



Public Defense Backup Center
REPORT

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Defender News

Must Trial Lawyers Represent Their Clients on Appeals by the Prosecution?

The Court of Appeals recently addressed an appointed lawyer’s duty to represent a client on an appeal filed by the prosecution. The attorney told his client about the prosecution’s appeal to the Appellate Division but failed to represent the client on that appeal. Finding that the lawyer had failed to comply with the terms of the Second Department rule found at 22 NYCRR 671.3(f), the Court of Appeals held that the client’s subsequent application for relief should have been granted. “Although a writ of error coram nobis generally raises the claim that defendant received ineffective assistance of appellate counsel, the writ is also a proper vehicle for addressing the complete deprivation of appellate counsel that occurred here.” *People v Brun*, _NY3d_, 2010 NY Slip Op 07580 (No. 229 SSM 50, 10/26/10). A summary of the decision appears on p. 24.

The memorandum opinion raises more questions than it resolves. Prof. Larry Cunningham asked some on his New York Criminal Law and Procedure blog, including: who represents a defendant when the prosecution appeals a pretrial order—“Trial counsel, who is usually inexperienced in handling appeals?” (<http://www.nycrimblog.com/nycrim/2010/10/role-of-defense-counsel-on-a-peoples-appeal.html>.)

Others include, what must, and can, trial counsel do to ensure that clients receive effective assistance on such appeals, given Rule of Professional Conduct 1.1(b): “A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it”?

Also, why did the Court of Appeals not mention 22 NYCRR 105.4, which should make the decision universally applicable? Related to that, how common is this problem? And related to *that*, might there be a number of convicted persons who may be able to seek and obtain relief by combining the *Brun* holding with that of *People v Syville* (_NY3d_, 2010 NY Slip Op 07249 [10/14/10]) [Coram Nobis relief may be granted even if the time limit for seeking to file a Late Notice of Appeal has passed]?

ICE’d in: No Opting Out of “Secure Communities” Initiative?

In early October, the federal Department of Homeland Security (DHS) announced deportation statistics for the past year. Among other things, DHS noted that the “Secure Communities” initiative—which uses biometric information and services to identify and remove from the country supposedly criminal noncitizens in state prisons and local jails—has expanded from 14 jurisdictions in 2008 to more than 660 today. But opponents of the measure question whether the initiative contributes to public safety.

One report says that, “According to Immigration and Customs Enforcement (ICE) records obtained by the Benjamin N. Cardozo School of Law, the Center for Constitutional Rights, and the National Day Laborer Organizing Network through a Freedom of Information Act request, 79 percent of individuals deported through the Secure Communities program from October 2008 through June 2010 had no criminal record or were arrested for minor offenses like traffic violations.” (<http://www.wnyc.org/articles/wnyc-news/2010/oct/20/immigration-leaders-press-paterson-revoke-enforcement-program/>.) As the *REPORT* went to press, preliminary findings about deportation of individuals from New York City jails and Rikers Island were released showing that over a quarter of individuals tagged for deportation had A misdemeanors or even lower-level offenses. (http://www.democracynow.org/seo/2010/11/18/as_new_york_debates_secure_communities.)

New York State is among the jurisdictions agreeing to participate in Secure Communities; in May 2010, the New York State Division of Criminal Justice Services (DCJS) and DHS entered into a written Memorandum of Agreement. Immigrant rights leaders

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want Governor David A. Paterson to withdraw New York from the agreement. NYSDA, through its Criminal Defense Immigration Project (CDIP), is among those advocating for withdrawal. The article above said that no community in New York has yet started sharing digital fingerprint data with ICE, but advocates fear it could happen at any time.

A DCJS spokesperson has reportedly said that local implementation will essentially occur on an opt-in basis. (www.deportationnation.org/2010/10/new-york-braces-for-fight-on-secure-communities/.) However, other sources indicate that is not the case. Very recently, *The New York Times* reported that confusion continues about how Secure Communities works and whether local participation is required. (http://www.nytimes.com/2010/11/10/nyregion/10secure.html?_r=1&ref=nyregion&pagewanted=print.)

Since May, DHS has initiated outreach to implement Secure Communities in Genesee, Orleans, Wayne, Oswego, Onondaga, Oneida, Herkimer, Hamilton, and Madison counties. ICE is scheduled to conduct outreach in Niagara, Monroe, Livingston, Ontario, Yates, Seneca, Cayuga, and Wyoming counties in the next few months before approaching counties located downstate. On November 14, 2010, a press report called the Putnam County Sheriff's Department "the first police agency in New York to join" Secure Communities. (<http://www.lohud.com/article/20101114/NEWS01/11140376/Putnam-Sheriff-s-Office-joins-federal-illegal-immigration-program>.)

The Secure Communities initiative leads to increased numbers of immigration detainees placed on noncitizens brought into the criminal justice system. Such a detainer is a "hold" rather than a warrant for arrest, and requires that ICE be notified of the individual's scheduled release from a jail or prison pursuant to 8 CFR 287.7. ICE then decides whether or not to apprehend the noncitizen, charge the noncitizen with an immigration violation, and detain the noncitizen in civil immigration detention until a determination is made by an immigration judge as to whether the noncitizen should be removed from the United States. The jail or prison can continue to hold an individual for ICE up to 48 hours (not including weekends and federal holidays) following that person's ordered release.

With the threat of detention and ultimate deportation hanging over noncitizen clients, criminal defense lawyers have an interest in information about the implementation of Secure Communities (and other ICE actions) in their area. CDIP works with other advocates to provide advisories and notices about developments in the implementation of Secure Communities in New York State. For more information, contact CDIP Director Joanne Macri by phone (716-913-3200) or email (jmacri@nysda.org).

ILSB Begins Its Work With a National Search for Head of the New Office

All members of the Indigent Legal Services Board created by statute earlier this year have been appointed. (For a description of the Board, and the Office of Indigent Legal Services, see the last issue of the *REPORT* or the website, www.nysda.org.) The members of the Board are:

- Chief Judge Jonathan Lippman
- Michael G. Breslin (Albany County Executive)
- Judge Sheila DiTullio (Erie County Court Judge)
- John R. Dunne (former State Senator and member of the Kaye Commission)
- Gail Gray (NYC criminal defense attorney)
- Susan V. John (currently, Assemblywoman from Rochester)
- Joseph C. Mareane (Tompkins County Administrator)
- Leonard Noisette (former director of the Neighborhood Defender Service of Harlem)
- Susan Sovie (Watertown Family Court attorney)

The Board held its first meeting on November 1st, and embarked on a national search to fill the position of Director of the Office of Indigent Legal Services. Notices were posted on national and state websites, including the American Bar Association, the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, the New York State Bar Association, and of course NYSDA. News of the opening spread via blogs like the Native American Law Blog (<http://lawprofessors.typepad.com/nativeamerican/>) and commercial job search pages, helping ensure that

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THE REPORT IS PRINTED ON RECYCLED PAPER

CONFERENCES & SEMINARS

Sponsor: National Association of Criminal Defense Lawyers
Theme: 31st Annual Advanced Criminal Law Seminar
Dates: January 16–22, 2011
Place: Aspen, CO
Contact: NACDL (Gerald Lippert): tel (202) 872-8600 x 236; email Gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Legal Aid & Defender Association
Theme: Appellate Defender Training
Dates: January 27–30, 2011
Place: New Orleans, LA
Contact: NLADA: tel (202) 452-0620; website www.nlada.org/Training

Sponsor: National Association of Criminal Defense Lawyers
Theme: Modern Evidence, Modern Defenses: What it Takes to Win Your Case
Dates: February 16–19, 2011
Place: San Antonio, TX
Contact: NACDL (Tamara Kalacevic): tel (202) 872-8600 x 241; email tamara@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Legal Aid & Defender Association
Theme: Life in the Balance

Dates: March 5–8, 2011
Place: Orlando, FL
Contact: NLADA: tel (202) 452-0620; website www.nlada.org/Training

Sponsor: New York State Defenders Association
Theme: 25th Annual Metropolitan Trainer
Date: March 12, 2011
Place: NYU Law School, New York City
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: Making Sense of Science IV: Forensic Science & the Law
Dates: March 25–26, 2011
Place: Las Vegas, NV
Contact: NACDL (Gerald Lippert): tel (202) 872-8600 x 236; email Gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: New York State Defenders Association
Theme: 44th Annual Meeting & Conference
Dates: July 24–26, 2011
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org ☪

Job Opportunities

The Wayne County Public Defender's Office (Lyons, New York) is seeking **Attorneys** for two (2) full time positions. **First Assistant Public Defender**—This attorney would be responsible in part for administering the office staff as well as handling felony calendars and trials in County Court, administering appeals and some Justice Court work. Requirements include a strong commitment to indigent defense work and trial experience. Starting salary is in the \$70,000's BOE with excellent benefits including membership in the New York State Retirement System. This position will commence January 2011. **Second Assistant Public Defender**—This is an entry level position with responsibilities in Justice Courts and for Parole Violations. It is anticipated that the Attorney hired would be exposed to felony work with eventual County Court responsibilities. Starting salary is in the \$50,000's BOE with excellent

benefits including membership in the New York State Retirement System. This position will commence December 2010. Interested applicants for either position should submit a résumé by **December 10, 2010**, to the Wayne County Public Defender's Office, 26 Church Street, Lyons, New York 14489, Attn: James S. Kernan, Esq. and should specify for which position they wish to apply. Please include two (2) references with telephone numbers and a writing sample. All applicants must be admitted to practice law in the State of New York and have a valid driver's license.

Equal Justice Works and the Southern Public Defender Training Center have partnered to establish the Public Defender Corps, a three-year fellowship program aimed at addressing the ongoing national crisis of providing quality representation to accused persons who cannot afford counsel. They are current-

ly accepting applications for this public defense pilot project. Approximately 20 fellowships will be selected, with terms commencing in the Fall of 2011. Fellows will be placed in a partner host site Public Defender office. Host site defender offices currently under consideration include New York, Massachusetts, Pennsylvania, Ohio, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. Final host sites will be announced in late 2010. The application is open to all law students from Equal Justice Works member law schools and lawyers with less than three years of practice. Application and supporting documents are due by **5 p.m. EST on Friday, December 17, 2010**. For more information, visit <http://www.equaljusticeworks.org/programs/public-defender-corps/general>. ☪

The following is a synopsis of recent case law of interest to the public defense community. The index headings appearing before each case are from the Association's Subject Matter Index. These case briefings are not exhaustive, nor are they designed to replace a careful reading of the full opinion.

Citations to the cases digested here can be obtained from the Backup Center as soon as they are published.

United States Supreme Court

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

Carr v United States, 560 US __, 130 Sct 2229 (2010)

The petitioner pleaded guilty in Alabama state court to first-degree sexual abuse. His prison sentence was suspended and, after his release on July 3, 2004, he registered as a sex offender under Alabama law. In late 2004 or early 2005, prior to enactment of the federal Sex Offender Registration and Notification Act (SORNA), the petitioner relocated to Indiana. He did not comply with Indiana's sex-offender registration requirements. In 2007, Indiana law enforcement learned of his presence in the state. On Aug. 22, 2007, federal prosecutors filed an indictment charging him with failing to register. He moved to dismiss, asserting that because he traveled to Indiana prior to SORNA's effective date, the Ex Post Facto Clause bars the prosecution. Dismissal was denied. He pleaded guilty and received a 30-month prison sentence. His conviction was affirmed.

Holding: SORNA, passed as part of the Adam Walsh Child Protection and Safety Act, includes a provision (18 USC 2250[a]) that created a federal criminal offense covering "any person who (1) 'is required to register under [SORNA],' (2) 'travels in interstate or foreign commerce,' and (3) 'knowingly fails to register or update a registration.'" The elements of 2250 are to be read sequentially. At issue is what event sets that sequence in motion. The petitioner correctly argues that the sequence begins when a person becomes subject to SORNA's registration requirements, which can only occur after SORNA's enactment. The language of the first provision of the statute, and the use of the present tense of the verb "travel," signify prospective application. Therefore, the provision the petitioner was alleged to have violated did not extend to pre-enactment travel. There is no need to consider here whether a construction of the statute applying it to pre-enactment travel would present difficulties under the Constitution's Ex Post Facto Clause. Judgment reversed.

Concurrence in Part, Concurrence in Judgment: [Scalia, J] The meaning of 18 USC 2250(a) was plain and nothing more was required to reach judgment here.

Dissent: [Alito, J] Congress intended 18 USC 2250(a) to apply to those persons who violated the registration requirement after the date of SORNA's enactment.

Prisoners (Good Time)

PRS I; 300(20)

Barber v Thomas, 560 US __, 130 Sct 2499 (2010)

The petitioners alleged that the federal Bureau of Prisons (BOP) used an unlawful method for calculating credit under 18 USC 3624(b)(1). The petitioners claimed that the statute requires a straightforward calculation based upon the length of the term of imprisonment the sentencing judge imposed, not the length of time that the prisoner actually serves. They alleged that the BOP's method caused model prisoners to lose seven days of good time credit per year of imprisonment, amounting to several months of additional prison time on long sentences. The district court in each case rejected the claims, and the decisions were affirmed.

Holding: The BOP's calculation method is lawful. Its interpretation comports with the language of the statute that the credit may be received at the end of each year of the prisoner's term of imprisonment, starting with the end of the first year of the term. The calculation "provides a prisoner entitled to a maximum annual credit with 54 days of good time credit for each full year of imprisonment that he serves and a proportionally adjusted amount of credit for any additional time served that is less than a full year." "The good time exception is limited . . . and tailored to its purpose—credit is earned at the end of the year after compliance with institutional rules is demonstrated and thereby rewards and reinforces a readily identifiable period of good behavior." BOP's approach furthers the statutory objective by tying the award of good time credits directly to good behavior during the prior year. Judgment affirmed.

Dissent: [Kennedy, J] The majority's interpretation disadvantages almost 200,000 prisoners at a human and fiscal cost. A fair reading of the statute interprets the phrase "term of imprisonment" as referring to the time that a prisoner must account for to obtain release. A calculation in which credits earned go toward the completion of the next year would provide 63 more days of credit on a ten-year sentence than the majority's method.

Juveniles (Delinquency) (General) JUV; 230(15) (55)

Sentencing (Ex Post Facto Punishment) SEN; 345(35)

Sex Offenses (Sentencing) SEX; 350(25)

**United States v Juvenile Male, 560 US __,
130 Sct 2518 (2010)**

In 2005, the respondent was charged with juvenile delinquency under the Federal Juvenile Delinquency Act (FJDA), 18 USC 5031 *et seq.* He pleaded to knowingly engaging in sexual acts with a person under 12 years of age, a crime under 18 USC 2241(c) and 1153(a) if committed by an adult. Adjudged a delinquent, he was sentenced

US Supreme Court *continued*

to two years' detention and supervision until he turned 21. In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 42 USC 16901 *et seq.* SORNA requires individuals who have been adjudicated delinquent for certain serious sex offenses to register and to keep their registrations current in each jurisdiction where they live, work, and go to school. "In February 2007, the Attorney General issued an interim rule specifying that SORNA's requirements 'apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA].' 72 Fed. Reg. 8897 (codified at 28 CFR §72.3 (2009))." In July 2007, the court revoked the respondent's juvenile supervision for failure to comply with the requirements of the prerelease program and sentenced him to an additional 6-month term of detention followed by supervision until he turned 21. The court also ordered him to register as a sex offender and to keep his registration current. The Court of Appeals vacated the sex-offender-registration requirements.

Holding: Whether retroactive application of SORNA to a juvenile delinquent is constitutional under the Ex Post Facto Clause cannot be determined until the mootness question is resolved. On May 2, 2008, the respondent's term of supervision expired. Unless voiding the sex-offender-registration conditions of his juvenile supervision might "be sufficiently likely to redress 'collateral consequences,' [the case does not] meet Article III's injury-in-fact requirement." *Spencer v. Kemna*, 523 US 1, 14 (1998)." The following question is certified to the Montana Supreme Court: "Is respondent's duty to remain registered as a sex offender under Montana law contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order that required him to register as a sex offender . . . , or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions . . . ?" Further proceedings reserved pending receipt of a response.

Aliens (Deportation)

ALE; 21(10)

Carachuri-Rosendo v Holder, 560 US __, 130 S Ct 2577 (2010)

The petitioner has been a lawful permanent resident in the United States since he was five years old. He committed two misdemeanor drug possession offenses in Texas. For possessing less than two ounces of marijuana, he received 20 days in jail. For possessing one tablet of a common antianxiety medication without a prescription, he received 10 days. After the second offense, the federal government initiated removal proceedings. The petitioner

conceded that he was removable, but claimed eligibility for discretionary relief from removal. *See* 8 USC 1229b(a). The federal Court of Appeals held that a simple drug possession offense, committed after the conviction for a first possession offense became final, is always an aggravated felony, precluding relief.

Holding: "[S]econd or subsequent simple possession offenses are not aggravated felonies under [8 USC] 1101(a)(43) when, as in this case, the state conviction is not based on the fact of a prior conviction." A lawful permanent resident subject to removal may apply for discretionary cancellation of removal if the resident does not have an aggravated felony conviction. *See* 8 USC 1229b(a)(3). With a few exceptions not applicable here, "only *recidivist* simple possession offenses are 'punishable' as a federal 'felony' under . . . 18 U.S.C. §924(c)(2)." According to *Lopez v Gonzales* (549 US 47, 56 [2006]), "in order to be an 'aggravated felony' for immigration law purposes, a state drug conviction must be punishable as a felony under *federal law*." The mere possibility that the defendant's conduct could have been treated as a felony under federal law is insufficient to eliminate the opportunity to seek cancellation of removal. "[W]hen a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been 'convicted' . . . of a 'felony punishable' as such 'under the Controlled Substances Act,' 18 U.S.C. §924(c)(2)." The petitioner, "and others in his position, may now seek cancellation of removal and thereby avoid the harsh consequence of mandatory removal." His conviction still makes him removable and relief is dependent on the discretion of the Attorney General. Judgment reversed.

Concurrence: [Scalia, J] "[A] misdemeanor offense with a sentencing factor that raises its punishment to the felony level qualifies for purposes of establishing the elements of a 'felony punishable under the Controlled Substances Act'; but does *not* qualify for purposes of determining what elements the alien has been 'convicted of.'" The petitioner was convicted of a misdemeanor and the crime did not contain a recidivism element. Therefore, his crime of conviction was not equivalent to the federal felony of recidivist possession under the Controlled Substances Act (21 USC 844(a)).

Concurrence: [Thomas, J] In order for the petitioner's conviction to qualify as a drug trafficking crime, which would make him ineligible for cancellation of removal, two requirements must be met: the offense must be a felony and must be capable of punishment under the federal Controlled Substances Act. *Lopez*, which allows a noncitizen to be eligible for deportation for a state misdemeanor if the underlying conduct is punishable as a felony under federal law, was wrongly decided. But a proper reading of the statute supports the Court's conclusion.

US Supreme Court *continued*

Sentencing (Restitution) SEN; 345(71)

Dolan v United States, 560 US __, 130 SCt 2533 (2010)

The petitioner pleaded guilty to a federal charge of assault resulting in serious bodily injury. The plea agreement included the possibility of restitution. The presentence report did not recommend a specific restitution amount in the absence of information about hospital costs and lost wages. The court sentenced the petitioner to a term of imprisonment and a period of supervised release, and stated that while restitution was applicable under the Mandatory Restitution Act (18 USC 3664), since no information had been received as to possible restitution owed, restitution would not be ordered at sentencing. An addendum to the presentence report regarding the total amount of restitution was submitted 67 days after sentencing and 23 days before expiration of the “90 days after sentencing” deadline. See 18 USC 3664(d)(5). The court set a restitution hearing about three months after the 90-day deadline expired. The petitioner objected. Restitution was ordered and the Court of Appeals affirmed.

Holding: Although the sentencing court missed the 90-day deadline, it retained the power to order restitution because it made clear prior to the deadline that it would order restitution and only left open, beyond the deadline, the amount. The statute requires that the court set a date for a final determination of losses not more than 90 days after sentencing. See 18 USC 3664(d)(5). The statute’s deadline is a “time-related directive” that does not deprive the court of the power to order restitution if the deadline is missed. See *eg United States v Montalvo-Murillo*, 495 US 711, 722 (1990). Several considerations support this conclusion. The statute does not provide a consequence for failure to comply with the deadline and federal courts will not ordinarily impose their own sanction. See *United States v James Daniel Good Real Property*, 510 US 43, 63 (1993). The statute emphasizes the importance of imposing restitution. And its procedural provisions support that purposes and require speed primarily to help crime victims, not defendants. If the statute was read as depriving the court of the power to order restitution, crime victims, who likely are not responsible for the missed deadline, would be harmed. Also, a defendant can usually mitigate the harm caused by a missed deadline where, as here, the court provided information about the restitution amount before the deadline expires. A defendant can tell the court a deadline is approaching, and appropriate action can be taken. In the unlikely event of a deliberate failure of the court to comply with the statute, a defendant can also seek mandamus. Arguments as to appellate or other harms claimed to result from a missed deadline are rejected. Judgment affirmed.

Dissent: [Roberts, J] Absent 18 USC 3664(d)(5), the court must impose restitution at sentencing, if at all. That section is a limited exception to the rule that the court cannot alter a sentence after sentencing, and does not give the court “a free pass to impose restitution whenever the trial court gets around to it.”

Counsel (Competence/Effective Assistance/Adequacy) (Duties) (Right to Counsel) COU; 95(15) (20) (30)

Habeas Corpus (Federal) HAB; 182.5(15)

Holland v Florida, 560 US __, 130 SCt 2549 (2010)

In 1997, the petitioner was convicted of first-degree murder and sentenced to death. After the Florida Supreme Court affirmed, this Court denied *certiorari* on Oct. 1, 2001, ending direct review and beginning the one-year Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limit for seeking habeas corpus relief. See 28 USC 2244(d)(1)(A). Thirty-seven days later, on Nov. 7, 2001, Florida appointed an attorney to represent the petitioner in all state and federal postconviction proceedings. On Sept. 19, 2002, the attorney filed a motion for postconviction relief in state court. This stopped the AEDPA clock with 12 days remaining. As state proceedings continued, relations between the attorney and the petitioner began to sour; the petitioner twice asked the court to remove the lawyer due to lack of communication. On Feb. 10, 2005, his attorney argued the appeal before the Florida Supreme Court, and shortly thereafter, the petitioner wrote to the attorney emphasizing the importance of filing a timely federal habeas petition once the Florida Supreme Court ruled. There was no reply. In November 2005, the Florida Supreme Court affirmed the lower court decision, and on Dec. 1, 2005, the court issued its mandate. The petitioner’s AEDPA deadline expired on Dec. 13, 2005. Unaware of the ruling, the petitioner again wrote his attorney, on Jan. 9, 2006, pointing out the timing issue. When the petitioner finally learned, on Jan. 18, 2006, of the state Supreme Court action, he wrote a pro se federal habeas petition and mailed it the next day. The federal district court held that equitable tolling was not warranted and that the petition was untimely. The Court of Appeals affirmed.

Holding: The AEDPA statutory limitations period may be tolled for equitable reasons. The deadline is not jurisdictional. See *Day v McDonough*, 547 US 198, 205 (2006). A petitioner is entitled to equitable tolling only upon showing a diligent pursuit of his rights and some extraordinary circumstance that stood in the way, preventing timely filing. See *Pace v DiGuglielmo*, 544 US 408, 418 (2005). The attorney here failed to timely file the federal petition despite many letters from his client emphasizing the importance of doing so. Apparently the lawyer failed to do the research necessary to find out the proper

US Supreme Court *continued*

filing date, and he failed to tell the petitioner in a timely manner about the Florida Supreme Court's decision. The petitioner not only wrote his attorney numerous letters seeking crucial information and providing direction, he also repeatedly contacted the state courts, their clerks, and state Bar Association seeking to have his attorney, who became the central impediment to seeking habeas relief, removed. And, the very day he learned that the AEDPA deadline had expired due to the attorney's failings, he prepared his own habeas petition pro se and promptly filed it. "Because the District Court erroneously relied on a lack of diligence, and because the Court of Appeals erroneously relied on an overly rigid *per se* approach, no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief." The Court of Appeals should determine whether the facts in this record entitle the petitioner to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that the respondent should prevail. Judgment reversed and matter remanded.

Concurrence: [Alito, J] "[E]quitable tolling requires 'extraordinary circumstances,' but that conclusory formulation does not provide much guidance to lower courts charged with reviewing the many habeas petitions filed every year." Attorney negligence is not an extraordinary circumstance, but the "statute of limitations may be tolled if the missed deadline results from attorney misconduct that is not constructively attributable to the petitioner." "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word."

Dissent: [Scalia, J] AEDPA left no room for equitable exceptions, and the petitioner could not qualify even if it did. "[B]y specifying situations in which an equitable principle applies to a specific requirement, Congress has displaced courts' discretion to develop ad hoc exceptions. Cf. *Lonchar v. Thomas*, 517 U.S. 314, 326-328 (1996)."

Search and Seizure (Electronic Searches) SEA; 335(30)
City of Ontario v Quon, 560 US __, 130 Sct 2619 (2010)

The respondent, a police officer, was employed by the petitioners, including the City of Ontario (City). The City provided the respondent and others with alphanumeric pagers. A set number of characters could be sent or received each month; any usage above that resulted in additional fees. The City's technology use policy stated that the City "reserves the right to monitor and log all network activity including e-mail and Internet use . . . [and] [u]sers should have no expectation of privacy or

confidentiality when using these resources.'" Later, the City said it would treat text messages the same way as it treated emails. After the respondent exceeded his character limit a few times, his supervisor audited his text messages to determine if the existing character limit was too low. Many of the audited messages were not work related and some were sexually explicit. The respondent was disciplined for misusing his pager. He filed suit, claiming that the petitioners violated his Fourth Amendment rights and the Stored Communications Act [SCA] (18 USC 2701 *et seq.*) by obtaining and reviewing the transcript of his pager messages and that the pager company violated the SCA by turning over a transcript of his text messages. The court granted the pager company's summary judgment motion, but denied the petitioners' motion on the Fourth Amendment claims. Based on a jury's finding that the audit's purpose was to determine the efficacy of the character limits, the district court held that the petitioners did not violate the Fourth Amendment. The Court of Appeals reversed in part.

Holding: For purposes of this Court's review, it is assumed that the respondent had a reasonable expectation of privacy in the text messages, the transcript review constituted a search under the Fourth Amendment, and the principles applicable to a government's search of its employees' physical offices apply in the electronic sphere. "[W]hen conducted for a 'noninvestigatory, work-related purpos[e]' or for the 'investigatio[n] of work-related misconduct,' a government employer's warrantless search is reasonable if it is "'justified at its inception'" and if "'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of'" the circumstances giving rise to the search." *O'Connor v Ortega*, 480 US 709, 725-726 (1987). The petitioners had a legitimate interest in ensuring that employees were not being forced to pay for work-related expenses and that the City was not paying for extensive personal communications. The respondent was told his messages were subject to audit, and he should have known that his actions were likely to come under legal scrutiny, which would include an analysis of his on-the-job communications. The otherwise reasonable search was not rendered unreasonable by the assumption that the pager company violated the SCA by turning over the transcripts. See *Virginia v Moore*, 553 US 164, 168 (2008). Judgment reversed.

Concurrence: [Stevens, J] It is unnecessary to resolve whether the plurality opinion in *O'Connor* provided the correct approach to determining an employee's reasonable expectation of privacy. The respondent, a law enforcement officer, had only a limited expectation of privacy in relation to this audit of his pager messages.

Concurrence: [Scalia, J] The rubric for determining the Fourth Amendment's application to public employees invented by the plurality in *O'Connor* is standardless and unsupported. The proper threshold inquiry should be

US Supreme Court *continued*

whether the Fourth Amendment applies in general to text messages on employer-issued pagers. In any event, the City’s search was reasonable.

Federal Law (Crimes) **FDL; 166(10)**
Sentencing (Guidelines) **SEN; 345(39) (70.5)**
(Resentencing)

Dillon v United States, 560 US __, 130 SCt 2683 (2010)

The petitioner was convicted of federal drug and firearms related offenses. Applying the federal sentencing guidelines to the quantities of crack and powder cocaine resulted in a then-mandatory guidelines range of 262 to 327 months’ imprisonment for the drug counts. The court sentenced the petitioner at the bottom of the guidelines range; his conviction was affirmed. After the crack-cocaine amendment to the guidelines was made retroactive in 2008, the petitioner filed a pro se motion for a sentence reduction pursuant to 18 USC 3582(c)(2). The court reduced his sentence to the bottom of the revised guidelines range. The Court of Appeals affirmed.

Holding: Congress provided an exception to the rule that a federal court generally may not modify an imposed prison term; the exception applies to defendants sentenced based on a sentencing range that is subsequently lowered. *See* 18 USC 3582(c)(2). In those circumstances, a court may reduce the prison term if doing so is consistent with applicable Sentencing Commission policy. The applicable policy statement instructed courts not to reduce a sentence below the minimum of the amended sentencing range except to the extent the initial term of imprisonment was below the then-applicable range. *See* United States Sentencing Commission, Guidelines Manual § 1B1.10(b)(2) (Nov. 2009). *United States v Booker* (543 US 220 [2005]), which rendered the guidelines advisory to remedy Sixth Amendment problems, does not require that § 1B1.10(b) be treated as nonbinding. “We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments. Rather, §3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines.” The Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt is not implicated. Judgment affirmed.

Dissent: [Stevens, J] When the court originally sentenced the petitioner, it stated that the punishment was “entirely too high for the crime [he] committed.” Had he been sentenced after *Booker*, the judge would have had the discretion to give a below-guidelines sentence. While the petitioner did not have a constitutional right to the benefit of the reduced sentencing guidelines, he has a statutory

one. *See* 18 USC 3582(c)(2). Treating the policy statement as a mandatory command rather than an advisory recommendation is unfaithful to *Booker*.

Constitutional Law (United States Generally) **CON; 82(55)**

Speech, Freedom of (General) **SFO; 353(10)**

Holder v Humanitarian Law Project, 561 US __, 130 SCt 2705 (2010)

Plaintiffs-respondents are two US citizens and six domestic organizations. In 1998, they filed a federal suit challenging the constitutionality of the material-support statute, 18 USC 2339B, which makes it a crime to “knowingly provid[e] material support or resources to a foreign terrorist organization.” The plaintiffs wanted to provide monetary contributions, tangible aid, legal training, and political advocacy support for the humanitarian and political activities of the Kurdistan Workers’ Party (PKK) and the Tigers of Tamil Eelam (LTTE), whose purpose was to break away from Turkey and Sri Lanka, respectively, and establish independent states. The district court found that the PKK and LTTE engaged in political and humanitarian activities. The government presented evidence that both groups had committed numerous terrorist attacks. The plaintiffs claimed that the material support statute violated their First Amendment freedoms of speech and association, criminalized their support of the named groups without requiring proof that the plaintiffs had a specific intent to further the unlawful ends of those organizations, and was unconstitutionally vague. A preliminary injunction was granted in part and affirmed on appeal. On remand, the district court entered a permanent injunction against applying to the plaintiffs the bans on “personnel” and “training” support. In 2001, Congress amended the definition of “material support or resources” to add the term “expert advice or assistance.” In a second action challenging the constitutionality of that term as applied to the plaintiffs, the district court held that it was impermissibly vague. Thereafter, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), § 6603, 118 Stat. 3762-3764, which clarified the mental state necessary to violate 2339B and added or clarified other provisions. The district court’s ruling was affirmed.

Holding: The plaintiffs challenge the prohibition on four types of material support—“training,” “expert advice or assistance,” “service,” and “personnel.” They raise three constitutional claims: the four terms are impermissibly vague, violating the Due Process Clause of the Fifth Amendment; the statute violates their First Amendment freedom of speech; and the statute violates their First Amendment freedom of association. Congress plainly spoke to the necessary mental state for a violation of the statute, *ie*, knowledge of the organization’s connection to

US Supreme Court *continued*

terrorism, not a specific intent to further the organization's terrorist activities. To judicially require proof of the latter intent would be to revise, not interpret, the statute. The statutory terms are clear in their application to the plaintiffs' desired conduct. Independent advocacy for the specified groups' causes is specifically excluded from the term "personnel." The First Amendment issue is whether the government may prohibit material support of the specified groups that takes the form of speech. "Material support" may free up other organizational resources for violent use, help lend legitimacy to the specified terrorist groups, making it easier for them to raise funds and attract other support, and strain relations between the US and its allies. "[O]nly material support coordinated with or under the direction of a designated foreign terrorist organization" is banned. "[A]ll contributions to foreign terrorist organizations further their terrorism." *McKune Affidavit*, App. 133, P8. See *Winter v Natural Resources Defense Council, Inc.*, 555 US __, 129 SCt 365 (2008). Judgment affirmed in part and reversed in part.

Dissent: [Breyer, J] The government failed to meet its burden of showing that an interpretation of the statute that prohibits speech- and association-related activity, coordinated teaching and advocacy to further lawful political objectives of the specified groups, serves a compelling government interest in combating terrorism. The statute should be read to place such activity outside its scope. See *Crowell v Benson*, 285 US 22, 62 (1932). A statutory requirement that a defendant know the support is "material" can be read as requiring proof that the defendant knew that consequences flowing from his acts had a significant likelihood of furthering an organization's terrorist, not just its lawful, aims.

Federal Law (Crimes) **FDL; 166(10)**

Fraud (General) **FRD; 176(10)**

Black v United States, 561 US __, 130 SCt 2963 (2010)

In 2005, the petitioners, leading executives of a publicly held US company, were indicted for three counts of mail fraud. The prosecution raised two mail-fraud theories: (1) the petitioners stole millions from their company by fraudulently paying themselves bogus "noncompetition fees"; and (2) by failing to disclose those fees, the petitioners deprived the company of their honest services as managers. The judge instructed the jury on both theories. As to the latter, the court said, over objection, that a person commits honest-services fraud if he "'misuse[s] his position for private gain for himself and/or a co-schemer' and 'knowingly and intentionally breache[s] his duty of loyalty.'" The prosecution requested a special-verdict form that would, if the jury convicted on a mail fraud

count, reveal the theory or theories accounting for the verdict. The petitioners objected, proposing that upon return of a guilty verdict on any mail-fraud count, jurors could be asked to specify their theory. After the court rejected its request, the prosecution said it would not object to submission of the mail-fraud counts for decision by general verdict. The jury returned guilty verdicts on all three mail-fraud counts. On appeal, the petitioners alleged that the honest-services fraud instructions were improper. The Court of Appeals affirmed.

Holding: The honest-services instructions given in this case are incorrect under *Skilling v United States* (130 SCt 2896 [2010]), which held that 18 USC 1346 criminalizes only schemes to defraud that involve bribes or kickbacks. The issue here is whether the petitioners forfeited their objections to the honest-services instructions by failing to agree to the prosecution's request for special verdicts. The Federal Rules of Criminal Procedure are silent on special findings in jury trials, but are informative on objections to instructions. See Rule 30(d). The petitioners complied with Rule 30(d)'s requirement that objections to instructions be specific and include grounds. The Court of Appeals devised a further "forfeiture sanction unmoored to any federal statute or criminal rule," and gave the prosecution the authority to trigger the sanction by requesting a special verdict. Without actual notice before the non-compliance, no sanction may be imposed for failing to comply with a requirement not found in a federal statute or rule. See Rule 57(b). The petitioners' objection to the honest-services jury instructions secured their right to challenge those instructions on appeal. "[A] general verdict may be set aside 'where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.'" *Yates v United States*, 354 US 298, 312 (1957). Judgment vacated and remanded.

Concurrence: [Scalia, J] The Court improperly relied on the Notes of the Advisory Committee in determining the meaning of Rule 30(d). The error here lay in instructing on honest-services fraud at all, which is an unconstitutionally vague offense.

Concurrence in Part, Concurrence in Judgment: [Kennedy, J] The honest-services statute is unconstitutionally vague. Conviction based on an honest-services-fraud theory violates a defendant's Fifth Amendment Due Process rights.

Death Penalty (Due Process) **DEP; 100(55) (120)**
(Penalty Phase)

Habeas Corpus (Federal) **HAB; 182.5(15)**

Magwood v Patterson, 561 US __, 130 SCt 2788 (2010)

The petitioner was tried in 1981 and sentenced to death. His act of killing an on-duty sheriff was found to be an aggravating, death eligibility factor under Alabama

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law, which was balanced against only two mitigating factors, his young age and clean record. After denial of his direct appeal and postconviction petition in state court, he sought a federal writ of habeas corpus. The district court conditionally granted the writ as to his sentence. The state trial court conducted a new sentencing in 1986, considering an additional mitigation factor, the petitioner’s mental status, and again imposed the death penalty. The petitioner challenged the new sentence on several grounds. After his claims were denied on direct appeal, he sought a second federal habeas writ. The district court granted the writ, but the Court of Appeals reversed.

Holding: The text and relief provided by 28 USC 2244(b), dealing with a “second or successive habeas corpus application,” indicate that the phrase “second or successive” must be interpreted with respect to the judgment challenged. The phrase clearly does not refer simply to habeas “applications filed second or successively in time.” *Panetti v Quarterman*, 551 US 930, 944 (2007). This was the petitioner’s first application for relief from the new judgment based on fair-warning and ineffective-assistance claims. Whether a second habeas challenge to the underlying conviction would lie after resentencing is not at issue here. Judgment reversed and matter remanded.

Concurrence: [Breyer, JJ] If the petitioner challenged an undisturbed state-court judgment for the second time, “abuse-of-the-writ principles would apply, including *Panetti*’s holding that an ‘application’ containing a ‘claim’ that ‘the petitioner had no fair opportunity to raise’ in his first habeas petition is not a ‘second or successive’ application.”

Dissent: [Kennedy, JJ] “The Court’s approach disregards [the Antiterrorism and Effective Death Penalty Act of 1966] ADEPA’s “principles of comity, finality, and federalism” *Panetti*, 551 U.S., at 945” Under this newly created exception, “a defendant who succeeds on even the most minor and discrete issue relating to his sentencing would be able to raise 25 or 50 new sentencing claims in his second habeas petition, all based on arguments he failed to raise in his first petition.”

Fraud (General) FRD; 176(10)

Venue (Change of Venue) VEN; 380(5)

Skilling v United States, 561 US __, 130 SCt 2896 (2010)

The petitioner, Jeffrey Skilling, was Enron’s chief executive officer. After he left, the company went into bankruptcy. A government investigation uncovered an elaborate conspiracy to prop up Enron’s short-run stock prices by overstating its financial well-being. The petitioner and other Enron executives were indicted for conspiracy to commit securities and wire fraud. The peti-

tioner moved to transfer the trial from Houston, Enron’s base, to another venue. The venue-transfer motion was denied. The jury convicted the petitioner of 19 counts, including the honest-services-fraud conspiracy charge, and acquitted him of nine insider-trading counts. The Fifth Circuit affirmed.

Holding: While defendants have a Sixth Amendment right to trial by impartial jury in the state where the alleged crime was committed (*see also* Art. III, § 2, cl. 3), the place-of-trial prescription does not block transfer to a different district at the defendant’s request if extraordinary local prejudice would prevent a fair trial. *See In re Murchison*, 349 US 133, 136 (1955). Only in an extreme case does publicity give rise to a presumption of prejudice. *See Rideau v Louisiana*, 373 US 723 (1963). The size and characteristics of the community where venue initially lies must be considered, with prejudice more likely in smaller populations. Houston is the nation’s fourth most populous city, with more than 4.5 million individuals eligible for jury duty. The news about the petitioner’s case contained no confession or other blatantly prejudicial information and was spread over four years, softening the volume of media attention. And the jury acquitted the petitioner of some charges. The trial court’s *voir dire* took into account the greater-than-normal need to ensure against jury bias, and jury questionnaires confirmed that the selected jurors were not under the sway of any community prejudice. The petitioner failed to establish a presumption of prejudice arose or that actual bias existed in his jury.

The honest-services fraud statute, 18 USC 1346, was intended to refer to and incorporate the honest-services doctrine recognized in federal Court of Appeals decisions before *McNally v United States* (483 US 350 [1987]). *McNally* derailed a developing intangible-rights theory of fraud. Congress then enacted a new statute specifically covering “the intangible right of honest services.” *Cleveland v United States*, 531 US 12, 19-20 (2000). To save that statute from the petitioner’s vagueness claim, without transgressing constitutional limitations, it must be read to criminalize only the bribe-and-kickback core of the pre-*McNally* case law. Whether the petitioner’s conspiracy conviction must be reversed must be determined on remand. Judgment affirmed on fair-trial argument, ruling on conspiracy vacated, and case remanded.

Concurrence: [Scalia, JJ] The petitioner’s conviction for the “honest-services fraud” must be reversed because the statute is unconstitutionally vague. By “transforming the prohibition of ‘honest-services fraud’ into a prohibition of ‘bribery and kick-backs’ [the Court] is wielding a power [it] long ago abjured: the power to define new federal crimes. *See United States v. Hudson*, [11 US 32] (1812).”

Concurrence: [Alito, JJ] The Sixth Amendment guarantee of an impartial jury is satisfied “so long as no biased juror is actually seated at trial.”

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Concurrence in Part, Dissent in Part: [Sotomayor, JJ] The trial court's failure to cover certain vital subjects with prospective jurors, its superficial coverage of other topics, and its uncritical acceptance of assurances of impartiality made it doubtful that the jury was free from the deep-seated animosity that pervaded the community at large.

Constitutional Law (United States Generally) CON; 82(55)

Due Process (General) (Substantive Due Process) DUP; 135(7) (40)

Weapons (Firearms) (General) (Possession) WEA; 385(21) (22) (30)

McDonald v City of Chicago, 561 US ___, 130 S Ct 3020 (2010)

The petitioners, Chicago area residents, wanted to keep handguns in their homes for self-defense. A Chicago ordinance prohibited possession of a firearm except by persons holding a valid registration certificate for it, and Oak Park made it unlawful to possess any firearm. Following *District of Columbia v Heller* (554 US 570 [2008]), the Chicago petitioners and two other groups filed suit in federal district court seeking a declaration that the handgun ban and related ordinances violated the Second and Fourteenth Amendments. The district court found against the petitioners, and the decision was affirmed.

Holding: The *Slaughter-House Cases* (16 Wall. 36, 79 [1873]) held that "the Privileges or Immunities Clause protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws.'" Other fundamental rights were found not to be protected by the Clause. This holding need not be revisited since the petitioners' claim can be resolved under the Due Process Clause of the Fourteenth Amendment. That the Second Amendment right to keep and bear arms is fundamental to our scheme of ordered liberty supports its incorporation into the concept of due process. See *Duncan v Louisiana*, 391 US 145, 149 (1968). The Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty. In *Heller*, the Second Amendment was found to protect the right to possess a handgun in the home for the purpose of self-defense. Therefore, the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment right recognized in *Heller*, making it applicable to both the federal government and the states. Judgment reversed and matter remanded.

Concurrence: [Scalia, JJ] "[T]he Court's approach intrudes less upon the democratic process because the

rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people, with the assurance that their decision is not subject to judicial revision."

Concurrence in Part, Concurrence in Judgment: [Thomas, JJ] The Fourteenth Amendment's privileges or immunities clause makes the Second Amendment right to keep and bear arms "fully applicable to the States."

Dissent: [Stevens, JJ] Due process precedents provide no guidance on the issue of "whether the Constitution 'guarantees individuals a fundamental right,' enforceable against the States, 'to possess a functional, personal firearm, including a handgun, within the home.'" "By its terms, the Second Amendment does not apply to the States; read properly, it does not even apply to individuals outside of the militia context. [It] was adopted to protect the *States* from federal encroachment. And the Fourteenth Amendment has never been understood by the Court to have 'incorporated' the entire Bill of Rights."

Dissent: [Breyer, JJ] "[T]he Fourteenth Amendment's guarantee of 'substantive due process' does not include a general right to keep and bear firearms for purposes of private self-defense." Nothing in the Second Amendment's "text, history, or underlying rationale . . . could warrant characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes." Therefore, "the Fourteenth Amendment does not 'incorporate' the Second Amendment's right 'to keep and bear Arms.'"

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)

Death Penalty (Penalty Phase) DEP; 100(120)

Sears v Upton, 561 US ___, 130 S Ct 3259 (2010)

A Georgia jury convicted the petitioner of a capital crime. During the penalty phase, his counsel presented evidence describing the petitioner's childhood as stable, loving, and essentially without incident. Counsel's mitigation theory was calculated to portray the adverse impact of the petitioner's execution on his family and loved ones. The prosecution turned that evidence against the petitioner, emphasizing that the advantages of the petitioner's upbringing enhanced the heinousness of his actions. During a state postconviction evidentiary hearing, a different body of mitigation evidence emerged: the petitioner's parents divorced when he was young, had an abusive relationship and were verbally abusive to him; the petitioner suffered sexual abuse, head trauma, and used drugs; and he had behavioral problems from an early age. By the time he reached high school, he was "described as severely learning disabled and as severely behaviorally handicapped." The evidence revealed that

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he suffered “significant frontal lobe abnormalities.” One expert said the petitioner’s scores on at least two standardized assessment tests placed him at or below the first percentile in several categories of cognitive function, “making him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli.” Another found that the petitioner had a grandiose self-conception. Lastly, the petitioner’s brother was a convicted drug dealer and user who introduced him to a life of crime. The postconviction court denied relief and the Supreme Court of Georgia summarily denied review.

Holding: Petitioner’s trial counsel failed to conduct an adequate mitigation investigation; none of the evidence uncovered at the state postconviction hearing was known at the time of the first sentencing proceeding. The state postconviction court did not apply the correct prejudice standard to the petitioner’s Sixth Amendment claim. The court correctly concluded that counsel’s penalty phase investigation was constitutionally deficient. *See Strickland v Washington*, 466 US 668 (1984). But it improperly relied on the assumed reasonableness of the mitigation theory. *Cf Wiggins v Smith*, 539 US 510, 522 (2003). “[T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel’s failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [the petitioner].” A proper analysis of prejudice must take into account the newly uncovered evidence of the petitioner’s “significant” mental and psychological impairments and the mitigation evidence presented during the penalty phase to assess whether there was a reasonable probability that the petitioner would have received a different sentence after a constitutionally sufficient mitigation investigation. *See Porter v McCollum*, 130 SCt 447 (2009). Judgment vacated and matter remanded.

Dissent: [Scalia, J] There was no error of law because the state court properly found no reasonable likelihood that the mitigation evidence disclosed in the postconviction proceeding would have persuaded a jury to change its mind about the death sentence. “[I]t is impossible to say that substituting the ‘deprived-childhood-cum-brain-damage’ defense for the ‘good-middle-class-kid-who-made-a-mistake’ defense would probably have produced a different verdict.”

Habeas Corpus (Federal) HAB; 182.5(15)

Wilson v Corcoran, No. 10-91, 562 US __, 11/8/2010

The respondent was convicted of murder and sentenced to death. The state supreme court affirmed his sentence, finding that the trial court complied with state

law by relying on only statutory aggravating factors when it sentenced him. In his federal habeas petition, the respondent asserted that the trial court relied on non-statutory aggravating factors in violation of state law and his Eighth and Fourteenth Amendment rights. The circuit court of appeals, rejecting the state supreme court’s finding that the trial court relied on only statutory aggravating factors, granted the habeas petition and directed the trial court to reconsider its sentencing determination.

Holding: “Federal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law.” *See Estelle v McGuire*, 502 US 62, 67 (1991). The circuit court’s decision granting the habeas petition did not indicate that the alleged violation of state law also violated any federal right and its amended decision did not cure this defect. “It is not enough to note that a habeas petitioner *asserts* the existence of a constitutional violation; unless the federal court agrees with that assertion, it may not grant relief. The Seventh Circuit’s opinion reflects no such agreement, nor does it even articulate what federal right was allegedly infringed.” Judgment vacated and case remanded.

New York State Court of Appeals

Courts (General) (Rules) CRT; 97(17) (55)

Jurisdiction (General) JSD; 227(3)

People v Correa, 15 NY3d 213, 907 NYS2d 106 (2010)

Defendant Fernandez was charged by misdemeanor information in New York City Criminal Court, Kings County. After arraignment, his case was transferred to the Integrated Domestic Violence (IDV) part in Kings County Supreme Court. He was convicted of a class B misdemeanor; the Second Department affirmed his conviction. Defendant Correa was charged by misdemeanor information in New York City Criminal Court, Bronx County, with several misdemeanors and a violation. After arraignment, his case was transferred to Bronx Criminal Division (BCD) where he was convicted of the violation. Defendant Mack was charged in an information with misdemeanors and a violation. Following arraignment in New York City Criminal Court, Bronx County, his case was transferred to the BCD, where he was convicted of a class B misdemeanor and a violation. The First Department reversed the convictions in *Correa* and *Mack*, crediting the jurisdictional arguments that the Supreme Court was not empowered to adjudicate misdemeanor cases prosecuted by information.

Holding: Although no objections to the transfers were made at the trial level, the jurisdictional issue survived. *See People v Casey*, 95 NY2d 354, 365; *see eg People v Nicometi*, 12 NY2d 428. The three defendants challenged the rules creating the BCD and IDV parts in the Supreme

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Court that allowed transfer of misdemeanor prosecutions to the Supreme Court for trial. The administrators of the Unified Court System were empowered under the state constitution and Judiciary Law to adopt these rules, and the Supreme Court had the power to adjudicate these misdemeanor cases. *See* NY Const, art VI, §§ 1, 28; 22 NYCRR Part 41. The Supreme Court's transfer powers under article VI, § 19(a) and the broad administrative authority vested pursuant to article VI, § 28 and Judiciary Law 211 authorized Unified Court System administrators to promulgate the IDV and BCD directives. The defendants' jurisdictional claim lacked merit. Defendant Fernandez's evidentiary error issue was abandoned on appeal. In *Fernandez*, order affirmed. In *Correa* and *Mack*, orders reversed and cases remitted for consideration of facts and issues raised but not determined on the appeals.

Courts (General) (Rules) CRT; 97(17) (55)

Jurisdiction (General) JSD; 227(3)

Trial (Venue) TRI; 375(65)

People v Wilson, 14 NY3d 895, 905 NYS2d 100 (2010)

After a non-jury trial, the defendant was convicted of attempted second-degree aggravated harassment, a misdemeanor. The conviction was affirmed.

Holding: The defendant asserted that the Supreme Court lacked subject matter jurisdiction to adjudicate the matter because it was prosecuted by a misdemeanor information and not an indictment or superior court information (SCI) issued upon waiver of indictment. This was not raised below, but is addressed. *See People v Casey*, 95 NY2d 354, 365; *see eg People v Nicometi*, 12 NY2d 428. The Supreme Court possessed concurrent subject matter jurisdiction over the trial of unindicted misdemeanor offenses. *See People v Correa*, 15 NY3d 213 (decided herewith). The defendant raised an alternative argument, *ie*, that the transfer of her case from NYC Criminal Court to Supreme Court was impermissible since court rules creating the Bronx Criminal Division in the Supreme Court and directing the reassignment of certain misdemeanor cases to that court for trial were not in effect on the date of her conviction. *See* 22 NYCRR Parts 42 & 142. The transfer claim was a venue argument, and not jurisdictional. Since it was not raised in the trial court, it was waived. *See People v Carvajal*, 6 NY3d 305, 312. Order affirmed.

Narcotics (General) (Possession) NAR; 265(27) (57)

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) SEA; 335(15[k])

People v Devone, 15 NY3d 106, 905 NYS2d 101 (2010)

Defendant Devone was a passenger in a vehicle pulled over by police when they observed the driver speaking on a cell phone. While the driver said that the car was registered to Devone, a computer check showed that it belonged to a female. Based on this inconsistency, the officer conducted a canine sniff of the exterior of the vehicle. The dog "alerted" at a particular exterior location, and when allowed to search inside, alerted at the center console where crack cocaine was found. Devone was indicted for third- and fourth-degree criminal possession of a controlled substance. The court granted his suppression motion. The Appellate Division reversed. Defendant Abdur-Rashid's car was stopped and ticketed for having no front license plate. Less than an hour later, his car was stopped again for the missing plate and for debris protruding from the front of it. A records check incorrectly showed that his insurance had lapsed. Although he showed the earlier ticket to the officer, the officer doubted whether he had revealed all the prior tickets and ordered him out of the car. Seeing the defendant acting nervously and based on a questionable story about their itinerary from the passenger, the officer cleared the vehicle and brought over a narcotics-sniffing dog. The dog alerted at several locations, including the trunk, which contained a duffel bag with two freezer bags of cocaine. The trial court denied his motion to suppress. He was convicted of first-degree criminal possession of a controlled substance and the Appellate Division affirmed.

Holding: A canine sniff of the exterior of a lawfully stopped vehicle constitutes a search under New York Constitution, art I, § 12, which is only authorized if there is a founded suspicion that criminal activity is afoot. The analysis should focus on whether the search intruded into an area where the individual has a reasonable expectation of privacy. *See People v Dunn*, 77 NY2d 19, 25; *People v Price*, 54 NY2d 557, 564. Because there is a legitimate, but reduced expectation of privacy in an automobile, a canine sniff of the exterior of an automobile constitutes a search under art I, § 12. *See People v Yancy*, 86 NY2d 239, 246; *see gen Arizona v Gant*, 129 SCt 1710, 1720 (2009). Because of the reduced expectation of privacy and the less intrusive nature of canine sniffs, which are significantly useful to the police, the founded suspicion standard is appropriate. In both cases, the officers' "founded suspicion" that criminality was afoot provided sufficient grounds for the canine sniffs. Orders in *Devone* and *Abdur-Rashid* affirmed.

Dissent: [Ciparick, JJ] Reasonable suspicion standard should be met before law enforcement conducted an exterior canine sniff of a vehicle. *See People v Dunn*, 77 NY2d 19. There is no reason to treat areas of a vehicle shielded from outside view differently than the contents of one's home. The majority's standard allows canine sniffs without requiring any suspicion of illegal drug activity; with-

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out a nexus between the police suspicion and the canine’s capabilities, the search becomes a fishing expedition.

Defenses (Affirmative Defenses Generally) (Notice of Defense) DEF; 105(2) (43.5)

Homicide (Mental Condition) (Murder [Defenses]) HMC; 185(35) (40[a])

Insanity (General) ISY; 200(27)

People v Diaz, 15 NY3d 40, 904 NYS2d 343 (2010)

The defendant was charged with murder and other offenses for killing his former girlfriend after she told him that another man fathered their son. Immediately before jury selection, the defendant informed the court and the prosecutor that he planned to assert an extreme emotional disturbance (EED) defense based on his own testimony. The defendant argued he did not have to provide notice since he was not going to present expert psychiatric testimony. The trial court allowed the defendant to file a late notice under CPL 250.10(2) in the interest of justice and granted an adjournment to permit the prosecution’s expert to examine the defendant. At trial, the defendant testified and presented the testimony of a psychiatrist who had examined him and found that EED was possible. The prosecution’s expert testified in rebuttal, explaining his perceptions of the defendant’s truthfulness as they related to the defense. The defendant was convicted of second-degree murder and the Appellate Division affirmed.

Holding: Notice of a psychiatric testimony is required under CPL 250.10(2) when the defendant seeks to present any mental health evidence, including lay testimony. *Cf People v Smith*, 1 NY3d 610. The sanction of preclusion of a defense for failure to comply with CPL 250.10 bears on the defendant’s constitutional right to present a defense, and while this was not an issue here, courts must be vigilant in weighing the defendant’s rights against the prejudice to the prosecution resulting from delayed notice. *See People v Berk*, 88 NY2d 257, 266. The prejudice may be less significant when the defendant plans to rely on lay testimony alone to support the defense. “[A] defendant can choose to testify in his own defense to explain his actions without triggering the notice requirement of CPL 250.10 (2), but he would not be entitled to a jury instruction on extreme emotional disturbance pursuant to Penal Law § 125.25(1)(a).” The trial court had the authority to compel the defendant to submit to an examination by the prosecution’s expert. *See* CPL 250.10(3). Portions of the prosecution expert’s “detailed testimony ‘exceeded the foundation necessary to establish the basis for the expert’s opinion and invaded the province of the jury to determine

defendant’s credibility” (*People v Braun*, 199 AD2d 993 *lv denied* 83 NY2d 849), but the error was harmless because the evidence of the defendant’s guilt was overwhelming. *See People v Crimmins*, 36 NY2d 230, 241-242. Order affirmed.

Driving While Intoxicated (Prior Convictions) DWI; 130(20)

People v Ballman, 15 NY3d 68, 904 NYS2d 361 (2010)

The defendant was indicted for driving while intoxicated (DWI) as a felony (Vehicle and Traffic Law (VTL) 1192[3]) and for second-degree obstructing governmental administration. The prosecution filed a special information charging that the defendant had a 1999 Georgia conviction for driving with an unlawful alcohol concentration (OCGA 40-6-391), which would have been a violation of VTL 1192(2) had it occurred in New York. This supported the felony DWI felony charge. The defendant’s motion to dismiss was denied, and he pleaded guilty to the charge. His conviction was reversed because the prior out-of-state conviction occurred before the effective date of VTL 1192(8).

Holding: The most reasonable interpretation of VTL 1192(8) and its enabling language was that out-of-state convictions from prior to Nov. 1, 2006 cannot be used to elevate a DWI offense to a felony. The initial version of this provision, 1192(7), was enacted in 1985 to allow prior out-of-state convictions for driving under the influence of drugs or alcohol to be considered when determining penalties for subsequent New York offenses after Nov. 29, 1985 (L 1985, ch 694, § 1). Until then, prior out-of-state convictions had not been considered for penalty purposes. *See* Mem in Support, Bill Jacket, L 1985, ch 694. Amendments in 2006 ended the practice of treating all prior out-of-state convictions as mere traffic infractions under New York law. The statute as amended in 2006 reads: “A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties imposed under this section . . . provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of this section.” It also stated that if the out-of-state conduct would have been a violation of 1192 had it occurred in-state, but would not have constituted a misdemeanor or a felony, the conduct would be deemed a prior conviction of driving while ability impaired for purposes of determining the appropriate penalties. The enabling language accompanying the amendment indicated that 1192(8) shall apply only to convictions occurring on or after Nov. 1, 2006. *See* L 2006, ch 231, § 2. Order affirmed.

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Accusatory Instruments (General) ACI; 11(10)

People v Frederick, 14 NY3d 913, 905 NYS2d 533 (2010)

After stabbing his former girlfriend and killing her new boyfriend, the defendant was indicted for second-degree attempted murder, two counts of second-degree murder (depraved indifference and felony murder, with an unspecified burglary as the underlying felony), and other charges. The trial court dismissed the depraved indifference murder count before submitting the case to the jury, and the case ended in a mistrial. At the defendant's second trial, the defendant was convicted all the crimes charged in the indictment except felony murder, on which they deadlocked. Those convictions were affirmed. Meanwhile, the prosecution returned to the grand jury and successfully sought a new indictment, which charged the defendant with both felony murder and first-degree manslaughter for the boyfriend's death. The trial court dismissed the original indictment, with its sole felony murder count, as superseded by the felony murder count in the new indictment. A motion to dismiss the superseding indictment was granted. The original indictment was reinstated and the defendant was convicted after a bench trial on the felony murder count of the original indictment. The Appellate Division affirmed.

Holding: The retrial properly went forward based on the felony murder count in the original indictment. The superseding indictment had been dismissed because Criminal Procedure Law 40.40(2) barred prosecution for manslaughter where the crime was a joinable offense uncharged in the original indictment on which the trial had commenced. As the superseding indictment was a nullity, so to was the action flowing from it, *ie*, the dismissal of the original indictment. The trial court possessed inherent authority to reinstate the original indictment after dismissing the superseding indictment. *See Matter of Lionel F.*, 76 NY2d 747, 749. The trial court was empowered to run the sentence for the new offense consecutive to the previously imposed sentences. *See People v Ramirez*, 89 NY2d 444, 451. "There is no uncertainty about whether the facts supported a consecutive sentence owing to a lack of specificity in the jury charge, as was the case in *People v Parks* (95 NY2d 811 [2000]) and *People v Alford* (2010 NY Slip Op 3760 [2010])." Order affirmed.

Homicide (Murder [Instructions]) HMC; 185(40[m])

People v Johnson, 14 NY3d 917, 904 NYS2d 691 (2010)

Holding: Following remittal (*see People v Johnson*, 10 NY3d 875), the Appellate Division used the proper legal standard in rejecting the defendant's argument that the verdict convicting him of depraved indifference murder

was against the weight of the evidence. *See People v Johnson*, 67 AD3d 448. The Appellate Division did not have to evaluate the elements of depraved indifference murder as interpreted in cases decided before the defendant's trial. The defendant did not object to the court's charge and failed to ask the court to include any specific judicial interpretations of the elements in the instructions. "[T]he Appellate Division properly refused to consider such information when it 'weigh[ed] the evidence in light of the elements of the crime as charged to the [jury]' (*People v Danielson*, 9 NY3d 342, 349 [2007])." Order affirmed.

Appeals and Writs (Judgments and Orders Appealable) (Record) APP; 25(45) (80)

Counsel (General) (Right to Counsel) COU; 95(22.5) (30)

Post-Judgment Relief (CPL § 440 Motion) PJR; 289(15)

People v McLean, 15 NY3d 117, 905 NYS2d 536 (2010)

After a *Huntley* hearing, the trial court denied the defendant's motion to suppress statements he made during a meeting with two police officers in December 2006. The motion alleged that his statements were involuntary. The defendant pleaded guilty to murder and other charges. On appeal, he challenged the trial court's refusal to suppress, raising a violation of his right to counsel claim for the first time. The Appellate Division rejected his argument because the record was insufficient to permit review.

Holding: The record of the *Huntley* hearing showed that no lawyer was present at the December 2006 meeting when the defendant described his role in this crime. He had talked about the same crime to the same detectives three years earlier, in October 2003, in the presence of his lawyer. At that time, he was awaiting sentencing for an unrelated robbery. The defendant claimed that his right to counsel as to the homicide indelibly attached at or before the 2003 meeting, and that he therefore could not be questioned again on it in 2006 without a waiver of that right in counsel's presence. *See People v Arthur*, 22 NY2d 325. The exact role of the defendant's lawyer at the time, whether limited to the robbery case or encompassing the homicide investigation, could not be determined from the record. While right to counsel claims like this need not be preserved, and no party has requested a change in that rule, an adequate record is indispensable for appellate review. *See People v Kinchen*, 60 NY2d 772, 773-774. Lack of an adequate record bars review on direct appeal not just where vital evidence is plainly absent "but wherever the record falls short of establishing conclusively the merit of the defendant's claim." Where the record does not make irrefutably clear that a right to counsel violation occurred,

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the claim can be reviewed only on a post-trial motion under CPL 440.10. Order affirmed.

Dissent: [Jones, J] The defendant’s plea was obtained in violation of his rights as it was based on a statement made without his attorney present. The record showed that the defendant had been represented by counsel during the earlier investigation of the homicide, and that the police knew that he was represented by counsel on the homicide.

Accusatory Instruments (Sufficiency) ACI; 11(15)

People v Dreyden, 15 NY3d 100, 905 NYS2d 542 (2010)

Police stopped a van for a traffic violation and recovered from the defendant passenger a knife and ziplock bag containing marijuana. He was charged in a misdemeanor complaint with unlawful possession of marijuana and fourth-degree possession of a weapon. He pleaded guilty to the weapon charge, in full satisfaction of the accusatory instrument, in exchange for a sentence of time served. He appealed, claiming the accusatory instrument was jurisdictionally defective because it did not include non-conclusory allegations establishing the basis of the arresting officer’s belief that the knife was a gravity knife as defined in the statute. His conviction was affirmed.

Holding: “The factual part of a misdemeanor complaint must allege ‘facts of an evidentiary character’ (CPL 100.15[3]) demonstrating ‘reasonable cause’ to believe the defendant committed the crime charged (CPL 100.40[4][b])’ (*People v Dumas*, 68 NY2d 729, 731 . . .).” In controlled substance cases, the reasonable cause requirement cannot be met by a mere conclusory statement that the substance is a particular type of controlled substance. See *People v Kalin*, 12 NY3d 225, 229. The statements in the accusatory instrument in support of the weapon charge did not meet this requirement. Despite pleading guilty, the defendant did not waive the jurisdiction issue. “A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution’ (*People v Case*, 42 NY2d 98, 99 . . .).” The test of validity is whether the accusatory instrument supplied the defendant with sufficient notice of the charged crime to satisfy due process and double jeopardy demands. See *People v Casey*, 95 NY2d 354, 366. The conclusory statement that the defendant had a gravity knife violated the “reasonable cause” requirement and amounted to a jurisdictional defect. Not every knife is a weapon for purposes of Penal Law 265.01(1). “An arresting officer should, at the very least, explain briefly, with reference to his training and experience, how he or she formed the belief that the object observed in defendant’s possession was a gravity knife.” This accusatory instrument contained no factual basis for

the officer’s conclusion that the knife was a gravity knife, rather than a knife that did not fit the definition of a *per se* weapon under Penal Law article 265. Order reversed and complaint dismissed.

Dissent: [Smith, J] There was no basis for holding that the accusatory instrument was jurisdictionally defective. No element of the crime with which the defendant was charged was omitted; the accusatory instrument gave the defendant ample notice that he was charged with possessing a gravity knife.

Insanity (Civil Commitment) ISY; 200(3)

Sex Offenses (General) SEX; 350(4)

People ex rel. Joseph II v Superintendent of Southport Correctional Facility, 15 NY3d 126, 905 NYS2d 107 (2010)

Petitioners Joseph II. and Humberto G. were convicted of serious sexual assaults. Both were sentenced to prison. A term of post-release supervision (PRS) was also required. See Penal Law 70.06(6); 70.45. In each case, the sentencing court failed to impose PRS, but the Department of Correctional Services (DOCS) added PRS to each sentence. Upon their release from prison, their PRS terms began and Joseph II. was involuntarily committed under Mental Hygiene Law (MHL) 9.27, and Humberto G. committed himself voluntarily under MHL 9.13. While in a psychiatric hospital, they violated the PRS and were returned to prison. Under Correction Law 601-d and Penal Law 70.85, enacted in response to *People v Sparber* (10 NY3d 457, 469) and related cases, prosecutors in each case chose to forego PRS resentencing. The State then began MHL article 10 proceedings, asking that each man be found “a sex offender requiring civil management” and be held in custody past his scheduled release date. Joseph II., after his release from custody was stayed under article 10, began a habeas corpus proceeding, which the Supreme Court dismissed. The Appellate Division reversed and granted the writ. Humberto G.’s motion to dismiss the article 10 proceeding was granted and the Appellate Division affirmed.

Holding: MHL article 10 provides that certain imprisoned sex offenders may be transferred to mental hospitals, rather than being released, when their prison terms expire. This applies even to persons incarcerated for violating the conditions of PRS terms that were improperly added to their sentences by DOCS without court authorization. Under article 10, only a “detained sex offender” can be found to be a “sex offender requiring civil management” (and thus perhaps a “dangerous sex offender requiring confinement”). See Mental Hygiene Law 10.03(q). Under MHL 10.03(g), a “[d]etained sex offender” means a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to

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a sex offense or designated felony, in that the person” has been convicted of a sex offense and is “a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility pursuant to article nine of this title or section four hundred two of the correction law upon release or conditional release from a correctional facility” Joseph II. and Humberto G. met this definition. When article 10 proceedings began, they were in DOCS’s custody (*see* Mental Hygiene 10.03[a]), and each was confined “with respect to a sex offense.” Whether there were any valid constitutional objections to article 10 was not decided in other cases relating to procedures under these provisions. Article 10 could be applied to those whose imprisonment resulted from a procedural error. Order reversed in *Joseph II.* and petition dismissed; order reversed in *Humberto G.* and motion to dismiss denied.

Dissent: [Ciparick, J] A prisoner must be lawfully in custody in order to qualify as a “detained sex offender” as defined in Mental Hygiene Law article 10. An invalid term of PRS and a subsequent violation should not be the basis for further proceedings under article 10, especially since those proceedings may result in a significant curtailment of liberty. *See gen Kansas v Hendricks*, 521 US 346, 356-347 (1997). Viewing the legality of the custody as “irrelevant” is troubling, and encourages and rewards DOCS’ errors.

Jurisdiction (General) **JSD; 227(3)**

Post-Judgment Relief (CPL § 440 Motion) **PJR; 289(15)**

People v Mitchell, 15 NY3d 93, 905 NYS2d 115 (2010)

The defendant was convicted in Essex County of felony driving while intoxicated and other charges. After pleading guilty, he was sentenced to five years’ probation and jail time. Pursuant to CPL 410.80(1), the Essex County Court transferred the defendant’s probation supervision to Franklin County, where he lived. Later, the defendant filed a CPL 440 motion in Essex County Court challenging his conviction and sentence. The court denied the motion due to lack of jurisdiction, and the Appellate Division affirmed.

Holding: “This case boils down to whether section 410.80(2) encompasses ‘all powers and duties’ that might be exercised by a sentencing court under article 410 of the Criminal Procedure Law, which governs probation, conditional discharge and parole supervision, or ‘all powers and duties’ possessed by a sentencing court more generally, including powers and duties under Criminal Procedure Law article 440” The 2007 amendments to section 410.80(2) were designed to transfer from sentenc-

ing courts to receiving courts the full range of powers and duties the receiving courts needed to fulfill their responsibilities to enforce the terms and conditions of probationers, and to deal with relief from forfeitures and disabilities. *See* Division of Probation and Correctional Alternatives Mem, Bill Jacket, L 2007, ch 191. The statute’s text and legislative history do not suggest that the Legislature also intended to divest sentencing courts of their jurisdiction under Criminal Procedure Law article 440. Therefore, the Essex County Court retained jurisdiction over the defendant’s post-conviction motion. Order reversed and case remitted to Essex County Court.

Double Jeopardy (General Punishment) **DBJ; 125(7) (30)**

Sentencing (Resentencing) **SEN; 345(70.5)**

People v Hassell, 14 NY3d 925, 905 NYS2d 555 (2010)

The defendant pleaded guilty in 2002 to second-degree assault. He was promised a sentence of three and a half years’ imprisonment. Although post-release supervision (PRS) was discussed during the plea proceeding, the court did not tell the defendant how long the PRS term would be, nor did it pronounce a PRS term at sentencing. In December 2008, more than nine months after he was released from prison, the court resentenced him, adding a five-year term of PRS. The Appellate Division affirmed.

Holding: “The Double Jeopardy Clause of the federal constitution precludes a court from adding PRS to a defendant’s sentence once the defendant had been released from imprisonment (*see People v Williams*, 14 NY3d 198, 217 [2010]).” Order reversed, sentence vacated, and original sentence reinstated.

[*Ed. Note:* The Court issued similar decisions in two other cases: *People v Williams* (14 NY3d 924, 905 NYS2d 555 [2010]) and *People v Jordan* (15 NY3d 727, 905 NYS2d 797 [2010]).]

Accomplices (Corroboration) **ACC; 10(20)**

People v Reome, 15 NY3d 188, 906 NYS2d 788 (2010)

The defendant was charged with participating in a rape with three others. The main witnesses at trial were Andrew Hilborn and the accuser. The accuser did not identify anyone, but Hilborn said he participated in the crime with the defendant and two others. Three of the men, including Hilborn, were connected to the rape by DNA evidence, but the defendant was not. The jury acquitted the defendant of personally raping the accuser, but convicted him on three counts of rape as an accomplice and one count of conspiracy. The Appellate Division affirmed.

Holding: Hilborn’s testimony was corroborated, as required by CPL 60.22(1). Corroborative evidence is suffi-

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cient “if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth’ (*People v Dixon*, 231 NY 111, 116 . . .).” Corroborative evidence need not prove that a defendant committed the crime; accomplice testimony can do that so long as other evidence connects the defendant with the commission of the crime. See *People v Hudson*, 51 NY2d 233, 238. *Hudson* would require that corroborative evidence be truly independent in the sense that it could be viewed as connecting the defendant to the crime even if the accomplice testimony did not exist; that rule is not supported by other cases and is not followed here. But consideration should be given to evidence that would, without the accomplice’s testimony, tend to connect the defendant to the crime. This evidence includes: the defendant was a friend of one of the known rapists; he was in frequent contact with another of the rapists before and after the incident; there was some weak evidence of a physical resemblance between the defendant and one of the rapists; and he had a strong emotional reaction when first contacted by the police. This independent evidence is weak. But other corroborative evidence exists that, while “not independent in the *Hudson* sense, should not be disregarded.” It may be considered corroborative even though it simply supported (or harmonized) the accomplice testimony, and did not independently incriminate the defendant. See *eg People v Daniels*, 37 NY2d 624, 629. That evidence included the accuser’s detailed account and the DNA identification of the three other rapists. This harmonized Hilborn’s testimony; together, it was enough to connect the defendant to the commission of the offense. Order affirmed.

Dissent: [Jones, JJ] The accomplice’s testimony did not meet the strictures of CPL 60.22(1). The corroborating evidence failed to identify the defendant as a perpetrator. The principles set forth in *People v Hudson* and its progeny should control.

Assault (Defenses) (Evidence) ASS; 45(20) (25)

People v Valencia, 14 NY3d 927, 906 NYS2d 515 (2010)

The defendant’s blood alcohol level was about three times the legal limit when he drove at night in the wrong direction on a Long Island parkway at a high rate of speed for four miles, crashing head-on into another vehicle and careening into another car. The defendant’s response to being told he had injured other people was: “I don’t know and I don’t care.” He was indicted for, among other offenses, first-degree assault for causing serious physical injury while recklessly creating a grave risk of death under circumstances evincing a depraved indifference to human life. See Penal Law 120.10(3). The trial court held

that the prosecution failed to prove that the defendant acted with depraved indifference at the time of the collision because he was so drunk that he was “oblivious” to the danger he created. The court did find the defendant guilty of first-degree depraved indifference assault on the theory that he created a grave risk of harm by becoming extremely inebriated knowing that he would eventually drive himself home. The Appellate Division reversed the conviction, concluding that the defendant’s state of mind before he drove was too remote in time from the car crash, and the conviction was reduced from the class B felony to the class D felony of second-degree assault.

Holding: “There is insufficient evidence to support a conviction for depraved indifference assault. The trial evidence established only that the defendant was extremely intoxicated and did not establish that he acted with the culpable mental state of depraved indifference.” Order affirmed.

Concurrence: [Graffeo, JJ] This affirmance “leaves an open issue: does the voluntary consumption of alcohol to the point of extreme inebriation preclude the formation of a depravedly indifferent state of mind?” Driving a car along a crowded sidewalk at high speed is a “[q]uintessential example[]’ of depraved indifference . . .” *People v Suarez*, 6 NY3d 202, 214. And voluntary intoxication does not excuse a reckless state of mind (see Penal Law 15.05[3]) because recklessness “encompasses the risks created by [a] defendant’s conduct in getting drunk’ (*People v Register*, 60 NY2d [270] at 280, *overruled on other grounds* . . .).” The appellate divisions have disagreed about whether the transformation of depraved indifference into a subjective state of mind precludes intoxication as a defense to that mens rea. The Legislature should resolve the question.

Concurrence: [Jones, JJ] There must be a temporal connection between mens rea and actus reus in the context of depraved indifference offenses. “[I]t cannot be argued that defendant’s mental state at the time he was drinking actuated his physical conduct.” It was too temporally remote from the act of driving to support first-degree assault.

Appeals and Writs (Preservation of Error for Review) APP; 25(63)

Juveniles (Youthful Offender) JUV; 230(150)

Sentencing (Appellate Review) (Enhancement) SEN; 345(8) (32)

People v Murray, 15 NY3d 725, 906 NYS2d 521 (2010)

The defendant pleaded guilty to third-degree criminal possession of a weapon with the understanding that he would “probably” be treated as a youthful offender and sentenced to a term of nine months if he proved that he was in school, received a favorable probation report, and

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appeared for sentencing. He was told that if he did not meet these conditions, he would be sentenced as an adult to a prison term of two years followed by two years' post-release supervision (PRS). He did not appear on the appointed sentencing date. When he appeared several months later, after issuance of a bench warrant, the court announced at the outset that, due to the defendant's non-appearance, it would sentence him as an adult. After hearing argument from defense counsel, the court imposed an adult sentence. The Appellate Division affirmed.

Holding: The court's decision not to treat the defendant as a youthful offender based on his failure to appear on the original sentencing date "was rooted in the terms of defendant's plea and evident to all concerned; this was not a situation in which the court arbitrarily trifled with the legitimate expectations of the defendant based on the plea (*see People v Selikoff*, 35 NY2d 227, 240 . . .)." Thus, it was not an abuse of discretion to sentence him as an adult. The defendant did not preserve his claim that the three-year PRS component of his sentence did not conform to the two-year term indicated at the plea proceeding. While preservation is unnecessary to review of a nonconforming PRS sentence where the defendant was not made aware of that part of the sentence before its imposition (*see People v Louree*, 8 NY3d 541, 546), this defendant was advised of the PRS term at the outset of the sentencing proceeding. Thus, he could have sought relief from the sentencing court in advance of the sentence's imposition. Order affirmed.

Juries and Jury Trials (Deliberation) **JRY; 225(25) (37)** (General)

People v Simmons, 15 NY3d 728, 905 NY2d 797 (2010)

Holding: "Although certain phrases in the trial court's supplemental instruction were inartfully worded, we are unpersuaded that the trial court's response to a jury note, which inquired about the element of intent, usurped the role of the jurors. Viewing the problematic language in the broader context of the supplemental instruction and the jury charge as a whole, the court conveyed the proper legal standards and repeatedly advised the jury that it was the exclusive arbiter of the facts." Order affirmed.

Appeals and Writs (Judgments and Orders Appealable) **APP; 25(45)**

Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches]) **SEA; 335(15[p])**

People v King, 15 NY3d 736, 906 NYS2d 802 (2010)

Holding: "County Court's findings that 'the police had no cause to initially stop' defendant and that 'it cannot be concluded that defendant stopped voluntarily' have support in the record and are therefore beyond this Court's further review." Any evidence resulting from the stop must be suppressed. Order reversed, motion to suppress granted, and case remitted for further proceedings on the accusatory instruments.

Dissent: [Smith, J] The defendant and a friend were traveling together on their motorcycles. Police flashed emergency lights after seeing a burned-out taillight on the motorcycle of the defendant's friend. The friend turned onto another street; the police followed him. The defendant stopped where he was. The officer and the friend returned to where the defendant was stopped; the defendant was not told to stay or leave. Other police officers arrived, one of whom noticed that the defendant appeared to be intoxicated. After he failed several sobriety tests, the defendant was arrested. The trial court found that the stop of the friend's motorcycle was not illegal. While the defendant's stop was not completely "voluntary," he was not intentionally detained by the officer. The defendant's rights were not violated; therefore, suppression was not warranted.

Identification (General) **IDE; 190(17) (30) (35) (50)** (Lineups) (Photographs) (Suggestive Procedures)

People v Perkins, 15 NY3d 200, 906 NYS2d 523 (2010)

The defendant was suspected of participating in an armed robbery. The accuser, who had been shot twice, picked the defendant from a photographic array four days later. Three months after the event, the police tried to conduct a lineup, but due to the defendant's refusal to cooperate, they instead used Polaroid head shots of the five fillers and the defendant. Nine months after the incident, the accuser selected the defendant in a court-ordered, double-blind lineup. The hearing judge held that the pre-trial identification procedures were not unduly suggestive. The trial judge decided that the accuser's photographic identification of the defendant from the attempted lineup proceeding was admissible. The defendant was convicted of second-degree attempted murder and first-degree robbery. The Appellate Division affirmed.

Holding: At common law, witnesses could not testify that they had identified a defendant prior to trial, whether at a lineup or from photographs. *See People v Huertas*, 75 NY2d 487, 493-494. Section 393-b of the Code of Criminal Procedure created an exception to that rule as to a witness' prior identifications of the defendant "'in the flesh' (*People v Caserta*, 19 NY2d 18, 20 [1966] [emphasis added])." Criminal Procedure Law 60.30 was derived

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from that section and has also been found to apply only to the admissibility of testimony of a prior corporeal identification. “But there is no indication that the Legislature intended to rule out photographic identification evidence in the event a defendant thwarts a lineup.” The defendant, by his misconduct, forfeited the right to rely on the rules ordinarily barring admission of photographic identification evidence, which allowed the prosecution to introduce of the accuser’s identification of him from pictures taken the same day as and in lieu of the aborted lineup. *See People v Geraci*, 85 NY2d 359, 366. The trial judge reasonably concluded, in rejecting the defendant’s claim that the later corporeal lineup avoided any prejudice to the prosecution, “that the jurors might be more skeptical about the reliability of an identification made nine and one-half rather than three months after the crime.” Order affirmed.

**Trial (Presence of Defendant
[Trial in Absentia])** TRI; 375(45)

People v Williams, 15 NY3d 739, 907 NYS2d 740 (2010)

During the pretrial suppression hearing in a buy-and-bust prosecution, defense counsel stated that he had told the defendant about his *Antommarchi* rights. The judge followed up by telling the defendant that if there were sidebars or times when the judge was talking to both of the attorneys, the defendant had an absolute right to be present, and added, “I’m sure that your counsel has explained that to you.” The defendant was present when the trial judge outlined the jury selection procedures, and watched on several occasions when the judge and both attorneys retired to the jury deliberation room with prospective jurors. And the judge reminded the defendant of his right to be present at those conferences. The defendant was convicted of one count, but the jury hung on another count. The Appellate Division affirmed.

Holding: The defendant knew when prospective jurors were being questioned in the deliberation room about possible bias, and he never objected or requested to participate. *See People v Antommarchi*, 80 NY2d 247; *see also People v Vargas*, 88 NY2d 363, 375-376. “As the Appellate Division remarked, ‘[w]hile the [trial] court articulated a right to be present that was broader than the law requires, its statement necessarily included the rights guaranteed by *Antommarchi*, and the surrounding circumstances support the inference that the defendant understood and waived those rights’ (61 AD3d 470, 471 [1st Dept 2009]).” The better practice would be to note that *Antommarchi* rights relate to conferences with potential jurors regarding issues of bias, but on this record, the finding that the

defendant waived his right to be present at such conferences was correct. Order affirmed.

Freedom of Information (General) FOI; 177(20)

In the Matter of Capital Newspapers Division of the Hearst Corporation et al. v City of Albany, 15 NY3d 759, 906 NYS2d 808 (2010)

Holding: “Respondent City of Albany failed to meet its burden of demonstrating that the gun tags are ‘personnel records’ under Civil Rights Law § 50-a. The Police Chief’s conclusory affidavit did not establish that the documents were ‘used to evaluate performance toward continued employment or promotion,’ as required by that statute. Consequently, the unredacted gun tags did not fall squarely within a statutory exemption and are subject to disclosure under the Freedom of Information Law (FOIL) (*see Public Officers Law § 87(2)*). Petitioners’ claim that Supreme Court abused its discretion in denying counsel fees is without merit.” Order modified, and as modified, affirmed.

Evidence (Sufficiency) EVI; 155(130)

Narcotics (Evidence) (Possession) NAR; 265(20) (57)

People v Diaz, 15 NY3d 764, 907 NYS2d 152 (2010)

Holding: “Viewed in the light most favorable to the People (*People v Contes*, 60 NY2d 620, 621 [1983]), the trial evidence was sufficient to allow a jury to infer both that the defendant exercised dominion and control over the van from which police recovered over four ounces of crack cocaine, and that defendant had knowledge that the drugs were secreted in a hidden compartment beneath the van’s air bag cover (Penal Law § 220.18[1]). Defendant’s knowledge could be inferred from his sole possession of the van at the time the contraband was seized, his possession of nine unused crack pipes in the van’s glove compartment, and his inconsistent and implausible accounts of his relationship to the van (*People v Reisman*, 29 NY2d 278, 285 [1971] [‘Knowledge [of the presence of illegal drugs] may be shown circumstantially by conduct or directly by admission, or indirectly by contradictory statements from which guilt may be inferred’]).” Order affirmed.

Accomplices (Corroboration) ACC; 10(20)

People v McRae, 15 NY3d 761, 906 NYS2d 809 (2010)

Holding: “Because the accomplice testimony was corroborated with independent evidence as well as evidence that ‘harmonized’ with the accomplice testimony, the evidence was legally sufficient to support defendant’s convictions (*see People v Reome*, __ NY3d __, Slip op at 8 [June 17, 2010]). Next, the trial judge did not abuse his discre-

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tion when denying defendant's eve-of-trial application to relieve his second court-appointed attorney and to appoint substitute counsel. Finally, defendant argues that the trial judge's failure to properly instruct the jury on the affirmative defense to CPL 160.15(4) affected the entire verdict. This claim is unpreserved for our review." Order affirmed.

Prisoners (Conditions of Confinement) (Rights Generally) **PRS I; 300(5) (25)**
In the Matter of Wooley v NYS Department of Correctional Services, 15 NY3d 275, 907 NYS2d 741 (2010)

The petitioner was a Department of Correctional Services (DOCS) prisoner since the late 1980s. Before 2001, he was diagnosed with hepatitis C. In 2001, the petitioner's treating physician at DOCS prescribed a combination of drugs (interferon and ribavirin) for a course of treatment lasting 48 weeks. At the end of that time, the petitioner's hepatitis C viral load was so low as to be undetectable. Shortly before treatment was to end, the petitioner wrote to DOCS's Chief Medical Officer, asking for six more months of the combination treatment, followed by low dose maintenance interferon therapy. According to petitioner, he received no response. In October 2002, he wrote to a regional medical director, asking for a continuation of the combination therapy with a more effective, newly developed pegylated interferon. DOCS rejected the request for off label use of the drug. Later, a consulting physician examined the petitioner and recommended re-treatment with pegylated interferon and ribavirin. As the petitioner neared completion of re-treatment, his treating physician opined that he would benefit from continued low dose maintenance of pegylated interferon. In correspondence to a different staff physician, the regional medical director rejected the use of maintenance therapy, observing that the recommended treatment was not supported by published studies, though a study was underway to determine if it had value. The petitioner filed a grievance following denial of maintenance therapy, which DOCS denied. He commenced a CPLR article 78 proceeding after exhausting his administrative remedies. The Supreme Court denied the petition and dismissed the proceeding. The Appellate Division affirmed.

Holding: The court properly found that there was a rational basis for DOCS's denial of the requested maintenance therapy. *See eg Matter of Peckham v Calogero, 12 NY3d 424, 431.* The requested use of the medication was unproven in long-term studies and not yet approved by the FDA, and the decision was made after consideration of the facts of the case. The petitioner's Eighth Amend-

ment rights were not violated. Prison officials must provide "adequate" medical care to people in prison. *See Farmer v Brennan, 511 US 825, 832 (1994).* The Eighth Amendment is violated only if prison officials acted with deliberate indifference to serious medical needs. *See Estelle v Gamble, 429 US 97, 104 (1976).* Denial of the petitioner's requested treatment was neither objectively unreasonable nor made with subjective recklessness, and did not constitute "deliberate indifference." Although hepatitis C is a serious medical condition, the petitioner received two 48-week courses of medically-accepted treatment and was referred to and examined by several specialists. And most, if not all of the specialists, recognized that the maintenance treatment was unproven in long-term studies and not yet approved by the FDA. Finally, DOCS promised it would continue to evaluate and consider treating the petitioner with any new treatment methodologies that may be developed in the future. The medical treatment provided was constitutionally adequate. Order affirmed.

Dissent: [Smith, J] No rational basis existed for DOC's decision. The FDA classified pegylated interferon as "experimental," but did not forbid doctors from prescribing it for their patients. All five doctors who examined the petitioner agreed that the treatment was medically indicated. The treatment offered at least some possibility of protecting the petitioner against a life-threatening illness. Nothing in the record suggested that the treatment he sought would endanger him, or subject him to any medical risk that would outweigh its possible benefits.

Counsel (Competence/Effective Assistance/Adequacy) **COU; 95(15)**
Defenses (Justification) **DEF; 105(37)**
People v Moore, 15 NY3d 811, 908 NYS2d 146 (2010)

Holding: The defendant "failed to establish that his attorney provided ineffective assistance because of her failure to request a justification charge. There are sound strategic reasons for counsel's decision not to request such a charge. And even if this were not the case, defendant cannot show that he was entitled to a justification charge under any favorable interpretation of the testimony presented at trial." Order affirmed.

Juries and Jury Trials (Deliberation) (General) **JRY; 225(25) (37)**
Narcotics (Possession) **NAR; 265(57)**
People v Ramirez, 15 NY3d 824, 909 NYS2d 1 (2010)

Holding: The "Appellate Division properly concluded that the verdict was supported by legally sufficient evidence. Viewing the evidence in the light most favorable to

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the prosecution, a reasonable jury could have inferred that defendant constructively possessed the drugs and drug paraphernalia located in an apartment in which defendant himself was found (*see generally People v Contes*, 60 NY2d 620, 621 [1983])." While the "record is silent as to whether Supreme Court showed the jury note to counsel as required in *People v O'Rama* (78 NY2d 270 [1991]), defense counsel had notice of the contents of the note and the court's response, and failed to object at that time, when the error could have been cured. Accordingly, defendant's claim is unpreserved for review (*see People v Starling*, 85 NY2d 509, 516 . . .)." Order affirmed.

Appeals and Writs (Counsel) APP; 25(30)

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)

People v Mack, 15 NY3d 835, 909 NYS2d 9 (2010)

Holding: "On review of submissions pursuant to section 500.11 of the Rules [of the Court of Appeals (22 NYCRR 500.11)], order affirmed. Defendant has failed to establish that he was denied the effective assistance of appellate counsel (*see People v Borrell*, 12 NY3d 365, 369 [2009])." Order affirmed.

Appeals and Writs (Judgments and Orders Appealable) (Question of Law and Fact) APP; 25(45)(75)

Bail and Recognizance (Forfeiture and Failure to Appear) BAR; 55(25)

Sentencing (Concurrent/Consecutive) SEN; 345(10)

People v Brabham, 15 NY3d 841, 909 NYS2d 15 (2010)

Holding: "On review of submissions pursuant to section 500.11 of the Rules [of the Court of Appeals (22 NYCRR 500.11)], appeal dismissed upon the ground that the modification at the Appellate Division was not 'on the law alone or upon the law and such facts which, but for the determination of law, would not have led to . . . modification' (CPL 450.90[2][a]). In view of the above, we have no occasion to comment on the dissent's position that Penal Law § 70.25(2-c) mandates that the Appellate Division delineate its reasons for modifying the sentence." Appeal dismissed.

Dissent: [Pigott, J] The defendant pleaded guilty to attempted third-degree possession of drugs; his sentence was deferred while he was in a treatment program. He absconded before finishing the program. More than two years later, he was arrested and pleaded guilty to bail jumping. The court sentenced him to consecutive terms,

under Penal Law 70.25(2-c), of four to eight years on the drug offense and one and a half to three years on the bail jumping offense. On appeal, the sentence was ordered to run concurrently based on unspecified "'mitigating circumstances'." Penal Law 70.25(2-c) mandates a consecutive sentence for bail jumping but allows a discretionary exception "in the interest of justice," if a court "finds mitigating circumstances that bear directly upon the manner in which the crime was committed" The Appellate Division failed to make the statutorily required "'statement on the record of the facts and circumstances upon which such determination is based'" This erroneous determination was a reviewable error of law. *Cf People v Leopold*, 13 NY3d 923.

Lesser and Included Offenses (Instructions) LOF; 240(10)

People v Rivera, 15 NY3d 844, 909 NYS2d 17 (2010)

Holding: Viewing the evidence in the light most favorable to the defendant, there was a reasonable basis for finding him not guilty of second-degree possession of a weapon under Penal Law 265.03(1) ("possessing a 'loaded firearm' 'with intent to use the same unlawfully against another'"), but guilty of fourth-degree possession of a weapon under Penal Law 265.01(1) ("possessing any firearm"). *See People v Discala*, 45 NY2d 38, 41-42. The defendant's request for a lesser included offense instruction should have been granted. Order reversed and new trial ordered.

Appeals and Writs (Preservation of Error for Review) (Record) (Scope and Extent of Review) APP; 25(63) (80) (90)

Assault (Evidence) (Lesser Included Offenses) (Serious Physical Injury) ASS; 45(25) (50) (60)

People v McKinnon, 15 NY3d 311, __ NYS2d __ (2010)

The defendant was indicted for, among other offenses, first-degree assault and two counts of second-degree assault. He was convicted of first-degree assault and other felonies. During the incident in question, the accuser entered a building, where the defendant grabbed her and choked her into brief unconsciousness. The struggle continued when she came to; she grabbed a knife and stabbed the defendant in the shoulder. In response, he bit her inner forearm. The convictions were affirmed.

Holding: Under Penal Law 120.10(2), a person commits first-degree assault when: "[w]ith intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person." The evidence presented was insufficient to prove

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beyond a reasonable doubt that the accuser was disfigured “seriously.” While “disfigure” is not defined in the Penal Law, “severe facial disfigurement” as used in Workers’ Compensation Law 11 has been held to mean “that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner’” *Fleming v Graham*, 10 NY3d 296. An injury could be “serious” without being “severe”; a “serious” disfigurement need not meet the stringent *Fleming* test, but exists when a reasonable observer would find the injured person’s altered appearance distressing or objectionable. The injury must be viewed in context – its location on the body and any relevant aspects of the person’s overall physical appearance. Color photographs of the accuser’s forearm taken after the incident showed two ovals with reddish discoloration, one midway between the wrist and the elbow, the other nearer but still above the wrist. The wounds did not require stitches. No visual documentation was made of the injuries’ appearance at the time of trial. No basis appeared in the record for finding a “serious” disfigurement. Without a serious disfigurement there was no evidence of “serious physical injury” as required for one of the second-degree assault counts. See Penal Law 10.00(10). The defendant may be retried on the count alleging that he committed second-degree assault by causing physical injury in the course of and in furtherance of or flight from a felony. Order reversed and case remanded.

Dissent: [Pigott, J] Defense counsel failed to make an adequate record that the prosecution’s evidence as to first-degree assault was legally insufficient. See *People v Johnson*, 205 AD2d 309, 309 *app den* 84 NY2d 827. He failed to place a contemporaneous description or photograph of the accuser’s arm into the record. See *People v Coon*, 34 AD3d 869, 870-871 *lv den* 10 NY3d 763. The majority engaged in a “factual determination disguised as a sufficiency argument that [the] Court lacks the authority to make.”

Appeals and Writs (Notice of Appeal) (Time) **APP; 25(60) (95)**

Counsel (Competence/Effective Assistance/Adequacy) **COU; 95(15)**

**People v Syville, Nos. 153 & 154,
2010 NY Slip Op 07249, 10/14/2010**

Defendant Syville was tried three times for several felony offenses. At the second trial, he was convicted on one count and acquitted of another count; the jury hung on the remaining counts, resulting in a second mistrial. He was sentenced on the one count in 2004; the sentence was stayed pending resolution of the remaining charges. De-

fense counsel did not file a notice of appeal until 2006. The third trial culminated in a mistrial in January 2006, after which the unresolved charges were dismissed. In July 2006, the defendant, seeking to file papers in the Appellate Division with regard to the single conviction, learned that the notice of appeal filed by his trial attorney had been untimely. All applications for relief from untimely filing under CPL 460.30 were denied. The defendant’s unopposed writ of error coram nobis was also denied.

Defendant Council was convicted of two felony offenses and was sentenced in February 2007. His attorney did not file a notice of appeal within 30 days of the judgment of conviction. More than two years later, Council hired a new attorney. The prosecution did not oppose his coram nobis application in the Appellate Division seeking leave to file a late notice of appeal and added time to perfect the appeal. The application was denied.

Holding: Coram nobis is the appropriate procedural course to seek permission to file a late notice of appeal that was not timely filed due to ineffective assistance of counsel. Since the state granted criminal defendants the right to direct appeal, the defendants had the right to effective assistance of counsel in perfecting it. See *Evitts v Lucey*, 469 US 387, 393 (1985). Defense counsels’ failure to comply with their clients’ timely requests to file notices of appeal was professionally unreasonable amounting to ineffective assistance of counsel in violation of the Due Process Clause. See *Roe v Flores-Ortega*, 528 US 470, 477 (2000). “[A] defendant must be provided with an opportunity to assert a claim that the right to appeal had been lost due solely to the unconstitutionally deficient performance of counsel in failing to file a timely notice of appeal.” Most bases for coram nobis relief available prior to the enactment of CPL 440.10 were incorporated into that statute. See *People v Corso*, 40 NY2d 578. But that statute does not address the extension of time issue raised presented in this case. CPL 460.30 permits only modified relief up to one year. An exception to the time limit had been recognized for unjustifiable inaction by a prosecutor that prevented a diligent defendant from filing the notice on time. See *People v Johnson*, 69 NY2d 339. A second exception to CPL 460.30’s time limit must be recognized here, and coram nobis is the proper procedure for invoking this exception. See *People v Bachert*, 69 NY2d 593. The rulings below were based on the Appellate Division’s interpretation of CPL 460.30’s one-year statutory limit. The prosecution failed to raise and preserve for review its argument that the defendant must exercise due diligence issue in pursuing appellate rights. Both cases must be remitted to the Appellate Division so that the defendants can file their appeals. Orders reversed, coram nobis motions granted, and cases remitted.

Arrest (Probable Cause)

ARR; 35(35)

NY Court of Appeals *continued*

Confessions (Illegal Arrest) CNF; 70(35)

People v Bradford, No. 159, 2010 NY Slip Op 07378, 10/19/2010

The defendant, a registered sex offender, was detained after a report that he had brought two teenagers to his home. At the police barracks, he was Mirandized and indicated a willingness to speak, but no discussion occurred. After the police interviewed both accusers, the police confronted him with their statements. Two hours after being Mirandized, he admitted the substance of those statements. Three hours later he again waived his *Miranda* rights and signed a typewritten version of his statement. He was charged with multiple counts of third-degree rape and endangering the welfare of a child. The court denied the motion to suppress his statement. His conviction and sentence were affirmed, with modifications as to orders of protection.

Holding: The record contains sufficient proof of attenuation, so the Appellate Division’s attenuation finding is affirmed; the confession was admissible. See *People v Paulman*, 5 NY3d 122, 129. The attenuation doctrine required the court to consider “the temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct” *People v Conyers*, 68 NY2d 982, 983; see *Brown v Illinois*, 422 US 590, 603-604 (1975). The defendant was given *Miranda* warnings about 30 minutes after being detained; *Conyers* found post-arrest *Miranda* warnings to be an “important” attenuation factor. The defendant waived his *Miranda* rights but was not questioned until about two and a half hours after he was first handcuffed. See *gen People v Rogers*, 52 NY2d 527, 532 *cert den* 454 US 898. In the interim, the accusers’ statements, obtained independent of the defendant’s detention and so not subject to suppression, established probable cause for arrest. That the defendant confessed after being confronted with the accusers’ statements “constitutes a ‘significant attenuating factor’ that reasonably could be deemed a ‘precipitating cause’ of his admissions” And there was no pre-*Miranda* interrogation, nor was he mistreated while in police custody. His initial detention was not motivated by bad faith or a nefarious police purpose. See *eg People v Borges*, 69 NY2d 1031, 1033. If probable cause was lacking to apprehend the defendant, the police still had a “fair basis” (*People v Martinez*, 37 NY2d 662, 671) for approaching and detaining the defendant. Order affirmed.

Appeals and Writs (Counsel) APP; 25(30)

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)

People v Brun, No. 229 SSM 50, 2010 NY Slip Op 07580, 10/26/2010

Holding: When the prosecution appeals to the Appellate Division, Second Department, and the defendant was represented by assigned counsel at the trial court, the assignment remains in effect and counsel is to continue representation on the appeal until the appeal is decided and until counsel has performed any additional applicable duties imposed by court rules, or until counsel is otherwise relieved of the assignment. See 22 NYCRR 671.3(f). Here, the defendant’s assigned trial counsel informed him of the prosecution’s appeal but failed to represent him on that appeal. The Appellate Division, apparently unaware that counsel had been assigned below, determined the prosecution’s appeal, noting there was no appearance by the defendant. Defendant applied for a writ of error coram nobis, alleging that he had been deprived counsel on appeal in violation of Rule 671.3(f). The Appellate Division found that the defendant “failed to establish that he was denied the effective assistance of appellate counsel’” Trial counsel’s failure to comply with the rule deprived the defendant of appellate counsel to which he was entitled. A writ of error coram nobis was the proper vehicle for addressing the complete deprivation of appellate counsel that occurred here. Order reversed, writ granted, order of modification vacated, and remitted to Appellate Division for a de novo determination of the prosecution’s appeal.

Admissions (Miranda Advice) ADM; 15(25)

Appeals and Writs (Judgments and Orders Appealable) APP; 25(45)

Juveniles (Delinquency) JUV; 230(15)

Matter of Daniel H., No. 158, 2010 NY Slip Op 07575, 10/26/2010

The appellant, a juvenile, was arrested at school for credit card theft after he made an inculpatory statement without being advised of his *Miranda* rights. He was taken to the precinct, placed in an adult holding cell, and again questioned. After he and his mother were advised of his *Miranda* rights, he made a written inculpatory statement. The Family Court precluded the oral statement but denied suppression of the subsequent, written statement, finding it sufficiently attenuated from the earlier statement. The appellant was adjudicated a juvenile delinquent for committing acts, which, if committed by an adult, would constitute burglary, grand larceny, and identity theft. A split court affirmed.

Holding: The two-justice dissent below was not on a question of law in favor of the party taking the appeal, which is required for appeals brought pursuant to CPLR 5601(a), such as this one. Whether a defendant’s inculpa-

NY Court of Appeals *continued*

tory statement is attenuated from a prior un-Mirandized statement presents a mixed question of law and fact. See *People v Paulman*, 5 NY3d 122, 129. This Court does not have jurisdiction to decide the appeal. See *Merrill v Albany Med. Center Hosp.*, 71 NY2d 990. Appeal dismissed.

Dissent: [Ciparick, JJ] Whether the courts below applied the correct standard in determining attenuation was a legal question firmly within Court of Appeals jurisdiction. See *People v Borges*, 69 NY2d 1031, 1033. What occurred below was a straightforward disagreement regarding a legal standard—whether or not attenuation should be assessed differently in cases where the suspect was a juvenile. The appellant’s age should have been a factor in considering whether his Mirandized statement was sufficiently attenuated from his prior, unwarned statement.

Admissions (Miranda Advice) ADM; 15(25)

Juveniles (Delinquency) JUV; 230(15)

Matter of Jimmy D., No. 157, 2010 NY Slip Op 07574, 10/26/2010

The appellant was 13 when his nine-year-old cousin reported that he had sexually abused her. At the police station, a detective Mirandized the appellant in English and advised his mother in Spanish. Speaking to the appellant alone, the detective said he should tell her exactly what had happened, and, if he did, he would get “some help” if he needed it. The appellant admitted to sexual contact with the accuser. The Family Court denied a motion to suppress the statement. The court found that the appellant had committed acts that, if committed by an adult, would have constituted sexual misconduct crimes, and adjudicated him a juvenile delinquent. On appeal, most of the adjudications were affirmed; the voluntariness challenge to the confession was rejected.

Holding: When police take a child under 16 into custody for juvenile delinquency, they must immediately notify a parent or other person legally responsible for the child, or the person with whom the child lives, that the child is in custody. See Family Court Act (FCA) 305.2(3). The child must be advised of *Miranda* rights and, if an adult notified of the arrest (hereafter, the parent) is present, the parent must be similarly apprised. See FCA 305.2(7). “[C]ontinuous, unusual, and deliberate isolation” of a juvenile from family or other supportive adults requires suppression as a denial of the right to counsel. *People v Bevilacqua*, 45 NY2d 508, 514-515. The appellant’s mother had an opportunity to attend his interrogation (*People v Mitchell*, 2 NY3d 272, 275 n 11) and declined, if hesitatingly. The better practice is to inform the parent that the parent may attend the interview and if asked to

leave, the parent should be made aware it is not required. A parent present at questioning would be able to monitor the interrogation in case the police engaged in coercive tactics. See *In re P.*, 70 AD2d 68, 71. However, presence at the interrogation is not an absolute right. The appellant and his mother were not so isolated from one another as to affect the likelihood that his confession was voluntary. “The detective’s promise of ‘help’ did not give rise to any ‘substantial risk that . . . [Jimmy] might falsely incriminate himself’ (FCA) § 344.2[2][b][I].” Evidence in the record supports the finding that the agency met its burden of proving the voluntariness of the appellant’s inculpatory statement beyond a reasonable doubt. Order affirmed.

Dissent: [Lippman, JJ] The detective’s condition of offering help to the appellant if he confessed vitiated the effect of the earlier *Miranda* warnings. The circumstances attending exaction of the appellant’s statements—“a tired and hungry child isolated with an experienced interrogator in the middle of the night and offered illusory inducements to confess to specifically described allegations of wrongdoing”—are exactly the factors that produce false confessions.

First Department

Grand Jury (Procedure) GRJ; 180(5)

People v Davis, 72 AD3d 53, 892 NYS2d 359 (1st Dept 2010)

Police arrested a codefendant but failed to arrest the defendant. The prosecutor indicated at the grand jury that a case was being submitted against the codefendant. The accuser testified about alleged actions of both the defendant and the codefendant. The defendant then surrendered to police. Soon after, on the last day of the grand jury’s term, the prosecutor withdrew the case due to “witness unavailability.” Four months later, the prosecution presented the accuser’s testimony and that of others to a second grand jury as to both defendants, without requesting judicial leave. After both were indicted, the defendant sought to inspect the grand jury minutes and to dismiss the indictment for insufficiency of evidence; she also requested a determination of whether presentation of evidence was withdrawn before a vote was taken, then resubmitted. The codefendant moved to dismiss because the prosecution improperly failed to seek judicial authorization to present to a second grand jury; the defendant did not join that motion, which was denied. The cases were severed. The defendant was convicted.

Holding: The defendant’s request for a determination about resubmission of the evidence preserved the issue for review. “[T]he first grand jury heard and considered sufficient evidence of criminality on [the] defendant’s part . . . to render the withdrawal of the case equivalent to a dismissal . . .” See *People v Wilkins*, 68 NY2d 269, 274-275.

First Department *continued*

The desire to present more witnesses to buttress the case is consistent with avoiding a grand jury dismissal, and the good faith of the prosecution is irrelevant where the case has progressed that far. Judgment reversed, indictment dismissed with leave to the prosecution to seek permission to represent. (Supreme Ct, New York Co [Obus, JJ])

Dissent: [Catterson, JJ] The prosecution made clear from the start of the first grand jury that there were more witnesses than the accuser and a continuance would be needed. Additional testimony was needed to establish essential elements. The view of the prosecution should prevail as to whether a grand jury presentation is complete.

Impeachment (Of Defendant [Including Sandoval]) IMP; 192(35)

Misconduct (Prosecution) MIS; 250(15)
People v Ortiz, 69 AD3d 490, 894 NYS2d 37 (1st Dept 2010)

Holding: The prosecution improperly impeached the defendant by cross-examining him about “his supposed dishonesty in initially entering pleas of not guilty in prior cases followed by allegedly belated pleas of guilty” See *People v Garcia*, 169 AD2d 358, 361-364 *lv den* 79 NY2d 857. Pleas of not guilty are not the equivalent of asserting factual innocence. This questioning tended to draw an improper inference. It also violated the court’s *Sandoval* ruling permitting only elicitation of the existence of the defendant’s prior convictions. A simple mention on direct examination of having pleaded guilty, which could not be viewed as a suggestion that the failure to plead guilty was proof of innocence, did not open the door. Any discussion of the defendant’s motivation for pleading guilty in other cases was the product of the improper cross-examination. The prosecution also improperly introduced a mugshot of the defendant’s nontestifying girlfriend and referred to her criminal history. The argument that the girlfriend’s recent arrest tended to support a missing witness inference because it somehow related to the defendant’s ability to locate the girlfriend lacked merit. All the evidence did was suggest the defendant’s association with a disreputable person. The prosecutor made extensive use of the defendant’s prior record to show criminal propensity during summation, and made comments that the “defendant ‘knows he did it.’” While these errors were not preserved, they are reviewed in the interest of justice. Cumulative prosecution error deprived the defendant of a fair trial. See *People v Calabria*, 94 NY2d 519, 523. Judgment reversed and matter remanded for new trial. (Supreme Ct, Bronx Co [Stadtmauer, JJ])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause]) (General) SEA; 335(10[g]) (42)

People v Reyes, 69 AD3d 523, 896 NYS2d 301 (1st Dept 2010)

The defendant was convicted of attempted third-degree robbery. At a suppression hearing, an officer testified that he and his partner responded to a radio call “about a dispute with a knife.” At the scene, two men pointed at the departing defendant. The man fled police pursuit. At an apartment, he sought to bar their entry; the police Maced him, kicked in the door, arrested him, and found a gravity knife and fake gun on him. Later, the men at the scene said the defendant had stolen lottery tickets from their store, then displayed an apparent revolver when they refused to honor winning tickets for him.

Holding: The police “lacked valid grounds to forcibly detain [the] defendant on the street and then pursue him when he fled.” See *Matter of Manuel D.*, 19 AD3d 128 *lv den* 5 NY3d 714. They had only vaguely worded information about a dispute, no description of a suspect, and no knowledge about who had called in the information. Flight alone did not establish reasonable suspicion of criminality. No specific circumstances combined with flight to give rise to the necessary reasonable suspicion. See *People v Woods*, 98 NY2d 627. That bystanders drew attention to the defendant was not enough; reasonable suspicion depends on the entire circumstances. See *People v Evans*, 65 NY2d 629. Cases relied on by the dissent are distinguishable. Judgment reversed, motion to suppress granted, and case remanded. (Supreme Ct, New York Co [Carro, JJ])

Dissent: [Buckley, JJ] The police reasonably interpreted as accusatory the pointing out of the defendant by men at the exact address relayed in the radio run. See *eg People v Davila*, 37 AD3d 305 *lv den* 9 NY3d 842.

Lesser and Included Offenses (General) (Instructions) LOF; 240(7) (10)

People v Reyes, 69 AD3d 537, 894 NYS2d 43 (1st Dept 2010)

The defendant, a New York City correction officer, was charged with rape and falsifying business records. His assignment at the time of the alleged incident was to stay in a control room overlooking two housing units. A false logbook entry said that at the time in question, he was helping escort prisoners to the dining facilities.

Holding: The court erred in submitting the crime of second-degree falsifying business records (Penal Law 175.05[1]) to the jury. The prosecution’s sole theory about the falsifying business records charges was that the defendant lied about his whereabouts to hide the fact that he

First Department *continued*

raped a prisoner in her cell during the period in question. The jury was given no basis on which to reject the intent to cover up the rape and therefore acquit the defendant of first-degree falsifying business records, but convict him of the lesser included offense of second-degree falsifying business records. The prosecution theory offered on appeal, that the false logbook entry was intended to conceal the defendant's absence from his post, was not offered at trial, and makes no sense. The "defendant would have had no reason to make a false admission that he had improperly left his assignment by going to the mess hall." On these facts, the defendant either intended to conceal the alleged rape or had no fraudulent intent. Only the first-degree falsifying business records count should have been submitted to the jury. Judgment reversed and indictment dismissed. (Supreme Ct, Bronx Co [Newman, JJ])

Double Jeopardy (Jury Trials) DBJ; 125(10) (20)
(Mistrial)

Juries and Jury Trials (Hung Jury) JRY; 225(40)

**Matter of Marte v Berkman, 70 AD3d 493,
895 NYS2d 376 (1st Dept 2010)**

The court declared a mistrial on Friday as to some counts, after two days of deliberation. The court had already told the jurors (two of whom raised scheduling problems as to the next week) to report on Monday. The petitioners filed a CPLR article 78 proceeding to prohibit retrial, claiming double jeopardy protection.

Holding: The court could reasonably have asked the jury to continue deliberating past 5:00 pm; there was no manifest necessity to declare a mistrial. *See Matter of Randall v Rothwax*, 78 NY2d 494, 498 *cert den sub nom Morgenthau v Randall*, 503 US 972 (1992). The court did not poll the jury or ask the foreperson whether a unanimous verdict could be reached in a reasonable amount of time, thus failing to confirm the jury was hopelessly deadlocked. However, consent vitiated the need for manifest necessity. Defense counsel had discussed with the court a Friday morning note saying the jury was deadlocked on some counts. A similar note in the afternoon prompted the court to say it was inclined to take a partial verdict. When asked if they wished to be heard, one defense lawyer said "no" and the other remained silent. After the court took a not guilty verdict on two counts and asked if counsel wished to place anything on the record, both remained silent. Only after the court discharged the jury did counsel ask that the jury be held and object to a mistrial. Application denied and proceeding dismissed.

Concurrence: [McGuire, JJ] The facts show counsel implicitly consented to the mistrial. *See eg Matter of Guido*

v Berkman, 116 AD2d 439, 444. Deference is owed the trial court as to manifest necessity; all alternate jurors had already replaced departing jurors.

Dissent: [Tom, JP] Counsel objected immediately when the court stated unequivocally that a mistrial was being declared. Juror convenience is not a valid basis for mistrial.

Defenses (Justification) DEF; 105(37)

Instructions to Jury (General) ISJ; 205(35) (50)
(Theories of Prosecution
and/or Defense)

**People v Rodriguez, 72 AD3d 238, 895 NYS2d 58
(1st Dept 2010)**

The defendant was convicted of second-degree manslaughter, second-degree assault, second-degree vehicular manslaughter, second-degree vehicular assault, and operating a vehicle while under the influence of alcohol. The charges were filed after a truck proceeded downhill through an intersection, striking three people. The defendant, who was seen leaving the truck afterward, had no permission to drive it, lacked the appropriate license, and had alcohol in his system. The prosecution theory was that the defendant, while drunk, moved the truck to play a trick on its absent driver. The defendant claimed he entered the truck after it began rolling downhill and tried to stop it, without starting the engine. No justification instruction was given to the jury.

Holding: The prosecution argued that no justification instruction was warranted because, under the defendant's theory, the defendant did not engage in any statutorily prohibited conduct that would require justification. Entitlement to an instruction on a criminal charge is not defeated solely by inconsistency between that charge and some other defense raised, including outright denial. *See People v Butts*, 72 NY2d 746, 748. The availability of the justification defense rests on the record as a whole, not just defense evidence. *See People v Steele*, 26 NY2d 526, 529. In addition to the defendant's testimony that he did not start the truck, there was evidence that the truck, grossly overloaded and with a nonfunctional hand brake, never exceeded 20 miles per hour. The prosecution failed to meet its burden of disproving justification, and the error was not harmless. Judgment reversed and matter remanded for new trial. (Supreme Ct, Bronx Co [Torres, JJ])

Dissent: [McGuire, JJ] The court correctly refused to charge the choice-of-evils defense pursuant to Penal Law 35.05(2). As to the lesser offenses, it was inconsequential.

Juveniles (Custody) (General) JUV; 230(10) (55) (145)
(Visitation)

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Linda R. v Art Z., 71 AD3d 465, 895 NYS2d 412 (1st Dept 2010)

Holding: The court’s finding that the subject child should transition to unsupervised visitation with the father is amply supported by the record, which includes a court-appointed forensic psychologist’s opinion and testimony by impartial witnesses that during visits the child seemed relaxed and comfortable. The record also supports a finding that it is in the best interests of the child for the stipulation of the parties to be modified during the transition period, subject to further order of the court, to give the father decision-making custody with respect to the child’s mental health. A child is not bound by a parental agreement regarding custody and support. *See* Family Court Act 461(a); *Matter of Boden v Boden*, 42 NY2d 210, 212. The court improperly delegated to an intervention therapist the court’s authority to determine when unsupervised visitation should commence. *See Matter of Held v Gomez*, 35 AD3d 608, 608-609. As to the directive to turn the child’s passport over to the mother’s attorney, the parties’ settlement stipulation allows the mother to take the child to Canada for 10 days at a time and there has been no suggestion that the mother is a flight risk or intends to remove the child to Canada. *Cf Anonymous v Anonymous*, 120 AD2d 983, 984. Orders modified accordingly and otherwise affirmed. (Supreme Ct, New York Co [Drager, JJ])

Forgery (Possession of a Forged Instrument) FOR; 175(30)

People v Rodriguez, 71 AD3d 450, 897 NYS2d 42 (1st Dept 2010)

A complainant told a detective investigating an unspecified crime that “Devine Perez” was a suspect. The detective called a number given by the complainant, and the person who answered responded to the name Perez and said he was out of state. The detective later received information that the suspect might be in Manhattan. Recognizing the defendant from a photograph provided by the complainant, the detective arrested him for the crime under investigation and found identification papers in the defendant’s true name and in the name “Louis D. Amadou.” The latter IDs were fake. The defendant was convicted by a jury of possessing forged instruments.

Holding: The intent required for second-degree possession of a forged instrument may be inferred from the act of possession or from a defendant’s conduct and surrounding circumstances. *See People v Bracey*, 41 NY2d 296, 301. The jury could rationally infer that the defendant’s intent in possessing the fake identification was to defraud, deceive, or injure another. The indisputably fake IDs

would serve no other purpose than to establish identity, the need for which arises only when seeking to obtain some privilege or benefit. Possession of four false identity documents could rationally be found to have no purpose other than to defraud another. *See People v Dallas*, 46 AD3d 489, 491 *lv den* 10 NY3d 809. Three of the documents bore photographs of the defendant wearing the same jacket he wore at his arrest, which was also depicted in loose photographs found then, showing active involvement in the fabrication. The defendant had motive to create a false identity, *ie*, to elude police. *People v Bailey* (13 NY3d 67) does not require actual use of the forged instrument. Judgment affirmed. (Supreme Ct, New York Co [McLaughlin, JJ])

Parole (Release [Conditions]) PRL; 276(35[a])

Matter of Williams v New York State Div. of Parole, 71 AD3d 524, 899 NYS2d 146 (1st Dept 2010)

Holding: The court improperly substituted its discretion for that of the Division of Parole (Parole) when it ruled in a CPLR article 78 proceeding that it was arbitrary for Parole to deny the petitioner any visitation with his wife during non-curfew hours as long as the wife consented to the contact. The State has discretion to place restrictions on parole release. *See Matter of M.G. v Travis*, 236 AD2d 163, 167 *lv den* 91 NY2d 814. Parole may impose special conditions before or after a parolee’s release. *See* Executive Law 259-c(2); 9 NYCRR 8003.3. Special Condition (SC) 131, forbidding the petitioner to have any contact with his wife without the permission of his parole officer, was imposed in furtherance of a “zero-tolerance” policy regarding domestic violence, codified in the Division’s Policy and Procedures Manual Item No. 9401.07” The petitioner’s criminal history included a 1982 rape conviction, classification as a level two sex offender, violation of orders of protection obtained by both his former and current wife, and two arrests for assaulting and harassing the latter, though no conviction resulted. *See Matter of Ciccarelli v New York State Div. of Parole*, 11 AD3d 843, 844. There was a direct connection between the petitioner’s history with regard to his current wife and Parole’s determination that unsupervised contact with her would be incompatible with rehabilitation and might lead to future conflict. *See Matter of Moller v Dennison*, 47 AD3d 818 *lv den* 10 NY3d 708. If the petitioner’s constitutional challenge were to be considered, SC 131 would be found permissible. *See Matter of Ariola v New York State Div. of Parole*, 62 AD3d 1228, 1229 *lv den* 13 NY3d 707. Order and judgment modified, special condition reinstated, and proceeding dismissed. (Supreme Ct, New York Co [Lehner, JJ])

Dissent: [Manzanet-Daniels, JJ] Unsubstantiated allegations did not warrant the draconian stricture of cutting

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off all of the petitioner's contact with his wife and therefore their young daughter.

Defenses (Justification) DEF; 105(37)

Instructions to Jury (Theories of Prosecution and/or Defense) ISJ; 205(50)

**People v Hayes, 72 AD3d 441, 901 NYS2d 154
(1st Dept 2010)**

The defendant was convicted of second-degree assault and criminal possession of a weapon. Shortly before the defendant's trial, at which he raised a justification defense, the prosecutor told the defendant's lawyer that a police sergeant had overheard bystanders at the crime scene say the accuser had the knife first. The sergeant, busy securing the scene, had not obtained the bystanders' identities or contact information.

Holding: The police were not required to affirmatively acquire or gather information, such as the bystanders' pedigree information and statements, that might be helpful to the accused. *See People v Alvarez*, 70 NY2d 375, 381. The bystanders were never in the prosecution's control, nor would merely acquiring their pedigrees have placed them in such control. *Compare People v Jenkins*, 41 NY2d 307, 310-311. The court properly exercised its discretion in precluding the defense from using the bystanders' statements to challenge on cross examination the thoroughness of the police investigation. The defendant did not preserve for review the court's failure to give a "stop consideration" instruction as to a finding of justification as to the greater crime. Counsel only said, "If they find it is justified, it is an acquittal," when the prosecution requested it. The charge as a whole included the prosecution's burden to disprove justification as to each count, adequately conveying the law. Judgment affirmed. (Supreme Ct, New York Co [Zweibel, JJ])

Dissent: [Abdus-Salaam, J] The second-degree assault charge should be reversed due to the erroneous justification charge. *See People v Feuer*, 11 AD3d 633, 634.

[*Ed. Note:* Leave to appeal was granted on June 17, 2010 (15 NY3d 751).]

Identification (Expert Testimony) IDE; 190(5)

**People v Santiago, 75 AD3d 163, 900 NYS2d 273
(1st Dept 2010)**

The defendant was convicted of first-degree assault. The accuser and two other witnesses identified the defendant at trial as the assailant. Two had identified him two weeks after the incident, though one of them did not acknowledge it at first due to concerns about his own

immigration status; he was 80% certain the defendant was the assailant. A year later, another witness identified the defendant at a lineup. The defendant's effort to present expert testimony with regard to the accuracy of eyewitness identification was rejected.

Holding: Admission of expert identification testimony is within the court's discretion. *See People v LeGrand*, 8 NY3d 449, 452. In *People v Austin* (46 AD3d 195 *lv den* 9 NY3d 1031), as here, there was no corroborating evidence, and exclusion of expert testimony was found a provident exercise of discretion. All three witnesses here had ample opportunity to observe the defendant at close range, initially noticing him for reasons other than criminal activity. Two recognized him only two weeks later, and the third had confirmed the accuracy of the police sketch within a few days. It was reasonable to conclude that three different identifications of the same person were unlikely to be mistaken. Judgment affirmed. (Supreme Ct, New York Co [McLaughlin, JJ])

Concurrence: [McGuire, J] Whether or not multiple identifications can cross-corroborate one another, any error in excluding expert testimony here was harmless.

Dissent: [Moskowitz, J] Misidentification was a risk here. No witness knew the attacker or noticed anything distinguishing about him, and the incident was brief. Expert testimony on several aspects of eyewitness identification should have been allowed.

Juveniles (Neglect) JUV; 230(80)

**Matter of Sasha B., 73 AD3d 587, 905 NYS2d 563
(1st Dept 2010)**

Holding: The finding that the respondent mother had neglected her child was supported by a preponderance of the evidence. *See Family Court Act* 1012(f)(i)(B); 1046 (b)(I). On the way home from school the respondent got off the subway, leaving her sleeping child behind. *See Matter of Joyce A-M. [Yvette A.]*, 68 AD3d 417. This had occurred twice before, according to the child. Given that the child went back to her school, it is a reasonable inference that she could not find her way home. Order affirmed as to the finding of neglect, appeal otherwise dismissed as moot as the date for the next permanency hearing has passed. (Family Ct, Bronx Co [Drinane, JJ])

Dissent: [Andrias, J] That the mother left a child of 11 and a half years old alone on the subway shows, at most, undesirable parental behavior that made future harm merely possible, not near or impending. *See Matter of Anna F.*, 56 AD3d 1197. The mother got off the train thinking her daughter was right behind her. When she saw that was not the case, she returned to the shelter where they lived and called the police. Upon being told then that the child had returned to school, the mother called the grandmother to pick up the child. The court drew the strongest negative inference possible from the mother's failure to

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appear to testify. There is no evidence the child was physically endangered or traumatized; the child said she felt safe with her mother. The children in *Joyce A-M.* were two and four years old, not eleven.

Sentencing (Pronouncement) SEN; 345(70) (72)
(Second Felony Offender)

People v Acevedo, 75 AD3d 255, 901 NYS2d 239
(1st Dept 2010)

The defendant pleaded guilty to attempted robbery in 2001. Based on a 1993 drug conviction, he was adjudicated a second felony offender and given a four-year determinate sentence. No mandatory term of postrelease supervision (PRS) was imposed; the Department of Correctional Services added it. In 2006, the defendant was convicted of drug offenses; he was adjudicated a second felony drug offender (Penal Law 70.70[1][b]), based on the attempted robbery, a violent felony. *See* Penal Law 70.02(1)(c). His conviction was affirmed; he had not contested the violent predicate felon adjudication. In 2008, he sought resentencing on the 2001 offense based on the court’s failure to impose PRS. *See People v Sparber*, 10 NY3d 457. He was resentenced to the four-year sentence *nunc pro tunc*. The court refused to set aside his sentence on the 2006 drug offense when the defendant sought CPL 440.20 relief.

Holding: Where resentencing on a prior crime occurs after a later one, the prior no longer qualifies as a predicate conviction. *See People v Wright*, 270 AD2d 213, 215 *lv den* 95 NY2d 859. The prosecution contends that resentencing for the procedural error of omitting PRS leaves the original sentence intact for predicate purposes. “By definition, vacating a sentence has the legal effect of annulling it” The language of Penal Law 70.85, under which the defendant was resentenced, specifically declares the reimposition of a prison term without PRS lawful. If the prison portion of the sentence remained valid, there would be no need for the statute to allow a court to re-impose the sentence. *People v Williams* (14 NY3d 198) bars an upward sentence modification after a defendant’s release from prison; here, no added punishment was provided. Order reversed and matter remanded for resentencing. (Supreme Ct, New York Co [White, JJ])

Dissent: [Nardelli, JJ] The procedural flaw of failure to impose PRS should not result in a windfall to the defendant of abrogating his second felon status.

Sentencing (Pronouncement) SEN; 345(70) (72)
(Second Felony Offender)

People v Collado, 73 AD3d 608, 905 NYS2d 136
(1st Dept 2010)

The defendant pleaded guilty to attempted second-degree robbery in 2000 and received a determinate sentence with no postrelease supervision (PRS). Upon release, the Department of Correctional Services imposed a term of PRS. He was then convicted of the instant robberies and, based on the prior conviction, was adjudicated a second violent felony offender, receiving the eight-year concurrent terms here reviewed. The commitment sheet included five years’ PRS, which was not orally pronounced. Following *People v Sparber* (10 NY3d 457), the Court of Appeals remanded for resentencing. The defendant then moved to set aside the sentence in the 2000 case under CPL 440.20. The resentencing court granted the motion, resentenced him *nunc pro tunc*, and held that “correcting the sentence did not preclude use of the 2000 crime as a predicate felony in connection with sentencing in the instant case.”

Holding: The resentencing date controls whether an earlier crime qualifies as a predicate offense under Penal Law 70.06(1)(b)(ii). *See People v Acevedo*, 75 AD3d 255. The prosecution argues that *People v Williams* (14 NY3d 198) rendered the resentencing in the 2000 case a nullity because the court cannot impose PRS after the defendant is released from incarceration and his direct appeal is completed. But the prosecution enjoys no double jeopardy protection and thus no “mode of proceedings error” excuse for the failure to preserve the issue for review. Where review is restricted to issues that may have adversely affected the appellant (*see* CPL 470.15[1]), the prosecution’s alternative argument in favor of affirmance cannot be considered. *See People v Karp*, 76 NY2d 1006. On remand, the prosecution may seek to show that a different prior felony constitutes a predicate felony. Judgment reversed and matter remanded for resentencing. (Supreme Ct, New York Co [Wiley, JJ])

Dissent: [Nardelli, JJ] The trial court correctly declined to alter the defendant’s second violent felon status.

Discrimination (Gender) DCM; 110.5(30)

Juries and Jury Trials (Challenges) JRY; 225(10) (55)
(Selection)

People v Wilson, 73 AD3d 606, 902 NYS2d 41
(1st Dept 2010)

The defendant was accused of abusing his girlfriend. Convicted by a jury of first-degree coercion, he appealed, raising *Batson* (*Batson v Kentucky*, 476 US 79 [1986]) issues. The case was remanded for the prosecution to provide gender neutral explanations for five peremptory challenges against men. A hearing was held at which the prosecutor, after reviewing contemporaneous notes, proffered reasons for four of the five challenges.

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Holding: The hearing court's order indicates that the prosecutor gave reasons for challenging three of four potential male jurors. In fact, the prosecutor offered reasons for four of five men challenged. The fourth potential juror was challenged because "he had not progressed beyond high school," which is the same explanation that was offered for one of the others and found to be gender neutral. But no reason was given for the fifth peremptory challenge. The hearing court did not proceed to the third step of *Batson* analysis, rightly finding that "a failure of memory signifies that the party who struck the juror has not met his or her burden of providing a neutral explanation' for that prospective male juror." By failing to recall why he had challenged the one juror, the prosecutor failed to meet the burden of overcoming the presumption of discrimination on which the remand was based. *See People v Allen*, 86 NY2d 101, 109. The exclusion of even a single juror on gender grounds is unconstitutional. The defendant has sustained his claim. *See People v Irizarry*, 165 AD2d 715. Judgment reversed and matter remanded for a new trial. (Supreme Ct, New York Co [Uviller, JJ])

Dissent: [Gonzalez, PJ] Nothing alters my position "that the defense did not meet its initial burden of establishing a prima facie case of discriminatory exercise of peremptory challenges . . ." There was no record basis on which to reopen the *Batson* application.

Insanity (Instructions) **ISY; 200(30)**

Juries and Jury Trials (Challenges (Qualifications)) **JRY; 225(10) (50)**

People v Johnson, 74 AD3d 427, 902 NYS2d 57 (1st Dept 2010)

The defendant was convicted of multiple counts of attempted murder and assault, including several designated as hate crimes. The court denied a defense cause challenge to a prospective juror who had expressed strong opinions on the insanity defense based on her college research. The jury was given the pattern Criminal Jury Instruction (CJI) on the insanity defense. The court declined to add language specifically telling the jury to consider the defendant's ability to know or appreciate the wrongfulness of his conduct in light of false beliefs he held as a result of psychiatric illness.

Holding: The standard instruction (CJI2d[NY] Insanity) allowed the jury to accept the defense theory that a "thought disorder caused him to sincerely believe society would approve of his otherwise immoral acts because they were divinely commanded." The challenged juror repeatedly said she could follow the court's instructions and would apply them to the evidence despite her biases and strong opinions and even if she disagreed with

the instructions. The use of terms like "think" or "try" did "not make her otherwise unequivocal answers less so (*see People v Shulman*, 6 NY3d 1, 28 . . . cert denied 547 US 1043" Judgment affirmed. (Supreme Ct, New York Co [Wiley, JJ])

Dissent: [Freedman, JJ] An earlier jury had been unable to reach a verdict on these charges. Examining psychiatrists disagreed as to the defendant's sanity. The challenged juror expressed bias against the defense critical to the defendant's case. Denial of the challenge for cause warrants reversal. *See People v Arnold*, 96 NY2d 358.

Sentencing (Restitution)

SEN; 345(71)

People v Vasquez, 74 AD3d 462, 903 NYS2d 22 (1st Dept 2010)

The defendant, a bookkeeper, was found to have stolen about \$590,000, nearly all the assets of his employer. The defendant's probation was revoked for failing to pay restitution as required by the terms of his plea. His application for resentencing on the grounds of inability to pay was denied.

Holding: A denial of resentencing under CPL 420.10(5) is not appealable. *See People v Frederick*, 123 AD2d 468. The defendant's claim that he was unconstitutionally incarcerated for inability to pay (*see Bearden v Georgia*, 461 US 660 [1983]) is unpreserved because he did not articulate a constitutional claim. *See eg People v Kello*, 96 NY2d 740, 743. The record establishes that the defendant's failure to pay was willful both because he made no good faith effort to pay and because he agreed to pay restitution to obtain a favorable plea while knowing it was unlikely he would be able to satisfy the obligation. *See People v Hassman*, 70 AD3d 716, 718. There was no adequate alternative to prison; the only reason he initially received probation was his promise to repay. Judgment affirmed. (Supreme Ct, New York Co [White, JJ])

Narcotics (Penalties)

NAR; 265(55)

People v Pratts, 74 AD3d 536, 904 NYS2d 380 (1st Dept 2010)

Holding: The defendant, "a reincarcerated parole violator, is not eligible to be resentenced under the 2009 Drug Law Reform Act (DLRA) (L 2009, ch 56)." The purpose of the Act is to relieve prisoners of onerous incarceration sentences. The defendant was relieved of his incarceration by release on parole. He could have remained at liberty by meeting his parole conditions; if he had done so for two years, he would have been relieved of his entire sentence, including parole. *See Executive Law 259-j(3-a)*. Had he not violated parole, he would not have been in custody when he moved for resentencing, and so would have been ineligible for DLRA relief. *See People v Rodriguez*, 68 AD3d 676.

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There is no indication that “the Legislature intended parole violations to trigger resentencing opportunities (*see People v Mills*, 11 NY3d 527, 537 . . .).” A statutory interpretation that is contrary to reason or yields unreasonable results is presumed contrary to legislative intent. *See McKinney’s Cons Laws of NY*, Book 1, Statutes 143, Comment, at 288. The defendant’s other claims, including alleged distinctions between the 2009 DRLA and its predecessor, are rejected. Order affirmed. (Supreme Ct, Bronx Co [Collins, JJ])

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) **GYP; 181(25)**

Sentencing (Second Felony Offender) **SEN; 345(72)**

People v De Aga, 74 AD3d 552, 903 NYS2d 39 (1st Dept 2010)

Holding: The defendant was improperly adjudicated a second violent felony offender. His New Jersey conviction of aggravated assault (NJ Stat Ann 2C:12-1[b] [2]) does not qualify as a New York felony, violent or otherwise. “The statute encompasses conduct that would not be a felony in New York (*see generally People v Gonzalez*, 61 NY2d 386 [1984]), since it can be committed through non-intentional conduct (*cf. People v Muslim*, 23 AD3d 319 [2005], *lv denied* 7 NY3d 760 . . .).” Further, that statute’s definition of “bodily injury” is broader than the definition of “physical injury” in Penal Law 10.00(9). The New Jersey complaint, which contained more information, was superseded by the indictment, which does not establish that the defendant committed a New York felony. This unpreserved error is reached in the interest of justice. Misinformation about the defendant’s status impacted plea negotiations, with the parties believing that he was receiving the most lenient available disposition. The defendant’s predicate status “made a dramatic difference in the minimum sentence upon a conviction after trial for the original charge of completed second-degree weapon possession.” The misinformation may have affected the prosecution’s offer and the defendant’s decision to accept it. Judgment reversed, plea vacated, and matter remanded. (Supreme Ct, New York Co [Uviller, JJ])

Counsel (Competence/Effective Assistance/Adequacy) **COU; 95(15)**

Homicide (Murder [Definition] [Evidence]) **HMC; 185(40[d] [j])**

People v Sanchez, 76 AD3d 122, 904 NYS2d 24 (1st Dept 2010)

The defendant was charged with two counts of second-degree murder. After a motion to dismiss the intentional murder count was denied, the defendant was convicted on March 16, 2004, of depraved indifference murder. A motion to set aside the verdict and reduce the conviction to second-degree manslaughter was denied as un-preserved. The conviction was affirmed. The defendant subsequently moved to vacate the judgment alleging ineffective assistance of trial counsel. Counsel did not “argue that the depraved indifference second-degree murder count, although sustainable under an objective recklessness standard, was not supported by the requisite subjective depravity . . .” Counsel’s affidavit said failure to do so was an oversight, not strategy.

Holding: At the time of the defendant’s trial, only a dissenting viewpoint (*see People v Register*, 60 NY2d 270, 394 [Rosenblatt, J, dissenting] *cert den* 466 US 953) said that depravity was legislatively intended to be the mens rea of depraved indifference murder and drew substantive distinctions between the two types of murder charged here. The majority holding in *Register* and *People v Sanchez* (98 NY2d 373) were controlling law. In recent years, the law as to depraved indifference murder has evolved; the law that the defendant relies on appeared in the two years following his conviction. *See eg People v Payne*, 3 NY3d 266, 272. The defendant fails to state what objection counsel below could have raised that would have led the trial court to dismiss the depraved indifference murder count on insufficient evidence grounds. Lawyers are not held to a standard of clairvoyance. Order affirmed. (Supreme Ct, Bronx Co [Marcus, JJ])

Family Court (Evaluative Reports) **FAM; 164(15)**

Matter of Isidro A.-M. v Mirta A., 74 AD3d 673, 902 NYS2d 362 (1st Dept 2010)

Holding: As the pro se petitioner was permitted to review the forensic report in court, Family Court did not improvidently exercise its discretion by denying his request for a copy. *See Family Ct Act* 166; *Matter of Morrissey v Morrissey*, 225 AD2d 779. “However, petitioner should be permitted to take notes during the in court review because he is proceeding pro se and opposing counsel have unfettered access to the report. As this issue is likely to arise again, we note the better practice in most cases would be to give counsel and pro se litigants access to the forensic report under the same conditions.” Order modified to permit petitioner to take notes of the report while reviewing it under court supervision, and otherwise affirmed. (Family Ct, New York Co [Cook, Ref])

Probation and Conditional Discharge (Conditions and Terms) **PRO; 305(5)**

First Department *continued***Search and Seizure (Parolees and Probationers)**

SEA; 335(50)

People v Pagan, 76 AD3d 414, 906 NYS2d 37 (1st Dept 2010)

Three months after the defendant was placed on probation for third-degree weapons possession, the Department of Probation (Probation) sought to enlarge the conditions of his supervision. Specifically sought was permission to “conduct sporadic, nondestructive, ‘knock-and-announce’ searches of defendant’s home at reasonable hours when defendant is at home.” The court granted the request.

Holding: The defendant’s argument that a probationer’s residence can only be searched pursuant to court order issued under CPL 410.50(3) is rejected. That statute does not purport to be the only vehicle for allowing a search by Probation of probationers’ persons, residences, or real property. As a matter of statutory interpretation, in keeping with the rehabilitative purposes of Penal Law 65.10, probation conditions may be enlarged under CPL 410.20. The probation system and other government entities, present “special needs” that may justify departure from normal probable-cause and warrant mandates. *See Griffin v Wisconsin*, 483 US 868, 873-874 (1987). The search order provision of CPL 410.50(3) has been held not to preempt the lawfulness of a search where a probationer’s plea agreement included consent to residence searches. *See People v Hale*, 93 NY2d 454. Without addressing unilateral imposition of search conditions, *Hale* cited with approval cases in which search conditions were imposed. The condition here was tailored to suit the probationer and circumscribed to meet probationary goals with respect to him. Order affirmed. (Supreme Ct, Bronx Co [Boyle, JJ])

Dissent: [Moskowitz, JJ] “I cannot agree that any legal precedent authorizes warrantless searches under the facts of this case.”

Misconduct (Judicial)

MIS; 250(10)

People v Leggett, 76 AD3d 860, 908 NYS2d 172 (1st Dept 2010)

The defendant was convicted of attempted second-degree robbery for a gunpoint carjacking. The accuser was the only eyewitness. The defendant was arrested four days later in an Acura that had been stolen in a successful carjacking the same day as this attempt; the defendant was acquitted of possession-related charges. Evidence was permitted in this case about a co-defendant’s theft of the Acura. The trial court made comments about defense counsel throughout the trial.

Holding: The defendant’s weight of the evidence arguments are unpersuasive, but the court’s “pervasive denigration” of defense counsel in the jury’s presence deprived the defendant of a fair trial. *See People v Torres*, 182 AD2d 461, 462. The court referred to one of counsel’s lines of questioning as “irrelevant to begin” with, and to repetition of it as “silly.” This disparaged counsel and negated the line of questioning. *See People v Reina*, 94 AD2d 727, 728. The court told counsel to stop arguing after prosecution objections during counsel’s summation; when counsel pointed out the prosecutor was arguing an objection to his summation, the court said, “You’re turning this into a comedy, and it’s not.” The most egregious court comment came when counsel objected during the prosecutor’s summation: “Would you behave like a professional, please and not a clown.” If a lawyer’s behavior warrants admonishment, the jury should not be present for it. Presenting evidence of the completed carjacking was not error. Judgment reversed and matter remanded for new trial before a different justice. (Supreme Ct, Bronx Co [Neary, JJ])

Sex Offenses (Sexual Abuse)

SEX; 350(27)

People v Mack, 76 AD3d 877, 908 NYS2d 181 (1st Dept 2010)

The court reduced a first-degree sexual abuse charge to a charge of third-degree sexual abuse after inspecting the grand jury minutes. The court found insufficient evidence to establish forcible compulsion. The case was resubmitted to a new grand jury, resulting in the instant one-count indictment charging first-degree sexual abuse, which was dismissed on the same ground. The charges stemmed from allegations that the defendant rubbed his penis against the lower back of the 14-year-old accuser in a crowded subway. She discovered semen on her jeans and coat as she left the train.

Holding: The prosecution posits two statutory theories of the element of forcible compulsion—“physical force and threat of force.” The conduct described to the grand jury established the use of stealth, not force. The defendant stopped what the accuser called “weird movements” each time she turned, and she did not know what had occurred until afterward. This furtive behavior is a far cry from limiting a victim’s freedom of movement by lifting her off the ground, as occurred in *People v Del Campo* (281 AD2d 279 *lv den* 97 NY2d 640). While the accuser here said in conclusory fashion that she felt threatened, no detailed facts were presented to the grand jury in support. *Cf People v Mirabal*, 278 AD2d 526, 527. No evidence in the record implied that the accuser was put in fear of immediate death, physical injury, or kidnapping. *See Penal Law 130.00(8)*. Order affirmed. (Supreme Ct, New York Co [White, JJ])

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Dissent: [Catterson, JJ] The evidence might not be sufficient to convict upon a trial, but only a prima facie case is required. The defendant was twice the accuser’s weight and seven inches taller and trapped the accuser where she could not move away.

Search and Seizure (Examinations of Personal Effects) (Warrantless Searches [Plain-View Objects]) SEA; 335(40) (80[k])

People v Herrera, 76 AD3d 891, 908 NYS2d 383 (1st Dept 2010)

The trial court granted the defendant’s motion to suppress physical evidence and a statement.

Holding: The detective who observed a shiny silver object clipped to the defendant’s back pants pocket when he walked slowly in front of the unmarked car at night believed the item was a weapon. Stopping their car, the officer and his partner approached the defendant without drawing their weapons and asked him to stop. The officer, when two or three feet behind the defendant, pulled the object—a gravity knife—out. In transit to the station after his arrest, the defendant said he had the knife for protection. The court erred in suppressing the knife. Based on training and experience—the officer had been involved in 50 to 60 weapon possession arrests—the officer’s observations of an object that “curved upward” unlike money clips and cell phones, and was not square like tape measures, provided reasonable suspicion that the defendant had an illegal weapon. The facts giving rise to the constitutionally permissible intrusion would not be negated by testimony that the officer did not fear for his safety. *See People v Batista*, 88 NY2d 650, 654. That the officer acknowledged he could not be absolutely sure the object was an illegal knife until he tested it did not undermine his substantial certainty that an illegal weapon was present. No physical restraint or frisk were involved; this was not a level-four intrusion under *People v De Bour* (40 NY2d 210). Order reversed and criminal complaint reinstated. (Supreme Ct, Bronx Co [Cirigliano, JJ])

Dissent: [Catterson, JJ] Training cannot provide the ability to distinguish an illegal knife from a legal one in a back pocket. This level-four encounter required probable cause.

Second Department

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) GYP; 181(25)

People v Robinson, 71 AD3d 1169, 898 NYS2d 175 (2nd Dept 2010)

During her 2002 plea allocution, the defendant said she came home to find her ex-boyfriend and the accuser taking items from her apartment. In an ensuing struggle, she stabbed the accuser; she said she “was ‘scared’ during the incident.” The prosecution said the plea was not satisfactory, but the court replied, “Who cares about scared.”

Holding: The allocution raised the possibility of a justification defense and so cast significant doubt on the defendant’s guilt. *See* Penal Law 35.15(2)(c), 35.20(e); *People v Lopez*, 71 NY2d 662, 666. It is a defense to attempted first-degree assault that the defendant, in possession of a dwelling, reasonably believed deadly force was necessary to terminate another person’s burglary of that dwelling. *See* Penal Law 35.20(3); *cf People v Adames*, 52 AD3d 617, 619. Preservation requirements do not apply as the defendant’s allocution called into question the voluntariness of her plea. The court should have made further inquiry to determine whether the defendant understood the ramifications of a viable justification defense. Judgment reversed, plea vacated, and matter remitted for further proceedings. (Supreme Ct, Kings Co [Rappaport, JJ])

Dissent: [Fisher, JP] The defendant was represented by a succession of lawyers, some assigned, others retained. The fifth one worked to get a favorable disposition as negotiations intensified, but resigned when the defendant filed disciplinary charges. After the plea, the defendant failed to appear for sentencing. Her allocution did not show a reasonable belief in the need for deadly force against an unarmed pregnant woman.

Sex Offenses (Sentencing) SEX; 350(25)

People v Woods, 72 AD3d 668, 897 NYS2d 640 (2nd Dept 2010)

After a hearing to determine the defendant’s sex offender risk level pursuant to *Doe v Pataki* (3 F Supp 2d 456 [SDNY 1998]), he was designated a level three sex offender under Correction Law article 6-C. This was an upward modification.

Holding: Nothing in the record indicates that the defendant sought a *Doe v Pataki* redetermination hearing. Further, the prosecution did not prepare a new risk assessment instrument, as the *Doe v Pataki* settlement required. Holding the redetermination hearing was error. Order reversed and the earlier order designating the defendant a level two sex offender reinstated. (County Ct, Suffolk Co [Spinner, JJ])

Appeals and Writs (Prosecution, Appeals by) APP; 25(70)

Article 78 Proceedings (General) ART; 41(10)

Second Department *continued***Matter of Donovan v Pesce, 73 AD3d 137,
898 NYS2d 610 (2nd Dept 2010)**

The prosecutor appealed suppression of identification testimony in a criminal proceeding to the Appellate Term. It did not appear that the defendant was advised of his rights in the event of a prosecution appeal, including the right to counsel, and he did not respond to the appeal. The Appellate Term directed the prosecutor to personally serve on the defendant within 20 days, along with the prosecutor's brief, a copy of a May 7, 2009 order setting out his rights and warning of the possibility of default if he did not respond. No proof of service or request for an alternative form of service appears in the record. The prosecutor seeks prohibition of enforcement of the May 7 order.

Holding: There is no clear right to the requested relief. Reliance on *People v Ramos* (85 NY2d 678) is misplaced. *Ramos* found a rule requiring personal service on a defendant inconsistent with relevant statutes because it permitted a defendant at liberty to cause dismissal of a prosecutor's appeal by evading personal service. But in *People v Garcia* (93 NY2d 42), the Court of Appeals found that in the absence of record evidence that an unrepresented defendant knew of and had waived the right to counsel on a prosecution appeal, the appeal should not be heard. The May 7 order was an effort to determine whether the defendant had effectively waived counsel, while allowing the prosecution a way around evaded service. The prosecution is not entitled to a judgment compelling the Appellate Term to abandon its reasoned response to *Garcia*. While the courts are ultimately responsible for ensuring compliance with *Garcia's* dictates, the person performing ministerial acts to do so need not be a court employee. Petition denied and proceeding dismissed on the merits.

Records (Sealing) **REC; 327(40)**

**Matter of Akeiba Mc., 72 AD3d 689, 897 NYS2d 656
(2nd Dept 2010)**

Holding: The appellant in this juvenile proceeding was granted an adjournment in contemplation of dismissal. The proceeding was dismissed and the record sealed pursuant to CPL 160.50. The prosecution later moved to unseal, claiming it was necessary to obtain the testimony or statements of the appellant with regard to criminal matters pending against two others arising from the same incident. The court granted unsealing and denied reargument. The appellant correctly contends that the prosecutor's request "does not fall under the 'law enforcement agency' exception to the general proscription against releasing sealed records (CPL 160.50[1][d][ii]; see *Matter of Katherine B. v Cataldo*, 5 NY3d 196, 202-205)." No

appeal lies from an order denying leave to reargue. Order granting unsealing reversed and motion to unseal is denied. (Family Ct, Nassau Co [Marks, JJ])

Appeals and Writs (Arguments of Counsel) (Counsel) **APP; 25(5) (30)**

Counsel (Anders Brief) (Competence/Effective Assistance/Adequacy) **COU; 95(7) (15)**

**People v Barger, 72 AD3d 696, 897 NYS2d 521
(2nd Dept 2010)**

Holding: Assigned appellate counsel moved to be relieved pursuant to *Anders v California* (386 US 738 [1967]), which requires that counsel who assert an appeal is wholly frivolous must brief the underlying facts and highlight anything in the record that might arguably support an appeal. See *People v Saunders*, 52 AD2d 833, 833. "The factual summary and analysis contained in the brief submitted by the defendant's assigned counsel was limited to a recitation of the circumstances surrounding the defendant's withdrawn plea of guilty. After the withdrawal of the plea, however, a three-day jury trial and a sentencing proceeding were held. Counsel's brief contained no reference to pretrial proceedings, merely mentioned that a jury trial was held . . . and did not analyze whether any possible issues for appeal arose from the pretrial proceedings, the trial, or the sentencing proceeding. Under these circumstances, the wholly deficient brief submitted by assigned counsel failed to 'adequately safeguard [the defendant's] right to appellate counsel' (*People v Stokes*, 95 NY2d 633, 635 . . .)." Motion granted and counsel relieved and directed to turn over all papers to new counsel. (County Ct, Orange Co [DeRosa, JJ])

Competency to Stand Trial (General) **CST; 69.4(10)**

Insanity (General) **ISY; 200(27)**

**People v Heston, 72 AD3d 701, 899 NYS2d 278
(2nd Dept 2010)**

Holding: "The defendant's history of mental illness, and his behavior and comments to the court prior to the commencement of the trial cast serious doubt on his competence, and therefore the Supreme Court erred in denying defense counsel's repeated requests to have the defendant examined pursuant to CPL 730.30 to determine his fitness to proceed (see *People v Peterson*, 40 NY2d 1014, 1015)." It would be futile to remit for a reconstruction hearing given the passage of time and lack of contemporaneous psychiatric reports about the defendant's mental condition at the time of trial. See *People v Hussari*, 17 AD3d 483, 483-484. The judgment must be reversed and the case remitted for further proceedings on the indictment,

Second Department *continued*

subject to the court’s discretion or a motion by either party raising the issue of the defendant’s capacity to proceed. See CPL art 730; *People v Hasenflue*, 48 AD3d 888. Judgment reversed and matter remitted. (Supreme Ct, Queens Co [Knopf, JJ])

Evidence (Prejudicial) EVI; 155(106)

People v Chi, 72 AD3d 709, 898 NYS2d 619 (2nd Dept 2010)

The accuser initially did not correctly identify the defendant, known to him from the neighborhood, at trial. He eventually said the defendant was the assailant who stabbed him. The defendant was convicted of assault and related offenses.

Holding: The court improperly admitted the accuser’s testimony that a relative of the defendant gave him money not to testify, and offered him more. There was no showing that the defendant participated in the alleged effort to interfere with the accuser’s trial testimony. See *People v Brooks*, 292 AD2d 540, 541. “This inflammatory evidence was not admissible to impeach the credibility of the People’s own witness, or to infer the defendant’s guilt (cf. *People v Fitzpatrick*, 40 NY2d 44, 49-50 . . .).” While a court is presumed to consider only competent evidence in reaching a verdict in a nonjury trial (see *People v Kozlow*, 46 AD3d 913, 916), the presumption was rebutted here when further testimony on the subject was permitted and elicited by the court. Under the particular circumstances, where the evidence of guilt was not overwhelming, the error was not harmless. See *People v Crimmins*, 36 NY2d 230. Judgment reversed and matter remitted for new trial. (Supreme Ct, Queens Co [Gavrin, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Lyons, 72 AD3d 776, 900 NYS2d 97 (2nd Dept 2010)

The defendant was designated a level two sex offender pursuant to Correction Law article 6-C.

Holding: The court granted the prosecution’s application for an upward departure from the presumptive risk level determined by use of the risk assessment instrument, but failed to set forth the findings of fact and conclusions of law on which that determination was made. See Correction Law 168-n(3); *People v Smith*, 11 NY3d 797, 798. The record is sufficient for such findings of fact and conclusions of law to be made on appeal. See *People v Hill*, 50 AD3d 990, 991. Certain circumstances about the sex offense highlighted by the prosecution were adequately taken into account by the guidelines. For example, the defendant was assessed 30 points for “use of violence,”

covering the fact that the defendant held a knife against the accuser’s throat and dragged her. Cf *People v Abraham*, 39 AD3d 1208, 1209. The remaining circumstances cited by the prosecution and not taken into account by the guidelines do not appear probative of a “risk of reoffense.” Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 5 (2006 ed); see *People v Burgos*, 39 AD3d 520, 521. The matter need not be remitted. Order reversed and the defendant is designated as a level one sex offender. (County Ct, Nassau Co [Brown, JJ])

Evidence (Business Records) (Hearsay) EVI; 155(15) (75)

Juveniles (Support Proceedings) JUV; 230(135)

Matter of Fortunato v Murray, 72 AD3d 817, 899 NYS2d 283 (2nd Dept 2010)

After the mother of the four subject children filed a petition claiming the father was willfully in arrears in child support payments of \$3,500 monthly, the father filed a petition for downward modification of his obligations, contending that he was medically disabled and could not work. The support magistrate refused to admit, on hearsay grounds, any medical records offered by the father. The father’s petition was then denied with prejudice and his objection was denied.

Holding: The Family Court found the father’s reference to CPLR 4518(a) inapposite because that section referred “to business records, not doctors office records or notes.” While medical reports containing a doctor’s opinion or expert proof, as opposed to routine business entries of a treating physician, are not admissible as business records (see *Matter of Bronstein-Becher v Becher*, 25 AD3d 796, 797), doctor’s office records supported by the foundations set out in CPLR 4518(a) are. These records can be admitted even if a physician is available to testify as to their substance and contents. See *Napolitano v Branks*, 141 AD2d 705, 705-706. The documents in question are not part of the record on appeal, so it is unclear whether they would be viewed as admissible. Order reversed, petition reinstated, matter remitted to the Support Magistrate for a new determination as to admissibility of the medical records and, if they are admitted, a de novo determination of the father’s petition. (Family Ct, Nassau Co [Singer, J & Walsh, SM])

Juveniles (Neglect) JUV; 230(80)

Matter of Alexander J.S., 72 AD3d 829, 899 NYS2d 281 (2nd Dept 2010)

The father was found to have neglected one child and derivatively neglected another.

Holding: The evidence showed that the father pulled on his daughter’s shirt, causing her to fall and hurt her wrist, when she failed to follow his directions. He then

Second Department *continued*

spanked her on the buttocks and hit her arm with an open hand. There was no evidence that he intended to injure her or engaged in a pattern of excessive force when disciplining her. While a single incident may support a finding of neglect (*see Matter of Rachel H.*, 60 AD3d 1060, 1061), parents have a right to use reasonable physical force in disciplining children. *See Matter of Isaiah S.*, 63 AD3d 948, 949. The family court's finding of neglect of the daughter was not supported by a preponderance of the evidence. *See Matter of Chanika B.*, 60 AD3d 671, 671-672. Therefore, the finding that the father neglected his son, present at the incident, was likewise not supported. *See Matter of Corey Mc. [Tanya Mc.]*, 67 AD3d 1015, 1016-1017. Fact-finding order reversed, petitions denied, and proceedings dismissed. (Family Ct, Suffolk Co [Whelan, JJ])

Juries and Jury Trials (Competence) **JRY; 225(15) (37)**
(General)

Misconduct (Juror) **MIS; 250(12)**

People v Giarletta, 72 AD3d 838, 898 NYS2d 639
(2nd Dept 2010)

The defendant was convicted by a jury of endangering the welfare of a child.

Holding: At a hearing on a motion to set aside the verdict, the defendant established, by a preponderance of the evidence (*see CPL 330.40[2][g]; People v McDonald*, 40 AD3d 1125) that during trial a juror communicated with her sister by text message and cell phone about information pertinent to the guilt or innocence of the defendant. This misconduct directly contravened the court's instructions. Not all misconduct by jurors reaches the level of inherent prejudice requiring automatic reversal (*see People v Brown*, 48 NY2d 388, 394), and every case must be examined on the unique facts thereof. *See People v Clark*, 81 NY2d 913, 914. The juror's actions created a significant risk of prejudicing a substantial right of the defendant. *See People v Romano*, 8 AD3d 503, 504. Judgment reversed, new trial ordered. (Supreme Ct, Richmond Co [Collini, JJ])

Juveniles (Support Proceedings) **JUV; 230(135)**

Matter of Moore v Abban, 72 AD3d 970, 899 NYS2d 362
(2nd Dept 2010)

The father of the subject child objected to and appealed from an order granting the mother's petition for a modification of her child support obligation, vacating her support arrears, and directing the Support Collection Unit to stop charging or collecting child support from her.

Holding: By relieving the mother of any child support obligation, the Support Magistrate violated the statutory requirement that a parent be required to pay at least \$25 per month. *See Family Court Act 413(1)(d), (g)*. On remittal, there must be a de novo determination, considering "the mother's contentions concerning her inability to work, the father's dissipation of marital assets, and the cost of counseling incurred by the mother as a result of the father's physical and emotional abuse" *See Family Court Act 413(1)(f)*. The Support Magistrate's vacatur of the mother's arrears based on a conclusion that imposing any child support on her was unfair (*see Family Court Act 413[1][g]*) was also error. Even if the mother had good cause for failing to seek modification of her support obligation before arrears accumulated, those arrears could not be reduced or vacated. *See Family Court Act 451; Matter of Dox v Tynon*, 90 NY2d 166, 173-174. Order reversed, the father's objections granted, order vacated, and matter remitted for a new determination. (Family Ct, Westchester Co [Duffy, JJ])

Juveniles (Paternity) **JUV; 230(100)**

Matter of Smythe v Worley, 72 AD3d 977,
899 NYS2d 365 (2nd Dept 2010)

The Family Court found that the mother of the subject child failed to meet her burden of showing the putative father was equitably estopped from challenging paternity. Genetic marker testing was ordered. The attorney for the child appealed by permission.

Holding: The State of Georgia, under the Uniform Interstate Family Support Act, directed the mother to commence proceedings to establish paternity of the then-15-year-old child and obtain child support. The putative father requested genetic marker testing. At a hearing on equitable estoppel, testimony demonstrated that the putative father and the child had a parent-child relationship, though somewhat limited, and that the child had developed relationships with members of the putative father's family. "From these facts, the Family Court should have found that there was sufficient evidence of harm to the child since the child changed his position by forming a bond with the putative father and his family (*see Matter of Shondel J. v Mark D.*, 7 NY3d [320] at 328 . . .)." The court should have found the mother demonstrated that the putative father was equitably estopped from challenging paternity and given the putative father an opportunity to present evidence that ordering genetic marker testing was in the child's best interests. Order reversed and matter remitted. (Family Ct, Kings Co [O'Shea, JJ])

Juveniles (Neglect) (Parental Rights) **JUV; 230(80) (90)**

Second Department *continued*

Matter of Christopher V., 72 AD3d 980, 898 NYS2d 667 (2nd Dept 2010)

The court terminated the mother’s parental rights as to the subject child and transferred custody to the county social services department for purposes of consenting to adoption.

Holding: “[T]he Family Court erred in failing to hold a dispositional hearing in the absence of consent of the parties (*see* Family Ct Act § 625[a]; *Matter of Imani M.*, 61 AD3d 870, 871).” The court did not err in considering the mother’s time at a drug-treatment facility when determining if she permanently neglected her child. Except for the first 30 days in the program, the mother was not prevented from visiting with or planning for the future of the child. The mother “was not ‘institutionalized’ or ‘hospitalized’ within the meaning of Social Services Law § 384-b(7)(d)(ii) (*see Matter of Regina M. C.*, 139 AD2d 929, 929-930).” Order modified and matter remitted for a dispositional hearing in accordance herewith. (Family Ct, Westchester Co [Duffy, JJ])

Double Jeopardy (General) DBJ; 125(7)

Sentencing (Resentencing) SEN; 345(70.5)

People v Bolden, 72 AD3d 985, 898 NYS2d 260 (2nd Dept 2010)

The defendant’s robbery convictions were affirmed on Mar. 1, 2004. After serving the prison term set by the court, he was released on Oct. 27, 2006. The Department of Correctional Services initiated a resentencing pursuant to Correction Law 601-d and a five-year term of post-release supervision was added to the defendant’s sentence on Dec. 22, 2008.

Holding: Double jeopardy prohibits modification of a sentence to add a period of post-release supervision once a defendant has completed the term of imprisonment imposed by the court and an appeal is finally determined (or the time to appeal has expired). *See People v Williams*, 14 NY3d 198. The defendant’s appeal had concluded and he had served his sentence before the resentencing. Resentence reversed and original sentence reinstated. (Supreme Ct, Kings Co [Gary, JJ])

Juveniles (Custody) (Visitation) JUV; 230(10) (145)

Matter of Schick v Schick, 72 AD3d 1100, 900 NYS2d 337 (2nd Dept 2010)

The Family Court in effect granted the father’s petition to enforce provisions of a 2005 judgment of divorce that was incorporated but not merged into a stipulation of settlement. The father was awarded temporary custody,

the mother was denied visitation for a stated period, and the child and father were directed to engage in joint therapeutic counseling.

Holding: The record shows that the child, now 17 and a half years old, is alienated from the father, with both parents having contributed to the deterioration of that relationship. Despite the father’s serious, good faith efforts at reconciliation over several years, the child strongly voiced to the court and the attorney for the child his objections to being required to visit his father. The paramount concern in exercise of the Family Court’s broad discretion to fashion custody and visitation remedies must be the best interests of the child. *See Matter of Pignataro v Davis*, 8 AD3d 487, 488-489. To change custody at this time, force the child to interact with his father and sever contact with his mother and siblings for three months, and require intensive joint counseling, was an improvident exercise of discretion unsupported by a sound and substantial basis. Considering the wishes, age, and maturity of the child, who is scheduled to graduate from high school in June, attend a program in Israel beginning in August, and then start college, the existing custody arrangement should not have been modified. Order reversed. (Family Ct, Queens Co [McGrady, Ct Atty Ref])

Arson (Degrees and Lesser Offenses) (Evidence) ARS; 40(25) (30)

Sentencing (General) (Restitution) SEN; 345(37) (71)

People v Harris, 72 AD3d 1110, 900 NYS2d 137 (2nd Dept 2010)

Holding: The subject fire occurred in a medical office building with apartments on the upper floors. An apartment resident walking outside reported the fire. This was insufficient to prove a resident was actually present in the building when the fire was set as is required by the statute. *See Penal Law 150.15(a); cf People v Grogan*, 192 AD2d 719, 720. The prosecution concedes that the count of fourth-degree arson was an inclusory concurrent count of third-degree arson. *See Penal Law 300.40(4); People v Grier*, 37 NY2d 847, 848. There was no statutory authorization for the court to order the defendant to file confessions of judgment as a component of restitution. *See CPL 420.10*. The court’s imposition of a determinate sentence and post-release supervision for third-degree arson was error, as that crime is not a violent felony offense. *See Penal Law 70.00(1), (2), 70.45; People v Watts*, 309 AD2d 628, 629. The period of post-release supervision imposed on the second-degree burglary count was unclear due to a conflict between the sentencing hearing minutes and the Sentence and Commitment Sheet filed with the court clerk. Where the court imposed a definite one-year term of imprisonment for third-degree burglary, imposition of a period of post-release supervision was improper. *See Penal Law*

Second Department *continued*

70.00(4), 70.15(1), 70.45(1); *People v Murdaugh*, 38 AD3d 918, 920. Judgment modified, and as modified, affirmed, and matter remitted for resentencing on the third-degree arson and second-degree burglary counts. (Supreme Ct, Nassau Co [Berkowitz, J])

Double Jeopardy (General) **DBJ; 125(7) (30)**
(Punishment)

Family Court (Violation of **FAM; 164(60)**
Family Court Orders)

Matter of Iceniar R., 73 AD3d 784, 899 NYS2d 639
(2nd Dept 2010)

Holding: As the Administration for Children's Services concedes, the father cannot be found to have violated the Family Court's order of protection on one unspecified and two specified dates, because he was not given notice of those specific charges before the hearing. *See Matter of Prinzo v Jenkins*, 251 AD2d 709. Imposing incarceration for actions occurring on Feb. 8, 2009 and Feb. 18, 2009 violated the prohibition against double jeopardy as the father had already pleaded guilty in a criminal proceeding to violating the order on those dates. *Cf People v Wood*, 95 NY2d 509, 513. Orders modified, and as modified, affirmed. (Family Ct, Kings Co [Danoff, JJ])

Aliens (General) (Immigration) **ALE; 21(30) (40)**

Juveniles (General) **JUV; 230(55)**

Matter of Trudy-Ann W. v Joan W., 73 AD3d 793,
901 NYS2d 296 (2nd Dept 2010)

The appellant, from Jamaica, left her mother's home when she was 16 and has lived with her aunt since 2007. The court refused to appoint the aunt as her guardian, and denied a motion for "a declaration and specific findings that would enable her to apply . . . for special immigrant juvenile status pursuant to 8 USC § 1101(a)(27)(J)."

Holding: It is uncontested that the appellant's aunt has provided "a loving home, financial and emotional support, and the ability to pursue educational goals." The appellant is currently unmarried and under 21. Before 2008, Family Court Act 661 was deemed applicable only to people under 18 years old. *See Matter of Vanessa D.*, 51 AD3d 790. But it now specifically allows appointment of a guardian for someone under 21 who consents. *See Family Court Act 661(a)*. For purposes of this proceeding, the appellant is an infant, whose best interest is paramount. *See Surrogate's Court Procedure Act 1707(1); Matter of Stuart*, 280 NY 245, 250. The order below is devoid of any references to her best interest. Independent review shows that the best interests of the appellant

would be served by appointment of her aunt as guardian. *Cf Eschbach v Eschbach*, 56 NY2d 167, 172-173. Appointment of a guardian establishes the declaration of dependency on a juvenile court required by 8 USC 1101(a)(27)(J) (as amended). The record supports a finding of parental abandonment and abuse and neglect, making reunification with either parent not a viable option. *See Matter of Antowa McD.*, 50 AD3d 507, 507. In Jamaica, the appellant would have nowhere to live and no means of support. Orders reversed, guardian appointed, and findings made as noted. (Family Ct, Kings Co [Kennedy, JJ])

Search and Seizure (Detention) **SEA; 335(25) (75)**
(Stop and Frisk Suppression)

People v Dean, 73 AD3d 801, 900 NYS2d 395
(2nd Dept 2010)

A police officer was told that a man making a fraudulent credit card purchase by phone had said a woman named Tracy Carter would pick up the merchandise. The officer was given the cell phone number used, and was directed to the exit Carter would be using when carrying the stolen items. The officer blocked Carter's car with his own, and saw three people in Carter's car looking in the shopping bags involved. With gun drawn, the officer approached the passenger side of Carter's car and told the defendant to get out. The defendant was then handcuffed and taken to the police station. He asked for his cell phone from the car, which the officer retrieved; it rang when the number used to make the purchase was dialed.

Holding: The information known to police at the time of the defendant's seizure did not support a finding of reasonable suspicion. The male making the purchase had not been identified, the number of the call had not been traced, and no inquiry was made of the defendant before seizing him. A stop and frisk cannot be justified solely because a person is in the company of someone the police reasonably suspect. *See People v Terrell*, 185 AD2d 906, 907-908. An inference of guilt by association will not support reasonable suspicion. *See People v Chinchillo*, 120 AD2d 266, 268. That the defendant, a man, was in Carter's car and looking at the bags was not enough. Passing shopping bags back and forth is innocuous behavior and the car, parked in the lot and not running, was not shown to be a getaway vehicle. Judgment reversed, suppression granted, and new trial ordered. (County Ct, Nassau Co [Jaeger, JJ])

Appeals and Writs (Arguments **APP; 25(5) (30)**
of Counsel) (Counsel)

Counsel (Competence/Effective **COU; 95(15)**
Assistance/Adequacy)

Second Department *continued*

**People v Hobson, 73 AD3d 808, 899 NYS2d 657
(2nd Dept 2010)**

Holding: The appellant, pro se, claims ineffective assistance of appellate counsel and seeks a writ of error coram nobis to vacate the order and decision affirming his conviction. The appellant is granted leave to serve and file a brief on whether former appellate counsel was ineffective for failing to assert that the trial court committed error by charging the jury pursuant to Penal Law 265.09(1)(b), rather than Penal Law 265.09(1)(a). New assigned counsel is to serve and file a brief expeditiously. Application held in abeyance.

Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches]) SEA; 335(15[p])

Traffic Infractions (General) TFI; 372(15)

**People v O’Hare, 73 AD3d 812, 900 NYS2d 400
(2nd Dept 2010)**

The defendant was convicted of two counts of weapons possession.

Holding: A police officer stopped the defendant’s vehicle upon seeing an air freshener hanging from the rearview mirror. A forensic safety engineer testified for the defense at a suppression hearing that the air freshener was at dashboard level, held by a string one-tenth of one inch wide and not an obstruction of the defendant’s view as prohibited by Vehicle and Traffic Law 375(30). *See People v MacKenzie*, 61 AD3d 703. Because the court incorrectly assessed the evidence in finding the prosecution had shown reasonable suspicion that the defendant had committed a traffic infraction, new findings of fact may be made on appeal. *See People v Lopez*, 95 AD2d 241, 253. The stop of the defendant’s vehicle was unlawful. There was no other basis for the stop and for the resulting observation of an apparent seat belt law violation, the license check erroneously indicating that the defendant’s license was suspended, and the eventual vehicle search that revealed weapons. Judgment reversed, suppression granted, indictment dismissed, and matter remitted for entry of an order in the court’s discretion pursuant to CPL 160.50. (County Ct, Suffolk Co [Hinrichs, JJ])

Sentencing (Restitution) SEN; 345(71)

**People v Rodriguez, 73 AD3d 815, 900 NYS2d 402
(2nd Dept 2010)**

Holding: The court erred in relying on the probation department’s preliminary fact-finding report to set the amount of restitution. Using the probation department as

a preliminary fact finder is proper, but the court should have held a hearing once the report was provided. The information in the trial record and presentence report was not sufficient to accurately determine the proper restitution amount. *See People v Jackson*, 261 AD2d 636, 637-638. There must be a hearing on the proper amount of restitution and the manner of payment. *See Penal Law 60.27(2)*. The evidence was sufficient to support the conviction, which was not against the weight of the evidence. The request to charge third-degree assault as a lesser-included offense of second-degree assault was properly denied, as was the request for a jury charge on the justifiable use of physical force. No objection was made to the admission of the defendant’s grand jury testimony in the prosecution’s case in chief, which in any event was not error. *See People v Spurgeon*, 264 AD2d 401. No other issues have merit. Judgment modified and as modified, affirmed, restitution provision vacated, and matter remitted for a hearing and new determination of restitution and payment. (Supreme Ct, Nassau Co [Honorof, JJ])

Guilty Pleas (Vacatur) GYP; 181(55)

Sentencing (Restitution) SEN; 345(71)

**People v Bruno, 73 AD3d 941, 900 NYS2d 447
(2nd Dept 2010)**

Holding: The unpreserved contention that the court breached the plea agreement by directing the defendant to pay restitution is reviewed in the exercise of the interest of justice jurisdiction. *See CPL 470.15*. “Although a court is free to reserve the right to order restitution as part of a plea agreement, the plea minutes in this case do not indicate that the plea of guilty was negotiated with terms that included restitution. Accordingly, under the circumstances of this case, we deem it appropriate to vacate the provision of the defendant’s sentence which imposed restitution, so as to conform the sentence imposed to the promise made to the defendant in exchange for his plea of guilty (*see People v Brown*, 70 AD3d 1047; *People v Ortega*, 61 AD3d 705).” The court did not improvidently exercise its discretion by denying, without a hearing, the defendant’s motion to vacate his guilty plea based on bare assertions of innocence. *See People v Doherty*, 134 AD2d 513, 513. His attorney had no obligation to participate in his baseless pro se motion. *See People v Caple*, 279 AD2d 635, 635. Judgment modified, restitution requirement vacated, and as modified, affirmed. (County Ct, Nassau Co [LaPera, JJ])

Grand Jury (General) (Procedure) GRJ; 180(3) (5)

Misconduct (Prosecution) MIS; 250(15)

Second Department *continued***People v Goldstein, 73 AD3d 946, 900 NYS2d 440
(2nd Dept 2010)**

The prosecution appealed from dismissal of the indictment charging attempted grand larceny, forgery, and possession of a forged instrument. It alleged that the defendant offered to buy, for \$401,000, real property that the accuser did not want to sell, tricking the accuser into signing a document that was a sale contract for \$265,000. Civil claims and cross-claims were fully litigated; the defendant obtained a judgment for specific performance. Further proceedings ensued, with the defendant prevailing. On June 16, 2009, denial of the accuser's motion to vacate a judgment was affirmed. On June 18, 2009, this matter was presented to the grand jury and a true bill returned.

Holding: The court properly dismissed the indictment because the prosecutor "failed to disclose the outcome of the civil action, which was vital information of an exculpatory nature." A prosecutor need not "advise the grand jury of every possible mitigating defense," but must inform it of exculpatory defenses with the "potential for eliminating a needless or unfounded prosecution" (*People v Harris*, 98 NY2d 452, 475 . . .). "The obligation to disclose is not the same at the grand jury as at trial, but the prosecutor may not "potentially prejudice the ultimate decision reached by the grand jury (see *People v Huston*, 88 NY2d 400, 409)." This grand jury knew of the civil action but the prosecutor's instructions and responses to grand jurors' questions likely misled the grand jury into believing that the accuser had prevailed. The court properly found the grand jury's integrity was impaired. Alternatively, the court properly dismissed the indictment for insufficiency. Order affirmed. (County Ct, Rockland Co [Alfieri, JJ])

**Juries and Jury Trials (Challenges) JRY; 225(10) (15) (60)
(Competence) (Voir Dire)****People v Rose, 73 AD3d 1091, 901 NYS2d 375
(2nd Dept 2010)**

A jury convicted the defendant of burglary.

Holding: During voir dire, a prospective juror said, in response to the court's inquiry about prior experiences as crime victims, that he had come home to find his mother and a neighbor bound and gagged as a result of a burglary. The court said this was an upsetting event and the prospective juror agreed. The court then said that "the most we can ask" is for the juror to decide this case on its own merits, and asked if the juror could do that and be fair and impartial. The response was, "I can try. I really don't know." Absent any unequivocal statement by the prospective juror that he could render an impartial verdict

and not let his prior state of mind affect his verdict, the court should have granted the defense challenge for cause. As the defendant exercised a peremptory challenge to remove the prospective juror, reversal is required. See CPL 270.20(2); *People v Torpey*, 63 NY2d 361, 365. The other contentions raised are rejected. Judgment reversed and new trial ordered. (County Ct, Westchester Co [Hubert, JJ])

Juveniles (Neglect)**JUV; 230(80)****Matter of Natiello v Carrion, 73 AD3d 1070,
905 NYS2d 605 (2nd Dept 2010)**

Holding: The proceeding should have been transferred to this Court pursuant to CPLR 7804(g) as it raised questions of substantial evidence. It is treated as having been initially transferred and is considered de novo. See *Matter of Patterson v State of N.Y. Off. of Children & Family Servs.*, 34 AD3d 684. "The determination that the petitioner failed to provide adequate supervision and guardianship for her then-13-year-old autistic son . . . was not supported by substantial evidence (see *Matter of Richard R. v Carrion*, 67 AD3d 915)." The son sustained minor bruises and scratches when left in his grandmother's care where he roughoused with his younger half-brother. He had a history of minor self-inflicted wounds regardless of the level of supervision. This did not constitute substantial evidence of neglect. See Social Services Law 371(4-a)(i)(B); *Matter of Veronica C. v Carrion*, 55 AD3d 411 412. Nor was there a sufficient showing that the petitioner neglected her then-16-year-old son. He had excessive school absences while living with his father, but how many of the absences were attributable to the petitioner or how many were unexcused was unproven. That the petitioner withdrew him from school in May and failed to show that he received necessary instruction from another source did not alone establish the requisite harm or potential harm. See *Matter of Fatima A.*, 276 AD2d 791. The son's emotional problems had caused him to refuse to go to school, and he was already failing most courses. He went to a GED summer program and began college at the end of the school year; his absence from school at the end of the year was not shown to have adversely affected him. Appeal dismissed, judgment vacated, petition granted and matter remitted for amendment of the incident report to unfounded and sealing. (Supreme Ct, Putnam Co [O'Rourke, JJ])

Assault (Attempt)**ASS; 45(5)****Attempt (General)****ATT; 50(7)****People v Grant, 73 AD3d 1079, 899 NYS2d 906
(2nd Dept 2010)**

Holding: As the prosecution concedes, the crime of attempted second-degree assault under Penal Law

Second Department *continued*

120.05(3) “is ‘a legal impossibility’ (*People v Campbell*, 72 NY2d 602, 607 . . .).” The evidence of the defendant’s intent to injure the accuser was sufficient and the conviction was not against the weight of the evidence. The claim that the prosecution violated the terms of a modified *Sandoval* ruling (see *People v Sandoval*, 34 NY2d 371) is unpreserved and in any event without merit. Judgment modified, conviction of attempted second-degree assault as a hate crime vacated and that count dismissed, and as modified, affirmed. (Supreme Ct, Kings Co [Chun, JJ])

Defenses (Justification) DEF; 105(37)

Homicide (Manslaughter [Evidence] [Defenses] (Mental Condition)) HMC; 185(30[d] [g]) (35)

Racism (Black Americans) RAC; 317(10)

People v White, 75 AD3d 109, 901 NYS2d 346 (2nd Dept 2010)

The defendant, who is black, shot and killed one of five white teenagers who came to his house to confront his son about an alleged threat against a girl. The evidence conflicted sharply as to the events of the evening and whether race played a role. A jury convicted the defendant of second-degree manslaughter and possession of a weapon.

Holding: The defendant claims rejection of his justification defense was against the weight of the evidence. While he did see four or five people walking up his driveway, once he and his son were outside, the teens backed toward the street. The confrontation occurred 65 feet from the defendant’s garage. Testimony that the decedent wanted to fight outside undercut the defendant’s claim that he feared the teens would try to enter his home. No one in the defendant’s family called 911. There is support for a finding that a reasonable person would not have believed deadly physical force was necessary to prevent a burglary. See *People v Scharpf*, 60 AD3d 1101; Penal Law 35.20(3). Even if the decedent grabbed the gun, causing it to discharge, the defendant’s act of brandishing it would support a finding that he caused the decedent’s death. See *People v Rodriguez*, 144 AD2d 273, 274. The defendant’s claim that he possessed the gun in his “home” is rejected. He had it at the edge of his driveway, inches from the public street. Justification based on an emergency can be used as a defense to use, but not possession, of a weapon. See *People v Almodovar*, 62 NY2d 126, 130. The court did not abuse its discretion in precluding, due to untimely notice, defense psychiatric testimony. See CPL 250.10(2). The claim that such testimony should have been allowed to shed light on how past incidents of racism might have

influenced the defendant’s perceptions is unpreserved. Judgment affirmed. (County Ct, Suffolk Co [Kahn, JJ])

Juveniles (Custody)

JUV; 230(10)

Matter of Drake v Carroll, 73 AD3d 1172, 900 NYS2d 897 (2nd Dept 2010)

The father appealed from an order changing sole custody from him to a maternal aunt.

Holding: “The Family Court properly determined that the petitioner, a maternal aunt who has had physical custody of the subject children for an extended period of time since their mother’s death, sustained her burden of demonstrating extraordinary circumstances in this case (see *Matter of Holmes v Glover*, 68 AD3d 868). Moreover, the Family Court’s determination that an award of custody to the petitioner would be in the best interests of the subject children is supported by a sound and substantial basis in the record, and we discern no basis to disturb it (see *Matter of Bennett v Jeffreys*, 40 NY2d 543).” Order affirmed. (Family Ct, Kings Co [Feldman, JHO])

Juveniles (Visitation)

JUV; 230(145)

Matter of Robinson v Lewis, 73 AD3d 1183, 900 NYS2d 888 (2nd Dept 2010)

Holding: “Under the particular circumstances of this case, the Family Court improperly dismissed the grandmother’s petition for visitation with the subject grandchild . . . without first conducting a full inquiry into the matter to determine whether such visitation was in the child’s best interests (see generally *Matter of Machado v Del Villar*, 299 AD2d 361). The Family Court terminated the hearing held on the petition without conducting an in camera interview with the child (cf. *Matter of E.S. v P.D.*, 27 AD3d 757, 758, *affd* 8 NY3d 150) and without permitting the grandmother to complete her presentation. Additionally, the Family Court failed to admit into evidence a forensic evaluation report prepared by a clinical psychologist at the Family Court’s direction (see *Matter of Richmond v Perez*, 38 AD3d 782, 784 . . .), and did not give the parties an opportunity to examine the forensic expert. Finally, in determining that visitation with the grandmother was not in the child’s best interests, the Family Court failed to consider whether any alternatives to unsupervised visitation, such as supervised visitation and/or limited telephone contact, would be in the child’s best interests (see *Matter of Fletcher v Fletcher*, 29 AD3d 908, 909).” Order reversed, petition reinstated, and matter remitted for a new hearing and determination. (Family Ct, Kings Co [Feldman, JHO])

Second Department *continued***Identification (Eyewitnesses)
(Photographs) (Suggestive
Procedures)** IDE; 190(10) (35) (50)**People v Coleman, 73 AD3d 1200, 903 NYS2d 431
(2nd Dept 2010)**

The defendant appealed his third-degree robbery and second-degree menacing convictions. The matter was remitted for a hearing and report on the defendant's motion to suppress identification testimony. Specifically, the court was to address whether the photographic identification procedures were confirmatory in nature and, if not, whether they were unduly suggestive. The court filed its report.

Holding: The evidence at the *Rodriguez* hearing (see *People v Rodriguez*, 79 NY2d 445) showed that the accuser had seen the defendant in his neighborhood an undetermined number of times in the three months before the incident. A detective said the accuser saw the defendant "every day" but the accuser had said at the grand jury "every other day." There was no evidence as to the length of the viewings, or the circumstances, such as lighting, in which they occurred. The detective said there had been no interaction between the defendant and the accuser. This was not enough to sustain the prosecution's burden of showing the accuser knew the defendant so well as to be impervious to police suggestion. See *People v Waring*, 183 AD2d 271, 273-274. The burden of establishing that the procedures were suggestive never shifted to the defendant. See *People v Ortiz*, 90 NY2d 533, 538. At the *Wade* hearing, a detective who had not conducted or been present at the challenged photographic array testified about procedures that occurred months after the crime. See *People v Thornton*, 236 AD2d 430. The prosecution failed to prove lack of undue suggestiveness. Judgment reversed, suppression granted, and new trial ordered. (Supreme Ct, Kings Co [McKay, JJ])

**Accusatory Instruments (Amendment)
(Variance of Proof)** ACI; 11(5) (20)**People v Colletti, 73 AD3d 1203, 901 NYS2d 684
(2nd Dept 2010)**

The defendant was convicted of enterprise corruption, first-degree promoting gambling (eight counts), and fifth-degree conspiracy.

Holding: The court's instructions constructively amended the indictment to allow the defendant to be convicted for participating in a criminal enterprise other than the one identified by the grand jury. The indictment specified that the defendant oversaw "the Genovese-Bonanno Gambling Organization." No fact witnesses mentioned

such organization or organized crime in general. The prosecutor used the defendant's name in asking about the gambling business or enterprise in question. The only evidence presented to establish a relationship between the defendant and organized crime was a police investigator, testifying as an expert, who described organized crime families and said "the defendant was a 'soldier' in the Genovese crime family." The court denied a defense request for an instruction that the defendant could not be convicted of enterprise corruption unless the jury found he acted for "the Genovese-Bonanno Gambling Organization." The court told the jury it could convict the defendant if it found he was associated with and participated in "a criminal enterprise." In *United States v Weissman* (899 F2d 1111 [11th Cir 1990]), conspiracy convictions were reversed where the indictment alleged association with a specific crime family but the court told the jury they could convict on a finding of involvement in any enterprise that fit the general statutory definition. On retrial, any expert testimony on specific crimes or organized crime must comport with *Crawford v Washington* (541 US 36 [2004]). Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [Cooperman, JJ])

Sentencing (Weapons) SEN; 345(80)**People v McCray, 73 AD3d 1213, 901 NYS2d 698
(2nd Dept 2010)**

Holding: "New York City's Gun Offender Registration Act (hereinafter GORA) imposes certain registration and reporting requirements on persons convicted in the courts of the City of New York of a 'gun offense' (Administrative Code of City of NY § 10-601 *et seq.*). GORA defines a '[g]un offender,' in pertinent part, as 'any person who is convicted, after the effective date of this act, of a gun offense as defined in subdivision e of this section' (*id.* § 10-602[d]). GORA defines '[g]un offense' as 'a conviction of criminal possession of a weapon in the third degree in violation of subdivision 4, 5, 6, 7, or 8 of section 265.02 of the penal law or criminal possession of a weapon in the second degree in violation of subdivision 3 of section 265.03 of the penal law' (*id.* § 10-602[e])." GORA does not apply to the defendant because he was convicted of attempted second-degree criminal possession of a weapon in violation of Penal Law 110.00 and 265.03(3), which does not meet the definition of a gun offense. See *People v Baker*, 62 AD3d 809. Judgment reversed insofar as appealed from, portion that directs the defendant to register as a gun offender and comply with GORA requirements vacated. (Supreme Ct, Kings Co [Gary, JJ])

Juveniles (Neglect) JUV; 230(80)

Third Department *continued*

In 2005, a prior foster child reported that the defendant had committed sexual acts with him in 2002. A relative of the defendant then asserted that the defendant had abused her in 1996 and 1997. A jury convicted him of all counts arising from these charges.

Holding: The statute of limitations for class A misdemeanors, including the five counts of endangering the welfare of a child (Penal Law 260.10[1]), is two years. *See* CPL 30.10(2)(c). That limitations period is not tolled until a complainant's 18th birthday, which here was over eight years after the last act involving the relative and three and a half years after the last act involving the foster child. The evidence at trial was insufficient to support conviction under count eleven for first-degree sexual abuse of the relative when she was under 11 years of age (Penal Law 130.65[3]). She had turned 11 in April of 1997; the acts were alleged to have occurred that summer. The jury was not instructed that evidence relating to the testimony of the defendant's wife could be considered only for impeachment. The prosecutor quoted an impeaching letter for consideration as direct evidence of guilt. *See People v Montgomery*, 22 AD3d 960, 962-963. The prosecution failed to timely disclose that the accuser who was related to the defendant had a pending criminal charge. The disclosure requirement of CPL 240.45(1)(c) gives defendants a chance to explore whether a witness has been promised anything for cooperating. Delaying disclosure of the information here until after the accuser's testimony violated the statute; while not reversible error on its own, it adds to the other errors. Judgment reversed, counts 3, 8, 10, 12, and 13 dismissed with leave to re-present any appropriate related charge, and matter remitted. (County Ct, Warren Co [Hall, Jr., JJ])

Search and Seizure (Consent [Third Persons, by] (General) (Private Persons) SEA; 335(20[p]) (42) (60)

People v McFall, 72 AD3d 1128, 897 NYS2d 770 (3rd Dept 2010)

After the defendant was charged with possession of drugs and use of drug paraphernalia, the court granted his motion to suppress evidence found in a motel room the defendant had rented. The prosecution appealed.

Holding: The defendant was entitled to the protection of the Fourth Amendment during the time the room was rented. *See Stoner v California*, 376 US 483, 490 (1964). The motel manager had no authority to consent to the room's search. The claim that the warrantless search was valid because it did not exceed the scope of the initial search by the motel housekeeping employer who reported the items is rejected. *See United States v Allen*, 106 F3d 695, 698-699

cert den 520 US 1281 (1997). The claim that the defendant's alleged breach of the rental agreement extinguished his privacy interest in the room was not raised below and is not properly before this court. Order affirmed. (Supreme Ct, Albany Co [Lamont, JJ])

Article 78 Proceedings (General) ART; 41(10)

Double Jeopardy (Jury Trials) DBJ; 125(10)

Matter of Hoffler v Jacon, 72 AD3d 1183, 897 NYS2d 755 (3rd Dept 2010)

The defendant argued on appeal that the evidence was insufficient, the verdict was against the weight of the evidence, and prospective jurors were not properly sworn in his first-degree murder trial. The conviction was reversed on the last issue. The defendant unsuccessfully moved to have the first-degree and second-degree murder counts dismissed based on double jeopardy. He brought this CPLR article 78 proceeding seeking prohibition.

Holding: The defendant failed to demonstrate a clear legal right to the relief sought. *See Matter of Baim v Eidens*, 279 AD2d 787, 789. In New York, a person is considered to have been "prosecuted" for double jeopardy purposes after a jury has been empanelled and sworn. *See Matter of Rivera v Firetog*, 11 NY3d 501, 506 *cert den* 129 SCt 2012 (2009). The failure to properly swear the jury made the whole trial a nullity; the petitioner was never placed in jeopardy although the trial proceeded to conclusion. *See Criminal Procedure Law 40.30(3); Matter of Stewart v Hartnett*, 34 AD3d 1134, 1136 *app dismd* 8 NY3d 936. The claim that double jeopardy does apply because the fundamental error in administering the oath could have been corrected before trial is rejected. There is no evidence of intentional misconduct or such irreparable harm to a fundamental right that it could not be cured by retrial. *See Matter of Randall v Rothwax*, 78 NY2d 494, 499 *cert den* 503 US 972. The claim that failure to address the sufficiency and weight of the evidence on appeal was a fundamental defect barring retrial is rejected. That the defendant was not aggrieved by the appellate decision, and so could not have sought reargument, is belied by the instant action. Petition dismissed.

Juries and Jury Trials (Challenges (Competence) (Qualifications) JRY; 225(10) (15) (50)

Sex Offenses (Sentencing) SEX; 350(25)

People v Guay, 72 AD3d 1201, 898 NYS2d 353 (3rd Dept 2010)

The defendant was convicted of first-degree rape, first-degree sexual abuse, and endangering the welfare of a child.

Third Department *continued*

Holding: The “defendant’s sentence is illegal in that the periods of postrelease supervision imposed by Supreme Court were apparently based on the ranges set out in Penal Law § 70.45(2-a); this section is inapplicable to [the] defendant’s 2005 offenses (see Penal Law § 70.45[2-a], as added by L 2007, ch 7, §§ 33, 52[a]). The court should have imposed postrelease supervision based on the ranges set out in Penal Law § 70.45 (former [2]). Remittal for resentencing is necessary as it is not possible to discern what periods of postrelease supervision the court would have imposed (see *People v Warner*, 69 AD3d 1052, 1054 [2010]).” This determination renders academic the claim that the sentence is harsh and excessive. Dismissal of a prospective juror on the basis of a hearing impairment was not error. While the juror said he could hear “pretty well” in the front, the court determined from observation of the juror, including his nonverbal reactions, and from the fact that the accuser was young and likely to speak softly, that the hearing impairment would prevent the juror from doing what jurors are supposed to do. See *People v Guzman*, 76 NY2d 1, 5. The defendant’s other issues, including prosecutorial misconduct, ineffective assistance of counsel, and the elicitation of opinion testimony from an expert regarding the accuser’s credibility, are rejected. Judgment modified, sentences vacated, matter remitted for resentencing, and as modified, affirmed. (Supreme Ct, Clinton Co [Lawliss, JJ])

[*Ed. Note:* Leave to appeal was granted on June 16, 2010 (15 NY3d 750).]

Prosecutors (General) PSC; 310(20)
Sentencing (Concurrent/Consecutive) SEN; 345(10)

People v Shutter, 72 AD3d 1211, 899 NYS2d 389 (3rd Dept 2010)

The defendant was convicted of four counts of making a punishable false statement, stemming from a written complaint to police claiming, among other things, that a police officer touched her inappropriately during a traffic stop.

Holding: While the individual sentences were not harsh and excessive, the aggregate of the sentences violates Penal Law 70.25(3). Each act having been separate and distinct, each was punishable by consecutive sentences (see Penal Law 70.25[2]). However, the individual statements, contained in a single written statement, were so closely related as to constitute parts of one criminal transaction. See *People v Williams*, 277 AD2d 508, 509. The aggregate sentences may not exceed one year. See Penal Law 70.25(3); *People v Gonzalez*, 63 AD3d 1293. The court did not err in denying the defendant’s motion to disqualify the prosecutor, who interviewed the defendant as a

putative victim after the defendant’s complaint was filed. The defendant did not show actual prejudice or such a substantial risk of prejudice that disqualification was necessary. See *People v Herr*, 86 NY2d 638, 641. Retained counsel and a crime victim’s caseworker were present at the interview, detracting from the claim that the defendant developed a protected relationship with the prosecutor then. The claims of insufficient evidence were not preserved for review. The claim that the conviction on count three is against the weight of the evidence is rejected, as are the claims relating to the *Molineux* ruling and prosecution remarks in summation. Judgment modified, jail terms to run concurrently, and as modified, affirmed. (County Ct, Albany Co [Breslin, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

Matter of Devane, 73 AD3d 179, 898 NYS2d 702 (3rd Dept 2010)

The petitioner pleaded guilty in Texas to first-degree aggravated sexual assault of a child. See Tex Penal Code 22.021. Under Texas law, he has to register annually for life as a sex offender. See Tex Code Crim Proc art 62.001 (5)(A). He moved to New York and was notified by the Board of Examiners of Sex Offenders (Board) that he must register here under the Sex Offender Registration Act (SORA). See Correction Law art 6-C. The Division of Criminal Justice Services (DCJS) notified him that he must register any Internet accounts. The Board completed a risk assessment and made a risk level recommendation. The petitioner commenced this CPLR article 78 proceeding seeking reversal of the Board’s determination that he is required to register under SORA and DCJS’s requirement that he disclose his Internet information.

Holding: The claim that a deferred adjudication in Texas is not a “conviction,” so that the petitioner need not register in New York, though he must register in Texas, is untenable. SORA does not define “conviction,” but a guilty plea is a conviction under CPL 1.20(13). “SORA does not provide that the various laws of other jurisdictions will control in the determination of whether an admitted, registered sex offender in that jurisdiction must register in this state upon relocating here.” Treating a Texas guilty plea the way a New York guilty plea is treated is fundamentally fair. There is no showing the Legislature intended to give “conviction” a meaning different in SORA than in the CPL. The petitioner’s 10 years of community supervision were not completed until Mar. 31, 2004, so the amendments to SORA effective in 2000 apply. Judgment affirmed. (Supreme Ct, Albany Co [Connolly, JJ])

Trial (Public Trial) TRI; 375(50)

Third Department *continued***People v Stearns, 72 AD3d 1214, 898 NYS2d 348
(3rd Dept 2010)**

The defendant was convicted of rape and assault following an incident at a campground with his girlfriend.

Holding: The defendant was not denied a public trial by the exclusion of his sister from the courtroom until after her nine-year-old son had testified. Excluding one witness while another is testifying is a permissible way to preserve the truth-seeking function by preventing one witness from learning of facts or events by hearing another witness's testimony. *See People v Sayavong*, 83 NY2d 702, 708. Whether to exclude a spectator is within the court's discretion. *See People v Kin Kan*, 78 NY2d 54, 57. When the defendant listed his nephew, who had been present in the campground at the time of the charged conduct, as a witness, the prosecution expressed fear of giving the child's mother an opportunity to influence or coach her son after hearing prosecution witnesses. The court was concerned that having the witness's mother present might implicate the defendant's right to a fair trial by creating an opportunity for the prosecution to question the witness about his mother's influence on his testimony. The court did not abuse its discretion; the mother's presence during prosecution witness testimony could have severely undermined the court's truth-seeking function. *See People v Ming Li*, 91 NY2d 913, 197. The verdicts were not against the weight of the evidence. Testimony about the accuser's statements to a former boyfriend was admissible as "prompt outcry" and the defendant did not preserve the issue of whether the testimony given exceeded the scope of admissible prompt outcry evidence. Judgment affirmed. (County Ct, Warren Co [Hall, JJ])

Discovery (Informants) DSC; 110(15)

Instructions to Jury (Missing Witnesses) ISJ; 205(46)

**People v Darby, 72 AD3d 1280, 897 NYS2d 795
(3rd Dept 2010)**

After an undercover officer, accompanied by a confidential informant, purchased drugs from an individual three different times, the undercover officer viewed a photo array and identified the defendant as that person. The defendant was then charged in a multi-count indictment and convicted of several drug offenses.

Holding: The failure to disclose the identity of the confidential informant, thereby depriving the defendant of the opportunity to call the informant as a witness, is troubling "given the level of his involvement in these transactions." But the defendant failed to show how the informant's testimony would be relevant to the defense, claiming only that it would be exculpatory and cast doubt

on the prosecution's case. The court could not determine whether the defense was merely angling in desperation for some weakness in the case; the application for disclosure was properly denied. *See People v Goggins*, 34 NY2d 163, 169 *cert den* 419 US 1012 (1974). The defense was properly denied a missing witness charge, as the trial evidence established that the informant's testimony would have been cumulative to the testimony given by police about the transactions. *See People v Guthrie*, 57 AD3d 1168, 1170 *lv den* 12 NY3d 816. Defense counsel was able to comment extensively in summation on the informant's absence. Error was committed when the defendant's name was placed on transcripts of the drug transactions, which were before the jury when they viewed recordings, but the jury was instructed not to regard those references as evidence of identity. The court did not err in denying the request for different counsel. Judgment affirmed. (County Ct, Columbia Co [Nichols, JJ])

Sex Offenses (Sentencing)

SEX; 350(25)

**People v Lewis, 72 AD3d 1294, 898 NYS2d 529
(3rd Dept 2010)**

Holding: The defendant pleaded guilty in 2003 to several counts of sexual abuse and related offenses. A hearing pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C) was held before his release from prison. The court adhered to the recommendation in the risk assessment instrument submitted by the Board of Examiners of Sex Offenders (Board) and designated him a sexually violent offender. He was determined to be a risk level III sex offender. On appeal, the defendant contends, among other things, that the Board had not issued its recommendation within 60 days of the defendant's release date. *See* Correction Law 168-1(6). The prosecution does not oppose a new determination hearing. Order reversed and matter remitted for further proceedings not inconsistent with this decision. (County Ct, Cortland Co [Campbell, JJ])

**Defenses (Affirmative Defenses
Generally) (Notice of Defense)**

DEF; 105(2) (43.5)

Insanity (General)

ISY; 200(27)

**People v Muller, 72 AD3d 1329, 899 NYS2d 425
(3rd Dept 2010)**

The defendant shot and killed his estranged wife's parents. At trial, he sought to raise a defense of extreme emotional disturbance (EED). He testified that he intended to kill himself in front of his wife and that the gun discharged accidentally during a struggle. His wife testified that he came to her parents' home intending to kill her, and executed her parents when they intervened.

Third Department *continued*

Holding: The court barred an EED defense because it found the defendant failed to file a sufficient notice of such defense before trial, and failed to comply with conditions set by the court that would have allowed the defense to be asserted. Notice of a psychiatric defense is required, and must provide enough information to allow the prosecution and court to discern the nature of the alleged malady and its relationship to the particular defense. *See* CPL 250.10(2); *People v Almonor*, 93 NY2d 571, 581. The notice filed by the defense was found untimely and insufficient. After a series of letters, the prosecution moved to preclude assertion of any psychiatric defense. The defense responded that only lay testimony would be offered. A month before trial, the defendant said the EED defense was based on his history of depression, suicidal ideation, and prior suicide attempts, and would be established through the observations of others. The court was conditionally prepared to allow the defense, but the defendant refused to provide additional written notice and submit to psychiatric examination as the court required. Preclusion was proper. The additional issues raised by the defendant are rejected. Judgment affirmed. (County Ct, Columbia Co [Nichols, JJ])

Counsel (General) COU; 95(22.5)

Grand Jury (Procedure) GRJ; 180(5)

People v Ruffino, 72 AD3d 1353, 898 NYS2d 731 (3rd Dept 2010)

The prosecution appealed an order dismissing the indictment charging the defendant with possession of stolen property. The defendant was arraigned in town court on Sept. 8, 2008 and appeared at a preliminary hearing the next day with assigned counsel. “Pursuant to the policy of the Assigned Counsel’s office of Tompkins County, [the] defendant’s assigned counsel representation was limited to the time that defendant remained in jail;” once released, he had to apply for counsel. He appeared on Oct. 7, 2008, saying he had been denied a lawyer and asking the town court to assign one. The court withheld decision. The prosecution served a grand jury notice on the defendant’s former assigned counsel in early November. Neither former counsel nor the prosecution notified the defendant. On Dec. 2, 2008, the defendant appeared again saying he was still without a lawyer. A grand jury heard the matter that same day.

Holding: The notice to prior counsel of the grand jury proceedings did not satisfy CPL 190.50(5)(a). The prosecution’s claim that they lacked information that counsel’s representation had ended (*see People v Ward*, 234 AD2d 723, 723-724 *lv den* 89 NY2d 1042) is belied by the record. While former counsel and the Assigned Counsel office

“may have been remiss” in failing to forward the grand jury notice to the defendant or bring the situation to the attention of the prosecutor, the provision of proper notice to the defendant is an independent obligation of the prosecution. *See People v Jordan*, 153 AD2d 263, 268 *lv den* 75 NY2d 967. Order affirmed. (County Ct, Tompkins Co [Ames, JJ])

Aliens (Deportation) (General) ALE; 21(10) (30)

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)

Guilty Pleas (Vacatur) GYP; 181(55)

People v Williams, 72 AD3d 1347, 899 NYS2d 438 (3rd Dept 2010)

The defendant, who is not a citizen, pleaded guilty to third-degree sale of drugs. Deportation proceedings were commenced. *See* 8 USC 1227(a)(2)(B)(i). He moved to vacate the conviction pursuant to CPL 440.10. The motion was denied.

Holding: The defendant asserts he would not have pleaded guilty but for being advised by counsel that the plea would not result in deportation. The ineffectiveness claim therefore impacts the voluntariness of the plea (*see People v Marshall*, 66 AD3d 1115, 1116), particularly following *Padilla v Kentucky* (559 US __, 130 Sct 1473 [2010]). The affidavit accompanying the motion to vacate indicates he initially rejected the plea offer and only accepted it following counsel’s erroneous advice with regard to deportation. *Cf People v McDonald*, 1 NY3d 109, 114-115. An affidavit by the defendant’s girlfriend supports his contention, saying that at least four times she was present when counsel said the plea would not expose the defendant to deportation. A hearing should have been held before the motion to vacate was decided. *See People v McKenzie*, 4 AD3d 437, 438-440. Order reversed and matter remitted for further proceedings. (County Ct, Cortland Co [Campbell, JJ])

Evidence (Business Records) EVI; 155(15) (75)
(Hearsay)

People v Burdick, 72 AD3d 1399, 900 NYS2d 195 (3rd Dept 2010)

The defendant was convicted by a jury of third-degree grand larceny based on the theft of \$22,245 worth of lottery tickets from a convenience store.

Holding: The court erred in allowing into evidence, under the business records exception to the hearsay rule, two New York State Lottery activation and winners reports. These were admitted for the truth of their contents, *ie*, that specific lottery tickets were redeemed at specific times and places. These reports were a vital com-

Third Department *continued*

ponent of the prosecution's circumstantial case. They were the sole evidence that winning tickets were being redeemed from books that had been activated but from which no sales had been noted, and of the time and date of the redemption, which was then compared to the defendant's work schedule. The records were admissible only if the fundamental requirements of CPLR 4518(a)—that the records were made in the regular course of business, that it was a regular course of business to make such records, and that the records were made at or close to the time of the occurrence recorded—were met. *See People v Cratsley*, 86 NY2d 81, 88-89. The general manager of the convenience store chain testified that she requested, received, and filed the two reports in the normal course of the store's business. She did not purport to know the business practices and procedures of the New York State Lottery, which produced the records in question. There was no testimony presented to make the requisite showing that the records were part of the course of the Lottery's business. The court's error in admitting the reports without a proper foundation was not harmless. Judgment reversed and matter remitted for a new trial. (County Ct, Otsego Co [Burns, JJ])

Evidence (Character and Reputation) **EVI; 155(20)**

Lesser and Included Offenses (General) **LOF; 240(7)**

**People v Fernandez, 74 AD3d 1379, 903 NYS2d 176
(3rd Dept 2010)**

Out of a number of charges including sexual conduct against a child and rape, the defendant was convicted only of first-degree sexual abuse, second-degree sexual abuse, and endangering the welfare of a child. The accuser, born in 1997 and a member of the defendant's family, claimed that the defendant (also born in 1997), engaged in sexual conduct with her between August and December 2005.

Holding: The second-degree sexual abuse charge (Penal Law 130.60[2]) is an inclusory concurrent count of the first-degree sexual abuse charge (Penal Law 130.65[3]) and must be reversed and dismissed. *See People v Harp*, 20 AD3d 672, 674 *lv den* 5 NY3d 852; *see also* CPL 1.20(37), 300.40(3)(b). The court erred in precluding testimony of two family members concerning the accuser's reputation in the family for untruthfulness. There is an absolute right to place before the jury a witness with personal knowledge of an accuser's bad reputation for truth and veracity in the community. *See People v Hanley*, 5 NY3d 108, 112. Defense counsel questioned the proposed witness about his relationship to the defendant and accuser, how long he had known the latter, how large the family was, and how often they got together. He said the accuser's reputation

had been discussed at family gatherings. His testimony contained an adequate foundation for reputation testimony. The extended family at issue was shown to have the required quantity and quality of contact with the accuser. *See People v Bouton*, 50 NY2d 130, 139. Judgment reversed, count five dismissed, and matter remitted for new trial on remaining counts. (County Ct, Ulster Co [Teresi, JJ])

Concurrence in Part, Dissent in Part: [McCarthy, JJ] The second-degree sexual abuse conviction must be dismissed, but the court did not err in its rulings as to reputation evidence.

[**Ed. Note:** *Leave to appeal was granted on July 8, 2010 (15 NY3d 780).*]

Juries and Jury Trials (Challenges) **JRY; 225(10) (20) (30)**
(Constitution—Right to)
(Discharge)

**People v Henderson, 74 AD3d 1567, 903 NYS2d 589
(3rd Dept 2010)**

The defendant was convicted of felony murder and other charges.

Holding: The court erred in dismissing a sworn juror, over objection, after it was determined that the juror had, three or four years earlier, been in the apartment where the homicide occurred to repossess merchandise loaned to an inhabitant by the juror's employer. The juror said he would impartially listen to that person's testimony and not be influenced by his prior knowledge of the witness. The juror's statements were not equivocal as to his ability to be fair and impartial. *See People v Lapage*, 57 AD3d 1233, 1236. The fleeting contact years before did not constitute such a close relationship as to render the juror grossly unqualified. *See People v Telehany*, 302 AD2d 927, 928. A sworn juror, by statute, must be removed if found grossly unqualified (*see* CPL 270.35[1]), but only after a probing inquiry that establishes the juror has a state of mind that would prevent rendering an impartial verdict. *See People v Buford*, 69 NY2d 290, 298. "Under settled precedent, a defendant has a right of constitutional dimension to a trial by a particular jury, in whose selection he participated, and deprivation of this right is not subject to harmless error analysis (*see People v Anderson*, 70 NY2d 729, 730 . . .)." The court never stated that the juror had the requisite state of mind, saying only that discharge was the only fair thing to do. The court failed to apply the correct standard. *See People v Dukes*, 8 NY3d 952, 953. Judgment reversed and matter remitted for new trial. (County Ct, Warren Co [Hall, JJ])

[**Ed. Note:** *On October 28, 2010, the Third Department deleted the decretal paragraph and ordered: judgment reversed, matter remitted for a new trial solely with respect to certain specified counts, and indictment otherwise dismissed without prejudice to the prosecution to re-present any appropriate charges to another grand jury (909 NYS2d 407).*]

Third Department *continued*

Civil Practice (General)	CVP; 67.3(10)
Discovery (General)	DSC; 110(12)
Evidence (Privileges)	EVI; 155(115)

Hurrell-Harring v State of New York, 75 AD3d 667, 905 NYS2d 334 (3rd Dept 2010)

Holding: The Court of Appeals having reversed the dismissal of the complaint in this matter, the discovery issue that was dismissed as academic is now addressed. The court below denied a declaration that by filing this suit, the plaintiffs, clients of lawyers providing public defense services in five counties, waived the attorney-client privilege with regard to all communications with their lawyers. The affidavits that the plaintiffs filed to support their claim of constitutionally deficient public defense representation does not necessarily put in issue all communications between the plaintiffs and their publicly-paid attorneys. "This is especially true where the subject matter contained in the affidavit is not vital or entirely relevant to the claims raised in this litigation (*see New York TRW Tit. Ins. v Wade's Can. Inn & Cocktail Lounge*, 225 AD2d [863] at 864)." Order affirmed. (Supreme Ct, Albany Co [Devine, JJ])

Juries and Jury Trials (Opening Statements) JRY; 225(45)

People v Baltes, 75 AD3d 656, 904 NYS2d 554 (3rd Dept 2010)

The defendant and another were at the scene of a one-car accident when police arrived. The defendant was eventually arrested for struggling with troopers who were interrogating the other person, who was arrested for DWI. At that point, the other person denied having been the driver of the vehicle, but refused to say who was driving. Two months later, the defendant gave a sworn statement saying he was the driver. He was indicted on five counts arising from the incident and was convicted.

Holding: The defendant's statements were sufficiently corroborated to support the DWI and related convictions; he was one of two people present at the scene and the other person denied being the driver. A person may be found guilty of second-degree obstructing government administration for conduct short of physical force. *See People v Romeo*, 9 AD3d 744, 745. The court erred in refusing to dismiss the counts charging second-degree obstructing governmental administration and resisting arrest based on the inadequacy of the prosecutor's opening statement. The prosecution is required under CPL 260.30(3) to make an opening statement setting forth the nature of the charges, the facts the prosecution expects to prove, and the evidence the prosecution plans to intro-

duce to support its case. *See People v Kurtz*, 51 NY2d 380, 384 *cert den* 451 US 911 (1981). The only arguable reference to the obstructing charge and resisting arrest was a brief remark about the "defendant's 'belligerent and disrespectful' behavior." The defendant's other contentions fail. Judgment modified, counts four and five reversed, matter remitted for new trial on those counts, and as modified, affirmed. (County Ct, Clinton Co [Ryan, JJ])

Juveniles (Youthful Offender) JUV; 230(150)

People v Tyler E., 75 AD3d 666, 903 NYS2d 275 (3rd Dept 2010)

The defendant pleaded guilty to two counts of second-degree criminal sexual act and waived his right to appeal. His convictions were converted to youthful offender adjudications at sentencing, and consecutive sentences of one and a third to four years and one to three years were imposed.

Holding: The defendant's challenge to the legality of his sentence survived the waiver of appeal. *See People v Lopez*, 6 NY3d 248, 256. As the prosecution concedes, the court lacked authority to impose consecutive sentences in excess of four years after adjudicating the defendant a youthful offender. *See CPL 720.20(1)(a); Penal Law 60.02(2), 70.00(2)(e); see gen People v Malloy*, 34 AD3d 1046, 1046 *lv den* 9 NY3d 847. "Accordingly, because it remains our opinion that, '[i]f the trial court was of the belief that defendant required incarceration for a period longer than four years, youthful offender status should not have been granted' (*People v Vincent Z.*, 82 AD2d 165, 167 [1981]), the judgment should be modified . . ." Judgment modified, sentences to run concurrently, and as modified, affirmed. (County Ct, Otsego Co [Cerio, JJ])

Juveniles (General) JUV; 230(55)

People v Kennedy, 75 NY3d 766, 904 NYS2d 577 (3rd Dept 2010)

The defendant's teenage children reported observing conduct and evidence indicating that the defendant possessed and used cocaine in their home. Police arriving at the home found the defendant there with a known drug dealer. Cocaine was found in the chair where the dealer had been sitting, and cocaine residue and paraphernalia were found around the home. A jury convicted the defendant of seventh-degree drug possession and two counts of endangering the welfare of a child.

Holding: "The testimony of defendant's daughters established that they were aware of his cocaine use and were exposed to the residue and paraphernalia in waste baskets that they were assigned to empty and in other readily accessible areas of their home. Further, we note that defendant need only 'be aware that the conduct may

Third Department *continued*

likely result in harm to a child, whether directed at the child or not' (*People v Johnson*, 95 NY2d 368, 372 . . .)." The jury gave the evidence proper weight. The court imposed maximum one-year jail terms only after appropriately assessing all the relevant factors and information it deemed reliable and accurate. *See People v Styles*, 285 AD2d 564, 564-565. Judgment affirmed. (County Ct, Broome Co [Smith, JJ])

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) **GYP; 181(25)**

People v McCaskill, 76 AD3d 751, 905 NYS2d 721 (3rd Dept 2010)

The defendant pleaded guilty to attempted second-degree weapons possession. During the plea colloquy, he signed in open court a waiver of the right to appeal, which counsel indicated he had reviewed with the defendant and signed as well. In explaining the plea agreement's terms, the court said the defendant "'would have to waive or give up [his] right to appeal, but in return, all other charges would be satisfied.'"

Holding: While the court wrongly failed to distinguish the right to appeal from rights forfeited by the guilty plea, the written waiver of the right to appeal was quite detailed. That thorough written waiver, the court's admittedly minimal inquiry, and counsel's assurances adequately demonstrated judicial examination of the waiver and a manifestation on the record (*see People v Calvi*, 89 NY2d 868, 871), and that the waiver of appeal was a knowing and voluntary choice. *See People v Callahan*, 80 NY2d 273, 280. Best practice would include an on-record explanation of the significance of the right to appeal and confirmation of the defendant's counseled understanding of it. The Court of Appeals has not offered specific guidance on what is required; no uniform mandatory catechism is required of pleading defendants. The valid waiver of appeal here bars review of a claim that the sentence is harsh and excessive. *See People v Ramos*, 7 NY3d 737, 738. Judgment affirmed. (County Ct, Schenectady Co [Giardino, JJ])

Concurrence: [Spain, JJ] Nothing on this record's face reflects the defendant's understanding of the meaning of the appeal waiver. "[T]here must be some record discussion between the defendant, counsel and the court concerning the appeal waiver . . ." However, the contention that the sentence is excessive is rejected.

Sentencing (Restitution) **SEN; 345(71)**

People v Naumowicz, 76 AD3d 747, 907 NYS2d 353 (3rd Dept 2010)

The defendant pleaded guilty to charges including second-degree grand larceny, based on misappropriation of funds. The plea agreement included an understanding that restitution of \$300,000 to \$500,000 would be imposed. Along with incarceration, the sentence included restitution to several complainants, totaling \$434,916.75. Three months later the prosecution moved to add over \$300,000 in restitution for others. The court signed additional restitution orders executed by the defendant.

Holding: Review of the restitution orders entered at sentencing is precluded for lack of preservation and no relief is granted in the interest of justice. The defendant's arguments with regard to the postsentencing orders relate to the court's jurisdiction to make such orders and to their legality; as mode of proceeding errors, these need not be preserved. *See People v Ahmed*, 66 NY2d 307, 310. At sentencing, the court overlooked victim impact statements relating to six of those for whom restitution was later sought. The court properly sought to correct the oversight only five days after sentencing. However, the amendment of the sentence, especially by adding an amount that raises the total beyond the amount anticipated at the time of the plea, increased the harshness of the sentence. The defendant must be given an opportunity to: withdraw the plea (*see People v Brown*, 198 AD2d 901, 901); consent to the higher restitution sought in the victim impact statements overlooked at sentencing; or consent to the court dispensing with some of those claims and resentencing him within the agreed-upon range. As to the postsentencing orders dealing with claims not brought to the court's attention until after sentencing, the orders must be vacated. Judgment modified, matter remitted, and as modified, affirmed. (County Ct, Saratoga Co [Scarano, JJ])

Fourth Department

Insanity (Civil Commitment) **ISY; 200(3)**

Sex Offenses (General) (Sentencing) **SEX; 350(4) (25)**

Witnesses (Experts) **WIT; 390(20)**

Matter of State v Flagg, 71 AD3d 1528, 898 NYS2d 747 (4th Dept 2010)

Holding: The court did not err in determining that the respondent was not a dangerous sex offender requiring confinement (DSO). The jury's verdict finding that the respondent suffered from a mental abnormality, as defined in Mental Hygiene Law (MHL) 10.03(i), did not require the court to find that he is a DSO. While the petitioner's expert opined that the respondent was unable to control his behavior, the court discounted her testimony, noting that she did not have the same level of education

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and experience as the respondent’s expert and she did not incorporate any clinical judgment into her analysis. The court, as fact finder, appropriately considered the expert’s qualification (*see Felt v Olsen*, 74 AD2d 722, 722 *aff’d* 51 NY2d 977), and its decision to credit the respondent’s testimony and his witnesses was within its province and there is no basis to disturb that decision. *See gen Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 *rearg den* 81 NY2d 835. However, the court improvidently exercised its discretion by omitting a number of conditions from the strict and intensive supervision order. The following conditions must be added: the respondent is prohibited from associating with people known to have a criminal record, except for those who are related to him by blood or marriage; he may not have contact with anyone under the age of 18, except for relatives provided that another adult is present; he may not possess or access pornography or sexually explicit materials in any form, including through the internet; he must notify his parole officer of any sexual relationship; and he must allow his parole officer to visit him at work. Order modified by adding several conditions to the respondent’s strict and intensive supervision and, as modified, affirmed, and matter remitted for proceedings pursuant to MHL 10.11(a)(2). (Supreme Ct, Onondaga Co [Karalunas, J])

Assault (General) ASS; 45(27)

Evidence (Weight) EVI; 155(135)

People v Groth, 71 AD3d 1391, 896 NYS2d 547 (4th Dept 2010)

Holding: The verdict convicting the defendant of reckless assault of a child and third-degree assault is against the weight of the evidence. *See gen People v Bleakley*, 69 NY2d 2d 490, 495. The trial evidence showed that the defendant’s two and a half month old child was brought to the hospital, where he was found to have bleeding in his brain and his eyes and two fractured ribs. “The weight of the credible evidence and the reasonable inferences that may be drawn therefrom do not support a finding that defendant caused injury to the baby.” The child showed signs of distress, including having vomited a few days before the defendant allegedly injured him. The defendant’s statements to the police do not constitute a confession; he admitted that he may have put the child down too hard on a pack and play, but the medical evidence presented at trial did not show that such action could have caused the child’s injuries. Without a confession to the police, the defendant’s statement to his girlfriend that he hurt the child does not establish his guilt. “[T]he jury engaged in impermissible speculation in finding defendant guilty, and failed to give the evidence the

weight it should be accorded on the issue whether defendant recklessly caused physical injury to his baby (Penal Law § 120.00[2]), or recklessly caused serious physical injury to his baby’s brain (§ 120.02[1]).” Judgment reversed, indictment dismissed, and matter remitted for further proceedings. (County Ct, Monroe Co [Geraci, Jr., JJ])

Dissent: [Fahey, JJ] The jury was justified in finding the defendant guilty of both assault counts based in part on the evidence about the child’s injuries. The defendant’s admissions during his videotaped police interview were equivalent to a confession. And the defendant also admitted to the child’s mother that he hurt his son.

Evidence (Chain of Custody) EVI; 155(18)

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles] [Probable Cause]) SEA; 335(10[a] [g])

People v Layou, 71 AD3d 1382, 897 NYS2d 325 (4th Dept 2010)

Holding: The court erred in admitting the cocaine found on the defendant and at the arrest scene because there were deficiencies in the chain of custody. The arresting officer testified about bringing the drugs from the arrest scene to the police station and leaving them on a table in a room. He also testified that a month later, he took the drugs from the station to the crime lab for testing. The arresting officer did not have personal knowledge of where the drugs were during that month and no other officers testified about the storage of the drugs during that time. Therefore, there was no assurance that the seized drugs were the ones analyzed at the lab. *See People v Gamble*, 94 AD2d 960 *lv den* 60 NY2d 590. And the prosecution’s witnesses did not provide a reasonable explanation for the significant weight discrepancies between the seized drugs and the drugs that were tested. The court also erred in denying the defendant’s motion to suppress the drugs and his statements to the police. As stated in the defendant’s pro se supplemental brief, the motion should have been granted because the police did not have reasonable suspicion to justify the initial seizure of his car. The police seized the car by pulling into the parking lot behind his car thereby preventing the defendant from driving away. *See People v Solano*, 46 AD3d 1223, 1225 *lv den* 10 NY3d 817. Merely because the defendant was in a parking lot early in the morning near the burglary the police were investigating did not give the police reasonable suspicion that the defendant committed, was committing, or was about to commit a crime. At the time the car was seized, the arresting officer had not seen acts indicative of criminal activity, there was no information connecting the defendant or the passenger to the burglary, and the complainant did not tell the police that the bur-

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glars fled in a car. *See People v Nicodemus*, 247 AD2d 833, 835 *lv den* 92 NY2d 858. Judgment reversed, motion to suppress granted, indictment dismissed, and matter remitted for proceedings pursuant to CPL 470.45. (County Ct, Oswego Co [Hafner, Jr., JJ])

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)

Witnesses (Experts) WIT; 390(20)

People v Okongwu, 71 AD3d 1393, 897 NYS2d 330 (4th Dept 2010)

Holding: The court erred in denying the defendant's CPL 440.10 motion to vacate the judgment convicting him of multiple counts of sexual offenses. Because the motion was based solely on the federal standard for ineffective assistance of counsel, the court correctly applied that standard. *See People v Wosu*, 55 AD3d 1253, 1254 *lv den* 11 NY3d 931. The codefendant, Eze, filed a writ of habeas corpus alleging ineffective assistance of counsel. The Second Circuit Court of Appeals found that acts and omissions of Eze's trial counsel, "if unexplained, would constitute constitutionally deficient representation and would likely establish a reasonable probability that, but for the errors, the result of [his] trial would have been different . . ." *See Eze v Senkowski*, 321 F3d 110, 119-120, 136-138. After a hearing at which Eze's attorney was given an opportunity to explain his acts and omissions, the federal district court vacated Eze's conviction. The district court's decision is persuasive authority and its determination of federal constitutional issues should be given great weight. *See New York R.T. Corp. v City of New York*, 275 NY 258, 265 *affd* 303 US 573 *reh den* 304 US 588. The purported failures of the defendant's attorney and Eze's attorney are the same. The defendant's attorney did not introduce evidence that a medical exam of one of the accusers done three years before the alleged abuse showed the same physical findings as those found during an exam a year after the alleged abuse. And defense counsel conceded that the court would have allowed redacted records to be introduced to avoid a negative inference against the defendant. Defense counsel failed to retain experts and introduce evidence to refute the prosecution's experts. Counsel's claim that he tried to contact five to ten experts, but was prevented from contact by those experts' staff is inadequate. "Based on the many charges and the evidence that there were other possible causes for the physical evidence of abuse, there is no excuse for such feeble attempts to contact experts." The unrefuted medical evidence corroborated the accuser's testimony. Defense counsel also admitted that he was unfamiliar with literature that raised doubts about child abuse syndrome and did not cross-

examine the prosecution's psychological expert about that literature, and his claim that the testimony about the syndrome did not relate to the defendant's case is incorrect. Order reversed, motion granted, conviction vacated, and matter remitted for further proceedings on the indictment. (Supreme Ct, Erie Co [Drury, JJ])

Counsel (Attachment) (Scope of Counsel) COU; 95(9) (38)

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) GYP; 181(25)

People v Balkum, 71 AD3d 1594, 897 NYS2d 824 (4th Dept 2010)

Holding: The defendant's waiver of his right to appeal in each of his cases was invalid because the record does not show that the defendant "'understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' (*People v Williams*, 59 AD3d 339, 340, *lv denied* 12 NY3d 861 . . .)." And the court failed to specifically ask the defendant if he understood that each plea was conditioned on his withdrawal of all pending motions and whether he agreed to those conditions. *Cf People v Williams*, 55 AD3d 759. However, the defendant's claim in his second appeal that the court erred in denying his motion to suppress his statement is rejected. The defendant did not unequivocally invoke his right to counsel prior to his custodial interrogation. When he was taken into custody, the defendant was represented by an attorney on unrelated charges. He told a police officer that he had an appointment with his attorney that morning and asked if he could call the attorney. The officer told him that he would have to wait and the defendant did not mention the attorney again when he was interviewed. Whether the defendant's request for counsel was unequivocal is a mixed question of law and fact and must be examined with reference to the circumstances surrounding the request, including his demeanor, manner of expression, and the particular words he used. *See People v Glover*, 87 NY2d 838, 839. The defendant did not mention his attorney when he was being questioned and he asked to call the attorney after mentioning his scheduled appointment regarding unrelated charges. The defendant may have wanted to call the attorney to cancel the appointment. *See People v Ramirez*, 59 AD3d 206 *lv den* 12 NY3d 858. Judgment affirmed. (Supreme Ct, Monroe Co [Egan, JJ])

Misconduct (General) (Judicial) MIS; 250(7) (10)

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

Fourth Department *continued*

People v Gregory, 71 AD3d 1559, 897 NYS2d 665 (4th Dept 2010)

Holding: The defendant’s Sex Offender Registration Act (SORA [Correction L art 6-C]) classification proceeding was time-barred. Because the defendant’s sentence for first-degree sexual abuse expired in February 1996, a month after SORA became effective, he was a sex offender required to register under SORA. *See* Correction L 168-g(2); *Doe v Pataki*, 120 F3d 1263 (2d Cir 1997) *cert den* 522 US 1122. However, the defendant was not notified of his duty to register until June 13, 2007, when he was told to appear in supreme court. Because SORA has its own time limits for classification proceedings, the six-year statute of limitations in CPLR 213 does not apply. “Although Correction Law § 168-l(8) expressly provides that a failure by the court ‘to render a determination within the time period specified in [article 6-C] shall not affect the obligation of the sex offender to register,’ we conclude that the 11-year delay is “so outrageously arbitrary as to constitute [a] gross abuse of governmental authority” (*People v Wilkes*, 53 AD3d 1073, 1074, *lv denied* 11 NY3d 710 . . .).” Order reversed and risk level determination is vacated. (Supreme Ct, Monroe Co [Geraci, Jr., AJ])

Juries and Jury Trials (Challenges) JRY; 225(10) (55) (60) (Selection) (Voir Dire)

People v Lewis, 71 AD3d 1582, 896 NYS2d 792 (4th Dept 2010)

Holding: The court erred in denying the defendant’s challenges for cause to two prospective jurors. One prospective juror stated that, based on her close association with police officers while working as a loss prevention officer, “she would ‘probably take the word of a cop’ over ‘the word of somebody else.’” And she said that she would lean toward giving “‘the cop the edge on who’s telling the truth’ . . .” These statements cast serious doubt on the prospective juror’s ability to render an impartial verdict (*see People v Nicholas*, 98 NY2d 749, 751-752), and the prospective juror failed to give “unequivocal assurance” that she could set aside her bias. *See People v Johnson*, 94 NY2d 600, 614. The jury panel’s prior collective acknowledgement that they would decide the case solely based on the evidence presented and not based on relationships with law enforcement does not constitute an unequivocal declaration. *See People v Bludson*, 97 NY2d 644, 646. The second prospective juror also did not give “unequivocal assurance” that she would render a fair and impartial verdict. The court prevented defense counsel from exploring the prospective juror’s stated uncertainty about her ability to be fair and impartial because of her close relationships with members of law enforcement.

Although the court has broad discretion to control voir dire questioning (*see People v Boulware*, 29 NY2d 135, 140 *rearg den* 29 NY2d 670 *cert den* 405 US 995), under the circumstances, the court erred in failing to allow defense counsel to ask follow up questions. Because the defendant exhausted his peremptory challenges before jury selection was completed, reversal is required. *See* CPL 270.20(2). Judgment reversed and new trial granted. (Supreme Ct, Erie Co [Burns, JJ])

Evidence (Prejudicial) (Preservation) (Uncharged Crimes) EVI; 155(106) (107) (132)

Witnesses (Credibility) (Cross Examination) WIT; 390(10) (11)

People v Loftin, 71 AD3d 1576, 896 NYS2d 789 (4th Dept 2010)

The defendant was convicted of first-degree rape and first-degree sexual abuse.

Holding: The court erred in preventing the defendant from cross-examining the accuser regarding her petit larceny charge. According to that charge, the accuser assaulted and robbed her ex-boyfriend, but told the police that the ex-boyfriend assaulted her. The defendant made similar allegations against the accuser in this case and sought to cross-examine her about the petit larceny charge “‘in good faith and with a reasonable basis in fact’ (*People v Jones*, 24 AD3d 815, 816, *lv denied* 6 NY3d 777).” Although the petit larceny charge was adjourned in contemplation of dismissal before the defendant’s trial, an ACOD is not a dismissal on the merits and it does not negate the good faith and basis in fact elements. Because the credibility of the defendant versus the credibility of the prosecution’s witnesses was crucial, the error was not harmless. *See People v Ayrrhart*, 101 AD2d 703, 704. The court also erred in not conducting a *Ventimiglia* hearing regarding the defendant’s statements to police regarding his past attempts to force sex from women. While the defendant failed to preserve the issue by objecting to the admission of testimony about his statements (*see People v Powell*, 303 AD2d 978 *lv den* 100 NY2d 565, 1 NY3d 541), the issue is reviewed in the interest of justice. *See* CPL 470.15(6)(a). Because the statements were not admissions regarding the charged offenses, but rather evidence of prior bad acts, the court had to determine whether the probative value outweighed the potential for prejudice. *See People v Robinson*, 202 AD2d 1044 *lv den* 83 NY2d 1006. Given the importance of witness credibility, the error was not harmless. *See gen People v Crimmins*, 36 NY2d 230, 241-242. Judgment reversed and new trial granted. (County Ct, Onondaga Co [Walsh, JJ])

Fourth Department *continued*

Harmless and Reversible Error (Harmless Error) (Reversible Error) HRE; 183.5(10) (30)

Trial (General) TRI; 375(15)

People v Clyde, 72 AD3d 1538, 899 NYS2d 757 (4th Dept 2010)

Holding: The court “erred in failing to articulate a reasonable basis on the record for its determination to restrain defendant in shackles during the trial.” Because the shackles were visible to the jury, it cannot be said that the jury was not prejudiced by it and that the error was therefore harmless. *Cf People v Sykes*, 244 AD2d 986. The defendant did not need to show actual prejudice to establish a violation of due process. *See Deck v Missouri*, 544 US 622, 635 (2005). It should be noted that the court abused its discretion by refusing to bar the prosecution from asking the medical experts whether the complainant’s injuries met the Penal Law definitions for physical and serious physical injuries, as the issue was within the ken of the typical juror. *See People v Forcione*, 156 AD2d 952 *lv den* 75 NY2d 919. Judgment reversed and new trial granted on counts two through five of the indictment. (County Ct, Cayuga Co [Wiggins, J])

Dissent: [Scudder, PJ] Although the court erred in failing to articulate a reasonable basis for the shackling and the shackling prejudiced the defendant, the harmless error test still must be applied. In light of the trial evidence, there is no reasonable possibility that the defendant’s improper shackling contributed to his conviction. *See People v Douglas*, 4 NY3d 777, 779.

[**Ed. Note:** Leave to appeal was granted on June 3, 2010 (15 NY3d 759).]

Insanity (Burden of Proof) (Civil Commitment) (General) ISY; 200(2) (3) (27)

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

Matter of State v Farnsworth, 75 AD3d 14, 900 NYS2d 548 (4th Dept 2010)

In June 2005, the respondent was convicted of second-degree burglary and sentenced to prison. Prior to his release, the petitioner filed a sex offender civil management petition pursuant to the Sex Offender Management and Treatment Act (Mental Hygiene Law [MHL] art 10), which alleged that the respondent’s offenses were sexually motivated. Since he was convicted before the effective date of MHL art 10 and the designated felony he was convicted of did not contain a sexual motivation element, the petitioner had to establish the sexual motivation element

by clear and convincing evidence. *See* MHL 10.07(c), (d). If the respondent committed the designated felony after MHL art 10’s effective date, to be subject to art 10, he would have had to be convicted of a sexually motivated felony (*see* Penal Law 130.91), which must be established beyond a reasonable doubt. *See* MHL 10.03(g)(1), (p).

Holding: The respondent’s due process and equal protection rights are not violated by the application of the clear and convincing evidence standard. The three-factor test in *Mathews v Eldridge* (424 US 319, 335 [1976]), must be applied to the due process claim. The first factor is satisfied because “[t]he Supreme Court has upheld civil commitment statutes that rely on a clear and convincing standard of proof (*Addington v Texas*, 441 US [418], at 431-433 [1979]).” The second and third factors are met because “the application of the clear and convincing evidence standard does not create an unacceptable risk of an erroneous deprivation of liberty” and it does not “improperly allocate the risk of error between New York State and a respondent” “[W]hile it may have been preferable for the Legislature to have imposed the higher reasonable doubt standard for all ‘backward-looking factual finding[s]’ ([*United States v*] *Shields*, 522 F Supp 2d [317] at 330 [D Mass 2007]), due process does not require the application of that standard.” With regard to his equal protection claim, the respondent is not a member of a suspect class, but because MHL art 10 interferes with a substantial right, it must be “‘narrowly tailored to serve a compelling state interest’ (*Hernandez v Robles*, 7 NY3d 338, 375 . . .).” Article 10 satisfies those requirements. The only other court to have addressed these constitutional claims reached the same conclusions in the context of a preliminary injunction motion. *See Mental Hygiene Legal Serv v Spitzer*, No. 07-CV-2935, 2007 US Dist LEXIS 85163 (SDNY 2007) *affd* 2009 US App LEXIS 4942 (2d Cir 2009). Order affirmed. (Supreme Ct, Chautauqua Co [Walker, AJ])

Confessions (Counsel) (General) CNF; 70(23) (32)

Counsel (Attachment) (Scope of Counsel) COU; 95(9) (38)

People v Foster, 72 AD3d 1652, 900 NYS2d 219 (4th Dept 2010)

Holding: The court erred in denying the defendant’s motion to suppress statements he made to a confidential informant (CI) in prison after July 17, 1997 regarding the murder of his girlfriend, but correctly denied the motion as to statements made to the CI prior to that date. The prosecution stipulated that the CI was acting as an agent of the police. Even though the defendant was represented by two attorneys before July 17th, his right to counsel did not attach until then. When the defendant spoke with the police twice in 1996 about his girlfriend’s disappearance, he appeared with an attorney who represented him on

Fourth Department *continued*

pending paternity and child custody proceedings regarding his girlfriend's children. Because the attorney went to the two meetings "in order to ensure that he did not say anything that would have a negative effect in the Family Court proceedings . . . she was not retained 'in the matter at issue' ([*People v West*, 81 NY2d 370, 373-374])." During the second meeting, the defendant admitted that he possessed a shotgun; he was later charged with criminal possession of a weapon. The defendant had an attorney for that case, but the attorney-client relationship ended before he made any statements to the CI. The defendant's right to counsel attached on July 17th when the police visited him at the correctional facility and the defendant said that he would not talk to them without an attorney present. The prosecution failed to show that the defendant made a knowing and voluntary waiver of his right to counsel when he told the CI about the murder and disposal of the body days after he invoked his right to counsel. See *People v Davis*, 75 NY2d 517, 523. The defendant did not contact the police after July 17th, and since he was incarcerated, the court erred in concluding that his failure to retain counsel during the almost two weeks he made incriminating statements to the CI indicated that he intended to withdraw his request for an attorney. The error in refusing to suppress the statements after July 17th cannot be deemed harmless error. Judgment reversed, motion to suppress certain statements to confidential informant granted, and new trial ordered. (County Ct, Jefferson Co [Martusewicz, JJ])

Dissent in Part: [Gorski, JJ] All of the defendant's statements to the CI should have been suppressed as his right to counsel attached in 1996. See *People v Ellis*, 58 NY2d 748, 750.

Guilty Pleas (*Alford* Plea) (General [Including Procedure and Sufficiency of Colloquy]) GYP; 181(5) (25)

Identification (Photographs) (Suggestive Procedures) IDE; 190(35) (50)

People v Richardson, 72 AD3d 1578, 900 NYS2d 230 (4th Dept 2010)

Holding: The court erred in accepting the defendant's *Alford* plea because the record did not contain strong evidence of the defendant's actual guilt. See *Matter of Silmon v Travis*, 95 NY2d 470, 475. This issue is unpreserved, but is reviewed in the interest of justice. The record does not support the prosecution's assertion during the plea colloquy that four witnesses would testify that they saw the defendant stab the complainant. The police statements are equivocal and are more exculpatory than inculpatory and the eyewitness who initially identified the defendant

made a statement to the police the next day that indicated she may have identified the wrong person. There is no other record support for the defendant's guilt. Reversal is required even though the defendant's decision to enter the *Alford* plea was knowing and voluntary. The court correctly denied the defendant's motion to suppress a photo array identification because the witness was allegedly intoxicated. The witness' sobriety may be relevant as to the reliability of the identification, but it does not affect the determination of whether the identification was the product of impermissibly suggestive police action. See *People v Barton*, 164 AD2d 917, 918. Judgment reversed, plea vacated, and matter remitted for further proceedings on the indictment. (County Ct, Jefferson Co [Martusewicz, JJ])

Harmless and Reversible Error (Reversible Error) HRE; 183.5(30)

Trial (Verdicts) TRI; 375(70)

People v Miller, 73 AD3d 1435, 901 NYS2d 444 (4th Dept 2010)

Holding: The defendant's conviction must be reversed because the verdict sheet contained improper annotations and legal instructions. The defendant was charged with two counts of weapons possession under the same article of law. The court may give the jury a verdict sheet that states the dates, names of complainants or specific statutory language, without defining the terms by which the counts may be distinguished. See CPL 310.20(2). "Here, the court included in the verdict sheet an instruction that the jury was to determine whether 'the Defendant established by a preponderance of the evidence that he acted under Extreme Emotional Disturbance.'" The court violated CPL 310.20(2) by including a legal instruction on the burden of proof instead of "complying with 'the statutory purpose of enabling the jury to distinguish between [the two weapons possession counts]'" (*People v Rosario*, 26 AD3d 206, 207, *lv denied* 7 NY3d 762 . . .)." Harmless error analysis does not apply to verdict sheet errors. See *People v Damiano*, 87 NY2d 477, 484-485. And the amendments to CPL 310.20(2) and its statutory history do not suggest that the legislature intended to overrule that holding in *Damiano*. Judgment reversed and new trial granted on counts one, five, six, and seven of the indictment. (Supreme Ct, Monroe Co [Van Strydonck, JJ])

Counsel (Right to Counsel) COU; 95(30)

Self-Incrimination (Non-testimonial Evidence) SLF; 340(15)

People v Gibson, 74 AD3d 1700, 902 NYS2d 289 (4th Dept 2010)

Fourth Department *continued*

While the defendant was in custody on a bench warrant issued on an unrelated charge for which he was represented by counsel, he asked to speak with a police investigator he knew. During their conversation, the investigator gave the defendant a cigarette. The defendant left the cigarette butt in an ashtray, which the investigator took and had tested. The defendant's DNA from the cigarette butt matched DNA found on a knit cap found near the scene of a robbery. The defendant was later charged and convicted of first-degree robbery.

Holding: The defendant's right to counsel was not violated when a police investigator obtained DNA evidence from the defendant. The rights set forth in the Fifth Amendment apply to testimonial or communicative evidence, not real or physical evidence. *See Schmerber v California*, 384 US 757, 761 (1966). "[T]he DNA from defendant's saliva is analogous to the blood alcohol content of a blood sample, and thus can be viewed only as real or physical evidence because it is not testimonial or communicative in nature under the definition set forth in [*People v Hager* [69 NY2d 141] (see e.g. *Wilson v Collins*, 517 F3d 421, 430 [6th Cir 2008] . . .)]." Because the defendant's right against self-incrimination was not violated by the police's surreptitious seizure of his saliva, his derivative Fifth Amendment right to counsel was not violated. "Although the right to counsel under the New York State constitution is broader than that under the Federal constitution (see *People v Ramos*, 99 NY2d 27, 33), New York jurisprudence parallels federal law with respect to the scope of Fifth Amendment protection (see [*People v Hawkins*, 55 NY2d [474] at 482 [cert den 459 US 846 (1982)])." Judgment affirmed. (Supreme Ct, Erie Co [Michalski, AJ])

Dissent: [Green, JJ] The defendant's motion to suppress the DNA evidence should have been granted. Just as it would have violated his right to counsel had the police, knowing he was represented by counsel, sought his consent to provide a DNA sample before he was allowed access to his attorney, his right to counsel was violated when the police used trickery to obtain a sample before he was allowed access to counsel.

[**Ed. Note:** Leave to appeal was granted on July 30, 2010 (15 NY3d 780).]

Courts (General) (Rules) CRT; 97(17) (55)

Sentencing (General) SEN; 345(37)

People v Adams, 74 AD3d 1897, 906 NYS2d 832 (4th Dept 2010)

Holding: The defendant's sentence is illegal because the sentencing judge had no authority to preside over sentencing. This issue survives the defendant's waiver of her right to appeal (see *People v Seaberg*, 74 NY2d 1, 9), may be

raised for the first time on appeal, and is not precluded by her guilty plea. *See People v Rodriguez y Paz*, 58 NY2d 327, 336-337. After the defendant pleaded guilty in county court, the judge assigned to the case recused herself. An acting supreme court justice told the prosecution and defense that he would preside over sentencing. The record contains no documentation that the justice was assigned to the case, nor does it include evidence of a transfer of the case from county court to supreme court pursuant to 22 NYCRR 200.11(d)(4). Removal from county court to supreme court must be authorized by the chief administrator and must occur before the entry of a plea or commencement of trial. *See* 22 NYCRR 200.14. Since neither condition was satisfied in this case, the justice did not have authority to preside over sentencing. Judgment modified by vacating the sentence, judgment affirmed as modified, and matter remitted to the county court for resentencing. (Supreme Ct, Erie Co [Griffith, AJ])

Habeas Corpus (State) HAB; 182.5(35)

Parole (Revocation) PRL; 276(40)

People ex rel Forshey v John, 75 AD3d 1100, 904 NYS2d 620 (4th Dept 2010)

Holding: The defendant was unlawfully incarcerated for violating his parole because his sentence was terminated in April 2007, three months before he was charged with a parole violation. The defendant was sentenced in 2000 to concurrent incarceration terms of six to 12 years for two controlled substance offenses. He was presumptively released in April 2005. Pursuant to Executive Law 259-j(3-a), his sentence was terminated in April 2007 after his presumptive release followed by two years of unrevoked parole. The 2008 amendment to section 259-j(3-a) must be applied retroactively. The 2008 amendment was designed to correct an oversight in the original provision that unintentionally failed to include persons who are presumptively released. *See* Senate Mem in Support, 2008 McKinney's Session Laws of NY, at 2159. Because the legislative history shows that the 2008 amendment was designed to clarify what the mandatory termination of supervision provision was always meant to say and do (see *Brothers v Florence*, 95 NY2d 290, 299), it should be given retroactive effect. *See Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122. Judgment reversed and writ of habeas corpus sustained. (Supreme Ct, Cattaraugus Co [Himelein, AJ])

Driving While Intoxicated (Chemical Test [Blood or Urine]) (Evidence) DWI; 130(5) (15)

Evidence (Chain of Custody (Sufficiency) (Weight)) EVI; 155(18) (130) (135)

Fourth Department *continued*

Forensics (General)

FRN; 173(10)

**People v Joseph, 75 AD3d 1080, 903 NYS2d 651
(4th Dept 2010)**

The defendant was convicted of aggravated vehicular assault, leaving the scene of a personal injury accident, driving while ability impaired (VTL 1192[4-a]), second-degree assault, and other offenses.

Holding: The court properly admitted in evidence the test results of blood samples taken from the inside of the car the defendant drove on the date of the accident. Because there are reasonable assurances of the identity and unchanged condition of the evidence, any defects in the chain of custody go to the weight, not the admissibility of the evidence. *See People v Caswell*, 56 AD3d 1300, 1303 *lv den* 11 NY3d 923, 12 NY3d 781. The court did not err in allowing the prosecution's expert to testify that the cocaine found in the blood samples was present in the defendant's bloodstream before the accident. The court conducted a *Frye* hearing, at which it properly determined that the techniques used were generally accepted as reliable by the scientific community (*see People v LeGrand*, 8 NY3d 449, 457), and while the expert's use of dried blood samples was unique, the techniques the expert used were routine and generally accepted as reliable to detect cocaine and its metabolites. Second-degree assault and driving while ability impaired (VTL 1192[4-a]) are not lesser included counts of aggravated vehicular assault. Even if the defendant preserved for review his claim that the evidence was legally insufficient to support the leaving the scene conviction, there is no merit to his argument that the prosecution failed to show that he knew or had reason to know that he caused serious physical injury to a person in the vehicle he hit. The trial evidence established that the defendant's car was going 75 miles per hour when it hit the rear end of a stopped vehicle, causing significant damage to the front of the defendant's car and the trunk of the other car was pushed into its back seat. *See gen People v Bleakley*, 69 NY2d 490, 495. Judgment affirmed. (Supreme Ct, Monroe Co [Affronti, JJ])

**Juries and Jury Trials (Challenges) JRY; 225(10) (50) (55)
(Qualifications) (Selection)**

Misconduct (Prosecution)

MIS; 250(15)

**People v Morgan, 75 AD3d 1050, 903 NYS2d 851
(4th Dept 2010)**

Holding: The court erred in allowing the prosecution to exercise a peremptory challenge to exclude a black prospective juror. Defense counsel raised a *Batson* objection to the prosecution's challenge. The prosecutor gave three reasons for the challenge: (1) the prospective juror

was a juror in a criminal case years ago, but could not remember what the case was about; (2) the prospective juror stated that she knew people who used cocaine; and (3) years ago, the prospective juror's son was accused, but not convicted, of a crime. Defense counsel refuted all three reasons, noting that one prospective juror who was not challenged knew someone who used cocaine and another unchallenged prospective juror had been accused of a crime, and arguing that the challenged juror's inability to recall facts about her prior jury service was not relevant. By not assessing the credibility of the prosecutor's stated reasons, the court failed to complete the third step of the *Batson* inquiry. *See People v Smocum*, 99 NY2d 418, 423. This is particularly troublesome given that the defendant rebutted each of the prosecutor's reasons. Without a credibility determination on the record, this court cannot defer to the trial court. *See Dolphy v Mantello*, 552 F3d 236, 239 (2d Cir 2009). Although the prosecutorial misconduct issue need not be addressed, "we nevertheless note our strong disapproval of the misconduct of the prosecutor on summation in improperly shifting the burden of proof onto defendant and in improperly vouching for the credibility of the People's witnesses." Judgment reversed and new trial granted. (Supreme Ct, Erie Co [Wolfgang, JJ])

Dissent: [Scudder, PJ & Carni, JJ] The court stated that the prosecutor's reasons were "quite sufficient." This rejection makes clear that the court concluded the defendant failed to show that the prosecutor's reasons were pre-textual and that the prosecutor's reasons were race-neutral.

Counsel (Right to Counsel) (Waiver) COU; 95(30) (40)

Sentencing (General)

SEN; 345(37)

**People v Bullock, 75 AD3d 1148, 904 NYS2d 629
(4th Dept 2010)**

The defendant initially had assigned counsel, but later retained an attorney. At the plea proceeding, the court told the defendant that he would sentence him to a 15-year determinate term, but would consider a lesser sentence if presented with compelling reasons to do so. Prior to sentencing, the court granted defense counsel's motion to be relieved as counsel after the defendant stated that he no longer wanted the attorney to represent him, and granted the defendant's request to adjourn sentencing 90 days so he could hire a new attorney. On the adjourn date, the defendant appeared pro se and told the court that his family had the money to retain an attorney, but the attorney he wanted to hire could not meet with him for another month. The court denied the defendant's request for a second adjournment. The defendant said that he was having trouble getting documents to support his argument for a lesser sentence. The court concluded that he waived his right to counsel and sentenced the defendant.

Fourth Department *continued*

Holding: The court erred in sentencing the defendant in the absence of counsel. The defendant did not forfeit his right to counsel; his conduct was not egregious, the court did not warn him that sentencing would proceed if he did not have a new retained attorney, and it did not offer to assign him an attorney if he could not afford counsel. *Cf. People v Taylor*, 164 AD2d 953, 954-956 *lv den* 76 NY2d 991. The question of whether the court abused its discretion in denying an adjournment need not be reached. Judgment modified by vacating the sentence, judgment affirmed as modified, and matter remitted for further proceedings. (County Ct, Chautauqua Co [Ward, JJ])

Dissent in Part: [Carni, JJ] Forfeiture may occur even if the court did not warn the defendant that it would proceed with sentencing in the absence of counsel. *See People v Parker*, 57 NY2d 136, 140. The defendant forfeited his right to counsel; he had ample time to hire a new attorney and he did not establish that another adjournment was necessary due to forces beyond his control. *See People v Arroyave*, 49 NY2d 264, 272.

Counsel (Right to Counsel) (Waiver) COU; 95(30) (40)

Sentencing (Resentencing) SEN; 345(70.5)

People v McDermott, 76 AD3d 790, 906 NYS2d 415
(4th Dept 2010)

Holding: The court erred in resentencing the defendant without making an inquiry as to whether he knowingly, voluntarily, and intelligently waived his right to counsel in connection with the resentence. *See People v Arroyo*, 98 NY2d 101, 103. On remand, the court must advise the defendant of his right to counsel, and if he chooses to waive that right, make the necessary inquiry to determine whether the waiver is knowing, voluntary, and intelligent. The defendant's claim that his defense counsel was ineffective because counsel signed the indictment and speedy trial waivers must be raised in a CPL article 440 motion because it depends on documents outside the record. *See People v Dorn*, 71 AD3d 1523. "Nevertheless, we note our concern with the fact that defense counsel, rather than defendant, signed those waivers." Resentence reversed and matter remitted for resentencing. (County Ct, Herkimer Co [Kirk, JJ])

Dissent: [Martoché, JP & Carni, JJ] The appeal should be dismissed as it is an appeal from the denial of the defendant's CPL 440.20 motion, not an appeal from a resentence, and the defendant did not seek leave to appeal pursuant to CPL 450.15(2). County Law 722(4) allows the court to appoint counsel when a hearing is ordered; there was no hearing in this case. If the majority incorrectly characterized this as an appeal from a resentence rather than an appeal from an order denying a pro se CPL article

440 motion, the ultimate result of the majority's decision is that counsel must be appointed upon the filing of every such motion. "We do not believe that this Court should so extend the law." ⚖️

Defender News *(continued from page 3)*

applications were received from a wide spectrum of candidates. The announcement contained a tight selection schedule, with applications due by November 17, 2010, and interviews expected on November 29 and 30.

Mental Health First Aid Offered in New York State

"Mental Health First Aid" is designed to teach non-mental-health professionals to provide help to someone developing a mental health problem or in a mental health crisis until appropriate professional treatment is received or the crisis resolves. Begun in Australia (www.mhfa.com.au/), mental health first aid was brought to the U.S. by mental health departments in Maryland and Missouri working with the originators of the program. (www.mentalhealthfirstaid.org/cs/background/.) The training is now being made available in New York State. Staff at the Mental Health Association of New York State (MHANYS) became certified trainers in the program this year, and are offering the course as well as teaching additional instructors. (www.mhanys.org/programs/mhic/MHFA.php.)

Margo Hirsh, Executive Director of the Empire State Coalition of Youth and Family Services, conducted a mental health first aid training in Syracuse on Nov. 9-10, 2010. While the Coalition's focus is on runaway youth (see www.empirestatecoalition.org), Hirsh says the mental health first aid course is useful to individuals working in many sectors. The training helps someone recognize symptoms and avoid escalating a situation; anyone who has felt the need to learn CPR should take this course too, Hirsch declares.

MHANYS Director of Training and Special Projects, Helena Davis, will conduct a mental health first aid course in Malone, NY, on Nov. 30-Dec. 1, 2010. Davis notes that law school does not help lawyers identify and deal with behaviors arising from mental health issues, whether in clients or in colleagues. Mental health first aid training is not intended to teach diagnosis but rather intervention.

Information about trainings as they are offered may be found online at: www.mentalhealthfirstaid.org/current_courses.php. Readers of the *REPORT* who take or have taken this course are encouraged to share their reactions with the Backup Center; contact Staff Attorney Mardi Crawford. ⚖️

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