



Public Defense Backup Center REPORT

Volume XXVII Number 2

April–July 2012

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Indigent Legal Services Board Approves Standards in Conflict Cases

Under a duty set out in Executive Law 832(3)(d), the Office of Indigent Legal Services has established “Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest.” The standards were approved by the Indigent Legal Services Board on June 8, 2012, distributed to Chief Defenders and others by the Office on June 15, and made effective as of July 1. In his memorandum introducing the standards, Director William J. Leahy indicated that the Office plans “to work *with* counties and legal service providers to achieve compliance with the standards,” consistent with the statutory directive to assist counties with compliance (emphasis added). The standards are posted on the NYSDA website.

Busy Spring for the Supreme Court and Court of Appeals

Both the US Supreme Court and the Court of Appeals issued a large number of decisions this spring, with mixed results for criminal defense and family law practitioners. (Case summaries begin on p. 6.)

US Supreme Court Confronts Confrontation, Ineffective Assistance of Counsel, Immigration

- *Williams v Illinois*, No. 10-8505 (6/18/2012): The Supreme Court’s latest decision on the Confrontation Clause and forensic science shows a deeply divided court. Five justices voted to affirm the judgment of the Illinois Supreme Court, holding that the expert witness’s testimony that a DNA profile produced by an outside laboratory (Cellmark), which had been sent vaginal swabs from the accuser, matched the defendant’s DNA profile did not violate the Confrontation Clause. The plurality opinion, written by Justice Alito, concluded that: the Confrontation Clause did not apply because the out-of-court statements relied upon by the expert were not offered to prove the truth of the matter asserted; and that, even if the Cellmark report had been admitted into evidence, the Con-

frontation Clause would not have been violated because the report was obtained to identify the perpetrator of the rape, not to gather evidence against the petitioner, who was not even a suspect at the time.

Justice Thomas concurred in the judgment, concluding that Cellmark’s report “lacked the requisite ‘formality and solemnity’ to be considered “‘testimonial’” for purposes of the Confrontation Clause.” But his opinion made clear that he “share[d] the dissent’s view of the plurality’s flawed analysis.” The four dissenting justices, in an opinion written by Justice Kagan, as well as Justice Thomas, agreed that the statements in the Cellmark report were introduced to establish their truth. The dissent emphasized that the Cellmark report was identical to the reports in *Melendez-Diaz v Washington* (557 US 305 [2009]).

A number of legal commentators have written on the implications of *Williams*. See, e.g., www.scotusblog.com/2012/06/the-holdings-and-implications-of-williams-v-illinois/; <http://sentencing.typepad.com/sentencing-law-and-policy/2012/06/anyone-figured-out-williams-v-illinois-or-its-tea-leaves-for-the-sentencing-cases.html>; and www.crimeandconsequences.com/crimblog/2012/06/making-sense-of-williams-v-ill.html.

- *Martinez v Ryan*, No. 10-1001 (3/20/2012): An Arizona defendant claiming to have been deprived of the effective assistance of counsel at trial and in initial state post-conviction proceedings got an opportunity to further litigate those claims in federal court despite a procedural default that ordinarily would bar his habeas claim. Seven justices found that where state law required ineffective assistance at trial claims to be initially raised in post-conviction proceedings rather than on direct appeal, the proceedings were the equivalent of a direct appeal and the convicted individual should have an opportunity to challenge as ineffective his post-conviction attorney’s assertion

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that no colorable claims could be raised. While stressing the importance of the right to counsel, the majority also sought to allay concerns that a flood of federal cases would result. Dissenting, Justices Scalia and Thomas attacked the majority's reasoning and decried the predicted results — overwhelming numbers of double ineffectiveness claims.

Since New York does not routinely provide appointed counsel for CPL 440 motions, our state may provide one testing ground for the dissent's fears.

• *Arizona v United States*, No. 11-182 (6/25/2012): See news item below.

Court of Appeals Addresses Wide Range of Issues, From Parental Rights to Appeal Waivers to SORA

This issue includes summaries of more than 50 Court of Appeals decisions over the past three months, beginning on p. 12, including:

• *Matter of Hailey ZZ.*, 2012 NY Slip Op 04374 (6/7/2012): The Court held that family courts do not have the authority to order continuing contact between a parent and a child after termination of parental rights proceedings under Social Services Law (SSL) § 384-b; the Legislature has only authorized such contact in voluntary surrender cases under SSL § 383-c. The Court concurred with the trial judge's findings that the petitioner made the requisite diligent efforts and the respondent father, who was incarcerated, failed to plan for his daughter's future. Judge Pigott, the lone dissenting judge, disagreed with the diligent efforts finding.

This decision resolved a split in the Appellate Divisions. (www.newyorklawjournal.com, 6/8/2012.)

• *People v Leonard*, 2012 NY Slip Op 04206 (5/31/2012): The Court held that it is possible for a custodial parent to kidnap his or her child, but warned that the holding "should not be too readily extended. Not every parent who disciplines a child inappropriately—not even every parent who commits child abuse—becomes a kidnapper when he or she causes the child to move from place to place, or to remain stationary."

• *People v Liden*, 19 NY3d 271 (5/3/2012): The Court unanimously held: "A determination by the Board of Examiners of Sex Offenders that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender's risk level." Thus, a defendant does not need to bring a separate CPLR article 78 proceeding against the Board to challenge its determination that an out-of-state conviction necessitates registration under the Sex Offender Registration Act.

• *People v Bedessie*, 19 NY3d 147 (3/29/2012): For the first time, the Court of Appeals acknowledged that "in a proper case expert testimony of the phenomenon of false confessions should be admitted." Unfortunately, the

Court concluded that the trial court did not err in denying the admission of the defendant's expert testimony, without a *Frye* hearing, holding that the testimony was not relevant to the defendant or her confession. Information about false confessions and expert testimony is available from the Backup Center, as well as online at www.innocenceproject.org/understand/False-Confessions.php, www.falseconfessions.org, and www.truthaboutfalseconfessions.com/.

• *People v Maracle*, 2012 NY Slip Op 05121 (6/27/2012): Distinguishing *People v Hidalgo* (91 NY2d 733), the Court held that the defendant's waiver of the right to appeal her conviction did not constitute a waiver of her right to appeal the severity of her sentence, finding that the trial court failed to engage in a "full and adequate colloquy" where it only advised the defendant she would not be able to withdraw her plea or to appeal her conviction.

45th Annual Conference: Preparing for the Future, Honoring the Past

In Saratoga on July 22–24, NYSDA will celebrate its 45 years of working to improve public defense services in New York State. We will continue some traditions, honor others that are ending, and begin preparing for what the future will bring. Board President Edward J. Nowak will present his Court of Appeals Update, a custom begun in 1981, for a final time. The Chief Defender Convening, two receptions, and included lunches will provide formal and informal opportunities to discuss the implications of new cases and other developments presented during CLE sessions. And the Awards Banquet will be a time to remember those whose lifework of stellar public defense service has aided clients and inspired colleagues.

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THE REPORT IS PRINTED ON RECYCLED PAPER

Steve Pittari Mourned by Many

The death in early June of Stephen J. Pittari saddened a multitude of friends and admirers who, along with his family, continue to miss him.

Before and after his 2011 retirement as long-time head of the Westchester County Legal Aid Society, Pittari “was recognized for his dedication not only to the clients of the office where he spent his legal career but to the principle that all public defense clients should receive respect and high-quality representation.” Those words came from the press release announcing Pittari as a recipient of NYSDA’s 2011 Service of Justice Award; he had been previously honored with a Special Recognition Award (1999) and the Wilfred R. O’Connor Award (2006). A long-time member of NYSDA and its Board of Directors, Pittari had made discovery reform a priority; his service as Chair of a new Discovery Committee was cut short by his final illness.

Well-known and respected beyond NYSDA as well, Pittari received recognition from a variety of groups including the Columbian Lawyers Association of Westchester County (1994), the Westchester Civil Liberties

Union (1993), the New York State Bar Association Criminal Justice Section (1999), and the Legal Aid Society of Westchester County (2011).

Such well-deserved tributes could not begin to capture Steve Pittari’s influence and example. His presence at contentious meetings was calming, his quiet wisdom and humor helping put fellow lawyers back on track when differences on how to proceed threatened to obscure the goal. But when yet another example of unfairness ignited his passion for justice he could silence the room or set off an ovation.

As Executive Director Jonathan E. Gradess said in announcing Pittari’s death to the NYSDA staff, “Steve was the consummate defender, never yielding to political interference, client centered in all that he did, always ready to help others. Would that his retirement had given him more time for a self that deserved it.”



GO IN PEACE, STEPHEN J. PITTARI

[Ed. Note: The following, a deeply-felt farewell read at the funeral of a man who embodied client-centered representation, honors that man’s memory by showing us all what putting clients’ interests first looks, sounds, and feels like. We thank Jeanne Mettler for so effectively telling Steve Pittari’s story, as he encouraged lawyers to learn and tell their clients’ stories. And we thank her for sharing it not just with those who knew and loved Steve but here, so that Steve can continue to teach and motivate by example even after his death.]

Thirty-five years ago I tried my first case. I represented a young man. Every day his mother came to court and sat in the front row. Until the last day, when the case went to the jury. And that day she did not attend. I was young. Everyone else understood why, but I did not.

After the jury came back—guilty—I cried—and then went back to the office. Steve talked to me and tried to make me feel better. And then he said—Now you have to call the mother and tell her why her son is not coming home. I said I couldn’t—he said I had to.

Because when you stood up for the Office of Stephen J. Pittari—with as he used to say—the school jacket on—it was not enough to be prepared (though he insisted on that), it was not enough to know the law (though you *better* know the law), it was not enough to always be honorable and understand that as an attorney your word was everything, it was not enough to fight hard and never give up or give in.

Steve Pittari also taught all of us that we were representing people who had histories and stories—and we better treat them—and their mothers—with dignity and understanding.

Steve Pittari was also a gentle man. He was sensitive. He thought deeply. He read widely. He could talk about a myriad of topics, with authority, in depth.

He was loyal.

Steve loved the music of Frank Sinatra and Helen Forrest and Margaret Whiting. He loved baseball and especially the Brooklyn Dodgers. He loved 1940’s movies where the hero won and decency prevailed. He loved Italy and especially the Aeolian Islands. He loved Mount Vernon and his neighborhood on Carwall Avenue. He loved his family. He loved the College of the Holy Cross. And he especially loved those two most lucky dogs: Togo and his little Bart.

No one will ever stand up in Court again and announce that he or she is from the Office of Stephen J. Pittari. That era has ended. But what will not end is the memory and the influence of this great man who taught so many of us to be lawyers. We will carry that with us, wherever we go and whatever we do.

I speak on behalf of all those lawyers when I say: We love you Steve, and we won’t stop loving you. We love you for your integrity, your perseverance, your courage, your gentle spirit and your kind, kind soul.

Go in Peace Stephen J. Pittari.

Ride on Eagle’s Wings.

Alleluia, Alleluia, Alleluia.

Notes on Immigration Law/Criminal Law Intersect and CDIP

Arizona v United States Decided

The United States Supreme Court's decision in *Arizona v U.S.*, awaited with dread and anticipation by people across the country, is summarized on p. 11. As was widely publicized, the Court struck down as pre-empted most of Arizona's controversial provisions designed to implement or increase state enforcement of federal immigration law. The Supreme Court found premature a federal injunction barring enforcement of one provision, because state courts have not yet had an opportunity to construe its terms. That provision, SB1070(2)(b), is referred to as the "show me your papers" clause and deals with state law enforcement officers' attempts to determine the immigration status of people they stop, detain, or arrest on a "legitimate basis."

On the heels of *Arizona v United States*, the Immigration and Customs Enforcement (ICE) of the Department of Homeland Security (DHS) rescinded agreements with Arizona state and local law enforcement agencies known as 287(g) Task Force agreements that deputize state officers to enforce immigration laws. ICE determined that such agreements are not useful in states with immigration enforcement laws like SB1070. This alleviates legal observers' concern that a combination of 287(g) agreements and SB1070(2)(b) would work to allow stops based solely on the grounds of suspicion about immigration status.

Nonetheless, vigilance must be maintained as to how state law enforcement and ICE interact with regard to people who are not U.S. citizens, even in New York State which has no provisions similar to section 2(b). NYSDA's Criminal Defense Immigration Project (CDIP) will be following developments around the Arizona law, keeping public defense lawyers in New York advised.

State Bar Adopts Report of the Special Committee on Immigration Representation

Meanwhile, CDIP Director Joanne Macri has been busy on other fronts. She co-chairs a committee of the New York State Bar Association that recently completed a report that was then adopted by the State Bar's House of Delegates. The "Report of the Special Committee on Immigration Representation" includes a set of written standards for representation of immigration cases, noting in several instances that immigration lawyers must become familiar with any criminal record their clients have that could affect their immigration status. NYSDA welcomed the State Bar's action, in a press release that includes a link to the newly-adopted report. <http://readme.readmedia.com/NYSDA-Welcomes-State-Bar-Recommendations-on-Immigration-Representation/4504273>.

CDIP Work Continues, Grant Funding Received

Macri frequently provides training on aspects of the intersect between immigration law and criminal law. For example, she presented "Bail, Bonds, and Holds: Making a Difference for Immigrant Clients" at the May 15, 2012 CLE event "Criminal Defense: New Strategies and Techniques for Sharpened Advocacy," presented by the Ontario County Public Defender's Office and NYSDA. She was also one of many stellar coaches working with participants in this year's Basic Trial Skills Program.

For the third year, the value of CDIP's work was recognized with a grant award of \$10,000 from the New York State Bar Foundation. The grant was presented to Macri at a meeting of NYSDA's Client Advisory Board on April 13, 2012. The support of the Bar Foundation for the full three years that its policies allow has been greatly appreciated.

CDIP continues its hotline, where public defense lawyers and others can receive advice and consultation about how a pending matter may affect a foreign national's immigration status. For assistance or further information, please contact Joanne Macri at jmacri@nysda.org or at 716-913-3200.

Legislative Session Brings Changes to Criminal and Family Court Practice

Unlike the voluminous output from the Court of Appeals, the number of bills passed by both the state Senate and Assembly during the 2012 legislative session is notably low. (www.nypirg.org/media/releases/good-gov/NYPIRG%202012%20Session%20Analysis.pdf.) Summaries of several bills passed earlier this year, including the expansion of the DNA databank, appeared in the Jan.-Mar. 2012 issue of the *REPORT* (www.nysda.org/docs/PDFs/TheReport/2012%20Jan-Mar%20Backup%20Center%20REPORT%20XXVII_1.pdf). The next issue of the *REPORT* will include Al O'Connor's annual legislative update, and O'Connor will discuss some of these legislative changes at the annual meeting on July 24.

Additional Considerations in Ordering Bail in Offenses Against Family Members; Charitable Bail Organizations Authorized

As part of a bill designed to enhance protection for domestic violence victims (S7638), the Legislature has made several amendments to the Criminal Procedure Law and Penal Law. Part D of the bill:

- amends CPL 510.30(2)(a) by adding a new subparagraph (vii) to require that, in considering bail applications in cases where the defendant is charged with a crime against a member of the same family or household, as defined in CPL 530.11, the court must take into account (a) any violation by the defendant of an order of protection issued by any court for the protection of members of the

same family or household, whether or not the order of protection is currently in effect; and (b) the defendant's history of use or possession of a firearm;

- adds a new section 240.75 to the Penal Law, creating the class E felony offense of aggravated family offense, which applies when a defendant commits a misdemeanor "specified offense" and has been convicted of one or more specified offenses within the preceding five years, exclusive of any time during which the defendant was incarcerated;

- adds a new section 200.63 to the CPL requiring a special information to be filed when a defendant is charged with an aggravated family offense or attempted aggravated family offense, and setting forth procedures for such cases; and

- amends Penal Law 240.30 (second-degree aggravated harassment) by adding a new subdivision 4: "Strikes, shoves, kicks or otherwise subjects another person to physical contact thereby causing physical injury to such person or to a family or household member of such person as defined in [CPL 530.11]."

The sections creating the new Penal Law 240.75 and CPL 200.63 take effect on the 90th day after the bill becomes law; the other provisions are effective on the 60th day.

The Legislature has approved a bill (A10640-B) that authorizes the creation of charitable bail organizations by non-profit organizations organized under Internal Revenue Code 501(c)(3) that are registered as charities under Executive Law article 17-A and are current on such registration. The bill contains a number of restrictions. The state Insurance Superintendent is in charge of approving applications for charitable bail organization status and regulating those organizations. The bill is effective on the 90th day after it becomes law.

Interim Probation Supervision May Be Transferred to Another County

Under this bill (A10555), courts will be allowed to transfer supervision of an interim probationer to the probationer's county of residence; the transferring court will retain jurisdiction during the period of interim probation, but the probation department in the receiving jurisdiction will assume the powers and duties of the original probation department. The bill includes an amendment to the judicial diversion law that allows courts to permit defendants to reside in another jurisdiction while participating in a judicial diversion program.

E-Filing Pilot Programs in Criminal and Family Court Authorized

Following the release of the reports on criminal and family court e-filing (available at www.nycourts.gov/publications/pdfs/eFile_Criminal_Report%20April%2012.pdf and www.nycourts.gov/publications/pdfs/eFile_FamilyCourt_Final_web.pdf), the Legislature passed a bill (A10706) allowing the Chief Administrative Judge to promulgate rules authorizing voluntary e-filing programs in criminal cases (in county and supreme court) and family court, as well as mandatory e-filing programs in criminal cases in up to six counties with the consent of the individual county's district attorney, criminal defense bar, and county clerk, and mandatory e-filing programs in family court for Family Court Act article 3 and 10 proceedings in up to six counties with the consent of specified entities in each county.

9.pdf and www.nycourts.gov/publications/pdfs/eFile_FamilyCourt_Final_web.pdf), the Legislature passed a bill (A10706) allowing the Chief Administrative Judge to promulgate rules authorizing voluntary e-filing programs in criminal cases (in county and supreme court) and family court, as well as mandatory e-filing programs in criminal cases in up to six counties with the consent of the individual county's district attorney, criminal defense bar, and county clerk, and mandatory e-filing programs in family court for Family Court Act article 3 and 10 proceedings in up to six counties with the consent of specified entities in each county.

Protection of People with Special Needs Act

The Protection of People with Special Needs Act (S7749), one of Governor Cuomo's program bills, establishes a new Justice Center for the Protection of People with Special Needs. Of particular note for the criminal defense bar are provisions in Part G. The Justice Center will employ a special prosecutor/inspector general for the protection of people with special needs who will be appointed by the governor and will have the power and duty to investigate and prosecute certain abuse or neglect offenses committed against vulnerable persons by their custodians and cooperate with and assist district attorneys and law enforcement in their efforts against such abuse or neglect. ⚖

CONFERENCES & SEMINARS

Sponsor: New York State Defenders Association, Cayuga Defenders Group & Monroe County Public Defender's Office

Theme: Criminal Defense Training: Defending Against Snitches

Date: August 11, 2012

Place: Auburn, NY

Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: National Child Abuse Defense & Resource Center

Theme: The Law, The Science, The Myths, The Reality

Dates: September 6-8, 2012

Place: Las Vegas, NV

Contact: NCADRC: tel (419) 865-0513; fax (419) 865-0526; email kimhart@kimhart.com; website www.falseallegation.org/conference

Sponsor: New York State Defenders Association

Theme: Winning Criminal Defense Strategies

Date: November 2, 2012

Place: Poughkeepsie, NY

Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org ⚖

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

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

United States Supreme Court

In the online version of the *REPORT*, the name of each case summarized is hyperlinked to the opinion on the US Supreme Court's website, www.supremecourt.gov/opinions/. 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.

Counsel (Competence/Effective Assistance/Adequacy) (Right to Counsel)

Habeas Corpus (Federal)

[Martinez v Ryan](#), 566 US __, 132 SCt 1309 (3/20/2012)

Holding: Where a collateral proceeding is the first opportunity a state defendant has to challenge the ineffective assistance of trial counsel, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial" in federal habeas corpus proceedings; otherwise, no court will ever review the prisoner's claims. To properly present a claim of ineffective assistance of trial counsel often requires investigative work and an understanding of trial strategy, and where collateral proceedings are the first opportunity to do so, there is no court decision or work of other counsel on which to rely, so that "a prisoner likely needs an effective attorney." And "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system." "Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure

that proper consideration was given to a substantial claim." This equitable ruling should not put a significant strain on state resources as it "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial" nor does it create a free-standing constitutional issue or impose the same system for provision of counsel on every state, but rather allows states a range of choices. The question raised here is not addressed by the Antiterrorism and Effective Death Penalty Act of 1996 (28 USC 2254).

Dissent: [Scalia, J] The result of the majority's equitable ruling is no different than that of a constitutional ruling. States will be free to continue the common practice of not appointing counsel in all initial collateral proceedings, but if they do, prisoners' failure to raise ineffectiveness claims at that point will be excused and the "monotonously standard" issue of trial counsel's effectiveness will be litigated in federal court years later; this essentially forces states to provide counsel at initial postconviction proceedings, making the majority's "pretended avoidance of requiring States to appoint collateral-review counsel ... a sham." [Footnote omitted.] The effect will be particularly dramatic in death penalty cases. "I *guarantee* that an assertion of ineffective assistance of trial counsel will be made in *all* capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred" [Emphasis in original.] The majority opinion ignores the externality requirement that has been the guiding light of excuse-for-cause jurisprudence, disclaims a need to consider *stare decisis* but in effect casts away precedent reaffirmed this term, and avoids the need to confront the established constitutional rule that no right to counsel exists in collateral proceedings. A closer balance between the need for "finality of criminal judgments and the need to provide for review of defaulted claims of ineffective assistance of trial counsel" would have been to hold that "uncounseled failure to raise ineffective assistance of trial counsel would not constitute default." Adding ineffectively counseled failure "creates a monstrosity."

Counsel (Competence/Effective Assistance/Adequacy)

Double Jeopardy (Jury Trials) (Lesser Included and Related Offenses)

Guilty Pleas

[Lafler v Cooper](#), 566 US __, 132 SCt 1376 (3/21/2012)

Holding: The defendant's conviction by a jury on all counts after he rejected two plea offers conveyed by counsel must be overturned where the defendant showed "that but for the ineffective advice of counsel there is a reasonable probability that ... [he] would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances ..., that the court would

US Supreme Court *continued*

have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." All parties conceded that counsel's advice was deficient. The government's contentions, which can be reduced to the one claim that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining[.] ignore[] the reality that criminal justice today is for the most part a system of pleas, not a system of trials."

"The correct remedy in these circumstances ... is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed."

Dissent: [Scalia, J] The majority has made plea-bargaining "a whole new field of constitutionalized criminal procedure" Habeas relief should not be granted in any event, as the "constitutional right to effective plea-bargainers" created here "is at least a new rule of law ... and therefore cannot serve as the basis for habeas relief." Furthermore, the remedy offered is "unheard-of in American jurisprudence"

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

Missouri v Frye, 566 US __, 132 SCt 1399 (3/21/2012)

Holding: Plea bargains are "so central to the administration of the criminal justice system that defense counsel have responsibilities" in the process that must be met to assure the effective assistance of counsel that is required at critical stages of the criminal process. The state's arguments that it should not be subjected to consequences of defense counsel's inadequacies where a plea offer has been rejected or lapsed, because 1) there is little opportunity to observe that something is amiss and so no capacity to intervene, and 2) defendants have no right to receive a plea offer, cannot counter the reality that well over 90% of convictions result from guilty pleas. "This case presents neither the necessity nor the occasion to define the duties of defense counsel" in plea bargaining, but it is held that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." As to showing prejudice from counsel's failure to tell the respondent about earlier offers, the court below did not articulate the proper standard, which includes not only a reasonable probability that the respondent would

have accepted the lapsed plea "but also a reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court." The matter is remanded for consideration of state law questions bearing on the prejudice showing.

Dissent: [Scalia, J] The majority's description of how the prejudice question is to be answered on remand shows "how unwise it is to constitutionalize the plea-bargaining process." While plea bargaining "is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained it is not a subject covered by the Sixth Amendment"

Federal Law (Crimes)**Sentencing (Concurrent/Consecutive)**

Setser v United States, 566 US __, 132 SCt 1463 (3/28/2012)

Holding: "Because it was within the District Court's discretion to order that Setser's sentence run consecutively to his anticipated state sentence in the probation revocation proceeding; and because the state court's subsequent decision to make that sentence concurrent with its other sentence does not establish that the District Court abused its discretion by imposing an unreasonable sentence; we affirm the judgment of the Court of Appeals," which affirmed the sentence. The statutes governing the jurisdiction of the federal courts are to be construed in light of the common-law background against which those statutes were enacted; judges have long had discretion to determine whether sentences are to run concurrently or consecutively to other sentences, and a majority of federal courts have extended that to other sentences that are anticipated.

Dissent: [Breyer, J] Federal judges do not have the authority to direct that a federal sentence run consecutively to a not-yet imposed state sentence; the Sentencing Reform Act (SRA) does not explicitly give judges such authority and such authority would more likely hinder than advance the SRA's basic objectives because judges do not have the information needed to construct an appropriate sentence, which could lead to confusion and error.

Aliens (Deportation)**Appeals and Writs (Retroactivity)**

Vartelas v Holder, 566 US __, 132 SCt 1479 (3/28/2012)

Holding: The presumption against retroactive legislation bars application of provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), under which a lawful permanent resident (LPR) may be denied reentry to the United States after even a brief sojourn outside the country following a criminal conviction.

US Supreme Court *continued*

tion, to an LPR whose conviction predated IIRIRA and who, but for IIRIRA, could make brief trips abroad and return unimpeded.

Dissent: [Scalia, J] While the class of noncitizens governed by the provisions in question is defined by past offenses, “the regulated activity is reentry” after leaving the country, which occurs after IIRIRA’s effective date. [Emphasis in opinion.]

Civil Rights Actions (USC § 1983 Actions)

Jails (Conditions)

Search and Seizure (Detention) (Prisoners)

Florence v Board of Chosen Freeholders of the County of Burlington, 566 US __, 132 SCt 1510 (4/2/2012)

Holding: The record does not contain substantial evidence showing that correctional officials’ policies regarding “close visual inspection” of arrested persons who are to be held in jail while their cases are processed are “unnecessary or unjustified response[s] to problems of jail security,” so the courts must defer to the judgment of those officials. Given that admitting new inmates to detention poses a wide range of risks that cannot be detected without these measures, from lice and disease to signs of gang affiliation and a wide variety of contraband, “the record provides full justifications for the procedures used.” The seriousness of charged offenses is a poor predictor of contraband or dangerousness.

Concurrence (Part IV of decision): [Kennedy, J] Not decided are issues of what searches are permitted of persons who will not be held in general population at a jail or searches involving touching of detainees by jail officials.

Concurrence: [Roberts, CJ] “[I]t is important for me that the Court does not foreclose the possibility of an exception to the rule it announces” such as instances of arrests for minor traffic offenses.

Concurrence: [Alito, J] The decision “does not address whether it is always reasonable, without regard to the offense or the reason for detention, to strip search an arrestee before the arrestee’s detention has been reviewed by a judicial officer.”

Dissent: [Breyer, J] Searches that, as here, involve “close observation of the private areas of a person’s body” constitute a far more serious invasion of privacy than just undressing and showering under the observation of guards and are unreasonable when conducted of individuals arrested for minor offenses that do not involve drugs or violence. Searches conducted absent reasonable suspicion turn up but little contraband and many facilities require reasonable suspicion for the type of search involved here, and there is no showing that this results in

increased smuggling. The record here does not justify the policy upheld by the majority.

Civil Rights Actions (USC § 1983 Actions)

Witnesses (Immunity)

Rehberg v Paulk, 566 US __, 132 SCt 1497 (4/2/2012)

Holding: In an action under 42 USC 1983, a complaining witness (here the chief investigator in a district attorney’s office) is entitled to the same immunity for testimony given before a grand jury as a witness who testifies at trial.

Appeals and Writs (Scope and Extent of Review)

Harmless and Reversible Error (Harmless Error)

Vasquez v United States, 566 US __, 132 SCt 1532 (4/2/2012)

Holding: “The writ of certiorari is dismissed as improvidently granted.”

Habeas Corpus (Federal)

Wood v Milyard, 566 US __, 132 SCt 1826 (4/24/2012)

Holding: A federal court of appeals has the authority, although not an obligation, to address a forfeited timeliness defense on its own initiative. Here, where the federal district court’s inquiry as to timeliness of the petition elicited a response that the State would not challenge, but was not conceding, timeliness, and the district court then decided the merits of the issues raised, the court of appeals should have reached the merits as well.

Concurrence in the Judgment: [Thomas, J] Neither a federal court of appeals nor a district court should have the authority to consider a forfeited statute of limitations defense.

Aliens (Deportation)

Holder v Martinez Gutierrez, 566 US __, 132 SCt 2011 (5/21/2012)

Holding: The Board of Immigration Appeals engaged in permissible statutory construction by interpreting 8 USC 1229b(a), which relates to cancellation of removal, to require a foreign national living in this country as a child to meet the statute’s requirements independently, without counting the years of a parent’s residence or immigration status.

Auxiliary Services (Interpreters)

US Supreme Court *continued*

Taniguchi v Kan Pacific Saipan, Ltd., 566 US __, 132 Sct 1997 (5/21/2012)

Holding: Because the costs that prevailing parties in federal court may be awarded under 28 USC 1920 include “compensation of interpreters” but not of translators, and the ordinary meaning of “interpreter” is someone who orally translates between languages, costs of document translation cannot be awarded.

Dissent: [Ginsburg, J] The use of the word “interpreters” is subject to interpretation and given the purpose of translation and that district courts have awarded document translation costs over the past several decades, there is no good reason to exclude translation costs from the statute.

Juries and Jury Trials (Deliberation) (Discharge) (Findings)**Trial (Mistrial)**

Blueford v Arkansas, 566 US __, 132 Sct 2044 (5/24/2012)

Holding: Following a mistrial occasioned by the jury’s report that it was unanimous against guilt as to capital murder and first-degree murder but was deadlocked as to manslaughter and had not taken a vote on negligent homicide, the Double Jeopardy Clause does not bar retrial on the murder charges. The state court found on review that the jury’s report was not a formal announcement of acquittal and the trial court had not erred in rejecting the defense request for verdict forms that would have allowed rendering of a partial verdict. The defense contention that declaration of a mistrial on the higher counts was not a necessity is rejected.

Dissent: [Sotomayor, J] The majority misapplies the principles that an acquittal occurs when a jury’s decision “represents a resolution, correct or not, of some or all of the factual elements of the offense charged” and that a court “may not defeat a defendant’s entitlement to ‘the verdict of a tribunal he might believe to be favorably disposed to his fate’ by declaring a mistrial before deliberations end, absent a defendant’s consent or a “manifest necessity” to do so.”

Evidence (Sufficiency)**Habeas Corpus (Federal)**

Coleman v Johnson, 566 US __, 132 Sct 2060 (5/29/2012)

Holding: In this habeas corpus case, the Court of Appeals “failed to afford due respect to the role of the jury and the state courts of Pennsylvania” and looked to state

law not only as to the substantive elements of the crime but as to the sufficiency of evidence, which was error because “the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law.” The evidence at trial “was not nearly sparse enough to sustain a due process challenge under *Jackson [v Virginia]* (443 US 307 [1979]),” which sets a high bar based on two layers of judicial deference — the deference due on direct appeal to a jury’s findings, and the deference due in federal habeas to the sufficiency rulings of state reviewing courts, which can be overturned only when they are objectively unreasonable, which the findings here were not. A rational jury could conclude on this record that the defendant knew his co-defendant was armed with a shotgun, knew the co-defendant intended to kill the decedent, and helped usher the decedent into an alley to meet his fate.

Civil Rights Actions (USC § 1983 Actions)**Speech, Freedom of**

Reichle v Howards, 566 US __, 132 Sct 2088 (6/4/2012)

Holding: At the time that the plaintiff in this 42 USC 1983 action was arrested after touching the Vice President of the United States during an encounter at a mall, there was no clearly established law holding that an arrest supported by probable cause could violate the First Amendment. The Secret Service agents who effectuated the arrest, defendants in the case and petitioners here, are therefore entitled to qualified immunity. The question of whether “a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest” is not addressed.

Concurrence in the Judgment: [Ginsburg, J] While arresting officers, unlike prosecutors, are not absolutely immune from suit, those whose jobs are to protect public officials “must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy,” and may “rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge.” A rational assessment made in that regard should not expose them to civil liability.

Habeas Corpus (Federal)

Parker v Matthews, No. 11-845 (6/11/2012)

Holding: The Court of Appeals vacated the respondent’s 29-year-old murder convictions due to insufficient evidence in this death penalty case, in a “textbook example of what the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) proscribes: ‘using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.’” Neither of two bases offered for overturning the conviction was valid. First, the state high

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court’s assessment of the evidence itself in light of state law developed after the instant trial was not clearly the sole basis for affirming the conviction; the court found the evidence adequate to sustain a finding by the properly instructed jury that the state had carried its burden, and the federal Court of Appeals’ reversal was improper in light of the applicable twice-deferential standard of review. Second, as to the claim of prosecutorial misconduct, the Court of Appeals erred by, among other things, “consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the Kentucky Supreme Court’s decision [;] circuit precedent does not constitute ‘clearly established Federal law, as determined by the Supreme Court,’ 28 U. S. C. §2254(d)(1).”

Evidence (Hearsay)

Witnesses (Confrontation of Witnesses) (Experts)

[Williams v Illinois](#), No. 10-8505 (6/18/2012)

Holding: An expert witness’s testimony that, according to the records available to the expert, biological material from the accuser was sent to and received back from a testing lab did not violate the Confrontation Clause because it was not admitted for the truth of the matter asserted; the Clause allows “an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts.” And had the report of the lab been admitted, no confrontation violation would have occurred because the report was not produced as evidence against the petitioner but to find the perpetrator of a crime, and the expense of requiring the production in court of lab technicians who participate in the preparation of a DNA profile would encourage the use of older, less reliable forms of evidence. The defense may always subpoena those who participated in testing in a particular case to probe the reliability of the testing done. Had this case been tried before a jury instead of a judge, the dissent’s argument that the trier of fact took the expert’s assumption that the sample came from the accuser for the truth of that matter would have force, but it is assumed the judge acting as fact finder understood that the objected-to parts of the expert’s testimony were not admissible for the truth of what was asserted, and the judge observed that the issue was what weight to give the expert’s own comparison, not whether to exclude it. Finally, there was no reason shown to believe that the sample sent to the lab had a source other than the accuser; there is circumstantial chain of custody evidence linking the sample to the accuser. And safeguards exist to prevent abuses suggested by amici and the dissent.

Concurrence: [Breyer, JJ] None of the opinions here squarely address how the Confrontation Clause applies to

the range of crime lab reports and underlying technical reports; the case should be reargued. Barring that, I adhere to the dissenting view in *Melendez-Diaz v Massachusetts* (557 US 305 [2009]) and *Bullcoming v New Mexico* (564 US __ [2011]).

Concurrence in the Judgment: [Thomas, JJ] The lab statements here lacked the formality needed for them to be testimonial, but I share the dissent’s view of the plurality’s analysis. Rules of evidence should not lightly trump the confrontation right.

Dissent: [Kagan, JJ] The plurality opinion is, in fact, a dissent, as five justices specifically reject every aspect of the reasoning in it. The expert testimony here is functionally identical to the testimony proffered in *Bullcoming* and rejected as “surrogate testimony.”

Federal Law (Crimes)

Retroactivity

Sentencing

[Dorsey v United States](#), No. 11-5683 (6/21/2012)

Holding: Congress’s amendment of mandatory minimum sentences for cocaine, reducing the difference between sentences for crack cocaine and powder cocaine, apply to offenders who committed a crack cocaine offense before the new statute came into effect but were not sentenced until after that. “[A] contrary determination would seriously undermine basic Federal Sentencing Guidelines objectives such as uniformity and proportionality in sentencing.” Six considerations show that Congress intended the new penalties to apply to offenders whose crimes preceded the statute.

Dissent: [Scalia, JJ] The considerations relied on by the majority do not meet “the demanding standard for repeal by implication.”

Juries and Jury Trials (Constitution, Right to)

Sentencing (Fines)

[Southern Union Co. v United States](#), No. 11-94 (6/21/2012)

Holding: The rule that “[t]he Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant’s maximum potential sentence applies to sentences of criminal fines.” Where a jury convicted the defendant corporation of illegally storing liquid mercury “on or about” a stated date range, but the jury’s decision could have been based on a violation for even one day, the probation office set a maximum fine based on the statutory per-day maximum fine times 762 days based on the beginning and end dates set out in the verdict form, which the defense objected to based on the *Apprendi* rule, and the

US Supreme Court *continued*

court set the maximum fine at the amount set out by probation and imposed a lesser fine and community service obligation, the sentence is reversed.

Dissent: [Breyer, JJ] The Sixth Amendment allows a judge to determine sentencing facts relevant only to the amount of a fine to be imposed. A contrary conclusion “is ahistorical and will lead to increased problems of unfairness” Defendants in cases like the instant one may have trouble showing at trial that they committed no environmental crime, but in any event did so only on 20 days rather than 30, for example. Administrative problems may cause legislatures to change statutes in ways that produce sentences that are not proportional. And this holding may nudge the criminal justice system even further in the direction of resolution by plea rather than trial.

Aliens**Arrest****Constitutional Law (United States Generally)****Arizona v United States, No. 11-182 (6/25/2012)**

Holding: Constitutional challenges asserting that four provisions of a state law known as the Support Our Law Enforcement and Safe Neighborhoods Act, relating to state efforts to reduce the number of people who are not United States citizens entering and remaining in the country unlawfully, violate Congress’s authority to implicitly or explicitly preempt fields of law or conflict with federal law, are upheld as to three provisions. A state law forbidding the “willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code section 1304(e) or 1306(a)” is preempted by federal law because “Congress intended to preclude States from ‘complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations’” as to “the subject of alien registration.” A state provision making it illegal “for ‘an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor’” is preempted because it conflicts with Congress’s finding, by inaction, that it is “inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment.” A state provision allowing state officers to arrest without a warrant persons that the officers have probable cause to believe have committed public offenses that make those persons removable from the country is preempted because it “creates an obstacle to the full purposes and objectives of Congress,” which “has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances.”

However, the lower federal court erred by enjoining a provision dealing with state officers’ attempts to determine the immigration status of people they stop, detain, or arrest on some other basis, when there is reasonable suspicion that those persons are aliens unlawfully present in the country, and the determination of arrested persons’ immigration status before they are released, “before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.”

Concurrence in Part, Dissent in Part: [Scalia, JJ] The majority’s decision finding three of the four state law provisions preempted deprives states of the power to exclude from their sovereign territory “people who have no right to be there.” And as to the provision correctly found to have been enjoined improperly, the majority “goes to great length to assuage fears that ‘state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status’” when there is “no reason why a protracted detention that does not violate the Fourth Amendment would contradict or conflict with any federal immigration law.”

Concurrence in Part, Dissent in Part: [Thomas, JJ] “[T]here is no conflict between the ‘ordinary meanin[g]’ of the relevant federal laws and that of the four provisions of Arizona law at issue here.”

Concurrence in Part, Dissent in Part: [Alito, JJ] I agree that that the state provision requiring aliens to carry documentation at all times is preempted and that the provision requiring state officers to make reasonable attempts when practicable to determine the immigration status of people lawfully stopped, detained, or arrested, upon reasonable suspicion that such people are aliens here unlawfully, is not. I disagree that the other two provisions are invalid.

Constitutional Law (United States Generally)**Juveniles****Sentencing (Cruel and Unusual Punishment)
(Life Imprisonment Without Parole)****Miller v Alabama, No. 10-9646 (6/25/2012)**

Holding: “[M]andatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments’” because the sentencer is prevented “from considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change’ ... and runs afoul of our cases’ requirement of individualized sentencing for defendants facing the most serious penalties.” Given this holding the “alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger” is not considered, but given what has been said in prior decisions and

US Supreme Court *continued*

here “about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon” and require a sentencer “to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” [Footnote omitted.]

Concurrence: [Breyer, J] Precedent mandates that only juveniles convicted of homicide offenses who killed or intended to kill may constitutionally be sentenced to life without parole; if, on remand, in defendant Jackson’s case, there is a finding that he intended to cause the death of the store clerk who was shot by another teen during a robbery, “the question remains open whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile” in the circumstances presented.

Dissent: [Roberts, CJ] The majority invokes the Eighth Amendment’s ban on “cruel and unusual punishments’ ... to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such.” “Neither the text of the Constitution nor our precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole.”

Dissent: [Thomas, JJ] Neither line of reasoning applied by the majority “is consistent with the original understanding of the Cruel and Unusual Punishments Clause.”

Speech, Freedom of

United States v Alvarez, No. 11-210 (6/28/2012)

Holding: Because laws enacted to recognize individuals who acted with extraordinary honor in defense of the nation must be consistent with the Constitution for which they fought, because content-based regulation of speech must pass exacting scrutiny to withstand a First Amendment challenge, and because the Stolen Valor Act of 2005 (18 USC 704) under which the habitually-lying respondent was convicted for falsely claiming to be a Medal of Honor recipient cannot pass that scrutiny, the conviction here must be set aside. The few types of speech traditionally excepted from First Amendment protection have never included false statements except those associated with some legally cognizable harm or antithetical to the integrity of courts and other governmental processes; “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation” Upholding the law here would “endorse government authority to compile a list of subjects about which false statements are punishable.” Where the government has shown “no evidence to support its claim that the public’s general perception of military

awards is diluted by false claims such as those made by Alvarez” and “has not shown, and cannot show, why counterspeech would not suffice to achieve its interest,” and where the goal of protecting the integrity of military awards could be achieved through less-restrictive means, such as creation of an Internet-accessible database listing Congressional Medal of Honor winners to allow for easy exposure of false claims, the law cannot stand.

Concurrence in the Judgment: [Breyer, J] This law works First Amendment harm, such as chilling the making of true statements under the threat of prosecution for false ones, “while the Government can achieve its legitimate objectives in less restrictive ways.”

Dissent: [Alito, JJ] The decision here “breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.”

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.

Bail and Recognizance (Pretrial Detention) (Right to)

People ex rel McManus v Horn, 18 NY3d 660, 944 NYS2d 448 (3/22/2012)

Holding: While the legality of the petitioner’s pretrial detention “is technically no longer germane” following his guilty plea, the mootness exception applies “because the propriety of cash-only bail is an important issue that is likely to recur and ... typically will evade our review” The bail statute, CPL 520.10, which sets out nine categories of bail and allows courts to designate an amount without designating the form(s) in which it may be posted or to “direct that the bail be posted in any one of two or more” of those forms, does not authorize a court to fix a single form of bail. Flexible bail alternatives are consistent with the underlying statutory purpose of securing defendants’ attendance at future court proceedings. The practice of ordering a one-dollar cash bail, which defendants can refrain from paying in order to receive credit for time served if other bars to release exist, is for defendants’ benefit and unlikely to be objected to; “[i]n any event, it will take little judicial effort ... to order another form of bail ... to properly comply with the statute.”

Counsel (Competence/Effective Assistance/Adequacy)

Evidence (Prejudicial) (Relevancy)

People v Keating, 18 NY3d 932, 944 NYS2d 714 (3/22/2012)

NY Court of Appeals *continued*

Holding: The defendant was not denied effective assistance of counsel by his appellate attorney's failure to argue that the trial court erred in admitting over objection a portion of a videotape of the defendant's response to being asked whether he consented to a blood test following a car accident in which another person died. Admission of the videotape was a matter of court discretion, and while the defendant's comments about not releasing the police or doctors from liability for blood draw problems were arguably irrelevant under depraved indifference law at the time, the omitted argument "was by no means 'clear-cut'" and was unlikely to prevail, so its omission on appeal was not inconsistent with reasonably competent representation.

Sex Offenses (Elements)

People v Mack, 18 NY3d 929, 942 NYS2d 457 (3/22/2012)

Holding: That a subway car was so crowded the complainant could not move away from the man whose semen was later found on the back of the complainant's outer clothing "merely masked and facilitated the unwanted sexual contact alleged" and did not establish that the contact was compelled by physical force, an element of first-degree sexual abuse. The Appellate Division dissenters' analogy to the role of robbery accomplices who intimidate or block a victim does not hold, as there was no coordinated action by the defendant and the other passengers.

Instructions to Jury (Verdict Sheet)**Juries and Jury Trials**

People v Miller, 18 NY3d 704, 944 NYS2d 433 (3/22/2012)

Holding: The Legislature's amendment of CPL 310.20(2) to expand what is permitted in a verdict sheet left unchanged the basic principle that "[n]othing of substance can be included that the statute does not authorize." Nothing in the amended statute authorized the addition of burden of proof language; the form used by the jury here included language, to which the defense objected, asking if the defendant had "established by a **preponderance of the evidence** that he acted under Extreme Emotional Disturbance." [Emphasis in opinion.] Nor did the amendment to the statute provide for a harmless error analysis where a verdict sheet exceeds the statutory limitations.

Dissent: [Read, J] The error complained of was harmless and the conviction should be upheld.

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

People v Rodriguez, 18 NY3d 667, 944 NYS2d 438 (3/22/2012)

Holding: The provisions of CPL 430.10, which say that a sentence of imprisonment that is accordance with law cannot be changed once it has begun, do not preclude remittal of a case for resentencing where the Appellate Division concluded that unlawful consecutive sentences had been imposed on two counts. The statute was derived from prior law prohibiting trial courts from changing sentences, and is limited by the phrase "[e]xcept as otherwise specifically authorized by law," along with CPL 470.20, which gives intermediate appellate courts broad authority "to take corrective action upon a modification of a sentence." To address whether Penal Law 70.25(2) allows any remaining counts in this case to run consecutively to the counts that the Appellate Division found must be concurrent would be premature.

Dissent in Part: [Lippman, CJ] The defect in the defendant's sentence was corrected when the Appellate Division directed that the attempted murder and assault convictions be served concurrently rather than consecutively. Any additional restructuring of the now-lawful sentence is precluded by CPL 430.10, and "remittal for the purpose of increasing the severity of the aggregate sentence was erroneous."

Dismissal**Prosecutors (Decisionmaking)**

People v Extale, 18 NY3d 690, __ NYS2d __ (3/27/2012)

Holding: "[A] prosecutor does not have the unilateral power to dismiss a count of a grand jury indictment over a defendant's objection. Whether such a count should be dismissed at the prosecutor's request is an issue to be decided by the court in its discretion." Nothing about passage of the Criminal Procedure Law, which does not contain a continuation of the Code of Criminal Procedure's abolition of prosecutorial nolle prosequi, indicates an intention to restore the unilateral prosecutorial authority to refuse to proceed on a count of a grand jury's indictment. While the prosecution could have moved for dismissal in the interest of justice of the count in question, or the court could have exercised its power under CPL 300.40(6)(a) to withdraw a count with the prosecution's consent, and it may be that the court could dismiss a count with prosecution consent even where neither the interest of justice statute nor 300.40(6)(a) applies, that is not the issue here. Where the court made clear it was deferring to the prosecutor rather than exercising its own power, the conviction must be overturned and a new trial ordered.

NY Court of Appeals *continued*

Narcotics (Marijuana) (Possession)

People v Jackson, 18 NY3d 738, 944 NYS2d 715 (3/27/2012)

Holding: When the defendant was in his vehicle on a public highway, he was “in a ‘public place’” within the meaning of Penal Law 240.00(1). Where the accusatory instrument alleged that an officer approaching the defendant’s car smelled a strong odor of marijuana coming from the vehicle and saw the defendant holding a quantity of the substance in his hand “‘open to public view,’” the allegations support an inference that the marijuana was in an unconcealed area visible to passersby, and therefore were not conclusory as to the statutory open-to-public-view requirement.

Dissent: [Lippman, CJ] The majority decision is contrary to the statute’s plain meaning and does not give sufficient weight to the legislative intent “to lessen the burden on an already overtaxed justice system by decriminalizing private possession of small amounts of marihuana.”

Confessions (Corroboration) (Evidence) (Interrogation) (Voluntariness)

Witnesses (Experts)

People v Bedessie, 19 NY3d 147, __ NYS2d __ (3/29/2012)

Holding: The trial court did not abuse its discretion by declining to hold a *Frye* hearing as to proposed expert testimony regarding the reliability of a confession. “While in a proper case expert testimony of the phenomenon of false confessions should be admitted,” the proffered testimony provided to the court the day before trial did not meet the requisite standard of relevancy to the defendant and interrogation at issue.

Dissent: [Jones, JJ] Where the defendant was convicted based on her confession and unsworn in- and out-of-court statements by a four-year-old, a *Frye* hearing should have been held and expert testimony on the reliability of the confession should have been admitted if it satisfied the relevant prongs of *People v LeGrand* (8 NY3d 449).

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

Search and Seizure (Appellate Review)

People v Ingram, 18 NY3d 948, 944 NYS2d 470 (3/29/2012)

Holding: The Appellate Division, which resolved the defendant’s suppression issue on a theory not reached by

the court below, is precluded “from reviewing an issue that was either decided in an appellant’s favor or was not decided by the trial court” so the matter must be remitted to the trial court for further proceedings.

Dissent: [Pigott, JJ] The decision in *People v LaFontaine* (92 NY2d 470) should be overruled, and in any event does not apply here. Rather than upholding a denial of suppression on a ground expressly rejected by the trial court, the Appellate Division here ruled that the officer’s initial request for the defendant’s name was permissible as a first-level *De Bour* inquiry, and the further inquiry when he realized the defendant had given a false name was justified under the second level of *De Bour*, while the trial court found that second inquiry was improper, which “if anything ‘adversely affected the appellant’” Remand, which will no doubt result in denial of suppression on second-level *De Bour* grounds, is a pointless exercise.

Appeals and Writs (Judgments and Orders Appealable)

Perjury (Evidence)

People v Perino, 19 NY3d 85, __ NYS2d __ (3/29/2012)

Holding: The prosecution’s appeal of the Appellate Division’s reduction of two counts of perjury from first degree to third degree, which was based on the theory that the content of the perjury had not been material to the criminal matter in which it was given, must be dismissed; materiality is typically a question of fact, and the Appellate Division’s determination, based on a factual analysis, is an unreviewable question of fact. The police officer defendant contends as to other counts that the subject of his perjury was only at issue in the suppression hearing of the underlying criminal case, and so was not material at the trial; this overlooks that the defendant in the underlying criminal trial could seek to convince the jury that unsuppressed evidence should be disregarded as involuntarily made.

Counsel (Competence/Effective Assistance/Adequacy)

Misconduct (Prosecution)

Trial (Summations)

People v Fisher, 18 NY3d 964, 944 NYS2d 453 (4/3/2012)

Holding: The defendant was denied effective assistance of counsel where his attorney failed to object to highly prejudicial instances of prosecutorial abuse during summation, including bolstering of the accusers’ testimony by referring to prior consistent statements not in evidence, improperly advising the jury that evidence of the accusers’ contemporaneous misbehavior could be considered as proof that the abuse had occurred, offering a “less than frank minimization of the consideration” a jailhouse

NY Court of Appeals *continued*

informant received for his vital testimony that the defendant admitted the offenses, and admonishing the jury that it was crucial to the administration of justice for them to accept the testimony of the young accusers. No strategic basis for the failure to object is apparent.

Dissent: [Smith, J] “I simply cannot fathom why the majority is reversing in this case.” None of the passages in the prosecutor’s summation would warrant reversal had there been objections that were overruled. Defense counsel may have refrained from objecting because he had given a strong summation and thought silence more effective than interrupting his adversary. Even if that was a mistake, it did not constitute ineffective assistance.

Extradition**Freedom of Information**

People v Leshner v **Hynes**, 19 NY3d 57, __ NYS2d __ (4/3/2012)

Holding: Where a suspect fled from the United States to Israel after indictment in 1984 for sex abuse of young boys and was not extradited due to differences in the laws of the two countries, and information about the case was produced by the prosecutor in response to a 1998 Freedom of Information Law request, denial of a second FOIL request in 2008 under Public Officers Law 87(2)(e)(i) was proper on the grounds that the case was now active given that a new extradition treaty made prosecution of the case viable. While not every document in a criminal case file is automatically exempt from disclosure, identification of generic kinds of documents for which the exemption is claimed and the generic risks posed by disclosure of those types of documents is sufficient, especially when the underlying prosecution appears viable. Where an Israeli court decision issued after the record in this matter was closed makes it appear unlikely the criminal prosecution will ever proceed, another FOIL petition based on that decision could be brought.

Defenses (Mistake of Fact or Law)**Robbery (Defenses) (Elements) (Instructions)**

People v Pagan, 19 NY3d 91, __ NYS2d __ (4/3/2012)

Holding: Where the defendant and the cab driver she was accused of robbing had engaged in a complicated series of small cash exchanges, and the defendant eventually pulled a knife, demanding return of money, the defenses of claim of right and mistake of fact were equivalent; the claim of right defense here was “a specific instance of the more general category of mistake of fact.” The court did not reversibly err by refusing the defense

request for a mistake of fact charge to the jury because the defense cannot apply to using force to take money to satisfy a debt. While a good-faith belief that a chattel belongs to the taker negates “the larcenous intent element of robbery” and could apply to currency in circumstances involving intrinsic qualities of the cash (such as a bill marked by handwriting), there was no evidence here that the particular bills the defendant sought to take “had any significance for defendant, or that she could identify them as hers” and the negative claim of right instruction was proper.

Lesser and Included Offenses (Instructions)**Weapons (Possession)**

People v Perry, 19 NY3d 70, 944 NYS2d 750 (4/3/2012)

Holding: Denial of the defendant’s request for a jury charge on fourth-degree criminal possession of a weapon under Penal Law 265.01(1) was not error where the defendant admitted that, after being told the decedent had threatened to shoot the defendant and his family, the defendant displayed a gun to the decedent to scare him before the gun went off accidentally. The second-degree weapons possession statute under which the defendant was convicted (former Penal Law 265.03) required proof of possession of a loaded firearm with intent to use it unlawfully against another. There is no reasonable view of the evidence under which the defendant did not intend to commit at least the crime of second-degree menacing while possessing the gun.

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

People v Bowden, 18 NY3d 980, 944 NYS2d 753 (4/26/2012)

Holding: “On review of submissions pursuant to section 500.11 of the Rules, appeal dismissed upon the ground that the reversal by the Appellate Division was not ‘on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal’ (CPL 450.90[2][a]).”

[*Ed. Note:* A summary of the First Department decision in *Bowden* (87 AD3d 402) appears in the Aug.-Oct. 2011 issue of the REPORT.]

Search and Seizure (Electronic Searches)

People v Rodriguez, 19 NY3d 166, __ NYS2d __ (4/26/2012)

Holding: A defendant who receives notice of an eavesdropping warrant within 15 days of arraignment and so relies in a suppression motion on CPL 700.50(3)

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because CPL 700.70 is inapplicable must show prejudice. The defendant here, one of the targets of an eavesdropping warrant, learned of that warrant at arraignment, and was indicted a week later for drug sale and conspiracy. He moved to suppress the recorded calls on the ground that he was not given proper notice under 700.50(3) within 90 days of its termination. While that section does not provide sanctions for violation, 700.70 requires that defendants receive a copy of any eavesdropping warrant and accompanying application within 15 days of arraignment, and makes suppression the penalty for violation of the disclosure requirement; suppression is generally the penalty for violation of 700.50(3). However, suppression has not been required when the defendant independently learned of an eavesdropping warrant in the requisite time period, a holding that “implicitly rests on the premise that suppression should not be ordered for a CPL 700.50(3) violation where there is no prejudice to the defendant.”

Dissent: [Ciparick, J] There is no basis to hold that a suppression motion under 700.50(3) cannot prevail without a showing of prejudice. As has been held, “without ‘scrupulous compliance with article 700 ... any evidence derived from [a] wiretap is inadmissible’” “[T]he notification requirement is intended to inure not only to the benefit of defendants but also ‘to the community at large’ Today’s holding minimizes the significance of statutory noncompliance.”

Sentencing (Post-Release Supervision)

People v Williams, 19 NY3d 100, __ NYS2d __ (4/26/2012)

Holding: For purposes of calculating the duration of an order of protection issued at sentencing, “‘a determinate sentence ... actually imposed’” under former CPL 530.13(4) includes the mandatory period of post-release supervision (PRS). Here, a 13-year prison term was imposed for first-degree assault, and an order of protection was issued to run for three years from the date the defendant was released from the “‘maximum time of incarceration.’” At a resentencing ordered upon appeal because PRS was not mentioned, a three-year term of PRS was ordered. The court properly found that the three-year PRS period extended the end date of the order of protection.

Jurisdiction (Subject Matter)

Juveniles (Paternity) (Support Proceedings)

Matter of O. v M., 19 NY3d 828, __ NYS2d __ (5/1/2012)

Holding: “Family Court erred by failing to hold a hearing on equitable estoppel after genetic testing was conducted” The matter must be remitted for a hearing and determination on the equitable estoppel claim. The family court had subject matter jurisdiction to order the appellant to pay child support even though a court in another state ordered another person to pay child support.

Homicide (Manslaughter [Evidence]) (Murder [Intent])

People v Ramos, 19 NY3d 133, __ NYS2d __ (5/1/2012)

Holding: Where the defendant, after being mocked by witnesses to an altercation on the street, retrieved a gun and fired into a group of people, killing one, and later said that he did not believe his small-caliber weapon would kill anyone, a reasonable jury could have concluded he intended to cause serious physical injury when he acted and caused a death; the evidence was legally sufficient to sustain his conviction for first-degree manslaughter. That the defendant’s acts might also be deemed reckless does not negate this conclusion, as “[t]here is no contradiction in saying that a defendant intended serious physical injury, and was reckless as to whether or not death occurred” The prosecutor brought no depraved indifference charge; their theory was that the defendant intended to kill, not that the defendant “shot into a crowd without knowing or caring whether he would kill anyone.”

Sentencing (Post-Release Supervision)

People v Yuson, 19 NY3d 825, __ NYS2d __ (5/1/2012)

Holding: Where the defendant pleaded guilty to second-degree assault as a first-time felony offender and was promised the court would impose a sentence of three and a half years in prison followed by the minimum allowable term of post-release supervision (PRS), but actually received a PRS term of five years, the PRS term was improper. The defendant was sentenced under Penal Law 70.02(3)(c), and Penal Law 70.45(2)(e) says that a PRS term imposed under 70.02(3) “‘shall be not less than one and one-half years nor more than three years’”

Appeals and Writs (Waiver of Right to Appeal)

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

Speedy Trial (Waiver)

People v Alexander, 19 NY3d 203, __ NYS2d __ (5/3/2012)

Holding: That the court told defense counsel the defendant’s guilty plea would only be accepted if he withdrew all outstanding motions and waived the right to

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appeal, and twice asked the defendant if he understood that all writs and motions were being withdrawn, did not, in context, go against appellate precedent; the conviction and sentence are therefore affirmed. The defendant had filed numerous pro se motions and writs, including a writ just as the case was going to trial that required an adjournment and a constitutional speedy trial motion. The decisions in *People v White* (32 NY2d 393), *People v Blakley* (34 NY2d 311), and *People v Sutton* (80 NY2d 273) are distinguishable, as they “dealt *solely* with attempts by prosecutors to manipulate plea bargaining so as to preclude judicial consideration of constitutional speedy trial claims,” [emphasis in original] while here the court’s comments could be understood as letting the defendant know that the court would not be deciding his motions once he pleaded guilty.

Dissent: (Ciparick, J) The judge expressly conditioned the defendant’s plea on the withdrawal of his constitutional speedy trial motion; the plea should be vacated as inherently coercive. An undecided motion that is abandoned by operation of law upon a guilty plea is distinguishable from a court insisting a defendant withdraw all pending writs and motions.

Homicide (Manslaughter [Evidence]) (Murder [Intent])**Kidnapping (Aggravated Kidnapping [Moving])**

[People v Bussey](#), 19 NY3d 231, __ NYS2d __ (5/3/2012)

Holding: By acquitting the defendant of intentional murder but convicting him of depraved indifference murder of the decedent, who was beaten for about ten or more minutes and died from “[m]ultiple blunt impact trauma to his head and torso,” the jury concluded that the defendant acted recklessly, but the prosecution did not show that the defendant evinced utter disregard for the decedent’s life, so the murder conviction is reduced to second-degree manslaughter. The acts that resulted in death were separate and distinct from the transportation of the decedent in the defendant’s car to a separate location while the decedent was still alive, so the acts alleged to constitute kidnapping did not merge into the homicide.

Article 78 Proceedings**Sex Offenses (Sex Offender Registration Act)**

[People v Liden](#), 19 NY3d 271, __ NYS2d __ (5/3/2012)

Holding: “A determination by the Board of Examiners of Sex Offenders that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender’s risk level.” While rulings of administrative agencies are

generally reviewable only in article 78 proceedings, the unique structure of New York’s sex offender registration law with regard to offenders whose convictions occurred out of state warrant an exception. Since the Board determines whether an offender with a foreign conviction must register, but a court has the final determination as to the risk level of those out of state offenders who must register, both efficiency and good policy warrant having the same court review registrability and resolve risk level issues. Individuals alleged to be sex offenders will often be without counsel when the Board determines registrability but have counsel appointed for the risk level proceedings, which may occur after the article 78 four-month statute of limitations has run. “And to bar the risk level court from examining registrability may put that court in the uncomfortable position of deciding the risk level of someone who, the court is convinced, is not a sex offender within the meaning of the statute at all.”

Juveniles (Neglect)

[Matter of Damian G.](#), 19 NY3d 841, __ NYS2d __ (5/8/2012)

Holding: “On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order reversed, with costs, and petition dismissed. The determinations of neglect against Jacquelyn M. and Christopher G. are not supported by legally sufficient evidence.”

Appeals and Writs (Judgments and Orders Appealable)**Sentencing (Appellate Review) (Excessiveness)**

[People v Gilliam](#), 19 NY3d 842, __ NYS2d __ (5/8/2012)

Holding: In each of these cases, “defendants pleaded guilty to a particular crime and waived the right to appeal ..., [then] subsequently challenged the validity of the waiver and asserted that the sentence was excessive. The Appellate Division summarily affirmed without indicating whether it relied on the waiver or determined that the sentencing claim lacked merit This was impermissible under *People v Qoshja* (17 NY3d 910, 911 [2011]). Consequently, we reverse and remit each case to the Appellate Division for clarification of the basis of its decision.”

Sex Offenses (Child Pornography)

[People v Kent](#), 2012 NY Slip Op 03572 (5/8/2012)

Holding: Where the evidence fails to show that a defendant was aware of “cache files” — temporary Internet files automatically created and stored on a hard drive — the prosecution has not met its burden of showing the defendant’s “knowing procurement or possession

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of those files.” The defendant’s contention that “merely ‘accessing and displaying’ Web images of child pornography does not constitute procurement for purposes of Penal Law § 263.15” is accepted; “where a promotion or possession conviction is premised on cached images or files as contraband, the People must prove, at a minimum, that the defendant was aware of the presence of those items in the cache.” While files stored in the cache may constitute evidence of images that were previously viewed, regardless of a defendant’s awareness of the cache function, possession of those images requires more affirmative acts of control than mere viewing, such as printing, downloading, or saving. Where testimony of an investigator from the State Police computer forensic lab established that at some point the defendant downloaded and/or saved child pornographic images before deleting them, the defendant was properly convicted of promotion and possession of those images.

Concurrence: [Smith, J] “[R]eading the statutes expansively, to include as many ‘consumers’ as the statutory language can reasonably be interpreted to permit,” as Judge Graffeo’s concurrence suggests, would be no more effective than “[a] policy of draconian enforcement directed at the most minor and peripheral of users” is likely to eliminate illegal drugs.

Concurrence in Result Only: [Graffeo, J] “Although it is not necessary for our Court to address these issues to resolve this case, the majority has decided to consider whether the statutory bans on acquiring and possessing embrace the viewing of images of child pornography that are accessed on the internet.” [Footnote omitted.] I disagree with a decision that makes viewing of hundreds of child pornographic images or videos legal as long as those images are not downloaded, printed, or further distributed.

New York State Agencies (Correction, State Commission of)

Subpoenas and Subpoenas Duces Tecum

Matter of New York City Health & Hosps. Corp. v New York State Commn. of Correction, 19 NY3d 239, __ NYS2d __ (5/8/2012)

Holding: A specific, narrow exception to the physician-patient privilege is “reasonably and indeed practically necessarily to be implied” where the respondent Commission, constitutionally charged with overseeing all correctional facilities in the state, while discharging its mandate to investigate the death of any inmate of a correctional institution, seeks through its Medical Review Board the pre-mortem medical records of a prisoner who subsequently died in another hospital.

Accusatory Instruments (Sufficiency)

Admissions (Corroboration)

People v Suber, 19 NY3d 247, __ NYS2d __ (5/8/2012)

Holding: The principle that “a person cannot ‘be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed’ (CPL 60.50)” does not apply to the adequacy of charging instruments, and “the precise language that the Legislature chose when the Criminal Procedure Law was adopted unmistakably establishes that corroboration was intended to be a component of the prima facie case for an indictment but not an information.” Here, the absence of allegations in the information corroborating the defendant’s admissions that he had failed to register two prior addresses as required by his status as a level three sex offender did not affect the jurisdictional validity of the information; his guilty plea stands.

Dissent: [Ciparick, J] The majority “departs from well settled precedent and again ‘brushes aside the protections that must be afforded to misdemeanor defendants to ensure that such prosecutions do not become routinized or treated as insignificant or unimportant’”

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

Dombrowski v Bulson, 2012 NY Slip Op 04203 (5/31/2012)

Holding: The Appellate Division erred in reinstating the plaintiff’s complaint seeking nonpecuniary damages in this legal malpractice action against his former criminal defense attorney for loss of liberty and other losses directly resulting from imprisonment. “Allowing this type of recovery would have, at best, negative and, at worst, devastating consequences for the criminal justice system.” It could chill the “willingness of the already strapped defense bar to represent indigent accused.... [and] put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions.”

Narcotics (Penalties)

Sentencing (Resentencing) (Second Felony Offender)

People v Dais, 2012 NY Slip Op 04201 (5/31/2012)

Holding: In the instant resentencing proceedings under the Drug Law Reform Act (DLRA) of 2009, “de novo review of whether the defendant’s prior felony is non-violent or violent is proper” because the distinction between violent and nonviolent priors did not exist in sentencing for drug cases before enactment of the 2004

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DRLA. Therefore, the prosecutor in *People v Dais* was properly allowed to introduce a new predicate felony statement to show that the defendant must be adjudicated a second felony drug offender whose prior offense was a violent felony, making Penal Law 70.70(4)(a) applicable, even though he had initially been sentenced based on a non-violent prior. In *People v Stanley*, the defendant was entitled to argue at resentencing that he was not previously convicted of a violent felony because his out of state convictions should not be considered the equivalent of New York violent felonies as that issue did not arise at the initial sentencing; he may not challenge the adjudication finding him a second felony offender, as he failed to contest the equivalency of his Florida conviction to a New York felony at the original proceeding.

Kidnapping (Elements)**People v Leonard, 2012 NY Slip Op 04206 (5/31/2012)**

Holding: It is legally possible for custodial parents to be guilty of kidnapping their children where parental actions are “so obviously and unjustifiably dangerous or harmful to the child as to be inconsistent with the idea of lawful custody.” Children too young to move on their own may be deemed to be restrained when the lawful movement of the children by adults is hindered; otherwise, no infant could ever be kidnapped. The holding here should not be too readily extended; “[n]ot every parent who disciplines a child inappropriately ... becomes a kidnapper” by causing a child to be moved, or to remain stationary. But where the defendant held a knife to his daughter’s throat and threatened to kill her if anyone tried to take her, his restrictions of her movements were unlawful; he could not consent to such restrictions because “the unlawfulness was blatant enough to justify the inference that he knew he was acting unlawfully.”

Homicide (Murder [Evidence] [Intent])**People v Matos, 2012 NY Slip Op 04204 (5/31/2012)**

Holding: While the defendant did put her own interests ahead of those of her child after the child suffered severe abuse by the defendant’s partner, the prosecution failed to show that the defendant did not care whether the child lived or died, given the defendant’s admittedly inadequate measures to aid him and her belated call for help, so that the conviction of depraved indifference murder of a child under 11 was not supported by sufficient evidence of the requisite culpable mental state. That count of the indictment is dismissed without prejudice to representation of appropriate charges to a new grand jury.

Dissent: [Pigott, J] “[O]n this evidence the jury could and did rationally conclude that defendant did not care at all about her own child’s plight,” so the conviction should be affirmed.

Misconduct (Judicial)**Matter of Schilling, 2012 NY Slip Op 04202 (5/31/2012)**

Holding: “On the Court’s own motion, it is determined that Honorable Diane L. Schilling is suspended, with pay, effective immediately, from the office of Justice of the East Greenbush Town Court, Rensselaer County, pending disposition of her request for review of a determination by the State Commission on Judicial Conduct.”

Narcotics (Penalties)**Sentencing (Second Felony Offender)****People v Yusuf, 2012 NY Slip Op 04200 (5/31/2012)**

Holding: A defendant could properly be adjudicated “a second felony drug offender previously convicted of a violent felony (*see* CPL 400.21 [7] [c]; Penal Law § 70.70 [4])” based on a foreign robbery conviction. “Considering section 70.70 (4) in light of Penal Law § 70.06 (1) and CPL 400.21 (2), (4) and (7) (c), we conclude that the Legislature meant for prosecutors and sentencing courts to take foreign violent felony convictions into account when determining a defendant’s sentencing status, notwithstanding the ambiguity created by the reference in section 70.70 (1) (c) to Penal Law § 70.02.” The defendant’s construction would have the Drug Law Reform Act increase sentences for prior non-violent felonies in foreign jurisdictions, but not for prior violent foreign felonies.

However, the trial court here improperly looked at the indictment underlying the defendant’s North Carolina conviction to determine whether, as a factual matter, the New York intent element of robbery was satisfied. The trial court’s ruling, favoring the defendant, that the North Carolina statute is broader than a felony in New York, is unreviewable on appeal.

Double Jeopardy (Jury Trials)**Juries and Jury Trials (Deliberation)****People v Gause, 2012 NY Slip Op 04276 (6/5/2012)**

Holding: The prohibition against double jeopardy requires reversal of the defendant’s second-degree intentional murder conviction where the defendant: was originally tried for second-degree murder under alternative theories of depraved indifference and intentional murder; was convicted of depraved indifference murder by a jury that had been instructed that they could not convict the defendant of both; had his conviction reversed by the

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Appellate Division for insufficient evidence of the depraved indifference count; and was convicted by a new jury of depraved indifference murder upon retrial. “Because the first jury had before it counts of depraved indifference murder and intentional murder — inconsistent counts — and it reached a guilty verdict on one, that determination necessarily acquitted defendant of the other crime”

Dissent: [Pigott, J] On the record here, where the first jury was instructed that if it found the defendant guilty of one count of murder it could not then convict on the other, and the jury began its deliberations with the depraved indifference murder count, it is possible that the first jury did not consider the intentional murder count at all. If double jeopardy does not bar retrial of top counts where a jury has reached a tentative acquittal on them but hung on a lesser count (*Blueford v Arkansas*, 556 US ___ [2/22/2012]), the “implied acquittal” doctrine should not bar retrial on the unconsidered intentional murder count here.

Freedom of Information

[Matter of Harbatkin v New York City Dept. of Records & Info. Servs.](#), 2012 NY Slip Op 04277 (6/5/2012)

Holding: Transcripts dating from the middle of the twentieth century of New York City Board of Education interviews with or regarding present or former members of the Communist Party should be released unredacted under a Freedom of Information Law request, except for “material that would identify informants who were promised confidentiality.” Claims of privacy that have been diminished by time must be weighed against the claims of history, but a solemn promise to individuals by a representative of the New York City government “that no one would find out they were being interviewed” may not be broken, at least not now.

Appeals and Writs (Judgments and Orders Appealable)

Probation and Conditional Discharge (Conditions and Terms) (Modification)

[People v Pagan](#), 2012 NY Slip Op 04278 (6/5/2012)

Holding: The Criminal Procedure Law does not provide for appeal by a defendant in a criminal case from an order “modifying the conditions of probation to permit the Department of Probation to conduct sporadic ‘knock and announce’ searches of defendant’s home at reasonable hours when he was present,” entered over six months after the defendant was sentenced to a split sentence of six months in jail and five years’ probation, on the motion of

the probation department made three months after sentencing. “[J]udicial review must be sought in a CPLR article 78 proceeding.”

Dissent: [Smith, J] The majority’s “literalistic reading [of] CPL 450.30 (3)” creates “a convoluted rule the Legislature could not possibly have intended” That is, defendants can appeal from their sentences when first imposed, and if the sentences are vacated, appeal will lie from resentencing, but sentences modified, without being vacated, in ways unfavorable to defendants cannot be appealed.

Witnesses (Confrontation of Witnesses)

[People v Reid](#), 2012 NY Slip Op 04272 (6/5/2012)

Holding: “[A] defendant can open the door to the admission of testimony that would otherwise be inadmissible under the Confrontation Clause of the United States Constitution.” The Clause “cannot be used to prevent the introduction of testimony that would explain otherwise misleading out-of-court statements introduced by the defendant.” When the issue arises, “[t]he inquiry is twofold — ‘whether and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression’” Where defense counsel, in furtherance of a theory that investigation of the case had been inadequate, had questioned witnesses about a man named McFarland whose name had come up but who was never charged, and the prosecutor in turn asked a police witness about having heard a nontestifying eyewitness — impliedly the co-defendant, who was being tried separately — say that McFarland was not there, the court properly overruled counsel’s objection on the basis that counsel had opened the door.

Homicide (Murder [Sentence])

Sentencing (Concurrent/Consecutive)

Weapons (Possession)

[People v Wright](#), 2012 NY Slip Op 04273 (6/5/2012)

Holding: Where the jury convicted the defendant of second-degree weapon possession and two counts of first-degree murder (intentional murder for one killing and murder with the intent to kill or seriously injure as to the other), the court erred in imposing consecutive sentences for the weapons charge and the murders because only where second-degree weapon possession was “accomplished before the commission of the ensuing crime and with a mental state that both satisfies the statutory mens rea element and is discrete from that of the underlying crime may consecutive sentences be imposed” Here,

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the prosecution did not allege or prove an unlawful intent separate and distinct from the intent to shoot the decedents; “[t]he crime of second degree weapon possession was completed only upon the shootings”

Instructions to Jury (Cautionary Instructions)**Trial (Joinder/Severance of Counts and/or Parties)****People v Chestnut, 2012 NY Slip Op 04375 (6/7/2012)**

Holding: The trial court’s conceded error in denying the defendant’s repeated requests for a severance based on the improper joinder of certain drug and resisting arrest counts relating only to the co-defendant in the single indictment was not harmless. The evidence against the defendant was far from overwhelming where there was reason to doubt the reliability of the identification testimony of the complainant, who was the only identifying witness; no corroborating evidence; no physical evidence linking the defendant to the robbery; and no inculpatory statements by the defendant. The jury learned a great deal about the unrelated charges against the co-defendant, including the volume of drugs and drug paraphernalia found at his mother’s house where he was arrested; 46 percent of the trial testimony, and more than half of the witnesses and exhibits presented at trial, had nothing to do with the defendant. The curative instructions did not cure the prejudice where the court, when saying that the drug and resisting charges applied only to the co-defendant, “did not instruct the jury to disregard the evidence related to those unrelated counts when considering defendant’s guilt or innocence.”

Appeals and Writs (Preservation of Error for Review)**Discovery (Matters Discoverable) (Prior Statements of Witness)****People v Flores, 2012 NY Slip Op 04379 (6/7/2012)**

Holding: Where trial counsel for the defendant received a transcript of the nine-year-old accuser’s videotaped grand jury testimony, viewed the videotape at the prosecutor’s office, and did not object to the viewing arrangement or request a copy of the videotape, the issue of whether CPL 240.45 and *People v Rosario* (9 NY2d 286) obligated the prosecution to provide a copy of the videotape was not preserved for appeal.

Appeals and Writs (Preservation of Error for Review)**Counsel (Competence/Effective Assistance/Adequacy)****Guilty Pleas (Errors Waived By) (Withdrawal)****People v Haffiz, 2012 NY Slip Op 04376 (6/7/2012)**

Holding: Denial of the defendant’s motion to withdraw his guilty plea was not an abuse of discretion where the motion was based on claims of factual innocence and entrapment, because the defendant “knowingly and voluntarily admitted the factual allegations of the crimes and made no protest of innocence.” The ineffective assistance of counsel claim raised on appeal on the basis of *Padilla v Kentucky* (130 SCt 1473 [2010]), alleging that counsel misinformed the defendant about immigration consequences of the plea by saying “sometimes people are not deported” when deportation was mandatory, was predicated on hearsay and facts not on the record and should be raised in postconviction proceedings.

Juveniles (Parental Rights) (Visitation)**Prisoners (Family Relationships)****Matter of Hailey ZZ., 2012 NY Slip Op 04374 (6/7/2012)**

Holding: The family court lacks the authority to direct continuing contact between a parent and a child once parental rights are terminated under Social Services Law 384-b. Here, the record supported the court’s finding that the incarcerated father’s parental rights should be terminated, and the Appellate Division properly found the court lacked authority to grant the father posttermination contact; contrary Appellate Division decisions are incorrect. “There is concededly no statutory support for such authority outside the context of a voluntary surrender pursuant to Social Services Law § 383-c” “Absent legislative warrant, Family Court is not authorized to include any such condition in a dispositional order made pursuant to Social Services Law § 384-b.” [Footnote omitted.]

Dissent: [Pigott, J] The record does not show the requisite “diligent efforts to encourage and strengthen the parental relationship” and the Appellate Division erred in holding that the family court lacked the authority to order posttermination visitation.

Appeals and Writs (Judgments and Orders Appealable)**Assault (Aggravated) (Deadly Weapons)****Guilty Pleas (Errors Waived By)****People v Plunkett, 2012 NY Slip Op 04378 (6/7/2012)**

Holding: The HIV-positive defendant’s saliva could not be considered a deadly weapon or dangerous instrument, an element of the aggravated assault charges stemming from the defendant biting a police officer. Comments at the plea proceedings that the defendant had not waived his right to appeal rulings made in the case clearly referred to the court’s rejection of the defendant’s contentions as to this issue. While the guilty plea would

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have forfeited the question of whether the crime of aggravated assault was made out from the evidence, the defendant would be entitled to withdraw the plea as induced by the promise of appellate review and to litigate the issue at trial. So many steps should not be required to resolve “the particular very basic, purely legal question ... raised” Allowing review of the claim that no extant crime was charged does not signal a “departure from the rule that, ordinarily, guilty pleas operate to forfeit appellate claims respecting nonjurisdictional defects”

Double Jeopardy (Punishment)

Sentencing (Resentencing)

People v Gammon, 2012 NY Slip Op 04667 (6/12/2012)

Holding: Where the court said at the defendant’s probation violation hearing that an additional 60 days of incarceration would be imposed, but the defendant was released immediately by the jail after his sentencing on the violation due to an erroneous credit for previous time served on the original sentence, the court did not err in resentencing him to “120 days in jail which is an additional 60 days to the 60 days sentence that he already served.” The court had inherent authority to correct the ambiguity and the defendant was not subjected to double jeopardy as he had not served out the sentence reasonably understood by all to have been imposed and therefore did not have a reasonable expectation of finality upon his release.

Due Process (Fair Trial)

Evidence (Objections)

Forensics (DNA)

People v Kelley, 2012 NY Slip Op 04665 (6/12/2012)

Holding: Where the accuser said that the defendant had a habit of ejaculating on a towel after performing sexual acts with her, a towel had been provided to police after the final alleged offense but was not tested for genetic material until near the end of the prosecution’s case, defense counsel objected when told that a test would then be performed, and results disclosed after the defendant had testified indicated that his semen and female DNA not belonging to the accuser were present on the towel, admission of this evidence over repeated objection was error. Its introduction after the defense had proceeded with a theory that focused on the absence of genetic material denied the defendant a fair trial; the evidence should have been precluded or a mistrial declared. The evidence, which corroborated the accuser’s testimony that the defendant commonly ejaculated on a towel following sex-

ual acts, was harmless as to the criminal contempt charges that the defendant admitted; a new trial is ordered on first-degree course of sexual conduct against a child and endangering the welfare of a child.

Dissent: [Smith, JJ] The prosecution’s failure to obtain genetic test results earlier was undisputedly a mistake, not deliberate, and the towel was not a major part of the case; given other evidence including the defendant’s statements verging on a confession, any prejudice was insignificant.

Conspiracy

Sentencing (Second Felony Offender)

People v Ramos, 2012 NY Slip Op 04669 (6/12/2012)

Holding: “We hold that, under New York’s ‘strict equivalency’ standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes.” A crime committed in another jurisdiction can be considered a predicate felony conviction pursuant to Penal Law 70.06(1)(b) only if comparison of the statutory elements shows the foreign conviction includes all the essential elements of a New York felony. The federal conspiracy statute at issue here, 21 USC 846, requires no overt act, while New York’s statute, Penal Law 105.00 *et seq.*, does. The prosecution’s contention that commission of an overt act is not an “element” is rejected. The defendant, sentenced as a second felony offender on the basis of that federal conviction, must be resentenced.

Defense Systems (Assigned Counsel Systems)

(Compensation Systems [Attorney Fees])

(New York State Law)

Matter of Smith v Tormey, 2012 NY Slip Op 04664 (6/12/2012)

Holding: An administrative judge exceeded the authority given him under 22 NYCRR 127.2(b) by considering the propriety of a trial court order assigning an attorney to represent a client in a criminal proceeding. An objection to a trial court’s order of assignment should be raised through an article 78 proceeding in the nature of prohibition. The appellant county and assigned counsel plan did not file such a challenge to the judge’s nunc pro tunc assignment of an attorney as second chair in a complex trial after the attorney, having served initially at the request of retained counsel who was later appointed when the client’s funds were exhausted, continued to serve through the duration of the trial. “Our holding should not be misconstrued to unduly constrain the authority of administrative judges. Section 127.2 (b) does allow review and modification of an order of compensation ‘with or without application.’ For instance, although

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the Administrative Judge here exceeded his authority under section 127.2 (b) by addressing the assignment of petitioner, he has not yet assessed whether the amount of compensation was adequate or excessive — an issue that is still open and not within our purview to address. However, it is evident that section 127.2 (b), which is a vehicle established for the exclusive review of awards of legal fees, cannot be used to circumvent a failure to contest an underlying order of assignment.”

Appeals and Writs (Scope and Extent of Review)**Identification (Show-ups)****Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause])****People v William, 2012 NY Slip Op 04666 (6/12/2012)**

Holding: “Whether the circumstances of a particular case rise to the level of reasonable suspicion” and whether “a showup is reasonable under the circumstances and/or unduly suggestive” are issues presenting mixed questions of law and fact that are beyond review here if the determination has record support. Record evidence supports the lower courts’ determinations in the instant cases, ending further review.

Appeals and Writs (Scope and Extent of Review)**Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause])****People v Martin, 2012 NY Slip Op 05094 (6/26/2012)**

Holding: Whether a detective had a founded suspicion to approach the defendant, or probable cause to arrest, presents mixed questions of law and fact; because record evidence exists supporting the determination, the issues are beyond further review here.

Defenses (Affirmative Defenses Generally)**Homicide (Mental Condition) (Murder [Defenses])****Instructions to Jury (Theories of Prosecution and/or Defense)****People v McKenzie, 2012 NY Slip Op 05090 (6/26/2012)**

Holding: The defendant’s request for a jury instruction on the defense of extreme emotional disturbance should have been granted because, while evidence existed on which the jury could reject such a claim, the viability of a contrary inference should have guided determination of the charge request. Viewed in a light most favorable to the defendant, evidence adduced during the prosecution’s case would have permitted the jury to reasonably conclude by a preponderance of the evidence that, at the time he killed his fiancée and paramour, he was affected by an extreme emotional disturbance supported by a reasonable explanation or excuse rooted in the circumstances as he perceived them, where the proof, including statements by the defendant, showed a heated argument, disclosures of infidelity, prior violence by the decedent against him, and a loss of control by the defendant.

ecution’s case would have permitted the jury to reasonably conclude by a preponderance of the evidence that, at the time he killed his fiancée and paramour, he was affected by an extreme emotional disturbance supported by a reasonable explanation or excuse rooted in the circumstances as he perceived them, where the proof, including statements by the defendant, showed a heated argument, disclosures of infidelity, prior violence by the decedent against him, and a loss of control by the defendant.

Search and Seizure (Examinations of Personal Effects)**People v Miranda, 2012 NY Slip Op 05095 (6/26/2012)**

Holding: Where a knife became plainly visible on the defendant’s person while a police officer was issuing the defendant a ticket for trespassing and inquiring about his after-hours presence in a park in a high crime area, it was reasonable for the officer to retrieve the knife, where the intrusion was “‘minimal’ and ‘consonant with the respect and privacy of the individual,’” and to arrest the defendant when it turned out to be an illegal gravity knife.

Judges (Disqualification)**Misconduct (Judicial)****Matter of Young, 2012 NY Slip Op 05089 (6/26/2012)**

Holding: The petitioner, a nonlawyer town court justice, “engaged in serious misconduct when he presided over matters involving persons with whom he and his paramour had close relationships” and the sanction of removal is warranted. His contention “that he lacked a familial relationship to the persons in the cases at issue and therefore had a ‘right to hear those cases’” is rejected. Cases the petitioner presided over during the approximately 10 years that he lived with his paramour included one involving her daughter as the accuser, in which the petitioner, after an *ex parte* request by his paramour, issued a stay-away order as to the defendant and only recused himself, after initially declining to do so, when defense counsel informed him that he would file a formal recusal motion and contact the Commission on Judicial Conduct. Another case involved a defendant who was the son of the petitioner’s former brother-in-law as well as the nephew of the petitioner’s paramour, and whom the petitioner resented to jail after members of the family advised him to do so during a family gathering; additional *ex parte* communications occurred in that matter and in another. In several other instances as well he heard cases involving litigants related to his paramour without disclosing the relationship, and his conduct in some instances gave the appearance of favoritism to his paramour’s family member.

NY Court of Appeals *continued*

Appeals and Writs (Judgments and Orders Appealable)
(Prosecution, Appeals by)

[People v Elmer](#), 2012 NY Slip Op 05125 (6/27/2012)

Holding: An appeal lies from a criminal court’s oral order finally disposing of the pre-trial matter at issue. In *Elmer*, where the court dismissed 22 of 37 counts of the indictment based on the defendant’s speedy trial motion following repeated adjournments by the prosecutor, the Appellate Division erred by dismissing the appeal for lack of a written order, as the prosecutor was “entitled under section 450.20 (1) to appellate review of the lower court’s oral decision dismissing certain counts of the indictment.” In *Cooper*, where the defendant pleaded guilty after oral denial of his suppression motion, “it was similarly error to conclude that defendant’s appeal under section 710.70 (2) was forfeited by the entry of his guilty plea simply because the oral order had not been issued in writing.” The Legislature has provided for a “written order” when it has been deemed necessary, and used only “order” in the provisions governing the appeals here.

Appeals and Writs (Judgments and Orders Appealable)

[People v Maracle](#), 2012 NY Slip Op 05121 (6/27/2012)

Holding: Where the plea colloquy is clear that the defendant waived her right to appeal her conviction, but there is no indication in the record that she waived the right to appeal the harshness of her sentence, the Appellate Division was “deprived of its right to review the harshness of that sentence”; the matter is remitted so that that the Appellate Division may, should it so choose, exercise its interest of justice jurisdiction. Unlike *People v Hidalgo* (91 NY2d 733), it is not clear here that the court “‘engaged in a full and adequate colloquy’” At most, the defendant was told that if she did not pay half the restitution by the sentencing date, there was no promise as to her sentence and no withdrawal of her plea. At sentencing, assigned counsel said the defendant knew she was going to prison and understood that because the contingency of paying half the restitution was not met the only alternative was imprisonment; but the court had not said prison was a certainty if the defendant failed to make any payments. The court still had the option of imposing probation, as the presentence report recommended, with a restitution order. After being notified by the Department of Correctional Services and Community Supervision that the sentence imposed was illegal because no sentence had been imposed on some counts, the court imposed the maximum sentence on every count.

Dissent: [Grafteo, JJ] “[T]he majority’s rationale conflicts with the rule established in *People v Hidalgo* ...

and there is no compelling justification for eroding that precedent.”

Discovery (*Brady* Material and Exculpatory Information)
(Matters Discoverable) (Right to Discovery)

[People v Sinha](#), 2012 NY Slip Op 05123 (6/27/2012)

Holding: The prosecution complied with the discovery requirements of CPL 240.20(1)(c) by providing a “mirror” copy of the contents of the computer seized from the defendant and exact copies of other computer disks recovered from her apartment, a forensic report which explained the software and methodology used by the detective who analyzed the hard drive, another forensic report that noted certain online file names, and printouts of several files of interest, including emails, even though the reports did not specifically identify an email used by the prosecution at trial that was available to the defense on the mirror copy of the hard drive. “Were the documents at issue of such a nature that they could only have been produced through the expertise of a qualified expert, our decision might be different; but there is no showing that this was the case here.”

Failure to disclose certain other information, which led to the Appellate Division’s reversal of the defendant’s conviction of bribing a witness, did not require reversal on the remaining counts “as there is no reasonable possibility that the evidence supporting the alleged tainted count had a spillover effect on the other convictions.”

Civil Practice

Unlawful Imprisonment

Wrongful Conviction

[Baba-Ali v State of New York](#), 2012 NY Slip Op 05196
(6/28/2012)

Holding: In this action to recover damages for unjust conviction and imprisonment under Court of Claims Act 8-b, the Appellate Division erred in granting the claimant’s motion for summary judgment as to liability where there are material issues of fact regarding the timing of the prosecution’s disclosure of exculpatory medical records, the prosecutor’s intent in withholding the records, and whether the prosecution’s actions were “the procuring cause of claimant’s conviction”

The Appellate Division did not exceed its authority in reducing the claimant’s nonpecuniary damage award; the question of whether the lost earnings award was adequate is a factual question beyond further review; and the finding that the claimant failed to prove his entitlement to damages for the loss of future earnings by a reasonable certainty is supported by the record and thus is not subject to further review.

NY Court of Appeals *continued*

Appeals and Writs (Judgments and Orders Appealable) (Preservation of Error for Review) (Prosecution, Appeals by) (Question of Law and Fact) (Scope and Extent of Review)

Discovery (Preservation of Materials) (Procedure [Enforcement])

Larceny (Value)

[People v Riley](#), 2012 NY Slip Op 05199 (6/28/2012)

Holding: The court did not abuse its discretion by declining to give an adverse inference instruction as a sanction for the prosecution's failure to give Penal Law 450.10 notice that the copper pipes the defendant allegedly stole were being returned to the rightful owner; the court determined that the defense did not suffer prejudice where the prosecution had advised counsel to arrange a time to examine the pipes six weeks before their return and counsel did not, defense counsel received almost 200 photographs of the pipes and buildings, and a representative sample of pipe was retained and admitted without objection. The order should be affirmed.

As to the prosecution's appeal, it "should be dismissed upon the ground that the modification by the Appellate Division was not 'on the law alone or upon the law and such facts which, but for the determination of law, would not have led to . . . modification' (CPL 450.90 [2] [a])." The dissent's position flies in the face of statutory law and precedent.

Dissent in Part: [Pigott, J] While the Appellate Division said it was modifying the trial court's judgment "on the facts," its decision actually "turned on a purely legal issue — whether labor costs can be included as part of 'the cost of replacement' contemplated by Penal Law § 155.20 (1)." This legal issue should be addressed here, as it is an open question; the Appellate Division had to look to authority in other states, and dismissal of the prosecution's appeal for failure to preserve the issue leaves as precedent that out-of-state authority chosen by the First Department. The majority's conclusion that lack of trial court preservation bars review of a legal issue reached by the Appellate Division results from an overly restrictive reading of the CPL 470.05 provision regarding "a question of law." It is unlikely that the Legislature intended to create "the unfortunate procedural circumstance in which the Appellate Division decides a legal issue for the State, yet we are powerless to reach it."

Double Jeopardy (Punishment)

Sentencing (Post-Release Supervision) (Resentencing)

[People v Velez](#), 2012 NY Slip Op 05198 (6/28/2012)

Holding: Failure to meet the statutory deadline in Correction Law 601-d, which sets out a procedure for resentencing in cases where the court omitted a term of post-release supervision (PRS) when imposing the original sentence, does not bar a resentencing "at least in cases like these, where the delays were not egregious, and where nothing suggests that they were willfully caused by the People or that they prejudiced defendants." The only consequences set out in the statute for a court missing the 40-day deadline of 601-d(4)(d) for issuing a determination and order after being notified of such omission is found in subdivision 6; it says that what was then known as the Department of Correctional Services may notify the court that no determination has been received and "shall adjust its records with respect to post-release supervision noting that the court has not, in accordance with subdivision four of this section, imposed a sentence of post-release supervision" Support exists in the legislative history for finding that failure to meet the deadline does not preclude resentencing.

Double jeopardy protection does not bar resentencing where the defendant was still serving the original sentence. But where a defendant's sentence expired before resentencing occurs, double jeopardy applies even though procedures leading toward resentencing began before the original sentence expired. The prosecution's suggestion that defendants have no expectation of finality warranting double jeopardy protection once a resentencing proceeding has begun "would undermine clarity, because the moment when a Correction Law § 601-d proceeding begins is hard to fix." It should not be impossible to complete resentencing before a defendant's sentence expires; while having the original sentencing minutes, which may cause delay, is preferable, it is not essential.

First Department

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

Sex Offenses (Sex Offender Registration Act)

[People v Gonzales](#), 91 AD3d 417, 937 NYS2d 6 (1st Dept 1/3/2012)

Holding: Based on the unusual circumstances in this case, the defendant is granted a downward departure from a level two to a level one sex offender. The underlying sex offense was in 1978; the defendant was released from prison in 1986; and he has successfully completed sex offender treatment, is employed, and has been married for 17 years. The defendant's only conflicts with the

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law since his release were alcohol-related misdemeanors and violations, he has been sober since 1993, and has had no contact with the criminal justice system for the past 20 years. (Supreme Ct, Bronx Co)

Juveniles (Delinquency)

Sex Offenses (Sexual Abuse)

People v. Ibn Abdus S., 91 AD3d 428, 939 NYS2d 294 (1st Dept 1/3/2012)

Holding: The finding of second-degree sexual abuse must be vacated because there is insufficient evidence that the 10-year-old appellant acted for the purpose of gratifying a sexual desire when he shoved the 11-year-old complainant onto the school gym floor and, while his friend held down the complainant’s arms, he grabbed, squeezed, and twisted the complainant’s breasts. The appellant said nothing to the complainant during the incident or when the complainant thereafter chased and yelled at him. There is sufficient evidence to support the finding of forcible touching. (Family Ct, Bronx Co)

Counsel (Competence/Effective Assistance/Adequacy)

Post-Judgment Relief (CPL § 440 Motion)

People v. Rivera, 91 AD3d 450, 935 NYS2d 515 (1st Dept 1/5/2012)

Holding: The defendant’s CPL 440.10 motion was properly granted because the defendant did not receive meaningful representation. “Defense counsel failed to conduct any investigation, make any motions, or even view the video of defendant’s breathalyzer test before negotiating a plea bargain whereby the defendant would plead guilty to the top count of the accusatory instrument. There were lines of defense that were at least worthy of investigation, including matters that could have affected the accuracy of the breathalyzer results. The attorney’s testimony established there were no strategic reasons for these omissions.” It was extremely unlikely that the defendant would receive a jail sentence as a first offender where no accident occurred; therefore, he received little to no benefit by pleading guilty to the top count without even a minimally accurate assessment of the strength of the prosecution’s case. (Supreme Ct, Bronx Co)

Post-Judgment Relief (CPL § 440 Motion)

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

People v. Santiago, 91 AD3d 438, 936 NYS2d 37 (1st Dept 1/5/2012)

Holding: The defendant’s motion to set aside his adjudication as a second violent felony offender and his sentence is granted where his predicate offense was unconstitutionally obtained because he was not advised during his plea allocution that the sentence included a period of post-release supervision. The defendant’s failure to appeal from his predicate conviction does not automatically bar his right to independently challenge the constitutionality of that conviction; however, failure to appeal may be a relevant consideration in predicate felony offender proceedings. The prosecution failed to preserve its argument that the defendant waived his right to challenge the prior conviction at the time of the second violent felony offender adjudication. The prosecution’s argument that a *Catu* violation should not affect the constitutionality, for predicate felony purposes, of the defendant’s prior conviction cannot be reviewed as it was raised for the first time on appeal. (Supreme Ct, New York Co)

Defenses (Notice of Defense)

Homicide (Murder [Defenses])

People v. Gonzalez, 91 AD3d 453, 936 NYS2d 174 (1st Dept 1/10/2012)

Holding: The court properly granted the prosecution’s motion to reopen its case and present psychiatric evidence after the court granted the defendant’s request that the jury be instructed regarding the extreme emotional disturbance (EED) defense, based on the evidence presented by the prosecution, including the defendant’s videotaped confession. The defendant had served and filed a CPL 250.10 notice, but withdrew it sometime after the prosecution’s psychologist examined the defendant. The court properly found that the defendant’s request for an EED charge constituted a notice of intent to offer psychiatric evidence under CPL 250.10, even though the defendant did not present a case or cross-examine the prosecution’s witnesses about his mental state. To allow the defendant to use his statements as evidence of EED without permitting the prosecution to present rebuttal evidence, “would be manifestly unfair, effectively allowing the defense to ‘sandbag’ the prosecution, and defeat the very purpose of the statute.” “We ... express no opinion concerning a case where a defendant has not filed such an initial CPL 250.10 notice.” (Supreme Ct, Bronx Co)

Robbery (Defenses) (Degrees and Lesser Offenses) (Evidence) (Instructions)

People v. Howard, 92 AD3d 176, 939 NYS2d 4 (1st Dept 1/12/2012)

First Department *continued*

Holding: The defendants' argument that the affirmative defense to first-degree robbery (Penal Law 160.15[4]) was established as a matter of law based on the evidence that the object the accuser saw was a BB gun, not a firearm, is unpreserved where the defendants failed to ask the court to instruct the jury on the affirmative defense or to object to its absence in the court's charge. The defendants also failed to argue that the prosecution did not satisfy the "display" element of first-degree robbery. Alternatively, the evidence was legally sufficient where the accuser could reasonably have perceived that the object one of the defendants placed against his back was a gun, particularly since the accuser saw the other defendant holding a gun. It is irrelevant that the accuser acknowledged that the object placed against his back could have been something other than a gun. (Supreme Ct, Bronx Co)

Dissent in Part: The convictions should be reduced to second-degree robbery in the interest of justice because the only evidence of a weapon that was adduced was that of a BB gun, not a firearm.

[*Ed. Note: Leave to appeal was granted on April 26, 2012 (2012 NY Slip Op 71396[U]).*]

Evidence (Hearsay)**Juveniles (Neglect)**

Matter of Imani O., 91 AD3d 466, 937 NYS2d 162 (1st Dept 1/12/2012)

Holding: The court erred in finding that the respondent father neglected his children by committing an act of domestic violence against the mother in the children's presence because there was no evidence, other than inadmissible hearsay in the non-testifying police officer's oral report transmission (ORT) and the mother's properly excluded out-of-court statements, that the children were present during the domestic dispute. The only witness was a caseworker who did not interview the mother at the time of the incident. The court improperly relied on the hearsay statements, including a statement that the children were present during prior domestic disputes, the source of which is not identified. While police officers have a duty to report suspected child abuse or maltreatment, an officer's entire statement is admissible under the business records exception to the hearsay rule if all the participants in the chain are under a duty to report and are acting in the scope of that duty. The ORT does not state that the children were present for the incident at issue; their presence at other incidents is irrelevant. And there is no way to know if the officer received the information from someone with a duty to report or from the mother, who has no such duty. (Family Ct, Bronx Co)

Admissions (Interrogation) (Voluntariness)**Juveniles (Delinquency)**

Matter of Eduardo E., 91 AD3d 505, 937 NYS2d 182 (1st Dept 1/17/2012)

Holding: The court properly denied the appellant's motion to suppress his statement to the police because the totality of the circumstances shows that the statements were voluntary, there is no evidence that the appellant had a mental impairment that would affect his ability to understand the *Miranda* warnings, and since the appellant turned 16 between the incident and the interrogation, the special statutory procedures for juvenile interrogations (Family Court Act 305.2[2]) were not required. (Family Ct, Bronx Co)

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

People v Rivera, 91 AD3d 498, 936 NYS2d 199 (1st Dept 1/17/2012)

Holding: The defendant's guilty plea was not knowingly, voluntarily, and intelligently made where the court failed to advise the defendant at the plea allocution of the length of the term of post-release supervision that would be imposed if the defendant violated the plea agreement by absconding from the drug treatment program. The court did not notify the defendant of the length of the term until it imposed sentence after the defendant absconded and was returned to court. The defendant did not need to preserve this issue by moving to withdraw his plea. (Supreme Ct, New York Co)

Constitutional Law (New York State Generally) (United States Generally)**Sex Offenses (Civil Commitment)**

Matter of State of New York v Enrique T., 93 AD3d 158, 937 NYS2d 203 (1st Dept 1/26/2012)

Holding: "[A] finding of probable cause to believe that [a Mental Hygiene Law (MHL)] Article 10 sex offender requires civil management because of a mental abnormality incorporates the necessary finding of a respondent's dangerousness. As a danger to society, all Article 10 sex offenders, therefore, come within the scope of those statutes upheld by the United States Supreme Court that authorize commitment or detention, even pretrial detention, without mandating consideration of a lesser restrictive alternative." The court erred in finding that the pretrial detention provision in MHL 10.06(k) is facially unconstitutional, and thus, the court incorrectly ordered

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the respondent's release. The respondent's claim that article 10 is unconstitutional as applied to him and other sex offenders who may ultimately be approved for civil management under strict and intensive supervision and treatment (SIST) is rejected. The legislature's decision to provide for the SIST alternative for certain dangerous sex offenders after trial depends on the establishment of a carefully tailored and individualized program; the availability of SIST does not create a mandatory constitutional obligation to offer pre-trial release that is not so tailored and individualized. "The respondent's claim that the New York State Constitution mandates that mental health patients must be treated in the 'least restrictive setting,' and that article 10 is unconstitutional because it fails to do so, is without merit." (Supreme Ct, Bronx Co)

Sex Offenses (Sex Offender Registration Act)

People v Aguilar, 92 AD3d 401, 937 NYS2d 583 (1st Dept 2/2/2012)

Holding: The court improvidently exercised its discretion in imposing an upward departure to a level three in this Sex Offender Registration Act proceeding where the defendant's point score was well below the level three threshold, neither the prosecution nor the Board of Examiners of Sex Offenders recommended an upward departure, and the factors cited by the court did not warrant a departure. The defendant's failure to accept responsibility was adequately accounted for in the risk assessment instrument and was not of a type that would indicate a strong likelihood of recidivism. That the accuser was the granddaughter of the defendant's girlfriend does not, by itself, support an upward departure. (Supreme Ct, Bronx Co)

New York State Legislation

Parole (Revocation Hearings [Due Process])

Matter of Mayfield v Evans, 93 AD3d 98, 938 NYS2d 290 (1st Dept 2/14/2012)

Holding: The state Division of Parole's bifurcated parole revocation process for parolees who are serving a sentence for homicide, sex crimes, or kidnapping, 9 NYCRR 8005.20(c)(6), "is a usurpation of legislative prerogative and therefore void." The regulation provides that, when a parolee is serving a sentence for certain offenses, an administrative law judge's time assessment is merely a recommendation and that a single member of the parole board determines the assessment; this conflicts with Executive Law 259-i(3)(f), which provides that a hearing officer may determine the time assessment, with-

out the parole board's approval. The parolee is entitled to due process at the time assessment stage of the parole revocation hearing because it is not certain at that point whether the parolee will be returned to custody. The petitioner must be given a new hearing consistent with the Executive Law and due process guarantees. (Supreme Ct, New York Co)

Admissions (Co-defendants)

Witnesses (Confrontation of Witnesses)

People v Rodriguez, 92 AD3d 586, 940 NYS2d 565 (1st Dept 2/23/2012)

Holding: The defendant failed to preserve his claim that his right of confrontation was violated by the admission of a portion of a nontestifying, jointly tried codefendant's remark to an accomplice witness that implicated the defendant. Under the circumstances, the defendant's request for certain remedies under *Bruton v United States* [391 US 123 (1968)] was not sufficient to preserve his confrontation clause claim, particularly since the court was not notified that there was an issue about whether the remark was testimonial. Alternatively, there was no confrontation violation as the remark was not testimonial, and it was not received for its truth, and it did not facially implicate the defendant. (Supreme Ct, New York Co)

Discrimination

Juries and Jury Trials (Challenges) (Selection)

People v Powell, 92 AD3d 610, 939 NYS2d 51 (1st Dept 2/28/2012)

Holding: The court erred in granting the prosecution's reverse-Batson application and seating three jurors where the record does not support the finding that the ethnically-neutral reasons provided by defense counsel for her peremptory challenges were pretextual. Defense counsel explained that she finds people with technical type or financial jobs are not favorable to the defense since they have higher incomes; two of the challenged jurors were investment bankers and the third was an interface developer who previously served on a jury, which counsel viewed as negative. The court improperly found that persons in the finance industry were a protected class because a profession, as opposed to race or gender, is not a class entitled to constitutional protection against discrimination. And defense counsel's failure to challenge a juror whose spouse had a financial job does not provide evidence of disparate treatment by counsel because a spouse's characteristics should not be attributed to the juror. (Supreme Ct, New York Co)

First Department *continued***Identification (Expert Testimony) (Weapons)**

[People v LeGrand](#), 94 AD3d 99, 939 NYS2d 444
(1st Dept 3/8/2012)

Holding: The court properly precluded a defense expert from testifying about the effect of “weapons focus” on eyewitness identification without a *Frye* hearing because the testimony would have had little relevance where none of the witnesses were close enough to the defendant to be threatened by the knife, they observed the defendant both during and after the stabbing, and one of the witnesses described the perpetrator as having distinctive features. And the exclusion of the testimony was at most harmless error, particularly since the defendant was able to produce expert eyewitness identification testimony about the lack of correlation between confidence and accuracy, confidence malleability, and the effect of postevent information on identification accuracy. The court correctly ruled that if the expert testified about postevent information, the prosecution could present evidence that, shortly after the crime, the identifying witnesses helped the police to produce a composite sketch that resembled the defendant because such evidence would have been admitted solely to address the potentially misleading impression that the expert’s testimony would have created, the sketch itself would not be admitted, and the ruling was not unduly prejudicial to the defendant, given the court’s proposed limiting instruction that the testimony could only be used to evaluate the expert’s opinion. (Supreme Ct, New York Co)

Search and Seizure (Automobiles and Other Vehicles) (Consent)

[People v McFarlane](#), 93 AD3d 467, 939 NYS2d 460
(1st Dept 3/13/2012)

Holding: The court correctly found that the defendant did not consent to a search of the locked glove compartment during a traffic stop where the police officer asked if he could take a look in the car or check it for contraband, the defendant said, “[G]o ahead,” and the officer, after checking the seats and center console, took the keys from the ignition without asking and unlocked the glove compartment. The defendant could have reasonably understood that the officer was asking to search the vehicle and possibly closed containers, but not the locked glove compartment. The officer’s subjective intent to search the glove compartment when he made the request is not determinative. “A reasonable person in defendant’s situation would have assumed that if the officer wanted to open the glove compartment with defendant’s consent he

would have asked for the key or asked defendant to open it.” (Supreme Ct, Bronx Co)

Dissent: When the police have consent to search the interior of a car, it is objectively reasonable for the police to conclude that the consent includes the glove compartment and it is expected that the police would, upon finding the glove compartment locked, take the key from the ignition to unlock it.

Counsel (Right to Counsel)**Misconduct (Juror)****Trial (Verdicts [Motions to Set Aside (CPL § 330 Motions)])**

[People v Wilson](#), 93 AD3d 483, 939 NYS2d 463
(1st Dept 3/13/2012)

Holding: The court correctly denied the defendant’s motion to suppress his statements because the defendant’s statement, during police questioning, that “‘maybe’ he wanted a lawyer” was ambiguous and equivocal, and thus insufficient to invoke the right to counsel. The defendant’s other remark about getting a lawyer, made between his first and second statements to police, was clearly intended to be facetious and it referred to his possible intention to get a lawyer in the future. Because the defendant was not in custody until after he made an inculpatory statement, he was able to withdraw a request for counsel, and the record shows he effectively withdrew any possible request he may have made. The court properly denied the defendant’s motion to set aside the verdict for juror misconduct where the juror posted on Facebook that she was on a jury, but did not discuss the case, and the juror testified unequivocally that she was not affected by the comments made by some of her friends in response to her posting, which the defendant characterized as inflammatory, she did not discuss the case with anyone during the trial, and her decision was based only on the evidence. (Supreme Ct, New York Co)

Counsel (Conflict of Interest)**Defense Systems (Assigned Counsel Systems) (Legal Aid Systems) (New York State Law [Statutes]) (System Impacting Litigation)**

[Matter of New York County Lawyers’ Assoc v Bloomberg](#), 95 AD3d 92, 940 NYS2d 229 (1st Dept 3/15/2012)

Holding: New York City’s revised plan for providing public defense representation (43 Rules of the City of New York 13-01 *et seq.*), including the changes to the provision of representation in cases involving a conflict of interest, is not arbitrary or capricious or irrational, does not require the consent of the county bar associations, and does not violate County Law 722 or Municipal Home Rule Law

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11(1)(e). The revised plan, which combines the legal aid society option in County Law 722(2) and a plan of a bar association option in 722(3), is a lawful combination plan under 722(4). The provision of representation by a legal aid society pursuant to 722(2) can include primary representation and conflict representation. County Law 722(3), as amended in 2010 to add an “office of the conflict defender” option (L 2010, ch 56, part E, § 3), does not give county bar associations the exclusive right to provide conflict representation. “Whatever the outcome of the implementation of the City’s proposed revised plan, however, the merit or wisdom of the enterprise is not the province of the courts.” (Supreme Ct, New York Co)

Dissent: New York City cannot implement a County Law 722(3) bar association plan over the objection of the county bar associations; the City’s attempt to use pieces of the 1965 bar association plan while discarding significant parts related to the assignment of panel attorneys in all conflict cases is not statutorily authorized. Without a 722(3) plan, the City does not have a valid 722(4) combination plan, and in such cases, 722(4) provides that a judge may appoint conflict counsel. The City cannot bypass judicial involvement in the appointment of conflict counsel by appointing a 722(2) legal aid society as conflict counsel.

[*Ed. Note: The petitioners have appealed the case to the Court of Appeals.*]

Juveniles (Neglect)

Matter of Jessica L., 93 AD3d 522, 941 NYS2d 42 (1st Dept 3/20/2012)

Holding: The court erred in finding that the respondent father neglected his children by failing to act sooner after he suspected that the mother was using drugs, based on his observation that the children’s mother was not working and slept a lot during the day, where the father anonymously called Administration for Children’s Services (ACS) to report his suspicion, which led to its investigation and the mother’s positive drug test. The court’s finding “placed the father in a ‘Catch-22’ situation — once he had failed to act promptly based upon his suspicion, he was faced with the dilemma of involving ACS and risk subjecting himself to a neglect proceeding for not having contacted ACS sooner, or not involving ACS to the detriment of his children. Respondent’s actions here did not rise to the level of neglect.” (Family Ct, Bronx Co)

Double Jeopardy (Mistrial)

Juveniles (Delinquency—Procedural Law)

Matter of Marcus B., 95 AD3d 15, 942 NYS2d 38 (1st Dept 3/22/2012)

Holding: Further prosecution of the respondent after the court declared a mistrial at the first fact-finding hearing over the respondent’s objection violated double jeopardy because the transfer of the presiding judge to another court did not rise to the level of manifest necessity for declaring a mistrial. “[T]he declaration of a mistrial based upon the mere reassignment of a judge for administrative purposes, without more, is an abuse of discretion.” The supervising judge declared a mistrial, but failed to explain how the transfer impeded the original judge’s ability to complete the case, and there was no proof that it was physically impossible for the judge to finish the case because of death or serious illness. Pursuant to New York Constitution, article VI, § 26, the presiding judge retained jurisdiction to hear the case after the transfer. The respondent’s later admission to the juvenile delinquency petition, like a guilty plea, does not constitute a waiver of a constitutional double jeopardy claim and nothing in the record indicates that the respondent expressly waived that claim. (Family Ct, Bronx Co)

Trial (Presence of Defendant) (Verdicts [Motions to Set Aside (CPL § 330 Motions)])

People v Rodriguez, 93 AD3d 595, 941 NYS2d 99 (1st Dept 3/29/2012)

Holding: The defendant was not denied his right to be present at material stages of the proceeding because the proceedings at which the court clarified its *Molineux* ruling or at which his CPL 330.30 motion was argued and decided were not material, he did not object to his absence, and since the defendant’s presence at those proceedings would not have had a substantial effect on his ability to defend against the charges, the claims are not preserved. Alternatively, the claims are rejected on the merits. The defendant was present at the initial *Molineux* proceedings, including the court’s ruling, and his presence was not needed when the court slightly clarified its ruling. The defendant’s presence was not required at the proceedings on his CPL 330.30 motion to set aside the verdict because the motion involved a legal issue regarding undisputed facts. The court properly denied the motion to set aside the verdict on the ground of newly discovered evidence, which was based on the prosecution’s violation of *Rosario* by failing to disclose certain grand jury minutes until after the trial, because the defendant could not establish that the new evidence created a probability of a more favorable result and he did not show prejudice under CPL 240.75’s “reasonable possibility” standard. (Supreme Ct, New York Co)

Second Department

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

Juveniles (Custody) (Neglect)

[Matter of Alexis M.](#), 91 AD3d 648, 937 NYS2d 257
(2nd Dept 1/10/2012)

Holding: Where proposed placement of the subject child with the nonrespondent father in Virginia was not approved by authorities there pursuant to the Interstate Compact on the Placement of Children (ICPC), which is codified in New York at Social Services Law 374-a, the order giving temporary custody to the father was improper and “the child is remanded to the Commissioner of Social Services pending the new dispositional hearing and new disposition.” Where the mother did not seek permission to withdraw her consent to Family Court’s jurisdiction with regard to the neglect finding, it is not subject to review. (Family Ct, Kings Co)

Weapons (Possession)

[Matter of Edwin O.](#), 91 AD3d 654, 937 NYS2d 94
(2nd Dept 1/10/2012)

Holding: A supporting affidavit saying that, while on a public street, the arresting officer “observed the handle of a kitchen knife which he described as a machete protruding from the respondent’s backpack,” which later was found to have a nine-inch blade wrapped in a plastic bag, did not constitute circumstances showing that the possessor considered it a weapon, as required for fourth-degree possession of a weapon under Penal Law 265.01(2) and 265.05; the petition was properly dismissed as facially insufficient. (Family Ct, Kings Co)

Juveniles (Custody) (Hearings)

[Matter of Joseph A.](#), 91 AD3d 638, 937 NYS2d 250
(2nd Dept 1/10/2012)

Holding: Where it was established that despite the mother’s refusal to acknowledge her mental illness, the subject children while in her care had near-perfect school attendance and were thriving academically, were up-to-date on their medical examinations and shots, and were of appropriate height and weight, the petitioner failed to establish by a preponderance of the evidence that their physical, mental, or emotional conditions were in imminent danger of being impaired; proof of a parent’s mental illness alone does not support a neglect finding, and the

evidence here regarding whether the children were left unattended for long periods was vague and contradictory.

Where the fact-finding hearing took an inordinate amount of time to complete even though the issues were not complicated and the actual hearing was not lengthy, so that the children, who were placed in foster care where it was very hard for the family to maintain a relationship during the three-year separation, family “reunification may be facilitated if the petitioner provides, and the mother accepts, appropriate services or referrals.” (Family Ct, Richmond Co)

Juveniles (Visitation)

[Matter of New v Sharma](#), 91 AD3d 652, 936 NYS2d 265
(2nd Dept 1/10/2012)

Holding: Under the circumstances of this case, the family court erred by granting the application of the attorney for the child to limit the father’s visitation to short periods in a specific location, which was filed in opposition to the father’s petition to modify a prior order of visitation, where that petition was in effect denied without a full evidentiary hearing to determine the subject child’s best interest. To the extent that the court relied on the attorney for the child’s detailed accounts about conversations with the child, it was inappropriate for reports containing facts not part of the record to be presented. A hearing on remand, before a different judge, must include an in camera interview with the child. (Family Ct, Nassau Co)

Discovery (*Brady* Material and Exculpatory Information)

Double Jeopardy (Dismissal) (Mistrial)

[People v Alonso](#), 91 AD3d 663, 936 NYS2d 250
(2nd Dept 1/10/2012)

Holding: Consideration of the merits of the prosecution’s appeal upon remand from the Court of Appeals shows that the prosecution fully complied with their duties to disclose *Brady* material where the prosecution disclosed the witness’s statements to investigators before omnibus motions were filed and the witness’s grand jury testimony a month before trial began and the prosecution and defense simultaneously learned of an expert’s change in opinion as to handwriting during cross examination; the prosecution did not have a duty to identify exculpatory portions within that material. Nor did the prosecution’s actions in failing to question the witness on direct about the handwriting samples in question amount to an attempt to conceal exculpatory evidence.

The trial court’s erroneous dismissal of the indictments “with prejudice” did not constitute an adjudication of guilt or innocence barring retrial on double jeopardy grounds, nor did the prosecutor engage in misconduct

Second Department *continued*

intended to provoke a mistrial. (Supreme Ct, Westchester Co)

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

**People v Braham, 91 AD3d 666, 935 NYS2d 657
(2nd Dept 1/10/2012)**

Holding: Reversal is required where the court, after granting a partial severance by having the defendant and co-defendant tried simultaneously before separate juries, improperly allowed the defendant’s jury to hear the co-defendant’s case during which the co-defendant’s attorney “took an aggressive adversarial stance against the defendant and elicited damaging evidence against him, creating the sort of compelling prejudice that could have been avoided by the grant of the requested total severance” (County Ct, Westchester Co)

Confessions (Counsel) (Illegal Arrest) (*Miranda* Advice)

Counsel (Attachment) (Right to Counsel)

**People v Harris, 93 AD3d 58, 936 NYS2d 233
(2nd Dept 1/10/2012)**

Holding: The defendant’s statement on Sept. 18-19, 2006 that “‘I think I want to talk to a lawyer and I want to go,’ unequivocally invoked his right to counsel,” so that his subsequent statements, taken after he had been released, returned to the trooper headquarters on Sept. 22, 2006 where he was questioned further, was arrested on Sept. 23, 2006, and eventually requested to be re-interviewed and was re-*Mirandized*, should have been suppressed. The question of whether the defendant was in custody on September 18 was not decided adversely to the defendant in the trial court and may not be considered on his appeal; in any event, no reasonable person would have believed they were free to leave in the circumstances presented. Since he was in custody, his right to counsel indelibly attached on September 18, and no counseled waiver was ever obtained. Failure to suppress the statements was not harmless error; while there was overwhelming evidence of the defendant’s guilt, the error was “not ‘unimportant and insignificant’” (County Ct, Orange Co)

Dissent: Any error in admitting the challenged statements was harmless beyond a reasonable doubt.

[*Ed. Note: Leave to appeal was granted on April 25, 2012 [2012 NY Slip Op 97762(U)].*]

Arrest (Probable Cause) (Resistance)

Motions (Suppression)

**People v Kevin W., 91 AD3d 676, 935 NYS2d 660
(2nd Dept 1/10/2012)**

Holding: The trial court erred in reopening a suppression hearing where the prosecution had been given every opportunity to present their evidence and the prosecution had only sought reargument after the court initially adopted a Judicial Hearing Officer (JHO) report that suppression of physical evidence should be granted. Suppression should have been granted and the weapon possession count of the indictment dismissed.

The resisting arrest count must also be dismissed as the initial suppression order found that the police lacked reasonable suspicion to stop the defendant; without probable cause there was no authorized arrest. (Supreme Ct, Queens Co)

Lesser and Included Offenses

Misconduct (Prosecution)

**People v Anderson, 91 AD3d 789, 937 NYS2d 109
(2nd Dept 1/17/2012)**

Holding: The conviction of seventh-degree possession of drugs must be vacated and the count dismissed because on the facts here, it was an inclusive concurrent count of third-degree possession of drugs.

While the court erred in allowing an assistant prosecutor to testify that her office decided not to prosecute a person arrested with the defendant for possessing the same drugs because the facts presented did not establish that other person possessed any drugs, which was the equivalent of opining the defendant was guilty, the error was harmless. (Supreme Ct, Kings Co)

Appeals and Writs (Judgments and Orders Appealable)

Driving While Intoxicated (Ignition Interlock Devices)

**People v Levy, 91 AD3d 793, 938 NYS2d 315
(2nd Dept 1/17/2012)**

Holding: The court improperly directed that the defendant install an ignition interlock device on her vehicle; her conviction for driving under the influence of drugs (Vehicle and Traffic Law 1192[4]) is outside the scope of the statute providing for installation of such devices as condition of probation. The defendant’s waiver of the right to appeal did not preclude review of this issue. (County Ct, Suffolk Co)

Appeals and Writs (Briefs) (Counsel)

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

Second Department *continued*

**People v Sanders, 91 AD3d 798, 936 NYS2d 568
(2nd Dept 1/17/2012)**

Holding: “Here, the submitted *Anders* brief was deficient, as assigned counsel did not perform the role of a zealous advocate by identifying possible issues for appeal and relating the facts to the point heading that was stated. Accordingly, new counsel is assigned to represent the appellant on the appeal” (County Ct, Westchester Co)

Juveniles (Grandparents) (Visitation)

**Matter of Peralta v Irrizaray, 91 AD3d 877,
938 NYS2d 114 (2nd Dept 1/24/2012)**

Holding: Where the record established, “prima facie, that the parents, in willful violation of prior court orders, refuse to allow the grandmother to visit with the children “ and that there had been a change in circumstances warranting a change from having the grandmother’s sister supervise visits, which she was no longer willing to do, to having the YWCA do so, the court erred in granting the parents’ motion to dismiss the grandmother’s petitions. There must be a new hearing before a different judge, and a new determination. (Family Ct, Orange Co)

Sentencing (Post-Release Supervision)

**People v Roelofsen, 91 AD3d 887, 936 NYS2d 677
(2nd Dept 1/24/2012)**

Holding: As the court concededly imposed illegal terms of post-release supervision on the first-degree course of sexual conduct and first-degree sexual abuse convictions for offenses that occurred before the effective date of Penal Law 70.45(2-a), new postrelease supervision terms must be imposed pursuant to Penal Law 70.45(2) on remittal. (Supreme Ct, Queens Co)

Counsel (Competence/Effective Assistance/Adequacy)**Larceny (Elements) (Evidence) (Grand Larceny) (Lesser and Included Offenses)**

**People v Yagudayev, 91 AD3d 888, 937 NYS2d 279
(2nd Dept 1/24/2012)**

Holding: In this fourth-degree grand larceny case, trial counsel was ineffective where, in an effort to persuade the jury that only attempted fourth-degree grand larceny had occurred, he presented testimony by his client that, while in a store, the client had taken a cheap vanity out of its box, put valuable tools in the box and resealed it, gave another customer money to pay just for the vanity, and left the store under the pretext of attending to a child.

Clear precedent existed at the time of trial that a defendant who “had taken steps toward an apparent planned theft, but had not actually left the store before being apprehended” could be convicted of a taking so long as the defendant had “exercised control over merchandise wholly inconsistent with the store’s continued rights” (Supreme Ct, Queens Co)

Speedy Trial (Cause for Delay) (Statutory Limits)

**People v Rahim, 91 AD3d 970, 937 NYS2d 325
(2nd Dept 1/31/2012)**

Holding: The indictment should have been dismissed for delay chargeable to the prosecution pursuant to CPL 30.30. A motion to have an oral swab taken from the defendant, made during a post-readiness 23-day adjournment that was granted so a new prosecutor could become familiar with the case, did not convert any portion of the adjournment to an excludable period. A 77-day delay occasioned by the granting of the prosecution’s motion for a DNA test was not excludable as “excusable, exceptional circumstances” where the motion was made three and a half months after the defendant was found competent to proceed. And post-readiness delay that occurred between Mar. 19, 2008 and April 14, 2008 was not excludable where “the defendant’s omnibus motion was granted four months before the adjournment that was granted on March 19” and there was no showing that, after the motion was granted, “the parties were actually engaged in earnest plea negotiations” (Supreme Ct, Kings Co)

Jurisdiction**Juveniles (Custody) (Visitation)**

**Matter of Guzman v Guzman, 92 AD3d 679,
938 NYS2d 195 (2nd Dept 2/7/2012)**

Holding: The New York court erred by acting without consulting a Florida court to, in effect, deny the mother’s motion to vacate a dismissal of her petition to modify the custody and visitation provisions of a Florida divorce judgment where the father moved to Florida with the child while the mother’s petition was pending; the New York court dismissed the petition on jurisdictional grounds; and a Florida court found, when the mother filed there, that New York was the more appropriate forum. Upon remittal, the court “is directed to contact the Florida court so that the courts of the two states may confer with each other and determine which state is the more appropriate forum for this proceeding at this juncture” (Family Ct, Queens Co)

Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause (Furtive Conduct)]) (Warrantless)

Second Department *continued*

Searches [Abandoned Objects]

[People v Carmichael](#), 92 AD3d 687, 938 NYS2d 197
(2nd Dept 2/7/2012)

Holding: The “tens[ing]’ of the defendant’s arm ‘around the vicinity’ of his waistband, even coupled with his flight from the officers, did not constitute specific circumstances indicative of criminal activity so as to establish the reasonable suspicion that was necessary to lawfully pursue the defendant,” and therefore, the gun and ammunition he discarded as he ran away should have been suppressed and the indictment dismissed. (Supreme Ct, Queens Co)

Discovery (Witnesses)

Evidence (Hearsay)

Transcripts (Right To)

[People v Parchment](#), 92 AD3d 699, 938 NYS2d 174
(2nd Dept 2/7/2012)

Holding: Admitting the recording of a 911 call into evidence as a “present sense impression” hearsay exception was error where the anonymous caller described the entire course of events in the past tense, indicating that the events were being recalled and not observed as they were occurring. The harmless error doctrine cannot be applied “[g]iven the conflicting evidence as to whether the defendant was the shooter”

“In addition, ... the defendant was entitled to a copy of the transcript of his own witness’s grand jury testimony since the prosecutor made use of it to impeach the witness during cross-examination” (Supreme Ct, Queens Co)

Juveniles (Parental Rights) (Visitation)

[Matter of Aquino v Antongiorgi](#), 92 AD3d 780,
938 NYS2d 460 (2nd Dept 2/14/2012)

Holding: “[T]he Family Court erred in directing that [n]o petition requesting additional visitation by the mother shall be accepted by the court until the [attorney for the children] has approved of such a request’ [and] the alternatives to that provision proposed by the father and the attorney for the children in their respective briefs also would be improper” (Family Ct, Dutchess Co)

Juveniles (Visitation)

Prisoners (Family Relationships)

[Matter of Smith v Smith](#), 92 AD3d 791, 938 NYS2d 601
(2nd Dept 2/14/2012)

Holding: While there is sound and substantial support in the record for a finding that “visitation with the father in person is not in the children’s best interests unless the father contributes toward the cost of such visitation,” “the Family Court improvidently exercised its discretion by, in effect, prohibiting the father from filing another petition for visitation for a period of three years” The primary obstacles to visitation, which are the cost and logistics of transportation, might be removed if the father was transferred to a closer correctional facility, which might constitute changed circumstances warranting modification. (Family Ct, Kings Co)

Appeals and Writs (Briefs) (Counsel)

Counsel (Anders Brief) (Competence/Effective Assistance/Adequacy)

[People v Graves](#), 92 AD3d 799, 938 NYS2d 470
(2nd Dept 2/14/2012)

Holding: New appellate counsel must be appointed where review of the record following the filing of an *Anders* brief shows “that nonfrivolous issues exist at least as to whether the County Court properly denied that branch of the defendant’s omnibus motion which was to controvert a search warrant and to suppress physical evidence seized in execution thereof ... and as to whether the County Court providently exercised its discretion in denying the defendant’s motion to withdraw his plea of guilty” (County Ct, Dutchess Co)

Evidence (Hearsay)

Juveniles (Custody) (Visitation)

Witnesses (Experts)

[Ashmore v Ashmore](#), 92 AD3d 817, 939 NYS2d 504
(2nd Dept 2/21/2012)

Holding: The father’s contention that the report and testimony of a forensic evaluator were improperly admitted because they were partially based on hearsay is rejected where “the forensic evaluator testified at trial that her conclusions were based on her interviews with the parties and the children ; some of the evidence referred to by the collateral witnesses was eventually admitted at trial through other witnesses[;] [and there was] ‘sharply conflicting testimony regarding the conduct of the parties, and evidence suggesting that the children were exhibiting behavioral problems’” (Supreme Ct, Kings Co)

Double Jeopardy

Second Department *continued***Sentencing (Post-Release Supervision) (Resentencing)**

**People v Bailey, 92 AD3d 890, 938 NYS2d 808
(2nd Dept 2/21/2012)**

The defendant's "resentencing to a term including the statutorily required period of postrelease supervision did not subject him to double jeopardy or violate his right to due process, since he had not yet completed his originally imposed sentence of imprisonment at the time he was resentenced" Also, "[o]n an appeal from a resentence to correct a *Sparber* error ... this Court lacks the authority to reconsider the incarceratory component of the defendant's sentence" (Supreme Ct, Kings Co)

Arrest (Probable Cause)**Identification (Lineups)****Search and Seizure (Suppression)**

**People v Gray, 92 AD3d 892, 938 NYS2d 633
(2nd Dept 2/21/2012)**

Holding: There was no probable cause to arrest the defendant where a radio call about a shooting contained no description of the suspect, the responding officer saw the defendant running from the direction of the reported site and asked him what had happened, and the defendant stopped to say someone had been shot, then began running again despite the officer's order to stop, discarded his jacket, and at the officer's direction showed that his hands were empty. The identifications of the defendant at a subsequent lineup must be suppressed; an independent source hearing must be held before the new trial. (Supreme Ct, Kings Co)

Accusatory Instruments (General) (Sufficiency)

**People v Milton, 92 AD3d 899, 938 NYS2d 635
(2nd Dept 2/21/2012)**

Holding: The defendant, who was charged by felony complaint, waived indictment, and pleaded guilty on a superior court information (SCI), is entitled to reversal of his first-degree grand larceny conviction where the SCI contained the names of different accusers than those in the complaint "and others," and so did not include at least one offense contained in the complaint. The defect survives the failure to raise the issue below, the guilty plea, and the waiver of appeal. (Supreme Ct, Queens Co)

Forensics (DNA)**Witnesses (Confrontation of Witnesses)**

**People v Oliver, 92 AD3d 900, 938 NYS2d 619
(2nd Dept 2/21/2012)**

Holding: The court erred in ordering the defendant to provide a buccal swab where the prosecution failed to show probable cause to believe the defendant committed the burglary at issue; the prosecutor's affidavit merely asserted in a conclusory way, without presenting a source of the information, "that the defendant had injured himself during the commission of the burglary and that blood was recovered at the crime scene"

The defendant's right to confront the witnesses against him was violated by a forensic scientist's testimony that DNA recovered from the crime was uploaded by his office to a database, he was informed days later that the DNA profile matched a profile in that database, and "approximately two weeks later, 'Albany' informed him that the profile in the database ... was the defendant's profile." (County Ct, Suffolk Co)

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

**People v Spence, 92 AD3d 905, 938 NYS2d 622
(2nd Dept 2/21/2012)**

Holding: "[I]mproper remarks by the prosecutor during summation deprived the defendant of a fair trial" where the prosecutor said "over objection, that the witness testified 'not knowing what the ramifications ... would be for herself and her family,'" without any evidence of threats by the defendant, and also commented on the defendant's tattoos, which the defense had pointed out were not noted by any witness, as supporting, by their violent content, the identity of the defendant as the person who possessed a gun. (Supreme Ct, Nassau Co)

Parole (Release [Consideration for])

**Matter of Stanley v New York State Board of Parole,
92 AD3d 948, 939 NYS2d 132 (2nd Dept 2/28/2012)**

Holding: The judgment granting the instant prisoner a de novo parole hearing on the basis that the Parole Board focused primarily on the nature of his offense when denying him parole release is reversed; the Board need not give equal weight to all factors, did consider, in addition to the seriousness of the original offense, the prisoner's disciplinary record in prison, criminal history, and escalating criminal behavior, so that its "determination was not based on 'irrationality bordering on impropriety'" (Supreme Ct, Orange Co)

Counsel (Competence/Effective Assistance/Adequacy)

Second Department *continued*

Trial (Verdicts [Motions to Set Aside (CPL § 330 Motions)])

People v Bernard, 92 AD3d 952, 938 NYS2d 898 (2nd Dept 2/28/2012)

Holding: Trial counsel took a position adverse to his client by responding at sentencing, when asked if he was adopting the defendant’s pro se motion to set aside the verdict, “that he had reviewed the motion and did not adopt it” because to do so “he would have had to indicate that he had ‘a belief that it had some legal merit’” so that a new determination of the motion must be made on remittal, with appellate counsel representing the defendant. (Supreme Ct, Queens Co)

Sex Offenses (Sex Offender Registration Act)

People v Martinez, 92 AD3d 930, 938 NYS2d 898 (2nd Dept 2/28/2012)

Holding: The matter is remitted to the court for a determination of “whether the defendant’s response to treatment was exceptional and, if so, whether, as a discretionary matter, a downward departure from his presumptive risk level was appropriate” where the court failed to do so based on its finding “that sex offender treatment is adequately taken into account in the Sex Offender Registration Act Risk Assessment Guidelines” (County Ct, Suffolk Co)

Evidence (Judicial Notice)

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

People v Taylor, 92 AD3d 961, 940 NYS2d 103 (2nd Dept 2/28/2012)

Holding: The court erred in granting the defendant’s motion to suppress physical evidence where the inventory search in question did create a usable inventory. Failure to use a particular form is not fatal. “The record supports the conclusion that the search was conducted in accordance with the New York City Police Department Patrol Guide, of which we take judicial notice” and that “the motivation of the police officers in conducting the inventory search was caretaking rather than criminal investigation” (Supreme Ct, Queens Co)

Dissent: The Judicial Hearing Officer found that the prosecutor “proffered ‘no testimony concerning . . . the [NYPD’s] standard procedure . . . with respect to inventory searches’” [Emphasis in decision.] The prosecution did not meet its burden of establishing that what occurred was a proper inventory search.

Judgment (Vacating)

Juveniles (Parental Rights)

Matter of Anna M., 93 AD3d 671, 940 NYS2d 121 (2nd Dept 3/6/2012)

Holding: The Family Court erred by denying the father’s motion to vacate an order issued two years earlier awarding guardianship of the subject children to an uncle without determining “whether personal service was properly effected, or whether any defect in service could be disregarded as an irregularity under CPLR 2001” given that jurisdictional issues must be resolved before the excusable nature of a party’s default is addressed. (Family Ct, Dutchess Co)

Sentencing (Concurrent/Consecutive)

Weapons (Possession)

People v Morency, 93 AD3d 736, 940 NYS2d 138 (2nd Dept 3/13/2012)

Holding: The court erred in imposing consecutive prison terms for second-degree weapon possession and first-degree manslaughter where the evidence showed that the decedent was the initial aggressor, pulling a gun from beneath her bed leading to a struggle over the weapon. The prosecution failed to establish “that the defendant possessed a dangerous instrument with a purpose unrelated to his intent to use it against the [decedent]” (Supreme Ct, Kings Co)

Evidence (Hearsay)

Juveniles (Neglect)

Matter of Ethan Z., 93 AD3d 733, 939 NYS2d 872 (2nd Dept 3/13/2012)

Holding: The Administration for Children’s Services (ACS) failed to establish that it was entitled to summary judgment on the issue of neglect where the evidence ACS submitted failed to establish neglect and was largely made up of hearsay, which, pursuant to Family Court Act 1046(b)(iii), (c), is not permitted in a fact-finding hearing. The father must be given an opportunity to prepare his case. (Family Ct, Kings Co)

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

People v Naughton, 93 AD3d 809, 940 NYS2d 667 (2nd Dept 3/20/2012)

Holding: The First Department decision in *People v Butler* (88 AD3d 470) is rejected and the defendant’s sentence as a second felony offender, based on a 2001 burgla-

Second Department *continued*

ry conviction for which he was resentenced after being sentenced for the instant 2008 attempted burglary, is affirmed. Whether the date of a *Sparber* resentencing initiated by the prosecution or DOCCS is the operative date for applying the predicate felony offender statutes has not been definitely decided by the Court of Appeals and is a matter of first impression here. (County Ct, Suffolk Co)

[*Ed. Note: The Third Department, in People v Boyer* (91 AD3d 1183 [3rd Dept 1/26/2012]), reached the same conclusion as the Second Department. A summary of that decision appears on p. 35 of the Jan.-Mar. 2012 issue of the REPORT.]

Appeals and Writs (Scope and Extent of Review)**Counsel (Competence/Effective Assistance/Adequacy)****Post-Judgment Relief (CPL § 440 Motion)**

People v Freeman, 93 AD3d 805, 940 NYS2d 314
(2nd Dept 3/20/2012)

Holding: The defendant's ineffective assistance of counsel claim, based in part on matters in the record and in part on information outside the record, cannot be resolved on the record alone; the appropriate forum for reviewing the entire claim is a CPL 440.10 proceeding. (County Ct, Dutchess Co)

Appeals and Writs (Judgments and Orders Appealable)**Narcotics (Diversion) (Marijuana)**

People v DeYoung, 95 AD3d 71, 940 NYS2d 306
(2nd Dept 3/20/2012)

Holding: The defendant's claim that the court improperly denied his application for judicial diversion was not waived by his guilty plea where the plea was entered with the understanding that this issue could be appealed and his waiver of the right to appeal specifically excluded this issue. Given that a defendant must usually plead guilty as part of the diversion process, "diversion is not incompatible with the defendant's guilt." The prosecution's argument that the defendant exaggerated his substance abuse history to get into diversion was not raised below and is not supported by the record. Where part of the proceeds of the defendant's criminal transaction was used to purchase alcohol and marijuana, that he used some of the money for other purposes does not detract from a conclusion that his chemical abuse and dependence were factors contributing to the criminal behavior; abuse or dependence need not be the only factor. As the Legislature made class B felons eligible for diversion, diversion cannot be said to be appropriate only for low-level offenses. Here, all of the factors of CPL

216.05(3)(b) support diversion and the defendant's application should have been granted. (County Ct, Orange Co)

Family Court (Family Offenses) (Orders of Protection)

Matter of Brito v Vazquez, 93 AD3d 842, 941 NYS2d 634
(2nd Dept 3/27/2012)

Holding: The court erred by including in the order of protection, issued upon finding that a family offense had been committed, a provision that the father not leave the parties' child under the supervision of his wife outside the father's presence and that the father be with the child at all times where there was no evidence or finding that such a restriction was necessary to protect the child from future family offenses. (Family Ct, Queens Co)

Appeals and Writs (Briefs) (Counsel)**Counsel (*Anders* Brief) (Competence/Effective Assistance/Adequacy)**

People v Geter, 93 AD3d 858, 940 NYS2d 898
(2nd Dept 3/27/2012)

Holding: The *Anders* brief filed in this appeal, from convictions following a jury trial that include third-degree rape and first-degree unlawful dealing with a child, "failed to adequately analyze potential appellate issues or highlight facts in the record that might arguably support the appeal" and independent review of the record discloses that "nonfrivolous issues exist with respect to, inter alia, the admissibility into evidence of the appellant's statement to the police" (County Ct, Orange Co)

Third Department

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Assault (Evidence) (Lesser Included Offenses)**Trial (Verdicts [Motions to Set Aside (CPL § 330 Motions)])**

People v Hakim-Peters, 92 AD3d 1030, 937 NYS2d 759
(3rd Dept 2/9/2012)

Holding: The court properly granted the defendant's motion to set aside the verdict finding him guilty of first-degree assault and reckless endangerment and modified the verdict by setting aside those convictions and entering third-degree assault and second-degree reckless endangerment convictions. The court correctly found that there was legally insufficient evidence to support a finding that

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the defendant acted with depraved indifference to human life where the defendant, a devout Muslim, had a verbal fight with his son and then he shoved and hit his son; later, after the son objected to the family’s lifestyle, the defendant grabbed him near the neck, threw him on the ground, and struck his head on the carpeted floor as many as five times; and when the defendant realized his son was unconscious, he attempted to revive him and immediately told his other children to call 911. A one-on-one fight rarely will support a depraved indifference finding and it is even rarer when the other person is the defendant’s child. While the defendant’s act of slamming his son’s head on the floor was deplorable, “his behavior did not constitute the type of prolonged torturous conduct necessary to support a finding of depraved indifference.” (Supreme Ct, Schenectady Co)

Juveniles (Adoption) (Custody) (Parental Rights)

People v Dakota F., 92 AD3d 1097, 939 NYS2d 586 (3rd Dept 2/16/2012)

Holding: The court erred in modifying the permanency goal in this Family Court Act (FCA) article 10-A proceeding to establish concurrent goals of return to parent and placement for adoption because FCA 1089(d)(2)(i) specifically requires the court to choose only one of five alternatives. The goals selected by the court are inherently contradictory and the petitioner cannot comply with the court’s order to implement the goals concurrently. The court also erred in failing to consult with the child or ask the child’s attorney about the child’s wishes; while FCA 1089(d) does not require that the child be produced in court, it does require that the court find an age-appropriate manner to consult with the child. Whether the failure to consult with the child alone requires reversal is not decided. (Family Ct, St. Lawrence Co)

Sentencing (Modification) (Restitution)

Victims (Compensation)

People v Morrishaw, 92 AD3d 1088, 937 NYS2d 763 (3rd Dept 2/16/2012)

Holding: The court did not have the authority to modify the restitution order to direct the defendant to pay restitution to the funeral home instead of paying restitution to the mother of the decedent to reimburse her for funeral expenses. Penal Law 60.27(1) authorizes the court to order restitution to a crime victim and the funeral home is not a victim because the funeral expenses were voluntarily incurred by the mother and did not arise from a legal obligation directly and causally related to the crime.

Further, the funeral home is not a representative of the mother; instead, the funeral home is a creditor of the mother and to seek payment, it must file a civil action against the mother for breach of contract. While, in general, restitution orders are not appealable, the restitution order is deemed to be an appealable amendment of the judgment of conviction. Whether the court was divested of jurisdiction over the defendant because of the almost two and one half year delay between sentencing and the modification is not decided. (County Ct, Schenectady Co)

Discrimination (Race)

Evidence (Chain of Custody) (Weight)

Juries and Jury Trials (Challenges) (Selection)

People v Thomas, 92 AD3d 1084, 940 NYS2d 163 (3rd Dept 2/16/2012)

Holding: The defendant failed to preserve his *Batson* claim regarding two women on the first panel who were peremptory challenged by the prosecution where defense counsel, in objecting to the peremptory challenge of a woman from the second panel, referred to those women in support of his argument that the prosecution was engaging in a pattern of exclusion, but did not expressly request race-neutral reasons for their exclusion, and after the prosecution stated that the first two women were not excluded based on race and the court gave defense counsel an opportunity to respond, counsel declined to do so. By not responding to the prosecution’s explanation for the exclusion of those jurors, the defendant failed to meet his burden of persuading the court that the prosecution’s explanations were pretextual. The court properly denied the defendant’s motion to suppress the packet of crack cocaine, even though one of the detectives did not testify about what he did with the packet after receiving it from the confidential informant, where the trial evidence established that the evidence custodian found the packet in the evidence drop box, the accompanying paperwork indicated the packet was put in the drop box by that detective, the packet was sealed and processed in accordance with established procedures, and the witnesses who handled the packet testified that they recognized the packet and that it was in the same or substantially the same condition. Any gaps in the chain of custody affect the weight, not the admissibility of the evidence. (Supreme Ct, Ulster Co)

Concurrence in Part, Dissent in Part: The defendant sufficiently articulated his *Batson* challenge as to all three jurors, and the court erred in only requiring the prosecution to provide a race-neutral explanation as to the third juror.

Aliens (Deportation) (Discrimination)

Third Department *continued***Article 78 Proceedings****Narcotics (Diversion) (Drug Treatment)**

Matter of Carty v Hall, 92 AD3d 1191, 939 NYS2d 609
(3rd Dept 2/23/2012)

Holding: Prohibition and mandamus are not available, nor is the petitioner entitled to seek a declaratory judgment, because the trial court had the discretion to determine whether to order the alcohol and substance abuse evaluation requested by the petitioner, a lawful permanent resident, who is an eligible defendant as defined in CPL 216.00(1). The record shows that the respondent judge held a full and fair hearing on the issue and did not violate the petitioner's due process or equal protection rights. "Although petitioner is faced with the inherent and grave risk of deportation if he is convicted, his participation in a discretionary program is not mandated so as to avoid this harsh collateral result."

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])**Sentencing (Fines)****Traffic Infractions**

People v Stewart, 92 AD3d 1146, 940 NYS2d 178
(3rd Dept 2/23/2012)

Holding: The defendant's convictions for first-degree aggravated unlicensed operation of a motor vehicle and unlicensed operation must be reversed and the counts dismissed where the superior court information alleged that the defendant committed these crimes while operating a motor vehicle in a parking lot, which does not satisfy the statutory requirement that the defendant operate a motor vehicle on a public highway.

Because the court failed to advise the defendant before he entered his plea that it could impose a fine as part of his sentence and, even though the court made no commitment as to sentencing, the defendant was entitled to know that a fine could be imposed, the matter is remitted to the trial court to impose a sentence without a fine or, in the alternative, give the defendant an opportunity to withdraw his plea. (County Ct, Clinton Co)

Due Process (Fair Trial)**Guilty Pleas (Withdrawal)****Plea Bargaining**

People v Dixon, 93 AD3d 894, 939 NYS2d 199
(3rd Dept 3/1/2012)

Holding: The defendant's due process rights were not violated and the court did not err in denying the defendant's pre-sentencing motion to withdraw his plea where, although the defendant's plea agreement required him to agree not to testify at the trials of any of his codefendants and the codefendants' plea agreements contained the same term, the defendant's plea was knowing and intelligent, the defendant admitted to participating in the burglary, and he did not show that any codefendant would offer exculpatory testimony. In support of his motion, the defendant asserted that none of the witnesses identified him and that he pleaded guilty because the court told one of the codefendants that he could not testify at the defendant's trial; however, the defendant did not identify which codefendant he was referring to nor did he explicitly say what that codefendant's testimony would be. If the defendant can get exculpatory statements from one or more of the codefendants or be rebuffed in his attempt to do so, he may be able to show that the prosecution's plea agreements with the codefendants operated to deprive him of his right to a fair trial, which he could use to seek relief in a CPL 440 proceeding. This court does not encourage the type of plea agreements used by the prosecution. (County Ct, Greene Co)

Dissent: "As the practice employed by the People here is — to my analysis — ripe for abuse, contrary to the notion of a voluntary plea agreement and, ultimately, violative of defendant's due process rights, I would reverse and grant defendant's motion to withdraw his plea." [Footnote omitted.]

Appeals and Writs (Waiver of Right to Appeal)**Double Jeopardy (Pleadings and Pleas) (Waiver)**

People v Galunas, 93 AD3d 892, 939 NYS2d 196
(3rd Dept 3/1/2012)

Holding: The defendant waived his constitutional double jeopardy claim by pleading guilty and expressly waiving his right to appeal. Even if the issue was preserved, it would have been denied because a claim of constitutional double jeopardy "does not arise when each of the challenged charges 'requires proof of a fact which the other does not'" The defendant was charged in Ulster County with three counts of third-degree criminal possession of a controlled substance and two counts of third-degree criminal sale of a controlled substance, and he was later indicted in Delaware County for various crimes, including burglary and two counts of first-degree criminal possession of a controlled substance. The defendant alleged that he came into possession of the controlled substances that formed the basis for the Ulster County charges as a result of the alleged Delaware County crimes. The challenged Delaware charge that alleged possession of methadone was not charged in the Ulster indictment,

Third Department *continued*

and the other challenged Delaware charge had a weight element that was different from the Ulster charges. (County Ct, Delaware Co)

Sentencing (Post-Release Supervision) (Resentencing)

People v Elliott, 93 AD3d 957, 939 NYS2d 721 (3rd Dept 3/8/2012)

Holding: The court erred in refusing to impose a period of post-release supervision (PRS) at the defendant’s resentencing because Penal Law 70.45 requires a court that failed to impose PRS at the initial sentencing to vacate the sentence and resentence the defendant and impose the appropriate period of PRS. The resentencing proceeding is designed to correct a procedural error and it is limited to adding the appropriate period of PRS. (County Ct, Sullivan Co)

Juveniles (Family Offenses) (Visitation)

Sentencing (Orders of Protection)

People v Howes, 93 AD3d 954, 939 NYS2d 766 (3rd Dept 3/8/2012)

Holding: The integrated domestic violence court erred in issuing, at sentencing, an order of protection prohibiting contact between the defendant and his children for a period of three years where the underlying crimes involved him sending a threatening text message to the children’s mother, in violation of an order of protection; the defendant’s conduct did not directly involve the children; the record evidence does not justify a three-year stay away order; and the prosecution, the mother, and the attorney for the children agreed that supervised visitation was appropriate. (Supreme Ct, Columbia Co)

Driving While Intoxicated (Breathalyzer) (Evidence)

Evidence (Business Records)

Witnesses (Confrontation of Witnesses)

People v Hulbert, 93 AD3d 953, 939 NYS2d 661 (3rd Dept 3/8/2012)

Holding: The defendant’s confrontation clause rights were not violated by the court’s admission of documents that stated that the breath test machine was routinely tested to ensure that it accurately measured a sample of simulator solution and provided an analysis of that simulator solution because those documents are not testimonial since they do not establish an element of the crimes charged. While the statements satisfy the necessary foun-

dational requirement for admission of the test results, they are not accusatory. (County Ct, Otsego Co)

Confessions (Duress) (Interrogation) (Videotapes) (Voluntariness)

Homicide (Murder [Intent])

Witnesses (Experts)

People v Thomas, 93 AD3d 1019, 941 NYS2d 722 (3rd Dept 3/22/2012)

Holding: The court did not abuse its discretion in denying, after a *Frye* hearing, the defendant’s motion to permit testimony from a social psychologist on police interrogation tactics and false confessions where the record, including testimony from the prosecution’s expert, fully supports the court’s findings that the defendant’s expert’s testimony did not deal with an issue outside the ken of the average juror and that the principles upon which the expert relied had not been accepted by the relevant scientific community. The jury, after viewing the defendant’s videotaped interviews and hearing the defendant’s trial testimony, was capable of deciding whether it believed that the defendant’s statements to the police were true or that they were falsely made due to police interrogation techniques and coercion, and the court provided an expanded charge on the issues of voluntariness and the factors that must be evaluated to determine if the confession was the product of undue pressure or improper conduct.

The prosecution satisfied its burden of demonstrating beyond a reasonable doubt that the defendant’s statements were voluntary.

There is sufficient evidence to prove that the defendant acted with depraved indifference and establish his guilt of depraved indifference murder of a child where the defendant admitted that over a four day period he repeatedly threw his premature infant son and then ignored signs the child was in distress, and the prosecution’s medical experts testified that the child sustained severe head trauma, causing his death. “[T]he jury reasonably concluded that defendant, aware of an obvious risk of death or serious physical injury, acted recklessly” And although a different finding would not have been unreasonable if the jury credited defense testimony, the verdict was not contrary to the weight of the credible evidence. (County Ct, Rensselaer Co)

Due Process (Notice)

Juveniles (Custody) (Neglect) (Parental Rights)

Matter of Alexis AA., 93 AD3d 1090, 941 NYS2d 318 (3rd Dept 3/29/2012)

Third Department *continued*

Holding: In this permanency proceeding, the court violated the father's due process rights by issuing a sua sponte order granting the children's mother sole legal custody, based on a conclusory best interests finding, where the father had no notice of the court's intention to modify his pre-existing right to joint legal custody. The petitioner's permanency plan, to which the mother, father, and attorney for the children consented, provided that the children would be discharged to the joint custody of the parents, with the mother having primary physical custody, the same custody arrangement that existed prior to the neglect findings against both parents and placement with the petitioner. (Supreme Ct, Clinton Co)

Driving While Intoxicated (Driving While Ability Impaired) (Evidence) (General)**Lesser and Included Offenses**

People v Carota, 93 AD3d 1072, 941 NYS2d 302 (3rd Dept 3/29/2012)

Holding: The court erred in denying the defendant's request to submit the lesser included offense of driving while ability impaired (DWAI) (VTL 1192[1]) in this felony DWI (VTL 1192[3]) case because there is a reasonable view of the evidence to support a finding of the lesser offense where the defendant admitted that he drank two beers before his arrest and that his ability to drive was impaired, but alleged that the impairment was caused by use of marijuana, and the defendant refused to submit to a chemical breath test. The jury could have believed that the defendant was affected by alcohol and marijuana and that the alcohol resulted only in some impairment of his ability to drive. However, the evidence was legally sufficient to establish that the defendant was intoxicated by alcohol, and the verdict was not against the weight of the evidence where the arresting officer testified that the defendant committed three traffic violations; smelled strongly of alcohol and marijuana; had slurred speech and glassy and bloodshot eyes; struggled to maintain his balance getting out of the vehicle; failed five field sobriety tests; refused to take a breathalyzer; and admitted he had been drinking, and, further, the defendant's girlfriend testified that he smelled of alcohol when she saw him at the jail several hours after his arrest. (County Ct, Warren Co)

Juries and Jury Trials (Challenges) (Selection)

People v Jabot, 93 AD3d 1079, 941 NYS2d 311 (3rd Dept 3/29/2012)

Holding: The court abused its discretion in denying the defendant's request to exercise a peremptory chal-

lenge of a juror where, after questioning of the first group of prospective jurors ended and the prosecution exercised their challenges, defense counsel initially indicated that he did not have any peremptory challenges, but seconds later, when the court named the first two jurors to be assigned seats, counsel immediately notified the judge that he intended to exercise a peremptory challenge of a juror in that group, one who had not been assigned a seat, but that he had missed it in his notes. While CPL 270.15 gives the court discretion to entertain a belated peremptory challenge, "we can detect no discernible interference or undue delay caused by defense counsel's momentary oversight that would justify County Court's hasty refusal to entertain defendant's challenge." (County Ct, Washington Co)

Juveniles (Family Offenses) (Representation)**Motions**

Matter of Pamela N. v Neil N., 93 AD3d 1107, 941 NYS2d 751 (3rd Dept 3/29/2012)

Holding: The court erred in granting the respondent's motion to dismiss the family offense petition in its entirety for failure to state a cause of action (CPLR 3211[a][7]) where the pro se petition, while inartfully drafted, adequately alleged that the respondent committed second-degree harassment and fourth-degree stalking; the court "should have waded through the myriad allegations and dismissed with specificity only those which did not sufficiently allege conduct that constituted harassment, stalking or any other act listed in Family Court Act § 821(1)" The standard for granting such a motion is whether, based on the allegations, the petitioner has a claim, not whether one was stated. At the appearance on the petition, the court mentioned that some of the allegations related to issues already resolved, presumably when the court dismissed with prejudice a previous petition; but the respondent did not move to dismiss on the grounds of res judicata or collateral estoppel (CPLR 3211[a][5]) and the court did not base its dismissal order on that ground, which is therefore not considered here. The court properly exercised its discretion in appointing an attorney to represent the children in this family offense proceeding, which is authorized in Family Court Act 249(a), particularly since the offenses were allegedly committed in the presence of the children. (Family Ct, Saratoga Co)

Fourth Department

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Fourth Department *continued*

Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause]) (Motions to Suppress [CPL Article 710]) (Weapons-frisks)

People v Bracy, 91 AD3d 1296, 937 NYS2d 501 (4th Dept 1/31/2012)

Holding: The court erred in denying the defendant’s motion to suppress the marijuana found in the waistband of his pants because the search went beyond the lawful limited pat frisk, but correctly denied the motion as to the gun found in his pocket, which was found during the frisk where: the defendant and another man were standing in the street next to an occupied parked car, thereby preventing passing cars from driving in the proper traffic lane; the area was known for violence; the officer approached the car and asked the men and the car’s occupants for identification, but no one complied; the officer then got out of her car and again asked for their identification; the defendant and the other man, both of whom were wearing long hooded jackets, reached toward their waistbands or pockets; the officer grabbed the men, put one in her car, frisked the defendant, finding a handgun in his pocket, and took a bag from his waistband that she believed contained a kit to test for marijuana. The hearing evidence does not support the court’s finding that the officer knew the bag had marijuana in it before she took it from his waistband. (County Ct, Erie Co)

Prisoners (Disciplinary Infractions and/or Proceedings)

Matter of Brown v Fischer, 91 AD3d 1336, 936 NYS2d 831 (4th Dept 1/31/2012)

Holding: The determination after a Tier III disciplinary hearing that the petitioner violated two inmate rules, threats of violence and false statements, is not supported by substantial evidence where the inmate misbehavior report did not contain any information that the hearing officer could use to assess the credibility of the unnamed inmate informants who told the counselor about the threatening letter that the petitioner allegedly wrote. Because the inmate behavior report was not written by a correction officer who witnessed the conduct in question, the record must include facts showing “some indicia of reliability to the hearsay before the report may be considered sufficiently relevant and probative to constitute substantial evidence’” Further, an independent comparison of the letter and the handwriting samples does not show sufficient similarities to constitute substantial evidence that they were written by the same person.

Civil Practice

Prisoners (Rights Generally)

Sentencing

Davis v State of New York, 91 AD3d 1356, 937 NYS2d 521 (4th Dept 1/31/2012)

Holding: The claimant is not entitled to damages for the failure of the then Department of Correctional Services to comply with Corr L former 601-a, which required the facility warden to contact the district attorney when a person was sentenced as a multiple felony offender and the warden believes the sentence was wrong, as there is no private right of action under that section. Although the respondent did not make this claim before the trial court, it can be raised for the first time on appeal because it is a question of law apparent on the record that the claimant could not have avoided if raised in a timely matter. (Court of Claims)

Instructions to Jury

Sentencing (Concurrent/Consecutive)

People v Dennis, 91 AD3d 1277, 937 NYS2d 496 (4th Dept 1/31/2012)

Holding: The defendant’s sentence is illegal to the extent that the sentences for the first-degree robbery counts run consecutively to rather than concurrently with the felony murder count because “the robbery was the underlying felony for that count of felony murder and thus constituted a material element of that offense’” The court correctly instructed the jury on consciousness of guilt where the prosecution presented evidence that the police tried to locate the defendant at the address on his driver’s license and the addresses of his former and current girlfriend; the police told the defendant’s family that they were looking for him; and when he was arrested six months later, after the police received information about his location, the defendant rammed the car he was driving into the police car before surrendering. The prosecution did not need to prove that the defendant knew the police were looking for him. (County Ct, Niagara Co)

Due Process

Juveniles (Parental Rights) (Permanent Neglect)

Matter of Liliana G., 91 AD3d 1325, 938 NYS2d 703 (4th Dept 1/31/2012)

Holding: The court deprived the respondent mother of her constitutional due process rights by failing to hold a hearing before determining that the petitioner did not have to continue to use reasonable efforts to reunite the mother and her child because, although the mother’s parental rights with respect to her other children had been involuntarily terminated, the record shows the respon-

Fourth Department *continued*

dent's answering papers raised genuine issues of fact, including that a child protective services caseworker testified at a prior hearing that the child could be safely returned to the mother, the court had stated that it wanted to hold a dispositional hearing to determine the mother's progress, but no hearing was held, and the record does not contain evidence about the issues raised by the mother. (Family Ct, Erie Co)

Freedom of Information**Prisoners**

Matter of Mack v Howard, 91 AD3d 1315, 937 NYS2d 785 (4th Dept 1/31/2012)

Holding: The court erred in denying the inmate petitioner's CPLR article 78 petition to the extent that he sought to compel the respondents to comply with his Freedom of Information Law request for a copy of the part of a videotape from a specified date that depicted his detention in a cell that is used to detain inmates temporarily on their way to and from court. The video is not exempt under Public Officers Law 87(2)(f) because the respondents failed to show that the release of the video could endanger the life or safety of any person; that the tape shows how an inmate can create a disturbance that draws deputies away from their transport duties and ties up manpower is speculative where it is not apparent from the video that the three officers involved in the fight with the petitioner were taken away from their transport duties. It is obvious that an inmate disturbance might result in the redistribution of correctional officers, the incident could be seen by other inmates, and the officers responded in a conventional way. The petitioner is not entitled to attorney's fees, however, because even assuming that the respondents did not have a reasonable basis for failing to disclose the tape, the petitioner did not substantially prevail because he established his entitlement to only one of the number of videos he requested. (Supreme Ct, Erie Co)

Accusatory Instruments (Amendment)**Motor Vehicles (Hit-and-run Driving)**

People v McKinney, 91 AD3d 1300, 937 NYS2d 507 (4th Dept 1/31/2012)

Holding: The defendant's conviction must be reduced from leaving the scene of a personal injury incident as a class D felony to the class E felony where the indictment charged the defendant with only the class E felony for having caused serious injury to the victim and the court incorrectly granted the prosecution's oral

motion at trial to amend the indictment to allege that the victim died, thereby raising the offense to a class D felony. (Supreme Ct, Monroe Co)

Appeals and Writs (Scope and Extent of Review)**Confessions (Notice of Use at Trial)****Larceny (Elements) (Evidence) (Grand Larceny) (Petty Larceny) (Value)**

People v Pallagi, 91 AD3d 1266, 937 NYS2d 486 (4th Dept 1/31/2012)

Holding: The evidence was legally insufficient to support the fourth-degree grand larceny convictions because the prosecution failed to prove beyond a reasonable doubt that the value of the stolen property exceeded \$1,000 where the sole evidence of value was the testimony of the store's loss prevention officer who provided values for three specific missing items, which totaled less than \$300; stated that the total value of the property taken was \$2,200, based on review of a poor quality recording of the defendants' movements in which she could not clearly identify the items taken; stated that the defendants took about 20 items into the dressing room area that were not recovered, but then admitted that about 20 items were found there, and there was no showing that the items found were not some of those allegedly taken; and assigned a minimum value to the items allegedly taken, based on her estimate of the minimum sales price of some items in that area. As the evidence is sufficient to support a petit larceny conviction, the indictments are dismissed without prejudice to filing of an appropriate lesser charge.

The court erred in denying the defendants' motion to strike testimony of a deputy that one of the defendants said her friend had given them a ride to the mall, which the prosecution used to argue in summation that the friend was part of the scheme to steal property, where the prosecution's CPL 710.30 notice did not provide adequate notice of the substance of that statement; the statement did not constitute pedigree information exempt from the notice requirement. (County Ct, Ontario Co)

Dissent: The conviction should be reduced to the lesser included offense of petit larceny. The court correctly refused to strike the testimony because there is no basis for concluding that the court would have suppressed the statement as involuntary; if this was a trial error, then the majority did not have the authority to review the legal sufficiency of the evidence and must remit for a new trial on the indicted counts.

Civil Practice**Prisoners (Conditions of Confinement) (Rights Generally)**

Fourth Department *continued*

Rivera v State of New York, 91 AD3d 1331, 937 NYS2d 791 (4th Dept 1/31/2012)

Holding: The court erred in granting the defendant’s motion for summary judgment with respect to the claimant’s negligence and medical malpractice claims on the grounds of res judicata or collateral estoppel because the claimant could not have sought the relief he seeks here in the earlier CPLR article 78 proceeding he brought to annul the determination of the then Department of Correctional Services refusing to give him treatment for hepatitis C based on his failure to participate in a residential substance abuse treatment program. And the issues of negligence and deviation from accepted standards of care were not actually and necessarily decided in the article 78 proceeding. (Court of Claims)

Narcotics (Diversion) (Drug Treatment)

People v Bona, 92 AD3d 1242, 937 NYS2d 813 (4th Dept 2/10/2012)

Holding: The drug court should have allowed the defendant to withdraw his guilty plea and transferred the case back to the county court for further proceedings, instead of proceeding to sentencing, because the defendant never entered judicial diversion where the case was transferred to the drug treatment court for a treatment evaluation and consideration for judicial diversion; the parties and the court agreed to his participation; the defendant entered his plea, at which time the court indicated there would be a drug court contract, but the defendant did not agree on the record or in writing to abide by the drug court’s release conditions; and when the defendant returned to court to sign the contract, he decided not to pursue judicial diversion. The defendant’s decision did not constitute a voluntary termination under CPL 216.05(9)(e) because the court never entered an order pursuant to CPL 216.05(4) granting diversion. (County Ct, Onondaga Co)

Appeals and Writs (Notice of Appeal)

Sentencing (Restitution)

People v Daniqua S.D., 92 AD3d 1226, 937 NYS2d 907 (4th Dept 2/10/2012)

Holding: By failing to raise it in a timely manner, the defendant forfeited her procedural claim that the court erred in relying on the presentence report to establish the complainant’s out-of-pocket loss where the complainant’s trial testimony suggested that she suffered no out-of-pocket loss. Although the defendant’s notice of appeal lists incorrect convictions and an incorrect adjudication

date, it does list the correct indictment number and the notice is treated as valid, in the exercise of discretion in the interest of justice. (County Ct, Erie Co)

Arson (Expert Evidence)

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

People v Howard, 92 AD3d 1219, 937 NYS2d 807 (4th Dept 2/10/2012)

Holding: The defendant’s second-degree murder convictions must be reversed and those counts of the indictment dismissed as they are inclusory concurrent counts of the first-degree murder counts.

The court incorrectly allowed a fire marshal “to testify regarding six categories of motivation for setting a fire, including revenge and crime concealment” where the prosecution failed to show that those categories are generally accepted in the scientific community or that the matter is beyond the ordinary ken of the trier of fact. However, the error is harmless in light of the overwhelming evidence of the defendant’s guilt and there is no significant probability that the court would have acquitted the defendant if the testimony was not admitted. The claim that the fire marshal improperly testified that he eliminated all causes of the fire but the human element is unpreserved and is without merit. (County Ct, Erie Co)

Appeals and Writs (Preservation of Error for Review)

Sentencing (Post-Release Supervision) (Pre-sentence Investigation and Report) (Second Felony Offender)

People v James, 92 AD3d 1207, 937 NYS2d 798 (4th Dept 2/10/2012)

Holding: The sentence for third-degree possession of drugs must be vacated where the defendant’s waiver of a new presentence report was invalid because a presentence report is required under CPL 390.20(4)(a) when a determinate sentence of imprisonment is to be imposed; the prosecution’s failure to file a predicate felony statement was not harmless; and the imposition of a period of post-release supervision longer than three years is illegal under Penal Law 70.45(2)(d) and 70.70(3)(b). The defendant’s general motion for a trial order of dismissal did not preserve for review his claim that the conviction is not supported by legally sufficient evidence, and he failed to renew the motion after presenting evidence. (County Ct, Cattaraugus Co)

Driving While Intoxicated (Ignition Interlock Devices)

Probation and Conditional Discharge (Conditions and Terms)

Fourth Department *continued***Sentencing (Restitution)**

[People v Farrelly](#), 92 AD3d 1290, 938 NYS2d 489
(4th Dept 2/17/2012)

Holding: The court correctly sentenced the defendant to a period of probation with an ignition interlock device requirement because, pursuant to L 2009, ch 496, § 15, the requirement contained in the amendments to VTL 1198 is applicable to the defendant since he was convicted of felony driving while intoxicated (VTL 1192[3]) and sentenced after Aug. 15, 2010. The defendant failed to preserve for review his claims that the amendments are unconstitutional and they are not reviewed in the interest of justice. The court did not err in ordering restitution in an amount over the statutory cap where the defendant consented to that amount, and the order does not conflict with the court's statement at sentencing that the defendant would not have to pay restitution twice if the complainant recovered insurance proceeds for the damage to his house caused by the defendant. (County Ct, Cayuga Co)

Sex Offenses (Civil Commitment)**Venue (Change of Venue)**

[Matter of State of New York v Williams](#), 92 AD3d 1271,
938 NYS2d 482 (4th Dept 2/17/2012)

Holding: The court erred in granting the respondent's motion to transfer venue from the county of conviction back to the county where he is confined because the motion did not set forth specific facts sufficient to show a sound basis for the transfer where the respondent made conclusory statements that he could not obtain a fair trial in the county of conviction; the respondent made the same allegation in his earlier motion to transfer venue from the county where he was confined to the county of conviction. (Supreme Ct, Chautauqua Co)

Sentencing (Concurrent/Consecutive)**Sex Offenses (Civil Commitment)**

[Matter of State of New York v Williams](#), 92 AD3d 1274,
938 NYS2d 717 (4th Dept 2/17/2012)

Holding: The court correctly determined, as it had in its original decision, that the respondent was a detained sex offender under Mental Hygiene Law (MHL) 10.03(g) because he was convicted of sex offenses and was currently serving a sentence for reckless endangerment, an offense that fell within the third category of related offenses in MHL 10.03(1), *ie*, "those 'which are the bases of the orders of commitment received by [DOCS] in connection

with an inmate's current term of incarceration'" The reckless endangerment sentence ran consecutive to the rape sentence that was entered at the same time, and the proceeding was commenced about four days before the respondent's maximum release date and while he was in the custody of the then Department of Correctional Services. The decision in *Matter of State of New York v Rashid* (68 AD3d 615 [1st Dept 2009] *affd* 16 NY3d 1 [2010]) is distinguishable. (Supreme Ct, Chautauqua Co)

Appeals and Writs (Notice of Appeal)**Witnesses (Credibility) (Cross Examination)**

[People v Dizak](#), 93 AD3d 1182, 940 NYS2d 408
(4th Dept 3/16/2012)

Holding: The court properly exercised its discretion in refusing to allow the defendant to question the second testifying coconspirator about a youthful offender adjudication, but erred in limiting the defendant's cross-examination of the witness as to the circumstances underlying that adjudication and the witness's disorderly conduct conviction. The error was harmless because defense counsel extensively explored the witness's criminal history, though not as thoroughly as the defendant might have wanted, and the court allowed counsel to impeach the witness with numerous other prior bad acts.

The court correctly allowed the prosecution to rehabilitate the second coconspirator on redirect where defense counsel improperly impeached the witness by showing that, when he provided a statement to law enforcement shortly after the defendant solicited him to kill his ex-wife, he omitted the material fact that he agreed to do so; there was no evidence that he was asked whether he agreed nor was it unusual for the incarcerated witness to omit that information.

The prosecution waived its claim that the defendant's notice of appeal was untimely by responding to the appeal on the merits rather than filing a motion to dismiss, and did not demonstrate that it was prejudiced by the defendant's alleged failure to comply with the requirements in CPL 460.10(1)(b). (County Ct, Monroe Co)

Domestic Violence**Juveniles (Neglect)**

[Matter of Ilona H.](#), 93 AD3d 1165, 940 NYS2d 406
(4th Dept 3/16/2012)

Holding: The court erred in finding that the respondent father neglected his child because "[a] neglect determination may not be premised solely on a finding of domestic violence without any evidence that the physical, mental or emotional condition of the child was impaired or was in imminent danger of becoming impaired" and

Fourth Department *continued*

the petitioner’s only evidence of domestic violence was that the father hit the child’s mother once when the child was 8 months old; the father testified that the child was not present during the incident; and there was no evidence that the incident was anything other than isolated and did not harm the child’s well-being. (Family Ct, Erie Co)

Search and Seizure (Parolees and Probationers)

People v Scott, 93 AD3d 1193, 940 NYS2d 411 (4th Dept 3/16/2012)

Holding: The court properly denied the defendant’s motion to suppress evidence seized by parole officers and given to police investigating an attempted murder because the parole officers’ conduct was rationally and reasonably related to the performance of their duty where they were helping the police find the defendant; when they found the defendant, they smelled alcohol on his breath; and knowing that his parole conditions prohibited him from consuming alcohol, they acted within their duties in taking saliva and breath samples for alcohol and drug testing purposes. (County Ct, Genesee Co)

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Due Process (Notice)

Forensics (DNA)

Search and Seizure (Motions to Suppress [CPL Article 710])

People v Smith, 95 AD3d 21, 940 NYS2d 373 (4th Dept 3/16/2012)

Holding: The court erred in denying the defendant’s motion to suppress the DNA evidence obtained from him because his due process rights were violated and the police used excessive force in obtaining the buccal swab. The defendant had notice of the prosecution’s first application for a buccal swab, and submitted to it after the court granted the application. However, the sample obtained was sent to the wrong lab and was compro-

mised, so the prosecution made a second application, which was granted. No exigent circumstances justified the failure to give the defendant notice of the application or the order. The defendant’s failure to contest the first order does not constitute a waiver as to future orders since each order involves a bodily intrusion for which notice and an opportunity to be heard are required. And the police violated the defendant’s Fourth Amendment rights when they used a taser to get the second buccal swab, an action objectively unreasonable where the defendant had no notice of the court order; the police approached him on the street and told him they were taking him to the police station; he did not resist and entered the police vehicle; while at the station, the police handcuffed him and put him on the floor in a secure room and three patrol officers and two detectives surrounded him; the defendant did not threaten or physically resist the officers, but merely refused to open his mouth; and the police used the taser approximately 10 to 15 minutes later. “[T]here were no exigent circumstances to justify the failure to employ a less-intrusive alternative to the use of a taser.” The evidence shows that the defendant was in pain when the taser was applied and that he shouted for the officers to stop using it. (County Ct, Niagara Co)

Dissent: The defendant received the required notice when the prosecution made its first application and the second application was merely a duplicate of the first application. The test for reasonable use of force was met.

Counsel (Competence/Effective Assistance/Adequacy)

Speedy Trial (Due Process) (Prosecutor’s Readiness for Trial) (Statutory Limits)

People v White, 93 AD3d 1181, 940 NYS2d 389 (4th Dept 3/16/2012)

Holding: Decision is reserved and the matter is remitted for a hearing to determine whether the pre-indictment delay of approximately 40 months violated the defendant’s constitutional rights to a speedy trial and due process; the record is insufficient to determine whether defense counsel’s failure to raise this claim deprived the defendant of meaningful representation. The court correctly denied the defendant’s statutory speedy trial motion where the defendant was arrested on Aug. 20, 2008, indicted on Feb. 19, 2009, but not arraigned until Mar. 6, 2009; the prosecution announced their readiness for trial in open court on Feb. 19, which was within the six month period; and the arraignment delay is attributable solely to the court. Although defense counsel was not present when the prosecution declared their readiness for trial and written notice went to the wrong attorney, because the defendant received prompt written notice of the prosecution’s readiness, the prosecution satisfied their

obligation to notify the defendant of readiness within the required six-month period. (Supreme Ct, Erie Co)

Appeals and Writs (Judgments and Orders Appealable)

Juveniles (Custody) (Foster Care) (Grandparents)

Matter of Angellynn S.H.W., 93 AD3d 1349, 941 NYS2d 428 (4th Dept 3/23/2012)

Holding: The court correctly determined that it was in the child's best interests to deny the grandparents' petition for custody and maintained the order awarding the Department of Social Services (DSS) custody of the child where the grandparents were already overwhelmed by raising four other grandchildren, several of whom "were troubled and difficult to control"; there was a pending child protective services investigation of the grandparents; and the grandmother was dealing with her own mental challenges. The mother's support for the grandparents' petition is deemed a motion to set aside her stipulation to the award of custody to DSS, and therefore, she may appeal from the order keeping the child in DSS custody. (Family Ct, Allegany Co)

Juries and Jury Trials (Challenges) (Selection)

People v Bryant, 93 AD3d 1344, 941 NYS2d 426 (4th Dept 3/23/2012)

Holding: The court erred in denying the defendant's for cause challenge of a prospective juror where the juror stated that it was possible she would presume the defendant was guilty if he did not testify and the court did not elicit unequivocal assurance from her that she would be able to reach a verdict based on the court's legal instructions. Based on her statement, there is serious doubt that the juror could render a fair verdict and the jury panel's earlier collective agreement to follow the court's instructions does not constitute unequivocal assurance. (County Ct, Monroe Co)

Driving While Intoxicated (Evidence) (Field Sobriety Tests)

Forensics

People v Julius, 93 AD3d 1296, 941 NYS2d 408 (4th Dept 3/23/2012)

Holding: The court correctly allowed the arresting officer to testify about a horizontal gaze nystagmus field sobriety test without a *Frye* hearing because courts have found that the test is accepted in the scientific community as a reliable indicator of intoxication and the court may take judicial notice of that acceptance; the Second and Third Departments have reached the same conclusion. The prosecution provided the proper foundation for the testimony by asking the officer who conducted the test

about his qualifications to administer the test and the techniques he used. (County Ct, Monroe Co)

Sex Offenders (Sex Offender Registration Act)

People v Lowery, 93 AD3d 1269, 940 NYS2d 745 (4th Dept 3/23/2012)

Holding: The court correctly assessed points under risk factor 11 of the risk assessment instrument (history of drug or alcohol abuse) where the defendant's presentence report from 1986, which was admitted at the Sex Offender Registration Act hearing, stated that the defendant acknowledged that he had a problem with alcohol and that he was referred to an alcohol rehabilitation program, but was discharged due to noncompliance; and at least one of the defendant's prison disciplinary charges involved the use of alcohol. His abstinence while incarcerated does not necessarily predict his behavior upon release. The court also correctly assessed points under risk factor 13 (conduct while confined or under supervision) where the undisputed hearing evidence showed that while on parole for the sex offense, the defendant violated his release conditions at least twice and was returned to prison both times; he escaped from a county jail and assaulted and injured a deputy in the process; and he had numerous Tier II and III infractions, four of which involved possession of a weapon. (County Ct, Livingston Co)

Driving While Intoxicated

Endangering the Welfare of a Child

People v Rogalski, 93 AD3d 1322, 941 NYS2d 825 (4th Dept 3/23/2012)

Holding: The court erred in granting the defendant's motion to dismiss count three of the indictment, endangering the welfare of a child, where a review of the sealed grand jury minutes shows that the grand jury evidence was legally sufficient to support the finding that the defendant's conduct was likely to be injurious to the physical welfare of a child; this offense does not require proof of actual harm to a child. (Supreme Ct, Erie Co)

Dissent: The prosecution failed to establish that harm to the child's physical welfare was likely to occur, and not merely possible, where the police approached the defendant's car after she made a wide turn and stopped in a parking lot and the defendant was subsequently charged with aggravated felony driving while intoxicated. The defendant's conduct in driving while intoxicated with a child in the car is not, by itself, enough to support an endangering the welfare of a child charge. ⚖️

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