NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

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Defender News

Supreme Court Addresses Dog Sniffs & Confrontation Near Term's End

Among the U.S. Supreme Court decisions issued in the last two months of the term were opinions addressing delays in traffic stops to allow trained drug dogs to sniff a vehicle and the constitutionality of admitting into evidence at trial a child's statement to teachers. Summaries of these and other cases may be found in the Case Digest section beginning at p. 12.

Police May Not Extend a Traffic Stop to Secure a Drug Dog Sniff

Ten years ago, in *Illinois v Caballes* (543 US 405 [2005]), the Court held that conducting a dog sniff of a vehicle during a lawful traffic stop is not unreasonable under the Fourth Amendment. The Court recently placed limits on such encounters in *Rodriguez v United States* (135 SCt 1609 [4/21/2015]). The Court found that detaining a driver for more time than "needed to handle the matter for which the stop was made," as where the officer waited for back-up before conducting a dog sniff after the driver refused to consent to it, "violates the Constitution's shield against unreasonable seizures." Efforts to detect ordinary criminal wrongdoing, not intended to ensure officer safety during a stop, are not related to the reason for the stop, so extending it for such purposes is impermissible absent reasonable suspicion. Three dissenting opinions were filed in the case.

Admission at Trial of Statement by Child to Teachers Not a Confrontation Violation

Out-of-court statements made by a three-year-old to his teachers about injuries he said were inflicted by the defendant were not testimonial; their admission at trial under a state rule of evidence did not violate the Confrontation Clause, the nation's High Court said in *Ohio v Clark* (135 SCt 2173 [6/18/2015]). The decision observed that statements to persons who are not law enforcement officers "are much less likely to be testimonial than statements to law enforcement officers," and that statements by very young children will rarely implicate confrontation. The Court noted the informal and spontaneous nature of the discussion at issue, aimed at determining whether it was safe to release the injured three-year-old to his guardian at the end of the day and whether any other child was at risk, and the lack of anything in the questioning to indicate that the child's statements would be used to prosecute or punish the abuse. A state mandatory reporting statute alone does not convert a conversation about abuse into a law enforcement mission, the opinion states. Justices Scalia and Thomas wrote concurring opinions.

Cursing Police Not Probable Cause for Disorderly Conduct Arrest

The Court of Appeals needed only a memorandum opinion to explain that police did not have probable cause to arrest, for disorderly conduct, a man who shouted obscenities at them in a subway station. Unlike typical probable cause determinations that are beyond review in the State's high court because they involve mixed questions of law and fact, this case offered a record lacking any support for the motion court's determination that the rant constituted disorderly conduct. The defendant's motion to suppress an alleged "gravity knife" found on him at arrest should have been granted. The website for the Center for Appellate Litigation, which represented Gonzalez, indicates that the knife was a work tool purchased at Home Depot. His conviction of third-degree criminal possession of a weapon was reversed. *People v Gonzalez*, 2015 NY Slip Op 05515

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(6/25/2015). Summaries of this case and others issued by the Court of Appeals before its summer break appear in the Case Digest section of this issue.

Burglary as a Predicate for Felony Murder, Youthful Offender Determinations, and More

The following are among the other cases decided by the Court of Appeals from May 5 through July 1:

- *People v Henderson*—burglarizing a residence intending to assault someone, then killing them, constitutes felony murder based on the burglary;
- *People v Middlebrooks*—even if a defendant convicted of an armed felony who would be eligible for youthful offender status under one or more provisions of CPL 720.10(3) fails to request a determination as to those factors, the court must make the determination;
- *Matter of Soares v Carter*—a trial court may not order the prosecution to call witnesses at a hearing or enforce such an order through its contempt powers; and
- *Matter of Trenasia J.*—record evidence supports a finding that the uncle by marriage of the subject child was a person legally responsible for her.

Legislative Session Ends—What Did and Didn't Happen?

Discussion of possible criminal justice reforms has received a lot of attention in New York and nationwide in recent months. Despite the many proposals, initiatives, meetings, and speeches, actual changes have been few and far between. As noted in the last issue of the *REPORT*, grand jury reforms and raising the age of criminal responsibility were not addressed in the state budget. And the legislative session ended without any new bills on these topics, though some incremental changes are being made.

Raise the Age

The Governor, Senate, and Assembly were unable to reach agreement regarding juvenile justice reforms, particularly raising the age of criminal responsibility. Discussions about large scale reform are expected to continue, but in the meantime, Governor Cuomo has announced that he intends to direct the state Department of Corrections and Community Supervision (DOCCS) to move all 16- and 17-year olds who are in its correctional facilities into one or more prisons designed and managed by DOCCS and the Office of Children and Family Services. No specific information about the plan, including where the prison(s) will be located, whether DOCCS will build new facilities, and the timeline, has been released.

Around the same time as that announcement, DOCCS proposed new rules establishing juvenile separation units and amending rules requiring hearing officers to consider an inmate's age as a mitigating factor in disciplinary hearings where the inmate is under 18 at the time of the incident. The proposed new rule (7 NYCRR Part 321) defines a juvenile separation unit as:

> a separate housing location within a correctional facility designed for inmates under eighteen years of age who, due to their behavior, would otherwise be serving a disciplinary confinement penalty in a SHU [special housing unit] or in another housing unit. The unit is designed to meet the educational and other needs of the inmates, while maintaining adequate safety and security on the unit, with a goal of expediting their transition back to general population and encouraging their interactions with others.

Notice of the proposed rulemaking appeared in the June 17, 2015 issue of the *State Register*. It is not clear how these rules, if adopted, would fit with the Governor's plan.

Settlement of Rikers Class Action Suit to Impact Placement of Juveniles

The federal class action suit against New York City regarding the use of excessive force against those held at Rikers Island, *Nunez v City of New York* (11-cv-5845 [SDNY]), has been settled. The plaintiff class, represented by The Legal Aid Society's Prisoners' Rights Project and two private firms, and the U.S. Department of Justice announced that they reached an agreement with the City that would "require the Department of Correction to implement new policies and practices to curb the rampant

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misuse of force and end the culture of violence which emboldens staff to abuse prisoners and lie about such abuse with impunity." As part of the agreement, the City must "make best efforts to search for and identify an alternative site not located on Rikers Island for the placement of Inmates under the age of 18" that would be readily accessible by public transportation to facilitate family visits and, among other requirements, must provide adequate educational services and recreational facilities. The full agreement is available at http://www.legal-aid.org/media/194198/0701_consent_judgment.pdf.

Grand Jury Reform

The Legislature and the Governor were also unable to reach agreement on grand jury reform by the end of the legislative session. In an effort to address the recent killings by police officers and the public's lack of trust in the criminal justice system, the Governor issued Executive Order 147 that appoints the New York State Attorney General as a special prosecutor "to investigate, and if warranted, prosecute certain matters involving the death of an unarmed civilian, whether in custody or not, caused by a law enforcement officer …." The state District Attorney's Association and law enforcement unions have criticized the order, according to a July 13th *State of Politics* blog post.

New York City Settles with the Garner Family

One of the cases that led to Executive Order 147 was the killing of Eric Garner by city police on Staten Island in July 2014. A grand jury declined to indict Daniel Pantaleo, the officer who used a chokehold on Garner. Just under a year after the killing, New York City has agreed to pay $5.9 million to resolve the Garner family's wrongful death claim, according to a New York City Comptroller press release. The Second Department is currently considering whether to release the grand jury minutes, sought by the Legal Aid Society, NYC Public Advocate Letitia James, and other organizations, and federal prosecutors are investigating the case.

Campus Sexual Assault Prevention and Response Bill

One piece of legislation that did pass this session was the college campus sexual assault prevention and response bill, also known as "Enough is Enough." (L 2015, ch 76.) The law requires that colleges and universities that maintain a campus in New York State amend their codes of conduct or other policies to implement the new law, which applies to all incidents of sexual assault, domestic violence, dating violence, and stalking, regardless of whether they occur on campus, off campus, or while studying abroad. Of particular note is that the law creates a definition of affirmative consent to sexual activity (set forth in Education Law 6441, effective Oct. 5, 2015). That definition is somewhat different from the definition adopted by all SUNY schools in 2014. It remains to be seen how the law, including the procedures for code of conduct violation proceedings, will impact criminal prosecutions of college students for such incidents. The *New York Times* recently published an op-ed about the current effort to amend the definition of consent and other sexual assault provisions in the American Law Institute's Model Penal Code and possible changes to state penal laws.

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

Other Legislation

The Legislature passed hundreds of bills by the end of the legislative session, most of which have not yet been sent to the Governor for approval or veto. A small subset of those bills are relevant to public defense, criminal defense, and family court representation, and will be summarized in the 2015 Legislative Review, which will appear in a forthcoming issue of the *REPORT.*

Some bills of note include:

- A6715-A: This bill makes significant changes to Family Court Act article 10 regarding the involvement of non-respondent parents in abuse and neglect proceedings, including the circumstances under which a non-respondent parent must submit to the family court's jurisdiction. It will take effect on the 180th day after it becomes law.
- A6255-B: In light of changes in the rules governing federal funding of drug courts, this bill amends the judicial diversion law (CPL 216.05[5] and [9][a]) to specifically provide that defendants who need treatment for opioid abuse or dependence may participate in and receive medically prescribed drug treatments (methadone and Suboxone) under the care of a health care professional and cannot be deemed to have violated a release condition for such participation. This law will take effect immediately upon the Governor's signature.
- A5266: This bill would create the new crime of aggravated leaving the scene of an incident without reporting, a class C felony.
- Four bills would expand the second-degree assault statute to include assaults on secure treatment facility employees (S3913-A), persons providing direct

patient care (A1034-A), public health and sanitarian enforcement workers (S3343), and emergency medical service paramedics and technicians (S4839).

Developments in DNA and Other Forensics

Certain DNA Testing Methods and Statistical Software Not Generally Accepted

Brooklyn Supreme Court Justice Mark Dwyer issued a written decision detailing the reasons for his conclusions that evidence based on low copy number (LCN) or high sensitivity analysis of DNA mixtures and results from the New York City Office of the Chief Medical Examiner's Forensic Statistical Tool (FST) about those mixtures are not generally accepted in the relevant scientific community and thus, not admissible. *People v Collins*, 2015 NY Slip Op 25227 (Supreme Ct, Kings Co 7/2/2015). This decision followed the court's oral ruling in November 2014, after an extensive *Frye* hearing on both issues, and its oral affirmance after reargument in January 2015. The Legal Aid Society's DNA Unit represents the defendants in the two cases that were consolidated for the *Frye* hearing.

Probabilistic Genotyping and LCN Analysis

Probabilistic genotyping software such as the OCME's FST and LCN DNA analysis are receiving a significant amount of attention in New York and nationwide. According to the Scientific Working Group on DNA Analysis Methods (SWGDAM) Guidelines for the Validation of Probabilistic Genotyping Systems (approved on June 15, 2015), probabilistic genotyping "refers to the use of biological modeling, statistical theory, computer algorithms, and probability distributions to calculate likelihood ratios (LRs) and/or infer genotypes for the DNA typing results of forensic samples …." The National Institute of Standards and Technology has training materials and webinars on DNA mixture interpretation on its website at http://www.cstl.nist.gov/strbase/ mixture.htm.

The New York State Commission of Forensic Science and its DNA Subcommittee have engaged in discussions about the use of LCN and probabilistic genotyping software at a number of their recent meetings, including the Commission's June 19 meeting [video of that meeting is available for a limited time on the DCJS website]. In May, the DNA Subcommittee voted to make a binding recommendation to approve the Erie County Department of Central Police Services Forensic Laboratory's use of STRmix™ probabilistic genotyping software, and in spite of efforts of some Commission members to send the matter back to the DNA Subcommittee for reconsideration, the Commission approved its use in June.

The Commission previously approved the New York State Police Forensic Investigation Center's use of TrueAllele software in 2011, though the State Police has not used it for casework in light of allegations that members of the State Police lab cheated on the TrueAllele proficiency test and questions about TrueAllele's validation study that was based on samples from the State Police lab. The New York State Inspector General is investigating the allegations. At least one New York trial court has concluded that results from TrueAllele software are admissible. *People v Wakefield*, 47 Misc 3d 850 (Supreme Ct, Schenectady Co 2/9/2015).

FBI Reveals Problems with its DNA Population Data

In May 2015, the FBI issued a Combined DNA Index Systems (CODIS) Bulletin notifying all labs that use CODIS that there were errors in its population data, the *Washington Post* reported. The errors appeared in a 1999 article published in the *Journal of Forensic Science*, "Population data on the thirteen CODIS core short tandem repeat loci in African Americans, US Caucasians, Hispanics, Bahamians, Jamaicans, and Trinidadians." An erratum, included in the July 2015 issue of that publication, explains the various discrepancies, which were attributable to human error and technological limitations. A Texas death row inmate, Clifton Lamar Williams, received an indefinite reprieve while questions about whether the FBI's erroneous statistics could have affected the outcome of his trial are considered.

IAC for Failure to Correct Prosecutor's Misrepresentations of DNA Evidence

The New York Court of Appeals has reversed a murder conviction based on ineffective assistance of counsel because defense counsel failed to object to the prosecution's multiple misrepresentations of the DNA evidence in summation. *People v Wright*, 2015 NY Slip Op 05621 (7/1/2015). Experts had testified during trial that the defendant could not be excluded as a contributor to the DNA found at the crime scene, but the prosecutor "argu[ed] the evidence established that defendant's DNA was at the crime scene and on a critical piece of evidence linked to the victim's murder." A full summary of the decision appears on p. 23.

Efforts to Analyze Other Disciplines

The American Association for the Advancement of Science (AAAS) has announced that it is conducting a quality and gap analysis of ten forensic disciplines: Bloodstain Pattern Analysis; Digital Evidence; Fire Investigations; Firearms and Toolmarks/Ballistics; Footwear and Tire Tracks; Forensic Odontology–Bitemark Analysis; Latent Fingerprints; Trace Evidence–Fibers;

Trace Evidence–Hair; and Trace Evidence–Paint & Other Coatings. AAAS will review the current scientific studies regarding the procedures and testimony of forensic experts and analyze the scientific bases for each discipline.

The National Commission on Forensic Science, a partnership between the U.S. Department of Justice and the National Institute of Standards and Technology, is making similar efforts. The Commission has issued a number of work products, including draft and final policy recommendations, on topics such as definitions, inconsistent terminology, expert testimony, and universal accreditation. Information about the Commission's past and upcoming meetings is available at http://www.justice.gov/ncfs/meetings.

Hair Comparison Testimony Was Flawed

As briefly noted in the last issue of the *REPORT*, *The Washington Post* reported in April that "[t]he Justice Department and FBI have formally acknowledged that nearly every examiner in [the FBI Laboratory's microscopic hair comparison unit] gave flawed testimony in almost all trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000." According to the article, 200 convictions have been reviewed with the assistance of the National Association of Criminal Defense Lawyers (NACDL) and the Innocence Project. More information about the FBI/DOJ microscopic hair comparison analysis review is available on the FBI's Laboratory Services' website. New York is one of several states reviewing its hair examiner cases. The Forensic Science Commission discussed the current status of the state's project at its June 19 meeting (video: discussion starts at 1:06), and the project is expected to be on the agenda for the Commission's September 29 meeting.

Model Guidelines Adopted for Photo Arrays and Line-Ups

Earlier this year, the New York State Municipal Police Training Council adopted model policies governing proper conduct of photo arrays and line-ups. Although non-binding, the policies are designed to establish guidelines "on how to conduct fair and reliable eyewitness identifications" and may be extremely helpful to defense attorneys cross-examining law enforcement officers at *Wade* hearings. The comprehensive guidelines cover such matters as construction and administration of the photo array or line-up, pre-and post-photo array or line-up communications with eyewitnesses, and how to record the results of the procedure. The guidelines are noteworthy for endorsement of "double-blinded" procedures ("where the administrator does not know the identity of the suspect") and "blinded" procedures (where the administrator is at least "unable to inadvertently provide cues to the witness"). Also, the guidelines call for written "confidence statements"—"[a] statement from an eyewitness immediately following their identification regarding their confidence or certainty about the accuracy of their identification," written in "their own words."

Rights of Incarcerated Parents and Resources for Their Children

Termination of Incarcerated Father's Parental Rights Was Error

Earlier this year, the Second Department modified a fact-finding and disposition order by deleting the provisions terminating the incarcerated father's parental rights and transferring custody and guardianship of the children to the county department of social services (DSS) for the purpose of adoption. *Matter of Javon J.*, 127 AD3d 1088 (2nd Dept 2015). While the record evidence supported the findings of permanent neglect by the father and diligent efforts by DSS both before and during his incarceration, the Second Department held that the family court improvidently exercised its discretion by terminating the father's parental rights where "the father made sufficient progress toward strengthening his relationship with [his] children" and concluded that the judgment should have been suspended for one year.

Resources for Children and Incarcerated Parents

The Osborne Association's New York Initiative for Children of Incarcerated Parents (NYICIP), which was launched in 2006, offers a number of resources and links to resources from other organizations that provide useful information for criminal defense attorneys, attorneys for adults in family court, and clients, including:

- *Stronger Together: Volumes I-III*—These handbooks focus on the needs of children of incarcerated parents, including what parents and caregivers can do to support children and how to navigate the criminal justice system to maintain parent-child relationships. The handbooks are free to download and hard copies may be purchased from The Osborne Association.
- NYICIP Fact Sheets: Children of Incarcerated Parents (national and state statistics); Family Impact Statements; Family Responsibility Statement; Parental Incarceration's Impact on Children's Health; and Proximity to Children: Why Being Close to Home Matters
- Children of Incarcerated Parents Framework Document (Urban Institute)
- Urban Institute Toolkits: Developing Parental Arrest Policies; Developing Family-Focused Jail Programs; and Developing Family Impact Statements

- Urban Institute webinar: Promising and Innovative Practices for Children of Incarcerated Parents: Arrest through Pre-Adjudication

Several resources are also available for attorneys representing non-citizen parents.

- U.S. Immigration and Customs Enforcement (ICE) Parental Interests Directive page
- ICE Directive: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities
- ICE Parental Interests Directive Fact Sheet: English and Spanish
- How to Get a Detained Person to Court for Family Court Cases Involving Children and/or Criminal Proceedings (National Immigrant Women's Advocacy Project)
- Applying the ICE Parental Interests Directive to Child Welfare Cases (Immigrant Legal Resource Center)

Electronic Communications and Information Services Issues Addressed

Electronic forms of communication, fundamental to the modern practice of law, may not always make client-attorney conversations easy (or effective). They are not always the answer to costs and other problems asserted by government entities or others calling for distance-appearances in courts. In a variety of ways, electronic communications raise issues with which lawyers must deal.

DOCCS Releases New Rules on Phone Calls

The Department of Corrections and Community Supervision (DOCCS) has issued new rules affecting lawyers who want to call their clients in New York State prisons. DOCCS amended Directive #4423 (Inmate Telephone Calls), adding a Part IX that spells out the procedure for arranging unmonitored attorney-client calls. The expectation that attorneys will generally communicate with clients in prison by privileged correspondence, spelled out in the directive, is echoed by the stringent procedures for requesting legal calls, set out below; the need to visit in person rather than call is also implied.

Requests must be in writing, or, if by phone, followed by an e-mail or fax, and addressed to the client's Offender Rehabilitation Coordinator (formerly "counselor"). Requests must indicate that a telephone call is necessary and a standard legal visit would be "unduly burdensome." The address attorneys have registered with the Office of Court Administration (OCA) must be more than 45 miles from the prison (or 30 miles if the attorney is located in New York City) for calls to be permitted. Attorneys must provide at least three dates and times (excluding weekends, evenings, and holidays) for proposed phone calls, which must be initiated by the attorney from the business telephone number on file with OCA. Calls may not exceed thirty minutes. Only one unmonitored attorney call can be made within a thirty-day period. Attorneys can contact the Office of Counsel if a request is denied.

Clients will receive attorney calls in a phone booth constructed for the purpose, in an inmate disciplinary hearing room, or other location affording confidentiality. Legal calls will replace any other call to which an inmate on restricted phone privileges may be entitled.

Attorneys who encounter problems communicating with clients who are in DOCCS facilities may wish to consult with the Backup Center; attorneys who gain information about the new procedures other than what is set out in the directive are asked to share it with Backup Center staff.

Survey Looks at Effect of Videoconferencing on Relationships with Clients

An article in the *Journal of International Commercial Law and Technology*, according to the abstract, "examines the impact of videoconferencing on private communications and the wider implications of the impacts of technology on civil liberties." Available (for free) online, "Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom" is said to be the first study of its kind, investigating claims that videoconferencing where the attorney is in the courtroom and the client is in a remote location "is detrimental to attorney-client private communications …."

State Bar Updates Comments to Professional Conduct Rules, Guidelines

This year, the New York State Bar Association has updated both the Comments to the Rules of Professional Conduct, including provisions relating to client communication, and ethical guidelines created by two of its sections regarding use of social media.

Comments to Rules Amended, Changes to Black Letter Rules Proposed

The House of Delegates approved amendments to State Bar Comments on New York's Rules of Professional Conduct, as well as proposed changes to the Rules themselves (which must be approved by the Appellate Divisions to become effective). Among the topics covered by the amendments is attorney use of modern communication and information technology. A July 6, 2015 article in the *New York Law Journal* noted that among the black-letter changes the State Bar supports is creation of Rule 1.6(c), requiring lawyers to "make reasonable efforts to prevent

the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by" the rules on confidentiality of information, duties to former clients, and duties to prospective clients. As the article indicates, the State Bar's comments to Rule 1.1, Competence, now include a requirement that attorneys "'keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information …." The State Bar's edition of the Rules, with Commentary updated through Mar. 28, 2015, is available at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671. The Rules as currently adopted by the Appellate Divisions can be found (in an unofficial compilation) at http://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf.

Sections Update Ethics Guidelines for Social Media Use

The whole area of social media use changes rapidly, and lawyers should approach with caution the incorporation of social media into attorney tasks such as communication, research, and investigation. One resource for attorneys is the "Social Media Ethics Guidelines" of the Commercial and Federal Litigation Sections of the State Bar, updated in June.

These Guidelines embody guiding principles and are predicated on the New York Rules of Professional Conduct and ethics opinions thereunder. However, as the Introduction to the Guidelines points out, they do not constitute best practices in the rapidly changing area of social media. Not formally adopted by the House of Delegates, the Guidelines are not a part of the Rules of Professional Conduct.

According to a *New York Law Journal* article on June 19, 2015, "The most significant change is a section declaring that knowledge of how social media works should be a core skill for a lawyer in New York, akin to the basic competencies recognized by the New York Rules of Professional Conduct …." This echoes the new comment on Rule 1.1 noted above.

Other Guidelines of interest include No. 3.C, "Retention of Social Media Communications with Clients," No. 4, "Review and Use of Evidence from Social Media," and No. 5, "Communicating With Clients."

Ethics of Bringing or Threatening Disciplinary Complaints Examined

A June ethics opinion by the Association of the Bar of the City of New York Committee on Professional Ethics addressed the ethics of threatening to file a disciplinary complaint against a fellow attorney, while in May, the Advisory Committee on Judicial Ethics of the Unified Court System responded to a judge's inquiry about reporting actions by prosecutors believed to be professional misconduct.

Carefully Consider Whether Threatening Another Lawyer Violates the Rules

The City Bar opinion (2015-5) begins by parsing what would constitute "threatening" another lawyer with a disciplinary complaint. Advising the lawyer that certain conduct could be a violation of professional conduct rules or could subject them to disciplinary action is not a threat. Coupling such statements with statements that disciplinary charges will be filed unless the lawyer meets a given demand is a threat. Several states explicitly prohibit threatening disciplinary action to gain an advantage, and New York ethics opinions are split as to whether making such a threat would violate Rule 3.4(e), which prohibits threatening criminal charges to obtain an advantage in a civil matter. The City Bar Committee concludes that 3.4(e) would not be violated, but added that attorneys "should carefully consider whether doing so violates other Rules."

If an attorney has a mandatory duty to report the other lawyer's misconduct, failing to report it would itself be misconduct under Rule 8.4(a), and threatening to report unless the other lawyer takes some action would be as well. Where one lawyer would be permitted but not required to report another lawyer's conduct, threatening to report the conduct unless it is reversed could be consistent with the "self-regulation" aspect of the disciplinary system, the opinion says. But "the right to threaten a disciplinary grievance is subject to important limitations," such as the need for a "'good faith belief'" that the other lawyer's conduct violates the Rules, the need for some substantial purpose beyond embarrassment or harm, and the need to avoid threats that amount to extortion or other violations of substantive law.

Judicial Ethics Advisory Committee Opines on Judge's Obligation to Report Prosecutors

The Unified Court System's Advisory Committee on Judicial Ethics responded in May to an inquiry as to whether a judge was "obligated to report two prosecutors to an attorney grievance committee based on what [the judge believed] to be professional misconduct."

In Opinion 15-54, the Committee noted that if the judge was satisfied that there was a substantial likelihood a prosecutor had engaged in the alleged misconduct, and that the conduct constituted a substantial violation of the Rules of Professional Conduct, the judge was required to "take 'appropriate action'" (22 NYCRR 100.3[d][2]). Such action can include "counseling, reprimanding, admonishing, sanctioning, reporting the attorneys to their superiors or to the grievance committee." Reporting the conduct for possible attorney disciple is only required "if the judge

concludes that the misconduct seriously calls into question the attorney's fitness as a lawyer…." Should the judge report the prosecutors in question, the Committee said, the judge would be "disqualified from presiding over the current case and any other in which the reported attorney appears" while the disciplinary matter was pending. The judge would also be disqualified as to cases with the attorney(s) for two years after the disciplinary matter is over "unless the attorneys waive their rights to confidentiality in the disciplinary matter or if the disciplinary matter results in a public discipline."

Prosecutorial Misconduct a Continuing Issue

The problems that would arise, particularly in smaller jurisdictions, if a judge was unable to hear cases in which a particular prosecutor appeared, may be one explanation for the low number of reported grievances regarding prosecutorial misconduct. Misconduct certainly occurs; it is an ongoing, national issue. Last year, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 467 regarding managerial and supervisory obligations in prosecutors' offices. The need for the opinion was, in part, "the frequency of prosecutorial misconduct nationwide documented by, *inter alia*, opinions in criminal cases and disciplinary proceedings reported in the last fifteen years …."

Reformers continue to advocate for ways to combat prosecutorial misconduct. In New York, the call for a State Commission on Prosecutorial Misconduct has garnered bipartisan support, as noted in an article on Syracuse.com in May.

ILS Office Makes Three Big Announcements

The breadth of three recent announcements from the Indigent Legal Services Office (ILS) reflect its status as the implementing authority for the *Hurrell-Harring* settlement discussed in the last issue of the *REPORT* and the scope of its ongoing work.

Warth to Lead Implementation Unit

On June 23, ILS announced the hiring of Patricia Warth as Chief Implementation Attorney. She will lead a new unit that, with the rest of the ILS staff, will work to implement the terms of the *Hurrell-Harring* settlement in the five counties named as defendants in that class action suit challenging New York State's failure to provide constitutional representation to eligible clients.

The *Hurrell-Harring* suit, as has often been noted, was brought with the goal of improving public defense representation across New York State, not just in Washington, Suffolk, Schuyler, Ontario, and Onondaga counties. Warth is well suited to pursuing that goal. As the announcement of her hiring notes, Warth "is keenly aware that a person's contact with the criminal justice system, even for a minor offense, can have life-long and life-altering consequences; and that therefore the quality of lawyering each client receives is of paramount significance."

NYSDA's staff congratulates ILS and Warth on her selection, and looks forward to working with her, others in the implementation unit as they are hired, and ILS as a whole in the exciting and challenging days ahead.

Hearings Announced Concerning Eligibility Standards

As part of its *Hurrell-Harring* implementation duties, ILS must issue criteria and procedures to guide courts in determining financial eligibility of potential public defense clients. This requirement is consistent with the statute governing the ILS Office, Executive Law 832. At 832(3)(c) the statute provides authority for "establishing criteria and procedures to guide courts in determining whether a person is eligible for such representation …."

Facing tight deadlines under the settlement, in mid-June ILS announced "Public Hearings on Eligibility for Assignment of Counsel." One hearing was scheduled for each of the judicial districts outside New York City, beginning in Syracuse on July 9 and concluding in Elizabethtown on August 26. The full hearing notice can be viewed online at https://www.ils.ny.gov/files/Eligibility%20Public%20Hearings%20Notice.pdf.

Unlawful deprivation of counsel due to consideration of improper eligibility factors or failure to apply the proper standard has plagued people seeking appointment of a lawyer across the state ever since the State delegated to localities its responsibility for providing mandated representation in 1965. NYSDA's 1994 report on "Determining Eligibility for Appointed Counsel in New York State" detailed the problems; while specifics may vary county to county more than two decades later, the problems remain, and remain ubiquitous.

Regional Immigration Assistance Centers Funded

On July 6, ILS announced grant awards totaling $8.1 million over three years intended to ensure that every public defense client in New York State "receives accurate and comprehensive advice with respect to the immigration consequences of his or her case." Recipients in New York City and five regions will receive funding "for their participation in the development of a statewide network of Regional Immigration Assistance Centers."

The United States Supreme Court recognized in its 2010 decision in *Padilla v Kentucky* that constitutionally effective representation includes advising noncitizen clients about the immigration consequences of conviction.

Such advice is just as important in many family court matters.

The need to advise clients about potential immigration consequences of involvement in the justice system was clear to NYSDA and others long before *Padilla*. NYSDA instituted an in-house Criminal Defense Immigration Project (CDIP) in 1997, from which formed the now-independent Immigrant Defense Project (IDP) in New York City that is one of the ILS grant recipients. NYSDA continued to maintain its capacity to help public defense lawyers advise their clients after IDP became a separate entity; former CDIP Director Joanne Macri, who left NYSDA to join ILS in 2013 as its Director of Regional Initiatives, will guide the new immigration centers.

The *New York Law Journal* reported on July 9 that the grant recipients outside the City are: the Legal Aid Society of Nassau County and the Legal Aid Society of Suffolk County; the Legal Aid Society of Westchester County; the Albany County Public Defender; the Oneida County Public Defender; and the Volunteer Lawyers' Project of the Erie County Bar Association and the Legal Aid Society of Rochester. They will serve five regions—Long Island; the lower Hudson Valley; and Northern, Central, and Western New York.

Richard Bartlett, Committee for an Independent Public Commission Co-founder, Dies at 89

The many achievements for which Richard Bartlett was noted in the *New York Law Journal* following his death in May included two relating to state structures involving the judicial system. One was his 1970s contribution to the drafting and approval of state constitutional amendments shaping the structure of New York's current Unified Court System. The other was his work in the 1960s on the New York Penal Law Revision Commission, which was responsible for much of the Penal Law in its current form.

But those who work to improve the quality of public defense representation remember Bartlett best for his efforts regarding statewide public defense. Specifically, he cofounded, in 2001, the Committee for an Independent Public Defense Commission (CIPDC). During his tenure as a member of the Assembly (1959 to 1966), Bartlett had authored, with the late Senator Warren Anderson and Michael Whiteman, then counsel to Governor Nelson Rockefeller, legislation that in 1965 became County Law article 18-B. Thirty-six years later, the three recognized that the county-based public defense system they helped create was on the verge of collapse. On behalf of the newly-formed CIPDC, they presented legislation to the Governor and Legislature designed to create a statewide Independent Public Defense Commission to oversee public defense services.

That Commission has yet to come into existence. But the work of Bartlett and the CIPDC, which grew to include 27 past presidents of the New York State Bar Association and many other influential leaders, greatly raised awareness of the need for public defense reform.

Improvements occurring as a result of ILS funding and guidance, and as a result of the *Hurrell-Harring* settlement, should be credited in part to Dick Bartlett.

Public Defense Providers and Others Push for Bail Reform

In New York City and locales across the country, concerns about criminal justice include growing awareness of the role money bail plays in over-incarceration and the devastation of poor communities of color. Public defense providers often appear in articles about bail, sometimes as advocates for reform and sometimes based on their absence at hearings due to systemic deficiencies.

Problems with Bail are Not New

The last issue of the *REPORT* included information on a national report from the Constitution Project noting, among other things, the important role that defense attorneys play at initial bail hearings and the absence of counsel at far too many arraignments where bail is initially set. Four years ago, a training session by Marika Meis and Justine Olderman of The Bronx Defenders at NYSDA's annual conference on "Bail Advocacy in New York State" highlighted the many forms of bail allowed by the state bail statute, the severe underutilization by judges of forms other than cash bail and insurance company bond, and the result—"a large portion of the state's jail population is incarcerated due to failure to post bail."

Intense Media Coverage of Racism in Pretrial Detention is New

Highly publicized deaths of black men at the hands of police for more than a year appear to have fueled coverage of other racial disparities in the justice system as well. Those disparities include death, hardship, and inequity in pretrial detention. The suicide of Kalief Browder, who had been held for three years in pretrial detention on Rikers Island as a teenager and never recovered from the trauma he suffered there, "heightened scrutiny and intensified calls for reform of [New York City's] bail system," as a *Gotham Gazette* article noted on June 12. A month earlier, a May 8 op-ed in the *New York Times* described many problems with current bail practices nationwide, including exacerbation of poverty and traumatization of those affected, which can lead to an increase in crime and racial injustice.

NYC Announces $17.8 Million Bail Fund

Back in April, the New York City Council proposed establishing a City-funded, revolving bail fund to reduce the number of low-income people charged with low-level offenses enduring lengthy pretrial detention. As the *New York Law Journal* reported, the proposal was meant to get qualified individuals "'home to their families," reducing "'the number of lives forever marked by an unnecessary stay in jail,'" and also cut costs by decreasing the number of people held on Rikers Island.

After a June 17 City Council hearing, discussed below, the *New York Law Journal* reported on July 9 that New York City officials plan to spend $17.8 million to expand supervised pretrial release programs, building on city-funded pilot programs in Queens and Manhattan. Over $13 million of the funding will come from asset forfeiture money controlled by New York District Attorney Cyrus Vance, Jr. An Associated Press report filled in details: the plan "allows judges beginning next year to replace money-bail for about 3,000 low-risk defendants with supervision options including regular check-ins, text-message reminders and connecting them with drug or behavioral therapy."

Public Defense Providers Weigh In

Among those testifying at the June hearing were public defense services providers. The Legal Aid Society's testimony included the stark reality that many clients, held in one case on only $1 bail when also held on another matter, remain locked up "when the other case is resolved and the only thing holding [them] in jail is $1 bail, [because] a good number of people cannot afford the $1." Testimony submitted by the Bronx Defenders "identified the many reasons why our bail system is broken, illustrated the devastation that it wreaks on people's lives, families, and communities, and proposed temporary solutions to alleviate the problem of pre-trial detention in NYC, and work towards the only real, long-lasting solution: abolish money bail all together," according to their website.

After the City's July announcement, the Executive Director of the Bronx Defenders and the Board Chair of the Bronx Freedom Fund, licensed under the Charitable Bail Law, cautioned against proposed cures that "may be nearly as bad as the disease." Appearing online at The Marshall Project, their commentary asserts that creation of a "'pretrial-services system' at an estimated annual cost of $18 million," which will be "a new government apparatus that extends the reach of the criminal justice system and broadens government-administered social control of marginalized communities," is not necessary. Further, they object, conditions imposed on release may be the same, or even more onerous, than the terms of the likely sentences that will ultimately be imposed.

ArchCity Defenders Play Role in Missouri Bail Reform

Meanwhile, halfway across the country, a Missouri public defense office and a Washington DC nonprofit brought a lawsuit that yielded a striking victory against unjust bail. As noted online by the National Association for Public Defense: "On June 3, 2015, the federal court in St. Louis, Missouri, issued an injunction ending the use of secured money bail in Velda City and a declaratory judgment affirming that the use of secured money bail schedules to detain impoverished people after arrest violates the United States Constitution." ArchCity Defenders, which last year issued a white paper exposing the "debtors' prison" character of the municipal court/traffic ticket system in Ferguson MO and the surrounding area, was one of the entities that filed the Velda City suit. The other was Equal Justice Under Law. The *St. Louis Post-Dispatch* reported at the time of the Velda City victory that "[t]he attorneys filed a similar suit against the city of St. Ann last week."

Should Public Safety Be Considered?

Largely unremarked in the current discussion of bail is the danger that reforms aimed at helping "low-level offenders" and their families and communities will include a completely separate change—the expansion of bail's purpose. Currently, in New York, bail is intended to ensure only that an accused person will return to court. The one exception is a limited expansion added in 2012; CPL 510.30 mandates that courts considering whether to release a person accused of crimes against a family or household member take into account whether the accused person has a history of firearms use or possession or has violated any order of protection issued for the protection of family or household members.

But when Chief Judge Jonathan Lippman called for bail reform in 2013, his State of the Judiciary Address contained more than a call to "do all we can to eliminate the risk that New Yorkers are incarcerated simply because they lack the financial means to make bail." Lippman also urged "changing New York's bail laws to require judges to take into account public safety considerations," as a recent letter to the Gloversville *Harold-Leader* by the Communications Director of the Court noted.

It is an open secret that prosecutors already seek to obtain high bail for those they perceive to be "dangerous." According to a Human Rights Watch report in 2010, "The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City," prosecutors acknowledged that they were likely to ask for bail in domestic violence or other assault cases.

The question of whether public safety should be a factor in pretrial release—more bluntly, whether preventive detention should be allowed—need not be debated at

NYSDA. In 1973, the Board of Directors passed a resolution opposing preventive detention in any form.

New York City Bans the Box

In an effort to give people with prior criminal convictions and pending charges a fairer opportunity for employment and certain licenses, New York City has enacted "ban-the-box" legislation entitled the "Fair Chance Act" (Local Law 63). According to a press release from the Mayor's Office, the Act, among other things, prohibits employers from "inquiring about candidates' criminal records until after they have made a conditional offer of employment, and require them to provide a written copy of the inquiry analysis, and supporting documentation to applicants." Certain public and private employers are exempt, including law enforcement agencies. The Act takes effect on Oct. 27, 2015.

Several other localities in New York have adopted ban-the-box laws and policies: Buffalo, Rochester, Syracuse, Ulster County, and Yonkers. Details about these and other laws from around the country appear in the National Employment Law Project's new publication, "Fair Chance- Ban the Box Toolkit." The Legal Action Center's National H.I.R.E. Network provides resources and assistance about the employment of people with criminal records.

NYSDA Training Events: Basic Trial Skills Program and More

In May and June, NYSDA presented or cosponsored 10 training events across the state and across a range of criminal and family court defense skills and issues. *REPORT* readers who follow NYSDA on Twitter and Facebook got a glimpse of some of them.

The Defender Institute's signature training event, the week-long Basic Trial Skills Program (BTSP), provided 56 lawyers the opportunity to engage in hands-on learning about representing public defense clients from initial client interviews to closing arguments. This award-winning program emphasizes how client-centered representation, which recognizes and addresses clients' circumstances including poverty and systemic racism, improves legal outcomes along with client satisfaction.

For the second year, NYSDA, the Monroe County Public Defender's Office, and New York State Indigent

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Conferences & Seminars

Sponsor: National Child Abuse Defense & Resource Center
Theme: Child Abuse Allegations: The Law, the Science, the Myths, the Reality—Practical Applications
Dates: August 3-4, 2015
Place: Orlando, FL
Contact: NCADRC: tel (419) 865-0513; email ncadrc@aol.com; website http://www.falseallegation.org/

Sponsor: National Association of Criminal Defense Lawyers
Theme: 17th Annual Making the Case for Life: Investigation, Mitigation & Voir Dire in Capital Cases
Dates: August 20-22, 2015
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website http://www.nacdl.org/cle/

Sponsor: National Association of Criminal Defense Lawyers & National College for DUI Defense
Theme: 19th Annual DWI Means Defend With Ingenuity
Dates: October 1-3, 2015
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website http://www.nacdl.org/cle/

Sponsor: National Association of Criminal Defense Lawyers
Theme: 8th Annual Defending the Modern Drug Case
Dates: October 1-3, 2015
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x 632 (Viviana Sejas); fax (202) 872-8690; email vsejas@nacdl.org; website http://www.nacdl.org/cle/

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Syracuse Fall 2015 Seminar: A Day Focused on the Ins & Outs of Jury Selection
Date: October 3, 2015
Place: Syracuse, NY
Contact: NYSACDL: tel (518) 443-2000; website http://nysacdl.site-ym.com/

Sponsors: **New York State Defenders Association, NYS Indigent Legal Services Office & NYS Unified Court System Child Welfare Court Improvement Project**
Theme: **Because All Families Matter: Enhancing Parental Defense in New York**
Dates: **November 13-14, 2015**
Place: **Albany, NY**
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.

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

Rodriguez v United States, 575 US __, 135 SCt 1609 (4/21/2015)

"We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." Denying the defendant's motion to suppress the evidence was error where the officer stopped the defendant for illegally driving on the shoulder of the road for a couple of seconds, examined the defendant's driver's license while questioning him and his passenger about their travels, completed a records check and called for a second officer, completed a warning ticket, refused to let the defendant leave after the defendant declined to consent to a dog sniff of his vehicle, and conducted a dog sniff after the second officer arrived, finding methamphetamine. The Fourth Amendment may tolerate certain unrelated investigations so long as they do not prolong the roadside detention. Checking the driver's license and any outstanding warrants, and inspecting the vehicle's registration and proof of insurance, serve the same purpose as enforcing the traffic code—ensuring the safe and responsible operation of vehicles on the road. But efforts to detect ordinary criminal wrongdoing, not intended to ensure officer safety during the stop, are not related to the reason for the stop and are impermissible absent reasonable suspicion. Whether such suspicion of criminal activity justified detaining the defendant here remains open for consideration on remand.

Dissent: [Kennedy, J] My joining in Justice Thomas' dissent does not extend to Part III.

Dissent: [Thomas, J] The majority's holding cannot be reconciled with precedent establishing that conducting a dog sniff does not change the character of a lawful traffic stop otherwise executed in a reasonable manner. The 29 minutes from the initial stop until the dog alerted to the presence of narcotics was not out of the ordinary for a single officer's stop of a vehicle with multiple occupants even absent a dog sniff. The reasonableness inquiry does not hinge on an individual officer's ability to expeditiously complete the tasks associated with the stop. "[T]he majority's inquiry elides the distinction between traffic stops based on probable cause and those based on reasonable suspicion." Further (Part III), the officer's observation of an overwhelming odor of air freshener, the passenger's nervousness, and the unlikeliness of the defendant's reason for traveling late at night, met the standard for reasonable suspicion.

Dissent: [Alito, J] The officer had reasonable suspicion that the car contained drugs. The majority's answer to a question not really presented by the facts is arbitrary. Conducting the dog sniff without backup would have increased the risk that the occupants would flee or attack the officer; the majority decision is unlikely to have an appreciable effect on the length of future stops.

Appeals and Writs (Arguments of Counsel)

Civil Rights Actions (USC § 1983 Actions)

Discrimination

City and County of San Francisco v Sheehan, 575 US __, 135 SCt 1765 (5/18/2015)

Whether or not certain provisions of the Americans With Disabilities Act (42 USC 12101 et seq) apply to arrests is an important question, but as no party has argued that those provisions do not apply, deciding that question would be imprudent; certiorari on that question was improvidently granted. The same is true as to the related question of whether public entities can be held vicariously liable for money damages based on purposeful or deliberately indifferent conduct of their employees. The two police officers who injured the plaintiff after responding to a call from a group home for people dealing with mental illness were entitled to qualified immunity from suit under 42 USC 1983 because any failure to accommodate the plaintiff's mental disability did not violate clearly established law. Even if the officers acted contrary to training for dealing with the mentally ill, that would not alone negate qualified immunity "so long as a

US Supreme Court *continued*

'reasonable officer could have believed that his conduct was justified' …." The officers had no "fair and clear warning of what the Constitution requires." Justice Breyer took no part in considering or deciding this case.

Concurrence in Part, Dissent in Part: [Scalia, J] "[B]y promising argument on the Circuit conflict that their first question presented, petitioners got us to grant certiorari not only on the first question but also on the second. I would not reward such bait-and-switch tactics by proceeding to decide the independently 'uncertworthy' second question." Both questions should have been dismissed as improvidently granted.

Civil Practice

Federal Law (Procedure)

Prisoners (Access to Courts and Counsel)

Coleman v Tollefson, 575 US __, 135 SCt 1759 (5/18/2015)

The statute that bars granting of in forma pauperis status to a federal litigant who is incarcerated and has on three or more prior occasions, while incarcerated, brought a federal action or appeal that was dismissed as frivolous, malicious, or failing to state a claim, applies to actions brought while one of the prior dismissals is still awaiting appellate review. The literal language of the "three strikes" statute, 28 USC 1915(g), refers to a strike as "'an action or appeal … *that was dismissed* on'" the relevant grounds; there is no requirement that the dismissal be affirmed on appeal before being considered. Trial court orders normally take effect pending appeal absent a stay. Applying the bar before appeal furthers the purpose of the statute, to filter out bad claims brought by people in prison and facilitate consideration of good claims, as many frivolous lawsuits could be brought while appeal of the dismissal was pending. The risk that applying the bar pending appeal will wrongly deprive a prisoner of in forma pauperis status is slight. The question of whether the bar would apply to the appeal of the third dismissal is not presented or decided here.

Federal Law (Crimes)

Weapons (Firearms) (Possession)

Henderson v United States, 575 US __, 135 SCt 1780 (5/18/2015)

The federal statute barring possession of guns by any person convicted of a felony does not bar a transfer of possession of guns owned by the person so convicted to a firearms dealer or third party so long as the transfer does not allow the convicted person to later use the guns or direct their use. Here, guns owned by a defendant were surrendered to the FBI as a condition of bail, and after his conviction, sentence, and release from prison the defendant asked the FBI to transfer the guns to a friend who agreed to buy them. The lower courts found that release of the guns on the defendant's directive would amount to constructive possession of them. The statute does not prohibit ownership, only possession, of firearms. While transfer to a person who would allow the felon future access to the firearms or the ability to instruct about their future use is not permissible, the right to sell or otherwise dispose of an item is a separate incident of ownership from possession; arrangements that serve only to divest felons of their guns are permissible. The government concedes that a person convicted of a felony could select a dealer or third party to sell that person's guns on the open market and give the proceeds to the felon. A court may approve the transfer of guns if the court is satisfied that the disposition prevents the felon from later exercising control over them.

Federal Law

Speech, Freedom Of

Elonis v United States, 575 US __, 135 SCt 2001 (6/1/2015)

The federal statute under which the defendant was convicted of transmitting threats in interstate commerce does not specify any mental state, including whether a defendant must intend that the communication contain a threat, but a basic principle of construction is that "'wrongdoing must be conscious to be criminal,'" so that instructing the jury that the government had to prove only that a reasonable person would regard the communications in question as threats was error. Negligence is not sufficient. Whether recklessness suffices was not raised here until oral argument, and no circuit conflict exists as to that question; this Court should not be the first to address that question.

Concurrence in Part, Dissent in Part: [Alito, J] This case squarely presents the question of which mental state is required under the statute in question, but the majority provides only a partial answer in a disposition "certain to cause confusion and serious problems." The majority correctly finds that an offense like the one here requires more than negligence; in the hierarchy of potentially required mental states, "the *mens rea* just above negligence is recklessness." Requiring no more would not violate the First Amendment.

Dissent: [Thomas, J] The Court of Appeals properly applied the general intent standard, and the "'true threats'" made were not protected by the First Amendment. Certiorari was granted to resolve a conflict in the lower courts as to the mental state required for threat

US Supreme Court *continued*

prosecutions, with only the Ninth and Tenth Circuits requiring proof of an intent to threaten. The majority decides only that general intent—knowledge that a communication was transmitted, what words it contained, and the ordinary meaning of those words in relevant context—will not suffice, leaving the lower courts to guess what is required.

Narcotics (Paraphernalia)

Non-Citizens (Deportation)

Mellouli v Lynch, 575 US __, 135 SCt 1980 (6/1/2015)

A noncitizen's state misdemeanor conviction for possessing drug paraphernalia based on use of a sock to hold four drug tablets did not make him eligible for removal from the country under 8 USC 1227(a)(2)(B)(i). Under the "categorical approach" to determining if a drug conviction renders a noncitizen removable, removal is not authorized where the state statute in question covers controlled substances not included in 21 USC 802. The Board of Immigration Appeals (BIA) used a different approach with regard to paraphernalia offenses, finding the state statute in question related to a federal controlled substance because a paraphernalia conviction '"involves drug trade in general ...."' "The incongruous upshot" of the BIA's interpretation, that a noncitizen is not removable for being convicted of possessing a drug controlled only under a state law, but is removable for using a sock to contain that drug, "makes scant sense, [therefore,] the BIA's interpretation, we hold, is owed no deference ...." And the sweeping interpretation offered by the government departs too sharply from the statutory text to be deemed a permissible reading.

Dissent: [Thomas, J] While rejecting the government's interpretation of the federal removal statute, the majority "offers no interpretation of its own," leaving lower courts to guess which convictions qualify noncitizens for removal.

Civil Rights Actions (USC § 1983 Actions)

Prisoners (Suicide)

Taylor v Barkes, 575 US __, 135 SCt 2042 (6/1/2015)

The purported right of an incarcerated person to "proper implementation of adequate suicide prevention protocols" was not clearly established on Nov. 14, 2004, the date of Christopher Barkes's death in a state correctional facility. The court erred in denying summary judgment to the state Department of Correction and prison warden in this 42 USC 1983 civil rights action, on the grounds of qualified immunity.

Death Penalty (Cruelty) (Penalty Phase)

Developmentally Disabled (Defenses)

Brumfield v Cain, 576 US __, 135 SCt 2269 (6/18/2015)

The state court's rejection without a hearing of the petitioner's request for an opportunity to prove he is too intellectually disabled to be executed violated 28 USC 2254(d)(2). The petitioner was entitled to have the federal court consider his claim on the merits. That an expert placed the petitioner's IQ at 75 did not preclude a finding of disability given the margin of error in testing; the possibility that another test had indicated a higher IQ was not enough to preclude a finding of intellectual disability because the test was not shown to be sufficiently rigorous. The record contained sufficient evidence of adaptive impairment to warrant a hearing. The petitioner had little reason to investigate and present evidence of intellectual disability at the penalty phase, which would have risked supporting a finding of future dangerousness.

Because the denial of a hearing was based on an unreasonable factual determination under 2254(d)(2), the separate question of the state court's refusal to grant expert funding or at least a chance to seek pro bono expert assistance need not be addressed. Similarly, the exact relationship between the review standards of 2254(d)(2) and 2254(e)(1) need not be determined here as the state did not press the more deferential standard below.

Dissent: [Thomas, J] The decedent's son also suffered a disadvantaged background but responded to circumstances beyond his control by caring for his family, building a career, and doing charity work. The majority mentions no more about the crime than the victim's name. Each of the state court's findings was supported by the record. The majority recasts legal determinations as factual ones, avoiding the test for habeas reversal—that the state court determination was an unreasonable application of federal law as established by this Court.

Dissent: [Alito, J] I join all of Justice Thomas' dissent but Part I-C, which is not essential to the legal analysis of the case, although it "will serve a very beneficial purpose if widely read ...."

Harmless and Reversible Error (Harmless Error)

Juries and Jury Trials (Challenges) (Qualifications)

Prisoners (Conditions of Confinement)

Davis v Ayala, 576 US __, 135 SCt 2187 (6/18/2015)

The Ninth Circuit's decision granting a writ of habeas corpus a quarter-century after a state jury convicted the respondent of triple murder and imposed the death penalty "was based on the misapplication of basic rules regarding harmless error." Assuming without deciding that the respondent's federal rights were violated when

US Supreme Court *continued*

the trial court heard ex parte the prosecution's justifications for juror strikes following *Batson* challenges, the respondent failed to show that the state supreme court determination that any federal error by the trial court was harmless was objectively unreasonable. "[W]e hold that any error was harmless with respect to all seven strikes."

Concurrence: [Kennedy, J] I join unqualifiedly in the majority opinion. This separate writing addresses a fact mentioned at oral argument with no direct bearing on the exact legal issues presented here. "[I]t is likely respondent has been held for all or most of the past 20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone." Research still confirms what was suggested by this Court over a century ago: near-total isolation over many years "exact[s] a terrible price." Should a case present the issue, "the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."

Concurrence: [Thomas, J] As to Justice Kennedy's opinion, the accommodations in which the respondent has been housed are much more spacious than those in which his victims, all of whom were 31 or younger, now rest.

Dissent: [Sotomayor, J] "Given the strength of Ayala's prima facie case and the comparative juror analysis his attorneys could have developed if given the opportunity to do so, little doubt exists that counsel's exclusion from Ayala's *Batson* hearings substantially influenced the outcome."

Federal Law (Crimes)

Narcotics (Evidence)

McFadden v United States, 576 US __, 135 SCt 2298 (6/18/2015)

The Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), 21 USC 813, requires courts to treat as controlled substances those substances that are substantially similar to those included in the federal controlled substance schedules. The Controlled Substances Act, 21 USC 841(a)(1), requires the government to show that defendants knew they were dealing with "'a controlled substance.'" The knowledge element can be established either by showing a defendant knew that the substance was actually listed on a drug schedule or was treated as such under the Analogue Act (not necessarily knowing the specific identity of the substance), or that the defendant knew the specific analogue being dealt with (with or without knowledge that it was legally considered an analogue). Where a jury instruction did not accurately convey the knowledge requirement, the case must be remanded for a determination of whether the error was harmless.

Concurrence: [Roberts, CJ] I join the majority opinion except to the extent it allows the knowledge requirement to be met "'by showing that the defendant knew the identity of the substance he possessed.'" The majority's statements on this issue are not necessary to the conclusion that the jury instructions failed to properly convey the requisite mental state.

Evidence (Hearsay)

Witnesses (Child) (Confrontation of Witnesses)

Ohio v Clark, 576 US __, 135 SCt 2173 (6/18/2015)

Admission at trial of out of court statements by a three-year-old to teachers regarding injuries he said were inflicted by the defendant, admissible under a state rule of evidence, did not violate the Confrontation Clause. While some statements to persons who are not law enforcement officers could raise confrontation issues, "such statements are much less likely to be testimonial than statements to law enforcement officers." Statements by very young children will also rarely implicate confrontation. And the relationship between a student and teacher "is very different from that between a citizen and the police." Here, the teachers needed to know whether it was safe to release the injured three-year-old to his guardian at the end of the day and whether any other child was at risk. Nothing in the questioning indicated that the child's statements would be used to prosecute or punish the abuser. The conversation was informal and spontaneous. A state mandatory reporting statute does not, alone, convert a conversation about abuse into a law enforcement mission.

Concurrence: [Scalia, J] "I write separately … to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave …." The opinion can be regarded as "the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause …. I concur only in the judgment."

Concurrence: [Thomas, J] "I would use the same test for statements to private persons that I have employed for statements to agents of law enforcement, assessing whether those statements bear sufficient indicia of solemnity to qualify as testimonial." The child's statements here do not.

Due Process (Unreasonable Searches)

Search and Seizure (Warrantless Searches)

City of Los Angeles v Patel, No. 13–1175, 576 US __ (6/22/2015)

US Supreme Court *continued*

"We hold [that] facial challenges [to statutes] can be brought under the Fourth Amendment. We further hold that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them any opportunity for pre-compliance review." Hotels must have "an *opportunity* to have a neutral decisionmaker review an officer's demand to search the registry before … [facing] penalties for failing to comply. Actual review need only occur in those rare instances where a hotel operator objects to turning over the registry."

Dissent: [Scalia, J] "Motels not only provide housing to vulnerable transient populations, they are also a particularly attractive site for criminal activity ranging from drug dealing and prostitution to human trafficking." The ordinance in question allowing a limited inspection of a guest register "is eminently reasonable under the circumstances presented ...."

Dissent: [Alito, J] Not every application of the law in question would be unconstitutional. The remedy for circumstances in which its command conflicts with the Fourth Amendment is an "as-applied injunction *limited to the conflict with the Fourth Amendment*."

Civil Rights Actions (USC § 1983 Actions)

Due Process (Prisoners)

Jails (Civil Liabilities) (Conditions) (Guards)

Kingsley v Hendrickson, No. 14–6368, 576 US __ (6/22/2015)

The correct standard for proof of an excessive force claim under 42 USC 1983 by a pretrial detainee is whether the officers' use of excessive force was objectively unreasonable. "A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." And the court must take into consideration the legitimate government interests in managing the facility, "appropriately deferring to 'policies and practices that in th[e] judgment' of jail officials" are necessary to preserve order, discipline, and institutional security. What standard is appropriate in excessive force claims brought by convicted prisoners is not at issue and is not addressed. The jury instructions below, which included references to recklessness, suggested that the jury should examine the officers' subjective views of the need for and the excessiveness of the force employed. The matter is remanded for resolution of whether the error was harmless.

Dissent: [Scalia, J] The question presented is "whether a pretrial detainee's due process rights are violated when 'the force purposely or knowingly used against him [is] objectively unreasonable.'" The answer should be no. "The Due Process Clause is not 'a font of tort law to be superimposed upon'" state systems.

Dissent: [Alito, J] "I would dismiss this case as improvidently granted." The due process issue should not be decided until the availability of a Fourth Amendment claim has been settled.

Due Process (Vagueness)

Federal Law (Crimes)

Weapons (Firearms) (Possession)

Johnson v United States, No. 13–7120, 576 US __ (6/26/2015)

"[T]he indeterminacy of the wide-ranging inquiry required by" the residual clause of 18 USC 924(e)(2)(B) makes it unconstitutionally vague. The clause, in the federal statute making it a crime for certain people to have guns, concludes a list of qualifying convictions by referring to any crime that "'*otherwise involves conduct that presents a serious potential risk of physical injury to another*.'" This language leaves "grave uncertainty about how to estimate the risk posed by a crime" and "uncertainty about how much risk it takes for a crime to qualify as a violent felony." The lower courts have found the clause "'nearly impossible to apply consistently,'" creating numerous splits about the nature of the inquiry needed to apply it. "Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." While prior decisions of this Court have opined that the clause is not unconstitutionally vague, this is the first case in which the issue was briefed and argued, and earlier decisions can be revisited when their application proves unworkable.

Concurrence: [Kennedy, J] The clause is not unconstitutionally vague, but the conviction for possession of a short-barreled shotgun does not qualify under the clause as a violent felony.

Concurrence: [Thomas, J] "I cannot join the Court in using the Due Process Clause to nullify an Act of Congress that contains an unmistakable core of forbidden conduct …." The majority decision cannot be reconciled with vagueness precedents, and the vagueness doctrine itself "shares an uncomfortably similar history with substantive due process, a judicially created doctrine lacking any basis in the Constitution." This case can be easily disposed of without nullifying the residual clause; the crime in question does not constitute a violent felony thereunder.

Dissent: [Alito, J] The Court is tired of the residual clause and so, "brushing aside *stare decisis*," the Court strikes it as unconstitutionally vague. The petitioner's cer-

US Supreme Court *continued*

tiorari petition raised only the issue of whether possession of a sawed-off shotgun qualified as a violent felony under the clause, failing to renew a lower-court argument that the clause is unconstitutionally vague, but after oral argument the Court sought reargument on that issue. The majority decision is indefensible. There is precedent saying that a law is vague "'only if [it] is impermissibly vague in all of its applications,'" which is not the case here.

Death Penalty (Abolition) (Cruelty) (States [Oklahoma])

Glossip v Gross, No. 14–7955, 576 US __ (6/29/2015)

Death-sentenced prisoners' challenge to the use of midazolam as the first drug in a three-drug protocol used in executions on the basis that it creates an unacceptable risk of severe pain is rejected. The petitioners "failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims," and the lower court "did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain." As capital punishment is constitutional, there must be a constitutional method of implementing it; some risk of pain being inherent in any method, there is no requirement that all risk of pain be avoided.

Concurrence: [Scalia, J] I join the Court's opinion, writing separately to respond to Justice Breyer's call for abolition. "It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*."

Concurrence: [Thomas, J] The rights to trial by jury and trial in the state where an offense was committed "ensure that capital defendants are given the option to be sentenced by a jury of their peers who, collectively, are better situated to make the moral judgment between life and death than are the products of contemporary American law schools."

Dissent: [Breyer, J] "[R]ather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution." "In this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both."

Dissent: [Sotomayor, J] The Court's decision "leaves petitioners exposed to what may well be the chemical equivalent of being burned at the stake." The decision absolves the State of Oklahoma of the duty to respect the dignity of all persons, even those convicted of heinous crimes.

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)

People v Flanders, 25 NY3d 997, 10 NYS3d 169 (5/5/2015)

The indictment counts charging first-degree assault and reckless endangerment, based on acts involving the use of both a pistol and a rifle, were not duplicitous. While the indictment used the conjunctive "and" with regard to the two weapons, neither statute requires proof that the defendant used both. It was not error to instruct the jury, following a question regarding whether they had to believe the defendant used both weapons, that the prosecution had to prove beyond a reasonable doubt that either or both weapons were involved; the prosecution was not bound by the use of the conjunctive in the indictment. Nor did the evidence at trial render the charges duplicitous. Though the defendant used two guns, the charges concerned a single incident in which the defendant attacked the complainant out of one impulse, to seek revenge.

Appeals and Writs (Preservation of Error for Review)

Motions (Suppression)

People v Graham, 25 NY3d 994, 10 NYS3d 172 (5/5/2015)

Where the defendant did not raise, in his pro se motion papers or at the suppression hearing, the issue of whether the police had to read him his *Miranda* rights at a second interview conducted at the defendant's request and in the presence of counsel, the issue is not preserved. The hearing court focused on whether counsel's continued presence was required once the defendant waived the right to counsel in counsel's presence and agreed to talk to police about the counterfeit bills in question. As the hearing court did not expressly decide the issue raised on appeal, the general motion for suppression cannot be said to have preserved it, and it is therefore beyond review.

Evidence (Privileges)

Sex Offenses (Sexual Abuse)

NY Court of Appeals *continued*

People v Rivera, 25 NY3d 256, __ NYS3d __ (5/5/2015)

Where a psychiatrist from whom the defendant sought treatment notified the Administration for Children's Services that the defendant had admitted he sexually abused a minor, the trial court erred in allowing the psychiatrist to testify at trial about the defendant's admissions. While a physician may be required or permitted by law to report abuse, such disclosure does not necessarily abrogate the privilege codified in CPLR 4504(a). Legislative exceptions to the physician-patient privilege have been very specific; had the Legislature intended to create one permitting a mental health professional to testify against a patient in a criminal proceeding, it would have so stated. The provisions limiting or abrogating the privilege for the purpose of protecting children by allowing physicians' statements to be admitted in child protection proceedings do not put offenders on notice that the privilege does not apply in criminal proceedings; the caselaw and theories put forward by the prosecution are not apposite. The testimony here about the defendant's admission was not harmless.

Juveniles (Abuse) (Neglect)

Matter of Trenasia J., 25 NY3d 1001, 10 NYS3d 162 (5/5/2015)

Record evidence supports the family court finding that the uncle by marriage of the subject child was a person legally responsible for the child, who was visiting in the uncle's home; had done so some eight or nine times, including four overnight visits, in the prior year; and had interacted with him at family functions. The uncle was the only adult present at his home at the time of the incident, and the child's mother said she expected the uncle to care for the child if the child's aunt was not present. The determination of derivative neglect of the uncle's own children as a result of his actions toward the child in question has record support.

Concurrence in Part, Dissent in Part: [Rivera, J] The record is devoid of facts regarding the nature and duration of the uncle's caretaker responsibility, especially in light of the mother's testimony that it was the aunt who was in charge in the mother's absence. The record also suggests that the family court "relied disproportionately on some undefined normative-based assumption about … the … familial bond ...." As the father of three children named in the petition, the uncle clearly meets the definition of "respondent" for purposes of the derivative neglect proceeding.

Prior Convictions (Foreign Convictions)

Sex Offenses (Sex Offender Registration Act)

Matter of Kasckarow v Board of Examiners of Sex Offenders of State of New York, 25 NY3d 1039, __ NYS3d __ (5/7/2015)

The petitioner's nolo contendere plea in Florida to indecent assault for sexual battery on a child under 16, for which the Florida court withheld adjudication and placed the petitioner on "'sex offender probation,'" subsequently granting early termination, constitutes a conviction for purposes of the Sex Offender Registration Act. Under New York law, a conviction includes a guilty plea, regardless of the subsequent sentence or judgment, and nolo contendere pleas, while not recognized in New York, are, like *Alford* pleas, "'no different from other guilty pleas' …."

Appeals and Writs (Remittiturs)

Sentencing (Appellate Review) (Concurrent/Consecutive) (Modification)

People v Rodriguez, 25 NY3d 238, __ NYS3d __ (5/7/2015)

The sentencing court acted within its discretion when it modified the defendant's sentence in accordance with the Appellate Division's directive remitting the case for a determination of whether one of the defendant's robbery sentences should be changed to run consecutively after an appellate determination that his assault and attempted murder convictions could not be consecutive. This Court previously held that the Appellate Division had the authority to remit the matter, but did not determine the propriety of running individual counts consecutively. The clear import of this Court's prior ruling was that CPL 470.20 allowed the appellate court to direct realignment of legally-imposed sentences. The consecutive sentences imposed for first-degree assault and first-degree robbery comport with Penal Law 70.25(2). While the defendant shot the accuser during the robbery, it was not done to effectuate the robbery, as the accuser was complying with the directive to relinquish a gold chain when the shooting occurred.

Dissent: [Lippman, CJ] This Court's earlier narrow opinion did not rule on whether the sentencing court had authority to alter the defendant's sentence. When the Appellate Division corrected the illegality as to the consecutive terms for offenses committed through the same act, the defendant was subject to a lawful sentence and no other changes could be made to it.

Article 78 Proceedings

Judges (Powers)

Prosecutors (Decisionmaking)

NY Court of Appeals *continued*

Matter of Soares v Carter, 25 NY3d 1011, 10 NYS3d 175 (5/7/2015)

The courts below properly found in this CPLR article 78 proceeding brought concerning a criminal case against protesters supporting the Occupy Movement that a trial court cannot order the prosecution "to call witnesses at a suppression hearing or enforce such a directive through its contempt powers." Each district attorney's executive power comes with the sole discretion "to orchestrate the prosecution of those who violated the criminal laws …." A court acts beyond its jurisdiction by assuming the district attorney's role and compelling prosecution. Issuance of a writ of prohibition precluding "a limited ultra vires act was appropriate."

Misconduct (Judicial)

Matter of Dorrance, 25 NY3d 986, 9 NYS3d 178 (5/12/2015)

The suspension of "Jeffrey P. Dorrance from his office of Justice of the Green Island Town Court, Albany County (25 NY3d 925 [2015])" with pay is to continue.

Appeals and Writs (Waiver of Right to Appeal)

Sentencing (Youthful Offenders)

People v Pacherille, 25 NY3d 1021, 10 NYS3d 178 (5/12/2015)

"[A] valid waiver of the right to appeal, while not enforceable in the face of a *failure* to consider youthful offender treatment, forecloses appellate review of a sentencing court's discretionary decision to deny youthful offender status once a court has considered such treatment."

Dissent: [Rivera, J] Allowing a waiver of appeal as to a court's denial of youthful offender (YO) treatment "merely serves to reestablish YO consideration as a legally valid 'chip' to be leveraged in the plea bargaining process." "I find [the majority's] decision unsupported by law, reason, society's understanding of the difference between young people and adults, and the ever-increasing appreciation of our criminal justice system's impact on young lives."

Narcotics (Penalties)

Sentencing (Resentencing)

People v Brown, 25 NY3d 247, __ NYS3d __ (5/14/2015)

The 2011 amendments to CPL 440.46, reflecting the merger of the Department of Correctional Services (DOCS) and Division of Parole, "expanded the class of defendants eligible for resentencing under the Drug Law Reform Act [DLRA] to include those who are on parole at the time resentencing is sought." The defendant here, who sought resentencing while on parole for his 2002 conviction for third-degree sale of drugs, was in the custody of the Department of Corrections and Community Services (DOCCS) and eligible for the relief sought. This reflects the plain meaning of the words used by the Legislature, the use of the word "custody" in several statutes, the intent of the 2011 law to focus on reentry and the common purpose of the two merged entities, and the principle that remedial statutes like the DLRA should be interpreted broadly to achieve their goals.

Dissent: [Read, J] There was no dispute four years ago when the Court decided, in *People v Paulin* (17 NY3d 238), that 440.46 relief was limited to incarcerated persons, not people on parole. While *Paulin* was pending, this Court was notified of the merger of DOCS and Parole into DOCCS, and declared in a footnote that the name change was of no consequence to the companion cases decided in *Paulin*.

Evidence (Sufficiency)

Robbery (Elements) (Evidence)

People v Lamont, 2015 NY Slip Op 04165 (5/14/2015)

Where the defendant and an accomplice, wearing masks and gloves and carrying what appeared to be handguns, knocked loudly on the rear door of a fast-food restaurant before regular store hours, with no apparent lawful purpose, while having a car parked nearby, the evidence was legally sufficient to establish the specific intent to steal required to support his attempted second-degree robbery conviction. That the apparent weapons found when the defendants fled were BB guns suggests an intent to forcibly steal rather that commit murder, and the store employees present at the time did not know the defendants, discounting the likelihood that a crime more commonly associated with a specific target was planned.

Sex Offenses (Civil Commitment)

Witnesses (Experts) (Testimony via Video)

Matter of State of New York v Robert F., 2015 NY Slip Op 04162 (5/14/2015)

The trial court in this Mental Hygiene Law article 10 proceeding erred "by permitting an expert witness to testify via electronic appearance on rebuttal without a showing by the State of exceptional circumstances," but the error was harmless. Courts have the discretion to permit electronic appearances in a dispositional hearing under article 10, "but only where exceptional circumstances so require, or when all parties consent." An assertion by the

NY Court of Appeals *continued*

prosecution that the expert could not appear on short notice and "was somehow limited by her remaining employment with an Office of Mental Hygiene facility" was not sufficient. But the testimony presented in the case-in-chief was overwhelming and the trial court's written decision credited the expert's testimony referencing only the original Static-99 test results, not the modified scores presented during the electronic appearance on rebuttal.

Admissions (*Miranda* Advice)

Harmless and Reversible Error (Harmless Error)

Juveniles (Delinquency)

Matter of Delroy S., 2015 NY Slip Op 04676 (6/4/2015)

There is no basis for disturbing the Appellate Division's conclusion that statements to police by 11-year-old Delroy, who was charged with acts constituting assault and attempted assault for stabbing the accuser, should have been suppressed where officers responding to the scene were taken by Delroy's adult sister to his home, where one officer asked Delroy "what happened" upon seeing him and without administering *Miranda* warnings. The family court's error in denying suppression was not harmless. Evidence existed supporting Delroy's justification defense, and the officer's summary of Delroy's statement appears to conflate two separate fights, leaving an impression that Delroy paused during a fight to obtain a knife with which to stab the accuser; admission of Delroy's statement "undermined, if not eviscerated [his] justification defense.

Appeals (Judgments and Orders Appealable)

Habeas Corpus (State)

Noncitizens (Deportation)

Parole

Sex Offenses (Civil Commitment)

People ex rel. Bourlaye T. v Connolly, 2015 NY Slip Op 04677 (6/4/2015)

The petitioner, a foreign national who was paroled from state prison after serving about 25 years and taken into federal custody pending deportation, was eventually released from federal detention due to lack of documentation to deport him; he filed this habeas petition challenging his subsequent state arrest and detention in the absence of allegations he violated conditions of his parole. The State having filed a Mental Hygiene Law article 10 petition the same day, and a court having found probable cause to believe that he "was a 'sex offender requiring civil management'" the issue raised on his appeal from denial of a habeas writ is academic. The appeal presents no question that would warrant application of an exception to the mootness doctrine.

Double Jeopardy

Forgery

People v Lynch, 2015 NY Slip Op 04754 (6/9/2015)

The courts below properly found no double jeopardy violation in separate prosecutions of the defendant for acts relating to a June 2009 application in Suffolk County for a non-driver identification card (ID card) and the presentation of the ID card to a police officer and possession of other forged instruments in November 2009 in Westchester County. The latter involved possession of the final ID card and other forged instruments while the former indictment charged the defendant with offenses related to the completion and filing of the application form. The two sets of charges, months apart, involved different forged instruments, "making them different criminal transactions." Alternatively, there were no "integrated, interdependent acts" constituting a "'single criminal venture' …."

Admissions (*Miranda* Advice)

Motions (Suppression)

People v Rutledge, 2015 NY Slip Op 04758 (6/9/2015)

"On review of submissions pursuant to section 500.11 of the Rules, order reversed, defendant's motion to suppress granted, and case remitted to Supreme Court, New York County, for further proceedings on the indictment (*see People v Dunbar*, 24 NY3d 304 [2014])."

[***Ed. Note:*** *The facts of the case are set out in the Appellate Division opinion,* People v Rutledge *(116 AD3d 645 [1st Dept 2014]).*]

Appeals and Writs (Waiver of Right to Appeal)

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

People v Sanders, 2015 NY Slip Op 04755 (6/9/2015)

The record sufficiently demonstrates that the defendant "knowingly and intelligently waived his right to appeal." The court "adequately described the right to appeal without lumping it into the panoply of rights normally forfeited upon a guilty plea." Further, the prosecution obtained the defendant's "confirmation that he had discussed the waiver of the right to appeal with his attorney and that he was waiving such right in consideration of his negotiated plea, as well as counsel's confirmation

NY Court of Appeals *continued*

that all motions pending or decided were being withdrawn." In light of the whole colloquy, and especially the defendant's extensive experience with the justice system and many prior guilty pleas leading to imprisonment, no elaboration was needed "on the phrase 'right to appeal your conviction and sentence to the Appellate Division Second Department,'" although "the better practice would have been to define the nature of the right to appeal more fully …."

Dissent: [Rivera, J] "[W]e have never before held that a defendant's criminal history, regardless of its length, is dispositive of the defendant's understanding of the plea." Information on whether the defendant had previously waived the right to appeal as part of a plea, and gone through an appellate process, is lacking in the record. The majority, in a footnote, finds delegation of the plea allocution to the prosecutor troubling, as do I.

Witnesses (Experts) (Police)

People v Inoa, 2015 NY Slip Op 04790 (6/10/2015)

Considerable portions of a detective's testimony about the content of recorded telephone conversations were admitted in error. Had the detective, who was intimately involved in the investigation and preparation of the case for prosecution, been qualified to testify just as to the meaning of coded expressions in the recordings, and limited his expert testimony accordingly, there would be no error. But the permission to decode conversations was generally extended "to explaining the meaning of virtually everything that was said" during the recordings, with the detective becoming "an apparently omniscient expositor of the facts of the case." His testimony encompassed two species of error—testifying as to the meaning of words beyond "'the particular language of drug traffickers'" that he possessed specialized knowledge of and interpreting ambiguous slang terms based not on their "fixed meaning[s]" in the drug world generally or this particular conspiracy but based on knowledge gained from his involvement in the case.

However, while "we do not minimize the potency of this species of error to affect the outcome of a criminal trial," the error here was harmless. The proof against the defendant did not primarily come from the recordings but instead came from eyewitness accounts, and "was utterly compelling." The testimony of another witness, which the defendant claims was unduly bolstered by the detective's testimony, was not necessary to prove the defendant's guilt.

Due Process

Motions (Adjournment)

Sex Offenses (Sex Offender Registration Act)

People v Lashway, 2015 NY Slip Op 04877 (6/11/2015)

The court did not abuse its discretion by denying the defendant's request for an adjournment of a reclassification hearing dealing with his Sex Offender Registration Act risk level status. The court, at the request of the defendant's counsel, directed the Board of Examiners of Sex Offenders to provide all documents listed in its updated recommendations, but the Board did not provide two of them; after denying counsel's request for an adjournment to obtain those two documents, the hearing proceeded and the court found that the defendant had failed to establish by clear and convincing evidence that he was entitled to a downward modification. The defendant correctly argues that he was entitled to the documents as a matter of procedural due process. However, on the record here, it cannot be said that the court abused its discretion as a matter of law in denying the adjournment, as there was a strong case against modification, the defendant was not prejudiced by the denial of a delay, and the defendant can make a timely request to obtain the documents to support a new application for reclassification in a year.

Juveniles (Youthful Offender)

Motions (Adjournment)

People v Middlebrooks, 2015 NY Slip Op 04875 (6/11/2015)

A court must make a determination on the record as to whether one or more of the factors under CPL 720.10(3) exist, making the defendant eligible for youthful offender treatment, where the defendant, who would otherwise be eligible, has been convicted of an armed felony. This must be done even if the defendant does not request it or agreed as part of a plea bargain to forgo youthful offender treatment. The prosecution's contention that the Legislature intended to make defendants convicted of armed felonies presumptively ineligible fails to acknowledge statutory language and "gives little consideration to the broader legislative purpose behind CPL article 720."

Concurrence in Part, Dissent in Part: [Stein, J] The majority's holding is an unwarranted extension of *People v Rudolph* (21 NY3d 497) as well as a strained reading of the statute. I concur in the reversal in *Lowe* herein on a different ground. Counsel for Lowe sought an adjournment to compile a defense presentence report and requested consideration of youthful offender status; denial of the adjournment was an abuse of discretion requiring reversal.

Evidence (Sufficiency)

Homicide (Manslaughter [Evidence])

Instructions to Jury

NY Court of Appeals *continued*

People v Scott, 2015 NY Slip Op 04874 (6/11/2015)

The defendant challenged his conviction of first-degree manslaughter for the death of a man over whose head he had smashed a beer bottle, claiming that there was insufficient evidence to support a theory of acting in concert with another who, at some point in the encounter, beat the decedent with a bat; while it was a close case, viewing the evidence in a light most favorable to the prosecution, the contention is rejected.

The claim that the trial court committed a mode of proceedings error by giving a supplemental jury instruction in the defendant's absence is also rejected where, the day after jury instructions, the court corrected for the jury the stated dates of the charges, saying on the record out of the jury's presence that the parties had agreed the jury could be told of the mistake without the parties present, and defense counsel made no objection when informed of the court's actions. The court's instruction was a mere technical conformance with the indictment.

Disorderly Conduct

Motions to Suppress (CPL Article 710)

People v Gonzalez, 2015 NY Slip Op 05515 (6/25/2015)

Reversal is required and the defendant's motion to suppress must be granted where the police testimony at the suppression hearing, credited by the motion court and not disputed by the parties, showed that the police prevented the defendant from leaving a subway station after he shouted obscenities at them and then found an allegedly illegal knife on his person, and the parties agree that if there was probable cause to arrest the defendant for disorderly conduct, the detention was justified. "[T]here is no record support for the motion court's determination that defendant's rant against the police officers constituted the crime of disorderly conduct."

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

Narcotics (Penalties)

Sentencing (Resentencing)

People v Lovett, 2015 NY Slip Op 05512 (6/25/2015)

The Appellate Division's consolidation of the order denying resentencing under the Drug Law Reform Act of 2004 with other, appealable orders did not transform the denial of resentencing into an appealable decision. Consolidation cannot expand or modify the scope of this Court's statutorily-established jurisdiction.

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

People v Washington, 2015 NY Slip Op 05511 (6/25/2015)

Trial counsel's comments in response to a court's questions about the defendant's belated pro se motion seeking a different attorney on the basis of ineffective assistance of counsel did not establish an actual conflict of interest. The lawyer described "when he met with defendant and for how long, what they discussed, what the defense strategy was at trial and what discovery he gave or did not give to defendant" and did not stray beyond this factual explanation of his efforts on the defendant's behalf into suggestions that the defendant's claims lacked merit.

Burglary

Homicide (Felony Murder)

People v Henderson, 2015 NY Slip Op 05592 (6/30/2015)

The defendant argues that he could not be convicted of felony murder based on a homicide committed during a burglary because the burglary was committed with the intent to kill the decedent; as there was evidence that the defendant re-entered the decedent's apartment with the intention of assaulting the decedent, not killing him, but then killed the decedent during the burglary, the felony murder charge was proper. The question of "whether a person who enters a building with the intent to kill may properly be convicted of felony murder" need not be addressed here.

The evidence was legally sufficient to support the felony murder conviction. The Legislature included burglary of all degrees as a predicate felony for felony murder, treating burglary differently from other crimes; people inside homes "'are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same criminal intent.'" While approaching someone on the street with the intent to assault that person and then causing the person's death could yield a manslaughter but not a felony murder conviction, applying felony murder in the context of an unlawful entry of a building is appropriate because "the homicide occurs in the context of other criminal activity that enhances the seriousness of the offense."

Accomplices (Instructions)

Appeals and Writs (Preservation of Error for Review)

Counsel (Competence/Effective Assistance/Adequacy)

Organized Crime

NY Court of Appeals *continued*

People v Keschner, 2015 NY Slip Op 05596 (6/30/2015)

"We hold that the prosecution in an enterprise corruption case may prove that a defendant was a member of a criminal enterprise, with a continuity beyond the scope of individual criminal incidents, without showing that the enterprise would have survived the removal of a key participant." Making such a showing would be impossible in most cases unless a key participant was actually removed. The continuity element requires that an organization continue "'beyond the scope of individual criminal incidents' …." The case relied upon by the defense, *People v Yarmy* (171 Misc 2d 13), "is not a correct statement of the law."

While the record reveals that the court's instructions on accomplice liability were flawed, the errors were not preserved and the failure to preserve them did not constitute a single failing of counsel so egregious and prejudicial as to deprive the defendants of their right to effective assistance of counsel.

Judge Abdus-Salaam took no part in this case.

Dissent in Part: [Lippman, CJ] The compound errors occurred in instructions dealing with accomplice liability, a crucially important factor in the charges here. When the jury asked the court to '"explain accomplice liability,'" counsel made a burden-shifting objection. After the court repeated its initial flawed charge with additional language, counsel sought to renew and further explain the objection but were cut off by the court. "The charge, as a whole, left the jury with a dizzying array of theories upon which to convict, only one of which was lawful." The error was sufficiently preserved.

Identification (Eyewitnesses) (Suggestive Procedures)

People v Pacquette, 2015 NY Slip Op 05595 (6/30/2015)

The prosecution was statutorily required, under CPL 710.30, to notify the defendant within 15 days of arraignment of their intention to offer testimony at trial of a detective who had identified him after he was arrested. The prosecution served a 710.30 notice as to an undercover officer who had identified him but not as to the detective who observed the drug transaction, left the scene to assist in apprehending an additional suspect, later observed the defendant in custody, and communicated that the defendant was the person he had seen with the undercover officer. The argument that the need for a 710.30 notice was obviated as to the detective because his identification was confirmatory is rejected. However, the failure to provide notice was harmless where the evidence at trial was overwhelming.

Harmless and Reversible Error (Harmless Error)

Instructions to Jury

Offenses Against Animals

People v Basile, 2015 NY Slip Op 05623 (7/1/2015)

The question of whether the trial court erred in refusing to instruct the jury that conviction under Agriculture and Markets Law 353 requires proof that the defendant knowingly deprived the dog in question of, or neglected or refused to furnish, basic necessities required to maintain its health does not need be reached because, even if the assertion on appeal is correct, relief would not be available on this ground. Given the veterinarian's testimony about the dog's emaciated appearance and the effects of its dirty living conditions, along with the defendant's admissions that he could not afford to support his animal and had not been regularly feeding it, "there can be no issue on this record whether defendant knowingly deprived the animal of" requisite care.

Counsel (Competence/Effective Assistance/Adequacy)

Forensics (DNA)

Misconduct (Prosecution)

People v Wright, 2015 NY Slip Op 05621 (7/1/2015)

Despite the known limitations of the DNA evidence presented in this circumstantial evidence case, "the prosecutor in summation misrepresented the DNA analysis, including arguing the evidence established that defendant's DNA was at the crime scene and on a critical piece of evidence linked to the victim's murder"; defense counsel rendered ineffective assistance by failing multiple times to object. Experts had testified about DNA found on the decedent's body or objects found with it but were only able to say, at most, that the defendant, as well as others including the decedent's husband, could not be excluded as a person whose DNA was present. However, in summation, the prosecutor offered "'common sense and science'" as the bases for conviction, describing the DNA evidence as narrowing the number of contributors to just the defendant and an accomplice, and the decedent's husband, and asserting that the defendant was the only one whose DNA matched that found on one of the most incriminating pieces of evidence. No reasonable strategy could explain allowing these misrepresentations given the defense efforts throughout trial to show the weaknesses of the DNA evidence.

Dissent: [Pigott, J] The majority looks at a single error in a vacuum. Viewed in its totality, counsel's representation "was light years from what is deemed ineffective assistance under our jurisprudence." Counsel was unrelenting in attacking the strength of the DNA evidence.

NY Court of Appeals *continued*

And the prosecutor did not argue that the DNA evidence statistically identified the defendant as the perpetrator.

First Department

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Confessions (Advice of Rights) (Counsel) (*Miranda* Advice) (Videotapes) (Voluntariness)

People v Adames, 121 AD3d 507, 994 NYS2d 334 (1st Dept 10/16/2014)

The court erred in denying the defendant's motion to suppress his written statement to the police and later videotaped statement to a prosecutor where the prosecution failed to show that the defendant knowingly and intelligently waived his *Miranda* rights. The defendant, who was 18 years old, had no prior criminal history, and could not read or write, made several statements on video that indicated he neither understood the word attorney nor that he had a right to talk with an attorney before questioning, and the prosecutor failed to sufficiently explain to the defendant the meaning of the right. Even though the defendant answered yes each time the police asked if he understood a particular right, based on the confusion he expressed in his later videotaped statement, it is clear that the defendant did not understand. (Supreme Ct, New York Co)

Guilty Pleas (Vacatur)

Plea Bargaining

Sentencing

People v Williams, 123 AD3d 240, 995 NYS2d 559 (1st Dept 10/30/2014)

The defendant's conviction, entered upon a guilty plea, must be vacated where the record shows that neither the court nor the parties knew that the agreed-upon sentence the defendant was to receive if he complied with the conditions of the plea was illegal. The defendant did not need to preserve his due process claim that his plea was induced by an illegal promise. That the enhanced sentence imposed after the defendant violated the conditions of his plea was legal is irrelevant because "there can be no breach of a plea agreement where the agreement itself is constitutionally defective and therefore cannot be recognized because it contains, as an integral component, an illegal promise that materially induced the defendant to plead guilty." (Supreme Ct, New York Co)

Dissent: The defendant's due process rights were not violated where he failed to comply with the conditions of the plea, did not move to withdraw his plea or otherwise preserve his current argument, and ultimately received a lawful sentence, which was within the range the parties agreed he would receive if he violated the plea conditions.

[***Ed. Note:*** *Leave to appeal was granted on Jan. 29, 2015 [2015 NY Slip Op 62556(U) (1st Dept 1/29/2015)].*]

Evidence (Sufficiency)

Juveniles (Custody)

Narcotics (Drugs)

People v Berry, 122 AD3d 414, 995 NYS2d 70 (1st Dept 11/6/2014)

"The evidence supports a reasonable inference that defendant 'permit[ted]' several underage children to 'enter or remain' in a place of drug activity (Penal Law § 260.20[1]), even though, in permitting the children to enter or remain, defendant may be viewed as having acted jointly with his codefendant. The statute does not require a defendant to have a legal responsibility for the care and custody of the child (*compare* Penal Law § 260.10[2]), and defendant's guilt was not negated by the fact that the codefendant may have been even more blameworthy, by virtue of her relationship with the children." That the defendant was acquitted of drug possession does not undermine his conviction of unlawfully dealing with a child. (Supreme Ct, New York Co)

[***Ed. Note:*** *Leave to appeal was granted on Apr. 2, 2015 (25 NY3d 987 [2015]).*]

Admissions (Interrogation) (*Miranda* Advice)

People v Daniel, 122 AD3d 401, 996 NYS2d 16 (1st Dept 11/6/2014)

In this second-degree murder case, the defendant's motion to suppress her written and videotaped statements must be granted where, although she gave the statements after receiving *Miranda* warnings, the statements were given as part of a continuous chain of events that included pre-warning questions by the police and responses by the defendant indicating she knew why she was taken into custody and acknowledging she was with the other suspect outside the decedent's house and that they asked the decedent to use her phone. The same police were involved in the interrogation before and after the warnings, the location and nature of the interrogation were the same, and the defendant did not indicate she

First Department *continued*

was willing to speak to the police before the *Miranda* violation. The prosecution failed to preserve and the court did not consider the issue of whether the break between the written and videotaped statements was sufficient to dissipate the taint. (Supreme Ct, Bronx Co)

Dissent: The statements the defendant made before she received *Miranda* warnings were not incriminating. "I find that the taint of the pre-*Miranda* statement was sufficiently dissipated." And the record is not clear that there was no break between the *Miranda* violation and the post-*Miranda* statements.

Attempt (Lesser and Included Offenses)

Strangulation (Obstruction of Breathing or Blood Circulation)

People v Mata, 122 AD3d 450, 995 NYS2d 75 (1st Dept 11/13/2014)

Attempted criminal obstruction of breathing or blood circulation conviction is not a nonexistent crime. "[C]riminal obstruction requires a specific intent, and it proscribes specific conduct committed with intent to achieve a certain result …. It is not an inchoate offense, and it may be committed by conduct that does not necessarily constitute an attempt to commit another crime," namely second-degree strangulation. (Supreme Ct, Bronx Co)

Instructions to Jury

Jurisdiction

People v Thomas, 124 AD3d 56, 997 NYS2d 53 (1st Dept 11/18/2014)

The court erred in refusing the defendant's request for a jury instruction on territorial jurisdiction under CPL 20.20 where the defendant challenged the state's jurisdiction and moved for a trial order of dismissal on that basis and there was equivocal evidence about whether the crime took place in New York State. The limited circumstances in which a court may dispense with a jurisdiction charge, such as where the defendant conceded jurisdiction, admitted facts upon which jurisdiction was based, or failed to request the instruction, are not present. The standard instruction for the crime itself, which refers to conduct occurring in this state, "is an insufficient substitute for the charge on jurisdiction." Further, the jurisdiction charge is meant to direct the jury "that they must decide the threshold jurisdictional issue before deciding anything else." (Supreme Ct, New York Co)

Appeals and Writs (Waiver of Right to Appeal)

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

People v Ramos, 122 AD3d 462, 997 NYS2d 24 (1st Dept 11/18/2014)

The court erred in denying the motion to suppress the drugs found in a coat during a warrantless search of the trunk of the car the defendant was driving where, although the police had reasonable suspicion to stop the car based on an officer's observation of the defendant smoking what appeared to be a marijuana cigarette, the police did not have probable cause to search the trunk because the officer did not see the cigarette after approaching the car and gave equivocal testimony about whether he smelled burning or unburnt marijuana; the glassine envelope found on the floor of the front passenger's seat was empty; and the defendant did not appear to be under the influence.

The defendant's appeal waiver was not knowing, intelligent, and voluntary where the court did not adequately explain the nature of the waiver, the rights being waived, or that the waiver of appeal was separate and distinct from the rights automatically forfeited by pleading guilty, and may have even misled the defendant into believing he had no choice but to waive his right to appeal. (Supreme Ct, New York Co)

Sex Offenses (Sex Offender Registration Act)

People v Bullock, 125 AD3d 1, 997 NYS2d 396 (1st Dept 11/25/2014)

The defendant, who moved to New York, is required to register as a sex offender for life under the Sex Offender Registration Act (SORA) based on his North Carolina sexual battery conviction, which includes the essential elements of first-degree sexual abuse under Penal Law 130.65(1). The language in SORA and established precedent show that courts do not have discretion to decline to designate a defendant a sexually violent offender where the defendant meets the statutory definition in Correction Law 168-a(7)(b). The statute requires the court to make such a designation, even if the defendant is deemed to be a level one offender. (Supreme Ct, New York Co)

Dissent: When SORA is read as a whole, it is clear that the court had the discretion to accept or reject the Board of Examiners of Sex Offender's "recommendation that defendant should not be adjudicated a sexually violent offender …."

Identification (*Wade* Hearing)

Narcotics (Sale)

People v French, 122 AD3d 535, 997 NYS2d 394 (1st Dept 11/25/2014)

First Department *continued*

In this drug sale case, "[t]he court erred in summarily denying defendant's motion to suppress identification testimony as the product of an arrest without probable cause" where the defendant alleged that he was not engaged in criminal conduct when he was arrested, he did not engage in such activity at a prior time, he was not involved in any drug sale, and he did not talk to any person about drugs that day. (Supreme Ct, New York Co)

Juveniles (Support Proceedings) (Unemancipated Minors)

Matter of Jose R. v Yvette-Ortiz M., 123 AD3d 412, 999 NYS2d 1 (1st Dept 12/2/2014)

The court properly found that the mother met her burden of establishing that she should be relieved of paying child support for her 18-year-old son based on constructive emancipation where the record showed that in the months before the support proceeding was commenced and for the following year, the son refused to talk to his mother without explanation; the mother tried to maintain a relationship with her son by calling him and sending him letters and cards, but he did not respond; and there was no evidence that the mother was responsible for the deterioration of the relationship. (Family Ct, New York Co)

Attorney/Client Relationship (Confidences)

Counsel (Conflict of Interest) (Multiclient Representation) (Right to Counsel)

People v Watson, 124 AD3d 95, 998 NYS2d 27 (1st Dept 12/2/2014)

The court violated the defendant's right to counsel by disqualifying the attorney who had represented the defendant for eight months where the record does not show that there was a conflict or potential conflict of interest. The defendant's attorney, an employee of New York County Defender Services (NYCDS), learned before trial that Stephens, the person who had been arrested with the defendant and whom he was trying to find, had been represented by another attorney in his office in connection with the same incident. Stephens pleaded guilty soon after arraignment and NYCDS no longer represented him. There is no indication or allegation that the defendant's attorney used or was aware of any confidential information regarding Stephens, and the defendant's attorney was not involved in Stephens's representation; thus, had the defendant's attorney continued the representation, there was no risk that the attorney would have disclosed any of Stephens's confidences. Further, the defendant's attorney acknowledged that his office had barred him from reviewing Stephens's file or using the address on file to locate Stephens. Under the circumstances, "it cannot be said that the prior representation of Stephens by the same public defense organization created a potential conflict of interest." Because there was no conflict, it is unnecessary to decide whether the court erred in denying the defendant's waiver of the conflict. (Supreme Ct, New York Co)

Dissent: "Where, as here, the chosen attorney is prohibited by a conflict of interest from conducting a thorough investigation, including interviewing a potential favorable witness, and would be prohibited from cross-examining that witness if called by the [prosecution], the attorney is unable to ensure that he will provide his client with an effective defense." Even though the defendant was willing to waive the conflict, the court's discretionary decision to disqualify the attorney should not be disturbed.

[***Ed. Note:*** *Leave to appeal was granted on Feb. 5, 2015 (2015 NY Slip Op 63184(U) [1st Dept 2015]).*]

Juveniles (Detention)

Search and Seizure (Detention) (Weapons-frisks)

Matter of Jamal S., 123 AD3d 429, 999 NYS2d 7 (1st Dept 12/4/2014)

The court erred in denying suppression of a firearm found in the respondent's right shoe during a search conducted in the precinct's juvenile detention room where: the police detained the respondent for disorderly conduct, but could not issue a summons because the respondent said he was 16, but did not have any identification; no contraband was found during two earlier searches; the respondent later admitted he was only 15 years old and an officer spoke to the respondent's mother, but told her to wait until the morning to come get her son; and although he did not expect that the respondent had any contraband, the officer who put the respondent in the juvenile room directed the respondent to remove his belt, shoelaces, and shoes. The police had no statutory authority to keep the respondent under arrest for a violation once they learned he was under 16, and the police could only conduct a frisk, not a full-fledged search when they put the respondent in temporary detention pending his parents' arrival. Requiring the respondent to remove his shoes "was far more intrusive than a frisk or a patdown" and the shoe removal "cannot be justified as a protective measure where … he had been twice searched by police officers who had no reason to expect that he had 'anything on him' or otherwise posed a danger." (Family Ct, Bronx Co)

Dissent: Because the respondent was going to be left by himself in the juvenile room until his mother arrived, "it was reasonable and prudent for the police to conduct a protective patdown search and, in accordance with standard lodging procedure, to request that appellant, for his

First Department *continued*

own safety and the safety of others, remove his belt, shoelaces and shoes ….”

Juries and Jury Trials (Deliberation) (Qualifications)

People v Franqui, 123 AD3d 512, 999 NYS2d 40 (1st Dept 12/11/2014)

The court erred in denying the defendant’s timely request for an inquiry after the jury sent a note reporting that one of the jurors was not participating at all in deliberations and was sleeping most of the time. The court’s observation of the jury demeanor while it delivered supplemental instructions, which the jury requested in a separate note, was not sufficient to determine “whether the juror was innocuously dozing off from time to time, or whether he slept through so much of the deliberations that he could be deemed absent, such that the verdict was reached by a jury of 11 persons.” And the court abused its discretion when it relied on general instructions that urged the jurors to get a good night’s rest and to request snacks, coffee, and breaks as needed. (Supreme Ct, New York Co)

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

Freedom of Information

Matter of Law Offices of Adam D. Perlmutter, PC v NYPD, 123 AD3d 500, 999 NYS2d 26 (1st Dept 12/11/2014)

The court correctly directed the respondents to disclose to the petitioner “all calibration and maintenance records for all Intoxilyzer machines owned or maintained by respondent New York City Police Department since January 2008.” The records, requested by the petitioner under the Freedom of Information Law (FOIL), are not covered by the law enforcement exemption in Public Officers Law (POL) 87(2)(e)(i); the “[r]espondents’ conclusive assertions that such records are often requested in DWI cases involving Intoxilyzer test results, and that thousands of such cases are pending in New York City, do not meet the burden of ‘identify[ing] … the generic risks posed by disclosure of these categories of documents’ ….” The respondents failed to raise at the administrative level the argument that the records are specifically exempted from disclosure under POL 87(2)(a), and the argument fails on the merits because that provision does not exempt the records from disclosure. (Supreme Ct, New York Co)

Admissions (Co-defendants)

Witnesses (Confrontation of Witnesses)

People v Johnson, 123 AD3d 573, 999 NYS2d 46 (1st Dept 12/16/2014)

The court erred in allowing the introduction of the codefendant’s grand jury testimony during a joint trial in violation of *Bruton v United States* (391 US 123 [1968]) where, although the testimony was intended to provide an innocent explanation of the events surrounding the alleged robbery and did not admit wrongdoing, it was facially incriminating as to the defendant because it placed the defendant with the codefendant throughout the events, referred to the defendant approximately 40 times, and described how, when the defendant returned to the codefendant’s car after being gone, the undercover officer appeared at the car window asking where the “stuff” was and dropped the prerecorded buy money, the alleged stolen property, into the car. Admission of the testimony was not harmless “in view of the extensive references to defendant and the indications that defendant had purported to set up a drug deal with an individual whom he then led back to the car ….” Also, given the defense claim that the police created a story about a sham drug sale leading to a robbery to excuse the undercover officer’s improper shooting of the defendant, the testimony was the only nonpolice evidence that the codefendant had the prerecorded buy money when the car was stopped. (Supreme Ct, Bronx Co)

Dissent: The codefendant’s testimony was not facially incriminating because it did not directly implicate the defendant in any of the conduct underlying his convictions; testimony by the police witnesses was needed to establish that the prerecorded money was the proceeds of the robbery.

[***Ed. Note:*** *Leave to appeal was granted on Feb. 17, 2015 (2015 NY Slip Op 63951(U) [1st Dept 2015]).*]

Second Department

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Prisoners (Temporary Release Programs)

Sentencing (Enhancement)

People v Lynch, 121 AD3d 717, 993 NYS2d 163 (2nd Dept 10/1/2014)

The defendant challenges the court’s denial of what is sometimes inaccurately called a “violent felony override,” an “imprecise and potentially confusing term” referring to a document that allows the Department of Corrections

Second Department *continued*

and Community Supervision (DOCCS) to ascertain whether a person in prison "has met one of the threshold requirements to be eligible for a temporary release program despite conviction of a specified violent felony offense …." Such a document needs only to set out "the exact offense, including the section, and subdivision if any, of the crimes of which the inmate was convicted." From this, DOCCS—not the court or prosecutor—determines whether conviction under a particular provision disqualifies the person from eligibility for temporary release. "[A] defendant is entitled to have the exact subdivision of the statutory provisions under which he or she was convicted specified in the sentence and commitment …." As the sentence and commitment in this case states only that the defendant "was convicted under 'Penal Law 120.10 (00) [sic]', and does not specify the subdivision," the judgment must be modified to specify the subdivision. (Supreme Ct, Westchester Co)

Sex Offenses (Sex Offender Registration Act)

People v Menjivar, 121 AD3d 660, 993 NYS2d 166 (2nd Dept 10/1/2014)

The prosecution failed to submit clear and convincing evidence in support of assessment of points for two victims on the risk assessment instrument prepared to determine the defendant's presumptive risk level under the Sex Offender Registration Act. While the defendant's two-year-old child was present when the defendant engaged in sexual conduct with his underage niece, there was no evidence that the child "was the victim of any sexual misconduct, or that she witnessed or was aware of the sexual conduct between the defendant and his niece." Absent those points, the defendant is presumptively a level one risk, and since the court ruled it would not grant an upward departure, the defendant's designation must be reduced to level one. (Supreme Ct, Queens Co)

Appeals and Writs (Waiver of Right to Appeal)

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

People v Corbin, 121 AD3d 803, 993 NYS2d 746 (2nd Dept 10/8/2014)

The defendant's challenge to the court's denial of his motion to suppress physical evidence was encompassed in his waiver of appeal; his contention that the waiver was invalid due to the court's failure to explain which constitutional issues could still be appealed and which were unappealable due to the waiver, creating uncertainty, is rejected. The court, in questioning the defendant about a written waiver of appeal form, ascertained that the defendant: had a sufficient opportunity to discuss that waiver with counsel; knew that the waiver was a negotiated part of his particular plea rather than a legal requirement of all guilty pleas; and understood that he was giving up the right to appeal any issues except certain constitutional issues. (Supreme Ct, Kings Co)

Dissent: The court's explanation of the waiver created an ambiguity that was never resolved and rendered the waiver unenforceable, permitting review of the suppression claim, which has merit. The officer who testified at the suppression hearing about the inventory search that yielded physical evidence was not asked if the department had a policy regarding inventory searches, the content of any such policy, or his compliance with it.

Sentencing (Resentencing) (Second Felony Offender)

People v Esquiled, 121 AD3d 807, 993 NYS2d 578 (2nd Dept 10/8/2014)

"The defendant's adjudication as a second felony offender was improper" where the predicate offense was a 1993 conviction that resulted in an illegal sentence and a lawful sentence thereon was not imposed until after the instant offenses were committed. Use of the prior conviction is barred even though the defendant only moved to set it aside after imposition of the sentence in the instant matter. (Supreme Ct, Kings Co)

Evidence (Sufficiency)

Identity Theft (Elements)

Possession of Stolen Property (Elements) (Evidence)

People v Green, 121 AD3d 808, 994 NYS2d 183 (2nd Dept 10/8/2014)

The conviction of fourth-degree criminal possession of stolen property under count 23 of the indictment must be vacated and the count dismissed where the defendant was charged therein with possessing the credit card of a named individual and no evidence was presented at trial that he had the card without that person's permission.

The conviction for second-degree possession of personal identification information under count 43 must be reduced to third-degree possession where trial evidence showing the defendant's possession of numerous items of personal identification information did not include proof that the items numbered 250 or more, as is required for second-degree possession. (Supreme Ct, Queens Co)

Perjury (Evidence)

People v Hadid, 121 AD3d 811, 993 NYS2d 754 (2nd Dept 10/8/2014)

Second Department *continued*

The judgment of conviction of first-degree perjury is reversed and the indictment dismissed because the prosecution failed to show that the defendant, a member of the New York Police Department (NYPD), made false statements under oath intentionally rather than mistakenly, and further failed to show that the statements were material to issues in the trial in which they were made. (Supreme Ct, Kings Co)

Counsel (Right to Counsel) (Standby and Substitute Counsel) (Waiver)

Evidence (Sufficiency)

People v Issac, 121 AD3d 816, 994 NYS2d 177 (2nd Dept 10/8/2014)

The evidence was legally insufficient as to the defendant's guilt on the burglary and criminal mischief counts, showing only that he possessed alleged proceeds of a burglary on the date of his detention. "[H]is possession of the alleged burglary proceeds was not shown to be 'recent and exclusive'" where police learned that a break-in had occurred at a nearby warehouse at some point between May 23 and May 27, 2008, the date he was allegedly seen transporting goods from a roof to the street.

The court erred in directing the defendant to proceed pro se, finding that he had forfeited his right to counsel where he made a fifth application for reassignment of assigned counsel after four applications had been granted. Assignment of new counsel may be denied when requests are mere dilatory tactics, but finding a forfeiture "is an 'extreme, last[ ]resort' …." At most, the defendant engaged in dilatory conduct, refused to cooperate with counsel, and was argumentative with his lawyers. He consistently sought the assistance of appointed counsel, and it is undisputed that he did not validly waive the right to counsel. He has already served the maximum possible sentence on the surviving count; rather than granting a new trial, that count is dismissed. (Supreme Ct, Queens Co)

Juveniles (Paternity)

Matter of Thomas T., 121 AD3d 800, 994 NYS2d 156 (2nd Dept 10/8/2014)

The court erred in dismissing a paternity petition filed by a man seeking to be declared the father of the subject child. The mother and the petitioner were not married when the child was born and the man the mother subsequently married filed an acknowledgment of paternity when the child was two. While neither the mother nor her husband disputed that the petitioner was the biological father of the child, the court nonetheless treated the petitioner's request as a motion to vacate the paternity acknowledgment. But "[a] prior acknowledgment of paternity made in accordance with Family Court Act § 516-a does not serve as an insuperable bar to a claim of paternity by one who is a stranger to the acknowledgment …." The petition must be reinstated and the matter remitted for further proceedings in which the mother's husband must be joined as a respondent. (Family Ct, Queens Co)

Sex Offenses (Sex Offender Registration Act)

People v Rohoman, 121 AD3d 876, 994 NYS2d 389 (2nd Dept 10/15/2014)

The prosecution failed to establish by clear and convincing evidence at the defendant's Sex Offender Registration Act (SORA) hearing that the defendant had a history of drug and alcohol abuse. The presentence report said "the defendant 'occasionally' used alcohol, and listed the amount … as '1 drink.'" A reference in the Board of Examiners of Sex Offenders' case summary stating that "the defendant was scored in the 'Strong Suggestion' range on the Michigan Alcohol Screening test" was unexplained. The court should not have assessed 15 points under risk factor 11. Deducting those points renders a score resulting in a presumptive risk level of two. The court's order designating the defendant a level three sexually violent offender is reversed and he is designated a level two sexually violent offender. (Supreme Ct, Kings Co)

Evidence (Other Crimes) (Prejudicial)

Impeachment (Of Defendant [Including *Sandoval*])

Prior Convictions (Evidence)

People v Wright, 121 AD3d 924, 994 NYS2d 396 (2nd Dept 10/15/2014)

The defendant is entitled to a new trial in this attempted burglary case because the court allowed the prosecution to introduce in the case in chief evidence of six prior crimes related to burglary. While the identity of the perpetrator was at issue, the prosecutor did not use the prior convictions to identify any distinctive modus operandi; the only unique characteristics claimed were that the crimes occurred in the same city as the charged crimes "and 'usually' involved two-story two-family houses" as did the charged offenses. And since intent could be easily inferred from the acts charged, the prior convictions were not properly admitted under that exception to the *Molineux* rule. The defendant was prosecuted "not on the strength of the evidence against him, but on the strength of his prior record and propensity to commit this sort of crime."

Second Department *continued*

Upon retrial, if the defendant testifies, the court must strike a balance between the danger of prejudice to the defendant and the probative value of potential impeaching evidence about the defendant's prior ten crimes and underlying facts of the six similar crimes. (County Ct, Dutchess Co)

Guilty Pleas

Sentencing (Enhancement) (Pre-sentence Investigation and Report)

People v Zeldine, 121 AD3d 928, 994 NYS2d 408 (2nd Dept 10/15/2014)

While the defendant did not object to the enhanced sentence imposed after he denied guilt during his interview for the presentence report, which the court found was a violation of the condition that he "cooperate" in the preparation of the report, the unpreserved claim is reviewed and the sentence vacated in the exercise of this Court's interest of justice jurisdiction. The cooperation condition did not specifically include a requirement that the defendant not deny guilt. While the court could have imposed such a condition, it did not, and thus, erred in imposing the enhanced sentence. (Supreme Ct, Kings Co)

Appeals and Writs (Waiver of Right to Appeal)

Juveniles (Support Proceedings)

Matter of Allain v Oriola-Allain, 123 AD3d 138, 995 NYS2d 105 (2nd Dept 10/22/2015)

In the context of this child support proceeding, the "fugitive disentitlement doctrine," which allows the court to dismiss an appeal where the party seeking relief has "deliberately removed herself from the jurisdiction of the New York courts," applies. As part of a 2005 divorce, the father was awarded custody of the child and the mother was ordered to pay child support. In October 2011, a petition was filed alleging that the mother willfully failed to obey the support order. Around that time, the mother moved to Nigeria. The mother did not comply with the summons to appear at the initial hearing, but did participate in a phone conference the following month. After several adjournments, the support magistrate conducted a hearing on the petition, at which the mother was allowed to appear by phone. The support magistrate concluded that the mother had willfully violated the order and recommended that she be incarcerated. Thereafter, the court directed the mother to personally appear, but she instead filed written objections to the support magistrate's findings and sought to stay any incarceration while her objections were before the court. The objections were denied and the court issued a warrant for her arrest based on her failure to appear. The mother failed to establish that she moved to Nigeria before receiving notice of the violation petition, and she did not appear despite the court's efforts to secure her appearance. The rationales of the fugitive disentitlement doctrine "'would be vindicated by dismissing the appeal' …." (Family Ct, Suffolk Co)

Family Court

Juveniles (Visitation)

Matter of Dolan v Masterson, 121 AD3d 979, 995 NYS2d 123 (2nd Dept 10/22/2015)

The court erred in conditioning a father's future unsupervised visitation on annual submission of "medical clearance" evidence. The father has diabetes and had on several occasions suffered low blood sugar levels that resulted in profuse sweating and disorientation, but there was no evidence that such episodes had occurred in the year preceding the hearing or that the child had been endangered or detrimentally affected by such an episode. The record did not establish that unsupervised visitation would be detrimental. The visitation order is modified by deleting the medical clearance requirements. (Family Ct, Suffolk Co)

Double Jeopardy (Punishment) (Time)

Sentencing (Modification) (Resentencing)

People v Langston, 121 AD3d 1016, 995 NYS2d 163 (2nd Dept 10/22/2014)

"[A]n order correcting an error in a transcript of a sentencing proceeding is subject to a temporal limitation imposed by the Double Jeopardy Clause … [which] prevents a sentence from being increased once a defendant has a legitimate expectation of finality" therein. Here, the prosecution obtained resettlement of the sentencing transcript nearly three years after the defendant served the original sentence and over two months after he was released from prison. For over seven years, as the defendant litigated aspects of his convictions for assault and weapons possession in state and federal court, the prosecution represented that the transcript accurately reflected a five-year sentence for possession of a weapon. The defendant had acquired a legitimate expectation of finality with respect to that sentence; the resettlement reflecting a sentence of 15 years and resentencing to add five years of post-release supervision must be reversed. (Supreme Ct, Kings Co)

Guilty Pleas (Vacatur)

Second Department *continued*

People v Perez, 121 AD3d 1015, 994 NYS2d 678 (2nd Dept 10/22/2014)

While the defendant failed to preserve his contention that his guilty plea to assault was not knowing, voluntary, and intelligent, his statements at the plea proceedings that "[i]t was self defense," that he "wasn't really guilty," and that "[i]t wasn't my fault" make this one of the rare cases in which the recitation of facts casts significant doubt on the defendant's guilt, so that the court's failure to fulfill its duty to inquire once the statements were made require that the plea be vacated and the matter remitted. (County Ct, Dutchess Co)

Identification (Eyewitnesses) (In-court) (Photographs) Impeachment

People v Ayala, 121 AD3d 1124, 997 NYS2d 81 (2nd Dept 10/29/2014)

The court "erred in permitting the prosecutor to impeach the sole eyewitness with her grand jury testimony and photo array identification of the shooter." The witness's trial testimony that, due to the passage of time and her struggles with alcohol and depression, she did not remember the shooter's face and could make no identification did not affirmatively damage the prosecution's case. The prejudicial impact of the improper impeachment was exacerbated by the prosecutor's suggestion in summation that the jury consider the impeachment material as direct evidence of the defendant's guilt. Further error occurred when a detective was allowed to testify that the eyewitness had identified the defendant from the photo array. (Supreme Ct, Queens Co)

Third Department

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

Insanity (Civil Commitment) (Definitions) (Post-commitment Actions)

Matter of Arto ZZ., 121 AD3d 1272, 994 NYS2d 455 (3rd Dept 10/16/2014)

The court did not err in granting the petitioner's CPL 330.20 application to release the respondent to a supervised intermediate care facility with the condition that he comply with his service plan and denying the prosecution's cross-motion to dismiss. The respondent has been in the care and custody of the New York State Office for People with Developmental Disabilities (OPWDD) since he was acquitted of a criminal charge by reason of mental disease or defect in 1986; he was transferred from a secure to a nonsecure facility in 2004. That the respondent has been diagnosed with more than one mental illness is insufficient to establish, by a preponderance of the evidence, that he met the definition of "mentally ill" in CPL 330.20(1)(d), which requires that the person in question needs inpatient care and treatment. (Supreme Ct, Franklin Co)

Family Court

Juveniles (Neglect)

Matter of Heaven H., 121 AD3d 1199, 994 NYS2d 446 (3rd Dept 10/16/2014)

The court did not err in finding that the respondent mother neglected her three children by starting a physical fight with a neighbor in front of the children, which frightened all three children and resulted in the oldest child being injured when she tried to intervene, as well as the mother's arrest. The caseworker's testimony about the incident provided sufficient evidence that "the children were at imminent risk of harm as a result of [the mother's] actions, which placed them in the immediate proximity of a violent tumult," and the court properly drew a strong negative inference from the mother's failure to testify. (Family Ct, Ulster Co)

Contempt

Family Court (Family Offenses) (Orders of Protection) (Violation of Family Court Orders)

Matter of Stuart LL. v Aimee KL., 123 AD3d 218, 995 NYS2d 317 (3rd Dept 10/23/2014)

In a Family Court Act article 8 proceeding, a criminal contempt finding based on a willful violation of an order of protection that includes, as a punitive remedy, a defined period of confinement must be supported by proof beyond a reasonable doubt. "Our cases indicating otherwise should no longer be followed." The court erred in applying a clear and convincing standard, but a review of the record shows proof of a willful violation of the protection order beyond a reasonable doubt. (Family Ct, Sullivan Co)

Identification (Eyewitnesses) (Photographs) (Suggestive Procedures)

People v Smith, 122 AD3d 1162, 997 NYS2d 534 (3rd Dept 11/26/2014)

Third Department *continued*

The six-person photo array was "unduly suggestive to the extent that defendant's photo draws the viewer's immediate attention" where five of the images show people from the shoulders up and the top portion of those photos shows a blank, gray background, but the defendant's photo shows him from the chest up and the top of his head reaches the top of the image, so that his face occupies the space that is not filled in the other images. However, the court properly ruled that two of the three identification witnesses had an independent source for their identifications where the record shows that the prosecution proved, by clear and convincing evidence, that the identifications by those two witnesses were based on their observations of and interactions with the defendant and not the unduly suggestive photo array. The court's error in finding that the third witness had an independent source does not necessitate reversal because the defendant pleaded guilty to the indictment count that involved one of the other two witnesses. (County Ct, Broome Co)

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)

Lesser and Included Offenses

Sex Offenses (Elements) (Sexual Abuse)

People v Baker, 123 AD3d 1378, 999 NYS2d 595 (3rd Dept 12/31/2014)

First-degree sexual abuse is not a lesser included offense of first-degree course of sexual conduct against a child because the greater offense may be committed by certain acts of sexual conduct that do require proof of intent, but intent is a necessary element of the lesser offense.

The first-degree criminal sexual act count was rendered duplicitous by the accuser's trial testimony where, based on the accuser's grand jury testimony, the indictment charged a single sexual act, but the accuser testified at trial about multiple incidents during the relevant time period; that testimony "made it impossible to ascertain the particular act upon which the jury verdict was based." This unpreserved issue was reviewed in the interest of justice, the conviction on that count is reversed, and the count dismissed. (County Ct, Franklin 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.

Impeachment (Of Defendant [Including *Sandoval*])

Motions (Pre-trial) (Suppression)

People v Blair, 121 AD3d 1570, 994 NYS2d 215 (4th Dept 10/3/2014)

The court's failure to rule on parts of the defendant's pretrial motion, those seeking inspection of the grand jury minutes and dismissal of the indictment on the grounds of legally insufficient evidence and defective grand jury proceedings, cannot be deemed a denial thereof. The matter must be remitted for a decision on those parts of the motion.

The court erred in allowing the prosecution to impeach the defendant using the statement he made to state university police where the statement was suppressed and the defendant's direct testimony did not open the door to its use for impeachment. However, the error was harmless. (Supreme Ct, Erie Co)

Evidence (Chain of Custody)

Forensics (DNA)

Misconduct (Prosecution)

People v Johnson, 121 AD3d 1578, 993 NYS2d 856 (4th Dept 10/3/2014)

The court did not err in admitting the DNA test results into evidence where the prosecution provided sufficient assurances of the identity and unchanged condition of the gun from which the DNA was recovered and any gaps in the chain of custody go to the weight of the evidence, not its admissibility. (Supreme Ct, Erie Co)

Concurrence: "I write separately … to express my concerns with the prosecutor's mischaracterization on summation of the DNA evidence linking defendant to the weapon." While the prosecution's expert testified that there were at least four contributors to the DNA found on the weapon and that the defendant could not be excluded as a contributor, in summation, the prosecution argued that the DNA tests established that the defendant was a contributor and therefore had possessed the gun.

Family Court

Juveniles (Hearings) (Neglect) (Parental Rights) (Right to Counsel)

Matter of Joslyn U., 121 AD3d 1521, 993 NYS2d 824 (4th Dept 10/3/2014)

The court erred by allowing the attorney for the respondent mother to withdraw because the mother did not appear at the hearing and in proceeding with the fact-finding hearing on the neglect petition in the mother's absence. The letter the attorney sent to the mother six days

Fourth Department *continued*

before the hearing stating that she may withdraw if the mother did not appear at the hearing was insufficient because the attorney did not give her client reasonable notice that she planned to withdraw and did not file a written motion to withdraw. While the record supports the neglect finding, reversal is required in light of this due process violation. The court must assign new counsel and conduct a new fact-finding hearing. (Family Ct, Oswego Co)

Discrimination (Race)

Juries and Jury Trials (Challenges) (Selection) (Voir Dire)

People v Mallory, 121 AD3d 1566, 993 NYS2d 609 (4th Dept 10/3/2014)

The court erred in allowing the prosecutor to use peremptory challenges to exclude two black prospective jurors because the prosecution failed to prove that there was a race-neutral reason for striking the jurors where the prosecutor's challenges were "solely based upon [the two jurors'] answers to a race-based question, i.e., whether they believed that police officers 'unfairly target members of the minority community,'" a question that was unrelated to the facts of the case. While originally directed at the entire group, when no one responded, the prosecutor directed the question to the three prospective black jurors, but not to any of the white prospective jurors. Also, the prosecutor's reason for excluding one of the prospective jurors "explicitly referenced race …." There are other acceptable ways to determine how prospective jurors feel about police officers, and the court and the prosecutor both asked numerous race-neutral questions on this issue. Even if the prosecution met its burden to proffer a race-neutral explanation, the defendant met the ultimate burden of showing that the explanation was a pretext for racial discrimination. (Supreme Ct, Erie Co)

Accusatory Instruments

Jurisdiction

People v Mano, 121 AD3d 1593, 994 NYS2d 225 (4th Dept 10/3/2014)

The superior court information (SCI) is jurisdictionally defective because the defendant had already been indicted on other charges related to the same incident when he waived indictment and consented to prosecution by an SCI and because the SCI charged second-degree criminal possession of a controlled substance, an offense that was not charged in the felony complaint and is not a lesser-included offense of an offense charged in the felony complaint. (County Ct, Livingston Co)

Appeals and Writs (Waiver of Right to Appeal)

Juveniles (Parental Rights) (Permanent Neglect)

Matter of Taleeya M., 121 AD3d 1583, 993 NYS2d 859 (4th Dept 10/3/2014)

The mother's stipulation to a finding of permanent neglect does not constitute a waiver of her right to appeal the court's decision terminating her parental rights. However, the evidence supports the court's finding that termination was in the best interests of the child; "[t]he mother's short-term progress in her service plan '"was not sufficient to warrant any further prolongation of the child's unsettled familial status"' …." (Family Ct, Cayuga Co)

Appeals and Writs (Judgments and Orders Appealable)

Juveniles (Hearings) (Neglect) (Parental Rights)

Motions (Adjournment)

Matter of Tyler W., 121 AD3d 1572, 994 NYS2d 217 (4th Dept 10/3/2014)

The mother's appeal from an order finding that she neglected the children and placing the children in the petitioner's custody was not rendered moot by the mother's consent to a subsequent neglect finding because the first neglect finding is a "'permanent and significant stigma that might indirectly affect the mother's status in future proceedings' …."

The court abused its discretion in denying the request of the mother's attorney to adjourn the dispositional hearing because the mother could not attend where there was good cause for the adjournment, the proceedings were not protracted, and it was the mother's first adjournment request. A new dispositional hearing is required. (Family Ct, Chautauqua Co)

Family Court

Juveniles (Custody) (Visitation)

Matter of Tuttle v Mateo, 121 AD3d 1602, 993 NYS2d 863 (4th Dept 10/3/2014)

The court correctly found that the stepmother demonstrated a change in circumstances since the guardianship order was entered warranting review of the visitation where "[t]he record establishes that, among other things, the relationship between the mother and the child has deteriorated significantly since entry of the order to the point that the child no longer wished to have visitation with the mother …." However, the court erred in suspending the mother's physical visitation with the child where the record does not show substantial evidence that visitation would be detrimental to the child's welfare; that the child did not want to see her mother is not deter-

Fourth Department *continued*

minative as to visitation. There must be compelling reasons to deny visitation to a noncustodial parent. (Family Ct, Ontario Co)

Appeals and Writs (Judgments and Orders Appealable)

Family Court

Juveniles (Custody) (Parental Rights) (Visitation)

Matter of Van Dyke v Cole, 121 AD3d 1584, 994 NYS2d 219 (4th Dept 10/3/2014)

The mother's appeal from an order granting joint custody of the child to the stepmother and mother, with the stepmother as the primary residential parent, and granting the mother unsupervised visitation is not moot as to the court's finding that extraordinary circumstances existed warranting consideration of the child's best interests. The subsequent order regarding custody and visitation does not preclude review of the extraordinary circumstances finding because that finding cannot be revisited in later proceedings seeking to modify custody and it "may have 'enduring consequences' for the parties …." However, the court properly found that the stepmother met her burden of proving extraordinary circumstances required to overcome a parent's superior custodial rights based on the mother's inability or unwillingness to provide a safe home for the child where the mother's husband had various untreated mental health issues, but the mother did not restrict her husband's access to the child and continually ignored court orders prohibiting the husband from having contact with the child. (Family Ct, Cattaraugus Co)

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

People v Wideman, 121 AD3d 1514, 993 NYS2d 599 (4th Dept 10/3/2014)

The court erred in denying the defendant's motion to suppress the weapon and marihuana found in the parked car he was sitting in where, "in the absence of any evidence that the officers smelled marihuana before engaging defendant in a common-law inquiry and asking for consent to search his vehicle," the prosecution failed to establish that the police had a founded suspicion that criminality was afoot. During his hearing testimony, the officer who asked the defendant whether there were any weapons in the car admitted that he could not remember the sequence of events. (County Ct, Erie Co)

Counsel (Competence/Effective Assistance/Adequacy)

Investigation (Pretrial)

Post-Judgment Relief (CPL § 440 Motion)

People v Rossborough, 122 AD3d 1244, 996 NYS2d 407 (4th Dept 11/14/2014)

The court improperly denied without a hearing the defendant's CPL 440.10 motion alleging ineffective assistance of counsel based on the failure to conduct an adequate investigation and the failure to move to suppress his statement where the defendant alleged sufficient facts that do not appear in the record that, if established as true, could entitle him to relief. An evidentiary hearing is also required as to the defendant's claim that his plea was involuntary because of his use of medication where the defendant offered sufficient allegations to create an issue of fact. (County Ct, Allegany Co)

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts) (Variance of Proof)

Double Jeopardy

People v Dukes, 122 AD3d 1370, 996 NYS2d 847 (4th Dept 11/21/2014)

The accuser's trial testimony rendered duplicitous two counts of the indictment, one that charged first-degree criminal sexual act and one that charged first-degree rape, where those counts related to two specific incidents that occurred during the summer of 2010, but the accuser testified that there were multiple incidents during that time period, making it "impossible to determine whether the jury reached a unanimous verdict on those counts [and] whether defendant was convicted of an act for which he was indicted …." Preservation of this issue "is not required because the 'right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable …, as is the right to a unanimous verdict' …." Where the accuser did not testify about a specific incident constituting the indicted offense, but only testified generally about several incidents during that time, it is unclear if double jeopardy would bar a second prosecution; therefore, the prosecution is granted leave to re-present appropriate charges under the two counts, if any, to a new grand jury. (County Ct, Yates Co)

Grand Jury (Procedure) (Witnesses)

Witnesses (Defendant as Witness)

People v Hymes, 122 AD3d 1440, 996 NYS2d 850 (4th Dept 11/21/2014)

The court erred in denying the defendant's motion to dismiss the indictment pursuant to CPL 210.20(1)(c), based on a claim that the defendant did not have reason-

Fourth Department *continued*

able time to consult with counsel and decide whether to testify before the grand jury, where: the prosecution notified the defendant and his attorney at arraignment on the felony complaint that the matter would be presented to the grand jury the next morning, which was less than 24 hours' notice; defense counsel notified the court later that day that a conflict of interest prevented him from representing the defendant; the defendant was not assigned new counsel until after the grand jury voted to indict; and when new counsel objected to the short notice and gave the prosecutor written notice of his client's intent to testify, the prosecutor offered to let the defendant testify before the grand jury before the indictment was filed, but would not allow him to testify before a different grand jury. (County Ct, Monroe Co)

Appeals and Writs (Record)

Counsel (Competence/Effective Assistance/Adequacy)

Search and Seizure

People v Parson, 122 AD3d 1441, 997 NYS2d 198 (4th Dept 11/21/2014)

The defendant's claim that he received ineffective assistance of counsel based on his attorney's failure to more vigorously challenge the police officer's testimony about the reasons why he stopped the defendant's car is denied where: the defendant's plea was advantageous; defense counsel cross-examined the officer about his reasons for stopping the car, i.e., an object hanging from the car's mirror and a cracked windshield; and counsel made a persuasive argument that the officer's testimony about seeing the windshield crack was not credible and there was no probable cause for the stop. That the court disagreed with counsel's assessment of the officer's credibility does not mean counsel was ineffective.

The defendant's argument that counsel was ineffective by not using the vehicle inventory form that purportedly showed that the windshield had no damage to cross-examine the officer at the suppression hearing must be raised in a CPL 440 motion because the form is not part of the appellate record. (County Ct, Erie Co)

Dissent: Counsel was ineffective because he failed to introduce the vehicle inventory form that directly contradicted the police officer's testimony that he stopped the defendant's car because it had "a 'pretty big' crack that 'covered most of the windshield,'" but the majority is correct that the claim must be raised in a CPL 440 motion. Counsel was also ineffective at the suppression hearing where he failed to adequately explore the circumstances of the stop, particularly the lighting and weather conditions, how far the car was from a streetlight, and where the defendant's car was in relation to the officer when he allegedly saw the crack in the windshield.

[***Ed. Note:*** *Leave to appeal was granted on Jan. 21, 2015 (24 NY3d 1124 [4th Dept]).*]

Evidence (Weight)

Sex Offenses (Sexual Abuse)

Witnesses (Credibility)

People v Woolson, 122 AD3d 1353, 997 NYS2d 865 (4th Dept 11/21/2014)

The possible discrepancy in the date of the offense does not necessitate a different verdict because such inconsistencies in the accuser's testimony merely present a credibility issue the jury must resolve. Regarding the circumstances under which the accuser disclosed the abuse, the testimony of the prosecution's expert established that, as part of sexual abuse accommodation syndrome, an accuser's disclosure is often delayed, conflicted, or unconvincing. (County Ct, Oswego Co)

Dissent: "[G]iven the combination of the victim's mental illness, his past false accusation of similar sexual abuse, his motivation to lie, and the timing of his accusation against defendant, this is one of those rare cases in which we should conclude that the jury failed to give the evidence the weight it should be accorded …." ⚖

Defender News *(continued from page 11)*

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