



Public Defense Backup Center **REPORT**

Volume XXX Number 1

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Defender News

Developments in Legislature and Courts Affect Public Defense

Provisions in the state budget for FY 2015-2016 and approval of the settlement in the longstanding New York Civil Liberties Union lawsuit top a wide range of developments affecting public defense services in New York State. Several of those developments are set out below.

Court Signs Off on the Hurrell-Harring Settlement; Clock Starts on Implementation

As reported in the last issue of the *REPORT*, the plaintiffs, New York State, and the five counties named in the class action suit *Hurrell-Harring v State of New York* reached a settlement in October 2014. After hearings on the settlement agreement in the five counties (Onondaga, Ontario, Schuyler, Suffolk, and Washington) and in Albany, acting Albany County Supreme Court Justice Gerald Connolly approved the [agreement](#) on Mar. 11, 2015. [News](#) of the settlement approval appeared on Mar. 18, which NYSDA Executive Director Jonathan Gradess [noted](#) was the 52nd anniversary of *Gideon v Wainwright*. The U.S. Department of Justice, which had filed a Statement of Interest in *Hurrell-Harring* in September 2014, [applauded the settlement](#) and Attorney General Eric Holder called it a “major step forward.”

The court’s approval of the settlement starts the clock on implementation of the agreed-upon reforms, which fall into four categories: counsel at arraignment; caseload reduction; initiatives to improve the quality of public defense; and eligibility standards for representation. The NYS Indigent Legal Services (ILS) Office is tasked with doing most of the implementation work. By mid-September, the ILS Office must address parts of each of these categories. It must develop a written plan for ensuring representation by counsel at arraignment in all five counties and establish written plans to improve the quality of public defense representation in those counties. As a first step in reducing caseloads/workloads, the ILS Office must ensure that the caseload/workload of each

attorney representing public defense clients in criminal proceedings in the five counties can be adequately tracked and reported. As to the final category, eligibility for counsel, which arguably will have the most immediate impact on counties outside of the five settlement counties, the ILS Office must issue criteria and procedures to guide courts in counties outside of New York City in determining eligibility for public defense representation.

The settlement required that New York State provide funds to achieve these implementation benchmarks. As part of the 2015-2016 budget, the State has appropriated \$3 million, \$2 million of which is to accomplish the objectives in the quality improvement plans. The other \$1 million is to pay the costs of interim steps taken to ensure the presence of counsel at arraignment. ([L 2015, ch 53](#)). The State also appropriated \$1 million for the ILS Office for costs associated with implementation of the settlement, up to \$500,000 of which is available for the development of a system for tracking caseloads/workloads. ([L 2015, ch 50](#)).

Criminal Justice Reforms Discussed During State Budget Process, But No Consensus Reached

Governor Cuomo’s proposed state budget included bills to raise the age of criminal responsibility from 15 to 17 and reform the grand jury process in cases involving police officer killings or assaults of unarmed people. The budget passed for the fiscal year that began April 1 did not include those bills; discussion on them is expected to continue.

Grand Jury Reform

The proposed grand jury and related criminal justice reforms were intended to “restore the public’s trust in New

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York's criminal justice system," as noted in the bill's [Memorandum in Support](#). Weeks after the proposed state budget was released, Chief Judge Jonathan Lippman, in his State of the Judiciary [address](#), offered his own grand jury reform proposal.

Lack of trust in the grand jury and justice system in general rose after a number of police killings of unarmed black men, including Eric Garner in Staten Island and Michael Brown in Ferguson, Missouri, and the grand jury decisions not to indict the police officers in those cases. While the Governor's bill received [support](#) from some district attorneys and others, many groups and legislators [questioned](#) the proposal and the bill was ultimately omitted from the state budget.

Raising the Age of Criminal Responsibility Still on the Table

The Governor's [Commission](#) on Youth, Public Safety and Justice issued its [final report](#) and recommendations on January 20, 2015, one day before the [proposed bill](#) intending to implement those recommendations was unveiled. The proposal drew a large number of supporters, but the details of the lengthy and complex bill and the impact it may have on 16 and 17 year olds charged with crimes caused some to urge that the reforms be addressed outside the limitations of the budget process. The budget as passed did include funding for implementation of juvenile justice reforms; new or revised proposals are expected to be released in the coming weeks.

Juvenile Justice Resources

Juvenile justice issues are receiving attention in New York and around the country both as part of and separate from debate about raising the age. A host of resources are available including the following:

- National Juvenile Defender Center: <http://njdc.info/>
- Office of Juvenile Justice and Delinquency Prevention (OJJDP): <http://www.ojjdp.gov/>
- OJJDP's Journal of Juvenile Justice: <http://www.journalofjuvjustice.org/index.html>
- Models for Change: Systems Reform in Juvenile Justice: <http://www.modelsforchange.net/index.html>
- Mental Health and Juvenile Justice Collaborative for Change: <http://cfc.ncmhjj.com/>
- Juvenile Justice Information Exchange: <http://jjie.org/>

Enacted Budget Includes Few Criminal Justice and Family Court Bills

The 2015-2016 enacted state budget contains only a handful of criminal justice and family court bills. The

enacted budget bills and related information are available at <http://publications.budget.ny.gov/budgetFP/enacted1516.html>. Legislative changes include:

- Restrictions on use of possession of condoms as evidence; clarification of syringe/needle exception in Penal Law 220.45 and 220.03 ([L 2015, ch 57, part I](#)) – effective April 13, 2015. The bill adds a new CPL 60.47 that provides that, in cases involving charges of prostitution or loitering for the purpose of prostitution, possession of one or more condoms may not be used as evidence to establish probable cause for an arrest or to prove a person's commission or attempted commission of such an offense. The bill also amends Penal Law 220.03 (criminal possession of a controlled substance 7th) and 220.45 (criminal possession of a hypodermic instrument) to make clear that the exception for possession of a syringe/needle pursuant to PHL 3381 "includes the state's syringe exchange and pharmacy and medical provider-based expanded syringe access programs."
- Medical parole for terminally ill inmates ([L 2015, ch 55, part A](#)) – effective April 13, 2015. Executive Law 259-r is amended to transfer from the Parole Board to the Commissioner of the Department of Corrections and Community Supervision (DOCCS) the responsibility to make medical parole decisions for terminally ill inmates, subject to review by the Chair of the Parole Board.
- Legislative changes required by the federal Preventing Sex Trafficking and Strengthening Families Act [[P.L. 113-183](#)] ([L 2015, ch 56, part L](#)) – effective April 13, 2015 (with some exceptions). Part L amends various provisions of the Social Services

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Law, Family Court Act, Surrogate's Court Procedure Act, Public Health Law, and Executive Law to comply with the 2014 federal law, which deals with opportunities for youth in foster care.

Sentencing Laws Extended for Another Two Years

The Graybook (New York Criminal Statutes and Rules) includes two versions of many sentencing statutes, with editorial notations that the current law is valid "until Sept. 1, 2015," after which the alternative will become effective. However, the alternative statutes would become effective only in the extremely unlikely event that the legislature chooses to let the current determinate sentencing scheme lapse. Since 2005, the legislature has extended these laws every time they were scheduled to "sunset." As part of this year's state budget, the sunset date for these laws has been extended for two years to September 1, 2017 ([L 2015, ch 55, part B](#)), so those laws will not change on Sept. 1, 2015.

State Loan Forgiveness Application Deadline: May 15, 2015

The application for the state's District Attorney and Indigent Legal Services Attorney Loan Forgiveness Program (Education Law § 679-e) is now available on the NYS Higher Education Services Corporation (HESC) [website](#). **The application deadline is May 15, 2015.** For more information about the state loan forgiveness program, contact HESC at 1-888-697-4372 or scholarships@hesc.ny.org. Public defense attorneys with questions about the state program and other loan forgiveness and repayment assistance programs may also contact Susan Bryant at the Backup Center at 518-465-3524 or sbryant@nysda.org.

ILS Issues Appellate Standards and Best Practices

The Indigent Legal Services (ILS) Office has promulgated standards for appellate representation that have been approved by the ILS Board. The "Appellate Standards and Best Practices," [available](#) on the ILS website, became effective Jan. 5, 2015. They address the qualifications, training, oversight, and duties of lawyers, and "apply to all mandated post-judgment representation in criminal cases, post-disposition representation in family law cases, appeals of Sex Offender Registration Act (SORA) risk level determinations, and Mental Health Law Article 10 appeals."

The appellate standards are the second set of standards adopted by ILS for public defense representation in New York State. Trial level "Standards and Criteria for the Provision of Mandated Representation in Cases Involving

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a Conflict of Interest" became effective in 2012. The ILS Board expanded their application beyond conflict of interest cases to [all trial level representation](#), effective Jan. 1, 2013. Workgroups are drafting three other sets of ILS standards and/or best practices, relating to representation of non-citizens, to representation of parents/caregivers in family court matters dealing with child welfare, and to provision of assigned counsel. As noted above, the *Hurrell-Harring* settlement requires ILS to issue standards for determining financial eligibility of potential clients.

ABA Revises Standards for Defense and Prosecution

The American Bar Association (ABA) just completed a revision of two major volumes of its Criminal Justice Standards. In February 2015, the ABA House of Delegates approved a fourth edition of its black letter standards regarding the [Defense Function](#) and the [Prosecution Function](#).

Confidential Conferences with Clients Vital from the Beginning and Throughout Representation

The recent appearance of new standards restating or expanding on the long-established need for prompt, confidential communication between attorneys and their clients has coincided with challenges in New York to the asserted deprivation of such communications.

The new ILS appellate standards (above) require lawyers to meet in person with clients they represent on appeal to help ensure creation of a trusting relationship, and for lawyers to be mindful that phone calls with incarcerated clients "typically are not secure." Standard IX. The ILS trial standards require attorneys to "Interview the client as soon as possible, and in a setting in which client confidentiality can be maintained and a client/attorney relationship can be established" Standard 5(b). And the new ABA Defense Function standards expand the requirement that jurisdictions "guarantee by statute or rule" the right to "prompt and effective communication with a lawyer" (Third Edition, Standard 4-2.1) to the right to "prompt, *confidential*, affordable and effective commu-

nication” with counsel. Fourth Edition, Standard 4-2.2(a) [emphasis added].

In February, the Suffolk County Legal Aid Society (SCLAS) brought a lawsuit against municipalities in the County’s East End over the unavailability of confidential conference space for client-attorney interviews at arraignment. SCLAS cited the right to counsel, including at the critical stages of arraignment and bail hearings, the deprivation of that right when a client is denied private consultation with counsel, and specific instances of such deprivation and examples of use of overheard content of client-attorney conferences in police documents. The parties [settled](#) the suit in March, with some municipalities agreeing to complete construction to create appropriate spaces by Apr. 30, 2015.

As public defense counsel begin to appear at arraignments/first appearances in localities where heretofore defendants’ right to counsel at that critical stage was ignored (as discussed below), similar issues may manifest themselves. The Backup Center has received some inquiries already, and lawyers or public defense programs are encouraged to seek consultation and bring other situations to NYSDA’s attention.

On a related issue, the *New York Law Journal* [reported](#) on Apr. 2, 2015, that an article 78 petition in Nassau County challenging alleged recording of telephone calls from clients in jail to their attorneys, raising similar concerns, was rejected. An appeal of the court’s [decision](#) is planned.

Counsel at Bail Hearings Found Lacking in Many States

The lack of counsel at arraignment is a problem in New York and elsewhere. Many states do not provide counsel at first appearances, as detailed in the Constitution Project’s National Right to Counsel Committee recent report, “[Don’t I Need a Lawyer?](#) Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing.” The report notes the important role that defense attorneys play at initial bail hearings, both in the short term, shown by data that these clients are released on recognizance or at significantly lower bail amounts, and for the rest of the case because counsel can immediately begin to investigate, build a trusting client relationship, and spare clients the adverse trial consequences of pretrial incarceration.

While the report correctly states that New York law requires counsel at arraignment, it does not mention that the law is not being followed in most of the state. Initial steps are being taken to meet that requirement through the *Hurrell-Harring* settlement and [grants](#) from the ILS Office to a number of counties so that counsel will be present in at least some courts.

Search and Seizure Issues Abound: New Technology, Old Fashioned Deceit, Police Stops, and More

Search and seizure issues are a staple of defense representation. The Case Digest in this issue [p. 21] contains summaries of several decisions addressing search and seizure issues, two of which are discussed below. Also, use of cell site simulators continues to make headlines and law.

Appellate Courts Address Police Mistakes Underlying Searches, Tracking of Sex Offenders

The U.S. Supreme Court found in [Heien v North Carolina](#) (135 SCt 530 [2014]) that an officer’s erroneous belief that state law required two functioning taillights on vehicles did not vitiate the legality of his stop of a vehicle with only one because the mistake was “objectively reasonable.” Justice Kagan, joined by Justice Ginsburg, concurred while stressing that, as both North Carolina and the Solicitor General had agreed, cases where a statute was sufficiently difficult to interpret to warrant designating a mistake “reasonable” would be “exceedingly rare.” Justice Sotomayor dissented, and would have held that officers’ understanding of the facts facing them should be evaluated “against the actual state of the law”; she lamented the erosion of “the Fourth Amendment’s protection of civil liberties” in the context of police stops, “where that protection has already been worn down.”

In [People v Guthrie](#) (2015 NY Slip Op 02867 [2015]), the Court of Appeals also found that when probable cause for a traffic stop “is based on a police officer’s objectively reasonable, but mistaken, view of the law . . . , the stop is constitutional.” The mistake in *Guthrie* was that the defendant’s disregard of a stop sign was not a traffic violation because the sign, at the edge of a parking lot leading onto a public street, was not properly registered. Judge Rivera dissented.

In another search and seizure realm, the U.S. Supreme Court held that subjecting a person with a record of sex offense convictions to satellite-based monitoring constitutes a search where the monitoring program includes “[t]ime-correlated and continuous tracking” of the person’s geographic location and reporting of any violations by the person “of prescriptive and proscriptive schedule or location requirements.” The Fourth Amendment applies regardless of the “civil” nature of the program, the court said. For example, the court noted, a building inspector’s entry into a home to ensure compliance with civil safety regulations constitutes a search under the Fourth Amendment. The case was remanded for determination of whether the search in question was reasonable. [Grady v North Carolina](#), No. 14-593 (3/30/2015).

Has a StingRay Stung Your Client — or You?

What do New York's Erie County and Baltimore, Maryland have in common? Recent media reports say law enforcement in both jurisdictions use—and quite possibly overuse—a cellphone tracking device that raises general privacy concerns and case-specific issues.

The *REPORT* brought such devices, known by brand names such as StingRay and formally designated cell site simulators, to readers' attention in [July 2014](#). Since then, the ACLU and others have [criticized](#) the devices' capacity to violate the privacy rights of large numbers of people whose phones report data to the device just as they would to a cell tower. And the use of StingRays also raises legal questions such as discovery and the need for search warrants.

At the beginning of this year, the FBI took the position that no warrant is required to deploy the simulators, as reported at [arstechnica.com](#) and elsewhere. In February, the *Washington Post* reported on a Florida case in which a defendant facing at least four years in prison got a plea deal for six months' probation because police did not want to disclose StingRay information to defense attorneys. In April, the *Baltimore Sun* pointed out both broad and specific concerns regarding StingRay use in an [article](#) that began, "The Baltimore Police Department has used an invasive and controversial cellphone tracking device thousands of times in recent years while following instructions from the FBI to withhold information about it from prosecutors and judges, a detective revealed in court testimony Wednesday." The FBI-required secrecy has drawn the attention of local officials in Santa Clara, California, concerned about spending tax dollars without information on what those dollars are buying, according to a *New York Times* [article](#) in March.

StingRays have been generating news headlines in New York State as well. In March, the *Albany Times Union* [editorialized](#) that state legislators should take steps to ensure that Fourth Amendment rights and other freedoms are protected by letting the public "know the ground rules for conducting [cell site simulator] surveillance, what happens to their data, and how their privacy is or is not protected." A lawsuit in western New York was the trigger for the editorial; on Mar. 17, 2015, an Erie County Supreme Court [ordered](#) the Erie County Sheriff's Office to hand over to the New York Civil Liberties Union (NYCLU) records related to a cell site simulator. On April 7, the [NYCLU](#) announced that those records "showed that of the 47 times the Sheriff's Office used stingrays in the past four years, it apparently only once obtained a court order, contradicting the sheriff's own remarks." The *New York Law Journal* [picked up the story](#) on April 14, relating law enforcement statements that the records released to the NYCLU might not contain complete information about when warrants were obtained and that "disclosures about the sophisticated Stingray technology were restrict-

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ed by the FBI and could compromise national security." According to the *Democrat and Chronicle* in [early April](#), documents obtained in the suit also "revealed that Erie County deployed its devices on behalf of other police agencies all the time—including once for the East Rochester Police Department in 2011 and twice for the US Marshals Service in Rochester, in 2012 and 2013."

Just where StingRay technology may be in use is hard to say. Whether in discovery demands, FOIL requests, or public opinion venues, lawyers may want to consider seeking answers to the question, have my clients—or me—been stung by a StingRay?

Because there is another problem. When cellular service is disrupted, one may legitimately wonder if that is a StingRay at work. A *Wired* article [posted](#) by the Marshall Project reports that disclosures about the device include this: "stingrays can disrupt cellular service for any phone in their vicinity—not just targeted phones—as well as any other mobile devices that use the same cellular network for connectivity as the targeted phone."

FBI Leading Us Astray?

Questions about FBI actions on or over the edge of unconstitutionality arise in contexts other than cell site simulators. The *Atlantic* concluded a Dec. 17, 2014 [article](#) about FBI use of subterfuge to enter homes with a summary of "disturbing and dangerous ways" the agency has been pushing its warrantless investigative powers. They range from using hacking tools against unknown individuals to impersonating legitimate news sites—as well as old-fashioned deceit, disconnecting internet service and then pretending to be a technician responding to the repair call. A federal district judge just suppressed evidence obtained by this last tactic, as noted in a [post](#) on the ABA Journal. As the StingRay issue shows, what the FBI does may affect more than federal prosecutions.

That has been true for a long time, of course—questions and scandals involving work by the FBI laboratory have arisen repeatedly. A [law review article](#) by Jessica D. Gabel, "Realizing Reliability in Forensic Science from the Ground Up," published by the *Journal of Criminal Law and Criminology* a year ago, recounted examples, including not just the notorious misidentification of an American as a

participant in a 2004 terrorist attack in Spain but also flawed hair and fiber analysis in the 1990s. The article noted that at least as recently as 2012 the FBI said its lab “still conducts microscopic hair comparisons” and “[t]here is no reason to believe the FBI Laboratory employed ‘flawed’ forensic techniques,” so that lawyers should continue to question results from the FBI in this (or any) type of forensic testing. But on Apr. 18, 2015, a *Washington Post* [headline read](#): “FBI admits flaws in hair analysis over decades.”

Sex Offender Restrictions Successfully Challenged Across the Nation

On a variety of legal bases, residency restrictions applied to sex offenders have been recently struck down in New York, California, and Michigan. A [post](#) on The Crime Report on Apr. 16, 2015, discussed developments regarding residency restrictions across the nation. And earlier this year, the Collateral Consequence Resource Center [noted](#) that a number of courts had questioned mandatory lifetime registration requirements for those convicted of sex offenses.

Preemption Doctrine Undoes Local Residency Laws in New York

The Court of Appeals found that the State’s series of laws and regulations regarding the “identification and monitoring of registered sex offenders” preempts the subject of sex offender residency restrictions so that local governments cannot encroach on the field. At issue was Nassau County’s Local Law 4-2006, prohibiting registered sex offenders from living within a certain distance of specified locations. The defendant, a level one registered sex offender who was not under parole or probation supervision, was charged under that law, successfully moved to dismiss, and, when the Appellate Term reinstated the accusatory instrument, he sought relief in the Court of Appeals. Albany attorney Kathy Manley represented him. *People v Diack*, 24 NY3d 674 (2015) [summary on p. 27]. Manley received NYSDA’s 2013 Service of Justice Award for her work on behalf of sex offenders, who are too often denied all opportunity for rehabilitation and reintegration; she has pursued litigation of a variety of cases challenging residency, classification, and registration requirements.

The exact number of local laws that will be affected by *Diack* is unclear. The *Democrat and Chronicle* said on [February 18](#), “[a]t least 109 cities, towns and villages and 21 counties have passed local restrictions, according to the New York Civil Liberties Union, though some have been repealed or invalidated.”

Officials in some localities are calling on the State Legislature to undo *Diack*, as noted in an Apr. 15, 2015

[blog post](#) on Sex Offender Research & State News. A bill authorizing municipalities to establish sex offender residency restrictions passed the Senate on Feb. 26, 2015—just nine days after *Diack* was issued—and a “same as” bill was referred to the Assembly Committee on Correction on March 5.

But calmer voices also call for change after the decision—change for the better. For example, *Newsday* editors [observed](#) that the ruling would end the “arms race of ever tougher restrictions that concentrated many offenders in a few acceptable locations” that had “likely left some offenders homeless and prompted others to stop reporting their addresses, making them difficult, if not impossible, to monitor,” and that with the ruling, “communities can stop relying on a solution that doesn’t work.” A lengthy [piece](#) from *The New York World* described many problems with the over-regulation of sex offenders. And Kevin Kearon [wrote](#) in the Mar. 13, 2015 *New York Law Journal*:

Diack presents an excellent opportunity for Albany to conduct a comprehensive review of this entire area, not to tighten the screws and make life more impossible for the convicted sex offender to rehabilitate and reintegrate, but to conduct honest hearings on the empirical data, on issues of recidivism, rehabilitation and the dubious benefit occasioned by the permanent or decades-long figurative branding of the scarlet letters, ‘SEX OFFENDER’ on the foreheads of such people.

NYSDA staff attorney Al O’Connor will participate in the Assembly Standing Committee on Correction’s invitation-only roundtable (see [notice](#)) on Sex Offender Residency Restrictions to be held on May 20, 2015, in Albany.

2014 Legislation Included Sex Offender Bills

Meanwhile, the State Legislature passed other bills relating to sex offenses, as noted in the Legislative Review beginning on p. 12. Among the new Laws of 2014 are:

- Chapter 198, which provides that volunteer firefighter applicants must submit to a background check to determine if they are subject to the Sex Offender Registration Act (SORA) and that if they are, the fire companies must determine whether they are eligible to be appointed; and
- Chapter 462, which requires the Division of Criminal Justice Services to include in the Sex Offender Registry all of a sex offender’s crimes of conviction that require registration, not just the most recent.

California High Court Finds Statewide Restrictions Unconstitutional

Individuals on parole in San Diego for sex offenses challenged, on constitutional grounds, statewide residential limits passed by voters in 2006, and the state's Supreme Court ruled in their favor on March 2. *In re Taylor*, 60 Cal 4th 1019 (Cal. 3/2/2015).

The decision notes that “well-settled authority establishes that every parolee retains basic constitutional protection against *arbitrary and oppressive official action*,” [emphasis in original], and that:

blanket enforcement of the mandatory residency restrictions of Jessica's Law, as applied to registered sex offenders on parole in San Diego County, cannot survive even the more deferential rational basis standard of constitutional review. Such enforcement has imposed harsh and severe restrictions and disabilities on the affected parolees' liberty and privacy rights, however limited, while producing conditions that hamper, rather than foster, efforts to monitor, supervise, and rehabilitate these persons. Accordingly, it bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and has infringed the affected parolees' basic constitutional right to be free of official action that is unreasonable, arbitrary, and oppressive.

Further, the court said, it “agreed with petitioners that the manner in which the CDCR [California Department of Corrections and Rehabilitation] has been implementing the residency restrictions in San Diego County has subjected them to arbitrary and oppressive official enforcement action, thereby contributing to the law's unintended, unforeseen, and socially deleterious effects.”

By March 27, according to the *Petaluma Patch*, the CDCR was taking steps to carry out the decision. A *Los Angeles Times* article on the CDCR's action led to a [post](#) on the Sentencing Law and Policy blog noting that the *Taylor* decision “was especially significant for the future of sex offender residency restrictions.”

Federal Court Strikes Portions of Michigan SORA

A federal district court has found parts of Michigan's Sex Offenders Registration Act (SORA) unconstitutionally vague. The ruling struck down several requirements, including 1,000-foot prohibited zones around schools that left persons subject to the law guessing the zones' boundaries. As noted by the Detroit *Free Press*, the court stated that “SORA's vagueness leaves law enforcement without adequate guidance to enforce the law and leaves registrants of ordinary intelligence unable to determine when the reporting requirements are triggered.” *Doe v Snyder*,

No. 12-11194, 2015 US Dist. LEXIS 41681 (ED Mich 3/31/2015).

NYSDA Continues Support for Representation of Military Veteran Clients

The State Legislature recognized the work of NYSDA'S Veterans Defense Program (VDP) by appropriating \$500,000 for its work in FY 2015-16. This will allow VDP to continue its training and backup support services aimed at improving legal representation of clients whose military service may be relevant to the behavior that brought them into court and/or to the best disposition of the case. In the past year, the VDP has presented at least four regional Continuing Legal Education (CLE) training events, offered sessions at other NYSDA trainers, and assisted numerous public defense lawyers handling criminal and family court cases for clients currently or formerly in the military. Defenders with questions about the representation of veterans and active duty military may contact the VDP Director, Gary Horton, at 585-219-4862 or ghorton@nysda.org.

NYSDA also seeks to provide information outside the context of specific cases and training events, disseminating information relevant to representation of veterans in the justice system, such as that appearing below.

National Study on Effectiveness of Veteran's Court Released

A study released earlier this year followed 86 veterans participating in an Ohio Veterans Treatment Court, charged with felony or misdemeanor offenses, and enduring significant post-traumatic stress disorder (PTSD) symptoms. Significant improvement was noted with regard to mental health issues and status, including PTSD, depression, emotional wellbeing, and more. “A Specialized Treatment Court for Veterans with Trauma Exposure: Implications for the Field,” appeared in the February 2015 issue of the *Community Mental Health Journal*. A link to it is available on the Justice for Vets website, <http://justiceforvets.org/node/238>.

Website Aims to Help Veterans Upgrade Punitive PTSD Discharges

The Army Review Boards Agency has a website to assist veterans seeking to upgrade punitive discharges related to behavior problems caused by PTSD. The site—<http://arba.army.pentagon.mil/adrb-ptsd.cfm>—provides information and applications for those seeking to upgrade an “other than honorable” discharge from service. Such upgrades are linked to benefits available through the U.S. Department of Veterans Affairs, such as

treatment for PTSD-related symptoms. Defendants who become eligible for VA benefits may be more attractive candidates for alternatives to incarceration.

This new policy was sparked by efforts of veterans of the Vietnam conflict to upgrade their discharges, as noted in a [post](#), with links, on Examiner.com on Mar. 18, 2015: “The Department of Defense has finally acknowledged that thousands of Vietnam Veterans were given punitive discharges because they had ... [PTSD].”

Family Law Decisions

Since the last issue of the *REPORT*, appellate courts have issued several opinions of note in cases from family courts, including those discussed below. Additional family law cases are summarized in the Case Digest that begins on p. 21.

4th Department Overrules Requirement of Actual Prejudice in Family Court for IAC Claims

In [Matter of Brown v Gandy](#) (125 AD3d 1389 [4th Dept 2015]), an appeal of a Family Court Act article 6 proceeding, the Fourth Department rejected all its previous decisions that required a showing of actual prejudice for an appellant to claim ineffective assistance of counsel. In doing so, the court noted that “because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings’....” However, the court found that the father here was not entitled to relief because he failed to demonstrate that his lawyer had lacked “strategic or other legitimate explanations” for the alleged ineffectiveness.

Neglect Finding Vacated, Petition Against Mother with Mental Illness Dismissed

A mother with no history of mental health issues required medical assistance in an emergency room and then in a mental health treatment facility for a short time. The maternal grandmother, with whom the court placed the child, conceded that the mother had appropriately cared for the child before and after her hospitalizations and was able to meet the child’s needs. However, the family court concluded that the mother had neglected her child. The Second Department reversed, finding that “[t]here was no evidence that the mother ever failed to properly care for the child or provide the child with adequate food, clothing or shelter. Rather, the evidence indicated that the child was a healthy, active and intelligent two year old.” [Matter of Nialani T.](#), 125 AD3d 672 (2nd Dept 2015).

While “[p]roof of ongoing mental illness and the failure to follow through with aftercare medication, which

results in a parent’s inability to care for her child in the foreseeable future, is a sufficient basis for a finding of neglect,” the proof here was found lacking. Evidence that the mother stopped taking her medicine, and her treating psychiatrist’s testimony that “it would be difficult” for her to care for others without that medication, “does not satisfy the petitioner’s burden of proof” because it did not show that the mother’s failure to take the medication was a clear refusal to comply with treatment, and there was evidence that she went to hospital appointments and complied with treatment.

Expiration Does Not Moot an Appeal from an Order of Protection

In [Matter of Veronica P. v Radcliff A.](#) (24 NY3d 668 [2015]), the family court issued a two year order of protection after finding that the respondent committed acts that constituted second-degree harassment in this Family Court Act article 8 (Family Offense) matter. The First Department unanimously dismissed the respondent’s appeal based exclusively on the expiration of the order. The Court of Appeals reversed, indicating that the “ability of an appellate decision to directly and immediately impact the parties’ rights and interests is among the most important aspects of the mootness analysis” and “because the order still imposes significant enduring consequences upon respondent,” the issue is not moot. The Court gave examples of “enduring consequences,” including the possibility that in a future criminal or family court case, the court may “rely on the order to enhance a sentence or adverse civil adjudication against respondent” or that the respondent may have to disclose to a future employer that an order had been entered against him. The Court, however, declined to declare that all appeals from expired orders of protection, other than those entered by stipulation, are not moot.

Criminal Contempt in Family Court

The Third Department has now clearly established the standard of proof required for criminal contempt in family court proceedings. In [Matter of Stuart LL. v Aimee KL.](#) (123 AD3d 218 [3rd Dept 2014]), the court ruled that when a judge makes a contempt finding in a Family Court Act article 8 proceeding that includes a defined term of confinement, the correct burden of proof is beyond a reasonable doubt. The opinion specifically noted that cases “indicating otherwise should no longer be followed.” The trial court erred in applying a clear and convincing standard and subsequently sentencing the respondent for a definite term of incarceration. The *Stuart LL.* holding follows the holding in a Second Department case, [Matter of Rubackin v Rubackin](#) (62 AD3d 11 [2nd Dept 2009]).

“Is Shaken Baby Syndrome the New Satanic Panic?”

A provocatively titled [article](#) in the *L.A. Weekly* on Apr. 9, 2015, reports on a new documentary film, “The Syndrome,” that highlights “the medical and legal industry that has arisen” around evidentiary use of Shaken Baby Syndrome (SBS). At the heart of the film, as described in the article, lies a comparison of SBS and the rise (and eventual fall) of “Satanic Ritual Abuse” evidence in child abuse cases beginning in the 1980s.

Among the reported connections are three doctors who, in the past, publicized symptoms said to show a child had been ceremonially tortured. They then turned to promoting, in conferences, writings, and training materials, the perceived danger of SBS, now also known as Abusive Head Trauma (AHT). Each of the three—David L. Chadwick, Robert M. Reece, and Carole Jenny—has served on the board of the [National Center on Shaken Baby Syndrome](#), which reported yearly earnings of \$2.14 million in 2014 from grants and purchase of materials, the article said. These names appear in many publications and pleadings dealing with SBS/AHT.

The article also identifies experts skeptical of the evidentiary value of the “triad” of symptoms said to prove that a child has been injured or killed by shaking. Among them is former Kentucky State Medical Examiner George Nichols, who has said he would testify for a reversal of all convictions in which he was involved when he testified positively about SBS. Another is pathologist John Plunkett, who has tested bio-mechanical dummies to determine the effects of shaking.

Mississippi Death Row Inmate Gets a Hearing on SBS

Just prior to the above article, questions about the credibility and reliability of SBS evidence in child abuse cases apparently provided grounds for the Mississippi Supreme Court to grant a person on death row permission to file a successive request for post-conviction relief. The *Washington Post* blog, *The Watch*, [reported](#) on April 3 that a favorable ruling following a hearing could result in a new trial for Jeffrey Havard, convicted in 2002 of killing his girlfriend’s six-month-old child. Havard’s conviction rested in part on the testimony of a medical examiner, Steven Hayne, who has since been criticized “for his improbable testimony, sloppy practices and herculean workload.”

Media Coverage of SBS Critiques

The preceding months saw a steady outpouring of media coverage of SBS. The Public Broadcasting System aired a segment about SBS on Mar. 23, 2015, as was [noted](#) on the Wrongful Convictions Blog the following day.

Earlier in March, the *Washington Post* [published](#) a series of articles about it. In February, the CBS news show “48 Hours” focused on an SBS case in a segment called “[Blaming Melissa](#).”

Also in February, 34 well-regarded doctors, medical professionals, and international experts jointly published a letter critical of how SBS cases are prosecuted. As [noted](#) on the Wrongful Convictions Blog, “[t]his is a very big deal,” perhaps especially as one of the signatories to the letter was A. Norman Guthkelch, whose initial study in 1971 “started the whole SBS/triad ‘religion.’” Thirty years later, Guthkelch first expressed publicly on a [segment](#) of NPR’s Morning Edition, “Rethinking Shaken Baby Syndrome,” his worries that medical examiners and doctors applied an SBS diagnosis without considering other possible explanations for children’s deaths and injuries.

Monroe County Decision is a Guidepost

On Feb. 17, 2015, a post appeared on the National Association for Public Defense (NAPD) website entitled “[Another Step Away from Bad Science](#)—a Review of the History and Science of ‘Shaken Baby Syndrome’ in *People v. Rene Bailey* (December 16, 2014, Monroe County, NY).” In the post, Jill Paperno of the Monroe County Public Defender’s Office discussed two decades of SBS prosecutions and the scrutiny some are now receiving. She said that the [decision](#) issued by County Court Judge James J. Piampiano overturning the conviction in *Bailey* “should be a starting point for a defender handling one of these cases, as a guide to the science, the medicine, the arguments, possible other causes for a death or injury with these physical symptoms, and even a list of potential experts or consultants (including and especially Ms. Adele Bernhard).” Bernhard represented Rene Bailey in post-conviction proceedings.

SBS Resources Available

NYSDA has an extensive collection of materials, including pleadings and the motion papers from *Bailey*, on SBS/AHT. Attorneys representing clients accused in criminal or family court with harming young children by shaking are encouraged to contact the Backup Center.

Bite Mark Evidence: Junk Science that Refuses to Die

In 2009, a committee of the National Research Council of the National Academies of Science (NAS) issued “Strengthening Forensic Science in the United States: [A Path Forward](#),” the landmark report criticizing the lack of science in forensic “science” evidence. That report noted the absence of any thorough, large-population study on the uniqueness of bite marks. “There is no science on the

reproducibility of the different methods of analysis” used to reach conclusions about “the probability of a match,” the report said. The best that could be said about bite mark comparison was that “it is reasonable to assume that the process can sometimes reliably exclude suspects.”

Four-Part Washington Post Series Targets Bite Mark Evidence

Despite the NAS report, and several DNA exonations of individuals convicted by bite mark evidence, such evidence is still accepted in most courts. Radley Balko authored a four-part series for his blog on the *Washington Post* website in February on this forensic issue. Despite the NAS having “singled out bite mark matching for some especially harsh criticism,” Balko noted, this area of forensics “is not only still going strong; it may be as strong as ever.”

Pursuing why that is, Balko detailed the influence of the American Board of Forensic Odontology (ABFO) within the American Academy of Forensic Sciences, and its attacks on critics of bite mark pattern matching. At the end of [Part 1](#), Balko opined that since the scientific community has declared bite mark matching unreliable and lacking a scientific basis, “it shouldn’t be used in the courtroom.” In [Part 2](#), he set out a scathing history of bite mark comparison, and in [Part 3](#) he profiled critics of bite mark comparison, including practicing dentist and law graduate Michael Bowers from California and Mary and Peter Bush, at the University of Buffalo. The Bushes’ work has resulted in bitter opposition, including nasty personal attacks, by some bite mark analysts who “fought back with a nasty campaign to undermine the Bushes’ credibility.”

In [Part 4](#), Balko described disappointing court decisions re-affirming the admissibility of bite mark evidence in the face of scientific challenges. Among them was the recent rejection of such challenges by a Supreme Court justice in New York County in the prosecution of a man named Clarence Dean. As briefly noted in the *New York Law Journal* on [Sept. 6, 2013](#), the ruling followed extensive hearing testimony. Acting Supreme Court Justice Maxwell Wiley had indicated that a written opinion would follow; Balko noted in the recent series that none has been forthcoming.

Did Bite Mark Experts Just Fail Their Own Test?

In an April 8 [follow-up](#) to his February series, Balko reported on a presentation at the American Academy of Forensic Sciences annual convention. Thirty-nine analysts certified by the ABFO were given photos of a hundred bite marks and asked to answer three questions based on a “decision tree” released last year as a guide for performing bite mark analysis. The intent, Balko noted, was to measure consensus, not the factual correctness of the

answers; consensus is important to show predictability and is particularly important in fields relying on pattern matching and subjective analysis, as bite mark comparison does.

The results of the three-question test showed very little consensus. For the first question, the analysts had 90% agreement in only 20 of the 100 samples used, and by the third question, there was 90% agreement in only 8 out of 100 cases. In contrast, as pointed out by Chris Fabricant, Director of Strategic Litigation at the Innocence Project, a similar 2011 study of fingerprint analysts resulted in 99% agreement.

The ABFO has decided not to publish the results of this study until its design is modified and another test is conducted. Therefore, the results will not be available in upcoming cases involving bite marks, including that of Clarence Dean.

Balko’s reports make clear that lawyers in New York and across the country must continue to battle bite mark evidence case by case. His writing provides both motivation and facts to do so. The Backup Center encourages attorneys handling bite-mark cases to contact its legal staff for consultation and assistance.

Resources in Review

Information overload often leads to losing track of what information is available or where to find it. What follows is a list of briefly-described online resources that *REPORT* readers may have seen, meant to look at, and lost in their overfull inboxes or overlong list of website “favorites.” They are not sorted by order of importance—or really by any order at all.

Collateral Consequences

More accurately known as enmeshed consequences, the many negative effects of criminal convictions that exist beyond imprisonment and probation or parole supervision present challenges to clients that lawyers need to recognize. The newest edition of the American Bar Association standards concerning the Defense Function (see p. 3) includes new Standard 4-5.4, Consideration of Collateral Consequences. This standard imposes on defense counsel the duty to identify collateral consequences, seeking assistance from others with specialized knowledge if need be; to advise the client about such consequences, including the possibility of mitigating or removing later those that are of most concern; and to include consideration of such consequences in plea negotiations and sentencing advocacy. Among sources of information on such consequences are:

- The [Collateral Consequences Resource Center \(CCRC\)](#) was established in 2014 “to promote public discussion of the collateral consequences of convic-

tion, the legal restrictions and social stigma that burden people with a criminal record long after their court-imposed sentence has been served.” Aimed at lawyers and many others, the CCRC website includes not just national news and general policy information but also a variety of state-specific resources: current news stories, manuals and more.

- The [National Inventory of the Collateral Consequences of Conviction](#), developed by the American Bar Association’s Criminal Justice Section under the Court Security Improvement Act, also offers state-by-state information. These charts list applicable statutes, the consequences those statutes impose on offenders, and the duration of the restrictions.

Immigration Consequences

The U.S. Supreme Court decision five years ago in *Padilla v Kentucky* (559 US 356 [2010]) took immigration consequences out of the “collateral” realm and imposed a duty on defense counsel to inform noncitizen clients about the often-drastic effects of criminal offenses on immigration status. NYSDA has long offered resources to help lawyers effectively represent noncitizen clients, and continues to do so. Immigration-related topics regularly appear on CLE programs sponsored or co-sponsored by NYSDA. For example, the Mar. 28, 2015 Rochester Family Court Update presented by NYSDA and the Monroe County Public Defender’s Office included “Overview of Harmful Immigration Consequences of Family Court Dispositions,” presented by the Co-Executive Director of the Immigrant Defense Project. Lawyers can refer to materials from such trainings and from other sources such as those below. Attorneys are also encouraged to call the Backup Center for assistance.

- A [Practice Advisory for Criminal Defenders: New “Deferred Action for Parental Accountability” \(DAPA\)](#), is available from the Immigrant Legal Resource Center and National Immigration Project of the National Lawyers Guild.
- The [Immigration Consequences of Convictions Checklist](#) is frequently updated by the Immigrant Defense Project.
- [“President Obama’s New Immigration Program: An Overview for the Public,”](#) a Mar. 4, 2015 webinar from the National Association for Public Defense (NAPD), is archived and available for viewing by NAPD members (annual membership is \$25). “Learn how to protect your clients’ immigration options while also obtaining better results in their criminal cases.”

Clemency Applications

For clients who were convicted and remain imprisoned or, perhaps, for those burdened by collateral consequences, the ultimate recourse may be clemency. While clemency has been extremely rare for some time—in 2014, for example, Governor Cuomo granted 2 pardons out of 21 applications and 0 sentence commutations out of 150 applications—some indications of change may give rise to new hope.

- The [Clemency Website](#) recently announced by the Governor’s office aims to end that, according to the announcement of its launch. The site offers information about the guidelines for filing and provides a pardon request form; no request form is needed for clemency applications.
- The [Office of the Pardon Attorney](#) has also posted application forms on the Web for those with federal convictions.

Expertise Shared by Public Defense Lawyers

NYSDA greatly appreciates the generosity of experienced lawyers and programs who share their knowledge and skills through CLE presentations and materials. Among the many who do so are David Klem of the Center for Appellate Litigation, who has been providing training on challenging predicate felony adjudications and Drew R. DuBrin, Special Assistant Public Defender in Monroe County, who annually shares his updated 30.30 manual with NYSDA.

- [Challenging Your Client’s Predicate Felony Adjudication](#), by David Klem and Barbara Zolot, is available online.
- The *2015 Criminal Procedure Law Section 30.30(1) Manual* by Drew R. DuBrin is available from the Backup Center.

Issues Regarding Race

Continuing publicity around police killings of unarmed black men nationwide and in New York, the resulting #BlackLivesMatter movement, and a host of related stories may make raising questions about the influence of race in individual cases particularly timely. Resources are available to help attorneys deal with this difficult and important issue; lawyers are also encouraged to call the Backup Center for additional materials.

- [Raising Issues of Race in North Carolina Criminal Cases](#), published by the University of North Carolina School of Government, includes not only legal sources and history specific to its state of origin, but also ideas that may be of help to New York lawyers wrestling

(continued on page 47)

By Susan Bryant and Lucy McCarthy*

Penal Law

- **Chapter 17** (S6346) – Clarifies probation revocation laws. Effective: February 9, 2014 (same as the effective date of [L 2013, ch 556](#)).

In 2013, Penal Law 65.00 was amended to authorize graduated probation sentences for most felonies and class A misdemeanors, as well as unclassified misdemeanors. (L 2013, ch 556). The Legislature passed this chapter amendment to address the Governor's concerns that chapter 556 did not make clear that the court must afford the defendant due process before extending a term of probation and that if a term is extended, the defendant must receive credit for time under supervision or while incarcerated for an alleged probation violation (amending Penal Law 65.00[4], Criminal Procedure Law [CPL] 410.70(1), (5)).

- **Chapter 31** (S7902) – Creates the new crime of criminal sale of a controlled substance by a practitioner or pharmacist. Effective: June 23, 2014.

As part of a package of legislation intended to address use and abuse of heroin and prescription painkillers (see also chapters 36 and 37 below), this bill amends Penal Law 220.65 to make it a class C felony for a practitioner or pharmacist, as defined in Public Health Law (PHL) 3302, "acting other than in good faith, while purporting to act within the scope of the power, authority and privileges of his or her license ... [to] knowingly and unlawfully sell[] a controlled substance."

- **Chapter 36** (S7907) – Creates the new crime of fraud and deceit related to controlled substances. Effective: June 23, 2014.

Adds Penal Law 178.26 (Fraud and deceit related to controlled substances), a class A misdemeanor, that provides:

1. No person shall willfully:
 - (a) obtain or attempt to obtain a controlled substance, a prescription for a controlled substance or an official New York State prescription form, (i) by fraud, deceit, misrepresentation or subterfuge; or (ii) by the concealment of a material fact; or (iii) by the use of a false name or the giving of a false address;
 - (b) make a false statement in any prescription, order, application, report or record required by [PHL article 33];

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- (c) falsely assume the title of, or represent himself or herself to be a licensed manufacturer, distributor, pharmacy, pharmacist, practitioner, researcher, approved institutional dispenser, owner or employee of a registered outsourcing facility or other authorized person, for the purpose of obtaining a controlled substance as these terms are defined in [PHL article 33];
- (d) make or utter any false or forged prescription or false or forged written order;
- (e) affix any false or forged label to a package or receptacle containing controlled substances; or
- (f) imprint on or affix to any controlled substance a false or forged code number or symbol.

Subdivisions 2 and 3 make "[p]ossession of a false or forged prescription for a controlled substance by any person other than a pharmacist in the lawful pursuance of his or her profession" and "[p]ossession of a blank official New York state prescription form by any person to whom it was not lawfully issued" presumptive evidence of the person's intent to use such prescription or form for purposes of illegally obtaining a controlled substance.

Subdivision 4 provides that "[a]ny person who, in the course or treatment, is supplied with a controlled substance or a prescription therefore by one practitioner and who with the intent to deceive, intentionally withholds or intentionally fails to disclose the fact, is supplied during such treatment with a controlled substance or prescription therefore by another practitioner shall be guilty of a violation of [Penal Law article 178]." Subdivision 5 makes the provisions of PHL 3396 applicable to this section.

- **Chapter 37** (S7908) – Adds Penal Law 220.65 to list of criminal acts and designated offenses in enterprise corruption and eavesdropping laws. Effective: June 23, 2014.

Amends Penal Law 460.10(1)(a) to add the newly revised Penal Law 220.65 (criminal sale of a prescription for a controlled substance or a controlled substance by a practitioner or pharmacist) to the list of criminal acts in Penal Law article 460 (Enterprise corruption). Also amends CPL 700.05(8)(c) to add Penal Law 220.65 to the list of designated offenses for eavesdropping and video surveillance warrants.

Chapter 55 (A8555-D)

- **Part H, Subpart A – Public Trust Act. Effective: April 30, 2014 (applies to acts committed on or after that date).**

- Creates a new Penal Law article 496 (Corrupting the Government), consisting of first-through fourth-degree corrupting the government (class B-E felonies), public corruption, and sentencing, and adds Penal Law 200.56 to create the class E felony of Corrupt use of position or authority.

- Amends CPL 30.10(3)(b) to specifically identify an offense defined in the new Penal Law article 496 as an “offense involving misconduct in public office by a public servant,” and expands the provision to include persons acting in concert with a public servant.
- Amends Penal Law 110.05 to provide that attempted third-degree bribery (Penal Law 200.00) is a class D felony; attempted second-degree bribery (200.03) is a class C felony; and attempted first-degree bribery (200.04[2]) is a class B felony.
- Amends CPL 700.05(8) to make any felony defined in Penal Law article 496 a “designated offense” and expands 700.05(8)(f) to include corrupt use of position or authority as defined in Penal Law article 200.
- Amends CPL 200.50(4) to provide that in any prosecution under Penal Law 496.06 (Public corruption), “the designated offense shall be the specified offense, as defined in subdivision two of such section, followed by the phrase ‘as a public corruption crime.’”
- Amends Penal Law 460.10(1)(a) to add felonies defined in article 496 to the list of criminal acts for enterprise corruption purposes.
- Amends Penal Law 200.03 (second-degree bribery) and 200.11 (second-degree bribe receiving) to reduce the value from \$10,000 to \$5,000.
- Amends Penal Law 200.04 (first-degree bribery) and 200.12 (first-degree bribe receiving) to include when a person confers, or offers or agrees to confer any benefit valued in excess of \$100,000 upon a public servant upon an agreement or understanding that it will influence the public servant’s vote, opinion, judgment, action, decision or exercise of discretion.
- Amends Penal Law 80.00(1) and 80.10(1) to provide that a fine for an article 496 offense shall not exceed three times the amount of the defendant’s gain.
- Adds consequences for misdemeanor and felony convictions for specified fraud and corruption offenses, including lobbying (amends Legislative Law 1-c[a]), holding civil office (amends Public Officers Law 3), cancellation/termination of contracts and disqualification from contracting with the state (amends State Finance Law 139-a and 139-b), and eligibility for certain tax credits.
- Amends financial disclosure laws.

➤ **Part EE: Using crossbows for hunting. Effective: April 1, 2014.**

- Amends Penal Law 265.20(a)(4) (exemptions from certain weapons offenses) to include the crossbow.
- Amends various provisions of the Environmental Conservation Law to authorize crossbow hunting with some limitations and adds provisions regarding

the revocation of a hunting license or bowhunting or muzzle-loading privilege in certain circumstances.

➤ **Chapter 90 (A6357) – Medical use of marijuana. Effective: July 5, 2014.**

The bill authorizes the medical use of marijuana in New York for specified serious conditions, pursuant to the provisions of the new PHL article 33, title 5-a.

The bill also amends sections of the CPL and Penal Law, including:

- Amends Penal Law 221.00 to provide that any act lawful under PHL article 33, title 5-a, is not a violation of article 221.
- Adds a new Penal Law article 179 creating the crimes of first-degree criminal diversion (class E felony), second-degree criminal diversion (class B misdemeanor), and criminal retention of medical marijuana (class A misdemeanor).
- Amends CPL 216.00(1) to provide that an eligible defendant includes a person charged with a class B, C, D or E felony offense defined in Penal Law article 179.
- Amends CPL 410.91(5) to include first-degree criminal diversion of medical marijuana (Penal Law 179.10) in the list of specified offenses for parole supervision sentences.

The bill also establishes an excise tax on medical marijuana under Tax Law article 20-b and a medical marijuana trust fund under State Finance Law 89-h. Information about the medical marijuana program is available on the Department of Health’s website at http://www.health.ny.gov/regulations/medical_marijuana/regulations.htm.

➤ **Chapter 98 (A8236-C) – Prohibits directing a laser at an aircraft. Effective: November 1, 2014.**

Adds two degrees of directing a laser at an aircraft, Penal Law 240.76 (second degree – class A misdemeanor) and 240.77 (first degree – class E felony). Second-degree directing a laser at an aircraft is committed “when, with intent to disrupt safe air travel, he or she directs the beam of a laser:

1. onto a specific aircraft intending to thereby disrupt or interfere with such aircraft in the special aircraft jurisdiction of the United States; or
2. in the immediate vicinity of an aircraft in the special aircraft jurisdiction of the United States, and: (a) the calculated or measured beam irradiance on the aircraft, or in the immediate vicinity of the aircraft, exceeds limits set by the FAA for the FAA-specified laser flight zone (normal, sensitive, critical, or laser-free) where the aircraft was located; and (b) a pilot in the illuminated aircraft files a laser incident report with the FAA.

Subdivision 3 defines the terms “laser” and “FAA” and subdivision 4 provides that “[t]his section does not prohibit directing a laser beam at an aircraft, or in the immediate vicinity of an aircraft, by” specified individuals or for specific emergencies.

The first-degree offense is violated when a person commits the second-degree offense and “thereby causes a significant change of course or other serious disruption to the safe travel of an aircraft that threatens the physical safety of the aircraft’s passengers or crew.”

➤ **Chapter 184 (A7720) – Expands fourth-degree stalking to include following using a GPS or other device. Effective: October 21, 2014.**

Amends Penal Law 120.45 (fourth-degree stalking) to provide that, for purposes of subdivision 2, “‘following’ shall include the unauthorized tracking of such person’s movements or location through the use of a global positioning system or other device.”

➤ **Chapter 186 (A8196) – Creates the new crime of first-degree public lewdness. Effective: November 1, 2014.**

Adds Penal Law 245.03, a class A misdemeanor, to provide that a person is guilty of first-degree public lewdness when:

1. Being nineteen years of age or older and intending to be observed by a person less than sixteen years of age in a place described in [Penal Law 245.00(a) or (b)], he or she intentionally exposes the private or intimate parts of his or her body in a lewd manner for the purpose of alarming or seriously annoying such person, and he or she is thereby observed by such person in such place; or
2. He or she commits the crime of public lewdness, as defined in [Penal Law 245.00], and within the preceding year has been convicted of an offense defined in such section 245.00 or this section.

➤ **Chapter 188 (A10128) – Amendments to second-degree aggravated harassment. Effective: July 23, 2014.**

Amends Penal Law 240.30 (second-degree aggravated harassment), a portion of which was declared unconstitutional earlier in 2014. See *People v Golb*, 23 NY3d 455 (2014). Subdivision 1 of the bill removes the intent to “annoy, threaten or alarm another person” language and adds a new threat requirement; the subdivision now requires that, “with the intent to harass another person,” the actor communicates or causes to be communicated “a threat to cause physical harm to, or unlawful harm to the property of” that person or a member of the person’s family or household and “knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person’s physical safety or property,” or

the physical safety or property of a family or household member.

➤ **Chapter 192 (S612) – Time excluded for calculating ten-year period for persistent sexual abuse. Effective: November 1, 2014.**

Amends Penal Law 130.53 (persistent sexual abuse) to provide that, for purposes of calculating the “previous ten year period” for the required two or more convictions, the period “exclud[es] any time during which such person was incarcerated for any reason.”

➤ **Chapter 193 (S1982-C) – Expansion of second-degree unlawful surveillance. Effective: November 1, 2014.**

Amends Penal Law 250.45 (second-degree unlawful surveillance) to add a new subdivision 5 that provides a person is guilty of this offense when:

5. For his or her own, or another individual’s amusement, entertainment, profit, sexual arousal or gratification, or for the purpose of degrading or abusing a person, the actor intentionally uses or installs or permits the utilization or installation of an imaging device to surreptitiously view, broadcast, or record such person in an identifiable manner: (a) engaging in sexual conduct, as defined in subdivision ten of section 130.00 of this part; (b) in the same image with the sexual or intimate part of any other person; and (c) at a place and time when such person has a reasonable expectation of privacy, without such person’s knowledge or consent.

The new provision is intended to authorize prosecution if there is evidence a person used a device to view, broadcast, or record another person engaged in sexual conduct without their consent, regardless of whether images of that other person’s sexual parts were captured. Previously, charges could only be brought if the accuser’s sexual parts were shown in the picture. Conforming amendments were also made to Penal Law 250.55 and 250.60 (first- and second-degree dissemination of an unlawful surveillance image).

➤ **Chapter 196 (S122-B) – Assault of a school crossing guard. Effective: November 1, 2014.**

Amends Penal Law 120.05(3) and (11) (second-degree assault) to add “a school crossing guard appointed pursuant to [General Municipal Law 208-a]” to the list of professionals in those subdivisions, elevating the assault of such a school crossing guard to a class D felony either where the individual acted: (3) “[w]ith intent to prevent” the guard “from performing a lawful duty” and caused physical injury to that guard; or (11) “[w]ith intent to cause physical injury” to the guard, caused physical injury to such guard while the guard “[wa]s performing an assigned duty.”

➤ **Chapter 197 (S3965-A) – Assault of a NYC Housing Authority employee. Effective: September 3, 2014.**

Amends Penal Law 120.05 (second-degree assault) to add new subdivisions (3-b) and (11-b), which provide:

3-b. With intent to prevent an employee of the New York city housing authority from performing his or her lawful duties while located on housing project grounds, real property, or a building owned, managed, or operated by such authority he or she causes physical injury to such employee;

11-b. With intent to cause physical injury to an employee of the New York city housing authority performing his or her lawful duties while located on housing project grounds, real property, or a building owned, managed, or operated by such authority he or she causes physical injury to such employee.

Section 2 of the bill states: “The provisions of subdivisions 3-b or 11-b of [Penal Law 120.05] shall not supersede other provisions of the penal law applicable to assaults on police, peace, or special officers employed by the New York city housing authority or other public employers, performing their duties on housing project grounds, real property, or buildings owned, managed or operated by such authority.”

➤ **Chapter 477 (S7888) – Fireworks, dangerous fireworks, and sparkling devices. Effective: December 21, 2014.**

Replaces subdivisions (1), (2), and (3) of Penal Law 270.00 (unlawfully dealing with fireworks and dangerous fireworks) with three new subdivisions that redefine the terms “fireworks” and “dangerous fireworks,” describe what constitutes an offense, and provide a list of exceptions. Also amends Penal Law 405.00(5) to provide, among other things, that “no city or county shall be bound to include ‘sparkling device’ in the definitions of ‘fireworks’ and ‘dangerous fireworks’ in [Penal Law 270.00], if such city or county shall so authorize the exemption of ‘sparkling device’ by law.” New York City is excluded from the sparkling device exception. The bill adds Executive Law 156-h (Registration and fees for manufacturers, distributors, wholesalers, and retailers or sparkling devices) and General Business Law 392-j (Sales of sparkling devices). According to the Sponsor’s Memorandum, “[t]his bill is intended to modernize the statute dealing with illegal fireworks, provide additional definitions of what constitutes fireworks and dangerous fireworks and take certain novelty devices, which are not recognized as fireworks by the federal government out of the definition of fireworks.”

Criminal Procedure Law

➤ **Chapter 347 (S7188) – Grand jury testimony of vulnerable elderly person. Effective: September 4, 2014.**

Amends CPL 190.25(3)(h) to allow “a social worker or informal caregiver, as provided in [Elder Law 206(2)]” to be present during the grand jury testimony of a “vulnerable elderly person as provided in [Penal Law 260.31(3)]” when the proceeding concerns a crime as defined in Penal Law article 121, 130, or 260, or section 120.10, 125.10, 125.15, 125.20, 125.25, 125.26, 125.27, 255.25, 255.26, or 255.27, with district attorney consent.

➤ **Chapter 385 (S6803) – Waiver of surcharge and crime victim assistance fee. Effective: September 23, 2014 (applies to convictions on or after that date and pending charges for which sentence had not yet been imposed).**

Amends CPL 420.35(2) to require that a court “waive any mandatory surcharge and crime victim assistance fee when the court finds that a defendant is a victim of sex trafficking under [Penal Law 230.34] or a victim of trafficking in persons under the trafficking victims protection act (United States Code, Title 22, Chapter 78).”

In March 2015, the Senate and Assembly passed other human trafficking prevention bills. The Trafficking Victims Protection and Justice Act ([S0007/A0506](#)) is expected to be signed by Governor Cuomo in the near future.

➤ **Chapter 402 (A8749-A) – Prostitution charges against certain 16- and 17-year-olds. Effective: October 16, 2014.**

The bill clarifies and adds to the 2013 law ([L 2013, ch 555](#)) that allows courts to convert prostitution and loitering for the purposes of prostitution cases to persons in need of supervision (PINS) proceedings where the defendant was 16 or 17 at the time of the alleged offense. Chapter 402 provides:

- After arraignment on an accusatory instrument charging a violation of Penal Law 230.00 or 240.37(2), provided the defendant is not charged with loitering for the purpose of patronizing a prostitute, where the defendant was 16 or 17 at the time of the alleged offense, the local criminal court may dismiss the charge in the interest of justice “on the ground that a defendant participated in services provided to him or her.” (CPL 170.30[4]).
- The court may: (1) conditionally convert prostitution or loitering charges and retain the case as a PINS proceeding “and shall make such proceeding fully subject to the provisions and grant any relief available under” Family Court Act article 7; and/or (2) order the provision of any specialized service in Social Services Law article 6, title eight-A (Safe

Harbour for Exploited Children Act) “as may be reasonably available.” The process for converted cases is detailed in CPL 170.80(3) and includes a provision authorizing the court to restore the accusatory instrument before the person’s 18th birthday if the prosecution presents competent proof that the person, without just cause, has not substantially complied with the conditions of the conversion.

- In such cases, the court must apply the provisions of CPL 720.15(1) and (2), which require or authorize the sealing of the accusatory instrument and the arraignment and all proceedings be conducted in private, regardless of whether the person had, prior to the start of trial or a plea of guilty, been convicted of a crime or found a youthful offender, or subsequent to such a conviction for prostitution or loitering for prostitution is convicted of a crime or found a youthful offender. (CPL 720.15[4])
- A prior conviction or youthful offender adjudication does not prevent a person from being adjudicated a youthful offender as required by CPL 170.80 and an adjudication under 170.80 may not be considered in determining whether a person is an eligible youth, or in determining whether to find the person is a youthful offender in a subsequent proceeding. (CPL 720.25)
- The court must deem a person for whom a youthful offender adjudication was substituted in such prostitution cases a “sexually exploited child,” as defined in Social Services Law 447-a(1) and must not consider the person an adult for purposes related to the charges in the youthful offender proceeding or a proceeding under CPL 170.80. (CPL 720.35)
- In these cases, the court must impose a sentence authorized for a violation, as defined in Penal Law 10.00(3). (Penal Law 60.02)

Vehicle and Traffic Law

- **Chapter 55, Part B (A8555-D) – License sanctions and fines for texting and cell phone violations. Effective: November 1, 2014.**
 - First texting or cell phone offense (VTL 1225-c or 1225-d) while the driver has a probationary license, class DJ or MJ learner’s permit, or class DJ or MJ license: 120 day suspension. (VTL 510(2)(b) amended and two new subparagraphs, (xvi) and (xvii), added).
 - Second or subsequent texting or cell phone offense committed within 6 months following restoration or issuance of a probationary license or within 6 months following restoration of a class DJ or MJ learner’s permit or license: minimum 1 year revocation; re-licensure requires approval of the DMV Commissioner. (VTL 510[2][a][x], [xi] amended and

new subparagraphs, [xii] and [xiii], added; VTL 510[6][n]).

- Increases maximum fines for violations of VTL 1225-c or 1225-d (texting or cell phone use): first offense: \$50 to \$200 (was \$150); second violation within 18 months: \$50 to \$250 (was \$200); third or subsequent violation within 18 months: \$50 to \$450 (was \$400).

- **Chapter 191 (A8021) – Penalties for multiple DWI convictions. Effective November 1, 2014 (applies to violations on or after that date).**

Also known as Vince’s Law, the bill provides that an individual convicted of a violation of VTL 1192(2), (2-a), (3), (4), or (4-a) who has been convicted in the previous 15 years of three or more specified offenses [VTL 1192(2), (2-a), (3), (4), or (4-a), first- or second-degree vehicular assault, aggravated vehicular assault, first- or second-degree vehicular manslaughter, and/or aggravated vehicular homicide] will be guilty of a class D felony and subject to a fine of between \$2,000 and \$10,000 and/or a Penal Law prison sentence. (VTL 1193[1][c][ii-a]).

Corrections and Parole

Chapter 55 (A8555-D)

- **Part M – Housing of inmates under 18 in county jails. Effective: March 31, 2014.**

Amends Correction Law 500-b(4) to provide that no persons under age 18 may be placed or kept or allowed to be at any time with any persons 18 or older in any room, dorm, cell, or tier unless they are “separately grouped to prevent access to persons” under 18 by prisoners 18 or older. Previously the law required the separation of those under 19 from those 19 and older.

- **Part S: Restrictions on closure of correctional facilities; review of security and safety at correctional facilities. Effective: March 31, 2014.**

- Prevents the State from closing correctional facilities after the closures scheduled for July 2014 until July 26, 2016 “unless there are material or unanticipated changes in the state’s fiscal circumstances, financial plan, or revenue.”
- Requires the Department of Corrections and Community Supervision (DOCCS) Commissioner to conduct a review of security staffing at each facility and develop a three-year plan to enhance safety in facilities, which may include increases in security. The Commissioner, in creating the plan, must solicit feedback from the public employee unions representing security staff. During the 2014-2015 state fiscal year, DOCCS must deploy the first 275 of these additional security staff.
- By September 30, 2014, DOCCS must develop clear and detailed definitions of at least four categories of

degrees of injuries that may result from assaults in correctional facilities. Starting on January 10, 2015, and within 10 days of the start of each quarter, DOCCS must make public the number of assaults occurring within the prior quarter by inmates on staff and inmates on other inmates using those categories.

➤ **[Chapter 139](#) (S4343-A) – Composition of Citizen’s Policy and Complaint Review Council. Effective: July 22, 2014.**

Amends Correction Law 42(a)(1) to expand the qualifications for two categories of members on the Commission of Correction’s Citizen’s Policy and Complaint Review Council to: (1) allow a veteran of any foreign war, conflict or military occupation to serve (previously was limited to the Vietnam War); and (2) allow the seat currently required to be filled by a former resident of a Division for Youth secure facility to be filled by either a former resident or a health care professional licensed in New York State.

➤ **[Chapter 155](#) (S6954) – Extend sunset date for local correctional facilities to house non-New York inmates. Effective: July 22, 2014.**

The bill extends from September 1, 2014 to September 1, 2017, the expiration of provisions authorizing local correction facilities to enter into agreements for boarding-in inmates from other states.

➤ **[Chapter 198](#) (S1885-C) – Criminal history searches for volunteer firefighter applicants. Effective: December 2, 2014.**

Amends Executive Law 837-o, Town Law 176-b, Village Law 10-1006, and Not-for-Profit Law 1402 to provide that a volunteer firefighter applicant must submit to a background check to search for convictions that require registration under the Sex Offender Registration Act (Correction Law article 6-c). If the applicant has such a conviction, the fire companies must determine whether the person is eligible to be appointed based on the criteria in Correction Law 752 and 753.

➤ **[Chapter 286](#) (S1413) – Information about prison visitation rules. Effective: November 9, 2014.**

Adds a new Correction Law 138-a (notification of visitation policies) that requires the DOCCS Commissioner to establish and maintain on the DOCCS public website information about the “specific visitation rules, regulations, policies and procedures for each correctional facility.” The information must include, but is not limited to, visiting days and hours, length and number of allowable visits, maximum number of people per visit, dress code, guidelines for those with medical and other special needs, infant care, and items restricted or prohibited. The

Commissioner must also designate a phone number(s) that people may call for information about those visiting rules, regulations, policies and procedures. This information is currently available at <http://www.doccs.ny.gov/Visitation/index.html>.

➤ **[Chapter 346](#) (S7138) – Pre-arraignment detention at Jefferson County Jail. Effective: September 4, 2014.**

Amends Correction Law 500-a and 500-c to allow the Jefferson County Correctional Facility to be used for detention of persons under arrest being held for arraignment in any court located in the county.

➤ **[Chapter 462](#) (S6231-A) – Sex offender registry. Effective: March 21, 2015.**

Amends Correction Law 168-q(1) to require that the Division of Criminal Justice include in the Sex Offender Registry “all of the sex offender’s crimes of conviction that require him or her to register pursuant to this article,” not just the most recent sex offense committed.

➤ **[Chapter 506](#) (S1353) – Reentry information provided to released inmates. Effective: April 16, 2015.**

Adds Correction Law 76 (Notice of transitional services for inmates released from correctional facilities) to require that, prior to release of an inmate, DOCCS provide the inmate with information on transitional services available in the county or city where the inmate is scheduled to be released, including referrals to programs designed to promote successful and productive reentry and reintegration, “including medical and mental health services, HIV/AIDS services, educational, vocational and employment services, alcohol or substance abuse treatment and housing services.” The information must be updated at least annually and the Commissioner must consult with and is entitled to get assistance from the Commissioners of Education, Labor, Health, Mental Health, and the Office of Temporary and Disability Assistance to implement the law.

➤ **[Chapter 548](#) (S7818) – Mental health discharge plans for inmates. Effective: February 27, 2015.**

Amends Correction Law 404 to add a new subdivision 4 that requires DOCCS to provide inmates who have received mental health treatment pursuant to Correction Law article 16 within three years of his or her anticipated release date from a state correctional facility with mental health discharge planning and, when necessary, an appointment with a community mental health professional who can prescribe medications following discharge and sufficient mental health medications and prescriptions to bridge the period between discharge and the time that professional may assume care of the patient. Inmates who have refused mental health treatment may also be given mental health discharge planning and any necessary

appointment. Also amends Mental Hygiene Law 9.27(b)(4) to give regional directors of community supervision standing to initiate petitions for involuntary commitment of persons who are under supervision following incarceration.

Judiciary Law

➤ **Chapter 44 (A10139) – Adding new Family Court judges. Effective: June 26, 2014.**

Amends the Family Court Act and Election Law to authorize nine new Family Court judgeships in New York City and 11 judgeships in Albany, Broome, Chautauqua, Franklin, Nassau, Oneida, Oswego, Schenectady, Suffolk, Ulster, and Westchester counties, with terms commencing on January 1, 2015. The bill also authorizes five Family Court judgeships, one each in Delaware, Dutchess, Erie, Monroe, and Warren counties, with terms commencing on January 1, 2016.

➤ **Chapter 274 (A9443) – Additional judge for the Town of Wallkill. Effective: August 11, 2014.**

Amends Town Law 20(1) to authorize the Wallkill Town Board (Orange County) to add a third judge to its town court. According to the Sponsor's Memorandum, the Town Board requested the bill to address the backlog of cases in its court.

➤ **Chapter 452 (A9375-A) – City Courts operating at night. Effective: February 19, 2015.**

Adds a new section 2105 of the Uniform City Court Act that provides: "A city which hosts a city court governed by this act is authorized to keep its court facilities open in the evening where court administrators determine that the court should schedule night sessions." The law applies to city courts outside of New York City.

➤ **Chapter 455 (A10022) – Public election of Kingston and Watertown City Court judges Effective: November 21, 2014.**

Amends Uniform City Court Act 2104 to authorize the public election of full-time city court judges in Kingston and Watertown. These City Court judgeships were converted from part-time to full-time in 2013 (L 2013, ch 548), but the law still authorized the mayor of each city to appoint the judges, unlike the overwhelming majority of cities in the state.

Family Court

➤ **Chap 205 (S4751-B) – Clarifies that coaches paid by school districts are mandated reporters. Effective: August 6, 2014; provided, however, that sections one and two take effect on July 1, 2015.**

Amends Social Services Law (SSL) 413(1)(a) to add full- or part-time compensated school employees required to

hold a temporary coaching license or professional coaching certificate to the list of individuals who have a duty to report suspected child abuse. Also amends SSL 488(5-a) to add such coaches to the definition of "human services professional." Adds Education Law 3036 (Coursework for reporting child abuse and maltreatment for those with coaching licenses or coaching certificates) directing the Education Commissioner to promulgate regulations requiring that people who currently have a temporary coaching license or professional coaching certificate and those applying for such license or certificate complete two hours of coursework or training on the identification and reporting of child abuse and maltreatment.

➤ **Chap 256 (A7025) – Punishment for falsely reporting child abuse. Effective: August 11, 2014.**

Amends SSL 422(5)(a)(v) to authorize an unfounded report to the central register to be unsealed and given to a district attorney's office or police department when the report is needed to conduct an active investigation or prosecution of a violation of Penal Law 240.50(4) (third-degree falsely reporting an incident involving child abuse or maltreatment or abuse or neglect of a vulnerable person). The law had incorrectly referred to Penal Law 240.55(3) (second-degree falsely reporting an incident involving a fire, explosion, or the release of a hazardous substance).

➤ **Chap 279 (A9732) – Health care consent for destitute children in foster care. Effective: August 11, 2014.**

Amends SSL 383-b to add destitute children to the categories of children for whom local commissioners of social services or health may provide consent for medical, dental, health, and hospital services.

➤ **Chap 325 (A9225-B) – Continued operation of Rockland and Erie Counties' Societies for the Prevention of Cruelty of Children. Effective: August 11, 2014.**

Amends sections 13 and 14 of L 2009, ch 329 to allow for the operation of the Societies for the Prevention of Cruelty to Children (SPCC) in Rockland and Erie counties for another five years. According to the Sponsor's Memorandum, "the Rockland SPCC assists local police with preventing underage alcohol and tobacco sales, and the Erie County SPCC provides the county with needed child protective services outside of normal business hours." However, the Governor's approval memo states that the five-year extension is not necessary and that the Legislature has agreed to amend this legislation to limit the extension to three years, "during which time I expect the two counties to absorb the functions of the SPCCs." Earlier this year, the Legislature passed a bill reducing the extension to three years ([S1519](#)), but it has not yet been sent to the Governor for signature.

- **Chap 357 (A1987-A) – Requires OCFS to send certain information to local investigating agencies. Effective: September 23, 2014.**

Amends SSL 422(2)(a) to require the Office of Children and Family Services (OCFS) to send to local child protective agencies all previous reports to the central registry that refer to the subject or the child(ren) named in a new report, including previous reports of child abuse or maltreatment alleged to have occurred in other counties and districts in New York. Prior to the enactment of this bill, child protective workers would have to request from other child protective agencies copies of the full reports made in those counties after receiving a new report for investigation. The Sponsor's Memorandum indicates that this bill was one of a series of measures "introduced at the request of the Erie County Executive upon the recommendation of the county's Commissioner of Social Services to improve" child protective services.

- **Chapter 373 (A9464) – Applications to modify child support orders in Family Court. Effective: December 22, 2014.**

Amends FCA 451 to provide that a support modification proceeding "shall be commenced by the filing of a petition which shall allege facts sufficient to meet one or more of the grounds enumerated in [now] subdivision three of this section." According to the Sponsor's Memorandum, many Family Courts read this section to require that a petitioner file both a support modification petition and an affidavit to preserve the possibility of a hearing. Requiring the filing of two documents was found to be unnecessary because the uniform [Family Court Form 4-11b](#) and [Family Court Form 4-11](#) contain virtually the same information. Also, "it [wa]s unduly restrictive as an impediment to effective access to the Family Court by unwary litigants, many of whom are unrepresented." This measure was part of the simplification efforts recommended in the [November 2011 Report of the Chief Judge's Task Force to Expand Access to Civil Legal Services](#).

- **Chapter 495 (A8918) – Changes in eligibility levels for childcare assistance. Effective: January 1, 2015.**

Amends SSL 34-a to add a new subdivision 9 to require county social services districts to inform OCFS at least 60 days before the effective date of a reduction in the financial eligibility level for a childcare subsidy or an increase in the co-payment required of parents. Previously, the law required only 10 days' notice and parents struggled to adjust child care arrangements on such short notice.

Peace Officers

- **Chapter 262 (A8331). Effective: August 11, 2014.**

Amends CPL 2.15(3) and (7) to update the references to federal immigration and customs agencies to reflect the

new titles of those agencies, Immigration and Customs Enforcement and United States Customs and Border Protection.

- **Chapter 459 (S285-A). Effective: November 21, 2014.**

Adds United States Mint Police to the list of peace officers in CPL 2.15.

- **Chapter 484 (A1500-A). Effective: November 1, 2015.**

Amends CPL 2.10(52) to provide peace officer status to security hospital treatment assistants, as so designated by the Office of Mental Health (OMH) Commissioner, while they are "performing duties in or arising out of the course of their employment." Previously, peace officer status was limited to times when assistants were transporting persons convicted of a crime to court, to other facilities within OMH's jurisdiction, or to any state or local correctional facility.

- **Chapter 516 (S5950-A) – Confidentiality of probation officer personnel records. Effective: December 17, 2014.**

Amends Civil Rights Law 50-a(1) to provide that "personnel records under the control of a probation department for individuals defined as peace officers pursuant to [CPL 2.10(24)] shall be considered confidential and not subject to inspection or review without the express written consent of such ... peace officer within the ... probation department except as may be mandated by lawful court order."

Miscellaneous

- **Chapter 42 (S6477-B) – Prescribing, dispensing, and distributing opioid antagonists. Effective: June 24, 2014.**

Amends PHL 3309 (opioid overdose prevention) to allow the Commissioner of the Department of Health to establish standards for opioid antagonist (Naloxone) "prescribing, dispensing, distribution, possession and administration" that is patient-specific and non-patient-specific. Naloxone or Narcan is able to prevent opioid and heroin overdose deaths. More information about opioid overdose prevention is available from the Department of Health at http://www.health.ny.gov/diseases/aids/general/opioid_overdose_prevention/.

- **Chapter 185 (A8185-B) – Penalties for theft of companion animals. Effective: July 23, 2014.**

Amends Agriculture and Markets Law (AML) 366 to expand the section to apply to theft of any companion animal, as defined in AML 350(5), and increase the fine for the offense from \$250 to \$1,000; the maximum possible jail term remains at six months.

2014 Legislative Review *(continued)*

➤ **Chapter 225 (S6588-A) – Residency of assistant district attorneys. Effective: August 7, 2014.**

Amends Public Officers Law 2 to provide that assistant district attorneys employed by Essex County, other than the first assistant or chief assistant district attorney, may reside in Essex or any adjoining county within the State.

➤ **Chapter 394 (S7232-A) – Protocols and procedures for Justice Center investigations. Effective: September 23, 2014.**

Amends Executive Law 553 to require that the State Justice Center for the Protection of People with Special Needs develop investigation protocols and procedures regarding interviewing vulnerable persons, including determining whether interviews are clinically contraindicated, ensuring that interviews are conducted safely and in a timely fashion, informing vulnerable persons and/or their personal representatives of the protocols and that the interview is voluntary, and “if applicable as determined

by the Justice Center,” informing the person that any search of the individual’s person or property shall be done voluntarily.

➤ **Chapter 486 (A2089-B) – Reporting crimes on college and university campuses. Effective: December 17, 2014.**

Amends Education Law 355, 6206, 6306, and 6434 to require all college and university campuses to adopt and implement a plan that includes a requirement that the institution notify the appropriate law enforcement agency as soon as practicable, but in no case more than 24 hours, after a report of a violent felony or that a student who resides in housing owned or operated by such institution is missing, provided that the reporting takes into consideration applicable federal law, including, but not limited to, the federal Campus Sexual Assault Victims’ Bill of Rights under 20 USC 1092(F) which gives the victim of a sexual offense the right to decide whether or not to report the offense to local law enforcement agencies. ⚡

CONFERENCES & SEMINARS

Sponsor: New York State Bar Association
Theme: 15th Annual DWI on Trial—Big Apple XV
Date: May 14, 2015
Place: New York City
Contact: NYSBA: tel (800) 582-2452; website <http://www.nysba.org/CLE/>

Sponsors: New York State Defenders Association and Clinton County Assigned Counsel Program

Theme: Handling Child Welfare Proceedings—From Removal to Reunification or TPR
Date: May 29, 2015
Place: Plattsburgh, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: National Legal Aid & Defenders Association
Theme: National Defender Leadership Institute Nuts and Bolts of Leadership and Management
Dates: June 4-6, 2015
Place: Columbia, SC
Contact: NLADA: tel (202) 452-0620; website www.nlada100years.org/events-and-trainings

Sponsor: New York State Bar Association
Theme: Focus on Family Court: Holistic & Effective Family Representation
Date: June 5, 2015
Place: Albany, NY
Contact: NYSBA: tel (800) 582-2452 (reference event code CEQMR15); website <http://www.nysba.org/Family2015/>

Sponsor: National Association of Criminal Defense Lawyers
Theme: 58th Annual Meeting & Seminar: High Altitude Trial Skills from the Masters of Advocacy
Dates: July 23-26, 2015
Place: Denver, CO
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website www.nacdl.org/meetings

Sponsor: New York State Defenders Association
Theme: 48th Annual Meeting & Conference
Dates: July 26-28, 2015
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org ⚡

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

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

United States Supreme Court

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

Habeas Corpus (Federal)

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

[Lopez v Smith](#), 574 US __, 135 S Ct 1 (10/06/2014)

The grant of habeas corpus relief is reversed; the federal appellate court failed to comply with the clear rule against relying on circuit precedent rather than Supreme Court precedent in determining, under the Antiterrorism and Effective Death Penalty Act of 1996, whether the state court decision before it "was 'contrary to, or involved an unreasonable application of, clearly established Federal law'" No Supreme Court caselaw was offered establishing that a defendant who had been adequately apprised early in the proceedings of potential prosecution under an aiding-and-abetting theory might be deprived of adequate notice of such theory by prosecutorial focus on another theory at trial.

Civil Rights Actions (USC § 1983 Actions)

Search and Seizure (Entries and Trespasses [Trespasses])

[Carroll v Carman](#), 574 US __, 135 S Ct 348 (11/10/2014)

A police officer, who was sued under 42 USC 1983 for violating the Fourth Amendment by entering the plaintiffs' backyard from a parking area on the property and

going onto a deck to knock at sliding glass doors there, was entitled to qualified immunity. Whether or not existing caselaw allowing officers to go to a back door rather than the front is correct, the issue is "not 'beyond debate,'" and the officer quite reasonably may have concluded that such cases made his actions permissible. Therefore, he did not violate a clearly established statutory or constitutional right. Applying qualified immunity in such circumstances allows officials "'to make reasonable but mistaken judgments,' and 'protects "all but the plainly incompetent or those who knowingly violate the law."'"

Civil Rights Actions (USC § 1983 Actions)

[Johnson v City of Shelby](#), 574 US __, 135 S Ct 346 (11/10/2014)

Summary judgment was improperly entered against police officers who sued the respondent city seeking compensatory relief for being fired, not for deficient performance, but for bringing to light criminal actions by a city alderman. The Federal Rules of Civil Procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted," and "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke [42 USC] §1983 expressly" "For clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to §1983."

Habeas Corpus (Federal)

Harmless and Reversible Error (Harmless Error)

[Glebe v Frost](#), 574 US __, 135 S Ct 429 (11/17/2014)

Where the state supreme court found that a trial court violated the defendant's federal Constitutional due process and assistance of counsel rights by not allowing the defense to present both a duress defense and a defense that not all elements of the charged crimes had been met, but that the error was subject to harmless error analysis and was harmless, the Ninth Circuit erred in ruling that the defendant was entitled to habeas corpus relief. Assuming the trial court's ruling did violate the Constitution, there is no established U.S. Supreme Court caselaw ranking such error as structural; circuit precedent cannot substitute.

Due Process (Unreasonable Searches)

Search and Seizure (Automobiles and Other Vehicles) (Motions to Suppress)

US Supreme Court *continued*

Heien v North Carolina, 574 US __, 135 SCt 530
(12/15/2014)

A search or seizure may be permissible under the Fourth Amendment even if the justification for the challenged action includes a reasonable mistake, whether of fact or law. Where an officer stopped a vehicle because it had only one working brake light, but the state law was later determined to require only one such light, not two, the evidence revealed in a consented-to search following the stop should not be suppressed. The statute regarding lamps on vehicles was not clear and had not been previously construed in the courts; for the officer to think a faulty brake light was a violation of law was objectively reasonable, justifying the stop. This holding does not discourage police from learning the law; only objectively reasonable mistakes will be tolerated under the Fourth Amendment, and the inquiry in a suppression context is not as forgiving as that employed to determine qualified immunity.

Concurrence: [Kagan, J] “[A]n officer’s ‘subjective understanding’ is irrelevant” in determining whether a mistake of law is objectively reasonable, so lack of training or reliance on incorrect information, which pertain to a subjective understanding of the law, cannot help justify a seizure. Instances where a law is sufficiently ambiguous to make a finding of mistake reasonable will be rare.

Dissent: [Sotomayor, J] Changing the reasonableness inquiry to take into account an officer’s understanding of the law will further erode protection of civil liberties. There will be human consequences, including to communities’ relationships with police. The new approach will also have “the perverse effect of preventing or delaying the clarification of the law” if courts need not interpret statutory language but only need to decide the reasonableness of an officer’s interpretation. No persuasive argument has been made that precluding consideration of mistakes of law unduly hampers law enforcement.

Federal Law (Crimes)

Robbery (Sentence)

Whitfield v United States, 574 US __, 135 SCt 785
(1/13/2015)

The enhanced federal penalties provided for persons committing or fleeing from a bank robbery if they force another person to accompany them (18 USC 2113[e]) apply even if the forced movement is over a short distance. “Accompany” means, today as in 1934 when the provision was enacted, “to go along with” and does not “connote movement over a substantial distance.” Here, while fleeing from a bank robbery, the defendant entered

a home and guided the occupant from a hallway to a computer room, where the occupant suffered a fatal heart attack. The provision applies.

Appeals and Writs (Scope and Extent of Review)

Habeas Corpus (Federal)

Jennings v Stephens, 574 US __, 135 SCt 793 (1/14/2015)

Where the federal district court in this habeas corpus action issued a judgment granting the death-sentenced prisoner release unless the state provided him a new sentencing hearing or commutation of his sentence to one of imprisonment, and the court’s opinion accepted the petitioner’s two ineffective assistance of counsel theories under *Wiggins v Smith* (539 US 510 [2003]) but rejected his theory that a *Spisak* error had occurred (*see Smith v Spisak*, 558 US 139 [2010]), the petitioner was not required to cross-appeal on the *Spisak* theory to argue it on the State’s appeal from the judgment. The petitioner’s rights under the judgment would not change if the appellate court applied the rejected theory, nor would the state’s rights change. Nor was he required to obtain a certificate of appealability. That issue-preclusion effects would vary depending on which theory is accepted on appeal does not change the reasoning of this opinion. Cross appeal is required where a party would obtain greater relief from an argument than it obtained below, or would reduce the rights of the adversary.

Dissent: [Thomas, J] The majority wrongly “equates a judgment granting a conditional-release order with an ordinary civil judgment.” The former affords a state the chance to remedy the specific constitutional violation identified by the district court. A habeas petitioner’s rights under such an order “are thus defined by the violation that justified its entry, not by the wording of the order.” Here, “the majority’s opinion invites the same frivolous appeals that Congress passed the Antiterrorism and Effective Death Penalty Act to prevent.”

Counsel (Conflict of Interest)

Death Penalty (Right to Counsel)

Habeas Corpus (Federal)

Christeson v Roper, 574 US __, 135 SCt 891 (1/20/2015)

Where lawyers appointed to represent a death-sentenced person in prison, nine months before the 1-year statute of limitations on federal habeas corpus applications expired, failed to timely file such an application, and the eventually-filed application was rejected as untimely, denial of a motion by other lawyers for substitution of counsel was error. The court failed to recognize that the initial habeas lawyers had a conflict of interest because they would have had to denigrate their own performance

US Supreme Court *continued*

to argue effectively that the statute of limitations should be tolled. That the initial habeas lawyers continued to represent the client in litigation challenging the means of execution, and that the Circuit Court had not substituted counsel during an appeal that was dismissed for lack of jurisdiction, are not substantial reasons for denying substitution of counsel. While these may be valid considerations in many cases, the delay in seeking substitution of counsel and the potential for abuse do not warrant denial of substitution under the circumstances here.

Dissent: [Alito, J] This case should not have been decided without briefing and argument. The attorney error in miscalculating the due date falls short of the kind of abandonment by counsel needed for equitable tolling.

Prisoners (Conditions of Confinement) (Religion)

Holt v Hobbs, 574 US __, 135 Sct 853 (1/20/2015)

As applied to the petitioner, who seeks to grow a one-half inch long beard in accordance with his religious beliefs, the state corrections department grooming policy prohibiting the growing of beards absent a diagnosed dermatological condition violates the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The policy is not shown to be the least restrictive means of furthering the compelling interest in preventing contraband and ensuring prisoner identification. RLUIPA provides greater protections than a line of cases involving the First Amendment rights of prisoners, so that allowing the petitioner to engage in other religious practices does not affect whether the beard ban substantially burdens religious exercise. That not all Muslims believe men must grow beards is not dispositive, nor was the petitioner's testimony that "his religion would 'credit' him for attempting to follow his religious beliefs"

Federal Law (Crimes)

Yates v United States, 574 US __, 135 Sct 1074 (2/25/2015)

Disposing of fish that law enforcement officials had determined did not meet federal size regulations did not violate 18 USC 1519's proscription against destroying, concealing, covering up, or altering any tangible object, record, or document with the intent to block or influence an investigation by a U.S. government entity. Passed as part of the Sarbanes-Oxley Act, prompted by the massive Enron accounting scandal during which auditing firm Arthur Anderson LLP had systematically destroyed potentially incriminating records, the language of 1519 should be read in that context. Under "the principle of *noscitur a sociis*—a word is known by the company it

keeps," and the rule of lenity, the phrase "tangible object" in 1519 does not cover all objects in the physical world, but only those used to record or preserve information.

Concurrence: [Alito, J] Three features of 1519, combined, support the decision in favor of the defendant: "the statute's list of nouns, its list of verbs, and its title."

Dissent: [Kagan, J] "The term 'tangible object' is broad, but clear." It means something discrete, possessing physical form. "A fish is, of course, a discrete thing that possesses physical form. See generally Dr. Seuss, *One Fish Two Fish Red Fish Blue Fish* (1960)." The result reached by the plurality and concurrence cannot be produced by traditional tools of statutory interpretation; the real issue is "overcriminalization and excessive punishment in the U.S. Code." While 1519 is bad law, "this Court does not get to rewrite the law."

Search and Seizure (Electronic Searches)**Sex Offenses**

Grady v North Carolina, No. 14—593, 575 US __ (3/30/2015)

The respondent state's program for satellite-based monitoring of recidivist sex offenders, which requires such individuals to wear tracking devices at all times, constitutes a Fourth Amendment search. This constitutional protection extends beyond criminal investigations to actions that are civil in nature. Although the petitioner did not introduce evidence of what information, if any, the state obtains through the program, the statute establishing the program makes clear that the program is designed to collect information about the geographic locations of offenders and to report about offenders' violations of schedule or location requirements. Since "[t]he Fourth Amendment prohibits only *unreasonable* searches," and because the state courts did not examine the reasonableness issue, the matter must be remanded for further proceedings.

Counsel (Competence/Effective Assistance/Adequacy)**Trial (Presence of Counsel)**

Woods v Donald, No. 14—618, 575 US __ (3/30/2015)

The absence of the defendant's counsel for about 10 minutes of the trial, during which time testimony was taken about phone calls between two co-defendants on the day of the crime, which counsel had previously said was not relevant to the defendant's theory of the case, did not constitute "*per se* ineffective assistance of counsel under *United States v. Cronin*, 466 U.S. 648 (1984)" This Court has never addressed whether *Cronin* applies when counsel is absent for testimony regarding the actions of co-defendants. "[I]f the circumstances of this case are only

US Supreme Court *continued*

‘similar to’ our precedents, then the state court’s decision is not ‘contrary to’ the holdings in those cases,” and habeas cannot be granted by framing the issue at such a high level of generality that it fits within prior decisions. And the state court’s decision is not an unreasonable application of the contours of *Cronic*. No position is taken on the merits of the underlying counsel claim.

New York Court of Appeals

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

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)

Identification (Lineups)

Impeachment

[People v Allen](#), 24 NY3d 441, 999 NYS2d 350 (11/25/2014)

“[A] duplicity argument based on trial evidence must be preserved for appeal where the count is not duplicitous on the face of the indictment.” The defendant contends that evidence adduced at trial rendered a count duplicitous, but “[a]ny uncertainty could have easily been remedied with an objection during opening statements or the witness testimony, or to the jury charge.” A preservation requirement serves to prevent unnecessary surprise after a trial has been conducted.

Any error in admission of the lineup identification was harmless given the strong evidence against the defendant, including the ballistics evidence, that two of the three eyewitnesses knew the defendant personally, and the defendant confessed to one witness an hour after the shooting and made strenuous efforts to avoid arrest.

The court did not abuse its discretion in limiting impeachment of the prosecution’s main witness.

Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause (Informants)]) (Automobiles and Other Vehicles [Investigative Searches] [Probable Cause Searches])

[People v Argyris](#), 24 NY3d 1138, __ NYS2d __ (11/25/2014)

In three cases presenting the issue of whether to apply a totality of the circumstances test or the standard from

Spinelli v United States (393 US 410 [1969]) and *Aguilar v Texas* (378 US 108 [1964]) for vehicle stops based on anonymous tips, there is record support for finding that the police stop of a vehicle in two cases was lawful under either approach, while the reliability of a tip in the third case was not established under either test. The minor traffic infraction observed by the deputy in the third case did not authorize the stop because the deputy was outside his geographical jurisdiction at that time and the defendant’s actions did not sufficiently elevate the deputy’s suspicion. The question of whether the deputy’s violation of statutory jurisdiction limits required denial of suppression is not presented.

Concurrence: [Smith, J] The four judges who agree on the outcome of these cases disagree on the rationale. I think that in cases requiring only reasonable suspicion rather than probable cause, applying the *Aguilar-Spinelli* test, which has been abandoned federally, “needlessly complicates and confuses the analysis of reasonable suspicion issues.”

Concurrence: [Abdus-Salaam, J] I join the memorandum opinion because it does not retreat from the state constitutional tradition of adhering to the *Aguilar-Spinelli* test when considering hearsay-based police searches and seizures. When determining the legality of investigatory stops based on anonymous hearsay tips, courts should apply *Aguilar-Spinelli*, and should look at the quality of the tip’s description of the purported crime, not the description of the suspect’s appearance and non-criminal conduct.

Dissent in Part, Concurrence in Part: [Read, J] I would adhere to this Court’s precedent and answer “no” to the question of whether reasonable suspicion to stop can be based solely on an anonymous tip that does not provide predictive information.

Dissent in Part, Concurrence in Part: [Rivera, J] An anonymous tip alone cannot provide reasonable suspicion justifying a stop where the informant makes only unsubstantiated assertions about illegal activity and provides “only generally observable descriptive information” as to the subject of the tip and no predictive information about the subject’s criminal conduct.

Guilty Pleas (Withdrawal)

Motions (Adjournment)

[People v Spears](#), 24 NY3d 1057, 999 NYS2d 818 (11/25/2014)

The denial of a sentencing adjournment to allow the defendant and counsel to discuss a possible motion to withdraw the guilty plea was not an abuse of discretion where the defendant, who was out on bond, had conferred with counsel prior to sentencing, and neither was

NY Court of Appeals *continued*

able to articulate a ground for plea withdrawal on the date of sentencing.

Dissent: [Pigott, J] “[A] simple adjournment would have harmed no one and would have demonstrated a balanced approach to defendant’s plea and sentence.” The defendant was held in pretrial detention on a class D felony for more than three months despite his employment and a finding by the County Pretrial Release Program that he was “OR eligible.” The court adjourned the *Huntley* hearing, over defense objection, after neither the prosecution nor their witnesses appeared on the scheduled date, while the court had previously warned defense counsel that she should “send somebody else over” if she had a scheduling conflict. On the rescheduled date, the defendant was offered a misdemeanor plea to time served and probation, which he accepted after getting a very short time to discuss it with his girlfriend. The court also granted the prosecution a delay in sentencing based on vacation time.

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

Evidence (Newly Discovered)

Post-Judgment Relief (CPL § 440 Motion)

[People v Jones](#), 24 NY3d 623, 2 NYS3d 815 (12/16/2014)

The portion of the decision in *People v Crimmins* (38 NY2d 407 [1975]) holding “that [t]he power to review a discretionary order denying a motion to vacate judgment upon the ground of newly discovered evidence [brought pursuant to CPL 440.10(1)(g)] ceases at the Appellate Division” has needlessly restricted review and is overruled. *Crimmins* relied on cases decided when defendants lacked any statutory mechanism for appealing to this Court from a denial of a new trial based on newly discovered evidence; with such mechanisms in place, defendants should have determinations rendered under the statute reviewed under the abuse of discretion standard involving a legal, not factual, review. That the Legislature placed 440.10(1)(g) motions in the same category as motions historically brought by *coram nobis* shows that the same standard of review should be applied.

Here, the Appellate Division abused its discretion by affirming a summary denial of the defendant’s 440.10(1)(g) motion based on the results of mitochondrial DNA (mtDNA) testing of evidence from his 1981 trial. At issue was the reliability of the testing, the meaning of the test results, and the weight the results should be given in light of eyewitness testimony at trial. The prosecution failed to rebut the defendant’s prima facie showing that he was entitled to a hearing.

Concurrence: [Abdus-Salaam, J] “I believe that on this record, the motion court had no discretion to deny the motion without a hearing” Of the four enumerated circumstances that allow a court to deny a motion under 440.30(4) without a hearing, the only one asserted is that the facts alleged did not constitute a legal basis for the motion. The provision does not require a showing that the movant would ultimately prevail, but only that a ground constituting a legal basis has been alleged. Under 440.30(5), a hearing was required here.

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

[People v Reid](#), 24 NY3d 615, 2 NYS3d 409 (12/16/2014)

“[T]he ‘search incident to arrest’ doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur.” Although probable cause to arrest the defendant here for driving while intoxicated existed before the police officer searched him, the search was not incident to arrest where the officer testified that he did not intend to arrest the defendant at the time he asked him to get out of the car. That the officer had observed behavior and circumstances that would have warranted arrest for DWI did not make the search that revealed a switchblade a search incident to the post-search arrest for possessing the knife.

Dissent: [Read, J] *Knowles v Iowa* (525 US 113 [1998]) does not control here, and interpreting it as the majority does puts *Knowles* in tension with *Rawlings v Kentucky* (448 US 98 [1980]).

Confessions (Counsel)

Counsel (Right to Counsel) (Waiver)

Plea Bargaining

[People v Johnson](#), 24 NY3d 639, 2 NYS3d 825 (12/17/2014)

Where the defendant had been charged with one crime, sought to mitigate his situation by providing information about a second, unrelated crime, and was ultimately charged with that second crime, the defendant’s right to counsel was violated when the prosecution offered into evidence in the second case the defendant’s statements to police made in the absence of his lawyer on the first case. Unlike in *People v McLean* (24 NY3d 125 [2014]), the first case here, and the lawyer’s representation of the defendant as to that case, were continuing at the time the defendant was questioned about the second case without the lawyer present. The lawyer’s duty to the defendant required him to concern himself with both cases where his client pinned hopes for a favorable result in the first case on his cooperation as to the second. A waiver of the right to counsel cannot be inferred from a

NY Court of Appeals *continued*

possible assumption on the part of a lawyer as to what would or would not be discussed at a meeting of the client with police. Furthermore, any waiver as to the interview of the defendant as a possible witness in the second case could not have extended to a conversation about the second case once the defendant admitted involvement in the second case.

Dissent: [Pigott, JJ] The Appellate Division adopted the trial court’s findings of fact and application of those facts to the relevant law, presenting a mixed question of law and fact here. Record support exists for the conclusion below that there was no connection between the first case and the second, and that the detectives acted properly in questioning the defendant about the second case under the circumstances; the Appellate Division order should be affirmed.

Sex Offenses (Civil Commitment)

Matter of State of New York v Michael M., 24 NY3d 649, 2 NYS3d 830 (12/17/2014)

The evidence in this Mental Hygiene Law (MHL) article 10 proceeding was “insufficient to justify revoking respondent’s strict and intensive supervision and imposing secure confinement.” The respondent had been released into the community as a result of a successful habeas corpus action based on procedural grounds not relevant to this appeal, and remained in the community with no evidence of criminal activity for nearly two years. In 2011, the court imposed “strict and intensive supervision” rather than confinement. After the defendant experienced a series of setbacks including loss of employment and homelessness, he was discharged from a sex offender treatment program for failure to cooperate and was then re-evaluated under MHL 10.11(d)(1) resulting in his commitment to a secure treatment facility. The testimony on which the determination was made tended to show only that the respondent was struggling with his sexual urges, not that he was unable to control them. The events that preceded his discharge from the treatment program did not support the proposition that he had become unable to control his sexual conduct.

Dissent: “Judge Read dissents ... for the reasons stated in the memorandum at the Appellate Division”

Post-Judgment Relief (CPL § 440 Motion)

Sentencing (Persistent Felony Offender)

Trial (Verdicts [Motions to set aside (CPL § 330 Motions)])

People v Giles, 24 NY3d 1066, 2 NYS3d 30 (12/18/2014)

The defendants’ motions to set aside the verdicts under CPL 330.30(1) in these two cases were procedurally improper, as they were based on matters outside the trial record. As the defendants did not ask the trial courts to consider their motions as premature de facto CPL 440.10 motions, and the courts did not deem them such or decide them in accordance with CPL 440.30, no opinion is expressed as to whether the trial courts had the authority to do so.

Concurrence: [Smith, JJ] A court does have the power to entertain a 440.10 motion made before entry of judgment, but proper procedures were not followed in *People v Hawkins* to allow that. To respond to Judge Abdus-Salaam’s dissent in *People v Giles*, it is true that the correctness of the interpretation of the persistent felony offender statute in *People v Rosen* (96 NY2d 329 [2001]) may be debated, but the continuation of the debate after many decisions and years is puzzling. At this point, the question should be considered settled.

Concurrence in Part, Dissent in Part: [Abdus-Salaam, JJ] “In *Giles*, I dissent from the Court’s decision to uphold defendant’s sentence because the trial court made additional fact-findings essential to elevate defendant’s punishment beyond the maximum authorized by the jury’s verdict, in violation of the United States Supreme Court’s *Apprendi* line of cases (*see Apprendi v New Jersey*, 530 US 466, 490 [2000]).”

Dissent: [Pigott, JJ] The dissent in the Appellate Term that would have treated the 440.10 motion as a 330.30(1) motion in the interest of judicial economy was correct.

Endangering the Welfare of a Child

Narcotics (Evidence) (Paraphernalia) (Possession) (Sale)

People v Diaz, 24 NY3d 1187, __ NYS3d __ (2/12/2015)

Where police found bundled glassine envelopes of heroin and drug paraphernalia in plain view in the bedroom and in a dresser drawer along with personal belongings of the defendant, who was the leaseholder, the jury could infer from this and other proof that the defendant exercised dominion and control over the contraband and that she knew the substance was heroin. Her co-defendant, the father of her children, who also lived in the apartment, was convicted by the same jury of second-degree criminal use of drug paraphernalia, which activity was plainly commercial and ongoing. While the defendant was acquitted of possessing drugs with intent to sell and drug paraphernalia crimes, the proof was sufficient to establish that the defendant knew or had reason to know about ongoing commercial drug-related activity where children were present, supporting her guilt of four counts of unlawfully dealing with a child. Her contention that Penal Law 260.20(1) excludes possessory crimes need not be addressed.

NY Court of Appeals *continued***Sex Offenses (Civil Commitment)****Venue (Change of Venue)**

Matter of Tyrone D. v State of New York, 24 NY3d 661, __ NYS3d __ (2/12/2015)

Mental Hygiene Law article 10 authorizes motions for change of venue in article 10 hearings, but the motion filed in connection with this annual review of a petition for discharge from commitment in a secure treatment facility for dangerous sex offenders failed to establish the requisite good cause and was properly denied. Counsel for the petitioner asserted that holding the hearing in Oneida County, where the petitioner is confined to Central New York Psychiatric Center, would make it burdensome, inconvenient, and impossible for the petitioner's family members and unidentified potential witnesses to attend, and that a judge in New York County would be "more attuned to the local situation' and better suited to making a determination regarding petitioner's status." The affidavit supporting the motion for change of venue failed to identify either the subject matter of testimony to be offered or any specific witnesses themselves.

While the colloquy between the court and counsel on whether the petitioner's failure to appear constituted a waiver of his hearing "was undeniably perfunctory," and the court should "satisfy itself that a petitioner truly intends to waive the hearing," under the circumstances here the court was entitled to rely upon counsel's assertion that the petitioner did not want the hearing.

Appeals and Writs (Judgments and Orders Appealable)**Family Court (Family Offenses) (Orders of Protection)**

Matter of Veronica P. v Radcliff A., 24 NY3d 668, __ NYS3d __ (2/12/2015)

Expiration of the contested order of protection issued by a family court on the basis of a family offense does not moot appeal of the order. The respondent may still receive relief from significant enduring consequences imposed by the order, which "on its face strongly suggests that respondent committed a family offense" The order could be relied upon by judges in future criminal or family court proceedings, or used as impeachment material by opposing parties in future legal matters. Examples include use as a basis for increased scrutiny by law enforcement given the order's retention in a police database and as stigmatizing information by business contacts, social acquaintances, or others. No view is expressed as to the respondent's urging of a broader holding, "that an appeal from any expired order of protection, other than one entered upon stipulation, is not moot."

Grand Jury (Procedure) (Witnesses)**Witnesses (Defendant as Witness) (Immunity)**

People v Brumfield, 24 NY3d 1126, __ NYS3d __ (2/17/2015)

The defendant was denied his right to testify before the grand jury where the waiver of immunity form presented to him included, in addition to the provisions required by CPL 190.45, three additional provisions that the defendant struck out before signing the form, and the prosecutor then refused to permit the defendant to testify. The defendant left intact the statutorily-required waiver provisions waiving "his privilege against self-incrimination and any immunity to which he would be entitled." Striking the other provisions, which concerned his right to talk to counsel before signing the waiver and before testifying, the unlimited scope of potential questioning before the grand jury, and his agreement that his testimony, or other evidence produced by him at any point, could be used against him, was not a violation of 190.45.

Housing**Sex Offenses (Sex Offender Registration Act)**

People v Diack, 24 NY3d 674, __ NYS3d __ (2/17/2015)

"[T]he State's comprehensive and detailed statutory and regulatory framework for the identification, regulation and monitoring of registered sex offenders prohibits the enactment of a residency restriction law such as" Nassau County's Local Law 4-2006. That law prohibited housing individuals registered under the Sex Offender Registration Act (SORA) within a certain distance of specified areas where children are likely to congregate. The State has enacted a series of laws regulating sex offenders, and its continuing regulation regarding "identification and monitoring of registered sex offenders" makes clear that "its 'purpose and design' is to preempt the subject of sex offender residency restriction legislation and to 'occupy the entire field' so as to prohibit local governments from doing so" Local laws like the one at issue encroach on the State's occupation of this field, inhibit the operation of state law, and by doing so thwart the State's overriding policy concerns as to "the identification, monitoring and treatment of sex offenders" Such laws also collide with state policy, as they bar probationers and parolees from residences "approved by the Division of Probation and Correctional Alternatives and Division of Parole," and they hinder uniformity of sex offender placement statewide.

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

NY Court of Appeals *continued*

Search and Seizure (Entries and Trespasses)

People v Gibson, 24 NY3d 1125, __ NYS3d __ (2/17/2015)

“A determination whether exigent circumstances existed to justify the warrantless entry into the apartment involves a mixed question of law and fact. Where, as here, there exists record support for the Appellate Division’s resolution of this question; the issue is beyond this Court’s power of review”

Assault (Lesser Included Offenses)

Attempt (Lesser and Included Offenses)

Harassment

People v Repanti, 2015 NY Slip Op 01375 (2/17/2015)

The defendant’s claim that the charge of second-degree harassment was a lesser included offense to the charge of attempted third-degree assault, and that he could only be convicted and sentenced for one, is rejected. The two offenses do not share a common intent element; one can “intend to annoy, harass or alarm without also intending to injure based on conduct that causes annoyance, harassment or alarm. Similarly, an intent to injure through physical contact involves a purpose of mind focused on a result more serious than that which may be obtained by the mere action of causing annoyance or alarm.” And “attempted assault requires the intent to commit an assault, which carries a different intent from harassment.”

Appeals and Writs (Preservation of Error for Review)

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

Sentencing (Post-Release Supervision)

People v Crowder, 24 NY3d 1134, __ NYS3d __ (2/19/2015)

Under the circumstances here, the defendant was required, and failed, to preserve his claim that the court failed to advise him at his guilty plea of the post-release supervision (PRS) component of his sentence, which had been set out on the record three days earlier when the plea offer was discussed. The defendant was allowed to attend a drug rehabilitation program before imposition of sentence, but failed to cooperate with that program, failed to appear for sentencing, and was sentenced in absentia, after an adjournment, to an enhanced prison term followed by three years of PRS. Counsel was present at both sentencing dates and did not object to the PRS term, nor

was an objection made when the defendant was eventually arrested and brought before the court, which again recounted the plea, including the PRS component.

Dissent: [Lippman, CJ] Imposing a preservation requirement, compelling the “defendant move to withdraw his plea under these circumstances, is at variance with our existing precedent.” Requiring a court to advise a defendant of PRS terms at the time of the plea is not an onerous burden and makes simple an appellate determination of whether there was adequate advisal.

[*Ed. Note: Judges Stein and Fahey took no part in this decision.*]

Reckless Endangerment (Elements) (Evidence)

People v Williams, 24 NY3d 1129, __ NYS3d __ (2/19/2015)

The defendant’s conduct in rejecting use of a condom when engaging in sex with the accuser, assuring the accuser that unprotected sex was safe, when the defendant knew he was infected with human immunodeficiency virus (HIV), “was reckless, selfish and reprehensible” but did not make out “a prima facie case of depraved indifference,” required for the first-degree reckless endangerment count. “[W]hether HIV infection creates a grave and unjustifiable risk of death in light of the medical advances in treatment made since the scourge of AIDS was first identified” is not decided.

Dissent: [Pigott, J] That the defendant knew he was HIV-positive, intentionally did not tell the accuser, took a condom away from the accuser before having sex, and assured the accuser four times “that it was ‘okay’” to have unprotected sex, “established at the very least” that the defendant acted with “utter indifference” to the accuser’s fate and with “wanton cruelty, brutality or callousness.” The court is not in a position to disagree with the grand jury’s apparent belief, based on the evidence presented, that the defendant “did not care at all” at the time.

[*Ed. Note: Judges Stein and Fahey took no part in this decision.*]

Due Process (Fair Trial)

People v Cooke, 24 NY3d 1196, __ NYS3d __ (2/24/2015)

The defendant waived his claim that wearing a stun belt denied him a fair trial where he did not object and expressly consented to wearing it. The “court’s failure to make a finding of necessity for the stun belt’s use does not constitute an unwaivable mode of proceedings error”

NY Court of Appeals *continued***Appeals and Writs (Judgments and Orders Appealable)
(Question of Law and Fact)****Searches and Seizure (Appellate Review) (Arrest/Scene of
the Crime Searches [Probable Cause]) (Stop and Frisk)****People v Brown, 2015 NY Slip Op 02552 (3/26/2015)**

The Appellate Division's reversals of the convictions based on the trial court's failure to suppress show-up identifications and physical evidence, found to have been obtained from stops and detentions for which the police lacked probable cause, involved mixed questions of law and fact and are not reviewable.

Dissent: [Pigott, J] "[T]he Appellate Division erred as a matter of law in holding that the undisputed facts and the reasonable inferences drawn therefrom failed to satisfy the minimum showing necessary to establish reasonable suspicion." When the officers recognized the defendants, seen running down Broadway looking over their shoulders in the early morning hours, as having been involved in or associated with people engaged in prior crimes in the Times Square area, the officers "plainly had reason to believe that [the] defendants had engaged in criminal activity" and would have been derelict in their duties not to stop them.

Prisoners (Disciplinary Infractions and/or Proceedings)**Sex Offenses (Sex Offender Registration Act)****People v Ford, 2015 NY Slip Op 02554 (3/26/2015)**

That the defendant committed disciplinary violations in prison that led to his placement in special housing where he could not participate in sex offender treatment "was not tantamount to a refusal to participate in treatment under the [Sex Offender Registration Act] (SORA) Guidelines," with refusal being considered evidence of denial of responsibility for the crime. The prosecution could seek an upward departure on the grounds that the SORA risk assessment instrument did not adequately take into account the number of prison violations, and that the defendant did not receive sex offender treatment.

Sentencing (Persistent Felony Offender)**People v Jones, 2015 NY Slip Op 02553 (3/26/2015)**

"New York's persistent felony offender statute, by its plain terms, does not require that, in order to classify someone as a persistent felony offender, an out-of-state predicate felony must have a New York counterpart." The legislative history of Penal Law 70.10 shows that such an equivalency test was considered and rejected; cases under

the second felony offender statute, which does require foreign statutes to have New York equivalents, are inapplicable. Adjudicating the defendant a persistent felony offender based on federal crimes that have no New York counterpart was not error.

Appeals and Writs (Question of Law and Fact)**Search and Seizure (Automobiles and Other Vehicles
[Investigative Searches]) (Consent)****People v Mercado, 2015 NY Slip Op 02556 (3/26/2015)**

"The order of the Appellate Division should be affirmed. The determinations regarding founded suspicion of criminality justifying a request to search the car, and then the trunk, and defendant's consent to a search of the vehicle, all involve mixed questions of law and fact. The determinations are supported by the record, and are beyond further review"

Sentencing (Youthful Offenders)**People v Anthony C., 2015 NY Slip Op 02678
(3/31/2015)**

"The order of the Appellate Division should be affirmed. The Appellate Division opinion does not suggest a misapprehension or misapplication of its authority to review Youthful Offender adjudications for abuse of discretion (CPL 720.20 [1] [a]), or under its broad interest-of-justice jurisdiction (see CPL 470.15 [6] [b]; *People v Dawn Maria C.*, 67 NY2d 625, 627 [1986])."

Counsel (Right to Counsel)**Juries and Jury Trials (Alternate Jurors) (Discharge)****Search and Seizure (Automobiles and Other Vehicles
[Probable Cause Searches]) (Suppression)****Trial (Public Trial)****People v Garay, 2015 NY Slip Op 02672 (3/31/2015)**

The defendant failed to preserve his claim that the court's replacement of a sick juror with an alternate juror was done in a manner that deprived him of his right to counsel, where counsel, who had been absent during discussion of the matter but was aware of the situation, and appeared in court before the court actually moved an alternate juror into the missing juror's seat, did not object.

The defense affirmation containing a simple denial of being engaged in criminal conduct when the defendant was stopped by police did not raise an issue of fact requiring a suppression hearing. It was incumbent on the defendant to refute the specific allegations that he was engaged in a conspiracy with the person he drove and dropped off

NY Court of Appeals *continued*

at the location of an alleged drug deal, then took home just before he was stopped, leading to recovery of drugs.

The record established a need to close the courtroom during the testimony of undercover police officers, and it can be implied that the court determined no lesser alternative would suffice.

Dissent: [Lippman, CJ] Preservation is not required when a claimed violation of the right to counsel is based on counsel’s absence from crucial parts of proceedings; affirming on preservation grounds encourages prosecutors to rely on imperfections in lawyers’ arguments to turn aside decisions on the merits. “I would hold that defendant’s right to counsel was violated when the court decided to dismiss a juror in defense counsel’s absence.”

Instructions to Jury (Cautionary Instructions) (Witnesses)

Witnesses (Confrontation of Witnesses)

[People v Garcia](#), 2015 NY Slip Op 02675 (3/31/2015)

While the right of defendants to confront witnesses against them generally bars admission at trial of testimonial statements by witnesses who do not appear, use of such statements is not “invariably intolerable.” The federal constitution does not bar use of such statements “‘for purposes other than establishing the truth of the matter asserted’” And such evidence may be admitted to help a jury understand context, such as why police focused on a defendant, if its probative value outweighs any undue prejudice. In defendant Garcia’s case, a detective’s testimony about his conversation with the decedent’s sister as to whether the decedent had a problem with anyone and her response about the defendant “exceeded that which was necessary to explain the police pursuit of [the] defendant”; admission of the testimony over objection was error, especially in the absence of a limiting instruction. In the *DeJesus* case, no confrontation error occurred when a detective testified that the defendant was a suspect before police interviewed the eyewitness; the defense assertion at trial and on appeal that the testimony clearly indicated that an anonymous caller had identified the defendant “is mere supposition.”

Concurrence: [Pigott, J] Admission of the detective’s testimony in *Garcia* was not error, but a limiting instruction should have been given as requested by both the defense and prosecution.

Misconduct (Prosecution)

Sex Offenses

Trial (Mistrial)

[People v Shaulov](#), 2015 NY Slip Op 02676 (3/31/2015)

The court erred in refusing to order a mistrial or strike testimony by the accuser on direct examination that on the night in question she had called a friend and told her what happened without telling the whole story, where the prosecution explicitly stated before trial that no evidence would come in showing the accuser made a prompt outcry. Defense counsel shaped his trial strategy in this case involving allegations of statutory and non-consensual sexual assault on the assumption that there was no disclosure by the accuser for six months. The resulting prejudice was not insubstantial; the defendant was convicted of the statutory charges and acquitted of charges based on lack of consent not related to age.

Counsel (Right to Counsel)

Judges (Powers)

Witnesses (Credibility)

[People v Carr](#), 2015 NY Slip Op 02798 (4/2/2015)

Where the mental and physical abilities of the prosecution’s main witness were inextricably tied to his credibility, holding an in camera discussion with the witness without the defense lawyer present was a denial of the right to counsel. “Absent a substantial justification, courts must not examine witnesses about nonministerial matters in camera without counsel present or ex parte” The witness, who used drugs for 30 years, was present at the time of the homicide. After he failed to appear in court the first time, trial was adjourned and he was later questioned by the court in camera; the content of the discussion remains mostly unknown. Despite defense counsels’ requests to be present for any future proceedings with the witness, another off-record discussion occurred without counsel when the witness again failed to appear, and thereafter when he did appear. Counsel had good reason to suspect the witness’s absences were due to drug use, which was potential impeachment material. The ex parte discussion “was much more than a scheduling matter”

Dissent: [Fahey, J] The majority strays far from precedent. Requiring a “showing of ‘substantial justification’” for ex parte hearings is new. Determining when a witness’s indisposition relates to a trivial, personal, and private situation will be impossible to administer, requiring a cumbersome new process. The scheduling of litigation is the court’s prerogative.

Homicide (Murder [Instructions] [Intent])

Witnesses (Confrontation of Witnesses)

[People v Dubarry](#), 2015 NY Slip Op 02865 (4/7/2015)

NY Court of Appeals *continued*

The “defendant cannot be convicted of depraved indifference murder and intentional murder on a transferred intent theory in a case involving the death of the same person”; such charges should have been submitted to the jury in the alternative, not the conjunctive. The transferred intent theory ensures that a person will be charged for the crime they intended to commit when the intended target was someone other than the person actually harmed; it “should not be employed to “multiply criminal liability ...”” While two different states of mind are attendant to the murder counts here, the outcome was the decedent’s death. The separate mens rea of intent and depraved indifference are mutually exclusive when applied to one outcome “even where the former is premised on the doctrine of transferred intent.”

Admission of an unavailable witness’s grand jury testimony was error where the prosecution failed to present evidence linking the defendant to threats that allegedly caused the witness’s refusal to testify. While the threats were linked to a group to which the defendant belonged, no misconduct by the defendant was shown and no facts were presented supporting an inference that he engineered the threats. An inference that the defendant had to be the source of the group’s suspicion that the witness was to testify, because the prosecution had told the defense about the witness and the witness denied telling anyone he was cooperating, does not support the further inference that the defendant communicated the information to procure the witness’s unavailability. There is no evidence the defendant controlled the group’s actions, influenced it to act, or persuaded individuals to make the threats.

Dissent in Part: [Pigott, J] The defendant was not deprived of the constitutional right to confront witnesses. The majority is “turning an evidentiary determination into a trial within a trial” and rewarding surreptitious witness tampering and intimidation.

Constitutional Law (New York State Generally) (United States Generally)
Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches]) (Suppression)
People v Guthrie, 2015 NY Slip Op 02867 (4/7/2015)

When probable cause to make a traffic stop “is based on a police officer’s objectively reasonable, but mistaken, view of the law ..., the stop is constitutional.” Where the defendant entered a public street without stopping at a stop sign located on the edge of the parking lot the defendant was exiting, the officer’s belief that a traffic violation had occurred was reasonable and his stop of the defendant was constitutionally justified even though the stop

sign was not legally valid because it was not properly registered as required by law. Evidence recovered as a result of the officer’s actions need not be suppressed.

Dissent: [Rivera, J] “I disagree with the majority’s conclusion that under our state constitution an officer’s erroneous belief that a driver violated the law may provide probable cause for a vehicular stop, and, regardless of the driver’s innocence, a court may admit evidence obtained as a consequence of the officer’s mistake.” The decision limits the reach of precedent rejecting, on state constitutional grounds, a federal good faith exception to the exclusionary rule.

Counsel (Competence/Effective Assistance/Adequacy)
People v Jarvis, 2015 NY Slip Op 02869 (4/7/2015)

The cumulative effect of errors by defense counsel deprived the defendant of meaningful representation where counsel failed to invoke a prior preclusion order when the prosecutor elicited testimony that had been ruled inadmissible absent an opening of the door on cross examination and also presented an alibi defense for the wrong day of the week.

Dissent: [Pigott, J] The “defendant failed to meet his burden of establishing the absence of a strategic or other legitimate explanation for defense counsel’s alleged errors.” A number of strategic reasons could explain why counsel did not object to the witness’s limited-use testimony, including wanting to avoid focusing attention on the witness’s testimony or, alternatively, seeking to use the witness’s difficulties in testifying to the defendant’s advantage.

Competency to Stand Trial
New York State Agencies (Corrections and Community Supervision, Department of) (Mental Health, Office of) (Parole, Board of)
Parole (Revocation Hearings [Due Process])
Matter of Lopez v Evans, 2015 NY Slip Op 02868 (4/7/2015)

“We hold that when a parolee lacks mental competency to stand trial, it is a violation of his or her due process rights to conduct a parole revocation hearing. In light of our concerns about the application of the pertinent statutes to such individuals, we urge the Legislature to address the issues raised by the parties to this litigation.” The defendant, convicted of murder, was released on lifetime parole in 1999, charged with misdemeanor assault four years later, found unfit to stand trial, and committed to the custody of the Office of Mental Health (OMH); he remained in OMH custody through a series of retention orders and voluntary admissions. On Aug. 11, 2008, he

NY Court of Appeals *continued*

attacked a fellow patient and was found incompetent to stand trial on resulting charges. The Department of Corrections and Community Supervision (DOCCS) commenced parole revocation hearings based on the 2008 incident and he was transferred from OMH custody to DOCCS. Over counsel’s objection, a final revocation hearing was held and the defendant was found to have violated parole. Despite testimony at the dispositional phase that the defendant should be restored to parole and returned to OMH custody, his parole was revoked and he was incarcerated. This litigation was commenced under CPLR article 78. The holding below that due process is violated by proceeding with parole revocations against persons found to be mentally incompetent is affirmed; however, the State raises practical objections that should be addressed, including the lack of authority for the Division of Parole to commit an incompetent parolee to OMH custody and the question of whether the Parole Board can assess a parolee’s competency to determine whether revocation proceedings can continue.

Admissions (Silence)

Self-Incrimination (Comment) (Conduct and Silence)

People v Williams, 2015 NY Slip Op 02866 (4/7/2015)

Evidence of a defendant’s selective silence during custodial interrogation following waiver of *Miranda* rights may not be used as part of the prosecution’s case in chief either to support an inference of admission of guilt or to impeach a non-testifying defendant’s version of events. The prosecutor in this rape case said in opening statements that the jury would be able to compare the defendant’s grand jury testimony and his statements to police; defense counsel responded in opening that the defendant’s silence should not be used against him and later objected to the prosecutor’s remarks. The court refused to issue a curative instruction on the basis that counsel’s remarks were adequate, and police testimony was admitted regarding the defendant’s failure to answer when asked if he had sex with the accuser. While conspicuous omissions from a defendant’s statement to police may be used during cross-examination, the prosecutor may not, as a matter of state evidentiary law, use evidence of silence in the case in chief.

Dissent: [Abdus-Salaam, JJ] Although the court erred in allowing the prosecution to present evidence of, and comment upon, the defendant’s silence, the error was harmless given the overwhelming quality of the proof and the limited prejudice flowing from the evidence of his silence.

First Department

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

Juveniles (Delinquency)

Sentencing (Mitigation) (Youthful Offenders)

People v Crawford, 119 AD3d 471, 989 NYS2d 606 (1st Dept 7/17/2014)

“The court properly exercised its discretion in denying defendant youthful offender treatment ... particularly since, while awaiting sentencing, defendant failed to comply with a treatment program and committed another armed robbery. We perceive no basis for reducing the sentence.” (Supreme Ct, New York Co)

Concurrence in Part, Dissent in Part: “I believe the current law that allows 15 year olds to be tried as adult criminals, even though they are sentenced as juvenile offenders, belies everything science has taught us about the functioning of the juvenile brain For that reason, I would reduce the sentence to 2 to 6 years to be served concurrently with the five-year term [imposed for the later robbery], but would not accord defendant the youthful offender treatment that he seeks.” That the defendant had a disastrous childhood and his older brother had an evil influence on him “mitigates strongly against an extended period of incarceration. Having already fallen through society’s cracks, both defendant, who readily admitted his guilt, apologized for his actions, and did not hurt anyone, and society would be far better served by a positive intervention and rehabilitation program than by an extended prison sentence.”

Counsel (Attachment) (Right to Counsel)

Defenses (Self-Defense) (Justification)

Homicide (Murder [Defenses] [Instructions])

People v McTiernan, 119 AD3d 465, 990 NYS2d 200 (1st Dept 7/17/2014)

“[T]he court’s instructions on the use of deadly physical force in defense against a robbery were prejudicially defective.” “[D]eadly physical force may be permissible to defend against a robbery even if the alleged robber is using only physical force, and not deadly physical force” The defendant failed to object to the erroneous charge, but the interest of justice warrants reversal.

The court also erred in precluding defense counsel from testifying at the suppression hearing about the telephone conversation counsel had with a police supervisor

First Department *continued*

assigned to the defendant's case and implicitly accepting the supervisor's testimony. Counsel's affirmation stated that he would have testified that he told the supervisor that he represented the defendant and that the defendant should not be questioned in his absence, which conflicted with the supervisor's testimony that counsel did not say he represented the defendant. (Supreme Ct, New York Co)

Search and Seizure (Motions to Suppress [CPL Article 710]) (Warrantless Searches)**People v Chamlee, 120 AD3d 417, 991 NYS2d 313 (1st Dept 8/21/2014)**

The court improperly denied, without a hearing, the defendant's motion to suppress contraband found during a search of his apartment "where the information proffered by the [prosecution] to support the forcible entry was conclusory and defendant did not have access to available information" In his motion, the defendant denied participating in any illegal activity when he was seen by officers in the hallway outside his apartment before he was chased into his apartment by the officers and the officers broke down the door; the defendant did not have access to the facts in the search warrant application, which the police obtained after the forced entry, before he made the motion. The matter is remanded for a hearing to determine whether there were sufficient exigent circumstances to justify the forced warrantless entry by the police. (Supreme Ct, New York Co)

[Ed. Note: After the suppression hearing, the trial court granted the motion to suppress and the prosecution has decided not to challenge that determination on appeal; therefore, the conviction is vacated and the indictment dismissed. 2015 NY Slip Op 01730 (1st Dept 3/3/2015).]

Witnesses (Confrontation of Witnesses) (Credibility) (Cross Examination)**People v McLeod, 122 AD3d 16, 991 NYS2d 418 (1st Dept 8/21/2014)**

The court violated the defendant's fundamental right of confrontation by precluding defense counsel from cross-examining a key prosecution witness, the defendant's alleged accomplice, who had entered into a prosecution agreement, about his prior crimes because it "allow[ed] the witness to avoid asserting his Fifth Amendment privilege in the jury's presence—because the probative value of the questions, targeted at the witness's credibility, bias, and motive to fabricate testimony, was not outweighed by any purported prejudice against the [prosecution]." The error, which unduly restricted prob-

ing of the witness's bias, was not harmless where the witness's "testimony, and thus his credibility, were central in proving defendant's mens rea" (Supreme Ct, New York Co)

Search and Seizure (Automobiles and Other Vehicles) (Consent [Coercion and Other Illegal Conduct])**People v Mercado, 120 AD3d 441, 992 NYS2d 12 (1st Dept 8/28/2014)**

The court properly denied the motion to suppress the drugs found in the trunk of the defendant's car where "[t]he totality of the information available to the police justified their request to search [it], and defendant validly consented to that search." The police saw the defendant illegally park his car, get out and have a very brief interaction with a man who approached, including a handshake and either a hug or a chest bump, which the arresting officer thought could have been a drug transaction even though he did not see an exchange; the car's passenger then returned from a nearby deli, and when the defendant drove off, the police saw the passenger lean forward as if putting something under his seat. After a second traffic violation, the police lawfully stopped the car; the defendant, "sweating profusely" and crying, admitted not having a license and said that he did not want to go back to jail. He consented to a pat down and search of the inside of the car, which revealed nothing. He then consented to the trunk search that yielded more than 120 glassine envelopes of heroin, which the defendant admitted were his. (Supreme Ct, New York Co)

Dissent: While the circumstances "may have justified the request to search the inside of the car, upon finding nothing therein or on the defendant after a frisk, the officer lacked a founded suspicion that criminal activity was afoot to justify the request to search the trunk of the car" And the "defendant, already facing a possible arrest for driving without a license and distraught and crying about the possibility of going back to jail, may have felt compelled to consent to a search of the trunk."

[Ed. Note: A justice of the First Department granted leave to appeal. The Court of Appeals affirmed, holding that "[t]he determinations regarding founded suspicion of criminality justifying a request to search the car, and then the trunk, and defendant's consent to a search of the vehicle, all involve mixed questions of law and fact. The determinations are supported by the record, and are beyond further review" 2015 NY Slip Op 02556 (3/26/2015) (Summary on p. 29).]

Speedy Trial (Cause for Delay)**People v Lathon, 120 AD3d 1132, 992 NYS2d 424 (1st Dept 9/25/2014)**

First Department *continued*

The court erred in granting the defendant’s speedy trial motion where the period during which the prosecution was waiting for DNA test results for samples taken from the defendant and codefendant was excludable under CPL 30.30(4)(g)(i) as a delay based on exceptional circumstances resulting from unavailability of material evidence. While the prosecution could have relied on the automobile presumption to establish the defendant’s possession of the pistol, that did not make the DNA analysis immaterial to the prosecution’s case where the defendant said he planned to testify before the grand jury that he did not have a connection to the pistol, thereby rebutting the presumption. Also, the court had already decided the DNA analysis was material and necessary when it compelled the defendant and codefendant to provide saliva samples, and the defendant did not claim the prosecution failed to diligently get the DNA analyzed. (Supreme Ct, Bronx Co)

Counsel (Duties)

Juries and Jury Trials (Deliberation)

Witnesses (Confrontation of Witnesses)

People v Lee, 120 AD3d 1137, 992 NYS2d 429 (1st Dept 9/25/2014)

The court violated the defendant’s right of confrontation when it read to the jury the transcript of the codefendant’s guilty plea that included statements that inculpated the defendant. The prosecution’s claim that the Confrontation Clause did not apply because the defendant personally asked for the evidence to be introduced is unsupported where the defendant was represented by counsel throughout the case, the decision to introduce evidence is a strategic or tactical decision for his attorney, and defense counsel vigorously and consistently opposed the defendant’s request. The defendant’s unpreserved arguments that the court deprived him of due process by not giving him a chance to comment on the evidence before the jury and that the court improvidently exercised its discretion by untimely admitting the evidence after deliberations started are reviewed in the interest in justice and reversal is also warranted based on those claims. “New evidence may be admitted during jury deliberation only with ‘the utmost caution’” where there was a risk that the jury would put undue emphasis on the evidence “as a result of ‘the drama of discovery’ at the proverbial last minute” (Supreme Ct, New York Co)

Second Department

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Grand Jury (Procedure) (Witnesses)

Witnesses (Defendant as Witness)

People v Ellison, 119 AD3d 602, 988 NYS2d 691 (2nd Dept 7/2/2014)

The court “should have granted the defendant’s timely motion to dismiss the indictment on the ground that he was deprived of his right pursuant to CPL 190.50 to testify before the grand jury prior to its vote on the indictment” The defendant gave written notice by 3:37 pm on June 7, 2010 of his intent to testify, in response to the prosecution’s 190.50 notice indicating he “was ‘scheduled to testify’” on June 8 and must testify before 5:00 pm on that date; the prosecution presented the case on the afternoon of June 7; and there was nothing on the record indicating the defendant knew or had reason to know that the matter would be heard before June 8. (Supreme Ct, Kings Co)

Juveniles (Custody)

Non-Citizens (Immigration)

Matter of Gabriela Y.U.M., 119 AD3d 581, 989 NYS2d 117 (2nd Dept 7/2/2014)

The motion for appointment of Gabriela Y.U.M.’s uncle as her guardian until she reaches age 21 is granted. Additionally, the motion for special findings is granted and the court declares that she is dependent on the Family Court as she is unmarried, under the age of 21, and reunification with her remaining parent is not likely. This finding enables Gabriela Y.U.M. to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC 1101(a)(27)(J). The facts supporting the petition include: Gabriela Y.U.M.’s mother died when she was 6; her father stopped supporting her at 12 and did not allow her to live with him; she was housed in two abusive homes of extended family; and she finally made the arduous trip here through Guatemala and Mexico, surrendering to Immigration and being released to her uncle who has sheltered her since 2012. Both Gabriela Y.U.M. and her father consented to the guardianship. (Family Ct, Nassau Co)

Juveniles (Custody) (Foster Care)

Second Department *continued***Matter of Grayson J., 119 AD3d 575, 989 NYS2d 95
(2nd Dept 7/2/2014)**

The court in this Family Court Act article 10 proceeding erred “in excluding from evidence Investigation Progress notes ... indicating that a police officer had informed a caseworker that the officer had visited [the child] shortly after the alleged neglect took place and observed that the bruises on her right arm were ‘not serious’” The notes were admissible as business records “since the caseworker was under a duty to maintain a comprehensive case record ... and the officer had a duty to report his or her observations of her condition” The court also erred in precluding the mother from offering testimony from four witnesses as to the child’s motivation to lie. Lastly, the court erred in excluding “Family Service Progress notes” that contained information relevant to the child’s motivation to lie. The errors “deprived the mother of her right to present a defense and her right to a fair fact-finding hearing.” The matter is remitted for a new fact-finding hearing at which the court “should not summarily deny an application for [the child] to testify.” (Family Ct, Kings Co)

Juries and Jury Trials (Deliberation) (Qualifications)**People v Henry, 119 AD3d 607, 988 NYS2d 686
(2nd Dept 7/2/2014)**

The court’s failure to inquire of juror number seven as to the juror’s qualifications to continue to serve was error, and harmless error analysis does not apply because the record does not show whether the juror’s ability to be impartial had been affected. Defense counsel reported during trial that a juror had said to the defendant’s wife, “the evidence speaks for itself or they got themself[ves] into this situation.” Counsel also reported during deliberations that the juror had flirted with individuals connected to the defendants, and sought a mistrial. That the court reiterated to all jurors during trial that they were to keep an open mind and inquired as to whether any juror had changed their mind about being able to give the defendants a fair trial, and during deliberations, after denying the mistrial motions, advised the juror to avoid talking to people in the building he did not know was not sufficient. (Supreme Ct, Queens Co)

Discrimination (Age) (Race)**Sentencing (Pronouncement) (Resentencing)****People v Miller, 119 AD3d 613, 987 NYS2d 881
(2nd Dept 7/2/2014)**

When sentencing the defendant for rape, burglary, and robbery charges relating to two incidents, one in 2003 and one in 2006, the court erred in assuming that the defendant chose the two victims based on their ethnicity and age, as there was no evidence that the two were specifically targeted on those bases. At resentencing, the court must not consider whether the “offenses may have had ‘hate crime’ elements.” (Supreme Ct, Kings Co)

Discovery (Matters Discoverable) (Right to Discovery)**Forensics (Electronic Evidence)****People v Naran, 119 AD3d 615, 987 NYS2d 891
(2nd Dept 7/2/2014)**

The court should have compelled the prosecution “to provide the defendant with the opportunity to inspect the laptop computer that was seized from his home and for an adjournment of the trial, in order to permit the defense to examine that computer” where the defense made a timely demand under CPL 240.20(1)(f), the computer was central to the case against the defendant, and the prosecution expert testified at length about evidence extracted from it, and the prosecution offered no reason for failing to provide the defense access. (County Ct, Orange Co)

Trial (Trial Order of Dismissal)**People v Robinson, 119 AD3d 616, 988 NYS2d 689
(2nd Dept 7/2/2014)**

In the defendant’s trial resulting in conviction of endangering the welfare of a child, the court improvidently exercised its discretion by allowing the prosecution to reopen its case at the close of the defense case to present testimony that a nurse previously told the defendant of the dangers of shaking a baby. Evidence presented in the prosecution’s case in chief included police testimony that the defendant said “she might have ‘rocked’ the child too hard” and that she did not realize her conduct could hurt her child. The defendant unsuccessfully moved to dismiss the endangering charge based on lack of evidence of the required mens rea of knowingly engaging in conduct likely to injure the subject child. Reopening a case is only allowed in limited situations where it is needed to establish a missing element that is not seriously contested and is simple to prove, and it does not unduly prejudice the defense; this case does not fit within those narrow circumstances. (Supreme Ct, Kings Co)

Juveniles (Custody)**Matter of Soto v Cruz, 119 AD3d 592, 989 NYS2d 129
(2nd Dept 7/2/2014)**

Second Department *continued*

The father’s petition for custody of the subject child is granted and the matter is sent back for a determination of an appropriate visitation schedule for the mother. The court failed to address the best interest of the child under the totality of the circumstances where, among other things, the mother had forced her older child to take inappropriate photos of the mother; the subject child had missed a significant amount of school; and the subject child was not enrolled in therapy for over a year despite a court order to that effect. Additionally, the court failed to recognize that a custody award to the mother would deprive the child of the company of her sibling who lived with the father. (Family Ct, Kings Co)

Family Court (Evaluative Reports)

Juveniles (Custody) (Foster Care) (Grandparents)

Matter of Paige G., 119 AD3d 683, 989 NYS2d 135 (2nd Dept 7/9/2014)

The court failed to recognize the priority of biological kin in determining placement of a child. “When the decision to remove the child was made, the DSS was obligated to locate the child’s relatives, including her grandmother, and inform them of the pendency of the proceeding and of the opportunity for becoming foster parents or for seeking custody or care of the child...” The grandmother, a Florida resident, was in New York when the child was removed from her home and was awarded temporary custody of the child. But when the grandmother returned to her employment and home, DSS placed the child in foster care. The court then ordered DSS to complete a home study of the grandmother’s Florida residence pursuant to the Interstate Compact on the Placement of Children (ICPC). Despite the “favorable” results of the ICPC home study and the grandmother’s continuing ability and desire to provide for the child, the court denied the DSS petition to modify the placement order to place the child with the grandmother, concluding that it was in the child’s best interest to stay with the foster family for “stability.” The determination lacks a record basis, and the court placed undue weight on the grandmother’s return to Florida without sufficiently considering “that she had to return to her job, and was not permitted to take the child with her at that time.” (Family Ct, Suffolk Co)

Habeas Corpus (State)

Sex Offenses (Civil Commitment)

People ex rel Bourlaye T. v Connolly, 119 AD3d 825, 989 NYS2d 347 (2nd Dept 7/16/2014)

A court’s finding that there was probable cause to believe the petitioner, a sex offender, required confinement pending a trial on a Mental Hygiene Law article 10 petition for civil management provided an independent basis for his confinement, so that denial of his habeas corpus petition, arguing that his imprisonment was unlawful where he had not committed a crime and was complying with his parole conditions, was not improper. Article 10 does not distinguish between lawful and unlawful detention at the time civil management proceedings are instituted. (Supreme Ct, Dutchess Co)

Assault (Evidence)

Evidence (Sufficiency)

Reckless Endangerment (Elements) (Evidence)

People v Jakobson, 119 AD3d 815, 990 NYS2d 88 (2nd Dept 7/16/2014)

The evidence was legally insufficient to support the convictions of first-degree assault and first-degree reckless endangerment where the prosecution established that the defendant’s ability to drive was significantly impaired by drugs when his vehicle collided with the back end of another vehicle causing both to leave the roadway and flip over, but failed to present evidence that he acted with depraved indifference to human life, such as by speeding, traveling the wrong direction, disobeying traffic signals, or driving erratically before the crash. Those two counts must be dismissed. (Supreme Ct, Nassau Co)

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

People v John, 120 AD3d 511, 990 NYS2d 597 (2nd Dept 8/6/2014)

The court properly denied suppression of a gun box containing a handgun and ammunition discovered by police, who were lawfully in the apartment building, in a common storage area accessible to anyone in the building where the unlocked box, which bore no indication of who owned it, was marked “Smith and Wesson,” proclaiming its incriminating character and vitiating any expectation of privacy. (Supreme Ct, Kings Co)

Concurrence: Affirmance is required under *People v Velasquez* (110 AD3d 835), but in the absence of exigent circumstances, the police should have gotten a search warrant before seizing and searching the gun box. “[E]xceptions to the warrant requirement have swallowed the rule.”

[*Ed. Note: Leave to appeal was granted on Oct. 20, 2014 (24 NY3d 1005).*]

Second Department *continued***Accusatory Instruments****Speedy Trial (Statutory Limits)**

**People v Sant, 120 AD3d 517, 990 NYS2d 630
(2nd Dept 8/6/2014)**

The court erred in dismissing the indictment in its entirety for violation of the statutory right to a speedy trial where counts three through six of the indictment do not derive directly from the felony complaint lodged in February 2009 regarding a stolen all-terrain vehicle but to felony complaints filed on August 7, 2009 regarding two others. Those counts must be reinstated. (County Ct, Suffolk Co)

Evidence (Hearsay)

**People v Wilkinson, 120 AD3d 521, 990 NYS2d 270
(2nd Dept 8/6/2014)**

The court erred in admitting, under the past recollection recorded exception to the hearsay rule, grand jury testimony about inculpatory statements allegedly made by the defendant. There was a year between the time the witness claimed to have heard the statements and the witness's grand jury appearance, and the prosecution did not show that the witness's recollections were "fairly fresh when recorded or adopted," and "the witness's trial testimony was equivocal as to whether her testimony in the grand jury correctly represented her knowledge and recollection when given" (County Ct, Westchester Co)

Counsel (Competence/Effective Assistance/Adequacy)**Trial (Joinder/Severance of Counts)**

**People v Hall, 120 AD3d 588, 991 NYS2d 114
(2nd Dept 8/13/2014)**

The defendant was deprived of the effective assistance of counsel where his lawyer failed to move before trial to sever robbery charges from drug and resisting arrest charges stemming from events two months after the robbery, raising the issue only at sentencing. The charges were not joinable under CPL 200.20(2)(b) as the proof relating to the earlier offense was not material and admissible as to the later ones. The improper joinder may have tainted the jury's evaluation of the separate incidents; the jury could have inferred that the robbery was committed for a drug-related purpose. (Supreme Ct, Queens Co)

Misconduct (Prosecution)**Trial (Summations)**

**People v Benitez, 120 AD3d 705, 991 NYS2d 133
(2nd Dept 8/20/2014)**

The court should have sustained defense objections to prosecution comments in summation strongly implying that whoever provided information through a "tips" office that led police to look for a man at a sixth floor address in Queens had also implicated the defendant in this otherwise one-witness identification case. The police found no one matching the tip's description at the specific floor, but further information led to the defendant in front of the building, and upon arrest he said he lived in 6B. The court's ruling "'legitimized' the prosecutor's improper remarks" The evidence was not overwhelming; the conviction is reversed. (Supreme Ct, Queens Co)

Sentencing (Post-Release Supervision)**Sex Offenses (Civil Commitment)**

**Matter of State of New York v Claude McC.,
122 AD3d 65, 991 NYS2d 642 (2nd Dept 8/20/2014)**

"[T]he respondent was incarcerated on a 'related offense' when the State commenced this proceeding" for his civil management under the Sex Offender Management and Treatment Act (SOMTA) "and, thus, was a 'detained sex offender,' subject to civil confinement proceedings, at that time." The Attorney General did not commence a proceeding under Mental Hygiene Law article 10, the main component of SOMTA, after the respondent completed the maximum period of a determinate sentence for a sex offense involving a child and was released on postrelease supervision, but an arrest and guilty plea to possession of a stolen credit card followed and he was incarcerated for that crime; the postrelease supervision for the sex offense was suspended. The respondent was still subject to the sex offense order of commitment as he had not completed postrelease supervision on that offense, so it retained a connection to the incarceration for the non-sex offense, making the latter a "related offense" under Mental Hygiene Law 10.03(l). There was no impermissible aggregation of terms of imprisonment. (Supreme Ct, Kings Co)

Family Court (Evaluative Reports)**Juveniles (Custody)**

**Matter of Doyle v Debe, 120 AD3d 676, 991 NYS2d 135
(2nd Dept 8/20/2014)**

The court's denial of the mother's petition for custody and permission to relocate to Georgia was not supported by a sound and substantial record basis where the living conditions at the father's apartment require the child to share the only bedroom with her grandmother and two adult uncles also live in the apartment, the child has her

Second Department *continued*

own bedroom in the mother's three-bedroom house, the court-appointed forensic evaluator opined that the mother was the more appropriate custodial parent and expressed concern about the father's psychological state and its impact on his parenting abilities, and a custody agreement between the parties, which the father acknowledged executing, provided that the child would live with the mother in Georgia during the school year. That the child has resided with the father since 2008 should not be weighed against the mother, who filed a petition for sole physical custody that year. The mother established by a preponderance of the evidence that the move was in the child's best interests. (Family Ct, Queens Co)

Counsel (Competence/Effective Assistance/Adequacy)

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

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

[People v Casseus](#), 120 AD3d 828, 991 NYS2d 147 (2nd Dept 8/27/2014)

The defendant was not deprived of the effective assistance of counsel by his lawyer's failure to request submission of first-degree manslaughter as a lesser included offense of intentional murder, as "counsel's decision reflected a legitimate trial strategy of a reasonably competent attorney" where it was consistent with the defendant's statements that he fired his gun to break up a fight, not to kill or injure anyone. Instead, defense counsel requested submission of second-degree reckless manslaughter. (Supreme Ct, Richmond Co)

Dissent: The defendant's statements to police and his conduct as described by eyewitnesses strongly indicated he may not have intended to kill anyone but only to break up the fight. Defense counsel requested a first-degree manslaughter charge based on the affirmative defense of extreme emotional disturbance, which the court rejected. Counsel's rejection of the court's offer to instruct on first-degree manslaughter based on intent to inflict serious physical injury was not supported by any viable trial strategy; the jury asked for additional instructions about the charges and convicted the defendant after two days of deliberation.

Juveniles (Custody)

[Matter of Cisse v Graham](#), 120 AD3d 801, 991 NYS2d 465 (2nd Dept 8/27/2014)

While the dissent is correct "that the authority of the appellate court is as broad as that of the Family Court, and

that simple deference to the Family Court's findings would be an abdication of our authority ..., we may not substitute our judgment for that of the hearing court where its custody determination depended upon its assessment of the credibility of the witnesses" and its determinations and findings "are founded on a sound and substantial basis in the record" (Family Ct, Queens Co)

Dissent: The father failed to show a sufficient change of circumstances to require a modification of custody to transfer custody of the 13-year-old child, raised by the mother since birth, to the father. The court failed to give sufficient weight to the need for stability, the impact of uprooting the child from her current home, school, and activities, the court-appointed evaluator's comments that the child, approaching adolescence, might benefit from the "mother's wisdom and similar 'cultural' experience" of being "the product of two cultures," and that the child has her own bedroom at the mother's but would share a room with a four-year-old half-sister at the father's. The change in circumstances resulted primarily from the father's relocation, which created an unreasonable mid-week travel schedule for the child.

[*Ed. Note: Leave to appeal was granted on Nov. 20, 2014 (24 NY3d 1028).*]

Appeals and Writs (Preservation of Error for Review)

Juries and Jury Trials (Deliberation)

[People v Morris](#), 120 AD3d 835, 991 NYS2d 454 (2nd Dept 8/27/2014)

Where it is not clear from the record that defense counsel was aware that the court would have only the direct examination of a witness read to the jury upon its request for a readback of that witness's testimony, the failure to object to the handling of the jury's note does not preclude review. The court failed to apprise counsel of the content of the note and substance of the court's planned response in violation of CPL 310.30 and *People v O'Rama* (78 NY2d 270 [1991]). The cross examination of the witness, which was detrimental to the prosecution and relevant to the defense, had revealed that the witness was intoxicated when he talked to police on the night of the incident, his statement to police that the accuser had a dispute with an unknown male was true, and the accuser was holding a 40-ounce bottle of beer when arguing with the defendant, despite his testimony on direct that the accuser was empty-handed. Failure to include the cross-examination in the readback seriously prejudiced the defendant. (Supreme Ct, Queens Co)

[*Ed. Note: Leave to appeal was granted on Nov. 25, 2014 (24 NY3d 1045).*]

Second Department *continued***Appeals and Writs (Preservation of Error for Review)****Juries and Jury Trials (Deliberation)**

**People v Sydoriak, 120 AD3d 840, 991 NYS2d 478
(2nd Dept 8/27/2014)**

The court failed to comply with CPL 310.30 when the jury sent out several notes. As to a question about coming to a decision on some but not all counts, the court did not first make the contents known to counsel outside the jury's presence, but rather read the note into the record and immediately responded that while there were provisions in the law as to this, "we haven't gotten to the point at which those provisions have any relevance" The court proceeded similarly as to two other notes asking for repetition of certain definitions and readback of testimony. While the defendant failed to object, errors under *People v O'Rama* (78 NY2d 270 [1991]) are not subject to preservation requirements; it is not evident from the record that counsel knew how the court would respond but rather learned of the court's responses at the same time the jury did. The court did not provide counsel with meaningful notice and opportunity for input. (Supreme Ct, Queens Co)

[*Ed. Note: Leave to appeal was granted on Nov. 25, 2014 (24 NY3d 1047).*]

**Appeals and Writs (Preservation of Error for Review)
(Waiver of Right to Appeal)****Sentencing (Youthful Offenders)**

**People v Brooks, 120 AD3d 1255, 991 NYS2d 899
(2nd Dept 9/10/2014)**

The defendant's waiver of his right to appeal was invalid, and his claim that the court failed to consider youthful offender treatment is in any event not barred by such a waiver, by the guilty plea, or the failure to raise the issue at sentencing. As the defendant has served his sentence, the matter is remitted for a determination of whether youthful offender treatment should be afforded; the appeals from the judgment of conviction and denial of his CPL 440.10 motion to vacate the judgment are held in abeyance. (Supreme Ct, Kings Co)

Appeals and Writs (Waiver of Right to Appeal)

**People v Brown, 122 AD3d 133, 992 NYS2d 297
(2nd Dept 9/10/2014)**

"The purpose of this opinion is to encourage deliberation by the trial courts in the taking of appeal waivers, with the hope that the laudable purpose of such waivers

will be achieved, and that defendants will be benefitted through a better understanding of the significance of the fundamental right they are being asked to waive and the consequences of doing so." No particular litany is required, but a waiver is not valid if the colloquy suggests such waiver is mandatory; factors individual to a defendant such as age, experience, and background may be relevant; and the crux of the inquiry is "whether the record reflects a knowing, intelligent, and voluntary waiver" "[I]t would be best practice to provide all defendants with a deliberate and thorough on-the-record explanation of the nature of the right to appeal and the consequences of waiving that right" Here, there was no on-record discussion between the court and the defendant about waiving the right to appeal; the court merely deferred to counsel, who had not yet discussed the waiver, and there was no further discussion on the record after a written waiver was executed, so that the record contradicted the assertion in the written waiver that the court had informed the defendant of the nature of his right. While the waiver was invalid, no reduction in sentence is warranted. (Supreme Ct, Kings Co)

Discovery (Brady Material and Exculpatory Information)**Post-Judgment Relief (CPL § 440 Motion)**

**People v Wagstaffe, 120 AD3d 1361, 992 NYS2d 340
(2nd Dept 9/17/2014)**

Denial of the defendants' CPL 440.10 motions to vacate their kidnapping convictions is reversed, the motions are granted, and the indictment as to each defendant is dismissed; the court improvidently exercised its discretion by finding that the defendants could have, with due diligence, established a record for direct appeal before sentencing, where there is no indication that the documents upon which they rely were provided in time for the *Wade* hearing, and it is clear that the documents, when provided during jury selection, were interspersed with voluminous other documents without being specifically identified. There is a reasonable probability that timely disclosure and use of the documents, which constituted impeaching material as to the police witness upon whose testimony the case rested, would have changed the outcome of the defendants' trial. (Supreme Ct, Kings Co)

Arrest (Probable Cause)

**People v Delvillartron, 120 AD3d 1429, 992 NYS2d 363
(2nd Dept 9/24/2014)**

The court should have suppressed the defendant's statements because the police did not have probable cause to arrest him when they first encountered him in the driver's seat of a lawfully parked van, which was not running, a full avenue away from the site of a reported

Second Department *continued*

burglary, with two people who had been pointed out as the perpetrators in the back seat of his vehicle. That the defendant was fumbling with the van’s keys when the police opened his door was innocuous behavior. (Supreme Ct, Queens Co)

Concurrence in Part, Dissent in Part: The totality of the circumstances supports the probable cause finding.

Article 78 Proceedings

Double Jeopardy (Jury Trials) (Mistrial)

Matter of Gentil v Margulis, 120 AD3d 1414, 993 NYS2d 115 (2nd Dept 9/24/2014)

The respondents are prohibited from retrying the petitioner on counts two and three of the indictment at issue in this CPLR article 78 proceeding. After a trial, the jury said it was unable to reach a verdict on those counts; the court refused to accept a partial verdict as to count one. Later, a juror was discharged due to a family emergency and, as the defendant declined to consent to substituting an alternate, the court immediately declared a mistrial. In response to the defendant’s motion to dismiss, the court, finding it had erred in not taking a partial verdict, dismissed count one but found retrial of the other counts permissible. Because the court failed to explore all appropriate alternatives before declaring a mistrial, retrial is precluded. (Supreme Ct, Queens Co)

Arrest (Warrantless)

Search and Seizure (Entries and Trespasses)

People v Riffas, 120 AD3d 1438, 994 NYS2d 136 (2nd Dept 9/24/2014)

This matter being heard on reargument, the decision and order of Feb. 13, 2014 is vacated and this decision and order is substituted therefore. While the court properly denied the portion of the defendant’s motion that sought suppression of a post-arrest lineup identification, it should have suppressed the defendant’s post-arrest statements to law enforcement. The police violated the defendant’s Fourth Amendment rights when they crossed the threshold of his apartment, pulled him into the hall, and arrested him without a warrant. “The hearing court erred in determining that the defendant’s arrest did not violate his rights under *Payton v New York* (445 US 573 [1980]).” (Supreme Ct, Kings Co)

[*Ed Note: The now-vacated earlier decision was summarized in the June-July 2014 issue of the REPORT at p. 27.*]

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.

Identification (Informers) (Photographs) (Suggestive Procedures) (Wade Hearing)

Misconduct (Prosecution)

Trial (Summation)

People v Casanova, 119 AD3d 976, 988 NYS2d 713 (3rd Dept 7/3/2014)

The prosecutor’s remarks during summation “were so prejudicial in their cumulative effect that they operated to deny defendant his fundamental right to a fair trial” where the prosecutor repeated statements that impermissibly shifted the burden of proof to the defendant; denigrated the theory of defense; and vouched for the credibility of prosecution witnesses. Specifics include claims that nothing in the trial record showed that the defendant did not commit the crime or that one of the confidential informants had a motive to lie; to find the defendant not guilty, the jury would have to believe the police staged the controlled buy recordings and planted evidence, which went beyond fair comment on the defendant’s argument that the police work was sloppy; and defense counsel was “throwing mud” because the defendant did not have a reasonable excuse for the crime. Despite the defendant’s failure to properly challenge some of the statements, the issue is reviewed in the interest of justice. While the court sustained several objections and admonished the prosecutor *sua sponte* in other instances, “many other improper remarks passed without objection, and few curative instructions were given.”

The court erred in finding that the prosecution introduced sufficient information to establish that the confidential informant’s identification of the defendant in a photo array was confirmatory where the informant did not describe the defendant with sufficient detail to show that he was so well acquainted with the defendant that he was not subject to police suggestion. (Supreme Ct, Albany Co)

Evidence (Hearsay) (Newly Discovered)

Post-Judgment Relief (CPL § 440 Motion)

People v Sheppard, 119 AD3d 986, 989 NYS2d 168 (3rd Dept 7/3/2014)

The court erred in denying, without a hearing, the defendant’s CPL 440.10 motion to vacate his weapon pos-

Third Department *continued*

session conviction based on newly discovered evidence where the defendant presented affidavits of his mother and a private investigator describing statements made to them by Jameel Melton, the roommate of the person who was shot and killed with the gun the defendant was convicted of possessing. The defendant was acquitted of charges related to the decedent's killing. The police had found a holster, ammunition, and a user's manual for a handgun, which had Melton's fingerprints on it, in Melton's bedroom and Melton admitted that he found the gun in his closet and handled it before his roommate was shot; Melton did not testify at trial. The mother's affidavit stated that Melton told her he owned the gun, the defendant did not possess or know about the gun, and he would testify to that effect if his attorney on an unrelated charge approved. The investigator's affidavit stated that, during a meeting with Melton and his attorney, Melton again said that the defendant had nothing to do with the gun and expressed a willingness to testify. But the prosecution claimed that Melton's lawyer said he was unwilling to talk with them and did not want to be involved in the defendant's case. The competing claims created issues of fact regarding Melton's availability and whether Melton's post-trial statements were declarations against his penal interest. A more lenient standard of reliability is applied to statements tending to exculpate a criminal defendant than to inculpatory statements; "an exculpatory declaration is admissible if competent evidence 'establishes a reasonable probability that the statement might be true'" Because Melton was the only person connected by forensics to the gun, he made hearsay statements while his attorney was present, and there was "relatively minimal evidence supporting defendant's conviction," a hearing is required. (County Ct, Tompkins Co)

Counsel (Competence/Effective Assistance/Adequacy) (Duties)**Juveniles (Custody) (Right to Counsel) (Visitation)****Matter of William O. v Michele A., 119 AD3d 990, 988 NYS2d 299 (3rd Dept 7/3/2014)**

In this custody proceeding, the petitioner father was denied the effective assistance of counsel where his attorney failed to object to the court's improper use of "the attorney for the children as both an investigative arm of the court and as an advisor" and did not request a fact-finding hearing about whether the father needed sex offender treatment and the best interests of the children. "We note that, although the father was represented by one institutional provider, five different attorneys appeared on his behalf at the nine court appearances. The individual attorneys were not always familiar with his case or

prepared to represent him. At several appearances, the father spoke extensively while his counsel largely remained silent." Also, the court erred in denying the father's custody petition and continuing supervised visitation without a hearing, after accepting information from the attorney for the children that was based on non-record evidence that the father was an untreated sex offender, despite the father's claim that the information was not accurate, and without any evidence that the lack of treatment would be detrimental to the children. (Family Ct, Chemung Co)

Appeals and Writs (Preservation of Error for Review)**Guilty Pleas****Speedy Trial (Due Process) (Waiver)****People v Wright, 119 AD3d 972, 989 NYS2d 180 (3rd Dept 7/3/2014)**

The prosecution's plea offer, which was expressly conditioned on the defendant's withdrawal of his constitutional speedy trial motion where the hearing on that issue was still pending and would expire as soon as the hearing resumed, is "expressly prohibited as 'inherently coercive'" Although the defendant did not move to withdraw his plea on the grounds that his plea was coerced and he waived his right to appeal, "this case involves a 'mode of proceedings error for which preservation is not required'" Where the record is insufficient to determine the constitutional speedy trial motion, the matter must be remitted for further proceedings. (County Ct, Broome Co)

Juries and Jury Trials (Challenges) (Qualifications) (Selection)**People v Young, 119 AD3d 970, 988 NYS2d 720 (3rd Dept 7/3/2014)**

The court erred in denying the defendant's challenge for cause of a prospective juror who "stated that he was 'very uncomfortable' about the alleged use of a firearm during the commission of the charged crimes" and, in response to a question from defense counsel, said his discomfort might affect his ability to keep an open mind. The court failed to conduct a further inquiry of the juror to obtain assurances on the record of his impartiality. "Absent such assurances, and given the fact that the defendant exhausted his peremptory challenges, the denial of defendant's challenge for cause constitutes reversible error" (County Ct, Schenectady Co)

Juveniles (Adoption) (Parental Rights)

Third Department *continued*

Matter of Bentley XX., 121 AD3d 209, 989 NYS2d 544 (3rd Dept 7/10/2014)

The respondent father executed a conditional judicial surrender of his son that was conditioned on adoption by Datus, the child’s maternal grandfather, and his partner Tanya, but before the adoption, the couple separated and Datus continued pursuing the adoption on his own. The court “misconstrued the amended provisions [of Social Services Law 383-c] and erred in granting the petition” for modification of the judicial surrender to allow Datus to adopt the child. “[T]he petition contemplated by Social Services Law § 383-c(6)(c) and Family Ct Act § 1055-a(a) is solely for the purpose of bringing the matter before the court ‘to review such failure’—namely, to permit the court to determine whether there has, in fact, been a substantial failure of a material condition; petitioner was not entitled to seek a modification of the surrender instrument over respondent’s objections, and Family Court erred in granting petitioner such relief” Because the 2002 statutory amendments did not address what a biological parent can do when there is a substantial failure of a material condition, the procedure set forth in *Matter of Christopher F.* (260 AD2d 97 [3rd Dept 1999]) is still valid and the surrendering parent may apply, either by petition or motion, for revocation. The court should have granted the father’s oral motion for revocation of the conditional surrender, returning the parties to their original positions. (Family Ct, St. Lawrence Co)

Juveniles (Parental Rights) (Permanent Neglect)

Matter of Marissa O., 119 AD3d 1097, 989 NYS2d 534 (3rd Dept 7/10/2014)

The court properly dismissed the permanent neglect petitions, holding that the petitioner failed to prove that the respondent mother failed to substantially plan for the future of three of her children. “While it must be recognized that [the mother] initially had some difficulty with adjusting to petitioner’s supervision, ... she attended all of the visits with her children, all of the permanency planning meetings, and participated in all recommended counseling and treatment.” During the two years before the fact-finding hearing, the mother had remained employed at the same job and found an apartment without agency assistance. Importantly, treatment providers for both the mother and the children testified that the mother, “over time, was able to acknowledge the role she played in allowing her children to be abused [by their older sibling].” (Family Ct, Saratoga Co)

Juveniles (Parental Rights) (Permanent Neglect)

Self-Incrimination (Scope)

Matter of Asianna NN., 119 AD3d 1243, __ NYS2d __ (3rd Dept 7/24/2014)

The court correctly found that the respondent mother had permanently neglected her two children, both of whom had been adjudicated to be abused based on the mother’s consent without admission after her conviction of endangering the welfare of a child and her boyfriend’s conviction of reckless assault of the younger child, where the record shows that the petitioner made the necessary diligent efforts, but could not provide individualized services as a result of the mother’s continual refusal to undergo a psychological evaluation and family assessment before the criminal prosecution was resolved.

The petitioner also proved that the mother failed to plan for her children’s future by delaying the evaluation, not meaningfully engaging in all offered services, and failing to accept responsibility for and gain insight into the circumstances that led to these proceedings. The privilege against self-incrimination applies in family court proceedings only when a direct answer by a witness presents a substantial and real danger of criminal prosecution; it was not clear that the mother would have had to make prejudicial admissions during the assessment where the inquiries were said to relate to the need for services, not determinations of culpability. Further, courts may draw negative inferences from the exercise of the privilege and the parents’ rights are subordinate to the protection of the children.

The court erred in denying a suspended judgment as to the older child, who was in the maternal grandparents’ custody, where there was no testimony about whether the mother could not satisfy needs of that child or that the grandparents were better able to do so and the grandmother testified that the mother saw the child almost daily, acted as a parent when they were together, and had a close, loving mother/child relationship. (Family Ct, Albany Co)

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

Matter of Hamilton v New York State Division of Parole, 119 AD3d 1268, 990 NYS2d 714 (3rd Dept 7/24/2014)

The Parole Board’s decision denying the petitioner’s request for parole release is upheld where “the Board properly considered the necessary factors in denying petitioner’s request for parole release and founded its determination upon the facts of this particular case.” The Board has the authority to place greater emphasis on the seriousness of the petitioner’s crime, felony murder of an off-duty police officer, than on his extensive rehabilitative successes over the past 30 years and other factors set forth in Executive Law 259-i. (Supreme Ct, Albany Co)

Third Department *continued*

Concurrence: The Board “gave appropriate consideration to all of the relevant statutory factors and further, did not abuse its discretion in emphasizing the nature of petitioner’s crime in denying his request for parole”

Dissent: (Peters, JP) “[T]he Board’s decision was based upon significant errors of fact and the consideration of improper factors.” One of the two commissioners who voted against release erroneously stated that the petitioner was the shooter and that he knew the decedent was a police officer and also made troubling comments that because the petitioner initially failed to cooperate with police, neither of the two coconspirators were ever charged and the petitioner is the only person who could be held accountable for the crimes, implying that the petitioner must continue to be punished. Even without those errors, the Board’s decision was irrational since there was no evidence of a reasonable probability the petitioner would commit further crimes nor that his release would be incompatible with society’s welfare and undermine respect for the law; the court’s role “is to make some measure of substantive evaluation to assure that justice is served.”

Dissent: (Garry, J) “[O]ur own Court has established an overbroad rule in appeals from denials of parole” and by adopting this standard “we have then wholly abdicated our critical judicial function, and the courthouse doors are closed.”

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

People v Leonard, 119 AD3d 1237, 991 NYS2d 159 (3rd Dept 7/24/2014)

The court erred in denying the defendant’s motion to suppress the heroin found in his car during a search after the police arrested him on an active warrant where the prosecution failed to show that the decision to impound the car was made based on standardized police procedure and that the inventory search was reasonable. While the prosecution’s failure to offer a copy of the State Police procedure manual into evidence is not alone dispositive, the prosecution also failed to establish that there was a standardized procedure, that it was reasonable, and that it was followed in this case. The testimony showed that the impound inventory was incomplete, leaving out money, CDs and a CD changer, and a GPS because the trooper, who completed the inventory form later, from memory, found them of no value. And there was insufficient proof that impounding the defendant’s car was the only option available. (County Ct, Washington Co)

Dissent: The officers’ testimony about the inventory search manual received during basic training, what the

manual requires, and how the search was done in this case was sufficient to show that they were following a reasonable, standardized procedure when conducting the inventory search.

Sentencing (Credit for Time Served) (Split Sentences)

People v Aleman, 119 AD3d 1319, 990 NYS2d 416 (3rd Dept 7/31/2014)

The defendant’s sentence, one year in jail and five years’ probation, was not illegal. While such a split sentence is generally illegal, when the court sentenced the defendant, who had served one year in jail at the time of his plea, it stated that the jail sentence was for time served. “While County Court should ‘have expressly imposed a sentence of six months in jail which was satisfied by the time the defendant had been held pending his conviction,’ its sentence amounted to one of time served that did ‘not retroactively render [defendant’s] sentence illegal’” (County Ct, Saratoga Co)

Sex Offenses (Sex Offender Registration Act)

People v Izzo, 120 AD3d 860, 990 NYS2d 736 (3rd Dept 8/7/2014)

The court properly classified the defendant as a level II sex offender under the Sex Offender Registration Act (SORA). The court appropriately assessed 30 points under risk factor 3 for three or more victims where, as to the third one, the “defendant’s plea allocution and the relevant grand jury testimony—discloses sufficient factual detail to establish ... that defendant indeed touched himself in a sexual manner while in contact with [her] via a webcam.” And the assessment of 20 points under risk factor 7 (relationship between offender and victim) was supported where, although the victims could not be considered strangers given their online contact with the defendant, “there is clear and convincing evidence ... that defendant engaged in ‘grooming’ behavior by cultivating a relationship with each of [them] for the purpose of satisfying his sexual desires.” Although the court’s decision did not reference the defendant’s request for a downward departure, its findings provide an adequate basis for appellate review and the defendant failed to show that such a departure was warranted. (County Ct, Chemung Co)

Dissent: The accuser’s grand jury testimony that the defendant touched himself in his genital area, over his clothing, without more is insufficient to show prohibited sexual conduct with that victim. And the record does not show that the defendant, who was said by experts to function socially at roughly the age level of the accusers, engaged in “emotional manipulation, undue influence or other customary indicia of grooming conduct.” When

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those points are deducted, the defendant is at the low end of level II and his downward departure request “merits close and careful review.”

[*Ed. Note: The case is currently pending before the Court of Appeals based on the two-judge dissent.*]

Narcotics (Diversion) (Drug Treatment) (Penalties)

**[People v Cooney](#), 120 AD3d 1445, 991 NYS2d 676
(3rd Dept 9/4/2014)**

The court did not abuse its discretion in terminating the defendant from the judicial diversion program (JDP) upon her arrest for and admission to committing second-degree criminal trespass where, although the defendant was presumptively ineligible to participate in the JDP based on the original attempted second-degree burglary charge and her prior violent felony offense conviction, which had resulted in a six-year prison sentence, she was allowed to participate based on prosecution consent, but was then arrested for conduct that was very similar to the circumstances of her prior offenses. (County Ct, St. Lawrence 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.

Counsel (*Anders* Brief)

**[People v Cruz](#), 119 AD3d 1389, 988 NYS2d 518
(4th Dept 7/3/2014)**

Appellate counsel having sought to be relieved “alleging that no issues are presented that would merit relief on appeal,” and review of the record revealing “that nonfrivolous issues exist as to the sufficiency of the evidence at trial and as to whether defendant was deprived of the opportunity to testify before the grand jury,” counsel is relieved and new counsel assigned to brief these and any other issues that review of the record may disclose. (County Ct, Cattaraugus Co)

Appeals and Writs (Waiver of Right to Appeal)

Sentencing (Hearing) (Pre-sentence Investigation and Report) (Pronouncement)

**[People v Kolata](#), 119 AD3d 1376, 989 NYS2d 223
(4th Dept 7/3/2014)**

The defendant was denied due process where the court imposed a term of imprisonment rather than any of the lesser alternatives that had been previously mentioned solely because the presentence report said that the defendant had been arrested and charged with a violation and a misdemeanor. The court failed to determine whether the information on which imposition of sentence was based was reliable and accurate and if there was a legitimate basis for the arrest, only inquiring “what was happening” with the new matter, to which defense counsel, who did not represent the defendant on the new charges, responded that it was still pending. This due process challenge was not encompassed by the defendant’s waiver of the right to appeal. (County Ct, Cattaraugus Co)

Counsel (*Anders* Brief)

**[People v Rockwell](#), 119 AD3d 1389, 988 NYS2d 517
(4th Dept 7/3/2014)**

Appellate counsel having sought to be relieved on the ground that no nonfrivolous issues exist for appeal, and review of the record revealing “that a nonfrivolous issue exists as to whether the court erroneously imposed a more severe sentence than that bargained for without affording defendant the opportunity to withdraw his plea,” counsel is relieved and new counsel assigned to brief this issue and any others disclosed by review of the record. (County Ct, Livingston Co)

Due Process

Sentencing (Excessiveness)

**[People v Angona](#), 119 AD3d 1406, 989 NYS2d 746
(4th Dept 7/11/2014)**

The defendant’s 25-year sentence was not unduly harsh or severe where he faced the possibility of consecutive sentences aggregating 100 years, reduced pursuant to Penal Law 70.30. While he self-reported the crimes, he then recanted, claiming his inculpatory statements were fabricated and that police had beaten him. He was not penalized for exercising his right to a jury trial. His other contentions are also without merit, including those relating to grand jury instructions, denial of permission to file a late notice of alibi, counsel’s failure to challenge a juror who said that as a grandmother she might sympathize with the accuser, and prosecution misconduct. (County Ct, Oswego Co)

Dissent in Part: While the defendant’s conviction of four counts of first-degree sodomy should stand, the sentence imposed was unduly harsh and severe where the

Fourth Department *continued*

defendant was 16 years old at the time of the offense, he self-reported the crimes eight years later, and the prosecution made plea offers that would have included only jail time and probation or, later, only a two-year sentence. The 25 years of imprisonment plus post release supervision is “too extreme a penalty for defendant’s exercise of his constitutional right to a jury trial’”

Due Process (Fair Trial)**Endangering the Welfare of a Child****Evidence (Sufficiency)****Sentencing (Orders of Protection)**

[People v Cooke](#), 119 AD3d 1399, 989 NYS2d 753 (4th Dept 7/11/2014)

The evidence is legally insufficient to support the defendant’s conviction of count eight, endangering the welfare of a child. As that is the only crime charged involving the older of the two accusers, the part of the order of protection issued in favor of that accuser must be vacated. While the defendant failed to preserve that challenge to the order of protection, it is reviewed as a matter of discretion in the interest of justice.

The defendant expressly consented to restraint by a stun belt throughout trial, waiving his contention that he was denied a fair trial because the court made no findings of fact warranting such restraint. (County Ct, Steuben Co)

Concurrence: “I concur in the result on the constraint of *People v Schrock* (108 AD3d 1221 [2013]” Application of a stun belt to a defendant, without a court’s knowledge or input, should be an unwaivable flaw.

[*Ed. Note: The Court of Appeals affirmed this decision on Feb. 24, 2015 (2015 NY Slip Op 01557) (Summary on p. 28).*]

Evidence (Sufficiency) (Uncharged Crimes)**Identification (Eyewitnesses)****Larceny (Elements) (Evidence) (Grand Larceny) (Value)****Misconduct (Prosecution)**

[People v Walker](#), 119 AD3d 1402, 989 NYS2d 756 (4th Dept 7/11/2014)

The evidence was legally insufficient to support the conviction of fourth-degree grand larceny under count four where the prosecution failed to establish that the value of the property exceeded \$1,000; only conclusory statements and rough estimates of the value of the jar of coins and the television were produced. The evidence was also insufficient as to the fourth-degree grand larceny

charge under count six, where the prosecution failed to prove, as alleged, that the Bank of America credit card was stolen by the defendant.

As to other counts, the court erred in admitting evidence of an uncharged burglary to prove the defendant’s identity as the perpetrator of the burglary and petit larceny charges here, as they were not so unique as to be subject to the modus operandi theory. Eyewitness identification testimony was improperly admitted where the prosecution failed to give the statutory notice required under CPL 710.30. In light of the need for a new trial, the defendant’s prosecutorial misconduct claim is not addressed, but “the prosecutor’s pervasive misconduct during summation” – vouching for the credibility of witnesses, suggesting the defendant was a liar, that his testimony was “smoke and mirrors,” and other improper denigrations of the defense, is noted with disapproval. (County Ct, Onondaga Co)

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

[People v Mobley](#), 120 AD3d 916, 991 NYS2d 193 (4th Dept 8/8/2014)

The court erred by denying the defendant’s motion to suppress a gun where officers who received a radio call from a fellow officer that the defendant “had made movements towards his right side,” but lacked any indication that a weapon was present, approached the defendant and after seeing him put an object in his back pants pocket, grabbed his hands, patted the pocket, felt a hard object, and removed a cell phone, and then conducted a further pat down that revealed the outline of the gun in the defendant’s front pocket. There was no evidence the officer reasonably suspected he was in danger. (Supreme Ct, Monroe Co)

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

[People v Myhand](#), 120 AD3d 970, 991 NYS2d 222 (4th Dept 8/8/2014)

Consideration of all the facts and circumstances shows that the search warrant was supported by probable cause in this first-degree possession of a controlled substance case. The issue is not probable cause to believe the defendant was the one selling cocaine, but whether the information was sufficient to support a reasonable belief that an offense had been or is being committed or that evidence of a crime may be found in a certain place. The warrant application set out the defendant’s prior drug convictions, police experience with the confidential informant, a controlled purchase of drugs from the defendant by the informant at the defendant’s former residence, and

Fourth Department *continued*

two drug purchases, arranged by the informant, by an “unwitting participant” from the defendant at his new residence. No hearsay from the informant or other participant was necessary to sustain the warrant, as officers described searches of the informant before and after the purchases, ensuring he did not have drugs before the sale, and continuous observation of the informant and the other participant. A remote possibility that the other participant had drugs beforehand does not make the basis for the warrant insufficient as it was more probable than not that the cocaine the informant received came from inside the defendant’s house. Even if the hearsay needed to be considered, what was contained in the warrant application met the *Aguilar-Spinelli* test. (County Ct, Monroe Co)

Appeals and Writs (Judgments and Orders Appealable)

Narcotics (Treatment Programs)

Records (Sealing)

[People v M.E.](#), 121 AD3d 157, 991 NYS2d 232
(4th Dept 8/8/2014)

“[C]riminal records are eligible for conditional sealing under CPL 160.58 even if they relate to convictions that predate the statute.” After a 1996 guilty plea to fourth-degree possession of drugs, the defendant served her three-year conditional discharge without incident, successfully completed an inpatient drug treatment program, and by all accounts, turned her life around. When she sought to “conditionally seal” her criminal records in 2013, the prosecution took no position, but noted that the defendant was eligible; the court denied the motion believing that the statute did not apply to records entered before its effective date. The appeal, which is governed by civil appellate rules in the CPLR, not CPL article 450, is properly before the court. Applying the statute here does not make the statute retroactive; the statute “creates a mechanism for restricting future access to existing records.” (County Ct, Chautauqua Co)

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

Sentencing (Post-Release Supervision)

[People v Davis](#), 120 AD3d 1530, 992 NYS2d 654
(4th Dept 9/26/2014)

As the prosecution correctly concedes, the defendant’s plea-based conviction must be reversed where the court failed to advise him that a period of post-release supervision would be imposed; this issue survives his valid waiver of the right to appeal. (County Ct, Erie Co)

Defenses (Affirmative Defenses Generally)

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

[People v Dukes](#), 120 AD3d 1597, 993 NYS2d 411
(4th Dept 9/26/2014)

The court erred in accepting the defendant’s guilty plea “without ensuring that he was making an informed decision to waive a potential affirmative defense to the robbery charge.” Statements made by defense counsel and the defendant at the plea proceeding indicated that the defendant had used only a BB gun, not a handgun as he told police, and defense counsel said at the beginning and end of the colloquy that the defendant was waiving the affirmative defense available under Penal Law 160.15(4) regarding firearms not readily capable of causing death or serious physical injury, but the court did not question the defendant as to the potential defense. (Supreme Ct, Monroe Co)

Counsel (*Anders* Brief)

[People v Ford](#), 120 AD3d 1614, 992 NYS2d 916
(4th Dept 9/26/2014)

Appellate counsel having sought to be relieved based on a lack of meritorious issues for appeal, and review of the record revealing nonfrivolous issues regarding “the assessment of the risk factor points challenged by defendant, and the application of an automatic override for a prior felony conviction of a sex crime” in the determination of the defendant’s risk level classification, counsel is relieved and new counsel assigned to brief those and any other issues disclosed by review of the record. (County Ct, Wayne Co)

Counsel (*Anders* Brief)

[People v Mead](#), 120 AD3d 1615, 992 NYS2d 916
(4th Dept 9/26/2014)

Appellate counsel has sought to be relieved, but “[o]ur review of the record reveals a nonfrivolous issue regarding the validity of defendant’s plea, i.e., whether there was sufficient evidence of guilt in the record to support the *Alford* plea” Counsel is relieved and new counsel assigned to brief this issue and any others that review of the record may disclose. (County Ct, Genesee Co)

Contempt (Elements)

Evidence (Sufficiency) (Weight)

Fourth Department *continued*

**[People v Ubbink](#), 120 AD3d 1574, 993 NYS2d 406
(4th Dept 9/26/2014)**

The defendant's challenge to the legal sufficiency of the evidence is preserved, and as to the first-degree criminal contempt conviction, has merit where the record does not show that his actions when he went to the accuser's home "constituted an actual or implied threat of physical harm to" the accuser, even if he knew or should have known that the accuser wanted no contact with him and could well be upset by the visit. The evidence does support the lesser included offense of second-degree criminal contempt, as the defendant intentionally disobeyed an order of protection. The defendant's claims about the sufficiency and weight of the evidence as to third-degree stalking are rejected. (Supreme Ct, Onondaga Co)

Accusatory Instruments (Duplicious and/or Multiplicious Counts)

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

**[People v Wilson](#), 120 AD3d 1531, 993 NYS2d 200
(4th Dept 9/26/2014)**

The defendant's attempted second-degree murder conviction rendered Sept. 7, 2007, is reversed, that count is dismissed, and sentences on the remaining counts are directed to run concurrently because the trial testimony rendered the attempted murder charge duplicitious; the jury could have convicted the defendant of an unindicted attempted murder. The same issue and result appear in the co-defendant's appeal in *People v Boykins* (85 AD3d 1554 [2011]), and the issue is reached here despite lack of preservation. The defendant's contention that the court erred in refusing to sever his trial from that of his codefendant is rejected where both were charged with principal and accomplice liability, both gave alibi notices, and both knew the eyewitnesses prior to the incident, giving no apparent basis for concluding that they would have been in antagonistic positions one to the other. (Supreme Ct, Monroe Co) ⚖

Defender News (*continued from page 11*)

with systemic racial disparities—or blatant individual racism—affecting their clients and cases.

- [Reports from the Center for Law and Justice](#) in Albany detail the disproportionate impact of criminal and juvenile justice on people of color in the Capital Region and on the effects of "arrest sweeps" conducted by authorities.
- ["Race and Prosecution in Manhattan,"](#) by the Vera Institute of Justice, indicates that "factors most directly relevant to the legal aspects of the case ... were those that best predicted case outcomes ... race remained a

statistically significant independent factor in most of the discretion points that were examined"

Resources for Family Court Practice

Public defense lawyers practicing in family court may find information on a number of resource sites. And of course attorneys can call the Backup Center to seek information from Family Court Staff Attorney Lucy McCarthy.

- The [Child Welfare Court Improvement Project](#) webpage of the Unified Court System's website offers a variety of materials, including some provided by Margaret Burt, who has provided training at NYSDA CLE events in the past. The large amount of material on this page will require some time to sort through and absorb.
- The [Become a Foster Parent](#) webpage of the Office of Children and Family Services' website, while geared to the public, offers a menu of information that attorneys practicing in family court need to know.
- Several **New York City public defense providers** maintain online resources that may be helpful to other lawyers and clients. These include the Center for Family Representation's [News and Blog](#); the Brooklyn Family Defense Practice's ["Know Your Rights Brochure"](#); and the Bronx Defenders [Family Defense Practice](#) page.
- Nationally, the [Center on Children and the Law](#), of the ABA, offers a variety of materials and news, as does the ABA's [National Child Welfare Resource Center on Legal and Judicial Issues](#).

Materials on Ethics

Keeping up with the substantive and procedural law affecting clients does not complete a lawyer's required knowledge. Ethical constraints on defenders, prosecutors, and others may also affect what should—or should not—be done in a particular case. Two relatively new resources on ethics are noted below.

- The [New York Legal Ethics Reporter](#), launched by the Legal Ethics Forum this year, "publishes three to five feature articles each month focusing on current issues in the field of ethics and professionalism." The online publication aims to continue the tradition of the former *New York Professional Responsibility Report*.
- The [National Association for Public Defense Ethics Counselors](#) provide a resource on the unique issues faced by attorneys offering mandated representation. They issued NAPD's first Formal Ethics Opinion, regarding the confidentiality of client information when defense teams include non-legal professionals such as social workers who may be subject to mandatory reporting regulations. An ethics page is also being developed on MyGideon, the library for NAPD members. ⚖

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