



Public Defense Backup Center  
**REPORT**

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**Defender News**

**Lippman on Law Day: Counsel at Arraignment**

Noting that the basic fairness of our system is challenged by the common failure across New York State to provide a lawyer to those making their first court appearances, Chief Judge Jonathan Lippman called in his Law Day address on May 2, 2011 for changes to make counsel at arraignment the norm by Law Day 2012. He praised the new Indigent Legal Services (ILS) Office and Board, and announced that solutions to the problem of no counsel at arraignment will be their top priority.

He emphasized that the goal is not to “impose new mandates on localities” but to “listen, support and encourage,” and “move forward together with a common purpose and unwavering commitment shared by all stakeholders.” Lippman noted with approval that the approach of Bill Leahy, the Director of the ILS Office, has been one of “cooperation, communication, creative problem solving, and a renewed focus on the quality and efficiency of services.” The Chief Judge’s full address is available online. ([www.nycourts.gov/whatsnew/pdf/ChiefJudgeLippmanLawDayAddress2011.pdf](http://www.nycourts.gov/whatsnew/pdf/ChiefJudgeLippmanLawDayAddress2011.pdf).)

**DWI Developments: Ignition Interlock Issues and More**

Issues related to drinking and driving offenses abound, and NYSDA works to keep defense lawyers informed about developments. In this issue of the *REPORT*, see the “Defense Practice Tips” article on cross-examining the officer whose stop led to a DWI-type charge against the client (p. 12) as well as the information below. Included here is the latest on the continuing implementation of the mandatory ignition interlock law; see the page on the NYSDA website devoted to ignition interlock developments. ([www.nysda.org/html/ignition\\_interlock.html](http://www.nysda.org/html/ignition_interlock.html).)

**2009 DWI Detection and Sobriety Testing Manual Now Available**

Stephen L. Jones’s “Defense Practice Tips” article suggests ways for defense lawyers to use the *DWI Detection and Standardized Field Sobriety Testing Manual* published by the National Highway Traffic Safety Administration. The National Association of Criminal Defense Lawyers, which initially published Jones’s article last December, announced in March that it had acquired the 2009 update of the Manual. For more information and pricing contact Doug Reale at [doug@nacdl.org](mailto:doug@nacdl.org) or call (202) 872-8600 x272.

**Guidance on Interstate and Intrastate Transfers of Cases with an Ignition Interlock Order**

In response to confusion regarding the application of Leandra’s Law’s mandatory ignition interlock provisions to non-NYS residents and out-of-county residents convicted of misdemeanor or felony DWI or Penal Law offenses of which an alcohol-related violation of VTL 1192 is an essential element, the Office of Probation and Correctional Alternatives (OPCA) released guidance for the interstate and intrastate transfer of ignition interlock cases. (<http://dPCA.state.ny.us/pdfs/2010-14guidanceforignitioninterlockintraandinterstatetransferscases.pdf>.) The memo, which deals with both probation and conditional discharge sentences, is to be read in conjunction with the OPCA regulations governing the installation and maintenance of ignition interlock devices (9 NYCRR Part 358; available at [http://dPCA.state.ny.us/pdfs/part358\\_3nov10.pdf](http://dPCA.state.ny.us/pdfs/part358_3nov10.pdf)).

Interstate transfers present a number of challenges, particularly in first misdemeanor DWI conviction cases, where the Interstate Compact

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for Adult Offender Supervision does not apply, and in cases where the defendant resides in a state in which New York qualified ignition interlock device manufacturers do not operate.

The guidance memo states that, when the Interstate Compact does not apply, interstate relocation “would be discouraged,” but indicates that the court has the authority to approve the move. Any suggestion by the guidance and/or the regulations that courts have the authority to prevent an out-of-state resident who is sentenced to conditional discharge with an ignition interlock condition from returning to his/her home state is troublesome at best. According to OPCA, it is working with the Interstate Commission and other states to address how interstate transfers of non-qualifying offenses should be handled.

Along with the guidance, OPCA provided a list of the states in which New York qualified ignition interlock device manufacturers operate. (<http://dpca.state.ny.us/pdfs/2010-14attachmentnationwideavailabilityofiidmanufacturersasof3Dec2010.pdf>). At least one of New York’s qualified ignition interlock device manufacturers does business in most states; however, as of December 2010, there were no New York qualified manufacturers operating in seven states and Washington, DC.

Attorneys representing out-of-state residents and clients who may be in the process of moving or planning to move out of state and who may be subject to an ignition interlock condition, in particular, should carefully examine the regulations and this guidance. Defenders with questions regarding interstate and intrastate transfers and ignition interlock device orders should contact the Backup Center.

### **Updated Lists of Ignition Interlock Manufacturers, Service Centers, and Conditional Discharge Monitors**

OPCA recently updated the list of qualified ignition interlock device manufacturers to include Statewide Interlock Systems, Inc., which offers a class I device in all four regions of the state. OPCA has also updated the list of conditional discharge monitors and service center locations. The list of probation monitors was updated in March. The updated lists are available at <http://dpca.state.ny.us/ignition.htm>.

### **Nassau County Crime Lab Fallout Now Includes DWI-Related Cases**

Soon after Nassau County’s crime lab was closed due to errors and possible misconduct, as we reported in the last issue (*REPORT*, Vol XXVI, No 1 [Jan-March 2011] p. 1), incorrect paperwork was discovered in nine misdemeanor DWI cases handled at the lab on Oct. 15, 2010. Other errors found, relating to drug tests at the lab,

included failure to note if the scale used to weigh cocaine had been calibrated and failure to run “blanks” between tests in order to eliminate drug residue. ([www.newsday.com](http://www.newsday.com), 3/3/2100.)

Within a few days of this announcement, a County Court judge set aside, under Criminal Procedure Law article 330, a vehicular assault conviction. The evidence presented by defense counsel included testimony from a blood and alcohol analyst admitting he had mislabeled nine blood alcohol test results. The judge rejected prosecution arguments that the basis for the lab’s closure had been errors in drug rather than alcohol testing, noting that alcohol testing is, after all, “a form of drug testing.” ([www.law.com](http://www.law.com), 3/8/2011.)

A blog entry on the crime lab situation posted in early April said, “Paperwork will be reviewed on about 1,000 blood-alcohol cases dating back to 2006 by a still-to-be-determined outside consultant.” Kent Moston, Attorney in Chief of the Legal Aid Society of Nassau County, and other lawyers said that they were challenging convictions and seeking dismissal or suppression in pending cases based on the lab deficiencies. The blog post indicates that Nassau County Court Judge James P. McCormack, an acting Supreme Court justice, will handle pending drug cases, as well as motions to set aside verdicts if the original judge has left the bench, where evidence from the lab is involved. ([http://affordablebailsnassau.com/index.php?option=com\\_k2&view=itemlist&task=tag&tag=crime+lab+nassau+county&Itemid=191](http://affordablebailsnassau.com/index.php?option=com_k2&view=itemlist&task=tag&tag=crime+lab+nassau+county&Itemid=191).)

#### **Public Defense Backup Center REPORT**

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## ***Immigration News Affecting Criminal Justice***

### ***More Counties Join Secure Communities Program***

Twenty-four of New York's 62 counties joined the Immigration and Customs Enforcement program, Secure Communities, between January and April, 2011. In April alone, ten counties agreed to participate in the program: Cayuga, Chautauqua, Fulton, Livingston, Niagara, Ontario, Otsego, Seneca, Steuben, and Yates. Immigration and Customs Enforcement's objective is to have all of New York's counties participating in the Secure Communities program by 2013.

Immigration and Customs Enforcement (ICE) reports that as of April 25, 2011, 1,253 jurisdictions in 42 states have joined the Secure Communities Program. A map of those jurisdictions is available at [www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/).

### ***ICE Issues Tool Kit for Prosecutors on Immigration Issues***

ICE has released a tool kit for federal, state, and local prosecutors that provides information on the different forms of immigration legal relief that may be available to victims of crime or witnesses who are assisting in criminal prosecutions. The tool kit also discusses immigration consequences of criminal convictions and encourages prosecutors to add language to plea agreements warning defendants of the possibility that their guilty plea will subject them to removal from the United States. The tool kit is available at [www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf](http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf). On-record comments by prosecutors or judges should not be considered a substitute for the legal advice to clients by defense lawyers as to the immigration consequences of a plea. NYSDA's Criminal Defense Immigration Project can assist lawyers in fulfilling their duty to advise clients pursuant to *Padilla v Kentucky* (130 S Ct 1473 [2010]). For information regarding defense counsel's duties under *Padilla* or immigration consequences of criminal convictions, call or email Joanne Macri, Director of NYSDA's Criminal Defense Immigration Project at 716-913-3200 or [jmacri@nysda.org](mailto:jmacri@nysda.org). The Office of Defender Services of the Administrative Office of the U.S. Courts also offers information about the immigration consequences of criminal convictions on its website at [www. fd.org/odstb\\_ConstructIMMIGRATIONCON.htm](http://www.fd.org/odstb_ConstructIMMIGRATIONCON.htm).

## ***Supreme Court Judge Annuls Parole Denial for Juvenile Offender***

A man who at 15 years old killed another boy brought an Article 78 proceeding after being denied parole for a fifth time. As a Supreme Court judge noted, the 31-year-old petitioner claimed that "by repeatedly denying parole, the Parole Board has effectively converted his juvenile sentence into an adult sentence" and that the Board's most recent denial was "an abuse of discretion, arbitrary and capricious, and irrational bordering on impropriety . . . ." In a 10-page decision, the court noted among other things that the Board had made "no reference to its juvenile offender guidelines," had focused almost entirely and for the fifth time on the nature of the underlying crime, giving "a strong indication that the denial of parole is a 'foregone conclusion,'" and relied on a "'recent Tier II report' that, in fact, had pre-dated the petitioner's prior parole appearance." In the court's view, the Board's actions amounted to, "in effect, re-sentencing [the] petitioner to a far greater sentence than imposed by the sentencing court." A new hearing was ordered. (*Matter of Stanley v New York State Board of Parole*, Index No. 341/2011, Supreme Court, Orange County, 4/13/2011, [www.courts.state.ny.us/Reporter/3dseries/2011/2011\\_21136.htm](http://www.courts.state.ny.us/Reporter/3dseries/2011/2011_21136.htm).)

## ***Parole Changes, Current and Envisioned***

Parole issues rate very high on the list of concerns held by people in or going into prison, those released on parole, and their families. As a result, parole reform has become a major focus of prisoner justice activism while criminal defense lawyers continue to receive questions about parole issues. Administrative changes by the Cuomo administration and legal ramifications of the drug law amendments of recent years are two current sources of legal uncertainties about aspects of parole.

## ***SAFE Parole Act Among Sought-After Reforms***

NYSDA and the New York State Association of Criminal Defense Lawyers (NYSACDL) are among many groups joining a diverse coalition seeking the reform of New York parole law. The coalition supports an as-yet-unintroduced bill, the Safe And Fair Evaluation (SAFE) Parole Act, and is seeking to change the nature of the parole process so that the Board evaluates applicants on the basis of their readiness for re-entry, and cannot deny release based primarily on the nature of the crime. An article discussing parole reform appeared in the Winter 2011 issue of *Atticus*, NYSACDL's magazine. ([www.communityalternatives.org/pdf/ATTICUS-ParoleReform.pdf](http://www.communityalternatives.org/pdf/ATTICUS-ParoleReform.pdf).) According to Prison Action Network, which spearheads this reform effort, legislative advocacy efforts to secure the introduction and passage of the SAFE Parole Act are

starting in earnest as the *REPORT* went to press. (<http://prisonaction.blogspot.com/2011/04/april-2011.html>.) Parole reform was among the issues included in the NYS Prisoner Justice Network's Legislative Awareness Day held on May 3, 2011.

### **Departments in Conflict as to Effect of Parole Reincarceration on 2009 DLRA Eligibility**

The Second and First Departments disagree as to what if any effect being reincarcerated as a parole violator has on one's eligibility for resentencing under the Drug Law Reform Act of 2009 (2009 DRLA). In *People v Phillips*, \_\_ AD3d \_\_, 919 NYS2d 88 (2nd Dept 3/15/2011) (see summary on p. 32), the Second Department said that while such status may be relevant to whether a denial of resentencing is warranted, nothing in CPL 440.46 makes a parole violator ineligible to apply. Leave has been granted in the First Department case with a contrary holding. See *People v Pratts*, 74 AD3d 536 (1st Dept) *lv granted* 15 NY3d 895 (2010).

### **Parole, DOCS Merging**

Governor Cuomo's press release touting the 2011-2012 budget noted that among cost-saving mergers and consolidations was the combining of the Department of Correctional Services (DOCS) and Division of Parole into the new Department of Corrections and Community Supervision (DOCCS). (<http://asapnys.wordpress.com/2011/03/31/2011-2012-state-budget-passed-governors-press-release/>.) A DOCS fact sheet posted in April set out the new agency's goal, and notes that the new agency will consist of two "operational components"—Parole Board and non-Parole Board activities.

The Parole Board will continue as an independent body, maintain its existing functions with no changes to parole eligibility criteria or manner in which boards meet and review cases, and see its members still appointed by the Governor and confirmed by the Senate. Appeals of release denials will continue to be handled by Counsel's Office, whose employees will be appointed by and answer to the Board.

As for parole revocation hearings, the preliminary hearing officers and Administrative Law Judges who perform revocation hearings will become DOCCS employees but will be hired by and report to the Board. Board Counsel's Office will handle administrative appeals and litigation resulting from revocation proceedings, and "[a]ll existing due process protections will remain in place."

Among the changes noted in the fact sheet, the following functions will be assumed by DOCCS: granting "merit terminations from presumptive release, parole, conditional release and release to post-release supervision for certain non-violent offenses"; "mandatory and discretionary terminations of sentences for certain drug offend-

ers"; and "issuing certificates of relief and certificates of good conduct." ([www.docs.state.ny.us/FactSheets/DOCS-Parole-Merger.html](http://www.docs.state.ny.us/FactSheets/DOCS-Parole-Merger.html).)

### **Effects of the 2011-2012 State Budget Not Fully Known**

The Legislature was able to pass an on-time budget this year, but while funding for some programs is known, other issues remain unresolved. Among the host of programs and services receiving cuts in this year's budget were the Aid to Defense program, loan forgiveness for district attorneys and indigent legal services attorneys, and alternatives to incarceration. The cuts ranged from eight to 10 percent of the amount appropriated in last year's budget. The Senate's proposal to eliminate the new Office of Indigent Legal Services was rejected, but negotiations resulted in a 50% cut in the Office's operating budget. (The new office is discussed above and in this issue's "From My Vantage Point" column, p. 16.) And NYSDA will receive \$1.33 million, which is significantly less than the \$1.8 million the Public Defense Backup Center needs for this year.

The Legislature agreed to give Governor Cuomo the authority to close state prisons during the 2011-12 state fiscal year "as he determines to be necessary for the cost-effective and efficient operation of the correctional system," provided that he gives the Temporary President of the Senate and the Speaker of the Assembly at least 60 days' notice prior to a closure. (L 2011, ch 57, Part C.) The Governor has said that the closures will result in the elimination of 3,700 prison beds statewide. Communities affected by closures and consolidations may receive some economic development capital funding. ([www.governor.ny.gov/press/033111budget](http://www.governor.ny.gov/press/033111budget).) To date, no announcements about prison closures have been made.

Days before passing the budget, the Legislature and the Governor agreed to cut \$70 million from the Judiciary budget; this is on top of the \$100 million that Chief Judge Lippman agreed to cut from the court system's proposed budget. The Office of Court Administration has already started to lay off staff and layoff notices for staff at courts around the state are expected by mid-May. ([www.law.com](http://www.law.com), 4/28/2011.) Some changes that have already been implemented: courts have been directed to close at 4:30; almost all of the judicial hearing officers have been dismissed; and children's centers in non-family courts have been closed and family court children's centers will have reduced hours. ([www.law.com](http://www.law.com).) It is unclear what other changes may be made and how public defense clients will be impacted by the cuts and staffing reductions.

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## ***Drug Courts and Drug Law Reform Haven't Won the War, and Clients Still Need Help***

With state and local budgets plummeting, and funding for even nearly-sacred endeavors shrinking, will calls for reform in more areas of drug enforcement bear fruit? To date, reforms of New York's Rockefeller Drug Laws (RDL) have been gratifying but incomplete, and sometimes ineffectually implemented.

Defense complaints about at least some drug courts, long ignored and mostly forsaken, received new support with the publication of recent reports criticizing these claimed solutions to the drug problem. Meanwhile, drug arrests continue, and defense lawyers have to determine the positive and negative aspects of any available drug court programs and other sentencing alternatives and advise clients whose addictions may play a role in their criminal cases accordingly.

In addition to the information below, this issue of the *REPORT* offers readers a "Defense Practice Tips" article (beginning on p. 6) with suggestions on how to deal with issues that attorneys have encountered during the implementation of CPL Article 216, "Judicial Diversion Program for Certain Felony Offenders." Judicial diversion, a 2009 statutory creation (*see* CPL 216.05[8]), is intended to give judges wide discretion over which addicted defendants should have an opportunity for treatment instead of incarceration.

### ***CCA: Interpret Existing Laws to Increase Diversion but Seek Legislative Clarification***

The Center for Community Alternatives (CCA), which provided the Practice Tips article noted above, has also posted an online article describing how existing interim probation laws are hampering judicial diversion. Confusion over whether individuals arrested in one county can have their interim probation transferred to the county where they reside so they can obtain local treatment is preventing some judges from diverting them to drug treatment at all. CCA offers suggestions for drug diversion under existing interim probation law, and notes the need for "a legislative fix to give the court the option of interim probation supervision for out-of-county defendants where necessary and prudent." (<http://makingreality.blogspot.com/2011/02/cpl-article-216-judicial-diversion.html>.)

(Note that other CCA material online dealing with implementation of drug law reforms includes a sample motion to renew a CPL 440.46 motion for resentencing in light of *People v Phillips*, 919 NYS2d 88 [2nd Dept 3/15/2011]. [[www.communityalternatives.org/pdf/CrowKingsCounty-renew-motion-Phillips.pdf](http://www.communityalternatives.org/pdf/CrowKingsCounty-renew-motion-Phillips.pdf)].) *Phillips*, which overturned a denial of resentencing based solely on the

movant's status as a reincarcerated parole violator, discussed above, is summarized on p. 32.)

### ***Drug Courts Seem Here to Stay***

In a relatively short period of time, drug courts have become a pervasive and seemingly permanent presence in the judicial system in New York and around the county. That drug courts, which began in their current form (more properly known as drug treatment courts) in Florida in 1989, are a success is often acknowledged as a given. (*See eg* <http://bjatraining.org/2011/03/01/a-closer-look-at-the-national-drug-court-institute/>.) They are touted as both fiscally prudent and humane, with claims that "the nation's 120 drug courts have saved the system \$200 million in incarceration costs" and "address underlying problems like addiction . . . by actively engaging defendants and promoting behavioral modification." ([www.thecrimereport.org/archive/2011-01-live-the-crisis-in-americas-courts-2](http://www.thecrimereport.org/archive/2011-01-live-the-crisis-in-americas-courts-2).) However, concerns remain, both as to resource problems created by the extra time demands on under-resourced defense offices and as to clients for whom drug court is not a salvation.

Now, two new reports challenge the claim that drug courts can deliver society from the drug problem. The Justice Policy Institute has issued a report entitled "Addicted to Courts: How a Growing Dependence on Drug Courts Impacts People and Communities." It posits that expansion of drug courts actually constitutes an ineffective allocation of scarce state resources, "widens the net" of involvement in the justice system, and "cannot replace the need for improved treatment services in the community." (*See* <http://sentencing.typepad.com/sentencing-law-and-policy/2011/03/new-jpi-report-expressing-concerns-about-drug-courts-and-net-widening.html>; [www.justicepolicy.org/research/2217](http://www.justicepolicy.org/research/2217).)

The Drug Policy Alliance (DPA) also released a report critical of drug courts, entitled "Drug Courts are Not the Answer: Toward a Health-Centered Approach to Drug Use." DPA says that drug courts "may not reduce incarceration, improve public safety, or save money when compared to the wholly punitive model they seek to replace." ([www.drugpolicy.org/library/drugcourts.cfm](http://www.drugpolicy.org/library/drugcourts.cfm).)

Proponents of drug courts challenge these reports. ([www.nadcp.org/setting-the-record-straight](http://www.nadcp.org/setting-the-record-straight).) In any event, zealous advocacy for an individual client's best interests, which can take different forms, remains as important in drug court as any other venue. And practitioners and clients know that drug courts vary greatly in how they operate and in their effectiveness.

*(continued on page 39)*

## CPL Article 216 Judicial Diversion Issues: Strategies for Effective Advocacy

By Andy Correia, Alan Rosenthal, and Patricia Warth\*

### Introduction

The 2009 Drug Law Reform Act (2009 DLRA) included the addition of Criminal Procedure Law (CPL) Article 216, which establishes the procedure for participation in judicial diversion programs. CPL § 216.00(1) provides that any person who is charged with a class B, C, D, or E felony offense listed in Penal Law Article 220 or 221 or an offense listed in CPL § 410.91(4) (the “Willard offenses”) is eligible to participate in judicial diversion. See CPL § 216.00(1). This section goes on to provide, however, that an otherwise eligible defendant is excluded from judicial diversion eligibility if the defendant: 1) is also currently charged with a violent felony or merit time excluded crime for which state prison is mandatory; 2) has, within the preceding ten years, been convicted of a violent felony offense, a merit time excluded offense, or a Class A drug offense; or 3) has previously been adjudicated a second or persistent violent felony offender under Penal Law §§ 70.04 or 70.08. See CPL § 216.00(1)(a), (b).

Below are some issues that trial attorneys have encountered since the implementation of CPL Article 216 and some suggested strategies for dealing with these issues.

### 1. Refusal By Trial Judges to Refer the Case to the Eligibility Screening Part and/or Sua Sponte Diversion Denial

Some superior court judges around the State have refused to refer statutorily eligible [CPL § 216.00(1)] defendants to the Superior Court for Drug Treatment for a hearing and determination of whether such defendants are appropriate for Article 216 judicial diversion. [“Appropriate” is used here to mean statutorily eligible and should be offered alcohol or substance abuse treatment as determined by considering the criteria in CPL § 216.05(3)(b)]. Other courts have simply stated that the particular client is not appropriate for judicial diversion without going through any aspect of the CPL Article 216 process. Depending on the

\* Andy Correia, Esq. is Wayne County’s First Assistant Public Defender. Alan Rosenthal, Esq. and Patricia Warth, Esq. are Co-Directors of Justice Strategies at the Center for Community Alternatives (CCA), a private, not-for-profit criminal justice agency with offices in Syracuse and New York City. CCA is pursuing the full implementation of the New York Drug Law Reforms through a grant from the Foundation to Promote Open Society. CCA’s website ([www.communityalternatives.org/publications/drugCases.html](http://www.communityalternatives.org/publications/drugCases.html)) and blog (<http://makingreformreality.blogspot.com>) offer a wide variety of materials that criminal defense counsel can use when representing defendants in drug offense cases.

jurisdiction, there may not be any separate screening part at all. Arraignment counsel needs to be aware of the local practice and be prepared to advocate that the “non-treatment” superior court should only consider statutory eligibility for judicial diversion. Counsel can request an evaluation and ask that the case be transferred to the court that has been designated under the local OCA administrative implementation as the Superior Court for Drug Treatment for hearing determination of Article 216 cases. Refusal to even consider an eligible, and thus potentially appropriate, case for diversion undermines the broad discretion given to the courts in these matters and overlooks the inclusive and ameliorative intent of the 2009 DLRA. The correct procedure is for the “non-treatment” superior court judge to simply order an “alcohol and substance abuse evaluation” if requested to do so by a statutorily eligible defendant. By ordering the evaluation the case is automatically transferred to the Superior Court for Drug Treatment.

The court rules indicate a very strict procedure for the ordering of the evaluation and the transfer, which is not being followed in some parts of the State. *Rules of the Chief Administrative Judge* § 143(2)(c) states:

“Where a superior court orders an alcohol and substance abuse evaluation pursuant to section 216.05(1) of the Criminal Procedure Law to determine whether the defendant should be offered judicial diversion for alcohol and substance abuse treatment under Article 216, the case shall be referred for further proceedings to:

- 1) the Superior Court for Drug Treatment or
- 2) any other part in superior court designated as a drug treatment court part by the administrative judge . . . .” If the person does not enter judicial diversion, the case can be adjourned to any part designated by the administrative judge.

Some courts appear to be following this procedure and some are not. Defense counsel should become familiar with the process in each jurisdiction in which they practice and formulate an approach to this issue accordingly.

### 2. Refusal By Trial Judges to Order the CPL § 216.05(1) Evaluation

Some courts have refused to order the “alcohol and substance abuse evaluation” as defined in CPL § 216.00(2) after the arraignment of a statutorily eligible defendant. The refusals are often based on purely arbitrary rationales and serve to frustrate the sweeping ameliorative purpose of the diversion statute. The difficulty arises from the permissive language in CPL § 216.05(1) which provides that after the arraignment of an eligible defendant, but prior to a plea or commencement of trial, “the court at the request of the eligible defendant, may order an alcohol and substance abuse evaluation.” (*emphasis supplied*)

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If your judge is making such decisions at arraignment, you can try:

**A.** Pointing out that right now the trial court does not have all the information necessary to make an informed decision about whether the defendant should participate in any diversion program. Ordering an evaluation does not commit the court to making an offer of diversion to the defendant; it does serve the very legitimate purposes of providing the court with information necessary to make the decision under CPL § 216.05(3)(b) and the parties the opportunity to address the question of whether the defendant is appropriate for judicial diversion. Try to get the court to articulate its reasons for refusing to even order the evaluation.

**B.** Consider, if possible, arranging for your own alcohol and substance abuse evaluation of the defendant.<sup>†</sup> Your evaluation expert should meet the statutory credentialing requirements of CPL § 216.00(2) and make the findings required by CPL § 216.00(2)(a)-(d). Then ask for your hearing under CPL § 216.05(3).

**C.** Advance the underlying policy of the Drug Law Reform Act favoring treatment over incarceration to convince the court that an evaluation should be ordered. See Governor Paterson's signing statement, which states:

We are reforming these laws to treat those who suffer from addiction and to punish those who profit from it. But to be successful we must not only overhaul the drug laws, we must also provide an infrastructure to ensure that we successfully rehabilitate those who are addicted with programs like this one at Elmcors which exemplifies our approach to focus on treatment, not punishment.

The laws will give judges the discretion to divert non-violent drug addicted individuals to treatment alternatives that are shown to be far more successful than prison in ending the cycle of addiction.

To convince the court that an evaluation should at least be ordered, use the information posted on CCA's website ([www.communityalternatives.org/](http://www.communityalternatives.org/)) to make the argument that treatment is a more effective and cost-efficient way than incarceration to improve public safety. Then use that same information to argue that the defendant should be found appropriate to be "offered" treatment under CPL § 216.05(3)(a).

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<sup>†</sup> Defense counsel with questions about County Law § 722-c applications for expert services may contact NYSDA's Public Defense Backup Center at 518-465-3524.

### **3. Judge Refuses to Provide Counsel with a Copy of the Evaluation**

Assume that a CPL § 216.00(2) evaluation has been ordered and the defendant has been referred to the Superior Court for Drug Treatment. Then, the court summarily decides that the defendant, although statutorily eligible, is not appropriate to participate in judicial diversion. To compound matters, the court either does not or refuses to provide counsel and the defendant with a copy of the evaluation. In fact, some courts have even destroyed the evaluation at this point under the theory that they must do so to protect the client's confidentiality.

CPL § 216.05(2) states:

"Upon receipt of the completed alcohol and substance abuse evaluation report, the court shall provide a copy of the report to the eligible defendant and the prosecutor."

If you encounter a judge refusing to disclose the evaluation, you should make the record as clear as possible about what has occurred. This disclosure is not a mere formality, but is critical to the entire process created by CPL Article 216. Defense counsel must have the evaluation in order to decide whether or not to request a hearing under CPL § 216.05(3)(a). The report is essential to assist defense counsel in determining what the key issues are that need to be addressed and what evidence should be introduced at the hearing.

This kind of judicial conduct could be addressed by filing an Article 78 under CPLR § 7803(1), a Writ of Mandamus, stating that the court has failed to perform a duty "enjoined upon it by law."

### **4. Eligibility-Neutral Offenses Should Not Exclude Potential Participants**

CPL § 216.00(1) lists the charged offenses that make a person eligible for judicial diversion. The statute goes on to list certain conditions that can result in exclusion, absent prosecutorial consent, and the offenses for which the defendant, if currently charged, will be excluded from eligibility for judicial diversion. An issue has arisen when defendants are charged in the same indictment with charges that are eligible offenses and at least one charge which is neither an eligible offense nor an exclusion offense, hereinafter referred to as an *eligibility-neutral offense*. Some prosecutors have argued that the presence of an eligibility-neutral offense in the charging document renders such defendant ineligible for judicial diversion. From reports we have received from around the State, it appears that most diversion courts are rejecting this prosecutorial gambit. The few written decisions from trial courts have split on the issue. CCA's website (see link below) has links to the reported and unreported decisions on this issue.

One persuasive argument to consider is that the overall plain reading of the statute does not indicate eligibility-neutral offenses are a bar to participation. The Legislature saw fit to list the specific exclusions to participation in diversion, and even those exclusions can be overcome with prosecutorial consent. There is no reason to believe that the Legislature intended the sweeping, ameliorative reforms to be thwarted by the mere presence of eligibility-neutral charges not specifically listed in CPL § 216.00. Such an interpretation would also allow the prosecution to control eligibility for diversion simply by adding an eligibility-neutral offense to the indictment. If nothing else is clear about the legislative intent, what is clear is that the Legislature intended to restore judicial discretion over appropriateness for treatment and remove the prosecution as the gatekeeper. Eligibility should not turn on the manipulation of the charging decision.

See the Eligibility Issues section of the CCA webpage, Tools for Defense Attorneys, Defense of Drug Offense Cases, at [www.communityalternatives.org/publications/drugCases.html](http://www.communityalternatives.org/publications/drugCases.html) for a memo on the issue and the latest cases.

### 5. Inappropriate Judicial Policies

Some judges exhibit a strong reluctance to divert defendants, often relying on certain reoccurring themes. There has also been a judicial reluctance to employ the “exceptional circumstances” exception under CPL § 216.05(4) allowing entry into diversion without a plea, most often for defendants who likely face immigration consequences upon a guilty plea. In several jurisdictions, judges and prosecutors have embraced the exception, rejecting the knee-jerk anti-immigrant posture. There is always the possibility that certain unstated, subtle, and off-the-record policies are at work. Advocates must be persistent in pointing out the legislative intent of the DLRA. You will need to be prepared to make arguments regarding certain predictable positions. For example:

**A.** Inappropriate policy: *No defendant charged with a sale shall enter diversion.*

“Your client doesn’t have a use problem, he has a distribution problem.”

As we all know, many people sell drugs as a means to access drugs and pay for their addiction. For some, the drug trade is the only way they can afford a very expensive drug dependence. Judges who take a dogmatic position that sellers should not be in diversion fail to grasp the realities of the drug trade and undermine the broad ameliorative intent of the statute. At the very least defense counsel should have an opportunity to present the facts surrounding the defendant’s dependency so the court can ascertain appropriateness for diversion on an informed case-by-case basis. CCA will also post resources on our website

related to the often murky distinction between a buyer and seller.

**B.** Inappropriate policy: *If the prosecution objects, no diversion:* Some judges still want a prosecutorial gatekeeper. We understand that this judicial policy is often stated subtly and off the record. Nonetheless, whenever possible counsel should remind the judge that the legislative history of the 2009 DLRA makes it clear that it was the Legislature’s intent to empower judges to make their own decisions. As one court poignantly observed:

The Legislature in crafting the 2009 DLRA wrote a detailed statute which gave courts the discretion to make reasoned judgments and created an adjudicatory process the Legislature deemed fair to both the prosecution and the criminal defendants.... Given this carefully considered legislative design, it is difficult to understand why the judiciary would impose categorical limitations on its own discretion which the Legislature did not create.

*See People v Figueroa*, 27 Misc 3d 751, 894 NYS2d 724 (Sup. Ct., New York Co. 2010).

The trial advocate can point out that diversion has been implemented in jurisdictions around the state over the objections of district attorneys and, so far, no judge has been forcibly removed from office.<sup>‡</sup> Defense counsel should be persistent in arguing for the exercise of judicial discretion. It is that constant reminder that will some day bear fruit. Without it, the policy will metastasize into the time-worn and institutionally-reliable refrain: “that is just how we do it around here.”

**C.** Inappropriate policy: *There are no “exceptional circumstances”; certainly not for non-citizen defendants.*

The legislative history specifically points to immigration issues as the prime example of circumstances in which the court should consider allowing the defendant to participate without pleading guilty. Many defenders have put forth great effort to avoid a plea or any admissions that could be used in the immigration context. Some have been able to position their undocumented clients to finish diversion as a way to improve their chances when they apply for Lawful Permanent Resident status. Joanne Macri of NYSDA is available to consult on these issues and to write advisory letters that spell out your client’s specific

<sup>‡</sup> CCA would like to hear from defenders around the State as to which jurisdictions and judges are requiring prosecutorial consent in order to offer a defendant judicial diversion. We would like to document those jurisdictions in which this problem of implementation of judicial diversion exists so that it might be addressed in a larger forum. Please contact either Alan Rosenthal or Patricia Warth at (315) 422-5638.

immigration situation and explain in detail how judicial diversion could help your client earn his or her way to a better situation with immigration. Joanne can be reached at (716) 913-3200 or JMacri@nysda.org.

## 6. Due Process is Required at a CPL Article 216 Eligibility Hearing

CPL § 216.05(3)(a)-(b) sets forth the following hearing procedure.

A. Upon receipt of the evaluation report, either party “may request a hearing” on the issue of whether this defendant should be offered diversion. There is no burden of proof attributed to either side in this statute.

B. The “proceeding” should be held “as soon as practicable” to facilitate early intervention if the defendant is found to need treatment.

C. The court may:

- i. consider oral and written arguments;
- ii. take testimony from witnesses offered by either party;
- iii. consider “any relevant evidence”, including but not limited to:
  - a) information that the defendant had been adjudicated a YO within the preceding 10 years (excluding time spent in jail on the YO or the instant offense) for a violent felony offense or any offense for which merit time is not available pursuant to Corr. Law § 803(1)(d)(2).
  - b) in the case of a “Willard-eligible” specified offense (CPL § 410.91), any victim statement.

D. Upon completion of the “proceeding,” CPL § 216.05(3)(b) directs that “the court shall consider and make findings of fact with respect to whether:

- i. the defendant is an eligible defendant as defined in subdivision one of section 216.00 of this article;
- ii. the defendant has a history of alcohol or substance abuse or dependence;
- iii. such alcohol or substance abuse or dependence is a contributing factor to the defendant’s criminal behavior;
- iv. the defendant’s participation in judicial diversion could effectively address such abuse or dependence; and
- v. institutional confinement of the defendant is or may not be necessary for the protection of the public.”  
(emphasis supplied)

### E. Problems Related to the Eligibility Hearing

Unfortunately, while many courts are conducting full-fledged hearings with exhibits and witness testimony,

other courts are making short-shrift of the CPL § 216.05(3) hearing process, finding encouragement to make quick work of the hearing in an Office of Court Administration (OCA) memo sent out to the judges and dated July 7, 2009. In that memo, OCA describes eligibility hearings as follows:

Either party has the right to a hearing on the issue of whether the court should grant diversion, but the statute gives the court wide latitude in how to conduct the hearing. For instance, although the court can elect to take testimony from witnesses, it can also simply rely on the oral or written arguments of the parties.

OCA Memo, by Michael Colodner, at 2 (7/7/2009).

As a result, some courts are making the determination of whether a defendant is appropriate for judicial diversion at a “hearing” that resembles an advocacy free zone. Counsel should attempt to fortify the record by:

- i. Making arguments in writing and making sure such documents are a part of the record.
- ii. Submitting supporting documentation.
- iii. Asking for oral argument and live testimony where appropriate.
- iv. Making an offer of proof, if the judge rebuffs your attempt to conduct a hearing at which testimony is taken and exhibits are offered.
- v. Forming relationships with the local substance abuse evaluators and transforming them into advocates for your clients where possible.

The court cannot make reliable findings of fact on these issues absent the professional input of treatment providers, especially factors ii. through v. of CPL § 216.05(3)(b). These factors contain concepts best explained at length by treatment providers on the witness stand. If their favorable opinions withstand judicial scrutiny and DA cross-examination, you may at least strengthen any potential issue for appeal, as well as educating the judge further about these issues.

vi. Giving consideration to calling the defendant as a witness. In some jurisdictions this has been done with a modicum of success, but obviously requires time to prepare the defendant for questioning about these issues. There are, of course, dangers involved with having the defendant testify which need to be carefully weighed.

## 7. Why the Court Should Use a Plea Agreement that Caps the Potential Sentence

CPL § 216.05 subsections (8), (9)(c), (9)(e), and (10) all make specific reference to an “agreement” between the court and the defendant. This agreement can be on the record or in writing. It shall include a specified period of treatment and may include periodic court appearances,

urinalysis, and a requirement to refrain from criminal behaviors. The statute implies, but does not explicitly direct, that the plea agreement contain the agreed upon disposition and sentence to be imposed in the event the defendant successfully completes diversion (CPL § 216.05(10)) and the agreed upon sentence that will be imposed if the defendant is unsuccessful in diversion. See CPL § 216.05(9)(c), (e). If the defendant's participation in judicial diversion is terminated before successful completion "... the court may impose any sentence authorized ... in accordance with the plea agreement, or any lesser sentence..."

Despite the plain implications of the statute there still are some jurisdictions in which judges have refused to cap the sentence for a diversion participant in the plea agreement. These courts insist on retaining the authority to sentence a participant to the maximum sentence if the defendant is terminated from diversion.

There are several reasons, both statutory and practical, why courts should include sentence caps in the plea agreement:

A. The language of the statute can be construed to require or at least strongly imply that the plea agreement should include an agreement as to the disposition and sentence in the event of successful completion of treatment or unsuccessful termination. CPL § 216.05(9)(c) refers to sentencing in "accordance with the [plea] agreement." Every other aspect of the statute regarding the agreement takes pains to give the court options to tailor the terms of diversion participation to the specific defendant based upon that individual defendant's problems and needs of service. There is every reason to believe that the Legislature intended the court to also individuate the sentence based upon the participant's prior record, individual characteristics, and the facts of the case before it. Every case is different, and in recognition of that fact the Legislature encouraged courts to make the specific plan, including potential punishment, fit each different case.

B. There is much less incentive for potential participants to sign up for the challenge of judicial diversion if they face the potential maximum punishment for a failed attempt at treatment. Generally in criminal cases defense counsel is able to negotiate a plea bargain that exchanges an admission of guilt for a sentence less than the maximum sentence, often much less. Such a negotiated plea should provide a baseline for the client's sentencing exposure while participating in diversion. Many clients will be reluctant to participate in diversion absent a negotiated cap. Many defense lawyers will be reluctant to advise clients to participate in diversion if the maximum sentence remains available to the treatment court simply because the client has opted to try treatment and failed.

C. Peter Preiser's Commentary in McKinney's CPL Article 216 indicates strong support for the requirement of a sentence cap as part of the plea agreement to enter diversion:

"And in consideration of the defendant's agreement the court will make a commitment as to the ultimate disposition of the criminal charge if defendant abides by the conditions of the program and an alternative sentence if the defendant does not ..."

Preiser's analysis of the statutory language clearly contemplates that the court is obliged to commit to the disposition and sentence for both successful completion and unsuccessful termination in exchange for the defendant's agreement to participate in the diversion program. Preiser also seems to express a preference that the conditions of this agreement be put in writing prior to any guilty plea.

D. There are studies that suggest defendants are more motivated by certainty of punishment rather than severity of punishment. See *Deterrence in Criminal Justice—Evaluating Certainty vs. Severity of Punishment* [[http://www.sentencingproject.org/doc/Deterrence\\_Briefing.pdf](http://www.sentencingproject.org/doc/Deterrence_Briefing.pdf)] (November 2010 Sentencing Project Report summarizing research on the limited value of severe sentences.) Caps on sentences, along with a system of supervision that creates a certainty of detection for violations, are more effective in gaining compliance with supervision than more lengthy periods of incarceration.

E. Some diversion courts use plea agreements which cap the sentence, but the participant is informed on the record that if he or she is arrested for a new offense while in diversion, or if a bench warrant has to be issued at any point, the cap on sentence will be removed and the full range of the authorized sentence becomes available. Although there is still a question about whether a failure in treatment warrants an enhanced sentence that is more than what the defendant would have received at the beginning of the case, at least in those jurisdictions the defendant is somewhat protected from the maximum sentence.

If such contracts are not being used in your jurisdiction, counsel can produce their own written contract, and include a provision for a cap on sentence. Even if rejected this could at least open discussions about such a cap. A sample contract from Monroe County can be found on the CCA website at [www.communityalternatives.org/publications/drugCases.html](http://www.communityalternatives.org/publications/drugCases.html).

### 8. Must the Defendant Plead to all Counts to Enter Diversion?

CPL § 216.05(4) states that the "eligible defendant shall be required to enter a plea of guilty to the charge or charges...." Absent an agreement from the prosecution to drop

charges, does this statute mean that the defendant must plead guilty to all charges in the charging document for the judge to issue an order granting judicial diversion?

At least one court has said no. The court in *People v Adolfo Taveras* (County Ct., Onondaga Co., J. Merrill, 1/4/2010) held that CPL Article 216 controls the plea limitations found in CPL § 220.10 and does not require DA consent to dismiss aspects of the indictment when a diversion court is fashioning a plea agreement with the eligible defendant. The court relied heavily on the sweeping, inclusive, and ameliorative intent of the Legislature in passing CPL Article 216 and encouraging diversion cases.

This case can be found on the CCA website at [www.communityalternatives.org/publications/drugCases.html](http://www.communityalternatives.org/publications/drugCases.html).

### 9. Refusal By Trial Judges to Offer Judicial Diversion to a Defendant Who Delays His or Her Request for an Alcohol and Substance Abuse Evaluation

Some judges have “punished” defendants for a delay in making the request to be considered for judicial diversion by refusing to either order an evaluation or refusing to offer judicial diversion. This refusal is apparently based upon the questionable assumption that the defendant is

not sincere about seeking treatment and is manipulating the system. CPL § 216.05(1) authorizes the defendant to make the request for judicial diversion “[a]t any time after the arraignment . . . but prior to the entry of a plea of guilty or the commencement of trial . . . .” There is nothing in the statute that requires the defendant to quickly opt in to judicial diversion.

Defense counsel may have many reasons to advise the defendant to delay the request for diversion, including the need to review discovery, conduct an investigation, file appropriate motions, obtain a private evaluation, and have informative discussions with the defendant about the pros and cons of judicial diversion. When confronted by a judge who fits this *modus operandi*, defense counsel should run interference for the defendant. Explain to the judge that the delay was caused by counsel and not by the defendant.

### Conclusion

With persistence and well-considered advocacy, trial counsel can help realize a more robust implementation of the Drug Law Reform of 2009 reflective of the full legislative intent of CPL Article 216, and help to foster a more therapeutic, less-punitive response to drug offenses. ☪

## CONFERENCES & SEMINARS

**Sponsor:** New York State Bar Association  
**Theme:** Staying Ahead of the Curve: What Every Criminal Defense Lawyer Needs to Know  
**Date:** June 17, 2011  
**Place:** Albany, NY  
**Contact:** NYSBA (Debra Harrington): tel (518) 458-5641; email [dharrington@nysba.org](mailto:dharrington@nysba.org); website [www.nysba.org](http://www.nysba.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** The Essentials of Criminal Law  
**Date:** June 25, 2011  
**Place:** Ithaca, NY  
**Contact:** NYSACDL: tel (212) 532-4434; fax (888) 239-4665; website [www.nysacdl.org](http://www.nysacdl.org)

**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](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Peak to Peak: The Summit of Cross  
**Dates:** August 3–6, 2011  
**Place:** Denver, CO  
**Contact:** NACDL (Tamara Kalacevic): tel (202) 872-8600 x 241; email [tamara@nacdl.org](mailto:tamara@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

**Sponsor:** National Association of Criminal Defense Lawyers & National College for DUI Defense  
**Theme:** DWI Means Defend with Ingenuity: Winning at Every Level  
**Dates:** September 15–17, 2011  
**Place:** Las Vegas, NV  
**Contact:** NACDL (Gerald Lippert): tel (202) 872-8600 x 236; email [gerald@nacdl.org](mailto:gerald@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

**Sponsor:** New York State Defenders Association  
**Theme:** Winning Criminal Defense Strategies  
**Date:** October 28, 2011  
**Place:** Poughkeepsie, NY  
**Contact:** NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org) ☪

### **The DWI Detection and Standardized Field Sobriety Testing Manual: Using Their Playbook Against Them**

By Stephen L. Jones\*

The DWI Detection and Standardized Field Sobriety Testing Manual<sup>1</sup> (SFST Manual) is the government's bible. It covers what the observing, investigating and arresting police officer is trained to "find." The SFST Manual consists of 16 sessions that cover topics ranging from note taking<sup>2</sup> to report writing and moot court.<sup>3</sup> Remarkably, far too much of a defense attorney's scrutiny of the government's case and hence the attorney's cross-examination centers on the administration of the so-called "field sobriety tests." Lawyers overlook the Vehicle in Motion<sup>4</sup> and Personal Contact<sup>5</sup> sessions (sections). It's time to refocus.

These two sessions set forth certain specific cues or indicators that the officer is trained to look for during the entire time the officer is with the client. This includes the time of driving, pulling over, interacting with the officer, complying with the officer's requests, getting out of the car, walking to the back of the car, standing at the back of the car as well as attempting the field sobriety tests.<sup>6</sup>

Many lawyers have one thing in common with police officers—they dislike paperwork. By the time the arrest and the booking are completed, the adrenaline has worn off and the officer is in most cases dreading the drafting of the narrative. Despite their training to graphically describe their observations,<sup>7</sup> they write briefly about the stop, a few comments about drinking, maybe how the client exited the car, certainly that he was unsteady as he walked to the rear, and then include a long dissertation on how the client failed the field "sobriety" tests. The story continues with the fact that there was the odor of an alcoholic beverage in the cruiser that was not present before the client got in there.

As a result of the way the reports are written, defense attorneys tend to focus on undermining the negatives in the testimony, which mimics the report, as opposed to focusing on what is absent from the report or the officer's testimony.

Field sobriety tests are nothing more than a determination of whether the client has the level of coordination and balance necessary to stand on one leg for 30 seconds without using his arms for balance, or to walk abnormally on a line for nine steps, turn around and walk back with

his hands at his sides. It is not known whether, if sober, the driver would have the ability to perform these abnormal tasks. The officer then arrests the suspect because of the suspect's inherent inability to perform these "tests."

When defense attorneys read the narrative for the first time, they hope that they do not see the common observations that form the basis of the officer's probable cause to arrest. They are so elated if one or more of these ubiquitous observations are not included in the narrative that they often do not bring attention to their absence at trial. If the prosecution is making an issue out of the fact that a certain observation is present, the defense should be making an issue out of the fact that something is not present. The goal of the cross-examination is to show that when the client is doing normal physical tasks, he is acting normally, and only when he is asked to do abnormal tasks does he have a problem. If the defense can change the focus of the trial to the client's ability to perform normal tasks, then the defense increases its chances to gain an acquittal.

#### **Six Cues**

To change the focus of the trial, the defense must separate not only the driving before the emergency lights go on from the driving after they are activated, but also the results of the field sobriety tests from the fine and gross motor skills exhibited when performing normal behaviors. The SFST Manual provides the foundation to do this through the Stopping Sequence,<sup>8</sup> Exit Sequence,<sup>9</sup> and the absence of indicia of impairment at times when one would expect them to be present. The elicitation of normal behavior by the client will not only help to create reasonable doubt on the impairment theory, but also help to discredit any breath or blood test result.

The police officer is trained to document the reason for the stop. He is also trained in the Stopping Sequence. The Stopping Sequence is the period between the time that the officer activates his lights to signal the car to pull over and the time that the car comes to rest. The SFST Manual enumerates six different cues that *are important evidence of DWI*.<sup>10</sup> Those cues are (1) an attempt to flee; (2) no response; (3) slow response; (4) an abrupt swerve; (5) sudden stop; and (6) striking the curb or another object.

It is likely that none of these six "important" indicators will be present. The cross-examination of the arresting officer should include having the officer acknowledge the Stopping Sequence as part of his training and acknowledge that there are six driving behaviors he is trained to look for in this kind of stop. That should be followed up with a cue-by-cue admission that the individual cues are not present. After the officer admits that each of the cues was missing, the defense attorney should have the officer admit that none of the six indicators for which he is trained to look for when the lights go on were present.

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## Approach, Observe, And Interview

The officer's approach to the car is the next portion of the case. The SFST Manual indicates that observation of the driver continues through the approach of the suspect vehicle.<sup>11</sup> If there is nothing out of the ordinary during the approach, such as the client being slumped over the wheel or leaning over, this should be pointed out as well as pointing out that the client's head was straight up and the brake lights were off (indicating that the client put the car in park as he should have).

The next segment of the stop also offers an opportunity to cross-examine the officer to reveal the presence of normal mental and physical faculties. Once the officer has stepped up to the driver's window of the car, the client will be asked to lower the window. The officer is taught "to approach, observe and interview the driver while they are still in the vehicle to note any face-to-face evidence of impairment."<sup>12</sup> This is also an opportunity to test the officer's memory of the night, as it is not part of the event that is often memorialized in the officer's narrative of the stop and arrest.

The defense attorney must be mindful of each and every movement that the client makes during his interactions with the officer. If the officer did not note a problem with any movement that the client made, then the lack of evidence of impairment should be brought to the attention of the fact finder. More often than not, the SFST Manual will instruct the officer to look for specific indicia of impairment. This, coupled with the officer's testimony, usually elicited on direct examination by the prosecution, will allow the defense to ask: "During the training you testified you received on DWI detection, you were trained to look for (fill in the blank)? Then ask: (fill in the blank) was not present, was it?["]

The first thing the officer typically asks the client to do is roll down the window. This is an opportunity for counsel to highlight the normal fine and gross motor skills that the client exhibited and his ability to follow instructions. It is recommended that the questioning be more detailed than simply asking the officer: "He didn't have any difficulty opening the window, did he?"

Rather, the questioning should be similar to the questions below.

- You asked him to lower the window?
- He responded to your request immediately and moved his hand towards the button?
- You were watching his hands for officer safety?
- His movements were normal?
- His finger went to the button and lowered the window?
- Without any evidence of loss of motor skills?

This is also a good opportunity to point out, if applicable, that the client made eye contact with the officer. Other potential areas of inquiry include detailing the nor-

mal movements the client demonstrated when asked to turn off of the radio and/or the car. The same detail of inquiry used on the "lowering of the window" inquiry should be used for these areas of cross-examination.

The next part of the interaction with the client is usually the request for license, registration, and/or proof of insurance. This stage of the interaction offers many movements, especially during the retrieval of the vehicle registration, which will help to show a lack of impairment. For the cross-examination to be effective, each and every movement of the client must be elicited. The individual movements are detailed below.

### License retrieval:

- Responded promptly to your request?
- Retrieved the wallet from pocket, console, or purse?
- If wallet—no difficulty getting his wallet out of his pocket?
- Opened his wallet without difficulty?
- He removed his license from among the other cards and papers in his wallet?
- Show the wallet to the officer for ID if appropriate.
- He was able to remove the license without any difficulty from the plastic sheath in the wallet?
- He handed you the correct document?

At the end of the license retrieval questioning and the registration retrieval questioning (below), assuming the questioning has gone as planned, the following questions should be put to the officer. If each and every movement has been detailed in the cross-examination, these questions will help to establish a reasonable doubt as to whether the client was impaired.

- You are trained to look for any sign of impairment during your request for the license?<sup>13</sup>
- And where officer safety is always a concern and he is going into his pockets or compartments of the car, you are watching him very closely?
- His fine and gross motor skills were normal?
- No evidence of impairment in his movements?
- Not even to the slightest degree?

The registration retrieval, in most cases, involves leaning and reaching over to the other side of the car. This is a great opportunity not only to extend the "normal" movements of the client further into the "investigation," but also to more types of movement.

- You requested his vehicle registration?
- He started to retrieve it promptly?
- He leaned over to get it from the glove box?
- He didn't use anything for support as he leaned over?

- He leaned right over and moved his hand to the latch?
- He pushed or turned the latch and opened the glove box without any problem with fine or gross motor skills?
- Drivers are oftentimes asked to touch the tip of a pen to test their hand eye coordination?
- Hand eye coordination is important in driving a car?
- He didn't lose his balance when he leaned across the car?
- Didn't fumble with the papers inside the glove box?
- Found the registration among other things in the glove box one-handed while leaning over?
- In the dark? (If the officer says he was illuminating the area with his flashlight, point out that as a result of the angle and the position of the glove box, the light was little or no help.)
- He transferred the document(s) to his other hand?
- Closed the glove box?
- It was the correct document? (mental awareness)
- Handed it to you without a problem?
- In this entire sequence of actions and movements, he had no physical difficulty?
- His fine and gross motor skills were normal?
- No evidence of impairment in his movements?
- Not even to the slightest degree?

The next area of inquiry at the vehicle should be follow-up questions on the client's admission, if any, to consuming alcohol.

- You asked him an initial question about drinking?
- He apparently understood you?
- He answered you appropriately?
- He again made eye contact with you?
- You understood his reply?
- You would agree that your training<sup>14</sup> indicated that the time over which the client consumed the five beers he told you he drank is important to determine whether the beers affected him?
- You didn't ask him what that time period was?

The lack of a follow-up inquiry is common. Combining an insufficient investigation with ongoing observations that are consistent with sobriety will have a synergistic effect on the fact finder.

### Exit Sequence

The interaction at the window will be followed by the exit order. This portion of the investigation is detailed in the Exit Sequence,<sup>15</sup> which is discussed in the Personal Contact session of the SFST Manual. The Exit Sequence enumerates

several specific behaviors (listed below) that the officer is trained to look for at this stage of the investigation.

- Shows angry or unusual reactions
- Cannot follow instructions
- Cannot open the door
- Leaves the vehicle in gear
- Leans against the vehicle
- Keeps hands on vehicle for balance

As with the Stopping Sequence, it is recommended that defense counsel inquire about the several indicators (that are not present). In nearly all cases there will be testimony about unsteadiness as the client walked to the rear of the vehicle. When there is testimony of unsteadiness, an observation that creates an unfavorable mental image, question the officer as to what he means by "unsteady."

- Where were you as the defendant walked to the rear of his car?
- Mr. Smith never bumped into you?
- Never grabbed on to you for support?
- Never put his hand on the vehicle as he walked?
- He walked a straight line to the back of his car?
- Ended up between the vehicles?
- Followed your instructions on where to go?
- Made the turn at the rear without a problem?
- Didn't bump into the car or use it for balance there?

The client, assuming he walks a straight line to the corner of the car and turns without a problem, has just passed a "walk and turn" test that requires normal behavior. The most natural thing people do is protect themselves from danger. If the client's gait were unsteady to any appreciable degree, he would have used the car or the officer to steady himself.

Another overlooked area of cross-examination is the walk to the cruiser after the client has been handcuffed. In all or nearly all of the cases, this part of the event will not be detailed in the officer's narrative. It involves the client walking, standing, and getting into the backseat of a car without the use of his arms.

- He didn't resist?
- Walked in a straight line?
- Never stumbled?
- Never tripped?
- One foot in front of the other?
- Standing and waiting for the door to be opened without swaying?
- Got into the backseat of a car without the use of his arms?

*(continued on page 39)*

# Job Opportunities

The Brennan Center for Justice at NYU School of Law seeks an Attorney for its Liberty and National Security Program. The Program works to advance effective national security policies that respect the rule of law and constitutional values, with a focus on policies in the areas of domestic counterterrorism (including privacy and profiling concerns), government secrecy and accountability, and detainee policy. The attorney's responsibilities will include engaging in policy analysis, writing reports and other public education materials, conducting media outreach, engaging in legislative drafting and advocacy, advising officials and activists, and litigating at the trial and appellate levels. The position is based in the Brennan Center's New York office and requires occasional travel to Washington, D.C. and other locations. Qualifications: at least three years' relevant experience (more preferred); excellent research, analytical, and writing skills; comfort with public speaking; ability to work with media; ability to work in coalition with other organizations and with diverse constituencies; and excellent organizational skills. The ideal candidate would have a strong background in one or more of the following areas: civil liberties and/or national security law; legislative advocacy (or other legislative experience); and litigation. The Brennan Center, an equal opportunity, affirmative action employer, is strongly committed to diversity and welcomes applicants of all races, ethnicities, genders, and sexual orientations. Applications will be considered on a rolling basis, with a preference for those submitted by May 31, 2011. For more information about the position and how to apply, visit <http://www.brennancenter.org/pages/jobs/>.

Prisoners' Legal Services (PLS), a statewide program, has a challenging career opportunity for a highly motivated, dedicated professional to lead its statewide efforts to provide pro bono legal services to people incarcerated in New York State prisons. PLS represents incarcerated individuals on civil issues associated

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Information**

with conditions of confinement including constitutional issues, disciplinary matters, excessive use of force, mental and medical treatment and sentencing issues. The Coordinator must be an innovative self-starter, who is passionate about providing legal services to the indigent, underserved prison population. The Coordinator will be responsible for developing, implementing and administering a statewide pro bono program that includes networking and partnering with large, medium and small law firms, the New York State Bar Association, the New York City Bar and other county Bar associations as well as collaborating with law schools and assisting in the development and implementation of a research and writing project for law students. The Coordinator will be responsible for coordinating PLS' CLE accreditation program, initiating and designing and implementing relevant training programs. The Coordinator will be responsible for the referral of cases to outside counsel and for overseeing and coordinating legal backup for those referrals. Statewide travel will be required to coordinate with upstate law firms and law schools and to enable the Coordinator to work with the PLS offices in Albany, Buffalo, Plattsburgh and Ithaca. The Coordinator must also have extremely strong organizational, communication and writing skills. The ideal candidate must be admitted to practice in New York State and have a minimum of three (3) years of legal practice experi-

ence in one of the following: the delivery of legal services to the incarcerated and/or poor, civil rights litigation or poverty law, and two (2) years of pro bono-related experience. This position is available immediately. EOE. For more information about the position and how to apply, visit [www.plsny.org/html/employment.html](http://www.plsny.org/html/employment.html).

The Massachusetts Committee for Public Counsel Services (CPCS) seeks applications for the position of Deputy Chief Counsel for the Public Defender Division. The Public Defender Division provides legal services to indigent adults facing criminal charges. It also represents clients in proceedings under G.L. c. 123A ("sexually dangerous persons" cases). Candidates must possess strong leadership skills and qualities, embrace the principles of zealous advocacy and community oriented defense in the representation of indigent clients for whom there is a right to court-appointed counsel, and have the ability to promote the provision of excellent representation by staff members. Candidates must have strong analytical, interpersonal, communication, negotiation and decision-making skills. Candidates must have the ability to develop, support and mentor staff. A minimum of five years prior management experience, including supervision of legal and support staff, is required. Prior experience in a policy-making position which required data analysis is a plus. Candidates must have the ability to work with courts, state agencies and legislators. Candidates must possess in depth knowledge of criminal law and procedure, strong criminal defense litigation skills, and be a member of, or eligible for admission to, the Massachusetts bar. Deadline: May 27, 2011. CPCS is an equal opportunity employer. The agency actively seeks to diversity its workforce. For more information about the position and how to apply, visit [www.public-counsel.net/employment\\_opportunities/employment\\_opportunities\\_2011/Deputy\\_Chief\\_Counsel\\_PD.pdf](http://www.public-counsel.net/employment_opportunities/employment_opportunities_2011/Deputy_Chief_Counsel_PD.pdf). ☺

# From My Vantage Point

by Jonathan E. Gradess\*

Assigned counsel rates had finally changed after a 17-year wait. Some counties reacting to increased rates were dismantling their systems, hunting for cheap alternatives. Illegal low-bid contracts with individual lawyers and firms camouflaged as county conflict defender offices were springing up. It was November 2003, and there we were, all standing together at the Indigent Defense Summit convened by then-Chief Judge Judith Kaye. Upstate was meeting downstate. National public defense experts were meeting New Yorkers. Hubris was in full bloom. New Yorkers were being told a storm was coming, yet there was much resistance. Members of our Client Advisory Board stood toe-to-toe with luminaries of the New York State Bar Association and demanded that lawyers stop calling standards merely “aspirational.” “It is time,” they said, “to change New York’s system.” From the Summit came a public recommendation for client-centered lawyering.

Descriptions of the crisis, peppered with a few stories about arraignments conducted in barns and kitchens, propelled Judith Kaye to establish a commission to study the public defense system. Things were moving.

That same year the New York State Bar Association established a special standing committee. The next year saw standards for family court and public defense representation promulgated by the Chief Defenders of New York State and adopted by NYSBA’s Board of Directors. By 2005, the Commission on the Future of Indigent Defense Services was holding hearings around the state. That same year the State Bar promulgated its award-winning standards dealing with mandated representation.

In 2006 Judge Kaye’s commission called on the State to create an adequately state-funded, statewide defender system headed by an independent public defense commission. For the next four years the Campaign for an Independent Public Defense Commission set about to implement that idea through two successive Albany administrations.

The story of that campaign—worth telling—could fill a book. All of us learned a lot during the campaign about the power of path dependency, the sluggish nature of positive political action, the fickle nature of friendship, and the beauty of integrity in action. We saw self interest trump justice, observed political cowardice undermine reform, and watched the urge for patronage thwart real restructuring. We also came to feel the nobility of stalwart allies and the generalized fear of change.

But it is 2011. We have all won something. It is not the czar or czarina feared by some, nor the frightening “bureaucracy” mantra spun by so many. And, like the national defender systems that were spoken of in November of 2003 at that Summit seemingly long ago, it

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is already under attack. Messaged as “unnecessary” by some who had no hand in its creation, already it has had its budget cut in half due to the absurd culture war that invaded this year’s Albany budget process.

But New York’s Indigent Legal Services Office is here. The Board, though not chosen exactly as we would have wished, is strong. Its members have integrity. They are committed to improvement. After a national search that Board selected Bill Leahy as Director of the Indigent Legal Services Office. Hailing from the Massachusetts Committee for Public Counsel Services, his three decade reputation as a defender leader is known and widely revered. Most importantly, he is committed to improving client representation and the quality of public defense services in New York.

So here we are. Eight years since the shock on the faces of the Bronx judges when they heard about the (continuing) crisis of counsel-less arraignments; seven years since assigned counsel fees went up and the county fiscal race to the bottom began. Six years since NYSBA’s standards. Five years since the Kaye Commission wrote, “. . . [T]he time for further study is over . . . [t]he time for action is now.”

It has been four years since the Spitzer Administration said public defense reform was a second-year priority. Three years since the Indigent Legal Services Fund Maintenance of Effort crisis began. It has been two years since hundreds of clients and lawyers came to Albany on Gideon Day and the leadership promised, “This is the year.”

Last year Governor Paterson signed legislation creating the Indigent Legal Services Office. That office is real. It is open for business. It is another milestone on the march to justice. But in order for that office to function well, to build the community of concern and service that is required for the clients of this state, we must all cooperate. Defenders need to offer up their programs’ funding-based deficiencies and seek help. Others need to consult with the office without fear. We all need to help the office build a new client-centered public defense system.

What matters now is that we treat the office as the vehicle for reform that it can be. That, my friends, is truly up to you. ♪

## Leahy Introduces ILS Office

The Director of the Indigent Legal Services Office contributed an article to the *Daily Record’s* Law Day 2011 Supplement. Leahy described the new office’s responsibilities and praised the creative and quality-enhancing proposals the office has received from counties seeking grants to improve the quality of public defense representation. (<http://nydailyrecord.com/wp-files//law-day-2011.pdf>, p. 10.)

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

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

*Ed. Note: With the last issue, the REPORT introduced a new case summary format. The change should increase the speed with which NYSDA can provide information about new decisions. The new format will also allow readers to more quickly identify those cases immediately relevant to their work. Because most REPORT readers can now access recent decisions electronically, citations to the precedents relied on in the summarized opinions are no longer included.*

## United States Supreme Court

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

### Sentencing (Guidelines) (Mitigation) (Resentencing)

[Pepper v United States](#), 562 US \_\_, 131 SCt 1229 (3/2/2011)

**Holding:** A district court may, when resentencing someone after a sentence has been set aside on appeal, consider evidence of that person's post-sentencing rehabilitation, which in appropriate instances may support a downward variance from the advisory Federal Sentencing Guidelines. The law of the case doctrine did not require the court below to apply the same percentage departure from the Guidelines range that had been applied for substantial assistance at the petitioner's previous sentencing. Congress made clear that no limit is placed on what information about a defendant's background, character, and conduct a court may consider in imposing an appropriate sentence, and no statutory distinction is made between initial and subsequent sentencings. Postconviction reha-

bilitation can be highly relevant to several of the statutory factors courts are to consider. The able arguments put forward by *amicus* after the government confessed error are rejected.

**Concurrence in Part:** [Breyer, J] The federal sentencing statutes, as interpreted, require appellate courts to review sentences, including those that vary from a specific Guideline, for reasonableness. Closer review should be applied when sentencing decisions rest on disagreement with Guidelines policy, and greater deference should be applied when decisions rest on case-specific circumstances that place those cases "outside a specific Guideline's 'heartland.'"

**Concurrence in Part, Dissent in Part:** [Alito, J] There should not be a return to the regime of entirely discretionary federal sentencing.

**Dissent:** [Thomas, J] Applying the sentencing guidelines as written in this case would not violate the 6th Amendment.

### Habeas Corpus (Federal)

[Wall v Kholi](#), 562 US \_\_, 131 SCt 1278 (3/7/2011)

**Holding:** A motion to reduce a sentence, which under state law is not part of the direct review process, seeks "review other than review of a judgment in the direct appeal process," amounting to "collateral review" that tolls the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limitation period.

**Concurrence in Part:** [Scalia, J] "I cannot join footnote 3 of the Court's opinion . . . , which declines to decide whether a Rule 35 motion seeks direct review."

### Civil Rights Actions (USC § 1983 Actions)

#### Forensics (DNA)

### Habeas Corpus (Federal)

[Skinner v Switzer](#), 562 US \_\_, 131 SCt 1289 (3/7/2011)

**Holding:** This postconviction claim for DNA testing is properly pursued in a suit under 42 USC 1983. Success in the petitioner's suit for DNA testing would not "necessarily imply" the invalidity of his conviction, so he is not required to proceed in habeas corpus. The dissent's fears of a "proliferation of federal civil actions 'seeking post-conviction discovery of evidence [and] other relief inescapably associated with the central questions of guilt or punishment'" is unwarranted. This is especially true for DNA cases, as the decision in *District Attorney's Office for Third Judicial Dist. v Osborne* (557 US \_\_, 129 SCt 2308 [2009]) "rejected substantive due process as a basis for such claims," and other controls exist.

Because the petitioner challenged the Texas post-conviction DNA statute's limitations and not the court

US Supreme Court *continued*

decisions announcing those limits, there is no lack of federal jurisdiction over his federal case.

**Dissent:** [Thomas, J] Due process challenges to state collateral review procedures should not be permitted under 1983. This ruling will undermine the limitations placed on federal habeas corpus challenges to state convictions.

## Habeas Corpus (Federal)

**Felkner v Jackson**, 562 US \_\_, 131 SCt 1305 (3/21/2011)

**Holding:** The 9th Circuit's reversal of the district court's holding that a California ruling on a *Batson* claim was not "based on an unreasonable determination of the facts in light of the evidence presented" is as "inexplicable as it is unexplained" in its three-paragraph unpublished memorandum opinion. The habeas petition was properly denied.

## Civil Rights Actions (USC § 1983 Actions)

Discovery (*Brady* Material and Exculpatory Information)**Connick v Thompson**, 563 US \_\_, 131 SCt 1350 (3/29/2011)

**Holding:** A district attorney's office may not be held liable under 42 USC 1983 for failure to train its lawyers properly about the requirement to disclose exculpatory evidence, set out in *Brady v Maryland* (373 US 83 [1963]), on the basis of a single *Brady* violation. This case does not fall within the narrow range of the "'single-incident' liability hypothesized in *Canton [v Harris]*, 489 US 378 (1989)] as a possible exception to the pattern of violations necessary to prove deliberate indifference in §1983 actions alleging failure to train." "A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason ... to believe that those tools are insufficient to prevent future constitutional violations in 'the usual and recurring situations with which [the prosecutors] must deal.'"

**Concurrence:** [Scalia, J] Accepting the failure-to-train theory here would make it "a talismanic incantation producing municipal liability" practically every time someone had their constitutional rights violated by a municipal employee. Worse, federal courts would then engage in endless second-guessing of municipal employee-training programs, diminishing state and local governmental autonomy. And in any event, it was not lack of an accurate training regimen that caused the conceded *Brady* violation here.

**Dissent:** [Ginsburg, J] The evidence showed that "misperception and disregard of *Brady's* disclosure

requirements were pervasive" in the District Attorney's office, establishing "persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under §1983."

## Search and Seizure ("Poisoned Fruit" Doctrine)

**Tolentino v New York**, 563 US \_\_, 131 SCt 1387 (3/29/2011)

**Holding:** "The writ of certiorari is dismissed as improvidently granted."

**[Ed. Note:** *Eight days after the oral argument, the Supreme Court dismissed the writ of certiorari. This was an appeal from the Court of Appeals decision, People v Tolentino [14 NY3d 382 (2010)], which held that "a defendant may not invoke the fruit-of-the-poisonous-tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name." A summary of the Court of Appeals decision is available in the [June-September 2010 issue of the REPORT.](#)]*

## Counsel (Competence/Effective Assistance/Adequacy)

## Death Penalty (Penalty Phase)

## Habeas Corpus (Federal)

**Cullen v Pinholster**, 563 US \_\_, 131 SCt 1388 (4/4/2011)

**Holding:** Review under USC 2254(d)(1) does not permit consideration of evidence introduced in an evidentiary hearing before the federal habeas court; it "is limited to the record that was before the state court that adjudicated the claim on the merits." This holding does not render USC 2254(e)(2) superfluous, for that section still has force where 2254(d)(1) does not bar federal habeas relief; "[a]t a minimum . . . 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." The alternative ruling below, that the respondent should receive habeas relief on the state-court record alone, is rejected. The record does not show that the respondent demonstrated an unreasonable application of federal law by the California Supreme Court in rejecting his ineffective assistance of counsel claim. Rather, the record supports the idea that counsel "acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed" to call only the respondent's mother, seeking to create jury sympathy for the respondent's family, instead of introducing mitigation evidence as to a very unsympathetic client. Nor was the state court's finding of no prejudice unreasonable, where the minor amount of "new" mitigation evidence largely duplicated what was offered at the penalty phase of this death penalty case. The Ninth Circuit misapplied *Strickland v Washington* (466 US 668 [1984]), overlooking

## US Supreme Court *continued*

counsel's constitutionally required independence and wide latitude as to tactics and failing to apply *Strickland's* strong presumption of competence.

**Concurrence in Part, Concurrence in the Judgment:** [Alito, J] "[W]hen an evidentiary hearing is properly held in federal court, review under 28 U. S. C. §2254(d)(1) must take into account the evidence admitted at that hearing."

**Concurrence in Part, Dissent in Part:** [Breyer, J] The case should be sent back for consideration of its complex facts in light of the legal standards announced in Part II.

**Dissent:** [Sotomayor, J] The majority's novel interpretation of 2254(d)(1) requires federal courts to turn a blind eye to new evidence even though "[s]ome habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own." And the respondent "satisfied §2254(d)(1) on either the state- or federal-court record;" the majority opinion "omits critical details relating to the performance of . . . trial counsel . . ." The holding here is not consistent with prior case law.

### Civil Rights Actions

#### Prisoners (Religion)

***Sossamon v Texas*, No. 08–1438, 563 US \_\_ (4/20/2011)**

**Holding:** By accepting federal funds, states do not consent to waive their sovereign immunity to suits for money damages under 42 USC 2000cc *et seq.*, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803. RLUIPA targets land-use regulation and restrictions on the religious exercise of institutionalized persons and includes an express private cause of action. RLUIPA's authorization of "appropriate relief against a government," does not constitute constitutionally required unequivocal expression of state consent.

**Dissent:** [Sotomayor, J] That monetary damages are "appropriate relief" under RLUIPA is self-evident. The "appropriateness" of relief is usually determined by the nature of the injury to a civil plaintiff's legal rights. The unavailability of monetary relief will hamper litigants seeking to enforce their statutory religious rights and "effectively shield unlawful policies and practices from judicial review . . ." "[N]othing in our precedent demands the result the majority reaches today."

## New York Court of Appeals

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

### Trial (Public Trial)

***People v Campbell*, 16 NY3d 756, \_\_ NYS2d \_\_ (2/15/2011)**

**Holding:** The exclusion of two of the defendant's relatives from the courtroom during the testimony of an undercover officer, on the ground that the relatives lived near the area where the undercover conducted ongoing investigations, was not improper. The parties stipulated to closure of the courtroom to the general public during the undercover's testimony regarding the charged drug transaction, and the court allowed the defendant's grandmother, with whom he lived, and another aunt to remain.

### Search and Seizure (Electronic Searches)

***People v Rabb*, 16 NY3d 145, \_\_ NYS2d \_\_ (2/15/2011)**

**Holding:** The record supports the findings below that the application by the prosecutor's Labor Racketeering Unit for an eavesdropping warrant adequately explained why normal investigative measures were reasonably unlikely to succeed in an investigation of suspected coercive techniques by P&D Construction Workers Coalition. An investigation begun in 2002 of a separate minority labor coalition, Akbar's Community Services, using one person acting undercover and other techniques, revealed some P&D practices. Those practices were linked to a cell phone number registered to someone named Rabb and used by a contact person for P&D going by the name of "Devine," who had spoken often to someone at phone numbers used by Akbar. The prosecution did not seek the wiretap of the phone based solely on general information about minority labor coalitions, but rather on information from the Akbar investigation about the collusive nature of the Akbar/P&D relationship, how P&D operated, and the similarity of their organizations and objectives. That investigative techniques such as physical surveillance, undercover operations, witness interviews, and search warrants worked as to Akbar did not disprove the assertion in the wiretap application that those techniques would not work as to P&D.

**Dissent:** [Lippman, CJ] The allegations that other techniques would not work were notably general and conclusory. Little effort was made to differentiate between the longstanding Akbar and nascent P&D investigations, and the application for an initial wiretap for P&D differed but little from the application to renew wiretaps for Akbar; a showing of necessity is not transferrable. No showing was made that normal investigative procedures had been tried and failed as to P&D. The majority decision will be taken as permission to dispense with the necessity requirement based only on supposed similarity of targets.

## NY Court of Appeals *continued*

### Search and Seizure (Consent) (Entries and Trespasses)

**Matter of Leroy M.**, 16 NY3d 243, \_\_ NYS2d \_\_ (2/17/2011)

**Holding:** Consent by the defendant's sister for police to enter the interior of the home attenuated the taint of the officers' initial unlawful entry into the vestibule as a matter of law. The sister spontaneously welcomed the police on sight, had planned to call police shortly if the defendant continued to act disrespectfully, and was not the subject of the investigation. The Appellate Division erred in considering only the temporal relationship between the illegal entry and the consent and ignoring other factors. Walking through an unlocked front door into a vestibule before knocking on the interior door is not such a flagrant intrusion of privacy that its taint cannot be dissipated.

**Dissent:** [Ciparick, J] Attenuation is usually a mixed question of law and fact in juvenile delinquency matters; the consent here did not attenuate as a matter of law the flagrant illegal entry.

### Witnesses (Confrontation of Witnesses)

**People v Montes**, 16 NY3d 250, \_\_ NYS2d \_\_ (2/17/2011)

**Holding:** That the defendant could not recall to the stand a witness who testified, subsequently revealed significant omissions out of court, and then suffered a breakdown, did not violate the defendant's rights under the Confrontation Clause. The witness's unavailability was not imposed by law, the defendant had completed cross examination of the witness, and her subsequent statements were placed before the jury through another witness's testimony and by stipulation of the parties.

**Concurrence:** [Lippman, CJ] Non-collateral testimony adverse to the defendant was admitted, and the defendant did not have a full and fair opportunity to test it; his confrontation right was implicated. The reason for a witness's unavailability does not matter. Affirmance is appropriate because no prejudice occurred where the jury acquitted the defendant of the top two counts, decisively rejecting the unrecalled witness's account.

### Forgery (Possession of a Forged Instrument)

**People v Muhammad**, 16 NY3d 184, \_\_ NYS2d \_\_ (2/17/2011)

**Holding:** The jury instructions adequately conveyed that second-degree criminal possession of a forged instrument requires knowing possession, as the court defined "to possess" as having physical possession of or exerting

knowing dominion or control over the items in question. In fact, by adding the word "knowing," the court went further than the Criminal Jury Instructions advise. The court was not required to append the word "knowing" every time the word "possession" was used. The evidence was legally sufficient to support the conviction; the jury could have properly inferred the defendant's knowledge that fake credit cards were in the car from the evidence, including that the defendant's belongings were strewn throughout the borrowed car he was driving.

### Fraud

**People v Wells Fargo Insurance Services, Inc.**, 16 NY3d 166, \_\_ NYS2d \_\_ (2/17/2011)

**Holding:** The rule that one acting as a fiduciary may not receive undisclosed compensation from persons with whom the fiduciary's principal may have a conflict of interest does not apply here; an insurance broker has no common-law duty to disclose to customers any "incentive" arrangements with insurance companies to reward the broker for bringing business to the companies. The causes of action alleging "'repeated fraudulent or illegal acts' in violation of Executive Law § 63(12)" were properly dismissed.

### Speedy Trial (Statutory Limits)

**People v Farkas**, 16 NY3d 190, \_\_ NYS2d \_\_ (2/22/2011)

**Holding:** Theft-related charges in an indictment filed more than a year after the initial accusatory instrument was filed alleging only assault-related charges were not time-barred under CPL 30.30. The defendant was issued a desk appearance ticket for third-degree assault on Aug. 18, 2005 after punching the accuser and taking his camera. A month after the defendant appeared to answer that charge, the prosecution filed a misdemeanor complaint adding third-degree menacing and second-degree harassment to the assault charge, and the prosecution answered ready for trial during a series of adjournments. On Nov. 8, 2006, an indictment was filed charging not only assault and menacing but also robbery, larceny, and possession of stolen property; the prosecution filed a statement of readiness the same day. The trial court dismissed the theft-related counts under 30.30 because the new, more serious charges were too wide a departure from those filed initially. The Appellate Division properly found that the statement of readiness and excludable time that applied to the assault-related offenses also applied to the later theft charges based on the same incident, including some of the same acts, charged in the accusatory instrument. Charges sufficiently related to require the same commencement date for purposes of CPL 30.30 are also sufficiently related for purposes of determining excludable time.

## NY Court of Appeals *continued*

### Counsel (Right to Counsel)

#### [People v Lopez](#), 2011 NY Slip Op 01316 (2/22/2011)

**Holding:** If it would be reasonable for the interrogator of an incarcerated defendant to suspect that an attorney has entered the matter for which the defendant is in custody, there must be an inquiry into the defendant's representational status. Allowing police to avoid inquiry about representation notwithstanding the likelihood that an attorney has entered the matter would be fundamentally unfair and undermine any pre-existing attorney-client relationship. The defendant here was in custody on drug trafficking charges in lieu of \$10,000 bail, which indicated he had been arraigned and therefore that the right to counsel had attached. It would be likely that a defendant in those circumstances had been assigned, or retained, an attorney. Where the officer should have inquired about the defendant's representational status, and it is likely that such an inquiry would have revealed the involvement of counsel, the officer is chargeable with knowing the defendant had a lawyer. Under the long-standing, workable rule of *People v Rogers* (48 NY2d 167 [1979]), questioning about an unrelated homicide was precluded, absent a valid waiver, while the defendant remained in custody on the charge for which he had a lawyer. But the error was harmless as there was no reasonable possibility that the improperly-obtained statement affected the jury's decision given other overwhelming evidence.

**Concurrence:** [Smith, J] New York "right to counsel jurisprudence is so complicated that it is almost incomprehensible . . ." It would be better to return to the simple rule of *People v Taylor* (27 NY2d 327 [1971]), under which a suspect's relationship with a lawyer in one case does not bar police interrogation about an unrelated matter.

### Homicide (Murder [Evidence])

#### [People v Prindle](#), 16 NY3d 768, \_\_ NYS2d \_\_ (2/22/2011)

**Holding:** The defendant's conviction for murder under Penal Law 125.25(2) must be reversed because there was legally insufficient evidence to support a finding that the defendant demonstrated a depraved indifference to human life by speeding away from police in a van, resulting in a crash that killed the passenger of another vehicle. At most, the evidence supported a finding of reckless manslaughter. The jury instructions, given without objection, were based on the standard of *People v Register* (60 NY2d 270 [1983]), which was later overruled by *People v Feingold* (7 NY3d 288 [2006]). The sufficiency issue is addressed without passing on the adequacy of the defendant's motion for a trial order of dismissal.

**Dissent:** [Pigott, J] At many times while speeding away from police, weaving into the left-hand passing lane, running red lights, causing many other vehicles to make evasive maneuvers or stop, and striking a truck but still not stopping, the defendant "had the opportunity to reassess his conduct and place society's interests above his own," but did not. The driver of the vehicle in which the decedent was riding was well into a turn when she saw the defendant's van in her lane. The defendant's conduct met the *Register* test which, as the defendant did not object to the instructions based on that test, informs the sufficiency analysis here.

### Sex Offenses (Sexual Abuse)

#### [People v Alonzo](#), 16 NY3d 267, \_\_ NYS2d \_\_ (2/24/2011)

**Holding:** Only one count of sexual abuse may be charged where the grand jury evidence shows one, uninterrupted incident in which a perpetrator gropes several parts of an accuser's body. Determining how many crimes are committed in a given sequence of events requires deciding what result is more consistent with legislative intent. Generally when a defendant violates a single Penal Law provision in an uninterrupted course of conduct, only one crime has been committed. To find that each movement of a hand constitutes a separate crime would be contrary to common sense. Charging four counts of sexual abuse for the defendant's continuous acts of grabbing and groping two women while following them out of his apartment was multiplicitous. To include the groping of each accuser's breasts and buttocks in one count would not be duplicitous. The reduction of four sexual abuse counts to two, one for each accuser, was proper.

### Insurance

#### [People v Boothe](#), 16 NY3d 195, \_\_ NYS2d \_\_ (2/24/2011)

**Holding:** The Legislature failed to criminalize the conduct at issue when, in 1998, it added to Penal Law 176.05 (entitled "Insurance fraud; defined") a subsection entitled "fraudulent health care insurance act." The substantive offense provisions, Penal Law 176.10 through 176.30, which describe five degrees of insurance fraud, all require "a fraudulent insurance act" and were not amended to include a "fraudulent health care insurance act." At the time of the amendment, the Division of Criminal Justice Services warned of this omission, and the Judicial Conference later proposed repair of the statute. No such repair occurred. The charges alleging that the defendant committed "fraudulent insurance acts" by submitting to Medicaid marketing plans he knew to contain materially false information were properly dismissed.

## NY Court of Appeals *continued*

### Burglary (Elements) (Evidence)

#### Counsel (Competence/Effective Assistance/Adequacy)

[People v Cummings](#), 16 NY3d 784, \_\_ NYS2d \_\_ (2/24/2011)

**Holding:** Defense counsel's failure to renew, at the close of the prosecution's case, an argument that the police precinct from which the defendant stole two guns was not a "dwelling" for purposes of the second-degree burglary statute did not deprive the defendant of a fair trial. Counsel did seek dismissal of the burglary charge before trial. At trial, the prosecution submitted evidence that had not been before the grand jury, buttressing their position that the precinct containing dormitories for overnight use was a dwelling. Counsel provided competent and meaningful representation throughout the proceedings.

### Instructions to Jury (Burden of Proof)

#### Trial (Summations)

[People v Smith](#), 16 NY3d 786, \_\_ NYS2d \_\_ (2/24/2011)

**Holding:** The court properly precluded from summation a proposed defense argument that the accuser first produced the gun with which she was shot, because the argument called on the jury "to reach conclusions that are 'not fairly inferable from the evidence' . . . ." Testimony relating to the accuser's description of the gun did not support a theory that she first displayed it. A misstatement by the court in its jury instructions as to the principle that a single victim's testimony can prove guilt beyond a reasonable doubt does not warrant reversal where the court then stated the principle correctly and the charge as a whole did not mislead the jury.

**Dissent:** [Jones, JJ] Precluding the defendant from arguing in summation that there was a struggle for the gun impermissibly infringed on the defendant's constitutional right to present to the jury an argument reasonably supported by the evidence. While the accuser had said she did not touch the gun, she described that gun as "heavier" than a gun shown her for comparison. The evidence could support a variety of interpretations, including that the accuser lied when she said she had not touched the gun and, therefore, lied when she said the defendant entered her car with the gun. Allowing counsel to argue only that the gun discharged accidentally essentially relegated the defense to conceding the accuser's account, *ie*, that the defendant had the gun and the struggle was over the accuser's handbag. The challenged part of the jury instructions also related to the accuser's testimony and likely fostered a guilty verdict.

### Appeals and Writs (Preservation of Error for Review)

#### Speedy Trial (General)

[People v Beasley](#), 2011 NY Slip Op 02076 (3/24/2011)

**Holding:** No question of law is presented for review where the defendant failed to identify specific legal and factual impediments to the exclusions claimed by the prosecution in response to the defense motion for dismissal under CPL 30.30. Once the prosecution set out statutory exclusions on which they intended to rely, the defense should have raised the specific argument that the prosecution should be charged with the 13 days between August 17, when production of grand jury minutes was ordered, and August 30, when the minutes were produced.

**Concurrence:** [Smith, JJ] Preservation was adequate where the defendant argued that 42 days were chargeable to the prosecution for failure to promptly furnish the minutes; that claim encompassed the argument that the first 17 days of those 42 were chargeable for the same reason. "It is not fair or realistic to insist that a defense lawyer follow arguments of this kind with a diminuendo sequence ('all three weeks are chargeable to the People, but if not the first two weeks are, and if not that the first week, and if not that the first three days . . .'). This affirmance on preservation grounds will only encourage prosecutors in their already well-established tendency to pounce on every arguable imperfection in a defense lawyer's argument as a barrier to deciding a case on the merits."

### Sentencing (Post-Release Supervision)

[People v Cornell](#), 2011 NY Slip Op 02078 (3/24/2011)

**Holding:** The Appellate Division properly reversed the defendant's conviction and ordered his guilty plea vacated, even in the absence of a post-allocation motion, as the record does not clearly show that the defendant knew when he pleaded guilty that the promised sentence included a period of post-release supervision.

### Juries and Jury Trials (Constitution—right to) (Deliberation)

[People v Kelly](#), 2011 NY Slip Op 02077 (3/24/2011)

**Holding:** The "brief, momentary separation" of a juror from deliberations to deal with a child care issue was not a mode of proceedings error dispensing with the requirement that the defendant preserve for review his claim that his constitutional rights to a jury trial were violated by the court's handling of the juror's communication. This "was not the type of violation contemplated by the 'continuously kept together' language of CPL 310.10 . . . [1] . . ."

**NY Court of Appeals** *continued***Defenses (Justification)****Instructions to Jury (Theories of Prosecution and/or Defense)****[People v Rodriguez](#), 2011 NY Slip Op 02074 (3/24/2011)**

**Holding:** Where the defendant testified that he faced a choice of two evils—drive while intoxicated or stay out of a runaway truck that could cause injury—the court should have given the requested justification charge with respect to the counts that alleged operating a motor vehicle while intoxicated. But the error was harmless. As to the most serious charges of second-degree manslaughter and second-degree assault, the defendant’s testimony that he was committing no offense when he jumped into a runaway truck to prevent harm to others did not support a choice-of-two-evils justification charge under Penal Law 35.05 (2).

**Dissent in Part:** [Lippman, CJ] While the defendant was not entitled to the requested justification charge with regard to the two top counts of manslaughter and assault, he was entitled to the charge with regard to all other counts, not just the charges alleging operating a vehicle while intoxicated.

**Dissent:** [Ciparick, J] “[T]he refusal of Supreme Court to give a justification charge relative to all the counts in the indictment was error.”

**Trial (Confrontation of Witnesses)****Witnesses (Confrontation of Witnesses)****[People v Duhs](#), 2011 NY Slip Op 02441 (3/29/2011)**

**Holding:** The statement to a doctor by the three-year-old whom the defendant was accused of burning that the defendant would not let him get out of the hot water was not testimonial; its admission under the “germane to medical treatment” exception to the hearsay rule did not violate the defendant’s constitutional right to confront the witnesses against him. It is irrelevant that the doctor’s inquiry may have also been motivated by “her ethical duty, as a mandatory reporter of child abuse, to investigate . . .” possible child abuse.

**Guilty Pleas (*Alford* Plea)****[People v Hill](#), 2011 NY Slip Op 02439 (3/29/2011)**

**Holding:** The defendant’s denial at the plea proceeding of intent to cause serious physical injury to the decedent negated the intent element of first-degree manslaughter, and the court’s further inquiry did not cure the defect. While a plea may be accepted even absent a

recitation of every essential element if it is the product of a voluntary and rational choice, “the record does not establish that [the defendant] was aware of the nature and character of an *Alford* plea.” And “there is no such thing as a ‘limited’ *Alford* colloquy or plea.”

**Appeals and Writs (Judgments and Orders Appealable) (Question of Law and Fact)****[People v Paige](#), 2011 NY Slip Op 02442 (3/29/2011)**

**Holding:** “Whether an officer had a reasonable belief that the subject of the arrest warrant was in the home so as to demand entry into the residence is a mixed question of law and fact” that is “beyond further review by this Court . . .” where, as here, record evidence exists to support the determinations of the courts below.

**Competency to Stand Trial****[People v Phillips](#), 2011 NY Slip Op 02438 (3/29/2011)**

**Holding:** There was record evidence to support the trial court’s finding that the defendant was competent to stand trial, which is a legal, judicial determination rather than a medical one, and the trial court’s meticulous accommodations to afford the defendant ample opportunity to consult with counsel and prepare his defense was significant.

**Dissent:** [Lippman, CJ] Where it is undisputed that the defendant suffered from transcortical motor aphasia as a result of stroke-induced brain damage that made him largely unable to express himself in words and implicated not only his ability to talk but also to think and understand, where all medical authorities agreed his condition was one that would not improve, and where defense counsel strongly asserted that the defendant was unable to communicate usefully with her about legal matters, the observations of one psychologist during group sessions designed to restore patients to legal competency cannot support a finding of competency despite the trial court’s painstaking review.

**Counsel (Competence/Effective Assistance/Adequacy)****Speedy Trial (General) (Statutory Limits)****[People v Brunner](#), 2011 NY Slip Op 02483 (3/31/2011)**

**Holding:** Where a CPL 30.30 application’s success “would have depended on the resolution of several novel issues,” “[t]he record of pretrial proceedings is complex and has spawned a dispute over the extent to which six discrete time periods were excludable from the readiness calculation,” and one of the defendant’s arguments, involving a large number of the disputed days, had been rejected by the Appellate Division in a decision issued

**NY Court of Appeals** *continued*

before this defendant’s trial, defense counsel’s failure to seek 30.30 relief did not constitute constitutionally ineffective assistance of counsel.

**Counsel (Competence/Effective Assistance/Adequacy)**

**Statute of Limitations**

[People v Evans](#), 2011 NY Slip Op 02482 (3/31/2011)

**Holding:** Declining to seek dismissal, on statute of limitations grounds, of manslaughter charges for a client facing both murder and manslaughter counts nearly eight years after a homicide would be a legitimate strategy; dismissal would have left the jury with murder as the only choice to find the defendant criminally responsible for the death. Trial counsel’s affirmations were never fully considered where the trial court denied a CPL 440.10 motion on the grounds that the record was sufficient to raise the issue of counsel’s effectiveness on direct appeal, leave to appeal that denial was denied, and the Appellate Division then held that determining counsel’s effectiveness would require consideration of evidence de hors the record. In future similar situations, appellate courts should consider granting leave on the 440.10 motion and consolidating it with the direct appeal.

**Dissent:** [Jones, J] In the absence of an affirmative request for a charge on the lesser offense, and waiver of the statute of limitations, the record fails to demonstrate a deliberate choice by defense counsel, and the ineffective assistance of counsel claim should be resolved in the defendant’s favor.

**Sex Offenses**

**Witnesses (Experts)**

[People v Spicola](#), 2011 NY Slip Op 02484 (3/31/2011)

**Holding:** Allowing testimony, over objection, about Child Sexual Abuse Accommodation Syndrome (CSAAS) was not error where acquittal required the jury to believe that the accuser was lying and the defense sought from the beginning to discredit the accuser’s credibility. The testimony of a pediatric nurse-practitioner who examined the accuser a day after he disclosed that he had been abused over seven years earlier was properly admitted; her account of what the accuser said fell within the hearsay exception for statements relevant to diagnosis and treatment and so did not improperly bolster the accuser’s testimony.

**Dissent:** [Lippman, CJ] The nurse practitioner’s testimony concerning the accuser’s demeanor while being examined “had no medical significance whatsoever” and should not have been admitted. That “error was egregiously compounded by the scope of the expert testimony on” CSAAS, where “the expert’s confirmation of nearly every detail of the case and of complainant’s behavior as consistent with that of a victim of sexual abuse was the functional equivalent of rendering an opinion as to complainant’s truthfulness . . . .”

**Instructions to Jury**

**Juries and Jury Trials**

**Trial (Verdicts [Inconsistent Verdicts])**

[People v Williams](#), 2011 NY Slip Op 02479 (3/31/2011)

**Holding:** The court did not err by instructing the jury, which declared it had reached a verdict, that the verdict contained inconsistencies and would not be accepted at that time, that the jury should reconsider and decide what the prosecution had proven as to the defendant’s state of mind, and on the concept of transferred intent. The jury’s inconsistent verdict did not constitute a request for further instruction requiring notice and an opportunity for the defense to be heard before a judicial response, and the court was not required to discuss its planned response with counsel. The defense argument on appeal “disregards the plain language of CPL 310.30 and 310.50 (2), and would render CPL 310.50 (2) superfluous.” Directing the foreperson in open court to indicate a verdict as to counts that had been blank on the verdict form was not error, and as the defendant was acquitted on those counts it was, in any event, harmless.

**Civil Practice**

**Wrongful Conviction**

[Warney v State of New York](#), 2011 NY Slip Op 02478 (3/31/2011)

**Holding:** On the instant facts, the claimant’s confession and other statements and actions attributed to him by the State do not warrant dismissal of his claim under the Unjust Conviction and Imprisonment Act (Court of Claims Act 8-b) on the ground that he caused or brought about his conviction.

**Attempt**

**Sex Offenses (Sexual Abuse)**

[Matter of Cecunjanin](#), 2011 NY Slip Op 02721 (4/5/2011)

**Holding:** Where there was no evidence that the defendant tried to subject the accuser to sexual contact during any of the times that the accuser was physically helpless due to intoxication, and the evidence shows the accuser was not physically helpless during an encounter in a

**NY Court of Appeals** *continued*

storage room during which she blocked the defendant's efforts to have sexual contact, the defendant's conviction for attempted first-degree sexual abuse must be vacated and the charge dismissed. While theoretically one person could attempt to subject a physically helpless person to sexual contact and fail, such as when a third person intervened, the record does not contain evidence that it happened here.

**Escape (Elements) (Evidence)****Juveniles (Delinquency)****Matter of Dylan C., 2011 NY Slip Op 02722 (4/5/2011)**

**Holding:** A juvenile detained while awaiting adjudication of delinquency charges does not commit second-degree escape by leaving a nonsecure facility without permission. The statutory provisions of Family Court Act article 3, which specifically govern the disposition and treatment of juveniles, do not equate detention with confinement, as the Penal Law does, and article 3 has, since the enactment of the relevant Penal Law provisions, introduced a distinction between "secure" and "nonsecure" detention facilities. Furthermore, *People v Ortega* (69 NY2d 763) held, in a case involving an adult with mental illness, that "'a nonsecure facility does not constitute a detention facility within the meaning of Penal Law § 205.00 (1) . . . ,' and, accordingly that one may not commit the crime of escape in the second degree by leaving such a facility without permission . . . ." It would be incongruous to treat juveniles awaiting adjudication differently.

**Dissent:** [Smith, J] The *Ortega* decision, a memorandum decision that devoted only two sentences to what "detention facility" means, should be confined to its facts.

**Appeals and Writs (Judgments and Orders Appealable)****Sentencing (Post-Release Supervision)****People v Jordan, 2011 NY Slip Op 2717 (4/5/2011)**

**Holding:** The defendant, resentenced pursuant to *People v Catu* (4 NY3d 242) because no term of post-release supervision was included in his original sentence, may challenge the resentencing but not the underlying judgment on this appeal due to the restrictions of CPL 450.30(3).

**Sex Offenses (Civil Commitment)****Witnesses (Experts)****Matter of State of New York v Andrew O.,  
2011 NY Slip Op 02715 (4/5/2011)**

**Holding:** At the jury trial held to determine whether

the appellant was a detained sex offender suffering from a mental abnormality, the prosecutor improperly attacked the credibility of the appellant's only witness, a psychologist, on the basis of the witness's religious beliefs and affiliation. The prosecution's contention that the overwhelming evidence of the appellant's mental abnormality constituted extraordinary circumstances, so that reversal under *People v Wood* (66 NY2d 374) is not required, lacks merit. The court failed to "'act as a saving grace,'" overruling objections to the questioning and failing to sustain an objection to the prosecutor's admonition to the jury that it would be their fault if the appellant molested another child; the court merely reminded the jury that attorney argument was not testimony.

**Appeals and Writs (Judgments and Orders Appealable)****Sentencing (Post-Release Supervision)****People v Stewart, 2011 NY Slip Op 02718 (4/5/2011)**

**Holding:** A claim that a guilty plea was involuntary due to the trial court's failure to advise of the specific term of post-release supervision that would be imposed should be raised on direct appeal, and absent justification for failing to do so, review of such challenge in a CPL 440.10 motion is foreclosed. The contention that *People v Louree* (8 NY3d 541) changed the law as to what claims may be raised under 440.10 is rejected.

**First Department**

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**Fraud****People v Khan, 82 AD3d 44, 916 NYS2d 28  
(1st Dept 1/20/2011)**

**Holding:** While the evidence as to one alleged transaction "was carelessly weak," the circumstantial evidence taken as a whole, including the defendant's discussions with the undercover about substituting pills for those listed on a prescription for the undercover's supposed girlfriend/wife, supported a finding that the defendant committed fourth-degree health care fraud. The theory advanced by the prosecution under this new law would not make pharmacies guilty of health care fraud merely for dispensing medications to a customer other than the person named in a prescription (eg, a spouse) absent evidence that the customer was involved in an illegal scheme and the pharmacist knew of it.

**First Department** *continued*

The statute does not require the defendant to personally submit the misleading Medicaid claims; relaying the information to another for requesting payment is enough. Here, records indicated that Medicaid claims were filed very close to the times that the undercover engaged the defendant in transactions. The evidence established that the defendant's pharmacy received, in less than a year, a cumulative amount above the amount statutorily required for fourth-degree health care fraud. That none of the drugs received by the undercover from the defendant were analyzed in a laboratory does not matter for this offense, although it would have been insufficient had the charge been limited to misinforming Medicaid as to actual drugs dispensed.

The evidence was also sufficient to support conviction of third-degree grand larceny for wrongfully taking, obtaining, or withholding money from the State through Medicaid. (Supreme Ct, New York Co)

**Dissent:** The evidence being insufficient to establish that the defendant provided materially false information, either as to the drugs dispensed or the identity of their recipient during the March 6 incident, the prosecution failed to prove fourth-degree health care fraud beyond a reasonable doubt.

**Narcotics (Penalties)**

**Sentencing**

**People ex rel Rosa v Warden, 80 AD3d 525, 915 NYS2d 542 (1st Dept 1/25/2011)**

**Holding:** The court erred in denying the petitioner's application to terminate his sentence for third-degree sale of drugs pursuant to Executive Law 259-j(3a), where the petitioner was presumptively released on Sept. 21, 2004 and his release was uninterrupted for more than two years. The 2008 statutory amendment made clear that presumptive releasees were always intended beneficiaries of the law and so its benefits apply to such individuals from the statute's original effective date. (Supreme Ct, New York Co)

**Narcotics (Penalties)**

**Sentencing (Resentencing)**

**People v Dais, 81 AD3d 432, 916 NYS2d 66 (1st Dept 2/3/2011)**

**Holding:** The court properly adjudicated the defendant "a second felony drug offender with a predicate violent felony conviction" when granting the CPL 440.46 motion for a reduced sentence. This classification did not exist at the time of the underlying sale. The defendant's

request for resentencing made relevant for the first time that he was a predicate violent felon as well as a predicate felon; his collateral estoppel, law of the case, and CPL 400.21(8) arguments lack merit. The argument that determining his status on the basis of Penal Law 70.70(4), which took effect after his sale, is unpreserved and unavailing; the new sentence is no greater than what he could have received initially and is less than what he initially got. (Supreme Ct, New York Co)

**Narcotics (Penalties)**

**Sentencing (Resentencing)**

**People v Sosa, 81 AD3d 464, 916 NYS2d 72 (1st Dept 2/8/2011)**

**Holding:** Nothing in any version of the Drug Law Reform Act limits the prosecution's pre-existing right to appeal from a sentence. The 10-year look-back provision of CPL 440.46(5)(a) with regard to exclusion offenses refers to the period preceding the resentencing application. Language in *People v Wright* (78 AD3d 474), said to support application of the look-back period to the time before the present felony, was dictum and was not meant to be an interpretation of the lookback provision. (Supreme Ct, New York Co)

**Speedy Trial (Cause for Delay) (Prosecutor's Readiness for Trial) (Statutory Limits)**

**People v Butler, 81 AD3d 484, 917 NYS2d 147 (1st Dept 2/10/2011)**

**Holding:** The court erred by excluding from the time charged to the prosecution, for purposes of the defendant's speedy trial motion, the 28-day adjournment to accommodate police vacation schedules, announced when the case was called but defense counsel was still en route and appeared shortly thereafter. But the number of days is still less than the 182 allowed under CPL 30.30. (Supreme Ct, New York Co)

**Concurrence:** Fortunately, the conclusion that the adjournment should be charged to the prosecution where counsel arrived over an hour after the scheduled calendar call, leaving the defendant without counsel through no fault of the court, there was no indication of how long counsel would take to arrive, and counsel gave no explanation for his delay and did not object to the announced adjournment, is dictum.

**Escape (Elements)**

**Identification (Lineups)**

**People v Rios, 81 AD3d 489, 917 NYS2d 152 (1st Dept 2/10/2011)**

**First Department** *continued*

**Holding:** The court's charge to the jury was not a proper substitute for the prosecution's failure to prove an element of first-degree escape, *ie*, that the defendant had been accused or convicted of a Class A or B felony. Rejecting a motion to suppress a lineup identification was proper where the defendant told police he had a lawyer and did not want to talk to them, but did not provide a name or seek to contact the lawyer, and lineups were then held. (Supreme Ct, Bronx Co)

**Assault (Attempt) (General)**

**People v Cisely G., 81 AD3d 508, 918 NYS2d 23**  
(1st Dept 2/17/2011)

**Holding:** The count in the petition charging acts constituting second-degree gang assault was defective in that it is said the petitioner "caused/attempted to cause physical injury . . ." when the required element is that serious physical injury resulted. "Attempted" gang assault is a legal impossibility, as there can be no attempt to commit a crime that includes as an element an unintended result, here, serious physical injury. Prior cases affirming findings of attempted second-degree gang assault did not involve challenges to the validity of the charge. (Family Ct, Bronx Co)

**Sentencing (Restitution)**

**People v Peavey, 81 AD3d 544, 916 NYS2d 600**  
(1st Dept 2/22/2011)

**Holding:** The defendant received proper CPL 420.10(3) notice that she could be incarcerated for failing to pay restitution, which was not vitiated by a later order, setting a payment schedule, that contained no such provision and purported to supersede prior orders. Whether or not the statute requiring notice of the right to seek resentencing (CPL 420.10[3]) applies to restitution matters, the defendant received a hearing on her ability to pay, which is the statute's purpose. (Supreme Ct, New York Co)

**Sentencing (Post-Release Supervision)**

**People v Rodriguez, 2011 NY Slip Op 01569**  
(1st Dept 3/3/2011)

**Holding:** A resentencing proceeding held under *People v Sparber* (10 NY3d 457) involves only post-release supervision and is not an occasion to revisit the initial prison sentence. There is no authority to reduce the sentence on appeal in the interest of justice. (Supreme Ct, New York Co)

**Guilty Pleas (General) (Vacatur)**

**People v Alvarado, \_\_ AD3d \_\_, 918 NYS2d 99**  
(1st Dept 3/8/2011)

**Holding:** The claim that the defendant's plea was involuntary due to an inaccurate statement by the court as to his sentencing exposure was not preserved where his plea withdrawal application was made on other grounds, and he made no CPL 440.10 motion, so issues as to advice provided by counsel are unreviewable. The record shows the defendant received all necessary information. (Supreme Ct, New York Co)

**Concurrence:** The plea agreement changed during plea proceedings so that the defendant did not have to admit having a prior violent felony conviction, only a prior felony, but the defendant does not explain how the court's failure to explain the new sentencing range could affect his plea. He does not seek vacatur of his plea, which is the only appropriate relief for the asserted error.

**Sentencing (Post-Release Supervision)**

**People v Deuras, \_\_ AD3d \_\_, 918 NYS2d 456**  
(1st Dept 3/15/2011)

**Holding:** Nothing in *People v Williams* (14 NY3d 198) or related cases suggests that the double jeopardy rule stated there is affected by a defendant's awareness, prior to release from prison, that a period of post-release supervision will ensue. The defendant did not cause the resentencing proceeding to be commenced less than two months before his scheduled release and more than a year and a half after *People v Sparber* (10 NY3d 457) was decided. As he was released before he was resentenced, he is entitled to *Williams* relief. (Supreme Ct, New York Co)

**Guilty Pleas (Vacatur)****Speedy Trial (Waiver)**

**People v Alexander, 2011 NY Slip Op 02444**  
(1st Dept 3/29/2011)

**Holding:** The defendant is not entitled to vacatur of his guilty plea that was conditioned on the withdrawal of his pending constitutional speedy trial motion because the defendant was prepared to go to trial even though the speedy trial motion was not decided, he initiated discussion about the prosecution's plea offer because he felt pressure when the court adjourned the case for two months to allow the prosecution to respond to the defendant's unrelated habeas corpus petition, the court, not the prosecutor, told the defendant it would only accept the plea if he agreed to withdraw all outstanding motions, and the court ensured that the defendant understood and agreed to all the terms of the plea offer. The defendant's

**First Department** *continued*

argument that a guilty plea specifically conditioned on the withdrawal of a speedy trial claim is per se illegal is unpersuasive. (Supreme Ct, Bronx Co)

**Concurrence:** The Court of Appeals should address the issue, albeit uncommon, of whether *People v White* (32 NY2d 393) remains good law after its decisions in *People v Blakley* (34 NY2d 311) and *People v Callahan* (80 NY2d 273).

**Second Department**

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**Forensics (DNA)**

**Sentencing (Pronouncement)**

**[People v Henry](#), 80 AD3d 625, 914 NYS2d 288 (2nd Dept 1/11/2011)**

**Holding:** The defendant’s contention that he was denied effective assistance of counsel by his lawyer’s failure to seek a *Frye* hearing as to the general acceptance in the scientific community of a Low Copy Number (LCN) DNA test cannot be reviewed because it is based on matters outside the record. The court’s failure to pronounce sentence on each of three second-degree menacing counts requires resentencing on all the convictions. (Supreme Ct, Kings Co)

**Lesser and Included Offenses**

**Sex Offenses (Sexual Abuse) (Sodomy)**

**[People v Ortiz](#), 80 AD3d 628, 914 NYS2d 281 (2nd Dept 1/11/2010)**

**Holding:** Third-degree sodomy and second-degree sexual abuse are not concurrent inclusive offenses of second-degree sodomy, so the defendant’s contention that he was subjected to double jeopardy by his convictions of all three offenses is without merit. (Supreme Ct, Kings Co)

**Constitutional Law (New York State Generally)**

**[People v Klem](#), 80 AD3d 777, 915 NYS2d 607 (2nd Dept 1/25/2011)**

**Holding:** By quashing the subpoena served on a defense witness, who allegedly would have testified that a water heater was removed from her property on the day that the defendant was seen with a water heater, the court

deprived the defendant of his constitutional right to present a defense. Such testimony was relevant to the defense theory that the hot water heater the defendant was seen with had not come from the accuser’s property, and would have impeached the prosecution witness’s testimony that the defendant entered the accuser’s building, with the intent to commit a crime. (County Ct, Suffolk Co)

**Guilty Pleas (Withdrawal)**

**Sentencing (Enhancement)**

**[People v Matyjewicz](#), 80 AD3d 779, 915 NYS2d 498 (2nd Dept 1/25/2011)**

**Holding:** Where the defendant completed the community service that was the only condition of a plea bargain that allowed him to withdraw his felony plea and receive a three-year probationary misdemeanor sentence, and where the defendant was a day late for sentencing after appearing on two adjourned dates, the court erred in imposing a sentence of incarceration. The defendant cannot be restored to his pre-plea status by withdrawing his guilty plea and is entitled to the benefit of his plea bargain as a matter of essential fairness. The conviction of third-degree criminal mischief must be vacated, and the matter remitted for resentencing by a different judge on the fourth-degree criminal mischief charge pursuant to the plea agreement. (Supreme Ct, Kings Co)

**Defenses (Justification)**

**Evidence (Weight)**

**[People v Rojas](#), 80 AD3d 782, 915 NYS2d 602 (2nd Dept 1/25/2011)**

**Holding:** The defendant’s conviction of second-degree assault, after a bench trial at which he was acquitted of all other counts, was against the weight of the evidence where the only evidence that the defendant struck one of the men who had attacked him and his friend after danger had passed came from a witness that no other witness recalled being present. The announcement of guilt shows the court implicitly found the defendant’s actions justified. The prosecution “failed to disprove beyond a reasonable doubt that the defendant was warranted in using deadly force to defend his friend . . .” (Supreme Ct, Queens Co)

**Double Jeopardy (Res Judicata)**

**Family Court (Family Offenses)**

**[Matter of Schneider v Arata](#), 81 AD3d 652, 915 NYS2d 875 (2nd Dept 2/1/2011)**

**Second Department** *continued*

**Holding:** As acquittal of a criminal charge related to the same conduct set out in the family offense petition did not have res judicata effect because the acquittal did not decide an identical issue, dismissal of the family offense was error. Double jeopardy is not implicated because no punitive remedy is sought in the family offense proceeding. The matter must be remitted for a hearing as to whether the parties have an intimate relationship within the meaning of the family offense statute. (Family Ct, Suffolk Co)

**Lesser and Included Offenses (Instructions)**

**People v Perry, 81 AD3d 665, 916 NYS2d 141**  
(2nd Dept 2/1/2011)

**Holding:** Denial of the defense request for a jury charge on fourth-degree possession of a weapon as a lesser included offense of second-degree possession of a weapon was error. The defendant was also charged with second-degree murder, second-degree manslaughter, and third- and fourth-degree possession of a weapon. The jury was instructed on murder, manslaughter, the lesser included offense of criminally negligent homicide, and second-degree possession of a weapon; the defendant was convicted of criminally negligent homicide and second-degree possession of a weapon. A reasonable view of the evidence existed that he was guilty of the lesser and not the greater weapons charge. (Supreme Ct, Kings Co)

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

**People v Serrano, 81 AD3d 753, 916 NYS2d 509**  
(2nd Dept 2/8/2011)

**Holding:** By appending letters submitted by the defendant from his mother and a friend that refuted challenged statements in the presentence investigation report (PSI), and expressly eschewing any reliance on the challenged remarks, the court sufficiently responded to the defendant's motion to correct the alleged misstatements. No hearing on the challenged statement's accuracy was required. (County Ct, Nassau Co)

**Identification (Eyewitnesses) (Show-ups)**

**Matter of James I., 81 AD3d 838, 916 NYS2d 822**  
(2nd Dept 2/15/2011)

**Holding:** The Family Court correctly found that the show-up was unduly suggestive where it occurred after the complainant heard a radio broadcast saying that individuals matching the description given had been detained and the complainant was taken to where the defendant

and two others were standing together, handcuffed or with hands behind their backs as if under arrest, surrounded by 10 police officers. (Family Ct, Kings Co)

**Counsel (Competence/Effective Assistance/Adequacy)**

**People v Cleophus, 81 AD3d 844, 916 NYS2d 624**  
(2nd Dept 2/15/2011)

**Holding:** The defendant demonstrated the absence of any strategic or other legitimate reason for his lawyer's express concurrence in the introduction of minutes of the defendant's prior guilty plea to second-degree contempt, which deprived the defendant of the effective assistance of counsel. By admitting the conviction, the defendant relieved the prosecution of its burden of proving that element of first-degree contempt and CPL 200.60(3)(a) precluded introduction of evidence of the conviction. No valid tactical reason for abandoning that statutory protection is perceived; counsel made no use of information from the plea minutes, either in cross-examination or summation. (Supreme Ct, Kings Co)

**Accusatory Instruments (Variance of Proof)**

**People v Wu, 81 AD3d 849, 917 NYS2d 234**  
(2nd Dept 2/15/2011)

**Holding:** The court erred in allowing the prosecution to proceed at trial solely on a theory omitted from the indictment, which charged second-degree trademark counterfeiting, but did not specify the statutory theory that the defendant offered to sell counterfeit goods with the intent to evade legal restrictions on offering, selling, or distributing goods. The proof at trial did not establish guilt under the theory in the indictment, as amplified by a bill of particulars, and the indictment must be dismissed. (Supreme Ct, Queens Co)

**Sentencing (Second Felony Offender)**

**People v Horvath, 81 AD3d 850, 916 NYS2d 230**  
(2nd Dept 2/15/2011)

**Holding:** The defendant's federal conviction for bank larceny did not qualify as a predicate felony supporting the defendant's adjudication as a second felony offender. The federal statute in question defines bank larceny as taking bank property of over \$1,000 in value or of value no greater than \$1,000, with differing sentences depending on the property's value. The analogous New York offense, fourth-degree grand larceny, requires taking of property valued at over \$1,000. The federal accusatory instrument cannot be considered as this is not a case "where resort to the foreign accusatory instrument would establish which 'discrete, mutually exclusive acts formed the basis of the charged crime' . . ." This unpreserved

## Second Department *continued*

issue is reached in the interest of justice. The defendant must be resentenced as a first felony offender. (County Ct, Orange Co)

### Identification (Eyewitnesses) (General) (Lineups)

[People v Rankins](#), 81 AD3d 857, 916 NYS2d 618  
(2nd Dept 2/15/2011)

**Holding:** The court erred in allowing a detective to testify that he “re-interviewed” the accuser a week after the accuser had been assaulted by four men, and that based on the re-interview, the defendant had been detained, placed in a lineup, and arrested after the accuser viewed the lineup. The detective’s testimony impermissibly bolstered the accuser’s prior testimony in this one-eyewitness case. (Supreme Ct, Kings Co)

### Accusatory Instruments (Duplicitous and/or Multiplicitous Counts)

[People v Smalls](#), 81 AD3d 860, 916 NYS2d 647  
(2nd Dept 2/15/2011)

**Holding:** The jury charges regarding the first-degree assault and first-degree robbery counts were essentially identical, as one cannot commit first-degree robbery without simultaneously committing first-degree assault, so these charges were multiplicitous. The issue was not preserved but is reached in the interest of justice. The assault conviction must be vacated. (Supreme Ct, Queens Co)

### Family Court

[Matter of Robert B.-H.](#), 81 AD3d 940, 917 NYS2d 879  
(2nd Dept 2/22/2011)

**Holding:** The authorized foster care agency that was supervising the father’s children was not authorized by Family Court Act 1056 to move for an order of protection against the father on behalf of its employees. The agency’s caseworkers “do not fit within any of the classes of persons in whose favor an order of protection may be issued . . . .” (Family Ct, Kings Co)

### Evidence (Newly Discovered)

[People v Malik](#), 81 AD3d 980, 917 NYS2d 583  
(2nd Dept 2/22/2011)

**Holding:** Where the accuser’s testimony was the primary evidence against the defendant and the defense theory was that the accuser fabricated the whole incident, newly-discovered evidence about a prior police report made by the accuser against the defendant and several

codefendants was material. The accuser had reported that the defendant and others threatened his life in telephone calls, but when questioned later the accuser could not remember basic information about the alleged calls or whether the defendant had made any of them. Had the defense known of the prior report and its apparent falsity, a theory could have been advanced that, given the false report, the accuser had also falsely identified the defendant in the charged incident. The court providently exercised its discretion in vacating the conviction. (Supreme Ct, Kings Co)

### Evidence (Prejudicial)

#### Misconduct (Prosecution)

[People v Mohammed](#), 81 AD3d 983, 917 NYS2d 295  
(2nd Dept 2/22/2011)

**Holding:** Admission at trial, without appropriate limiting instruction, of letters said to have been written by the daughters of the defendant and codefendant was error where the defendants were charged with entering the accuser’s apartment, stealing money, and assaulting him in an effort to get information about the location of the girls, who had allegedly run away to live with their boyfriends, one of whom was the accuser’s nephew. The error was compounded by the prosecutor’s statements in summation about the letters. Other improper remarks included that 100 Pakistani men supporting the defendants glared at the accuser during his testimony, and that the defense attorneys had taunted and mocked the accuser during cross examination. Also error was the prosecutor’s reference to an unsuccessful attempt to admit a detective’s report into evidence. The cumulative effect of the comments deprived the defendants of a fair trial. Those errors that were unpreserved are reviewed in the interest of justice. (Supreme Ct, Kings Co)

### Sentencing (Enhancement) (Pronouncement)

[People v Newson](#), 81 AD3d 984, 917 NYS2d 202  
(2nd Dept 2/22/2011)

**Holding:** Because the defendant was not told during plea proceedings, and it cannot be inferred that he understood, that if he were arrested on other charges his sentence might be enhanced, imposing an enhanced sentence without first giving him an opportunity to withdraw his plea was error. Further, the failure of the court to conduct any inquiry into the basis for the post-plea arrest upon defense request violated due process. (Supreme Ct, Nassau Co)

### Juveniles (Abuse)

**Second Department** *continued*

**Matter of Iyonte G.**, \_\_ AD3d \_\_, 918 NYS2d 519  
(2nd Dept 3/1/2011)

**Holding:** The strong inference that can be drawn against a respondent in a child protective proceeding for failing to testify cannot, alone, corroborate a previous, out-of-court statement by a child. (Family Ct, Queens Co)

**Counsel (Competence/Effective Assistance/Adequacy)**

**People v Bodden**, \_\_ AD3d \_\_, 918 NYS2d 141  
(2nd Dept 3/1/2011)

**Holding:** The cumulative effect of defense counsel's conduct at trial denied the defendant meaningful representation. The conduct included making comments during jury selection that distanced counsel from the defendant, failing to cross-examine a witness as to weaknesses in direct testimony, using "an anachronistic and potentially offensive term to describe the race" of a person said to be present at the defendant's arrest, declining to examine photographs offered by the prosecutor that counsel acknowledged not having seen, offering to stipulate that a fact witness was an expert on "whatever you want him to testify to," offering to stipulate to another witness's testimony without knowing what it would be, failing to examine the defendant's mother about the event at which she was an alleged eyewitness, making an untimely request for a missing witness charge, failing to call attention to serious weaknesses in the prosecution's case during summation, and failing to object to prosecutorial comments implying the defendant's character made it more likely he had committed the charged crimes. The judgment being reversed on direct appeal, the appeal from denial of a CPL 440.10 motion on the grounds that the effectiveness of counsel could be raised on direct appeal is dismissed as academic. (Supreme Ct, Queens Co)

**Counsel (Conflict of Interest)**

**People v DiPippo**, \_\_ AD3d \_\_, 918 NYS2d 136  
(2nd Dept 3/1/2011)

**Holding:** Where the trial record does not support retained counsel's post-conviction hearing testimony, and counsel responded to a lengthy hypothetical based on discovery materials that had been provided to him before trial by saying he didn't recall having such information before trial, no deference need be given to the post-conviction court's determination finding counsel credible. The conduct of the defense by trial counsel, who failed to disclose to the defendant or the court his prior representation of a person who had been identified as a possible suspect and later admitted that he did not investigate the

former client's possible involvement upon learning that a car driven by the former client had been seized and searched, affected the representation received by the defendant. The motion to vacate the judgment is granted. (Supreme Ct, Putnam Co)

**Sentencing (Second Felony Offender)**

**People v Grigg**, \_\_ AD3d \_\_, 917 NYS2d 913  
(2nd Dept 3/1/2011)

**Holding:** The prosecution conceded on remitter that the defendant's Florida armed robbery conviction could not be used as a predicate felony in New York. The sentence is vacated to allow the defendant to be sentenced as a first-time felony offender. (Supreme Ct, Kings Co)

**Counsel (Advise of Right to) (Waiver)****Juveniles (Family Offenses) (Right to Counsel)**

**Matter of Tumminello v Tumminello**, \_\_ AD3d \_\_,  
918 NYS2d 735 (2nd Dept 3/15/2011)

**Holding:** Where the court did not advise the petitioner of her right to an adjournment to consult with counsel, to have counsel assigned if she could not afford to hire a lawyer, or of the dangers and disadvantages of proceeding pro se, the matter must be remitted for the petitioner to either appear with counsel or adequately waive counsel. (Family Ct, Nassau Co)

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

**People v Miles**, \_\_ AD3d \_\_, 918 NYS2d 594  
(2nd Dept 3/15/2011)

**Holding:** That the car in which the defendant was a passenger was parked outside a bar, in an area where gang and drug activity had been complained of, did not provide an objective, credible basis for police to approach the car and ask for information. (Supreme Ct, Nassau Co)

**Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])****Sentencing (Post-Release Supervision)**

**People v Monk**, 2011 NY Slip Op 02036  
(2nd Dept 3/15/2011)

**Holding:** "[A] court's failure to advise a defendant of the consequences of violating the conditions of postrelease supervision does not render the plea infirm." The ramifications of violating postrelease supervision conditions are collateral, being peculiar to the individual and dependent on the actions of agencies outside the court's

## Second Department *continued*

control, and as such need not be specifically addressed for a guilty plea to be knowing and voluntary. (County Ct, Westchester Co)

### Narcotics (Penalties)

#### Sentencing (Resentencing)

[People v Phillips](#), \_\_ AD3d \_\_, 919 NYS2d 88  
(2nd Dept 3/15/2011)

**Holding:** The court erred in denying the defendant's motion for resentencing under the Drug Law Reform Act of 2009 (2009 DRLA) solely because he was a reincarcerated parole violator. Such status may be relevant to whether substantial justice dictates denial of resentencing, but nothing in CPL 440.46 makes a parole violator ineligible to apply, contrary to the First Department's holding in *People v Pratts* (74 AD3d 536 *lv granted* 15 NY3d 895). Language in *People v Mills* (11 NY3d 527) about fresh crimes not triggering resentencing opportunities dealt with the Drug Law Reform Act of 2005, not 2009 DRLA, and is inapplicable here. (County Ct, Orange Co)

### Argument (Misconduct)

#### Misconduct (Prosecution)

[People v Spann](#), \_\_ AD3d \_\_, 918 NYS2d 588  
(2nd Dept 3/15/2011)

**Holding:** Where the prosecutor improperly denigrated medical evidence that the defendant's physical manifestations during the traffic stop were symptoms of hypertension by referring to the evidence as, *eg*, "'smoke and mirrors,'" shifted the burden of proof by saying that if the jury did not find the defendant's testimony reasonable they could not form reasonable doubt, and repeatedly misstated the evidence as to the location of the gun in the car, the cumulative effect requires a new trial. The partially unpreserved claim is reviewed in the interest of justice. (Supreme Ct, Queens Co)

### Sentencing (Enhancement)

[People v Zobe](#), \_\_ AD3d \_\_, 918 NYS2d 570  
(2nd Dept 3/15/2011)

**Holding:** Where the defendant, having been advised at the plea proceedings that if he violated the condition of the plea requiring that he speak to the probation department truthfully and in a way consistent with his plea statement he would receive an enhanced sentence, sought to explain at sentencing that the probation officer misunderstood what he had said as to police use of force when

he was arrested, the court should have made further inquiry before imposing an enhanced sentence. The defendant should have had a chance to present evidence that what he told probation did not contradict his plea statements. (County Ct, Westchester Co)

### Parole (Release [Consideration for (includes guidelines)])

[Matter of Gelsomino v New York State Board of Parole](#), \_\_ AD3d \_\_, 918 NYS2d 892 (2nd Dept 3/22/2011)

**Holding:** Where the Parole Board cited only the circumstances of the petitioner's crime when denying him parole, failing to mention any of the other factors set out in Executive Law 259-i(2)(c), including the petitioner's excellent prison record and achievements while imprisoned, as well as positive statements by the sentencing judge, a new hearing and determination is required. (Supreme Ct, Richmond Co)

### Juveniles (Custody) (Hearings) (Parental Rights)

[Matter of Perez v Estevez](#), 2011 NY Slip Op 02399  
(2nd Dept 3/22/2011)

**Holding:** That the father was incarcerated was not alone sufficient to support an award of sole custody to the mother. As the court lacked enough information to make an informed determination as to the child's best interest, there must be a hearing and a new determination on the custody petition. (Family Ct, Nassau Co)

### Evidence (Other Crimes) (Prejudicial)

[People v Barbato](#), \_\_ AD3d \_\_, 918 NYS2d 895  
(2nd Dept 3/22/2011)

**Holding:** Where the defendant did not contest the element of intent but rather denied committing the acts charged in this second-degree assault case, the court erred in admitting evidence that the defendant had previously strangled two women in the 1980s. The prejudicial effect of this information outweighed its probative value and the limiting instructions were insufficient to cure that prejudice under the circumstances of the case. (County Ct, Dutchess Co)

### Admissions (*Miranda* Advice)

#### Assault (Evidence)

#### Evidence (Sufficiency)

[People v Zalevsky](#), \_\_ AD3d \_\_, 918 NYS2d 790  
(2nd Dept 3/22/2011)

**Holding:** By raising in a pro se written motion submitted at the close of the prosecution's case his claim that

**Second Department** *continued*

evidence of “physical injury” was legally insufficient to support the second-degree assault charge, the defendant preserved the issue for review. The accusing peace officer testified that he was “bruised up a little bit” where the defendant kicked him but sought no medical treatment and missed no work, and said nothing on direct examination about the duration or severity of pain but described it as “minor” on cross; this did not constitute “impairment of physical condition or substantial pain’ . . . .” While un-Mirandized statements made by the defendant after the decedent’s body was discovered and before detectives left his interrogation for the crime scene should have been suppressed because they were not in response to questions of an emergency nature, the error was harmless. (Supreme Ct, Kings Co)

**Juveniles (Paternity) (Support Proceedings)****Matter of Derrick H. v Martha J.,****2011 NY Slip Op 02675 (2nd Dept 3/29/2011)**

**Holding:** Where the record supports the court’s finding credible the petitioner’s testimony that he executed an acknowledgement of paternity based on a mistake of fact because the mother had said the petitioner was the child’s father, the court’s conclusion that the petitioner was estopped from denying paternity was an improvident exercise of discretion. There was no parent-child relationship where the petitioner and the three-year-old child had only limited contact during the child’s first 18 months and virtually none thereafter. The petitioner had informed the court before a support order was entered that he planned to move to vacate the acknowledgement of paternity, and did so the same day; on these unusual circumstances, because the petitioner’s paternity was not actually litigated in the support proceeding, the support order does not support application of the collateral estoppel doctrine. (Family Ct, Queens Co)

**Juveniles (Hearings) (Paternity)****Witnesses (Child)****Matter of Nassau County Department of Social Services v Alford,** 2011 NY Slip Op 02679 (2nd Dept 3/29/2011)

**Holding:** The court did not improvidently exercise its discretion in requiring the physical presence of the child at paternity proceedings in New York, rather than remote audiovisual participation from Georgia, to facilitate the court’s determination of whether equitable estoppel bars genetic testing to determine paternity. (Family Ct, Nassau Co)

April–May 2011

**Guilty Pleas****Sentencing (General) (Mitigation)****People v Ruggiero,** 2011 NY Slip Op 02708  
(2nd Dept 3/29/2011)

**Holding:** The defendant, who pleaded guilty to reduced charges in exchange for a negotiated sentence, and agreed to cooperate with the prosecution in exchange for the possibility of a lighter sentence, but was unable, despite significant efforts, to comply after the prosecution unilaterally and materially changed the terms, the defendant is deemed fully compliant with the cooperation agreement and is entitled to any benefit the trial court finds appropriate. (County Ct, Suffolk Co)

**Third Department**

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**Endangering the Welfare of a Child****Evidence (Sufficiency)****People v Bell,** 80 AD3d 891, 914 NYS2d 422  
(3rd Dept 1/13/2011)

**Holding:** Testimony by the accuser that the defendant called her profane and highly degrading names, put his hands around her neck, and pushed her onto a couch, and that the accuser bit the defendant to stop him from choking her, all while their older child attempted to get between them, was sufficient to support a conviction for endangering the welfare of a child. (Supreme Ct, Clinton Co)

**Double Jeopardy (Pleadings and Pleas)****Guilty Pleas****People v Wystozaly,** 80 AD3d 894, 914 NYS2d 426  
(3rd Dept 1/13/2011)

**Holding:** Where the town justice testified at a hearing that he would not consider a plea to be entered absent a signed, written application for a reduction of charges, the defendant was not put in jeopardy a second time when the prosecutor withdrew a misdemeanor offer to a felony DWI, despite the defendant’s claim to have accepted the plea. While Supreme Court credited the truthfulness of defense witnesses who testified about the proceedings and their understanding that the plea had been accepted, there is no basis on the record to overturn the court’s ruling that the witnesses had misunderstood events and that

**Third Department** *continued*

the plea offer had been withdrawn before it was formally accepted. (Supreme Ct, Otsego Co)

**Jurisdiction (Subject Matter)**

**Probation and Conditional Discharge (General)  
(Revocation)**

**People v Lawrence, 80 AD3d 1011, 915 NYS2d 699  
(3rd Dept 1/20/2011)**

**Holding:** A 2007 statutory amendment providing in relevant part that where supervision of a defendant’s probation is transferred to another county, the appropriate court in the receiving county should assume sole jurisdiction in the case upon completion of the transfer, was not retroactive. The defendant’s probation having been transferred from Franklin to Clinton County before CPL 410.80(2) was amended, the later revocation of his probation by the Franklin court was not error. Review of the issue was not barred by the defendant’s waiver of appeal or failure to object, as jurisdiction can be raised at any time. (County Ct, Franklin Co)

**Jurisdiction (Personal)**

**Juveniles (Support Proceedings)**

**Matter of Bowman v Bowman, \_\_ AD3d \_\_,  
917 NYS2d 379 (3rd Dept 2/17/2011)**

**Holding:** The jurisdictional requirements of the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) preempt those of the Uniform Interstate Family Support Act (UIFSA) by operation of the Supremacy Clause. Where both parties moved from Washington, where their divorce and initial custody and child support orders were entered, and where the respondent (now a California resident) acquiesced in the child’s relocation to New York, paid child support here, visited with the child here, and invoked New York law in New York courts by filing a cross-petition here to modify the Washington order, the Family Court had personal jurisdiction over the respondent. (Family Ct, Saratoga Co)

**Counsel (Right to Counsel) (Waiver)**

**Family Court**

**Venue**

**Matter of Julie G. v Yu-Jen G., 81 AD3d 1079,  
917 NYS2d 355 (3rd Dept 2/17/2011)**

**Holding:** Saratoga County Family Court did not abuse its discretion in declining Rensselaer County

Family Court’s transfer of this matter, made on the respondent’s motion, because neither party currently resided in Saratoga County. Venue in either county would be appropriate, as the petitioner lived in Rensselaer County and the respondent had lived in Saratoga County when the proceedings commenced, but the transfer to Rensselaer was appropriate even without a motion by either party where the respondent moved out of Saratoga County (to Schenectady County) before the first appearance in Saratoga County. The respondent’s actions constituted a valid waiver of his right to counsel where he discharged his lawyer during an adjournment period and provided no explanation of his inability to find another lawyer during the remaining two weeks, filed papers on his own behalf, had represented himself before, obtained and discharged new counsel before the disposition date, appeared with a third lawyer but then argued with counsel during questioning of a witness and discharged him despite the lawyer’s willingness to continue if the respondent would accept his legal decisions and the court’s strong recommendation that the respondent not proceed pro se. (Family Ct, Rensselaer Co)

**Family Court (Family Offenses) (General)**

**Competency to Stand Trial**

**Matter of Loomis v Yu-Jen G., 81 AD3d 1083,  
918 NYS2d 220 (3rd Dept 2/17/2011)**

**Holding:** Where the respondent refused to cooperate and submit to a mental health evaluation in this and other proceedings despite multiple orders to do so, so that the court received no expert opinion on competency, the court did not have to comply with CPL article 730 and did not err by not appointing a guardian ad litem or finding the respondent competent. Where the respondent, who was represented by the Public Defender in his criminal action, failed to apply for assigned counsel to represent him with regard to this Family Court violation of probation when repeatedly told that such an application was necessary, the court reasonably found that the respondent had waived counsel. The respondent failed to object to hearsay testimony as to his failure to complete a batterer’s program and is not granted greater rights because he appeared pro se. He established that the year-long program could not be completed during his probation, but his failure to regularly attend and comply with the program’s rules constituted a violation of probation, as did his failure to cooperate with a mental health evaluation. The record does not support his argument that he was “concerned that the results would be used against him in his criminal action . . . .” (Family Ct, Rensselaer Co)

**Juveniles (Visitation)**

**Third Department** *continued***Sex Offenses (Sexual Abuse)**

**[Matter of Culver v Culver](#), \_\_ AD3d \_\_, 918 NYS2d 619  
(3rd Dept 3/3/2011)**

**Holding:** The Family Court's conclusion that visits by the young daughter with the father, who is incarcerated for sexual abuse of young boys, would be in the best interest of the child, cannot on this record be said to be unsound, but the mother should not be required to pay for telephone calls and for counseling for the child and her escorts before and after such visits. The father should pay or pursue third-party or family assistance to cover the costs. (Family Ct, Saratoga Co)

**Dissent:** There is no sound and substantial basis in the record to support the conclusion that future visitation with the father is in the child's best interests; the father could not have had a healthy relationship with the child when he was molesting his elementary school students at the same period he was living in the child's home.

**Juries and Jury Trials (Selection)**

**[People v Dickson](#), \_\_ AD3d \_\_, 917 NYS2d 747  
(3rd Dept 3/3/2011)**

**Holding:** That the jury venire panel was sworn outside the presence of the defendant and defense counsel did not violate the defendant's constitutional right to be present at all material stages of his trial. Failure to preserve the issue, however, did not preclude review, and the defendant did not affirmatively waive objection. (Supreme Ct, Tompkins Co)

**Counsel (Conflict of Interest)****Evidence (Sufficiency)**

**[People v Caulkins](#), 2011 NY Slip Op 2491  
(3rd Dept 3/31/2011)**

**Holding:** The evidence was insufficient to support a finding that the defendant intended to harass, annoy, or alarm the accuser, who had approached him and began arguing with him about their son, after which he shoved her left shoulder with an open hand, said "this [is] done," and left. The court abused its discretion in excluding the Public Defender from personally appearing on the defendant's behalf when the matter was transferred into the Integrated Domestic Violence Court on the grounds that the Public Defender was involved in a CPLR article 78 proceeding challenging a prior ruling of the court in an unrelated matter. The court's reasoning does not support disqualification of the Public Defender or the view that the method by which the Public Defender seeks to over-

turn the court's prior ruling created a conflict of interest, and such a conflict would not warrant the court's interference with an established attorney-client relationship. (Supreme Ct, Cortland Co)

**Counsel (Competence/Effective Assistance/Adequacy)****Post-Judgment Relief (CPL § 440 Motion)**

**[People v Deyo](#), 2011 NY Slip Op 2490  
(3rd Dept 3/31/2011)**

**Holding:** The defendant was entitled to a hearing on his CPL 440.10 motion to vacate his conviction and withdraw his plea where he alleged ineffective assistance of counsel and the record raises questions as to 1) the adequacy of counsel's pre- and post-plea negotiations as to the prosecution's sentencing recommendation, and 2) whether the defendant was correctly advised about the initial offer and of any benefit he might obtain from cooperating against a co-defendant. These fact-based issues cannot be determined on the motion papers, and the matter is remitted for a hearing where proof can be presented on the issues set out in this decision. (County Ct, Greene Co)

**Admissions (Co-defendants)****Witnesses (Confrontation of Witnesses)**

**[People v Reid](#), 2011 NY Slip Op 02488  
(3rd Dept 3/31/2011)**

**Holding:** The prosecutor elicited testimony from a police investigator about receiving eyewitness testimony indicating a third party was not present, which violated the defendant's right to confront witnesses because the obvious implication was that the eyewitness was the non-testifying co-defendant. The defense questioning of the investigator about whether anyone had implicated a third party did not open the door to the question about "an 'eyewitness'" when the co-defendant was the only person who would fit that description. The prosecutor could have simply asked the investigator if any person had said the third party was not involved. The error was not harmless where the only evidence linking the defendant to the crime was the testimony of individuals testifying in exchange for some benefit in their own cases. (County Ct, Albany Co)

**Fourth Department**

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**Fourth Department** *continued*

**Counsel (Anders Brief)**

**Guilty Pleas (Withdrawal)**

**People v Bouwens, 81 AD3d 1388, 918 NYS2d 394 (4th Dept 2/10/2011)**

**Holding:** Appellate counsel, who concluded there were no nonfrivolous issues to be raised, is relieved and new counsel appointed to brief, with any other issues counsel may find, whether the court erred in not offering the defendant a chance to withdraw his plea or holding a hearing on whether the defendant met the requirements of the prosecution’s plea offer or was prevented from doing so. (County Ct, Ontario Co)

**Speedy Trial (Cause for Delay) (Statutory Limits)**

**People v Bussey, 81 AD3d 1276, 916 NYS2d 539 (4th Dept 2/10/2011)**

**Holding:** Where the prosecution did not learn until less than a day before the scheduled arraignment that the defendant had been incarcerated in another county, the court properly excluded from the statutory time limits of CPL 30.30 an additional 14 days to obtain the defendant’s presence. (Supreme Ct, Monroe Co)

**Counsel (Competence/Effective Assistance/Adequacy)**

**Witnesses (Defendant as Witness)**

**People v Cosby, 82 AD3d 63, 916 NYS2d 689 (4th Dept 2/10/2011)**

**Holding:** Defense counsel’s single error in failing to advise the defendant that his right to testify meant he could ignore counsel’s strong advice against testifying did not deprive the defendant of effective assistance of counsel. The defendant failed to prove at the CPL article 440 hearing that he would have given relevant testimony; the record established that the defendant refused to tell his lawyer what occurred on the night of the alleged crimes. (Supreme Ct, Onondaga Co)

**Rape (Degrees and Lesser Offenses)**

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

**People v Cummings, 81 AD3d 1261, 916 NYS2d 432 (4th Dept 2/10/2011)**

**Holding:** The Legislature’s creation of a new subdivision in the third-degree rape statute (Penal Law 130.25[3]), making it a crime to engage in sexual intercourse with another without their consent where lack of consent is not due to incapacity, did not warrant a downward departure from the defendant’s presumptive risk level under the Sex

Offender Registration Act following his conviction for forcible rape under Penal Law 130.35(1). The new section was intended to increase penalties for sex offenses and close loopholes, not reduce penalties for forcible rape. (County Ct, Wyoming Co)

**Confessions (Evidence) (Huntley Hearing) (Interrogation)**

**Evidence (Business Records)**

**People v Gano, 81 AD3d 1378, 916 NYS2d 419 (4th Dept 2/10/2011)**

**Holding:** Where there was no provision in a Kings County proffer agreement saying that the defendant’s statements would not be used to prosecute him in a different jurisdiction, and hearing testimony established that Monroe County was not consulted before the Kings County agreement was presented to the defendant, the court did not err in refusing to suppress the defendant’s statements. Nor did the court err in admitting records of various tissue processing companies under the business records exception to the hearsay rule. (Supreme Ct, Monroe Co)

**Double Jeopardy**

**People v Gause, 81 AD3d 1293, 916 NYS2d 376 (4th Dept 2/10/2011)**

**Holding:** Where the jury in the first trial did not reach the intentional murder count, and the defendant’s conviction of depraved indifference murder was overturned in a decision stating that he could be retried for intentional murder, that ruling precludes reconsideration of the defendant’s double jeopardy claim as there is no showing of manifest error or exceptional circumstances warranting departure from the law of the case doctrine. (County Ct, Monroe Co)

**Rape (Elements)**

**Sex Offenses**

**People v Lawrence, 81 AD3d 1326, 916 NYS2d 393 (4th Dept 2/10/2011)**

**Holding:** That in some instances the crimes of first-degree rape (Penal Law 130.35[4]) and predatory sexual assault against a child (Penal Law 130.96) are identical does not violate the guarantees of equal protection and due process and the decision as to what is an exceptional case warranting prosecution for the less harsh offense is entrusted to the prosecutor. Counsel was not ineffective for failing to request an instruction on first-degree rape as a lesser included offense as the request had little or no chance of success since that charge should be reserved for unusual factual situations, which this was not. (Supreme Ct, Erie Co)

**Fourth Department** *continued***Sentencing (Enhancement) (Pronouncement)**

[People v McCriminger](#), 81 AD3d 1324, 916 NYS2d 392  
(4th Dept 2/10/2011)

**Holding:** Where the court said at the plea proceeding that the permissible determinate sentencing range was three and a half years to nine years, but the actual range was two to eight years, and the court later imposed an enhanced sentence because the defendant had not appeared for sentencing but failed to indicate awareness that the Legislature had reduced the minimum sentence to one and a half years, the defendant is entitled to a resentencing. (Supreme Ct, Erie Co)

**Narcotics (Penalties)****Sentencing (Resentencing)**

[People v Hill](#), 82 AD3d 77, 916 NYS2d 710  
(4th Dept 2/18/2011)

**Holding:** In calculating whether a defendant is eligible for resentencing pursuant to the provisions of CPL 440.46 dealing with drug offense sentences, the ten-year look-back period for determining whether a prior offense is an “exclusion offense” is to be measured from the date of the motion for resentencing. To accept the prosecution’s theory that the measurement is to be from the date of the offense for which the defendant seeks resentencing would require adding language to the statute. (Supreme Ct, Onondaga Co)

**Sentencing (Appellate Review) (Orders of Protection) (Pronouncement)**

[People v Lilley](#), \_\_ AD3d \_\_, 917 NYS2d 494  
(4th Dept 2/18/2011)

**Holding:** A valid waiver of appeal would not preclude review of an order of protection issued at the time of sentencing, for such an order is not a part of the sentence. An order of protection may be issued independent of a plea agreement, and a court has the authority to issue such an order in the absence of the victim’s consent. (County Ct, Jefferson Co)

**Evidence (Sufficiency)****Harassment (Evidence)**

[People v Mollalaie](#), 81 AD3d 1448, 916 NYS2d 726  
(4th Dept 2/18/2011)

**Holding:** The evidence was legally sufficient to support the conviction of second-degree harassment (Penal Law 240.26[1]), where the accuser said the defendant tried

to hit her with a closed fist, followed her through the apartment and grabbed her repeatedly, and knocked her down. (Supreme Ct, Erie Co)

**Dissent:** Where the accuser grabbed the defendant’s cell phone while he was talking, and ran away, his chasing her and repeatedly asking for return of the phone, pushing her shoulder, and grabbing her arm, did not support the conclusion that he intended to harass, annoy, or alarm her.

**Speedy Trial (Prosecutor’s Readiness for Trial) (Statutory Limits)**

[People v Sawyer-Plato](#), 81 AD3d 1444, 916 NYS2d 722  
(4th Dept 2/18/2011)

**Holding:** Where the defendant was initially charged with misdemeanor driving while intoxicated and was then indicted by the grand jury for felony DWI, but those charges were reduced to misdemeanors when the defendant’s Department of Motor Vehicles abstract was corrected, the applicable statutory speedy trial provisions were those regarding felonies. (County Ct, Oneida Co)

**Sentencing (Concurrent/Consecutive)**

[People v Slattery](#), 81 AD3d 1415, 916 NYS2d 871  
(4th Dept 2/18/2011)

**Holding:** The court misapprehended its discretion in finding that the defendant’s sentences for first-degree unlicensed operation of a vehicle and third-degree unauthorized use of a vehicle had to run consecutively to a prior undischarged parole term. Penal Law 70.25(1) gives the court discretion to impose concurrent sentences. (County Ct, Erie Co)

**Accusatory Instruments (Duplicitous and/or Multiplicitous Counts) (General)****Counsel (Competence/Effective Assistance/Adequacy)**

[People v Brown](#), 2011 NY Slip Op 02297  
(4th Dept 3/25/2011)

**Holding:** Defense counsel was not ineffective for failing to move to dismiss the first count of the indictment as duplicitous, as the court could have denied the motion and given a jury instruction to eliminate any danger of conviction of an unindicted act or conviction by different jurors for different acts. The duplicity issue was unreserved and there is no showing that counsel lacked a strategic or other valid reason for the inaction. (County Ct, Wyoming Co)

**Dissent in Part:** Counts one and two were rendered duplicitous by the accuser’s testimony tending to establish that multiple criminal acts occurred during the charged period, and “the compelling reasons behind the

## Fourth Department *continued*

duplicity principle represent interest of justice and constitutional concerns . . . warrant our review.”

### Evidence (Sufficiency)

#### Search and Seizure (Automobiles and Other Vehicles) (Weapons-frisks)

[People v Everett](#), 2011 NY Slip Op 02250  
(4th Dept 3/25/2011)

**Holding:** Where two officers who stopped the defendant’s vehicle for traffic violations lacked knowledge to support a reasonable suspicion that the defendant was armed or posed a danger, no pat-down search was authorized, so there was no legally sufficient evidence that the officer injured by the defendant during that search was undertaking a lawful duty at the time. (County Ct, Monroe Co)

### Accusatory Instruments (Sufficiency)

[People v Ferenchak](#), \_\_ AD3d \_\_, 919 NYS2d 436  
(4th Dept 3/25/2011)

**Holding:** Where the misdemeanor information alleging violation of an order of protection contained no allegation that the defendant was served with the order of protection, was present in court when it issued, or signed it, and the supporting deposition fails to reference the order of protection, the information was jurisdictionally defective for failure to assert facts that, if true, would establish the defendant’s knowledge of the order. (County Ct, Onondaga Co)

### Evidence (Sufficiency)

[People v Gayton](#), 2011 NY Slip Op 02171  
(4th Dept 3/25/2011)

**Holding:** Proof that a licensed funeral director received a “facility fee” from a human tissue procurement agency that recovered tissue from two cadavers at the defendant’s funeral home without the required consent of the next of kin did not satisfy the statutory requirement that he receive property from more than one person by false or fraudulent pretenses, an element of second-degree scheme to defraud (Penal Law 190.60[1]). The money was not the property of the next of kin, and their legal right to dispose of the decedents’ bodies did not constitute “property.” (Supreme Ct, Monroe Co)

### Sentencing (Orders of Protection)

[People v Knight](#), \_\_ AD3d \_\_, 919 NYS2d 437  
(4th Dept 3/25/2011)

**Holding:** As the prosecution concedes, the oral modification of the order of protection issued at sentencing, which prohibited the defendant from ever entering Wayne County again or traveling within 50 miles of the home of the person that the order was meant to protect, must be stricken. (County Ct, Wayne Co)

### Counsel (*Anders* Brief)

#### Sentencing (Concurrent/Consecutive)

[People v Phelps](#), \_\_ AD3d \_\_, 918 NYS2d 914  
(4th Dept 3/25/2011)

**Holding:** Appellate counsel, who concluded there were no nonfrivolous issues to be raised, is relieved and new counsel appointed to brief, with any other issues counsel identifies, whether concurrent sentences were illegally imposed because the defendant committed the instant violent felony offense while sentencing on a prior offense was pending. (County Ct, Steuben Co)

### Narcotics (Penalties)

#### Sentencing (Resentencing)

[People v Reeb](#), 2011 NY Slip Op 02181  
(4th Dept 3/25/2011)

**Holding:** The court wrongly denied the defendant’s application under CPL 440.46 for resentencing for a drug conviction on the basis that he had two prior “exclusion” offenses; the period to be measured for the ten-year exclusion is the period preceding the date the application for resentencing was filed, not the period between the present and previous felonies. However, the record shows that, when the time the defendant was incarcerated between the prior felonies and the present one is taken into account, his application was premature and properly denied on that ground. (County Ct, Erie Co)

### Grand Jury (Procedure)

[People v Washington](#), 2011 NY Slip Op 02263  
(4th Dept 3/25/2011)

**Holding:** The defendant’s challenge to the integrity of the grand jury proceedings survived his guilty plea, and the court erred in denying without a hearing the defense motion to dismiss the indictment for possible prejudice to the defendant because the grand juror listed as foreperson may have been a close relative of the defendant’s former girlfriend who, with the defendant, was a party to a prior order of protection. As allegations that a grand juror could not properly perform the required duty because of bias or prejudice provide a legal basis for dismissal under CPL 190.20(2)(b), a hearing must be held. (County Ct, Oneida Co) ⚖

## ***NYSDA Files Amicus Brief in Battles***

The Association has filed an *amicus* brief urging the United States Supreme Court to grant *certiorari* in *Battles v State of New York*, No 10-9465. *Battles* raises the issue of whether New York's discretionary Persistent Felony Offender (PFO) statutes can survive constitutional challenge under *Apprendi v New Jersey* (530 US 466 [2000]) and its progeny. See *People v Battles*, 16 NY3d 54 (2010).

The brief notes that the challenged statutes require a court to make fact findings beyond previous convictions in imposing an enhanced sentence; sets out the need to bring the statutes within the commands of the Sixth Amendment; describes the understanding of the Court of Appeals and other New York appellate courts that the statutes require fact-finding beyond the existence of sufficient prior convictions; and points out the need to resolve a circuit split and lack of guidance from the high court on the recidivism exception. Written by Ursula Bentele, Director of the Brooklyn Law School Federal Habeas Clinic, the brief is posted on the Association's website. ([www.nysda.org/html/nysda\\_in\\_the\\_courts.html](http://www.nysda.org/html/nysda_in_the_courts.html).)

In the last issue of the *REPORT*, we conveyed advice to lawyers to keep challenging the constitutionality of the PFO statutes while the *Battles* petition is pending. ([www.nysda.org/2011\\_Jan-Mar\\_Backup\\_Center\\_REPORT\\_XXVI.pdf](http://www.nysda.org/2011_Jan-Mar_Backup_Center_REPORT_XXVI.pdf).)

## ***Sometimes, the Only Appellate Issue Can Hurt the Client***

In *People v Phelps* (2011 NY Slip Op 02333 [4th Dept 3/25/11]), summarized on p. 38, the Appellate Division relieved appellate counsel who had submitted an *Anders* brief claiming the existence of no nonfrivolous issues, and assigned new counsel. The new lawyer is ordered to brief the issue of "whether concurrent sentences were illegally imposed."

As Brian Shiffrin noted on the New York Criminal Defense blog two days after the *Phelps* decision was issued, new counsel faces a dilemma, as raising the flagged issue "might result in the client receiving a longer sentence." To resolve the dilemma, counsel could advise the client about legally available options—proceed and risk more time or dismiss the appeal—and act on the client's choice. Should the client not respond, counsel could move to dismiss the case for abandonment. (<http://newyorkcriminaldefense.blogspot.com/2011/03/what-should-assigned-appellate-counsel.html>.) ☺

- He got out of the backseat of a car at the station without the use of his arms?
- Up the stairs?
- Not unsteady?
- Didn't stumble or trip?
- Each step fine?

The officer may indicate during the examination that he was "guiding" or "holding on to" the client since he was in custody. If there is such testimony, the officer should be questioned as to where his hand was as he was guiding the client to confirm that he did not need to hold up or even steady the client during the time he was "guiding" the client.

This technique of questioning may be used continuously until the officer's contact with the client ended. Other areas of inquiry might include the actions of the client during any booking procedures such as fingerprinting, taking photos, or placing the mouthpiece on the BrAT device.

### **Conclusion**

At the end of the questioning on the above topics, should the defense attorney follow this model, the fact finder will likely be left with a lack of credible impairment evidence beginning with the Stopping Sequence and continuing through the window interaction, Exit Sequence, and walk to and from the cruiser. The amount of normal behavior exhibited while performing normal tasks—both before and after the administration of the abnormal tasks required by the field sobriety tests—will hopefully provide the reasonable doubt necessary to obtain an acquittal. ☺

### **Endnotes**

1. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING, STUDENT MANUAL (hereinafter SFST MANUAL), Session V, 2006 Edition.
2. SFST MANUAL, Session IV.
3. SFST MANUAL, Session XIII.
4. SFST MANUAL, Session V.
5. SFST MANUAL, Session VI.
6. SFST MANUAL, Session VIII.
7. SFST MANUAL, Session IV, p. IV-6.
8. SFST MANUAL, Session V, p. V-10.
9. SFST MANUAL, Session VI, p. VI-6.
10. SFST MANUAL, Session V, p. V-10.
11. SFST MANUAL, Session VI, p. VI-1.
12. *Id.*
13. SFST MANUAL, Session VI, p. VI 2-3.
14. SFST MANUAL, Session II, p. II 13-18.
15. SFST MANUAL, Session VI, p. VI-6.

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