



Public Defense Backup Center
REPORT

Volume XXV Number 3

June–September 2010

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Movements Toward Public Defense Reform in New York

As part of the 2010-2011 state budget, Governor Paterson and the Legislature created a new Office of Indigent Legal Services and a nine-member Indigent Legal Services Board in the Executive Branch. Part E of Chapter 56 of the Laws of 2010 (Public Protection and General Government article VII bill) established the Office and Board (new Executive Law article 30, “Indigent Legal Services”). Part E also amended State Finance Law § 98-b (the Indigent Legal Services Fund) and County Law § 722(3) (authorizing conflict defender offices that are part of a bar association plan). The text of Chapter 56 is available at http://assembly.state.ny.us/leg/?default_fld=&bn=A09706&Text=Y.

The purpose of the Office and Board is to monitor, study, and make efforts to improve the quality of public defense services provided pursuant to County Law article 18-B. This includes all public defense providers (public defenders, legal aid offices, and assigned counsel, as well as conflict defender offices) and all areas of public defense representation, including family court. Additionally, the Office will make recommendations about the distribution of the Indigent Legal Services Fund to localities for public defense services; the Board is responsible for making final decisions on those recommendations. See p. 10 for more information about Part E.

Court of Appeals Allows the NYCLU Lawsuit Challenging NY’s Broken Public Defense System to Proceed

On May 6, 2010, Chief Judge Jonathan Lippman, writing for the five-member majority, held that while ineffective assistance of counsel claims must be raised in the context of an individual’s case, the NYCLU complaint does raise an issue justiciable in a civil suit, *i.e.*, whether the systemic deficiencies alleged in the complaint amount to a constructive denial of counsel. See *Hurrell-Harring v New York*, 15 NY3d 8 (2010). “The questions properly raised in

this Sixth-Amendment grounded action . . . go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State has met its foundational obligation under *Gideon* to provide legal representation.” The court also stated:

This complaint contains numerous plain allegations that in specific cases counsel simply was not provided at critical stages of the proceedings. The complaint additionally contains allegations sufficient to justify the inference that these deprivations may be illustrative of significantly more widespread practices; of particular note in this connection are the allegations that in numerous cases representational denials are premised on subjective and highly variable notions of indigency, raising possible due process and equal protection concerns. These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.

The majority recognized that Criminal Procedure Law § 180.10(3) “expressly provides for ‘the right to the aid of counsel at the arraignment and at every subsequent stage of the action’ and forbids a court from going forward with the proceeding without counsel for the defendant, unless the defendant has knowingly agreed to proceed in counsel’s absence (CPL 180.10[5]).” (footnote omitted)

In his dissent, Judge Eugene F. Pigott, Jr. recognized the inadequacies in the state’s public defense system, but concluded that the complaint stated ineffective assistance of counsel claims, which cannot be pursued in a civil action.

As reported in the June-August 2009 issue of the *REPORT*, the Third Department had reversed the trial court’s decision denying the state’s motion to dismiss and directed dismissal of the plaintiffs’ complaint.

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NYSDA and a number of other organizations, including the National Association of Criminal Defense Lawyers, The Legal Aid Society, and the Innocence Project, submitted amicus briefs in support of the plaintiffs. A summary of the decision appears at p. 29.

Resources and Training on Leandra's Law and Ignition Interlock Devices

The New York State Defenders Association's website now offers a Hot Topics page on ignition interlock devices and Leandra's Law (L 2009, ch. 496): www.nysda.org/html/ignition_interlock.html. The page includes links to the statute, regulations promulgated by the Office of Probation and Correctional Alternatives (OPCA), administrative memos, the list of qualified manufacturers, reports, news, and information about the implementation of the new ignition interlock device program. The page also features a detailed reference manual for criminal defense lawyers. We will continue to update the page as we develop more relevant materials and resources.

NYSDA offered training on the ignition interlock program at its Annual Meeting and Conference in July and will be offering additional training during its November 5th (Poughkeepsie) and November 11th (Binghamton) trainers. See p. 5 for more information about these and other upcoming NYSDA training programs.

Legislative Updates

In addition to the legislative changes discussed in Al O'Connor's 2010 Legislative Review (beginning on p. 6) and the creation of the Office of Indigent Legal Services and the Indigent Legal Services Board (discussed above), below is a list of Family Court, prisoners' rights/reentry, and other criminal justice-related legislation enacted this year.

Family Court Legislative Changes

- **Chapter 113:** relates to guardianship and custody of destitute or dependent children who have a parent or parents incarcerated or in a residential substance abuse treatment program [amends Social Services Law [SSL] §§ 384-b; 409-e] (Eff. 6/15/2010)
- **Chapter 182:** relates to modifying child support orders, employer reporting of new hires and quarterly earnings, work experience programs and noncustodial earned income tax credit [amends Tax Law §§ 171-a, 171-h, 606, 697; Family Court Act [FCA] §§ 440, 451, 461; Domestic Relations Law [DRL] § 236; SSL § 111-h; adds FCA § 437-a]
- **Chapter 325:** authorizes the family court in family offense proceedings to extend an order of protection

upon the showing of good cause or consent of the parties [amends FCA § 842] (Eff. 8/13/2010 [applies to orders entered prior to the effective date and to actions and proceedings pending on or commenced on or after the effective date])

- **Chapter 341:** provides that orders of protection shall not be denied in support, paternity, termination of parental rights, person in need of supervision, family offense, and child protective proceedings solely on the basis that the events alleged are not contemporaneous with the application therefor or the conclusion of the action [amends FCA §§ 446, 551, 656, 759, 812, 842, 1056; DRL § 240] (Eff. 8/13/2010 [applies to all orders of protection pending or entered on or after the effective date])
- **Chapter 342:** relates to trial discharges of youth in foster care and voluntary re-placements of older adolescents in foster care; extends trial discharges at permanency hearings for successive periods of up to six months until youth reach the age of 21, and, where the affected youth is over 18, any such trial discharge would require his or her consent; allows youth between 18-21 who have been discharged within 24 months to seek leave to return voluntarily to foster care [amends FCA §§ 1055, 1087-1090; SSL §§ 371, 409-a; adds FCA § 1091 (article 10-B)] (Eff. 11/11/2010)
- **Chapter 343:** provides a process for a petition to restore previously terminated parental rights under certain circumstances [adds FCA article 6, Part 1-A (§§ 635-637); amends FCA § 1089; SSL § 384-b] (Eff. 11/11/2010)

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THE REPORT IS PRINTED ON RECYCLED PAPER

- **Chapter 446:** relates to service of orders of protection including applications to extend and petitions for violations of orders of protection and temporary orders of protection in family court [amends FCA § 153-b; DRL § 240] (Eff. 8/30/2010)

Prisoners' Rights & Reentry Legislative Changes

- **Chapter 256:** allows inmates to be permitted to leave an institution under guard to voluntarily perform work for nonprofit organizations [amends Correction Law §§ 72, 170, 177, 500-d] (Eff. 7/30/2010)
- **Chapter 56, Part OO, § 4:** Upon request, the Division of Criminal Justice Services must provide a person in a state or local correctional facility with a free copy of all criminal history information it has on file pertaining to that person [amends Executive Law § 837] (Eff. 7/22/2010)
- **Chapter 56, Part OO, § 1:** A person with a license or special license to sell alcoholic beverages at retail for consumption on the premises where such license authorizes sale of liquor, beer, and/or wine on the premises of a catering establishment, hotel, restaurant, club, or recreational facility may employ a person with a criminal conviction. [amends Alcohol Beverage Control Law § 102] (Eff. 7/22/2010)
- **Chapter 56, Part OO, §§ 6-7:** Birth certificates must be issued free of charge when requested by: (1) DOCS or a local correctional facility in order to provide a certified copy/transcript of birth to an inmate in anticipation of the person's release from custody; or (2) OCFS or an authorized agency in order to provide a certified copy/transcript of birth to a youth in custody pursuant to FCA article 3 in anticipation of the youth's discharge [amends Public Health Law §§ 4174, 4179] (Eff. 7/22/2010)
- **Chapter 56, Part LL:** amends a number of laws to ensure that certificates of relief from disabilities and certificates of good conduct are both accepted for purposes of: (1) overcoming barriers to obtaining employment and occupational licenses; and (2) allowing persons who were convicted of bribery or any infamous crime to vote in a school district or town election by absentee ballot. Additional information about these amendments is available on the Legal Action Center's website at <http://www.lac.org/index.php/lac/520>.

In addition to the resources available from the Legal Action Center's website, the New York State Reentry Resource Center (<http://www.reentry.net/ny/>) provides comprehensive information about reentry issues for public defense practitioners, advocates, persons with criminal convictions, and family members.

Other Criminal Justice-Related Legislative Changes & Attorney Registration Fee Increase

- **Chapter 56, Part K, § 7:** increases the cost of criminal history searches through the Office of Court Administration from \$55 to \$65 [amends L 2003, ch 62 (Part J, § 14)] (Eff. 7/1/2010)
- **Chapter 56, Part A:** merges the operations of the Division of Probation and Correctional Alternatives into the Division of Criminal Justice Services; the Division of Probation and Correctional Alternatives is now the Office of Probation and Correctional Alternatives (Eff. 6/22/2010 [exceptions in Part A, § 72])
- **Chapter 56, Part A-I:** The Crime Victims Board is now the Office of Victim Services. (Eff. 6/22/2010 [exceptions in Part A-I, § 58])
- **Chapter 227:** establishes a civil remedy for victims of bias-related violence or intimidation for deprivation of a civil liberty, property damage, injury or death motivated by race, religion, national origin, sex, disability, age or sexual orientation to recover actual damages, injunctive relief or other appropriate remedy; includes attorney's fees [adds Civil Rights Law § 79-n] (Eff. 8/29/2010)
- **Chapter 56, Part K, § 9:** biennial attorney registration fee increased from \$350 to \$375 [amends Judiciary Law § 468-a; the additional \$25 will be deposited into the Legal Services Assistance Fund (State Finance Law § 98-v)] (Eff. 9/1/2010)

Legislative Changes and Training Increase Backup Center Work

The systemic public defense issues and defense practice issues discussed above, along with many other new developments and day-to-day work, have kept NYSDA's Backup Center busier than ever these last several months. Staff sought to keep lawyers and public defense offices abreast of many changes in the law.

Creation of the new Ignition Interlock Devices and Leandra's Law page under Hot Topics was only one of many updates made on the NYSDA website, www.nysda.org. The Breaking News section of the home page has been updated frequently, and additions were made to other Hot Topics areas. Chief defenders and NYSDA members received email updates from the Backup Center about the new ignition interlock page and other matters in the past few months.

Successful NYSDA Trainings Held

NYSDA presented several successful trainings in the last few months.

Immigration Law Trainings

Criminal Defense Immigration Project Director Joanne Macri continues to offer training on the immigration consequences of criminal proceedings and defense counsel's elevated role under *Padilla v Kentucky* (see case summary on p. 16) in counties across the state. She presented programs in Monroe, Erie, Cattaraugus, and Livingston counties from June through August. She also ensured that there was an immigration component in the week-long Defender Institute Basic Trial Skills Program (BTSP) in June and NYSDA's 43rd Annual Meeting and Conference in July. These latter two trainings, as always, required extensive preparation at the Backup Center and reaped positive results. A portion of the Criminal Defense Immigration Project's work this year has been supported by a grant from the New York Bar Foundation.

Basic Trial Skills Program

With public defense budgets tighter than ever, many programs faced barriers to sending new lawyers to the annual Defender Institute trial skills training, but 42 attorneys were able to attend this year's BTSP. They worked with a faculty of national communications experts and lawyers to build the many skills—from client interviewing to preparing and executing cross-examinations and closing arguments, all with a client-centered focus—necessary in trying a criminal case.

43rd Annual Meeting and Conference

A full year's worth of CLE credits were offered on July 26-27; over 240 lawyers attended Annual Conference training this year. Topical subjects abounded, from "Life After *Padilla*" and "DWI—Interlock Devices" to "Prosecutor's Disclosure Obligations Under *Brady* and Rule 3.8" and essential annual updates on Court of Appeals and United States Supreme Court decisions.

Chief Defenders Discuss Counsel at Arraignment, Other Topics

NYSDA convened the heads of public defense offices from around the state during the Annual Conference and at its October 14th Chief Defender Convening. Topics discussed included how counties are dealing with the right to counsel at arraignment that the Court of Appeals addressed when it reinstated the New York Civil Liberties Union complaint in *Hurrell-Harring v State of New York* (15 NY3d 8 [2010]). The New York State Association of Counties almost immediately made information about this aspect of *Hurrell-Harring* available to counties, noting that counties must be aware that arraignment and other pre-trial stages require counsel.

Other agenda topics explored at the convenings, in addition to many of the developments mentioned in other Defender News items above, such as the newly established Office of Indigent Legal Services, included regionalization efforts, such as shared training and CLE programming, and the lack of funding for the Indigent Parolee Program in this year's State budget. Also discussed was the need for early and complete access by defense lawyers to their clients' rap sheets. A letter in support of a pending bill that would make defense providers "qualified agencies" for purposes of receiving criminal histories (S.8229/A.11602) was signed by all the attending chiefs and then submitted to legislators.

Don Thompson, Andy Fine, and Leanne Lapp Honored

A highlight of the Forty-Third Annual Meeting and Conference was the awards banquet at which three outstanding lawyers were recognized.

- Donald M. Thompson, of Easton Thompson Kasperek Shiffrin LLP in Rochester, received the Service of Justice Award. Thompson has worked independently and with the Innocence Project to exonerate several wrongfully convicted defendants, including Frank Sterling, who was exonerated in April 2010.
- Andrew Fine, Director of the Court of Appeals Practice in the Criminal Appeals Bureau of The Legal Aid Society in New York City, received the Wilfred R. O'Connor Award.
- Leanne Lapp, first assistant public defender in Ontario County's new Office of the Public Defender, received the Kevin M. Andersen Memorial Award, created by the Genesee County Public Defender's Office.

For more about these well-deserved awards, see <http://readme.readmedia.com/Outstanding-Lawyers-Recognized-at-New-York-State-Defenders-Association-Conference/1662500>.

Next Year's Annual Conference Set in Saratoga

Next year's annual conference will again be held at the Gideon Putnam in Saratoga Springs, on July 24-26, 2011 (see p. 5). The announcement that NYSDA would be returning to Saratoga was greeted by vigorous applause from this year's attendees. ♪

CONFERENCES & SEMINARS

Sponsor: New York State Defenders Association
Theme: Winning Criminal Defense Strategies
Date: November 5, 2010
Place: Poughkeepsie, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: New York State Defenders Association
Theme: Cutting Edge Criminal Defense
Date: November 12, 2010
Place: Binghamton, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: Northern District of New York Federal Bar Association, New York State Defenders Association & Office of the Federal Public Defender
Theme: Federal Criminal Law Update
Date: November 18, 2010
Place: Albany, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: Appellate Division, Third Department & New York State Defenders Association
Theme: Third Department Assigned Counsel Appeals

Date: November 19, 2010
Place: Albany, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: New York County Lawyers' Association
Theme: Forensic Evidence—Evidence in Criminal Trials
Date: December 2, 2010
Place: NYCLA
Contact: NYCLA: tel (212) 267-6646 x 215; website www.nycla.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Defending Against DNA and Scientific Evidence
Dates: December 3–4, 2010
Place: Brockport, NY
Contact: NYSACDL: tel (212) 532-4434; website www.nysacdl.com

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

Job Opportunities

The Albany County Conflict Defender's Office seeks a dedicated, bright and focused **Family Court attorney** with 1-5 years' experience for its busy public defense office. Requirements: admission to the NYS Bar, experience in Family Court Act Articles 6, 8 & 10 proceedings, and a dedication to service of public defense clients. Salary: mid 50's to low 60's DOE. To apply, send a cover letter and résumé to: Albany County Conflict Defender, 112 State Street, Albany, NY 12207; fax: (518) 447-7416. Deadline: November 23, 2010.

The Monroe County Public Defender's Office (Rochester, New York) is accepting résumés for an entry-level position as an **Assistant Public Defender** in the Town Court Bureau. In this position the attorney would be responsible for representing persons charged with misdemeanors or violations in town courts throughout Monroe County. Starting salary is \$51,154 with excellent benefits, including full health insurance, dental, vacation, sick

time, compensatory time, and membership in the NYS Retirement System. Applicants must be admitted to practice in New York and have a valid driver's license. All employees of Monroe County are required to reside within Monroe County. Interested applicants should submit a résumé to the Monroe County Public Defender's Office, 10 N. Fitzhugh Street, Rochester, NY 14614.

The Center for Community Alternatives (CCA) seeks a **Senior Project Manager** for its Syracuse office. CCA is looking to hire an attorney who has a keen interest in Drug Law Reform to work in collaboration with the Co-Directors of Justice Strategies and other organizations across the state to increase awareness and engagement in implementing the 2009 Rockefeller Drug Law Reform on the part of criminal justice and substance abuse treatment stakeholders, train and support defense attorneys and sentencing advocates in resentencing, Judicial Diversion,

the other expanded sentencing options now available under the Drug Law reform, and in conditional sealing. The Senior Project Manager will develop curriculum and resources, conduct training, provide ongoing technical assistance, and coordinate statewide conference calls to facilitate strategizing, problem solving, and the evolution of best practices. Qualifications: NYS bar admitted attorney with minimum 3 years in criminal defense work, experience conducting CLEs or other attorney training, and excellent analytic, writing, and communications skills. Must have NYS driver license and vehicle and be able to travel to out of town meetings and training. To apply, send a cover letter, résumé, and salary history to: Center for Community Alternatives, 115 E. Jefferson St., Syracuse, NY 13202 or jobs@communityalternatives.org. EOE. For more information, visit <http://www.communityalternatives.org/about/employment.html>.

2010 Legislative Review

By Al O'Connor*

New Crimes

➤ **Chap. 405 (S.6987-A) (Strangulation and related offenses). Effective: November 11, 2010.**

Creates new Penal Law article 121 with three new crimes relating to strangulation and obstruction of blood flow or breathing.

Penal Law § 121.11 Criminal obstruction of breathing or blood circulation

A person is guilty of criminal obstruction of breathing or blood circulation when, with intent to impede the normal breathing or circulation of the blood of another person, he or she:

- (a) applies pressure on the throat or neck of such person; or
- (b) blocks the nose or mouth of such person.

(Class A misdemeanor)

Penal Law § 121.12 Strangulation in the second degree

A person is guilty of strangulation in the second degree when he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, and thereby causes stupor, loss of consciousness for any period of time, or any other physical injury or impairment.

(Class D violent felony)

Penal Law § 121.13 Strangulation in the first degree

A person is guilty of strangulation in the first degree when he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, and thereby causes serious physical injury to such other person.

(Class C violent felony).

It is an affirmative defense to these crimes that the conduct was performed for a valid medical or dental purpose.

A conviction for any of these crimes subjects the defendant to DNA databank testing. All three have been added to list of family offenses subject to concurrent jurisdiction of the criminal and family courts. Penal Law § 60.05 has been amended to require imprisonment upon conviction of the Class D felony of strangulation in the second degree. First- and second-degree strangulation have been added to the list of "specified offenses" that can support a hate crimes prosecution under Penal Law Article 485, and have also been designated crimes subject to the sex

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offender civil commitment law (Mental Hygiene Law Article 10) when charged as "sexually motivated" crimes under Penal Law § 130.91.

Penal Law

➤ **Chap. 232 (A.5537-A) (Loitering — Repeal of unconstitutional provisions). Effective: July 30, 2010.**

Repeals subdivisions of Penal Law § 240.35 that have been declared unconstitutional. The repealed subdivisions are:

(1) Loiters, remains or wanders in a public place for the purpose of begging [*Loper v New York City Police Department*, 999 F.2d 699 (1993)];

(3) Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in oral sexual conduct, anal sexual conduct or other sexual behavior of a deviate nature [*People v Uplinger*, 58 N.Y.2d 936 (1983)]; and

(7) Loiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation for his presence [*People v Bright*, 71 N.Y.2d 376 (1988)].

➤ **Chap. 284 (S.5620-A) (Hypodermic syringes). Effective: October 29, 2010.**

Chap. 284 clarifies that persons who possess residual amounts of a controlled substance in a lawfully possessed hypodermic syringe under Public Health Law § 3381 are not guilty of criminal possession of a controlled substance in the seventh degree. It also clarifies that Penal Law § 220.45 (criminally possessing a hypodermic needle) does not apply to needles lawfully obtained under the Public Health Law.

➤ **Chap. 447 (A.11111) (Abandonment of a child — Endangering the welfare of a child). Effective: August 30, 2010.**

In 2000, the legislature established an affirmative defense to the crimes of abandonment of a child and endangering the welfare of a child when the defendant leaves a newborn (no more than 5 days old) "with the intent that the child be safe from physical injury and cared for in an appropriate manner . . . with an appropriate person or in a suitable location and promptly notified an appropriate person of the child's location."

The law has now been amended to cover children no more than 30 days old, and to make such conduct an ordinary defense to the charges of abandonment of a child and endangering the welfare of a child.

➤ **Chap. 464 (S.5536-A) (Larceny of an automated teller machine). Effective: November 1, 2010.**

Establishes the new crime of aggravated grand larceny of an automated teller machine.

Penal Law § 155.43

A person is guilty of aggravated grand larceny of an automated teller machine when he or she commits the crime of grand larceny in the third degree, as defined in subdivision two of section 155.35 of this article [relating to automated teller machines] and has been previously convicted of grand larceny in the third degree within the preceding five years.

(Class C felony)

➤ **Chap. 479 (S.8175) (Larceny of religious property). Effective: August 30, 2010.**

Amends subdivision 9 of Penal Law § 155.30 pertaining to theft of religious property. The subdivision now applies to a “scroll, religious vestment, a vessel, an item comprising the display of religious symbols which forms a representative expression of faith, or other miscellaneous item of property” and is valued at \$100 or more and kept in — or upon the curtilage of — a religious building (underlined matter new) (Class E felony).

➤ **Chap. 315 (A.2257-B) (Trespass — sex offenders in schools). Effective: November 1, 2010.**

Amends Penal Law § 140.15 to provide that a level 2 or 3 sex offender who enters a school knowing that the victim of the offense for which registration is required is or was a student in that school is guilty of criminal trespass in the second degree. The law provides exceptions when a sex offender is an enrolled student in the school, or the parent of one, the school is the person’s polling place, or entry was authorized by school officials (Class A misdemeanor).

➤ **Chap. 318 (A.3103-A) (Assault on a nurse). Effective: November 1, 2010.**

Adds registered and licensed nurses to the lists of professionals protected by Penal Law §§ 120.05(3) and (11) (assault on certain persons with intent to prevent them from performing lawful duties or while they are performing assigned duties) (Class D felony).

➤ **Chap. 345 (A.9186-B) (Assault on sanitation enforcement agents). Effective: September 12, 2010.**

Adds sanitation enforcement agents to the lists of professionals protected by Penal Law §§ 120.05(3) and (11) (assault on certain persons with intent to prevent them from performing lawful duties or while they are performing assigned duties) (Class D felony).

➤ **Chap. 193 (A.9938-A) (Definition of “sexual contact”). Effective: October 13, 2010.**

Amends Penal Law §§ 130.00(3) and 260.31(2) to

expand the definition of “sexual contact” to include the “emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.”

➤ **Chap. 14 (A.9534) (Endangering the welfare of an incompetent or physically disabled person). Effective: May 22, 2010.**

Expands the scope of Penal Law §§ 260.30 and 260.34 (endangering the welfare of a vulnerable elderly person) to include an incompetent or physically disabled person, defined as an “individual who is unable to care for himself or herself because of physical disability, mental disease or defect.”

➤ **Chap. 1 (S.6439) (Defrauding the government). Effective: February 12, 2010.**

Amends Penal Law § 195.20 to apply the statute to fraudulent obtaining of “services or resources of the state” or government instrumentality (in addition to “property”), and adds a new subparagraph (a)(ii) pertaining to fraudulent use of governmental property, services or resources for private business purposes.

➤ **Chap. 321 (A.3762) (Slot machines). Effective: August 13, 2010.**

Amends Penal Law § 225.30 to provide that transportation and possession of a slot machine shall not be unlawful “where such slot machine was transported into this state in a sealed container and possessed for the purpose of product development, research, or additional manufacture or assembly, and such slot machine will be or has been transported in a sealed container to a jurisdiction outside of this state for purposes which are lawful in such outside jurisdiction.”

Criminal Procedure Law

➤ **Chap. 332 (A.7670) (Loitering for purposes of prostitution — motion to vacate judgment on ground defendant was a victim of sex trafficking). Effective: August 13, 2010.**

Adds a new paragraph (i) to CPL § 440.10(1) to authorize a court to vacate a conviction based on an arrest for loitering for the purpose of engaging in prostitution (Penal Law § 240.37) when the defendant was a sex trafficking victim.

➤ **Chap. 10 (A.602) (Execution of bench warrants by uniformed court officers). Effective: May 22, 2010.**

Amends CPL § 530.70(2) to authorize uniformed court officers in all courts that are part of the unified court system to execute bench warrants in the buildings where they are employed or in the immediate vicinity thereof.

➤ **Chap. 94 (A.8530-E) (Right to phone call following arrest). Effective: July 24, 2010.**

Adds a new subdivision 8 to CPL § 120.90 and a new subdivision 7 to CPL § 140.20 to codify an arrestee's right to make a phone call to obtain counsel or inform someone of the arrest. CPL § 120.90(8) provides:

Upon arresting a defendant, other than a juvenile offender, for any offense pursuant to a warrant of arrest, a police officer shall, upon the defendant's request, permit the defendant to communicate by telephone provided by the law enforcement facility where the defendant is held to a phone number located anywhere in the United States or Puerto Rico, for the purposes of obtaining counsel and informing a relative or friend that he or she has been arrested, unless granting the call will compromise an ongoing investigation or the prosecution of the defendant.

(CPL § 140.20(7) is similarly worded) [Also amends CPL § 170.10(3)(b), CPL § 180.10(3)(b), CPL § 210.15(2)(b)]. Chap. 96 (A.10750) deleted a sentence concerning access to seized cellphones and other digital devices.

Sentencing

➤ **Chap. 377 (A.11391) (Expands SHOCK incarceration program eligibility). Effective: August 13, 2010.**

Chap. 377 significantly expands eligibility criteria for the SHOCK incarceration program. Defendants with prior non-violent felony convictions that resulted in a state prison sentence are now eligible for the SHOCK program when the current felony conviction is a SHOCK eligible offense [see Corr. Law § 865(1)], including direct judicial placement when the current conviction is a drug or marijuana offense. Under former law, clients who had previously been committed to the Department of Correctional Services were categorically ineligible for the SHOCK program.

Furthermore, the statute has been amended to allow a defendant convicted of a Class B felony drug offense, who has a predicate violent felony conviction that did not result in a state prison sentence, to participate in the SHOCK program. Previously, such clients were not eligible.

The new criteria for SHOCK eligibility are as follows:

- Eligible for release on parole or conditional release within 3 years
- Has not reached age 50 at the time of DOCS' reception
- Not previously committed to DOCS for a violent felony (or out-of-state offense with same elements)
- Current conviction cannot be for a violent felony, A-I felony (including A-I drug offense), homicide offense (Penal Law Article 125), sex offense (Penal Law Article 130), escape or absconding offense.

➤ **Chap. 121 (S.2405) (Willard Drug Treatment Program). Effective: June 15, 2010.**

Amends CPL § 410.91 to clarify that a sentence of parole supervision with commitment to the Willard drug treatment program is available when the court imposes a determinate sentence (as for a drug felony).

➤ **Chap. 179 (A.7961) (Probation reports). Effective: July 15, 2010.**

Amends CPL § 390.20 to authorize jail sentences up to 180 days without a probation report (increased from 90 days).

➤ **Chap. 158 (A.9220-A) (Hate crimes sentencing). Effective: November 1, 2010.**

Amends Penal Law § 485.10 to authorize courts to sentence persons convicted of hate crimes to "complete a program, training session or counseling session directed at hate crime prevention and education."

➤ **Chap. 56, Part D, § 7 (A.9706-C) (Restitution orders). Effective: September 20, 2010.**

Adds a new subdivision 14 to Penal Law § 60.27 to specify a procedure for handling restitution orders when the defendant's probation supervision is transferred to another county.

Penal Law § 60.27(14)

Where a transfer of probation has occurred pursuant to section 410.80 of the criminal procedure law and the probationer is subject to a restitution condition, the department of probation in the county in which the order of restitution was imposed shall notify the appropriate district attorney. Upon notification by the department of probation, such district attorney shall file a certified copy of the judgment with the clerk of the county in the receiving jurisdiction for purposes of establishing a first lien and to permit institution of civil proceedings pursuant to the provisions of subdivision six of section 420.10 of the criminal procedure law.

➤ **Chap. 56, Part D, § 8 (A.9706-C) (Probation transfers — waiver of extradition). Effective: September 20, 2010.**

Amends Penal Law § 65.10(3)(b) to require probationers to sign a waiver of extradition as a condition being granted permission to move or travel out of state.

Prisons/Jails

➤ **Chap. 412 (S.7864) (Limited credit time allowance — expanded prison job opportunities). Effective: August 13, 2010.**

The 2009 Drug Law Reform Act included a minor provision authorizing a 6 month credit time allowance for inmates serving time for violent felonies, homicide and

non-drug A-I felony convictions (excluding sex offenses and first degree murder). The credit must be earned by “significant programmatic achievement.” Chapter 412 adds to the list of prison programs that can result in the credit, including optics, asbestos handling, sign language, and the “puppies behind bars” program.

➤ **Chap. 82 (A.8613) (Willard Drug Treatment Program – alternative programs). Effective: May 18, 2010.**

Requires the Department of Correctional Services to offer an alternative drug treatment program to defendants sentenced to the Willard Drug Treatment Program but who are unable to complete it due to medical or mental health care issues. The defendant may object to the alternative program and have the sentencing court decide which program he or she must complete. A defendant who completes an alternative program “shall be treated in the same manner as a person who has successfully completed” the Willard program.

➤ **Chap. 249 (A.9826) (Montgomery County Jail). Effective: July 30, 2010.**

Amends Correction Law § 500-a to permit the Montgomery County Correctional Facility to be used for the detention of persons under arrest and awaiting arraignment.

➤ **Chap. 260 (A.10233) (Chautauqua County Jail). Effective: July 30, 2010.**

Amends Correction Law § 500-a to permit the Chautauqua County Correctional Facility to be used for the detention of persons under arrest and awaiting arraignment.

➤ **Chap. 56, Part OO, § 2 (A.9706-C) (DOCS’ criminal history website database). Effective: July 22, 2010.**

Requires the Department of Correctional Services to omit criminal history information from its website five years after an inmate’s sentence (including post-release supervision) has expired. The law does not apply to violent felonies, homicide offenses, sex offenses, escape or absconding, or aggravated harassment of an employee by an inmate.

➤ **Chap. 56, Part OO, §§ 8-9 (A.9706-C) (Notification of restoration of voting rights). Effective: July 22, 2010.**

Requires the Department of Correctional Services and the Division of Parole to notify persons being discharged upon maximum expiration of their sentences (including parole or post-release supervision) that they are eligible to vote and to give them voter registration materials.

Vehicle and Traffic Law

➤ **Chap. 409 (S.7485-A) (License suspension — Failure**

to exercise due care). Effective: August 13, 2010.

Increases the license suspension periods for a violation of VTL § 1146 involving serious physical injury (“[E]very driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.”). First offense — 6 month suspension; second offense within 5 years — 1 year suspension [Amending VTL § 510(2)(b)(xiv)].

➤ **Chap. 169 (S.46-B) (Drawing of blood for alcohol or drug testing). Effective: July 13, 2010.**

Amends VTL § 1194(4)(a)(1) to authorize additional persons to draw blood for purposes of testing for alcohol or drug content. At the request of a police officer, the following additional persons may draw blood: a certified nurse practitioner or an advanced emergency medical technician as certified by the Department of Health. The following additional persons may draw blood under the supervision and at the direction of a physician: a registered physician assistant or certified nurse practitioner acting within his or her lawful scope of practice, or upon the express consent of the person eighteen years of age or older from whom such blood is to be withdrawn, a clinical laboratory technician or clinical laboratory technologist.

Miscellaneous

➤ **Chap. 176 (S.7945-A) (New York City stop and frisk records — personal identifying information). Effective: July 16, 2010.**

Requires the New York City Police Department to omit personal identifying information from databases concerning persons subjected to *Terry* stops and frisks when the police-citizen encounter does not lead to a summons or arrest. A new CPL § 140.50(4) states:

In cities with a population of one million or more, information that establishes the personal identity of an individual who has been stopped, questioned and/or frisked by a police officer or peace officer, such as the name, address or social security number of such person, shall not be recorded in a computerized or electronic database if that individual is released without further legal action; provided, however, that this subdivision shall not prohibit police officers or peace officers from including in a computerized or electronic database generic characteristics of an individual, such as race and gender, who has been stopped, questioned and/or frisked by a police officer or peace officer.

➤ **Chap. 56, Part OO, § 3 (A.9706-C) (Certificate of relief from civil disabilities — federal convictions). Effective: July 22, 2010.**

Adds a new subdivision 7 to Correction Law § 703 to

provide a qualified presumption in favor of the issuance of a certificate of relief from civil disabilities based on a federal conviction in New York when the defendant has a favorable written recommendation from the chief federal probation officer of the district.

➤ **Chap. 56, Part OO, § 5 (A.9706-C) (Inmate access to presentence reports for parole related proceedings). Effective: July 22, 2010.**

Amends CPL § 390.50(2) to give inmates a right to a copy of the presentence report from the court in order to prepare for a parole hearing or appeal.

Upon written request, the court shall make a copy of the presentence report, other than a part or parts of the report redacted by the court pursuant to this paragraph, available to the defendant for use before the parole board for release consideration or an appeal of a parole board determination. In his or her written request to the court the defendant shall affirm that he or she anticipates an appearance before the parole

board or intends to file an administrative appeal of a parole board determination. The court shall respond to the defendant's written request within twenty days from receipt of the defendant's written request.

➤ **Chap. 112 (A.2374-A) (Jury pools — collection of demographic data). Effective: September 13, 2010.**

Requires commissioners of jurors to collect demographic data concerning jurors' race, ethnicity, age and sex. The data are to be annually compiled by OCA and submitted to the governor, the legislature, and the Chief Judge of the State of New York.

➤ **Chap. 91 (A.4300) (Unauthorized practice of law — Attorney General may criminally prosecute). Effective: May 25, 2010.**

Amends Judiciary Law § 476-a to authorize the Attorney General to criminally prosecute the crime of unauthorized practice of law [addressing *People v. Romero*, 91 N.Y.2d 750 (1998)]. ⚖

2010 Legislative Highlight

Summary of Legislation Creating the Office of Indigent Legal Services: Part E of Chapter 56 of the Laws of 2010

By Susan C. Bryant*

Part E is comprised of four sections:

- Section 1: Creation of the Office of Indigent Legal Services and the Indigent Legal Services Board (adding a new Executive Law article 30 [§§ 832-833])
- Section 2: Amendments to State Finance Law § 98-b regarding distribution of monies from the Indigent Legal Services Fund
- Section 3: Amendments to County Law § 722(3) to allow counties to create conflict defender offices through bar association plans
- Section 4: Effective date- Part E is effective immediately (June 22, 2010).

I. Section 1: Office of Indigent Legal Services and the Indigent Legal Services Board

The Office of Indigent Legal Services is housed within the Executive Department, but not a particular executive agency. The Office reports to the Indigent Legal Services Board and the Board will consult with and advise the Office.

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A. The Indigent Legal Services Board

The Board has nine members. The Chief Judge of the Court of Appeals is the chair of the Board. The eight other members are appointed by the Governor as follows:

- One nominated by the temporary president of the Senate;
- One nominated by the speaker of the Assembly;
- One appointed by the Governor from a list of at least three attorney nominees submitted by the New York State Bar Association;
- Two appointed by the Governor from a list of at least four nominees submitted by the New York State Association of Counties;
- One appointed by the Governor and shall be an attorney who has provided public defense services for at least five years;
- One attorney appointed by the Governor;
- One appointed from a list of no more than two nominees submitted by the Chief Administrator of the courts, each of whom shall be a current or retired judge or justice elected to the supreme, county or family court or appointed to the New York City criminal or family court and has substantial experience presiding as such a judge or justice in trial matters before such court.

Board members cannot be active prosecutors, law enforcement officials, or persons providing prosecution-related services or employees of such prosecutor, official, or person. The Chief Judge serves ex officio. The other board members serve for three year terms, except that the NYSBA nominee, one of the two NYSAC nominees, and

the Governor's attorney appointment serve initial terms of two years.

B. Director of the Office of Indigent Legal Services

The Board nominates the Director of the Office and the Governor must approve/fail to act within 30 days or disapprove the nominee. The Director must be admitted to practice law, have not less than five years' professional experience in the area of public defense services, and have a demonstrated commitment to the provision of quality public defense representation and to communities served by public defense providers. The Director serves for a five-year term, but can be removed by two-thirds of the members of the Board for good cause shown, after notice and an opportunity to be heard.

C. Purpose of the Office and the Board

The purpose of the Office and the Board is to "monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law." This purpose covers both criminal and family court adult representation, as well as all other types of representation authorized by County Law article 18-B.

D. Data Collection

The Office is responsible for collecting and receiving a wide variety of information about public defense services, including information about the current systems being used in each county, caseloads, spending for 18-B services, and eligibility determinations, as well as data comparing caseloads and expenditures of public defense providers to those providing prosecution-related services. Section 832 requires that counties, providers, and other state and local entities cooperate with the Office's data collection. The Office will use this data to inform its recommendations and creation of standards.

E. Reporting by Counties and Public Defense Providers

The Office will establish measures of performance on which programs and counties must regularly report to the Office, which will assist it in monitoring the quality of public defense services. In addition to reporting to the Office, counties are required to continue to file County Law § 722-f(2) reports with the State Comptroller.

F. Funding

The Office is charged with making recommendations regarding distribution and expenditure of monies appropriated for indigent legal services, including monies from the Indigent Legal Services Fund. In developing those recommendations, the Office may consider, in addition to measures of performance, commitment of local resources and changes thereto, geographic balance of funding among regions, population, crime rates, poverty rates, and individual community needs.

The Office is responsible for targeting grants in support of innovative and cost effective solutions that enhance the provision of quality services, including collaborative efforts serving multiple counties. As part of its recommendations for improving the delivery of public defense services in a manner that is consistent with the needs of the counties, the efficiency and adequacy of county public defense plans, and the quality of representation offered, the Office also may receive applications for and distribute grants pursuant to specified criteria.

The Office will present its funding recommendations to the Indigent Legal Services Board. The Board must accept, reject, or modify the Office's recommendations regarding distributions from the Indigent Legal Services Fund (see Point II below for more information about the ILSF funds available to the Office and the Board). The Board must set forth the basis for its determination. The Office will execute the Board's decision regarding the distribution of funds.

The Office may apply for and accept grants or gifts that fit with the purposes of the Office or the Board. The Office may expend that money to effectuate those purposes.

G. Standards and Recommendations

The Office also is responsible for developing standards, guidelines, and recommendations regarding article 18-B services. The Office must examine, evaluate, and monitor services provided in each county pursuant to article 18-B. The Indigent Legal Services Board must also evaluate existing article 18-B services.

The Office also must analyze and evaluate the data and information it collected to recommend measures to enhance article 18-B services and ensure that clients are provided quality representation from fiscally responsible providers. Those recommendations must include, at a minimum: (1) criteria and procedures to guide courts in making eligibility determinations; and (2) standards, criteria, and a process for qualifying and re-qualifying attorneys to provide 18-B services.

The Office must establish standards and criteria for the provision of representation in conflict cases and assist counties in developing plans consistent with such standards and criteria. For more information on conflict defense representation, see Point III below.

Additionally, the Office must develop recommendations to improve delivery of services in a manner that is consistent with county needs, efficiency and adequacy of plans operated in counties, and the quality of representation offered.

As with funding recommendations, the Office will present its findings and recommendations for consideration by the Board. The Board must determine the type of public legal services that should be provided in the State to best serve the interests of article 18-B clients. The Board has a duty to advise the governor, legislature, and judiciary.

ary regarding public defense services and make an annual report to the three branches. The Office is responsible for executing Board decisions.

II. Section 2: Amendments to State Finance Law § 98-b regarding distribution of monies from the Indigent Legal Services Fund

State Finance Law § 98-b has been amended to establish a new way for distributing the Indigent Legal Services Fund. The purpose of the ILSF is to:

- Assist counties and New York City in providing legal representation for persons who are financially unable to afford counsel pursuant to County Law article 18-B;
- Assist the state in improving the quality of public defense services and funding representation provided by assigned counsel paid in accordance with Judiciary Law § 35; and
- Provide support for the operations, duties, responsibilities, and expenses of the Office of Indigent Legal Services and the Indigent Legal Services Board.

The Office of Court Administration (OCA) will continue to receive up to an annual sum of \$25 million for the provision of assigned counsel paid in accordance with Judiciary Law § 35.

Distributions from the ILSF for counties and New York City have been changed. New York City will receive an annual amount of \$40 million for the provision of 18-B services. In order to receive that money, NYC must continue to provide at a minimum the aggregate amount of funding for public defense services including, but not limited to, the amount of funding for contractors of public defense services and individual defense attorneys, that it provided, pursuant to article 18-B of the County Law during its 2009-2010 fiscal year.

Non-New York City counties will receive a percentage of the amount received in March 2010 as follows:

- March 2011: 90% of the amount received in 2010;
- March 2012: 75% of the amount received in 2010;
- March 2013: 50% of the amount received in 2010; and
- March 2014: 25% of the amount received in 2010.

Hamilton and Orleans Counties did not receive ILSF money in March 2010. Those two counties will receive percentage funding based on the amount each would have received in March 2010 had it not failed the maintenance of effort test.

Beginning in 2015, counties will receive ILSF money from the Office and the Board through general distributions and grants.

Remaining amounts in the ILSF after accounting for the payments to OCA, New York City, and the percentage payments to counties in the next four years, as well as payments for the operations of the Office and the Board,

will be distributed by the Office and the Board in accordance with the new Executive Law §§ 832 and 833.

The amended § 98-b specifies that ILSF money received by a county or city: "shall be used to supplement and not supplant any local funds which such county or city would otherwise have had to expend for the provision of counsel and expert, investigative and other services pursuant to article eighteen-B of the county law. All such state funds received by a county or city shall be used to improve the quality of services provided pursuant to article eighteen-B of the county law. Nothing in this paragraph shall preclude a county from decreasing local funds as long as the county demonstrates to the office of indigent legal services established by section 832 of the Executive Law that the quality of services has been maintained or enhanced notwithstanding the use of state funds."

As noted above, in making recommendations regarding the distribution and expenditure of remaining ILSF money, the Office may consider the commitment of local resources to 18-B services. The Office is also responsible for making recommendations regarding the distribution and expenditure of all ILSF funds, including the New York City and county annual distributions. Therefore, the Office may recommend that New York City and the counties use all ILSF monies received for specified purposes and the Board may accept those recommendations.

III. Section 3: Amendments to County Law § 722(3) to allow counties to create conflict defender offices through bar association plans

County Law § 722(3) has been amended to allow bar association plans to provide representation through an assigned counsel program or an office of conflict defender or both. The term "office of conflict defender" is not defined in the statute. Plans must be approved by the state administrator prior to being placed in operation. When reviewing a plan that includes an office of conflict defender, the state administrator must employ the guidelines established by the Office of Indigent Legal Services pursuant to Executive Law § 832(3)(d).

The amended § 722(3)(c) states that a conflict defender office, as defined in § 722(3)(a)(ii), that was operated by a county as of March 31, 2010 may continue to operate until the Office of Indigent Legal Services promulgates criteria for the provision of services in conflict cases. Within 180 days of the promulgation of those criteria, such county must submit to the state administrator a bar association plan that includes the conflict defender office. The state administrator will either approve or disapprove the plan. If the plan is disapproved, the authorization under § 722(3)(c) to operate the office of conflict defender ceases. If the state administrator approves the plan, the county may operate the office of conflict defender in accordance with § 722(3)(a) and (3)(b). ♪

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

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

United States Supreme Court

Habeas Corpus (Federal) HAB; 182.5(15)

Juries and Jury Trials (Challenges) JRY; 225(10) (50) (60) (Qualifications) (Voir Dire)

Thaler v Haynes, 559 US __, 130 SCt 1171 (2010)

The respondent was tried for capital murder in Texas. Two judges presided over jury selection; one was present during juror questioning, the other while peremptory challenges were made. When the prosecutor struck an African-American juror, the respondent's attorney raised a *Batson* objection. The prosecutor asserted that the juror's demeanor "had been 'somewhat humorous' and not 'serious' and that her 'body language' had belied her 'true feeling.'" He thought "she 'had a predisposition' and would not look at the possibility of imposing a death sentence 'in a neutral fashion.'" The judge found the explanation was race-neutral and denied the *Batson* objection. The conviction and death sentence were affirmed in state court. The federal district court denied the respondent's habeas petition, noting that the Supreme Court has not decided that the deference to state-court factual determinations mandated by the federal habeas statute is inapplicable when the judge ruling on a *Batson* objection did not observe the jury selection. The Court of Appeals reversed.

Holding: Federal habeas relief is not available unless the state court's decision was contrary to or unreasonably applied established federal law. See *Carey v Musladin*, 549 US 70, 74 (2006). This Court has not established a categorical rule that a judge ruling on an objection to a peremptory challenge under *Batson v Kentucky* (476 US 79 [1986]) must reject a demeanor-based explanation unless the judge personally observed and recalled the prospective juror's demeanor on which the explanation is based. Where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations that the judge was able to make during the voir dire. But *Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or could not recall the juror's demeanor. See also *Snyder v Louisiana*, 552 US 472 (2008). The Court of Appeals may consider whether the state high court's "determination may be overcome under the federal

habeas statute's standard for reviewing a state court's resolution of questions of fact." See 28 USC 2254(d)(1). Judgment reversed and case remanded.

Civil Rights Actions (USC § 1983 Actions) CRA; 68(45)

Prisoners (Conditions of Confinement) PRS I; 300(5) (25) (Rights Generally)

Prisons (Conditions) (Correction Officer) PRS II; 300.5(6) (10)

Wilkins v Gaddy, 559 US __, 130 SCt 1175 (2010)

The petitioner, a North Carolina state prisoner, filed a 42 USC 1983 action claiming that a corrections officer "maliciously and sadistically" assaulted him, causing "multiple physical injuries including a bruised heel, lower back pain, increased blood pressure, as well as migraine headaches and dizziness" and "psychological trauma and mental anguish including depression, panic attacks and nightmares of the assault." On its own motion and without hearing from the petitioner, the District Court dismissed the complaint for failure to state a claim. The court said the petitioner did not establish that he suffered more than a *de minimis* injury. The dismissal was affirmed.

Holding: In *Hudson v McMillian* (503 US 1, 4 [1992]), this Court held that "the use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when the inmate does not suffer serious injury." The District Court dismissed the petitioner's excessive force action based solely on its conclusion that his injuries were *de minimis*. This action should have been decided based on the nature of the force rather than the extent of his injuries. "When prison officials maliciously and sadistically use force to cause harm," the Court recognized, "contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." *Hudson*, 503 US at 9. Injury and force are only imperfectly correlated; the force ultimately counts. Judgment reversed and case remanded.

Concurrence: [Thomas, J] The Fourth Circuit's Eighth Amendment analysis was inconsistent with *Hudson*. However, *Hudson* was wrongly decided. See *Erickson v Pardus*, 551 US 89, 95 (2007) (dissenting opinion). Under the Eighth Amendment, there must be a serious injury before a remedy to abusive prison conditions could be considered. See *Estelle v Gamble*, 429 US 97 (1976).

Admissions (*Miranda* Advice) ADM; 15(25)

Florida v Powell, 559 US __, 130 SCt 1195 (2010)

US Supreme Court *continued*

The respondent was arrested and taken to the local police station. Officers read him the standard Tampa Police Department Consent and Release Form, which stated: "You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview." The respondent acknowledged that he had been informed of his rights, "underst[oo]d them," and was "willing to talk" to them. He signed the waiver and admitted ownership of an illegal handgun found at the arrest scene. Charged with weapons possession, he moved to suppress, challenging the sufficiency of the warnings on the ground that they did not adequately convey his right to the presence of an attorney during questioning. The trial court denied his motion and he was convicted. The Florida Supreme Court reversed his conviction due to the inadequate warnings, relying on both *Miranda* and the state constitution.

Holding: In *Miranda v Arizona* (384 US 436, 471 [1966]), this Court held that an individual must be "clearly informed," prior to custodial questioning, of rights including, "the right to consult with a lawyer and to have the lawyer with him during interrogation." Advising the defendant that he had the right to talk to a lawyer before answering any of the officers' questions and that he could invoke the right at any time during the interview satisfied *Miranda*. See *Duckworth v Eagan*, 492 US 195, 203 (1989); *California v Prysock*, 453 US 355, 360-361 (1981). The two warnings reasonably conveyed the right to have an attorney present, not only at the outset of interrogation, but at all times. The Florida Supreme Court treated state and federal law as interchangeable and interwoven; at no point did it expressly say that state law gave the respondent rights distinct from, or broader than, those delineated in *Miranda*. See *Michigan v Long*, 463 US 1032, 1040-1041, 1044 (1983). Thus, this Court has jurisdiction to review the issue on federal constitutional grounds. Judgment reversed.

Dissent: [Stevens, JJ] The Florida Supreme Court had an adequate and independent state-law ground for its finding that the warnings did not sufficiently inform him of the "right to a lawyer's help" under the Florida Constitution." Therefore, the decision was unreviewable here. Also, the warnings only advised the respondent about the right to consult counsel before questioning; the warning failed to mention "the right to have counsel present during interrogation."

Admissions (*Miranda* Advice)
(Voluntariness)

ADM; 15(25) (35)

Maryland v Shatzer, 559 US __, 130 Sct 1213 (2010)

The respondent was suspected of sexual abuse. In 2003, the police interviewed him while he was in prison on an unrelated offense. After being *Mirandized*, he signed a waiver, but after the respondent learned the purpose of the interview, he refused to speak without an attorney. In 2006, the investigation was reopened and he was interviewed again at the prison. He acknowledged his *Miranda* rights and signed a waiver. He was questioned for 30 minutes and, after making admissions, agreed to take a polygraph. Five days later, fresh *Miranda* warnings were given and a waiver obtained; the respondent failed the test, made an inculpatory statement, and asked for a lawyer. His motion to suppress his statements was denied and he was convicted. His conviction was reversed on appeal.

Holding: *Edwards v Arizona* (451 US 477 [1981]) provided a second layer of protection over *Miranda* warnings by requiring interrogation to stop when a request for counsel has been made; involuntariness in response to further questioning is presumed. See *Arizona v Roberson*, 486 US 675, 681 (1988). However, the *Edwards* presumption, a judicially created rule, should not extend for more than 14 days after the initial interrogation. A two-week break from custody means that a suspect is no longer isolated and is able to seek advice from an attorney, family members, and friends. "The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of 'prolonged police custody,' . . . by repeatedly attempting to question a suspect who previously requested counsel until the suspect is 'badgered into submission.'" *Minnick v Mississippi*, 498 US 146, 153 (1990). Where a suspect has been released from pretrial custody and returned to his normal prison life for 2½ years before the next interrogation, his change of mind in answering questions without counsel could not be presumed to have been coerced. Lawful imprisonment upon conviction of a crime does not create the coercive pressures identified in *Miranda*. Since the respondent experienced a break lasting more than two weeks between the first and second attempts at questioning, *Edwards* did not mandate suppression of the 2006 statements. Judgment reversed and case remanded.

Concurrence: [Thomas, JJ] Release of the respondent back into the general prison population constituted a break in custody. The *Edwards* rule should be limited to the circumstances in that case, and not applied to scenarios after custody has ended.

Concurrence: [Stevens, JJ] The *Edwards* rule does not apply to a 2½-year break in custody. However, limiting *Edwards* to a 14-day break in custody is an unnecessary restriction. If law enforcement stopped questioning a suspect and then re-interrogated him 14 days later without

US Supreme Court *continued*

providing him with the lawyer he requested, the suspect would likely feel that the police lied to him and that he really did not have any right to a lawyer. *See Davis v United States*, 512 US 452 (1994) (Souter, J., concurring in judgment). The prison environment is not comparable to the freedom of life on the outside. “[P]rison is not like a normal situation in which a suspect ‘is in control, and need only shut his door or walk away to avoid police badgering.’” *Montejo v Louisiana*, 556 US __, __, 129 S Ct 2079, 2090 (2009).

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

Sentencing (Aggravated Penalties) **SEN; 345(5) (32)**
(Enhancement)

Johnson v United States, 559 US __, 130 S Ct 1265 (2010)

The petitioner pleaded guilty to knowingly possessing ammunition after being previously convicted of a felony, in violation of 18 USC 922(g)(1). The prosecution sought an enhanced penalty under the Armed Career Criminal Act (ACCA) (18 USC 924[e]), which provides that someone who violates 922(g) and has three prior convictions for a “violent felony” committed on different occasions shall be imprisoned for at least 15 years and a maximum of life. The prosecution argued that the petitioner’s conviction for simple battery qualified as a violent felony. At sentencing, the petitioner objected to the use of that conviction, which was a third-degree felony only because of his prior conviction for battery. The district court rejected that objection and sentenced him under the ACCA. His conviction and sentence were affirmed.

Holding: The Florida felony of battery by the actual and intentional touching of another lacked the element of use “of physical force against the person of another” (*see* 18 USC 924[e][2][B][i]), and thus was not a “violent felony” under 924(e)(1). The meaning of “physical force” in 924(e)(2)(B)(i) is a question of federal, not state, law, but the court was bound by the Florida Supreme Court’s interpretation of state law, including its determination of the elements of battery under Florida law. *See Johnson v Fankell*, 520 US 911, 916 (1997). That court has held that “the element of ‘actually and intentionally touching’ under Florida’s battery law is satisfied by *any* intentional physical contact, ‘no matter how slight.’” *State v Hearn*s, 961 So2d 211, 218 (FL 2007). The ACCA did not define “physical force,” and therefore it must be given its ordinary meaning. *See Bailey v United States*, 516 US 137, 144-145 (1995). The phrase means violent force—force capable of causing physical pain or injury. *See Flores v Ashcroft*, 350 F3d 666, 672 (7th Cir 2003) (Easterbrook, J.). Judgment reversed and matter remanded.

Dissent: [Alito, J] The term “violent felony” includes any offense punishable by a prison term of exceeding one year, an element of which is “‘the use, attempted use, or threatened use of *physical force against the person of another.*’” 18 U.S.C. §924(e)(2)(B)(i) (emphasis added).” Because the traditional definition of battery falls within the plain language of the ACCA, the conviction qualified as a predicate. The majority’s ruling will have untoward consequences as to other federal statutes, such as 8 USC 1227(a)(2)(E).

Speedy Trial (Cause for Delay) **SPX; 355(12) (45)**
(Statutory Limits)

Bloate v United States, 559 US __, 130 S Ct 1345 (2010)

On Aug. 24, 2006, a grand jury indicted the petitioner. The petitioner was arraigned on September 1 and a magistrate judge entered a scheduling order with a pretrial motion deadline of September 13. On September 7, the petitioner moved to extend the pretrial motion deadline to September 21. The motion was granted and the deadline extended to September 25. On that day, the petitioner filed a waiver advising the court that he did not wish to file any motions. On October 4, the petitioner confirmed his intention to waive his right to file pretrial motions. On Feb. 19, 2007—179 days after the petitioner was indicted—he moved to dismiss the indictment because the statutory 70-day limit had elapsed. In calculating how many of the 179 days counted toward the limit, the court excluded the period from September 7 through October 4 as “‘within the extension of time granted to file pretrial motions.’” The petitioner was convicted and the Court of Appeals affirmed.

Holding: The period from September 7 through October 4, which included the additional time granted for pretrial motion preparation, was not automatically excludable. The Speedy Trial Act of 1974, 18 USC 3161 *et seq.*, requires that a criminal trial commence within 70 days after a defendant is charged or makes an initial appearance, whichever is later. The Act excludes from the 70-day period delays due to certain enumerated events; “‘delay resulting from . . . proceedings concerning the defendant’ is automatically excludable” 18 USC 3161(h)(1). The time granted to a party to prepare pretrial motions is not automatically excludable and can only be excluded when a district court makes case-specific findings under section 3161(h)(7). *See Zedner v United States*, 547 US 489 (2006). Judgment reversed and case remanded.

Concurrence: [Ginsburg, J] The Circuit Court, on remand, may consider the prosecutor’s argument that excluding the time from September 25 to October 4 would reduce the number of days counted to 65, 5 days short of the 70-day threshold.

Dissent: [Alito, J] Nothing in the text, legislative history, or precedent underlying the Speedy Trial Act of 1974

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meant to give the defense additional time to prepare pre-trial motions and thus delay the commencement of trial.

Discrimination (Race) DCM; 110.5(50)

Juries and Jury Trials (Constitution —right to) (Jury System) (Selection) JRY; 225(20) (44) (55)

Berghuis v Smith, 559 US __, 130 SCt 1382 (2010)

The respondent, an African-American, was charged with murder. Only three African-Americans were part of the venire panel. The court denied the respondent’s challenge to the composition of the jury pool. An all-white jury convicted the respondent of murder and he was sentenced to life without parole. The Michigan Court of Appeals ordered an evidentiary hearing on the respondent’s fair-cross-section claim, which revealed that Grand Rapids, the largest city in Kent County, was home to roughly 37% of Kent County’s population, and to 85% of its African-American residents. The trial court concluded that African-Americans were underrepresented in jury venires, but found the respondent’s evidence insufficient to prove that the jury-selection process had systematically excluded African-Americans. The state court of appeals reversed, finding underrepresentation resulting from the juror-allocation system. The state supreme court reversed, finding a lack of prima facie evidence of a Sixth Amendment violation. The federal district court dismissed the respondent’s habeas petition; the Sixth Circuit reversed.

Holding: To establish a prima facie violation of the fair-cross-section requirement for jury selection, the respondent must prove that a distinctive group was not fairly and reasonably represented in jury venires, as a result of systematic exclusion in the jury-selection process. *See Duren v Missouri*, 439 US 357, 364 (1979). No Supreme Court decision has identified the method or test that courts must use to measure the representation of distinctive groups in jury pools, such as absolute disparity, comparative disparity, or standard deviation. All of these tests have some deficits. As the state supreme court noted, the respondent’s evidence scarcely showed that the assignment order he targeted caused underrepresentation. “No ‘clearly established’ precedent of this Court supports [the respondent’s] claim that he can make out a prima facie case merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group’s underrepresentation.” Therefore, the state supreme court’s holding was not contrary to, or an unreasonable application of, Supreme Court precedents as is required for habeas relief. *See* 28 USC 2254(d)(1). Even absent statutory habeas constraints, “we would have no cause to take sides today on the method or methods by which under-

representation is appropriately measured.” Judgment reversed and case remanded.

Concurrence: [Thomas, J] The right to a jury drawn from a fair cross-section of the community rests on a blend of the Fourteenth Amendment’s Due Process and Equal Protection Clauses, which is difficult to square with the Sixth Amendment’s text and history.

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

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

Padilla v Kentucky, 559 US __, 130 SCt 1473 (2010)

The petitioner, a native of Honduras, had been a lawful permanent resident of the United States for more than 40 years. He faced deportation after pleading guilty to the transportation of a large amount of marijuana in Kentucky. In postconviction proceedings, he claimed that his counsel failed to advise him of this consequence before the plea and had said he “did not have to worry about immigration status since he had been in the country so long.” The petitioner averred that he would have insisted on going to trial if he did not receive the incorrect advice. The Kentucky Supreme Court denied relief.

Holding: Constitutionally competent counsel would have advised the petitioner that his conviction for drug distribution made him subject to automatic deportation. *See Strickland v Washington*, 466 US 668 (1984). Under current law, a noncitizen who has committed a removable offense will almost inevitably be removed from the country. Subject to limited exceptions, the remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses (*see* 8 USC 1229b) are not available for offenses related to trafficking in a controlled substance. *See* 8 USC 1101(a)(43)(B), 1228. Deportation being an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes, *Strickland* applies. The weight of prevailing professional norms supports the finding that counsel must advise a client regarding the risk of deportation, and preserve the possibility of avoiding removal. *See INS v St. Cyr*, 533 US 289, 323 (2001). The petitioner’s lawyer could have determined that the plea would have made him eligible for deportation by reading the text of 8 USC 1227(a)(2)(B)(i), which commands removal for all controlled substances convictions except some minor marijuana possession offenses. The petitioner’s counsel provided false assurance that conviction would not result in removal. Where the deportation consequence is truly clear, the duty to give correct advice is equally clear. When the law is not succinct and straightforward, a defense attorney need do no more than advise a noncitizen client that charges may carry a risk of adverse immigration consequences. While the petitioner

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satisfied the first *Strickland* requirement as to the unreasonableness of counsel's actions, the prejudice prong must be left to the state court. Judgment reversed.

Concurrence: [Alito, J] A criminal defense attorney fails to provide effective assistance, as defined in *Strickland*, if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. "[A]n attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the [client] wants advice on this issue, the [client] should consult an immigration attorney." A criminal defense attorney should not be required to provide advice on immigration law, a complex specialty generally outside the scope of a criminal defense attorney's expertise.

Dissent: [Scalia, J] The Sixth Amendment guarantees adequate assistance of counsel in defending against a pending criminal prosecution. "There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within 'the range of competence demanded of attorneys in criminal cases.' *McMann v. Richardson*, 397 US 759, 771 (1970)." Legislation could solve the problems raised by the collateral consequences of a criminal defendant's citizenship status in a more precise and targeted fashion than court action.

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

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

United States v Stevens, 559 US __, 130 SCt 1577 (2010)

The respondent ran a business and an associated Web site through which he sold videos of pit bulls engaging in dogfights and attacking other animals. On the basis of three videos he was indicted for violating 18 USC 48. The district court denied his motion to dismiss on First Amendment grounds. The Court of Appeals, en banc, vacated his conviction, holding that the statute was facially unconstitutional; it could not survive strict scrutiny as a content-based regulation of protected speech, which the videos were found to be.

Holding: Congress enacted 18 USC 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty, with a penalty range of up to five years in prison. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. Under an "exceptions clause," the law exempted from prohibition any depiction with "serious religious,

political, scientific, educational, journalistic, historical, or artistic value." The statute, which restricts "visual [and] auditory depiction[s]," such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed, explicitly regulates expression based on content. This makes it "'presumptively invalid,' and the Government bears the burden to rebut that presumption." *United States v Playboy Entertainment Group, Inc.*, 529 US 803, 817 (2000). Finding that a category of speech falls outside the protection of the First Amendment requires more than a cost-benefit analysis; it requires a finding that the speech was an integral part of conduct violative of criminal statutes. *See Ashcroft v Free Speech Coalition*, 535 US 234, 249-250 (2002). Animal cruelty does not satisfy the criteria for creating a new category of unprotected speech. Overbreadth analysis shows that the statute was intended to create a criminal prohibition of broad scope. *See United States v Williams*, 553 US 285, 293 (2008). Its enforcement could go well beyond the crush videos and depictions of animal fighting, intrinsically related to criminal conduct, envisioned by the legislature and prosecutors. A statute limited to crush videos or other depictions of extreme animal cruelty might be constitutional, but the current law encompasses a substantial amount of innocent conduct and protected content. Judgment affirmed.

Dissent: [Alito, J] The Court of Appeals declined to decide whether the statute was unconstitutional as applied to the respondent's videos, reaching out to hold that the statute was facially invalid. A party seeking to challenge the constitutionality of a statute generally must show that the statute violated the party's own rights. *See New York v Ferber*, 458 US 747, 767 (1982). Overbreadth invalidation can and should be avoided if the statute under attack is unconstitutional as applied. *See eg Board of Trustees of State Univ. of N. Y. v Fox*, 492 US 469, 484-485 (1989). Properly interpreted, this law is not overbroad. Given the practical problems thwarting prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only effective way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct.

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

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

Renico v Lett, 559 US __, 130 SCt 1855 (2010)

After about four hours of jury deliberations in the respondent's murder trial, the foreman sent out notes raising questions about a mistrial or retrial. After a back and forth with the judge, the jury indicated that they were deadlocked and could not reach a unanimous verdict. A mistrial was declared without objection from either side. The second-degree murder conviction upon retrial was

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reversed on appeal, but reinstated by the state supreme court. The respondent sought a federal habeas corpus writ on double jeopardy grounds, claiming that the trial court abused its discretion and there was no manifest necessity to end jury deliberations. The writ was granted and the Court of Appeals affirmed.

Holding: The state supreme court decision, finding that the trial court did not abuse its discretion in declaring a mistrial, was not “an unreasonable application of . . . clearly established Federal law.” 28 USC 2254(d)(1). “Unreasonable” means “objectively unreasonable,” not “incorrect.” *Williams v Taylor*, 529 US 362, 409, 410 (2000). It is clearly established federal law that when a judge discharges a jury because that jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new trial so long as there was manifest necessity for the mistrial. *See United States v Perez*, 9 Wheat 579, 579-580 (1824). The declaration of a mistrial is in the trial judge’s broad discretion. *See Illinois v Somerville*, 410 US 458, 462 (1973). Although the respondent was not entitled to habeas relief, it is noted that the trial judge could have been more thorough before declaring a mistrial. Judgment reversed and case remanded.

Dissent: [Stevens, J] Double jeopardy protects the fundamental right of a defendant to have his or her “trial completed by a particular tribunal.” *Wade v. Hunter*, 336 U.S. 684, 689 (1949).” There was no manifest necessity requiring the judge to abrogate this respondent’s right to have the initial jury reach a verdict; the state supreme court’s decision finding no double jeopardy violation was in error. The record suggests the trial judge “did not fully appreciate the scope or significance of the ancient right at stake.” The court did not take sufficient measures to ensure that the jury was genuinely deadlocked. The reviewing state courts were obliged to decide whether the trial judge exercised “sound discretion.” This trial for first-degree murder, for which the respondent faced life imprisonment, involved testimony by 17 witnesses over 10 days, but the first jury deliberation lasted under 40 minutes; on the second day, they met for a few hours during which they sent the judge seven notes. The record shows the court’s failure to follow the constitutional standards for determining manifest necessity. The federal courts were required to conduct a deeper level of scrutiny that the “the dual layers of deference” standard relied on by the majority.

Constitutional Law (United States Generally) CON; 82(55)
Federal Law (Crimes) (General) FDL; 166(10) (20)
United States v Comstock, 560 US __, 130 Sct 1949 (2010)

The five respondents were convicted of sex offenses, and the petitioner claimed that four of them were about to be released from federal prison, had engaged in sexually violent conduct or child molestation in the past, and suffered from mental illness that made them sexually dangerous to others. The fifth had been found mentally incompetent to stand trial in similar proceedings. The petitioner sought to civilly commit each under 18 USC 4248. The respondents moved to dismiss the civil commitment proceeding on double jeopardy, Ex Post Facto, and Sixth and Eighth Amendment grounds and because the statutory hearing requirement of clear and convincing evidence violated their due process rights. They also asserted that enactment of the statute exceeded the powers granted to Congress by Art. I, § 8 of the Constitution. Dismissal was granted on due process and legislative powers grounds and affirmed on the legislative powers ground alone.

Holding: The Constitution’s Necessary and Proper Clause, Art. I, § 8, cl. 18, gave Congress sufficient authority to enact the civil commitment statute at issue. The statute constitutes a means of implementing a constitutionally enumerated power (*see Sabri v United States*, 541 US 600, 605 [2004]) “not prohibited” by the Constitution. *See McCulloch v Maryland*, 4 Wheat. 316, 421 (1819). The Constitution does not explicitly mention Congress’ power to criminalize conduct, its power to imprison individuals who engage in such conduct, or its power to enact laws governing prisons and prisoners. Congress nonetheless possesses broad authority through the Necessary and Proper Clause to do each of those things in executing the enumerated powers vested in the federal government by the Constitution. Congress has long been involved in delivering mental health care to, and providing for civil commitment of, federal prisoners. Aside from its specific focus on sexually dangerous persons, the statute here is similar to provisions first enacted in 1949, being a modest addition to a longstanding federal statutory framework that had been in place since 1855. “Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence.” *Cf Youngberg v Romeo*, 457 US 307, 320 (1982). And the statute properly accounts for state interests and does not invade state sovereignty. *Cf Jackson v Indiana*, 406 US 715, 736 (1972). The links between the statute and an enumerated Article I power are not too attenuated. Therefore, taken together, the statute was a “necessary and proper” means of exercising the federal authority that permits Congress to create federal criminal laws, punish their violation, imprison violators, provide appropriately for those imprisoned, and maintain the security of those who were not imprisoned but who may be affected by the federal

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imprisonment of others. Judgment reversed and matter remanded.

Concurrence: [Kennedy, J] When asking if a law “has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.”

Concurrence: [Alito, J] “The Necessary and Proper Clause does not give Congress *carte blanche*. Although the term ‘necessary’ does not mean ‘absolutely necessary’ or indispensable, the term requires an ‘appropriate’ link between a power conferred by the Constitution and the law enacted by Congress.”

Dissent: [Thomas, J] “The Government identifies no specific enumerated power or powers as a constitutional predicate for §4248, and none are readily discernable.” “[T]he Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.” See *New York v United States*, 505 US 144, 157 (1992). The enumerated powers that justify an arrest or conviction do not justify subsequent civil detention.

Juveniles (General)	JUV; 230(55)
Sentencing (Cruel and Unusual Punishment)	SEN; 345(20)

Graham v Florida, 560 US __, 130 SCt 2011 (2010)

The petitioner, at age 16, pleaded guilty in Florida to a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole, and a related second-degree felony. The court withheld adjudication of guilt and sentenced him to concurrent 3-year terms of probation with an initial term of incarceration. Less than 6 months after release on probation, he was arrested for a home invasion robbery and a second robbery, both involving guns. The petitioner admitted attempting to avoid arrest, which violated his probation. Despite a presentence report recommendation of, at most, four years’ imprisonment, and a prosecution recommendation of 30 years, the trial court sentenced the petitioner to life imprisonment for the armed burglary and 15 years for the related offense; since the state has no parole system, executive clemency would be the only mechanism for release from the life sentence. The state appellate court affirmed the denial of the petitioner’s motion challenging his sentence on Eighth Amendment grounds. The state supreme court denied review.

Holding: The Eighth Amendment’s prohibition against cruel and unusual punishments requires looking “beyond historical conceptions to “the evolving standards of decency that mark the progress of a maturing society.”” *Estelle v Gamble*, 429 US 97, 102 (1976). Most

challenges to sentences involve claims that the punishment is disproportionate to the crime. Proportionality analysis has been said to forbid “only extreme sentences that are “grossly disproportionate” to the crime.” *Harmelin v Michigan*, 501 US 957, 997, 1000-1001 (1991). The second classification of cases for Eighth Amendment analysis has used categorical rules with subsets relating to the nature of the offense and the characteristics of the offender. See *Enmund v Florida*, 458 US 782 (1982). The petitioner’s case raises a new issue: a categorical challenge to a term-of-years sentence because it implicates a particular type of sentence as applied to an entire class of offenders who had committed a range of crimes. The analysis used in the categorical approach, not proportionality, is appropriate. Looking at cited studies and the Court’s own research, life without parole for juvenile nonhomicide offenders appears exceedingly rare; a national consensus has developed against it. Additionally, the limited culpability of juvenile nonhomicide offenders and the severity of life without parole sentences, which deny at the outset any chance to demonstrate growth and maturity, *ie*, rehabilitation, lead to the conclusion that the sentencing practice here is cruel and unusual. States need not guarantee juvenile nonhomicide offenders eventual release, but must provide some realistic opportunity to obtain release before the end of a life term. Judgment reversed.

Concurrence: [Stevens, J] “Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete”

Concurrence: [Roberts, J] The petitioner’s sentence of life without parole violated the Eighth Amendment’s prohibition on “cruel and unusual punishments,” based on “(1) our cases requiring ‘narrow proportionality’ review of noncapital sentences and (2) our conclusion in *Roper v. Simmons*, 543 U.S. 551 (2005), that juvenile offenders are generally less culpable than adults who commit the same crimes.”

Dissent: [Thomas, J] “Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile nonhomicide cases, and those judges and juries have decided to use it in the very worst cases they have encountered.” The majority’s “calculation that 123 juvenile nonhomicide life-without-parole sentences have been imposed nationwide in recent memory, even if accepted, hardly amounts to strong evidence that the sentencing practice offends a common sense of decency.”

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

Habeas Corpus (Federal) (State) HAB; 182.5(15) (35)

Jefferson v Upton, 560 US __, 130 Sct 2217 (2010)

The petitioner suffered a traumatic head injury as a child. Before his capital trial began, a psychologist's pre-trial examination concluded that the petitioner's mental deficiencies did "not impair 'his judgment or decision-making capacity,'" but that additional testing to explore any effects of the childhood injury should be conducted. Despite medical records and expert recommendations, defense counsel did not have the petitioner tested for organic brain injury or present any related evidence to the jury. The petitioner claimed in state and federal proceedings that his trial attorneys' failure to pursue brain-damage testing impaired his defense. The trial lawyers claimed an expert said further investigation might be a waste of time; the expert submitted an affidavit denying that. A federal district court ruled on the petitioner's behalf without rejecting the state habeas court's factual conclusions. The Court of Appeals reversed.

Holding: The petitioner's habeas petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), so the old version of 28 USC 2254 must be applied. Under that version, a state habeas court's finding of facts must be presumed correct unless it was shown, as relevant here: "(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," "(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding," "(7) that the applicant was otherwise denied due process of law in the State court proceeding," "(8) or unless . . . the Federal court on a consideration of [the relevant] part of the record as a whole concludes that such factual determination is not fairly supported by the record." 28 USC 2254(d). The state court's habeas findings were drafted exclusively by prosecutors pursuant to an ex parte request from the state judge, who did not make a similar request of the petitioner or even notify him of the request made to opposing counsel. The judge adopted verbatim the proposed opinion, even though it recounted evidence from a nonexistent witness. The federal appeals court mistakenly concluded that the factual findings of the state habeas court were fairly supported by the record. The court failed to consider the other exceptions to the presumption of correct state court findings; it was not duty bound to accept any and all state-court findings that are "fairly supported by the record" if other exceptions apply. This matter must be remanded to the state court to fully develop the record to determine if it warranted a presumption of correctness.

See *Townsend v Sain*, 372 US 293, 313-319 (1963). Judgment vacated and case remanded.

Dissent: [Scalia, JJ] The question of whether the petitioner's counsel were ineffective for failing to investigate the head trauma before trial should be answered or the petition denied. The statutory presumption of correctness is not properly before this court; there was no challenge to the state court's fact-finding process cognizable under the habeas statute, and the circuit court did not incorrectly apply the statutory presumption.

Retroactivity (General) RTR; 329(10)

Sex Offenses (General) SEX; 350(4)

United States v Marcus, 560 US __, 130 Sct 2159 (2010)

The respondent was convicted of engaging in unlawful forced labor and sex trafficking between January 1999 and October 2001. On appeal, he claimed that the provisions he was charged under were enacted as part of the Trafficking Victims Protection Act of 2000 (TVPA), which did not become law until Oct. 28, 2000. See 114 Stat. 1486, § 112(a)(2). He argued that as the indictment and the evidence presented at trial permitted the jury to convict him exclusively upon the basis of actions before Oct. 28, 2000, his conviction violated the Ex Post Facto Clause, Art. I, § 9, cl. 3. He asserted that this was plain error, allowing review despite a timely objection. The Second Circuit noted that conviction for a "'continuing offense'" was not prohibited so long as the conviction rested, at least in part, upon post-enactment conduct. See *United States v Harris*, 79 F3d 223, 229 (2d Cir 1996). But "'if it was possible for the jury—wh[ic]h had not been given instructions regarding the date of enactment—to convict *exclusively* on [the basis of] pre-enactment conduct, then the conviction constitutes a violation' of the Ex Post Facto Clause." The court said this rule applied under plain error review.

Holding: An appellate court may recognize, under Fed. Rule Crim. Proc. 52(b), a "'plain error that affects substantial rights,' even if the claim of error was 'not brought' to the district court's 'attention.'" An appellate court has the discretion to "correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Puckett v. United States*, 556 U.S. __, __ (2009) [173 LEd2d 266, 275] . . . " The Court of Appeal's decision to set aside the conviction for plain error because there is a possibility, no matter how unlikely, that the jury could have convicted the respondent based solely on conduct prior to the enactment date is inconsistent with this Court's prece-

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dent. The risk of conviction for pre-enactment conduct could have been resolved at trial by giving a jury instruction about the effective date of the statute, but such an instructional error is not a structural error. The Second Circuit's approach also conflicted with the fourth "plain error" criterion. The appellate court's standard would have required finding a "plain error" in a case where the evidence supporting a conviction consisted of a few days of preenactment conduct and several continuous years of identical postenactment conduct. Judgment reversed and case remanded.

Dissent: [Stevens, JJ] It has been conceded that there was a real risk that the jury may have improperly considered preenactment evidence in reaching its verdict, in violation of the Ex Post Facto rule. Therefore, the trial error was sufficiently weighty to affect "substantial rights" under Rule 52(b). In addition to the very real possibility that the jury convicted the respondent of sex trafficking solely on the basis of preenactment conduct, there was another risk. By arguing that preenactment evidence showed a violation of the TVPA, the government mischaracterized that evidence as showing illegal behavior, giving the jury the impression that the respondent committed much more criminal conduct than he did, tipping the scales in favor of the prosecution. The error prejudiced the respondent and seriously undermined the integrity of the proceeding. Without endorsing the reasoning of the Second Circuit, its judgment should be affirmed.

Sentencing (Aggravated Penalties) (Enhancement) (General) **SEN; 345(5) (32) (37)**

Weapons (Firearms) **WEA; 385(21)**

United States v O'Brien, 560 US __, 130 Sct 2169 (2010)

The respondent and two others attempted to rob an armored car. Among the firearms recovered was a semi-automatic Cobray pistol that the government alleged had been altered to operate as a fully automatic weapon. Count four of the indictment alleged use of a machinegun (the Cobray) in furtherance of a crime of violence, as proscribed by 18 USC 924(c)(1)(A) and (B)(ii), which mandates a minimum sentence of 30 years' imprisonment. The government dismissed that count. Instead, it relied on count three, using a firearm in furtherance of a crime of violence, with a statutory minimum of five years' imprisonment. They claimed that the machinegun provision in 18 USC 924(c)(1)(B)(ii) was a sentencing factor, so that, if the respondents were convicted under count three, the court could determine at sentencing that the particular firearm was a machinegun, activating the 30-year mandatory minimum. The court ruled that the machinegun provision stated an element of a crime and to invoke the 30-

year minimum sentence, the government would have to charge and then prove to the jury that the Cobray was a machinegun. The respondents pleaded guilty to all three counts and were sentenced without the enhancement. The government appealed the ruling as to the machinegun provision; it was affirmed.

Holding: "Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt." Sentencing factors may be proved to a judge by a preponderance of the evidence. See *McMillan v Pennsylvania*, 477 US 79, 91-92 (1986). The constitution bars a legislature from taking from the jury a factual assessment that is used to increase the possible sentencing range to which a defendant is exposed. See *Apprendi v New Jersey*, 530 US 466, 490 (2000). Thus, facts found by a judge cannot increase a defendant's maximum sentence beyond that which he might otherwise have received based on the facts found by the jury. In *Castillo v United States* (530 US 120 [2000]), this Court examined an earlier version of the statute in question and, using a five-factor test, concluded that the machinegun enhancement provision was an element of the offense. While the current version of the statute is structurally different (one factor in the analysis), the other factors were not affected. The five-factor analysis favors a finding that the current machinegun provision is an element of the offense. It was not likely that Congress intended to remove the indictment and jury trial protections when it provided for such an extreme sentencing increase. See *Jones v United States*, 526 US 227, 233 (1999). Judgment affirmed.

Concurrence: [Stevens, JJ] To the extent that *McMillan* and *Harris v United States* (536 US 545 [2002]) authorize judicial factfinding on a preponderance of the evidence standard, they should be overruled. "[A]ny fact mandating the imposition of a sentence more severe than a judge would otherwise have discretion to impose should be treated as an element of the offense."

Concurrence: [Thomas, JJ] The requirement of *Apprendi* and *Harris* applies to sentencing facts that alter the mandated sentencing range by increasing the mandatory minimum whether or not they affect mandatory maximums. Sentencing facts, like the machinegun enhancement, that establish a harsher range of punishments "must be treated as an element of a separate, aggravated offense that is submitted to a jury and proved beyond a reasonable doubt."

Admissions (Miranda Advice) (Silence) **ADM; 15(25) (30)**

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

Berghuis v Thompkins, 560 US __, 130 Sct 2250 (2010)

The respondent was arrested out of state for his involvement in a Michigan shooting death. Before he was transferred, two Michigan police officers interrogated

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him. After being *Mirandized*, the respondent refused to sign the acknowledgement of rights form, though he may have verbally confirmed the rights. At no point during the interrogation did the respondent say that he wanted to remain silent, that he did not want to talk with the police or that he wanted an attorney. After nearly three hours and a few one-word answers or nods, one of the officers asked the respondent whether he prayed to be forgiven for shooting the deceased. The respondent answered, "Yes." Suppression was denied. At trial, defense counsel did not ask for an instruction informing the jury that it should consider evidence of the outcome of the other defendant's separate trial, where he was acquitted of murder, only to assess his credibility, not to establish the respondent's guilt. The respondent's first-degree murder conviction was affirmed on appeal. Denial of federal habeas corpus relief was reversed on appeal based on *Miranda* and ineffective-assistance-of-counsel claims.

Holding: The respondent claimed that his initial silence after receiving adequate *Miranda* (*Miranda v Arizona*, 384 US 436 [1966]) warnings was an invocation of his right not to be questioned. However, the right to remain silent must be invoked unambiguously. *See Davis v United States*, 512 US 452, 459 (1994). "Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity." *See Moran v Burbine*, 475 US 412, 427 (1986). The respondent did not say that he wanted to remain silent or that he did not want to talk with the police. A waiver of those rights could be established even absent formal or express statements of waiver. *See North Carolina v Butler*, 441 US 369 (1979). The respondent waived his rights since there was no showing that he did not understand them—he received a written copy of the *Miranda* warnings and read parts aloud, demonstrating he could speak English. That he made no statement until nearly three hours later did not rise to the level of a *Miranda* violation. "Police are not required to rewarn suspects from time to time." His admission to the shooting was sufficient to show a course of conduct indicating waiver. There was no evidence of coercion. A suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. The decision rejecting the respondent's *Miranda* claim was correct under de novo review and therefore necessarily reasonable under the deferential standard of review in 28 USC 2254(d). The failure of defense counsel to request instruction about the other defendant's earlier acquittal or conviction on a weapons charge, even if ineffective, did not prejudice the respondent in the light of the evidence of guilt. *See Strickland v Washington*, 466 US 668 (1984). Judgment reversed.

Dissent: [Sotomayor, J] The respondent was entitled to relief on the ground that his statements were admitted at trial without the prosecution having carried its burden to show that he waived his right to remain silent. *See Michigan v Mosley*, 423 US 96 (1975). Even if he did not invoke the right to remain silent, he deserved relief based on the absence of waiver. *See Smith v Illinois*, 469 US 91, 98 (1984). "[A] precautionary requirement that police 'scrupulously hono[r]' a suspect's right to cut off questioning is a more faithful application of our precedents than the Court's awkward and needless extension of *Davis*." The broad rules the Court announces today are also troubling because they are unnecessary to decide this case, which is governed by the deferential standard of review.

New York State Court of Appeals

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

Homicide (Manslaughter [Instructions]) (Murder [Degrees and Lesser Offenses]) [Instructions] HMC; 185(30[j]) (40[g] [m])

People v Baker, 14 NY3d 266, 899 NYS2d 733 (2010)

The defendant was convicted of depraved indifference murder of a child, first- and second-degree manslaughter, and endangering the welfare of a child in connection with the death of his girlfriend's child. At trial, defense counsel did not object when the court decided to allow the jury to consider all three homicide counts and would not charge them in the alternative. The Appellate Division affirmed.

Holding: The defendant failed to establish that his attorney was ineffective for failing to ask the court to instruct the jury that it should consider the three homicide counts in the alternative. The fact finder must consider charges in the alternative if guilt of one charge is inconsistent with guilt of the other. *See People v Gallagher*, 69 NY2d 525. The depraved indifference murder of a child and the first-degree manslaughter counts were not inconsistent because the jury could have found that the defendant recklessly created a grave risk of serious physical injury or death under circumstances evincing a depraved indifference to human life and that he intended to cause physical injury. *See People v Trappier*, 87 NY2d 55, 59. This Court has held that second-degree manslaughter is a lesser included offense of depraved indifference murder under Penal Law 125.25(2) (*see People v Atkinson*, 7 NY3d 765, 766-767), but has not ruled on whether it is a lesser included offense of depraved indifference murder of a child under Penal Law 125.25(4). The Third and Fourth Departments, however, have held that it is not a lesser

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included offense. See *People v Heslop*, 48 AD3d 190, 195-196 [3d Dept] *lv den* 10 NY3d 935; *People v Robinson*, 278 AD2d 798 [4th Dept] *lv den* 96 NY2d 762. It was not unreasonable for defense counsel to believe that the jury could consider both counts (see *gen People v Carter*, 7 NY3d 875, 876-877), and counsel may have seen a benefit in allowing the jury to consider the less serious offense at the same time as it considered the two higher charges. The prosecutor's use of slides setting forth the definitions of depraved indifference and recklessness during summation did not deprive the defendant of a fair trial; the definitions were accurate and the court's instructions were sufficient to ensure that the jury would not place undue emphasis on the slides. See *gen People v Tucker*, 77 NY2d 861, 863. The defendant's right to a public trial was not violated when the court granted the prosecutor's request to exclude the mother of the defendant's children from the trial because she was a potential witness. See *People v Santana*, 80 NY2d 92, 100. It was not unreasonable for the court to conclude that the woman might be called as a rebuttal witness, and the court allowed the defendant's mother to remain in the courtroom, which refutes his claim that the court sought to remove his relatives and friends. Order affirmed.

Counsel (Conflict of Interest) **COU; 95(10) (15)**
(Competence/Effective Assistance/Adequacy)

Evidence (Sufficiency) **EVI; 155(130)**

People v Carncross, 14 NY3d 319, 901 NYS2d 112 (2010)

A jury acquitted the defendant of aggravated manslaughter, but convicted him of reckless driving and aggravated criminally negligent homicide after a state trooper died during a high speed pursuit of the defendant who was riding his motorcycle without a license. Before trial, the court granted the prosecution's motion to disqualify the defense counsel due to a potential conflict of interest. The Appellate Division affirmed.

Holding: The court did not abuse its discretion in disqualifying the defendant's retained counsel. See *People v Gomberg*, 38 NY2d 307, 312. While the defendant agreed to waive the conflict after talking to an independent attorney, the court had an "independent obligation to ensure that defendant's right to effective representation was not impaired." See *Wheat v United States*, 486 US 153, 164 (1988). Defense counsel represented the defendant's father and girlfriend when they testified before the grand jury. Although these witnesses were not called at trial, at the time of the disqualification motion, it was understood that the prosecution might call them if the defendant argued at trial that he was not the person who was driving the motorcycle. Had the prosecution called these wit-

nesses, both of whom possessed damaging evidence about the defendant's actions, defense counsel would have been required to cross-examine them. This conflict may have impaired defense counsel's ability to objectively assess the best trial strategy. The dissent embraces an apparently unworkable test. The defendant received effective assistance of counsel from his first attorney who encouraged him to give a statement to the police. Unlike in *People v Claudio* (83 NY2d 76, 78), counsel's advice was based on his understanding that the prosecutor would look favorably on a voluntary statement and that the police had information connecting him to the crime. The defendant failed to preserve his claim that the evidence was insufficient to support the mens rea element of aggravated criminally negligent homicide because his trial motion to dismiss did not raise this specific issue. See *People v Gray*, 86 NY2d 10, 19. And his argument that the evidence was insufficient to establish a causal connection between his conduct and the trooper's death, while properly preserved, is meritless. See *People v DaCosta*, 6 NY3d 181, 184. Order affirmed.

Dissent: [Pigott, J] "Where, as here, the potential conflict is theoretical at best because the witnesses are united with the defendant and the defendant has been adequately apprised of the risks of waiving any potential conflict and agrees to do so, the defendant should not be deprived of his fundamental right to counsel of his own choosing." Since the representation would not have jeopardized the integrity of the proceedings, the court should not have protected the defendant from himself. See *United States v Perez*, 325 F3d 115, 125-126 (2d Cir 2003).

Criminal Law and Procedure (General) **CLP; 98.8(10)**

People v Assi, 14 NY3d 335, 902 NYS2d 6 (2010)

The defendant was arrested for vandalizing a synagogue and charged with attempted third-degree arson and third-degree criminal mischief as hate crimes. The defense moved to dismiss the hate crimes because they occurred two days before the effective date of the Hate Crimes Act of 2000 (L 2000, ch 107), which was 90 days after it was enacted. That date, Oct. 8, 2000, fell on a Sunday, and Monday was a holiday; the defense claimed General Construction Law 20 and 25-a pushed the start date to Tuesday, Oct. 10, 2000 and that the Hate Crimes Act did not apply to property offenses. Both arguments were rejected and the defendant was convicted of both offenses. The Appellate Division affirmed.

Holding: Under the statute, the term "hate crimes" refers to criminal acts against "'victims [who] are intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation'" (Penal Law § 485.00). There are two modes of committing hate crimes: (1) intentionally selecting the "person" who will

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be the victim “in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct,” and committing a specified offense (Penal Law § 485.05[1][a]); and (2) intentionally committing a specified offense “in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct” (Penal Law § 485.05[1][b]).” A “person” has been defined as “a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality” (Penal Law § 10.00[7]).” The congregation that owned the synagogue fell under the category of an association of individuals or a religious corporation, and therefore, it qualified as a “person” within the meaning of 10.00(7). And Penal Law 485.05(1)(b) broadly applies to specified offenses—including property crimes such as trespass, burglary, arson, and grand larceny (see Penal Law 485.05 [3])—that were motivated by a belief or perception of another person’s religion. See Donnino, Practice Commentary, McKinney’s Cons Laws of NY, Book 39, Penal Law 485.00, at 284. Chapter 107 was to take effect on Oct. 8, 2000, 90 days after it was enacted. See L 2000, ch 107, § 9. The Legislature has the power to select an effective date of its choosing (see eg McKinney’s Cons Laws of NY, Book 1, Statutes § 41). General Construction Law 20 and 25-a(1) are inapplicable. Penal Law article 485 became effective on Sunday, Oct. 8, 2000, hours before the crimes occurred. Order affirmed.

Search and Seizure SEA; 335(15[k]) (42) (45) (55)
(Automobiles and Other Vehicles [Investigative Searches])
(General) (Motions to Suppress [CPL Article 710])
(“Poisoned Fruit” Doctrine)

People v Tolentino, 14 NY3d 382, 900 NYS2d 708 (2010)

The defendant had been stopped while driving for playing music too loudly. The police learned his identity and then did a search of Department of Motor Vehicles (DMV) files, discovering his license suspensions, and charged him with first-degree aggravated unlicensed operation of a motor vehicle. Defense counsel moved to suppress the defendant’s statements based on the illegality of the stop and the DMV records search. The trial court granted the defendant’s motion for a *Huntley/Dunaway*

hearing, but denied his request for a *Mapp* hearing. The defendant pleaded guilty. The Appellate Division affirmed the conviction.

Holding: The United States Supreme Court in *INS v Lopez-Mendoza* (468 US 1032, 1039 [1984]) said a defendant’s “body” or identity is never itself suppressible in a criminal or civil proceeding as the fruit of an unlawful arrest, even if an unlawful police action occurred. The defendant claimed that the pre-existing DMV records here were subject to suppression because without the alleged illegality, the police would not have learned his name and would not have been able to access these records. Federal courts have held that government database checks of identity are not a basis for suppression. See eg *United States v Farais-Gonzalez*, 556 F3d 1181, 1189 (11th Cir 2009). Further, the public nature of the records militated against an expectation of privacy. See *United States v Crews*, 445 US 463, 475-477 and n 22 [1980] [plurality]. The DMV records here were obtained by the police from a source independent of the claimed illegal stop. See *People v Pleasant*, 54 NY2d 972. The defendant could not invoke the fruit of the poisonous tree doctrine when the only link between improper police activity and the disputed evidence was that the police learned the defendant’s name. Cf *Davis v Mississippi*, 394 US 721, 724 (1969). Order affirmed.

Dissent: [Ciparick, J] The DMV records were subject to suppression if obtained by the police through the exploitation of a Fourth Amendment violation, ie, an unlawful traffic stop. Fruit of the poisonous tree may be anything “of evidentiary value,” including identifications. See *People v Gethers*, 86 NY2d 159, 162. The decision in *Lopez-Mendoza* has been interpreted by the Fourth, Eighth, and Tenth Circuits as referring only to the court’s personal jurisdiction over *Lopez-Mendoza*, not the admissibility of identity evidence. See eg *United States v Oscar-Torres*, 507 F3d 224, 227-230 (4th Cir 2007). And the defendant here did not need to establish a legitimate expectation of privacy in the evidence he wanted to suppress, but only that police discovery of the evidence was the product of a Fourth Amendment violation. See *Kamins, New York Search and Seizure* § 1.01[5][a], at 1-22 [2009]).

Probation and Conditional Discharge (General) (Revocation) PRO; 305(18) (30)

Sentencing (Credit for Time Served) (General) SEN; 345(15) (37)

People v Zephirin, 14 NY3d 296, 899 NYS2d 739 (2010)

The defendant pleaded guilty to grand larceny and the court sentenced him to six months’ incarceration and five years’ probation. He received credit for four months of pretrial incarceration that started in August 2000 and was released at sentencing on Jan. 3, 2001 to the custody

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of the probation department. On Apr. 27, 2005, the defendant was arrested for forgery. In December 2005, the probation department filed a declaration of delinquency. The next month the defendant pleaded guilty to the forgery charge. On the probation violation, the judge rejected the defendant's argument that his probation sentence ended in August 2005, before the delinquency declaration had been filed. The probation violation sentence of one to three years' imprisonment, concurrent to the sentence imposed for his new forgery conviction, was vacated on appeal.

Holding: Authorized by Penal Law 60.01(2)(d), the "split sentence" consists of a term of incarceration combined with a term of probation. *See Pirro v Angiolillo*, 89 NY2d 351, 353. Where a defendant has been incarcerated pending sentencing, that time is credited toward the term of imprisonment of a split sentence (*see* Penal Law 70.30[3]), as well as toward the probationary term. The defendant's probation term expired prior to the filing of the declaration of delinquency because he should have received credit toward his probationary term for the presentencing incarceration. *See People v Teddy W.*, 56 AD3d 697, 698 *lv den* 12 NY3d 860. Penal Law 65.00(3)(a) authorizes a five-year probation term for most felonies. Section 65.00(2), however, recognizes that, where a split sentence is imposed, the limitations set forth in Penal Law 60.01(2)(d) may trump the time period set forth in section 65.00(3)(a). Taken together, the explicit statutory command of Penal Law 60.01(2)(d) and 65.00 dictate that, where a court imposes a split sentence, the terms of imprisonment and probation taken together may not generally exceed five years. Therefore, the delinquency declaration was filed too late. Order affirmed.

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

Evidence (Other Crimes) EVI; 155(95)

People v Caban, 14 NY3d 369, 901 NYS2d 566 (2010)

The defendant was convicted of criminally negligent homicide for killing a pedestrian while backing up her car to unload passengers. Three months before the event, she had been ticketed for unsafe backing and for failing to yield to pedestrians in a crosswalk among other violations, and her driver's license was suspended. A prosecution request to introduce evidence that the defendant's license was suspended on the day of the incident was granted. The Appellate Division reversed.

Holding: The alleged error in admitting the license suspension was preserved; therefore, the Appellate Division's decision is reviewable. *See People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 406-407. The trial court

denied the prosecution's motion to allow in the facts underlying the license suspension in its case in chief. The prosecution interpreted the ruling to mean that they could prove the license suspension, while defense counsel believed it excluded all mention of the suspension. Attorneys for both sides discussed the ruling privately, then the prosecutor reiterated it for the court on the record. The judge resolved the question by allowing the prosecution to introduce only evidence of the suspension, and no other facts. While the defense did not object on the record, the prosecution's summary of the defendant's objection was sufficient to make the judge aware that the defense wanted him to exclude the evidence. The issue was therefore a question of law suitable for review. The license suspension was relevant to the issue of criminal negligence because it allowed the jury to find that the defendant was more negligent than the other evidence showed her to be. *See* Penal Law 15.05(4). The prejudicial effect did not outweigh its probative value (*see People v Scarola*, 71 NY2d 769, 777), *ie*, the inference that it was unsafe for the defendant to be behind the wheel of a car. Nor was it prohibited as propensity evidence; a defendant who was repeatedly negligent in the same way may be found unable or unwilling to learn from prior mistakes, *ie*, a "gross deviation" from reasonable care. *Cf People v Molineux*, 168 NY 264. As to the claim of a mode of proceeding error based on the trial court's alleged failure to give defense counsel meaningful notice of notes sent by the jury during its deliberations, the issue was not considered by the Appellate Division and is not ripe for review. Order reversed and matter remanded for consideration of other issues.

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

People v Carr, 14 NY3d 808, 899 NYS2d 746 (2010)

Holding: "A party seeking a missing witness instruction has the burden of making the request 'as soon as practicable.'" *People v Gonzalez*, 68 NY2d 424, 428. Evaluating the timeliness of the request was within the trial court's discretion based on when the party seeking the charge knew or should have known that a basis for such a charge existed, and any prejudice that may have been suffered by the opposing party due to the delay. The defendant knew from the outset of trial that the prosecution did not intend to call three of the accuser's relatives who were present at the alleged crime. Finding that the defendant's request for a missing witness charge came too late—it was made more than a week after the prosecution provided their witness list, and after the prosecution had rested their case in chief—was not an abuse of discretion. Order affirmed.

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Search and Seizure SEA; 335(42) (65[a] [f] [p])
 (General) (Search
 Warrants [Affidavits,
 Sufficiency of] [Execution]
 [Suppression])

People v Mothersell, 14 NY3d 358, 900 NYS2d 715 (2010)

The defendant filed a suppression motion claiming that there was no foundation for an all-persons-present warrant, and if there was, it did not authorize a body cavity search. The basis for the warrant application was two controlled purchases of cocaine made by known and reliable informants at the target premises. The trial judge found the warrant application sufficient. Police testimony at the hearing revealed that the defendant had been searched solely based on the warrant; there was admittedly no independent basis for an arrest and the defendant was not under arrest at the time of the search. The defendant's body cavities were inspected during the search; incriminating narcotics were found. Suppression was denied, and the defendant's guilty plea to fifth-degree possession of drugs was affirmed.

Holding: A warrant that does not describe anyone in particular may be valid if it directs a search of a particular premises and any person present therein. *See* CPL 690.15(2). But the facts in the application and the reasonable inferences raised must create a substantial probability that the invasions of privacy authorized by the warrant "will be justified by discovery of the items sought from all persons present when the warrant is executed." *See People v Nieves*, 36 NY2d 396, 405. *Nieves* requires all of the following to be addressed: (1) the character of the premises, (2) the nature of the illegal activity believed to be conducted there, (3) the number and behavior of persons present at the time the warrant was proposed to be executed, and (4) whether persons unconnected with the illicit activity had been observed there. Two isolated purchases of small quantities of alleged narcotics did not show that a residence had been given over to the drug trade, much less that every person there was probably a drug trafficking participant. Therefore, the warrant was invalid. A post-arrest strip search must be based upon reasonable suspicion that an arrestee is hiding contraband; a body cavity search must be separately justified, requiring a "specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity." *People v Hall*, 10 NY3d 303, 310-311 *cert den* 129 S Ct 159 (2008). The defendant had not even been arrested at the time of the search. "This warrant, even if valid for other uses, would fail of its essential limiting purpose if it were understood to afford plenary authority for the inspection of the most private recesses of

a person's anatomy." Order reversed, suppression motion granted, and indictment dismissed.

Concurrence: [Read, JJ] The affidavit supporting the warrant application was too skimpy and dependent on boilerplate. All-persons-present warrants for drug searches must be more detailed. *See People v Williams*, 284 AD2d 564, 565 *lv den* 96 NY2d 909. Additional details might have included: were drugs at the location in open view; was paraphernalia visible; did those observed seem to be high or using drugs; and, generally, how many people were seen and did any appear unaware of or uninvolved with the illegal activity.

Juries and Jury Trials (General) JRY; 225(37)

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

People v Cruz, 14 NY3d 814, 901 NYS2d 122 (2010)

Charged with first-degree assault, the defendant raised a misidentification defense. During deliberations, the jury sent a note asking for a written statement received in evidence containing some admissions, which had been prepared by a police officer and signed by the defendant. It had been used to refresh a testifying officer's memory. This exhibit was initially marked into evidence over defense objection. The court later reversed its ruling, outside the presence of the jury, and said the statement was not evidence; it was re-marked as a court exhibit. Nothing in the record suggested that the judge received the jury note or discussed its contents with the parties. On remand based on a violation of CPL 310.30 and *People v O'Rama* (78 NY2d 270), the trial judge stated during a reconstruction hearing that he had no independent recollection of receiving the jury note. He discussed his standard practice of generally allowing juries to review exhibits admitted in evidence upon their request without reconvening, if the parties were in agreement. He stated that, had he been told that the jury in this case requested a court exhibit not in evidence, he would have reconvened the proceeding in the defendant's presence. The conviction was affirmed.

Holding: "Typically, 'a presumption of regularity attaches to judicial proceedings' (*People v Velasquez*, 1 NY3d 44, 48 . . .)." Here, the presumption was overcome by substantial evidence. That the jury requested an exhibit not in evidence was a significant, unexplained irregularity in the proceedings. It was reasonable for the jury to believe that the exhibit was in evidence, since it did not know the court reversed its ruling on admissibility, and the jury's request had never been brought to the judge's attention. The jury may have obtained the statement in error. Since the exhibit contradicted the defendant's misidentification defense at trial, the error was not harm-

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less. *Cf People v Bouton*, 50 NY2d 130, 137. Order reversed and a new trial ordered.

Concurrence: [Lippman, J] The dispositive issue was not whether the jury was given the unadmitted court exhibit but whether the defendant's right to be present and participate in his defense with the assistance of counsel was violated by the absence of any notice of the jury note or of an opportunity to be heard.

Juries and Jury Trials (General)**JRY; 225(37)****People v Kadarko, 14 NY3d 426, 902 NYS2d 828 (2010)**

In a trial for five separate robbery charges, the deliberating jury sent a note to the judge indicating a division: "Are still divided as follows regarding alleged robberies on: 7/14/04 8 to 4; 7/26/04 11 to 1; 7/20/04 10 to 2; 8/3/04 11 to 1; 8/9/04 11 to 1" [punctuation added]. The judge advised counsel about the note but did not disclose the numerical breakdown. No objections were made to the nondisclosure. Defense counsel's motion for a mistrial based on the deadlock was denied. The court gave the jury an *Allen* charge and then showed the attorneys the note. The jury reached a verdict for conviction on one count, a mistrial was declared as to the others. The conviction was reversed.

Holding: In *People v O'Rama* (78 NY2d 270, 276), this Court held that CPL 310.30 imposed two distinct duties on a court that received a jury note: first, notify counsel, and second provide a "meaningful response." The trial judge in this case provided defense counsel with meaningful notice of the contents of the jury note and an opportunity to respond. No objections had been made to the initial failure to disclose the specific numbers. While the court's decision not to read the entire note until after the jury had resumed deliberations may have been error, it was not a mode of proceedings error and the court later corrected itself, without objection or request for further instruction by either party. Order reversed and matter remitted for consideration of facts and issues raised but not determined on appeal.

Sex Offenses (Sentencing)**SEX; 350(25)****People v Pettigrew, 14 NY3d 406, 901 NYS2d 569 (2010)**

The defendant pleaded guilty to first-degree rape. Before his release from prison, a Sex Offender Registration Act (SORA) hearing was conducted. The Risk Assessment Instrument (RAI) prepared for the hearing assessed the defendant 120 points, designating him a presumptive level three sex offender. Included in the Board of Examiners of Sex Offenders' summary of the offense was a factual description of the crime saying the defendant

showed the accuser a gun sticking out of his waistband and said he would shoot her if she told anyone. The court rejected the defendant's argument to deduct 30 points for the armed with a dangerous instrument factor of the assessment because of insufficient proof that it was loaded and operable. The level three assessment was affirmed.

Holding: The defendant's display of a gun and its threatened use constituted clear and convincing evidence (Correction Law 168-n[3]) that, for SORA purposes, he was armed with a dangerous instrument during the crime. *See* Board of Examiners of Sex Offenders, Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [Guidelines], ¶ 7, at 5 (2006). This justified his classification as a level three sex offender. *See People v Dodt*, 61 NY2d 408, 415. The RAI case summary can "meet the "reliable hearsay" standard for admissibility at SORA proceedings." *People v Mingo*, 12 NY3d 563, 573. "A [d]angerous instrument means "any instrument, article or substance, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury."" Guidelines at 8, *citing* Penal Law 10.00(13). There was sufficient evidence to support a level three risk assessment. Order affirmed.

Narcotics (Penalties)**NAR; 265(55)****Sentencing (Resentencing)****SEN; 345(70.5)****People v Acevedo, 14 NY3d 828, 901 NYS2d 578 (2010)**

The defendant was sentenced on several counts, including first-degree criminal possession of a controlled substance, an A-I drug felony (15 years to life), other drug charges (lesser prison terms), and third-degree criminal possession of a weapon (two counts, 5 years on each). All of the sentences for the drug-related charges were to run concurrently; the sentences for the weapons convictions were to run concurrently with each other, but consecutively to the drug sentences. After the sentences were affirmed, the defendant sought resentencing under Drug Law Reform Act of 2004 (L 2004, ch 738, § 23) (DLRA), seeking a reduction on the A-I drug sentence and concurrent sentences on all counts. The court reduced the A-I drug sentence from 15 years to life to 15 years with 5 years' post-release supervision. The weapons charges continued to run consecutively. The defendant challenged the refusal to order concurrent sentences; the resentencing was affirmed.

Holding: The trial court did not have the authority to modify a sentence by changing its terms from consecutive to concurrent when it granted the defendant's DLRA application for resentencing. When the court imposed a reduced sentence under the amended statute, it did not impose an "additional term of imprisonment"

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as contemplated by Penal Law 70.25(1). Nor was the DLRA proceeding used to modify the original term of resentence as occurred in *Murray v Goord* (1 NY3d 29). The “court that resentences a defendant pursuant to the 2004 DLRA does not possess the authority, conferred by Penal Law § 70.25(1), to determine whether the sentence is to be served concurrently or consecutively with respect to other sentences.” *People v Vaughan*, 62 AD3d 122, 128. Order affirmed.

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

People v McBride, 14 NY3d 440, 902 NYS2d 830 (2010)

An employee who told police that it was the defendant who robbed the restaurant later picked him out of a photo array and lineup. Police went to the defendant’s apartment. They could hear voices inside and confirmed that a man was present. When their knock went unanswered, some climbed up a fire escape to look into the apartment. They saw a man lying on the floor. With guns drawn, they rapped on the window and ordered him to open up. A woman, seemingly upset and out of breath, came to the front door and let the other officers in. They arrested the defendant. His pretrial suppression motions challenging evidence taken from his home, the lineup identification, and a confession given to the police were denied after a hearing. His conviction was affirmed.

Holding: Warrantless entries into a home to make an arrest are “presumptively unreasonable.” *People v Molnar*, 98 NY2d 328, 331, quoting *Payton v New York*, 445 US 573, 586 (1980). However, if there was probable cause, the police could proceed without a warrant in the presence of exigent circumstances. See *Kirk v Louisiana*, 536 US 635, 638 (2002); see also *People v Burr*, 70 NY2d 354, 360. Exigent circumstances depend on many factors: the gravity or violent nature of the offense; whether the suspect is reasonably believed to be armed; a clear showing of probable cause to believe the suspect committed the offense; a strong reason to believe the suspect is present; a likelihood the suspect will escape if not quickly arrested; and the peaceful circumstances of entry. See *United States v Martinez-Gonzalez*, 686 F2d 93, 100 (2d Cir 1982). The alleged crime here was violent, probable cause was acknowledged, there was strong reason to think the defendant was in the apartment, and the police entered only after assessing the distressed condition of the woman answering the door. See *People v Brown*, 95 NY2d 942, 943. That the police created the exigency by frightening the woman (see *People v Levan*, 62 NY2d 139, 146) was not sup-

ported by the record. While the better practice would have been to get an arrest warrant, the police actions were legally supportable (see *People v Minley*, 68 NY2d 952, 953), and seizure of evidence was justified. The record supported a finding that the defendant knowingly and voluntarily waived his *Miranda* rights. The lineup fillers were physically similar to the defendant, and his wearing an article of clothing described by the accuser was not unduly suggestive as the gray hooded sweatshirt was not unusual or distinctive. See *People v Gilbert*, 295 AD2d 275, 277 *lv den* 99 NY2d 558. The affirmed findings below were supported by the record and are not reviewable. Order affirmed.

Dissent: [Pigott, J] Exigency did not cancel the need for an arrest warrant when there was ample time to obtain it; the police had probable cause to arrest the defendant three days before going to his home. See *People v Bloom*, 241 AD2d 975 *lv den* 90 NY2d 938. The police appeared to have created the exigency. See *People v Levan*, 62 NY2d 139. Since the arrest was insupportable, whether the defendant’s statement was sufficiently attenuated from the warrantless entry ought to be considered on remand.

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

People v Alford, 14 NY3d 846, 901 NYS2d 132 (2010)

Holding: Penal Law 70.25(2) states: “[w]hen more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently.” Counts one and four of the indictment charged predatory sexual assault against a child. A person commits that crime when, being 18 years old or more, he or she commits one of several lesser crimes with a victim less than 13 years old. See Penal Law 130.96. Count one alleged that the defendant committed the lesser crime of first-degree criminal sexual act on or about Mar. 12, 2007 by engaging in anal sexual conduct with the accuser. Count four alleged that the defendant committed the lesser crime of first-degree course of sexual conduct against a child by engaging in at least two acts of sexual conduct with the accuser between August 2006 and March 2007. Because it was impossible to determine whether the act that formed the basis for the jury’s guilty verdict on count one was also one of the acts that formed the basis for its guilty verdict on count four, the trial court should have ordered the sentences on those counts to run concurrently. If the prosecution wished to seek consecutive sentencing in a case such as this, they should have requested a form of verdict that would have required the jury to explicitly delineate that an act constituting one offense was not a material element of another offense. Order modified by providing that the sentence imposed on count four run concurrently with the sentences imposed

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on counts one and three of the indictment, and, as so modified, affirmed.

Discovery (*Brady* Material and Exculpatory Information) (Procedure [Enforcement]) **DSC; 110(7) (30[a])**

People v Daly, 14 NY3d 848, 902 NYS2d 499 (2010)

Holding: “Whether violations of *People v Rosario* (9 NY2d 286 . . .) or *Brady v Maryland* (373 US 83 [1963]), resulting in the reversal of convictions on certain counts, also require reversal of convictions on other, jointly tried counts is a question to be resolved on a case-by-case basis. Reversal of the jointly tried counts is required only if there is a ‘reasonable possibility that the evidence supporting the . . . tainted counts influenced the guilty verdicts on the other [counts].’” *People v Baghai-Kermani*, 84 NY2d 525, 532. There was no reasonable possibility that the evidence supporting the tainted counts, which related to offenses at an off-track betting parlor, had a spillover effect on the other guilty verdicts, relating to offenses at a gas station. A thorough review of the record revealed no reasonable possibility that the violations affected the defendant’s ability to defend against the gas station counts or otherwise influenced those verdicts. Order affirmed.

Appeals and Writs (Judgments and Orders Appealable) (Preservation of Error for Review) (Scope and Extent of Review) **APP; 25(45) (63) (90)**

People v Johnson, 14 NY3d 483, 903 NYS2d 299 (2010)

The defendant agreed to plead guilty to first-degree robbery and waive the right to appeal in exchange for a youthful offender adjudication with a maximum prison sentence of one to four years. Before sentencing, the court reconsidered and decided that “‘it would be inappropriate to grant youthful offender status, in light of the seriousness of the crime, the injuries to the victim, and other factors.’” The probation department had recommended against youthful offender treatment. The defendant decided not to withdraw his plea and accepted a new sentencing commitment of five years’ imprisonment and five years’ post-release supervision with no youthful offender adjudication. The conviction was affirmed, upholding the waiver of appeal.

Holding: The trial court’s modification of the sentence offer was a significant change in circumstances. A waiver of the right to appeal may be elicited as part of a plea bargain (see *People v Seaberg*, 74 NY2d 1, 5), but it must be knowingly, voluntarily and intelligently entered.

See eg *People v Callahan*, 80 NY2d 273, 280. “[W]hen defendant agreed to waive his right to appeal, he had no reason to suspect that he would not be treated as a youthful offender or receive a sentence in excess of the maximum that had been negotiated.” See *People v Selikoff*, 35 NY2d 227, 238 *cert den* 419 US 1122 (1975). Because the court did not advise the defendant that its sentencing commitment was contingent on the presentence report and other factors, the defendant could not have knowingly and intelligently waived his right to appeal the judge’s decision not to abide by the original promise. Cf *People v Hidalgo*, 91 NY2d 733, 737. Once the decision to impose the more severe sentence was announced, the court had to elicit the defendant’s continuing consent to waive his right to appeal. The defendant may pursue appellate review of the propriety of the denial of youthful offender treatment and the severity of the imposed sentence. Order reversed and case remitted for consideration of issues raised but not determined by the Appellate Division.

Defense Systems (New York State Law [Caselaw]) (System Impacting Litigation) **DFS; 104(75[b]) (101)**

Hurrell-Harring v State of New York, 15 NY3d 8, 904 NYS2d 296 (2010)

Plaintiffs were defendants in various criminal prosecutions in Washington, Onondaga, Ontario, Schuyler, and Suffolk counties that were ongoing at the time of this action’s commencement. They contended that the state scheme for providing public defense services, involving a costly, largely unfunded, and politically unpopular mandate on local government, functioned to deprive them and other similarly situated public defense clients in the five counties of constitutionally and statutorily guaranteed representational rights. See US Const, amend VI; County Law articles 18-A and 18-B. They sought a declaration that their rights and those of the putative class were being violated and an injunction to avert further abridgment of the right to counsel. They did not seek relief within their criminal cases. The trial court denied the defendants’ motion pursuant to CPLR 3211 to dismiss the action as non-justiciable. The Appellate Division reversed, finding no cognizable Sixth Amendment claim for ineffective assistance of counsel other than one seeking post-conviction relief, and that violation of a criminal defendant’s right to counsel could not be vindicated in a collateral civil proceeding. That was found especially true where the object of the collateral action was to compel an additional allocation of public resources, which is a legislative prerogative.

Holding: The complaint is justiciable. A fair reading of *Strickland v Washington* (466 US 668 [1984]) and relevant state precedents supports the defendants’ contention that effective assistance was a judicial construct designed to do

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no more than protect an individual defendant’s right to a fair adjudication. That is not a concept capable of expansive application to cure systemic deficiencies or a basis for judicially promulgated standards. See *People v Baldi*, 54 NY2d 137, 146-147. But *Strickland’s* approach was expressly premised on the assumption that the fundamental underlying right to representation under *Gideon v Wainwright* (372 US 335 [1963]) had been enabled by the State in a way that justified presuming the standard of objective reasonableness would ordinarily be satisfied. The questions properly raised in this Sixth Amendment-grounded action go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State had met its foundational *Gideon* obligation to provide legal representation. The plaintiffs’ complaint contained allegations of non-representation at critical stages of the criminal proceedings and claims that appointed counsel were inaccessible and unresponsive, waived important rights, failed to make court appearances, and did little more than facilitate plea bargains. These allegations stated cognizable Sixth Amendment claims under *Gideon*. The defense of public defense clients in the five counties might be improved in many ways that the Legislature is free to explore, but the much narrower focus of the constitutionally-based judicial remedy sought here must be simply to assure that every indigent defendant is afforded actual assistance of counsel. Absence of representation at critical stages can cause grave and irreparable injury to persons who would not be convicted. *Gideon’s* guarantee does not turn on a defendant’s guilt or innocence, and neither can the availability of a remedy for its denial. Order modified, complaint reinstated in accordance with this opinion, and remitted for consideration of issues raised but not determined on appeal.

Dissent: [Pigott, J] The complaint failed to state a claim, either under the theories proffered by plaintiffs—ineffective assistance of counsel and deprivation of the right to counsel at a critical stage (arraignment)—or under the “constructive denial” theory read into the complaint by the majority. Whether a defendant received ineffective assistance of counsel under *Strickland* or was entitled to a presumption of prejudice under *United States v Cronin*, 466 US 648, 654-655 (1984) is a determination that can only be made after the criminal proceeding had ended. The Kaye Commission Report was implicitly addressed to the Legislature.

Counsel (Advice of Right to Competence/Effective Assistance/Adequacy) (Right to Counsel) COU; 95(5) (15) (30)

Juveniles (Paternity)

JUV; 230(100)

Matter of Juanita A. v Kenneth Mark N., 15 NY3d 1, 904 NYS2d 293 (2010)

When the child who is the subject of this proceeding was born, the mother was living with Raymond S., who was named as the child’s father on the birth certificate and with whom she had other children. When the child was seven, she learned that Raymond S. may not be her biological father, and she briefly spoke by telephone with the respondent, who lived in Florida. Raymond S. rebuffed the respondent’s attempt to talk to the child again. When the child was twelve, the mother sought an order of filiation and child support from the respondent. A DNA test suggested the respondent is the father, and he was appointed counsel. Appearing via telephone at a January 2007 hearing, he protested that he had not been able to speak with his lawyer, which the lawyer admitted. Over the respondent’s protest, the hearing proceeded in front of a support magistrate until the issue of equitable estoppel was raised. The case was transferred to a Family Court judge who entered an order of filiation. The Appellate Division affirmed.

Holding: A biological father may assert an equitable estoppel defense in proceedings regarding paternity and child support. Just as equitable estoppel may be raised to prevent a biological father from belatedly asserting paternity when it would be detrimental to a close relationship with another father figure (see eg *Fidel A. v Sharon N.*, 71 AD3d 437 [2010]), it was properly raised here “to, among other things, protect the status of [the] parent-child relationship” that had existed between the child and Raymond S. from the child’s birth. A hearing, at which Raymond S. must be joined as a necessary party, is needed to decide the merits of the respondent’s claim. The failure to advise the respondent of his right to counsel before genetic testing was done, and counsel’s failure to consult with him before the hearing, are troubling events that should not have occurred. Order reversed and matter remitted.

Juries and Jury Trials (Deliberation) (General) (Hung Jury) JRY; 225(25) (37) (40)

Trial (Verdicts) TRI; 375(70)

People v Rivera, 15 NY3d 207, 906 NYS2d 785 (2010)

The judge submitted eleven counts to the jury: first-degree robbery (three counts); second-degree criminal possession of a weapon; third-degree criminal possession of a weapon; first-degree burglary; third-degree burglary; petit larceny; and second-degree unlawful imprisonment (three counts). After deliberations began, the jury sent a note indicating it had reached a verdict on some counts

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and had deadlocked on the others. The judge heard the partial verdict, which was acquittal on the unlawful imprisonment and second-degree weapons possession counts and conviction on petit larceny. Over defense objection, the court refused to accept the partial verdict and ordered the jury to resume deliberations on all eleven counts. The jury convicted the defendant of ten of the eleven counts, acquitting him only of second-degree weapons possession. His prison sentences were modified on appeal and the partial verdict was upheld.

Holding: When there is a partial verdict but the reasonable possibility of ultimate agreement, the Criminal Procedure Law requires that a trial court either order the jury to render a partial verdict and continue deliberating “upon the remainder” of the counts (CPL 310.70 [1][b][i]) or “refuse to accept a partial verdict” and order the jury to continue deliberating “upon the entire case” (CPL 310.70 [1][b][ii]). By refusing to accept the partial verdict after it was announced, the trial court signaled to the jury that the partial verdict was incorrect. In the full verdict, rendered the day after the partial verdict was announced, the jury convicted the defendant of counts it had acquitted him of the day before; the trial court’s actions had a coercive effect. Order modified, three counts of second-degree unlawful imprisonment dismissed, remitted for a new trial on the counts charging first-degree robbery, third-degree possession of a weapon, and first- and third-degree burglary, and for resentencing on petit larceny.

Search and Seizure (Motions to Suppress [CPL Article 710] (Search Warrants [Affidavits, Sufficiency of] [Suppression]) **SEA; 335(45) (65[a] [p])**

People v Scully, 14 NY3d 861, 903 NYS2d 302 (2010)

Police obtained a warrant based on information from a confidential informant to search a second floor location for drugs, drug paraphernalia, illegal weapons, and two unnamed men who might possess such items or have them under their control. Entering a common hallway under the guise of making a crack cocaine purchase, an investigator arrested the seller/defendant and found on him a loaded handgun and \$847. In the second floor apartment, police found a clear plastic baggie containing several smaller ones, some tied in a knot and containing a quantity of an off-white, chunky substance and two containing a greenish-brown vegetation, along with a single-edged razor blade and a partially-smoked, hand-rolled cigarette. Arrested for weapons possession, the defendant made several inculpatory statements. Indicted for possession of weapons, controlled substances, and marihuana,

he “moved to suppress ‘any evidence allegedly seized from [him] upon the grounds such seizure was unconstitutional and improperly and illegally conducted, and was in violation of [his] Constitutional Rights.’ In the supporting affidavit, the defendant’s attorney stated, upon information and belief, that ‘the evidence obtained in this case was obtained by way of a search warrant,’ and that ‘the information placed before the Judge was not sufficient to satisfy the requirements for probable cause for the issuance of the warrant as it related to this Defendant.’” The motion was denied without a hearing and the conviction was affirmed.

Holding: More than a mere assertion that contraband was taken from a defendant’s person was required to create a factual issue on Fourth Amendment grounds. *See People v Burton*, 6 NY3d 584, 588. The defendant “‘must additionally assert that the search was not legally justified and there must be sufficient factual allegations to support that contention.’” The defendant failed to allege facts demonstrating that probable cause to search him was lacking. Nor did he show a privacy interest that allowed him to contest the apartment search. *See People v Wesley*, 73 NY2d 351, 357. Order affirmed.

Defenses (General)

DEF; 105(31)

Larceny (Defenses)

LAR; 236(15)

People v Zona, 14 NY3d 488, 902 NYS2d 844 (2010)

The defendant, a deputy sheriff, along with other officers, was ordered by the undersheriff to transfer miscellaneous surplus items stored in a police warehouse to another warehouse. In the process, the defendant took, among other things, five tires that he later traded in for a \$375 credit toward the purchase of new tires; others took other items. When he learned that the undersheriff did not have the authority to give away the property, the defendant tried to repurchase the tires, then bought comparable, more expensive tires and put them in the new facility. When the new facility burned, the defendant’s actions were uncovered. Indicted for petit larceny (Penal Law 155.25), he argued that he honestly believed he could take the property because the undersheriff said he could, and that the prosecution’s failure to properly instruct the grand jury on the good-faith claim of right defense unfairly prejudiced him. His motion to dismiss was denied. At trial, the judge denied his request to instruct the jury on the claim of right defense. His conviction was reversed.

Holding: Penal Law 155.15(1) provides that “[i]n any prosecution for larceny committed by trespassory taking or embezzlement, it is an affirmative defense that the property was appropriated under a claim of right made in good faith.” However, this is a defense, not an affirmative defense; the prosecution has the burden of disproving it beyond a reasonable doubt. *See Penal Law 25.00(1); People*

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v Green, 5 NY3d 538, 542. Viewing the evidence at trial in the light most favorable to the defendant (see *People v Butts*, 72 NY2d 746, 750), there was evidence in the record to support the good-faith claim of right defense. The defendant said that the undersheriff gave him and others permission to take the property, that they used their personal vehicles to move the property, and that most of the property was described as junk, old, and wrecked. Since the test for claim of right is subjective good-faith, not reasonableness, a trier of fact could find that the defendant had a good-faith belief that the undersheriff had the authority to dispose of the property and that the defendant could retain some of it for his personal use. There is no requirement that the defendant prove prior ownership or possession of the property to assert a claim of right. See *People v Ricchiuti*, 93 AD2d 842. Order affirmed.

Dissent: [Pigott, J] No reasonable view of the evidence supported the defense that the defendant took five brand new tires from a warehouse, believing in good faith that he had the right to do so. The claim of right defense required him to assert that he previously owned the property at issue, or that he was unaware that it belonged to another, or that its owner permitted him to take it. See *People v Ace*, 51 AD3d 1379. The court was not obligated to submit the defense to the jury when no reasonable view of the evidence supported it. See *People v Watts*, 57 NY2d 299, 301.

**Appeals and Writs (General)
(Judgments and Orders
Appealable)**

APP; 25(35) (45)

People v Backus, 14 NY3d 876, 903 NYS2d 333 (2010)

Holding: The Appellate Division vacated the sentence imposed by the county court and authorized that court to entertain a prosecution motion to vacate the plea and set aside the conviction. The prosecution has not appealed the part of the order that vacated the sentence. “We thus have no power to grant the People affirmative relief, and we therefore do not consider the People’s argument that the consecutive terms imposed by County Court for vehicular assault and for driving while intoxicated were permissible (*People v Carpenito*, 80 NY2d 65, 68 [1992]). Defendant’s sentence having been vacated, County Court is required to resentence defendant in accordance with the law, and lacks power to vacate the conviction or the plea (*Matter of Kisloff v Covington*, 73 NY2d 445, 451-452 [1989]; *Matter of Campbell v Pesce*, 60 NY2d 165, 169 [1983]).” Order, insofar as appealed from, reversed, and so much of the order as authorized a motion by the prosecution to vacate the plea and set aside the conviction is vacated.

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

GYP; 181(25)

People v Gravino, 14 NY3d 546, 902 NYS2d 851 (2010)

Defendant Gravino pleaded guilty to third-degree rape. During the plea colloquy, she was not told she would have to register under the Sex Offender Registration Act (SORA) (Correction Law art 6-C). At sentencing, her motion to withdraw her plea due to conflict of interest and ineffective representation by her assigned counsel was denied without inquiry. The promised sentence was then imposed, along with certification of Gravino as a sex offender. Her conviction was affirmed. Defendant Ellsworth pleaded guilty to one count of second-degree course of sexual conduct against a child in exchange for a split sentence of six months in jail and 10 years of probation; no specific conditions were mentioned. During the presentence interview, the probation officer told defendant Ellsworth, who lived with his girlfriend and her underage children, that he could not associate with any child under 18, even his own. At sentencing, he moved to withdraw his plea. While there was some discussion about an alternative sentence, he did not inquire about access to his minor children, or ask the judge for supervised visits with them. The judge sentenced him as promised, and gave him a written copy of the terms and conditions of his probation, including a special condition prohibiting contact with minors. His CPL 440.10 motion based on ineffectiveness of counsel and involuntariness of his plea was denied without a hearing. His conviction was affirmed.

Holding: Due process requires that a plea represent a voluntary and intelligent choice among available alternative courses of action. See *North Carolina v Alford*, 400 US 25, 31 (1970). A trial court may accept a guilty plea only after ensuring that the defendant “has a full understanding of what the plea connotes and its consequences.” *People v Ford*, 86 NY2d 397, 402-403. Defendants are entitled to know the direct consequences of their plea. See *Brady v United States*, 397 US 742, 755 (1970). A court is not obliged to warn a defendant about collateral consequences, which are peculiar to the individual’s personal circumstances and usually not within the control of the court system. Unlike post-release supervision, which is a statutory sentencing mandate (see *People v Catu*, 4 NY3d 242), a SORA risk-level determination is not part of a defendant’s sentence – it is a collateral consequence of a sex offense conviction, intended not to punish, but to protect the public. See *People v Windham*, 10 NY3d 801, 802. The judge was not required to inform Gravino of the SORA consequences of pleading guilty. Her conflict of interest claim rested on matters outside the record and must be pursued through a CPL 440.10 motion. In Ellsworth’s case, the court was not required to predict

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every potential condition of probation that might be recommended in the presentence report. It was enough that Ellsworth was made aware that his sentence would include a 10-year period of probation. These were not among those rare cases in which defendants can show they pleaded guilty in ignorance of consequences of such great importance that they would have made a different decision had such consequences been disclosed. Orders affirmed.

Dissent: [Ciparick, JJ] SORA certification and subsequent registration and the restriction of contact with one's children as a condition of probation were direct consequences of a guilty plea of which a defendant must be informed. Although the terms of SORA registration will vary, the imposition of SORA certification and the need to comply with SORA requirements was, like PRS, mandatory. A condition of probation that prohibited defendant Ellsworth from living with his children was "a most significant and direct consequence of his guilty plea," affecting his fundamental parental interest in the care and custody of his children. *See Matter of Tammie Z.*, 66 NY2d 1, 4.

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

Search and Seizure (Warrantless Searches [Abandoned Objects]) SEA; 335(80[a])

People v Davis, 69 AD3d 647, 892 NYS2d 200 (2nd Dept 2010)

The defendant was convicted of second- and third-degree possession of a weapon and possession of marijuana. The convictions were based on the discovery by police of a loaded gun and marijuana in a backpack the defendant left on his front stoop inside a fenced yard while he talked to someone in a parked vehicle at the curb.

Holding: The defendant sought in his omnibus motion to suppress the knapsack, which was seized by police officers after they observed what they believed to be a marijuana sale and apprehended the defendant at the curb. The defendant did not include in the motion a contention that he had not abandoned the knapsack. While the motion alone was therefore not sufficient to preserve the issue for review, the court specifically found that the knapsack had been abandoned; the issue on appeal was therefore expressly decided by the court below and may be reviewed. *See People v Prado*, 4 NY3d 725, 736; CPL 470.05. The prosecution failed to prove the defendant intended to abandon the knapsack that the police opened without his consent and searched. *See People v Howard*, 50

NY2d 583, 593 *cert den* 449 US 1023. The defendant did not discard it but merely put it on the stoop of his residence inside a fenced yard and walked to the curb. He relinquished no expectation of privacy in the knapsack. The prosecution waived a claim of exigent circumstances in the suppression court and may not raise it now. Judgment reversed, suppression of physical evidence granted, and new trial ordered. (Supreme Ct, Queens Co [Aloise, JJ])

Arrest (Probable Cause)

ARR; 35(35)

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

SEA; 335(10[g])

Matter of Robert D., 69 AD3d 714, 892 NYS2d 523 (2nd Dept 2010)

The appellant was found to have committed an act which, if committed by an adult, would have constituted seventh-degree drug possession.

Holding: The appellant's probation has expired but potential collateral consequences keep the appeal as to the adjudication from being academic. The arresting officer said in his supporting deposition that he saw the appellant put "a canister-like object in his pocket." After arresting the appellant, the officer found cocaine. A defense motion to suppress evidence was improperly denied. The court found the officer to be a credible witness who had extensive experience concerning drug deals, who would have known what to look for when approaching people and "to recognize even the small plastic bag of drugs" here. But the officer testified for the first time on cross-examination, and contrary to his deposition, that he saw the drugs before the arrest and had seen the appellant put something in the canister. No satisfactory explanation for the contradiction was given. The testimony appeared to be tailored to nullify constitutional objections. *See People v Garafolo*, 44 AD2d 86, 88. Without this evidence there was no basis for a finding that the appellant committed the charged act. The presentment agency failed its burden of establishing the existence of probable cause to arrest. *See People v Quinones*, 61 AD2d 765, 766. Appeal as to probation dismissed as academic, order reversed insofar as reviewed, suppression granted, fact-finding order vacated, petition denied, proceeding dismissed, and matter remitted. (Family Ct, Kings Co [Freeman, JJ])

Speedy Trial (Cause for Delay)

SPX; 355(12)

People v Beasley, 69 AD3d 741, 893 NYS2d 201 (2nd Dept 2010)

On May 27, 2005, the defendant was indicted and the prosecution filed a statement of readiness. The defense asked the court to inspect the grand jury minutes; the matter was adjourned to Aug. 17, 2005 for discovery and pro-

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duction of the minutes. That day, the prosecution said the minutes would be filed “off calendar.” When the court said the matter would be adjourned, defense counsel asked for Sept. 29, 2005; the court set September 28 for a decision as to the sufficiency of grand jury evidence. The minutes were provided on August 30; on September 28, the court dismissed one count of the indictment with leave to re-present. After arraignment on the new indictment on Jan. 3, 2006, the court adjourned the matter to Feb. 15, 2006, saying that if the prosecution provided the new grand jury minutes before February 15, the court would try to issue a sufficiency ruling on that date. The minutes were not produced until February 23 after the matter had been adjourned to March 13. The defendant was convicted.

Holding: No part of the time between Aug. 17, 2005 and Sept. 28, 2005 was chargeable to the prosecution. The need for an adjournment was clear on August 17. The September adjourn date was chosen to accommodate defense counsel. That the prosecution delivered the minutes “off calendar” on August 30 rather than on August 17 did not delay the case. *Cf. People v Harris*, 82 NY2d 409, 412. Absent a claim that production of the minutes on August 17 would have resulted in a request for an earlier adjournment date, the defendant failed to show that any post-readiness delay should be charged to the prosecution. Judgment affirmed. (Supreme Ct, Kings Co [Holdman, J (judgment); Firetog, J (motion to dismiss)])

Dissent: [Eng, JJ] The defense request for a certain date after the court said on August 17 that the matter would be postponed was not consent. Prosecution inaction twice delayed the court’s consideration of the grand jury minutes.

[*Ed. Note:* Leave to appeal was granted on May 4, 2010 (14 NY3d 895).]

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

Speedy Trial (General) SPX; 355(30)

Matter of Pitt v Walsh, 69 AD3d 860, 893 NYS2d 246 (2nd Dept 2010)

Holding: The petitioner brought a CPLR article 78 proceeding in the nature of mandamus to compel the trial judge to determine a motion to dismiss the indictment based on a speedy trial violation. There is no justification for delaying determination of the motion until the petitioner is found fit to stand trial under CPL article 730. A defendant who has been adjudicated unfit and ordered to be committed may make motions susceptible of fair determination without the defendant’s personal participation. *See* CPL 730.60(4). The petitioner’s personal presence and his fitness to be tried are not prerequisites to determining a speedy trial claim. As there is a clear statutory right to a

determination of the motion, mandamus will lie to compel it. *See Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16. Petition granted and matter remitted for determination of the motion, with a written order to be made within 90 days of service upon the justice. (Supreme Ct, Kings Co [Walsh, JJ])

Speedy Trial (Burden of Proof) (Prosecutor’s Readiness for Trial) SPX; 355(10) (32)

People v Brown, 69 AD3d 871, 895 NYS2d 127 (2nd Dept 2010)

The defendant was arraigned on a felony complaint on Feb. 16, 2006. He was indicted on charges including assault on a police officer and resisting arrest. The prosecution announced ready on June 15, 2007, 484 days after the initial arraignment. At a hearing on the defense motion to dismiss the indictment pursuant to CPL 30.30, evidence was adduced that the defendant had executed a document consenting to “every adjournment” until he demanded a felony hearing. In local criminal court on Oct. 26, 2006, he requested a felony hearing; the court adjourned the matter without date, saying the parties would be notified. The defense received notice on Nov. 1, 2006 of a Feb. 12, 2007 hearing. The parties appeared, but the officer involved in the underlying incident, reportedly “still injured,” did not. An indictment followed.

Holding: The court erred in finding that the 109 days between the defendant’s request for a felony hearing and the scheduled hearing date was excludable. Defense counsel’s response of “that’s fine” when told the parties would be notified of the date did not constitute clearly expressed consent to an unspecified and unlimited delay. That the length of the adjournment was a result of court congestion did not excuse the prosecution from timely declaring readiness for trial. *See People v Chavis*, 91 NY2d 500, 505. No showing was made at the 30.30 hearing that the unavailability of the injured officer was the basis for the failure to declare readiness. *See* CPL 30.30(4)(g). The prosecution failed to meet its burden of showing the challenged period was excludable. Judgment reversed, indictment dismissed, matter remitted for entry of an order in its discretion pursuant to CPL 160.50. (Supreme Ct, Westchester Co [Adler, JJ])

Appeals and Writs (General) (Preservation of Error for Review) APP; 25(35) (63)

Witnesses (Confrontation of Witnesses) WIT; 390(7)

People v Fairweather, 69 AD3d 876, 894 NYS2d 81 (2nd Dept 2010)

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Holding: A detective testified that he determined the defendant was a suspect following an interview with the injured accuser, who did not testify at trial. The defendant claimed that this denied his constitutional right to confront witnesses. *See Davis v Washington*, 547 US 813, 821 (2006). This unpreserved issue is reviewed in the interest of justice. *See CPL 470.15(6)(a)*. The challenged testimony directly implied that the accuser identified the defendant as the culprit, which is improper. *See People v Berry*, 49 AD3d 888, 889. The evidence of guilt was not overwhelming, and the prosecutor said in opening statement that the accuser would testify and identify the defendant; the error was therefore not harmless. The defendant's claim that the evidence was legally insufficient to support his conviction is rejected. Judgment reversed and matter remitted for new trial. (Supreme Ct, Queens Co [Cooperman, JJ])

Evidence (Uncharged Crimes) EVI; 155(132)**People v Wilkinson, 71 AD3d 249, 892 NYS2d 535 (2nd Dept 2010)**

The defendant was convicted of third-degree drug sale and possession for a single sale of cocaine. An undercover officer said he saw the defendant give someone a knotted clear plastic bag containing white powder. That person, the accuser, was subsequently stopped and found to possess such a bag containing cocaine. The defendant had no drugs when arrested two hours later. The accuser testified against the defendant in exchange for dismissal of his own case. Before trial, the court ruled that testimony by the accuser about prior alleged sales would not be admitted unless developments at trial warranted it. At trial, defense counsel tried to show on cross examination that the accuser's testimony was based only on his need to solve his own legal problems by naming the defendant, as the police wanted. The accuser acknowledged knowing that a misdemeanor possession charge was less serious than a sale charge. The defense suggested that the accuser had been the seller. The accuser was then allowed to testify that he bought drugs from the defendant more than 10 other times.

Holding: The evidence of past sales "was not admissible as inextricably intertwined with the charged crime (*cf. People v Vails*, 43 NY2d 364, 368)." Nor was it admissible to establish "absence of mistake." Such evidence may not be used to imply that the government is not mistaken in its allegations because the defendant has committed the same or other crimes before. *See United States v Merriweather*, 78 F3d 1070, 1077 [6th Cir 1996]. The error was not harmless. Judgment reversed and matter remitted for a new trial. (County Ct, Suffolk Co [Gazzillo, JJ])

Counsel (Right to Counsel) COU; 95(30)**Family Court (General) FAM; 164(20)****Matter of Collier, 69 AD3d 936, 892 NYS2d 793 (2nd Dept 2010)**

Holding: The petitioner, a mother seeking custody of, and interim visitation with, her child, was entitled to counsel. *See Family Court Act 262(a)(ii), (v)*. "The Family Court thus erred in failing to properly advise her of her right to counsel." Deprivation of the right guaranteed by the statute requires reversal without regard to the merits of the unrepresented party's legal claim. *See Matter of Brown v Wood*, 38 AD3d 769, 770. Orders reversed, matter remitted for further proceedings in accordance with this decision. (Family Ct, Kings Co [Krauss, JJ])

Guilty Pleas (Withdrawal) GYP; 181(65)**People v Molina, 69 AD3d 960, 892 NYS2d 783 (2nd Dept 2010)**

The defendant pleaded guilty to second-degree burglary.

Holding: Denial without a hearing of the defendant's motion to withdraw his plea was an improvident exercise of the court's discretion. A court has the duty to inquire further when a defendant makes a statement that calls the voluntariness of a plea into question. *See People v Lopez*, 71 NY2d 662, 666. The record of the plea proceeding does not refute the claim that the defendant received incorrect information from defense counsel about the potential sentence. *See People v Fitzgerald*, 56 AD3d 811, 814. The court did not apprise the defendant of the possible sentence. A hearing is required. Matter remitted for a hearing and report on the defendant's motion, upon which appellate counsel shall represent him, and appeal held in abeyance. (Supreme Ct, Queens Co [Kohm, JJ])

Family Court (General) FAM; 164(20)**Juveniles (Custody) (General) JUV; 230(10) (55) (70) (Jurisdiction)****Matter of Dodson v Pica, 70 AD3d 686, 894 NYS2d 493 (2nd Dept 2010)**

In April 2008, the mother of the three subject children took them from New York to California. The father filed a petition in New York for custody of the two daughters. The son returned to live with the father. On April 29, the mother sought in California an order of protection against the father and custody. She told that court about the pending New York proceeding but there was no communication between the two courts. In June, the California court issued a stay away order and granted the mother custody

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of all three children. The courts in the two states later agreed that New York was the “home state.” The California court’s June action was deemed taken under its temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act [UCC-JEA]. See Domestic Relations Law art 5-a; Cal Fam Code 3400 *et seq.* In August, the mother registered the California order of protection in New York, where the Family Court issued a similar one, then granted the father temporary custody of the son. The parties later sought to enter into a so-ordered stipulation giving the father visitation with one daughter. The court refused, citing the California order of protection, which the father then sought to modify; his petition was dismissed for lack of jurisdiction.

Holding: As the home state, New York has jurisdiction to make child custody determinations. See Domestic Relations Law 75-a(3), 75-a(7), 76(1)(a). That includes the power to modify the California order of protection as appropriate to effectuate New York custody determinations. California’s emergency jurisdiction did not extend to the son who had returned to New York before the order. Order reversed, petition reinstated, and matter remitted for determination on the merits. (Family Ct, Nassau Co [Singer, JJ])

Defenses (General) DEF; 105(31)

People v Bunge, 70 AD3d 710, 894 NYS2d 97 (2nd Dept 2010)

Holding: The defendant contends that the court deprived him of his right to present a defense when it rejected his request for leave to cross-examine the accuser about a wanted poster depicting a person who resembled the defendant and was alleged to have committed crimes using an identical *modus operandi*. The issue was not preserved for appeal, but is reviewed in the exercise of the interest of justice jurisdiction. See CPL 470.15(6)(a). The poster “sufficiently connected the individual identified thereon with the charged crime (*cf. People v Schultz*, 4 NY3d 521) and, thus, was probative of whether the complainant may have mistakenly identified the defendant as the perpetrator, which was an issue central to the case (*see People v Sanchez*, 293 AD2d 499, 499).” The proposed cross-examination “posed no danger of delay, prejudice, or confusion.” As the error was not harmless under the circumstances, reversal is required. See *People v Elder*, 207 AD2d 498, 499. Judgment reversed, matter remitted for a new trial. (Supreme Ct, Kings Co [Parker, JJ])

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) (Withdrawal) GYP; 181(25) (65)

People v Hassman, 70 AD3d 716, 893 NYS2d 618 (2nd Dept 2010)

The defendant pleaded guilty to grand larceny and falsifying business records, with an agreement that he would receive up to five years’ probation and up to 30 days in jail, and would have to pay \$135,000 restitution (\$65,000 of it before sentencing) and possible fines. At the plea, the defendant was warned that the sentencing promise would end if he violated the plea conditions. After the plea but before sentencing, he was named in a Pennsylvania arrest warrant based on allegations occurring a month before the instant plea. At sentencing, the prosecution claimed the defendant violated his plea agreement by being arrested and failing to pay the “up front” restitution. The defendant said some of the up-front restitution had been paid and that his remand on the Pennsylvania matter had kept him from obtaining funds to pay it all. He was sentenced to two and a third to seven years in prison, a \$5,000 fine, and the restitution. The court rejected the defendant’s effort to withdraw his plea.

Holding: When a defendant whose failure to pay up-front restitution was not willful seeks to withdraw the plea rather than accept an enhanced sentence, the court must extend the time for payment or allow withdrawal of the plea. See *People v Almo*, 300 AD2d 503, 504. The court here failed to conduct an inquiry as to the defendant’s willfulness. The defendant’s claim that his Pennsylvania remand made payment impossible was unchallenged; the court lacked information to determine the defendant had willfully failed to pay. Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted for resentencing. (County Ct, Nassau Co [LaPera, JJ])

Counsel (Right to Self-Representation) COU; 95(35)

Evidence (Sufficiency) EVI; 155(130)

Possession of Stolen Property (Elements) PSP; 288.5(10)

People v Wingate, 70 AD3d 734, 892 NYS2d 867 (2nd Dept 2010)

A jury convicted the defendant of fourth-degree possession of stolen property and seventh-degree possession of drugs.

Holding: The defendant did not preserve for appeal his contention that the evidence of his possession of a stolen van was legally insufficient. The issue is reached in the exercise of the interest of justice jurisdiction. See CPL 470.15(3)(c). “[T]hat the defendant was briefly seated in the parked van before the police arrived was insufficient

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to establish the element of possession, as a person's mere presence in a vehicle does not support a rational inference that he or she exercised dominion and control over it (*see* Penal Law 10.00[8]; *People v Rivera*, 82 NY2d 695 . . .).” The court failed to conduct a proper waiver colloquy before allowing the defendant to represent himself at a pretrial suppression hearing, but the record as a whole shows the defendant's decision to proceed pro se was knowing, voluntary, and intelligent. *See People v Providence*, 2 NY3d 579, 582-583. Judgment modified, stolen properly conviction and sentence vacated and that count dismissed, and as modified, affirmed. (Supreme Ct, Queens Co [Spires, JJ])

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

Homicide (Murder [Evidence]) HMC; 185(40)(j)**People v Fortunato, 70 AD3d 851, 894 NYS2d 152 (2nd Dept 2010)**

A 1994 shooting at which the defendant was present resulted in the death of one man and injury of another, named D'Urso, who was connected to a crime family. D'Urso made a deal with federal prosecutors in 2002 resulting in the arrest of the defendant and four others. The defendant and one other were convicted of federal offenses for the 1994 incident. Those convictions were overturned due to insufficient evidence. State murder charges were then brought; double jeopardy objections were rejected. The prosecution's theory at the joint trial was that the codefendant masterminded the murder plot and the defendant provided a gun and funding. The codefendant was acquitted by a jury; the defendant, who chose a bench trial, was convicted.

Holding: An acquittal would not have been unreasonable and the verdict was against the weight of the credible evidence. All key witnesses—D'Urso, Cerasulo, and Bruno—were career criminals with cooperation agreements. Cerasulo said at his guilty plea that the codefendant financed the shooting, but testified here that the codefendant said the defendant would pay for it. Bruno testified he knew nothing about the defendant agreeing to pay. Cerasulo, whose testimony was inconsistent and confusing (*see People v Roman*, 217 AD2d 431, 432), said the defendant gave him the codefendant's gun in a paper bag. Even if that was true, nothing showed the defendant knew the bag held a gun or what it was for. The defendant's reactions to the shooting support a finding he was surprised. His reasons for fleeing the scene and denying being there were plausible. *See People v Wong*, 81 NY2d 600, 609. The conviction cannot stand. *See People v Madison*, 61 AD3d 777, 779. Conviction reversed, indict-

ment dismissed, and matter remitted. (Supreme Ct, Kings Co [Goldberg, JJ])

Appeals and Writs (Judgments and Orders Appealable)

APP; 25(45)

People v Alonso, 70 AD3d 957, 894 NYS2d 757 (2nd Dept 2010)

The defendants orally moved for dismissal during the prosecution's case in a bench trial, claiming that the prosecution had failed to disclose exculpatory evidence pursuant to *Brady v Maryland* (373 US 83 [1963]). The court indicated in a decision rendered from the bench that it would grant the application if it determined that the Criminal Procedure Law authorized “‘appropriate action,’ including dismissal of the indictments where necessary, to remedy a *Brady* violation (*see* CPL 240.20[1][h]; 240.70[1] . . .).” The prosecution appealed the order implementing the decision.

Holding: An order imposing sanctions under CPL 240.70(1) is not appealable under CPL 450.20. *See People v Myers*, 226 AD2d 557. Contrary to the prosecution's contention that the order should be deemed entered under CPL 210.20(1)(h), which is covered by CPL 450.20, this court “may not ‘convert [the] nature and nomenclature [of the order] for appeal convenience’ (*People v Laing*, 79 NY2d 166, 172 . . .).” Dismissal of the appeal is not to be viewed as approval of the court's determination. Appeal dismissed. (Supreme Ct, Westchester Co [Bellantoni, JJ]).

[*Ed. Note:* Leave to appeal was granted on June 10, 2010 (15 NY3d 746).]

Juries and Jury Trials (Challenges (Qualifications))

JRY; 225(10) (50)

People v Barreto, 70 AD3d 959, 897 NYS2d 445 (2nd Dept 2010)

Holding: The prosecution correctly concedes that a prospective juror's statement that he was unsure if he could be objective or impartial “revealed ‘a state of mind likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial’ (CPL 270.20[1][b]; *see People v Chambers*, 97 NY2d 417, 419 . . .).” As the defendant exercised a peremptory challenge to remove the prospective juror after the court denied his challenge for cause, and subsequently exhausted his peremptory challenge allotment, the conviction must be reversed. Ordinarily the defendant would be entitled to a new trial, but where “he has already completed the sentence imposed on his conviction of endangering the welfare of a child, dismissal of the indictment rather than a new trial is appropriate (*see People v Flynn*, 79 NY2d 879, 882 . . .).” Judgment reversed, indictment dismissed, and matter remitted. (Supreme Ct, Queens Co [Gavrin, JJ])

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Identification (Eyewitnesses) (General) (In-court) IDE; 190(10) (17) (24)

People v Nolasco, 70 AD3d 972, 894 NYS2d 527 (2nd Dept 2010)

Two brothers, Jose and Jorge, were robbed at gunpoint. The next day, each brother separately picked out a picture of the defendant from many photographs viewed on a precinct computer. Upon the defendant’s arrest eight days later, Jorge picked him out of two lineups. The prosecution timely served a CPL 710.30(1)(b) notice that it intended to present identification testimony from Jorge. No notice was served regarding Jose. After suppressing the lineup identifications following a *Wade* hearing (*United States v Wade*, 388 US 218 [1967]), the court conducted an independent source hearing and allowed Jorge’s in-court identification. The prosecution then sought to solicit an in-court identification from Jose. The defense moved to preclude based on the lack of notice and alleged taint from the presence of defendant’s photograph in the courtroom when Jose entered. Preclusion was denied and Jose identified the defendant in court. The jury, after reporting a deadlock and being charged pursuant to *Allen v United States* (164 US 492 [1896]), convicted the defendant.

Holding: Jose’s in-court identification should have been precluded. The decision in *People v Grajales* (8 NY3d 861) did not excuse the prosecution’s failure to provide the required notice. In *Grajales*, notice was provided as to an accuser’s point-out identification but not a pretrial photographic identification. The *Grajales* court held that because the prosecution could not have intended to offer inadmissible photographs, no notice was required. Here, there was no notice of intent to offer any identification by a witness—Jose—who had previously identified the defendant. See CPL 710.30(1)(b); *People v Smothers*, 20 Misc 3d 654, 658-659. Judgment reversed and new trial ordered. (Supreme Ct, Kings Co [Heffernan, Jr., JJ])

Counsel (Anders Brief) COU; 95(7)

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

Sex Offenses (Sentencing) SEX; 350(25)

People v Okamura, 70 AD3d 974, 893 NYS2d 888 (2nd Dept 2010)

Holding: The defendant appealed from a conviction of attempted first-degree criminal sexual act. Assigned counsel filed a brief seeking to be relieved of the assignment in accordance with *Anders v California* (386 US 738

[1967]). Independent review of the record shows the existence of nonfrivolous issues including whether the appellant’s guilty plea “was knowing, voluntary, and intelligent, given the applicability of article 10 of the Mental Hygiene Law. Accordingly, assignment of new counsel is warranted (see *People v Stokes*, 95 NY2d 633, 638).” Motion granted, counsel relieved, new counsel assigned and directed to perfect the appeal, the prosecution directed to provide a certified copy of the transcript to new counsel, and briefing schedule set. (County Ct, Westchester Co [Bellantoni, JJ])

Evidence (Sufficiency) (Weight) EVI; 155(130) (135)

Reckless Endangerment (Evidence) RED; 326(15)

People v Scott, 70 AD3d 978, 894 NYS2d 532 (2nd Dept 2010)

The defendant was convicted of second-degree attempted murder, several robbery counts (both first and second degree), weapons offenses, and first-degree reckless endangerment. The accusers were a couple named Lee. Mr. Lee ran when he saw a man pointing a gun at his wife, heard shots behind him, and eventually tripped and fell. He saw the defendant pointing a gun at him. During the subsequent struggle, Mr. Lee tried to grab the gun, then complied with a directive to remove his clothes; the defendant took cash and other items. The other assailant knocked Mrs. Lee down and took her purse containing cash and food stamps.

Holding: The evidence as to first-degree reckless endangerment was legally insufficient, as the prosecution failed to prove that anyone other than Mr. Lee was endangered by the defendant’s actions. No proof was offered that anyone “other than Mr. Lee ‘was in or near the line of fire’ (*People v Bennett*, 193 AD2d 808, 809) and, thus, failed to prove that the defendant’s conduct created ‘a grave risk of death’ to any such person (Penal Law § 120.25).” The evidence would not support a rational juror in finding that the defendant acted with depraved indifference to human life. See *People v Sallitto*, 125 AD2d 345. There was not legally sufficient evidence that Ms. Lee sustained a physical injury, a necessary element of second-degree robbery. See *People v Chiddick*, 8 NY3d 445, 447-448. The weight of the evidence does not support the finding that Mr. Lee sustained a physical injury. See CPL 470.15(5). Judgment modified, two counts of second-degree robbery and the reckless endangerment counts vacated and dismissed, and otherwise affirmed. (Supreme Ct, Queens Co [Lasak, JJ])

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

Sentencing (Restitution) SEN; 345(71)

Second Department *continued***People v Hurdle, 70 AD3d 1051, 894 NYS2d 770
(2nd Dept 2010)**

Holding: The minutes of the defendant's guilty plea to attempted possession of a forged instrument do not show that the terms of the plea agreement included restitution. At sentencing, the court included \$631.30 restitution in the sentence. The prosecution consents on appeal to vacatur of that provision. The issue is reached in the exercise of the interest of justice jurisdiction. *See* CPL 470.15(6). Judgment modified, provision directing payment of \$631.30 in restitution vacated, and as modified, affirmed. (Supreme Ct, Nassau Co [Berkowitz, JJ])

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) **GYP; 181(25)****People v Wilcox, 70 AD3d 1059, 894 NYS2d 763
(2nd Dept 2010)**

Holding: The court failed to advise the defendant at the time of his guilty plea that his sentence would include a period of post-release supervision. As the prosecution acknowledges, this requires reversal and vacatur of the plea. *See People v Hill*, 9 NY3d 189, 191-192. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, Dutchess Co [Dolan, JJ])

Sex Offenses (Sentencing) **SEX; 350(25)****People v Sterling, 71 AD3d 654, 894 NYS2d 900
(2nd Dept 2010)**

Holding: The court designated the defendant a sexually violent offender and a level three sex offender following a hearing. *See* Correction Law art 6-C. The court failed to make the required written findings of fact and conclusions of law. *See* Correction Law 168-n(3). The record is sufficient to allow such findings to be made on appeal. *See People v Britt*, 66 AD3d 853 *lv den* 13 NY3d 716. The designation of defendant as a level three sex offender is supported by clear and convincing evidence. *See* Correction Law 168-n(3); *People v Mingo*, 12 NY3d 563. Points were properly assessed for several challenged risk factors: factor 1 (based on statements by the defendant and the accuser and the defendant's testimony at the plea and sentencing proceedings); factor 7 (because the defendant was a stranger to the accuser); and factor 11 (because he admitted he was using alcohol at the time of the offense). *See* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 7-8, 12, and 15. As the prosecution properly concedes, the court erred in designating the defendant a sexually violent offender. *See* Correction Law

168-a(3), (7)(b). Order modified, provision finding the defendant a sexually violent offender deleted, and as modified affirmed. (Supreme Ct, Nassau Co [Kase, JJ])

Robbery (Elements) (Instructions) **ROB; 330(15) (25)****People v Archie, 71 AD3d 686, 896 NYS2d 153
(2nd Dept 2010)**

The defendant was convicted of robbery and burglary. The court told the jury "that '[t]he offense of larceny is complete when there has been a taking or severance of the goods from possession, and even momentary possession another's property is sufficient.'"

Holding: While the defendant's objection to the instruction could have been expressed more precisely (*see People v Albanese*, 88 AD2d 603, 603), it was sufficient to preserve the issue for review. Contrary to the instruction as given, "the offense of larceny is not complete, even where there has been 'a taking or severance of the goods from possession, unless there has been, at the same time, 'an intent to permanently deprive' the owner of his or her property (*People v Zambuto*, 93 AD2d 873, 873 . . .)." The jury could have been misled "'into thinking that *any* withholding, permanent or temporary, constituted larceny' (*People v Blacknall*, 63 NY2d 912, 914 . . .)." The likelihood of jury error was increased by the court's failure to define "intent" and to tell the jury about the distinction between the intents to permanently deprive and temporarily deprive. The evidence that the defendant intended to permanently deprive the accuser of property was not overwhelming. Other issues, including challenges to the sufficiency and weight of the evidence, were not preserved or lack merit. Judgment modified, conviction of first-degree robbery vacated, and matter remitted for a new trial on that count. (Supreme Ct, Kings Co [Gerges, JJ])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause (Furtive Conduct)]) **SEA; 335(10)(g)(i))****People v Cadle, 71 AD3d 689, 894 NYS2d 910
(2nd Dept 2010)**

Holding: The defendant ran when he saw an unmarked car in which three plainclothes officers were riding. They chased him. Police described the defendant as walking down the street in a high crime area at night holding his waistband, and appearing "to be 'overly alerted' to his surroundings or 'afraid of something.'" The pursuit was unlawful under the circumstances. "[T]he defendant's discarding of the weapon during the pursuit was precipitated by the illegality and was not attenuated from it (*see People v Lopez*, 67 AD3d 708; *cf. People v Boodle*, 47 NY2d 398, *cert denied* 444 US 969). Accordingly, the

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Supreme Court properly granted that branch of the defendant’s omnibus motion which was to suppress the weapon.” Order affirmed. (Supreme Ct, Kings Co [Goldberg, JJ])

Speedy Trial (Cause for Delay) SPX; 355(12) (32)
(Prosecutor’s Readiness for Trial)

People v Hill, 71 AD3d 692, 894 NYS2d 909
(2nd Dept 2010)

Holding: Reversal is required because the prosecution, as it concedes on appeal, was not ready for trial within the statutorily required period. *See* CPL 30.30(1)(a), 210.20(1)(g). At the relevant hearing, the prosecution “failed to prove either that the defendant was attempting to avoid apprehension or that his location could not be determined by due diligence . . .” *See* CPL 30.30(4)(c)(i). The police did not exhaust all reasonable investigative leads to find the defendant. *See People v Devore*, 65 AD3d 695. He was reporting regularly to a probation officer pursuant to the sentence in another case, so that his whereabouts were readily ascertainable with a minimum of effort. *See People v Swinton*, 52 AD2d 561, 561. The time between May 11, 2005 and May 10, 2006 should not have been excluded from the speedy-trial calculation. Judgment reversed, motion to dismiss the indictment granted, indictment dismissed, and matter remitted. (Supreme Ct, Westchester Co [Adler, JJ])

Arrest (Vehicle and Traffic Law) ARR; 35(50)

Motor Vehicles (Driver’s License) MVH; 260(5)

People v Rivera, 71 AD3d 700, 896 NYS2d 408
(2nd Dept 2010)

Holding: The court properly dismissed the count charging the defendant with first-degree aggravated unlicensed operation of a vehicle (Vehicle and Traffic Law 511[3]). The grand jury minutes show that the defendant had a conditional license at the time of his arrest. It had been issued a day after his license had been revoked for a prior driving while intoxicated conviction. Upon issuance of the conditional license, the defendant’s status became that of a person with a conditional license, superseding his status as a person with a revoked license. *See People v Greco*, 151 Misc 2d 859, 861. There was no prima facie demonstration before the grand jury that the defendant drove with knowledge that his license was suspended or revoked. *See* Vehicle and Traffic Law 511(1)(a). Thus, the grand jury evidence was not sufficient. The prosecution did not indict the defendant under Vehicle and Traffic Law 1196(7)(f), which would be applicable if he drove in

violation of the terms of his conditional license. Order affirmed insofar as appealed from. (Supreme Ct, Westchester Co [Cacace, JJ])

[*Ed. Note:* Leave to appeal was granted on June 23, 2010 (15 NY3d 756).]

Assault (Evidence) (General) ASS; 45(25) (27)

Counsel (Conflict of Interest) COU; 95(10)

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

People v Rivera, 71 AD3d 701, 897 NYS2d 146
(2nd Dept 2010)

The defendant said during his guilty plea to first-degree gang assault that he and two codefendants planned to fight with and injure people at a specified location. The codefendants went in one vehicle and arrived before the defendant, who traveled separately. The defendant said that when he arrived, the stabbing underlying the charges had already occurred. The defendant’s lawyer said, with no dispute by the prosecution, that “the defendant was pleading guilty based upon his accessorial conduct in planning the fight and aiding and abetting the codefendants after the fight was over.”

Holding: Constructive presence by accomplice liability is insufficient to sustain a first-degree gang assault conviction. The statute requires that a defendant cause physical injury to another, with intent to do so, while aided by two or more persons actually present. Those two or more others must be in the immediate vicinity and capable of rendering immediate assistance to the perpetrator. *See People v Sanchez*, 13 NY3d 554. The defendant’s admission that he only aided in planning the assault negated an essential element of the crime. At sentencing, defense counsel took a position adverse to his client by asking the court to honor the sentence commitment when the defendant attempted to withdraw his plea. New counsel is required on remittal. *See People v Dixon*, 63 AD3d 957. Judgment reversed, plea vacated, and matter remitted for further proceedings at which the defendant is to have new trial counsel. (Supreme Ct, Nassau Co [Honorof, JJ])

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

Misconduct (Judicial) MIS; 250(10)

People v Santiago, 71 AD3d 703, 894 NYS2d 904
(2nd Dept 2010)

Holding: By failing to move to withdraw his plea on the grounds that it was coerced, the defendant failed to preserve the issue for appeal. *See People v Clarke*, 93 NY2d

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904, 906. It is reviewed in the exercise of the interest of justice jurisdiction. *See* CPL 470.15(6)(a). “[T]he remarks of the trial court throughout the proceedings in this case concerning its sentencing intentions in the event that the defendant proceeded to trial and was convicted, as well as its hostility and bias toward the defendant, created a coercive environment which rendered the defendant’s plea involuntary (*see People v Flinn*, 60 AD3d 1304; *People v Beverly*, 139 AD2d 971 . . .).” Judgment reversed, guilty plea vacated, and matter remitted for further proceedings. (County Ct, Suffolk Co [Weber, JJ])

Domestic Violence (General) **DVL; 123(10)**

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

People v Fernandez, 72 AD3d 303, 897 NYS2d 158 (2nd Dept 2010)

Holding: Criminal Procedure Law 210.05 does not preclude the Integrated Domestic Violence (IDV) Part of Supreme Court from exercising its jurisdiction to try misdemeanor charges against a defendant in the absence of an indictment or superior court information. The issue may be raised for the first time on appeal as it relates to the court’s jurisdiction. *See People v Wiltshire*, 23 AD3d 86, 88. The Supreme Court has general original jurisdiction in law and equity. *See* NY Const, art VI, Sec. 7(a). It may entertain all causes of action except those specifically proscribed. *See Sohn v Calderon*, 78 NY2d 755, 766. As a superior court, it has exclusive trial jurisdiction of all felonies, concurrent (with local criminal courts) trial jurisdiction of misdemeanors, and trial jurisdiction of petty offenses but only when they are charged in an indictment that also charges a crime. *See* CPL 1.20(20); 10.10(2). Supreme Court may divest local criminal courts’ concurrent jurisdiction. *See* CPL 10.30(1)(b); (2); *see also* CPL 170.20. Supreme Court exercises its preliminary jurisdiction over all offenses through the agency of grand juries. *See People v Davis*, 162 Misc 2d 662, 663. IDV Parts were created pursuant to Administrative Orders of the Chief Judge and Chief Administrative Judge, and Part 141 of the Rules of the Chief Administrator of the Courts. *See* 22 NYCRR 41.1, 141.1. Establishment of IDV Parts, unlike establishment of the Bronx Criminal Court that the 1st Department declared unconstitutional in *People v Correa*, 70 AD3d 532 (2010), did not involve the “purported ‘collapse’ . . . of any other constitutionally created court.” To the extent *Correa* supports a finding that there is no authority to create IDV Parts, this court disagrees. Given the conflict between this holding and *Correa*, the issue may be ripe for Court of Appeals review. Judgment affirmed. (Supreme Ct, Kings Co [Morgenstern, JJ])

[*Ed. Note:* The Court of Appeals affirmed on June 3, 2010. *See People v Correa*, 15 NY3d 213 (2010).]

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

People v Ingram, 71 AD3d 786, 896 NYS2d 446 (2nd Dept 2010)

Holding: Under the unique circumstances here, the court erred in denying the defendant a missing witness charge as to the nontestifying alleged accomplice. The missing witness, who had been charged and pleaded guilty, had initially identified two people other than the defendant as having participated in the offense, only later saying that the defendant was involved. The defendant showed that this person could reasonably have been expected to testify favorably to the prosecution, had knowledge about a material issue in the case, and was in the prosecution’s control. *See People v Gonzales*, 68 NY2d 424, 427-429. The prosecutor’s speculation that the missing witness may have perjured herself if she testified did not alone establish that the witness was not within the prosecution’s control. *See People v Keen*, 94 NY2d 533. The court’s denial of the defendant’s application for a missing witness instruction was not harmless. The proof of the defendant’s identity was not overwhelming where the accuser selected the defendant in a lineup but said he would not have recognized the defendant on the street, the accuser had failed to recognize one of the alleged accomplices in a lineup, and another witness could not definitively identify the defendant at trial. Further, the court effectively charged the jury to disregard the missing witness’s absence. Judgment reversed and matter remitted for a new trial. (Supreme Ct, Kings Co [Ingram, JJ])

Sentencing (General) **SEN; 345(37)**

People v Romero, 71 AD3d 795, 896 NYS.2d 417 (2nd Dept 2010)

The defendant was convicted of second-degree criminal possession of a weapon.

Holding: “[T]he remarks of the sentencing court demonstrated that it improperly considered the crimes of which the defendant was acquitted as a basis for sentencing (*see People v Schrader*, 23 AD3d 585, 585-586; *People v Smith*, 305 AD2d 432; *People v Reeder*, 298 AD2d 468; *see also People v Zuniga*, 142 AD3d 474, 475; *People v Maula*, 163 AD2d 180).” The defendant failed to preserve his contention that the court failed to meaningfully respond to the jury’s request for the court to “clarify the charge” particularly as to the phrase, “used unlawfully against another.” The court responded by instructing on “the relationship between justification and intent to use a weapon unlawfully (*see* CJI2d[NY] Penal Law art 265, Intent to Use Unlawfully and Justification)” This

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unpreserved issue is without merit, as are the claims that the evidence was legally insufficient and against the weight of the evidence. Judgment modified, sentence vacated, and matter remitted for resentencing. (Supreme Ct, Kings Co [Reichbach, JJ])

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

Weapons (Possession) WEA; 385(30)

People v Stevenson, 71 AD3d 796, 895 NYS2d 750 (2nd Dept 2010)

Holding: The defendant was indicted for, among other things, second-degree possession of a weapon under Penal Law 265.03(3). The court submitted to the jury the charge of second-degree possession of a weapon under Penal Law 265.03(1)(b). The crime as charged to the jury did not exist on Dec. 13, 2006, the date of the offense. *See* L 2006, chs 742, 745. Therefore, there could not be evidence to support a conviction beyond a reasonable doubt. “Additionally, ‘such a conviction presents error fundamental to “the organization of the court or the mode of proceedings proscribed by law” that cannot be waived’ (*People v Martinez*, 81 NY2d [810] at 812 . . .).” Therefore, preservation of the issue was not required. Judgment modified, conviction of second-degree possession of a weapon vacated, and as modified, affirmed. (Supreme Ct, Kings Co [Lott, JJ])

Juveniles (Neglect) JUV; 230(80)

Sex Offenses (General) SEX; 350(4)

Matter of Afton C., 71 AD3d 887, 896 NYS2d 465 (2nd Dept 2010)

The petitioner Department of Social Services (DSS) filed neglect petitions against the mother and father based on allegations that the father was an untreated level three sex offender living in the family home, which the mother allowed. The parents appeal from a finding of neglect.

Holding: “DSS failed to establish by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]) that the father’s presence in the home had impaired the subject children’s physical, mental, or emotional well-being, or placed them in imminent danger of such impairment (*see Nicholson v Scoppetta*, 3 NY3d 357, 368-369).” That a designated sex offender lives in a home is not alone “sufficient to establish neglect absent a showing of actual danger to the subject children (*see Matter of Kayla F.*, 39 AD3d 983, 985-986 . . .).” The court properly considered the parents’ evasiveness when testifying and the father’s invocation of his Fifth Amendment privilege, but the evidence was not

sufficient to show he posed an imminent danger to his children. Therefore, DSS did not show that the mother neglected the children by permitting him to live with them. Order reversed and proceedings dismissed. (Family Ct, Dutchess Co [Sammarco, JJ])

Juveniles (Support Proceedings) JUV; 230(135)

Matter of Westchester County Commissioner of Social Services o/b/o Santana v Perez, 71 AD3d 906, 897 NYS2d 192 (2nd Dept 2010)

Holding: Proof that a respondent failed to pay ordered child support is prima facie evidence that violation of the order was willful, shifting to the respondent the burden of offering competent, credible evidence of inability to pay. *See* Family Court Act 454(3)(a). “[T]he father sustained his burden of demonstrating his financial inability to make the payments required by the child support order dated April 18, 2008. The father presented uncontroverted evidence that, since losing his position as a security guard in 2004, he has been able to obtain only sporadic employment at low wages, and has no savings or other assets. Under these circumstances, the finding that his violation of the child support order was willful was not supported by the record (*see Matter of Orange County Commr of Social Servs. v Davis*, 67 AD3d 1018 . . .).” Appeal from the sentence imposed dismissed as academic, order adjudicating the father in willful violation of the 2008 child support order reversed, and petition denied. (Family Ct, Westchester Co [Horowitz, JJ])

Instructions to Jury (General) ISJ; 205(35)

Robbery (Elements) (Instructions) ROB; 330(15) (25)

People v Cordes, 71 AD3d 912, 897 NYS2d 479 (2nd Dept 2010)

The defendant was convicted of first-degree robbery. The accuser said the defendant had surreptitiously taken her purse from her unlocked vehicle and, when she demanded its return, threatened to stab her to death. She believed he was reaching for a knife, though she did not see one, and he fled when she screamed. Her identification of him at a lineup was the only evidence connecting him to the offense.

Holding: When instructing the jury, the judge just repeated the language of the first-degree robbery statute. *See* Penal Law 160.15(3). The court did not use the term, or convey the requirement of, “actual possession.” Thus, the court failed to adequately state a material legal principle applicable to the case. *See* CPL 300.10(2); *People v Alvarez*, 96 AD2d 864, 865. The issue was not preserved but is reached in the exercise of the interest of justice jurisdiction. *See People v Cotterell*, 7 AD3d 807, 807. The evidence of guilt was not overwhelming, so the error was not harm-

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less. Other issues, including the court's denial of the defense motion to introduce expert testimony on the issue of eyewitness identification, the denial of the motion to suppress the accuser's identification of the defendant on the basis the procedure was suggestive, and the sufficiency of the evidence, are rejected. Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [Aloise, JJ])

Motor Vehicles (Unauthorized Use) MVH; 260(35)**People v Franov, 71 AD3d 914, 897 NYS2d 176 (2nd Dept 2010)**

Police testified to seeing the defendant get out of a car holding an automotive component, which he dropped upon seeing the police. He fled. The side door lock of the car was found to be broken and the dashboard dismantled. When arrested, the defendant had a screwdriver, ratchet, and four sockets. The defendant was convicted of second-degree unauthorized use of a vehicle and other offenses.

Holding: The evidence was insufficient to support the unauthorized use conviction. Specifically, it was insufficient to establish that the defendant had exercised dominion and control over the vehicle. *See Matter of Javier F.*, 3 AD3d 493, 494. A defendant's momentary presence in or about a vandalized car cannot alone support that required finding. *See Matter of Archangel O.*, 157 AD2d 729. The evidence was sufficient to support the third-degree criminal mischief conviction, and that conviction was not against the weight of the evidence. Judgment modified, second-degree unauthorized use conviction vacated and that count dismissed, and as modified, affirmed. (Supreme Ct, Queens Co [Holder, JJ])

Evidence (Weight) EVI; 155(135)**Sex Offenses (Corroboration) (General) SEX; 350(2) (4)****People v Otway, 71 AD3d 1052, 897 NYS2d 236 (2nd Dept 2010)**

The defendant was convicted of first-degree course of sexual conduct against a child (two counts) and endangering the welfare of a child. One count of course of sexual conduct alleged a violation of Penal Law 130.75(1)(a), requiring a certain number and type of sexual acts with a child under 11. The other count alleged a violation of Penal Law 130.75(1)(b), requiring that the defendant, being 18 years old or more, engaged in such acts with a child under 13. The jury acquitted the defendant of many counts of other sexual offenses, including sodomy, sexual abuse, and third-degree rape.

Holding: The evidence was sufficient to support all three convictions, but the conviction under Penal Law 130.75(1)(a) was against the weight of the evidence. The accuser testified that the defendant began having oral sex with her "when she was '[p]robably [10] or 11, something like that.'" This did not justify a finding that at least some part of the alleged course of conduct occurred when the accuser was less than 11. That fact was not established through other evidence. This case is distinguishable from *People v Velez* (212 AD2d 819). This accuser's testimony was not detailed. There was no corroborating testimony, despite the presence of other sleeping individuals in the room at the time of most alleged acts. Corroborative proof about the accuser's failing grades and inability to focus existed only as to incidents after the accuser turned 11 and before she turned 13. The jury acquitted the defendant of many counts, calling the accuser's credibility into question. Judgment modified, conviction under Penal Law 130.75(1)(a) reversed and dismissed, and as modified, affirmed. (Supreme Ct, Kings Co [Mullen, JJ])

Appeals and Writs (Preservation of Error for Review) APP; 25(63)**Discovery (Brady Material and Exculpatory Information) DSC; 110(7)****Sentencing (Persistent Violent Felony Offender) SEN; 345(59)****People v Thomas, 71 AD3d 1061, 897 NYS2d 244 (2nd Dept 2010)**

Holding: The adjudication of the defendant as a persistent violent felony offender must be vacated. His 1986 New Jersey burglary conviction cannot serve as a predicate violent felony offense in this state. *See People v Muniz*, 74 NY2d 464, 471; *compare* NJ Stat 2C:18-1 *with* Penal Law 140.25. Whether his 1997 New Jersey robbery conviction may be used is, as the prosecution concedes, unclear. *Compare* NJ Stat 2C:15-1 *with* Penal Law 160.15; *see People v Yancy*, 86 NY2d 239, 246-247. A hearing must be held. The defendant did not preserve his claim that the prosecution denied him due process by failing to produce a report of a detective's interview of the accuser and the memo-book entries of two officers who transported the accuser to a showup. His *Rosario* objections (*see People v Rosario*, 9 NY2d 286 *cert den* 368 US 866) were first raised in a CPL 330.30(1) motion to set aside the verdict and were based on matter outside the record. The court properly declined to consider them. *See People v Ai Jiang*, 62 AD3d 515. Judgment modified, adjudication as a persistent violent felony offender vacated, matter remitted for a hearing to determine if the 1997 out-of-state conviction can serve as a predicate felony and for resentencing, and as modified, affirmed. (Supreme Ct, Kings Co [Carroll, JJ])

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Contempt (General) (Procedure) CNT; 85(8) (10)

Juveniles (Visitation) JUV; 230(145)

Matter of Jean v Washington, 71 AD3d 1145, 898 NYS2d 63 (2nd Dept 2010)

Holding: Family Court improperly dismissed the mother’s request to modify the visitation order. She had met the burden of showing a change in circumstances such that modification was necessary to insure the continued best interests and welfare of the subject child. *See* Family Court Act 467(b), 652(b); *Matter of Wilson v McGlinchey*, 2 NY3d 375, 380-382. Her petition alleged that the father had missed “‘40-50%’ of his visits.” The petition to hold the father in contempt was properly dismissed, as the father still had time to comply with the order. “[C]ontrary to the mother’s contention, the summer visitation clause does not provide that the mother must have visitation with the child on the weekend following the father’s two consecutive weeks of visitation with the child.” A hearing is needed only if a factual dispute exists that cannot be resolved on papers alone. *See Matter of Brown v Mudry*, 55 AD3d 828, 828. Order dismissing petition to modify visitation reversed, petition reinstated, and matter remitted. Order dismissing the petition to hold the father in contempt affirmed. (Family Ct, Kings Co [Feldman, JHO])

Assault (Deadly Weapons) (Evidence) (General) (Intent to Commit Murder) ASS; 45(15) (25) (27) (35)

People v Douglas, 73 AD3d 30, 901 NYS2d 57 (2nd Dept 2010)

The defendant was convicted of first-degree assault and other offenses. After a heated exchange that began when he drove over a glass bottle that shattered, showering bystanders, the defendant left. He came back with a gun and eventually fired toward a van, striking one passenger. At sentencing, the court did not impose the statutorily required periods of post-release supervision (PRS).

Holding: The rule that one cannot be guilty of both intentional and reckless assault of the same person does not apply where a defendant harbors no intent to injure the actual victim but the crime is deemed intentional under a transferred intent theory. *See* Penal Law 120.10(1). If, under circumstances evincing depraved indifference to human life, a defendant’s efforts to harm a specific victim create a defined risk of death to a different person, and the defendant knows of the risk but consciously engages in the conduct and thereby causes serious physical injury, “the act constitutes a reckless first-degree assault as well

(*see People v Hamilton*, 52 AD3d 227, 228 . . .).” By firing into the van occupied by people he had argued with earlier, intending to kill or seriously injure them, the defendant created the type of risk to other occupants, including the man who was struck, that meets the statutory requirements. The conduct evinced the same sort of depraved indifference to human life as firing into a crowd. *See People v Feingold*, 7 NY3d 288, 293. The error in failing to impose required PRS periods can be remedied. Judgment modified, sentence vacated, and as modified, affirmed, and remitted for resentencing that includes PRS. (Supreme Ct, Kings Co [Reichbach, JJ])

Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause (Official Sources)] [Time] (Detention) (Plain View Doctrine) (“Poisoned Fruit” Doctrine) (Search Warrants [Suppression]) (Weapons-Frisks) SEA; 335(10[g(v)] [p]) (25) (53) (55) (65[p]) (85)

People v Mais, 71 AD3d 1163, 897 NYS2d 716 (2nd Dept 2010)

The prosecution appealed a suppression order.

Holding: The stop and detention of the defendant for a showup based on a radio report was supported by the requisite reasonable suspicion. The frisk of the defendant before the showup was not, as no evidence at the suppression hearing supported a reasonable suspicion that the defendant was armed. *See People v Stevenson*, 7 AD3 820, 821. The officer, asked if he thought the defendant was armed, said, “‘I was not sure, but for my safety and everybody else he was frisked.’” The court properly suppressed the flashlight recovered from the defendant’s pocket. The inevitable discovery doctrine does not apply to primary evidence. *See People v Stith*, 69 NY2d 313, 320. The showup was not unduly suggestive. The defendant’s statements, following a lawful detention and arrest, should not have been suppressed as fruits of the poisonous tree. *See People v Fleury*, 8 AD3d 585, 587. The search warrant for the defendant’s home did not authorize the seizure of sneakers and do-rags, so they were properly suppressed. *See People v Baker*, 23 NY2d 307, 319-320. Their incriminating character was not immediately apparent, so that the plain view doctrine did not apply. *See People v Brown*, 96 NY2d 80, 89. The court should not have precluded the part of the defendant’s statement denying that he came from the burglarized home; the CPL 710.30 notice informed the defense “of the ‘sum and substance’ of the conversation sought to be introduced at trial (*see People v*

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Carter, 44 AD3d 677, 678 . . .).” Order modified, and as modified, affirmed. (County Ct, Rockland Co [Bartlett, JJ])

Third Department

Evidence (Weight) **EVI; 155(135)**

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

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

**People v Scott, 67 AD3d 1052, 889 NYS2d 279
(3rd Dept 2009)**

The defendant, a 23-year-old, was accused of having sex with a 13-year-old girl during a party at which two other teenage girls were present. The jury convicted him of second-degree rape and three counts of endangering the welfare of a child.

Holding: The defendant failed to preserve his argument that the evidence was legally insufficient to support the endangering counts related to the two teenage girls who were not present at the time he allegedly had sex with the 13-year-old girl. However, that issue must be considered in reviewing the weight of the evidence. *See People v Loomis*, 56 AD3d 1046, 1046-1047. The evidence showed that the bedroom where the sexual act took place was “the center of activity for the teenagers at the party because the alcoholic beverages were kept there.” The two teens were just outside the bedroom and could have heard the sexual act or entered the room at any time, and the defendant does not dispute that the sexual act with the other teen could harm them if they knew about or observed it. Therefore, the jurors could reasonably conclude that the defendant committed the endangering offense against the two teens. Endangering the welfare of a child is not a lesser included offense of second-degree rape. *See People v Beauharnois*, 64 AD3d 996, 1001. Judgment affirmed. (County Ct, Saratoga Co [Scarano, JJ])

[*Ed. Note:* Leave to appeal was granted on May 19, 2010 (14 NY3d 892).]

Sentencing (Pre-sentence Investigation and Report) **SEN; 345(65)**

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

**People v Freeman, 67 AD3d 1202, 889 NYS2d 119
(3rd Dept 2009)**

The defendant was convicted of third-degree rape. The probation officer who wrote the presentence investigation report (PSI) completed and attached a risk assessment instrument (RAI). The court noted several serious

errors and recited the correct information under each category. Defense counsel’s request to redact the entire RAI from the PSI was denied.

Holding: The RAI contemplated under Correction Law 168-n(3) (the Sex Offender Registration Act [SORA]) is not legislatively intended for consideration at sentencing when incarceration is being imposed. Presentation of the completed RAI form was premature. In addition, the Probation Department is not the proper agency to complete an RAI; a recommendation from the Board of Examiners of Sex Offenders is required (*see* Correction Law 168-n[2], [3]). “Failing to redact erroneous information from the PSI created an unjustifiable risk of future adverse effects to defendant in other contexts . . .” Should the sentencing minutes become separated from the PSI (*see* CPL 380.70, 390.60), or an agency seek to rely on the original PSI on file at the Probation Department (*see* CPL 390.30), the defendant would have to refute the erroneous information and explain why that information was seemingly not corrected by the court. Inaccurate PSI information can result in longer incarceration and affect other rights. Judgment affirmed and court directed to redact the RAI from all copies of the defendant’s PSI. (County Ct, Columbia Co [Nichols, JJ])

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

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

**People v Johnson, 67 AD3d 1206, 889 NYS2d 121
(3rd Dept 2009)**

Before the defendant’s release from prison following his conviction of first-degree rape based on sexual intercourse with a 12-year-old, the Board of Examiners of Sex Offenders (Board) prepared a risk assessment instrument (RAI). The defendant was found to be presumptively classified at risk level II under the Sex Offender Registration Act (SORA). *See* Correction Law art 6-C. The Board recommended an upward departure to risk level III based on the defendant’s conviction of endangering the welfare of a child encompassing acts after those underlying this conviction. The court found the defendant to be a sexually violent offender and placed him at risk level III.

Holding: Special circumstances warranting a departure from the presumptive risk level must be proven by clear and convincing evidence. *See People v Miranda*, 24 AD3d 909, 910. While the record contains evidence that might justify an upward departure, the prosecution offered no proof of that, and the court’s findings in that regard are insufficiently detailed to allow appellate review. *Cf People v Roberts*, 54 AD3d 1106, 1106-1107 *lv den* 11 NY3d 713. The court’s sole stated reason for the departure was information in the presentence report about events leading to the conviction. The crime was adequate-

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ly covered by the RAI and so is not an aggravating factor. The defendant preserved the issue by challenging the proposed increase in risk level; he had no reason to anticipate the court's focus solely on the original offense. *Cf People v Oginski*, 35 AD3d 952, 953. Order reversed, matter remitted for proceedings consistent herewith. (County Ct, Sullivan Co [LaBuda, JJ])

Narcotics (Evidence) **NAR; 265(20) (40) (55) (57)**
(Marijuana) (Penalties)
(Possession)

Prisoners (Disciplinary Infractions **PRS I; 300(13)**
and/or Proceedings)

People v Cooper, 67 AD3d 1254, 889 NYS2d 714
 (3rd Dept 2009)

The defendant was convicted of crimes relating to the possession of drugs. Pursuant to a tip, officers went to the defendant's prison cell shortly after he had a visit from his wife, searched him, and found drugs, including 30.5 grams of marijuana and .06 grams of heroin. At the end of the prosecution's case, the defense unsuccessfully moved to dismiss, claiming no showing that the defendant possessed "dangerous" contraband.

Holding: The defendant failed to renew the dismissal motion at the close of all proof, but the circumstances surrounding the charges of first-degree promoting prison contraband are addressed in determining whether the convictions were against the weight of the evidence. The Court of Appeals recently held small (non-criminal) amounts of marijuana are not dangerous contraband. *See People v Finley*, 10 NY3d 647. The *Finley* court left open the question of whether illegal amounts of marijuana could be deemed dangerous contraband. The test is whether the contraband has particular characteristics that create a substantial possibility it will be used in a way likely to cause specified harms including death or serious injury or major threats to a prison's institutional safety or security. The amounts of marijuana here were punishable as misdemeanors. *See* Penal Law 220.03, 221.10(2). Evidence indicated that the defendant's wife received money from other prisoners in advance to bring drugs into prison. Success in importing drugs may encourage others to do the same. The prison in question is a maximum security facility for problem prisoners; drugs may lead to dangerous confrontations and disciplinary problems. The weight of the evidence supported the convictions. Judgment affirmed. (County Ct, Chemung Co [Buckley, JJ])

Defense Systems (General) **DFS; 104(50) (75[e])**
(New York State Law [Statutes])

Goehler v Cortland County, 70 AD3d 57,
 890 NYS2d 660 (3rd Dept 2009)

Cortland County Local Law No. 1 created an office to handle cases in which the public defender had a conflict and set out new procedures for assignment of counsel. The plaintiffs sought to have the law declared invalid for violating County Law 722 and the Municipal Home Rule Law. The court so declared.

Holding: "[A] conflict attorney appointed by the County Legislature is not authorized by section 722 . . ." [emphasis in original] The state law requires a county to provide mandated counsel using one of four specific delivery options: a public defender, a private legal aid office, a county bar association plan approved by the state court administrator, or some combination of these options. Local Law No. 1 affected the courts' power to appoint counsel and so impermissibly superseded a state law that affects courts. It did not conform to any of the four delivery service options. Whether the law's substantive provisions would be proper if adopted in accordance with the County Law, that is, were contained in an approved county bar association plan, is not determined. Other issues raised, such as the plaintiff's standing and the power of judges below to issue a "standing decision" establishing a procedure for assignment of counsel, are not preserved, are not properly before the court, or are rendered academic. Order affirmed. (Supreme Ct, Cortland Co [Dowd, JJ])

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

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

Matter of State of New York v Andrew O.,
 68 AD3d 1161, 890 NYS2d 667 (3rd Dept 2009)

The appellant pleaded guilty to first-degree sexual abuse and was sentenced prison. The State sought an order authorizing civil management of the appellant under Mental Hygiene Law article 10. After a bench trial, he was determined to be a dangerous sex offender requiring confinement. *See* Mental Hygiene Law 10.07(f); 10.03(e).

Holding: The cross-examination of the appellant's expert witness in front of the jury regarding a religion the expert co-founded was improper. That questioning was brief, and most questioning dealt with factual matters that undermined the expert's credibility and the factual basis for his opinion. The improper questioning was not such that, in the context of the whole trial, it would substantially affect the jury's conclusion that the appellant suffers from a mental abnormality. *See Biello v Albany Mem. Hosp.*, 49 AD3d 1036, 1038. The appellant's records from the Division of Criminal Justice Services and the Board of Examiners of Sex Offenders were properly admitted as certified business records. *See* CPLR 4518(c). Evidence of the contents of an accuser's extrajudicial statement was

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disclosed by a state expert to show the basis for the expert's opinion, not for the truth of the statement. *See O'Brien v Mbugua*, 49 AD3d 937, 938. The evidence at the dispositional phase included testimony by the State's experts, who based their opinions that the appellant was not a good candidate for strict intensive supervision and treatment on the appellant's past behavior. The appellant's challenge to the court's determination is rejected. Order affirmed. (Supreme Ct, Saratoga Co [Seibert, JJ])

Dissent: [Rose, JJ] The State stressed the religious beliefs of the appellant's expert, which were different from those beliefs with which the jury would likely be familiar. It cannot be said that this did not influence the jury.

[*Ed. Note:* Leave to appeal was granted on April 1, 2010 (14 NY3d 706).]

Sex Offenses (Sentencing)**SEX; 350(25)****People v Burke, 68 AD3d 1175, 889 NYS2d 756 (3rd Dept 2009)**

The defendant was accused of sexual activity with four people under the age of 17 during one night when he was 23. He pleaded guilty to one count of third-degree rape. The Board of Examiners of Sex Offenders (Board) presumptively classified him as a level III sex offender due to the number of points scored on a risk assessment instrument (RAI). *See Sex Offender Registration Act (SORA)*, Correction Law article 6-C. The court declined to follow the Board's recommendation of a downward departure to level II.

Holding: The risk assessment guidelines seek to address the probability of reoffending and the harm that results. The specific factors required to be considered are not exclusive, and no matter how well designed an RAI is, it cannot capture the nuances of every case. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, at 4 (2006 ed). The Board's recommendation took into account that only the ages of the sexual partners, which were not significantly disparate from the defendant's, created lack of consent to the sexual activity, which at least one of them admitted they initiated. The defendant asserted he was intoxicated at the time and has since completed sex offender treatment as well as drug and alcohol treatment. The court did not set forth findings of fact and conclusions of law as required by Correction Law 168-n(3). Given the consequences that arise from a level three risk assessment, the record must be fully developed "to allow 'meaningful appellate review of the propriety of the court's risk level assessment' (*People v Miranda*, 24 AD3d 909, 911 . . .)." Order reversed and matter remitted for further proceedings not inconsistent with this decision. (County Ct, Cortland Co [Campbell, JJ])

Discrimination (Race)**DCM; 110.5(50)****Juries and Jury Trials (General) (Qualifications) (Selection)****JRY; 225(37) (50) (55)****Trial (Verdicts [Motions to Set Aside (CPL § 330 Motions)])****TRI; 375(70[a])****People v Estella, 68 AD3d 1155, 889 NYS2d 759 (3rd Dept 2009)**

The defendant filed a CPL 330.30 motion to set aside the verdict on several grounds, including juror misconduct. While preparing a response to the motion, the prosecutor contacted several of the jurors. The prosecutor reported to the court that when she asked juror No. 6 about his basis for finding the defendant guilty, the juror stated, "I guess I based my [decision] on race." The juror is a white male and the defendant is black. A few days later, the juror denied that his vote was based on race. Defense counsel amended the 330.30 motion to include juror No. 6's misconduct. The court denied the motion as to the initial grounds presented, but granted a hearing on the issue of juror No. 6's statement. The juror testified, denying that he made the remark, and the prosecutor affirmed in open court that the juror made the statements set forth in her letter to the court. The court credited the prosecutor's testimony and granted the motion, finding that the "defendant was deprived of his fundamental, constitutionally guaranteed right to an impartial, unbiased jury and fair trial . . ."

Holding: The court properly granted the defendant's motion to set aside the verdict. *See CPL 330.30(1), (2), 330.40(2)(g)*. The prosecutor, as an officer of the court, has an "unqualified duty of scrupulous candor . . ." *People v Hameed*, 88 NY2d 232, 238 *cert den* 519 US 1065 (1997). The court properly relied on the prosecutor's statements in open court; a formal oath was not necessary. Deferring to the court's assessment of the juror's credibility and its conclusion that the juror made the statement (*see People v Douglas*, 57 AD3d 1105, 1106 *lv den* 12 NY3d 783), the court properly determined that the juror failed to disclose a pre-existing racial prejudice that deprived the defendant of a chance to explore his ability to be impartial. As the issue related to the defendant's right to a fair trial, the court correctly declined to use a harmless error analysis. *See People v Crimmins*, 36 NY2d 230, 238. Order affirmed. (County Ct, Schenectady Co [Giardino, JJ])

Admissions (Silence)**ADM; 15(30)****Self-Incrimination (Conduct and Silence)****SLF; 340(5)****People v Patterelli, 68 AD3d 1151, 889 NYS2d 748 (3rd Dept 2009)**

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The defendant was convicted of multiple sex offenses for acts alleged by an acquaintance. The defense was that the sexual acts were consensual.

Holding: Testimony that the defendant invoked his right to remain silent when questioned by police was improperly admitted during the prosecution’s case in chief. *See People v Stewart*, 20 AD3d 769, 770. A pretrial hearing was held at which testimony was received about responses the defendant made during a *Mirandized* pre-arrest interrogation by a police officer. The prosecutor and initial defense counsel agreed to redact the portion of the statement relating to speaking to an attorney. Before trial, the defendant’s second lawyer unsuccessfully sought to also bar use of the defendant’s comment that he didn’t want to discuss anything with or about the accuser. At trial, the officer testified during the prosecution’s case that the defendant had, after an initial response to what the officer said to him, “indicated that he wished not to speak with me any further about the matter.” On redirect, the officer testified similarly. In closing, the prosecutor argued that the defendant had said he made a mistake being around the accuser and didn’t want to talk to the officer about it anymore. The prosecutor then said, “Again what does the evidence and your common sense tell you?” Elicitation of the testimony cannot be characterized as just an innocuous comment about the end of the questioning given the prosecutor’s effort in closing to exploit the defendant’s silence. *See People v Nolan*, 152 Ill App 3d 260, 266-267 (1987). Judgment reversed and matter remitted for a new trial. (County Ct, Cortland Co [Campbell, JJ])

Contempt (Elements) (General) CNT; 85(7) (8)

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

People v Roblee, 70 AD3d 225, 890 NYS2d 166 (3rd Dept 2009)

The defendant was charged with an alleged assault. When the prosecution was told that the defendant had written letters to the accuser from jail, a superseding indictment was obtained adding counts of aggravated criminal contempt. The court conducted pre-voir dire questioning to identify potential jurors who would have problems serving. The entire panel was given a list of situations such as having been a victim of domestic violence. Those who indicated that any of the listed items applied to them were asked to step aside. The jury was selected from the remainder of the panel, over counsel’s objection, without any of the sidelined jurors being further questioned or recalled.

Holding: The contempt charges were not supported by legally sufficient evidence. The order of protection the defendant was charged with violating contained a box that would have directed the defendant to avoid mail or electronic contact with the accuser, but the box was not checked. The handwritten notation of “no contact” could be interpreted to mean physical or in-person contact. A reasonable person could have interpreted the order to allow letters. Ambiguity in the order must be resolved in the defendant’s favor. *See Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 241. “The jury selection method utilized here effectively excluded potential jurors without determining if they were unqualified or biased, and without permitting defendant to question them concerning their fitness to serve” Judgment reversed, criminal contempt counts dismissed, and remanded for a new trial on the remaining count. (County Ct, Warren Co [Hall, JJ])

Misconduct (Prosecution) MIS; 250(15)

Speedy Trial (General) (Statutory Limits) SPX; 355(30) (45)

People v Nelson, 68 AD3d 1252, 890 NYS2d 189 (3rd Dept 2009)

The defendant was convicted of several sex offenses and endangering the welfare of a child. A felony complaint charging three counts of first-degree sodomy was issued on Oct. 1, 2002. The defendant was charged by superior court information with the same crimes. The prosecution declared readiness for trial on Mar. 31, 2003, but then presented charges to a grand jury. An indictment was filed May 14, 2003 containing the original and additional counts. A statement of readiness was filed on June 2, 2003.

Holding: The March 2003 statement of readiness, while ineffective as to the later-charged crimes (*see People v Johnson*, 112 AD2d 1, 1 *lv den* 66 NY2d 764), satisfied the prosecution’s obligation as to the sodomy counts that were directly derived from the felony complaint. *See People v Sinistaj*, 67 NY2d 236, 241 n 4. No significant postreadiness delays chargeable to the prosecution were established and no denial of the statutory right to speedy trial occurred as to those three counts. The speedy trial time clock began to run upon the filing of the indictment with respect to the new charges to the extent that “separate and distinct criminal transactions” were alleged. *People v Dearstynne*, 230 AD2d 953, 955 *lvs den* 89 NY2d 921, 89 NY2d 1034. The June 2003 readiness statement was well within six months of the filing date of the indictment. While the prosecutor did make improper remarks in summation that denigrated defense counsel and the defense (*see People v Wlasiuk*, 32 AD3d 674, 681 *lv dismd* 7 NY3d

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871), and inappropriately appealed to the jury's sympathies for the accuser (see *People v Bhupsingh*, 297 AD2d 386, 388), the error was harmless. Judgment affirmed. (County Ct, Chenango Co [Sullivan, JJ])

Accusatory Instruments (General) ACI; 11(10) (15)
(Sufficiency)

Evidence (Exhibits) (General) EVI; 155(55) (60)

People v Clevensine, 68 AD3d 1448, 891 NYS2d 511
(3rd Dept 2009)

The defendant was convicted of multiple sex offenses based on conduct with two teenagers. His wife discovered instant messages in the defendant's MySpace account revealing sexually explicit discussions between the defendant and the younger accuser.

Holding: Count one charged that the defendant and the younger teen had intercourse sometime between April 1, 2006 and Jan. 18, 2007. This exceeded the nine-month interval that has been held "generally per se unreasonable" for a non-continuous act. See *People v Sedlock*, 8 NY3d 535, 538. The younger accuser, who testified at age 16 about events that occurred when she was 13 and 14, showed no inability to recall events and set other acts in much narrower time frames. The count should have been dismissed. See *People v Bennett*, 57 AD3d 688, 690 *lv den* 12 NY3d 781. The computer disk holding electronic communications between the defendant and the younger accuser were properly admitted. The evidence was sufficiently authenticated. Both accusers testified that they had engaged in MySpace instant messaging about sexual activities with the defendant. A police investigator testified about retrieving such messages from a computer used by the accusers and a MySpace legal compliance officer testified that the messages on the disk admitted into evidence had been exchanged by users of accounts created by the defendant and the accusers. The defendant's wife testified about the conversations she viewed in the defendant's MySpace account. The testimony provided ample authentication. See *People v Lynes*, 49 NY2d 286, 291-293. Judgment modified by reversing the conviction and sentence for count one, count dismissed, and as modified, affirmed. (County Ct, Albany Co [Breslin, JJ])

Appeals and Writs (General) APP; 25(35)

People v Fannell, 68 AD3d 1447, 892 NYS2d 237
(3rd Dept 2009)

In 1998, the defendant pleaded guilty to fourth-degree grand larceny and first-degree offering a false

instrument for filing. He admitted double billing and falsely billing for work supposedly done for two programs that provided services to the county social services department, which then disclaimed all hours he had billed and recouped money paid to the programs. He was ordered to pay restitution to those programs and was sentenced to five years' probation. All requirements were fulfilled. He appeals.

Holding: The nearly 11-year delay by the defendant in perfecting his appeal constituted an abandonment of his right to appeal. See *People v West*, 100 NY2d 23, 24 *cert den* 540 US 1019 (2003). After the defendant filed a notice of appeal in 1998, a request for poor person relief in 2005 was opposed and denied. He again sought poor person relief in February of 2009, which the prosecution did not oppose; the defendant did not disclose his prior application or explain the lengthy delay. The application was granted. The defendant, who was not incarcerated, knew his appellate rights and woefully failed to diligently pursue them. Appeal dismissed. (County Ct, Sullivan Co [Ledina, JJ])

Narcotics (Evidence) NAR; 265(20) (40) (57)
(Marijuana) (Possession)

Retroactivity (General) RTR; 329(10)

People v McCrae, 68 AD3d 1451, 892 NYS2d 574
(3rd Dept 2009)

In 2000, the defendant was found in possession of 10.94 grams of marijuana while imprisoned in a state correctional facility. He pleaded guilty to first-degree promoting prison contraband and possession of marijuana. His conviction was affirmed in 2003. After the Court of Appeals decided *People v Finley* (10 NY3d 647) in 2008, the defendant moved to vacate the promoting prison contraband conviction pursuant to Criminal Procedure Law 440.10. The motion was denied without a hearing.

Holding: The *Finley* court held that less than 25 grams of marijuana did "not constitute dangerous contraband within the meaning of Penal Law § 205.00(4) and § 205.25(2)." This clarified existing law rather than announcing a substantive change in controlling law. See *People v Hurrell-Harring*, 66 AD3d 1126, 1127. Therefore, no retroactivity issue is presented. The defendant's possession of 10.94 grams of marijuana, absent aggravating circumstances, did not constitute possession of dangerous contraband. Order reversed, motion granted, and conviction of first-degree promoting prison contraband dismissed. (County Ct, Clinton Co [Ryan, JJ])

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

People v McDermott, 68 AD3d 1453, 891 NYS2d 515 (3rd Dept 2009)

The defendant signed a 12-page document in connection with his plea agreement. One paragraph said that if he was arrested before sentencing, the court would not be bound by the agreement to a one-year sentence and could impose the maximum. Before sentencing, the defendant was re-arrested. He was sentenced in this case to an enhanced sentence of two and one-half years plus post-release supervision.

Holding: Review of whether the sentence enhancement was improper is not precluded by the defendant’s waiver of appeal. While the issue was not preserved, it is reviewed under the interest of justice jurisdiction. To waive the right to be sentenced according to an agreement, a defendant must have been informed by the court of that right and of the consequences of failing to abide by the conditions set by the court. *See People v Parker, 57 NY2d 136, 141.* Here, the court did not mention *Parker* warnings or the paragraph of the document setting out the no-arrest condition. The colloquy was insufficient where the court only asked if the defendant had reviewed the document with counsel, had any questions, and was willing to plead guilty in order to obtain the promised sentence. The court’s incorporation by reference of the document did not remedy the flawed plea allocution. *Cf People v Kinch, 15 AD3d 780, 781.* Written documents do not substitute for an on-record discussion between the court and the defendant. The “practice of ‘plea by check off list’” is condemned. The weighty constitutional matters at issue “must be developed in an appropriate manner on the record.” Judgment modified, sentence vacated, and matter remitted for further proceedings. (County Ct, Greene Co [Pulver, Jr., JJ])

Juveniles (Custody) (Parental Rights) **JUV; 230(10) (90)**

Matter of Paul Z., 68 AD3d 1473, 891 NYS2d 530 (3rd Dept 2009)

Soon after the mother of the subject child disappeared in 2004, the child’s maternal grandmother, the petitioner, was granted custody under Family Court Act article 6. The respondent, the child’s father, was convicted in 2005 of manslaughter for killing the mother. The petitioner sought in 2008 to have the respondent’s parental rights terminated under Social Services Law (SSL) 384-b(4)(e) on the grounds of severe abuse, *ie*, causing the mother’s death. *See SSL 384-b(8)(a)(iii)(A).* No authorized agency

made efforts to promote the respondent’s relationship with the child or sought a judicial determination that such efforts were not necessary. The court found that the petitioner lacked standing and dismissed the petition.

Holding: The petitioner’s quick receipt of custody under article 6 and continuous care of the child resulted in no action by the county Department for Children, Youth and Families (Department), which ostensibly believed the court could rule on the petition without its involvement. Summary judgment was properly denied because “termination of parental rights cannot occur consistent with the statute in the absence of a role by the Department” But dismissal was not required in these narrow circumstances. A relative with care and custody of a child can originate a proceeding. *See SSL 384-b(3)(b).* A separate section evinces an intent to permit action by another interested party where termination should be addressed and an agency has failed to act. *See SSL 384-b(3)(l)(iv).* The petition should be reinstated and the Department joined as a party to determine if a judicial waiver of the reasonable efforts requirement should be sought. Order modified, petition reinstated, and matter remitted. (Family Ct, Albany Co [Duggan, JJ])

Search and Seizure (Detention) SEA; 335(25) (75) (85)
(Stop and Frisk Suppression)
(Weapons-Frisks)

People v Sampson, 68 AD3d 1455, 891 NYS2d 518 (3rd Dept 2009)

Arthur Hyde, an investigator with the prosecutor’s office, received a call from the sheriff’s department relaying a tip that the defendant was bringing drugs from New York City to an address in Troy. Hyde was asked to look for a 2006 Saturn, but was then told to disregard that; the defendant was said to already be in Troy and Hyde went to the address looking for a Dodge Stratus the defendant was reportedly driving. Upon arrival, Hyde saw only a taxi in the driveway, which then drove by him allowing him to identify the defendant as the passenger. Pulling the taxi over, Hyde asked the defendant to get out. Seeing a bulge in the defendant’s pocket, Hyde sought to pat down the defendant, who pushed Hyde and ran. The defendant was captured, drugs he had discarded were recovered, and he made an incriminating statement. The evidence was suppressed.

Holding: The tip relayed to Hyde by the sheriff’s department did not give rise to a reasonable suspicion of criminal activity by the taxi’s occupant. *See People v Heapps, 13 AD3d 107, 108 lv den 4 NY3d 799.* Hyde did not know who supplied the tip or even who at the sheriff’s department had relayed it. No basis existed for finding the information credible. Neither vehicle mentioned by the unknown person was seen, so this potentially “predictive information” was not verified. The defendant was

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impermissibly seized. See *People v Sobotker*, 43 NY2d 559, 564-565. Seeing a bulge after the improper stop did not justify the pat down. The defendant's pushing of Hyde was a spontaneous reaction and a direct consequence of the illegal seizure. See *People v Felton*, 78 NY2d 1063, 1065. Order affirmed. (County Ct, Rensselaer Co [Jacon, JJ])

Counsel (Right to Counsel) COU; 95(30) (35)
(Right to Self-Representation)
People v Tafari, 68 AD3d 1540, 891 NYS2d 711
(3rd Dept 2009)

The defendant was convicted of multiple counts of assault and criminal mischief following an altercation at the prison where he was incarcerated. He appealed, and moved pro se to vacate the judgment pursuant to CPL 440.10. He obtained permission to appeal the denial of that motion.

Holding: The court denied the defendant his right to self-representation. His timely request to represent himself was denied, apparently on the grounds of his mental illness and the belief that his medication affected his ability to understand the proceedings. Defendants may invoke the right to represent themselves as long as their requests are unequivocal and timely, they have not engaged in conduct that would prevent fair and orderly trials, and they knowingly and intelligently waive the right to counsel. See *People v McIntyre*, 36 NY2d 10, 17. The record shows that the defendant sought self-representation for legitimate reasons, not to delay or prevent an orderly trial. See *People v Schoolfield*, 196 AD2d 111, 117 *lv dismd* 83 NY2d 858 *lv den* 83 NY2d 915. The court's comments seemed to implicate the defendant's competency, but the defendant had been determined competent in CPL article 730 proceedings. That, plus the defendant's responses during the colloquy on the risks of proceeding without counsel, sufficiently established that he knowingly and intelligently waived counsel. See *People v Reason*, 37 NY2d 351, 356. Judgment and order reversed, motion to vacate granted, and matter remitted for a new trial. (Supreme Ct, Ulster Co [McDonough, JJ])

Guilty Pleas (General [Including GYP; 181(25)
Procedure and Sufficiency of
Colloquy])
People v Ortiz, 69 AD3d 966, 892 NYS2d 622
(3rd Dept 2010)

Holding: The defendant's challenge to the voluntariness of his guilty pleas survives his waivers of appeal. He preserved the challenge by moving to withdraw the pleas. See *People v Fitzgerald*, 56 AD3d 811, 812. However, the

challenge is not persuasive. The universal misunderstanding that he could be sentenced as a persistent violent felony offender is not dispositive; several factors must be considered. This defendant, 43 years old, had extensive experience in the criminal justice system. He has pleaded guilty to several prior felonies. The pleas here were in satisfaction of numerous other charges for which he received no additional time. He was represented by counsel, and the record shows he "was fully informed of the rights he was waiving, understood the nature and consequences of his pleas, was acting of his own free will without any coercion or threats, had no mental health problems and had ample time to confer with counsel," with whose services he was satisfied. Nothing in the record indicates that he would not have pleaded guilty if he had known he would be sentenced as a persistent felony offender rather than a persistent violent felony offender. Despite the misunderstanding, the agreed-upon sentence he received, 15 years to life, is the minimum for a persistent felony offender. See Penal Law 70.00(2)(a); (3)(a); 70.10(2); *cf People v Williams*, 300 AD2d 825, 826-827. There are no other indications that the pleas were not voluntary. The inaccurate information has not been shown to have influenced the defendant's decision. See *People v Garcia*, 92 NY2d 869, 870. Judgment affirmed. (County Ct, Schenectady Co [Hoye, JJ])

Discovery (Prior Statements of DSC; 110(26)
Witness)
People v Mosby, 69 AD3d 1045, 894 NYS2d 534
(3rd Dept 2010)

An undercover officer was introduced to the defendant and purchased drugs from him on July 27, 2005. The undercover discussed making future buys and made arrangements to contact him. The defendant learned of these recorded conversations through a Freedom of Information Law request after trial. Two weeks after the July events, the undercover contacted the defendant and bought drugs from him on Aug. 10 and 19, 2005 while wearing a transmitter. The drugs purchased on August 19 included fentanyl, which the defendant had said on July 27 would be available on that date. The defendant was charged only with the sales of August 10 and 19.

Holding: The prosecution is obligated to furnish to the defense any written or recorded statements of persons the prosecution intends to call at trial, relating to the subject matter of the witness's testimony. See CPL 240.45(1)(a). The statements by the undercover, including the recorded conversation, relating to the July 27 buy were *Rosario* material even though no charges were brought as to that date. See *People v Baghai-Kermani*, 84 NY2d 525. The connection between the undisclosed recording and the issues at trial here were compelling. July 27 was the first known police contact with the defendant in this investigation, and further sales were discussed. The same people

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were involved, the same illegal subject matter was discussed, and the discussion occurred only a short time before the charged offenses. It was error not to turn the material over when the witnesses testified. There must be a hearing as to whether timely disclosure would have affected the outcome. Decision withheld and matter remitted for further proceedings. (County Ct, Tompkins Co [Sherman, JJ])

Dissent: [Mercure, JP] Evidence related to the uncharged July drug sale is not *Rosario* material.

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

People v Bonville, 69 AD3d 1223, 894 NYS2d 208 (3rd Dept 2010)

The defendant’s gun discharged during a fight with his son, who was killed. The defendant was indicted on charges of second-degree murder, first- and second-degree assault, criminal use of a firearm, and (as to a separate event) unlawful dealing with a child. The parties agreed that the defendant would plead guilty to second-degree assault; all other charges would be dropped. A three-year prison sentence was recommended. The prosecution moved to dismiss the other charges, the defendant pleaded guilty, and the court accepted his plea, saying that trying the other charges would be a waste of resources and time. *See* CPL 210.40(3). However, at sentencing the court refused to accept the recommended sentence. The defendant was offered the chance to withdraw his plea and did, but objected to reinstatement of the entire indictment. He was tried and convicted of second-degree assault and unlawful dealing with a child, and acquitted of other charges.

Holding: The defendant was not entitled to specific performance of the plea bargain. He chose to withdraw the plea and did not rely on the agreement in a way that placed him in a “no-return position.” *People v McConnell*, 49 NY2d 340, 345-346. But he should have been tried only on the remaining charge of second-degree assault. He did not agree to the reinstatement. The prosecution was precluded from seeking to resubmit the charges dismissed at its request. *See People v Strudwick*, 178 AD2d 947, 948 *lv den* 80 NY2d 839. The subsequent prosecution was barred by CPL 210.20(4). The error was not harmless. *See People v Mayo*, 48 NY2d 245, 251. Judgment reversed and matter remitted for new trial on the second-degree assault charge. (Supreme Ct, Clinton Co [Lawliss, JJ])

Appeals and Writs (Judgments and Orders Appealable) (Preservation of Error for Review) **APP; 25(45) (63)**

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

People v Dalton, 69 AD3d 1235, 893 NYS2d 692 (3rd Dept 2010)

Holding: As part of his guilty plea agreement, the defendant waived his right to appeal, thereby forfeiting his right to appeal a claim that he had been denied his right to a speedy trial under CPL 30.30. *See People v Di Donato*, 87 NY2d 992, 993. “However, at the time of the plea allocution, County Court not only failed to advise defendant of this direct consequence of his plea, it specifically advised defendant that ‘you still retain your right to appeal the 30.30 decision.’ Consequently, we agree with defendant that his plea of guilty was not knowing, intelligent and voluntary. To the extent that defendant failed to properly preserve this issue, we exercise our interest of justice jurisdiction to reverse and vacate the plea (*see People v Hill*, 9 NY3d 189, 191 [2007], *cert denied* __ US __, 1128 S Ct 2430 . . .).” This rendered the defendant’s remaining contention academic. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, Rensselaer Co [McGrath, JJ])

Appeals and Writs (General) (Judgments and Orders Appealable) (Scope and Extent of Review) **APP; 25(35) (45) (90)**

Plea Bargaining (General) **PLE; 284(10)**

People v Garcia, 69 AD3d 1229, 895 NYS2d 546 (3rd Dept 2010)

The defendant was indicted on two counts of second-degree possession of a forged instrument. During plea negotiations, in response to a question by the court, the prosecutor indicated that consecutive sentences would not be sought. The defendant subsequently pleaded guilty to both counts, and received consecutive prison terms of two and a third to seven years.

Holding: The defendant’s waiver of his right to appeal at the time of his plea did not foreclose appellate review of the prosecution’s subsequent failure to honor its plea promise. *See People v Hoeltzel*, 290 AD2d 587, 588. The prosecutor originally said that consecutive sentences “‘might be a stretch’” where the defendant had only attempted to negotiate one of two credit cards, and that consecutive sentences would not be sought. The court recalled at the plea that the recommended sentence was to

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be concurrent. The prosecution later argued for the consecutive sentences that were then imposed. The defendant objected that the promise of concurrent sentences had induced his plea. The prosecution almost certainly violated the spirit of the plea agreement, entitling the defendant to a resentencing that avoids potential prejudice from the prosecution's improper recommendation and argument. *See People v Muller*, 174 AD2d 838, 839. Judgment modified, sentence vacated, matter remitted for resentencing before a different judge, and as modified, affirmed. (County Ct, Cortland Co [Campbell, JJ])

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) **GYP; 181(25)**
People v Grimm, 69 AD3d 1231, 895 NYS2d 220 (3rd Dept 2010)

The defendant was charged with several counts arising from sexual abuse, and pleaded guilty to two counts of predatory sexual assault against a child. He waived his right to appeal. The court advised him that the sentencing promise of 18 years would be binding only if the defendant continued to accept responsibility for the offenses and was honest during the presentence investigation. After the prosecution sought enhanced sentencing, the defendant unsuccessfully moved to set aside the plea. He was sentenced to 50 years in prison and five years' post-release supervision (PRS).

Holding: The defendant was not advised of the length of mandatory PRS, so vacatur is required. This issue relates to the voluntariness of his plea and survives the waiver of appeal. *See People v Seaberg*, 74 NY2d 1, 10. Preservation by postallocation motion is not required. *See People v Boyd*, 12 NY3d 390, 393. The court made a specific sentencing commitment, but PRS was mentioned only once during the plea colloquy, and the court neither promised a specific term nor specified the permissible range of such PRS. A defendant must be made aware of the promised or potential duration of the PRS component of a sentence when a negotiated sentence is part of the plea bargain. *See People v Thomas*, 68 AD3d 1445. On the facts here, reversal is required. *See People v Rivera*, 51 AD3d 1267, 1269-1270. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, Sullivan Co [LaBuda, JJ])

[*Ed. Note:* Leave to appeal was granted on May 26, 2010 (14 NY3d 888).]

Developmentally Disabled (General) **DSB; 108(30)**
Rape (Elements) (Evidence) **RAP; 320(15) (20)**
People v Dean, 70 AD3d 1193, 894 NYS2d 596 (3rd Dept 2010)

The complainant, with a 52 IQ, became pregnant. A relative claimed that intercourse had been forced by the defendant, whose IQ was 64 and who said the intercourse was consensual. The complainant chose to complete the pregnancy when tests indicated the child could not live. After a bench trial, the judge convicted the defendant of second-degree rape (based on inability to consent to sex) and endangering the welfare of a mentally incompetent person.

Holding: Where, as here, acquittal would not have been unreasonable and the weight of the evidence is challenged, the reviewing court weighs conflicting testimony, reviews rational inferences, and evaluates the strength of conclusions that may be drawn from the evidence to decide if a finding of guilt beyond a reasonable doubt was justified. *See People v Richardson*, 55 AD3d 934, 935 *lv dismd* 11 NY3d 857. All elements of the crime must be established. *See People v Danielson*, 9 NY3d 342, 349. The burden of establishing incapacity to consent is a high one. *See People v Cratsley*, 86 NY2d 81, 86. It was not met here. Whether the encounter was primarily exploitive, which is the type of harm the law seeks to prevent, is a relevant consideration. The defendant and complainant were well acquainted and were seen being affectionate; the complainant's parents, who have mental impairments, knew they were spending time together. Medical personnel gave the complainant autonomy as to reproductive choices. If the conviction is upheld, anyone having sex with the complainant would likely be committing a crime. Judgment reversed and indictment dismissed. (County Ct, Broome Co [Cerio, JJ])

Counsel (General) (Right to Counsel) **COU; 95(22.5) (30)**
Driving While Intoxicated (Evidence) **DWI; 130(15)**
People v Johnson, 70 AD3d 1188, 896 NYS2d 199 (3rd Dept 2010)

The defendant was indicted for driving while intoxicated (DWI) and charged by special information with having been previously convicted of DWI.

Holding: A defendant's invocation of the right to counsel during custodial interrogation may not be used against the defendant in the prosecutor's case-in-chief. *See People v Knowles*, 42 AD3d 662, 665. The prosecution here was allowed to introduce a videotape of the defendant's booking process in which the defendant invoked both his right to counsel and right to remain silent. The court gave curative instructions to the jury only as to the right to remain silent. The record does not support a finding that the improper evidence did not contribute to the defendant's conviction. While the defendant did not object to admission of the video, the potential for prejudice cannot

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be ignored. *See People v Murphy*, 51 AD3d 1057, 1058. Admitting into evidence the defendant’s unredacted emergency room records was also error. Two notations indicated that the defendant was intoxicated. The prosecution failed to show that whether the defendant was intoxicated had been germane to medical diagnosis or treatment for the broken clavicle he suffered. *See People v Thomas*, 282 AD2d 827, 828 *lv den* 96 NY2d 925. The reference to intoxication in the records was not admissible under the business records exception to the hearsay rule. *See CPLR 4518(a)*. As intoxication was the very issue for the jury to decide, admission of the unredacted record was not harmless. *Cf People Castillo*, 62 AD3d 540, 541 *lv den* 13 NY3d 795. The remaining issues are without merit or academic. Judgment reversed and matter remitted for a new trial. (County Ct, Fulton Co [Hoye, JJ])

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

People v Loomis, 70 AD3d 1199, 896 NYS2d 208 (3rd Dept 2010)

Following a lengthy course of proceedings, including prior indictments before different grand juries, and dismissal of 11 counts of the third indictment with leave to re-present, the prosecutor reconvened a grand jury in May 2008 and presented new evidence and a new indictment that did not include previously-dismissed counts. It did include new counts involving new theories and facts as to allegations of unlawful drug sales via the Internet. The prosecutor told the May 2008 grand jury it was about to hear a re-presentation of an indictment heard in October 2007. After the grand jury was told that it could consider all evidence including transcripts, a 33-count indictment was returned. It was dismissed without leave to re-present.

Holding: The prosecutor failed to provide guidance adequate to allow the grand jury to carry out its function. This fourth grand jury proceeding was improperly said to involve a superseding indictment; the grand jury was never told it was being presented with an entirely new indictment. The charges were based on 65 pattern criminal acts. The jury was not told how many counts to consider for each charge, what evidence related to the various counts, or which counts charged which crimes. The instructions “were so deficient and confusing that they substantially undermined the integrity of the proceedings, requiring dismissal . . .” *People v Caracciola*, 78 NY2d 1021, 1022. The dismissal court found no improper motive or other malfeasance, nor does the record reflect any. The defendant has not demonstrated that any prejudice would result from re-presentation. The lapse of 15 months between the first and fourth indictments was not so long

as to warrant denying leave to re-present. The prosecution’s ineffectiveness in complying with the court’s rulings should not prevent another attempt to properly pursue charges. Order modified, denial of leave to re-present reversed, leave to re-present granted, and as modified, affirmed. (County Ct, Albany Co [Herrick, JJ])

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

People v Onyia, 70 AD3d 1202, 894 NYS2d 610 (3rd Dept 2010)

The defendant and a co-defendant were charged with robbery, burglary, criminal use of a firearm, and possession of a weapon. The co-defendant pleaded guilty and testified against the defendant. Testimony differed among witnesses as to the number of perpetrators, who had a gun, and other facts. The defendant’s request for a missing witness charge was denied. He was convicted of several counts but acquitted of possession of a weapon. The court dismissed the use of a firearm count as a noninclusionary concurrent count, and sentenced the defendant on the remaining counts.

Holding: The missing witness, the accuser’s girlfriend, was present in the apartment when the defendant bought drugs from the accuser a few minutes before intruders came in, brandished a handgun, and took money. The testimony of others, and her statement to police, showed she was knowledgeable about the incident. The prosecution alleged her testimony would be cumulative to that of the accuser and the co-defendant, but their testimony was contradictory on some points; the girlfriend’s testimony could have been helpful. *See People v Brown*, 4 AD3d 790, 791. The court accepted without further inquiry the prosecutor’s assertion that the witness could not be found. The record does not indicate what efforts the prosecutor took to find her, and he was the only one shown to have tried. As the accuser’s girlfriend, and a victim herself having been present, she can be considered to be under the prosecutor’s control. The prosecutor failed to rebut the prima facie case established by the defense. The error in denying a missing witness charge was not harmless. Judgment reversed and matter remitted for a new trial. (Supreme Ct, Albany Co [Lamont, JJ])

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

Sex Offenses (Sentencing) SEX; 350(25)

People v Harnett, 72 AD3d 232, 894 NYS2d 614 (3rd Dept 2010)

The defendant pleaded guilty to first-degree sexual abuse, waived his right to appeal, and received an agreed-

Third Department *continued*

upon prison sentence of seven years with 10 years' post-release supervision.

Holding: Courts must advise defendants of direct consequences of their guilty pleas, but not of every collateral consequence of a conviction. *See People v Catu*, 4 NY3d 242, 244. The possibility of confinement or intensive supervision beyond the expiration of a prison term under the Sex Offender Management and Treatment Act (*see* Mental Hygiene Law article 10 [SOMTA]) is not an immediate, definite, or automatic result of the defendant's guilty plea. "SOMTA proceedings are expansive civil proceedings, which are entirely separate from and independent of the original criminal action." The determinations relevant to whether a sex offender is placed in post-sentence confinement or intensive supervision will not be based solely on admissions made at the guilty plea. "[T]he current state of the law does not require that defendants be informed of [SOMTA] prior to entering a plea of guilty." The court's entry of a more restrictive order of protection than was contemplated during plea negotiations did not render the defendant's plea invalid. Such orders are not punitive, "and are not necessarily dependent on, or the result of, a plea agreement (*see People v Nieves*, 2 NY3d 310, 316 . . .)." Judgment affirmed. (County Ct, Schenectady Co [Hoye, JJ])

Dissent: [Stein, JJ] "[W]e would find, as a matter of fundamental fairness, that the possibility of civil commitment under SOMTA must be disclosed to a defendant prior to his or her plea of guilty . . ."

Sex Offenses (General) (Sentencing) **SEX; 350(4) (25)****People v Texidor, 71 AD3d 1190, 896 NYS2d 234 (3rd Dept 2010)**


The defendant was convicted of multiple counts of first- and second-degree sexual abuse, endangering the welfare of a child, aggravated second-degree sexual abuse, and first- and second-degree criminal sexual act. The acts were alleged to have occurred over three years beginning when the accuser was 11 but not reported until a year after it ended and she had become sexually active with a boyfriend the defendant forbade her to see. The defendant's sentence included consecutive terms for counts eight and nine, second-degree sexual abuse and endangering the welfare of a child.

Holding: The court correctly denied the defendant's motion to suppress statements made to a Child Protective Services (CPS) caseworker who interviewed him in connection with a CPS investigation a month after his arrest. No evidence was presented that any member of law enforcement was present, and the defendant never asked for his attorney. The statements were not the result of interrogation by law enforcement personnel or anyone

acting under their direction or in cooperation with them. *See People v Wilhelm*, 34 AD3d 40, 44; CPL 60.45(2)(b)(ii). As the prosecution concedes, the sentences on counts eight and nine should be concurrent, not consecutive. *See* Penal Law 70.15, 70.35. The verdict was not against the weight of the evidence. Forcible compulsion must be viewed through the state of mind produced by a perpetrator in the mind of the accuser. *See People v Thompson*, 72 NY2d 410, 416. Factors to be considered include the relative size and strength, and the relationship, of the two individuals involved. *See People v Sehn*, 295 AD2d 749, 750 *lv den* 98 NY2d 732. Judgment modified, sentences on counts eight and nine to run concurrently, and as modified, affirmed. (County Ct, Clinton Co [McGill, JJ])

Counsel (Competence/Effective Assistance/Adequacy)**COU; 95(15)****People v Hull, 71 AD3d 1336, 898 NYS2d 284 (3rd Dept 2010)**

The defendant was convicted of second-degree murder. A motion pursuant to CPL 440.10 to vacate the judgment was denied without a hearing. The defendant asserted that he had not intended to shoot the decedent during an escalating argument over noise. After the decedent began pounding on the defendant's locked door while shouting, the defendant had gotten his revolver. When the defendant stepped into the hallway, the decedent, who had gone back downstairs, started back up while continuing to argue. The defendant, holding the gun, raised his hands to try to push the decedent away, and the gun fired.

Holding: While an acquittal would not have been unreasonable, the conviction was not against the weight of the evidence. However, several errors deprived the defendant of a fair trial. *See* US Const 6th Amend; NY Const, art 1, § 6. Trial counsel failed to have the gun tested and to call a gunsmith to testify about the likelihood that it accidentally discharged. Counsel did try to cross examine the prosecution's expert about a safety recall dealing with the weapon's propensity to accidentally discharge; when the expert claimed unfamiliarity with it, and the court said counsel would have to present his own expert, counsel said he would, but did not. In an affidavit filed with the 440.10 motion, an expert opined that the gun could have fired as the defendant described. Counsel's affidavit revealed no strategic reason not to call an expert. *See People v Heath*, 49 AD3d 970, 974 *lv den* 10 NY3d 959. Counsel also failed to object to the prosecutor's cross examination of the defendant about his beliefs in gun-ownership rights. Judgment and order reversed, and matter remitted for a new trial. (County Ct, Delaware Co [Becker, JJ]) 

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