



Public Defense Backup Center REPORT

Volume XXXI Number 1

January–April 2016

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

ILS Releases Criteria and Procedures for Determining Assigned Counsel Eligibility

On April 4, 2016, just as *The REPORT* was going to press, the Indigent Legal Services Office (ILS) released its long-awaited eligibility standards. The document, “Criteria and Procedures for Determining Assigned Counsel Eligibility—Full Report” can be found, along with many supporting documents and a copy of the Black Letter standards, on the ILS website at <https://www.ils.ny.gov/content/eligibility-documents>.

The purpose of the Criteria and Procedures, set out at page 17 of the report, is “to ensure equitable, efficient, and fair implementation of the statutory and constitutionally guaranteed right to counsel across New York State and to make the rights articulated in *Gideon* and *Witenski* a reality in New York.” [Referring to the landmark right-to-counsel cases *Gideon v Wainwright*, 372 US 335, 344 (1963) and *People v Witenski*, 15 NY2d 392 (1965).]

The Introduction and extensive materials included in the Appendices provide background and context for the standards. The appendices also include a form for applying for counsel and sample notices for letting applicants know whether a screener is recommending to a judge that the person be found eligible, about the right to seek review of an ineligibility recommendation, and of a judge’s decision of ineligibility.

The Criteria begin with a foundational description upon which the remaining criteria and procedures build:

I. An applicant shall be eligible for assignment of counsel when the applicant’s current available resources are insufficient to pay for a qualified attorney, release on bond, the expenses necessary for a competent defense, and the reasonable living expenses of the applicant and any dependents.

A. Whether an applicant is eligible for assignment of counsel shall be determined in accordance with the criteria and procedures set forth below.

B. Counsel shall be assigned unless the applicant is conclusively ineligible.

NYSDA commends ILS for its very thorough work and for creating standards that recognize the need for fair, prompt determinations of eligibility, a presumption of eligibility in the absence of compelling evidence otherwise, an opportunity for review of ineligibility findings, and clear direction as to what considerations are inappropriate. Potential public defense clients, courts, funders, and all who care about justice should find much to like in this document.

As the Introduction notes, NYSDA provided assistance to ILS in the development of the standards; Backup Center staff look forward to assisting ILS as well as local public defense providers, county officials, and others in implementation of these important provisions.

Public Defense Reform Not Part of the State Budget

The State Budget for FY 2016-2017 contains flat funding for NYSDA’s Backup Center and Veterans Defense Program, but no reform bills such as the one call-

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ing for state reimbursement of county public defense costs were included in the mammoth package passed on April 1, 2016. Also flat-funded were the Aid to Defense Program and Indigent Parolee Representation Program.

The Indigent Legal Services Office received \$200,000 more for operating expenses associated with *Hurrell-Harring* implementation. As for funding for distribution to counties, ILS will have available an additional \$15 million for *Hurrell-Harring* implementation, but a proposed additional \$5 million for upstate caseload relief was not included in the final budget.

NYSDA is analyzing the budget closely, and continuing to work for public defense improvements, in the days ahead.

High Court Comes “Close to Recognizing” Public Defense Crisis

A subheadline for an [article](#) from *The Atlantic* says U.S. Supreme Court justices came “close to recognizing the perilous state of the American public-defense system” when considering government pretrial seizure of funds that were not the fruits of criminal activity. Included in the balancing approach used by a plurality of the Court to find a Sixth Amendment bar to the pretrial forfeiture of untainted assets was this consideration: allowing such seizure would in some instances cause defendants to “fall back upon publicly paid counsel, including overworked and underpaid public defenders.” Dissenters retorted that “concerns about the caseloads of public-defender offices do not justify a constitutional command” of the nature imposed by the plurality, adding, “[t]he Constitution does not require victims of property crimes to fund subsidies for members of the private defense bar.” The case, [Luis v United States](#) (No. 14-419 [3/30/2016]) is summarized at p. 19.

Conflict Barred Office’s Representation of Former Client’s Codefendant

In [People v Watson](#) (2016 NY Slip Op 00998 [2/11/2016]), the Court of Appeals held that the trial court did not abuse its discretion in removing the attorney who had represented the defendant on weapons charges for eight months and appointing new counsel where *Rosario* material revealed that another attorney from the same NYC public defense office had represented a codefendant on a drug charge arising from the same incident, an individual the defendant’s lawyer had been seeking as a potential defense witness. While the defendant said that he wanted his lawyer to continue representing him, the defendant also wanted the codefendant to testify, but the attorney’s supervisors expressly prohibited the attorney

from searching for the former codefendant, calling him as a witness, or cross-examining him.

The Court distinguished *Watson* from its decision in *People v Wilkins* (28 NY2d 53 [1971]), which held “that no conflict of interest existed merely because a defendant was represented by the Legal Aid Society and a different staff attorney from that same organization had previously represented—in an unrelated criminal proceeding—the person who was now the complaining witness against Wilkins” and “unlike private law firms where knowledge of one member of the firm is imputed to all, large public defense organizations are not subject to such imputation, so there was no inferred or presumed conflict” A summary of *Watson* begins at p. 20.

Attorney Can Waive a Client’s Right to Testify in Grand Jury

The Court of Appeals has concluded that an attorney may waive a client’s statutory right to testify before the grand jury, holding that the right is not fundamental and “the decision is a strategic one, requiring the expert judgment of counsel.” [People v Hogan](#), 2016 NY Slip Op 01207 (2/18/2016). In this case, defense counsel provided an explanation for his decision, but a lack of strategy alone will not constitute ineffective assistance of counsel unless the defendant could show that he was prejudiced. “[W]hile the better practice may be for counsel to consult with his or her client, defendant cannot establish ineffective assistance of counsel based on counsel’s decision that defendant would not testify before the grand jury.” The majority and dissenting opinions in *Hogan* are summarized at p. 21.

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THE REPORT IS PRINTED ON RECYCLED PAPER

New Trial Ordered Due to Denial of Third-Party Culpability Defense

Citing the constitutional right to a meaningful opportunity to present a defense, a majority of the Court of Appeals ordered a second retrial for a man convicted of a 1994 rape and murder. The Court found that the trial court abused its discretion by precluding the defendant from introducing evidence of third-party culpability. Judge Stein wrote the decision, joined by Judges Pigott, Rivera, and Abdus-Salaam, while Judge Fahey dissented; Chief Judge DeFiore and Judge Garcia took no part. [People v DiPippo](#), 2016 NY Slip Op 02279 (3/29/2016). A summary of the decision appears at p. 24.

Third Department Vacates Conviction and Orders Judicial Diversion

In [People v Cora](#) (2016 NY Slip Op 00066 [3rd Dept 1/7/2016]), the Appellate Division vacated the defendant's conviction of second-degree criminal possession of marijuana and split sentence (6 months/5 years' probation) on the ground that the trial court erroneously denied his application for judicial diversion under CPL article 216. The lower court ruled the defendant had failed to establish that substance abuse was a "contributing factor" to his crime, which involved possession of four pounds of marijuana.

Reversing, the Third Department held that "[t]he statute does not require that a defendant's ... substance abuse or dependence be the exclusive or primary cause of the defendant's criminal behavior'" Here, the defendant testified his "progressively escalating marihuana use ... advanced to daily use ... and culminated in [him] becoming a mule, transporting larger quantities of marihuana across state lines ... in order to receive compensation in the form of marihuana." His application for judicial diversion was also supported by a substance abuse counselor who testified that the defendant was "cannabis dependent." The court also rejected the lower court's conclusion that this proof amounted to mere "recreational" use. The decision is significant for its recognition that a trial court's denial of a judicial diversion application can be a meritorious appellate issue even after a guilty plea or trial conviction.

News About Sentencing and Consequences of Criminal Involvement

Mandatory Surcharge Can't be Deferred at Initial Sentencing

After construing various CPL provisions dealing with mandatory surcharges, the Court of Appeals has con-

cluded that sentencing courts lack the authority to defer a mandatory surcharge at the initial sentencing proceeding. The Court made clear that the overall statutory design is intended to limit judicial discretion and to "increase the collection of surcharges from persons during periods of confinement and upon release from incarceration." [People v Jones](#), 2016 NY Slip Op 01208 (2/18/2016).

Defendants who are sentenced to more than 60 days' imprisonment must move pursuant to CPL 420.10 for resentencing and deferral of the mandatory surcharge. Defendants sentenced to 60 days or less may move for deferral on the return date of a summons issued pursuant to CPL 420.30. A summary of *Jones* appears on p. 22.

DOJ Offers Guidance on Incarceration for Nonpayment of Fines or Fees

In March, the U.S. Department of Justice (DOJ) issued a [guidance letter](#) intended to aid "state and local courts in their efforts to ensure equal justice and due process for all" in the "assessment and enforcement of fines and fees" As the [press release](#) announcing the letter's publication says, "[t]he letter addresses some of the most common practices that run afoul of the U.S. Constitution and/or other federal laws, such as incarcerating individuals for nonpayment without determining their ability to pay. The letter also discusses the importance of due process protections such as notice and, in appropriate cases, the right to counsel, and provides citations to key U.S. Supreme Court decisions. Related New York authority includes [People v Amorosi](#) (96 NY2d 180 [2001]) and CPL 420.10. DOJ has also developed a [resource guide](#) on reforming the assessment and enforcement of fines and fees.

The letter comes in the wake of increasing media and public attention to harmful and illegal practices around fees and fines. It was published just days ahead of the NAPD release on Mar. 18, 2016—the anniversary of *Gideon v Wainwright*—of its Annual Report, which [highlights](#) among other things that, nationwide, "Public defenders led the movement to end the imposition of fines, fees, unconstitutional bail and debtor's prisons."

Legislation Clarifies Non-Respondent Parents' Situation in Family Court Proceedings

A newly-passed bill clarifies what treatment a non-respondent parent receives in a Family Court Act (FCA) article 10 (abuse or neglect) case. The bill, [A6715-A](#) (L 2015, ch 567), becomes effective June 18, 2016. As recommended by the Family Court Advisory and Rules Committee, the bill adds definitions of "parent," "relative," and "suitable person" to FCA 1012 and recognizes parents' superior rights to the care and custody of their

children. The bill also adds provisions authorizing the assignment of counsel for non-respondent parents at pre-petition hearings and requiring that, upon the filing of a petition, non-respondent parents receive a notice advising them of the right to counsel.

Before releasing a child to a non-respondent parent, relative, or suitable person, the family court must review “the orders of protection and sex offender registries, as well as child protective petitions and Family Court warrants regarding” such person. That person must “submit[] to the jurisdiction of the court with respect to the child” and may be directed to “cooperate in making the child available for court-ordered visitation” and appointments. Finally, the new legislation establishes a procedure for cases in which an FCA article 6 action is brought in response to allegations of abuse or neglect by formally inserting respondent parents into the list of persons who may be granted article 6 custody pursuant to section 1055-b of the Family Court Act.

Summaries of this bill and several others related to family court practice, as well criminal law bills, appear in the 2015 Legislative Review, which starts on p. 8.

Resources and Information Relating to Family Court

ABA’s Quick Guide on Child Welfare and Immigration Intersection

The American Bar Association’s Center on Children and the Law, as part of its [Child Welfare and Immigration Project](#), has issued a set of state-specific reference guides to assist practitioners. The New York [Quick Guide](#) to Child Welfare & Immigration Law seeks to help practitioners “identify federal and state child welfare resources, screen clients for immigration relief options, and protect clients’ rights and interests.”

Commission to Eliminate Child Abuse and Neglect Fatalities Releases Report

The federal [Commission to Eliminate Child Abuse and Neglect Fatalities](#) (CECANF), established by the [Protect Our Kids Act of 2012](#) to review data and best practices in child protection matters and make recommendations for improvement, has released its [final report](#). A [fact sheet](#) summarizing key findings and recommendations from the report is also available; its conclusion makes clear that the Commission wants stronger Child Protective Services agencies, while acknowledging that such agencies must work with multiple other community partners, from states and tribes to local communities. The Commission’s term expired the day following the report’s release on Mar. 17, 2016.

One Commissioner, Judge Patricia M. Martin, released a [dissenting report](#), criticizing a lack of an effective process for deliberations and some unsupported conclusions and recommendations. And the [National Coalition for Child Protection Reform](#) (NCCPR) issued its own scathing critique, [Minority Report](#), of the CECANF report; complaints included that CECANF’s recommendations would increase child protective services caseloads by 700,000 per year, which “would inundate the system, so overloading workers that they actually would wind up missing more children in real danger.”

IDP: Know Your Rights as to ICE Home Raids and Community Arrests

The Immigrant Defense Project (IDP), with legal support from the Center for Constitutional Rights, has developed materials on “Know Your Rights: ICE Home Raids and Community Arrests,” available at www.immdefense.org/ice-home-and-community-arrests/. Among the materials is a two-page flyer (available in English and Spanish) as well as a more detailed booklet. The materials’ purpose is “to educate community members and advocates about how to protect their rights should ICE try to arrest them at home, on the street, or at the courthouse.”

IDP also operates a [Padilla Support Center](#), funded through a grant from ILS and part of a statewide network of regional assistance centers intended to fulfill *Padilla v Kentucky*’s requirement that defense counsel advise non-citizen clients about the consequences of a criminal conviction. Five other [immigration assistance centers](#) are in the process of opening around the state.

Courts Address Issues Regarding Sex Offenders

Various control mechanisms affecting people convicted of sex offenses received judicial scrutiny recently.

DOCCS Can’t Hold Someone in Non-RTF Facility Pending Kendra’s Law Application

The Third Department ruled in January that the Department of Corrections and Community Supervision (DOCCS) improperly held the petitioner beyond the maximum expiration date of his sentence while awaiting a decision on an application to subject him to court-ordered outpatient mental health treatment. Although the Board of Parole may impose a post-release supervision condition requiring up to six months in a residential treatment program (RTF) “immediately following release from the underlying term of imprisonment” (Penal Law 70.45[3]), and the RTF programs can be located on the grounds of designated prisons, the petitioner was not held in an RTF.

[*People ex rel. Green v Superintendent of Sullivan Correctional Facility*](#), 2016 NY Slip Op 00417 (3rd Dept 1/21/2016).

The petitioner had completed a three-year determinate sentence for a sex offense and was designated a Level III offender but continued to be held while the State sought to subject him to treatment under Kendra's Law. The court recognized when overturning the lower court's denial of habeas corpus relief "that the dilemma presented is no doubt a consequence of the difficulty in finding acceptable housing for sex offenders" and noted that "DOCCS remains statutorily obligated to assist" sex offenders in locating suitable housing in the community. "Where an individual needs mental health treatment not otherwise available at an RTE, DOCCS must, prior to the release date, seek a court order authorizing continued hospitalization pursuant to Mental Hygiene Law article 9 or admission to a secure detention facility pursuant to Mental Hygiene Law article 10"

Federal District Court Says Private Group Monitoring Sex Offenders for County May Be Sued

Parents for Megan's Law (PFML) and Suffolk County failed in their efforts to dismiss, on the basis that PFML is not a state actor, a lawsuit brought under 42 USC 1983 alleging the violation of federal rights. The plaintiff, who was subject to reporting procedures under the Sex Offender Registration Act (SORA), brought the suit claiming that he was damaged by the actions of PFLM agents under color of a contract with the County to monitor SORA compliance.

While a contract with a government entity alone will not make a private entity a state actor for 1983 purposes, the federal court found that in this case the County "retained the power to actively manage the home verification program" to be conducted by PFML. The County set the number of visits; required PFML to submit a schedule of visits, which the County could alter; and sent a letter to those subject to monitoring, indicating they were required to provide identification and employment information to PFML.

The court declined to dismiss the plaintiff's alleged Fourth Amendment violations but did grant dismissal of his due process claims as duplicative of those under the Fourth Amendment, rejecting his assertion that PFML interfered in his relationship with his family. The court also declined to consider the defendants' assertion that the suit would be moot once the plaintiff is removed from the SORA registry a few months after the decision. [*Jones v County of Suffolk*](#), 15-CV-0111(JS)(ARL) (EDNY 2/16/2016).

Divided First Department Upholds SARA Restrictions

A panel of the Appellate Division said in January that "under the highly deferential constitutional standard applicable to legislative enactments," it did not find unconstitutional the provisions of the Sexual Assault Reform Act (SARA) that prohibit parolees with sex offense convictions from residing or traveling within 1,000 feet of schools or other institutions where minor children congregate. [*Matter of Williams v Department of Corr. & Community Supervision*](#), 2016 NY Slip Op 00135 (1st Dept 1/12/2016). The provisions were "enacted with the goal of protecting children and not to further punish sex offenders for their prior bad acts," the court said in rejecting an ex post facto claim. And while the provisions do "constitute affirmative restraints, bear some resemblance to historical criminal punishment, and serve the goal of deterrence," they are not punitive in effect because parolees have restricted liberty in any event. Finally, the court found a "sufficient rational connection between SARA's nonpunitive intent and its effect" and that the provisions are "not unconstitutionally excessive."

Dissenting in part, Justice Barbara R. Kapnick asserted that "the 1,000 foot buffer zone constitutes a retroactive punishment" of those whose crimes predated the legislative amendment creating the buffer, violating the ex post facto prohibition.

Forensics Receiving State and National Attention

Law Enforcement Agencies Must Appear Before the State DNA Subcommittee Before Using Rapid DNA Instruments

In response to concerns about law enforcement and district attorney use of rapid DNA instruments, [described by the FBI](#) as "the fully automated (hands free) process of developing a CODIS Core STR profile from a reference sample buccal swab," the State Commission on Forensic Science and its DNA Subcommittee have [notified law enforcement agencies](#) around the state that "agencies seeking to adopt rapid DNA must appear before the New York State DNA subcommittee to discuss how they intend to implement this technology."

Lawsuits Brought Against NYC OCME and State Police Allege Lack of Transparency, Faulty DNA Analysis

Dr. Marina Stajic, former director of the Forensic Toxicology Laboratory at the NYC Office of the Chief Medical Examiner (OCME), filed a lawsuit earlier this

year against the City alleging that she was forced to resign in April 2015 after she questioned the reliability of the OCME's low-copy number (LCN) DNA testing and sought transparency regarding the technique. Dr. Stajic had been a member of the New York State Commission on Forensic Science from 2004 until late 2015. At the Commission's Oct. 24, 2014 meeting, she voted in support of Commission member Barry Scheck's motion to have the Commission request for review the OCME's LCN validation studies and to make the studies public; the motion failed. Dr. Stajic was also supportive of other efforts by Scheck and Commission members Peter Neufeld and Marvin Schechter to explore issues surrounding the validity of probabilistic genotyping software.

Around the same time as the OCME lawsuit was filed, three scientists who worked at the New York State Police Forensic Investigation Center filed suit against the State Police alleging that they were discriminated against for their support of the TrueAllele method of statistical evaluation of DNA evidence and their criticism of administrators who had "allow[ed] scientists to provide questionable DNA statistics in criminal cases and allow[ed] staff members to perform questionable casework examinations" and also allowed forensic scientists to "engage[ed] in 'suspect-centric' DNA analysis in the Crime Lab." The suit alleges that an investigation into allegations that State Police forensic scientists had cheated in the TrueAllele training was started "as a means to prevent the implementation of TrueAllele and retaliate against the Plaintiffs for their advocacy of the software and criticism of the [Combined Probability of Inclusion] CPI method." The State Inspector General has been investigating the cheating claims since last year.

Both lawsuits received media attention, from the *New York Times* (Feb. 18, 2016; Feb. 26, 2016) to the *New York Law Journal* (Feb. 22, 2016) and the Associated Press (Feb. 19, 2016). Issues surrounding LCN DNA testing and statistical analysis have been discussed in the *REPORT* (May-July 2015 issue) and *News Picks from NYSDA Staff* and we will continue to monitor developments in this area. Defenders who are interested in more information on this topic should contact the Backup Center.

National Commission on Forensic Science Releases Recommendations on Terminology

The [National Commission on Forensic Science](#) (NCFS), established in 2013 as a federal advisory committee to the U.S. Department of Justice (DOJ) "to enhance the practice and improve the reliability of forensic science," held its [ninth meeting](#) at the end of March 2016. The two-day meeting included votes on various Commission recommendations and views documents and reports of subcommittees on reporting and testimony, training on science and law, accreditation and proficiency

testing, scientific inquiry and research, interim solutions, human factors, and medicolegal death investigation.

The Commission voted to approve the "[Recommendations to the Attorney General Regarding the Use of the Term 'Reasonable Scientific Certainty'](#)," which recommended against the use of terms such as "to a reasonable degree of scientific certainty" or "to a reasonable degree of [discipline] certainty." The Commission noted that "[t]hese terms have no scientific meaning and may mislead factfinders about the level of objectivity involved in the analysis, its scientific reliability and limitations, and the ability of the analysis to reach a conclusion." Additional discussion about the use of this terminology appears in the related "[Views of the Commission](#)" and [public comment summary](#) documents. Other recommendations and views documents are available on the [NCFS website](#).

Department of Justice to Review Pattern-Based Forensic Disciplines

At the March NCFS meeting, DOJ officials [announced a plan](#) to expand its review of FBI pattern-based forensics beyond hair matching to disciplines including firearms/ballistics, latent fingerprints, handwriting, and shoe and tire treads. A *Washington Post* [article](#) about the announcement reported that a detailed plan will be presented to the NCFS in June.

As noted in the [May-July 2015 issue](#) of the *REPORT*, the DOJ and FBI formally [acknowledged](#) that the FBI's examiners gave flawed testimony regarding microscopic hair comparisons. And several states, including New York, are in the process of reviewing cases involving hair comparison analysis. Progress reports on the review in New York are often provided during New York State Commission on Forensic Science meetings; the next Commission meeting is scheduled for June 17, 2016 and a live webcast of the meeting will be available on the Division of Criminal Justice Services' [open meetings page](#).

Redesigned NYSDA Website Launched

Near the end of February, NYSDA announced the launch of a newly designed website, using the same Web address—www.nysda.org. Staff worked hard to make the website more informative and easy to navigate. The new site makes content more accessible with the power of text to speech, using ReadSpeaker. Also new is an [archive](#) of the *News Picks from NYSDA Staff* e-newsletters, beginning with the Jan. 14, 2015 edition.

Justice Community Mourns Mike Beldock

Myron Beldock, described in the *New York Times* at the time of his death on Feb. 1, 2016 as "a lawyer who cham-

pioned seemingly lost criminal causes but won freedom for various wrongly convicted men,” inspired and will be missed by many. At NYSDA, Beldock was known not only as a member and contributor, but as a great lawyer to call when a victim of injustice needed counsel. NYSDA worked closely with Beldock in many cases; he will not be replaced as a colleague or as an inspiration.

The cases and exonerated clients Beldock is known for include the late Rubin (Hurricane) Carter, mentioned frequently in media coverage of Beldock’s death, and Everton Wagstaffe. The latter was [released](#) just last year after spending 23 years in prison—and refusing parole offers contingent on his admitting guilt—for a crime committed by someone else. In just one of many ways that Beldock’s cases and clients maintain NYSDA connections, Wagstaffe assisted NYSDA in its Basic Trial Skills Program, appearing as a mock juror in hands-on voir dire workshops, soon after his release.

Another well-known Beldock client is Yusef Salaam, one of the five exonerated defendants in what is remembered as “the Central Park jogger case.” Beldock, Salaam, and Salaam’s mother Sharonne Salaam participated in a NYSDA-sponsored Gideon Day speak-out about public defense services on the fortieth anniversary of *Gideon v Wainwright* in 2003; links to videos of their [comments](#) and [responses to questions](#) appear on the [Gideon Day page](#) of NYSDA’s new website.

Not every client Mike Beldock represented has been exonerated, but Beldock achieved other successes in cases such as those involving parole rights. Beldock mentioned at the 2003 speak-out the landmark case of NYSDA Client Advisory Board member Darryl King. (*Matter of King v*

New York State Div. of Parole, 190 AD2d 423 [1st Dept 1993] [affd](#) 83 NY2d 788 [1994]). NYSDA filed an amicus brief in *King*, and worked closely with both King and Beldock.

The day after the *Times* announced Beldock’s death, the *New York Law Journal* reported on a decision from the Second Circuit reviving a dismissed federal lawsuit on behalf of Beldock client Albert Victory concerning the rescission of his parole on spurious grounds. [Victory v Pataki](#), Docket No. 13-3592, 2016 US App LEXIS 1650 (2nd Cir 2/1/2016).

Buffalo Attorney John R. Nuchereno Dies

Cancer claimed “a model defense” attorney on Feb. 2, 2016. John R. Nuchereno represented many clients in serious cases during his career and was lauded as someone who zealously represented his clients while showing respect to all, according to the *Daily Record* report of his death on Feb. 4, 2016. He became the [director](#) of the Buffalo Law School’s Innocence and Justice Project after winning exoneration for four people wrongfully convicted.

Nuchereno was a frequent lecturer, and had served as a CLE training presenter for NYSDA. After his presentation on “Ethics of the Criminal Lawyer” one lawyer attending the training suggested for future events, “I would like more on the Ethics of the Criminal Lawyer. By that I mean a 1/2–1 hour more by John Nuchereno.” Many presentations by Nuchereno are [archived](#) by The Erie County Bar Association Aid to Indigent Prisoner Society, Inc. NYSDA extends sympathy to his family, colleagues, and friends. ☺

CONFERENCES & SEMINARS

Sponsor: New York State Defenders Association
Theme: Criminal Defense Mitigation Training
Date: May 19, 2016
Place: New Paltz, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: NYSBA Committee to Ensure the Quality of Mandated Representation
Theme: Spring 2016 Public Defense Trainer
Date: June 3, 2016
Place: Albany, NY
Contact: NYSBA: tel (518) 463-3200; email kwagner@nysba.org (Kristen Wagner); website <http://www.nysba.org/probono-events/>

Sponsor: ABA’s Criminal Justice Section & Louis Stein Center for Law and Ethics
Theme: Seventh Annual Prescriptions for Criminal Justice Forensics Conference
Date: June 3, 2016
Place: New York City
Contact: ABA: tel (202) 662-1500; email crimjustice@americanbar.org; website http://www.americanbar.org/groups/criminal_justice.html

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

By Susan Bryant*

Criminal Procedure Law & Penal Law

A. New and Amended Crimes

- **Chapter 242 (S2957-A)** – Creates a new crime of human corpse concealment. Effective: November 22, 2015.

Entitled “Amanda Lynn’s Law,” this chapter creates a new class E felony, concealment of a human corpse (Penal Law 195.02), which is violated when a person, having a reasonable expectation that a human corpse or a part thereof will be produced for or used as physical evidence in an official proceeding or an autopsy or examination by law enforcement as part of a criminal investigation, alone or in concert with another, conceals, alters, or destroys such corpse or part thereof with the intent to prevent its production, use, or discovery.

- **Chapter 250 (A4969-B)** – Expands the crime of forcible touching. Effective: November 1, 2015.

This law expands the crime of forcible touching (Penal Law 130.52) to include when a person intentionally, and for no legitimate purpose:

2. Subjects another person to sexual contact for the purpose of gratifying the actor’s sexual desire and with intent to degrade or abuse such other person while such other person is a passenger on a bus, train, or subway car operated by any transit agency, authority or company, public or private, whose operation is authorized by New York state or any of its political subdivisions.

- **Chapter 373 (A2761-B)** – Expands the crime of public lewdness. Effective: November 1, 2015.

This chapter law expands the crime of public lewdness (Penal Law 245.00) to include when a person “intentionally exposes the private or intimate parts of his or her body in a lewd manner or commits any other lewd act: ... (b) ... (ii) while trespassing, as defined in section 140.05 of this part, in a dwelling as defined in [Penal Law 140.00(3)], under circumstances in which he or she is observed by a lawful occupant.”

- **Chapter 423 (A1034-A)** – Adds new subdivisions to second-degree assault that apply to assaults on persons providing direct patient care who are not nurses. Effective: November 1, 2016.

This law adds two subdivisions (3-c and 11-c) to Penal Law 120.05 that apply when a person causes physical injury to a non-nurse employee providing direct patient care whose principal employment responsibility is to

carry out direct patient care in specified hospital and other medical facilities where the person does so: with intent to prevent the employee from performing a lawful duty or with intent to cause physical injury and the injury is caused while the employee is performing a lawful duty.

- **Chapter 472 (S3343)** – Amends second-degree assault to include public health sanitarians and NYC public health sanitarians. Effective: November 1, 2016.

This chapter amends subdivision 11 of Penal Law 120.05 to add public health sanitarians and New York City public sanitarians to the list of protected individuals.

- **Chapter 477 (S3913-A)** – Amends second-degree assault to include secure treatment facility employees. Effective: November 1, 2016.

This law amends Penal Law 120.05 to add a new subdivision 13 to provide that a person is guilty of second-degree assault when, “[b]eing confined to a secure treatment facility, as such term is defined in [Mental Hygiene Law 10.03(o)], and with intent to cause physical injury to an employee of such secure treatment facility performing his or her duties, he or she causes such injury to such person.”

- **Chapter 487 (S4839)** – Amends second-degree assault to include emergency medical service paramedics and technicians. Effective: February 18, 2016.

This chapter amends subdivision 11 of Penal Law 120.05 to add emergency medical service paramedics and technicians to the list of protected individuals.

B. Controlled Substances

- **Chapter 370 (A627-A)** – Adds three synthetic drugs to Schedule I of the schedules of controlled substances. Effective: October 26, 2015.

This chapter law amends schedule I of Public Health Law 3306 to add three synthetic drugs to the list of hallucinogenic substances: (1) 2-(4-iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine, also known as 25I-NBOMe, 2C-I-NBOMe; 25I, and Cimbi-5; (2) 2-(4-chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine, also known as 25 CNBOMe, 2C-C-NBOMe, 25C, and Cimbi-82; and (3) 2-(4-bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine, also known as 25 BNBOMe, 2C-B-NBOMe, and Cimbi-36.

- **Chapters 416 (A7060) and 417 (A8258)** – Expedited access to medical marijuana. Effective: November 11, 2015.

These chapter laws establish a temporary emergency medical marijuana access program that would be effective until the state’s medical marijuana program is fully implemented.

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C. Sunset Extensions

- **Chapter 55 (Part B) (A3005-B) – Extension of sentencing and other laws scheduled to sunset on September 1, 2015. Effective: April 13, 2015.**

A number of determinate sentencing statutes have two versions, one with a sunset date and the other that would take effect after the sunset date. The sunset date for those sections has been extended from September 1, 2015 to September 1, 2017. Other laws scheduled to sunset on September 1, 2015 have also been extended for two years, including the mandatory and presumptive arrest provisions in CPL 140.10(4); provisions regarding the maximum length of criminal court orders of protection; provisions regarding the ignition interlock device program in the Vehicle and Traffic Law; and provisions regarding testimony by certain child witnesses by closed-circuit television.

D. Diversion & Treatment

- **Chapter 258 (A6255-B) – Medically prescribed treatment for opioid addiction during judicial diversion. Effective: September 25, 2015.**

This law amends the judicial diversion statute (CPL 216.05) to specify that defendants who need treatment for opioid abuse or dependence “may participate in and receive medically prescribed drug treatments under the care of a health care professional licensed or certified under [Education Law title 8], acting within his or her lawful scope of practice” and may not be deemed to have violated a release condition for participating in such drug treatments. More information about medication-assisted treatment is available from the Legal Action Center at <http://lac.org/resources/substance-use-resources/medication-assisted-treatment-resources>.

- **Chapter 371 (A1327-A) – Expedited determination of health insurance coverage for court-ordered mental health and/or substance use disorder services. Effective: April 1, 2016 (applies to policies issued, renewed, or modified on or after such date).**

The law amends sections of the Insurance Law and Public Health Law to give individuals with health insurance coverage the ability to seek expedited utilization review and, if necessary, an expedited external appeal to determine if their insurance plan will cover proposed court-ordered mental health and/or substance use disorder services.

E. Criminal History Unsealing and Consequences of Conviction

- **Chapter 56 (Part EE, Subpart G) (S2006-B) – Teaching certificate revocation for certain convictions. Effective: July 1, 2015.**

This law amends Education Law 305(7-a) to provide that the Education Commissioner must revoke and annul the teaching certificate of a teacher convicted of a violent felony offense (as defined in Penal Law 70.02[1]) “committed against a child when such child was the intended victim of such offense.”

- **Chapter 449 (A7319) – Unsealing of criminal records in district, city, and NYC criminal courts. Effective: November 20, 2015.**

This chapter law amends CPL 160.50(1)(d) to allow a district court, city court, or New York City criminal court to unseal a criminal record it previously sealed, upon an ex parte motion of a law enforcement agency and a finding that justice requires that the records be made available to the agency. The law makes a similar amendment to CPL 160.55(1)(d). Previously, all law enforcement applications had to be made to the superior court.

F. Sex Trafficking and Prostitution

- **Chapter 80 (S5966) – Licensing and registration of nail salons and related businesses. Relevant provisions effective: July 16, 2015.**

This law amends General Business Law (GBL) 410(1) to provide that a license or registration to practice nail specialty or other related practices governed by GBL article 27 may be suspended or revoked or a fine may be imposed for conviction of compelling prostitution (Penal Law 230.33) or sex trafficking (230.34). The law also amends GBL 412 to create a new misdemeanor offense (punishable by imprisonment of up to six months or by a fine of up to \$2,500 or both) for operating an appearance enhancement business without license or when such license is suspended or revoked or operating in violation of an order of the Secretary of State directing cessation of unlicensed activity.

- **Chapter 368 (S7) – “Trafficking Victims Protection and Justice Act.” Effective: January 19, 2016.**

The Act amends and adds many new sections of law, including:

- Amendments to CPL 700.05, Correction Law 168-a and 168-d, Mental Hygiene Law 10.03, VTL 509-cc, and a host of Penal Law sections, including 60.13, 70.02, 70.80, 135.35, 240.37, 440.10, and 460.10, and many Penal Law article 230 sections;
- New crimes: aggravated labor trafficking, a class C felony (Penal Law 135.37); patronizing a person for prostitution in a school zone, a class E felony (Penal Law 230.08); and aggravated patronizing a minor for prostitution, third degree (class E felony), second degree (class D felony), and first degree (class B felony) (Penal Law 230.11-.13); and

- New provisions: affirmative defense to prostitution (Penal Law 230.01); and suspension and revocation of a class E (for-hire) driver's license where the holder is convicted of a specified Penal Law article 230 offense and the holder "used a for hire motor vehicle to commit such crime" (VTL 510-d).

➤ **Chapter 426 (A2469-A) – Surcharge and fee waivers for sex trafficking victims. Effective: November 20, 2015; applies to convictions on or after November 20 and convictions for which sentence has not been imposed prior to November 20.**

The chapter law amends CPL 420.35(2) to require a court to waive the DNA databank fee of sex trafficking victims. It also amends that subdivision to require a court to waive the mandatory surcharge, DNA databank fee, and crime victim assistance fee where the defendant is convicted of: (1) Penal Law 240.37 (loitering for the purpose of engaging in prostitution), provided the person was not convicted of loitering for patronizing a person for prostitution; (2) Penal Law 230.00 (prostitution); or (3) a violation where the conviction is in lieu of a plea to or conviction for 240.37 (provided there was no allegation of loitering for patronizing) or 230.00.

G. Domestic Violence and Sexual Assault

➤ **Chapter 76 (S5965) – College campus sexual assault, dating violence, domestic violence, and stalking prevention and response. Effective: October 5, 2015 (with exceptions set forth in § 7 of the chapter law).**

This law creates Education Law article 129-b that requires colleges and universities that maintain a campus in New York State to 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. This 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.

➤ **Chapter 240 (A1797-A) – Expiration of orders of protection for sexual assault convictions. Effective: October 22, 2015.**

The law amends CPL 530.12 and 530.13 to require that, in sexual assault cases where the sentence is or includes probation (as provided in Penal Law 65.00[3]) and the court issues an order of protection, the duration of the order may not exceed six years from the date of sentencing

for misdemeanors and 10 years from the sentencing date for felonies.

➤ **Chapter 432 (A4347) – Translation of domestic incident reports. Effective: February 18, 2016.**

The chapter law amends Executive Law 214-b and 840 and CPL 140.10(5) to require law enforcement officials throughout the state to provide a translation of domestic incident reports when such reports are made in a language other than English and notification to victims of their rights, in their native language, if identified as other than English.

➤ **Chapter 537 (S1316) – College and university sexual assault victim notification. Effective: December 11, 2015.**

This chapter law amends provisions of the Education Law to require colleges and universities to notify victims of sexual offenses that occurred at or on the grounds of such institution of their options regarding reporting of such offenses in accordance with the federal Campus Sexual Assault Victims' Bill of Rights under 20 USC 1092(f).

➤ **Chapter 584 (A6626) – Service animals and therapy dogs in residential domestic violence programs. Effective: originally December 28, 2015, but amended by L 2016, ch 7 to December 28, 2016.**

The law amends Social Services Law 459-b to provide that if a victim of domestic violence has a therapy dog or service animal, as defined in Agriculture and Markets Law 108 and 123-b, respectively, that animal or therapy dog must be allowed to accompany the individual at the residential program for victims of domestic violence.

This chapter law was amended by [L 2016, ch 7](#), to clarify that the animal must be allowed to accompany the individual so long as the accompaniment would not create an undue burden, as defined in Executive Law 296. If it would create an undue burden, the program must make reasonable efforts to facilitate placement of the animal at an off-site animal care facility or, if such reasonable efforts fail, provide referral to one or more off-site facilities. Chapter 7 also adds language noting that this law does not limit any rights or obligations under other federal or state laws.

H. Evidence

➤ **Chapter 57 (Part I) (A3007-B) – Informed consent for HIV related tests, possession of condoms excluded from evidence; clarification of syringe/needle exception. Effective: April 13, 2015.**

This law makes several changes, including:

- Adding CPL 60.47 (Possession of condoms; receipt into evidence) to provide that in prosecutions for

Penal Law 230.00 (prostitution) or 240.37 (loitering for the purpose of engaging in a prostitution offense), “[e]vidence that a person was in possession of one or more condoms may not be admitted at any trial, hearing, or other proceeding ... for the purpose of establishing probable cause for an arrest or proving any person’s commission or attempted commission of such offense”;

- Amending Penal Law 220.03 (seventh-degree criminal possession of a controlled substance) and 220.45 (criminally possessing a hypodermic instrument) to make clear that the exception for possession of a syringe/needle pursuant to PHL 3381 “includes the state’s syringe exchange and pharmacy and medical provider-based expanded syringe access programs”; and
- Repealing Public Health Law (PHL) 2781(2-a), which provided that informed consent requirements shall not apply to HIV related tests done in correctional facilities.

I. Juvenile Justice

- **Chapter 195 (S4906) – Interstate Compact for Juveniles extended. Effective: August 13, 2015.**

The law extends New York’s participation in the Interstate Compact for Juveniles until September 1, 2020. The Compact governs the interstate management, monitoring, and supervision of children adjudicated juvenile delinquents and provides for the return of non-delinquent juveniles who have run away from home to another state.

Probation, Parole & Corrections

- **Chapter 5 (A858) – Transitional services for individuals released from state prison. Effective: April 16, 2015.**

This law amends Correction Law 76 (added by L 2014, ch 506) to provide that, “[w]here appropriate, [DOCCS] shall provide assistance to an inmate in contacting a program or service provider prior to such inmate’s release to the community.”

- **Chapter 55 (Part A) (A3005-B) – Medical parole for terminally ill inmates. Effective: April 13, 2015.**

The chapter law amends Executive Law 259-r by transferring from the Parole Board to the Commissioner of the Department of Corrections and Community Supervision (DOCCS) the responsibility to make decisions regarding the medical parole of terminally ill inmates, but making decisions granting medical parole subject to review by the Chair of the Parole Board.

- **Chapter 270 (A7814) – Prison release date. Effective: October 25, 2015.**

This chapter law amends Correction Law 74 to give the Commissioner of the Department of Corrections and

Community Supervision the discretion to advance the release date of an inmate who is scheduled to be released on a Friday to a Thursday where the person will be serving a period of community supervision and “the commissioner determines that public safety will be enhanced by a next day reporting requirement.”

- **Chapter 321 (S5023-A) – Livingston County jail as holding facility. Effective: September 25, 2015.**

The law amends Correction Law 500-a and 500-c to allow the Livingston County correctional facility to be used for the detention of persons who have been arrested and are being held for arraignment in any court in Livingston County.

- **Chapter 431 (A3838-B) – High school equivalency education in state prisons. Effective: November 20, 2018.**

This chapter law requires that the Department of Corrections and Community Supervision (DOCCS) provide to all inmates who are determined to be capable of successfully completing the coursework necessary for the high school equivalency test, other than those serving a sentence of life imprisonment without parole, the opportunity to complete that coursework at least two months before the individual is paroled, conditionally released, released on post-release supervision, or presumptively released. DOCCS must also give written notice of the availability of the test. DOCCS must also present a plan for implementing the equivalency test to the Assembly and Senate on or before April 1, 2019.

- **Chapter 442 (A6527) – Schenectady County jail as a holding facility. Effective: November 20, 2015.**

The law amends Correction Law 500-a and 500-c to allow the Schenectady County correctional facility to be used for the detention of persons who have been arrested and are being held for arraignment in any court in Schenectady County.

- **Chapter 490 (S4903) – Performance of autopsies and access to autopsy reports performed after the death of an incarcerated person. Effective: November 20, 2015.**

This chapter law clarifies that a county’s coroner, coroner’s physician, or medical examiner must perform an autopsy regarding any death in that county of an inmate of a correctional facility, whether or not the death occurred in such facility, and that the autopsy report must be provided to the Chairman of the Correction Medical Review Board and the DOCCS Commissioner. The county official must provide an autopsy report to the Executive Director of the Justice Center for the Protection of People with Special Needs where the deceased was receiving services while residing at a facility operated, licensed, or certified by the Department of Mental Hygiene, the Office

of Children and Family Services, the Department of Health, or the State Education Department.

➤ **Chapter 518 (A836) – Training for staff in residential mental health units. Effective: December 11, 2015.**

The law amends Correction Law 401(6) to require that all security, program services, mental health, and medical staff who have direct contact with individuals residing in correctional facility residential mental health treatment units receive a minimum of eight hours of mental health training annually.

This chapter law was amended by [L 2016, ch 20](#), to provide that security, program services, mental health, and medical staff with direct inmate contact must receive annual training on the identification of, and care for, inmates with mental illnesses, but not a minimum of eight hours annually. New correctional officers and other new department staff who will regularly work in programs providing mental health treatment for inmates must receive a minimum of eight hours of training about the types and symptoms of mental illnesses, the goals of treatment, the prevention of suicide, and training in how to effectively and safely manage inmates with mental illness. And department staff in residential mental health treatment units must receive 8 hours of mental health training annually as long as they work in such a unit.

➤ **Chapter 545 (S4780-A) – Parole violation proceedings involving an individual who may be incapacitated. Effective: June 8, 2016.**

This chapter law, enacted in response to the Court of Appeals decision in [Matter of Lopez v Evans](#) (25 NY3d 199 [2015]), amends Executive Law 259-i(3)(a)(i), (3)(f), and (3)(f)(v) and CPL 730.10(2) to address situations in which a person alleged to have violated parole appears to be incapacitated, as defined in CPL 730.10(1).

Where such person, his or her counsel, or an employee of the Department of Corrections and Community Supervision claims or it reasonably appears to the hearing officer that the person is incapacitated and a judicial determination of incapacity has not been made, the hearing officer must temporarily stay the parole revocation proceeding and refer the matter to the superior court for a determination of fitness to proceed. The court must appoint counsel to any unrepresented individual eligible for appointed counsel under Executive Law 259-i(3)(f)(v). The court must make a determination within 30 days of the referral. If the individual is found fit to proceed, the matter is referred back to the hearing officer for further proceedings.

Where the individual is found to be incapacitated:

- and no felony charges are pending against the individual, the court must issue a final order of observation committing the person to the custody of the Commissioner of Mental Health or the Commissioner of Developmental Disabilities for care

and treatment consistent with CPL 730.40(1) and the hearing officer must dismiss the violation charges

- and felony criminal charges are pending before a fitness determination is made, the court must issue an order of observation and the hearing officer must adopt the capacity finding and terminate the revocation process.

➤ **Chapter 570 (A6430-A) – Ban on shackling of pregnant inmates during transport. Effective: originally December 22, 2015, but amended by L 2016, ch 17 to February 20, 2016.**

This chapter amends Correction Law 611(1)(a) to specifically prohibit the use of restraints of any kind during transport of a woman inmate while she is pregnant and about to give birth, known to be pregnant, or in the eight weeks after delivery, except in extraordinary circumstances after consultation with the chief medical officer. In such circumstances, restraints are limited to handcuffs in front of the body. The law applies to both state and local correctional facilities.

On March 21, 2016, chapter 570 was amended by [L 2016, ch 17](#) as follows:

- for the category of a “woman known to be pregnant,” correctional personnel or personnel providing medical services to the institution or local correctional facility must know of the pregnancy;
- the term “chief medical officer” is changed to “medical professional responsible for the institution”;
- handcuff restraints are allowed where the correctional personnel directly responsible for transporting such a woman determines that there is an emergency that necessitates the use of restraints because the woman “poses an immediate risk of serious injury to herself or medical or correctional personnel or others and cannot reasonably be restrained by other means”; and
- DOCCS and State Commission of Correction are required to post on their websites annual reports about use of restraints.

Vehicle and Traffic Law

➤ **Chapter 440 (A6222) – Ignition interlock conditions upon declaration of delinquency. Effective: November 20, 2015.**

The law amends Penal Law 65.15(2) to add the following regarding ignition interlock conditions after a declaration of probation or conditional discharge delinquency:

Any order for the installation and maintenance of a functioning ignition interlock device imposed pursuant to [PL 60.21] shall remain in effect throughout the delinquency and the court may extend the period of such installation and maintenance by the period of the delinquency; provided,

however, that the defendant shall get credit for any period where the device was installed and maintained during the delinquency.

➤ **Chapter 578 (S5046-A) – Bars collection of fines and fees when a VTL violation is dismissed. Effective: April 20, 2016.**

The chapter law adds Vehicle and Traffic Law (VTL) 1804 to prohibit municipalities from imposing a fine, penalty, forfeiture, or any other fee or surcharge against a person charged with a VTL violation unless the person is convicted or found liable for that violation. The Governor’s approval memo notes that, by its terms, “the bill would also prohibit the imposition of fines and surcharges in the relatively common situation where a violation is plea-bargained down to a lesser charge. The Legislature has agreed to a chapter amendment that would address this concern.” That chapter amendment has not yet been enacted.

Courts

➤ **Chapter 237 (A8083) – Electronic filing in criminal cases in superior court and appellate divisions, family court; e-filing under the CPLR. Effective: August 31, 2015.**

This chapter law makes a number of amendments and additions regarding e-filing in criminal, family court, and civil proceedings.

Criminal Cases:

- Amends CPL 10.40 to give the chief administrative judge, with the approval of the administrative board of the courts, the authority to promulgate rules authorizing e-filing in supreme and county court for filing an accusatory instrument to commence a criminal action or proceeding (pursuant to CPL articles 195 and 200) and the filing and service of papers in pending criminal actions and proceedings. Parties must consent to the filing and service of papers in pending actions, except that the chief administrative judge may eliminate the consent requirement in up to six counties provided consent is given by the District Attorney, the criminal defense bar (defined as all provider offices and/or organizations in the county that represented 25% or more of the persons represented by public defense providers pursuant to County Law 722 as shown in the most recent annual reports filed pursuant to County Law 722-f), and the county clerk.

The chief administrative judge may not eliminate consent until persons and organizations who regularly appear in such proceedings are given reasonable notice and an opportunity to submit comments regarding the matter, the judge gives due consider-

ation to such comments, and upon consultation with the e-filing advisory committee. When consent is eliminated, the court must give counsel the opportunity to opt out in specified limited circumstances and must give unrepresented parties information about their options for e-filing. E-filed documents and papers shall not be available for public inspection online, except in limited circumstances, and the e-filing law does not affect or change existing laws on sealing and confidentiality of court records or access to court records by the parties. The chapter law does not affect or change existing laws on service of process, including existing personal service requirements in the CPL.

- Adds a new CPL 460.90 to allow each judicial department of the appellate division the authority to promulgate rules allowing e-filing for the taking and perfection of appeals. Such rules may not require e-filing by unrepresented parties and attorneys under certain limited circumstances. Such rules may not be promulgated until the judicial department consults with the chief administrative judge and gives an opportunity for review and comment by all those who are or would be affected by the rules.

Family Court Cases:

- Amends Family Court Act 214 to authorize the chief administrative judge, with the approval of the administrative board of the courts, to promulgate rules allowing e-filing in family court for the origination of proceedings in such court and the filing and service of papers in pending proceedings. Similar to the provisions related to criminal cases discussed above, the chief administrative judge may eliminate the consent requirement in not more than six counties for the filing of a petition starting an abuse or neglect proceeding pursuant to FCA article 10 by a child protective agency, the filing of a juvenile delinquency petition, and the filing and service of papers in such article 10 and juvenile delinquency proceedings where the proceedings were originated by e-filing. The persons and organizations who must consent include the family court bar providing representation to parents (as represented by the head of each legal services organization, the head of each public defender organization, and the president of the local bar association as applicable) and those who regularly appear in such family court proceedings must have an opportunity to submit comments on those rules. The provisions regarding access to e-filed documents and papers and service of process are similar to those applicable to criminal cases.
- Adds FCA 1122 to permit each judicial department of the appellate division to promulgate e-filing rules

for the taking and perfection of appeals.

The law also adds a new article 21-A to the CPLR regarding the filing of papers in trial and appellate courts by fax transmission and electronic means.

- **Chapter 272 (A7939-A) – Court access for persons who are deaf or hard of hearing. Effective: September 25, 2015.**

The law expands Judiciary Law 390 (“Equal access to court proceedings for deaf or hard of hearing person”) to make it applicable to persons who are hard of hearing and to add jurors and prospective jurors to the list of covered persons. It gives the courts authority to, at the request of a person (party, witness, juror, or prospective juror) who is deaf or hard of hearing or on its own motion, and in lieu of appointing an interpreter, “provide an assistive listening device, a stenographer who can furnish communication access real-time translation or any other appropriate auxiliary aid or service.”

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

- **Chapter 312 (S4817-B) – Residence of the Lewis Town Court justice. Effective: September 25, 2015.**

The law amends Town Law 23 and Public Officers Law 3 to authorize the town justice of the town of Lewis in Lewis County to be a resident of the town of Lewis or an adjoining town.

Family Court

- **Chapter 29 (A7193-A) – Drivers’ license suspension to enforce child support orders. Effective: June 30, 2015.**

This law extends the sunset date of the law allowing for the enforcement of child support through the suspension of driving privileges from June 30, 2015 to August 31, 2017.

- **Chapter 56 (Part L) (S2006-B) – Compliance with the federal Preventing Sex Trafficking and Strengthening Families Act. Effective: April 13, 2015 (with exceptions as set forth in Part L, § 35).**

This law amends various provisions of the Social Services Law, Family Court Act, Surrogate’s Court Procedure Act, Public Health Law, and Executive Law to comply with the 2014 federal Preventing Sex Trafficking and Strengthening Families Act, which seeks to provide opportunities for youth in foster care.

- **Chapter 142 (S1514) – Foster home licensing. Effective: August 13, 2015 (deemed in effect as of June 27, 2015).**

This is a chapter amendment to L 2014, ch 539, which directed social services districts and voluntary agencies, before authorizing a foster parent, to determine whether the applicant previously had a foster care license that was revoked or not renewed and whether a child was ever removed from the applicant’s care. This chapter amendment makes changes to Social Services Law 376 and 377 to specifically provide that, in accordance with state regulations, DSS must review the information available from the Statewide Automated Child Welfare Information System and clarifies that reviews would be limited to whether a child was removed for health and safety reasons.

- **Chapter 145 (S1518) – Protocol for release of reports by DSS on death of certain children. Effective: August 13, 2015 (deemed in full force and effect on December 29, 2014).**

This is a chapter amendment to L 2014, ch 544, which amended Social Services Law 20(5) to allow a local social services department referenced in a report by the Office of Children and Family Services about the death of a child to provide written comments for inclusion in the report. The chapter amendment clarifies that DSS comments must adhere to current confidentiality requirements and be relevant and factually accurate. It also shortens the time period for DSS to submit comments.

- **Chapter 269 (A7645) – Temporary and permanent spousal maintenance and support. Effective: January 23, 2016 (for matrimonial and Family Court actions for spousal support commenced on or after that date); October 25, 2015 (for temporary maintenance in matrimonial actions commenced on or after that date).**

The law amends Domestic Relations Law 236 and Family Court Act 412 regarding the duration and calculation of the amount of maintenance and spousal support, including the consideration of child support payments.

- **Chapter 347 (S5685-B) – Uniform Interstate Family Support Act. Effective: December 24, 2015.**

The law repeals the existing Family Court Act article 5-b (Uniform Interstate Family Support Act [UIFSA]) and replaces it with a new article 5-b that includes the 2008 amendments to UIFSA and amends Social Services Law 111-i. Information about the national adoption of the 2008 amendments is available on the Uniform Law Commission’s website ([Interstate Family Support Act Amendments \[2008\]](http://www.uniformlaw.org/interstate-family-support-act-amendments-2008)), and the U.S. Department of Health and Human Services, Office of Child Support Enforcement website ([IM-15-01](http://www.acf.hhs.gov/ocse/im-15-01)).

➤ **Chapter 367 (S6) – Pilot program for filing of petitions for temporary orders of protection. Effective: April 1, 2016.**

This law amends Family Court Act 153-c to allow the Chief Administrator of the Courts to promulgate rules to:

establish and implement a pilot program for the filing of petitions for temporary orders of protection by electronic means and for the issuance of such orders *ex parte* by audio-visual means in order to accommodate litigants for whom attendance at court to file for, and obtain, emergency relief would constitute an undue hardship or to accommodate litigants, for whom traveling to and appearing in the courthouse to obtain emergency relief, creates a risk of harm to such litigant.

➤ **Chapter 387 (A7637) – Spousal maintenance and child support calculations. Effective: January 24, 2016.**

This law amends Family Court Act 413 and Domestic Relations Law 240 to clarify the treatment of spousal maintenance in the calculation of child support.

➤ **Chapter 436 (A5803) – Law enforcement access to the central register of child abuse and maltreatment. Effective: January 19, 2016.**

This law amends Social Services Law 422 to give law enforcement agencies access to records of the state child abuse register and local social services districts when such an agency is investigating a missing child where there is reason to suspect that the child's parent, guardian, or a legally responsible adult is the subject of a child abuse report or the child or the child's sibling is named in a child abuse report and that information is needed to further the investigation. The provisions of this chapter law that authorized OCFS or a local district to deny access to such records and established a process for prompt administrative review of the denial were repealed by a chapter amendment signed into law on March 21, 2016 ([L 2016, ch 13](#)).

➤ **Chapter 492 (S5054) – Severe abuse findings against non-parent caregivers. Effective: February 18, 2016.**

This law amends Family Court Act (FCA) 1051 to specifically allow family court judges to make a finding of severe or repeated abuse against a non-parent respondent in an FCA article 10 child abuse proceeding. As noted in the accompanying sponsor's memo, "several court decisions have held that enhanced findings of severe or repeated child abuse may only be made in an original child abuse proceeding under Article 10 of the Family Court Act against parents" For example, in 2015, the Third Department reversed a severe abuse finding against the respondent, the boyfriend of the child's custodian, noting that "[a]lthough Family Court and petitioner artic-

ulated policy reasons that may support extending severe abuse to a nonparent who is legally responsible for a child's care, such an extension is for the Legislature." [Matter of Tiarra D.](#), 124 AD3d 973 (3rd Dept 1/8/2015).

The law also amends Executive Law 221-a to require that temporary and final orders of protection issued in FCA article 10 proceedings, and warrants pertaining to such orders of protection, be entered into the statewide automated registry of orders of protection.

➤ **Chapter 499 (S5286) – Adjudication and violation procedures in juvenile delinquency and PINS cases. Effective: February 18, 2016.**

This law amends various provisions of Family Court Act articles 3 and 7 regarding violations of court orders and acceptance of an admission in article 7 proceedings.

➤ **Chapter 567 (A6715-A) – Treatment of non-respondent parents in child abuse and neglect proceedings. Effective: June 18, 2016.**

This law purports to clarify what treatment a non-respondent parent should expect in a Family Court Act (FCA) article 10 (abuse or neglect) case. Recommended by the Family Court Advisory and Rules Committee, it adds definitions of "parent," "relative," and "suitable person" to FCA 1012 and recognizes parents' superior rights to the care and custody of their children. According to the sponsor's memo, FCA 1017 includes a requirement that "certain additional individuals should be identified, located and notified in writing of the pendency of child protective proceedings" It also adds provisions authorizing the assignment of counsel for non-respondent parents at pre-petition hearings and requiring that, upon the filing of a petition, non-respondent parents receive a notice advising them of the right to counsel.

The law authorizes the family court to temporarily release a child to a non-respondent parent, relative, or other suitable person for up to one year, which can be extended for another year on a good cause showing. Before releasing a child, the family court still must review "the orders of protection and sex offender registries, as well as child protective petitions and Family Court warrants regarding" such person. When the court temporarily releases a child to a non-respondent parent, relative, or other suitable person, that person must "submit[] to the jurisdiction of the court with respect to the child" and may be directed to "cooperate in making the child available for court-ordered visitation" and appointments. Finally, the bill establishes a procedure for cases in which an article 6 action is brought in response to allegations of abuse or neglect.

➤ **Chapter 573 (A7679) – Right of children to participate in permanency hearings. Effective: December 22, 2015.**

The law amends Family Court Act 1089(b)(1) to add a subparagraph (iii) that requires that children 10 years of age and older receive notice of permanency hearings and have the right to be present at such hearings; this right can be waived after consultation with the attorney for the child. It also provides that, “[u]pon an application by the attorney for the child, the court shall grant an adjournment whenever necessary to protect the child’s right to meaningfully participate in the hearing.” On March 21, 2016, the Governor signed [L 2016, ch 14](#) to amend chapter 573 in several ways:

(1) Family Court Act 1089(b)(1)(iii) now provides that the attorney for the child must receive notice of permanency hearings;

(2) A new 1089(b)(1-a) was added to require that the local social services district serve such a child age 10 or older with notice of the permanency hearing no later than 14 days prior by regular mail and to provide that the attorney for the child may consult with the child about the child’s participation in the permanency hearing before notice is served on the child;

(3) A new FCA 1090-a (effective June 19, 2016) was added to govern participation of children in their permanency hearings, with different rules for children under age 10, between 10 and 13, and 14 and older.

The Office of Children and Family Services (OCFS) released the Bill of Rights for Children and Youth in Foster Care earlier this year, which provides that children in foster care have the right “[t]o have a voice in determining [their] permanency goal, including, depending on [the child’s] age or ability, to participate in Service Plan Review meetings and court Permanency Hearings, to give input into the development and review of [their] service plan.” More information about the Bill of Rights is available in the OCFS Administrative Directive [15-OCFS-ADM-18](#).

Law Enforcement (Police, Prosecution)

➤ **Chapter 121 (A7256) – Authority of St. Regis Police. Effective: August 13, 2015 (expires September 1, 2017).**

This law amends Indian Law 114(2) to authorize the State Police Superintendent to give the St. Regis Police concurrent jurisdiction in an area in Franklin County known as the Bombay Triangle, which is outside the boundaries of the St. Regis Indian reservation.

➤ **Chapter 139 (S69) – Residence of Wyoming County assistant district attorneys. Effective: August 13, 2015.**

This law amends Public Officers Law 3 to allow Wyoming County assistant district attorneys, other than a first assistant or chief assistant district attorney, to reside in an adjoining county.

➤ **Chapter 384 (A7207) – Law enforcement training on animal cruelty and protection laws. Effective: October 26, 2015.**

This chapter law amends Executive Law 837 and 840 and Agriculture and Markets Law 16 to require that the Department of Agriculture and Markets assist with development of law enforcement training and policies on enforcement of animal cruelty and protection laws.

➤ **Chapter 565 (A4310-A) – Annual reporting of crimes on New York City transit. Effective: December 21, 2015.**

This chapter law amends New York City Administrative Code 14-150 to add a new subdivision d that requires the New York City Police Department to annually report to the New York City Council the total number of criminal complaints and arrests for specified crimes that occur on subways and buses operated by the New York City Transit Authority or the Staten Island Rapid Transit Operating Authority.

Miscellaneous

➤ **Chapter 115 (A5652) – Licensing of private investigators, bail enforcement agents, and watch, guard, or patrol agencies. Effective: August 13, 2016.**

The law separates the licensing of private investigators (General Business Law [GBL] 70) and the licensing of bail enforcement agents and watch, guard, or patrol agencies (new GBL 70-a), and increases the punishment for a violation of GBL 70 from a class B to a class A misdemeanor. The law also amends GBL 85 to provide that violations of GBL article 7 may be prosecuted by the attorney general, deputy attorney general, or a district attorney.

➤ **Chapter 231 (S1757-A) – Prohibits the sale of powdered or crystalline alcohol products. Effective: September 13, 2015.**

This law amends the definition of the terms alcoholic beverage and beverage in Alcoholic Beverage and Control Law (ABC) 3(1) to include powder or crystal and amends ABC 100 by adding a new subdivision 1-a: “No person shall sell, offer for sale, or otherwise provide for the consumption of any powdered or crystalline alcoholic product.”

➤ **Chapter 394 (S1744-A) – Notification to victims of name change petition. Effective: November 25, 2015.**

This law amends CPL 380.50(6) to require that prosecutors, within 60 days of the imposition of a sentence for a violent felony offense or other specified offense, provide a victim with a form prepared and distributed by the Division of Criminal Justice Services, in consultation with the Office of Victim Services, on which the individual may indicate a demand to be informed if the defendant files a petition for a name change. ♪

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.

Civil Practice

Prisoners (Access to Courts and Counsel) (Rights generally)

[Bruce v Samuels](#), 577 US __, 136 Sct 627 (1/12/2016)

Provisions of the Prison Litigation Reform Act of 1995 require prisoners who proceed in forma pauperis to pay an initial partial filing fee and to pay the remainder of the filing fee in monthly installments. Initial filing fees are assessed on a per-case basis. To resolve a conflict about the calculation of subsequent monthly installment payments when a litigant files more than one case, "[w]e hold that monthly installment payments, like the initial partial payment, are to be assessed on a per-case basis. Nothing in [28 USC] §1915's current design supports treating a prisoner's second or third action unlike his first lawsuit."

Death Penalty (Penalty Phase)

Juries and Jury Trials (Constitution – Right to)

[Hurst v Florida](#), 577 US __, 136 Sct 616 (1/12/2016)

"The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Florida's capital sentencing scheme calls for a "'hybrid' proceeding 'in which [a] jury renders an advisory verdict but the

judge makes the ultimate sentencing determinations.'" In this case, after a first death sentence was reversed on other grounds, the judge resentencing the defendant to death based her decision in part on her determination about aggravating factors, giving "great weight" to her own findings as well as to the jury's recommendation of death. Florida offered "a bevy of arguments for why Hurst's sentence is constitutional. None holds water." A defendant is not eligible for the death penalty in Florida without "'findings by the court that such person shall be punished by death.'" The argument that the defendant admitted aggravating circumstances is meritless. The stare decisis argument based on cases upholding the Florida capital sentencing scheme in the past is rejected; the cases in question, *Hildwin v Florida* (490 US 638 [1989]) and *Spaziano v Florida* (468 US 447 [1984]), are overruled in relevant part.

Concurrence: [Breyer, J] Florida judges, not juries, sentence defendants to death, which violates the Eighth Amendment.

Dissent: [Alito, J] The jury plays a critically important role in the Florida system and Court precedent does not dictate that the procedure violates the Sixth Amendment.

Constitutional Law (State Constitutional Law [other states] generally) (United States generally)

Death Penalty (Penalty Phase)

[Kansas v Carr](#), 577 US __, 136 Sct 633 (1/20/2016)

The state supreme court's decision regarding jury instructions on mitigating circumstances in these death penalty cases did not rest on adequate and independent state grounds but on prior decisions that ultimately rested on interpretation of the Eighth Amendment. State courts may experiment with their own constitutions, but not with the federal constitution.

The Eighth Amendment does not require juries in death penalty cases to be affirmatively informed that mitigating circumstances do not have to be proven beyond a reasonable doubt.

The joint capital-sentencing proceedings against one set of defendants did not violate their constitutional "right to an 'individualized sentencing determination.'"

Dissent: [Sotomayor, J] Because there is no reason to intervene in cases like these, and many reasons not to, "I would dismiss the writs as improvidently granted."

Civil Rights Actions (USC § 1983 Actions)

[James v City of Boise](#), 577 US __, 136 Sct 685 (1/25/2016)

A court has discretion, under 42 USC 1988, to "allow the prevailing party, other than the United States, a rea-

US Supreme Court *continued*

sonable attorney's fee' in a civil rights lawsuit filed under 42 U. S. C. §1983." The decision by this Court in *Hughes v Rowe* (449 US 5 [1980]), allowing a prevailing defendant to recover fees only in cases that were "'frivolous, unreasonable, or without foundation,'" applies in state courts as well as federal courts. The Idaho Supreme Court erred in awarding attorney's fees without determining if the plaintiff's action met the *Hughes* test.

Appeals and Writs (Jurisdiction) (Retroactivity)

Juveniles

Sentencing (Life Imprisonment Without Parole)

Montgomery v Louisiana, 577 US __, 136 Sct 718 (1/25/2016)

This Court has jurisdiction to decide this case, contrary to the able arguments put forth by *amicus* appointed after the parties agreed that jurisdiction did lie.

The retroactivity analysis in *Teague v Lane* (489 US 288 [1989]) is not limited to review of federal habeas corpus matters. Here, certiorari was granted after the Louisiana Supreme Court denied an application for a supervisory writ to overturn a trial court's denial of the petitioner's motion to correct an illegal sentence. The petitioner relied on *Miller v Alabama* (567 US __ [2012]), which barred mandatory sentences of life without parole (LWOP) for juveniles. "The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." The *Teague* exception for watershed rules of *procedure* is not addressed.

Miller, which determined that sentencing all but the rarest juvenile offender to LWOP is excessive, rendered LWOP an unconstitutional penalty for a class of defendants based on their status as "juvenile offenders whose crimes reflect the transient immaturity of youth." Thus, *Miller* "announced a substantive rule of constitutional law" that is retroactive. States may choose to consider juvenile homicide offenders for parole rather than re-litigate their sentences, which does not impose an onerous burden on the states or disturb the finality of convictions. The petitioner's submissions as to his evolution into "a model member of the prison community" serve as examples of one type of evidence that might demonstrate rehabilitation; perhaps exceptional circumstances can be offered to show that LWOP was a just and proportionate punishment for his crime, but he and those like him "must be given the opportunity to show their crime did not reflect irreparable corruption"

Dissent: [Scalia, J] "The Court has no jurisdiction to decide this case, and the decision it arrives at is wrong."

Dissent: [Thomas, J] "I join Justice Scalia's dissent. I write separately to explain why the Court's resolution of the jurisdictional question ... lacks any foundation in the Constitution's text or our historical traditions."

Appeals and Writs (Preservation of Error for Review)

Evidence (Instructions) (Sufficiency)

Statute of Limitations

Musacchio v United States, 577 US __, 136 Sct 709 (1/25/2016)

The sufficiency of the evidence in a criminal case where the jury has been instructed without objection on an additional element should be assessed against the elements of the charged offense, not those in the erroneous instruction. In this case alleging illegal accessing of a computer under 18 USC 1030(a)(2)(C), the trial court's instruction indicated that the crime resulted when a person intentionally accessed a computer without authorization *and* exceeded authorized access; only access without authorization *or* access that exceeded authorization is required. The Circuit Court correctly rejected the petitioner's challenge, but erred in basing its conclusion on the law-of-the case doctrine.

A general statute-of-limitations defense under 18 USC 3282(a) may not be successfully raised for the first time on appeal. Congress made no clear statement that the statute of limitations is jurisdictional and context confirms that the statute does not impose such a jurisdictional limit.

Federal Law

Sentencing (Enhancement)

Sex Offenses (Sentencing)

Lockhart v United States, 577 US __, 136 Sct 958 (3/1/2016)

In the sentencing enhancement statute at issue here, 18 USC 2252(b)(2), the phrase "involving a minor or ward" modifies only the item that immediately precedes it, "abusive sexual conduct." The text and context of the statutory provision in question lead to this conclusion. The petitioner's prior conviction of first-degree sexual abuse for acts involving his then-53-year-old girlfriend was a proper basis for enhancing his current sentence for violating 18 USC 2252(a)(4) by attempting to receive child pornography.

Dissent: [Kagan, J] The ordinary understanding of how English works when a modifying phrase follows a list of terms should decide this case. The majority's reliance on the last-antecedent rule does not conform to

US Supreme Court *continued*

the proper application of that rule. Legislative history confirms that each of the predicate offenses in the provision at issue must involve a minor. The structural argument offered by the majority is also fails.

Constitutional Law (United States generally)**Juveniles (Adoption) (Parental Rights)**

[V.L. v E.L.](#), No. 15-648, 577 US __ (3/7/2016)

Alabama must respect, under the Full Faith and Credit Clause of the federal Constitution, the Georgia Superior Court judgment that made V.L. a legal adoptive parent of children she had been raising with E.L., her partner and the children's biological mother, who maintained her own parental rights. "The Georgia judgment appears on its face to have been issued by a court with jurisdiction, and there is no established Georgia law to the contrary. It follows that the Alabama Supreme Court erred in refusing to grant that judgment full faith and credit."

Appeals and Writs**Discovery (Brady Material and Exculpatory Information)****Misconduct (Prosecution)**

[Wearry v Cain](#), 577 US __, 136 Sct 1002 (3/7/2016)

Because the prosecutor's failure to disclose material evidence violated the petitioner's right to due process, the state judgment denying him postconviction relief is reversed. The court "improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively" The withheld evidence included statements by inmates incarcerated with the star prosecution witness that the witness had admitted wanting to convict the defendant due to a personal vendetta and had told another inmate what to say about the defendant; information that an inmate testifying against the defendant had sought a deal reducing his sentence, which contradicted the prosecution's argument in summation that the witness "hasn't asked for a thing"; and medical evidence that made it impossible that a third party described by the star witness as helping abduct the decedent could perform the described actions.

The merits of the defendant's ineffective assistance of counsel claim, based on trial counsel's failure to locate alibi witnesses who had no personal ties to the defendant and other witnesses who would contradict the star prosecution witness's testimony about his own presence at the crime, are not considered.

Dissent: [Alito, J] The majority, in issuing a summary reversal here, highlights the exculpatory quality of the

information that was withheld while downplaying considerable evidence of guilt, and makes its decision without full briefing and argument. The Court has heard from the State only as to whether or not the case should be accepted for review. By deciding the case straight from the state court, rather than after the petitioner's claims are reviewed by federal courts in habeas corpus proceedings, the Court precludes application of the Antiterrorism and Effective Death Penalty Act's stringent limitations on review of claims. "In my view, therefore, summary reversal is highly inappropriate."

Constitutional Law (United States generally)**Weapons (Defenses)**

[Caetano v Massachusetts](#), No. 14-10078, 577 US __ (3/21/2016)

When upholding a state law prohibiting the possession of stun guns, the Massachusetts Supreme Court offered three explanations to support its holding, all of which contradicted this Court's precedent. That stun guns were not in common use when the Second Amendment was enacted, and that they are "'unusual' because they are 'a thoroughly modern invention'" and so were not commonly used at that time, are inconsistent with the holding in *District of Columbia v Heller* (554 US 570, 582 [2008]). That stun guns were not shown to be readily adaptable to military use similarly does not matter, as *Heller* rejected the contention that only weapons "'useful in warfare are protected.'"

Concurrence: [Alito, J] Being armed with a stun gun allowed the target of threats by her violent ex-boyfriend to protect herself. The decision below defies the *Heller* decision, despite professions of adherence to it, and does a grave disservice to vulnerable individuals "who must defend themselves because the State will not."

Counsel (Right to Counsel)**Forfeiture**

[Luis v United States](#), No. 14-419, 577 US __ (3/30/2016)

An order freezing a defendant's assets untainted by crime violates the Sixth Amendment right to counsel insofar as it prevents the defendant from paying for legal representation. The government sought a pretrial order under 18 USC 1345(a)(2) to freeze funds belonging to the defendant that it hoped to tap for criminal forfeiture—which can include assets untainted by the crime—once a conviction was obtained. While the government may well be permitted to seize crime-tainted assets before trial because a defendant's ownership interest in such assets is imperfect, precedent allowing pretrial restraint of assets has involved only tainted property. The distinction is not

US Supreme Court *continued*

a technicality, but “the difference between what is yours and what is mine.” Three other basic considerations underlie the holding here. One, the interests of a defendant—the fundamental right to counsel, including “the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire”—are undermined by the type of order challenged here, while the interests of the government in securing its punishment of choice (forfeiture) and the interests of harmed persons in securing restitution “lie somewhat further from the heart of a fair, effective criminal justice system.” Two, there is no significant legal tradition supporting the government’s position. Three, accepting the government’s position could seriously erode the right to counsel. Statutory provisions like the one relied upon here could be expanded infinitely. The defendants who will be most harmed by freezing of their untainted assets are those who are innocent and therefore lack “tainted” assets; they will be rendered indigent and made to “fall back upon publicly paid counsel, including overworked and underpaid public defenders.” Accepting the government’s position here “would—by increasing the government-paid-defender workload—render less effective the basic right the Sixth Amendment seeks to protect.”

Concurrence: [Thomas, J] “[A] pretrial freeze of untainted assets violates a criminal defendant’s Sixth Amendment right to counsel of choice” based “strictly on the Sixth Amendment text and common-law backdrop.” If the government’s “bare expectancy of criminal punishment” provided the power to freeze assets before trial, the right to counsel of choice would be meaningless. “The dissent’s approach nullifies the *original understanding* of the right to counsel.” I do not endorse the plurality’s atextual balancing analysis.

Dissent: [Kennedy, J] Finding a Sixth Amendment right to pay for counsel with untainted funds forfeitable upon conviction rewards criminals who dissipate the proceeds of their crimes, ignores precedent, and distorts the constitutional right to counsel. The right to counsel of choice is limited in several respects, including by what a defendant can afford. “Given the large volume of defendants in the criminal justice system who rely on public representation, it would be troubling to suggest that a defendant who might be represented by a public defender will receive inadequate representation.” And “concerns about the caseloads of public-defender offices do not justify a constitutional command to treat a defendant accused of committing a lucrative crime differently than a defendant who is indigent from the outset. The Constitution does not require victims of property crimes to fund subsidies for members of the private defense bar.”

Dissent: [Kagan, J] Because the correctness of *United States v Monsanto* (491 US 600 [1989])—a troubling decision—has not been placed at issue here, it controls, as the principal dissent states. The plurality’s efforts to cabin *Monsanto* leads to utterly arbitrary distinctions as among criminal defendants who are in fact guilty.

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.

Appeals and Writs (Judgments and Orders Appealable)

Sentencing (Appellate Review) (Second Violent Felony Offender)

[People v Thompson](#), 2016 NY Slip Op 00997 (2/11/2016)

The defendant’s sentence of five years’ probation in 1994, not the resentencing to a prison term of two to six years in 1995, determines whether his prior violent felony conviction comes within the second violent felony offender statute’s 10-year look-back period for sentencing on his current convictions for robberies committed in 2010. *Revoking* probation does not equate to *annulling* a sentence for purposes of Penal Law 60.01. Therefore, resentencing the defendant as a second violent felony offender was error.

The prosecution’s contention that the Appellate Division’s decision in this matter is not appealable under CPL 450.90(1), which does not say that an order modifying a resentence creates adversity, is rejected. The Appellate Division’s order modified the defendant’s resentence by reducing the term of incarceration but otherwise affirmed it. Further, there is a practical affect to the defendant from a determination of whether he was properly adjudicated a second violent felony offender, as the determination affects whether a court could find him to be a persistent violent felony offender should he recidivate quickly upon release from his current incarceration. Nor is the issue here one of fact rather than law, as the issue turns on interpretation of Penal Law 70.04 and 60.01.

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

[People v Watson](#), 26 NY3d 620, __ NYS3d __ (2/11/2016)

The trial court did not abuse its discretion by relieving a New York County Defender Services (NYCDS) attorney who had been representing the defendant on weapons charges for eight months and assigning a new lawyer to represent the defendant prior to trial upon disclosure of *Rosario* material that revealed that another NYCDS attor-

NY Court of Appeals *continued*

ney had represented a co-defendant on a drug charge arising from the same incident. Where the defendant's original counsel had been looking for the co-defendant as a possible defense witness, the defendant stated that he wanted to keep his original lawyer but also wanted the co-defendant to testify, the co-defendant had pleaded guilty but had not waived confidentiality, and NYCDS supervisors noted a potential or actual conflict of interest based on an institutional duty of loyalty to the co-defendant as a former client, the court did not err in concluding that the defendant did not sufficiently waive the conflict.

While knowledge about a large public defense program's current and former clients is not typically imputed to every attorney within the program, circumstances may arise that create a conflict, as here, where NYCDS expressly prohibited certain actions by the defendant's attorney with regard to the co-defendant once the completed representation of that person came to light. The court was faced with a dilemma of choosing between undesirable alternatives, the defendant's right to effective assistance and the right to counsel of choice, so that its discretion was particularly broad.

Counsel (Competence/Effective Assistance/Adequacy)**Misconduct (Prosecution)****Post-Judgment Relief (CPL § 440 Motion)****People v Gross, 2016 NY Slip Op 01204 (2/18/2016)**

The defendant, who claimed ineffective assistance of counsel in this sexual abuse case involving anal rape, relied on three studies to support his assertion that trial counsel should have called an expert witness to testify about the lack of detectable physical trauma, but the defendant failed to provide a proper foundation for considering those studies as he failed to include an expert's affidavit explaining the studies' conclusions or how they supported his contentions. Trial counsel's articulated reasons for not calling an expert witness were arguably legitimate.

Neither counsel's failure to request a limiting instruction as to the accuser's disclosures to other individuals, nor counsel's failure to object to the prosecutor's comments about the testimony of the witnesses to whom the accuser had disclosed, rendered counsel ineffective in light of the totality of the representation; the latter may have been a strategic choice. Because the record clearly indicates that counsel was not ineffective, the trial court's denial of a hearing on the defendant's CPL 440.10 motion was not an abuse of discretion.

Dissent: [Rivera, J] While, under the constraint of *People v Ludwig* (24 NY3d 221 [2014]), failing to object to

testimony about the accuser's disclosure of sexual abuse cannot be found to constitute ineffective assistance of counsel, the prosecutor exceeded the bounds of permissible summation by bolstering the accuser's credibility, advocating that the disclosure was proof of the abuse. Failure to object and request a cautionary instruction requires reversal.

Counsel (Competence/Effective Assistance/Adequacy)**Grand Jury****Narcotics (Drugs) (Evidence) (Paraphernalia) (Sale)****People v Hogan, 2016 NY Slip Op 01207 (2/18/2016)**

Whether or not a defendant testifies before a grand jury is a strategic decision that rests with counsel. Here, counsel did not see a prosecution grand jury notice faxed on Friday afternoon until Tuesday morning following a Monday holiday, responded without consulting the defendant that counsel would not have the defendant testify before the grand jury, and stated on the record, in plain language, the reasons for the decision; counsel was not ineffective and the defendant was not deprived of the opportunity to make a fundamental decision.

The defendant's claim that the drug factory presumption of Penal Law 220.25(2) did not apply is rejected. The defendant was seen running from the kitchen, where cocaine in both packaged and loose forms was in open view along with baggies and a razor blade.

Dissent: [Rivera, J] "[T]he majority ignores the intention of Penal Law § 220.25 (2) and construes the statute broadly to apply where the evidence of a drug business is tenuous and defendant's participation in a drug sale operation is lacking." Only six dime bags of crack and 50 unused ziplock baggies were on the counter, while the razorblade and loose cocaine were on the floor, and this could be evidence of personal drug use.

While this Court recently reaffirmed that a defendant's opportunity to testify before the grand jury should be "scrupulously protected," such protection apparently "does not extend to one's own lawyer." Further, where counsel did not even discuss the matter with the defendant, "counsel could not have made an informed choice regarding this critical question."

Arrest (Delay)**Confessions (Miranda Advice) (Voluntariness)****Evidence (Photographs and Photography)****People v Jin Cheng Lin, 2016 NY Slip Op 01205 (2/18/2016)**

The record supports the determination that the "defendant sufficiently understood his rights and that his

NY Court of Appeals *continued*

statements were voluntarily made.” While the defendant was not totally fluent in English, he was fully able to understand the *Miranda* warnings, a finding based on his school attendance in this country, the testimony of the detectives who questioned him without difficulty, and the defendant’s failure to articulate any inability to comprehend what was being said to him.

The defendant was arraigned over 28 hours after his arrest, which followed 10 hours of intermittent questioning; no “per se ‘ongoing investigation’ exception” exists to the statutory requirement that defendants be arraigned without unnecessary delay. But while “the cumulative length of [the] defendant’s detention and the undue pre-arraignment delay are troubling,” it cannot be said that as a matter of law the prosecution “failed to meet its burden of proving beyond a reasonable doubt that defendant’s confession was voluntary. Nor, on this mixed question of law and fact, is the record devoid of support for the Appellate Division’s determination” The defendant was not subjected to the sorts of deprivations and psychological pressures described in cases where a coercive environment was said to impact on voluntariness.

Denial of the defendant’s effort to introduce the videotape of his meeting with the prosecutor was not error. Counsel explicitly said introduction was not sought for the purpose of showing the defendant’s lack of ability to understand English, but was only to show the defendant’s appearance after a period of interrogation, yet counsel refused the suggestion that a still image taken from the videotape could be used.

Sentencing (Mandatory Surcharge) (Resentencing)

People v Jones, 2016 NY Slip Op 01208 (2/18/2016)

Statutory law does not provide a sentencing court the discretion to allow a defendant to defer payment of a mandatory surcharge imposed under Penal Law 60.35. The assertion that CPL 420.40 establishes a procedure for deferral at sentencing is rejected, as is the prosecution’s contention that relief may only be sought upon release from confinement. Someone subject to a mandatory surcharge may apply any time after imposition of sentence for resentencing under CPL 420.10(5), at which time payment may be delayed, but a determination of inability to pay under CPL 420.10 shall not be based solely on incarceration; all the person’s sources of income must be considered. Persons sentenced to 60 days or less of confinement need not make a CPL 420.10 motion, being able to present information supporting a deferral request at the appearance date on a summons issued pursuant to Penal Law 60.35(8) for failure to pay. The language of Penal Law 60.30, which permits courts to exercise preexisting author-

ity to impose civil penalties, did not give the sentencing court authority to defer the mandatory surcharges.

Evidence (Rebuttal)

Impeachment

Witnesses (Experts)

People v Nicholson, 2016 NY Slip Op 01206 (2/18/2016)

“[T]he Appellate Division does not exceed its statutory authority or run afoul of our decisions in *People v LaFontaine* (92 NY2d 470 [1998]) and *People v Concepcion* (17 NY3d 192 [2011]), when it relies on the record to discern the unarticulated predicate for the trial court’s evidentiary ruling.” Where a trial court fails to identify the predicate for its ruling, the Appellate Division may consider the import of the trial judge’s stated reasoning. The language of CPL 470.15(1) does not prohibit consideration of the record and any proffer colloquy to understand the context of the trial court’s determination, so long as the Appellate Division does not rule based on grounds explicitly different from those relied upon by the trial court and the record is not wholly devoid of reasons for the ruling by the trial court.

On the merits, the defendant’s claim that the trial court erred in admitting rebuttal testimony intended to show the sole defense witness’s bias or motive to fabricate is rejected. Record support exists for the Appellate Division’s conclusion that the trial court appropriately found the testimony allowed an inference that the defense witness, who had mischaracterized her relationship with the defendant, harbored a bias greater than one based only on friendship, which could lead to lying on his behalf.

The court’s admission of expert testimony on Child Sexual Abuse Accommodation Syndrome was not error, contrary to the defense contention that questioning during voir dire showed jurors understood the reasons for delayed disclosure of sexual abuse, rendering expert testimony unnecessary and irrelevant.

The defendant’s other challenges to evidentiary rulings, and multiple examples of claimed ineffective assistance of counsel, are also rejected.

Civil Practice

Civil Rights Actions (USC § 1983 Actions)

Police (Misconduct)

De Lourdes Torres v Jones, 2016 NY Slip Op 01254 (2/23/2016)

“[T]he courts below improperly granted summary judgment to the individual defendants on plaintiff’s false arrest and malicious prosecution claims under New York common law and 42 USC § 1983.” It has been implicitly

NY Court of Appeals *continued*

recognized that a defendant other than a public prosecutor who provides false information to a prosecutor in furtherance of a criminal action against a plaintiff may be commencing or continuing a criminal proceeding so as to be liable for malicious prosecution. The evidence of guilt relied on by a defendant in such a case may be shown to be falsified or so scant that it simultaneously rebuts the presumption of probable cause arising from a plaintiff's indictment and satisfies the element of malice. Here, the "plaintiff's deposition testimony raised triable questions of fact regarding whether the detectives unlawfully arrested her for ... murder without probable cause, improperly commenced the prosecution against her and participated in the prosecution out of malice." Evidence that the defendant detectives lacked probable cause, then "made a fake confession, attributed the confession to plaintiff and gave it to prosecutors could, if credited, overcome the presumption of probable cause arising from plaintiff's indictment."

While the plaintiff maintains triable state law claims against the City of New York and the New York City Police Department, the record is devoid of proof that an official City policy resulted in the allegedly wrongful arrest and prosecution of the plaintiff; therefore, the courts below properly granted summary judgment to the governmental defendants on plaintiff's claims under 42 USC 1983.

Appeals and Writs (Preservation of Error for Review)
(Waiver of Right to Appeal)
People v Leach, 2016 NY Slip Op 01253 (2/23/2016)

"Regardless of the validity of defendant's appeal waiver, his challenge to the voluntariness of his guilty plea is unpreserved for appellate review Contrary to defendant's contention, the narrow exception to the preservation requirement does not apply in this case"

Concurrence: [Rivera, JJ] The issue of the validity of the defendant's post-plea waiver is preserved, and the propriety of such waivers is likely to evade review when defendants complete their sentences prior to decisions from this Court as to challenges. The record here does not establish that the defendant's waiver of appellate rights was knowing, intelligent, and voluntary where the court made only two passing references to it during the plea colloquy, "bundled [it] with the post-plea conditions imposed by the court and its questions regarding defendant's discussions with counsel about all matters of importance to the case"; and a month later, after pronouncing sentence, the court explained the defendant's appellate rights and asked if the defendant understood them.

Search and Seizure (Examinations of Personal Effects)
(Warrantless Searches [Plain-view Objects])
People v Sanders, 2016 NY Slip Op 01255 (2/23/2016)

The seizure of the defendant's clothing at the hospital where he was being treated for a gunshot wound was unconstitutional, where the clothing had been put in a clear plastic bag in a trauma room a short distance from the stretcher on which the defendant was lying in the hallway and the police took and examined the clothes without the defendant's consent or a warrant. The plain view doctrine does not apply where the suppression hearing evidence did not show that the officer had specific information that would give rise to a reasonable belief that the shooting had affected the defendant's clothes; "there is no record support for the lower courts' conclusion that the investigating officer had probable cause to believe that defendant's clothes were the instrumentality of a crime"

Search and Seizure (Arrest/Scene of the Crime Searches)
(Detention) (Examinations of Personal Effects)
(Warrantless Searches [Emergency Doctrine])
Matter of Kenneth S., 2016 NY Slip Op 02123
(3/24/2016)

Whether the officer, acting under police authority to detain suspected truants, intended to transport the appellant to the precinct or an educational facility does not affect the legality of the detention here. Where the appellant's bag produced a distinctive sound recognizable as what a gun sounds like when it comes into contact with an automobile and the appellant gave evasive answers when asked about the sound and appeared nervous when asked to give up the bag, police had a reasonable suspicion that the appellant was armed, even if the officer who took the bag conducted an "investigative touching" and felt what seemed to be a gun. The search of the bag in the police car after the defendant was placed there following efforts to resist being handcuffed was justified by concern for officer safety where the unmarked car had no partition and the officer who conducted the bag search was seated next to the appellant.

Appeals and Writs (Preservation of Error for Review)
Search and Seizure (Arrest/Scene of the Crime Searches)
People v Miranda, 2016 NY Slip Op 02120 (3/24/2016)

The hearing on the defendant's suppression motion focused on whether police had probable cause to arrest the defendant, and "[t]he hearing court's mere reference to 'search incident to a lawful arrest' is insufficient to preserve" for review the defendant's current argument that the warrantless search of the defendant's bag, found

NY Court of Appeals *continued*

under his coat after he was handcuffed and patted down, was beyond the scope of a search incident to arrest.

Impeachment

Self-Incrimination

Witnesses (Credibility) (Experts)

[People v Berry](#), 2016 NY Slip Op 02283 (3/29/2016)

No reversible error occurred when the prosecution was allowed to call as a witness a man, identified as present when the shooting for which the defendant was convicted occurred, who invoked his Fifth Amendment privilege against self-incrimination. As the defense concedes, there were some matters that warranted his appearance as a witness, and the prosecution did not argue the Fifth Amendment in summation to raise improper inferences. The prosecution did not call the witness solely so that he would invoke the Fifth in front of the jury, but rather was prepared to—and did—grant the witness immunity as to certain questions.

Nor was impeachment of the witness by the prosecutor through use of a redacted statement made to police improper, as the witness's testimony in contradiction of the earlier statement affirmatively damaged the prosecution's case and the court gave limiting instructions as to use of the impeachment three different times.

The trial court's limitation of an identification expert's testimony, disallowing testimony as to the effect of "event stress" on the accuracy of eyewitnesses' identification of a person, did not deprive the defendant of a fair trial.

Admissions (Co-defendants)

Harmless and Reversible Error (Reversible Error)

[People v Cedeno](#), 2016 NY Slip Op 02281 (3/29/2016)

Admitting into evidence a redacted statement by a nontestifying codefendant violated the rule set out in *Bruton v United States* (391 US 123 [1968]) as the visible redactions to the written statement made it obvious that the codefendant had implicated a specific gang member, and the defendant was one of three codefendants sitting at the table with the nontestifying codefendant whose statement was admitted. The error was not harmless, as the testimony of two witnesses who identified the defendant was undermined by admitted bias, the incident in question had been a confusing melee leaving eyewitness observations open to challenge, and there is a strong likelihood that the jury considered the codefendant's statement as implicating the defendant, "thereby tainting the verdict." Further, the court gave limiting instructions

about the redactions but "failed to give the critical limiting instruction that the jury should not consider the statement itself against anyone" other than the nontestifying codefendant himself. And the harm done by the statement must be considered in conjunction with additional error with regard to improper hearsay testimony about the defendant's nickname.

The challenge to the denial of the defendant's motion to suppress identification testimony presents a mixed question of law and fact and is beyond review.

Dissent: [Pigott, J] The redacted statement did not obviously refer to the defendant; the gang member implicated could have been any one of several.

Admissions (Corroboration) (Evidence)

Defenses

Evidence (Hearsay)

[People v DiPippo](#), 2016 NY Slip Op 02279 (3/29/2016)

The trial court abused its discretion by precluding the defendant from introducing evidence of third-party culpability during his second trial for felony murder and first-degree rape. Third-party culpability evidence may in some circumstances be admitted absent proof directly linking the third party to the crime scene. Here, the offer of proof included an affidavit of a man who had been incarcerated with the third party and who indicated that the third party had made incriminating admissions. Those admissions constituted a declaration against penal interest; the third party had no obvious motive to falsely implicate himself, his admissions were internally consistent and coherent, and corroborated in many ways by outside sources including statements taken from other victims of the third party about actions taken against them similar to the attack on the decedent. The probative value of the evidence of third-party culpability "'plainly outweigh[ed] the dangers of delay, prejudice and confusion'"

Dissent: [Fahey, J] "For the first time, we are allowing a theory of third-party culpability to go forward based on an offer of proof consisting entirely of hearsay... This decision imposes an undue restraint upon the discretion of trial courts to weigh the probative versus prejudicial value of third-party culpability evidence and make a reasoned decision regarding its admissibility."

Admissions (Co-defendants)

Harmless and Reversible Error (Reversible Error)

[People v Johnson](#), 2016 NY Slip Op 02282 (3/29/2016)

Where a nontestifying codefendant's statements placed the defendant in joint possession of robbery proceeds and connected him to drug-related activity, admis-

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sion of the statements at a joint trial violated the rule of *Bruton v United States* (391 US 123 [1968]). The statements were obvious efforts by the codefendant to exculpate himself, deflecting guilt to the only other possible culpable individual—the defendant. Inferences that the defendant was implicated in initial stages of a proposed drug transaction that led to the theft of money from a person who approached the car where the defendant and codefendant sat can be drawn from the statement with no reference to other evidence.

The error was not harmless. The defense claimed prosecution witnesses fabricated testimony to inculcate the defendant in nonexistent crimes to protect the undercover officer from repercussions for unjustifiably firing his weapon at the car. Further, there were a number of materially significant inconsistencies in the prosecution's evidence. In summation, the prosecutor relied heavily on the codefendant's statements, describing how they generally mirrored the testimony of the undercover officer.

Dissent: [Pigott, J] None of the codefendant's statements facially incriminated anyone, so *Bruton* does not apply.

Juries and Jury Trials (Discharge) (Selection)**People v Jordan, 2016 NY Slip Op 02284 (3/29/2016)**

The “[d]efendant failed to preserve his contention that the trial court discharged prospective jurors based on hardship without conducting a sufficient inquiry”

Dissent: [Rivera, J] “For the reasons stated in my dissenting opinion in *People v King* (___ NY3d ___, [decided herewith]), I would reverse the order of the Appellate Division on the sole ground that the judge’s jury selection process denied defendant his right to a jury trial.”

Due Process (Fair Trial)**Juries and Jury Trials (Qualifications) (Selection) (Voir Dire)****Misconduct (Prosecution)****People v King, 2016 NY Slip Op 02278 (3/29/2016)**

No mode of proceedings error occurred. Formal voir dire had not begun when the court told the jury panel that if serving on a jury during a trial expected to last five days would present a hardship, potential jurors could be excused from this trial but not jury duty. Those individuals were directed to speak to the clerk and only after they had left the courtroom did the court give a general synopsis of the charges and parties’ theories, ask about potential jurors’ ability to be fair and impartial, excuse a couple, and begin the formal voir dire process. There was no devi-

ation from the procedure required by CPL 270.15(1)(a), and the defendant had no “‘fundamental right’ to have a judge oversee whether a prospective juror ha[d] issues in his or her life that prevent them from sitting.” No exclusively judicial function was delegated to the clerk. At most, the court failed to adhere to statutory procedures, which did not relieve the defendant of the obligation to object to the court’s procedures.

The court did not abuse its discretion in disallowing proffered hearsay third-party culpability testimony.

Trial counsel’s failure to object to patently improper prosecution comments said to appeal to gender bias and denigrate the defendant’s alibi defense did not amount to ineffective assistance of counsel requiring a new trial. “The remarks by the prosecutor were so over the top and ridiculous that defense counsel may very well have made a strategic decision not to object to the inflammatory comments out of a reasonable belief that the jury would be alienated by the prosecutor’s boorish comments.”

Dissent: [Rivera, J] “I would reverse the Appellate Division on the grounds that the jury selection process employed by the judge violated the defendant’s right to a trial by jury, and defendant was denied a fair trial due to her defense counsel’s failure to object to the prosecution’s inflammatory, irrelevant, and prejudicial gender-based summation comments.”

First Department

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

Developmentally Disabled**Sex Offenses (Sex Offender Registration Act)****People v McKelvin, 127 AD3d 440, 7 NYS3d 94 (1st Dept 4/7/2015)**

The court erred by upwardly departing to a level three Sex Offender Registration Act (SORA) risk based on the defendant’s mental retardation where there was no clinical assessment that the defendant had a “psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior,” which the SORA guidelines require for an automatic override to a presumptive level three designation. “To the extent the upward departure was based on factors other than defendant’s mental retardation, those factors were adequately taken into account by the guidelines, or were not established by clear and convincing evidence.” (Supreme Ct, Bronx Co)

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Prior Convictions (Foreign Convictions)

Sex Offenses (Sex Offender Registration Act)

[People v Crews](#), 127 AD3d 491, 4 NYS3d 527
(1st Dept 4/9/2015)

The court erred during its adjudication of the defendant’s risk level under the Sex Offender Registration Act by assessing 30 points under risk factor 9 for a prior violent felony or misdemeanor sex crime where the prosecution merely presented a copy of the Maryland statute under which the defendant had been convicted, which encompasses conduct broader than the New York offenses the prosecution cited as analogous, and did not provide any information about the underlying facts of that conviction. Without the underlying facts, the prosecution failed to prove by clear and convincing evidence that the Maryland conviction was equivalent to a New York offense. (Supreme Ct, New York Co)

Competency to Stand Trial

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

[People v Delsol](#), 127 AD3d 458, 11 NYS3d 111
(1st Dept 4/9/2015)

The defendant’s CPL 440.10 motion to vacate the judgment alleging that he was mentally incompetent when he entered his guilty plea must be granted. Six weeks before the plea, two psychiatrists had found the defendant unfit to proceed to trial due to mental illness, but the record does not include any reference to those CPL article 730 examinations let alone a motion to confirm or convert the findings, or a reexamination or hearing. The defendant expanded the record by offering an affidavit describing his mental condition at the time of the plea and a report from the psychiatrist who was treating him at the time the motion was filed. Mental incompetency is an unwaivable defect and the “defendant’s claim is closely intertwined with a claim of ineffective assistance of counsel, and the submissions on the motion support a conclusion that counsel rendered ineffective assistance by permitting the plea to go forward without alerting the court to the article 730 examinations.” (Supreme Ct, Bronx Co)

Counsel (Competence/Effective Assistance/Adequacy)

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

[People v Agard](#), 127 AD3d 602, 8 NYS3d 125
(1st Dept 4/23/2015)

“Defense counsel rendered ineffective assistance at the underlying sentencing proceeding by failing to ascertain that, in violation of *People v Catu* (4 NY3d 242 [2005]), defendant was not advised about postrelease supervision at the time of his prior plea, and by failing to litigate whether the *Catu* violation rendered the prior conviction unconstitutional for predicate felony purposes” The prosecution failed to preserve its arguments that “a *Catu* error is not a federal constitutional violation under CPL 400.15(7)(b)” and that a *Catu* error does not affect the predicate status of the prior conviction. (Supreme Ct, New York Co)

Search and Seizure (Automobiles and Other Vehicles) (Standing to Move to Suppress)

Weapons (Possession)

[People v Rivera](#), 127 AD3d 595, 8 NYS3d 118
(1st Dept 4/23/2015)

The court erred in finding that the defendant lacked standing to move to suppress weapons found in a box on the backseat of a car that the defendant was driving and that was owned by one of the passengers. The defendant had automatic standing to challenge the seizure of the weapons where the prosecution did not demonstrate that the weapon possession charges against the defendant were based on something other than the statutory presumption in Penal Law 265.15(3). (Supreme Ct, New York Co)

Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause]) (Weapons-frisks)

[People v Butler](#), 127 AD3d 623, 10 NYS3d 1
(1st Dept 4/28/2015)

The court erred in denying the defendant’s motion to suppress pills found on his person after a vehicle stop “in a ‘high narcotics area.’” The police officer’s observation of the defendant passenger turning his head back and forth, a lot of movement in the front passenger seat area, and the defendant pulling his hand from his jacket “gave rise to founded suspicion that criminality was afoot, and so justified his question regarding what defendant put in his pocket,” which the defendant did not answer. However, the officer did not have a reasonable suspicion that would justify tapping on the defendant’s pocket with his flashlight or the subsequent frisk of the defendant. The totality of the circumstances did not suggest that the officer needed to take any self-protective measures; the defendant was not reaching for an area where there might be a weapon, and there was no indication that there was a

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weapon present or that violence was imminent. Because the initial intrusion was invalid, the frisk and arrest were also invalid, and there were no exigent circumstances that justified the post-arrest search of the bag in which the pills were found. (Supreme Ct, New York Co)

Defenses (Justification)**Instructions to Jury (Theories of Prosecution and/or Defense)****People v Valentin, 128 AD3d 428, 8 NYS3d 317 (1st Dept 5/7/2015)**

The court committed reversible error by instructing the jury about the initial aggressor exception to the justification defense where there was no evidence that the defendant was the first person to use or threaten the imminent use of force or deadly physical force. The evidence indicated either that the decedent was the first to use deadly physical force or that the defendant and the decedent used or threatened force simultaneously. Swinging a mop handle at a person's head "may constitute 'deadly physical force'" (Supreme Ct, Bronx Co)

Dissent: Even if the court erred in giving the initial aggressor exception instruction, the error was harmless because there was no evidence to support a finding that the defendant was justified in using deadly physical force when faced with the decedent's threatened or actual use of a mop handle.

[*Ed. Note: Leave to appeal was granted on Oct. 15, 2015 (2015 NY Slip Op 87471[U] [1st Dept]).*]

Evidence (Sufficiency)**Sex Offenses (Civil Commitment)****Matter of State of New York v Gen C., 128 AD3d 467, 9 NYS3d 48 (1st Dept 5/12/2015)**

The verdict that the respondent suffers from a mental abnormality, as defined in Mental Hygiene Law article 10, is reversed where "no rational factfinder could conclude based on the trial evidence that hypersexuality/sexual preoccupation is an independent mental abnormality within the meaning of article 10." The State failed to present evidence that such a condition "predisposes one to commit a sexual offense and results in serious difficulty in controlling the sexually offending conduct." (Supreme Ct, Bronx Co)

Evidence (Weight)**Forensics (DNA)****People v Graham, 128 AD3d 572, 10 NYS3d 54 (1st Dept 5/26/2015)**

The verdict convicting the defendant of criminal possession of a weapon was against the weight of the evidence where there was no evidence connecting the defendant with a pistol that was discarded during a shooting incident in which the defendant sustained gunshot wounds. The prosecution's expert testified that the co-defendant's DNA matched DNA found on the trigger of the pistol and that a DNA mixture from at least three people was found elsewhere on the pistol. But the expert testimony and forensic testing established only that the defendant could have been one of at least three contributors to that mixture. Further, the only eyewitness who testified could not identify the defendant as the man firing a weapon. (Supreme Ct, New York Co)

Dissent: The expert testified that the defendant's DNA was included in the mixture and there was a permissible inference from the DNA evidence that the defendant used the pistol, an inference that was not eliminated by the fact that the trigger had only the codefendant's DNA.

Identification (Eyewitnesses) (Show-ups) (Suggestive Procedures)**People v Cruz, 129 AD3d 119, 10 NYS3d 214 (1st Dept 6/2/2015)**

The showup identification of the three defendants was unduly suggestive and there were no exigent circumstances warranting a showup. Although it was made in close geographical and temporal proximity to the crime scene, the showup was avoidable where the complainant had already been driven to the precinct and was being treated for non-life threatening injuries; her treatment was interrupted so the police could bring her back to the scene, an hour after the crime, to identify three men who the police had already arrested; and the police had stopped searching the area for other suspects. The burden of arranging a lineup at the precinct is not a factor in the exigency analysis. "[T]he additional time and resources required to conduct a separate lineup for each defendant are nothing more than the administrative burdens generally attendant to conducting lineup identifications. Inconvenience does not excuse the utilization of the preferable method of lineup identification" The showups were unduly suggestive where the three suspects were standing next to each other, surrounded by up to eight uniformed officers and visibly restrained; the complainant described the assailants as black and the suspects were covered in soot, which affected their appearance, particularly their skin color; and the suspects were illuminated by a patrol car's headlights and take-down floodlights, even though the lighting at the scene was good. (Supreme Ct, New York Co)

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Dissent: The showup was not unreasonable under the circumstances where the police located the defendants shortly after the crime, but the defendants created delay by refusing to open the locked door in the garage and then resisting arrest. The identification was not unduly suggestive as the conditions were “generally unavoidable in view of the reasonable security concerns inherent in any showup”

Appeals and Writs (Judgments and Orders Appealable)

Forfeiture

People v Burgos, 129 AD3d 627, 13 NYS3d 350 (1st Dept 6/30/2015)

By so-ordering, at sentencing, the forfeiture stipulation bearing the criminal caption and signed by the defendant and the prosecution, the court rendered the stipulation part of the judgment of conviction and reviewable on appeal. Penal Law 60.30 “allows a court to order forfeiture as a separate component of the judgment of conviction” The forfeiture need not be included on the sentence and commitment sheet to be reviewable “since a forfeiture, although not a component of a criminal sentence, can nevertheless be part of the judgment of conviction” However, the judgment must be affirmed where the defendant failed to raise any of his appellate challenges at sentencing, move to withdraw his plea, or otherwise object to sentencing if forfeiture was part of the plea. (Supreme Ct, New York Co)

Dissent: The forfeiture is not reviewable on appeal because it was not part of the plea and it was not included in the court’s pronouncement of the sentence.

Defenses (Justification)

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

People v Velez, 131 AD3d 129, 13 NYS3d 354 (1st Dept 6/30/2015)

“Since justification was a central issue at trial and the court’s instructions did not convey that acquittal of the greater charge of attempted murder based on a finding of justification precluded consideration of the lesser included offenses, the verdict is at best ambiguous. Thus, defendant was deprived of a fair trial, and a reversal is warranted in the interest of justice.” (Supreme Ct, Bronx Co)

Counsel (Competence/Effective Assistance/Adequacy)

Sentencing (Persistent Felony Offender) (Post-Release Supervision)

People v Lara, 130 AD3d 463, 13 NYS3d 74 (1st Dept 7/7/2015)

“Defense counsel rendered ineffective assistance at defendant’s persistent felony offender adjudication by failing to ascertain that, in violation of *People v Catu* (4 NY3d 242 [2005]), defendant was not advised about postrelease supervision at the time of a prior plea, and by failing to litigate whether the *Catu* violation rendered the prior conviction unconstitutional for predicate felony purposes In the present procedural posture ... we do not decide the underlying issue of whether a *Catu*-violative conviction may serve as a predicate felony We only hold that defendant is entitled to a hearing on the issue at which counsel can fully develop a record and arguments.” (Supreme Ct, New York Co)

Burglary (Possession of Tools)

Evidence (Weight)

People v Pannizzo, 130 AD3d 467, 13 NYS3d 78 (1st Dept 7/7/2015)

The defendant’s conviction of attempted possession of burglar’s tools must be reversed where “the officer’s testimony that he observed defendant, in broad daylight, stopping his bicycle between two or three cars and looking through the driver’s side front window, is not, in and of itself, sufficient to support the inference that defendant intended to use the tools to steal any items from the cars. The officer admitted ... that during the 15 seconds that he observed defendant, he never saw him touch either a tool in the pouch or any of the cars and that the screwdriver set had to be assembled to be usable” (Supreme Ct, New York Co)

Counsel (Advice of Right to) (Right to Counsel) (Right to Self-Representation) (Waiver)

Guilty Pleas (Vacatur)

People v Wells, 130 AD3d 457, 14 NYS3d 6 (1st Dept 7/7/2015)

The defendant’s waiver of his right to counsel was invalid where the court did not adequately evaluate the defendant’s competency to waive counsel, warn him of the risks of proceeding pro se, and apprise him of the importance of representation. The lack of adequate warnings cannot be cured by other factors such as that the defendant was in his 40s and previously represented himself in criminal cases, particularly since the defendant has a history of mental illness and substance abuse. The court’s warnings later in the proceedings could not cure

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the error because the waiver is analyzed based on what the defendant knew when he first waived his right to counsel. Because his waiver of the right to counsel was not valid, neither were his guilty pleas. (Supreme Ct, New York Co)

Evidence (Business Records)**Larceny (Value)**

[People v Nashal](#), 130 AD3d 480, 13 NYS3d 396
(1st Dept 7/9/2015)

In this grand larceny case, the court correctly allowed the prosecution to admit, as a business record, a cash register receipt displaying the prices of the items the defendant allegedly stole where the store detective testified that it was standard practice for a store employee to generate a receipt when an item is shoplifted using the same procedure as that used for a purchase and that he watched a salesperson scan the price tags of the items and print out a receipt. The receipt was not prepared solely for the purpose of litigation where the essential business record was the electronically stored information regarding the price of the items and the receipt was merely a printout of that information. Even if it was intended to be used in the criminal prosecution, the detective testified that the store makes this type of record in all instances of shoplifting; where there are other business reasons for creating the records, they are admissible. The receipt was properly authenticated by the detective as a person familiar with the practices and procedures of the store and competent to state that, when the price tag is scanned, the computer shows the price of the item, including any applicable sale price. (Supreme Ct, New York Co)

Appeals and Writs (Preservation of Error for Review)
(Scope and Extent of Review)**Trial (Public Trial)**

[People v Tate](#), 130 AD3d 505, 14 NYS3d 332
(1st Dept 7/9/2015)

The defendant's assertion that his right to a public trial was violated did not alert the court that he was also arguing "that, before closing the courtroom during the testimony of an undercover officer in order to protect his identity, the court was required, under the First Amendment, to provide the public with notice and an opportunity to be heard on the closure." Therefore, the issue was not preserved.

The defendant lacks standing "to challenge the absence of *notice* to nonparties of an impending closure

hearing" as he did not show how he was injured by the court's failure to notify the public. (Supreme Ct, New York Co)

Discovery (Procedure [Subpoena Duces Tecum])**Search and Seizure (Electronic Searches) (Search Warrants [Issuance] [Suppression]) (Standing to Move to Suppress)**

[Matter of 381 Search Warrants Directed to Facebook, Inc.](#), 132 AD3d 11, 14 NYS3d 23 (1st Dept 7/21/2015)

Facebook moved to quash digital search warrants that sought information comprising the postings and actions of 381 identified Facebook users and directed Facebook not to disclose the warrants to those users. The court's "summary denial of Facebook's motion ... was proper because there is no constitutional or statutory right to challenge an alleged defective warrant before it is executed." New York's warrant statutes "are designed to protect the constitutional rights of criminal suspects and defendants, beginning with the initial police investigation of a suspect." Because of those protections and the protections available through the motion to suppress, there is no need for an individual to make a pre-execution motion to quash. And there is no statutory mechanism for filing such a motion or appealing from a denial of such a motion. The warrants, issued before any pending criminal proceeding, are not equivalent to subpoenas; that the warrants were served on a third party "is a distinction without a difference" The federal Stored Communications Act (SCA), part of the Electronic Communications Privacy Act (18 USC 2701-2712), does not give Internet Service Providers the right to object to SCA warrants and thus, Facebook cannot rely on the SCA in its motion to quash warrants that are analogous to SCA warrants. (Supreme Ct, New York Co)

[*Ed. Note: Leave to appeal was granted on Dec. 16, 2015 (26 NY3d 914).*]

Second Department

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Appeals and Writs (Preservation of Error for Review)**Counsel (Competence/Effective Assistance/Adequacy)****Juries and Jury Trials (Deliberation)**

[People v Cotton](#), 127 AD3d 778, 6 NYS3d 286
(2nd Dept 4/1/2015)

Second Department *continued*

“[T]he trial court’s failure to share the entire contents of a substantive note from the jury constituted a mode of proceedings error requiring reversal” so that failure to preserve the issue does not bar review.

“While defense counsel’s failure to review a surveillance video in its entirety is troublesome, in light of our determination, we need not reach the defendant’s claim of ineffective assistance of counsel” (Supreme Ct, Kings Co)

Lesser and Included Offenses (Instructions)

Weapons (Possession)

**People v Verni, 127 AD3d 887, 7 NYS3d 340
(2nd Dept 4/8/2015)**

The court in this case involving prosecution of the defendant for second-degree possession of a weapon erred by denying the defense request to charge the jury on the lesser included offense of fourth-degree possession of a weapon, warranting a new trial. “[T]here was a reasonable view of the evidence that could have supported an inference that the defendant shot himself in his home or place of business prior to entering his automobile, and that he therefore may have been guilty of the lesser crime but not the greater” While the jury in this circumstantial evidence case could have inferred that the defendant shot himself while in his car, it was not required to do so. (Supreme Ct, Queens Co)

Misconduct (Prosecution)

Trial (Summations)

Witnesses (Cross Examination) (Defendant as Witness)

**People v Rowley, 127 AD3d 884, 7 NYS3d 338
(2nd Dept 4/8/2015)**

The cumulative effect of unobjected-to prosecution misconduct, reviewed in the interest of justice, deprived the defendant of due process. The prosecutor improperly suggested facts not in evidence by implying that her office had checked a restaurant’s hours of operation and that the information discredited the defendant’s testimony; questioned the defendant about a tattoo to create “the inflammatory and unsupported inference that the defendant had previously used the weapon to harm someone”; improperly insinuated during summation that the defendant possessed a weapon with the intent to harm someone, which is not an element of the crime for which he was on trial; and speculated that the defendant had mentally played out the scenario at the traffic stop “‘every time he left his house with that gun’” (Supreme Ct, Kings Co)

Family Court

Juveniles (Abuse) (Hearings) (Removal)

**Matter of Baby Boy D., 127 AD3d 1079, 9 NYS3d 73
(2nd Dept 4/22/2015)**

In 2011, three children were removed from the home based on serious injury to one of them. The court determined that the injured child was abused by both the mother and father and the two siblings were derivatively abused. Both parents were ordered to complete counseling and attend supervised visitation. The mother completed counseling and a parenting course and consistently visited the children. Despite this positive involvement, upon the 2014 birth of Baby Boy D., the Administration for Children’s Services (ACS) petitioned for custody alleging derivative abuse. Imminent danger justifying government custody “‘must be near or impending, not merely possible’ (*Nicholson v Scopetta* (3 NY3d [357] at 369 [2004]).” Given the record evidence of the mother’s positive involvement with her children, her completion of tasks and work ordered by the court, and the fact that she no longer resided with the father, “the Family Court’s determination that remand of the subject child to his mother’s custody would place him at imminent risk of harm is based upon nothing more than speculation that the mother would not enforce the order of protection as against the father.” (Family Ct, Queens Co)

Counsel (Advice of Right to) (Right to Counsel)

Identification (Lineups)

Kidnapping (Elements)

**People v Garnes, 127 AD3d 1104, 6 NYS3d 666
(2nd Dept 4/22/2015)**

The defendant’s conviction of four counts of second-degree kidnapping must be vacated because the restraint of the accusers “was essentially incidental to and inseparable from the count of burglary” Remand is required for further proceedings as to the latter count because the defendant’s motion to suppress his statement to law enforcement and lineup identification testimony should have been granted; his right to counsel was violated when he requested counsel, but then waived counsel without counsel present and made a statement to law enforcement officials, and also when police officers conducted a lineup without telling counsel and providing counsel with a reasonable opportunity to participate in that identification procedure. The defendant is entitled to a hearing on whether there was an independent source for the in-court identification. Other errors also occurred including introduction of evidence of prior uncharged crimes and an

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insufficient limiting instruction regarding that evidence. (Supreme Ct, Kings Co)

Family Court**Juveniles (Parental Rights) (Permanent Neglect)**

Matter of Javon J., 127 AD3d 1088, 7 NYS3d 494
(2nd Dept 4/22/2015)

While the evidence at the fact-finding hearing supported a finding that an incarcerated father had permanently neglected his children and that the agency had “made diligent efforts to assist the father in maintaining contact with the children and planning for their future,” both before and during his incarceration, under the particular circumstances here, the trial court improperly exercised its discretion in freeing the children for adoption. The record did not support a possible adoptive placement for either of the children and the father had made “sufficient progress toward strengthening his relationship with the subject children” One child resided at a treatment facility and the other, while placed with a family, did not have the option of adoption with those foster parents. (Family Ct, Orange Co)

Counsel (Duties)**Lesser and Included Offenses (Instructions)****Robbery (Degrees and Lesser Offenses)**

People v Lowery, 127 AD3d 1109, 6 NYS3d 672
(2nd Dept 4/22/2015)

The court erred by failing to submit a lesser-included offense charge to the jury where defense counsel wanted such a charge but the defendant did not; “the decision whether to seek a jury charge on a lesser-included offense is a matter of strategy and tactics which is ‘for the attorney, not the accused, to make’” A reasonable view of the evidence would support a finding that the defendant was guilty of petit larceny but not first-degree robbery. (Supreme Ct, Queens Co)

Counsel (Competence/Effective Assistance/Adequacy) (Duties)**Defenses (Justification) (Self-defense)****Instructions to Jury (Theories of Prosecution and/or Defense)**

People v Clark, 129 AD3d 1, 9 NYS3d 277
(2nd Dept 4/29/2015)

The defendant’s ineffective assistance of counsel claim based on trial counsel’s pursuit of a misidentification defense and rejection of any justification defense fails, given that the defendant himself maintained that he was not the person involved in the shooting whose images were captured on video. The misidentification defense was supported by the poor quality of the video and the fact that a survivor, who knew the defendant, could not identify him as the shooter, while the justification defense was weak, would have provided no defense as to the shooting of the survivor, and of course conflicted with the tenable misidentification claim. The further claim that the court had a duty to sua sponte charge the jury on the justification defense likewise fails; that the jury’s note about the decedent initiating the struggle and the defendant’s reaction could be an indication that the misidentification defense had failed did not mean that the jury had unanimously rejected the defense, warranting a sua sponte charge on justification. (Supreme Ct, Kings Co)

Dissent: The evidence “raises an issue of fact as to whether the defendant was acting in self-defense,” and defense counsel failed to exercise professional judgment about a justification instruction on the mistaken belief he could not do so without the defendant’s permission. Additionally, “[t]he trial court failed to respond meaningfully to the jury’s request for further instruction.”

[*Ed. Note: Leave to appeal was granted on June 29, 2015 (25 NY3d 1174 [2nd Dept]).*]

Evidence (Business Records)

People v Cordova, 127 AD3d 1227, 9 NYS3d 90
(2nd Dept 4/29/2015)

The court erred in allowing into evidence a spreadsheet comparing the defendant’s manual entries with computer-generated information about the parking transactions underlying the third-degree grand larceny and first-degree falsifying business records prosecution of the defendant where there was insufficient evidence that the exhibit was made in the regular course of a business. (Supreme Ct, Queens Co)

Misconduct (Prosecution)**Trial**

People v Martinez, 127 AD3d 1236, 9 NYS3d 88
(2nd Dept 4/29/2015)

Prosecutorial misconduct at trial included statements during voir dire and cross-examination of the defense expert that the expert had lied in other cases; intimation that the prosecutor had observed such lies in another case; and repeated questioning of a different defense witness about lying. The cumulative effect of the misconduct

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improperly deprived the defendant of the ability to present his extreme emotional disturbance defense as to the second-degree murder charge. The conduct was harmless error as to second-degree possession of a weapon because there was overwhelming evidence of guilt as to that count and no significant probability that the jury would not have convicted the defendant absent the misconduct. (Supreme Ct, Richmond Co)

Search and Seizure (Examinations of Personal Effects) (Suppression) (Warrantless Searches)

[People v Salvodon](#), 127 AD3d 1239, 6 NYS3d 674 (2nd Dept 4/29/2015)

The prosecution at the suppression hearing failed to meet its burden of showing the legality of police conduct with regard to physical evidence. Evidence taken from the defendant’s phone should have been suppressed where police responded to a notification that a gunshot victim had been brought to a hospital but had no information that this was related to a burglary or robbery report; the gunshot victim said he had been robbed but refused to answer further questions; after a detective looked through the gunshot victim’s cell phone for next-of-kin contact information, names and numbers from the phone were sent to the police station where it was discovered that the gunshot victim had given a false name and was the defendant; and photographs of his personal belongings were sent to the station investigating the robbery and a ring that was included was identified as one taken from an accuser in the robbery. (Supreme Ct, Queens Co)

Family Court

Juveniles (Parental Rights) (Paternity)

[Matter of Heaven A.A.](#), 130 AD3d 10, 8 NYS3d 384 (2nd Dept 5/6/2015)

The court erred in denying the respondent’s request for a DNA test to determine paternity and granting the petition to terminate the respondent putative father’s parental rights on the ground of abandonment after the respondent failed to confirm he was the father. “[W]here paternity is not ascertained in fact or by law, the Family Court may not conclusorily find that a respondent is not a ‘consent father,’ or that his consent, while otherwise required, has been forfeited by reason of his abandonment of the child.” The petitioner, SCO Family of Services, alleged that the respondent was not listed on the Putative Father Registry, but a caseworker later testified that he was. The respondent, who testified that he was not aware of the child’s existence until he was served with the ter-

mination petition while incarcerated, agreed the child could possibly be his. During the hearing on the petition, the respondent was trying to establish whether he had parental rights to assert rather than asserting such rights. The court “should have granted the appellant’s request for DNA testing to determine if he was the biological father of the child.” In such circumstances, “[c]ourts must ... render a threshold factual determination of whether the putative father is, in fact, the biological father of the child, and then proceed accordingly.” (Family Ct, Queens Co)

Identification (Show-ups)

[People v James](#), 128 AD3d 723, 8 NYS3d 400 (2nd Dept 5/6/2016)

The police-arranged showup leading to the defendant’s arrest was unduly suggestive, requiring that the identification be suppressed. The defendant, who is five feet, eight inches tall, was stopped while wearing shorts and carrying a red-and-blue-striped shirt minutes after the broadcast of a robbery suspect’s description as being about six feet tall, wearing a brown-and-white-striped shirt; the accuser described the perpetrator as wearing jeans; the accuser was brought to view the defendant where he was handcuffed with several police officers and vehicles nearby; the accuser hesitated when asked if she could make an identification; the police then moved the car slightly nearer, held up a striped shirt, and, when the accuser identified it as the perpetrator’s shirt, held the shirt over the defendant’s chest. The actions of the police suggested to the accuser that the defendant was the robber. (County Ct, Orange Co)

Dissent: The showup was near in time and location to the crime and was not unduly suggestive.

[*Ed. Note: Leave to appeal was granted on Nov. 18, 2015 (26 NY3d 1044 [2nd Dept]).*]

Family Court

Juveniles (Custody) (Foster Care) (Neglect) (Removal)

[Matter of Julissia B.](#), 128 AD3d 690, 7 NYS3d 596 (2nd Dept 5/6/2015)

The order that returned a child to the mother after a Family Court Act 1028 hearing is reversed. The mother’s four older children were removed from her care a year before the child in question was born. The record does not support the court’s decision to return the newborn baby despite the mother’s substantial compliance with recommendations and services required of her by the petitioner because “she was still prone to unpredictable emotional outbursts, even during visits with the children, and she was easily provoked and agitated.” (Family Ct, Kings Co)

Second Department *continued*

Dissent: “[I]t appears that the mother did everything in her power to comply with the petitioner’s service requirements.” The record reflects that the mother had completed two different therapeutic programs, had cooperated with a mental health evaluation, and was compliant with a drug treatment program with negative test results. As the court reasoned, “although the mother was complying with the petitioner’s directives, the ‘goal post’ kept getting moved and any reasonable parent would be frustrated under those circumstances.”

Sex Offenses (Sex Offender Registration Act)

People v Lancaster, 128 AD3d 786, 9 NYS3d 145 (2nd Dept 5/13/2016)

The defendant’s prior conviction by a military tribunal of assault with intent to commit rape did not qualify as a “sex offense” under Correction Law 168-a(2)(d)(ii) nor did the offense include all the essential elements of attempted first-degree rape under New York law so as to qualify under Correction Law 168-a(2)(d)(i). Therefore, the court determining the defendant’s risk level under the Sex Offender Registration Act erred in relying on the conviction to assess 30 points under risk factor 9, applying an automatic override to risk level three, and designating the defendant a predicate sex offender. But while the designation as a predicate sex offender was error, the military conviction does warrant assessment of five points under risk factor 9, which, when added to the other properly assessed points, supports the risk level three adjudication. (County Ct, Dutchess Co)

Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)**Misconduct (Prosecution)****Sex Offenses**

People v Singh, 128 AD3d 860, 9 NYS3d 324 (2nd Dept 5/13/2016)

While many of the counts in the 75-count indictment each charged a single sexual act within a different two-week period, the accuser said at trial that the defendant had intercourse with her two or three times per week during each two-week period, making the counts void as duplicitous because they were premised on multiple acts.

And although many other counts charged that the defendant had sex with a person under 17 years of age, the jury was charged that the prosecution had to prove that the accuser was less than 14; as the prosecution did not object, it was bound to accept the heavier burden,

and a weight of the evidence review shows it did not meet that burden.

The defendant’s convictions under counts one and 75 must be vacated due to prosecutorial misconduct during summation; the prosecutor acted as an unsworn witness by saying that certain uncalled witnesses had “‘nothing to offer’” and that unintroduced medical evidence was “‘either irrelevant or cumulative’” The prosecutor also vouched for the accuser, suggested that the defense had to show the accuser had some reason to lie, made inflammatory comments that the defendant treated the accuser as a personal sex toy, and said that to acquit the defendant the jury would have to find the accuser “evil.” (Supreme Ct, Queens Co)

Double Jeopardy (Res Judicata)**Sex Offenses (Sex Offender Registration Act)**

People v Cook, 128 AD3d 928, 9 NYS3d 385 (2nd Dept 5/20/2016)

The Queens County Supreme Court should have granted the defendant’s motion to dismiss a proceeding under the Sex Offender Registration Act (SORA) where the defendant was convicted in Richmond and Queens counties of sex offenses against children in 1997 and 1998; the sentences for those offenses ran concurrently; the Board of Sex Examiners prepared, before the defendant’s release from prison, one case summary and risk assessment instrument based on all the offenses; and the Richmond County Supreme Court already designated the defendant a level three sex offender after a hearing. The Division of Criminal Justice Services had all the information required to protect the public when it received the Richmond County order, and the Queens SORA proceeding was barred by the doctrine of res judicata. (Supreme Ct, Queens Co)

[*Ed. Note: Leave to appeal was granted on Oct. 20, 2015 (26 NY3d 908).*]

Speedy Trial (Cause for Delay) (Statutory Limits)

People v Allard, 128 AD3d 1081, 11 NYS3d 190 (2nd Dept 5/27/2016)

Upon remittitur for a hearing and report, the prosecution failed to show that it attempted with due diligence to make the accuser available so as to make a 32-day period not chargeable to the prosecution; the total time chargeable to the prosecution therefore exceeds 181 days and the defendant’s CPL 30.30 motion should have been granted. (Supreme Ct, Kings Co)

[*Ed. Note: Leave to appeal was granted on Sept. 3, 2015 (26 NY3d 965).*]

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

**People v Dollinger, 128 AD3d 1085, 9 NYS3d 635
(2nd Dept 5/27/2016)**

The defendant must be resentenced where he was represented at sentencing not by the county Legal Aid Society lawyer who appeared with him at his guilty plea and the proceeding at which he was found to have violated conditions of drug court but by a private lawyer who had been the prosecutor at his guilty plea, and who commented about the defendant's violation of his treatment conditions, "that goes to show you that if you keep screwing up, at some point you are going to get caught." The potential conflict created by being represented by the same lawyer who prosecuted him "actually operated on or affected the defense" when the lawyer characterized her client as a repeat offender, showing "that she had not departed from her prosecutorial stance." (County Ct, Putnam Co)

Discrimination (Race)

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

**People v Grant, 128 AD3d 1088, 9 NYS3d 403
(2nd Dept 5/27/2016)**

Reversal is compelled by the court's erroneous application of the *Batson* doctrine in considering one of the prosecution's five reverse-*Batson* objections alleging that the defense had improperly challenged all prospective jurors of Asian descent. Defense counsel offered three race-neutral explanations—the juror had two daughters and a son-in-law who were lawyers, had been a crime victim, and had expressed concerns about the reasonable doubt standard. The prosecution countered only that the crime victim basis was pretextual, but defense counsel had challenged another juror on the same basis. The court's finding that the juror's victim status and relationship to lawyers were pretextual reasons was not supported by the record, and the reasonable doubt basis corresponds to a for-cause challenge. The record does not support the court's step-three finding. (Supreme Ct, Queens Co)

Family Court

Juveniles (Disposition) (Neglect)

**Matter of Milagros A.W., 128 AD3d 1079, 9 NYS3d 676
(2nd Dept 5/27/2015)**

The court erred in determining that a father neglected his child by attempting to take the child home, alone, after

an argument on a sidewalk with the child's mother. The police contacted him when he was four miles from his home. The neglect petition alleged that the father had grabbed the baby out of her stroller and then "absconded" with the baby. While the father's conduct may have been undesirable, the baby had been fed and was dressed for the weather. Further, the father had accepted formula from someone en route and fed her again. He had not changed her during the three-hour commute as he did not think it appropriate. Requiring that there be "[a]ctual or imminent danger of impairment is necessary to prevent state intrusion absent 'serious harm or potential harm to the child,'" so that children are not removed for "'just ... what might be deemed undesirable parental behavior'"

The dispute between the father and the mother, "absent evidence of actual or threatened impairment to the baby, is also insufficient to establish neglect" (Family Ct, Queens Co)

Sex Offenses (Sex Offender Registration Act)

**People v Perkins, 128 AD3d 1036, 8 NYS3d 592
(2nd Dept 5/27/2016)**

The court erred by upwardly departing from the defendant's presumptive risk level in the Board of Examiners of Sex Offenders' assessment based on the defendant's admission at trial "that he contemplated having sexual intercourse with the victim, but decided against it because he did not have a condom. The fact that the defendant contemplated committing a crime and decided against it, without interference from a third party, was insufficient to warrant an upward departure from the defendant's presumptive risk level" (Supreme Ct, Kings Co)

Sex Offenses (Sex Offender Registration Act)

**People v Ruland, 128 AD3d 1036, 9 NYS3d 648
(2nd Dept 5/27/2016)**

When determining the defendant's risk level under the Sex Offender Registration Act, the court erred by upwardly departing from the presumptive level two indicated by the risk assessment instrument (RAI) on the basis of a prior conviction and a prior adjudication as a juvenile delinquent. The prosecution rightly concedes that the juvenile delinquency matter should not be considered, and the defendant's prior conviction for second-degree sexual abuse was adequately taken into account by the RAI. On remand, the court is "to reopen the SORA risk assessment hearing for the purpose of determining whether an upward departure from the defendant's presumptive risk level designation is warranted" (County Ct, Suffolk Co)

Second Department *continued***Family Court (Orders of Protection)****Juveniles (Disposition) (Neglect)**

[Matter of Abbygail H.M.G.](#), 129 AD3d 722,
10 NYS3d 326 (2nd Dept 6/3/2015)

In this Family Court Act article 10 matter the court erred in determining that the mother had neglected her child based exclusively on allowing contact between the child and the child's father after the mother obtained a temporary protective order that prohibited the father from being in contact with the child. The Orange County Department of Social Services received photographs from members of the child's family that showed the father sitting with the mother and child during a family barbeque. "[A] violation of an order of protection, standing alone, is insufficient to establish neglect"" (Family Ct, Orange Co)

Juries and Jury Trials (Deliberation)

[People v Brown](#), 129 AD3d 854, 11 NYS3d 616
(2nd Dept 6/10/2015)

The court committed a mode of proceedings error by not making the contents of a jury note known to counsel before reading the note, which said one juror felt she could not make a decision based on what had been presented at trial, in front of the jury and immediately issuing a truncated *Allen* charge. It is not evident that counsel knew about the note's contents or the court's intended response ahead of time, as the sidebar held just before the jury was brought in was off the record, and compliance with the required *O'Rama* procedure cannot be assumed. (Supreme Ct, Queens Co)

Counsel (Competence/Effective Assistance/Adequacy)**Insanity (Evidence)****Investigation (Pretrial) (Sentencing)**

[People v Graham](#), 129 AD3d 860, 11 NYS3d 242
(2nd Dept 6/10/2015)

As the prosecution concedes, defense counsel, who knew from a competency report about the defendant's mental health history, including several hospitalizations, erred by failing to obtain the defendant's psychiatric records, to have the defendant evaluated by a psychiatrist with regard to a possible psychiatric defense, and to present the records for mitigation at sentencing. Counsel's failure deprived the defendant of effective assistance of counsel. While some showing of prejudice from a

lawyer's error is generally required, it is not "an 'indispensable element in assessing meaningful representation'" The case against the defendant hinged almost entirely on his state of mind at the time he stabbed his girlfriend while she was driving and thereafter; the test is not whether a psychiatric defense would have been successful but whether failure to obtain valuable information that could assist counsel in developing a strategy constituted meaningful representation. (Supreme Ct, Kings Co)

Search and Seizure (Inevitable Discovery) (Suppression)

[People v Henagin](#), 129 AD3d 864, 12 NYS3d 120
(2nd Dept 6/10/2015)

As the prosecution correctly concedes, the court erred by relying on the doctrine of inevitable discovery in refusing to suppress jewelry recovered from the defendant's pocket when he was stopped by a police officer based on a description of the person who burglarized two houses in the area; "the inevitable discovery doctrine does not apply to primary evidence, that is, 'the very evidence obtained in the illegal search,' such as the jewelry at issue here" The theory that the search was justified by a probable cause arrest was expressly disclaimed by the prosecution below and cannot be asserted on appeal. The error was not harmless. Evidence that the defendant possessed the jewelry not only supported the burglary charge involving the home from which the jewelry was taken but was highly probative of intent as to the lesser-included offense of attempted second-degree burglary with respect to the other house; a new trial as to that offense is required. Further, the defendant's conviction of one count of fourth-degree criminal mischief cannot stand where the two counts alleging this crime did not specify the house to which each related, and the record does not show which house was the subject of the count on which he was convicted; the admission of the jewelry could have contributed to that conviction as well. (Supreme Ct, Nassau Co)

Sentencing (Youthful Offenders)

[People v Spitzer](#), 130 AD3d 657, 10 NYS3d 902
(2nd Dept 7/1/2015)

As the prosecution correctly concedes, the record here does not demonstrate that the court considered whether the defendant, who was 18 at the time of the offenses to which he pleaded guilty, should be treated as a youthful offender (YO) as required by CPL 720.20(1). The matter is remitted for resentencing after the court determines whether the defendant should be adjudicated a YO; no opinion is expressed as to whether YO status should be afforded. (County Ct, Rockland Co)

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Family Court

Juveniles (Disposition)

Non-Citizens

Matter of Haide L.G.M. v Santo D.S.M., 130 AD3d 734, 13 NYS3d 500 (2nd Dept 7/8/2015)

The court erred in denying the subject child’s motion to make special findings that would allow her to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC 1101(a)(27)(J). While the child met all of the qualifying conditions for that special finding, the court incorrectly imposed a requirement that “reunification with one or both of her parents *is viable*” instead of the law’s requirement that “reunification with one or both of her parents *is not viable* due to abuse, neglect, abandonment, or a similar basis” While the child’s mother retained custody of her, the record supports a finding that reunification with the child’s father is not viable because he abandoned her. (Family Ct, Nassau Co)

Burglary (Instructions)

Evidence (Weight)

Instructions to Jury (Burden of Proof)

People v Samuels, 130 AD3d 757, 13 NYS3d 229 (2nd Dept 7/8/2015)

The verdict convicting the defendant of first-degree assault, first-degree gang assault, and first-degree burglary was against the weight of the evidence. As to the assault charge, the prosecution did not advance an acting-in-concert theory, alleging that the defendant alone slashed the accuser with a dangerous instrument, but the defendant was acquitted of weapons possession, and the accuser testified he did not see who slashed him and, during a struggle, heard the defendant say, “no, don’t stab him” As to the burglary charge, the prosecution failed to object to jury instructions requiring proof that the defendant “unlawfully entered *and* remained” in the accuser’s dwelling and so was bound to satisfy the burden established by this erroneous charge, and failed to do so given the evidence that the accuser voluntarily invited the defendant in. (Supreme Ct, Kings Co)

Sentencing (Fines) (Incarceration)

People v DiSalvo, 130 AD3d 841, 12 NYS3d 555 (2nd Dept 7/15/2015)

The court improperly imposed a \$5,000 fine in addition to a split sentence of 60 days of incarceration and three years’ probation for failing to pay wages in violation of Labor Law 1191(1)(a), a class A misdemeanor. The punishment of a first offender is a fine *or* imprisonment (see Labor Law 198-a[1]; Penal Law 55.10[2][b]; and Penal Law 10.00[6]), not a fine *and* imprisonment. Given that the incarceration period has been served, the sentencing provision imposing the fine must be vacated. (County Ct, Suffolk Co)

Defenses (Justification)

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

Misconduct (Prosecution)

People v Irving, 130 AD3d 844, 15 NYS3d 62 (2nd Dept 7/15/2015)

Where the defendant testified that he stabbed the decedent because he feared that the decedent would fulfil a threat to beat the defendant to get money the defendant denied owing to the decedent’s employer, the court erred in denying the jury instruction on justification requested by the defense. “Viewing the evidence in the light most favorable to the defendant, the jury reasonably could have concluded that the defendant reasonably believed that the use of deadly force was necessary to prevent the victim from robbing him”; contrary to the prosecution’s assertion, “it would not have been irrational for the jury to credit the defendant’s account of the incident”

Given that a new trial is required, it is noted that the defendant correctly contends that the prosecutor improperly “denigrated the defense by characterizing the defendant as a ‘methodical’ liar who made up a ‘story,’ ‘a cliffhanger,’ and ‘a show,’” repeatedly vouched for the strength of the prosecution’s case, and “asked the jury to draw a conclusion concerning the victim’s actions at the time of the stabbing which was not fairly inferable from the evidence” (Supreme Ct, Kings Co)

Counsel (Right to Counsel) (Waiver)

Defense Systems (Client Eligibility)

Family Court (Family Offenses)

Matter of Nixon v Christian, 130 AD3d 831, 12 NYS3d 551 (2nd Dept 7/15/2015)

A party in a Family Court Act article 8 matter has a statutory right to counsel. Here, the respondent did not waive his right to counsel, but was forced to proceed pro se when he allegedly could not produce paperwork that would allow for assignment of counsel. “[D]eprivation of a party’s right to counsel, as guaranteed by Family Court

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Act § 262, requires reversal,” and the matter is remitted for a new hearing “where the appellant either appears with counsel, knowingly, intelligently and voluntarily waives his right to counsel, or requests that counsel be assigned, if appropriate, and a new determination on the petition thereafter.” (Family Ct, Queens Co)

Non-Citizens**Probation and Conditional Discharge (Conditions and terms) (Decisionmaking) (Denial)****Sentencing (Pronouncement)****People v Cesar, 131 AD3d 223, 14 NYS3d 100 (2nd Dept 7/22/2015)**

“[W]hile a defendant’s undocumented immigration status may be considered by sentencing courts as one factor in determining whether an appropriate sentence should include incarceration, probation, or a combination of both, courts may not rely solely upon a defendant’s undocumented immigration status in imposing a sentence of incarceration to the exclusion of all other relevant factors.” Automatically refusing to consider probation for undocumented immigrants violates due process and equal protection. The court here refused to sentence the defendant to probation because “if the defendant were to be placed on probation, he would be in immediate violation of such sentence since probation typically prohibits the violation of any law, and the defendant’s undocumented status would constitute a violation of federal immigration law.” The court’s reasoning disregards the fact that it is the court, not the probation department, that determines conditions of probation; nothing prevents the court from modifying the standard conditions to provide that his immigration status would not, by itself, provide a basis for violating him.

The defendant’s waiver of the right to appeal does not foreclose review, as the constitutional claims put forward implicate the societal interest in proper resolution of matters that embrace the fairness of the process involved. The unpreserved issues are reached in the exercise of the interest of justice jurisdiction.

While New York State has no statute prohibiting probationary sentences for undocumented immigrants, no statute or rule prohibits the consideration of such status when determining an appropriate sentence; consideration of such status during sentencing does not in and of itself violate the constitutional separation of powers doctrine. Factors that may be appropriately considered include the likelihood of deportation during a probationary term; any history of repeated illegal reentries into the country; whether the defendant has family in this country;

employment history; and legal employability. No opinion is expressed as to the appropriate sentence to be imposed upon resentencing. (County Ct, Orange Co)

Discrimination (Race)**Juries and Jury Trials (Challenges) (Qualifications) (Voir Dire)****People v Fabregas, 130 AD3d 939, 15 NYS3d 794 (2nd Dept 7/22/2015)**

Where the prosecutor used peremptory challenges to strike a Hispanic male and a Hispanic female, defense counsel raised a *Batson* challenge saying the strikes were discriminatory, the court credited the prosecutor’s race-neutral explanation that the male prospective juror’s hesitant responses indicated he would have difficulty understanding and following the law, and the court then denied the *Batson* application, a new trial is required. The record does not bear out the prosecutor’s facially race-neutral reason for excusing the man, who asked for one of the court’s questions to be repeated and didn’t understand compound questions but never gave conflicting answers or said he would not or could not follow the law. That the prosecutor did not pursue further questioning in the face of the man’s repeated assurances also renders the basis pretextual. Further, the court did not perform the third *Batson* step regarding the woman, making no finding as to the prosecutor’s explanation that, based on the very short answers the woman gave, the woman was not communicative and the prosecutor could not build rapport with her. (County Ct, Nassau Co)

Sex Offenses (Sex Offender Registration Act)**People v Rodriguez, 130 AD3d 897, 12 NYS3d 895 (2nd Dept 7/22/2015)**

There was insufficient evidence to support designation of the defendant as a level two sex offender under the Sex Offender Registration Act. There was no evidence at the hearing that he “abused alcohol or drugs at the time he committed the instant offense,” and the indication that he drank “‘socially’ at some point in the past was insufficient” to show a history of alcohol abuse. Further, the prosecution failed to submit any evidence “to establish that the supervision to which the defendant was subject would not be considered ‘specialized’” under risk factor 14. While the defendant’s living situation was uncertain at the time of the hearing—he had resided in a homeless shelter before his arrest, for which he provided an address—he had an employment history, planned to seek public assistance upon release from prison, and provided certain contacts; the prosecution failed to show by clear

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and convincing evidence that he is undomiciled. (Supreme Ct, Kings Co)

Forensics (DNA)

Post-Judgment Relief

[People v Williams](#), 130 AD3d 949, 14 NYS3d 121 (2nd Dept 7/22/2015)

The record is sufficient for this court to make the necessary findings on the defendant's CPL 440.30(1-a) motion for DNA testing, made after his CPL 440.20 motion was denied below in an order that makes no reference to the DNA testing request. In the interest of judicial economy the 440.30(1-a) motion is decided here in the first instance. The police officer in charge of evidence retention and destruction in 2000 testified that the hat taken into evidence after the burglary in 1998, which the defendant sought to have tested, was destroyed in accordance with procedures in place in 2000. This testimony was sufficient to show that the evidence in question is not available for testing; thus, the 440.30(1-a) motion must be denied. (Supreme Ct, Kings Co)

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

[People v Alvarez](#), 130 AD3d 1054, 14 NYS3d 157 (2nd Dept 7/29/2015)

The unpreserved contention that the court improvidently exercised its discretion in denying three defense challenges of prospective jurors for cause is reviewed in the interest of justice. A new trial is required where one prospective juror indicated that she was not sure whether she could be fair and impartial due to her son's work as a police officer, did not know whether she would believe police witnesses just because of their job or follow the court's legal instructions, and added only, "I'll try" when re-asked about being fair and impartial; the two other prospective jurors, who had been crime victims, said they were unsure if they could be objective or impartial; none of the prospective jurors unequivocally stated that they would render impartial verdicts based solely on the evidence, uninfluenced by their prior states of mind; and the defense exhausted its allotment of peremptory challenges. (Supreme Ct, Queens Co)

Search and Seizure (Stop and Frisk)

[People v Fletcher](#), 130 AD3d 1063, 15 NYS3d 797 (2nd Dept 7/29/2015)

The prosecution met its burden of demonstrating the legality of police conduct that yielded the physical evidence challenged in a defense motion to suppress; the following testimony by the officer was not incredible. He described his extensive experience with enforcement of firearms law and said that while riding in a slow-moving police van he made eye contact with the defendant, who then moved to adjust his waistband in a way that the officer recognized as typical when a firearm was present; the movement revealed a "rectangular shape" under the defendant's clothing" that the officer thought could be a firearm handle; light from a building and street light provided sufficient illumination; when the officer looked back he could clearly see the defendant, about 15 feet away; and when the police got out of the van the defendant increased his pace. (Supreme Ct, Kings Co)

Dissent: The defendant had a right to be left alone, and his walking away from the police did not raise the level of the encounter so as to justify the stop and frisk.

[*Ed. Note:* Leave to appeal was granted on Nov. 2, 2015 (26 NY3d 1044 [2nd Dept]).]

Driving While Intoxicated (Preliminary Breath Test) (Test Refusal)

Evidence (Instructions) (Prejudicial)

[People v Palencia](#), 130 AD3d 1072, 15 NYS3d 89 (2nd Dept 7/29/2015)

The defendant was deprived of his right to a fair trial by the court's admission into evidence of results of a portable breath test (PBT) given at the scene of the accident that brought the defendant to law enforcement's attention, as the prejudicial effect of that evidence outweighed its probative value. The reliability of a PBT to establish intoxication is not generally accepted in the scientific community and admission of the PBT results created an unacceptable risk that it would be used for that purpose, particularly on the record here. While the results were offered for the purpose of showing the defendant's state of mind in connection with his later conduct, no limiting instruction was given to the jury when the evidence was admitted, but only at the end of trial, and there was a strong likelihood jurors would give the result substantial weight. (County Ct, Nassau Co)

Dissent: There was no error in admitting the PBT results to show purposefulness and consciousness of guilt where the defendant learned of the PBT results at the scene and then failed to provide a sufficient breath sample during a later chemical test.

[*Ed. Note:* Leave to appeal was granted on Nov. 9, 2015 (26 NY3d 1044 [2nd Dept]).]

Second Department *continued***Sex Offenses (Civil Commitment)**

Matter of State of New York v Ted B., 132 AD3d 28, 15 NYS3d 366 (2nd Dept 7/29/2015)

“[A]n on-the-record colloquy is required to ensure that a detained sex offender validly waives th[e] right to a jury trial on the issue of mental abnormality” requiring civil management under Mental Hygiene Law article 10. “This requirement was not satisfied here, where the waiver of Ted B.’s right to a jury trial was apparently based solely upon a letter he wrote to the Supreme Court, and where there is nothing in the record to show that the waiver was knowing and voluntary.” (Supreme Ct, Orange Co)

Assault (Evidence)**Evidence (Sufficiency)****Robbery (Elements) (Evidence)**

People v Torres, 130 AD3d 1082, 14 NYS3d 151 (2nd Dept 7/29/2015)

The evidence adduced against the defendant was legally insufficient as to the second-degree robbery charges under counts three and four of the indictment, and second-degree assault under count six, where a fake gun was pointed at a police officer who put it in his front pocket after it was dropped, and the same gun was later pointed at the officer by a codefendant after it was removed without the officer’s knowledge from the pocket where he had placed it. There was no evidence that the codefendant or the defendant used force to take the fake gun while the officer was calling 911 and attending to a dog at the scene; force is required under Penal Law 160.10 (1) and (2)(a). The second-degree assault conviction under Penal Law 120.05(6) also fails for lack of sufficient evidence, as the element of an underlying felony—here, the second-degree robberies—is not met. (Supreme Ct, Queens Co)

Evidence (Hearsay) (Prejudicial) (Uncharged Crimes)

People v Grigoroff, 131 AD3d 541, 14 NYS3d 497 (2nd Dept 8/12/2015)

Reversal is required due to the court’s error in admitting, at the defendant’s trial for felony murder, second-degree possession of a weapon, and attempted second-degree burglary, testimony about a separate shooting that occurred before the events underlying this case and involving the defendant’s identical twin brother, who was implicated by the defendant in this case. Evidence regard-

ing the prior shooting was introduced after the defense offered evidence that the demeanor of the defendant and his uncharged accomplices after the shooting at issue here had been calm and therefore inconsistent with their participation in the crime. The evidence about the prior shooting showed the brother had been similarly calm after shooting a person at a bar. “This evidence ‘served no purpose other than to raise an inference of guilt by association’”

The court further erred in allowing a witness to testify that she had overheard the defendant’s brother admit his involvement in a shooting at the garage where the charged incident occurred. This was not shown to fall within any hearsay exception. (County Ct, Putnam 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.

Sentencing (Persistent Violent Felony Offender) (Post-Release Supervision)

People v Brewington, 127 AD3d 1248, 8 NYS3d 439 (3rd Dept 4/2/2015)

The defendant, who pleaded guilty to burglary and executed a waiver of appeal while reserving his right to challenge the propriety of being sentenced as a persistent violent felony offender, is entitled to resentencing. The 1999 guilty plea used as a predicate violent felony was constitutionally infirm where he was not advised that the plea would result in imposition of a mandatory period of post-release supervision (PRS) and was not afforded an opportunity to withdraw that plea either at the original sentencing or when he was resentenced to conform the duration of the PRS term to Penal Law 70.45. (County Ct, Albany Co)

Appeals and Writs (Preservation of Error for Review) (Waiver of Right to Appeal)**Probation and Conditional Discharge (Conditions and terms)****Sentencing (Pre-sentence Investigation and Report)**

People v Fishel, 128 AD3d 15, 6 NYS3d 312 (3rd Dept 4/2/2015)

The defendant’s valid waiver of appeal does not bar review of an illegal sentence, and while his claim concerning two conditions of his probation is unpreserved, the illegality is readily discernible from the record and

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may be reviewed. The probation conditions that require disclosure of the defendant's presentence investigation report (PSI) "to any agency or individual involved in the evaluation, treatment or rehabilitation of [the] defendant" upon request, if deemed appropriate by the Probation Department, and require the "defendant to consent to release of the PSI to any sex offender treatment provider," violate the CPL 390.50 restrictions on disclosure of PSIs. (County Ct, Franklin Co)

Appeals and Writs (Preservation of Error for Review) (Scope and Extent of Review)

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

**People v Lang, 127 AD3d 1253, 7 NYS3d 618
(3rd Dept 4/2/2015)**

The defendant's claims that his guilty plea was coerced and/or otherwise involuntary, raised in a CPL article 440 motion, were not the proper subject of such a motion as they were reviewable on direct appeal, and while they survived his waiver of appeal, were unpreserved in the absence of a motion to withdraw the plea. But the defendant's qualified response when asked if he caused the death of his brother when acting with the intent to cause serious physical injury triggered the narrow exception to the preservation requirement. His reply, "'To the best of my recollection it is, sir,'" cast doubt on his guilt and/or the voluntariness of his plea, obligating the court to make further inquiry, especially in view of other facts in the record.

The court's intention to move up the trial date despite the defense request for an adjournment based on the unavailability of an expert witness and questionable analysis regarding the defendant's planned intoxication defense for which the expert's testimony would be offered, support the claim that the plea was coerced. (County Ct, Essex Co)

Juveniles (Delinquency)

Sex Offenses (Sex Offender Registration Act)

**People v Shaffer, 129 AD3d 54, 7 NYS3d 708
(3rd Dept 4/30/2015)**

The court's use of the defendant's juvenile delinquency adjudication to assess points under risk factor 9 when determining the defendant's Sex Offender Registration Act (SORA) risk level requires reversal. This is in line with the Second Department's holding that including juvenile delinquency adjudications in the definition of crimes for

purposes of establishing an offender's criminal history under factor 8 exceeds the Board of Examiners of Sex Offenders' authority. Prior decisions of this Court that may be construed to allow juvenile delinquency adjudications to be considered "crimes" for purposes of determining risk level should not be followed. This holding is limited to the assessment of points within the criminal history portion of the risk assessment instrument and does not address the consideration of juvenile records when deciding whether to depart from the recommended risk level. (County Ct, Madison Co)

Family Court

Juveniles (Custody) (Hearings)

**Matter of Liz WW. v Shakeria XX., 128 AD3d 1118,
8 NYS3d 713 (3rd Dept 5/7/2015)**

The court erred in failing to hold a hearing to determine if "extraordinary circumstances" exist to support awarding custody to the non-parent petitioner in a Family Court Act article 6 proceeding. The mother and the petitioner had resided together and had been in a relationship when the mother gave birth to the child in late 2007. Thereafter, the petitioner assumed all parental responsibility for the child and after the couple separated, the mother in August 2012 "consented to an order giving petitioner physical custody and shared legal custody, without prejudice to the [biological] father," who was incarcerated from 2009 to December 2012. On release, he petitioned for a modification of custody and visitation. Without conducting a hearing or admitting evidence, the court gave custody of the child to the father and refused to order visitation for the petitioner, who then filed for sole custody, and when the father was again incarcerated, the petitioner filed for a custody modification. The court gave custody to the mother with visitation to the petitioner and "thereafter concluded, again without a hearing, that petitioner had not demonstrated extraordinary circumstances" and granted summary judgment for the biological parents. "[S]ummary judgment was not appropriate"; the matter is remitted for expedited proceedings. (Family Ct, Albany Co)

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

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

**People v Klinger, 129 AD3d 1115, 10 NYS3d 366
(3rd Dept 6/4/2015)**

The defendant failed to preserve his claim that his guilty plea was invalid due to the court's failure to advise him that a guilty plea waived the rights to a jury trial, to

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confront witnesses, and against self-incrimination; while the type of error raised is imprecisely characterized, it is certainly “one serious enough to warrant reversal in the interest of justice,” and, because it also relates to the voluntariness of the plea, it survived the waiver of appeal. Reversal is required where the court made no effort to explain the rights the defendant would give up by pleading guilty, making only a passing reference to them, and made only a vague inquiry into whether the defendant had spoken to counsel about “the case” and “the plea bargain.” (County Ct, Sullivan Co)

Family Court**Juveniles (Abuse) (Custody) (Parental Rights)**

**Matter of Natalie AA., 130 AD3d 50, 10 NYS3d 720
(3rd Dept 6/11/2015)**

In this Family Court Act article 10 res ipsa case, the court erred in finding that the father, a pediatric nurse, abused and neglected his seven-week old daughter by inflicting injuries that resulted in her hospitalization. The petitioner made out a prima facie case of abuse, based on the testimony of the petitioner’s expert, Karyn Patno, that the child started showing signs of injury that would not ordinarily occur absent an act or omission of the father while she was under the father’s sole care. However, the testimony of the father’s expert, Joseph Scheller, which was consistent with the conclusions of the child’s “treating physicians and her medical records in crucial respects, offered a reasonable and persuasive account of how [the child’s] symptoms—and lack thereof—better supported his venous thrombosis diagnosis,” a diagnosis that did not implicate the father. The uncontested evidence showed that the child did not suffer any external trauma, broken bones, or neck injuries, and she had a one-sided retinal hemorrhage, and the experts disagreed as to whether such a hemorrhage was an indication of nonaccidental abuse or a nonabusive event. Given the respondent’s expert testimony, “and mindful of the fact that petitioner had the burden of proof, we cannot conclude that petitioner established by a preponderance of the evidence that the father caused [the child’s] injuries so as to support” an abuse and neglect finding. (Family Court, Clinton Co)

Larceny (Credit Cards) (Elements) (Sentence)**Possession of Stolen Property (Elements) (Sentence)****Sentencing (Concurrent/Consecutive)**

**People v Garcia, 129 AD3d 1383, 12 NYS3d 350
(3rd Dept 6/25/2015)**

Where the defendant stole a credit card and used it to buy items at two different stores, the imposition of concurrent sentences for the counts of fourth-degree grand larceny for theft of the card and fourth-degree possession of stolen property for possessing the card was not required; stealing the card and possessing it with the intent to benefit herself entailed separate acts. Further, the statutory elements of the larceny and possessory offenses are distinct so that “one is not a component of the other, nor do the material elements of these offenses overlap” (County Ct, Cortland Co)

Appeals and Writs (Waiver of Right to Appeal)

**People v Pope, 129 AD3d 1389, 14 NYS3d 512
(3rd Dept 6/25/2015)**

While the court clearly explained to the defendant at the plea proceedings the distinct right to appeal, the court failed to come back to the point that the defendant’s plea included a waiver of that right. The defendant’s affirmative, one-word response that he understood the explanation of the right to appeal does not make clear whether he understood the right itself or that he was waiving it. Counsel made no comment, nor did the court ask the defendant if he had discussed the waiver with counsel. The defendant’s signing of a written appeal waiver later in the day at sentencing did not cure the deficiency. No reversible error is found, however. (County Ct, Madison Co)

Concurrence: The plea colloquy reveals no confusion on the defendant’s part as to the waiver of appeal, and any that may have existed was dispelled at sentencing, where the record shows the defendant consulted with counsel and executed a written document with bold print indicating it was “a ‘waiver of [the] right to appeal and other rights.’”

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

**People v Nowlan, 130 AD3d 1146, 13 NYS3d 646
(3rd Dept 7/9/2015)**

The court erred in ruling that the defendant failed to establish that he was entitled to have the jury instructed on the agency defense where: a confidential informant (CI), not the defendant, initiated the drug transactions in question; the record contains comments made by the defendant showing he had aligned himself with the buyer (CI); and the defendant’s girlfriend testified that he did not benefit from the sales. Comments by the defendant touting the quality of the drugs could be taken, in the light

Third Department *continued*

most favorable to the defendant, as just making conversation. (County Ct, Warren Co)

Family Court

Juveniles (Hearings) (Neglect) (Permanent Neglect) (Visitation)

Matter of Searra L., 130 AD3d 1184, 13 NYS3d 662 (3rd Dept 7/9/2015)

The court abused its discretion in sua sponte dismissing the mother’s petition to enforce the supervised visitation condition set forth in the 2006 conditional surrenders she signed and the court approved in 2006. The surrenders provided that if the children were adopted, the adoption order must include the visitation condition and the mother must receive a copy of the order. The yearly supervised visit was to be coordinated by the Otsego County Department of Social Services, but every time the mother sought visitation, her request was denied. In 2014 the mother, believing her children had been adopted, filed the enforcement action pursuant to Domestic Relations Law (DRL) 112-b. The record does not reflect that the children have been adopted and because the court dismissed the petition, the respondent did not need to file a response. So it is unclear whether the enforcement action is governed by DRL 112-b, which applies post-adoption, or Family Court Act 1055-a(b), which applies pre-adoption. The petition must be reinstated and the matter remitted for further development of the record. If the children have been adopted, the petitioner must receive the adoption orders and she may seek leave to amend her petition to comply with DRL 112-b. (Family Ct, Otsego Co)

Counsel (Competence/Effective Assistance/Adequacy)

Investigation

People v Cassala, 130 AD3d 1252, 15 NYS3d 479 (3rd Dept 7/16/2015)

The defendant was charged with sex offenses stemming from an alleged series of sexual assaults against an under-age accuser, including alleged instances of forcible anal intercourse, and was convicted of some but not all counts after a trial at which the defense theory was that that the accuser fabricated the allegations. Defense counsel was ineffective due to his failure, which had no tactical explanation, to investigate or address the accuser’s bleeding disorder, the existence of which was noted in the report of the sexual assault nurse examiner who found no signs of physical injury. Counsel also failed to object to or seek an instruction on testimony by the defendant’s ex-

spouse about his preference for anal sex during their relationship. While counsel’s failure to object to statements during the prosecution’s summation “does not, in and of itself, amount to ineffective assistance of counsel, it further illustrates counsel’s representation, the cumulative effect of which deprived [the] defendant of meaningful representation” (Supreme Ct, Albany Co)

Appeals and Writs (Waiver of Right to Appeal)

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

People v Mones, 130 AD3d 1244, 13 NYS3d 686 (3rd Dept 7/16/2015)

The defendant’s purported waiver of the right to appeal was not valid. The court “also failed to properly inform [the] defendant of his trial rights,” which “could ... be viewed as a mode of proceedings error” not requiring preservation and in any event, is reviewed in the interest of justice. The plea colloquy was spread over two days because defense counsel sought additional time to talk with the defendant, but there was no explanation of the “[t]rial rights, grand jury right, appellate rights, et cetera” that the defendant was giving up nor record indication that the attorney consulted with the defendant about a plea’s constitutional consequences. (County Ct, Sullivan Co)

Dissent: The plea was knowing, voluntary, and intelligent where, while further explanation would have been welcome, the defendant confirmed that he had adequately conferred with counsel about whether to move toward trial and a probation violation hearing and, the next day, reiterated that he had no questions for counsel about the forfeiture of rights.

Family Court

Juveniles (Hearings) (Parental Rights)

Matter of Marcus BB., 130 AD3d 1211, 13 NYS3d 626 (3rd Dept 7/19/2015)

The court erred in concluding that the mother failed to substantially plan for her child’s future. After an earlier neglect finding, the mother completed the many tasks required for the return of her child in less than one year and the child was discharged to her care on a trial basis. However, during an unannounced visit two months later, the father, who was subject to a protective order that prohibited contact outside of visitation monitored by the petitioner, was found in the home. The petitioner immediately removed the child and, six months later, filed for termination. Despite the mother’s prior success, her meaningful contact with the child that continued after the child was removed the second time, her continued plan-

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ning for the child's return, and the agency's plan to discharge the child to the father, the agency nevertheless asserted that the permanent neglect petition and termination of parental rights were necessary. "[T]he record as a whole does not contain clear and convincing evidence that respondent permanently neglected her child. To find otherwise would be to hold respondent to an unreasonable standard and ignore well-settled precedent requiring only evidence of meaningful steps toward amelioration of the original condition, not proof of perfect compliance with petitioner's mandates." (Footnote omitted.) Further, the court's determination to terminate the mother's parental rights was error where such disposition "was impractical as there was no need to free the child for adoption" as the plan was to return the child to the father's care and custody. (Family Ct, Ulster Co)

Due Process (Fair Trial)**Evidence (Uncharged Crimes)**

People v Nicholas, 130 AD3d 1314, 14 NYS3d 214 (3rd Dept 7/23/2015)

The "defendant was deprived of a fair trial due to the cumulative effect of erroneously admitting evidence of prior uncharged crimes and the improper vouching by a" prosecution witness. Law enforcement targeted the defendant after a confidential informant (CI), whose testimony was the only direct evidence of the drug sale for which the defendant was tried, said the defendant was present at a buy from someone else; the court ruled that the defendant's presence at that buy was admissible, but at trial the CI went further, saying the defendant provided the drugs; a motion for mistrial was denied but the testimony was struck, without a limiting instruction. Other improper testimony was erroneously allowed, compounded by police testimony that the CI was "'very reliable and very trustworthy.'" (County Ct, Washington Co)

Concurrence: While the prejudicial effect of the testimony that the defendant possessed heroin as well as crack outweighed its probative value, that does not mean that "every casual, off-the-cuff reference to an uncharged crime constitutes reversible error."

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

People v Warrington, 130 AD3d 1368, 15 NYS3d 256 (3rd Dept 7/30/2015)

The court erred by denying the defense motion to dismiss for cause a prospective juror who responded to a voir dire question as to whether anyone felt they could not be

fair by saying, after noting the young age of the decedent and the defendant's adulthood, "I can't do it." The same juror later said "I don't know" when asked if she would have trouble finding the defendant not guilty if the prosecution failed to meet their burden. While the juror responded appropriately to further questioning as to the burden of proof, she never agreed she could set aside any bias she held and never specifically referenced the age issue she had identified as a bias. (County Ct, Warren Co)

Dissent: "I do not agree with my colleagues that the facts of this case required County Court to excuse prospective juror No. 383 for cause and, as such, I dissent."

[*Ed. Note:* Leave to appeal was granted on Sept. 22, 2015 (26 NY3d 973 [3rd Dept 2015]).]

Sex Offenses (Civil Commitment)

Matter of State of New York v Richard TT., 132 AD3d 72, 14 NYS3d 824 (3rd Dept 8/13/2015)

The court abused its discretion in granting the respondent's motion to vacate the court's earlier orders entered pursuant to Mental Hygiene Law article 10, finding the respondent to be a detained sex offender suffering from a mental abnormality and a dangerous sex offender requiring confinement "as *Matter of State of New York v Donald DD.* [24 NY3d 174 (2014)] did not compel the conclusion that respondent did not suffer from a mental abnormality." While the respondent was diagnosed with anti-social personality disorder, which, without more, does not satisfy the mental abnormality requirement of article 10, there was evidence that the respondent was diagnosed with several mental disorders "that can lead not only to a generalized willingness to commit crimes, but impulsive sexual behavior in particular." (Supreme Ct, Warren Co)

Dissent: "The record provides insufficient evidence to establish that respondent suffered a mental abnormality within the meaning of Mental Hygiene Law article 10."

Fourth Department

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Speedy Trial (Cause for Delay) (Statutory Limits)

People v Amrhein, 128 AD3d 1412, 7 NYS3d 806 (4th Dept 5/1/2015)

The defendant was denied his statutory right to a speedy trial where the prosecution did not announce

Fourth Department *continued*

readiness until 278 days after the criminal complaint was filed and the prosecution failed to meet its burden of showing that there was sufficient excludable time; the time during which the local criminal court failed to transmit to the superior court the documents required by CPL 180.30(1) did not constitute excludable time under the exceptional circumstances exception as it did not prevent the prosecution from presenting the case to the grand jury or being ready for trial. There was no adjournment or continuance, with or without the defendant's consent. (County Ct, Allegany Co)

Grand Jury (Procedure)

Jurisdiction

People v Carr, 128 AD3d 1402, 8 NYS3d 527 (4th Dept 5/1/2015)

The defendant's unpreserved challenge to the prosecution's failure to seek leave to present murder and robbery charges to a second grand jury after the defendant's indictment and conviction for a connected burglary raised a jurisdictional issue that could not be waived. "[C]harging the grand jury with only one offense did not constitute the functional equivalent of the dismissal of the murder and robbery counts"; it was clear that the defendant was suspected of the homicide, and his waiver of immunity indicated he understood that the initial grand jury was investigating murder and other charges, but witnesses provided at most only an inferential link between him and the homicide. After the defendant's burglary conviction, the prosecution presented evidence to the second grand jury that a fellow inmate said that the defendant had admitted the murder. (Supreme Ct, Erie Co)

[*Ed. Note: Leave to appeal was granted on Dec. 28, 2015 (26 NY3d 1086 [2015]).*]

Double Jeopardy

Driving While Intoxicated (Driving While Ability Impaired) (Evidence)

Matter of Case v Sedita, 128 AD3d 1328, 8 NYS3d 744 (4th Dept 5/1/2015)

The petition to prohibit, on double jeopardy grounds, the continued prosecution of the defendant for the felony of driving while intoxicated (DWI) per se is granted where the defendant, who had unsuccessfully sought suppression of breathalyzer test results, successfully moved to set aside his conviction of DWI per se based on the improper admission of the test result documents during the bench trial. Deeming the remaining evidence

insufficient, the court dismissed the DWI per se charge in an order from which the prosecution did not appeal.

Double jeopardy does not bar prosecution for the lesser included offense of driving while ability impaired, which the defendant had requested be considered by the court during the bench trial. Nor did the acquittal of the DWI counts render the accusatory instrument a nullity because Vehicle and Traffic Law 1192(9) specifically permits a DWAI conviction on an instrument charging DWI, so that the instrument charging DWI also charges DWAI as a matter of law. (Supreme Ct, Erie Co)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v Washington, 128 AD3d 1397, 7 NYS3d 798 (4th Dept 5/1/2015)

The court erred by denying the defendant's CPL 440.10 motion asserting ineffective assistance of counsel without a hearing, where counsel had moved to suppress a weapon found under the front passenger seat of a vehicle stopped for traffic violations including a stop lamp that provided white rather than red light; the only witness testifying at the suppression hearing was the officer who stopped the car; the driver of the car, who supplied an affidavit in support of the 440 motion saying the rear lamp had cracked and was covered with red tape so that light from it was red, was present in court for the suppression hearing but was not called; the defendant's 440 motion, alleging failure to develop a sufficient factual record for suppression, was adverse and hostile to trial counsel so that requiring an affidavit from counsel for the 440 would be wasteful and unnecessary; and no tactical reason for failing to call the driver at the suppression hearing can be discerned from the record. (County Ct, Onondaga Co)

Guilty Pleas

Sentencing (Concurrent/Consecutive)

People v Brooks, 128 AD3d 1467, 8 NYS3d 797 (4th Dept 5/8/2015)

The narrow exception to the preservation requirement applies to the claim here that the mistaken understanding of the court and of counsel as to the legally required sentence rendered the defendant's plea not voluntary, knowing, or intelligent. The prosecutor incorrectly stated that the sentence would have to run consecutively to that on another conviction and the error was not corrected by defense counsel or the court. (County Ct, Steuben Co)

Grand Jury (Procedure) (Witnesses)

Fourth Department *continued*

People v Cooper, 128 AD3d 1431, 9 NYS3d 490
(4th Dept 5/8/2015)

While the court erred in failing to articulate a rational basis for denying the defendant's request to have restraints removed before he appeared before the grand jury, the court directed the prosecutor to give a "cautionary instruction to dispel any prejudice resulting from" the defendant appearing in restraints, and because the defendant refused to testify because of the restraints, "it cannot be said that he was denied his statutory right" to testify at the grand jury. (County Ct, Monroe Co)

Appeals and Writs (Preservation of Error for Review)**Sentencing (Weapons)**

People v Gillespie, 128 AD3d 1519, 7 NYS3d 922
(4th Dept 5/8/2015)

The defendant did not object to an order revoking his pistol permit, seek to withdraw his plea, or seek to vacate his conviction on the ground that such order was erroneously issued without giving him a chance to withdraw his plea, and the unpreserved issue is without merit regardless, as such an order is not part of the defendant's sentence. (Supreme Ct, Monroe Co)

Homicide (Manslaughter [Definitions])

People v Hardy, 128 AD3d 1453, 8 NYS3d 534
(4th Dept 5/8/2015)

The evidence was legally sufficient to support the defendant's conviction of second-degree manslaughter under Penal Law 125.15(1) where the defendant's actions during his vehicular flight from an attempted petit larceny caused a collision that injured a pregnant woman; a cesarean section was performed to save the mother's life; no heartbeat was detected in the child immediately after the delivery but resuscitation yielded a heartbeat; the child was removed from mechanical life support; and the heartbeat continued for about 2½ hours. Penal Law 125.00 defines homicide as action causing "the death of a person or an unborn child" with a gestational age over 24 weeks. That the gestational age here was approximately 23 weeks does not control because the statute uses the disjunctive "or"; the child was born alive and was thus a "person," as defined in Penal Law 125.05. The contention that manslaughter does not lie because the child was not yet a "person" when the collision occurred is rejected. (Supreme Ct, Monroe Co)

Guilty Pleas**Search and Seizure (Automobiles and Other Vehicles)
(Standing to Move to Suppress)**

People v Kendrick, 128 AD3d 1482, 8 NYS3d 807
(4th Dept 5/8/2015)

The prosecution correctly concedes that the court erred in finding that the defendant lacked standing to contest the legality of a vehicle search that revealed a large quantity of drugs. The error is not harmless where, although the defendant pleaded guilty after the improper ruling, there is a reasonable possibility that the denial of suppression contributed to the defendant's plea; one of the class A-I felony counts in the indictment, which carried a maximum sentence of 25 years to life, related to the drugs at issue and the defendant accepted a plea to second-degree possession of drugs with a sentence promise of six years to life. The matter must be remitted for a suppression hearing. (Supreme Ct, Monroe Co)

Probation and Conditional Discharge (Revocation)**Search and Seizure (Suppression)**

People v Robinson, 128 AD3d 1464, 8 NYS3d 794
(4th Dept 5/8/2015)

Where the defendant was arrested and arraigned on a new indictment while on probation, but the court suppressed the evidence underlying the new charge due to violations of his state and federal constitutional rights, "the court erred in using the unconstitutionally seized evidence as a basis upon which to revoke [the] defendant's probationary sentence." As the defendant did not challenge on appeal the findings that he engaged in other actions in violation of probation conditions, the sentence is vacated and the matter remitted for resentencing. (Supreme Ct, Monroe Co)

Juries and Jury Trials (Challenges) (Competence)**Misconduct (Prosecution)****Post-Judgment Relief (CPL § 440 Motion)**

People v Bailey, 129 AD3d 1493, 12 NYS3d 412
(4th Dept 6/12/2015)

The defendant's CPL article 440 motion to vacate the judgment was wrongly denied without a hearing where transcripts of his codefendant's case supported the contention that the codefendant who testified against the defendant received undisclosed benefits, including lower charges in the indictment that avoided the plea bargaining restrictions of CPL 220.10(5)(d)(ii) and an agreement that the codefendant could withdraw his plea to the felony and plead guilty to a misdemeanor if he cooperated against the defendant. No prosecutor has yet made full disclosure to a court of any promises; the defendant's

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motion raises a question of fact and the record does not permit adequate review of the issues raised.

The further contention that a juror lacked capacity to serve similarly requires a hearing as it was supported by some evidence and the court declined to provide the defendant with the judicial subpoenas necessary to obtain more information as to the juror’s alleged developmental disability and misrepresentations about his employment. (Supreme Ct, Oneida Co)

Family Court

Juveniles (Custody) (Hearings) (Visitation)

Matter of Majuk v Carbone, 129 AD3d 1485, 12 NYS3d 410 (4th Dept 6/12/2015)

Where the mother commenced a proceeding seeking the addition of supervision for visitation between the father and the child, and the court, without conducting a hearing, issued an order that permanently prohibited all contact between the father and the child, the court erred by “sua sponte granting relief that was not requested by the parties or the Attorney for the Child” The order that prohibits contact between the father and child is reversed and the matter remitted for further consideration. (Family Ct, Erie Co)

Due Process

Sentencing (Pronouncement)

People v McKnight, 129 AD3d 1459, 12 NYS3d 681 (4th Dept 6/12/2015)

The defendant was denied due process at sentencing in these two matters where the court “relied on material-ly untrue information pertaining to his criminal history,” stating without record support that the defendant had been involved in over 40 burglaries and referring to “all the tens of burglaries’” The defendant did not waive his right to appeal in one matter, and while his waiver of appeal in the second matter was effective, it does not encompass his challenge to the use of improper information at sentencing. The unpreserved error is reviewed as a matter of discretion in the interest of justice. The defendant must be resentenced before a different judge. (County Ct, Genesee Co)

Evidence (Newly Discovered) (Privileges)

Post-Judgment Relief (CPL § 440 Motion)

People v Pierre, 129 AD3d 1490, 11 NYS3d 389 (4th Dept 6/12/2015)

On this appeal from an order granting the defendant’s CPL 440.10 motion to vacate his conviction, the prosecution’s contention that the defendant failed to prove by a preponderance of the evidence that new evidence had been discovered warranting relief is rejected. Two witnesses at the hearing testified that a third party had admitted committing the acts of which the defendant was convicted; it was reasonable to assume the third party would claim his Fifth Amendment right not to incriminate himself and therefore would be unavailable. Records from the defendant’s trial support the new evidence, showing that the victims died in the manner that the two hearing witnesses described. That one of the hearing witnesses was the third party’s ex-wife did not render her testimony inadmissible under spousal privilege, as the threats she described the third party making against her to keep her from reporting his comments are strong evidence that the admissions were not made by the third party in reliance on any confidential relationship. (County Ct, Monroe Co)

Freedom of Information

Matter of Bottom v Fischer, 129 AD3d 1604, 10 NYS3d 786 (4th Dept 6/19/2015)

In this Freedom of Information Law (FOIL) matter, “the court abused its discretion in denying, without explanation, that part of [the] petition seeking an award of reasonable attorney’s fees and other litigation costs reasonably incurred in this proceeding.” The respondent’s contention that there was a reasonable basis for denying access to requested materials “is belied by its release of the majority of those documents when the court directed it to justify their nondisclosure,” and the petitioner was subjected to the sorts of unreasonable delays and denials of access that the FOIL provision allowing counsel fees seeks to deter. (Supreme Ct, Wyoming Co)

Evidence (Weight)

People v Hazzard, 129 AD3d 1598, 12 NYS3d 415 (4th Dept 6/19/2015)

The verdict was not against the weight of the evidence given the accuser’s testimony, including that the defendant forced her to engage in sexual intercourse, holding her down and restraining her in the process, along with the DNA evidence. The defendant’s other issues are unpreserved for review or without merit. (County Ct, Lewis Co)

Dissent: Where the credibility of certain prosecution witnesses was manifestly suspect, the jury acquitted the defendant of other offenses alleged by the accuser, the way that the accuser and another were said to have found the towel from which the DNA was recovered was incred-

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ible and unbelievable, especially in light of the elapse of three days before its discovery, “I am not convinced that guilt was proven beyond a reasonable doubt.”

Appeals and Writs**Motions (Suppression)****Witnesses (Credibility) (Police)**

**[People v Sylvester](#), 129 AD3d 1666, 12 NYS3d 469
(4th Dept 6/19/2015)**

The prosecution contends, in its appeal from an order granting suppression of physical evidence, that the requisite reasonable suspicion was established, but the contention is premised on the testimony of a police officer that the court found untruthful; such a credibility determination is not to be disturbed unless unsupported by the record, which is not the case here. (County Ct, Niagara Co)

Admissions (*Miranda* Advice)

**[People v Walker](#), 129 AD3d 1590, 13 NYS3d 723
(4th Dept 6/19/2015)**

“[T]he court properly granted that part of [the] defendant’s motion seeking to suppress his pre-*Miranda* statements, but erred in denying that part of the motion seeking to suppress the post-*Miranda* statements” where the defendant made one inculpatory statement without a *Miranda* warning in response to questioning while being escorted in handcuffs to a police car and made further, *Mirandized* statements less than 10 minutes later, in the same location. Nothing in the record establishes that there was a perceivable marked change in the tenor of the interaction between the defendant and the police. (County Ct, Monroe Co)

Sentencing (Restitution)

**[People v Webber](#), 129 AD3d 1673, 12 NYS3d 474
(4th Dept 6/19/2015)**

The defendant has properly appealed from the order of restitution entered following a restitution hearing held as part of a bifurcated sentencing proceeding. He correctly contends that the court erred in imposing restitution where there was no hearing evidence that the stolen items described by the owner were acquired by the defendant as part of the same criminal transaction to which the defendant pleaded guilty and for which restitution was ordered. (County Ct, Wayne Co)

Juries and Jury Trials (Challenges) (Qualifications)**Search and Seizure (Search Warrants [Suppression])**

**[People v Mitchum](#), 130 AD3d 1466, 12 NYS3d 749
(4th Dept 7/2/2015)**

The court erred in denying the defendant’s challenge for cause to a prospective juror who expressed bias toward police and whose answers to subsequent questioning by the court were insufficient to constitute an unequivocal declaration that he could set aside his bias and render an impartial verdict based on the evidence.

Suppression of evidence was properly denied based on the quality of information provided by a confidential informant and evaluated at an *in camera Darden* hearing. Eavesdropping information not relied on by the suppression court cannot be and is not relied upon to uphold the suppression ruling. (County Ct, Monroe Co)

Juries and Jury Trials (Waiver)**Sentencing (Excessiveness)****Trial (Trial Order of Dismissal)**

**[People v Ashkar](#), 130 AD3d 1568, 14 NYS3d 852
(4th Dept 7/10/2015)**

The court erred in imposing upon the defendant, following his conviction after a nonjury trial of first-degree possession of stolen property, the maximum sentence where the crime involved no use of or threats of violence and the defendant has no prior criminal history. The defendant failed to preserve issues regarding the validity of his waiver of a jury trial. He also failed to renew, after presenting evidence, his motion for a trial order of dismissal; the evidence was in any event legally sufficient. Viewed in totality and as of the time it occurred, defense counsel’s representation was meaningful. (County Ct, Onondaga Co)

Evidence (Sufficiency)**Larceny (Evidence) (Grand Larceny) (Value)**

**[People v Cruz](#), 130 AD3d 1538, 13 NYS3d 758
(4th Dept 7/10/2015)**

The defendant’s unpreserved challenge to the sufficiency of the evidence is reviewed in the interest of justice and his conviction of third-degree grand larceny is reduced to petit larceny. The prosecution was required to establish that the four puppies stolen by the defendant had a market value of over \$3,000, but the person from whom they were stolen testified that he was not a dog expert, and his testimony about the worth of the puppies amounted to mere speculation, especially where he admitted advertising the dogs as being of one breed when they were in fact of another breed. (County Ct, Cattaraugus Co) ♪

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