 (3rd Dept 2010) <i>People v Dallas</i> , 119 AD3d 1362 (4th Dept 2014)
130.95, Predatory Sexual Assault	Underlying felony (e.g., PL 130.35(1), Rape 1st; PL 130.50(1), Criminal Sexual Act 1st)	Yes	<i>People v Ortiz</i> , 95 AD3d 1140 (2nd Dept 2012)
130.96, Predatory Sexual Assault against a Child	PL 130.35, Rape 1st	Yes	<i>People v Perez</i> , 87 AD3d 930 (1st Dept 2011) <i>People v Lawrence</i> , 81 AD3d 1326 (4th Dept 2011)
	PL 130.75(1)(a), Course of	Yes	<i>People v Alford</i> , 65 AD3d 1392 (3rd Dept 2009),

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	Sexual Conduct Against a Child 1st		<i>affd</i> 14 NY3d 846 (2010)
	PL 130.75(1)(b), Course of Sexual Conduct Against a Child 1st	Yes	<i>People v Reynolds</i> , 81 AD3d 1166 (3rd Dept 2011) <i>People v Slishevsky</i> , 97 AD3d 1148 (4th Dept 2012)
	PL 130.50, Criminal Sexual Act 1st	Yes	<i>People v Perez</i> , 87 AD3d 930 (1st Dept 2011)
	PL 130.50(3), Criminal Sexual Act 1st	Yes	<i>People v Alford</i> , 65 AD3d 1392 (3rd Dept 2009) , <i>affd</i> 14 NY3d 846 (2010)
	PL 260.10(1), Endangering the Welfare of Child	No	<i>People v Beauharnois</i> , 64 AD3d 996 (3rd Dept 2009)
135.10, Unlawful Imprisonment 1st	PL 130.05, Unlawful Imprisonment 2nd	Yes	<i>People v Logan</i> , 198 AD2d 439 (2nd Dept 1993)
135.20, Kidnapping 2nd	PL 135.05, Unlawful Imprisonment 2nd	Yes	<i>People v Sanford</i> , 48 AD3d 221 (1st Dept 2008) [!] <i>People v Saunders</i> , 261 AD2d 718 (3rd Dept 1999) [!]
	PL 135.10, Unlawful Imprisonment 1st	No Yes	<i>People v Player</i> , 17 AD3d 701 (2nd Dept 2005) <i>People v Tillman</i> , 69 AD2d 975 (4th Dept 1979) [Note: decided pre- <i>People v Glover</i> , 57 NY2d 61 (1982)]
135.25, Kidnapping 1st	PL 135.05, Unlawful Imprisonment 2nd	Yes	<i>People v Saunders</i> , 261 AD2d 718 (3rd Dept 1999) [!]
135.25(1), Kidnapping 1st	PL 135.10, Unlawful Imprisonment 1st	No	<i>People v Ahedo</i> , 229 AD2d 588 (2nd Dept 1996)
	PL 135.20, Kidnapping 2nd	Yes	<i>People v Mauleon</i> , 266 AD2d 66 (1st Dept 1999)
135.25(2)(a), Kidnapping 1st	PL 135.20, Kidnapping 2nd	Yes	<i>People v Jorge</i> , 1 AD3d 121 (1st Dept 2003) [!] <i>People v Singh</i> , 191 AD2d 470 (2nd Dept 1993) [!]
135.65, Coercion 1st	PL 135.60, Coercion 2nd	Yes	<i>People v Perea</i> , 99 AD2d 591 (3rd Dept 1984), <i>affd</i> 64 NY2d 1055 (1985)
	PL 240.25, Harassment 1st	No	<i>People v Zuziela</i> , 98 AD2d 161 (3rd Dept 1983)
140.17(2), Criminal Trespass 1st	PL 140.15, Criminal Trespass 2nd	Yes	<i>People v White</i> , 31 AD3d 273 (1st Dept 2006)
140.20, Burglary 3rd (attempt)	PL 140.10, Criminal Trespass 3rd	Yes	<i>People v Henderson</i> , 41 NY2d 233 (1976) [Note: decided pre- <i>People v Glover</i> , 57 NY2d 61 (1982)] <i>People v Scoggins</i> , 167 AD2d 321 (1st Dept 1990)
		No	<i>People v LaMountain</i> , 249 AD2d 584 (3rd Dept 1998)
140.20, Burglary 3rd	PL 140.05, Trespass	Yes	<i>People v Grant</i> , 132 AD2d 929 (4th Dept 1987)
	PL 140.10(a), Criminal Trespass 3rd	Yes	<i>People v Blim</i> , 63 NY2d 718 (1984)
	PL 140.15, Criminal Trespass 2nd	Yes	<i>People v Springs</i> , 58 AD3d 541 (1st Dept 2009) [!] <i>People v Torres</i> , 56 AD2d 640 (2nd Dept 1977)
	PL 145.00, Criminal Mischief 4th	No	<i>People v Locke</i> , 122 AD2d 77 (2nd Dept 1986)

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [!] = Implied
140.25, Burglary 2nd (attempt)	PL 140.10, Criminal Trespass 3rd	Yes	<i>People v Brown</i> , 270 AD2d 495 (2nd Dept 2000)
140.25, Burglary 2nd	PL 140.10, Criminal Trespass 3rd	Yes	<i>People v Camacho</i> , 134 AD2d 441 (2nd Dept 1987) [!]
	PL 140.15, Criminal Trespass 2nd	Yes	<i>People v Rickett</i> , 94 NY2d 929 (2000)
	PL 165.40, Criminal Possession of Stolen Property 5th	No	<i>People v Harrison</i> , 151 AD2d 778 (2nd Dept 1989)
	PL 165.54, Criminal Possession of Stolen Property 1st	No	<i>People v Perez</i> , 156 AD2d 7 (1st Dept 1990)
140.25(1)(a), Burglary 2nd	PL 265.02(1), Criminal Possession of a Weapon 3rd	No	<i>People v Franklin</i> , 137 AD2d 710 (2nd Dept 1988)
140.25(1)(b), Burglary 2nd	PL 115.00, Criminal Facilitation 4th	No	<i>People v Cable</i> , 96 AD2d 251 (1st Dept 1983), <i>revd on other grounds sub nom., Matter of Anthony M.</i> , 63 NY2d 270 (1984)
	PL 140.20, Burglary 3rd	Yes	<i>People v Best</i> , 120 AD3d 707 (2nd Dept 2014)
140.25(2), Burglary 2nd	PL 140.10(a), Criminal Trespass 3rd	Yes	<i>Matter of Richard M.</i> , 89 AD3d 849 (2nd Dept 2011)
	PL 140.17, Criminal Trespass 1st	No	<i>People v Calandrillo</i> , 134 AD2d 271 (2nd Dept 1987)
	PL 140.20, Burglary 3rd	Yes	<i>People v Barney</i> , 99 NY2d 367 (2003) <i>People v Best</i> , 120 AD3d 707 (2nd Dept 2014)
	PL 155.40, Grand Larceny 2nd	No	<i>People v Gilbert</i> , 122 AD2d 454 (3rd Dept 1986)
	PL 165.45(2), Criminal Possession of Stolen Property 4th	No	<i>People v Kohl</i> , 19 AD3d 1155 (4th Dept 2005)
140.30, Burglary 1st	PL 140.15, Criminal Trespass 2nd	Yes	<i>People v Greene</i> , 291 AD2d 410 (2nd Dept 2002)
140.30(1), Burglary 1st	PL 140.17(1), Criminal Trespass 1st	No	<i>People v Dodson</i> , 96 AD2d 1116 (3rd Dept 1983)
140.30(2), Burglary 1st	PL 120.05(6), Assault 2nd	No	<i>People v Ali</i> , 89 AD3d 1417 (4th Dept 2011)
	PL 140.15, Criminal Trespass 2nd	Yes	<i>People v Slaughter</i> , 138 AD2d 835 (3rd Dept 1988)
	PL 140.20, Burglary 3rd	Yes	<i>People v Johnson</i> , 112 AD2d 1 (4th Dept 1985) [!]
	PL 140.25(2), Burglary 2nd	Yes	<i>People v Ali</i> , 89 AD3d 1416 (4th Dept 2011)
140.30(3), Burglary 1st	PL 140.25, Burglary 2nd	Yes	<i>People v Kindred</i> , 263 AD2d 672 (3rd Dept 1999) [!]
140.30(4), Burglary 1st (attempt)	PL 140.25(1)(d), Burglary 2nd (attempt)	Yes	<i>People v Morales</i> , 36 AD3d 957 (3rd Dept 2007) [!]
140.30(4), Burglary 1st	PL 140.25(1) Burglary 2nd	Yes	<i>People v Skinner</i> , 211 AD2d 979 (3rd Dept 1995)
	PL 140.25(2), Burglary 2nd	Yes	<i>People v Boone</i> , 269 AD2d 459 (2nd Dept 2000) <i>People v Skinner</i> , 211 AD2d 979 (3rd Dept 1995)
145.05(2), Criminal Mischief 3rd	PL 145.00(1), Criminal Mischief 4th	Yes	<i>People v Cammorto</i> , 185 AD2d 986 (2nd Dept 1992)
145.10, Criminal Mischief 2nd	PL 145.05(2), Criminal Mischief 3rd	Yes	<i>People v Klos</i> , 190 AD2d 754 (2nd Dept 1993)

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [!] = Implied
150.10, Arson 3rd	PL 150.05, Arson 4th	Yes	<i>People v Borst</i> , 232 AD2d 727 (3rd Dept 1996)
150.15, Arson 2nd	PL 150.05, Arson 4th	Yes	<i>People v Clinkscales</i> , 134 AD2d 889 (4th Dept 1987) [!]
	PL 150.10, Arson 3rd	Yes	<i>People v Cushner</i> , 46 AD3d 1121 (3rd Dept 2007) <i>People v Piccione</i> , 78 AD3d 1518 (4th Dept 2010)
155.30(1), Grand Larceny 4th	PL 155.25, Petit Larceny	Yes	<i>People v Walker</i> , 119 AD3d 1402 (4th Dept 2014)
155.30(5), Grand Larceny 4th	PL 155.25, Petit Larceny	Yes	<i>People v Haynes</i> , 240 AD2d 162 (1st Dept 1997) [!], <i>affd on other grounds</i> 91 NY2d 966 (1998)
155.35, Grand Larceny 3rd	PL 145.10, Criminal Mischief 2nd	No	<i>People v Gammons</i> , 106 AD3d 1287 (3rd Dept 2013)
155.35(1), Grand Larceny 3rd	PL 155.30(1), Grand Larceny 4th	Yes	<i>People v Versage</i> , 48 AD3d 254 (1st Dept 2008) <i>People v Riess</i> , 168 AD2d 787 (3rd Dept 1990)
	PL 155.30(5), Grand Larceny 4th	No	<i>People v Reynolds</i> , 240 AD2d 210 (1st Dept 1997)
	PL 155.30(8), Grand Larceny 4th	No	<i>People v Brown</i> , 259 AD2d 985 (4th Dept 1999)
	PL 165.05, Unauthorized Use of Vehicle 3rd	Yes	<i>People v Palmer</i> , 193 AD2d 888 (3rd Dept 1993)
	PL 165.45, Criminal Possession of Stolen Property 4th	No	<i>People v Robinson</i> , 90 AD2d 249 (4th Dept 1982), <i>affd</i> 60 NY2d 982 (1983)
155.40, Grand Larceny 2nd	PL 190.60, Scheme to Defraud 2nd	No	<i>People v Omrami</i> , 155 AD2d 369 (1st Dept 1989)
158.15, Welfare Fraud 3rd	PL 158.10, Welfare Fraud 4th	Yes	<i>People v Niver</i> , 45 AD3d 1051 (3rd Dept 2007) [!]
160.05, Robbery 3rd	PL 155.25, Petit Larceny	Yes	<i>People v Brown</i> , 269 AD2d 539 (2nd Dept 2000)
	PL 155.30(5), Grand Larceny 4th	No	<i>People v Cintron</i> , 199 AD2d 526 (2nd Dept 1993)
	PL 155.30(6), Grand Larceny 4th	No	<i>People v Adams</i> , 266 AD2d 831 (4th Dept 1999)
160.10, Robbery 2nd	PL 155.25, Petit Larceny (attempt)	Yes	<i>People v Bethea</i> , 24 AD3d 685 (2nd Dept 2005)
160.10(1), Robbery 2nd	PL 115.00, Criminal Facilitation 4th	Yes	<i>People v Cable</i> , 96 AD2d 251 (1st Dept 1983), <i>revd on other grounds sub nom.</i> , <i>Matter of Anthony M.</i> , 63 NY2d 270 (1984)
	PL 120.00(1), (2), Assault 3rd	No	<i>People v Miguel</i> , 53 NY2d 920 (1981)
	PL 120.05(6), Assault 2nd	No	<i>People v Ramos</i> , 232 AD2d 433 (2nd Dept 1996)
	PL 155.25, Petit Larceny	Yes	<i>People v Bowman</i> , 79 AD3d 1368 (3rd Dept 2010)
	PL 155.30(5), Grand Larceny 4th	No	<i>People v Buster</i> , 122 AD2d 525 (4th Dept 1986)
	PL 160.05, Robbery 3rd	Yes	<i>People v Camara</i> , 44 AD3d 492 (1st Dept 2007) [!]
160.10(2)(a), Robbery	PL 165.50, Criminal Possession of Stolen Property 3rd	No	<i>People v Brown</i> , 70 NY2d 857 (1987)
	PL 120.00(1), (2), Assault 3rd	No	<i>People v Miguel</i> , 53 NY2d 920 (1981)

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [!] = Implied
2nd	PL 120.05(6), Assault 2nd	Yes	<i>People v Martin</i> , 136 AD2d 509 (1st Dept 1988) <i>People v Tucker</i> , 221 AD2d 670 (2nd Dept 1995)
	PL 155.30(5), Grand Larceny 4th	No	<i>People v Vaught</i> , 258 AD2d 602 (2nd Dept 1999)
	PL 160.05, Robbery 3rd	Yes	<i>People v Diggs</i> , 60 AD3d 459 (1st Dept 2009) [!] <i>People v Best</i> , 120 AD3d 707 (2nd Dept 2014)
160.10(2)(b), Robbery 2nd	PL 160.05, Robbery 3rd	Yes	<i>People v Whitfield</i> , 287 AD2d 393 (1st Dept 2001) [!]
	PL 155.40, Grand Larceny 2nd	No	<i>People v Bryant</i> , 85 AD2d 575 (1st Dept 1981)
160.15, Robbery 1st	PL 120.14, Menacing 2nd	No	<i>People v Mercer</i> , 214 AD2d 343 (1st Dept 1995)
	PL 155.25, Petit Larceny	Yes	<i>People v Monroe</i> , 30 AD3d 616 (2nd Dept 2006) <i>People v Agha</i> , 239 AD2d 930 (4th Dept 1997)
	PL 155.30(5), Grand Larceny 4th	No	<i>People v Garcia</i> , 219 AD2d 669 (2nd Dept 1995)
	PL 160.10(1), Robbery 2nd	No	<i>People v Acevedo</i> , 40 NY2d 701 (1976)
	PL 165.15, Theft of Services	No	<i>People v Shortley</i> , 269 AD2d 254 (1st Dept 2000) <i>People v Polite</i> , 300 AD2d 681 (2nd Dept 2002) [!]
	PL 265.01(2), Criminal Possession of a Weapon 4th	No	<i>People v Perez</i> , 45 NY2d 204 (1978)
160.15(1), Robbery 1st (attempt)	PL 120.05(1), Assault 2nd	No	<i>People v Strawder</i> , 78 AD2d 810 (1st Dept 1980)
	PL 120.05(6), Assault 2nd	Yes	<i>People v Strawder</i> , 78 AD2d 810 (1st Dept 1980)
		No	<i>People v Ali</i> , 89 AD3d 1417 (4th Dept 2011) [!]; see also <i>People v Abrew</i> , 95 NY2d 806 (2000)
160.15(1), Robbery 1st	PL 115.00(1), Criminal Facilitation 4th	No	<i>People v Cable</i> , 96 AD2d 251 (1st Dept 1983) <i>revd on other grounds sub nom., Matter of Anthony M.</i> , 63 NY2d 270 (1984)
	PL 120.10(4), Assault 1st	No	<i>People v Abrew</i> , 95 NY2d 806 (2000)
	PL 160.10(2)(a), Robbery 2nd	Yes	<i>People v Rivera</i> , 123 AD2d 295 (1st Dept 1986) <i>People v Fuller</i> , 286 AD2d 910 (4th Dept 2001)
160.15(2), Robbery 1st	PL 155.25, Petit Larceny	Yes	<i>People v Lowery</i> , 127 AD3d 1109 (2nd Dept 2015)
	PL 160.05, Robbery 3rd	Yes	<i>People v Kilpatrick</i> , 143 AD2d 1 (1st Dept 1988) (abrogated on other grounds by <i>People v Gray</i> , 86 NY2d 10 [1995])
			<i>People v Ferguson</i> , 255 AD2d 598 (2nd Dept 1998)
	PL 160.10(2)(b), Robbery 2nd	No	<i>People v Kilpatrick</i> , 143 AD2d 1 (1st Dept 1988) (abrogated on other grounds by <i>People v Gray</i> , 86 NY2d 10 [1995])
PL 165.50, Criminal Possession of Stolen Property 3rd	No	<i>People v Brown</i> , 70 NY2d 857 (1987)	
160.15(3), Robbery 1st	PL 120.05(6), Assault 2nd	No	<i>People v Solomon</i> , 141 AD2d 579 (2nd Dept 1988)
	PL 155.25, Petit Larceny	Yes	<i>People v Robertson</i> , 53 AD3d 791 (3rd Dept 2008)
	PL 160.05, Robbery 3rd	Yes	<i>People v Grant</i> , 17 NY3d 613 (2011) <i>People v Rivera</i> , 262 AD2d 17 (1st Dept 1999) [!] <i>People v Blair</i> , 148 AD2d 767 (3rd Dept 1989)
	PL 160.10(2)(a), Robbery 2nd (attempt)	No	<i>People v Edwards</i> , 39 AD3d 875 (2nd Dept 2007)

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [!] = Implied
	PL 160.10(1) Robbery 2nd	No	<i>People v McFadden</i> , 100 AD2d 520 (2nd Dept 1984)
	PL 165.30(1), Fraudulent Accosting	No	<i>People v Lee</i> , 50 AD3d 1603 (4th Dept 2008)
160.15(4), Robbery 1st	PL 155.25, Petit Larceny	Yes	<i>People v Smith</i> , 214 AD2d 971 (4th Dept 1995)
	PL 155.30(5), Grand Larceny 4th	No	<i>People v Velilla</i> , 285 AD2d 565 (2nd Dept 2001)
	PL 155.35, Grand Larceny 3rd	No	<i>People v Acevedo</i> , 40 NY2d 701 (1976)
	PL 160.05, Robbery 3rd	Yes	<i>People v James</i> , 11 NY3d 886 (2008)
	PL 160.10(2)(b), Robbery 2nd	Yes	<i>People v Rivera</i> , 77 AD3d 483 (1st Dept 2010) <i>People v Morales</i> , 36 AD3d 957 (3rd Dept 2007) <i>People v Bell</i> , 265 AD2d 813 (4th Dept 1999) [Note: must assert as an affirmative defense]
	PL 160.10(3), Robbery 2nd	No	<i>People v Sterling</i> , 11 AD3d 932 (4th Dept 2004)
	PL 165.50, Criminal Possession of Stolen Property 3rd	No	<i>People v Brown</i> , 70 NY2d 857 (1987)
165.40-.54, Criminal Possession of Stolen Property	PL 165.05, Unauthorized Use of Vehicle 3rd	No	<i>Matter of Raul M.</i> , 248 AD2d 336 (1st Dept 1998) (UUV is not a LIO of “stolen property crimes that do not, in the abstract, rather than under the particular facts, necessarily involve vehicles”) <i>People v Edwards</i> , 104 AD2d 448 (2nd Dept 1984)
165.45(2), Criminal Possession of Stolen Property 4th	PL 165.40, Criminal Possession of Stolen Property 5th	Yes	<i>People v Nicholas</i> , 106 AD3d 1026 (2nd Dept 2013) <i>People v Berry</i> , 78 AD3d 1226 (3rd Dept 2010)
165.45(5), Criminal Possession of Stolen Property 4th	PL 165.40, Criminal Possession of Stolen Property 5th	Yes	<i>Matter of Michael S.</i> , 262 AD2d 6 (1st Dept 1999) <i>People v Berry</i> , 78 AD3d 1226 (3rd Dept 2010)
165.50, Criminal Possession of Stolen Property 3rd	PL 165.45(5), Criminal Possession of Stolen Property 4th	No	<i>People v Frick</i> , 77 AD3d 677 (2nd Dept 2010) <i>People v Quarcini</i> , 4 AD3d 864 (4th Dept 2004)
	PL 165.05, Unauthorized Use of a Motor Vehicle 3rd	No	<i>People v Singh</i> , 35 AD3d 633 (2nd Dept 2006)
170.10(1), Forgery 2nd	PL 170.05, Forgery 3rd	Yes	<i>People v Gause</i> , 2 AD3d 1449 (4th Dept 2003)
	PL 170.25, Criminal Possession of a Forged Instrument 2nd	Yes	<i>People v Black</i> , 253 AD2d 984 (3rd Dept 1998); see also PL 170.35 (“[A] person may not be convicted of both criminal possession of a forged instrument and forgery with respect to the same instrument.”)
170.25, Criminal Possession of a Forged Instrument 2nd	PL 170.20, Criminal Possession of a Forged Instrument 3rd	Yes	<i>People v Hayes</i> , 133 AD2d 934 (3rd Dept 1987)
170.30, Criminal Possession of a Forged Instrument 1st	PL 170.20, Criminal Possession of a Forged Instrument 3rd	Yes	<i>People v Bell</i> , 286 AD2d 931 (4th Dept 2001) [!]
175.10, Falsifying	PL 175.05(1), Falsifying	Yes	<i>People v Reyes</i> , 69 AD3d 537 (1st Dept 2010)

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [!] = Implied
Business Records 1st	Business Records 2nd		
175.35, Offering a False Instrument for Filing 1st	PL 175.30, Offering a False Instrument for Filing 2nd	Yes	<i>People v Vanderbush</i> , 300 AD2d 1126 (4th Dept 2002) [!]
176.20, Insurance Fraud 3rd	PL 176.10, Insurance Fraud 5th	Yes	<i>People v Hade</i> , 255 AD2d 768 (3rd Dept 1998) [!]
	PL 176.15, Insurance Fraud 4th	Yes	<i>People v Hade</i> , 255 AD2d 768 (3rd Dept 1998) [!]
190.26(1), Criminal Impersonation 1st	PL 190.25(3), Criminal Impersonation 2nd	Yes	<i>People v Archer</i> , 238 AD2d 183 (1st Dept 1997) [!]
190.65, Scheme to Defraud 1st	PL 155.25, Petit Larceny	Yes	<i>People v Lasek</i> , 94 Misc 2d 1007 (County Ct, Jefferson Co 1978) [Note: decided pre- <i>People v Glover</i> , 57 NY2d 61 (1982)]
	PL 190.25(2), Criminal Impersonation 2nd	Yes	<i>People v Lasek</i> , 94 Misc 2d 1007 (County Ct, Jefferson Co 1978) [Note: decided pre- <i>People v Glover</i> , 57 NY2d 61 (1982)]
	PL 190.60, Scheme to Defraud 2nd	Yes	<i>People v Lasek</i> , 94 Misc 2d 1007 (County Ct, Jefferson Co 1978) [Note: decided pre- <i>People v Glover</i> , 57 NY2d 61 (1982)]
205.10, Escape 2nd	PL 205.05, Escape 3rd	Yes	<i>People v Montanez</i> , 78 AD3d 1198 (2nd Dept 2010) <i>People v Berard</i> , 142 AD2d 927 (4th Dept 1988)
	PL 205.30, Resisting Arrest	No	<i>People v Becoats</i> , 88 AD2d 766 (4th Dept 1982)
	PL 205.05, Escape 3rd	Yes	<i>People v Walker</i> , 19 Misc 3d 444 (Supreme Ct, Monroe Co 2008)
205.25(1), Promoting Prison Contraband 1st	PL 205.20(1), Promoting Prison Contraband 2nd	Yes	<i>People v Hernandez</i> , 42 AD3d 657 (3rd Dept 2007)
205.25(2), Promoting Prison Contraband 1st	PL 205.20(2), Promoting Prison Contraband 2nd	Yes	<i>People v Finley</i> , 10 NY3d 647 (2008)
210.15, Perjury 1st	PL 210.05, Perjury 3rd	Yes	<i>People v Perino</i> , 76 AD3d 456 (1st Dept 2010), <i>affd</i> 19 NY3d 85 (2012)
215.13, Witness Tampering 1st	PL 215.12, Witness Tampering 2nd	Yes	<i>People v Drakes</i> , 263 AD2d 514 (2nd Dept 1999)
215.51, Criminal Contempt 1st	PL 215.50, Criminal Contempt 2nd	Yes	<i>People v Kennerly</i> , 20 AD3d 491 (2nd Dept 2005)
215.51(b)(v), Criminal Contempt 1st	PL 215.50(3), Criminal Contempt 2nd	Yes	<i>People v Mingo</i> , 66 AD3d 1043 (2nd Dept 2009) <i>People v Sullivan</i> , 284 AD2d 917 (4th Dept 2001) [!]
215.51(c), Criminal Contempt 1st	PL 215.50(3), Criminal Contempt 2nd	Yes	<i>People v Dewall</i> , 15 AD3d 498 (2nd Dept 2005)
215.52, Aggravated Criminal Contempt	PL 215.51(b)(v), Criminal Contempt 1st	No	<i>People v Wilmore</i> , 305 AD2d 117 (1st Dept 2003)
220.03-.21, Criminal Possession of a	PL article 220 possession offenses, generally	Yes (for	CPL 220.20(1)(i) ["Where the crime charged is criminal possession of a controlled substance, any

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [I] = Implied
Controlled Substance		pleas)	offense of criminal possession of a controlled substance, in any degree, is deemed to constitute a lesser included offense.”]
220.06, Criminal Possession of a Controlled Substance 5th	PL 220.03, Criminal Possession of a Controlled Substance 7th	Yes	<i>People v Smith</i> , 209 AD2d 557 (2nd Dept 1994)
220.06 (1), Criminal Possession of a Controlled Substance 5th	PL 220.03, Criminal Possession of a Controlled Substance 7th	Yes	<i>People v Harrison</i> , 139 AD2d 422 (1st Dept 1988)
220.09, Criminal Possession of a Controlled Substance 4th	PL 220.03, Criminal Possession of a Controlled Substance 7th	Yes	<i>People v Gomez</i> , 178 AD2d 432 (2nd Dept 1991) <i>People v Davis</i> , 170 AD2d 1006 (4th Dept 1991)
220.16, Criminal Possession of a Controlled Substance 3rd	PL 220.03, Criminal Possession of a Controlled Substance 7th	Yes	<i>People v Biggs</i> , 280 AD2d 484 (2nd Dept 2001) <i>People v Berry</i> , 5 AD3d 866 (3rd Dept 2004)
	PL 220.09, Criminal Possession of a Controlled Substance 4th	No	<i>People v Lee</i> , 196 AD2d 509 (2nd Dept 1993)
220.16 (1), Criminal Possession of a Controlled Substance 3rd	PL 220.03, Criminal Poss. Controlled Substance 7th	Yes	<i>People v McFadden</i> , 20 NY3d 260 (2012) <i>People v Olivera</i> , 45 AD3d 154 (1st Dept 2007) <i>People v Fairley</i> , 63 AD3d 1288 (3rd Dept 2009) <i>People v Palmer</i> , 216 AD2d 883 (4th Dept 1995)
220.16 (12), Criminal Possession of a Controlled Substance 3rd	PL 220.03, Criminal Poss. Controlled Substance 7th	Yes	<i>People v Walker</i> , 300 AD2d 417 (2nd Dept 2002) [I]
	PL 220.16(1), Criminal Possession of a Controlled Substance 3rd (attempt)	No	<i>People v Nemnom</i> , 123 AD3d 740 (2nd Dept 2014)
220.18, Criminal Possession of a Controlled Substance 2nd	PL 220.16, Criminal Possession of a Controlled Substance 3rd	Yes	<i>People v Campbell</i> , 230 AD2d 636 (1st Dept 1996)
220.18 (1), Criminal Possession of a Controlled Substance 2nd	PL 220.03, Criminal Possession of a Controlled Substance 7th	Yes	<i>People v Palmer</i> , 216 AD2d 883 (4th Dept 1995)
220.21, Criminal Possession of a Controlled Substance 1st	PL 220.18, Criminal Possession of a Controlled Substance 2nd	Yes	<i>People v Young</i> , 271 AD2d 263 (1st Dept 2000)
220.31-.44, Criminal Sale of a Controlled Substance	PL article 220 possession offenses, generally	No Yes (for pleas)	<i>People v Davis</i> , 14 NY3d 20 (2009) <i>People v Teixeira</i> , 101 AD2d 818 (2nd Dept 1984) <i>People v Cogle</i> , 94 AD2d 158 (3rd Dept 1983) CPL 220.20(1)(h)

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [I] = Implied
	PL article 220 sale offenses, generally	Yes (for pleas)	CPL 220.20(1)(h)
220.39, Criminal Sale of a Controlled Substance 3rd	PL article 115, Criminal Facilitation	No	<i>People v Mills</i> , 308 AD2d 386 (1st Dept 2003) <i>People v Brown</i> , 193 AD2d 751 (2nd Dept 1993)
	PL 220.03, Criminal Possession of a Controlled Substance 7th	Yes	<i>People v Johnson</i> , 45 NY2d 546 (1978)
		No	<i>People v Davis</i> , 14 NY3d 20 (2009); <i>see also People v Alvarez</i> , 51 AD3d 167 (1st Dept 2008) (noting the split of authority post- <i>People v Glover</i> on whether CPCS 7th is a LIO of any CSCS offense)
	PL 220.06, Criminal Possession of a Controlled Substance 5th	No	<i>People v Ayoub</i> , 289 AD2d 413 (2nd Dept 2001)
	PL 220.16, Criminal Possession of a Controlled Substance 3rd	No	<i>People v Biggs</i> , 280 AD2d 484 (2nd Dept 2001)
	PL 220.31, Criminal Sale of a Controlled Substance 5th	Yes	<i>People v Nimmons</i> , 43 AD3d 1232 (3rd Dept 2007)
	PL 220.34, Criminal Sale of a Controlled Substance 4th	No	<i>People v Torres</i> , 300 AD2d 221 (1st Dept 2002)
220.41, Criminal Sale of a Controlled Substance 2nd	PL 115.05, Criminal Facilitation 2nd	No	<i>People v Glover</i> , 57 NY2d 61 (1982)
220.43, Criminal Sale of a Controlled Substance 1st	PL 115.00, Criminal Facilitation 2nd	No	<i>People v Fischer</i> , 94 AD2d 706 (2nd Dept 1983)
	PL 115.00, Criminal Facilitation 4th	No	<i>People v Fischer</i> , 94 AD2d 706 (2nd Dept 1983)
	PL 115.08, Criminal Facilitation 1st	No	<i>People v Parks</i> , 99 AD2d 537 (2nd Dept 1984)
	PL 220.39, Criminal Sale of a Controlled Substance 3rd	Yes	<i>People v Flores</i> , 84 NY2d 957 (1994) [I]
	PL 220.41, Criminal Sale of a Controlled Substance 2nd	Yes	<i>People v Bobb</i> , 207 AD2d 458 (2nd Dept 1994)
220.44, Criminal Sale of a Controlled Substance in/near School Grounds	PL 220.34, Criminal Sale of a Controlled Substance 4th	No	<i>People v Torres</i> , 300 AD2d 221 (1st Dept 2002)
221.30, Criminal Possession of Marihuana 1st	PL 221.05, Unlawful Possession of Marihuana	Yes	<i>People v Morgridge</i> , 85 AD3d 822 (2nd Dept 2011)
225.10, Promoting Gambling 1st	PL 225.05, Promoting Gambling 2nd	Yes	<i>People v Giordano</i> , 87 NY2d 441 (1995)
230.25, Promoting Prostitution 3rd	PL 230.20, Promoting Prostitution 4th	Yes	<i>People v Rodriguez</i> , 104 AD2d 547 (1st Dept 1984)
230.30, Promoting Prostitution 2nd	PL 230.20, Promoting Prostitution 4th	Yes	<i>People v Pan</i> , 245 AD2d 149 (1st Dept 1997) [I]
	PL 230.25, Promoting Prostitution 3rd	Yes	<i>People v Garner</i> , 15 AD3d 190 (1st Dept 2005)

Penal Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority [!] = Implied
240.05, Riot 2nd	PL 240.20, Disorderly Conduct	Yes	<i>People v Bollander</i> , 156 AD2d 456 (2nd Dept 1989)
240.06, Riot 1st	PL 240.05, Riot 2nd	Yes	<i>People v Oliveras</i> , 204 AD2d 226 (1st Dept 1994)
240.30, Aggravated Harassment 2nd	PL 240.26, Harassment 2nd	Yes	<i>People v Garrand</i> , 22 AD3d 959 (3rd Dept 2005) [!]
240.62, Placing a False Bomb or Hazardous Substance 1st	PL 240.61, Placing a False Bomb or Hazardous Substance 2nd	Yes	<i>People v Lettley</i> , 64 AD3d 901 (3rd Dept 2009)
265.02(1), Criminal Possession of a Weapon 3rd	PL 265.01(2), Criminal Possession of a Weapon 4th	Yes	<i>People v Smith</i> , 183 AD2d 653 (1st Dept 1992) <i>People v Capra</i> , 20 AD3d 824 (3rd Dept 2005)
265.02(3), Criminal Possession of a Weapon 3rd	PL 265.01, Criminal Possession of a Weapon 4th	Yes	<i>People v Butler</i> , 192 AD2d 543 (2nd Dept 1993)
265.03, Criminal Possession of a Weapon 2nd	PL 265.02(4), Criminal Possession of a Weapon 3rd [Note: 265.02(4) was repealed and moved to 265.03(3) in 2006]	No	<i>People v Okafore</i> , 72 NY2d 81 (1988) <i>People v Johnson</i> , 24 AD3d 958 (3rd Dept 2005) <i>People v Rosado</i> , 36 AD3d 965 (3rd Dept 2007) <i>People v Paul</i> , 298 AD2d 849 (4th Dept 2002)
265.03(1)(b), Criminal Possession of a Weapon 2nd	PL 265.01(1), Criminal Possession of a Weapon 4th	Yes	<i>People v Rivera</i> , 15 NY3d 844 (2010)
265.03(3), Criminal Possession of a Weapon 2nd	PL 265.01(1), Criminal Possession of a Weapon 4th	Yes	<i>People v Menchetti</i> , 76 NY2d 473 (1990) [charge was former 265.02(4), which was repealed and moved to CPW 2nd, PL 265.03(3)] <i>People v Verni</i> , 127 AD3d 887 (2nd Dept 2015) <i>People v Laing</i> , 66 AD3d 1353 (4th Dept 2009)
265.09, Criminal Use of a Firearm 1st	PL 265.03, Criminal Possession of a Weapon 2nd	Yes	<i>People v Rogers</i> , 94 AD3d 1152 (2nd Dept 2012) <i>People v Fowler</i> , 45 AD3d 1372 (4th Dept 2007)
265.09(1)(a), Criminal Use of a Firearm 1st	PL 265.03, Criminal Possession of a Weapon 2nd	Yes	<i>People v Dinsio</i> , 286 AD2d 517 (3rd Dept 2001) <i>People v Lott</i> , 55 AD3d 1274 (4th Dept 2008)

Vehicle and Traffic Law §, Offense Name	Potential Lesser Included Offense	LIO?	Authority
511(3), Aggravated Unlicensed Operation of a Motor Vehicle	VTL 509(1), Unlicensed Operation of a Motor Vehicle	Yes	<i>People v Pacer</i> , 6 NY3d 504 (2006)
600(2), Leaving the Scene of a Personal Injury Accident	VTL 600(1), Leaving the Scene of a Property Damage Accident	No	<i>People v Cordisco</i> , 68 AD3d 565 (1st Dept 2009)
600(2), Leaving the Scene of a Fatal Motor Vehicle Accident	VTL 600(2), Leaving Scene of Motor Vehicle Accident	Yes	<i>People v Markidis</i> , 142 AD2d 990 (4th Dept 1988)
1192, Driving While Intoxicated (misdemeanor)	VTL 1212, Reckless Driving	No	<i>People v Crandall</i> , 39 AD3d 1077 (3rd Dept 2007) (noting, however, that under VTL 1192[10][a], the defendant may enter a plea other than to VTL 1192(2), (3), (4), or (4-a) where the prosecution determines that the charges laid were not warranted and the basis for the proposed disposition is set forth on the record)
1192(2), Driving While Intoxicated	VTL 1192(1), Driving While Ability Impaired	Yes	<i>People v Litto</i> , 8 NY3d 692 (2007) (DWAI is a lesser of 1192[2] and [3]); <i>see</i> VTL 1192(9); <i>but see</i> <i>People v Brown</i> , 53 NY2d 979 (1981) (holding DWAI is not a LIO of 1192[2])
1192(3), Driving While Intoxicated	VTL 1192(1), Driving While Ability Impaired	Yes	<i>People v Litto</i> , 8 NY3d 692 (2007)
1192(3), Driving While Intoxicated (misdemeanor)	VTL 1192(1), Driving While Ability Impaired (misdemeanor under 1193(1)(a))	No	<i>People v Harris</i> , 23 Misc 3d 250 (County Ct, Monroe Co 2008) <i>People v Jamison</i> , 170 Misc 2d 974 (Rochester City Ct 1996)
1192(3), Driving While Intoxicated (felony)	VTL1192(1), Driving While Ability Impaired	Yes	<i>People v Carota</i> , 93 AD3d 1072 (3rd Dept 2012)
1192(4), Driving While Ability Impaired- Drugs	VTL 1192(1), Driving While Ability Impaired	No	<i>People v Lehman</i> , 183 Misc 2d 97 (Watertown City Ct 2000)

Key Resources

People v Glover, 57 NY2d 61 (1982)

To establish entitlement to a lesser included offense charge, the defendant must make two showings. First, it must be shown that the additional offense that he desires to have charged is a "lesser included offense", i.e., that it is an offense of lesser grade or degree and that in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the same conduct, committing the lesser offense. That established, the defendant must then show that there is a reasonable view of the evidence in the particular case that would support a finding that he committed the lesser offense but not the greater.

The first requirement -- that it is theoretically impossible to commit the greater crime without at the same time committing the lesser -- is mandated by the provisions of CPL 1.20 (subd 37) and is determined by a comparative examination of the statutes defining the two crimes, in the abstract. The second, sequential requirement, prescribed by CPL 300.50 (subd 1), calls for an assessment of the evidence of the particular criminal transaction in the individual case and a determination that there is a reasonable view of such evidence which would support a finding that, while the defendant did commit the lesser offense, he did not commit the greater.

People v Ford, 62 NY2d 275 (1984): "Any error by the trial court in considering or submitting to the jury a lesser crime arising out of the same criminal transaction as an indicted crime, that is not in fact a lesser included offense, is waived unless defendant makes timely objection." *See also* CPL 300.50(1).

People v Colville, 20 NY3d 20 (2012): "We hold that the decision whether to seek a jury charge on lesser-included offenses is a matter of strategy and tactics which ultimately rests with defense counsel."

Statutes

- CPL 1.20(37). Definitions
- CPL 210.20. Motion to dismiss or reduce indictment
- CPL 220.10. Plea; kinds of pleas
- CPL 220.20. Plea; meaning of lesser included offenses for plea purposes
- CPL 290.10. Trial order of dismissal
- CPL 300.10. Court's charge; in general
- CPL 300.30. Court's charge; submission of indictment to jury; definition of terms
- CPL 300.40. Court's charge; submission of indictment to jury; counts to be submitted
- CPL 300.50. Court's charge; submission of lesser included offenses
- CPL 320.20. Non-jury trial; nature and conduct thereof
- CPL 350.10. Conduct of single judge trial
- CPL 360.50. Court's submission of information to jury; counts and offenses to be submitted

Definition of Lesser Included Offense (CPL 1.20[37])

When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense." In any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto.

Lesser included offenses for plea purposes (CPL 220.20[1])

- (a) Where the only culpable mental state required for the crime charged is that the proscribed conduct be performed intentionally, any lesser offense consisting of reckless or criminally negligent, instead of intentional, performance of the same conduct is deemed to constitute a lesser included offense;
- (b) Where the only culpable mental state required for the crime charged is that the proscribed conduct be performed recklessly, any lesser offense consisting of criminally negligent, instead of reckless, performance of the same conduct is deemed to constitute a lesser included offense;
- (c) Where according to the allegations of a count a defendant's participation in the crime charged consisted in whole or in part of solicitation of another person to engage in the proscribed conduct, the offense of criminal solicitation, in any appropriate degree, is, with respect to such defendant, deemed to constitute a lesser included offense;
- (d) Where according to the allegations of a count a defendant's participation in the crime charged consisted in whole or in part of conspiratorial agreement or conduct with another person to engage in the proscribed conduct, the crime of conspiracy, in any appropriate degree, is, with respect to such defendant, deemed to constitute a lesser included offense;
- (e) Where according to the allegations of a count charging a felony a defendant's participation in such felony consisted in whole or in part of providing another person with means or opportunity for engaging in the proscribed conduct, the crime of criminal facilitation, in any appropriate degree, is, with respect to such defendant, deemed to constitute a lesser included offense;
- (f) Where the crime charged is assault or attempted assault, in any degree, allegedly committed by intentionally causing or attempting to cause physical injury to a person by the immediate use of physical force against him, or where the crime charged is menacing, as defined in section 120.15 of the penal law, the offense of harassment, as defined in subdivision one of section 240.25 of the penal law, is deemed to constitute a lesser included offense;
- (g) Where the crime charged is murder in the second degree as defined in subdivision three of section 125.25 of the penal law, allegedly committed in the course of the commission or attempted commission of a designated one of the underlying felonies enumerated in said subdivision, or during immediate flight therefrom, such designated underlying felony or attempted felony is deemed to constitute a lesser included offense. If such designated underlying felony is alleged to be robbery, burglary, kidnapping, or arson, without specification of the degree thereof, or an attempt to commit the same, a plea of guilty may be entered to the lowest degree thereof only, or as the case may be to attempted commission of such felony in its lowest degree, unless the allegations of the count clearly indicate the existence of all the elements of a higher degree;
- (h) Where the crime charged is criminal sale of a controlled substance, any offense of criminal sale or possession of a controlled substance, in any degree, is deemed to constitute a lesser included offense.
- (i) Where the crime charged is criminal possession of a controlled substance, any offense of criminal possession of a controlled substance, in any degree, is deemed to constitute a lesser included offense.
- (j) Where the offense charged is unlawful disposal of hazardous wastes in violation of section 27-0914 of the environmental conservation law, any offense of unlawful disposal or possession of hazardous wastes as set forth in sections 71-2707, 71-2709, 71-2711 and 71-2713 of such law, in any degree, is deemed to constitute a lesser included offense;
- (k) Where the offense charged is unlawful possession of hazardous wastes in violation of section 27-0914 of the environmental conservation law, any offense of unlawful possession of hazardous wastes as set forth in sections 71-2707 and 71-2709 of such law, in any degree, is deemed to constitute a lesser included offense.

*** This chart was prepared by Susan Bryant, NYSDA Staff Attorney, with the assistance of the Office of the Appellate Defender [Anita Aboagye-Agyeman and Samantha L. Stern, with the assistance of Anant Kumar, Scott McAbee, and Leila Tabbaa].**



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CONFERENCES & SEMINARS

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Sponsors: New York State Defenders Association and Monroe County Public Defender's Office
Theme: Criminal Defense Update
Date: November 7, 2015
Place: Rochester, NY
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Sponsors: New York State Defenders Association, NYS Indigent Legal Services Office & NYS Unified Court System Child Welfare Court Improvement Project
Theme: Because All Families Matter: Enhancing Parental Defense in New York
Dates: November 13-14, 2015
Place: Albany, NY
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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Weapons for the Firefight 2015
Date: December 4, 2015
Place: New York City
Contact: NYSACDL: tel (518) 443-2000 (Jennifer Van Ort); email jivanort@nysacdl.org; website <http://nysacdl.site-ym.com/>

Sponsor: National Association of Criminal Defense Lawyers
Theme: 36th Annual Advanced Criminal Law: Winning Strategies for the Defense
Dates: January 10-15, 2016
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/cle/

Sponsor: National Legal Aid & Defender Association
Theme: National Appellate Defense Training
Dates: January 21-24, 2016
Place: New Orleans, LA
Contact: NLADA: tel (202) 452-0620; website <http://www.nlada100years.org/>

Sponsor: National Association of Criminal Defense Lawyers
Theme: The Science of the Mind: Litigating Mental Health in Criminal Cases
Dates: February 17-20, 2016
Place: Austin, TX
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/cle/

Sponsor: New York State Defenders Association
Theme: 49th Annual Meeting & Conference
Dates: July 24-26, 2016
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Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org



Luke Nebush (center, holding plaque), of the office of the Oneida County Public Defender – Criminal Division, was the 2015 recipient of the Kevin M. Andersen Memorial Award created by the Genesee County Public Defender Office. In nominating Nebush, his direct supervisor, Leland D. McCormac, III, noted that in handling “some of the most complex, difficult, and consuming cases in our office,” often with favorable results, Nebush is “always solely focused on his client’s best interests” and “treats all ... as he would like to be treated.”

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.

Second Department

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

Juveniles (Custody)

[Matter of Guiracocha v Amaro](#), 122 AD3d 632, 996 NYS2d 108 (2nd Dept 11/5/2014)

Award of sole legal and physical custody of the child to the father lacked a sound and substantial basis in the record. Contrary to the court's finding that neither party was the primary caregiver, the record showed the mother had been the primary caregiver for most of the child's life; residential custody was awarded temporarily to the father only shortly before the custody hearing. Record evidence did not support findings that the father was more likely to provide for the child's needs and foster the child's relationship with the other parent. And while the position of the attorney for the child (AFT) is not determinative, the AFT's position here, that the mother should have residential custody because the child was more bonded to her, "was entitled to some weight" yet the court appears not to have taken it into account at all. (Family Ct, Westchester Co)

Counsel (*Anders* Brief)

[People v Louis](#), 122 AD3d 645, 995 NYS2d 228 (2nd Dept 11/5/2014)

While the brief submitted by assigned counsel pursuant to *Anders v California* (386 US 738) does recite in painstaking detail the testimony elicited at a pretrial suppression hearing and summarizes the plea proceeding, it fails to "highlight[] anything in the record that might arguably support the appeal'" Since a "lengthy, indis-

criminate narrative of the facts" alone does not highlight for the court the relevant evidence, the brief fails to show that assigned counsel fulfilled his *Anders* obligations. New counsel is assigned to represent the appellant. (Supreme Ct, Kings Co)

Speedy Trial (Cause for Delay) (Prosecutor's Readiness for Trial)

[People v Clarke](#), 122 AD3d 765, 995 NYS2d 727 (2nd Dept 11/12/2014)

The 161-day period from the day that the defendant preserved a speedy trial objection while consenting to the prosecutor's request for a DNA sample until the day the prosecution produced the complete DNA report was not excludable under CPL 30.30 because the prosecution "failed to exercise due diligence in obtaining the DNA sample" The request for the swab was made over 17 months after the defendant's arraignment on the complaint, about nine months after his indictment, and nearly three months after the court ruled on the defendant's motions to suppress physical evidence and statements. (Supreme Ct, Queens Co)

[*Ed. Note: Leave to appeal was granted on Mar. 25, 2015 (25 NY3d 950).*]

Counsel (*Anders* Brief)

[People v Pendelton](#), 122 AD3d 774, 994 NYS2d 868 (2nd Dept 11/12/2014)

The *Anders* brief submitted by appellate counsel is deficient where, among other things, the statement of facts does not review the court's advisements to the defendant as to the rights being waived or any inquiries and responses made to ensure the plea was knowing and voluntary, and lacks detail as to the defendant's factual admissions; counsel also failed to explain the basis for his conclusion that the guilty plea was voluntary. (County Ct, Suffolk Co)

Family Court (Orders of Protection)

Juveniles (Custody) (Neglect)

[Matter of Reina R.](#), 122 AD3d 746, 995 NYS2d 233 (2nd Dept 11/12/2014)

In this Family Court Act article 10 proceeding, the order of fact-finding is dismissed, the order of disposition that placed the child in the grandmother's custody is reversed, the neglect petition is dismissed, and the order of protection is reversed. The allegations of the mother's excessive use of corporal punishment and her failure to secure medical attention for her daughter when she ingested too much cough syrup were not supported by a

Second Department *continued*

preponderance of the evidence. The family court relied too heavily on an emergency medical technician's report that the child had swelling and bruising. The technician did not testify at the hearing and the report directly conflicted with testimony from a caseworker who was present during the technician's examination and did not observe any injury on the child. The court also relied heavily on the statements made by the subject child's four-year old brother, which did not establish a pattern of excessive corporal punishment. (Family Ct, Queens Co)

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

[People v Sassi](#), 122 AD3d 779, 995 NYS2d 611 (2nd Dept 11/12/2014)

The defendant's conviction of third-degree falsely reporting an incident for calling 911 to report a burglary in progress is reversed because the court erred in denying his request to have the jury instructed on the legal definition of burglary. Without the definition, the jury could not appropriately assess the report, which the defendant, a law enforcement officer, made while at the home of a person he recruited as a confidential informant after the defendant got into an altercation with the informant's former boyfriend who had let himself in using a key. (County Ct, Dutchess Co)

Family Court**Juveniles (Adoption) (Custody) (Paternity)**

[Matter of Baby Girl N.](#), 122 AD3d 858, 996 NYS2d 367 (2nd Dept 11/19/2014)

In this consolidated adoption and custody matter, the court did not err in denying the adoption petition and awarding custody to the child's birth father. Although the child had been placed for adoption by the unwed mother at birth, some six months prior to the birth, the unwed father "promptly asserted his interest in the child, manifested his ability and willingness to assume custody of the child, and provided financial and moral support to the birth mother" Because the birth father's consent was necessary for adoption, the Family Court's determination is not disturbed. (Family Ct, Suffolk Co)

Family Court (Family Offenses) (Orders of Protection)**Jurisdiction (Subject Matter)**

[Matter of Johnson v Carter](#), 122 AD3d 853, 996 NYS2d 658 (2nd Dept 11/19/2014)

In this family offense proceeding, the petitioner argued that the definition of "intimate relationship" extended to his former girlfriend's new paramour, the respondent here. The petitioner and his ex-girlfriend have a child in common and contact is limited to exchanges of the child. The petitioner alleged that the respondent threatened him and his new girlfriend. But "[t]he legislature expressly excluded from the definition of 'intimate relationship' a 'casual acquaintance'" The court properly dismissed the matter for lack of subject matter jurisdiction. (Family Ct, Kings Co)

Counsel (Anders Brief)**Sex Offenses (Sex Offender Registration Act)**

[People v Williams](#), 122 AD3d 820, 996 NYS2d 355 (2nd Dept 11/19/2014)

Appellate counsel is relieved and new counsel is appointed where, despite the filing of a sufficient *Anders* brief, independent review of the record reveals at least one nonfrivolous issue: whether the court abused its discretion in granting the prosecution's petition to upwardly modify the defendant's Sex Offender Registration Act risk level from level one to level three. (County Ct, Westchester Co)

Privacy (Right of)**Search and Seizure (Consent) (Warrantless Searches)**

[People v Alston](#), 122 AD3d 934, 997 NYS2d 160 (2nd Dept 11/26/2014)

The defendant's suppression motion in this robbery case should have been granted; his status as an apparent crime victim did not strip him of his Fourth Amendment protections, and the officer who obtained the defendant's personal belongings exceeded the scope of any consent. The officer approached the defendant while he was in a hospital trauma room with a bleeding stab wound; asked the defendant for identification after the defendant gave his name; was told that either hospital personnel had taken it or that it was in the security office; went to the security office and got a sealed envelope of the defendant's belongings; unsealed the envelope, retrieving two drivers licenses, one ultimately determined to be that of a robbery victim; and gave both licenses—after questioning the defendant further—to an officer from a different precinct before leaving the hospital. (Supreme Ct, Queens Co)

Search and Seizure (Stop and Frisk) (Weapons-frisks)

[People v Harris](#), 122 AD3d 942, 997 NYS2d 481 (2nd Dept 11/26/2014)

Second Department *continued*

The defendant’s motion to suppress physical evidence and statements should have been granted where the police, patrolling an area with a high burglary rate, saw the defendant on the sidewalk smoking a cigarette in front of a gated residence that was dark and had uncut grass; observed the defendant turn his back when he saw the police and make a motion suggesting that he shoved something into his front waistband; saw on closer approach a bulge in the defendant’s waist area; and immediately conducted a pat-down that yielded a gun. Assuming the officer could, based on the observations, legally ask if the defendant was carrying a weapon, the officer “lacked reasonable suspicion to believe that the defendant posed a threat to his safety” absent any threatening motions or report of a crime involving a weapon. (Supreme Ct, Queens Co)

Counsel (Anders Brief)

**People v King, 123 AD3d 737, 996 NYS2d 373
(2nd Dept 12/3/2014)**

Independent review of the record in this matter in which appellate counsel has filed an *Anders* brief reveals the existence of nonfrivolous issues “including, but not necessarily limited to, whether the defendant’s right to counsel was adversely affected when his attorney took a position adverse to him regarding his pro se motion to withdraw his plea” New counsel must be assigned. (County Ct, Westchester Co)

Juveniles (Delinquency)

Larceny (Credit Cards)

**Matter of Luis C., 124 AD3d 109, 998 NYS2d 120
(2nd Dept 12/3/2014)**

The presentment agency now agrees that the petition, charging the juvenile respondent with acts that would constitute fourth-degree grand larceny and fourth-degree possession of stolen property if committed by an adult, should be dismissed; the underlying acts were illegal but did not violate the named statutory provisions. While the law is unsettled, detailed analysis shows that the two statutes in question, when applied to debit card theft, require theft and possession of the physical card, not just the numbers assigned to it. To the extent that *People v Barden* (117 AD3d 216 [1st Dept] *lv granted* 24 NY3d 959 [2014]) is inconsistent, it is not followed. (Family Ct, Kings Co)

Counsel (Anders Brief)

**People v Magnotta, 123 AD3d 739, 999 NYS2d 424
(2nd Dept 12/3/2014)**

Upon independent review of the record in this matter in which appellate counsel has filed an *Anders* brief, “we conclude that nonfrivolous issues exist, including, but not necessarily limited to, whether the appellant’s plea of guilty was knowing, voluntary, and intelligent ..., whether the defendant validly waived his right to appeal ..., and whether the integrity of the grand jury proceedings was impaired by the presentation of charges arising from separate incidents.” New counsel must be assigned. (County Ct, Putnam Co)

Accusatory Instruments (Sufficiency)

Jurisdiction

Lesser and Included Offenses

**People v Nemnom, 123 AD3d 740, 997 NYS2d 736
(2nd Dept 12/3/2014)**

As the prosecution concedes, the defendant’s plea-based conviction must be reversed where the defendant was charged by felony complaint with third-degree drug possession under Penal Law 220.16(12), waived indictment, and pleaded guilty under a superior court information to attempted third-degree possession under Penal Law 220.16(1), a charge for which he had not been held for grand jury action. Attempted third-degree possession under subdivision 1 is not a lesser-included offense of third-degree possession under subdivision 12 because the attempt offense includes an intent to sell element. The issue survives the failure to preserve it below, the defendant’s guilty plea, and his waiver of appeal. (Supreme Ct, Westchester Co)

Sentencing (Second Felony Offender)

**People v Sylvestre, 123 AD3d 743, 997 NYS2d 713
(2nd Dept 12/3/2014)**

“[T]he defendant was improperly adjudicated a second felony offender based on a prior federal conviction of false representation of a social security number (42 USC §?408 [a] [7] [B]).” The prosecution did not “establish the requisite strict equivalency between the federal statute and Penal Law §?175.10, the New York Statute which proscribes falsifying business records in the first degree (*see* CPL 400.21 [7] [a] ...).” (Supreme Ct, Kings Co)

Family Court

**Juveniles (Custody) (Neglect) (Parental Rights)
(Permanent Neglect)**

Second Department *continued***Matter of Winstoniya D., 123 AD3d 705, 997 NYS2d 716
(2nd Dept 12/3/2014)**

The finding that the mother permanently neglected her children is reversed, the order of disposition that terminated her parental rights is reversed, and the petition is dismissed. The petitioner did not demonstrate, by clear and convincing evidence, that the mother failed substantially and continuously to maintain contact with her children and plan for their future. The children lived with the mother while she completed a residential substance abuse program and continued to live with her while she was in an outpatient program until they were removed after an allegation was made that the mother may have relapsed. But the mother consistently visited with her children, planned for their future to the extent she was able, and otherwise substantially complied with the terms of the past court orders, including by completing parenting classes. (Family Ct, Orange Co)

Family Court**Juveniles (Adoption) (Hearings) (Parental Rights)
(Visitation)****Matter of Jayden A., 123 AD3d 816, 998 NYS2d 425
(2nd Dept 12/10/2014)**

In a proceeding initiated by the mother to enforce the visitation provision of a judicial surrender under Social Services Law 383-c, the court erred by not “afford[ing] the biological mother’s attorney an opportunity to speak until after it stated that the petition was dismissed.” While “it may be true that the Family Court was aware of facts and circumstances that may have supported a determination that enforcement of the visitation provision would not have been in the child’s best interests, the *record* before us does not contain those facts. Accordingly, we are unable to conduct effective appellate review of the court’s determination or to make required findings on our own” (Family Ct, Queens Co)

Dissent: Domestic Relations Law 112-b(4) does not specifically require a hearing before the court decides whether enforcement is in the child’s best interests.

Sentencing (Modification) (Pronouncement)**People v Cardenas, 123 AD3d 940, 999 NYS2d 146
(2nd Dept 12/17/2014)**

The court’s “imposition of a one-year term of incarceration, after previously pronouncing a sentence of four months of incarceration, was ineffective.” While the defendant served the one-year sentence, the issue is not academic as the sentence “may have collateral immigra-

tion consequences”; therefore, the matter is remitted for correction of the sentence and commitment to reflect the four-month sentence. (County Ct, Westchester Co)

Sex Offenses (Sex Offender Registration Act)**People v Chiu, 123 AD3d 896, 996 NYS2d 730
(2nd Dept 12/17/2014)**

In this Sex Offender Registration Act risk level proceeding, there was not clear and convincing evidence to support the court’s assessment of 10 points under the acceptance of responsibility risk factor. In context, the defendant’s description of how his relationship with the underage victim began was not an effort to minimize his guilt or shift blame; the defendant admitted guilt, took a guilty plea, appeared remorseful during the presentence report interview, and apologized to the victim. (County Ct, Nassau Co)

Sentencing (Concurrent/Consecutive)**People v Grant, 123 AD3d 942, 999 NYS2d 144
(2nd Dept 12/17/2014)**

The sentences imposed on the defendant for attempted second-degree murder and attempted first-degree robbery should run concurrently, not consecutively, as the act of firing three gunshots at the accuser was the actus reus of the attempted murder charge and the use or threatened use of force to attempt to steal property from the same accuser while armed was the actus reus of the attempted robbery. Where the act constituting attempted murder is subsumed within the use of force element, the act constituting attempted murder is a material element of the attempted robbery. The prosecution failed to show that the acts constituting the two crimes were separate and distinct. (Supreme Ct, Kings Co)

Family Court**Juveniles (Adoption) (Parental Rights) (Permanent Neglect)****Matter of Kimberley J.G., 123 AD3d 928, 998 NYS2d 453
(2nd Dept 12/17/2014)**

The court did not err in dismissing the mother’s petition under Family Court Act 635, 636, and 637 to restore her parental rights by modifying the previous permanent neglect and termination of parental rights orders. Such a petition may only be filed if all four [(a)-(d)] of the conditions of section 635 are met. In this matter, the fourth condition [subdivision (d)] could not be met where one of the children was over 21 and no longer under the court’s jurisdiction and the other child had been adopted. (Family Ct, Westchester Co)

Second Department *continued*

Forfeiture

People v Carmichael, 123 AD3d 1053, 999 NYS2d 476 (2nd Dept 12/24/2014)

Where the plea minutes do not reflect a voluntary agreement by the defendant to civil forfeiture of his mobile phone and nearly \$1000 in cash, and he refused to sign forfeiture documents at sentencing, the court improperly imposed civil forfeiture as part of the sentence. Absent a CPLR article 13-A civil forfeiture action, which remains available at the prosecutor’s discretion for five years after the crime was committed, the defendant’s property must be returned to him. (County Ct, Dutchess Co)

Due Process (Fair Trial)

People v Nelson, 125 AD3d 58, 998 NYS2d 216 (2nd Dept 12/24/2014)

While it is troubling that the court did not act when members of the decedent’s family appeared in court during this murder trial wearing t-shirts bearing the decedent’s photo and a caption about remembering him, no per se rule requires reversal. Whether particular conduct, or a judge’s response to it, violates the right to an impartial jury depends on the circumstances of the case, including the nature of the charges, the evidence produced at trial, and the degree of the jury’s exposure to the questioned conduct, but actual prejudice need not be established. Here, the shirts were found not to be inflammatory, the jury’s attention was not drawn to them by any conduct of those wearing the shirts, which were somewhat obscured by other spectators and by over garments, and defense counsel, who did not notice them for some time, failed to create a record sufficient to support reversal when he did raise the issue. (Supreme Ct, Kings Co)

Dissent: The record is more than adequate to conclude that the defendant was denied a fair trial by the unacceptable risk that improper considerations contributed the jury verdict.

[*Ed. Note: Leave to appeal was granted on Mar. 27, 2015 (25 NY3d 955).*]

Identification (Lineups) (Photographs) (Suggestive Procedures)

People v Robinson, 123 AD3d 1062, 999 NYS2d 499 (2nd Dept 12/24/2014)

The motion to suppress identification testimony should have been granted where eyewitnesses first identified the defendant from photographs on a computer; the police did not preserve the screens viewed, giving rise to

a presumption of suggestiveness that was not rebutted; and the detective could not recall at the suppression hearing how many screens the witnesses viewed or how long they looked at photographs before making the identification, and gave inconsistent testimony about the age range used to generate each array. A later lineup procedure was also unduly suggestive, with only one of the four fillers of a similar age to the defendant. (Supreme Ct, Kings Co)

Family Court (Evaluative Reports)

Juveniles (Custody) (Hearings) (Representation)

Matter of Brown v Simon, 123 AD3d 1120, 1 NYS3d 238 (2nd Dept 12/31/2014)

In this custody modification proceeding, the court erred by allowing the father to testify about a statement by the subject child that was intended to show that the mother’s older daughter may have sexually abused the child because it “was inadmissible hearsay, and did not qualify as either prompt outcry evidence, or as a spontaneous declaration” The admission was not harmless as it was the only evidence presented to support the sexual abuse allegations.

The court improperly allowed, over objection, testimony from a physician about his treatment of the mother’s older daughter as that child was not a party to the proceeding and the testimony violated the privacy protections of the Health Insurance Portability and Accountability Act of 1996.

Finally, the court erred by failing to order forensic evaluations of the parents and without those evaluations, the record is inadequate to support a finding that modification of custody is in the child’s best interests.

In addition to these errors, the attorney for the child improperly advocated for a change in temporary custody before conducting a complete investigation; a new attorney for the child must be appointed. (Family Ct, Westchester Co)

Sentencing (Fines)

People v York, 123 AD3d 1155, 999 NYS2d 520 (2nd Dept 12/31/2014)

The defendant’s guilty plea to operating a vehicle while under the influence of drugs was made with the understanding that a fine could be imposed, but the court improperly characterized that fine as “mandatory.” Because it is unclear from the record whether the court “misapprehended its ability to exercise discretion in determining whether to impose a fine,” the sentence is vacated and the matter remanded for the court to exercise its discretion as to imposition of a fine. (County Ct, Dutchess Co)

Third Department

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

Family Court (Family Offenses)

Jurisdiction (Subject Matter)

Juveniles (Family Offenses)

Matter of Samantha I. v Luis J., 122 AD3d 1090, 997 NYS2d 510 (3rd Dept 11/20/2014)

The court had subject matter jurisdiction over the Family Court Act (FCA) article 8 petition filed by the mother of a 13-year-old girl alleging that the 13-year-old respondent committed various family offenses against her daughter. “[T]he focus of the jurisdictional analysis is on the child’s relationship with the respondent, rather than that of the parent” The child’s undisputed testimony that she and the respondent had an intermittent “boyfriend-girlfriend” relationship supports the court’s finding that the children were in an “intimate relationship” within the meaning of FCA 812(1)(e). “[T]he youth of the participants does not preclude a determination that their relationship was intimate ...; Family Ct Act § 812(1) expressly extends its jurisdiction to include respondents who are too young to be held criminally responsible” To the extent that the respondent is challenging the mother’s standing to file the petition, the issue is unpreserved and it is well established that parents have standing to file such petitions on behalf of their children. (Family Ct, Clinton 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.

Family Court

Juveniles (Custody) (Visitation)

Matter of Gelster v Burns, 122 AD3d 1294, 996 NYS2d 438 (4th Dept 11/14/2014)

The family court erred in dismissing the mother’s petition for sole custody at the conclusion of her proof. The court failed to accept the mother’s proof as true and give her the most favorable inferences that can reasonably

be drawn from that proof. The mother offered proof that she “successfully completed a substance abuse program and thus, in accordance with a provision in the prior consent order, she satisfied the requisite significant change of circumstances to permit the court to consider whether a change of custody in in the best interest of the child” However, the court’s dismissal is affirmed where the father, who had also petitioned for sole custody, presented proof that refuted the mother’s evidence and showed that the mother “had made numerous unfounded reports of alleged physical abuse of the child both to Child Protective Services and to the police.” The record also supports the court’s findings that the parties’ acrimonious relationship warranted a change in custody and that it was in the child’s best interests for the father to have sole custody. (Family Ct, Erie Co)

Family Court (Evaluative Reports)

Juveniles (Visitation)

Sex Offenses

Matter of Cardwell v Mighells, 122 AD3d 1293, 995 NYS2d 879 (4th Dept 11/14/2014)

Where the father, a level one sex offender, petitioned for visitation with his child, the court properly “dismissed the petition without prejudice to reapply for visitation upon the fulfillment of certain conditions, including completion of another sex offender risk assessment.” The record showed that the child is the product of sexual intercourse the father had with the then-underage respondent mother, for which the father was convicted of third-degree rape, and the father admitted that he did not complete a court-ordered sex offender risk assessment. It was not an abuse of discretion for the court to order the father to undergo a risk assessment with an objective evaluator before filing a reapplying for visitation where, although the father presented a prior assessment completed by his current treatment provider, “the court found that his ongoing treatment provider was not impartial and thus that the ... prior assessment ... was insufficient.” (Family Ct, Cattaraugus Co) ⚖

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