`JUVENILE DELINQUENCY AND PINS CASELAW/LEGISLATIVE UPDATE

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I. NEW LEGISLATION

PENAL LAW: SEXUAL ABUSE IN THE FIRST DEGREE

Chapter 26 of the Laws of 2011 amends Penal Law § 130.65 to state that a person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact when the other person is less than thirteen years old and the actor is twenty-one years old or older.
Chapter 26 takes effect on November 1, 2011.

Penal Law: Assault on a Judge - Chapter 148 of the Laws of 2011 adds a new Penal Law § 120.09 (Assault on a judge), which states as follows:
A person is guilty of assault on a judge when, with intent to cause serious physical injury and prevent a judge from performing official judicial duties, he or she causes serious physical injury to such judge.
For the purposes of this section, the term judge shall mean a judge of a court of record or a justice court.
Assault on a judge is a class C felony.
Chapter 1449 takes effect on November 17, 2011.

Penal Law: Promoting Prostitution - Chapter 215 of the Laws of 2011 amends Penal Law § 230.20 (Promoting prostitution in the fourth degree) to state that a person is guilty of the crime when he or she knowingly "advances" prostitution, or "[w]ith intent to advance or profit from prostitution, distributes or disseminates to ten or more people in a public place obscene material, as such terms are defined by [Penal Law § 235.00(1), (2)], or material that depicts nudity, as such term is defined by [Penal Law § 245.10(1)]."
Chapter 215 takes effect on November 17, 2011.

Penal Law: Prostitution in a School Zone - Chapter 191 of the Laws of 2011 adds a new Penal Law § 230.03 (Prostitution in a school zone), which states as follows:
"1. A person is guilty of prostitution in a school zone when, being nineteen years of age or older, and acting during the hours that school is in session, he or she commits the crime of prostitution in violation of [Penal Law § 230.00] at a place that he or she knows, or reasonably should know, is in a school zone, and he or she knows, or reasonably should know, that such act of prostitution is within the direct view of children attending such school.
2. For the purposes of this section and [new Penal Law § 230.19] "school zone" means (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior

high, vocational, or high school, or (b) any public sidewalk, street, parking lot, park, playground or private land, located immediately adjacent to the boundary line of such school.
Prostitution in a school zone is a class A misdemeanor."
Chapter 191 also adds a new Penal Law § 230.19 (Promoting prostitution in a school zone), which states as follows:
“1. A person is guilty of promoting prostitution in a school zone when, being nineteen years of age or older, he or she knowingly advances or profits from prostitution that he or she knows or reasonably should know is or will be committed in violation of [Penal Law § 230.03] in a school zone during the hours that school is in session.
2. For purposes of this section, "school zone" shall mean "school zone" as defined in [Penal Law § 230.03(2)].
Promoting prostitution in a school zone is a class E felony.”
Chapter 191 takes effect on November 17, 2011.

Penal Law: Witness or Victim of Drug or Alcohol Overdose - Chapter 154 of the Laws of 2011 adds a new Penal Law § 220.78 (Witness or victim of drug or alcohol overdose), which states as follows:
“1. A person who, in good faith, seeks health care for someone who is experiencing a drug or alcohol overdose or other life threatening medical emergency shall not be charged or prosecuted for a controlled substance offense under [Penal Law article 220 or a marihuana offense under [Penal Law article 221], other than an offense involving sale for consideration or other benefit or gain, or charged or prosecuted for possession of alcohol by a person under age twenty-one years under section sixty-five-c of the alcoholic beverage control law, or for possession of drug paraphernalia under article thirty-nine of the general business law, with respect to any controlled substance, marihuana, alcohol or paraphernalia that was obtained as a result of such seeking or receiving of health care.
2. A person who is experiencing a drug or alcohol overdose or other life threatening medical emergency and, in good faith, seeks health care for himself or herself or is the subject of such a good faith request for health care, shall not be charged or prosecuted for a controlled substance offense under this article or a marihuana offense under [Penal Law article 221], other than an offense involving sale for consideration or other benefit or gain, or charged or prosecuted for possession of alcohol by a person under age twenty-one years under section sixty-five-c of the alcoholic beverage control law, or for possession of drug paraphernalia under article thirty-nine of the general business law, with respect to any substance, marihuana, alcohol or paraphernalia that was obtained as a result of such seeking or receiving of health care.
3. Definitions. As used in this section the following terms shall have the following meanings:
(a) "Drug or alcohol overdose" or "overdose" means an acute condition including, but not limited to, physical illness, coma, mania, hysteria or death, which is the result of consumption or use of a controlled substance or alcohol and relates to an adverse reaction to or the quantity of the controlled substance or alcohol or a substance with which the controlled substance or alcohol was combined; provided that a patient's condition shall be deemed to be a drug or alcohol overdose if a prudent layperson, possessing an average knowledge of medicine and health, could reasonably believe that the condition is in fact a drug or alcohol overdose and (except as to death) requires health care.

(b) "Health care" means the professional services provided to a person experiencing a drug or alcohol overdose by a health care professional licensed, registered or certified under title eight of the education law or article thirty of the public health law who, acting within his or her lawful scope of practice, may provide diagnosis, treatment or emergency services for a person experiencing a drug or alcohol overdose.

4. It shall be an affirmative defense to a criminal sale controlled substance offense under this article or a criminal sale of marihuana offense under [Penal Law article 221], not covered by subdivision one or two of this section, with respect to any controlled substance or marihuana which was obtained as a result of such seeking or receiving of health care, that: (a) the defendant, in good faith, seeks health care for someone or for him or herself who is experiencing a drug or alcohol overdose or other life threatening medical emergency; and (b) the defendant has no prior conviction for the commission or attempted commission of a class A-I, A-II or B felony under this article.

5. Nothing in this section shall be construed to bar the admissibility of any evidence in connection with the investigation and prosecution of a crime with regard to another defendant who does not independently qualify for the bar to prosecution or for the affirmative defense; nor with regard to other crimes committed by a person who otherwise qualifies under this section; nor shall anything in this section be construed to bar any seizure pursuant to law, including but not limited to pursuant to [Public Health Law § 3387].

6. The bar to prosecution described in subdivisions one and two of this section shall not apply to the prosecution of a class A-I felony under this article, and the affirmative defense described in subdivision four of this section shall not apply to the prosecution of a class A-I or A-II felony under this article."

Chapter 154 amends Penal Law § 220.03 to conform to the new legislation.

Chapter 154 takes effect on September 18, 2011.

Penal Law - Obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance - Chapter 327 of the Laws of 2011 adds a new Penal Law § 195.17 (Obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance), which states as follows:

A person is guilty of obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance when he or she, in furtherance of a felony offense, knowingly and unlawfully installs or causes to be installed a bomb, destructive device, explosive, or hazardous substance, in any object, place, or compartment that is subject to a search so as to obstruct, prevent, hinder or delay the administration of law or performance of a government function.

Obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance is a class D felony.

Chapter 327 takes effect on November 1, 2011.

CPLR - Subpoenas - Chapter 307 of the Laws of 2011 amends CPLR §§ 2302(b) and 3122(a) to make it clear that in the absence of an authorization by a patient, a trial subpoena duces tecum for the patient's medical records may be issued by a court.

Chapter 307 took effect on August 3, 2011.

THE INTERSTATE COMPACT FOR JUVENILES - Chapter 29 of the Laws of 2011 repeals Chapter 155 of the laws of 1955 - the former Interstate Compact on Juveniles - and codifies the new Interstate Compact for Juveniles in new Executive Law § 501-e. Attorneys and other advocates for children should go to this link for a very useful advocacy kit, which includes the ICF Rules:
http://www.csg.org/knowledgecenter/docs/ncic/ICJ-ResourceKit.pdf

The Compact has thirteen Articles: I (Purpose); II (Definitions); III (Interstate Commission for Juveniles); IV (Powers and Duties of the Interstate Commission); V (Organization and Operation of the Interstate Commission); VI (Rulemaking Functions of the Interstate Commission); VII (Oversight, Enforcement and Dispute Resolution by the Interstate Commission); VIII (Finance); IX (The State Council); X (Compacting States, Effective Date and Amendment); XI (Withdrawal, Default, Termination and Judicial Enforcement); XII (Severability and Construction); XIII (Binding effect of Compact and Other Laws).

The Article III "Interstate Commission for Juveniles" "shall be a body corporate and joint agency of the compacting states," which "shall have all the responsibilities, powers and duties set forth herein, and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact." Under Article IV, the Commission's powers and duties include: Providing for dispute resolution among compacting states; Promulgating rules to effect the purposes and obligations as enumerated in this compact, which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact; Overseeing, supervising and coordinating the interstate movement of juveniles subject to the terms of this compact and any bylaws adopted and rules promulgated by the interstate commission; Enforcing compliance with the compact provisions, the rules promulgated by the interstate commission, and the bylaws, using all necessary and proper means, including but not limited to the use of judicial process.

Chapter 29 also adds to the Executive Law: § 501-f (Commissioner for the interstate compact for juveniles); § 501-g (State council for interstate juvenile supervision); and § 501-h (Detention and appointment of an attorney for the child for proceedings under the interstate compact for juveniles).

New § 501-h states:
1. If a juvenile is detained under the interstate compact for juveniles established pursuant to [Executive Law § 501-e], he or she shall be brought before the appropriate court within seventy-two hours or the next day the court is in session, whichever is sooner, and shall be advised by the judge of his or her right to remain silent, his or her right to be represented by counsel of his or her own choosing, and of the right to have an attorney assigned in accord with, as applicable, [FCA § 249] or article eighteen-B of the county law. The youth shall be allowed a reasonable time to retain counsel, contact his or her parents or other person or persons legally responsible for his or her care or an adult with whom the youth

has a significant connection, and the judge may adjourn the proceedings for such purposes. Provided, however, that nothing in this section shall be deemed to require a youth to contact his or her parents or other person or persons legally responsible for his or her care. Provided further, however, that counsel shall be assigned immediately, and continue to represent the youth until any retained counsel appears. The court shall schedule a court appearance for the youth no later than ten days after the initial court appearance, and every ten days thereafter, while the youth is detained pursuant to the interstate compact for juveniles unless any such appearance is waived by the attorney for the child.
2. All youth subject to proceedings governed by the interstate compact for juveniles established pursuant to [Executive Law § 501-e] shall be appointed an attorney pursuant to, as applicable, [FCA § 249] or article eighteen-B of the county law if independent legal representation is not available to such youth.

Chapter 29 also makes conforming amendments to FCA § 249 and FCA § 249-a (waiver of counsel).

Chapter 29 takes effect on June 23, 2011 and expires on September 1, 2013, when the provisions of chapter 155 of the laws of 1955 would be revived.

EXCERPTS FROM SPONSORS MEMO:
This bill would enact the most current Interstate Compact for Juveniles (New ICJ), which governs the management, monitoring, and supervision of juveniles, delinquents and status offenders who are on probation or parole and the return of those who have absconded, escaped or run away to another state; and provide for the return of non-adjudicated juveniles who have run away from home to another state.
New York and other states have entered into several interstate compacts that coordinate state activities affecting other States. In addition to the 1955 ICI, these compacts include the Interstate Compact on the Placement of Children and the Interstate Compact for Adult Supervision. Each compact member state must enact uniform legislation providing for joint and cooperative action among the states regarding the subject matter of that compact.
By its terms, the New ICJ became effective in 2008 when the 35th state enacted the new ICJ legislation. Similar to the 1955 ICJ, the primary purpose of the New ICJ is to manage the relationship between states that send and states that receive adjudicated juveniles and status offenders who are on parole or probation regarding the provision of services and supervision. The New ICJ also governs the return of a juvenile who absconds to another state while under supervision or after being accused of a crime. The New ICJ additionally provides for the return of a non-adjudicated juvenile who runs away from his or her state of residence.
The New ICJ creates an Interstate Commission for Juveniles (Commission) to oversee, supervise and coordinate the interstate movement of juveniles. The Commission is made up of "commissioners" who are the Compact administrators or designees from each of the member states. Member states pay dues for the operation and 'staffing of the Commission. Only member states may vote on Commission matters, but nonmember states may attend Commission meetings. The Commission is permanently staffed to perform its duties.

Probation Supervision: Inter-county Transfer - Chapter 97 of the Laws of 2011, inter alia, amends FCA § 176 (Inter-county probation) by deleting the prior language, and replacing it with the following:

"1. Where a person placed on probation resides in another jurisdiction within the state at the time of the order of disposition, the family court which placed him or her on probation shall transfer supervision to the probation department in the jurisdiction in which the person resides. Where, after a probation disposition is pronounced, a probationer requests to reside in another jurisdiction within the state, the family court which placed him or her on probation may, in its discretion, approve a change in residency and, upon approval, shall transfer supervision to the probation department serving the county of the probationer's proposed new residence. Any transfer under this subdivision must be in accordance with rules adopted by the commissioner of the division of criminal justice services.

2. Upon completion of a transfer as authorized pursuant to subdivision one of this section, the family court within the jurisdiction of the receiving probation department shall assume all powers and duties of the family court which placed the probationer on probation and shall have sole jurisdiction in the case. The family court which placed the probationer on probation shall immediately forward its entire case record to the receiving court.

3. Upon completion of a transfer as authorized pursuant to subdivision one of this section, the probation department in the receiving jurisdiction shall assume all powers and duties of the probation department in the jurisdiction of the family court which placed the probationer on probation."

This amendment took effect on June 24, 2011.

CPLR - Subpoenas - Chapter 307 of the Laws of 2011 amends CPLR §§ 2302(b) and 3122(a) to make it clear that in the absence of an authorization by a patient, a trial subpoena duces tecum for the patient's medical records may be issued by a court.

Chapter 307 took effect on August 3, 2011.

II. JUVENILE DELINQUENCY CASELAW

Detention

DETENTION - Time Computation - Pre-Petition Detention

Family Court Act § 307.4(7) states that a juvenile delinquency petition must be filed and a probable cause hearing held "within four days of the conclusion of" a pre-petition detention hearing. In this case, the family court remanded respondent for six days from a Tuesday to the following Monday. At the pre-petition hearing, the court noted that because the fourth day fell on a Saturday and 21 cases were scheduled for Friday, she was adjourning the matter to the next business day for the filing of the petition and a probable cause hearing.

After finding that the appeal satisfies the criteria for the mootness exception, the Second Department holds that the family court erred in applying General Construction Law § 25-a(1) to extend the period of pre-petition detention under § 307.4(7).

GCL § 25-a(1) provides: "When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day." Under GCL § 110, the General Construction Law "is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter."

The plain language of § 307.4(7) contains no indication that extensions for weekends or holidays were intended. While other provisions of the Family Court Act allow the court to grant adjournments upon a showing of good cause or special circumstances at various stages of the proceeding after a petition is filed, § 307.4(7) does not provide for any adjournment of the filing of the petition. Section 307.4(7) was enacted as part of the 1982 revisions of the Family Court Act, which established strict time limits for all phases of the proceeding despite concerns that the restrictions would impose an undue burden on the Family Court system. This suggests that the Legislature weighed all of the competing considerations and found the goal of speedy resolution of charges to be paramount.

Moreover, the different time limitations for detained and non-detained children reflect a long-held legislative recognition that detention is a drastic measure that may cause lasting damage in children who are needlessly detained. The application of General Construction Law § 25-a to Family Court Act § 307.4(7) would be inconsistent with the statute's general object of swift adjudication and the Legislature's concern regarding the needless detention of children. Applying § 25-a would extend detention by up to three days (taking into account holiday weekends) without a showing of good cause or special circumstances.

Matter of Kevin M.
(2d Dept., 6/14/11)

Adjustment/ACD/Dismissal in Furtherance of Justice

DISPOSITION - Least Restrictive Alternative
ADJOURNMENT IN CONTEMPLATION OF DISMISSAL

In a 3-2 decision, the First Department affirms an order that adjudicated respondent a juvenile delinquent upon her admission to assault in the third degree, and placed her on probation for a period of 12 months. The family court did not err in refusing to order a conditional discharge. The charges stem from an attempted robbery, and respondent admitted punching the victim in the face. The probation officer concluded that respondent could benefit from services such as anger management counseling and "close school monitoring," which may "help to deter further criminal behavior." Respondent admitted to associating with negative peers, missed 34 days of school and was late 74 times, was not involved in any outside activities, admitted that her relationship with her mother was somewhat strained because of respondent's poor attitude, did not express remorse and claimed it was a simple fight, and admitted to cutting herself several years ago because "she felt alone and sad." Respondent's mother has a conviction for driving while intoxicated, a robbery arrest, and an arrest for fighting with her sister, and respondent's father has been incarcerated on a charge of attempted murder since respondent was born, and thus respondent is unlikely to be properly supervised at home. Respondent's claim that the court mistakenly relied on a belief that respondent drank alcohol socially is not preserved, and, in any event, the disposition was the least restrictive alternative.

The dissenting judges assert that although the majority emphasizes the negative findings concerning respondent, the probation report also indicated that respondent obeys her mother and her curfews, gets along well with her siblings, is well liked by her teachers, has had no prior involvement with the law, and has maintained grade averages in the mid-70s despite school absences, some of which were attributable to the time involved in the administrative hearing resulting from this incident. The "somewhat strained" relations with her mother are, if anything, typical of relations between 14- or 15-year-old girls and their mothers. Respondent did not show a lack of remorse; she fully admitted to committing the charged act and acknowledged her need to control her anger. Her cutting herself several years earlier during a period of sadness should not be considered as a dispositional factor. "Although [respondent] is not blessed with parents who are able to provide optimal supervision, she is obedient and has no history of behavioral problems." A supervised adjournment in contemplation of dismissal would involve adequate supervision and would not impose the stigma of a juvenile delinquency adjudication.

In re Lameka P.
(1st Dept., 6/30/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The First Department reverses an order adjudicating respondent a juvenile delinquent upon his admission that he had committed possession of graffiti instruments and criminal possession of marihuana in the fifth degree, and imposing a conditional discharge for a period of 12 months, and remands the matter remanded to the family court with the direction to order a supervised adjournment in contemplation of dismissal.

The Court notes that respondent was 13 years old at the time of the adjudication; that the offenses were minor, were respondent's first offenses, and occurred over a short period of time when, through no fault of his own, respondent was not receiving his psychiatric medication; that respondent's mother was actively involved in his home and school life, and she recognized and addressed respondent's need for psychiatric treatment prior to any intervention by the court; and that at the time of the dispositional hearing, respondent was receiving appropriate medication and therapy.

In re Tyvan B.
(1st Dept., 5/5/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The First Department upholds an order adjudicating respondent a juvenile delinquent after he made an admission to assault in the third degree, and placing him on probation for a period of 12 months, and rejects respondent's claim that the court should have ordered an adjournment in contemplation of dismissal.

The disposition, which provided a full year of supervision, was the least restrictive alternative consistent with the needs of respondent and the community. Respondent committed a violent act that injured another boy, and had a pattern of school and behavioral problems.

In re Shareef S.
(1st Dept., 6/14/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The First Department reverses an order adjudicating respondent a juvenile delinquent upon a finding of grand larceny in the fourth degree and placing him on probation for 12 months, and remands the matter with a direction to order an adjournment in contemplation of dismissal.

A supervised ACD would adequately serve the needs of respondent and society. The underlying offense did not involve injuries or weapons. This was respondent's first offense and he had no history of behavioral problems, was generally doing well at school and had a very favorable report from a work-study program in which he participated. Respondent had been removed from his mother at a young age and spent many years in difficult foster care situations before being returned to his home. Respondent's "troubled family background did not warrant a finding of juvenile delinquency, particularly since he had made significant progress in overcoming the effects of that background."

In re Julian O.
(1st Dept., 1/25/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

While upholding findings of, inter alia, attempted robbery in the second and third degrees and a conditional discharge order, a 3-judge First Department majority finds that the offense, for which respondent has expressed no remorse, was not the sort of minor first offense for which an adjournment in contemplation of dismissal would be appropriate. Respondent's act involved premeditation, planning and concerted action with confederates. In any event, respondent made no request for an ACD before the finding of delinquency.

The dissenting judges assert that there was no evidence that respondent was in need of supervision, treatment or confinement and the court did not order any. The court left it up to respondent's school to address any issues he might have, and stated that "there is not any significant or negative information that relates to anything that would be delinquency." Respondent had no prior arrest record, comes from a stable home and is not a disciplinary problem at home or at school. The complainant was not hurt and no property was taken from him. "This is the sort of minor first offense that should result in an ACD, a dispositional alternative that would not stigmatize defendant as a juvenile delinquent…."

In re Derrick H.
(1st Dept., 1/13/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The First Department affirms an order adjudicating respondent a juvenile delinquent and placing him on probation following fact-findings of attempted assault in the second and third degrees, resisting arrest, and obstructing governmental administration in the second degree.

The court properly denied respondent's request for an adjournment in contemplation of dismissal. The underlying conduct was a serious assault on an unarmed person with a weapon made of a sock weighted with a padlock. As his companion struck the victim, respondent held the victim from behind and punched him. Also, respondent refused to acknowledge the seriousness of his offense.

In re Joseph K.
(1st Dept., 3/29/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The Second Department affirms an order adjudicating respondent a juvenile delinquent upon a finding of attempted assault in the third degree, and placing him on probation for a period of eighteen months.

Respondent was not entitled to an adjournment in contemplation of dismissal merely because this was his first encounter with the law or in light of the other mitigating circumstances he cites. The family court's disposition was appropriate in light of the violent nature of the incident, respondent's poor academic and school attendance record, a school disciplinary record which included five suspensions, his failure to take responsibility for his actions, and the recommendation in the probation report.

Matter of Liston J.
(2d Dept., 2/1/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_00689.htm

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The Second Department affirms an order adjudicating respondent a juvenile delinquent upon a finding of criminal possession of marijuana in the fifth degree, and placing him on probation for a period of nine months.

Respondent was not entitled to an adjournment in contemplation of dismissal merely because this was his first brush with the law. Factors supporting the family court's order include probation's recommendation, and respondent's poor academic and attendance record, incidents of misbehavior at school, and failure to take responsibility for his actions.

Matter of Antoine H.
(2d Dept., 2/1/11)

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DISPOSITION - Least Restrictive Alternative
- Community Service
ADJOURNMENT IN CONTEMPLATION OF DIMISSAL

The Second Department affirms a dispositional order which, after a finding of, inter alia, robbery in the second degree, adjudicated respondent a juvenile delinquent and placed him on probation for a period of 18 months and, inter alia, directed him to perform 200 hours of community service. Respondent was not entitled to an adjournment in contemplation of dismissal merely because this was his first brush with the law or in light of the other mitigating circumstances.

Matter of Gustav D.
(2d Dept., 12/14/10)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

In a case in which respondent made an admission to petit larceny, and the family court adjudicated respondent a juvenile delinquent and imposed a conditional discharge, the First Department rejects respondent's claim that the court abused its discretion when it refused to order an adjournment in contemplation of dismissal.

The Court notes the seriousness of the underlying incident, respondent's history of school disciplinary problems, and the very short duration of the supervision that an ACD might have provided.

In re Mamadiou D.
(1st Dept., 11/4/10)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL - Restitution Condition

The Fourth Department finds no abuse of discretion where the family court, in a case in which it was alleged that respondent and other juveniles committed unauthorized use of a vehicle in the third degree, granted an adjournment in contemplation of dismissal upon the condition that respondent pay $800 as restitution for damage to the vehicle that he and the other juveniles used.

Respondent failed to preserve his contention that the court was required to consider his ability to pay before ordering him to pay restitution.

Matter of Dante P.
(4th Dept., 2/10/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative
PLEAS - Allocution

The Third Department finds no error in the family court's acceptance of respondent's admission to reckless criminal mischief in the fourth degree. Respondent's admission that he and his friend lit firecrackers in a barn, together with his acknowledgment that he understood that such conduct constituted a reckless action, was sufficient; although respondent did not explicitly state that he knowingly disregarded the risk, that can be inferred from his admission.

The family court also properly denied respondent's request for an adjournment in contemplation of dismissal and ordered a conditional discharge. This is respondent's first involvement with the juvenile justice system, he is not a disciplinary problem, is a good student and his risk of recidivism is low. But, in concert with a co-participant, he caused the destruction of the barn and its contents, damage that was valued at over one million dollars. He admitted to initially lying to police and showed little remorse, and also admitted to occasionally consuming alcohol and smoking marihuana starting at age 13.

Matter of Orazio A.
(3d Dept., 2/17/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The First Department affirms a dispositional order that, upon a finding of attempted assault in the third degree and menacing in the third degree, placed respondent on probation for a period of nine months.

The family court properly exercised its discretion in denying respondent's request for an adjournment in contemplation of dismissal. The offense "was not a simple schoolboy fight"; respondent insisted on fighting after the complainant twice refused to do so. In addition, respondent had disciplinary and academic problems at school and his mother was unable to supervise him adequately. The Court also notes the very short duration of any supervision that an ACD might have provided.

In re Akeem B.
(1st Dept., 2/17/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The First Department finds no error where the family court denied respondent's request for an adjournment in contemplation of dismissal, and adjudicated him a juvenile delinquent and imposed a conditional discharge, with the condition that he participate in a sex offender treatment program.

The Court notes that the underlying incident was serious - when nearly 16 years old, respondent engaged in sexual conduct with a 10-year-old girl - and the very short duration of supervision an ACD might have provided.

In re Bryant M.
(1st Dept., 3/10/11)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
SEARCH AND SEIZURE - Reasonable Suspicion
- Credibility Of Police Testimony
HEARSAY - Excited Utterances

According to the officers' testimony at the suppression hearing and at trial, they received a radio run stating that a few young men with a firearm were a few blocks away and that one of them was black, wearing a blue shirt, blue jeans and sneakers. The officers saw three young men, one of whom (not respondent) fit the description, running in front of their car and away from bystanders, who yelled, "That's them!" The officers yelled "Stop!" and all three stopped. The officers searched the one who fit the description and found nothing. Then they searched respondent, who had a sweatshirt over his arm, and found something that looked like a broken gun wrapped in his sweatshirt. They cuffed the three young men and placed them on the ground. Bystanders told the officers that the young men were pointing the gun and passing it around. Although one officer testified at the suppression hearing that he recovered the toy gun from respondent, he equivocated when reminded that he testified otherwise at a preliminary hearing. He agreed that he might have told others, including respondent's mother, that he did not recover the gun from respondent. He also claimed that he was unable to obtain the names of any witnesses who claimed to have seen all of the boys handling the gun, and the other officer stated that there was no need to interview witnesses.

A defense witness who was employed by the New York City Department of Education testified that she was eight feet away when the gun was retrieved from an olive green jacket taken from a boy other than respondent. She recognized respondent because he came to her school to pick up his younger siblings and a cousin at dismissal time. She stated that none of the bystanders rushed over to say "That's them." Respondent's mother testified that she went to the precinct and spoke to one of the officers and asked him if her son had the gun, and the officer said, "Let me see," left and came back and told her that her son did not have the gun and another juvenile did.

The family court credited the officers. The court discounted the testimony of the eyewitness because she said she did not see people jumping up and down or hear anyone say "That's them," and because she could not have been eight feet away when the police officers were arresting suspects. The court discounted the testimony of respondent's mother because she had reason to protect her son.

The First Department, in a 3-2 decision, reverses the order adjudicating respondent a juvenile delinquent upon a fact-finding of possession of an imitation firearm, and placing him on probation for a period of 12 months, and remands the matter with the direction to order an adjournment in contemplation of dismissal.

The Court concludes that the police had reasonable suspicion justifying a stop and frisk of the boys. The Court also concludes that respondent was not deprived of the effective assistance of counsel or of due process by defense counsel's failure to seek to reopen the suppression hearing based on the testimony at the fact-finding hearing, since that testimony could not have affected the suppression ruling.

However, the officers' testimony at the fact-finding hearing that unnamed bystanders told them that the boys had been passing the gun around and pointing it at persons outside the school building was inadmissible hearsay. Those statements, unlike the statement "That's them," were not excited utterances. The family court's complete rejection of the testimony of respondent's witnesses "appears to have been arbitrary." The officers testified from memory, their testimony regarding retrieval of the toy gun was not completely consistent, and they saw no need to obtain the names of any of the bystanders who supposedly told them what the boys had been doing with the toys before they were apprehended.

Because respondent briefly possessed the broken toy gun, the Court does not dismiss the petition. In view of respondent's very limited role in the incident and lack of a prior record, a supervised adjournment in contemplation of dismissal is the least restrictive available alternative.

In re Jahloni G.
(1st Dept., 4/14/11)

* * *

ADJUSTMENT

The Court denies an application by the New York City Department of Probation for leave of court to continue its adjustment efforts for an additional two-month period where the youth was charged with criminal possession of a weapon in the fourth degree for allegedly possessing a switchblade knife. The Court notes, inter alia, that the Department of Probation enrolled the youth in a substance abuse program, but the program has yet to have had any success in curbing his abuse of marijuana; that the alleged criminal act appears to be part of a larger pattern of maladaptive behavior which includes a failure to attend school, to pass classes, and to adhere to school rules, and the continuing abuse of marijuana.

Although the Court routinely approves requests to continue adjustment services because adjustment often entails ameliorative measures, there is little indication in this case that such efforts will prove successful without the authority of the Court to compel participation and compliance. The Court also notes that the youth is about to turn 16 years of age and become subject to criminal prosecution for further violations of law.

Matter of Edwin R.
NYLJ, 4/25/11
(Fam. Ct., Queens Co., 4/15/11)

* * *

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The First Department holds that the family court properly denied respondent's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and imposed a period of probation, given the seriousness of the offense (respondent brought a knife to school and brandished it at a schoolmate, which resulted in injury to the other boy), and respondent's poor school record.

In re Akilino R.
(1st Dept., 4/26/11)

* * *

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The First Department holds that the family court properly denied respondent's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and imposed a conditional discharge that provided a longer period of supervision than an ACD, where respondent had swung a bicycle chain at a much younger child in an effort to intimidate and punish him, and injured the child.

In re Anthony N.
(1st Dept., 4/26/11)

Jurisdiction

JURISDICTION

Although the juvenile delinquency petition included only charges over which the family court has original jurisdiction, the family court *sua sponte* dismissed the petition, with prejudice, on the ground that the complainant's sworn deposition set forth facts which, if proved at trial, supported a finding of rape in the first degree, an offense for which original jurisdiction lies with a criminal court.

The Second Department reverses. Whether the family court has original jurisdiction depends on the charges set forth in the petition, not the crimes for which the juvenile could have been charged. "The Family Court's interpretation of the statutory scheme would, in effect, strip a District Attorney of his or her broad prosecutorial discretion, which, among other things, includes a determination not to prosecute a juvenile offender in criminal court, but instead to allow the Presentment Agency to pursue reduced charges in Family Court. . . ." Here, where the District Attorney declined to prosecute respondent in criminal court, the dismissal of the petition in family court would effectively relieve respondent of any accountability for his alleged serious misconduct.

Matter of Trevon Y.
(2d Dept., 2/15/11)

* * *

JURISDICTION
JUVENILE OFFENDERS

The petition charges respondent with the commission of five completed crimes, including robbery in the second degree, grand larceny in the fourth degree and menacing in the second degree, and also charges respondent with attempted robbery in the first degree.

In *Matter of Travis Y.* (27 Misc.3d 557), the Court concluded that it was impermissible for the presentment agency to file a juvenile delinquency petition against a 14-year-old male charging only acts which could not be charged in a juvenile offender proceeding where the non-hearsay factual allegations established, if true, that the perpetrator committed the crime of rape in the first degree, which is a juvenile offender offense for which the defense of infancy was unavailable. The Court concluded that there could be no exercise of the Court's juvenile delinquency jurisdiction absent a removal from a criminal court.

In this case, the Court dismisses the attempted first degree robbery charge on the same grounds.

Matter of Kaminski G.
(Fam. Ct., Queens Co., 9/2/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20366.htm

Statute of Limitations

STATUTE OF LIMITATIONS - Tolling

For certain sex crimes committed against children, the statute of limitations is tolled until the child reaches the age of 18, or the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment, whichever is first [CPL § 30.10(3)(f)].

The Second Department holds that the charged sex crimes were not "reported" when the complainant first spoke to the police about an alleged rape resulting in her pregnancy, but never mentioned defendant. The report contemplated by the statute must provide a description of harm caused by the offender and the crimes charged must derive, at least in part, from this report. It would be completely contrary to the spirit of the statute to conclude that the statute of limitations is triggered where, as here, a child falsely reports that she was raped by another child at school and then recants the allegation, and was in reality being sexually abused at home by someone with whom she has an ongoing familial relationship.

However, with respect to non-sex-related charges, the lower court properly determined that CPL § 30.10(4)(a)(ii), which excludes "[a]ny period following the commission of the offense during which . . . the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence," did not apply. For the five years at issue, the police were not aware that a crime was committed against the complainant by defendant.

People v. Santos Quinto
(2d Dept., 8/31/10)

Petitions

POSSESSION OF A WEAPON - Gravity Knife
- Dangerous Knife
POSSESSION OF A WEAPON BY PERSONS UNDER SIXTEEN

The Second Department finds facially sufficient a gravity knife possession charge where the arresting officer's supporting deposition contains a description of the gravity knife and its operation, based upon the officer's personal observations and handling of the knife. The Court also finds facially sufficient a charge that respondent possessed a dangerous knife where the

petition and supporting deposition allege that respondent possessed a knife approximately 13 inches in length with an 8-inch blade.

However, the Court dismisses as facially insufficient a charge of unlawful possession of weapons by persons under 16 since neither the petition nor the supporting deposition provide a sworn, nonhearsay allegation as to respondent's age, which is an element of the offense. This is a nonwaivable jurisdictional defect.

Matter of Michael Grudge M.
(2d Dept., 1/11/11)

* * *

POSSESSION OF A WEAPON - Gravity Knife

The Court finds facially sufficient a charge of criminal possession of a weapon in the fourth degree where it is alleged that the officer recovered a gravity knife from defendant, which he tested, and that the knife blade "released from the handle by the force of gravity or centrifugal force and locked in place by means of a button, spring, lever or other device."

There is no requirement that the officer refer to his prior experience or training; his conclusion that the knife was a gravity knife was based on his testing of the knife.

People v. Mathis
(Crim. Ct., Richmond Co., 6/24/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51183.htm

* * *

POSSESSION OF A WEAPON BY PERSONS UNDER 16 - Dangerous Knife

The First Department finds facially sufficient a charge of unlawful possession of weapons by persons under 16 where the circumstances, including respondent's behavior in placing the knife down the front of her pants, indicated that she considered it a weapon of significance and not an innocent utilitarian utensil. The allegations were sufficient to allege possession of a "dangerous knife."

Matter of Carolina P.
(2d Dept., 4/12/11)

* * *

POSSESSION OF A WEAPON BY PERSONS UNDER 16

The First Department, noting its agreement with the Second Department, holds that a failure to include in the petition sworn allegations establishing the age element of unlawful possession of weapons by persons under 16 is a nonwaivable jurisdictional defect.

The deposition merely stated, without elaboration, that during arrest processing the officer was able to determine that respondent was 15 years old. There was no explanation of how the officer learned respondent's age.

In re Devon V.
(1st Dept., 4/12/11)

* * *

POSSESSION OF A WEAPON BY PERSONS UNDER SIXTEEN

The Second Department reverses a finding of unlawful possession of weapons by persons under the age of 16 where the petition contains no sworn, nonhearsay allegations as to respondent's age, which is an element of the crime.

Matter of Divine D.
(2d Dept., 12/17/10)

* * *

ACCUSATORY INSTRUMENTS - Multiplicitous Counts

The Court of Appeals, finding that the indictment as returned by the grand jury was multiplicitous, holds that where the evidence before the grand jury shows a single, uninterrupted attack in which the attacker gropes several parts of a victim's body, the attacker may be charged with only one count of sexual abuse.

"To hold that each such movement of the hand may be prosecuted as a separate crime would be contrary to common sense." Although the People suggest that it would have been duplicitous to include the groping of each victim's breasts and buttocks in a single count, none of the Court's leading cases on duplicity involves a single, uninterrupted criminal act.

People v. Jose Alonzo
(Ct. App., 2/24/11)

* * *

POSSESSION OF DRUGS - Identity Of Substance - Sufficiency Of Allegations

The First Department finds drug possession allegations facially sufficient where the supporting deposition stated that an officer observed defendant remove from his waistband a condom containing eight glassines of beige powdery substance, which the officer concluded to be heroin based on his training and experience, "includ[ing] training in the recognition of controlled substance, and its packaging."

People v. Donald Pearson
(1st Dept., 11/9/10)

* * *

PHYSICAL INJURY
RESISTING ARREST

The Court finds facially insufficient charges of assault in the third degree where it is alleged that the complainant sustained "lacerations" to his right knee, and that as a result of a single punch "about the left side of the face" of the seated complainant, there was "bruising, swelling and substantial pain."

The Court also dismisses as facially insufficient a charge of resisting arrest where it is alleged that after the officer informed defendant that he was an off-duty police officer, defendant "attempted to flee by flailing his arms and attempting to run from the train." There are no allegations establishing that the officer was making an arrest, and, in any event, there was no reasonable cause authorizing an arrest for intentional or reckless assault.

People v. Anthony Ingrilli
(Dist. Ct., Nassau Co., 2/25/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50747.htm

* * *

PHYSICAL INJURY

The Court finds facially sufficient a charge of assault in the third degree where defendant is the eight-year-old complainant's 6 foot three inch tall, 210 pound father, and the complainant alleges that she was "punched in [the] right eye causing me pain and making me cry."

A punch is not a petty slap, and is intended to inflict pain. The arresting officer observed a one-inch laceration to the complainant's eye, which rises above the level of trivial, and the Court can reasonably infer substantial pain.

People v. Paul Smith
(Albany City Ct., 7/25/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51382.htm

* * *

PHYSICAL INJURY - Sufficiency Of Allegations

The Court dismisses as facially deficient a charge of assault in the third degree where it is alleged that, during a struggle with defendant, who "did flail his arms" while resisting arrest, the officer "suffered a severe knee sprain requiring immediate medical attention." There is no indication that the officer actually received medical attention, or that the officer has medical training which would permit him to diagnose a "severe knee sprain," or that he sustained an impairment of physical condition or substantial pain.

People v. Luckelson Frederique
(Dist. Ct., Nassau Co., 4/18/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50680.htm

* * *

PHYSICAL INJURY

The Court finds facially sufficient a charge of assault in the third degree where the accusatory instrument includes no allegations by the alleged victim, but it is alleged that defendant struck her in the head two times with a closed fist; that defendant stood above her during the assault, straddling her body as she lay on the ground; that defendant was punching her so hard [that the witness] could hear it over New York City noise; that the witness heard the victim's cries; and that she suffered physical injury and had redness on her forehead.

While the strongest allegation about physical injury typically would come from the victim, the requisite level of physical injury may be inferred. Here, it is alleged that there was a vicious and violent attack, which caused discoloration of the victim's face and caused her to both cry out while she was attacked and remained on the ground once it was over.

People v. Calixto
NYLJ, 9/13/10
(Crim. Ct., N.Y. Co., 9/8/10)

* * *

ACCUSATORY INSTRUMENT - Date Of Offense

The Court dismisses the accusatory instrument where date of the offense is stated as April 4, 2007 but the actual date was April 4, 2008 and the officer affirms the simplified traffic information using a date that precedes the offense itself. The People were required to move to correct the date of the offense.

People v. Marvin Benjamin
(Mount Vernon City Ct., 9/20/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51627.htm

* * *

POSSESSION OF A WEAPON - Constructive Possession

The Court dismisses as facially defective Administrative Code charges of possession of an air pistol and possession of an imitation pistol where the deponent alleges that what appeared to be a black pistol, but was actually an air pistol, was in the hatchback area of a car in which defendants were seated; that the pistol was within the control and dominion of defendants because it was in the common area of the car; and that the air pistol appeared to be an actual pistol because of its black color and shape.

Although PL § 265.15(3) creates a rebuttable presumption of possession by every occupant of the vehicle when a firearm or any other enumerated weapon is found inside but not in the actual possession of any one occupant, neither air pistols nor imitation pistols are included in the statute.

People v. Justin Vargas and Jonathan Lopez
(Crim. Ct., N.Y. Co., 9/21/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51759.htm

* * *

ACCUSATORY INSTRUMENTS - Latent Defects

In this case in which the deponent testified at trial that he had never before seen the complaint, the Court first notes that, under *Matter of Edward B.* (80 N.Y.2d 458) and *People v. Casey* (95 N.Y.2d 354), the latent defect is not jurisdictional and does not require dismissal. However, the Court does have power to dismiss this case in its discretion.

The Court then denies defendant's motion to dismiss. The deponent's testimony was consistent with the complaint, and such testimony effectively trumps the hearsay defect in the complaint. The Court also finds no justification for a mistrial.

People v. Leonid Antonovsky
NYLJ, 4/18/11
(Crim. Ct., Kings Co., 3/25/11)

* * *

ACCUSATORY INSTRUMENTS - Use Of Hearsay - Corroboration Of Confession

The Appellate Term holds that an information, like a juvenile delinquency petition, does not satisfy the prima facie case pleading requirement unless admissions are corroborated.

People v. Frank Suber
(App. Term, 2d, 11th & 13th Jud. Dist., 4/1/11)

* * *

POSSESSION OF DRUGS - Identity Of Substance - Sufficiency Of Allegations

The Appellate Term finds facially sufficient a charge of criminal possession of a controlled substance in the seventh degree where officer who alleged that the substance defendant possessed was heroin had "professional training as a police officer in the identification of heroin, had previously made arrests for criminal possession heroin," and through training was "familiar with the common methods of packaging heroin," and that "the glassine envelope used to package the heroin in this case is a commonly used method of packaging heroin."

People v. James Oliver
(App. Term, 2d, 11th & 13th Jud. Dist., 4/1/11)

* * *

POSSESSION OF DRUGS - Identity Of Substance - Sufficiency Of Allegations
RESISTING ARREST

The Appellate Term finds facially sufficient a charge of criminal possession of a controlled substance in the seventh degree where the allegation that the substance was cocaine was based on the officer's "experience as a police officer and … his training in the identification and packaging of controlled substances."

The Appellate Term finds facially sufficient a charge of resisting arrest where defendant allegedly flailed his arms and knocked the detective to the ground when she tried to arrest him.

People v. Robert Bracy
(App. Term, 2d, 11th & 13th Jud. Dist., 4/1/11)

* * *

PETITIONS - Use Of Video Recordings
- Identification Of Respondent

The Court dismisses the petition as facially defective where the petition and supporting depositions fail to allege non-hearsay facts identifying respondent as a participant in the crime.

The complainant's deposition does not mention the respondent at all. Another deponent alleges that he was given a phone by a teacher who received the phone from an unknown person who refused to give the teacher his or her name, and that the deponent recognized respondent on the phone video, and the deponent describes what he observed respondent doing in the video. However, the deponent's statement regarding what the teacher told him and what the teacher was told by the unidentified person is hearsay. There is no non-hearsay allegation that the incident depicted on the phone was in fact the incident alleged in the petition, nor is there a deposition from the complainant or any other person who was an eyewitness stating that the video was viewed and that it fairly and accurately depicted the incident.

Matter of Tyshawn M.
(Fam. Ct., Monroe Co., 6/29/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21226.htm

* * *

ACCUSATORY INSTRUMENTS - Use Of Video Recording

The Court finds facially insufficient a charge of riot in the second degree where it is alleged that defendant, "while acting simultaneously with at least six other people in a public place, did engage in several physical fights with others, including kicking and punching others, and did recklessly cause a large crowd to gather causing public alarm"; and that the source of the allegations against defendant made by the officers is their review of a video recording of the fights.

The Court does not find any hearsay problem. Observations of a videotape are not hearsay. However, the officers have failed to indicate in some fashion that the video they viewed depicted the fight that they personally observed, and thus there is nothing connecting defendant to the events.

People v. Derek Patten
(City Ct. of Long Beach, 6/10/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21199.htm

Double Jeopardy

DOUBLE JEOPARDY - Prosecution After Mistrial

The Court of Appeals finds sufficient support in the record for the determination that defendant impliedly consented to a mistrial where, after the jury submitted a note stating that a verdict had been reached on two counts and that it was at an impasse on others, the trial judge indicated that

he intended to take a partial verdict and declare a mistrial on the undecided charges; the court asked defense counsel if they wanted to be heard, and counsel for defendant responded "no" and counsel for the co-defendant remained silent; and, after the court took the partial verdict but before it discharged the jury, the court again inquired of defense counsel if there was anything they wanted to put on the record, and neither attorney responded.

Nothing that occurred at the conference could have led counsel to reasonably believe that the court was deferring a decision concerning the proper response to the note. When the prosecutor agreed that a mistrial was warranted and the defense voiced no disagreement despite being asked their views, there was no reason for the court to deviate from its initial inclination. Under the dissent's analysis, defense attorneys would have no obligation to meaningfully participate in conferences and could simply say nothing when a trial judge articulates a proposed response, leaving the false impression of acquiescence even while anticipating a subsequent objection. Attorneys could, by their silence, lull the court into taking actions that could not later be undone. Certainly, once the verdict was announced and defense counsel nonetheless remained mute when asked their views, the inference that defense counsel concurred with the court's decision to grant a mistrial was even more apparent.

Judge Ciparick and Chief Judge Lippman dissent.

Matter of Marte v. Berkman
(Ct. App., 5/5/11)

Competency To Proceed

COMPETENCY TO PROCEED

While upholding a determination that defendant was fit to stand trial, the Court of Appeals notes, inter alia, that the trial court concluded that defendant's expert witnesses performed abstract tests that did not properly determine whether defendant had legal competency for trial purposes, while the People's experts found that defendant evinced an understanding of the purpose of a trial, the actors in a trial, their roles, the nature of the charges against him, and the severity of a potential conviction and sentence; that while all sides agreed that defendant possessed motor speech issues, one of the People's experts presented findings that if a question was posed in multiple forms, it ensured that defendant understood what was being asked and that his answers were not inconsistent; and that the trial court had found defendant's answers to be coherent, rational, and relevant, albeit truncated at times, had observed and interacted with defendant during the six-month competency hearing and noted conduct and responses that evinced perception and comprehension of the nature of the proceedings, and, during the one-month trial, noted that defendant actively consulted with counsel, reacted appropriately to testimony and evidence, and engaged in colloquy with the court that demonstrated an understanding of the nature and import of the proceedings.

Defense counsel's representations that defendant's condition impaired his power to communicate with counsel and undermined his ability to intelligently assist in his own defense were merely a factor to be considered by the court.

Referring to Chief Judge Lippman's dissenting opinion, the Court states that "[t]o conclude, as the dissent does, that the testimony of defendant's witnesses had more probative force because of their qualifications as neurological experts is to make a determination based on the weight of the evidence, a role beyond this Court's purview. . . . This Court must defer to the findings of the trial court so long as there is record support for those determinations."

People v. James Phillips
(Ct. App., 3/29/11)

* * *

COMPETENCY TO PROCEED

Almost 9 years after defendant was first found unfit to stand trial, the Court finds that defendant remains incompetent. There is expert evidence that although defendant can regurgitate answers, "he can't really use that information that he has learned" and "cannot use that information and make meaningful decisions in his own case"; that even after eight years of treatment, defendant cannot read beyond a first grade level and does not understand the dangerousness of his behavior or the need for supervision in the community; and that defendant suffers from a high level of anxiety that will be exacerbated by confinement in jail or in the courtroom dock, and a trial would cause defendant "debilitating stress."

However, the Court grants defendant's application for release pursuant to *Jackson v Indiana* (406 U.S. 715), where the Supreme Court held that a defendant found incompetent to stand trial "cannot be held more than a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the state must institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." Here, nearly nine years after treatment began, defendant's developmental disability, intellectual deficits, anxiety and suspicion have not abated.

Within a reasonable period, the Commissioner of the New York State Office for People with Developmental Disabilities shall admit and retain defendant under Article 15 of the New York State Mental Hygiene Law, or release him from confinement.

People v. A.S.
(Sup. Ct., Kings Co., 2/9/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50132.htm

Discovery/Preservation Of Evidence

EVIDENCE - Preservation By Prosecution
BRADY MATERIAL

The Court of Appeals finds no *Brady* violation where defendant claims that the police and the People failed to interview, or, at a minimum, acquire contact information for, two individuals who made exculpatory statements overheard by an officer. While defendant's argument is couched in *Brady* terms, he essentially seeks a rule that would impose an affirmative duty upon the police to obtain potentially exculpatory evidence for the benefit of a criminal defendant. This Court has declined to impose such an obligation. While the Court has held that a necessary corollary of the duty to disclose is the obligation to preserve evidence until a request for disclosure is made, defendant erroneously equates the word "preserve" with "obtain" or "acquire." The protection of *Brady* extends to discoverable evidence gathered by the prosecution.

The Court also rejects defendant's argument that he was improperly precluded from utilizing the two statements and challenging the thoroughness of the police investigation. Defendant contends that the statements were germane to his justification defense because they established that the victim was the initial aggressor and possessed the knife first, and that the investigation was inadequate because the police failed to fingerprint the knife, and failed to interview, or obtain contact information for the two individuals who made the statements. However, it is undisputed that at a certain point during the altercation, defendant came into possession of a knife and the victim was unarmed, and the crucial inquiry is whether defendant was justified in the use of deadly physical force against an unarmed victim. Thus, the question of whether the knife was initially possessed by the victim is not decisive, and the two statements that the victim initially possessed the knife did not have great probative force. Moreover, a criminal defendant does not have an unfettered right to challenge the adequacy of a police investigation by any means available. The trial court properly concluded that the use of the anonymous hearsay in cross-examination would have created an unacceptable risk that the jury would consider the statements for their truth.

Chief Judge Lippman, dissenting, agrees that there was no Brady violation, but asserts that there was no hearsay bar to admission of the statements to show that an investigative lapse had occurred, which left room for reasonable doubt as to the adequacy of the evidence offered by the People to meet their burden of disproving the defense of justification. A trial court has no discretion to cut off a legally permissible, non-collateral, potentially exculpatory line of inquiry by a criminal defendant. Such discretion is utterly incompatible with the constitutional right to present a defense. "The State in our adversary system of justice has no affirmative duty to seek out evidence favorable to the accused, but when its failure to do so may reasonably be understood to impair the adequacy of the proof of guilt, judicial discretion is not properly deployed to shield the alleged infirmity from the jury's scrutiny."

People v. Kenneth Hayes
(Ct. App., 5/10/11)

* * *

DISCOVERY - Sanctions
APPEAL - Prosecution Appeal From Dismissal Order

After a *Brady* violation came to light in this Medicaid fraud prosecution, the trial court found that the violation was of such a magnitude that the prejudice to defendants could not be overcome by any remedy short of dismissal. The court dismissed the indictments, with prejudice. The Appellate Division dismissed the People's appeal without passing upon the merits, concluding that the People lacked the statutory right to appeal from a dismissal of an indictment in connection with a discovery violation.

A Court of Appeals majority holds that the People have a right to appeal. Criminal Procedure Law § 210.20, which lists the grounds upon which a court may dismiss an indictment, is listed in CPL § 450.20(1), while § 240.70, which authorizes specified sanctions for discovery violations as well as "any other appropriate action," is not. Thus, the determinative issue is whether the trial court's dismissal power arose from CPL § 210.20, or only from CPL § 240.70.

The Court concludes that the power to dismiss emanates from § 210.20. Although the trial court did not expressly refer to § 210.20(1), the court believed that it would be impossible for defendants to receive a fair trial. Thus, the *Brady* violation, in the court's view, became a "legal impediment to conviction" within the meaning of § 210.20(1)(h). The Court notes that there is no express grant of dismissal power in § 240.70.

Judges Jones and Smith dissent, asserting that the trial court dismissed the indictments pursuant to § 240.70, penalizing the People for a discovery violation.

People v. Robert Alonso and Emilia Alonso
(Ct. App., 5/3/11)

* * *

BRADY MATERIAL - Cooperation Agreement

The Third Department, noting that defendant should have been informed that a prosecution witness had been offered a favorable plea bargain in connection with a DWI charge, concludes that the failure to disclose did not deprive defendant of a fair trial since there is no evidence that the plea offered to the witness was related to his appearance at defendant's trial.

The District Attorney sent a letter to the town court where the DWI charge was pending, authorizing a reduced plea to a misdemeanor in full satisfaction of all charges pending against the witness and recommending that a sentence be imposed that included a fine and three years of probation. However, the ADA prosecuting defendant denied knowing of the proposed disposition or of the District Attorney's letter at the time the witness testified at defendant's trial.

The District Attorney and the ADA submitted affirmations indicating that the witness's DWI charge was handled pursuant to established procedures then in effect in the District Attorney's office, and denied that the reduced plea was offered in exchange for the witness's testimony at defendant's trial.

People v. Mark Smith
(3d Dept., 6/9/11)

* * *

BRADY MATERIAL - In Camera Review By Court

Defendant, charged with criminal trespass in the third degree, was arrested in possession of a video camera, a digital camera, a cellular telephone and a digital voice recorder. Defendant moves for an order directing the return of his property, or alternatively, the production of all recordings contained on each device. Defendant contends that the devices contain exculpatory evidence necessary to his defense.

The Court will conduct an in camera inspection of the devices. While a prosecutor must have some discretion in determining which evidence must be turned over to the defense, where, as here, there is some basis for an argument that material in the possession of the prosecutor might be exculpatory, deference to the prosecutor's discretion must give way and a duty to determine the merits of the request for disclosure devolves on the court.

People v. Samuel Rivers
(New Rochelle City Ct., 6/16/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51092.htm

* * *

DISCOVERY - Sanctions
- Drug Analysis Reports

The Court orders preclusion of the results of drug testing where the People failed to provide defendant with a lab report for almost ten months after it was demanded in a request for discovery, and then turned it over just as the trial was about to begin.

The information alleged that defendant possessed cocaine residue, and he prepared his defense based on that allegation and refused what appeared to be reasonable plea offers. Meanwhile, from the beginning, the police had a lab report showing that defendant possessed methamphetamine, not cocaine residue. Defendant claimed all along that he never possessed cocaine, and that what the officer recovered was the ground-up residue of generic amphetamine pills prescribed by a physician. "To have the People turn around eleven months after they stated ready for trial . . . and expect defendant to now go to trial in a case in which they turned over a

long-existing lab report showing he possessed something completely different . . . without any sanction at all would be decidedly unfair."

To mount a defense, defendant would have to consult with and perhaps retain a chemist to conduct a comparative analysis between the prescription medication dispensed to him and the recovered residue, which the Court finds is likely to be impossible. There is no sufficient legal remedy other than preclusion.

People v. Donald Archer
(Sup. Ct., Bronx Co., 5/12/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50842.htm

* * *

DISCOVERY - Prior Bad Acts Of Respondent
IMPEACHMENT - Sandoval - Right To Hearing

The Court orders the Presentment Agency to notify respondent of prior uncharged criminal, vicious or immoral conduct the Presentment Agency intends to use to impeach respondent's credibility if he testifies at trial, and also grants respondent's application for a pre-trial *Sandoval* hearing.

With respect to discovery, the Court notes that although there is no FCA Article Three analogue to CPL § 240.43, the factors which led to the enactment of § 240.43 "are equally applicable to juvenile delinquency proceedings which involve youngsters who are more likely to suffer from a lack of memory than an adult, including an inability to recall past incidents of misbehavior or criminality that did not result in an arrest or the initiation of a delinquency proceeding. . . ." Under the case law, an accused juvenile delinquent has the right to request a pre-trial Sandoval determination, and, given that § 240.43 codifies the holding in *People v. Sandoval*, it logically follows that § 240.43 should be applicable to juvenile delinquency proceedings.

Matter of Daniel C.
(Fam. Ct., Queens Co., 8/16/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20331.htm

* * *

IMPEACHMENT - Motive To Lie
EVIDENCE - Photos
DISCOVERY - Notice Of Alibi - Rebuttal Witnesses

The Court denies defendant's motion to set aside the verdict, rejecting defendant's claim that the Court erred in precluding cross-examination of two witnesses about their alleged gang membership and that of the deceased. Defendant relied on photographs that his mother

downloaded from the internet website "MySpace" four days after the murder, but defendant did not know who took the photographs or posted them on "Myspace." In light of the ability to "photo shop" on the computer, defendant could not authenticate the photographs, and also was unable to persuade the Court that certain hand gestures and articles of clothing worn by the witnesses in the photographs provide a good faith basis to allow cross-examination about gang affiliation. Moreover, defendant's claim that the witnesses may have had a motive to lie because they may have thought defendant was a member of a rival gang was too speculative, and defendant denied being a member of the rival gang.

The Court also concludes that defendant's due process rights were not violated by the People's failure to give reciprocal notice of its alibi rebuttal witnesses prior to trial. The prosecutor was not, and could not reasonably have been aware of the facts that gave rise to the opportunity for rebuttal until after defendant's alibi witnesses had testified. Requiring a prosecutor to divulge alibi rebuttal witnesses during pretrial proceedings or face preclusion would require that the prosecutor base disclosures on little more than speculation about what might happen at trial. Moreover, a court does not abuse its discretion in granting an adjournment after the People fail to serve notice of an alibi rebuttal witness where a contradiction goes to a material, core issue in the case (defendant's whereabouts at the time of the crime).

People v. Karon Lenihan
(Sup. Ct., Queens Co., 11/12/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20462.htm

* * *

DISCOVERY - Notice Of Alibi

The First Department finds no error in the preclusion of the testimony of defendant's three alibi witnesses, who were family members who resided with defendant, where defendant offered his notice of alibi on the day of jury selection, without any showing of good cause for the delay.

The failure to provide timely notice was the product of willful conduct by defendant that was motivated by his desire to obtain a tactical advantage. Defendant provided notice only after the trial court had rejected another last-minute attempt by defendant to delay the trial. Prior counsel investigated an alibi defense and evidently found it unavailing; although counsel mentioned, during arraignment, that defendant's brother would be a potential alibi witness, counsel also stated that the brother had said he was asleep at the time the crime occurred. Moreover, if the court had accepted the untimely alibi notice, the People would have needed a substantial adjournment of the trial, rather than merely a mid-trial investigation, and the passage of time was likely to have made the investigation difficult or futile.

People v. Ernesto Valdez
(1st Dept., 2/22/11)

* * *

DISCOVERY - Notice Of Alibi

The Court grants defendant's application seeking leave to file an untimely notice of alibi. The defense previously was given leave to file an untimely notice identifying different witnesses, and has failed to justify the additional delay since the filing of the previous application, and thus it would be a reasonable exercise of discretion to deny this application. However, as the People do not allege that they would be prejudiced, the application is granted in the interest of justice.

People v. Parsely
NYLJ, 2/28/11
(Sup. Ct., West. Co., 1/31/11)

* * *

DISCOVERY - Video Surveillance Tapes And Public Housing Sign-In Sheets

In this sex crime prosecution in which the charges arise from an incident that occurred inside a public housing structure, the Court denies the NYPD's motion to quash a subpoena duces tecum for the production of any video surveillance images showing any individuals entering and exiting the building during the relevant period of time; any video surveillance images of the fifth floor hallway during the same time period; and any records, including but not limited to a logbook or sign-in sheet for guests and visitors, for apartment 5A on the day in question.

Defendant is not seeking to subpoena routine police reports created in connection with the investigation of the case. The surveillance tapes depicting the very incident that gave rise to the charges are relevant and material to the determination of guilt or innocence. A sign-in log is likely to show the identity of anyone who entered the building at the time in question. This is not an attempt to conduct a fishing expedition.

People v. Ray Duran
(Crim. Ct., Kings Co., 4/14/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21162.htm

* * *

DISCOVERY - Notice Of Intent To Offer Psychiatric Evidence

The Court grants defendant's application for leave to file notice of intent to proffer psychiatric evidence after expiration of the statutory deadline where the People have not suggested that they have been deprived of the opportunity to have a sufficiently reliable psychiatric examination of defendant performed in advance of trial or have been prejudiced in any other way; a trial date has not yet been scheduled due to the extensive period of time needed for examination of defendant

concerning his competency to stand trial, and so the People will be able to have defendant examined without unduly delaying the proceedings; and defendant's proposed psychiatric expert witness has not yet had an opportunity to examine defendant, and thus the experts for both sides are on an equal footing.

Moreover, the potential significance of the psychiatric evidence implicates defendant's constitutional right to present witnesses in his own defense.

People v. Kasem Cunningham and Gwendolyn Thompson
(Sup. Ct., West. Co., 12/8/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_52345.htm

* * *

DISCOVERY - Notice Of Intent To Offer Psychiatric Evidence

Defendant, charged with, inter alia, murder and endangering the welfare of a child, was arraigned on April 3, 2008. On June 2, 2010, defendant served CPL § 250.10 notice stating that defendant intended "to present at trial psychiatric evidence in support of her affirmative defense that she acted under the influence of extreme emotional disturbance," and, on July 30, 2010, filed a second notice naming her expert witness and stating that, based on his examination of defendant on May 25, 2010, he "is of the opinion that on February 4, 2008, Ms. Allen was suffering from Posttraumatic Stress Disorder and, as a result, she acted under the influence of extreme emotional disturbance."

The Court denies the People's motion to preclude the evidence due to late notice. Defense counsel, who was assigned in June of 2009 after former counsel resigned from the Bronx Defender's office, states that her "direction and focus was toward plea bargaining and the preparation of a thorough and complete pre-pleading report," which "was a time consuming process," and, when plea negotiations were unsuccessful, counsel indicated that defendant would seek a defense of extreme emotional disturbance. The People have not stated with any specificity how they have been prejudiced by the late filing. There is no indication that defendant sought a strategic advantage in filing late notice or that her psychiatric defense is not viable.

People v. Krystal Allen
(Sup. Ct., Bronx Co., 10/6/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_52104.htm

* * *

EVIDENCE - Preservation By Police

The Court denies respondent's motion preclude, pursuant to Penal Law § 450.10, introduction at trial of a jacket that was allegedly stolen by respondent where the police returned the jacket to

the complaining witness without first notifying respondent and following the procedures for disposing of stolen property.

Respondent was wearing the jacket at the time he was arrested and brought to the police station, where it was returned to the complaining witness later that same day. The property was never in the custody of the police as contemplated in § 450.10.

Moreover, even when § 450.10 has been violated, sanctions are not warranted where, as here, respondent has failed to demonstrate bad faith or prejudice. Respondent essentially argues that the police are required to retain and voucher any and all stolen property in any case in which counsel may be assigned, which is an overly broad reading of the statute. The incident occurred in December, and the item was a winter jacket the complainant had been wearing on the street until respondent allegedly stole it. There is no allegation that the jacket possessed any unique quality or characteristic which may be relevant to any element of the offenses charged or tend to show that it did not belong to the complaining witness.

Matter of Nixon C.
(Fam. Ct., Bronx Co., 1/18/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50061.htm

* * *

BRADY MATERIAL - Cooperation Agreement
- Witness's Motive To Fabricate
ACCUSATORY INSTRUMENTS - Amendment - Date Of Offense

The First Department reverses defendant's conviction for bribing a witness where the People failed to disclose, until after a prosecution witness testified, certain e-mails to his mother from assistant district attorneys involved in the prosecution. In the e-mails, a prosecutor told the mother she would "do everything in [her] power" to make Connecticut prosecutors who were prosecuting the witness on probation violation charges "see that [the witness] deserved a break because of what had happened to him when he was younger"; prosecutors told the mother that they had arranged for the witness to receive phone privileges at the youth institution at which he was incarcerated so that he could call her; and a prosecutor informed the mother that she had arranged to stop the witness from being transferred to an adult facility.

Prior to the belated disclosure of these e-mails, the prosecutors had apprised the defense only that the District Attorney's Office had promised to inform Connecticut prosecutors that the witness was cooperating with the investigation and prosecution of the case against defendant, and that, after initially declining to take that cooperation into account, the Connecticut prosecutor had agreed to at least consider it when making the sentencing recommendation to the judge.

The People also failed to disclose to the defense that the witness believed that defendant had caused him to be charged with violating probation in Connecticut and that the witness's prior

criminal activities included having acted as a courier for someone by transporting guns or drugs in a paper bag.

The Court finds no error where the indictment charged that certain sex acts occurred on or about the month of June of 1996, and, at trial over 10 years later, the complainant was unable to say whether it was in June, July or August of 1996. He knew it was after the regular school year had ended, and he was in summer school. Given that the witness was 13 years old at the time of the incident, and did not report the crime for many years, the three-month period was not an unreasonably large time frame and there is no reason to believe the People could have further narrowed it. This amendment did not change the People's theory or cause any prejudice to defendant.

People v. Lina Sinha
(1st Dept., 4/7/11)

* * *

ROSARIO MATERIAL

While finding a *Rosario* violation where the People failed to disclose the existence of a tape recording of a conversation between defendant and an undercover police officer that took place prior to the transactions in question, a conversation that set the stage for the undercover officer's subsequent dealings with defendant, the Third Department finds that defendant was not prejudiced.

People v. Malik Mosby
(3rd Dept., 11/18/10)

* * *

ATTORNEY CLIENT PRIVILEGE
DISCOVERY - Work Product

Defendant, charged with manslaughter, filed notice that she intends to present psychiatric evidence that she suffers from battered woman syndrome in support of the defenses of justification and diminished capacity. The People have subpoenaed records from the Steps to End Family Violence Program, a subsidiary of Edwin Gould Services for Families and Children, Inc., and that agency moves to quash the subpoena on the grounds that it seeks discovery of material protected by attorney-client privilege and attorney work product.

The Court denies the motion. When the accused places her psychiatric condition in issue, the attorney-client privilege is waived. Although in the civil context the work product doctrine is broadly phrased and not defined under CPLR § 3101(c), in the criminal context it is narrowly defined as property to the extent that it contains the opinion, theories or conclusions of defense counsel. It is difficult to imagine how an opinion of defendant's attorney could wind up in the

notes of an independent social worker. Moreover, there is no support for the agency's claim that it is part of the defense team, as opposed to a treatment provider subject to subpoena like any doctor or hospital having information relevant to a criminal prosecution.

People v. Jaquelyn Brooks
(Sup. Ct., Kings Co., 9/30/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51676.htm

* * *

DISCOVERY - Notice Of Psychiatric Defense

The Court denies the People's motion to preclude psychiatric evidence where defendant was arraigned upon the indictment and entered his not guilty plea on June 17, 2009, and served untimely notice regarding the defense on April 7, 2010 and served on May 10, 2010 a forensic report prepared by a defense expert.

The mental illness, which is categorized as "psychotic" in the report, existed long before defendant's alleged commission of the crimes charged and continues to this date. Thus, the People will not be unduly prejudiced by an examination of defendant by their expert 20 months after the crimes.

In addition, defense counsel has demonstrated good cause for late service. The Court notes that counsel was not assigned until four days prior to the notice deadline; that the examination and testing of defendant was commenced on July 31, 2009 and did not conclude until September 1, 2009, and the forensic report was not provided to counsel until September 19, 2009; that a Huntley/Wade hearing held on January 26, 2010 "further solidified [counsel's] belief that defendant's mental state at the time of the crime prevented him from forming the intent to commit the crime. . . ."

People v. Shea Caldwell
NYLJ, 9/24/10
(Sup. Ct., Queens Co., 9/20/10)

* * *

DISCOVERY - Witness's Confidential Personnel File

An Appellate Term majority finds no error where the trial court denied defendant access to the complaining witness's confidential personnel file. The witness had retired as building inspector, and the Town had decided to forgo proceedings against the inspector and seal the records. There were no grounds for a belief that the file contained information, beyond matters affecting general credibility, with which defendant could confront the witness.

The dissenting judge asserts that the trial court should have granted defendant's motion for an in camera inspection of the file of the building inspector, the prosecution's only witness. Defendant's offer of proof included information that the inspector had been the subject of official reprimands, and of a professional misconduct investigation which was settled, before defendant's trial, by the inspector's retirement and the dropping of all charges with prejudice.

People v. Wendy Gennimi
(App. Term, 9th & 10th Jud. Dist., 11/24/10)

* * *

DISCOVERY - Shield Law

In this attempted murder prosecution in which the People intend to prove that defendant shouted, in so many words, "shoot the cop" as his co-defendant struggled with an officer for control of a pistol, the Court denies the Daily News's motion to quash a subpoena seeking the identity of the police source of a report that "according to authorities," the co-defendant's mother had shouted "shoot the cop."

Defendant's rights under the Confrontation Clause of the Sixth Amendment and under the Due Process Clause of the 14th Amendment trump the statutory and constitutional privileges of the Daily News. Where a criminal defendant seeks press information that is highly material, is critical to the defendant's claim, and is not otherwise available, the press privilege must give way to the Sixth Amendment. Here, the identity of the individual (or individuals) who said "shoot the cop" is highly material to whether defendant was an accomplice, and defendant's claim that someone else made the statement is critical to his defense. There is no available source for this information other than the Daily News. The People's claim that defendant was an accomplice is almost completely dependent on the statement at issue. The disclosure will be narrow: counsel for the Daily News need disclose to the court, in camera, only whether the confidential source is one of the two officers present at the crime scene and, if so, which of the two he is.

Matter of Subpoena Ad Testificandum to Third Party Daily News, L.P.
(Sup. Ct., Kings Co., 1/11/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21038.htm

Ethics and Judicial/Attorney Misconduct

JUDGES - Excessive Interference In Trial

Reaching the unpreserved issue in the interests of justice, the Second Department reverses fact-findings of grand larceny and criminal possession of stolen property and orders a new trial, finding that respondent was deprived of a fair trial because the family court judge took on the function of an advocate by excessively intervening in the fact-finding hearing.

A trial court may take an active role in the presentation of evidence in order to clarify a confusing issue or avoid misleading the trier of fact, but the function of the judge is to protect the record at trial, not to make it, and the line is crossed when the judge takes on either the function or appearance of an advocate at trial. Here, the judge extensively participated in both direct and cross-examination of the two prosecution witnesses and elicited testimony which strengthened the prosecution's case.

In addition, when respondent indicated while testifying that a certain document which would support her defense had been turned over to a probation officer, the judge interrupted her testimony to question a Probation Department Court Liaison about whether documents of that nature would be kept by the Probation Department, and then summoned to the courtroom the probation officer assigned to respondent's case and indicated to defense counsel that unless he agreed to stipulate as to what the records would reflect, the records would be admitted into evidence through the probation officer's testimony. Neither the prosecutor nor defense counsel intended to call the probation officer as a witness or enter the Probation Department records into evidence, and the stipulation had the effect of rebutting a portion of respondent's testimony. The judge assumed the parties' traditional role of deciding what evidence to present and offered no explanation on the record as to why he felt compelled to do so.

Matter of Jacqulin M.
(2d Dept., 4/12/11)

* * *

JUDGES - Excessive Interference At Hearing

The Third Department, exercising its discretion to consider the unpreserved error, reverses a dispositional order where, even though the parties agreed with the recommendation made by the Probation Department, the family court called and extensively questioned the author of the pre-dispositional report, secured the production of additional documentary evidence, and, according essentially no weight to the underlying recommendation and the parties' expressed wishes, crafted a placement disposition based almost entirely upon proof that the court elicited.

The court is vested with the discretion to call witnesses, including the author of the pre-dispositional report, and may assume a more active role in the presentation of evidence in order to clarify a confusing issue. However, it is the function of the court to protect the record at trial, not to make it, and the court must take care to avoid assuming the function or appearance of an advocate.

Matter of Kyle FF.
(3d Dept., 6/23/11)

* * *

ETHICS - Conflict Of Interest

In *People v. Cristin*, defendant is represented by retained counsel, who had also been retained to represent co-defendant Palmero on this case and did so for nearly eleven months. Palmero is now represented by counsel from the 18-B panel, assigned after retained counsel asked to be relieved because of the conflict.

In *People v. Callistro*, the Bronx Defenders represented defendant at arraignment on the felony complaint. Bronx Defenders had already been assigned to represent the co-defendant, Ms. Doe, who was arraigned before another judge earlier the same day. After the two defendants were indicted together, Bronx Defenders asked to be relieved from representing Doe, who was assigned 18-B counsel. Her case has been dismissed.

In both cases, the Court relieves defense counsel. Rule 1.9(a) of the Code of Professional Conduct provides that unless the former client "gives informed consent, confirmed in writing" to an attorney representing a co-defendant in the same case, the attorney "shall not thereafter represent another person in the same or a substantially related matter." In *Cristin*, Palmero has not consented. Moreover, defense counsel has acknowledged that because of conversations he had with Palmero about this case when she was his client, he cannot cross-examine her. Even if there were a severance, counsel could never take a position adverse to Palmero's interests.

In *Callistro*, there has been no attempt to secure a written waiver of the conflict. Also, there is an appearance of impropriety when assigned counsel with a conflict makes a choice about which client to continue to represent after the cases have been presented to a grand jury. Bronx Defenders allege that they have constructed a "wall," but that is not only impractical, it has already failed; even after Bronx Defenders was relieved in this case, two different attorneys from Bronx Defenders appeared on two different dates to represent the co-defendant and make arguments on her behalf. "Put simply, while 'the wall' concept is sometimes recognized as an option in cases where a firm has been retained by different clients who are parties in the same case, it is still incumbent upon the organization to demonstrate that there has been no sharing of information, and that the 'wall' is adequate."

In *People v. Wilkins* (28 N.Y.2d 53), The Legal Aid Society's conflict resulted from past representation of a witness who testified at trial, and the conflict was not discovered until another attorney from The Legal Aid Society was perfecting the appeal. At that time, the defendant raised a claim that he had been denied the effective assistance of counsel because of the "unknowing dual representation," and was required to demonstrate actual prejudice. In that context, the Court of Appeals declined to apply to The Legal Aid Society, a "large public defense organization," the rule that knowledge of one attorney will be imputed by inference to all members of s law firm. *Wilkins* cannot be read in a way that would relieve attorneys in public defender offices from the requirements of the Code of Professional Conduct in cases where the conflict is known to exist.

People v. Omarys Cristin and Wanda Palmero, People v. Kanton Callistro

(Sup. Ct., Bronx Co., 11/12/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20466.htm

* * *

JUDGES - Bias

The District of Columbia Court of Appeals holds that recusal was required where, during trial, the judge received two ex parte emails from another judge that contained information regarding the circumstances surrounding the recantation of an important government witness. These facts were the subject of dispute in the case, and the communications did not fall within the scope of the judge's functions and thus were extrajudicial.

In re M.C.
2010 WL 4642052 (D.C. Ct. App., 11/18/10)

* * *

JUDGES - Bias/Interest

The Advisory Committee on Judicial Ethics concludes that a law clerk or court attorney should not participate in a legal educational program for local school students that is sponsored by a district attorney's office, but may participate if defense attorneys also are involved in the program.

Participation by judges or court personnel in a program designed and sponsored solely by the district attorney's office could create the impression of improper alignment with prosecutorial interests, and, without input from defense attorneys, the scenarios and role playing may be perceived to reflect a pro-prosecution bias.

Opinion 09-127
NYLJ, 8/9/11, at 6, col. 5

* * *

JUDGES - Bias

The Committee on Judicial Ethics concludes that a judge may provide forensic science and crime scene processing training to a law enforcement agency that regularly appears before the judge as long as the judge does not: (1) provide partisan advice on litigation strategy or on how better to obtain convictions; (2) does not comment on pending or impending matters; and (3) does not manifest a predisposition to decide a particular type or class of case a certain way.

Opinion 09-62

NYLJ, 11/16/10, at 6
(Committee on Judicial Ethics)

* * *

JUDGES - Bias

The Florida Supreme Court holds that the usual presumption that the judge in a nonjury trial has disregarded inadmissible evidence can be rebutted through a judge's express admission of the evidence over objection (unless the judge later states on the record that the erroneously admitted evidence did not contribute to its decision), or through a judge's statement on the record indicating that the judge actually relied on the inadmissible evidence.

Petion v. State
2010 WL 4117037 (Fla., 10/21/10)

* * *

PROSECUTORIAL ETHICS - Conflict Of Interest

The Court denies defendant's motion under County Law § 701 for the appointment of a special district attorney where the complainant is the sister of a "high ranking deputy" in the Kings County District Attorney's office.

Such an order is justified only in the rare case in which a defendant can show "actual, palpable, factual prejudice" rather than mere surmise or conjecture. Here, the assigned assistant states that she is not supervised by the complainant's sister, and, in fact, has never met or spoken to her. "If removal of the office were required each time a complainant or defendant was related to one of them, the cost in time to the criminal justice system and money to the citizenry would be extensive."

People v. Dimas Gonzalez
(Sup. Ct., Kings Co., 2/14/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50156.htm

* * *

ETHICS - Communication With Unrepresented Persons Via Internet

The question posed to the New York State Bar Association's Committee on Professional Ethics is as follows: "May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the

network?"

The Committee concludes as follows: "A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction)."

Opinion 843
(New York State Bar Association, 9/10/10)

* * *

ETHICS - Communications With Represented Party

Amgen, a biotechnology company, alleges that the United States Attorney's Office for the Eastern District of New York has been investigating the corporation since 2006 in connection with allegations that Amgen violated the False Claims Act and other federal statutes. Amgen claims it has cooperated with the Government and agreed to "coordinate contacts between the [G]overnment and Amgen's current employees through Amgen's counsel," but that, after initially accepting Amgen's assistance, the Government abandoned this protocol and began to contact the employees directly, attempting to conduct interviews and to subpoena documents in their possession. Amgen moved for a protective order, alleging that the Government's practice violated Rule 4.2 of the New York Code of Professional Responsibility. The Court directed a Magistrate Judge to hear and determine the motion, and the Magistrate filed a Report and Recommendation which recommends that the Court dismiss the motion as non-justiciable or, in the alternative, deny it on the merits.

The Court adopts the Report and Recommendation in its entirety. The Report and Recommendation notes, *inter alia*, that it has been assumed that in communicating with Amgen employees, the government communicated with Amgen itself; that although it has been assumed that government attorneys engaged in contacts with Amgen that come within Rule 4.2, that is not obvious since Amgen rests its motion on communications between federal law enforcement agents and Amgen employees and on the theory that such communications are attributable to government attorneys; that the subject of a grand jury investigation is not a "party" to a "matter"; and that the "authorized by law" exception in Rule 4.2 covers these communications.

In re Amgen
(EDNY, 6/14/11)

* * *

ETHICS - Communication With Unrepresented Persons Via Internet

The New York City Bar Association's Committee on Professional and Judicial Ethics addresses "the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively 'deceptive' behavior to 'friend' potential witnesses."

Noting that Rule 8.4(c) of the New York Rules of Professional Conduct states that "[a] lawyer or law firm shall not … engage in conduct involving dishonesty, fraud, deceit or misrepresentation," and that Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person," the Committee concludes that a lawyer may not use deception to access information from a social networking webpage. The Rules are violated whenever an attorney "friends" an individual under false pretenses to obtain evidence from a social networking website. It does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse.

Although there are ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence, any limited exceptions are, at least in most situations, inapplicable to social networking websites since non-deceptive means of communication ordinarily are available to obtain information on a social networking page. However, lawyers can, and should, seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page.

Formal Opinion 2010-2
(Ass'n of the Bar of the City of New York, Sept. 2010)

Confessions/Self Incrimination

CONFESSIONS - Custody - Juveniles

Asserting that "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave," and "[s]eeing no reason for police officers or courts to blind themselves to that commonsense reality," a 5-Justice United States Supreme Court majority holds that the age of a child subjected to police questioning is relevant to the determination as to whether the child is in custody for purposes of the *Miranda* requirement. So long as the child's age was known to the officer at the time of questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.

Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely. Indeed, the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. That risk is all the more troubling, and, recent studies suggest, all the more acute, when the subject of custodial interrogation is a juvenile. A child's age generates commonsense conclusions about behavior and perception. Because the *Miranda* custody inquiry turns on the mindset of a reasonable person in the suspect's position, it cannot be the case that a circumstance is subjective simply because it has an "internal" or "psychological" impact on perception.

Though the State and the dissent worry about gradations among children of different ages, that concern cannot justify ignoring a child's age altogether. Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age.

And, although the State and the dissent suggest that excluding age from the custody analysis comes at no cost to juveniles' constitutional rights because the due process voluntariness test independently accounts for a child's youth, *Miranda's* procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake.

J. D. B. v. North Carolina
2011 WL 2369508 (U.S. Sup. Ct., 6/16/11)

* * *

SEARCH AND SEIZURE - Credibility Of Police Testimony
CONFESSIONS - Huntley Hearing - Burden Of Going Forward

The Court finds unlawful the stop of the livery cab in which defendants were riding, and suppresses the gun and ammunition recovered, concluding that the officer's testimony that he saw defendants turning back and looking at him and speaking to each other, and saw defendant Ramon T. bending over in the vehicle, was incredible.

Defendant T.'s statement is suppressed as the fruit of the unlawful stop, and also because there is no evidence as to what, if anything, was said by defendant and police personnel before the interview that led to the statement.

People v. Ramon T.
(Sup. Ct., Bronx Co., 2/1/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50119.htm

* * *

CONFESSIONS - Voluntariness - Promise By Police
- Parent/Guardian - Absence During Interrogation

After then 13-year-old Jimmy's 9-year-old cousin reported to family members that Jimmy had sexually abused her, Jimmy's mother took both children to a hospital, where the police were called. A detective arrived and arranged for Jimmy, his mother, his cousin, and the cousin's mother to be taken to a child advocacy center. After initially being placed in separate rooms, Jimmy and his mother sat together in a closed-door waiting room while the detective interviewed the cousin and her mother. After the girl was interviewed, the detective took Jimmy and his mother to a juvenile interview room, where she explained the allegations and read *Miranda* warnings to Jimmy in English and to his mother in Spanish, according to their preferences. The version of the *Miranda* warnings the detective read to Jimmy, designed for use with juveniles, explains each of the rights in simple language. Each time one of the rights was stated, Jimmy responded, without hesitation, that he understood the right, his mother did the same and also reread the warnings, and they signed the *Miranda* waivers.

The detective asked Jimmy's mother for permission to speak with him alone, adding that children sometimes do not feel comfortable talking to a detective in front of a parent. The mother did not respond immediately, but after Jimmy agreed to talk with the detective alone, the mother agreed and left the room. The detective told Jimmy that he should tell her exactly what had happened, adding that, if he did so, he would get psychiatric or counseling help, if necessary. Jimmy admitted to sexual contact with his cousin, and subsequently made a written confession. He and his mother were reunited, and he read his confession to her. According to his mother, he stated that the detective had told him that she would help him only if he wrote a statement admitting to sexual conduct. The mother and the detective exchanged words, with the detective insisting that she had simply told Jimmy to write down in his own words exactly what he had done.

The family court and the Appellate Division denied suppression. In a 4 to 3 decision, the Court of Appeals affirms.

Special care must be taken to protect the rights of minors in the criminal justice system, and thus New York courts carefully scrutinize confessions by youthful suspects who are separated from their parents while being interviewed. A parent may help a child understand the *Miranda* warnings. Children may not fully understand the scope of their rights and how to protect their own interests, or appreciate the ramifications of their decisions or realize the importance of counsel. If the child chooses to waive the *Miranda* rights, a parent can monitor the interrogation lest the police engage in coercive tactics.

A parent who is present at the location of a custodial interrogation by a police officer has a right to attend the interrogation, and may not be denied an opportunity to do so and should not be discouraged, directly or indirectly, from doing so. The better practice is to inform the parent that he or she may attend the interview if he or she wishes. A parent may choose not to be present, but the police should always ensure that the parent is aware of the right of access to the

child during questioning. If a parent is asked to leave, the parent should be made aware that he or she is not required to leave.

However, a confession obtained in the absence of a parent may be voluntary. Because voluntariness is a mixed question of law and fact, the Court's review is limited to deciding whether the Appellate Division's finding is supported by evidence in the record. Jimmy and his mother had an opportunity to talk there when they were in the closed-door waiting room. The mother was present for the *Miranda* waiver that followed the reading of a version of the warnings that explains the rights in simple language, both agreed to questioning outside the mother's presence, and there is no evidence that Jimmy asked for his mother during the questioning. He was doubtless tired but there is no evidence that he asked for food or water and was denied it, and the detective's promise of "help" did not give rise to any substantial risk that he might falsely incriminate himself; in fact, there is no attraction in making a false confession and receiving psychiatric assistance relating to a crime one did not commit.

In an opinion by Chief Judge Lippman, the dissenting judges assert that although the initial waiver appears to have been valid, the exclusion of the mother cannot be deemed benign, and the waiver was no longer valid after the detective made representations significantly at odds with those upon which the waiver had been based. Jimmy was first warned that anything he said could and would be used against him in a court of law, but was later told that an admission could be helpful to him. Perhaps an experienced adult would not have been misled by the detective's representations, but this case involves an apparently unsophisticated child with no prior involvement with the juvenile justice system who was improperly deprived of parental support and guidance at a time when it would have been crucial to the protection of his interests. Jimmy believed, as he had been encouraged to in his mother's absence, that making a confession was the only way he could extricate himself from the situation in which he found himself. "Children do resort to falsehood to alleviate discomfort and satisfy the expectations of those in authority, and, in so doing, often neglect to consider the serious and lasting consequences of their election. There are developmental reasons for this behavior which we ignore at the peril of the truth-seeking process."

Matter of Jimmy D.
(Ct. App., 10/26/10)

* * *

CONFESSIONS - Voluntariness – Promises/Deception

A Supreme Judicial Court of Massachusetts majority holds that certain statements made by defendant were not rendered involuntary where defendant asked that the statements be "off the record" and the Trooper agreed. The Trooper's simple acquiescence was not so manipulative or coercive that it deprived defendant of his ability to make a free and rational choice about whether to make the comments in the first instance.

However, telling a suspect that statements will be "off the record" is a tactic to be avoided, and in other circumstances such a tactic may render statements involuntary.

Commonwealth v. Tremblay
950 N.E.2d 421 (Mass., 7/20/11)

* * *

CONFESSIONS - Voluntariness - Challenge Raised At Trial
- Burden Of Proof
STIPULATIONS

The First Department holds that by raising a challenge at trial to the voluntariness of his statements, defendant opened the door to the introduction of evidence the police had placed before him to elicit those statements.

Admission of the evidence - a videotape of the interview of a non-testifying witness and a photo array from which that witness had identified defendant - did not violate the hearsay rule or defendant's right of confrontation because the evidence was admitted not as proof of the matters asserted, but to show the inducement for defendant's statements and rebut his claim that the statements were involuntary, a claim the People were required to disprove beyond a reasonable doubt.

Although the defense offered to stipulate for the jury that defendant was shown a videotape indicating that he participated in a shooting, the defense had saddled the People with the burden of proving what motivated defendant to make the statements forming the centerpiece of the prosecution case, and thus the People were entitled to have the jury see and hear what defendant had seen and heard at the police station.

People v. Allan Andrade
(1st Dept., 8/4/11)

* * *

CONFESSIONS - Voluntariness

The Court denies suppression of defendant's statement regarding the stabbing, concluding that it was not involuntarily made where an investigator stated to defendant during the interrogation: "I am going to help you look for the truth. And thank God, that you have this time now. Because He is watching us. If you don't want to tell me you're sorry, say sorry to that man up there. Because He is watching all of us. He sent me to talk to you. He sent me to give you a chance to explain why. Because if not, we have the words of all those other people, and that man that's looking at this case, the lawyer that is looking at this case, is going to think that you are a monster."

The Court rejects defendant's contention that there should be a "bright-line" rule preventing police from impersonating clergy or other religious figures as a tactic for obtaining confessions. While defendant is a religious, vulnerable, non-English speaking indigent immigrant, there is no evidence that the investigator specifically appealed to defendant's vulnerability "to strike almighty fear in" defendant. The investigator identified himself as a member of the State Police. Defendant has not presented evidence to show that he was particularly susceptible to religious pressure.

The Court does not that "these strategies are not, and should not, be advocated by the trial courts," but the issue is whether the treatment of defendant was so fundamentally unfair as to deny due process.

People v. Armando Peres
(County Ct., Sullivan Co., 7/8/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51271.htm

* * *

CONFESSIONS - Interrogation
RIGHT TO COUNSEL

Defendant, suspected of a gunpoint gas station robbery, was arrested on a bench warrant stemming from an unrelated matter in which his indelible right to counsel had attached by virtue of an attorney's entry into the case. While incarcerated, defendant asked to speak to a detective he had known for several years. Hoping to obtain a DNA sample, the detective brought out a pack of cigarettes and defendant asked to smoke one. The two men smoked while defendant discussed problems he was having with a landlord, and did not discuss the robbery or any other criminal matter. Eventually, defendant extinguished the cigarette in an ashtray and was returned to his cell. The detective took possession of the ashtray and the cigarette butt, and DNA from defendant's saliva was later extracted and found to match the DNA found on an article of clothing believed to have been worn by the person who robbed the gas station.

The Court of Appeals finds no right to counsel violation. The detective's actions were not reasonably likely to elicit an incriminating response, and the transfer of bodily fluids was not a communicative act that disclosed the contents of defendant's mind.

The detective did not coerce defendant into providing the DNA evidence or cause him to make the functional equivalent of an un-counseled decision to consent to a search. Defendant initiated the interaction by summoning the detective, requesting a cigarette and abandoning the cigarette butt.

People v. Jeffrey Gibson
(Ct. App., 6/14/11)

* * *

CONFESSIONS - Miranda Warnings
- Voluntariness

On remand from the United States Supreme Court, the Ninth Circuit again concludes that the state court rulings denying suppression of a confession made by then 17-year-old petitioner constituted an unreasonable determination of the facts and an unreasonable application of governing Supreme Court precedent.

The *Miranda* warnings provided to petitioner were defective because the detective downplayed the warnings' significance. The detective emphasized that petitioner should not "take [the warnings] out of context," and implied, to a juvenile who had never heard of *Miranda*, that the warnings were just formalities. The detective assured petitioner repeatedly that the detectives did not necessarily suspect him of any wrongdoing. The detective misinformed petitioner about his right to counsel by deviating from the juvenile *Miranda* form and ad libbing that petitioner had the right to counsel if he was involved in a crime. The detective stated that the warnings were for the benefit of petitioner and the officers, which carried a dramatically different connotation than if the detective had given petitioner a straightforward explanation that the warnings were given for petitioner's protection, to preserve valuable constitutional rights.

Also, the confession was involuntary. The Court must take into account the fact that petitioner was a juvenile. Audiotapes reflect a relentless, nearly 13-hour interrogation of a sleep-deprived juvenile by a tag-team of detectives, and, by the end of the interrogation, petitioner was sobbing almost hysterically. During the interrogation, there were extended periods when petitioner was unresponsive, his posture "deteriorated," and he looked down at the ground.

Doody v. Ryan
2011 WL 1663551 (9th Cir., 5/4/11)

* * *

CONFESSIONS - Parent/Guardian - Conflict Of Interest

The First Department, while upholding the denial of suppression, notes that the appearance at a juvenile's interrogation by a parent who is also the parent of the complainant is not disqualifying, but is only a factor to be considered in evaluating the voluntariness of the statement.

In re Kevin R.
(1st Dept., 1/4/11)

* * *

CONFESSIONS - Miranda Warnings
- Waiver Of Rights - Knowing And Intelligent
- Voluntariness

In this sex crime prosecution involving a charge that twelve-year-old respondent put his penis into the buttocks of his five-year-old niece, the Court rejects respondent's argument that the detective's reading of the juvenile *Miranda* warnings was perfunctory and insufficient. The Court also concludes that the detective's offer of mental health or other supportive services to respondent did not give rise to any substantial risk that respondent might falsely incriminate himself.

Respondent has not demonstrated that his statement was involuntary by reason of his diminished mental capacity. Respondent's expert witness would not go so far as to say that respondent could not understand the immediate implication of the warnings as administered, and indicated only that respondent "would have a problem with some of them" and "did not understand completely." The heart of the expert's testimony was his opinion that respondent would have been unable to assert himself to the police, not that he was completely incapable of understanding the meaning and effect of the confession. Respondent's responses to the expert's questions indicate a basic understanding that what he said could be repeated in court and used "over" him, and that a lawyer could help him with difficult questions and could speak to the police on his behalf. Although respondent did say that he did not think he could get a lawyer, despite having just been told that one would be provided to him without cost, that response appears to have been an excuse offered upon being asked, in a somewhat accusatory manner, why he did not ask for a lawyer despite being told that he could have an attorney's assistance. His responses to other questions posed by the expert, including questions about the similarities between different objects, indicate that he is capable both of basic reasoning and more abstract thought. Respondent's composite IQ score of 78 places him above the range where an individual would be considered mildly mentally retarded, and the expert testified that respondent's verbal comprehension abilities place him in the low average range. Mental retardation, in and of itself, is not enough to show that a waiver of rights was not made knowingly, intelligently and voluntarily. The Court also is not persuaded that respondent is incapable of asserting himself in the face of authority.

Matter of Akeem Z
NYLJ, 1/31/11
(Fam. Ct., N.Y. Co., 1/20/11)

Practice Note: In a footnote, the Court noted that after the expert testified that he had administered the "Grisso test" while evaluating respondent's capacity to waive his *Miranda* rights, the Court concluded that the Grisso test had not gained sufficient acceptance in the scientific community to meet the Frye standard, and precluded the expert from testifying about those portions of his evaluation that pertained to respondent's performance on the Grisso tests.

* * *

HEARSAY - Declaration Against Penal Interest
CONFESSIONS - Voluntariness

The Second Department holds that defendant was deprived of a fair trial when the trial court denied his application to offer hearsay evidence that another individual had stated that he had beaten the victim with a baseball bat and robbed him. The declarant was unavailable to testify because of his refusal to testify on constitutional grounds, his statement was clearly and unambiguously against his penal interest, and there is a reasonable possibility that the statement may be true.

The Court also concludes that the trial court's instructions on the voluntariness of defendant's confession did not adequately convey the factors the jury was to consider. Where defendant was 16 years old at the time of the confession and had been held at the police station overnight while handcuffed to a chair and subjected to repeated questioning, the court should have instructed the jury to consider the factors contained in the "expanded charge" on voluntariness (see CJI2d[NY] Statements [Admissions, Confessions]).

People v. Terrell Clinkscaleas
(2d Dept., 11/23/10)

* * *

CONFESSIONS - Fruits - Subsequent Statements

The Second Department holds that the hearing court, which suppressed defendant's statement made prior to the administration of *Miranda* warnings and also determined that her written statement was tainted fruit, erred in refusing to suppress defendant's videotaped statement.

Given the relatively brief time break between the *Miranda* violation and the subsequent statements (less than two and three-quarter hours), the evidence indicating that defendant remained continuously in the presence of the detectives from the time she made her pre-*Miranda* statements until the completion of the prosecutor's videotaped interview, and the fact that the statements appear to have all been made in the same location, there was no definite pronounced break in the interrogation.

People v. Natasha Sedunova
(2d Dept., 4/19/11)

* * *

CONFESSIONS - Admission Of Exculpatory Portion
POSSESSION OF A WEAPON - Intent To Use Unlawfully
RIGHT TO PRESENT DEFENSE

Defendant, who, while being attacked by a group of men in his neighborhood, pulled a gun and shot one of the men and killed him, described in his post-arrest statements and in his testimony in the grand jury escalating harassment and threats, an assault to which he had been subjected upon moving into the neighborhood, his attempts to have the police intervene, his unsuccessful efforts to obtain emergency housing, and the shooting incident itself. He also admitted that he had possessed the gun for several weeks before the incident. The grand jury returned an indictment charging defendant with two counts of criminal possession of a weapon in the second degree, but no homicide counts.

At trial, defendant's statements and grand jury testimony were admitted, but were redacted to omit all but the portions relating to the incident itself and how long defendant had possessed the gun. The court told defendant that, if he were to testify, his testimony would be similarly limited, and he declined to testify.

The Second Department finds reversible error. A defendant has a fundamental constitutional right to present witnesses in his or her defense. While justification is not a defense to the crime of weapon possession, the court improperly precluded defendant from presenting evidence to support his contention that he possessed the weapon without the intent to use it unlawfully. Moreover, defendant was entitled to have his complete statements, rather than only the inculpatory portions, introduced into evidence.

People v. Trevor Pitt
(2d Dept., 5/24/11)

* * *

CONFESSIONS - Fruits - Subsequent Statements

While affirming an order granting suppression, a Second Circuit majority concludes that the initial, pre-*Miranda* interrogation, followed 90 minutes later by a second, post-*Miranda* interrogation by the same investigator on the same subject matter, under similar circumstances, and with no explicit curative language alerting defendant that his first statement would be inadmissible, amounted to a deliberate, two-step interrogation technique designed to undermine defendant's *Miranda* rights.

The initial conversation was in no way casual. Between the two phases of the interrogation, fellow investigators engaged defendant in "small talk" and advised him that it was in his interest to tell the truth. Defendant was handcuffed throughout the process. The second phase opened with a hostile remark when the investigator stated that defendant was "one of the most laziest employees I've ever seen."

Inexperience, while not a legitimate excuse for postponing *Miranda* warnings, nevertheless may save a post-*Miranda* confession from exclusion as tainted fruit. However, this investigator was experienced enough to know there was no valid reason to delay Miranda warnings.

United States v. Capers
2010 WL 4869768 (2d Cir., 12/1/10)

* * *

CONFESSIONS - Invocation Of Right To Remain Silent

The Second Department holds, inter alia, that after initially agreeing to speak to the police, defendant unambiguously and unequivocally invoked his right to remain silent when he stated that he wanted to keep his story to himself.

People v. Ronald Rodriguez
(2d Dept., 10/26/10)

* * *

RIGHT TO COUNSEL - Invocation
CONFESSIONS - Invocation Of Right To Remain Silent

Upon the Government's motion seeking reconsideration and reversal of an order of suppression in light of the Supreme Court's decision in *Berghuis v. Thompkins* (130 S.Ct. 2250), the Second Circuit agrees that *Berghuis* constitutes an intervening change in controlling law, and vacates the district court's order of suppression.

Previously, a Second Circuit majority acknowledged that defendant's statements - "I am not sure if I should be talking to you" and "I don't know if I need a lawyer" - were ambiguous, but held that the unambiguous invocation standard applies only when a defendant claims that he subsequently invoked previously waived Fifth Amendment rights. However, In *Berghuis*, the Supreme Court clarified that the unambiguous invocation standard applies to both the right to counsel and the right to remain silent, and applies where a court evaluates an initial rather than subsequent invocation.

The Court rejects defendant's claim that he invoked his *Miranda* rights through his "unequivocal" refusal to sign a waiver of rights form. A refusal to waive rights, however unequivocal, is not necessarily equivalent to an unambiguous decision to invoke them. Between an unambiguous invocation of rights, and a knowing and voluntary waiver of rights, there is a middle ground occupied by suspects who are unsure of how they wish to proceed. Defendant was in that middle ground. While his refusal to sign the form may have unequivocally established that he did not wish to waive his rights at that time, his concurrent statements - "I am not sure if I should be talking to you" and "I don't know if I need a lawyer" - made equally clear he was not

seeking to invoke his rights and cut off all further questioning. At no point did defendant unambiguously state that he wished to invoke his right to remain silent or his right to speak with an attorney, nor was his course of conduct such that the officers should reasonably have been put on notice that no further questioning could occur. Moreover, absent an unambiguous invocation, officers have no obligation to stop questioning or to ask only questions intended at clarifying an ambiguous statement.

United States v. Plugh
NYLJ, 8/9/11
(2d Cir., 8/8/11)

* * *

CONFESSIONS - Parent/Guardian Or Person Legally Responsible
- Necessity Of Questioning
- Voluntariness

The First Department, upholding the denial of suppression, concludes that given the seriousness and complexity of the charges, it was clearly "necessary" to take respondent to a designated facility for questioning; that representatives of Children's Village, the entity that was legally responsible for respondent's care, were present and were suitable; that the delay in commencing the questioning was reasonable in light of the time consumed in obtaining the presence of the Children's Village employees; and that the length of the interrogation was reasonable in light of the large number of burglaries and the need to conduct a canvass in which respondent identified the locations he burglarized.

In re Dominique P.
(1st Dept., 3/8/11)

* * *

CONFESSIONS - Huntley Hearing - Burden Of Proof

The Court orders suppression where the officer testified that he gave Miranda warnings to defendant and then interrogated him, he wrote on the interrogation sheet that defendant was interrogated at 9:15 and noted on the Miranda checklist that he read the rights to defendant at 9:25.

People v. Jorge
NYLJ, 1/3/11
(Sup. Ct., Bronx Co., 12/7/10)

* * *

CONFESSIONS - Custody - Statements In Prison

The Sixth Circuit U.S. Court of Appeals, adopting a bright-line approach, holds that *Miranda* warnings must be given when an inmate is isolated from the general prison population and interrogated about conduct occurring outside of the prison.

While locking doors or handcuffing the inmate enhances the potential for coercion, isolation is perhaps the most coercive aspect of custodial interrogation. Being placed in a room, apart from others within the prison population, sequesters the prisoner with his accusers in the type of scenario for which *Miranda* seeks to provide protection. The sense of control exercised by interrogators over the prisoner in determining the length of the prisoner's removal from his normal life further reinforces the element of coercion. A prisoner may feel he has no choice but to cooperate and provide the exact answers his interrogators seek to elicit, regardless of the potential for incrimination.

Fields v. Howes
2010 WL 3271654 (6th Cir., 8/20/10)

* * *

CONFESSIONS - Notice Of Intent To Offer

The Court orders preclusion of defendant's statements pursuant to CPL § 710.30. Although "actual notice" can provide good cause for late service, the People have not moved for permission to serve late notice.

People v. Crippen
(Rome City Ct., Oneida Co., 12/13/10)
http://courts.state.ny.us/Reporter/pdfs/2010/2010_33402.pdf

Practice Note: While alluding to the possibility of good cause, the Court cited *People v. Michel* (56 N.Y.2d 1014), where notice was excused because the defendant's confession was negotiated, drafted and signed by the defendant and his attorney and it specifically stated that it was "going to be used in court." This is an extremely narrow exception to the strict notice requirement; in contrast, mere knowledge of the existence of a statement does not constitute constructive notice. *People v. Phillips*, 183 A.D.2d 856 (2d Dept. 1992); *People v. Heller*, 180 Misc.2d 160 (Crim. Ct., N.Y. Co., 1998).

* * *

CONFESSIONS - Fruits - Subsequent Statements

A Ninth Circuit U.S. Court of Appeals majority, applying the holding in *Missouri v. Seibert* (542 U.S. 600), concludes that the officers' deliberately delayed *Miranda* warnings, administered prior

to each of defendant's two statements but after defendant had already made admissions, were ineffective, and thus defendant's post-warnings statements must be suppressed.
The Court notes, *inter alia*, that the pre-warnings interrogation was highly confrontational and detailed; that the interrogation sessions were effectively continuous and the same police personnel were involved; and that the police, who took no curative measures, should have explained to defendant the likely inadmissibility of the pre-warnings custodial statements.

Thompson v. Runnel
2010 WL 3489837 (9th Cir., 9/8/10)

*** * ***

CONFESSIONS - Voluntariness

A Maryland Court of Appeals majority holds that an officer's statement to defendant that the victim and his family did not want defendant to get into trouble and only wanted an apology constituted an improper inducement and rendered defendant's statements involuntary.

A reasonable layperson in defendant's position would not necessarily understand that the State could prosecute him even against the wishes of the victim or victim's family. The Court rejects the State's argument that only statements offering or implying the officer's assistance in avoiding prosecution qualify as inducements.

Hill v. State
2011 WL 222244 (Md., 1/26/11)

Search And Seizure

SEARCH AND SEIZURE - Exigent Circumstances - Police-Created Exigency

The United States Supreme Court holds that the exigent circumstances rule applied when police knocked on the door of a residence and announced their presence, causing the occupants to attempt to destroy evidence.

Addressing the "police-created exigency" doctrine developed by lower courts as an exception to the exigent circumstances rule, the Court concludes that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable and police did not create the exigency by engaging in or threatening to engage in conduct that violates the Fourth Amendment.

The Court rejects the approach adopted by some courts under which the exigent circumstances rule does not apply when law enforcement officers deliberately created the exigent circumstances with bad faith intent to avoid the warrant requirement. The Court's Fourth Amendment cases have employed an objective, and not a subjective approach. The Court also rejects holdings that

the police may not rely on an exigency if it was reasonably foreseeable that the investigative tactics employed would create the exigent circumstances, and may not knock on the door and seek to speak with an occupant or obtain consent to search, rather than seek a warrant, after acquiring probable cause to search particular premises. The Court also rejects defendant's proposed rule under which law enforcement officers impermissibly create an exigency when they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable.

Here, the police did not violate the Fourth Amendment or threaten to do so before entering. There is no evidence that they demanded entry.

Kentucky v. King
2011 WL 1832821 (U.S. Sup. Ct., 5/16/11)

* * *

SEARCH AND SEIZURE - Reasonable Suspicion

After taking into custody a man who was wanted in connection with a shooting incident, and receiving from the man insufficient identification and conflicting information as to his name, which he initially gave as Jason Lawyer, and his address, the police determined that on a previous occasion they had arrested a man named Joshua Lawyer. The police went to the address they had for Joshua Lawyer, and, when they knocked at the apartment door, a female voice asked who was there. An officer said "It's the police. Can I have a word with you?" When the officer heard scuffling noises followed by the sound of a window being opened, he sent two officers up to the roof, and they reported observing a figure emerge from a fourth-floor window and ascend the fire escape to the roof, with an object in hand. When the individual (defendant) arrived on the roof, one of the officers announced "Police. Don't move." Defendant dropped a canvas bag, which landed with a loud thud. One officer detained defendant, and the other retrieved the bag. Through the fabric, the officer could feel an L-shaped, hard object he concluded was a gun. He opened the bag and found a loaded pistol and a magazine and five rounds within another bag.

A 3-judge First Department majority reverses an order granting suppression, concluding that the totality of the information known to the police by the time defendant was observed on the roof holding the bag created a reasonable suspicion that defendant had been or was then trying to avoid detection of contraband, possibly relating to the shooting, and entitled the police to detain defendant and pat down the canvas bag.

The dissenting judges assert that even if, as the People argued at the hearing, defendant's flight created a founded suspicion that criminal activity was afoot and justified a common-law inquiry, an immediate forcible detention was not justified. Although the People argued that the sound made by the bag when defendant dropped it created reasonable suspicion and a basis for a frisk of the bag, defendant had already been forcibly seized at gunpoint at the time the officer heard the "thud".

People v. Latisha Bowden
(1st Dept., 8/4/11)

* * *

SEARCH AND SEIZURE - Material Witness Warrants
- Pretextual Arrests

In a case involving allegations that federal officials used the material witness statute as a pretext for the detention of terrorism suspects, in the absence of sufficient evidence to charge them with a crime and with no intention of calling most of them as witnesses, the Supreme Court holds that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.

When the Court refused in *Whren v. United States* (517 U.S. 806) to look behind an objectively reasonable traffic stop to determine whether racial profiling or a desire to investigate other crimes was the real motive, the Court did not limit the holding to cases in which there is probable cause to believe a violation of law has occurred.

Justices Ginsburg, Breyer and Sotomayor concur in the Court's finding that no clearly established federal law renders the former Attorney General liable for damages, but challenge the Court's assumption that the warrant was validly obtained, given the Government's omissions and misrepresentations.

Ashcroft v. Abdullah al-Kidd
2011 WL 2119110 (U.S. Sup. Ct., 5/31/11)

* * *

SEARCH AND SEIZURE - Exclusionary Rule

In a case in which an unlawful auto search took place two years before the Supreme Court announced a new rule in *Arizona v. Gant* (552 U.S. 1230) that applies retroactively to this appeal, a Supreme Court majority holds that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on binding precedent that is later overruled. Suppression would do nothing to deter police misconduct in such circumstances, and would come at a high cost to both the truth and public safety.

Davis v. United States
2011 WL 2369583 (U.S. Sup. Ct., 6/16/11)

* * *

SEARCH AND SEIZURE - Fruits - Consent To Enter/Search

After tracing a stolen school laptop computer to a Bronx address, the police went to the address, a single family dwelling. They entered the vestibule without ringing the doorbell or otherwise announcing their presence, and then one of the officers knocked on an inner door separating the vestibule from the rest of the home. Respondent's sister, who had heard the officers enter the vestibule, welcomed the officers inside, saying "Thank God you're all here." When asked whether respondent was at home, she answered affirmatively, explaining that he had been "acting up" and cursing at her mother, and that she "was going to call [the police] anyway, if [her brother] kept it up." The sister then directed the officers up the stairs, to a bedroom where they encountered a young man, not respondent, with a laptop. When asked whether it was his laptop, the young man answered that it was not. Respondent entered the room and said, "That's my laptop, my friend stole it." Respondent was arrested and charged with criminal possession of stolen property.

The family court denied suppression, but the Appellate Division reversed, concluding that the officers' "intrusion over the threshold of the home was unlawful" and that the Presentment Agency had not met its burden of showing that the sister's consent was both voluntary and sufficiently distinguishable from the entry to be purged of any illegality.

The Court of Appeals reverses in a 4-3 decision, concluding that the sister's voluntary consent attenuated the taint of the illegal police action. The fact that the consent came close on the heels of the initial illegality is not dispositive, particularly where the person giving the consent is not the subject of the police action. There was no evidence that the illegal entry was undertaken for the purpose of obtaining the consent or seizing the fruits of the search, and the alleged police misconduct did not so flagrantly intrude on personal privacy that its taint cannot be dissipated.

The dissenting judges, noting that attenuation is generally a mixed question of law and fact, rejects the majority's holding that the consent was attenuated as a matter of law. Given the quick pace of events, there were no intervening circumstances destroying the link between the illegal entry and the sister's consent. The majority assumes that the sister's frame of mind was unaffected by the sudden presence of several police officers in her living room, and the Presentment Agency, which has the burden of demonstrating attenuation, proffered no evidence that the sister was aware she could refuse to consent. Had the officers knocked and requested entry, the sister or another resident might have considered whether letting them in was in the family's best interest. Moreover, the police misconduct was flagrant. Numerous officers, some in uniform, illegally entered what was obviously a private home without a warrant or exigent circumstances. The officers who testified could explain how this happened, and the failure of their recollection in this context is disturbing.

Matter of Leroy M.
(Ct. App., 2/17/11)

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SEARCH AND SEIZURE - Expectation Of Privacy - Cell Phone Information

The First Department finds no error where the court denied defendant's motion to suppress historical cell site location information for calls made over his cell phone during the three-day period surrounding the shootings. The records were obtained by court order under 18 U.S.C. § 2703(d), which does not require that the People establish probable cause or obtain a warrant.

Obtaining the information without a warrant did not violate the Fourth Amendment or State Constitution. Defendant had no reasonable expectation of privacy while traveling in public. The Court of Appeals' decision in *People v. Weaver* (12 N.Y.3d 433), which requires the police to obtain a warrant supported by probable cause for the installation of a global positioning system device, does not address this issue, and, in *Weaver*, the device was used to track defendant's movements for 65 days, as opposed to 3 days in this case. Even if prolonged surveillance might require a warrant under federal law, 3 days is insufficient.

People v. Alexander Hall
(1st Dept., 7/14/11)

* * *

SEARCH AND SEIZURE - Common Law Right To Inquire
- Reasonable Suspicion

The officer's attention was drawn to defendant because, even though it was an unusually warm night, he was wearing a brown sweatshirt with the hood over his head, and he was crouching behind an SUV and looking at two men. Defendant also was holding something near his waistband that the officer suspected was a gun, but he could not see defendant's hand and did not see a weapon. Another officer thought defendant was holding something inside the pocket of his sweatshirt that may have been a weapon, but, when asked why defendant's hand position suggested a weapon, said he did not know. A third officer thought defendant was holding something in the pocket of his sweatshirt. The officers exited their car to investigate, and, with their shields displayed, two officers approached defendant from the front and the third from behind. When one officer made eye contact, defendant turned away towards another officer and "basically walked into [him]." That officer stopped defendant, whose hands were in the pocket of his sweatshirt, and asked him if he had any weapons on him. Defendant said no, and the officer then patted down the area where he saw defendant's hands, felt a hard object, and lifted up the sweatshirt and removed a gun that was tucked into defendant's waistband.

Affirming an order granting suppression, the First Department concludes that the officers, at most, had a common law right to inquire, which included a right to ask him to remove his hands from his pockets as a precautionary measure, but lacked reasonable suspicion justifying the forcible stop. The fact that defendant's hand was near his waistband or in his sweatshirt pocket,

absent any indication of a weapon such as the visible outline of a gun, did not create a reasonable suspicion, nor did the fact that defendant was located in an alleged high crime area.

People v. Bonelly Fernandez
(1st Dept., 8/18/11)

* * *

SEARCH AND SEIZURE - Protective Sweep

The Second Circuit concludes that the agents conducted an unlawful sweep after they went to defendant's apartment with the legitimate purpose of questioning and possibly arresting him, and were admitted by a young woman the agents had no legitimate reason to believe had authority to consent to a search of the premises.

The agents' purpose could not be pursued until defendant was found, and the sweep itself became the purpose for the agents' continued presence. The sweep was not a reasonable security measure incident to an interrogation or arrest. It may have been objectively reasonable for agents to think defendant's presence on the premises posed a danger to their safety, but a protective sweep is reasonable only to safeguard officers in the pursuit of an otherwise legitimate purpose. Where no other purpose is being pursued, a sweep is no different from any other search and, therefore, requires a warrant, exigency, or authorized consent.

United States v. Eric Hassock
NYLJ, 2/15/11
(2d Cir., 1/28/11)

* * *

SEARCH AND SEIZURE - Fruits - Confession

While finding sufficient record support for the Appellate Division's determination that defendant's confession was sufficiently attenuated from any unlawful detention, the Court of Appeals notes that after defendant was initially detained at around 10:30 p.m., he was taken to a police barracks and given *Miranda* warnings about 30 minutes later; that defendant waived his *Miranda* rights and offered to talk to the police, and his interrogation did not begin until 1:00 a.m.; that in the interim, the police secured witness statements that clearly established probable cause; that defendant confessed after being confronted with the witnesses' statements, which is a significant attenuating factor; that defendant was not subjected to any pre-*Miranda* interrogation or mistreated while in police custody; and that the trooper, who knew that defendant was a registered sex offender in the company of two teenage girls who had been reported as missing by their mother, had a good faith basis for approaching and detaining defendant.

People v. Dana Bradford

(Ct. App., 10/19/10)

* * *

SEARCH AND SEIZURE - Reasonable Suspicion - Possession Of Gravity Knife

The Court of Appeals holds that an officer has reasonable suspicion to believe an individual possesses a gravity knife, as opposed to other similar knives such as a pocketknife, and is authorized to conduct a stop and frisk, when the officer, has reason to believe that the knife is in fact a gravity knife, based on his or her experience and training and/or observable, identifiable characteristics of the knife. An individual may not be detained merely because he or she is seen in possession of an object that appears to be a similar, but legal object, such as a pocketknife.

In *People v. Brannon*, the officer testified that he was able to see a hinged top of a closed knife and observed the outline of a pocketknife in defendant's pocket, but was unable to testify that he suspected or believed it to be a gravity knife. The record does not support the finding of reasonable suspicion.

In *People v. Fernandez*, the record supports the finding of reasonable suspicion. The officer saw, in plain view, the "head" of a knife that was sticking out of and clipped to defendant's pants pocket, and testified, based on his experience, that gravity knives are commonly carried in a person's pocket, attached with a clip, with the "head" protruding.

Judge Jones, concurring in *Brannon* and dissenting in *Fernandez*, would hold that a stop and frisk based on the mere observance of a portion of a knife and the experience of the officer is not supported by reasonable suspicion. A gravity knife cannot be identified until it is operated because there is no inherently distinguishing mark or physical trait that would allow for the plain identification of a gravity knife.

People v. Ernest Brannon, People v. Fernandez
(Ct. App., 5/5/11)

* * *

SEARCH AND SEIZURE - Request For Information

Late at night on New Year's Eve, in a high-crime neighborhood, a group of young men, including respondent, was congregating on a street corner. When two uniformed officers got out of their marked car and approached respondent, he turned around, walked quickly away and looked back several times over the course of two minutes.

The First Department orders suppression, concluding that the police did not have the right to approach for a level one request for information during which the officer followed respondent in his police car, stopped the car, asked respondent to stop and asked him what he was doing.

Respondent’s conduct was ambiguous, and was no more than an exercise of his "right to be let alone" in response to the initial approach, and was not flight. The officer’s subsequent observations leading to the recovery of a loaded revolver from respondent’s jacket were the result of the unauthorized encounter.

In re Michael F.
(1st Dept., 5/5/11)

* * *

SEARCH AND SEIZURE - Request For Information

At approximately 11:47 a.m., the officer saw defendant, with whom he had had "previous interactions," enter and go through the vestibule of a public housing apartment building that has a no trespassing sign posted inside. The officer briefly observed defendant on the stairs before the door shut. About five minutes later, defendant came out of the building and began speaking to another female in front of the building for no more than a minute. The officer approached and asked defendant whether she was visiting anyone in the building, and, if so, what was the person's name. Defendant stated that she just popped into the building to see if anyone was there who owed her money, and was unable to provide the name, apartment number or floor of a person she was visiting. The police then arrested defendant.

The Court suppresses defendant's statements, concluding that the police did not have valid grounds to approach and request information. There was no stated reason for stopping defendant other than for entering and exiting the building within five minutes.

People v. Ortiz
NYLJ, 6/3/11
(Crim. Ct., Kings Co., 5/25/11)

* * *

SEARCH AND SEIZURE - Stop And Frisk
- Auto Stop -Frisk Of Occupant

The Second Department holds that after lawfully making a traffic stop and ordering the occupants to exit the vehicle, the officer was entitled to conduct a patdown search of defendant’s right pants pocket in light of defendant's furtive behavior while seated in the vehicle, which included attempting to cover his right side pants pocket, and, upon exiting the car, continuing to cover that same pocket while trying to avoid showing the officers the right side of his body.

People v. Quasii Grant
(2d Dept., 4/12/11)

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SEARCH AND SEIZURE - Standing/Expectation Of Privacy – Garbage

The Third Department holds that defendant had no legitimate expectation of privacy in his trash.

The Court rejects defendant's argument that a distinction should be made where, as here, defendant threw his trash into a closed dumpster at a private apartment complex that was under the control of a private waste management company, rather than leave it along a public street and under the control of the public department of sanitation.

People v. Vernon Harris
(3d Dept., 4/14/11)

* * *

SEARCH AND SEIZURE - Motion Papers
MOTION TO SUPPRESS - Default

The First Department rejects defendant's contention that his suppression motion should have been granted summarily where the People alleged that the evidence was lawfully obtained and denied all allegations to the contrary. This was sufficient to meet their burden of refusing to concede the truth of facts alleged by defendant.

People v. Ventura-Almonte
(1st Dept., 11/18/10)

* * *

SEARCH AND SEIZURE - Request For Information
- Common Law Right To Inquire
- Stop

After noting that defendant has conceded that the officers had an objective, credible reason to approach him and ask for an explanation as to why he was in the subway where they recognized defendant as a person with a history of repeatedly picking the pockets of subway passengers, and also knew he was on parole and that a condition of his parole generally barred him from being in the subway system, the First Department concludes that when an officer said, "[P]olice," and "Duval, stop, I need to talk to you," there was no seizure and the encounter was still a request for information.

When defendant admitted he knew he was not allowed to be in the subway, and gave an invalid and suspicious excuse for being there, there was founded suspicion that defendant was in the subway to commit a crime, and an officer made a proper common law inquiry when he asked defendant whether he had "anything that he shouldn't have."

People v. Duval Simmons
(1st Dept., 12/2/10)

* * *

IDENTIFICATION - Showup - Suggestiveness

During a canvass shortly after the robbery, without any prompting by the police, the complainant pointed to two groups of individuals on the street and stated, "that's them, those are them over there." The first group, which consisted of three individuals and included defendant Guitierres, was "cut off" by a police van, and two of the members of the second group ran away. The complainant was asked by an officer if the individuals in the first group were involved in the robbery, and the complainant stated that "he wasn't too sure." The officer then stated to the complainant, "I want you to understand something[,] I can't arrest somebody when you say you're not sure. Either they did or they didn't. I need you to take a good look at them and let me know one by one if they were involved or not involved." At this point, the complainant looked at all three individuals "slowly" and "deliberately," and stated that all three were involved in the robbery. Defendant Abriz, a member of the second group, was brought to the complainant, and, when the complainant was asked if Abriz was involved in the robbery, the complainant initially stated that "he wasn't sure." The officer told the complainant, "it's either yes or no. I need you to take a good look at him and make sure whether it's yes or no." The complainant then took a "good look" at Abriz, and identified him.

The hearing court suppressed evidence of the showup identifications and potential in-court identifications.

A Second Department majority reverses, concluding that the officer's statements did not render the showup identification procedures unduly suggestive. The statements "were balanced and did not pressure the complainant to make positive identifications."

A dissenting judge asserts that, in the complainant's mind, he "had the option of either making the identification and ensuring an arrest, or going home as a victim without an arrest being made."

People v. Oscar Guitierres and Brandon Abriz
(2d Dept., 3/22/11)

* * *

IDENTIFICATION - Showups - Suggestiveness

After the complainant provided the officers with a description of the assailant and of his clothing, the officer immediately canvassed the area and observed defendant, who matched the description

of the suspect, in a group of four or five teens a block and a half from the crime scene. The officer detained defendant and separated him from the other teens. When the complainant arrived at the scene within a half hour after the incident, defendant was standing with an officer 25 feet from the group of teens. The complainant made a positive identification.

The Appellate Term upholds an order suppressing the showup identification. Street showups of suspects caught near the crime scene are not presumptively infirm, but must be scrutinized very carefully for unacceptable suggestiveness and unreliability. Here, the police conduct was so suggestive as to create a substantial likelihood of misidentification.

People v. Troy Williams
(App. Term, 2d, 11th & 13th Dist., 7/28/11)

* * *

IDENTIFICATION – Suggestiveness

The Court of Appeals holds that two witnesses' knowledge that the suspect whom they had tentatively identified from a photographic array would be in a lineup did not, under the circumstances of this case, present a serious risk of influencing the witnesses' identification of defendant from the lineup.

People v. Jazzmone Brown
(Ct. App., 6/6/11)

* * *

SEARCH AND SEIZURE - Arrest Warrant - Presence Of Suspect At Location
POSSESSION OF DRUGS - Constructive Possession

A 3-judge Third Department majority upholds a forcible entry to execute an arrest warrant and concludes that the troopers had a reasonable belief that Laroe, the subject of the warrant, was present in the apartment. Defendant confirmed that it was Laroe's residence and stated that Laroe was not there and that had gone to Plattsburgh with her mother, but defendant was not sure where Laroe was and was only able to identify the mother as Victoria and could not identify the type of vehicle the mother drove. Defendant, while being asked questions, looked back over his shoulder into the apartment. After a trooper twice told defendant that he believed Laroe was in the apartment, that they needed to execute the warrant and that defendant faced arrest if he did not allow them into the residence, defendant, rather than deny again that Laroe was in the apartment, twice responded that he would not let the troopers in. As the trooper began to turn to go to his vehicle and get the warrant, defendant slammed the door.

The Court also finds sufficient evidence that defendant possessed a clear plastic baggie containing what was later determined to be cocaine weighing 2.8 ounces, which was in plain

view on a bedroom nightstand. There was evidence that defendant had recently woken up in the bed next to the nightstand, and pants containing defendant's identification were found on a suitcase located next to the nightstand.

The dissenting judges assert that defendant's reasonable and constitutionally protected reaction to the troopers' conduct cannot be used as post hoc support for a reasonable belief that Laroe was present and for the forcible entry, arrest of defendant for obstructing governmental administration, and search of the apartment. This essentially "permits any police officer with an arrest warrant to decide for himself or herself, without any objective basis whatsoever, that a person who answers the door is lying and harboring a suspect, thus permitting wholesale entry into residences in contravention of the protections afforded to citizens against unreasonable searches and seizures by the government."

People v. Tiray Paige
(3rd Dept., 10/28/10)

* * *

SEARCH AND SEIZURE - Request For Information

The Second Department upholds a determination that the arresting officers lacked an objective, credible reason for approaching the stopped car in which defendant was a passenger where the officer's reason for approaching the vehicle was that it was parked outside a bar in an area where there had been "community complaints" of gang and drug activity.

People v. James Miles
(2d Dept., 3/15/11)

* * *

SEARCH AND SEIZURE - Auto Stop - Reasonable Suspicion

The Fourth Circuit U.S. Court of Appeals finds no reasonable suspicion justifying a stop where the Government relies on the detective's prior knowledge of defendant's criminal record; defendant's sudden appearance from a crouched position in a parked car immediately after the driver had apparently said something to him after seeing the detective walking towards them; and defendant's frenzied arm movements, including the movement of his arms down towards the floor of the car.

The detective had some specific knowledge about defendant's history of traffic offenses, but lacked familiarity with defendant's marijuana arrest or that arrest's disposition and knew only that defendant was "under investigation" for drug trafficking. Defendant's behavior in the car was not suspicious. There are an infinite number of reasons, unrelated to criminality, why a passenger would not immediately be visible. The Government argues that the detective reasonably could

have inferred that defendant's arm shifting was an attempt to hide something; however, when, at that time, the detective asked the occupants "What are ya'll doing," defendant acknowledged the detective, was not noticeably nervous and did not flee, and the men remained in the car for at least 15 minutes before the stop took place.

The Court expresses its "concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." The Court is "deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception."

United States v. Foster
2011 WL 711858 (4th Cir., 3/2/11)

* * *

SEARCH AND SEIZURE - Probable Cause - Drug Transactions
- Arrest
CONFESSIONS - Interrogation

The Court orders suppression of contraband recovered from defendant, and his statement to the arresting officer, finding no probable cause where defendant briefly touched hands with a drug dealer moments after the dealer sold drugs to an unrelated individual. This was entirely consistent with a completely innocent encounter involving two people who know each other exchanging a brief greeting as they pass on the street. The officer failed to articulate any basis for his belief that there was an exchange of drugs or money.

Defendant was clearly under arrest by the time he admitted that he was in possession of marijuana. He was surrounded by three officers, had his hands against the wall and had his feet apart in a spread position, and the officer stated: “If you give me what I think you just bought, I’ll try to get you a desk appearance ticket tonight. If I search and find it, you know, I have to send you to Central Booking.” This statement was not intended to clarify the situation or to gain explanatory information.

People v. Milo Tyler
(Sup. Ct., N.Y. Co., 2/3/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50122.htm

* * *

SEARCH AND SEIZURE - Stop And Frisk
- Reasonable Suspicion

When the officers responded to a call regarding a burglary in progress involving two black males at a specific address, they encountered defendant and the co-defendant, who are black males, on

the porch wearing hooded sweatshirts on a day when the temperature was approximately 80 degrees. The officers asked if they lived there, and each responded that he did not. The officers then attempted to pat them down, but the co-defendant fled. Defendant initially complied with the command to place his hands on his head, but when the officer pursuing the co-defendant announced on the radio that he saw a gun, defendant pushed another officer and struggled with him until they fell down the stairs together, and began to flee. When the officer apprehended defendant, he searched him and found a shotgun shell.

The Third Department, upholding an order denying suppression, concludes that the officers were justified in momentarily detaining the two men and patting them down for weapons to ensure the officers' safety. Defendant's conduct in injuring the officer before he fled was a crime and thus the officer was justified in arresting him.

People v. Daniel Clinkscales
(3d Dept., 4/7/11)

* * *

SEARCH AND SEIZURE - Probable Cause - Possession Of Drugs

The First Department finds probable cause where the officer observed defendant rolling marijuana cigarettes in his car. Although the officer did not specifically testify as to his experience and training regarding marijuana, his general police experience and training permitted the inference that he could identify marijuana for probable cause purposes.

People v. Omar Tsouristakis
(1st Dept., 3/24/11)

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SEARCH AND SEIZURE - Auto Search - Canine Sniff

In a case of apparent first impression nationwide, an Illinois Supreme Court majority holds that no automobile search took place where, after a lawful traffic stop, the officers ordered defendant to roll up her windows and turn the blowers on high before conducting a dog sniff of the truck's exterior.

The majority also concludes that defendant has not properly raised a claim that the procedure constituted an additional, unlawful seizure. The dissenting judges would reach the seizure issue and find an unreasonable seizure.

People v. Bartelt
2011 WL 1049788 (Ill., 3/24/11)

* * *

SEARCH AND SEIZURE - Strip/Body Cavity Search

The First Department orders suppression where the warrant authorized only a search of defendant and his vehicle, but, at the precinct, after a patdown search revealed a gravity knife and currency but no drugs, the police conducted a strip search and visual body cavity search which revealed a white object in defendant's buttocks which was a piece of toilet paper rolled in a ball around 29 glassines of heroin, and another object behind the toilet paper which also contained drugs.

To conduct a visual cavity inspection, the police must have a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity. The officers' generalized knowledge that drug sellers often keep drugs in their buttocks, and the fact that no drugs were found during a search of defendant's clothing, were insufficient. No inference could be drawn in these circumstances that the absence of drugs in defendant's clothing indicated that he must have them in a body cavity because they had to be somewhere. The information that led to the issuance of a warrant nine days earlier gave the police reason to believe that defendant was a person likely to be carrying drugs, but no specific reason to believe he ever carried them in his buttocks.

People v. Jose Colon
(1st Dept., 1/4/11)

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SEARCH AND SEIZURE - Request For Information
- Reasonable Suspicion - Flight
- Abandonment

While responding to a call regarding a suspicious man, the officer saw defendant, who matched the description, near the location given. Defendant was running out of a school driveway toward the officer, who was in a marked patrol car. She yelled for him to stop, but he turned onto the street and kept running. While following him in her car, the officer saw him put his hand in his shirt and make a movement like he was throwing something onto the porch or lawn of a house. The officer parked and began a foot pursuit, handcuffed defendant after he stopped running, and retrieved the stolen property defendant had thrown.

The Third Department orders suppression. The officer could lawfully request information from defendant about his presence in the area, but defendant did not have to answer the inquiry or stop running. The officer did not have reasonable suspicion justifying pursuit. While the officer could have followed defendant to keep him under observation, her testimony was more consistent with immediate pursuit in her vehicle. Defendant did not act spontaneously or make a conscious and

independent decision to abandon the property; rather, he discarded the property in response to the illegal pursuit.

People v. Justin Pirillo
(3rd Dept., 11/24/10)

* * *

SEARCH AND SEIZURE - Probable Cause - Drug Transactions

The First Department finds probable cause to arrest where, in an area known for drug activity, a trained and experienced narcotics officer saw defendant converse briefly with a man known to the officer to be a local seller of heroin and cocaine, and defendant received an unidentified object from the dealer in exchange for money.

People v. David Selby
(1st Dept., 3/3/11)

* * *

SEARCH AND SEIZURE - School Searches

Respondent was found in the locker room by a school aide at a time when he was not supposed to be there. The aide brought respondent to a school safety officer, who then brought him to the Dean's office. While the officer and respondent were alone in the office, respondent placed his hand down the front waistline of his pants. The officer asked him to take his hand out of his pants, and respondent complied. However, he placed his hand down his pants again, in the same manner, and the officer again asked him to remove his hand from his pants. He complied, but then put his hand down his pants for a third time, and slid his hand from his pants to the inside shoulder of his fleece jacket. The officer called a Sergeant into the office, and after respondent spoke to one of his parents on the telephone, the officer asked him to take off his jacket. The officer patted down the pockets of the jacket and did not feel anything, but then ran his hand along the sleeves and felt a small, hard object in one of the sleeves. The officer opened the zipper of the jacket, observed a tear in the shoulder, and turned the sleeve up, and a small cellophane bag containing a white pill fell from the sleeve. The white pill was determined to be Xanax.

The Second Department affirms an order denying respondent's motion to suppress the pill and statements he made to the officer immediately following the discovery of the pill. The officer had reasonable grounds to believe that respondent was concealing a weapon, and the search was permissible in scope and not excessively intrusive.

Matter of Thomas G.
(2d Dept., 4/26/11)

* * *

SEARCH AND SEIZURE - Reasonable Suspicion
- Abandonment

At approximately 1:10 a.m., four uniformed police officers heard a gunshot while inside a public housing building. They determined that the sound had emanated from the rear of the building, but the sole officer testifying agreed that he did not know the gunshot's precise location. When the officers went outside to the back of the building, they saw a group of four male and one female youths who were merely walking away from the building at a normal pace. The officers followed the five individuals for three blocks, and none of the individuals behaved in a suspicious manner. The lone female looked back in the direction of the officers and gestured to her male companions, and the four males ran. The police pursued and followed them inside one of the public housing buildings and up the stairwells to the roof. During the pursuit, defendant handed a gun to another group member, and the gun's magazine fell onto the stairwell.

The Second Department orders suppression. The police lacked reasonable suspicion when they pursued the four males. Although the public housing building into which the males ran had "no trespassing" signs, the unlawful pursuit began before the males reached that location, and, in any event, there was no basis for believing that defendant and other group members did not in fact live in the public housing complex. Defendant' act of parting with the gun was a spontaneous reaction to the sudden and unexpected pursuit, and not an independent act involving a calculated risk attenuated from the illegal police conduct.

People v. Andrew Smalls
(2d Dept., 4/26/11)

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SEARCH AND SEIZURE - Request For Information
- Reasonable Suspicion - Attempted Assault/Harassment

The First Department concludes that police officers, as part of a "Clean Halls" initiative undertaken at the request of the landlord, lawfully approached defendant to request information after they saw him acting suspiciously in a hallway of a building known for the presence of trespassers and drug dealers.

When, before the plainclothes officers were able to identify themselves, defendant pushed one of the officers with enough force to knock him down and ran downstairs, there was at least reasonable suspicion that defendant had committed harassment or attempted assault. Thus, the police were entitled to pursue, as a result of which defendant dropped his bag, causing cocaine to spill out.

Although defendant claims that he was justified in using physical force because he reasonably believed that the disguised officers were robbers, any evidence suggesting justification under Penal Law Article 35 was not so substantial as to negate reasonable suspicion or immunize defendant from being chased by the police.

People v. Richard Brown
(1st Dept., 3/22/11)

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SEARCH AND SEIZURE - Common Law Right To Inquire

In an area known to have high levels of violent crime, gang activity and weapons possession, in which there had been two shooting incidents in the previous two weeks, the officer saw respondent walking alone and wearing a blue, puffy, heavy, winter jacket and a black ski mask that covered respondent's entire head except for his eyes. The officer though the ski mask was peculiar attire for an unusually warm February day. (The Court takes judicial notice that the temperature was 33 degrees at 9:51 a.m. and 36 degrees at 10:51 a.m.) Respondent, upon making eye contact with the officer, reversed direction, and put his right hand in his right jacket pocket and began walking away from the police vehicle. The officer and his partner exited their vehicle, and got respondent's attention with words the officer could not recall. Respondent stopped walking, and the officer asked him if he had any weapons. Respondent froze and did not say anything, and the officer ordered him to take his right hand out of his jacket pocket, and, after respondent complied, patted down respondent's right pocket. The officer grabbed what felt like a three-inch long, hard object whose outline he believed to be consistent with a folding knife, but he testified that it also could have been consistent with other objects. The officer reached into respondent's pocket and took out the object, which was a gravity knife.

The Court suppresses the knife. The officers lacked a founded suspicion that criminal activity was afoot when they inquired whether respondent had a weapon. The high crime nature of the neighborhood does not change the fact that walking away from officers is innocuous behavior. The respondent's other behavior - wearing a ski mask in 33 to 36 degree weather and putting his hand in his pocket - also was consistent with innocence. Multiple innocuous acts do not provide the requisite suspicion. Even if putting his hand in his pocket and walking away from the officers were to be interpreted as nervous behavior, such behavior does not permit a level two inquiry.

Since the police lacked the requisite founded suspicion for asking respondent if he had a weapon, the subsequent frisk, which required a higher level of suspicion, also was impermissible. Respondent had a right not to answer the improper question, and his failure to respond did not elevate the level of suspicion.

Matter of Abdullah Y.
(Fam. Ct., N.Y. Co., 6/22/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51113.htm

* * *

SEARCH AND SEIZURE - Standing/Expectation Of Privacy

A California appeals court holds that defendant had no reasonable expectation of privacy in his friend's home, or in the locked bathroom, when the police entered without a warrant and found defendant in the bathroom trying to dispose of individually wrapped pieces of cocaine base. Defendant entered the home to escape police pursuit, not for a social visit.

The Court rejects defendant's proposed bright-line rule under which a person who has an ongoing social relationship with the residents of a house has a reasonable expectation of privacy whenever he is present in the house with the permission of the residents. Such a rule would permit drug dealers to create a network of sanctuaries.

People v. Magee
2011 WL 1366663 (Cal. Ct. App., 1st Dist., Div. 5, 4/12/11)

* * *

SEARCH AND SEIZURE - Sending Officer Rule
- Auto Search

After lawfully stopping a car in which defendant was a passenger, and removing the occupants from the car and frisking them, an officer leaned into the car and saw a revolver, which he seized. Another officer had already obtained the driver's consent to search the car, but, at the time of the search, the searching officer was not aware of the consent. The hearing court denied suppression, concluding that the driver's consent justified the search even though it was not communicated to the officer who conducted the search.

The First Department reverses. Although the existence of a communication may be established by inference, imputation of one officer's knowledge to another requires an actual communication between the officers. The Court remits for consideration of the People's as yet unresolved claim at the hearing that the car occupants' furtive conduct in the back seat justified a protective sweep of the back of the car to search for weapons.

A dissenting judge asserts that because the driver had given consent, defendant was not aggrieved by any unlawful conduct by the seizing officer. Moreover, it is far from clear that a search requiring probable cause occurred merely because the officer leaned into the car, breaking the plane of the door, before seeing the butt of the gun on the floor protruding from under the driver's seat.

People v. Timothy Washington
(1st Dept., 3/22/11)

* * *

SEARCH AND SEIZURE - Auto Stop - Reasonable Suspicion - Stop And Frisk

The officers observed defendant "holding a black plastic bag in an unusual manner as if he was holding a firearm in his hands." The arresting officer testified that "[m]ost people hold the bag, they hold it from the straps or the top of the bag. [The defendant] was holding it like this [indicating by holding a plastic bag with his right index finder and thumb extended up]. Like he was holding a firearm . . . As if the butt of the gun was in his palm and finger was on the outline." After defendant and his three companions got into a taxi cab, the officers pulled the cab over and observed defendant throwing the plastic bag from the back seat to the front seat. The officers removed the men from the car, retrieved the plastic bag, felt an object that was like a gun, opened the bag, and recovered a loaded firearm wrapped in a T-shirt.

The Second Department holds that the police had reasonable suspicion that defendant was armed, and thus the stop of the taxi cab was justified.

People v. Randolph Washington
(2d Dept., 2/22/11)

* * *

SEARCH AND SEIZURE - Consent To Search

The First Department concludes that the prosecution failed to sustain their heavy burden of establishing that respondent's consent to a search of her purse was voluntary where respondent is 14 years old and no evidence was presented to demonstrate that she had prior experience with the law; she stopped and approached and offered no resistance when the officer called to her from an unmarked car, and that officer and three other officers exited the car; and there is no evidence that respondent was told she did not have to consent when the officer asked if he could look in her purse.

Respondent's act of handing her purse to the officer was not the product of a free and unconstrained choice.

In re Daijah D.
(1st Dept., 7/28/11)

* * *

SEARCH AND SEIZURE - School Searches

A California appeals court majority upholds a school search that was conducted pursuant to an established policy under which every student who leaves the campus and then returns is subject to search upon return.

The students and their parents receive notice of the policy as part of the school's behavior code, and the search in this case was carried out without touching the student, who was required only to empty his pockets. The purpose of the policy is to prevent students who have left and returned in violation of the school rules from bringing in harmful objects such as weapons or drugs.

In re Sean A.
2010 WL 5175177 (Cal. Ct. App., 4th Dist., Div. 1, 12/22/10)

* * *

SEARCH AND SEIZURE - Stop And Frisk

Responding to a radio call of shots fired, the police saw a teenager who met the suspect's description, and respondent. The teenagers immediately engaged in evasive conduct and then fled. The police apprehended them and recovered a weapon from respondent's companion's bag.

The First Department concludes that, at that point, the police had at least reasonable suspicion justifying a frisk of respondent, and a precautionary frisk of his backpack, which was on the ground in his grabbable area. When an officer felt a hard object in the backpack, she was entitled to open it.

In re Bryan G.
(1st Dept., 2/24/11)

* * *

SEARCH AND SEIZURE - Incident To Arrest - Containers

After seeing defendant and his companions smoking marijuana, Street Narcotics Enforcement Unit officers identified themselves and asked, "You guys were smoking?" Defendant and one of his friends responded, "We just finished." The officers arrested the three for smoking marijuana in plain view. An officer removed a backpack from defendant's back and handed it to another officer, who was about two or three feet away, and that officer opened the bag, after defendant was handcuffed, and recovered 11 bags of marijuana, a pair of brass knuckles, a gun, and two magazines of ammunition. The gun and magazines were wrapped in socks.

The First Department orders suppression. There were no exigent circumstances justifying the warrantless search of the closed backpack incident to arrest. There was no threat to the general public and/or to the arresting officer, and no need to protect evidence from concealment or destruction. The backpack was under the complete control of an officer when it was searched;

defendant and his two friends were in handcuffs, surrounded by four police officers, and enclosed by a 12-foot-high metal fence.

People v. Maurice Evans
(1st Dept., 5/17/11)

* * *

SEARCH AND SEIZURE - Incident To Arrest

A Supreme Court of California majority holds that law enforcement officers' search of the text message folder of defendant's cell phone approximately 90 minutes after lawfully arresting defendant and transporting him to a detention facility was a valid search incident to arrest.

The cell phone was an item of personal property on defendant's person at the time of his arrest and during administrative processing at the police station, and was not an item that was separate from him and merely within his immediate control. Supreme Court decisions do not support the view that the necessity of a warrant turns depends in any way on the character of the seized item. Neither defendant nor the dissent persuasively explains why the sheer quantity of personal information should be determinative, nor is there any legal basis for distinguishing the contents of an item found upon an arrestee's person from either the seized item itself or the arrestee's person. A delayed search of an item of personal property found upon an arrestee's person no more imposes upon the arrestee's constitutionally protected privacy interest than does a search at the time and place of arrest.

People v. Diaz
2011 WL 6158 (Cal., 1/3/11)

* * *

SEARCH AND SEIZURE - Search Warrants - Computers

The Third Circuit U.S. Court of Appeals rejects defendant's argument that the seizure of six entire hard drives from his computer during an investigation into financial crimes was overbroad because the Government also seized personal emails and other information not related to the crimes.

Evidence related to financial crimes could have been found on any of the six hard drives, and the evidence likely would have been concealed. When a search requires review of a large collection of items, it is certain that some innocuous documents will be examined, at least cursorily, to determine whether they are to be seized. To require narrower on-site searches, which would be time consuming and require trained forensic investigators, is not practical.

United States v. Stabile

2011 WL 294036 (3d Cir., 2/1/11)

* * *

SEARCH AND SEIZURE - Common Law Right To Inquire
- Stop And Frisk

The First Department concludes that the police had an objective, credible reason to make a common-law inquiry where the officers were in the stairwell of a crime-ridden location when defendant descended the stairs, made eye contact with one of the officers, grabbed at a large bulge in his pocket, and turned to walk back up the stairs. There was no "pursuit" up the stairs; instead, the police did no more than follow defendant while attempting to engage him, which is within the scope of a level-two inquiry.

When defendant engaged in additional suspicious conduct regarding the bulge in the pocket, the officers were justified in patting down the bulge, which led to the discovery of a firearm.

People v. Thomas Correa
(1st Dept., 10/26/10)

* * *

SEARCH AND SEIZURE - Request For Information

The Court holds that if a person is merely standing in the lobby of a housing project building and there is no evidence of prior criminality at that location, the police are not permitted to approach and question the individual for the purpose of determining whether he or she lives there.

Officers conducting "vertical" patrols are not permitted to select individuals for questioning based on presence alone. At a minimum, there must be evidence of prior criminality in the building. To the extent that vertical patrols involve random, unjustified questioning, the practice amounts to a systematic violation of *DeBour*.

People v. Jose Ventura
NYLJ, 12/21/10
(Sup. Ct., N.Y. Co., 12/17/10)

* * *

SEARCH AND SEIZURE - Exigent Circumstances

The First Department finds that the People established by clear and convincing evidence that the police entered the apartment and found contraband only after obtaining the voluntary consent of the tenant, and also finds exigent circumstances where the police were sent to the apartment as a

result of a 911 call which was traced to the apartment; the caller had hung up without leaving a message; no one responded to the officers' initial requests to enter; an individual was observed running from the apartment; and the two occupants denied making the call.

It was not beyond the realm of possibility that there were other individuals in the apartment, and that someone was being held hostage in one of the other rooms. The police were justified in putting little credence in the occupants' denials that they had made the call, or their representations that nothing was amiss. "If the officers had left the apartment, and it was subsequently discovered that a crime was being committed, including possibly one involving physical harm to the occupants, the officers would have been hard pressed to defend their actions."

Two concurring judges agree that there was valid consent, but reject the majority's finding of exigent circumstances. Once officers arrived at the apartment and questioned the occupants, there did not appear to be any circumstance posing an imminent threat to anyone in the apartment.

People v. Jassan J.
(1st Dept., 5/24/11)

* * *

SEARCH AND SEIZURE - Stop And Frisk - Report Of Person With Firearm

The First Department upholds the denial of suppression, finding reasonable suspicion justifying a stop and frisk where the caller provided a detailed and generally accurate description of defendant and one of his companions, as well as their location and direction of travel.

The call included a partial name and a callback number that the police called, and, in each of the two communications, the caller reported not only the presence of a person with a firearm, but also that the person had threatened to kill him. Both communications were excited utterances, which enhanced their reliability.

People v. Andre Rivera
(1st Dept., 5/24/11)

* * *

SEARCH AND SEIZURE - Expectation Of Privacy - Email

The Sixth Circuit U.S. Court of Appeals holds that a subscriber enjoys a reasonable expectation of privacy in the contents of emails that are stored with, or sent or received through, a commercial Internet Service Provider, and thus government agents violated defendant's Fourth Amendment rights by compelling his ISP to turn over emails without first obtaining a warrant

based on probable cause. To the extent that the Stored Communications Act purports to permit the government to obtain such emails without a warrant, it is unconstitutional.

Given the often sensitive and sometimes damning substance of his emails, it is highly unlikely that defendant expected them to be made public. And, given the fundamental similarities between email and traditional forms of communication, such as the telephone and letters, it would defy common sense to afford emails lesser Fourth Amendment protection. "Email is the technological scion of tangible mail, and it plays an indispensable part in the Information Age." Emails must pass through an ISP's servers to reach their intended recipient, and thus the ISP is the functional equivalent of a post office or a telephone company. The ability of a rogue mail handler to rip open a letter does not make it unreasonable to assume that sealed mail will remain private on its journey across the country. In this context as well, the threat or possibility of access, including access by the ISP, is not decisive when it comes to the reasonableness of an expectation of privacy. The Court does acknowledge that a subscriber agreement could be broad enough to snuff out a reasonable expectation of privacy, but here there is no such language.

However, because the agents relied in good faith on provisions of the Stored Communications Act, the exclusionary rule does not apply.

United States v. Warshak
2010 WL 5071766 (6th Cir., 12/14/10)

* * *

SEARCH AND SEIZURE - Expectation Of Privacy - Internet Provider Information

The New Hampshire Supreme Court, refusing to adopt the New Jersey Supreme Court's holding in *State v. Reid* (945 A.2d 26), concludes that a person has no expectation of privacy under the State Constitution with respect to subscriber information provided to an Internet service provider.

State v. Mello
2011 WL 2135356 (N.H., 5/26/11)

* * *

SEARCH AND SEIZURE - Fruits - Physical Evidence

While upholding suppression where the hearing court found the officer's testimony incredible, the Second Department holds that the court properly suppressed, as the fruit of defendant's illegal arrest, physical evidence taken from the trunk of a vehicle which the police opened using a key seized from defendant incident to arrest. Suppression was warranted regardless of whether defendant had an expectation of privacy in the vehicle.

People v. Carlos Rivera
(2d Dept., 11/30/10)

* * *

SEARCH AND SEIZURE - Common Law Right To Inquire

Police officers, who were about a block away, went to a location in response to a radio run that was based on an anonymous tip that a male black approximately 16 years of age was pointing a BB gun into the air, was sitting on a park bench, had a black bag, and was wearing a white T-shirt, black shorts and white sneakers. The officers saw approximately six young men, including respondent, in the park. Respondent, who was sitting on a bench in the park, was the only one who matched the description. The officers asked respondent if he had a gun, and he stated that he had a BB gun in his bag, and showed it to the officers.

Upholding the denial of suppression, the First Department holds that the radio run, coupled with the description of the suspect that matched defendant's appearance except for the slight discrepancy in the clothing description, gave the police a founded suspicion that criminal activity was afoot, and justified the question regarding whether respondent had a gun.

A dissenting judge notes that the description of the alleged perpetrator included black shorts, a white top, and white sneakers, but and respondent was wearing a gray shirt or tank top and black sandals, and was also wearing headgear that was not mentioned by the caller. Respondent had a black book bag, not the duffel bag mentioned in the radio run. Only the black shorts, and possibly the bag, fit the description the officers received.

In re Dominique W.
(1st Dept., 5/26/11)

* * *

SEARCH AND SEIZURE - Credibility Of Police Testimony

In a 3-2 ruling, the First Department upholds the denial of suppression, concluding that there is no reason to disturb the court's credibility determinations.

The dissenting judges set forth the facts. The officer saw a bulge in defendant's left front pants pocket, and when he "felt" (or "patted," "touched" or "tapped") it, defendant turned the left side of his body away from the officer. The officer had felt "something hard"; it "wasn't fat but it was shaped like a little rectangle." The officer "thought it was a knife." He turned defendant back toward him, reached into the pocket and took out a small bag of crack cocaine. From a photograph admitted into evidence, it appears that the bag was about 2 to 2 ½ inches by 3 inches and shaped like Africa.

The dissenting judges concede that the officer lawfully touched or patted down the bulge in defendant's pants pocket. And, when an officer touches a bulging pocket and feels a hard object he reasonably fears is a weapon, he may reach into the pocket and remove the object. Here, however, the officer's claim that he thought the small bag of crack was a knife was incredible, and even if he did believe that, his belief was not reasonable. Regardless of how impressive the officer's demeanor was, "his testimony that he thought the small bag of crack was a knife is too much at war with common sense to be credited." The dissenting judges also reject the majority's suggestion that the presence of $8025 in the same pocket renders more plausible the officer's claim that he thought the small bag of crack was a knife.

People v. Keith Greene
(1st Dept., 5/12/11)

* * *

SEARCH AND SEIZURE - Credibility Of Police Testimony

While reversing an order of suppression, an Appellate Term majority concludes that probable cause was established where defendant had bloodshot, watery eyes, alcohol on his breath, and an unsteady gait, and, prior to his arrest, admitted that he had consumed alcohol. While the court found that the officer's testimony was "at times" not credible, the court made no specific finding that the testimony regarding observations of defendant or defendant's pre-arrest admission was not credible. The result of the breathalyzer test administered at the precinct approximately two hours after the arrest, which was below the legal limit, did not undermine a finding of probable cause.

A dissenting judges asserts that the self-contradictory and confusing testimony of the arresting officer entitled the court to find that there was no probable cause. "If the officer observed the watery, blood shot eyes, the sagging gait and smelled alcohol on defendant's breath, why wouldn't he have arrested defendant at that point?" Because the officer "is a seasoned officer, he would know the 'magic' words to establish probable cause."

People v. Larry Creer
(App. Term, 1st Dept., 12/30/10)

* * *

SEARCH AND SEIZURE - Request For Information
- Abandonment

At approximately 12:29 a.m., a police officer observed three individuals, one of whom was defendant, disperse in different directions from a street corner as the officer approached slowly in an unmarked police car. Defendant walked to a nearby house and stood at a side door of the residence for 10 to 15 seconds without opening the door, attempting to retrieve keys, knocking,

or ringing the doorbell. The officer exited his vehicle, walked towards defendant with his shield displayed, and said something to the effect of “police, hey, hold up,” or “I want to speak with you.” Defendant immediately stepped down from the doorway entrance, removed a firearm from his waistband, ran to the back of the property, and placed the firearm on the ground. The firearm was recovered, and, shortly thereafter, defendant was stopped by the police at another location based upon the first officer’s description, and the first officer subsequently identified him. The hearing court ordered suppression, concluding that the physical evidence, identification testimony, and defendant’s statements were the fruit of an improper approach to request information based upon “entirely innocuous” conduct.

The Second Department reverses. Defendant’s abandonment of the firearm was not a spontaneous response to the officer’s request for information; it was the intentional and voluntary product of a considered judgment to waive any privacy interest, and thus defendant had no standing to contest the seizure. In any event, defendant’s conduct provided the officer with an objective credible reason to approach him and request information.

People v. Deon Davis
(2d Dept., 11/3/10)

* * *

SEARCH AND SEIZURE - Exigent Circumstances

The Fourth Circuit U.S. Court of Appeals holds that the police entry without a warrant was objectively reasonable and justified by exigent circumstances where the officer was attempting to locate the parents of a 4-year-old child who was wandering alone along a busy street. The exigency was not limited to the girl herself, for there was the real possibility that her caretaker was unconscious or otherwise in need of assistance. When yelling from the doorway produced no response, a reasonable officer could have concluded that someone inside may well have needed help. Although the girl did state that no one was home, her youth and time spent wandering away from the house called the basis of her knowledge into question. The officer did the reasonable thing by following the child inside in an effort to render assistance and to ensure the child’s safety.

The scope of the officer’s entry also was reasonable. He simply yelled "hello" in the hope of finding a parent or guardian. Although, when the officer and the child happened upon defendant upstairs, defendant did not need assistance and the officer did not leave the child with him, defendant had no identification or other means of proving that he was in fact the girl’s father and could not recite the address of the house, there was a transparent bag of bullets in plain view near the bed, defendant was visibly angry with the child, and the officer verified that the identity defendant had provided was false. The subsequent protective sweep, which revealed a gun under the mattress, was an appropriate safety measure and was limited to the area from which the defendant might gain possession of a weapon.

In response to defendant's assertion that the officer should have left a note on the front door while taking the child to safety, the Court states: "Where, then, was she to be taken?" An officer "can hardly be expected to serve as an indefinite babysitter, and a police station is hardly a proper daycare facility for a four-year-old child." The Court also finds unpersuasive defendant's suggestion that the officer should have questioned the child in detail and taken her around to talk to neighbors and ask them questions, in a search for evidence that would support a reasonable belief that someone was inside the home.

Even if defendant could point to an unproblematic alternative, reasonableness analysis does not require that the police employ the least intrusive means. "The officer acted with caution in the legitimate belief that protection of the most vulnerable members of our society would not become a constitutional infraction."

United States v. Taylor
2010 WL 4455178 (4th Cir., 11/4/10)

* * *

SEARCH AND SEIZURE - Search Warrants

The Second Circuit holds that the search warrant lacked the requisite specificity to allow for a tailored search of defendant's electronic media. The warrant, which sought any and all electronic equipment potentially used in connection with the production or storage of child pornography and any and all digital files and images relating to child pornography contained therein, failed to link the items to be searched and seized to the suspected criminal activity and thus lacked meaningful parameters on an otherwise limitless search.

The Court rejects the Government's contention that any defect in the search warrant may be cured by reference to its supporting documents. The Court may not rely on unincorporated, unattached supporting documents to cure an otherwise defective search warrant.

However, the Court upholds the denial of suppression, concluding that there was good faith because a reasonably well-trained officer is not chargeable with knowledge that this search was illegal in these circumstances.

United States v. Efrain Rosa
NYLJ, 10/28/10
(2d Cir., 10/27/10)

* * *

SEARCH AND SEIZURE - Consent - Authority To Consent

A California appeals court holds that the juvenile's mother had the authority to consent to a search of his bedroom, and to override any objection he raised to the search of the mother's apartment.

To fulfill their duty of supervision, parents must be empowered to authorize the police to search the family home, even over the objection of their minor children.

In re D.C.
2010 WL 3720164 (Cal. Ct. App., 1st Dist., Div. 1, 9/24/10)

Identification

APPEAL - Scope Of Review - Court of Appeals
IDENTIFICATION - Showup – Suggestiveness

A little after 2:00 a.m., a female witness who was standing within inches of the victim when he was stabbed helped him outside where he collapsed in the street, and she immediately and spontaneously identified defendant as the attacker to a police sergeant who asked if anyone knew who stabbed the victim. Defendant fled. At 2:15 a.m., two officers were notified of an assault in progress and joined in the chase in their patrol car, and finally caught up with defendant a few blocks away. They took defendant to a nearby hospital where the victim had been taken by ambulance, to conduct a showup because the sergeant suspected that the victim was "probably going to lose his life." After running into the female witness and her companion, an officer, who did not know that the witness had already identified defendant to the sergeant, told the witness and her companion that he would place them in a car to "view someone" or to "show [them] someone who might have been involved in the incident." When a patrol car arrived, the witness and her companion climbed inside, and the officer told them that he was going to "put a bright light on the individual [whom he] would show them and that at any time if they identified that person they should let [him] know." At the officer's signal, a fellow officer guided defendant, who was rear-handcuffed, to the lighted area and stood next to him. The witness and her companion were asked if they could identify defendant, and they did so. The showup took place at about 2:45 a.m., no more than 45 minutes after the crime.

The hearing court denied suppression, concluding that the "chain of events" was "unbroken," related in temporal and geographic proximity, and driven by the exigency of the victim's critical condition. The Appellate Division found no basis for suppression.

The Court of Appeals, noting that the reasonableness and suggestiveness of the showup are mixed questions of law and fact, concludes that there is sufficient support in the record for the rulings below and that the issue is beyond the Court's further review.

People v. Terrell Gilford
(Ct. App., 5/3/11)

* * *

IDENTIFICATION - Notice Of Intent To Offer - Description And Location Of Procedure - Waiver Of Preclusion

The Court denies respondent's motion to preclude identification evidence, finding no violation of the notice requirement in FCA § 330.2 where the presentment agency's Voluntary Disclosure Form provided notice of an identification made by the complainant during a canvass in the "vicinity of Grand Avenue and West 192nd Street, Bronx, NY," but an officer testified at the suppression hearing that a "show-up" was conducted at 190th Street and Creston Avenue in the Bronx.

While the location could have been stated with more precision in the VDF, it was within several blocks of the location revealed at the hearing. Thus, respondent had sufficient information with which to conduct an investigation and move for suppression. In addition, the brief hearing testimony did not definitively establish that the police conducted a show-up and not a canvass. Indeed, both procedures may have been used. "Logic would dictate that [the officer] put the complainant and the two eyewitnesses in his patrol car and was conducting a canvass when summoned by other officers to the corner of 190th Street and Creston Avenue where the respondent had been apprehended by other officers."

Moreover, even if the notice was inadequate, respondent waived the preclusion remedy when he moved to suppress and was granted a hearing. Respondent cannot nullify the waiver by withdrawing his motion after commencement of the hearing. Where the respondent withdraws his motion in the midst of testimony, "purely for tactical reasons, he does so at his own peril since, at that point, the statutory intent has been fulfilled, leaving the subject evidence no longer subject to suppression or, in this case, preclusion."

Matter of Jose C.
(Fam. Ct., Bronx Co., 10/8/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51796.htm

* * *

IDENTIFICATION - Notice Of Intent To Offer - Confirmatory ID By Officer

The Second Department holds that the officer's identification of respondent was confirmatory where the officer made the identification at the scene minutes after observing the youths and an adult male punch, kick, and attempt to rob a male victim.

Matter of Devon A.
(2d Dept., 11/30/10)

* * *

IDENTIFICATION - Videotape

The First Department finds error, albeit harmless, in the admission of testimony by two police officers and another witness who identified defendant on a surveillance videotape.

Such testimony is most commonly allowed in cases where the defendant has changed his or her appearance since being photographed or taped, and the witness knew the defendant before that change of appearance and is more likely to correctly identify the person than is the jury. Here, the People never claimed that defendant had altered his appearance, and no other circumstance suggested that the jury, which had ample opportunity to view defendant, would be any less able than the witnesses to determine whether he was seen in the videotape.

People v. Nathan Coleman
(1st Dept., 11/9/10)

* * *

IDENTIFICATION - Photos - Suggestiveness

With respect to one of two witnesses whose identification testimony was suppressed by the family court, the Second Department reverses.

The viewing of a photo array by two witnesses in the same room, by itself, does not taint identification testimony, but evidence of communication between the witnesses may establish taint. Here, the witnesses, who are sisters, communicated regarding the photos before the second sister identified respondent, and thus her identification was tainted, and the presentment agency failed to establish by clear and convincing evidence an independent source for an in-court identification. However, there is no evidence that the sisters communicated prior to the first sister's identification of respondent, and thus her identification was proper.

A dissenting judge notes that each witness was present for the other's description of the perpetrator directly prior to viewing the photo books, and that being interviewed in the same room was tantamount to "communication" between the witnesses.

Matter of Tyquan W.
(2d Dept., 3/29/11)

* * *

IDENTIFICATION - Confirmatory

The First Department, upholding the denial of suppression, concludes that the victim's post-arrest viewing of respondent at the precinct on the day of the incident, which was accidental, was also essentially confirmatory since the victim already had identified respondent at a prompt, on-the-scene showup.

In re Angel W.
(1st Dept., 3/15/11)

* * *

IDENTIFICATION - Sufficiency Of Evidence

The Appellate Term reverses defendant's conviction for stealing a shrub from his neighbor's front yard where the complainant and his wife based their identification of defendant on a videotape they had possessed that was not preserved for trial; the complainant's testimony regarding the duration and contents of the videotape conflicted with that of his wife and of a police officer who had also viewed it; and the officer testified that she could not identify defendant from the videotape while the complainant's wife stated that she could identify defendant simply from his "gait" and "walk."

People v. Steven Loguirato
(App. Term, 9th & 10th Jud. Dist., 5/9/11)

* * *

IDENTIFICATION - Wade Hearing - Right To Call Witnesses

The First Department finds no error in the hearing court's refusal to have the victim testify at the Wade hearing. The evidence did not raise a substantial issue about the constitutionality of the lineup that could only be resolved by the testimony of the identifying witness. Defendant and a detective gave opposing testimony about events leading up to the lineup, and the court credited the detective's version. There was no gap that only the victim's testimony could fill.

People v. Victor Perez
(1st Dept., 6/23/11)

* * *

IDENTIFICATION - Showups - Suggestiveness

The Second Department upholds the family court's order suppressing identification evidence where, shortly after the alleged incident, the complainant called the police and an officer promptly arrived at the complainant's location; the complainant overheard a radio broadcast indicating that individuals matching the complainant's description of the suspects had been

apprehended; the complainant walked with the officer to where the suspects had been apprehended and saw the three suspects standing together against a fence surrounded by ten police officers; and all the suspects were either handcuffed or had their hands behind their back as if they were under arrest.

Matter of Mikel P.
(2d Dept., 2/15/11)
Matter of James T.
(2d Dept., 2/15/11)

* * *

IDENTIFICATION - Wade Hearing - Right To Call Witnesses

The First Department holds that the hearing court properly denied defendant's request to call the victim as a witness at the *Wade* hearing where the evidence did not raise any substantial issue as to the constitutionality of the lineup that could only be resolved through the victim's testimony.

Although defendant was wearing a chain that the victim later identified as the one that had been taken from him and none of the other lineup participants were wearing chains, the chain was barely visible, if at all, because it was almost completely covered by defendant's shirt, the victim's chain was a large chain with a cross, and so little of the chain was visible that it is highly unlikely the victim would have recognized the chain as his own. Indeed, during the officer's conversation with the victim after the lineup, he mentioned the chain but said nothing about having seen it during the lineup.

People v. David Hayes
(1st Dept., 5/5/11)

* * *

IDENTIFICATION - Bolstering

The Second Department finds reversible error in this one-witness identification case where a detective was permitted to testify that he "re-interviewed" the complainant one week after the incident, that, "based on" that meeting, he apprehended defendant and placed him in a lineup, and that he placed defendant under arrest after the complainant viewed the lineup.

People v. Edward Rankins
(2d Dept., 2/15/11)

* * *

IDENTIFICATION - Videos - Suggestiveness

- Fruits - Subsequent Identification
CONFESSIONS - Interrogation - Functional Equivalent

The Court suppresses an identification made by a police witness from three surveillance videos where the officer, by telling the witness when and where the videos were taken, indicated that he believed they captured the images of the four suspects just after the witness had lost sight of them. The witness had already been made aware that the elevator surveillance video depicting two men was taken following the other videos depicting the two men from the elevator running with the two other men. This sequence left little or no doubt that the men in the elevator were part of the group of four males the witness had seen on the street. In addition, all three videos depicted the same man wearing a distinctive white bubble jacket, and defendant, whose face was the only face visible in the elevator video, was wearing the same clothing and backpack the witness had stated the shooter was wearing. Showing the witness the elevator video as the third part of the three-video sequence, rather than first showing him a photographic array, created a substantial likelihood that defendant would be singled out for identification. The officer had available a photograph of defendant that did not show defendant wearing the same clothing as the alleged shooter or show defendant in the company of someone wearing the distinctive white bubble jacket.

As a result, the Court also concludes that a photo identification that took place only 20 minutes after the witness identified defendant in the elevator video was rendered unnecessarily suggestive. However, the Court denies suppression of a lineup identification made more than 9 weeks later, finding an attenuation of the taint.

The Court also denies suppression of a statement made by defendant after the reading of his *Miranda* rights and the officer's concluding question: "Now that I have advised you of your rights, are you willing to answer any questions?" Defendant's statement was not responsive to the question, nor was the question the functional equivalent of interrogation.

People v. Fedley Racine
(Sup. Ct., Kings Co., 8/17/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51440.htm

* * *

IDENTIFICATION - Showups - Suggestiveness
- Accidental Showup

The Second Circuit reverses an order awarding habeas relief, while holding, *inter alia*, that the state courts' finding that a stationhouse showup identification was not unnecessarily suggestive was not contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court.

The witness, who came to the police station at the request of the police to identify the perpetrators, spontaneously identified defendant immediately upon entering the police station. Although he may have anticipated that the police would have a suspect in custody, he was given no reason to expect to see any suspects in the first room he entered. The fact that defendant was handcuffed is of limited significance since people in handcuffs are not unexpected or unusual sights in a police station. Although defendant was significantly shorter than the two men next to him, that would not have linked him to any crime.

Richardson v. Superintendent of Mid-Orange Correctional Facility
2010 WL 3619781 (2d Cir., 9/20/10)

Pleas

PLEAS - Alford
- Allocution

During the allocution conducted in connection with defendant's plea of guilty to first-degree manslaughter, in a courtroom packed with defendant's relatives, including his uncle's family, defendant insisted that he did not intend to kill or harm his uncle. Defendant acknowledged that he had gotten into an argument and "struggle" with his uncle; that he "put the knife out just to keep [his uncle] back, but at the same time [his uncle] was coming back into [him] and [the knife] stuck [his uncle]"; that he knew that contact with a switchblade "could have caused damage"; that the medical evidence would show that the knife penetrated his uncle's body through several layers of muscle and tissue, broke a rib bone and pierced his heart, creating a two-inch laceration that caused his uncle to bleed to death; that the jury was likely to conclude there was an intent to cause death or serious physical injury; and that he was "giving up [his] right to raise any defenses." The court accepted the plea.

Subsequently, while awaiting sentence, defendant sent a letter to the judge, asking to withdraw his plea and arguing that his attorney "led him to believe that it was in [his] family's best interest that [he] cop out to 15 years in prison, which turned out to be untrue according to [his] family." Defendant's mother wrote to the judge, complaining that her son's attorney had "tricked" him into taking the plea. At sentencing, defendant stated, inter alia, that "[i]t wasn't intentional"; that he "didn't intend to kill his uncle," who was his "best friend"; and that he "didn't intend to cause any harm to [his] uncle" and "pulled the knife out just to keep him away . . . from coming back and attacking . . . again." The judge denied defendant's motion to withdraw his plea and imposed the bargained-for sentence. The Appellate Division concluded that the plea was valid because the court made the requisite further inquiry to make sure there was no justification defense and conducted what was essentially a limited *Alford* colloquy with respect to the intent element.

The Court of Appeals reverses. *Alford* pleas are, and should be, rare, and are allowed only when they are the product of a voluntary and rational choice and the record contains strong evidence of actual guilt. Accordingly, there is no such thing as a "limited" *Alford* colloquy or plea. While the medical evidence provided strong proof of guilt, the record does not establish that defendant was

aware of the nature and character of an *Alford* plea. "He was not, for example, asked if he wished to plead guilty to first-degree manslaughter to avoid the risk of conviction upon a trial of the more serious crime of second-degree murder." It is not enough that defendant made concessions from which such a choice might be inferred, especially since he may have thought that his knowledge that the switchblade knife "could have caused damage" was an admission of guilt.

People v. Hadji Hill
(Ct. App., 3/29/11)

* * *

PLEAS - Voluntariness
- Waiver Of Claims For Appeal

The First Department refuses to vacate defendant's guilty plea where it was conditioned on the withdrawal of all outstanding motions and writs, including his constitutional speedy trial motion.

Defendant's plea and waiver were not coerced in any manner. Even though the speedy trial motion remained outstanding, defendant and the People were ready for trial on the date of the plea. After the court informed the parties that the case would have to be adjourned to allow the People to respond to defendant's writ, it was defense counsel who advised the court that defendant had asked him "to make further inquiry" regarding the People's plea offer, and it was the court, not the prosecutor, that informed defendant that it would accept the plea only on the condition that defendant withdraw "all motions that are outstanding." When defense counsel first advised the court that defendant was not interested in the plea offer because he would not be immediately released, the court set an adjourned date and neither the court nor the prosecutor said anything designed to persuade defendant to change his mind and accept the plea offer.

Although a waiver of appeal is ineffective to the extent that it precludes appellate review of constitutional speedy trial claims, a properly interposed constitutional claim may be deemed abandoned or waived if not pursued.

People v. Hans Alexander
(1st Dept., 3/29/11)

* * *

PLEAS – Allocution

The Third Department reverses an adjudication of delinquency where the family court informed respondent of his right to a hearing, but did not advise respondent that he had the right to remain silent, the right to present witnesses on his own behalf and to confront witnesses against him at a

fact-finding hearing, and the right to require the presentment agency to prove that he committed alleged acts beyond a reasonable doubt.

Even assuming the court's statement that respondent could be placed on probation or in a residential facility sufficed to advise respondent of the possible specific dispositional alternatives, the allocution did not establish that respondent voluntarily waived his right to a fact-finding hearing and that his mother fully understood the legal implications of the allocution. In addition, the record is silent as to the court's reasons for accepting the admission.

Matter of Daquan BB.
(3d Dept., 4/14/11)

* * *

PLEAS - Allocution - Collateral Consequences
RIGHT TO COUNSEL - Effective Assistance

The Court of Appeals holds that failing to warn a defendant who pleads guilty to a sex offense that he may be subject to the Sex Offender Management and Treatment Act does not automatically invalidate the guilty plea since SOMTA consequences are collateral.

The Court also rejects defendant's argument that SOMTA consequences, whether collateral or not, are simply too important to be left out of a plea allocution. Defendant relies on *State v Bellamy* (178 N.J. 127), where Bellamy pleaded guilty to a sex crime in exchange for the State's agreement to recommend an 18 month jail sentence. Bellamy had already served a significant part of that time at the time of sentencing, and, when sentenced, was scheduled to be released in a bit more than two months. About a week before his release date, the New Jersey Attorney General began a proceeding under the New Jersey Sexually Violent Predator Act that resulted in Bellamy's commitment. Here, it is not asserted that defendant has been made the subject of a SOMTA proceeding, and the Court cannot tell on this record whether there is or ever was any significant likelihood that that would occur.

Where collateral consequences of a plea are an issue, claims that a non-disclosure rendered the plea involuntary are best evaluated on a case by case basis, in the context of a motion by a defendant to withdraw his plea. Since SOMTA consequences can include extended confinement, a plea made in ignorance of such consequences may sometimes be proved involuntary if a defendant can show that the prospect of SOMTA confinement was realistic enough that it would have caused him, to reject an otherwise acceptable plea bargain. Of course, the defendant will have to prove that he did not know about SOMTA, and if his lawyer did not tell him about it before he pleaded guilty, the issue of whether the plea was voluntary may be closely linked to the question of whether the defendant received the effective assistance of counsel. But here, defendant has not moved to withdraw his plea and has not made the factual showing that would justify plea withdrawal.

Judge Ciparick and Judge Jones dissent, asserting that a defendant cannot be said to knowingly and voluntarily forego his right to trial if he does not know the full extent of confinement that might result from his conviction. Defendant should be given an opportunity to put before the court in a motion to withdraw his plea or other appropriate motion the specifics which are lacking in this record.

People v. David Harnett
(Ct. App., 2/10/11)

* * *

PLEAS - Allocution - Parent

The First Department holds that the family court satisfied the parental allocution requirement of FCA § 321.3(1) when, after conducting a thorough colloquy with respondent, it incorporated that colloquy by reference in addressing the mother and ascertained that she understood everything.

In re Humberto R.
(1st Dept., 2/10/11)

* * *

ETHICS - Conflict Of Interest - Joint Representation
RIGHT TO COUNSEL - Effective Assistance

Defendant and her husband, charged with allowing parties to occur on their property at which minors were drinking alcohol and smoking marihuana, were tried jointly and represented by the same counsel.

The Third Department finds no violation of defendant's right to the effective assistance of counsel. When the trial court fails, as it did here, to make the required inquiry regarding the risks involved in joint representation, reversal is required only where the defendant demonstrates that a conflict of interest affected the conduct of the defense or operated on counsel's representation.

Here, the People did not assert different levels of culpability, which would have suggested that different theories and defense tactics should have been pursued for each defendant. While counsel may have had an incentive to shift blame from the husband to defendant because the People tried to prove that she personally purchased alcohol for the party and he was more passively involved, counsel did pursue the defense that neither defendant nor her husband was aware that drinking was occurring on their property and they did not purchase the alcohol.

People v. Kellie St. Andrews
(3d Dept., 3/10/11)

* * *

PLEAS - Waiver Of Issues On Appeal

The Second Department holds that by making an admission, respondent forfeited his right to challenge the family court's denial of his application for permission to make a late motion to suppress his statements to law enforcement officials, and any ineffective assistance of counsel claim which did not directly involve the plea bargaining process.

Matter of Angel V.
(2d Dept., 12/28/10)

* * *

PLEAS - Allocution - Possible Dispositions
APPEAL - Preservation

The Second Department rejects respondent's request that the Court modify the 18-month placement to a 12-month placement where the family court mistakenly advised him at the time of his felony admission that the most severe disposition permitted was a 12-month term of placement. Respondent's raised no objection at the time of disposition.

Matter of Jahmanni A.
(2d Dept., 9/21/10)

Speedy Trial/Initial Appearance/Prompt Verdict

SPEEDY TRIAL - Adjournment Within 60-Day Period

A fact-finding hearing was scheduled for 11:30 a.m. on a day the parties stipulated would be deemed "day 60" for speedy trial purposes. That day, respondent, her attorney, and the prosecutor appeared at 11:30 a.m. but the complainant failed to appear. The prosecutor advised the court that she had spoken to the complainant's mother the night before, and had spoken to the complainant herself at 9:30 a.m. that morning, and both had stated that the complainant would appear for the hearing. The prosecutor stated that she had left messages at the complainant's home and called the cell phone of the complainant's father, but was unable to speak with or leave a message for him. At 11:40 a.m., respondent's counsel moved to dismiss the petition, and the court stated that it would adjourn the matter until 12:00 p.m. When the matter was recalled at 12:13 p.m. and the complainant still had not arrived, the prosecutor requested that the matter be adjourned until later that day, and informed the court that she had just spoken to the complainant's father and he had indicated that the complainant was going to the wrong address. The prosecutor stated that she had given the complainant's father the correct address, and he had indicated that he would promptly contact the complainant. The court refused to adjourn the matter until later in the day and dismissed the petition.

The Second Department reverses, finding no speedy trial violation. Any delay in the commencement of the hearing was de minimis, and would have been obviated by merely recalling the case later that day after the complainant had an opportunity to arrive.

Matter of Tierra H.
(2d Dept., 4/12/11)

* * *

SPEEDY TRIAL - Constitutional

The Third Department finds no constitutional speedy trial violation where respondent's two younger male cousins alleged that, during late July or early August 2009, respondent engaged in anal sexual conduct with them by forcible compulsion; respondent was arrested in August 2009; the Probation Department referred the matter to the presentment agency in September 2009, and the presentment agency filed the petition in March 2010.

While the presentment agency was at fault for the delay, the family court found that there was a "good faith miscommunication between the parents . . . and the prosecuting attorney" regarding whether the prosecuting attorney was waiting for the victims' parents to obtain medical records. The family court also considered the serious nature of the charges ; the fact that respondent was just 12 years old at the time of the alleged incidents; and the fact that if respondent committed the alleged acts, he may have special mental or emotional needs and rehabilitation would be required.

Matter of Gordon B.
(3d Dept., 4/7/11)

* * *

SPEEDY TRIAL - Delay Caused By Appellate Proceedings

Upon the People's motion for re-argument, the Court rejects the People's argument that the Court should have excluded for speedy trial purposes some portion of the period of time between the Court of Appeals' denial of the People's leave request following the Appellate Term's reversal of the conviction, and the People's statement of readiness.

The case was calendared on May 10, 2010, which was four days before the Court of Appeals' decision, and was scheduled to be heard again on June 21, 2010. While it is true that, through some administrative error by the Criminal Court, the case was not called on June 21, 2010, the People were on actual notice on May 10, 2010 that the case was back and had an adjourn date, and that there was a strong possibility they would have to retry defendant. And, due to the appellate history of this case, the People began the relevant 90-day period with far more

information and evidence than they would have at the commencement of the average assault case.

People v. Wells
NYLJ, 2/24/11
(Crim. Ct., N.Y. Co., 2/22/11)

* * *

SPEEDY TRIAL - Good Cause For Delay - Calendar Congestion

The California Supreme Court holds that the trial court did not abuse its discretion in determining that the unavailability of a judge or courtroom due to a chronic shortage of resources was fairly and reasonably attributable to the fault or neglect of the state and thus did not constitute adequate grounds for delay under the state speedy trial statute.

People v. Engram
2010 WL 4157355 (Cal., 10/25/10)

* * *

VERDICT - Right To Prompt Verdict

The Appellate Term finds a violation of defendant's right to receive a verdict in a nonjury trial within a reasonable period of time where the trial lasted one day, only three witnesses testified and there were no complicated issues of law or fact which had to be resolved, and the court rendered a verdict 72 days after trial.

People v. Watson Morgan
(App. Term, 9th & 10th Jud. Dist., 12/15/10)

* * *

SPEEDY TRIAL – Late Arrival Of Defense Counsel

The First Department concludes that although the court properly denied defendant's speedy trial motion, it erred by not charging the People with a 28-day pre-readiness adjournment ordered after the court called the case at 10:40 a.m., when defense counsel was not present. The co-defendant's counsel informed the court that the other attorney was "on route" and the attorney appeared within minutes of the calendar call.

A concurring judge finds the ruling regarding the 28-day adjournment to be "nothing short of astonishing, especially because it entails the unspoken conclusion that defendant was without counsel due to some fault of the court." Defense counsel already was more than one hour late

when the case was called, and the statement made to the court --- that counsel was "on route" -- was "utterly uninformative." "Because the court did not know and could not have known when counsel would be appearing, it is folly to make the excludability of the delay dependent on the unforeseeable fact that counsel did appear five minutes later. Moreover, the majority should explain both whether the adjournment would be chargeable to the People if counsel had not appeared for another 30, 60 or 90 minutes and why trial courts must wait for attorneys who are reportedly "on route." Counsel failed to provide any explanation for his tardiness when he finally did appear.

People v. Denard Butler
(1st Dept., 2/10/11)

* * *

SPEEDY TRIAL - Superseding Accusatory Instrument

Noting that a subsequent indictment is related back to the original for purposes of applying the six-month limitation prescribed by CPL § 30.30(1)(a) and also for the purpose of computing the time to be excluded, the Court of Appeals concludes that since the parties agree that the charges are sufficiently related to require the same commencement date for speedy trial purposes, they are sufficiently related to apply the same excludable time.

The test is whether the subsequent indictment can be traced to or originates from the prior accusatory instrument. Here, the indictment appears to satisfy that test because the charges, including more serious theft-based charges that were added, originate from the prior accusatory instrument charging assault and incorporate the same physical injury component.

People v. Isidore Farkas
(Ct. App., 2/22/11)

Adjournments

ADJOURNMENTS

A Ninth Circuit U.S. Court of Appeals majority finds reversible error where the district court prejudiced defendant's ability to present his defense by refusing to continue the trial for two days to allow defendant to see his dying son.

A continuance would have relieved defendant of the pressure of testifying with the knowledge that his son was on the brink of death and that he had to complete his testimony before he could see his son one last time. Defendant's overwhelming concern about his son's condition prevented him from preparing his testimony the night before his final day of testimony and left him distracted and unable to concentrate during the testimony itself. It is self-evident that an

individual's demeanor would be affected by the knowledge that his son was on the brink of death.

Moreover, defendant could have been present for the end of his trial and prevented the impression that he simply chose to be absent without cause and the negative inferences the jury might have drawn.

The district court made no finding that a continuance would have inconvenienced the government or the court.

United States v. Kloehn
2010 WL 3385542 (9th Cir., 8/30/10)

Right To Counsel

RIGHT TO COUNSEL - Entry By Counsel Into Proceeding

In connection with defendant's suppression motion, an attorney alleged that after he was assigned to represent defendant in a drug prosecution, he told defendant in front of detectives who were investigating a homicide that defendant was not to speak with them about any legal matters, and told the detectives that they should not question defendant. However, the attorney acknowledged that he was not ultimately engaged to represent defendant in the homicide prosecution and did not, in so many words, tell the detectives that he represented defendant in that case.

The Court of Appeals holds that even accepting the attorney's version of what happened, defendant's indelible State constitutional right to counsel did not attach in connection with the homicide. The Court has never held that an attorney may unilaterally create an attorney-client relationship in a criminal proceeding in such a fashion, and declines to do so now. Counsel made no statements during the arraignment on the drug charge even arguably related to the homicide. Had he said in open court that defendant was represented by counsel and that the police should not question him, the prosecutor or the judge would have had the occasion and the opportunity to ask him flat out whether he was defendant's lawyer in the murder case.

Chief Judge Lippman and Judge Jones dissenting, assert that no competent defense attorney would simply abandon a client about to be interrogated as a suspect in a homicide, and that it was entirely appropriate for counsel to enter the homicide case, if only temporarily to interpose himself between his client and the homicide detectives until formal appointment of counsel at the impending homicide arraignment.

People v. Dean Pacquette
(Ct. App., 6/7/11)

* * *

RIGHT TO COUNSEL - Entry By Counsel Into Proceeding

Defendant's counsel in a weapon possession case, after being approached and informed of the police's desire to speak with defendant regarding the homicide, met with and advised defendant regarding the homicide investigation and accompanied defendant to a meeting with the police concerning his requested participation in a polygraph examination in the homicide investigation. After the conference, counsel advised defendant not to take the polygraph examination despite the favorable sentencing agreement defendant would receive in connection with the weapon possession charge if he did so. Although counsel was unable to attend the polygraph examination, she arranged for another attorney from the Public Defender's office to confer with defendant prior to the examination.

The Third Department holds that defendant's right to counsel with respect to the homicide investigation indelibly attached. These affirmative and direct actions taken by the Assistant Public Defenders sufficiently identified a professional interest in the homicide investigation and signified that counsel had undertaken to represent defendant in that matter.

Although defendant made statements regarding the homicide about seven months later while he was serving a sentence in the weapon possession case, when counsel no longer was representing defendant, the police were aware that the attorney had appeared on defendant's behalf in the homicide case and thus the right to counsel was still in effect.

People v. Devon Callicutt
(3d Dept., 6/9/11)

* * *

RECKLESS ENDANGERMENT - Depraved Indifference
MANSLAUGHTER - Recklessness
RIGHT TO COUNSEL - Representation By Counsel In Family Court Proceeding

The Court of Appeals finds sufficient evidence of recklessness and upholds defendant's conviction for second degree manslaughter, but finds insufficient evidence of depraved indifference and reverses defendant's conviction for first degree reckless endangerment, in connection with events leading to the death of defendant's son.

The evidence shows that defendant knew, or at least believed it possible, that her live-in boyfriend was hitting, shaking and biting her child. She knew that he was capable of inflicting significant injury on her, and believed him capable of killing a small animal in a rage. She was worried enough to tell her boyfriend that, if he was angry, he should "shake a teddy bear, not [the child]." Yet, she left the child with her boyfriend again and again, even after she saw that the child had been seriously hurt.

However, while the evidence shows that defendant cared much too little about her child's safety, it cannot support a finding that she did not care at all. On the contrary, she feared the worst and recklessly hoped for the best. There is evidence that defendant tried to conceal the abuse, but even that does not show that defendant did not care whether the child lived or died. Trying to cover up a crime does not prove indifference to it.

The Court also rejects defendant's claim that one of several statements she gave to the police should have been suppressed because it was taken in violation of her "indelible" right to counsel. The indelible right to counsel cannot attach by virtue of an attorney-client relationship in a Family Court or other civil proceeding. A relationship formed in a civil matter is not entitled to the same deference as the attorney-client relationship in a criminal proceeding.

Judge Jones and Chief Judge Lippman, dissenting in part, would overturn the manslaughter conviction as well. While the evidence established that defendant was aware of a risk of abuse, the prosecution did not prove defendant's awareness and conscious disregard of a substantial and unjustifiable risk of her son's death. The acts of abuse took place while defendant was at work, and thus defendant could not know the severity of the abuse, or that the injuries sustained by her child were life-threatening or could contribute to his death, because to the naked eye they only appeared to be marks or bruises.

People v. Alicia Lewie
(Ct. App., 6/9/11)

* * *

RIGHT TO COUNSEL - Effective Assistance - Failure To Raise Statute Of Limitations Defense

The Court of Appeals holds that defense counsel was not ineffective for failing to raise the 5-year statute of limitations defense to manslaughter.

The single error of failing to raise a statute of limitations defense may qualify as ineffective assistance. However, in this case counsel's failure to raise the defense reflected a legitimate trial strategy of a reasonably competent attorney. At the time of trial, defendant was facing second degree murder charges with an admission that he had fired the shot that caused a cab driver's death. Had the manslaughter count been dismissed prior to verdict, the trier of fact would have been left with murder as the only choice if defendant was to be found criminally responsible for the homicide, and thus allowing the trial court to consider the manslaughter count would be a legitimate strategy. Indeed, during summation, counsel specifically requested that the court consider the manslaughter count on the theory that defendant stated that he took out the weapon to stop a robbery.

Judge Jones dissents.

People v. Shareef Evans

(Ct. App., 3/31/11)

* * *

RIGHT TO COUNSEL - Representation By Counsel In Unrelated Matter In Which Defendant Is In Custody

Addressing New York's indelible right to counsel rule, a 4-judge Court of Appeals majority concludes that if it is reasonable for an interrogator to suspect that an attorney may have entered a matter in connection with which the suspect is in custody, there must be an inquiry regarding the suspect's representational status and the interrogator will be charged with the knowledge that such an inquiry likely would have revealed. "Society's interest in protecting individual constitutional rights would be devalued if the police were allowed to question an incarcerated individual under circumstances where it would be reasonable for the interrogating officer to expect that it is highly likely that the accused has an attorney on the custodial matter. Permitting a police officer to remain deliberately indifferent - avoiding any inquiry on the subject notwithstanding the nature of the custodial charges and the likelihood that a lawyer has entered the matter - in order to circumvent the protection afforded by [the Court's previous decision in People v. Rogers] is not only fundamentally unfair to the rights of the accused, it further undermines the preexisting attorney-client relationship that serves as the foundation of the Rogers rule. A contrary holding would allow a police officer who is fairly certain that an attorney is involved in the custodial matter to flout Rogers by claiming that he was not fully confident about a lawyer's involvement."

Here, the detective was aware that defendant was incarcerated on a drug charge for transporting narcotics into Pennsylvania and was being held in lieu of $10,000 bail, which indicated that defendant had been arraigned and that it was probable that defendant had been assigned or had retained an attorney.

However, the error in admitting defendant's improperly obtained statement was harmless.

Three judges, concurring only in the result, would return to the rule of *People v Taylor* (27 N.Y.2d 327), and hold that a suspect's relationship with a lawyer in one case does not bar any police questioning of him about another, unrelated case.

People v. Ollman Lopez
(Ct. App., 2/22/11)

* * *

RIGHT TO COUNSEL - Effective Assistance

Petitioner filed for post-conviction relief in state court, alleging that he had been denied his right to effective assistance of counsel because his lawyer had not filed a motion to

suppress petitioner's confession to police before petitioner accepted a plea offer. The state court concluded that a "motion to suppress would have been fruitless" in light of petitioner's other admissible confession. Petitioner filed a habeas petition in the United States District Court, renewing his ineffective-assistance claim. The District Court denied the petition, but a divided Ninth Circuit panel reversed.

The Supreme Court reverses. The Court of Appeals was wrong to accord scant deference to the judgment of defense counsel, who explained that suppression would serve little purpose in light of petitioner's other full and admissible confession. Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision. An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial.

The prospect that a plea deal will afterwards be unraveled, when a court second-guesses counsel's decisions while failing to accord the latitude *Strickland* mandates or the deference required by the AEDPA, could lead prosecutors to forgo plea bargains that would benefit defendants. Here, delaying the plea for further proceedings would have given the State time to uncover additional incriminating evidence that could have formed the basis of a capital prosecution.

With respect to the prejudice issue, the Court notes that the state court reasonably could have determined that petitioner would have accepted the plea agreement even if his second confession had been ruled inadmissible. By the time of the plea agreement, the State's case was already formidable.

Premo v. Moore
2011 WL 148253 (U.S. Sup. Ct., 1/19/11)

* * *

RIGHT TO COUNSEL - Effective Assistance

The Second Department overturns defendant's convictions for rape and sexual abuse, finding a violation of defendant's right to the effective assistance of counsel where defense counsel failed to cross-examine the complainant about inconsistent statements she had made to hospital personnel hours after the attack, which indicated that there had been no penile penetration. These statements, if properly utilized, may have cast doubt on the complainant's entire account of the incident.

People v. Jean Cantave
(2d Dept., 4/12/11)

* * *

ATTORNEY-CLIENT PRIVILEGE - Sanction For Violation
PROSECUTORIAL MISCONDUCT
RIGHT TO COUNSEL

After a state laboratory improperly turned over to the police privileged attorney-client communications obtained from defendant's computer, the police turned over the materials, which contained detailed trial strategy, to the prosecutor, who read them.

The Connecticut Supreme Court dismisses the case, with a majority holding that the prosecution is irreversibly tainted by the intrusion into privileged attorney-client communications. Because the materials contained defendant's trial strategy, defendant was presumptively prejudiced, and, because the prosecutor tried the case to conclusion after reading the materials, the taint would be irremediable on retrial.

When a trial court becomes aware of a potential Sixth Amendment violation resulting from an intrusion into privileged communications, the court must, *sua sponte*, devise a remedy adequate to cure any prejudice to the defendant.

State v. Lenarz
2011 WL 2638158 (Conn., 7/19/11)

* * *

RIGHT TO COUNSEL - Effective Assistance/Absence Of Counsel From Proceeding
APPEAL - Preservation

A 3-judge First Department majority finds reversible error and orders a new suppression hearing where the hearing court commenced the hearing with the testimony of a DEA agent while defense counsel was not present; counsel arrived more than halfway through the agent's direct testimony; to that point, the testimony had covered personal background information, general information concerning how wiretap surveillance is conducted, and some specific information regarding the events in question; and defense counsel was able to conduct a cross-examination of the agent and was present for the testimony of both of the People's other witnesses, who were also on the scene at the time of defendant's arrest.

"Because of the sanctity of the right to counsel, [the Court] need not engage in an analysis as to what transpired in the case during counsel's absence and whether the evidence received, or matters discussed with the court, were material to the defense. The majority rejects the People's argument that the deprivation can be overlooked because defendant was unrepresented for only a small portion of the cumulative testimony and that the portion counsel missed covered only background and general information.

Moreover, it does not matter that, once counsel arrived, he did not preserve the objection that the hearing began without him. Where counsel is not present when the deprivation occurs and so cannot lodge an objection, the issue can be raised for the first time on appeal.

The dissenting judges assert, inter alia, that defendant did not preserve the issue; that he effectively was accorded a de novo hearing when his attorney eventually arrived in the courtroom; that the alleged deprivation was harmless error; and that defendant was not unrepresented for testimony relating to him because the People, with the court's permission, refrained from asking specific questions about defendant during defense counsel's absence and any information imparted about defendant as a result of questions asked about a co-defendant was repeated after defense counsel's arrival.

People v. Heath Strothers
(1st Dept., 8/11/11)

* * *

RIGHT TO COUNSEL - Effective Assistance - Pleas

The Second Circuit overturns an order that denied without a hearing defendant's motion to vacate a sentence due to counsel's failure to advise defendant with regard to a plea offer by the government.

The court denied relief based on defendant's failure to show prejudice. Prima facie evidence may include a defendant's own statement that he would not have pled guilty had he been informed of the plea offer. In order for the statement to be sufficiently credible to justify a full hearing, it must be accompanied by some objective evidence, such as a significant sentencing disparity, that supports an inference that the defendant would have accepted the proposed plea offer if properly advised.

Here, defendant has asserted under oath that he would have accepted the plea offer if properly advised by counsel. Moreover, the disparity between the 29-year sentence offered in the plea agreement, and the sentence defendant actually received - multiple life terms - was substantial. Defense counsel's statement that conveyed the plea offer but defendant rejected it is hardly equal to a sufficiently detailed affidavit from counsel credibly describing the circumstances.

Raysor v. United States
NYLJ, 7/28/11
(2d Cir., 7/27/11)

* * *

RIGHT TO COUNSEL - Effective Assistance

The First Department rejects defendant's ineffective assistance of counsel claim where defense counsel, whose ability to conduct a defense was impaired by defendant's absence, generally declined to participate in the trial in absentia, pursuing a "protest strategy."

There is a presumption of prejudice where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, but that presumption is inapplicable here. Counsel's strategic decisions were objectively reasonable.

People v. Isaac Diggins
(1st Dept., 5/26/11)

* * *

RIGHT TO COUNSEL - Effective Assistance

The Court grants habeas relief, concluding that defense counsel provided ineffective assistance of counsel where he failed to provide an adequate notice of alibi under New York Criminal Procedure Law § 250.20.

There was no physical evidence tying petitioner to the gun found at the scene, and the defense put on no witnesses other than petitioner himself. Counsel's failure to abide by the essentially ministerial obligation to serve notice, with the penalty for non-compliance laid out in the statute, cannot be construed as objectively reasonable or strategic.

Harrison v. Cunningham
NYLJ, 5/27/11
(EDNY, 5/11/11)

* * *

RIGHT TO COUNSEL - Effective Assistance

In a state habeas proceeding, petitioner claimed his counsel was deficient for failing to present expert testimony on serology, pathology, and blood spatter patterns. The California Supreme Court denied relief. Subsequently, petitioner filed a federal habeas petition, re-asserting the claims in his state petition. The District Court denied relief, and a Ninth Circuit penal affirmed. However, the Ninth Circuit granted rehearing en banc, and reversed the District Court's decision.

The Supreme Court reverses. Under § 2254(d) of the AEDPA, a habeas court must determine what arguments or theories supported, or could have supported, the state court's decision, and then ask whether it is possible that fair minded jurists could disagree with respect to whether those arguments or theories are inconsistent with a prior decision of this Court. The Ninth Circuit all but ignored that issue, and appears to have concluded that because it had little doubt that

petitioner's *Strickland* claim had merit, the state court must have been unreasonable in rejecting it. This analysis illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system.

It was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence given the many factual differences between prosecution and defense versions of the events. Even if it had been apparent that expert blood testimony could support the defense, it would be reasonable to conclude that a competent attorney might elect not to use it. There was the possibility that expert testimony would shift attention to esoteric matters of forensic science, distract the jury from whether the prosecution witness was telling the truth, or transform the case into a battle of the experts. "To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option."

Although counsel had not expected the prosecution to offer expert testimony, and the Ninth Circuit concluded that counsel should be prepared for "any contingency," an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. Here, the prosecution itself did not expect to present expert testimony and had made no preparations for doing so on the eve of trial. Moreover, in many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to argue that there is too much doubt about the State's theory for a jury to convict.

With respect to the prejudice issue, the question is whether it is "reasonably likely" the result would have been different. Here, it would not have been unreasonable for the California Supreme Court to conclude that petitioner's evidence of prejudice fell short of this standard.

Harrington v. Richter
2011 WL 148587 (U.S. Sup. Ct., 1/19/11)

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RIGHT TO COUNSEL - Effective Assistance

Reversing the Ninth Circuit's order awarding habeas relief upon petitioner's claim that trial counsel was ineffective for failing to adequately investigate and present mitigating evidence at a capital sentencing hearing, a Supreme Court majority first concludes that a federal court sitting in habeas corpus review is limited to reviewing the evidence that was before the state court when deciding whether the state court's denial of the petitioner's constitutional claim was contrary to, or an unreasonable application of, clearly established Federal law.

The majority then holds that the Ninth Circuit erred in drawing from this Court's prior cases a constitutional duty to investigate and the principle that it is prima facie ineffective assistance for counsel to abandon an investigation of the defendant's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Counsel has wide latitude in making tactical decisions, and specific guidelines are not appropriate. The Ninth Circuit did not properly apply the strong presumption of competence.

The majority also concludes that petitioner has failed to show that the California Supreme Court unreasonably found that he was not prejudiced.

Cullen v. Pinholster
2011 WL 1225705 (U.S. Sup. Ct., 4/4/11)

* * *

RIGHT TO COUNSEL - Effective Assistance

In this proceeding in which plaintiffs, who had criminal charges pending against them in Onondaga, Ontario, Schuyler, Suffolk and Washington Counties, allege that the current system of public defense is systemically deficient and poses a grave risk that indigent criminal defendants are being or will be denied their constitutional right to counsel, the Third Department reverses an order denying class certification.

The proposed class, consisting of potentially tens of thousands of individuals, meets the numerosity requirement. Common questions of law and fact predominate over questions affecting only individual class members. The representative parties would fairly and adequately protect the interests of the entire class.

Finally, a class action is superior to other available methods for obtaining a fair and efficient adjudication of this controversy. Denial of class certification gives rise to the possibility of multiple lawsuits involving duplicative claims and inconsistent rulings, and saddle plaintiffs with the enormous task of establishing that deprivations of counsel are not simply isolated occurrences in these 20 cases. Research has failed to identify a single case which involved claims of systemic deficiencies and sought widespread, systematic reform that was not maintained as a class action, and any error should be resolved in favor of granting class action certification.

Hurrell-Harring et al. v. State of New York
(3d Dept., 1/6/11)

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RIGHT TO COUNSEL - Effective Assistance
APPEAL - Notice Of Appeal

Criminal Procedure Law § 460.30 permits the Appellate Division to excuse a defendant's failure to file a timely notice of appeal if the application is made within one year of the date the notice was due. The Court of Appeals holds that where a defendant discovers after the expiration of the one-year grace period that a notice of appeal was not timely filed due to ineffective assistance of counsel, recourse is available in New York through a coram nobis proceeding.

When defense counsel disregards a client's timely request to file a notice of appeal, the attorney acts in a manner that is professionally unreasonable. The Due Process Clause prohibits a defendant from being denied the right to appeal as a consequence of the violation of the right to the effective assistance of counsel on direct appeal. The Court has previously authorized an appeal despite noncompliance with the CPL § 460.30 time limit when, through action or unjustifiable inaction by a prosecutor, a defendant's diligent and good faith efforts to exercise his appellate rights within the one-year time frame were thwarted. The Court now recognizes the need for a second exception.

People v. Nathaniel Syville
(Ct. App., 10/14/10)

* * *

RIGHT TO COUNSEL - Eligibility For Assigned Counsel

The Court, having found a reasonable basis for inquiring whether or not defendant is financially able to make full or partial payment for his legal representation after it was disclosed in the Pre-Sentence Report that defendant reported being employed by the City of Rye and earning wages of $62,000 a year, terminates the assignment of counsel.

Criminal Procedure Law § 722 provides that "[e]ach county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county a plan for providing counsel to persons charged with a crime . . .who are financially unable to obtain counsel." While the statute does not use the term "indigent," that label has been conflated with the statutory language "financially unable to obtain counsel." The Court also notes: "It cannot have been the purpose of County Law § 722 to provide appointed counsel to the stereotypical couch potato who eats bon bons while watching soap operas on a large flat screen television while chatting on their cell phone and who lives off of the distribution of a trust fund. On the other end of the spectrum, some circumstances are prima facie proof of financial inability to pay, such as being qualified to receive public assistance, Medicaid, SSI, or other income and asset based government assistance programs. Absent such qualification, the Court needs to examine the defendant's complete financial picture, including income, expenses, assets, liabilities and obligations. Impoverishment is not the criteria. . . . Where defendant's income after expenses of the necessities of life is insufficient to fully pay for retained counsel, defendant should be eligible for appointed counsel, but defendant's excess funds should be paid towards reimbursement of the cost of appointed counsel. . . . A defendant should not be in the position of seeking assigned counsel while choosing for which non-necessities to pay or whether to keep his assets."

However, “County Law § 722-d, appears to be a grossly under-utilized weapon in the battle of balancing a defendant's right to counsel and the exploding financial burden to the State of providing free representation to those who are not fully able to afford private counsel.”

People v. David Mion
(City Ct. of Westchester, 2/3/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50492.htm

* * *

RIGHT TO COUNSEL - Choice of Counsel

An Alabama Supreme Court majority holds that an indigent defendant, who has no right to choose initially a particular court-appointed attorney, has no Sixth Amendment right to continued representation by a particular court-appointed counsel. While deprivation of the right to retained counsel of choice is structural error, improper replacement of court-appointed counsel violates the Sixth Amendment only if the defendant can show prejudice.

Lane v. State
2011 WL 2093933 (Ala., 5/27/11)

Practice Note: In *People v. Linares*, 2 N.Y.3d 507, the Court of Appeals also held that defendants have no choice in selecting their assigned counsel, but concluded that trial courts should substitute assigned counsel when a defendant can show good cause.

* * *

RIGHT TO COUNSEL - Choice Of Counsel

In each case, the Court of Appeals holds that defendant’s motion to substitute counsel was properly denied.

In *People v. Porto*, defendant’s form motion did not contain specific factual allegations that would indicate a serious conflict with counsel, and counsel’s vague, conclusory allegation regarding defendant’s “frustration” was not sufficiently specific to require a minimal inquiry by the court. The Court rejects defendant’s contention that the trial court failed to make a sufficient inquiry because it engaged in a colloquy solely with defense counsel without directing any questions towards defendant and affording him a chance to explain. The Court refuses to adopt a rule requiring that questions be posed directly to the complaining defendant.

In *People v. Garcia*, it was not until sentencing, when the court indicated that it would enhance the sentence for failure to comply with plea conditions, that defendant sought new counsel. Given the timing, it can be inferred that the motion was a possible delay tactic. The court

engaged in sufficient minimal inquiry by directing questions to both defendant and defense counsel, but counsel consistently evaded expounding upon the motion. Counsel mentioned defendant's belief that he was coerced by counsel into accepting the guilty plea, and defendant offered a similarly general allegation.

People v. William Porto
(Ct. App., 12/21/10)
People v. Rodriguece Garcia
(Ct. App., 12/21/10)

* * *

RIGHT TO COUNSEL - Choice Of Counsel
ETHICS - Excessive Workload

In a case that has been pending for 32 months, the Court relieves defense counsel where his unavailability due to other matters has resulted in the extensive pretrial delay, which has prejudiced both defendant, who has not had his day in court, and the People, whose case may be growing weaker with the passage of time.

If an attorney believes that a case in which a firm trial date has been set is unlikely to proceed because that attorney has other firm trial dates on the same date, it is incumbent upon that attorney to, at a minimum, inform his adversary about potential scheduling conflicts. Otherwise, as occurred here on multiple occasions, an adversary will block out time to try a case, prepare for trial and schedule witnesses for no reason.

People v. Robert Jones
(Sup. Ct., N.Y. Co., 3/21/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51064.htm

* * *

RIGHT TO COUNSEL - Effective Assistance
ETHICS - Decision-Making

While rejecting defendant's ineffective assistance of counsel claim, the Second Department concludes that it need not determine whether the decision to seek the submission of lesser-included offenses to the jury is a fundamental decision to be made by the defendant, or a strategic decision to be made by counsel.

Trial counsel stated on the record that he had explained the amount of punishment defendant was facing on a conviction for manslaughter as opposed to murder, and that in his experience the submission of manslaughter would give the jury some "leeway" -- that is, the opportunity to reach a compromise verdict. After full consultation with counsel, defendant decided to disregard

counsel's advice and pursue an all-or-nothing strategy, and counsel followed that decision. Counsel's acquiescence did not constitute constitutionally ineffective assistance.

Even had there been no disagreement, counsel's decision to seek the submission of lesser-included offenses, or not, could be justified as a strategic decision of a reasonably competent attorney.

People v. Delroy Colville
(2d Dept., 10/5/10)

* * *

RIGHT TO COUNSEL - Effective Assistance

A Tenth Circuit U.S. Court of Appeals majority finds a right to counsel violation where counsel failed to understand the basic mechanics of the federal sentencing guidelines and, in particular, failed to advise petitioner, prior to his meeting with his probation officer, regarding how he should conduct himself during the sentencing process.

United States v. Washington
2010 WL 3786159 (10th Cir., 9/30/10)

* * *

RIGHT TO COUNSEL - Eligibility For Assigned Counsel

While noting that it has no binding case law dictating the standards applicable where a district court considers a defendant's motion to discharge retained counsel and be represented by a court-appointed attorney, the Ninth Circuit U.S. Court of Appeals holds that the district court erred in summarily rejecting defendant's request for appointed counsel to replace retained counsel simply because of the expense and the stage of the proceedings.

The court never inquired into defendant's eligibility for appointed counsel, and the Criminal Justice Act expressly provides for appointment of counsel "[i]f at any stage of the proceedings ... the court finds that the [defendant] is financially unable to pay counsel whom he had retained." A judge may not summarily decide that a defendant is not eligible for appointed counsel merely because he has previously retained an attorney.

Requiring a retained counsel to continue to represent the defendant even if the defendant cannot pay him and no longer wants him is no substitute for appointed counsel paid with public funds. "Such an unpaid lawyer is likely, consciously or subconsciously, to resent the transformation of an agreement to represent a defendant for pay into an involuntary pro bono arrangement, and therefore to seek to end the representation as expeditiously as possible." That is precisely what defendant alleged happened here with respect to retained counsel's advice whether to plead

guilty. Moreover, an involuntarily unpaid lawyer may influence the defendant's litigation choices by expressing an intention to seek fees from relatives or friends, or from the defendant should he later obtain funds. The system for providing compensated lawyers where the defendant cannot afford to compensate counsel himself eliminates the opportunity for such extraneous influences on criminal proceedings.

United States v. Trinidad Rivera-Corona
2010 WL 3239458 (9th Cir., 8/18/10)

* * *

RIGHT TO COUNSEL - Effective Assistance

The Ninth Circuit U.S. Court of Appeals holds that defendant's motion to withdraw his guilty plea should have been granted where, shortly after he entered his plea, he was for the first time informed that he would be deported on the basis of his plea.

Even if defendant was aware of the "possibility" that he might incur some risk of deportation, he was not advised that a plea would make his deportation virtually certain, and it was reasonable for him to have inferred that he likely would not be deported from the fact that his attorney did not tell his wife about the immigration consequences, despite the fact that she had requested that information. The immigration consequences could have motivated a reasonable person in defendant's position not to plead guilty.

United States v. Bonilla
2011 WL 833293 (9th Cir., 3/11/11)

* * *

APPEAL - Retroactivity Of Appellate Ruling
RIGHT TO COUNSEL - Effective Assistance

The Supreme Judicial Court of Massachusetts holds that the United States Supreme Court's decision in *Padilla v. Kentucky*, holding that defense counsel provided ineffective assistance in failing to advise the defendant that a consequence of his guilty plea likely would be deportation, applies retroactively.

Here, since effective representation requires counsel to gather at least enough personal information to represent the client, counsel's failure to ascertain that defendant was not a United States citizen fell below acceptable professional norms.

Commonwealth v. Clarke
2011 WL 2409894 (Mass., 6/17/11)

* * *

RIGHT TO COUNSEL - Effective Assistance
APPEAL - Retroactivity Of Ruling

While holding that the Supreme Court's decision in *Padilla v Kentucky* (130 S.Ct. 1473) applies retroactively because the Supreme Court merely applied the well-established *Strickland* standard to the facts, the Appellate Term remands for a determination as to whether defendant received the ineffective assistance of counsel because his attorney misadvised him regarding the immigration consequences of his guilty plea.

People v. Roberto Nunez
(App. Term, 9th & 10th Jud. Dist., 12/15/10)

* * *

RIGHT TO COUNSEL - Effective Assistance

Defendant moves pursuant to CPL § 440.10 to vacate the judgments of conviction in six cases, claiming that he advised defense counsel that he was a lawful permanent resident but not a citizen and that counsel failed to advise him regarding the immigration consequences of his guilty pleas, which were entered upon a promise that they would be vacated if defendant completed drug treatment. Defendant also alleges that had counsel correctly advised him regarding the immigration consequences of his pleas, he would not have pled guilty and would have proceeded to trial on his six cases. Defendant alleges that counsel gave him no advice, while counsel claims that he warned defendant that if he failed to complete the drug treatment, "he would have immigration consequences."

The Court, while crediting counsel's claim, denies the motion. Defendant is currently facing removal proceedings based upon the pleas, but did not plead guilty to any offenses which expose him to "automatic" or "mandatory" removal or deportation. Since the risks were uncertain, counsel was constitutionally obliged to do no more than advise defendant that the pleas carried a risk of adverse immigration consequences.

Defendant argues that even if counsel's claim is credited, the advice was constitutionally deficient because defendant remained subject to removal even if he completed drug treatment and his guilty pleas were vacated, since, according to settled immigration law, the vacated guilty pleas would still be considered "convictions" for immigration purposes. Although it would have been better practice for counsel to provide that additional advice, counsel was not constitutionally deficient. Counsel's advice placed defendant on notice that his pleas, if not vacated, would place him at risk of removal. Defendant failed to complete treatment and is now reaping the precise consequences about which he was warned by counsel.

It was objectively reasonable for counsel to negotiate the plea arrangement because it provided

defendant with the best opportunity to seek cancellation of removal based upon his prospective rehabilitation. And since immigration authorities devote much of their resources to identifying criminal aliens who are already incarcerated, the risk of removal may be reduced where a non-citizen is able to remain out of jail.

The Court also declines to credit defendant's claim that he would not have pled guilty and would have insisted upon going to trial had counsel properly and fully advised him of the immigration consequences of pleading guilty. Defendant "was perfectly willing to risk deportation (and seven months' jail, along with a criminal record) when he repeatedly absconded from the drug treatment programs with full knowledge that the absconding would most certainly result in adverse immigration consequences." And, if defendant had been fully informed, he would have known that going to trial would likely place him at greater risk of removal than pleading guilty; even if defendant were found not guilty of the removable offenses, he would have remained at risk of removal because of his long-standing drug addiction.

People v. Constantine Cristache
(Crim. Ct., Queens Co., 9/13/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20370.htm

* * *

SEARCH AND SEIZURE - Strip Search
PLEAS - Allocution
RIGHT TO COUNSEL - Effective Assistance

The Second Department holds, inter alia, that the trooper, who had smelled marijuana and had probable cause to search the vehicle and its occupants for drugs and believed that defendant had secreted contraband in his clothing, did not act unlawfully when he lifted defendant's shirt, unbuckled his pants, reached into his underwear, and retrieved a plastic bag containing cocaine and marijuana. The search was not akin to a strip search, since defendant was not required to disrobe and his genitals were not visible to the public.

The Court also rejects defendant's claim that the judge, during the plea allocution, misrepresented the likelihood of deportation when it informed him, pursuant to CPL § 220.50(7), that his plea "may" subject him to deportation, and defendant's claim that his attorney's failure to object to the judge's alleged misrepresentation constituted ineffective assistance of counsel. While defendant argues that his plea of guilty made deportation a virtual certainty, the judge's statement was not misleading, put defendant on notice that his guilty plea had potential immigration consequences, and provided an opportunity to pursue those consequences more fully with his attorney or with an immigration specialist.

People v. Isan Contant
(2d Dept., 10/26/10)

* * *

RIGHT TO COUNSEL - Assigned Counsel Plan

While rejecting an Article 78 challenge to New York City's assignment of conflict cases to institutional providers of indigent defense services, such as The Legal Aid Society, the Court concludes that the consent of the County Bar Associations is not required under Article 18-B, § 722 of the County Law.

New York County Lawyer's Ass'n, et al. v. Bloomberg
(Sup. Ct., N.Y. Co., 1/3/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21001.htm

* * *

ETHICS - Advocate-Witness Rule

After the Court granted the People's application to question defendant regarding his prior inconsistent statement that was revealed in a statement made by defense counsel, counsel notified the Court that she had reviewed her notes and determined that she had misstated the facts related by defendant. Counsel argued that the only way to rebut the impeachment testimony was for her to testify at trial, and she moved for her withdrawal and the declaration of a mistrial. The Court denied the application.

The Court now denies defendant's motion to set aside the verdict. Defense counsel and the People entered into a stipulation which stated what counsel's testimony would have been. Thus, counsel's credibility was never called into question.

People v. Luis Ortiz
(Sup. Ct., Bronx Co., 1/26/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50353.htm

* * *

RIGHT TO COUNSEL - Effective Assistance - Conflict Of Interest
ETHICS - Conflict Of Interest

While holding that alleged conflicts of interest arising from dual representation of defendants by the Office of the Public Defender will be examined on a case-by-case basis, the Supreme Court of Montana finds in this case that given the strong precautions and safeguards, including ethical walls, in place at OPD, dual representation of the co-defendants by attorneys in different offices did not create a conflict.

State v. St. Dennis

2010 WL 4253685 (Mont., 10/28/10)

* * *

RIGHT TO COUNSEL - Effective Assistance
ETHICS - Conflict Of Interest

In this murder/rape prosecution, the Second Department grants defendant's motion to vacate the judgment of conviction, concluding that defendant was deprived of the effective assistance of counsel because his retained trial counsel operated under a conflict of interest that arose when the initial police investigation of this matter identified counsel's former client, who had a lengthy arrest record and whom counsel had previously represented on a rape charge, as a possible suspect.

Counsel's failure to disclose his prior representation of the suspect and his failure to investigate him as the possible perpetrator demonstrated that the conduct of his defense was affected by the conflict of interest. If defendant had been represented by a different attorney, the events would have unfolded differently.

People v. Anthony DiPippo
(2d Dept., 3/1/11)

* * *

RIGHT TO COUNSEL - Invocation By Defendant

The Second Circuit grants habeas relief where petitioner, prior to making a statement, invoked his right to counsel by stating, "I think I should get a lawyer."

Petitioner's statement evidences no internal debate, and the circumstances erase any possible ambiguity. The police held petitioner for more than twenty-four hours before taking his statement. During that time, investigators confronted him with various interrogation techniques and, up until the moment an investigator suggested a videotaped confession, petitioner complied with every request. Faced for the first time with the prospect of being recorded, petitioner expressed a desire for counsel.

The government's argument amounts to the claim that petitioner was not insistent enough. Perhaps "I demand a lawyer" would have resolved any doubt, but the Court cannot fault petitioner for being polite and calm, rather than querulous and aggressive. His statement was unequivocal; it need not have been forcefully made.

Wood v. Ercole
NYLJ, 5/9/11
(2d Cir., 5/4/11)

* * *

RIGHT TO COUNSEL - Invocation Of Right

The California Supreme Court holds that considering the totality of defendant's exchange with the officer, including defendant's repeated use of the phrase "talk to me," defendant did not unequivocally invoke his right to counsel when he stated, "I think it'd probably be a good idea for me to get an attorney."

People v. Bacon
2010 WL 4117545 (Cal., 10/21/10)

Evidence: Internet Materials

EVIDENCE - Internet Materials/MySpace

A Maryland Court of Appeals majority holds that the State did not sufficiently authenticate pages that allegedly were printed from defendant's girlfriend's MySpace profile.

The page contained the girlfriend's picture, birth date and location and identified her boyfriend, but the State did not ask her whether the profile was hers and whether its contents were authored by her. The picture, birth date, and location were not distinctive, authenticating characteristics given the possibility that someone else created the site and authored the relevant comments.

Proper authentication of social networking site materials could be achieved by asking the purported creator if she indeed created the profile and authored the posting; by searching the computer of the person who allegedly created the profile to determine whether that computer was used to originate the profile and posting; or by obtaining information directly from the social networking site that links the creation of the profile and the posting to the purported creator.

Griffin v. State
2011 WL 1586683 (Md., 4/28/11)

* * *

EVIDENCE - Internet Materials/E-Mail

The Massachusetts Supreme Judicial Court holds that e-mails purportedly sent by defendant were properly authenticated where they originated from an account bearing defendant's name and used by defendant; they were found on the hard drive of the computer defendant acknowledged he owned and for which he supplied passwords; and at least one e-mail contained an attached photograph of defendant and, in another, the author described the unusual set of services

provided by a salon and characterized himself as, among other things, a "hairstylist, art and antiques dealer, [and] massage therapist" (defendant owned such a business).

Defendant's testimony that others used the computer and that he did not author the e-mails was relevant to the weight, but not the admissibility of the e-mails.

Commonwealth v. Purdy
945 N.E.2d 372 (Mass., 4/15/11)

Evidence: Uncharged Crimes

UNCHARGED CRIMES EVIDENCE - Background/Completing The Narrative
EVIDENCE - Character
SELF INCRIMINATION - Post-Arrest Silence

In this drug possession prosecution in which defendant was not charged with possession of the marijuana or "crack pipe" found in his vehicle, the Second Department holds that evidence regarding the recovery of the marijuana and the pipe was not properly admitted to "complete the narrative" or to explain the officer's conduct. Defendant did not place the propriety of the police action in issue, nor did he dispute that he possessed the narcotics.

It was also error to allow the prosecutor to inquire of a defense witness whether defendant was always "truthful," and then impeach that testimony by questioning the witness about criminal complaints she had made against defendant. Defendant did not testify and put his credibility in issue, and the witness was offered as a fact witness rather than as a character witness.

The court also erred in admitting evidence that defendant did not provide the officer with certain facts upon the officer's recovery of narcotics and defendant's arrest.

People v. Eric Maier
(2d Dept., 10/7/10)

Right of Confrontation/Hearsay Evidence

RIGHT OF CONFRONTATION - Hearsay - Business Record/Laboratory Report

A five-Justice United States Supreme Court majority finds a Confrontation Clause violation where the prosecution introduced a forensic laboratory report, which contained a testimonial certification that defendant's blood-alcohol concentration was above the threshold for aggravated DWI, through the testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.

In her opinion, Justice Ginsburg notes that surrogate testimony of the kind the witness was equipped to give could not convey what the analyst knew or observed about the events his

certification concerned (i.e., the particular test and testing process he employed), nor could such testimony expose any lapses or lies on the certifying analyst's part. The Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. Despite the absence of notarization, the formalities attending the report are more than adequate to qualify the analyst's assertions as testimonial. Application of the Confrontation Clause in these circumstances would not impose an undue burden on the prosecution.

Justice Ginsburg's opinion was joined in full by Justice Scalia. However, Justices Thomas, Sotomayor, and Kagan did not join Justice Ginsburg's conclusion that requiring the testimony of laboratory analysts would not impose an undue burden on the prosecution. Justice Thomas also did not join footnote 6 of Justice Ginsburg's opinion, which defined testimonial hearsay in a manner that did not mention the statement's "formality."

Justice Sotomayor specified four circumstances that are not controlled by this decision: (1) cases in which there was an alternate purpose for the report, such as medical treatment; (2) cases in which the person testifying is a supervisor, reviewer, or other person "with a personal, albeit limited, connection to the scientific test"; (3) cases in which an expert witness testifies to an independent opinion about testimonial reports not admitted in evidence; and (4) cases in which the State "introduced only machine-generated results, such as a printout from a gas chromatograph."

Bullcoming v. New Mexico
2011 WL 2472799 (U.S. Sup. Ct., 6/23/11)

* * *

RIGHT OF CONFRONTATION - Hearsay

In a 5-Justice majority opinion written by Justice Sotomayor, the Supreme Court reverses the Michigan Supreme Court and finds no Confrontation Clause violation where police officers, who were dispatched to a gas station parking lot where they found a man who was mortally wounded and who told them that he had been shot by defendant outside defendant's house and had then driven himself to the lot, were allowed to testify at trial about what the murder victim said. The identification and description of the shooter and the location of the shooting were not testimonial statements because they had a primary purpose to enable police assistance to meet an ongoing emergency.

To make the "primary purpose" determination, a court must objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions. The existence of an ongoing emergency at the time of the encounter is not determinative, but it is among the most important circumstances informing the interrogation's primary purpose. An emergency focuses the participants not on proving past

events potentially relevant to later criminal prosecution, but on ending a threatening situation. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized because the threat to the first responders and public may continue. Domestic violence cases like *Davis v. Washington* and *Hammon v. Indiana* often have a narrower zone of potential victims than cases involving threats to public safety. *Davis* and *Hammon* involved the use of fists, while this case involved a gun. This is not to suggest that an emergency is ongoing for the entire time that the perpetrator of a violent crime is on the loose. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent. However, the Michigan Supreme Court too readily dismissed informality as a factor.

In addition to the circumstances in which an encounter occurs, The statements and actions of both the declarant and interrogators also provide objective evidence of the interrogation's primary purpose. Police officers' dual responsibilities as both first responders and criminal investigators may lead them to act with different motives simultaneously or in quick succession. And during an ongoing emergency, victims may want the threat to end, but may not envision prosecution.

Here, the circumstances of the encounter as well as the statements and actions of the victim and the police objectively indicate that the interrogation's primary purpose was to enable police assistance to meet an ongoing emergency. When the victim responded to questions, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. The police did not know why, where, or when the shooting had occurred; the shooter's location; or anything else about the crime. They asked exactly the type of questions necessary to enable them to meet an ongoing emergency.

Justice Thomas concurs on the ground that the questioning lacked sufficient formality and solemnity. Rather than attempting to reconstruct the "primary purpose" of the participants, Justice Thomas would consider the extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed.

Justices Scalia and Ginsburg dissent.

Michigan v. Bryant
2011 WL 676964 (U.S. Sup. Ct., 2/28/11)

* * *

RIGHT OF CONFRONTATION - Limitation On Cross Examination

The Court of Appeals holds that defendant's Confrontation Clause rights were not violated when, after a prosecution witness testified inconsistently with another prosecution witness, the first witness could not be recalled to testify again because she had had a breakdown and twice attempted suicide.

The witness's unavailability was neither imposed by law nor restricted by the court. Defendant cross examined the witness regarding her direct testimony, and was able to attack her credibility after the other witness's testimony and the parties' stipulation revealed the unavailable witness's out-of-court statements.

Chief Judge Lippman, concurring because it seems clear that, in acquitting defendant of the two top counts, the jury rejected the unavailable witness's account, asserts that the range of defendant's right of confrontation was properly defined by the unavailable witness's direct testimony "and, at a minimum, by the information required to be disclosed to defendant during trial, not by the circumstance that the witness, through no fault of the trial court, became unavailable. It does not matter why a witness becomes unavailable. If adverse testimony has been placed before the jury that a defendant has not been afforded a full and fair opportunity to test by means of cross-examination, the interests protected by the right of confrontation are fully entailed." Any evidence that the witness had not been truthful was, from defendant's perspective, to be brought to the jury's attention through cross-examination; a stipulation was not a substitute for vigorous confrontation of the witness in open court.

People v. Omar Montes
(Ct. App., 2/17/11)

* * *

RIGHT OF CONFRONTATION - Hearsay - Statements To Police At Scene - Dying Declarations
HEARSAY - Dying Declarations

The Second Department holds that a statement uttered by the shooting victim shortly before his death, in response to a police officer's inquiry regarding the identity of the shooter, constituted testimonial evidence. In most of the cases in which such statements have not been found to be testimonial, the officers to whom the statements were made were the first responders to the scene of an emergency or established the first line of communication with a potential victim, and thus were charged with finding out the nature of the attack. Here, there were other officers and a police van already present, and it stands to reason that the other officers would have already tried to determine the nature of any emergency and implement necessary actions. In contrast to a general inquiry as to what had happened, the officer's question was pointed and designed only to learn the identity of the perpetrator. Getting no response to his initial inquiry, "who shot you," the officer stated, "I don't think you're going to make it," and repeated, "who shot you" or "why don't you tell me who shot you." The officer's purpose was not to deal with an emergency, but to give the victim a final opportunity to bear witness against his assailants. The victim, having

already been attended to by another officer and advised that he probably was not going to “make it,” could only have reasonably expected that his response would be used for purposes of prosecution.

However, a "dying declaration” is admissible as an exception to the Confrontation Clause. The Supreme Court, having suggested in *Crawford v. Washington* that the common-law right of confrontation did not encompass dying declarations, would likely determine that the same is true of the Sixth Amendment. Defendant has not argued that the State Constitution is more protective of the right of confrontation than the Federal Constitution.

The Second Department then concludes that the statement was properly admitted as a dying declaration. The victim was shot six times. Three of the bullets entered his abdomen, the right side of his back, and the left side of his back, and his condition appeared to be declining at the time the declarations were made. He was struggling to breathe and at some point was unable to speak any further in response to the officer’s inquiries. While there were no medical personnel there who could have expressed an opinion to the victim as to his condition, the officer informed the victim that he did not think he would live. There is no indication that the victim, who was shot at relatively close range, based his identification of the shooter on suspicion or conjecture.

People v. Thomas Clay
(2d Dept., 6/28/11)

* * *

HEARSAY - Witness Unavailable Due To Misconduct By Defendant
RIGHT OF CONFRONTATION - Hearsay - Forfeiture Doctrine/Forensic Testing Reports

The First Department holds that the trial court did not err in allowing the prosecution to use a witness’s grand jury testimony in its case-in-chief, without producing the witness, where the People established by clear and convincing evidence that the witness’s refusal to testify was the product of fear, precipitated by defendant’s threats that if the witness testified against him, harm would befall her. Defendant called the witness’s home over 1,000 times, and, through his friends, told her that if she "comes in," defendant would "get her."

The Court also rejects defendant’s contention that his right of confrontation was violated when the trial court allowed a prosecution witness to testify regarding DNA testing linking defendant to the crime scene even though the witness had not personally tested all the items about which she testified. The Confrontation Clause is not violated by testimony about DNA testing performed by a non-testifying analyst that yielded non-accusatory raw data.

A concurring judge, who would not decide either issue because any error was harmless, asserts that there is insufficient evidence that defendant’s phone calls were threatening or that defendant played a part in any threats made by his friends. The only evidence to which the majority can point is testimony by the complainant’s mother that "[defendant’s] friends from the street were

telling her that [defendant] keeps saying if she doesn't stay with him, that he was going to hurt her." This testimony boils down to an in-court statement by the mother about an out-of-court statement her daughter allegedly made about an out-of-court statement allegedly made by unidentified persons about an out-of-court statement allegedly made by defendant.

People v. Samuel Encarnacion
(1st Dept., 6/23/11)

* * *

RIGHT OF CONFRONTATION - Hearsay

The First Department rejects defendant's contention that under *Melendez-Diaz v Massachusetts* (129 S.Ct. 2527), admission of an un-redacted autopsy report violated his rights under the Confrontation Clause. Under *People v. Freycinet* (11 N.Y.3d 38), the factual part of the autopsy report is non-testimonial and admissible, and, in this case, *Melendez-Diaz* does not mandate a contrary result.

Melendez-Diaz did not explicitly hold that autopsy reports are testimonial. Justice Thomas joined the majority, but wrote separately to stress that the drug analysis certificates were affidavits, and he continued to adhere to his position that the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. Thus, any holding in *Melendez-Diaz* regarding scientific forensic reports is arguably limited to the formalized testimonial materials to which Justice Thomas referred.

Moreover, while in *Melendez-Diaz* the sole purpose of the sworn affidavits under Massachusetts law was to provide prima facie evidence of the composition and weight of the controlled substance, the mandate of the Office of the Chief Medical Examiner is to provide an impartial determination of the cause of death. The OCME is not a law enforcement agency and is independent of and not subject to the control of the prosecutor. Although OCME performs autopsies where the cause of death is suspected to be criminal, its powers and duties also extend to certain deaths arising by accident or by suicide.

Also, *Melendez-Diaz* did not address the situation here, where there was testimony by a medical examiner from the same office as the medical examiner who had performed the autopsy. As in *Freycinet*, the testifying medical examiner relied upon factual portions of the autopsy report consisting primarily of contemporaneous observations and measurements, but reached conclusions that were entirely her own. The factual portions of the autopsy report do not link defendant to the crime or contain subjective analysis.

"It bears mentioning that the blanket prohibition on the admission of autopsy reports urged by defendant could result in practical difficulties for murder prosecutions. If, for example, the medical examiner who performed the autopsy passes away before a perpetrator is apprehended

and tried, barring the use in evidence of the autopsy report could, in some situations, effectively amount to a statute of limitations on murder, where none otherwise exists (*see e.g. Melendez-Diaz*, 557 US at ___, 129 S Ct at 2546 [Kennedy, J., dissenting])."

People v. Ralph Hall
(1st Dept., 4/21/11)

* * *

HEARSAY - Inferential
- Opening The Door
RIGHT OF CONFRONTATION - Hearsay
IDENTIFICATION - Bolstering

The Third Department finds reversible error where, after defense counsel questioned a police investigator about whether he had received information implicating an individual named Charles McFarland in the murder, the prosecutor asked whether the investigator "also received eye witness testimony about who exactly was at the murder" and whether "that eye witness testimony was that Charles McFarland certainly wasn't there." The "eye witness" was unavailable to testify, and his statement was testimonial.

While the People contend that defendant opened the door, the prosecutor, in order to give the jury a more complete picture, could have inquired only as to whether an individual had told the investigator that McFarland was not involved. Instead, the People raised the implication that the "eye witness" gave a statement excluding McFarland and, presumably, identifying defendant.

People v. Lamarr Reid
(3d Dept., 3/31/11)

* * *

HEARSAY - Prior Consistent Statement

The Third Department finds no error in the admission of a 911 tape as a prior consistent statement where there was an anticipated defense that the victim was fabricating the entire assault, and, when the trial court offered to exclude the tape if defendant stipulated that he was not going to make a claim of recent fabrication, defendant would not so stipulate.

People v. Daniel Shaver
(3d Dept., 7/21/11)

* * *

HEARSAY - Prior Consistent Statement

The First Department finds no error in the admission of the victim's prior consistent statement to a police officer naming defendant as his assailant immediately after the crime.

Defendant attacked the victim's credibility by arguing that he was motivated to testify falsely by a cooperation agreement, entered into more than a year after the shooting, which required him to testify against defendant in exchange for a lenient sentence in his own drug case. Defendant also contended that the victim had deliberately misidentified defendant from the start in order to avoid revealing that the shooting involved the victim's own drug trafficking. However, there is no requirement that a prior consistent statement predate all possible motives to falsify.

People v. Marlon Flowers
(1st Dept., 4/19/11)

* * *

RIGHT OF CONFRONTATION - Hearsay

While rejecting defendant's Confrontation Clause claim, the First Department finds non-testimonial a declaration made by the rape victim to a police officer who responded shortly after the crime intending to ascertain what had happened and both deal with the danger posed to other persons in the area by a knife-wielding suspect who might have still been nearby and determine whether the victim required prompt medical assistance.

Also non-testimonial was a declaration made to a gynecologist at the hospital. The doctor acted primarily as a treating physician, and her role in gathering evidence for the police by way of a rape kit was secondary.

People v. Michael Shaw
(1st Dept., 1/11/11)

* * *

DISCOVERY - Journalist's Privilege
RIGHT OF CONFRONTATION

The Second Circuit declines to adopt, for use in all criminal cases, the "clear and specific showing" standard applicable in civil cases to requests for materials from a press entity only when confidentiality is at stake. In criminal cases, as in civil cases, a party seeking nonconfidential materials from a press entity must show that the materials are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.

In this case, where the Government sought disclosure, information regarding defendant's false exculpatory statements was likely relevant, and, because defendant possessed an absolute right not to testify, the material was not reasonably obtainable from other sources.

However, the district court erred in treating the reporter's interest as a competing interest to be balanced against defendant's Confrontation Clause rights, and in restricting defendant's cross-examination of the reporter. Once the Government has overcome the journalist's privilege and compelled a reporter's direct testimony, a trial court may not, consistent with the Confrontation Clause, employ the privilege to restrict the defendant's cross-examination of the reporter to a greater degree than it would restrict cross examination in a case where no privilege was at issue.

United States v. Treacy
2011 WL 799781 (2d Cir., 3/9/11)

* * *

CONFESSIONS - Invocation Of Right To Remain Silent
RIGHT OF CONFRONTATION - Hearsay

After refusing to suppress statements made by defendant at 12:05 a.m. and 3:30 a.m. and concluding that defendant's medical condition did not prevent him from making a voluntary and knowing waiver of his rights, the Court suppresses subsequent statements made by defendant at 7:35 p.m., about 15 hours after he had invoked the right to remain silent, and at 10:45 a.m. The police did not re-administer the Miranda warnings to defendant prior to these statements.

The Court also finds no error in the admission into evidence of the tape of a 911 emergency call made by one of the victims - a detective - and testimony as to statements made by the detective to another police officer at the scene. The evidence fell within the dying declaration and excited utterance hearsay exceptions, and there was no Confrontation Clause error since the detective's primary purpose was to obtain emergency aid for himself and for another detective, and to prevent further harm by the perpetrator, who at that point was still at large and armed.

People v. Marlon Legere
(2d Dept., 2/8/11)

* * *

RIGHT OF CONFRONTATION - Hearsay

The United States Court of Appeals for the Armed Forces holds that the improperly admitted testimonial hearsay of two drug analysts was not "cured" by the testimony of an expert who testified about the tests. Substitute means of ensuring reliability do not satisfy the Confrontation Clause no matter how efficacious they might be.

Although the expert may well have been able to proffer a proper expert opinion based only on admissible machine-generated data and calibration charts and his review of drug testing reports, his testimony contained a mix of admissible and inadmissible evidence.

United States v. Blazier
69 M.J. 218 (U.S. Ct. App. for Armed Forces, 12/1/10)

* * *

HEARSAY - Excited Utterance

The First Department reverses respondent's juvenile delinquency adjudication, concluding that the trial court erred in admitting, as an excited utterance, a 911 call made by a nontestifying complainant who was respondent's older brother.

The complainant's conduct prior to calling 911 indicates a capacity for deliberation and reflection. Although the testimony did not establish how much time passed between respondent's alleged threats against the complainant with a knife and the time the complainant placed the 911 call, several intervening events occurred. The complainant called his mother on the phone and waited for her to get home, and, when his mother arrived, asked her whether he should call the police. Moreover, other than the recording of the 911 call itself, there is no evidence of the existence of the allegedly startling event.

In re Odalis F.
(1st Dept., 6/7/11)

* * *

HEARSAY - Excited Utterances

The Third Department finds no error in the trial court’s ruling admitting, as “excited utterances,” statements made by the victim to two friends shortly after escaping from defendant’s restaurant.

Although the victim testified that she was able to form and execute an escape plan and, after escaping, drive 10-15 minutes in traffic to the friends' home and report the rape, the friends testified that upon her arrival, the victim was hysterical, crying and shaking, could not walk up the stairs without stumbling, and collapsed in a fetal position on a bed before she responded to questions by stating that a man had held a gun to her head and raped her on a job interview.

People v. Francis Auleta
(3d Dept., 3/17/11)

* * *

HEARSAY - Statements Relevant to Diagnosis And Treatment
RIGHT OF CONFRONTATION - Hearsay

Defendant, who was babysitting his girlfriend's three-year-old son, allegedly placed the child's feet and lower legs into a tub filled with scalding hot water, resulting in second and third degree burns. When the mother returned home, she and defendant took the child to the hospital, where he was examined and treated by an emergency room pediatrician. At trial, the court permitted the pediatrician to testify that the child, when asked why he did not get out of the tub, responded, "he wouldn't let me out."

The Court of Appeals holds that the child's statement was properly admitted as germane to his medical diagnosis and treatment. The pediatrician asked the child how he had been injured to determine the time and mechanism of the injury so she could properly administer treatment, and was trying to ascertain whether the child had a predisposing condition, such as a neurological disorder, that may have prevented him from getting out of the bathtub.

The Court also concludes that there was no violation of defendant's Sixth Amendment right of confrontation. Under the Supreme Court's "primary purpose" test, the statement was not testimonial since the primary purpose of the pediatrician's inquiry was to determine the mechanism of injury so she could render a diagnosis and administer medical treatment. It does not matter that the pediatrician may also have been motivated to fulfill her ethical and legal duty as a mandatory reporter of child abuse. Her first and paramount duty was to render medical assistance to an injured child. Moreover, in *Michigan v. Bryant*, the Supreme Court noted that statements to physicians in the course of receiving treatment are subject to exclusion under hearsay rules and not the Confrontation Clause.

People v. Michael Duhs
(Ct. App., 3/29/11)

* * *

HEARSAY - Statements Relevant To Treatment And Diagnosis

In each case, the Court of Appeals finds no error in the admission, under the business records exception to the hearsay rule, of certain statements appearing in medical records that were relevant to diagnosis and treatment. The Court also rejects defendant Benston's argument that his is not a case of domestic violence because he and the complainant, his former girlfriend, were living together in a platonic, landlord-tenant-type relationship.

In *People v Benston*, the record contained references to an "old boyfriend" as the perpetrator, a description of the case as involving "domestic violence," references to a "safety plan" for the complainant, and the description of the weapon as a "black" leather belt. The Court notes that domestic violence differs materially from other types of assault in its effect on the victim and in the resulting treatment. In addition to physical injuries, the victim may have a host of other issues

to confront, including psychological and trauma issues that are part of medical treatment. Developing a safety plan can be an important part of the treatment. The nature of the weapon used to strangle complainant -- a leather belt -- may have been relevant to diagnosis and treatment; however, the color of the belt had no relevance.

In *People v. Ortega*, the record contained a statement that the complainant was "forced to" smoke a white, powdery substance. Treatment of a patient who is the victim of coercion may differ from treatment of a patient who has intentionally taken drugs.

Judge Smith, concurring in the result, notes that these hospital records present a "hearsay within hearsay" problem, and thus the business records exception is not enough to support the Court's conclusion. The Court is implicitly recognizing another hearsay exception -- that for statements made for purposes of medical diagnosis or treatment. This exception is justifiable; statements to one's own doctor or other healthcare professional have an intrinsic guarantee of reliability, for only a foolish person would lie to his or her doctor when seeking medical help.

Judge Pigott, also concurring, finds harmless error in each case. While concluding that these statements were not relevant to treatment and diagnosis, he notes that domestic violence victims may mislead medical providers to protect their abusers and are known for crafting cover stories to hide their victimization, and in such cases the records would be offered by the defense.

People v. Oldalys Ortega, People v. Maurice Benston
(Ct. App., 11/23/10)

* * *

HEARSAY - Medical Records
- Statement Relevant To Treatment Or Diagnosis

The Third Department holds that the trial court did not err by denying defendant's request to redact the child complainant's statements from the medical records and by permitting a nurse to testify as to those statements.

The child's statement was related to treatment in that the hospital needed to create a discharge plan to provide for her safety, rather than send her home with defendant, and to refer her to counseling services. Although police personnel were present in the hospital room and may have asked the question that elicited the child's statements, the information was included in the medical records by hospital personnel who were also present. The trial court determined after an in camera examination that the child would be competent to testify as an unsworn witness.

People v. Adam Wright
(3d Dept., 2/24/11)

* * *

HEARSAY - Witness Unavailable Due To Misconduct By Defendant

In this domestic violence-related prosecution, the People allege that the complainant has had a change of heart and is refusing to cooperate with the prosecution as a result of over 300 telephone calls placed to her by defendant from jail. The People seek admission into evidence of the complainant's grand jury testimony.

Upon a *Sirois* hearing, the Court grants the People's request, finding by clear and convincing evidence that defendant's wrongdoing has caused the victim to stop cooperating with the prosecution. Although the defense argues that the recorded conversations contain no threats of harm or efforts at intimidation, it is not only outright threats that can demonstrate the intent to stay a witness' cooperation. "The power, control, domination and coercion exercised in abusive relationships can be expressed in terms of violence certainly, but just as real in repeated calls sounding expressions of love and concern." Defendant's "onslaught of attention cannot be viewed in vacuum, but understood in relation to the surrounding circumstances."

People v. Darrell Smith
(Sup. Ct., Kings Co., 9/27/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20392.htm

* * *

HEARSAY - Business Records - Police Reports
IMPEACHMENT - Prior Inconsistent Statements

In this robbery prosecution, the Second Department finds reversible error where, after the complainant testified that he gave a description of his white jacket in his statement to the officers, the trial court refused to admit into evidence a report prepared by the officers that contained no such description.

A police report should be admitted into evidence where it indicates that the source of the information contained in it was the complaining witness, and the information is inconsistent with the testimony of the complaining witness. Such a report is admissible to prove that the statement was made.

People v. Lenroy Mullings
(2d Dept., 4/12/11)

* * *

IMPEACHMENT - Prior Inconsistent Statements
HEARSAY - Business Record/Police Report

In this CPL Article 440 proceeding, the Second Department concludes that defendant was not denied the effective assistance of counsel where counsel failed to offer into evidence the complainant's alleged prior inconsistent statements in a certain police report.

Absent proof that the complainant signed, prepared, or verified the accuracy of the police report or any portion of it, the statements in the report attributed to the complainant were not admissible as prior inconsistent statements made by her. In addition, under the circumstances, the report was not admissible to demonstrate that the complainant failed to tell the police certain information about the incident.

People v. Victor Bernardez
(2d Dept., 6/14/11)

Impeachment

IMPEACHMENT - Rape Shield Law

Three eighth-grade girls left a slumber party and went to the home of Steven A., a 16-year-old friend of theirs. Defendant, a 23-year-old man, and another adult were also there. While at Steven A.'s home, the girls drank alcohol and smoked marijuana with the three males and also engaged in sexual activity. Two days later, one of the girls informed the police that she had intercourse with Steven A., and did not accuse defendant, but gave a second statement to the police a few days later, stating she had intercourse with defendant that night against her will.

Prior to trial, defendant moved for an order allowing him to introduce evidence at trial of the complainant's sexual conduct at the party; specifically her involvement with Steven A. The court ruled that the defense was prohibited from eliciting any evidence of sexual conduct of the complainant with any of the other individuals present unless the People introduced evidence attributing the complainant's bruises to sexual activity.

The Court of Appeals finds no error. If the People had introduced evidence of bruising caused by sexual contact and attributed such evidence to defendant, the excluded evidence would have been relevant to the rape charges, but the People decided not to offer evidence of bruising.

People v. Steven Scott
(Ct. App., 5/3/11)

* * *

IMPEACHMENT - Reputation For Truth And Veracity

A Court of Appeals majority holds that when the proper foundation has been laid, family and family friends may constitute a relevant community for purposes of introducing testimony pertaining to an opposing witness' bad reputation for truth and veracity.

Here, the proper foundation was laid. One witness testified that he had known the complainant since her birth and that they were members of the same large extended family, comprising approximately 25 to 30 people. He identified many of these family members and indicated that his entire family knew the complainant. He had overheard discussions among them concerning the complainant and was aware of her reputation for truthfulness in the family. The other witness explained that she had known the complainant since her birth and that she, along with many of her family members and friends, witnessed the complainant grow up. She testified that all her family members and family friends often discussed the complainant and that she was present during such conversations. She testified that she was aware of the complainant's reputation for truthfulness among this group.

Although the People and the dissent (Judge Graffeo and Chief Judge Lippman) argue that the witnesses' testimony would have been inherently unreliable, given their purported bias in favor of defendant, the presentation of reputation evidence by a criminal defendant is a matter of right, not discretion, once a proper foundation has been laid.

People v. Marcos Fernandez
(Ct. App., 6/2/11)

* * *

IMPEACHMENT - Reputation For Truth And Veracity

The Second Department finds no error where the trial court permitted defendant to impeach a prosecution witness with testimony by the witness's father as to his son's "exceedingly bad" reputation in the community for truth and veracity, but did not allow the father to testify that he had discussed his son's reputation with his son's "teachers, neighbors, friends, people of that sort."

The father was permitted to testify that he had raised his son as a single parent, taught at the high school his son attended, and continued to live in the community where he had raised his son. Thus, defendant was permitted to establish the basis for the father's testimony.

People v. John McGhee
(2d Dept., 3/29/11)

* * *

IMPEACHMENT - Prior Inconsistent Statements
RIGHT TO PRESENT DEFENSE

The child complainant in this sex crime prosecution did not report the abuse, which allegedly occurred between 1998 and 2002, until 2006 when she revealed it to her mother. Defendant

denied the accusations and contended that the child was upset with him after he and his wife sent her from Florida, where the three had been living together, to live with her mother in New York. Defendant wanted to call two witnesses to testify that while the child was en route to New York, she had stated that the abuse never happened and that she wanted to continue to live in Florida with her sister and defendant, “beg[ged]” the witnesses to go back to Florida, and stated that there were "no problems" in Florida. This conflicted with the child's trial testimony denying that she made any statements concerning the alleged abuse to the witnesses and claiming that the extent of her conversation with them was "[j]ust hi, how are you and how was school." The trial court precluded the testimony, concluding that it was collateral.

The Second Department finds reversible error. The court’s ruling deprived defendant of his constitutional right to present a defense. The testimony not only would have contradicted the child's previous testimony, it also would have tended to buttress defendant's contention that the child fabricated her allegations soon after defendant and his wife sent her back to New York.

People v. Luis Gomez
(2d Dept., 12/21/10)

* * *

IMPEACHMENT - Prior Inconsistent Statement

The First Department finds reversible error where the trial court concluded that a prosecutor’s testimony concerning statements made by defendant during a jailhouse interview could not be impeached with statements in the People’s case summary and VDF.

The Court rejects the People’s claim that the witness could not be impeached because nothing conclusively demonstrated that she was the author of the statements contained in the summary and VDF. Whatever the precise standard may be, the People set it too high. The inference that the witness prepared both the case summary and the VDF is a reasonable one, because she testified that either she or another prosecutor had prepared the documents, that the other prosecutor was not present during the jailhouse interview, that it was "very possible" she had prepared the case summary, and that the VDF bore her typewritten name. Even assuming that she did not personally prepare each document, it is entirely unreasonable to think that she, the lead prosecutor in a serious homicide case, did not know what each document said about a matter of great import - the statements defendant made during the jailhouse interview. "Indeed, it is confounding that the People continue to contend that the defense properly was prevented from impeaching the testimony of the lead prosecutor on such a critically important subject with the accounts of defendant's statements in documents prepared either by the lead prosecutor or by an assistant district attorney she was supervising."

Two concurring judges would also hold that the People's failure to provide the defense with certain documents before trial impeded defendant's ability to introduce the case summary for

impeachment purposes, and violated the prosecution's disclosure obligations under *People v Rosario* and *Brady v Maryland*.

People v. Pavan Ortiz
(1st Dept., 6/23/11)

* * *

IMPEACHMENT - Prior False Allegations
- Motive To Fabricate
EXPERT TESTIMONY - Sex Offender Profile

The Second Department finds reversible error in this child sex abuse prosecution against the child's step-grandfather where the trial court precluded testimony by a witness who was the ex-boyfriend of the child's mother and the father of the child's younger brother. He would have testified that, when the child was approximately five years old, and he and her mother were living together, the child had accused him of "touching her private parts," but that later, in the presence of the ex-boyfriend and the child's mother, the child had recanted and admitted to having lied. On cross-examination, the child denied having made the prior allegation against the ex-boyfriend, and, on direct examination, her mother denied any knowledge of that allegation.

Evidence of a complainant's prior false allegations of rape or sexual abuse is admissible to impeach the complainant's credibility. Where, as here, a defendant establishes that the prior allegation may have been false and that the particulars facts suggest a pattern casting substantial doubt on the validity of the charges made by the complainant, it is error for the trial court to preclude evidence regarding the prior allegation.

Moreover, the ex-boyfriend's testimony should have been permitted on the ground that the child's mother testified that she was unaware of any accusation against the ex-boyfriend. The denial of the opportunity to contradict answers given by a witness to show bias, interest or hostility deprives a defendant of his right to confrontation.

The trial court also erred in admitting expert testimony describing how a sex offender typically operates to win over the trust of a child victim where the description closely paralleled the child's account of defendant's behavior. While expert testimony may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand, it cannot be introduced merely to prove that a sexual assault took place or bolster a witness' credibility.

People v. Randolfo Diaz
(2d Dept., 6/21/11)

* * *

IMPEACHMENT - Prior False Allegations
RIGHT OF CONFRONTATION

The Florida Supreme Court finds no violation of defendant's right of confrontation where defendant was not permitted to cross-examine the complainant regarding an alleged false accusation against someone other than defendant.

The complainant's prior accusation was against her uncle, not defendant. The accusation involved a one-time incident involving "over-the-clothes" groping, whereas her accusation in this case involves "under-the-clothes" sexual acts that occurred on multiple occasions. The complainant testified that she did not recant the accusation against her uncle. Cross-examination would not have explained the complainant's knowledge of sex to the jury and might have caused the jury to infer that she had a propensity to lie about sexual abuse.

A concurring opinion notes that this type of evidence could be highly probative of the complainant's general credibility. In another case, the circumstances surrounding the prior false accusation may be so similar to the facts in the defendant's case that due process would require cross-examination regarding the prior incident.

Pantoja v. State
2011 WL 722374 (Fla., 3/3/11)

* * *

IMPEACHMENT - Prior Sexual Abuse Allegations

In this sex offense prosecution in which defendant, the "quasi or de facto brother-in-law" of the 14-year-old complainant, is charged with criminal sexual act in the second degree, forcible touching and endangering the welfare of a child, the People move to preclude defendant from cross-examining the complainant or making reference during trial to any claim that the complainant made a prior unrelated allegation of sexual abuse against another individual.

The Court denies the motion. The rape shield law does not bar evidence of a claim of prior sexual abuse by a complainant; it bars evidence of prior sexual conduct of a complainant. Here, the complainant made is a similar allegation against her brother-in-law, the husband of her other sister. The prior allegation was investigated by the Vermont State Police, who have made no arrest to date. This suggests a pattern casting doubt on the complainant's credibility, which is crucial in this case.

People v. Kenneth Foulkes
(Sullivan County Ct., 1/28/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50162.htm

* * *

IMPEACHMENT - Motive To Fabricate
RIGHT OF CONFRONTATION

The Court grants habeas relief, concluding that petitioner's Confrontation Clause rights were violated where petitioner was permitted wide-ranging cross examination of a key prosecution witness regarding several potential grounds for bias -- fear-based bias stemming from threats petitioner made against the life of the witness's son, and greed-based bias rooted in the expectation that, if petitioner were sent to jail, the witness could keep the money petitioner accused her of stealing from him -- but was barred from cross-examining the witness about retaliation-based bias and/or bias stemming from a desire to shift blame specifically to petitioner after petitioner accused the witness of the murder with which petitioner was charged.

Bias stemming from the witness's reaction to petitioner's accusation is distinct from other forms of bias, and "has a different emotional and psychological cast, all of which are factors important for a jury responsible for gauging the credibility of a witness." Furthermore, retaliatory or blaming-shifting bias offers a cogent explanation for why the witness, after two years of silence, implicated petitioner when she did. Had the jury been permitted to hear this evidence, there is a reasonable likelihood that the jury would have decided that the witness was not credible and not convicted petitioner.

Corby v. Artus
NYLJ, 4/1/11
(SDNY, 3/24/11)

* * *

IMPEACHMENT - Bad Acts

The Second Circuit finds error, albeit harmless, where the district court limited cross-examination of a government witness by barring use of a state court's finding that the witness had given false testimony in a prior judicial proceeding.

The district court considered only two issues: (1) whether the prior judicial finding addressed the witness's veracity in that specific case or generally; and (2) whether the two sets of testimony involved similar subject matter. This analysis was too narrow. The Court has never held or suggested that these are the only factors to be considered or that they are determinative. The district court could have also considered, for example: (1) whether the lie was under oath in a judicial proceeding or was made in a less formal context; (2) whether the lie was about a matter that was significant; (3) how much time had elapsed since the lie was told and whether there had been any intervening credibility determination regarding the witness; (4) the apparent motive for the lie and whether a similar motive existed in the current proceeding; and (5) whether the witness offered an explanation for the lie and, if so, whether the explanation was plausible.

United States Of America v. Cedeño
NYLJ, 5/6/11
(2d Cir., 5/2/11)

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RIGHT OF CONFRONTATION - Limitation Of Cross-Examination

In this first degree murder prosecution, habeas petitioner admitted at trial that he participated in the robbery during which the victim was shot, but maintained that his co-defendant Rakeem Harvey (a/k/a "Keemie") had shot the victim. Petitioner's claims are based on a note the prosecution disclosed to defense counsel, which stated, in relevant part: "Keemie Harvey, a/k/a Keemie Cooke. Keemie had gun + went off accident." Defense counsel unsuccessfully sought to cross-examine the lead detective about the note in an effort to show that, despite having this information, the police did not adequately investigate whether Harvey was, in fact, the shooter.

The district court granted habeas relief, finding that the state appellate courts unreasonably applied clearly established federal law by rejecting petitioner's Confrontation Clause argument.

The Second Circuit reverses. The Court agrees with the district court that cross-examining the detective on the note might have had some probative value. If the jury had been allowed to hear that the detective had received information, in addition to petitioner's self-serving statements, suggesting that Harvey was the shooter, the jury might have been more concerned about whether the detective had prematurely concluded that petitioner was the shooter, and had failed to investigate diligently the possibility that it was Harvey who had shot the victim.

However, a trial judge may balance the probative value of evidence against the potential for unfair prejudice. Here, any decision excluding cross-examination on balancing grounds was not unreasonable. The probative value of the note is significantly diluted because the information in it was derived from multiple hearsay, and the jury reasonably could have determined that, given the strength of the evidence then available, the detective's decision not to follow up on unreliable information in the note did not reflect a serious lack of thoroughness in the police investigation. Also, there was a possibility that the jury would be misled or distracted by the suggestion that the note was substantive evidence that Harvey was the shooter. The trial court did allow defense counsel to explore the thoroughness of the investigation on cross-examination.

Watson v. Greene
NYLJ, 5/18/11
(2d Cir., 5/17/11)

Expert Testimony

EXPERT TESTIMONY - Child Sexual Abuse Accommodation Syndrome

HEARSAY - Statements Relevant To Diagnosis And Treatment

In this sex crime prosecution in which it was alleged that defendant engaged in reciprocal oral to genital contact with a young boy, a 4-judge Court of Appeals majority rejects defendant's contention that the nurse-practitioner's testimony regarding the boy's statements improperly bolstered his credibility. The boy's responses about why he was at the Child Advocacy Center were germane to diagnosis and treatment. Indeed, without the boy's allegations regarding what happened and when, the nurse would not have known where to begin her examination. The nurse did not identify who the boy said touched him and acknowledged that she did not know whether the boy was being truthful. Her testimony about the nature of the alleged abuse consisted of a single question and a brief answer. Since the testimony falls within the hearsay exception for statements relevant to diagnosis and treatment, it did not improperly bolster the boy's testimony. Moreover, the testimony "rounded out the narrative of the immediate aftermath of the boy's disclosure to his mother," and addressed the negative inference jurors might draw from the absence of medical evidence of abuse.

The nurse's observations of the boy's demeanor and manner were relevant to medical decisions about the necessity for counseling or psychological therapy or other treatment. In response to the dissenting judges' contention that the complainant's embarrassment or nervousness had no medical significance, the majority notes that the boy's flushed skin and elevated heart rate are not "statements" and thus do not constitute hearsay in any event.

The majority also finds no error in the admission of expert testimony regarding Child Sexual Abuse Accommodation Syndrome. From the beginning, defendant attacked the boy's credibility by citing his failure to report the alleged abuse promptly and his willingness to continue to associate with defendant. In his opening statement, defense counsel emphasized the six or seven years when the boy said nothing. In this context, the trial judge properly allowed the expert to testify about CSAAS to rehabilitate the boy's credibility. "The expert stressed that CSAAS was not a diagnosis; rather, it describes a range of behaviors observed in cases of validated child sexual abuse, some of which seem counterintuitive to a lay person. He confirmed that the presence or absence of any particular behavior was not substantive evidence that sexual abuse had, or had not, occurred. He made it clear that he knew nothing about the facts of the case before taking the witness stand; that he was not venturing an opinion as to whether sexual abuse took place in this case; that it was up to the jury to decide whether the boy was being truthful." While finding that defendant failed to preserve his claim that certain of the hypothetical questions too closely mirrored the boy's circumstances and thus improperly bolstered or vouched for his credibility, the majority also notes that the expert did not express an opinion on the boy's credibility.

The majority also rejects defendant's challenge to the scientific reliability of CSAAS. While some experts have reservations about the prevalence of denial and recantation, those aspects of CSAAS are not at issue in this case.

Chief Judge Lippman, Judge Ciparick and Judge Jones dissent. They assert, with respect to the nurse practitioner's testimony, that the complainant's embarrassment or nervousness at the examination had no medical significance whatsoever, and the majority's purported justification for the admission of the testimony "is pure invention." The prosecution was perfectly blunt about why the testimony was being offered: it was for credibility purposes. With respect to the expert testimony on CSAAS, they note that "the prosecutor proceeded to ask the expert, in hypothetical terms, about virtually every detail in the case." The expert even managed to inform the jury that in 154 cases, he had seen only 4 instances of false allegations, 3 of them in the context of divorce battles. Even though the expert did not expressly render an opinion as to whether or not the complainant was a victim of sexual abuse, the expert's "confirmation of nearly every detail of the case and of complainant's behavior as consistent with that of a victim of sexual abuse was the functional equivalent of rendering an opinion as to complainant's truthfulness. . . . The expert's testimony had the effect of improperly bolstering complainant's testimony and, in the context of this case, was extremely prejudicial."

People v. Michael Spicola
(Ct. App., 3/31/11)

* * *

EXPERT TESTIMONY - Identification

The victim followed defendant for about 15 minutes after the crime, and watched him from across a street as he made what appeared to be efforts to sell the gold chain he had just stolen from her. The victim continuously kept defendant in sight, except for very brief periods under circumstances that would render mistaken identity highly unlikely. When the police arrived, she gave them a detailed and fairly accurate description of defendant, including his clothing and shaved head. She then rode with the officers for two blocks and pointed out defendant.

The First Department finds no error in the denial of defendant's request to present expert testimony on identification. There was significant corroborating evidence, independent of the victim's identification, that connected defendant with the crime. Police testimony placed defendant very close to the scene of the crime within 15 minutes after it occurred, and established that he resembled the perpetrator the victim described, both in his clothing and in his physical appearance.

People v. Monzir Zohri
(1st Dept., 3/10/11)

* * *

EXPERTS – Identification

The Court of Appeals unanimously reversed defendant's conviction and ordered a new trial, concluding that the trial judge abused his discretion by denying, without first holding a Frye hearing, defendant's application to call an eyewitness identification expert to testify in the areas of "event stress, exposure time, event violence weapon focus, and cross-racial identification" (*People v. Abney*, 13 N.Y.3d 251, 268).

Upon a *Frye* hearing, the Court grants defendant's motion to introduce expert testimony with respect to event stress, weapon focus, event duration, confidence malleability, the effect of post-event information on accuracy of identification, and the correlation between confidence and accuracy of identification is granted. Defendant's motion to introduce expert testimony at trial with respect to own-race bias is denied.

People v. Abney
(Sup. Ct., N.Y. Co., 5/5/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50919.htm

* * *

EXPERT TESTIMONY - Sexual Assault

The First Department finds no error in the admission of testimony by a certified sexual assault nurse who testified as an expert in sexual assault forensics and stated that the victim's injuries had been recently acquired and that the abrasions on the victim's labia were consistent with forcible penetration. These were matters beyond the knowledge of the average juror.

People v. Eddy Momplaisir
(1st Dept., 5/3/11)

* * *

EXPERT TESTIMONY - Domestic Violence

The Third Department finds no error where the trial court allowed expert testimony regarding domestic violence to explain the victim's delay in seeking aid or attention immediately following the attack, to the extent that it was otherwise unexplained. The expert only described the general behavior patterns of domestic violence perpetrators and victims.

People v. Thomas Roblee
(3d Dept., 4/7/11)

* * *

EXPERTS - Battered Woman's Syndrome
HEARSAY - Witness Unavailable Due To Misconduct By Defendant

ASSAULT - Dangerous Instrument

While denying habeas relief, the Court concludes that it was not unreasonable for the trial court to determine that petitioner's numerous phone calls, all in violation of an order of protection, and his visits to the hospital, when viewed in the context of the history of domestic abuse, constituted misconduct that procured the complainant's unavailability at trial and justified admission of her Grand Jury testimony.

The Court finds no error in the admission of expert testimony on Battered Woman's Syndrome to help the trial court understand why seemingly innocuous acts, such as telephone calls, visits, and apologies, may intimidate or coerce a battered woman and cause her to refuse to prosecute.

The Court also concludes that the admission of the BWS evidence at trial was not erroneous and did not deprive petitioner of a fair trial. The expert did not testify about the facts of this case and only drew the conclusion that "[i]t is common for [battered women] to refuse to cooperate if they are being contacted by the abuser."

The Court also finds that first degree assault was properly charged under New York law where petitioner's foot was covered with a hard plastic sandal when he assaulted the complainant.

Byrd v. Brown
NYLJ, 11/1/10
(SDNY)

* * *

EXPERTS - Mental State Of Defendant

Defendant, charged with assault and reckless endangerment after shooting another hunter who was camouflage hunters' clothing and was not wearing hunter's orange or other florescent or safety clothing or gear, claims that he believed he was shooting at a deer. Defendant seeks to call a neuropsychologist, to testify regarding Normal Brain Function as it relates to whether and how expectation affects visual perception and causes misperception. The expert would be asked to educate the jury as to the basic brain function of perception and how we are able to identify objects in our environment, and to explain that research findings have shown that experience and expectation may interfere with and impair the accuracy of split-second recognition of an object. At a *Frye* hearing, the expert testified that he could state with a reasonable degree of scientific certainty that a hunter with a lot of experience hunting on the same terrain forms an expectancy based on this experience of seeing deer on the terrain and of never before having seen another human on the terrain; that because the brain has an expectancy to see what it has always seen, i.e. a deer, the ability of the brain to focus on the "novel object," i.e. a human, is impaired; and that this visual processing occurs at the millisecond level.

The Court excludes the testimony. While these matters are not within the ken of the jury and

expert testimony could help a jury understand how a hunter, in a millisecond, could mistake a human for a deer, the theory does not explain how this defendant, looking through his high-powered scope and focused for some ten minutes in the area of his target, would or could see a deer because he expected to see a deer, rather than another hunter who was actually in the woods.

Moreover, the expert's testimony was equivocal as to the general acceptance in the scientific community of the principles he would offer.

People v. Robert Robar
(County Ct., Suffolk Co., 8/24/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_20345.htm

* * *

EXPERTS - Ballistics

The Supreme Judicial Court of Massachusetts finds no error in the trial court's admission of expert testimony that the handgun that was connected to defendant fired the projectiles recovered from the scene of the shooting and from the victim's body.

The Court discusses the recent report issued by the National Research Council that raises concerns about the validity of the scientific basis for evaluating the reliability of forensic ballistics evidence and the subjective nature of forensic ballistics comparisons. However, the judge in this case, in determining without conducting a hearing that the evidence was admissible, conditioned and limited the scope of the expert's opinion by ruling that the expert could testify "to a degree of scientific certainty" that the recovered projectiles were fired by the gun in question, but also had to admit that he could not exclude the possibility that the projectiles were fired by another nine millimeter firearm.

Commonwealth v. Heang
2011 WL 489926 (Mass., 2/15/11)

* * *

EXPERTS - Firearms/Toolmark Identification

Defendant moves for an order precluding the People from offering expert testimony as to firearms and toolmark identification. Defendant argues that such testimony is no longer generally accepted in the relevant scientific and legal communities, and cites various articles and federal court decisions and submits the affirmation of Professor Adina Schwartz of John Jay College of Criminal Justice. Defendant requests a "Frye" hearing.

The Court denies the motion. Professor Schwartz appears to attack the methodology employed by many experts as opposed to the fundamental methodology itself, and her findings have been criticized by many in the scientific (ballistics) community and she has been denied qualification by a court as an expert in firearms. Similarly, the report issued by the National Academy of Sciences appears to question the way in which results of the testing are reported and the lack of review of the initial findings of the examiner. In none of the cases cited by defendant did a Court find that firearms and toolmark identification is no longer scientifically acceptable or is unreliable. While concerns have been expressed regarding the scientific methodology of firearms and toolmark identification, courts have typically allowed the testimony while noting that the defense may certainly challenge any expert testimony through cross-examination and/or by offering defense experts.

People v. Givens
NYLJ, 11/24/10
(Sup. Ct., Bronx Co.)

Missing Witness Inference

MISSING WITNESS INFERENCE - Unavailability Of Witness

The Appellate Term finds reversible error where the trial court denied defendant’s request for a missing witness charge regarding the second witness to the incident.

The prosecutor asserted that the witness could not be located, that he had conducted a Lexis locator search, and that he had attempted to call the witness's aunt living in Guyana but was unable to contact her. However, the People had been informed by the complaining witness's wife that the missing witness had indicated that he intended to move back to Florida from New York, but no search was conducted of criminal, motor vehicles or social services records within New York and Florida.

People v. Hafiz Khan
(App. Term, 2d, 11th & 13th Jud. Dist., 4/1/11)

Justification Defense

DEFENSES - Justification

Penal Law § 35.05(2), the "choice-of-evils" defense, provides that conduct that would otherwise constitute an offense is justified when it "is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue."

A Court of Appeals majority holds that defendant was not entitled to a jury charge under § 35.05(2) with respect to the crimes of manslaughter in the second degree and assault in the second degree where, according to defendant, he was not committing any offense when he jumped into a runaway vehicle to prevent it doing harm to others.

However, it was error, albeit harmless, for the trial court to refuse to give a charge under § 35.05(2) with respect to the counts charging operating a motor vehicle while intoxicated. If defendant elected to operate a motor vehicle while under the influence of alcohol, in an attempt to prevent injury, he faced the choice of two evils: drive while intoxicated or risk a runaway truck causing injury.

People v. Freddy Rodriguez
(Ct. App., 3/24/11)

* * *

DEFENSES - Justification - Applicability Of Defense To Crime Charged

The Second Department finds no error in the trial court's failure to charge the jury on the issue of justification with respect to a felony murder count.

The purpose of the felony murder statute is to punish a felon for killing a victim when the mortal danger arises from his or her commission of an enumerated felony, even when the killing was in self-defense. Therefore, a justification charge as to felony murder itself would directly undermine the legislative purpose of the statute.

People v. Timmy Lee Walker
(2d Dept., 9/28/10)

Intoxication Defense

DEFENSES - Intoxication

The Court of Appeals finds no error in the trial court's refusal to give an intoxication charge to the jury where the uncontradicted evidence, including defendant's own account, supports the conclusion that his overall behavior on the day of the incident was purposeful.

Judge Jones dissents, noting that defendant, on the day of the incident, consumed two large glasses (approximately 12 to 15 ounces each) of Southern Comfort whiskey and ingested a Xanax pill, and, shortly thereafter, threatened friends and neighbors with a bow and arrow, fired an arrow into the side of a truck, and then fatally shot the victim - actions that call into question defendant's state of mind.

People v. Thomas Sirico
(Ct. App., 6/7/11)

Age Element Of Crime

STATUTES - Rules Of Interpretation - Age Element Of Crime

While reversing an order dismissing a charge that defendant violated Nassau County's Social Host Law, the Appellate Term, concluding that the law applies to eighteen year-old defendant, asserts that the most natural understanding of the phrase "over the age of eighteen" includes individuals, like defendant, who have passed their eighteenth birthday and begun the nineteenth year of life.

People v. Sherman Lam
(App. Term, 9th & 10th Jud. Dist., 4/1/11)

Murder

MURDER - Intent
MANSLAUGHTER - Recklessness

The Second Department, finding that the verdict was against the weight of the evidence, reduces defendant's conviction for murder in the second degree to manslaughter in the second degree where the evidence established that defendant acted recklessly and not that he intended to kill the victim.

Although there was evidence that defendant and the victim were starting to argue, no one at the party testified that defendant ever threatened the victim, a witness who knew them testified that they were a happy couple who sometimes had "their little spats," and defendant testified that they argued sometimes but their arguments never became violent. There was a struggle between the victim and defendant before the stabbing, both had been drinking alcohol before the victim was stabbed, and two witnesses testified that the victim was using PCP. A medical doctor testified that PCP may distort the user's thinking and make her violent, and that alcohol amplifies the effect of PCP on the user. After the stabbing, several knives were found lying on the floor of the apartment, both the defendant and the victim had cuts on their hands, and each of them suffered injuries causing them to bleed. The victim suffered one stab wound on her left side, and she and defendant left the apartment after the stabbing.

This evidence supports a finding that the wounds were inflicted recklessly in the midst of a struggle, and not as part of a calculated effort to kill the victim.

People v. James Haney
(2d Dept., 6/7/11)

* * *

MURDER - Depraved Indifference

In a 4-3 decision, the Court of Appeals reduced defendant's conviction of depraved indifference murder to manslaughter in the second degree where defendant and a separately charged individual were in the process of stealing two snow plows when police officers responded to the scene; defendant immediately jumped into the driver's seat of his van while his partner sat on the passenger side and sped away; and a police chase ensued, ultimately resulting in defendant smashing his van into another vehicle and killing a passenger therein.

The dissenting judges note that defendant led police on a chase through residential and business districts at speeds as high as 65 miles per hour, ran at least five red lights, repeatedly drove in the oncoming lane of traffic, and collided with one vehicle before the incident at issue occurred; that rather than stopping his van after the first collision, defendant "doubled down" and continued through two more red lights and driving into oncoming traffic; and that "[e]ach time defendant blasted through a red light, each time he drove into the oncoming lane of traffic, defendant had the opportunity to reassess his conduct and place society's interests above his own."

People v. Michael Prindle
(Ct. App., 2/22/11)

* * *

MURDER - Depraved Indifference

Granting relief in this habeas proceeding, the Second Circuit, applying New York law on depraved indifference murder as it existed at the time petitioner's conviction became final in 2004, concludes that the law of depraved indifference had so fundamentally changed that no point-blank, one-on-one shooting could be depraved indifference murder. A reasonable jury could have found that petitioner plotted his attack in advance, lured the victim to his home on the night of the murder, and then deliberately put a handgun to her head and pulled the trigger.

Alternatively, the State now contends that a reasonable jury could have found that, after bringing the gun to his meeting with the victim in an attempt to scare or intimidate her, petitioner accidentally shot her when the gun discharged during a struggle. The State argues that this alternative set of facts would support a conviction for depraved indifference murder because the act of confronting the victim with a loaded weapon, and thereby precipitating a struggle for the gun, was sufficiently reckless. However, the State has not provided, nor was the Court able to find, any case in which a New York appellate court has held that the mere act of bringing a gun to a contentious confrontation, without more, could rise to the level of depraved indifference murder. Were there evidence that petitioner intentionally pulled the trigger of the gun during the struggle, then perhaps his conduct might rise to the level of depraved indifference murder. But there is no such evidence.

Rivera v. Cuomo
NYLJ, 8/10/11
(2d Cir., 8/9/11)

* * *

MURDER - Depraved Indifference
EXPERT TESTIMONY - Domestic Violence

"In this extraordinary case," the First Department finds sufficient evidence of depraved indifference murder where defendant's liability was based entirely on her failure to perform the duty of obtaining medical attention for her injured child. Defendant knew her son had sustained devastating, life-threatening injuries and was in severe pain. She did not call an ambulance or take her son to the hospital. Instead, she and the co-defendant made worthless efforts to treat the child with home remedies, and she otherwise ignored her child's injuries over a period of seven hours and made casual telephone calls without mentioning the child's injuries, drank beer and smoked, and then went to sleep. She finally called 911 at or around the time the child died, and took the time to dispose of potentially incriminating evidence before making the call. She admitted that she did not seek medical attention earlier because she was afraid of being blamed for the injuries.

The Court also finds no error in the trial court's refusal to receive expert testimony on abusive domestic relationships. Because the People had expressly limited themselves to the theory that defendant's liability was based solely on her failure to obtain medical attention for the child on the particular night he died, evidence explaining why she remained with the co-defendant would have been irrelevant and potentially misleading.

People v. Zahira Matos
(1st Dept., 4/19/11)

Criminal Mischief

CRIMINAL MISCHIEF - Value

In its earlier decision in this case (31 Misc.3d 131[A]), the Appellate Term dismissed the charge of criminal mischief, finding insufficient evidence of damage where defendant spray-painted a Belgian block wall but there was no proof that the wall's usefulness or value was diminished and the complainant did not even testify that she disliked and intended to strip the paint from the wall, in which case evidence of cleaning and repair costs may have demonstrated proof of damage.

The Court now recalls and vacates the prior decision and upholds the criminal mischief conviction in light of the undisputed testimony that defendant did not have permission to spray-

paint the wall and the photographs depicting the wall which were entered into evidence.

People v. Suarez
(App. Term, 2d Dept., 7/21/11)

Endangering The Welfare Of A Child

ENDANGERING THE WELFARE OF A CHILD

An Appellate Term majority affirms defendant's conviction for attempted endangering the welfare of a child where the transcript of a 911 call made by a witness indicated that, during an argument, defendant was holding his infant daughter and pushed the mother away and refused to return the infant; the officer observed defendant holding the infant with the infant's head in his forearm, apparently choking the infant with his forearm, and also observed defendant flailing the infant about in a violent manner while pushing the mother away; the officers attempted to take the infant away from defendant several times, but, every time, defendant had become more violent and begun flailing the infant about even harder; and, after approximately five minutes, the officer was able to convince defendant to give the infant back to its mother.

The dissenting judge asserts that, other than defendant's verbal exchange with the mother and the awkward manner in which he held his daughter during the exchange, there was no evidence that defendant knew his actions would likely cause his daughter harm. Defendant and the mother were engaged in a heated argument, and defendant eventually handed his daughter to the police and was taken to the hospital for a psychiatric evaluation.

People v. Edward McDuffie
(App. Term, 2d, 11th & 13th Jud. Dist., 4/11/11)

* * *

ENDANGERING THE WELFARE OF A CHILD

The Court finds facially sufficient a charge of endangering the welfare of a child where it is alleged that the police recovered cocaine from on top of the refrigerator in defendant's apartment, and that defendant's granddaughter, who is between two and three feet tall and approximately 40 pounds, was lying on the couch in the apartment.

Although the cocaine was allegedly recovered from an area above the height of the child, she could walk and climb and put herself within reach of the cocaine, or the cocaine could simply fall off the refrigerator. Ingestion of cocaine by the child would certainly be injurious to her physical, mental and moral welfare.

People v. Rita Gunter
NYLJ, 5/26/11

(Crim. Ct., N.Y. Co., 5/19/11)

Sex Crimes

RAPE - Consensual Sex Between Minors

The South Dakota Supreme Court holds that application of the statutory rape law to an act committed by a fourteen-year-old who engaged in consensual sexual intercourse with his twelve-year-old girlfriend did not create an absurd result the Legislature did not intend.

J.L. was the only participant who could have been adjudicated a juvenile delinquent; his girlfriend was under the age of legal consent. By designating thirteen as the age of consent, the Legislature exercised its prerogative to protect children under thirteen from children over thirteen.

In re J.L.
2011 WL 2650242 (S.D., 7/6/11)

* * *

RAPE - Constitutionality Of Statute
SEX CRIMES - Consensual Sex Between Minors

The Supreme Court of Ohio holds that the first degree rape statute is unconstitutional as applied in a case involving two boys under the age of 13 who engaged in consensual sexual activity.

The statute is unconstitutionally vague because it authorizes and encourages arbitrary and discriminatory enforcement. When two children under the age of 13 engage in sexual conduct with each other, each child is an offender and a victim, and the distinction between those terms breaks down.

Application of the statute also results in an equal protection violation since both children are members of the class protected by the statute.

In re D.B.
2011 WL 2274624 (Ohio, 6/3/11)

* * *

SEXUAL ABUSE - Sexual Gratification

The First Department reverses a finding of attempted sexual abuse in the third degree where "11-year-old [respondent] inappropriately touched the 12-year-old complainant without her permission in a crowded school auditorium," which was "deeply offensive" behavior, but the

evidence did not establish beyond a reasonable doubt that respondent was acting for the purpose of obtaining sexual gratification.

In re Shamar D.
(1st Dept., 5/19/11)

* * *

SEX CRIMES - Lack Of Consent - Physically Helpless
SEXUAL ABUSE

The complainant went with friends to dance at a bar defendant owned. She had been drinking before she arrived at the bar, continued after she got there, and became extremely drunk. Defendant and the complainant were acquaintances, and she hugged him and permitted him to put his arm around her shoulders. As she showed more severe signs of intoxication, defendant became more aggressive. He made "rude comments" to her as she sat on a bar stool drinking, and when she tried to get up to find one of her friends he prevented her by holding her wrist. He tugged on her shirt, and tried to put his hands under it. He held her chin, and tried to turn it towards him. He touched her thighs around where her shorts ended, and kissed her once. Holding her by her wrist or waist, he led her to a nearby storage room, pulled her in and closed the door. Defendant held her wrist, and another man who was present pulled at (but did not remove) her shorts, and one or both of them pulled at her shirt. Defendant tried to put his hands under her shirt, and both men tried to kiss her. They asked her to go upstairs with them. She refused to go upstairs, and resisted their advances by sitting on the floor. At one point she tried to leave the room but was unable to open the door (though the door had no lock). When her cell phone rang, defendant prevented her from answering, and took the phone away. The encounter ended after one of the complainant's friends called her family, and her father arrived and led her out.

The Court of Appeals reverses the conviction on the charge of attempted sexual abuse, which was based on the theory that the complainant was incapable of consent by reason of being physically helpless. There is no evidence that the complainant was physically helpless at any time after she entered the storage room. While she was in the bar area, the complainant may well have been physically helpless at some times, and defendant may have attempted to subject her to sexual contact at other times, but there is no evidence that the two occurred together. Although one witness testified that, while the complainant was "kind of lifeless," defendant had his hands "under her shirt," it is clear in context that she was not saying he touched the complainant's breast.

People v. Zufer Cecunjanin
(Ct. App., 4/5/11)

* * *

SEXUAL ABUSE - Force

A three-judge First Department majority affirms an order granting defendant's motion to dismiss an indictment charging sexual abuse in the first degree because of insufficient evidence of forcible compulsion. It is alleged that defendant rubbed his penis against the then 14-year old complainant's lower back while standing behind her on a crowded subway car; that the complainant felt "weird movements" which stopped each of the three times she turned around, and she "kind of figured it was just because the train was moving really fast and it was really crowded"; that she did not attempt to get away from defendant because the train was crowded and seats were to her immediate right; and that she did not realize what was happening until, when she was ready to leave the train, she noticed that there was semen on her jeans and on her coat.

Given the complainant's testimony that defendant stopped making the movements each time she turned around and that she did not know what had occurred until she discovered the semen on her clothing, the evidence established only the use of stealth to commit the crime. The complainant's claim that she felt threatened was not supported by detailed facts.

The dissenting judges assert that a defendant's use of his superior size, and trapping a victim and blocking the victim's means of escape, may amount to physical force.

People v. Jason Mack
(1st Dept., 9/21/10)

* * *

BRADY MATERIAL - Timing Of Disclosure - Pre-Plea
IMPEACHMENT - Suggestibility Of Children
SEX CRIMES - Credibility Of Complainant
WITNESSES - Hypnotically Refreshed Testimony

While denying habeas relief in connection with this prosecution for child sexual abuse, the Second Circuit concludes that even if petitioner could establish his actual innocence and thereby avoid the time-bar, the petition would have to be denied because petitioner's *Brady* claim fails. Even if hypnosis that may have been used to stimulate memory recall and potentially induce false memories of abuse constitutes impeachment evidence that comes within *Brady*'s definition of exculpatory evidence, the state courts did not unreasonably apply federal law in refusing to apply *Brady* to a challenge to a guilty plea.

However, the Court "voic[es] some concern regarding the process by which the petitioner's conviction was obtained," noting, inter alia, that in the late 1980's and early 1990's was "a period in which allegations of outrageously bizarre and often ritualistic child abuse spread like wildfire across the country and garnered world-wide media attention"; that "[v]ast moral panic fueled a series of highly-questionable child sex abuse prosecutions"; that "[a]lthough many of these cases included 'fantastical accusations,' such as those of satanic abuse - a strand of

accusations which has been discredited entirely - others involved allegations of real and serious crimes committed in an impossible manner"; that "[t]hese prosecutions were largely based on memories that alleged victims 'recovered' through suggestive memory recovery tactics, including those petitioner claims were used in this case"; that "[t]he prevailing view is that the vast majority of traumatic memories that are recovered through the use of suggestive recovery procedures are false"; that "many highly-publicized and large-scale investigations into alleged child abuse conspiracies were also accompanied by a variety of interviewing techniques designed to assist children in recalling abuse - techniques which an extensive body of research suggests can induce false reports"; and that "[p]etitioner has come forward with substantial evidence that flawed interviewing techniques were used to produce a flood of allegations, which the then-District Attorney of Nassau County wrung into over two hundred claims of child sexual abuse against petitioner."

The record suggests a reasonable likelihood that petitioner was wrongfully convicted. Petitioner has not exhausted his claim in the New York State courts even though New York cases suggest that relief on this basis may be available pursuant to CPL § 441.10(1)(h), and the New York courts may be particularly sympathetic to a proceeding seeking such relief. Only a reinvestigation of the underlying case or the development of a complete record in a collateral proceeding can provide a basis for determining whether petitioner's conviction should be set aside.

A concurring judge does not join the Court's comments about the problems with the prosecution.

Friedman v. Rehal
(2d Cir., 8/16/10)

* * *

CRIMINAL SEXUAL ACT

Upon examination of the Grand Jury minutes, the Court finds sufficient evidence of sexual abuse in the third degree, but dismisses a charge of criminal sexual act in the third degree, where the victim never gave defendant permission to engage in oral sexual contact with her, but the sexual act did not continue after the victim explicitly expressed her lack of consent. "Lack of consent," as that term is defined in PL § 130.05(2), requires an explicit expression of lack of consent.

People v. Cooper
NYLJ, 1/31/11
(Sup. Ct., N.Y. Co., 1/12/11)

Stalking

STALKING - Attempts

The Court of Appeals holds that attempted stalking in the third degree -- the stalking statute states that the defendant, "[w]ith intent to harass, annoy or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury or serious physical injury, the commission of a sex offense against, or the kidnaping, unlawful imprisonment or death of such person or a member of such person's immediate family" -- is a legally cognizable offense.

There is nothing impossible about attempting to engage in such a course of conduct. For instance, if a telephone call or e-mail were "likely to cause" the consequences referred to, an attempt to make such a phone call or send such an e-mail, even if the communication never reached its intended recipient, would be an attempt.

People v. Herbert Aponte
(Ct. App., 2/10/11)

Possession Of A Weapon

POSSESSION OF A WEAPON - Second Amendment

The Second Department, agreeing with the Third Department, holds that Penal Law Article 265 is not unconstitutionally overbroad merely because it restricts the Second Amendment and Civil Rights Law § 4 rights of those who have been convicted of any crime.

The statutes represent a policy determination by the Legislature that an illegal weapon is more dangerous in the hands of a convicted criminal than in the possession of a novice to the criminal justice system. Although individuals may have the constitutional right to bear arms in the home for self-defense, this right is not unlimited and may properly be subject to certain prohibitions.

People v. Franklin Hughes
(2d Dept., 4/19/11)

* * *

POSSESSION OF A WEAPON - Ammunition
CONFESSIONS – Voluntariness

Officers recovered a .25 caliber semiautomatic pistol that respondent's mother reported had been found in respondent's bedroom. Respondent initially stated to the police that the gun was hers and she bought it the previous week. However, after the police stated that they did not believe her, and arrested her and handcuffed one of her hands to a metal bar because they did not have cells for juveniles - the arrest process took approximately four and a half hours - respondent was again questioned with her mother present and stated that the gun belonged to her boyfriend and she had put it under her bed, that the day before her boyfriend asked her to hold the gun because there were cops downstairs and he did not want to get caught with it, that she did not know if the

gun was loaded or not, and that she had never heard of her boyfriend or his friends being involved in any robberies.

The First Department upholds the denial of respondent's motion to suppress her statements. All the relevant events took place in a designated juvenile room with respondent's mother present or nearby, and the time she was in police custody was reasonable given the delays involved in processing a firearm arrest.

However, the Court reverses respondent's delinquency adjudication and dismisses the charges of unlawful possession of a weapon by a person under 16 and possession of pistol ammunition (NYC Administrative Code § 10-131[i][3]). To find guilt, the Court would have to apply a strict liability standard, but the family court's findings are correctly based on a knowing possession standard. Respondent's statements do not prove that she knowingly possessed ammunition.

In re Amber B.
(1st Dept., 8/24/10)

* * *

POSSESSION OF A WEAPON - Second Amendment

The Tenth Circuit U.S. Court of Appeals, applying intermediate scrutiny to a statute prohibiting the possession of all types of firearms while subject to a domestic protection order, concludes that defendant's conviction under the statute does not violate the Second Amendment.

United States v. Reese
2010 WL 5023256 (10th Cir., 12/10/10)

Escape

ESCAPE

In a 4-3 decision, the Court of Appeals holds that respondent could not be charged with felony second degree escape for absconding from the non-secure juvenile detention facility to which he had been remanded.

For purposes of the felony escape statute, a "Detention Facility" is "any place used for the confinement, pursuant to an order of a court, of a person (a) charged with or convicted of an offense, or (b) charged with being or adjudicated a youthful offender, person in need of supervision or juvenile delinquent" (PL § 205.00[1]). However, Article Three of the Family Court Act does not equate detention with confinement, as does the Penal Law, but rather defines it more broadly as "the temporary care and maintenance of children away from their own homes" (FCA § 301.2[3]). And, after enactment of the applicable Penal Law provisions, Article Three introduced a distinction, not articulated in the Penal Law, between secure detention

facilities (FCA § 301.2[4]) and nonsecure detention facilities (FCA § 301.2[5]). The distinction is crucial because it is anomalous to speak of "escaping" from a facility that is characterized by the absence of physically restrictive construction, hardware and procedures.

Moreover, the Court held in *People v Ortega* (69 N.Y.2d 763) that a nonsecure facility does not constitute a detention facility within the meaning of PL § 205.00(1). Although Ortega involved an alleged escape from a nonsecure psychiatric hospital, and its carve-out was warranted by the different objectives of secure and nonsecure psychiatric commitment, there is no relevant distinction to be made between a nonsecure psychiatric facility and a nonsecure juvenile detention facility. Both are designed to detain but not imprison, and to rehabilitate rather than punish, and neither has as a principal end the protection of the public. Moreover, it would be incongruous to treat an adult acquitted of rape upon a plea of insanity with impunity for his escape from a nonsecure psychiatric facility, but deem a child answerable to a felony charge for leaving the nonsecure detention facility to which he had been remanded, through its evidently unlocked door.

It may well be desirable that a significant consequence attach to a child's noncompliance with the conditions upon which a nonsecure remand is made, but the filing of a new petition alleging felony escape is not essential; the child may be directly transferred to a secure facility, as respondent was.

Matter of Dylan C.
(Ct. App., 4/5/11)

Robbery

ROBBERY - Displays What Appears to Be Firearm

The First Department finds legally sufficient evidence that defendant committed first degree robbery while displaying what appeared to be a firearm where, during the robbery, defendant placed his hand under his sweatshirt, leading the victims to believe that defendant had a weapon, and threatened to "blast" one of the victims.

With respect to the affirmative defense in PL § 160.15(4), the Court notes that although no weapon was recovered from defendant when he was apprehended shortly after the robbery, he had ample opportunity to rid himself of a firearm while, after crossing the street, he was unobserved for several minutes, and he had reason to dispose of the firearm because he was aware that the first victim had left and would most likely return with the police to assist his friend.

People v. Terrence Allen
(1st Dept., 8/11/11)

* * *

ROBBERY - Display Of What Appears to Be Firearm

The Second Department reduces findings of attempted robbery in the second degree and menacing in the second degree to attempted robbery in the third degree and menacing in the third degree where respondent took a gun from his waist, pointed it at the victim's right side, and touched the victim's side with the gun as he pulled the victim's purse strap from her shoulder, but the victim testified that she did not know what caused the "poke" she felt in her side, did not see anyone with a gun, and only observed the gun after it was dropped to the ground as the arresting officer approached.

The presentment agency failed to establish that the victim actually perceived the display of what appeared to be a firearm.

Matter of Tafari S.
(2d Dept., 4/26/11)

* * *

ROBBERY - Display Of What Appears To Be Firearm

The First Department, while upholding defendant's first degree robbery conviction, finds legally sufficient evidence that defendant displayed what appeared to be a firearm where the complainant testified that defendant first demanded, "Give me all the fucking money," and, after that, "said that he had a gun" and "was going to shoot me in the face," and, while defendant gesticulated with his right hand, he kept his left arm rigidly in one position, with the elbow bent, so that his left hand would be situated near his waist.

Although defendant's waist and hand were hidden from the complainant by the counter and the soda display on it, the jury could reasonably have found that defendant had purposefully created the impression that his left hand was on or near a gun at his waist. Defendant's hiding his hand from view behind the counter display was no different from sliding it into the inside of a jacket.

People v. Douglas Welsh
(1st Dept., 1/11/11)

* * *

ROBBERY - Intent
DEFENSES - Claim Of Right

The First Department upholds defendant's attempted robbery conviction where defendant claims that she mistakenly believed that the cash in the cabdriver's hand belonged to her because "she erroneously believed that she had given the cabdriver more money than was due him and that the

money he refused to return belonged to her." The court properly declined to charge mistake in fact, and properly gave the jury an anticipatory instruction that the claim of right defense did not apply.

A claim of right defense is unavailable to a defendant who uses force to recover cash. Due to the fungible nature of cash, a defendant cannot have a genuine belief as to its ownership. Moreover, the cash in the cabdriver's hand never were defendant's property; the $20 bill defendant gave the driver had already been returned to her, and the bills in the driver's hand were the change he had originally given defendant in exchange for the $20 bill. The Court need not determine whether defendant would have a legitimate argument had she tried to take back her original $20 bill.

People v. Debra Pagan
(1st Dept., 12/14/10)

* * *

ROBBERY - Acting in Concert
GRAND LARCENY
ASSAULT

The Second Department reverses, as against the weight of the evidence, findings of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and attempted assault in the third degree, concluding that in light of the conflicting versions of the events offered by the witnesses and the complainant's testimony that respondent was not actively participating and was standing apart from the perpetrators and later fled with them, the evidence established only that respondent was present at the scene of the offense.

Matter of Leonel T.
(2d Dept., 11/30/10)

Unauthorized Use Of A Vehicle

UNAUTHORIZED USE OF A VEHICLE

The Court of Appeals finds legally sufficient evidence of unauthorized use of a vehicle in the second degree where defendant exited the driver's side door of a vehicle, holding a small black box; defendant began walking in the direction of the officers but, upon seeing them, dropped the box to the ground and continued to walk; the officers stopped defendant and recovered the discarded item, which turned out to be a computerized automobile light control module, and, upon examination of the vehicle, noticed that the driver's side door lock was broken and the dashboard had been ripped apart, exposing the internal wiring; and the officers arrested defendant and recovered a screwdriver, rachet and four sockets from his pants pocket.

Penal Law § 165.05 is not limited to joyriding or situations in which the vehicle is actually driven. Moreover, operability is not a sine qua non of the crime. The Court rejects defendant's contention, accepted by the dissent, that a person may not be convicted of unauthorized use of a vehicle unless he had the ability and intent to operate it. Although entry alone is not enough under the statute, which expressly requires some degree of control or use, a violation of the statute occurs when a person enters an automobile without permission and takes actions that interfere with or are detrimental to the owner's possession or use of the vehicle.

Here, defendant's unauthorized entry, coupled with multiple acts of vandalism and the theft of a vehicle part, constituted a temporary use of the car for a purpose accomplished while the vehicle remained stationary.

Judge Smith concurs in result, and Judge Jones and Judge Pigott dissent.

People v. Robert Franov
(Ct. App., 5/10/11)

Prostitution

PROSTITUTION - Sex Trafficking Victims
- Juveniles
DISMISSAL IN THE INTEREST OF JUSTICE

Defendant, charged with prostitution, moves to dismiss and argues that in light of the Federal Trafficking Victims Protection Act, the New York State Safe Harbour for Exploited Children Act, and a recent amendment to Article 440 of the Criminal Procedure Law, the prosecution of prostitution charges against persons under the age of 18 is precluded. Defendant moves in the alternative for dismissal in the interest of justice.

The Court denies the motion. The jurisdiction of the Criminal Court over the prosecution of a person under the age of 18 for the crime of prostitution has not been limited, and CPL 440.10 merely presents the possibility of future vacatur in this case.

With respect to defendant's interests of justice motion, the Court notes that prostitution is a serious offense, despite its classification as a "B" misdemeanor, and it is an offense which does cause harm and is not victimless. Such activity may negatively affect the health of the participants, innocent third parties, and the neighborhoods where it occurs.

People v. Lewis
NYLJ, 7/20/11
(Crim. Ct., N.Y. Co., 7/12/11)

Resisting Arrest/Obstructing Governmental Administration

RESISTING ARREST
OBSTRUCTING GOVERNMENTAL ADMINISTRATION
ASSAULT

Respondent was confronted in school by an assistant principal and a school safety officer regarding a hammer that was protruding or visible from her book bag. The officer tried to persuade respondent to give her the hammer, but she refused and started to walk away. The officer walked in front of respondent and stated that if she did not give the officer the hammer, she would have to take it. When respondent again refused to surrender the hammer, the officer tried to seize it, but respondent put up a violent struggle that caused injury to the officer.

The First Department upholds findings of assault in the second and third degrees, resisting arrest, and obstructing governmental administration in the second degree. The evidence satisfied the "lawful duty" element of second-degree assault, the "official function" element of obstructing governmental administration and the "authorized arrest" element of resisting arrest. It is within the scope of school authorities' lawful and official functions to remove from a student an item that could pose a threat to safety and order even where possession of the item would not be criminal without proof of intent to use unlawfully.

In re Sheyna T.
(1st Dept., 12/7/10)

Criminal Trespass

CRIMINAL TRESPASS - Housing Authority Apartment Building

The Court finds facially sufficient charges of criminal trespass where it is alleged that defendant was inside the lobby and beyond the vestibule of a New York City Housing Authority building, a location that was beyond a conspicuously posted sign saying that loitering and trespassing in the lobby, hallway and stairs and on the roof is not permitted; that when defendant was asked whether he was a tenant in the building, he stated no and that he was "here to see my friend"; and that the officer determined defendant's response to be false because defendant was unable to give an apartment number.

The People are not required to allege facts negating the possibility that the defendant had been an invited guest of one of the tenants. The existence of such an invitation can be raised as a defense at trial and must be proven by the defendant. For pleading purposes, an allegation that the defendant admitted that he did not reside in the building is sufficient. In addition, an allegation that "No Trespassing" signs were posted in the lobby of a Housing Authority building, beyond the vestibule, is sufficient to establish, for pleading purposes, that the lobby was not open to the public.

People v. Salvator Messina

(Crim. Ct., N.Y. Co., 3/29/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21123.htm

* * *

CRIMINAL TRESPASS - Public Housing Apartment Building

Departing from the conclusion reached in several recent opinions that trespassing in a public housing apartment building can only be prosecuted as a B misdemeanor under P.L. § 140.10, the Court holds that defendant may be charged with criminal trespass in the second degree. This legislative history establishes, if anything, that the Legislature intended for those who trespass in public housing projects to be prosecuted to the full extent of the law governing trespass in private dwellings.

People v. Gil Delossantos
(Crim. Ct., N.Y. Co., 5/24/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21183.htm

* * *

CRIMINAL TRESPASS - NYCHA Buildings

The Court dismisses as facially defective charges of criminal trespass in the second degree and criminal trespass in the third degree where it is alleged in the information that while on patrol outside of the "NYCHA building," the officer observed defendant inside the lobby of the dwelling beyond the vestibule, and that defendant was not a tenant of the building or an invited guest of a resident of the building.

With respect to the charge of criminal trespass in the second degree under PL § 140.15, which provides that "[a] person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a dwelling," the Court concludes that in light of the legislative history, a defendant who has allegedly trespassed in a public housing building can only be charged under PL §§ 140.10(e) or (f), and not under § 140.15.

With respect to the charge of criminal trespass in the third degree under PL § 140.15(e), the Court notes that there are no factual allegations indicating that rules and regulations governing entry and use of the building were conspicuously posted.

People v. Julio Bazan
(Crim. Ct., N.Y. Co., 3/15/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50379.htm

Drug Offenses

SALE OF DRUGS - Acting In Concert

The Court dismisses as facially defective a charge of criminal sale of marijuana in the fourth degree where it is alleged that defendant "stayed in the vicinity" while a marijuana sale was completed by two other individuals, and "constantly look[ed] up and down the street for other individuals, as a lookout."

The allegations are too equivocal to demonstrate that defendant's conduct was related to the drug sale.

People v. Vincent Mondon
(Crim. Ct., N.Y. Co., 3/11/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_50369.htm

Burglary

BURGLARY - "Dwelling"
RIGHT TO COUNSEL - Effective Assistance

In this burglary prosecution, the Court of Appeals rejects defendant's claim that his trial counsel was ineffective for failing to challenge the legal sufficiency of the People's proof on the ground that a police precinct containing dormitories for overnight use is not a "dwelling." There is no requirement that the building must always be a home or what would normally be considered a residence.

People v. Elijah Cummings
(Ct. App., 2/24/11)

Menacing

MENACING

The Appellate Term finds facially sufficient a charge of menacing where the misdemeanor information alleges that shortly after midnight, defendant "approached" a Manhattan restaurant while the complainant was standing directly behind the restaurant's front window, that defendant "took out a knife from [his] pocket, looked at [the complainant], and ... tap[ped] said knife on the window," and that the police recovered a gravity knife from defendant's pants pocket.

That defendant and the complainant are alleged to have stood on opposite sides of the window is not fatal to the prosecution's case at the pleading-stage.

People v. Sergei Kramtsov
(App. Term, 1st Dept., 12/30/10)

* * *

MENACING

The Second Department, while otherwise upholding respondent's delinquency adjudication, exercises its interest of justice jurisdiction and finds that the evidence was legally insufficient to establish menacing in the third degree.

The facts are not included in the Second Department's opinion. Here are excerpts from respondent's brief on appeal:

"There was no evidence that before, during, or after the confrontation with [A.], Brooklyn B. uttered any threatening words--indeed, the prosecution presented testimony that he said nothing to [A.]--or engaged in any threatening behavior, other than suddenly punching [A.]. The punch might have been relied upon to show that Brooklyn B. intended to physically injure [A.], i.e., to make out the mens rea for an assault, but it did not establish an intent to place [A.] in fear of such injury. Indeed, "[i]n a pure menacing situation, there is no injury and thus no assault; nor is there an intent to cause injury and thus no attempted assault." Donnino, Practice Commentary, 2009 Main Volume, McKinney's Cons. L. N.Y., P.L. §120.15. See Matter of Shenay W., 68 A.D.3d 576, 576 (1st Dept. 2009) (reversing findings to second- and third-degree menacing while upholding one of second-degree assault where respondent intended "natural consequence" of her act, throwing an object at her teacher, but "there was no evidence of any threatening behavior before, after, or otherwise separate from the sudden attack").

In addition, the menacing finding must fall because there was no evidence that [A.] felt frightened when Brooklyn B. approached and punched him. Even when asked questions by the Family Court that were manifestly intended to elicit that response, [A.] gave no reply that supported that element of the crime. See Matter of Ashley C., 59 A.D.3d 715, 715-716 (2d Dept. 2009) (reversing finding to third-degree menacing as legally insufficient where "complainant did not testify to the effect that she feared death, imminent serious injury, or physical injury"); Matter of Davonte B., 44 A.D.3d 763, 764 (2d Dept. 2007) (evidence legally insufficient to sustain third-degree menacing charge where complainant did not testify respondent's act put him in fear of imminent injury but said only that he felt "violated"); People v. Peterkin, 245 A.D.2d 1050, 1051 (4th Dept. 1997) (reversing conviction for third-degree menacing where complainant did not testify that defendant's verbal threat put him in fear of injury or death); cf. Matter of David PP., 211 A.D.2d 995 (3d Dept. 1995) (menacing finding upheld where complainant testified that he feared he would die when respondent pointed gun at him and pumped it twice)."

Matter of Brooklyn B.
(2d Dept., 10/26/10)

Hazing

HAZING

The Second Department holds that a high school gang is an "organization" within the meaning of New York's hazing statutes. Legislative history indicates that certain amendments were designed to apply the law to all persons engaging in hazing activities, not merely students.

The Court rejects respondent's argument that the complainant willingly subjected himself to being hit by the other participants because he wanted to be a member of the gang. Often, those who are victims of hazing are, to some degree, willing to accept humiliation and physical abuse from others in order to gain social acceptance, but in order to give effect to Penal Law §§ 120.16 and 120.17, and under the circumstances of this case, consent is not a valid defense.

The Court also concludes that the evidence was legally sufficient to prove that respondent acted in concert. His acts of recruiting the complainant, and directing the duration and timing of the attack by counting aloud and videotaping the incident, proved that he shared a community of purpose with those who actually struck the complainant.

The Court also rejects respondent's argument that the complainant was an accomplice as a matter of law since he willingly and eagerly participated in the initiation ritual, and that his testimony required corroboration. The complainant was a victim who could not be an accomplice to his own victimization.

The Court "recognize[s] that not all initiation and admission ceremonies are criminal. In fact, the Legislature did not criminalize all initiation rituals, only those acts that create a substantial risk of physical injury to another person. Under certain circumstances, some initiation rituals may even perform a social utility by promoting bonding and solidarity among members of a group (citations omitted)."

Matter of Khalil H.
(2d Dept., 11/9/10)

Assault/Gang Assault

MISSING WITNESS INFERENCE
ASSAULT - Acting In Concert

The Second Department finds error, albeit harmless, where the trial court denied defendant's request for a missing witness charge with respect to a police officer who spoke to the complainant shortly after the incident, and could be expected to have knowledge about a material issue and to testify favorably to the People. The People failed to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate.

The Court also dismisses a charge of assault in the first degree where the People presented evidence that defendant and several other individuals physically attacked the complainant, who was stabbed at some point during the altercation, but failed to demonstrate that defendant carried

a dangerous instrument, stabbed the complainant, or was aware that any of his co-perpetrators intended to stab the complainant.

People v. Qasim Chardon
(2d Dept., 4/19/11)

* * *

KIDNAPPING/UNLAWFUL IMPRISONMENT - Merger
RIGHT TO COUNSEL - Effective Assistance
PHYSICAL INJURY

The Third Department finds unpreserved defendant's claim that his convictions for kidnapping and unlawful imprisonment should be reversed because they merged with his convictions for assault, attempted assault and sexual abuse, and rejects defendant's claim that the failure to raise the merger issue constituted ineffective assistance of counsel. Each victim agreed to accompany defendant in his truck as part of a sexual solicitation, but each became frightened after getting into the vehicle, at which point defendant used force and threats in order to prevent each of them from getting out of his truck after defendant drove to a secluded area.

The Court reverses defendant's conviction for assault in the second degree, finding insufficient evidence of physical injury where defendant, while struggling with the victim, cut the knuckle on her left middle finger with a knife, causing it to bleed. There was no testimony regarding pain, and, aside from evidence of "insignificant" scar on her finger, no evidence that the victim lost the use of the finger or that it was impaired by the injury.

People v. Joseph Kruppenbacher
(3d Dept., 2/24/11)

* * *

GANG ASSAULT - Attempts

The First Department holds that attempted gang assault in the second degree is a non-existent crime since it involves the intended result of physical injury and the unintended result of serious physical injury.

In re Cisely G.
(1st Dept., 2/17/11)

* * *

ASSAULT - Serious Physical Injury

The Second Department dismisses a charge of gang assault in the second degree, finding insufficient evidence of serious physical injury where the complainant suffered a fractured patella.

Matter of Jason P.
(2d Dept., 11/9/10)

* * *

ASSAULT - Seriously Disfigured
- Serious Physical Injury

The Court of Appeals dismisses a count charging first degree assault, and holds that the evidence did not establish that the victim was "seriously" disfigured, where defendant's bite marks were two ovals with reddish discoloration, one located at and above the midpoint between the wrist and the elbow, and the other closer to, but still several inches above, the wrist; one mark measured 3.5 x 3, the other 3 x 3, centimeters; police officers who saw the victim's injuries on the day she suffered them described them as "severe" and "deep," and hospital records show that the victim's flesh was torn but that there was no "exudation" (oozing of fluid from blood vessels); the wounds did not require any stitches; and the victim was told to follow up with a plastic surgeon for "optimal" cosmetic results, but there is no evidence that she did so.

A person is "seriously" disfigured when a reasonable observer would find her altered appearance distressing or objectionable. The standard is an objective one, but the nature of the injury is not the only relevant factor; the injury must be viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance. Here, the case might be different if there were something unusually disturbing about the scars, but if there was the prosecution failed to make a record of it, in the form of either a photograph or a detailed description. The Court declines the prosecution's invitation to infer, in effect, that whatever the jury saw must have supported its verdict; a court reviewing the sufficiency of the evidence cannot rely on facts of which no record is made.

The Court also dismisses a count charging second degree assault based on "serious physical injury." Without a "serious disfigurement" there is no evidence in the record of "serious physical injury."

Judge Pigott dissents.

People v. Donald McKinnon
(Ct. App., 10/14/10)

Larceny/Possession Of Stolen Property/Forgery Offenses

PETIT LARCENY - Attempts

The Appellate Term reverses, as against the weight of the evidence, the verdict of guilt of attempted petit larceny where defendant carried unpaid merchandise into a stall of a restroom within Macy's and was apprehended by a loss prevention agent immediately upon exiting the stall.

Factors which have been found to give rise to an inference of larcenous intent include, but are not limited to, concealment of merchandise while in close proximity to or moving towards an exit, possession of a known shoplifting device, removal of a sensor device or price tag, switching price tags and switching personal property with merchandise.

People v. Lioudmila Haimovici
(App. Term, 9th & 10th Jud. Dist., 2/16/11)

* * *

POSSESSION OF A FORGED INSTRUMENT

After arresting defendant for driving a borrowed car with a suspended license, the officer, in the course of inventorying the automobile, discovered two fake credit cards, as well as a number of documents belonging to defendant "spread out all over the car." One credit card was found in a jacket on the backseat, and the other was found in the side pocket of the driver's door.

The Court of Appeals, finding legally sufficient evidence of criminal possession of a forged instrument in the second degree, concludes that a rational trier of fact could have inferred beyond a reasonable doubt from the evidence that defendant must have known the cards were in the car.

People v. Mujahid Muhammad
(Ct. App., 2/17/11)

* * *

POSSESSION OF A FORGED INSTRUMENT

Penal Law § 170.27 states, "A person who possesses two or more forged instruments, each of which purports to be a credit card or debit card, as those terms are defined in [General Business Law § 511], is presumed to possess the same with knowledge that they are forged and with intent to defraud, deceive or injure another." The First Department holds that a MetroCard is a "debit card" for the purpose of the statutory presumption of fraudulent intent.

People v. Bernard Solomon
(1st Dept., 11/18/10)

Disposition

DISPOSITION - Probation - Violations
APPEAL - Mootness

After first concluding that respondent's challenge to the finding that he violated probation has not been rendered academic by the termination of respondent's placement, the Second Department holds that the family court should not have accepted respondent's admission to violating a condition of probation without conducting an allocution to ascertain that respondent was voluntarily waiving his right to a hearing and was aware of the specific dispositional orders that could be entered.

Matter of Alex Z.
(2d Dept., 3/15/11)

Practice Note: FCA § 360.3(2) does incorporate the requirement in FCA § 321.3(2) that the court, upon accepting the respondent's admission to a violation of probation, state the reasons for accepting the admission, but does not refer to the allocution requirement in § 321.3(1). The Third Department also required an allocution in the probation violation context in *Matter of Abram E.*, 69 A.D.3d 1006 (3d Dept. 2010).

* * *

DISPOSITION - Probation - Violations
DETENTION - Post-Disposition

The Appellate Division held that the family court lacked authority to remand respondent, who was on probation, to detention in the absence of a violation of probation petition. The Appellate Division granted the presentment agency leave to appeal to the Court of Appeals and certified the following question: "Was the order of this Court, which reversed the order of Family Court, properly made?"

Invoking the exception to the mootness doctrine for the same reasons cited by the Appellate Division, the Court of Appeals answers the certified question in the affirmative. The Legislature did not empower the family court to order detention of a juvenile probationer before the filing of a violation of probation petition, and the Court is unwilling to imply such authority in the absence of a statutory peg. "As Jazmin points out, 'it is odd to suggest . . . that the Legislature intended to permit detention before a VOP petition has been filed when it enacted an express provision [i.e., § 360.3(2)(b)] providing [for] a juvenile [to] be detained after a VOP petition is filed.'" If the family court possesses inherent authority to order detention at any time during the period of probation, § 360.3(2)(b) would seem to be unnecessary. While the family court retains jurisdiction over a juvenile probationer until probation ends, continuing jurisdiction does not provide power to take actions not authorized by FCA Article Three. Detention is not authorized by FCA § 320.5: a court appearance for the purpose of monitoring compliance with probation is

not an "adjournment" of the "initial appearance" on the underlying juvenile delinquency petition.

Respondent's acknowledgement at the dispositional hearing that a poor probation report meant that she would "quickly find [her]self in detention" did not amount to a waiver of a VOP petition, even assuming that such a waiver could be obtained from a minor in respondent's position. In a footnote, the Court notes that the Appellate Division explicitly declined to decide the hypothetical questions of whether a motion made under FCA § 355.1 to stay, modify or terminate an order of probation based on change of circumstances is an alternative means of initiating proceedings to revoke probation, and whether detention would be authorized pending resolution of such a motion.

Matter of Jazmin A.
(Ct. App., 11/17/10)

* * *

DISPOSITION - Least Restrictive Alternative
- Equal Protection - Gender-Based Preferences

While determining what disposition to order in these eight proceedings, the Court holds that the Probation Assessment Tool created by the Vera Institute of Justice and the New York City Department of Probation, which is utilized by the Department in formulating dispositional recommendations in juvenile delinquency proceedings, impermissibly discriminates against males by awarding a preference to females in the form of asset points based solely on gender.

Those advocating for reform of the State's juvenile justice system focus on factors including: (i) the negative evaluation of the functioning of OCFS by the Civil Rights Division of the United States Department of Justice; (ii) the concession by responsible public officials that OCFS is presently unable to carry out the responsibilities delegated it by statute; (iii) the high cost associated with placing a juvenile delinquent in OCFS custody; and (iv) the perception that Family Court judges place juvenile delinquents in OCFS custody for the commission of "minor infractions." In 2003, the New York City Department of Probation adopted a plan known as "Project Zero," which is designed to reduce the use of preventive detention and placement. The Vera Institute, in collaboration with the Department of Probation, created the PAT to ensure that those juveniles subjectively believed to be least likely to commit further criminal acts -- females 12-15 years of age -- would receive recommendations for the least restrictive outcomes, such as adjournment in contemplation of dismissal or conditional discharge. These outcomes minimize the expenditure of fiscal resources or the resources of the Department of Probation. However, while presented as a diagnostic tool to ensure "fairer outcomes," the PAT program creates "a seemingly bizarre, sterile, and largely impersonal system of 'asset points', 'asset scores' and 'asset classifications' which supposedly correlate a numerical figure to the presumptively correct

order of disposition." The system invariably awards 14 "asset points" to females, and thus contains a built-in gender bias.

Here, in the cases involving females, the PAT computer program produced total asset scores which, when bolstered with additional asset points based upon gender, and on a few occasions age, corresponded to ACD recommendations, while the PAT-generated scores in the cases involving males corresponded to recommendations of probation supervision or placement with OCFS. Except for the fact that two of the children were accomplices, none of these cases presented identical facts, yet the PAT computer program mechanically applied a "one size fits all" approach driven by gender. "As presently designed, the PAT computer program would render Family Court Judges little more than mechanical magistrates who would impose a specified disposition based upon a computer generated score which often ignores the reality of a particular child's circumstances." Moreover, "[b]y creating a system of internal gender discrimination against males, the PAT computer program also creates the very real possibility that female delinquents will receive less services or less supervision than they should, which itself creates an unnecessary risk of recidivism as well as an unnecessary risk to the safety of the community."

Classifications based upon sex are inherently suspect and are subjected to close judicial scrutiny. There must be a showing that there is an "exceedingly persuasive justification" for a gender distinction. Here, there is no evidence of the scientific or sociological validity of the preference, and the Court refuses to assume that the data underlying the PAT program justifies its disparate impact. Even if statistics support the proposition that males are more likely to commit further crimes if released to the community, nothing in the statute permits the Court to act upon that proposition.

Moreover, the Legislature has not amended relevant statutes relating to dispositions in juvenile delinquency proceedings. "The Court is faced with what is basically an unwritten policy choice unilaterally made by a municipal government without any input by the public through its elected legislators. That policy determination effectively alters the methodology by which the Department of Probation conducts court mandated investigations in juvenile delinquency proceedings and makes dispositional recommendations to the court. Plainly, the Court is under no obligation to defer to the policy preferences of the City and those policy preferences are entitled to no presumption of validity. While the City may wish to see certain reform made in the juvenile justice system of this State for a number of valid reasons, it is clear that the State has preempted the field of juvenile justice and that amendments to the controlling statutes must be enacted by the State Legislature." The Court "is obligated to exercise its considered judgment as to the appropriate order of disposition, even where the public officials responsible for carrying out that order will decline to do so based upon fiscal concerns."

Matter of Geraldine A., et al.
NYLY, 11/30/10
(Fam. Ct., Queens Co., 11/23/10)

* * *

SENTENCE - Hearing - Due Process/Judge's Reliance On False Information

The Court grants defendant's motion to set aside his sentence where the sentencing court's erroneous belief that defendant was a persistent felony offender was a factor in the court's decision. A defendant has a due process right not to be sentenced on the basis of materially false information.

People v. George McGuire
(Sup. Ct., Kings Co., 6/24/11)
http://courts.state.ny.us/Reporter/pdfs/2011/2011_32047.pdf

* * *

DISPOSITION - Discovery - Probation Records
ORDERS

For purposes of the dispositional hearing, the Court, believing that the Department of Probation utilized the Probation Assessment Tool computer program to arrive at the final recommendation of an adjournment in contemplation of dismissal even though the information contained in the probation investigation tends to indicate that respondent "could benefit from a brief period of supervision and counseling," issues an order directing the Department of Probation to provide the Court with a copy of the PAT report. The Court relies on *Matter of Jasmine G.* (35 A.D.3d 604), which is controlling since there is no contrary ruling by the Second Department or by the Court of Appeals.

The Court also notes that while the Department indicated that it would not release the PAT report "without a court order" -- apparently meaning that the Department would not comply with a verbal order -- the Department is not free to disregard the order and cannot compel this Court to reduce the order to a writing.

Matter of Natasha G.
(Fam. Ct., Queens Co, 12/1/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_52080.htm

Practice Note: This decision was issued by the same judge who sparked controversy with his decision in *Matter of Geraldine A., et al.*, NYLJ, 11/30/10 (Fam. Ct., Queens Co., 11/23/10), which is summarized in the 12/6/10 Newsletter. The judge found in those cases that Probation's PAT violates equal protection principles by automatically giving female respondents an advantage over male respondents when dispositional recommendations are formulated.
link: http://courts.state.ny.us/Reporter/3dseries/2010/2010_52033.htm

* * *

DISPOSITION - Least Restrictive Alternative
- Placement With OCFS - Conditions Of Confinement

In this burglary prosecution, the Court, upon a dispositional hearing, adjudicates respondent a juvenile delinquent and places him in the custody of the Office of Children and Family Services. The Court notes that respondent has a history of absconding, criminal activity, truancy and multiple school suspensions, and substance abuse; that his mental health needs are significant; and that he has admitted to being a member of a gang which takes pride in its members' ability to fight and carrying a knife for protection. Although respondent has been the victim of neglect, "the unfortunate fact that [his] early life has been marked by chaos and trauma and that some of his problems may be the direct result of a situation beyond his control does not relieve the Court of its obligation to enter a dispositional order that meets the needs and best interests of the respondent while protecting the community." Although respondent was accepted by the Juvenile Justice Initiative's Multidimensional Treatment Foster Care Program, the program is not well-suited to respondent's needs and the program's goals do not include any component meant to insure the safety of the community.

The Court also notes that increased attention has been given to the conditions faced by juveniles in placement. The U.S. Department of Justice's Civil Rights Division issued a report in August 2009 finding that conditions at four of the thirty-one residential facilities established and maintained by the OCFS violate constitutional standards in the areas of protection from harm and mental health care, and that those facilities' staff had engaged in an inappropriate and dangerous use of force. The Commissioner of the OCFS has been quoted in the press as stating that the conditions described in the Department of Justice report should not be considered limited to the four facilities identified in the report. On July 14, 2010, Governor Patterson announced that New York State had reached a settlement with the Department of Justice that is designed to improve oversight and operations at the four-identified OCFS facilities, and $18.2 million is to be used to hire mental health professionals, counselors and direct care staff.

However, recognition of a juvenile's constitutional right to be free from harm "does not mean that a juvenile has a right to be free of all placements in State custody where application of the statutory balancing process between the needs and best interests of juveniles and the community's need for protection compels the removal of a child from his or her home." Under the provisions of the Executive Law, the OCFS has a duty to establish and maintain treatment programs and other services for youth placed with the division.

Matter of Jack D.
NYLJ, 8/30/10
(Fam. Ct., N.Y. Co., 7/29/10)

* * *

DISPOSITION - Least Restrictive Alternative

- Probation - Length Of Period

In this appeal from an order which adjudicated respondent a juvenile delinquent upon his admission to grand larceny in the fourth degree, and placed him on probation for a period of 18 months, the First Department reduces the term of probation to 12 months. Given the underlying offense and favorable aspects of respondent's background, a 12-month period would be the least restrictive alternative.

In re Ramon B.
(1st Dept., 4/28/11)

* * *

DISPOSITION - Placement - Post-Discharge Education
EDUCATION LAW

In this federal action, plaintiffs, who are New York City public school students, allege that defendants violated their rights under federal and state laws by depriving them of educational services while plaintiffs were at or after they returned from juvenile delinquency/juvenile offender placement facilities. Plaintiffs' primary allegation is that they have been denied timely and appropriate enrollment in New York City community schools upon discharge. Plaintiffs and the City defendants have reached agreement on the terms of a settlement (the State defendants already have settled), and plaintiffs now move for the intervention of additional named plaintiffs, class certification, preliminary approval of the settlement, and approval of class notice.

The Magistrate recommends that plaintiffs' motions be granted. The Magistrate rejects defendants' contention that the proposed intervenors, who are now in placement, lack standing because the possibility that they will not be properly enrolled if they seek a community school placement is too unlikely to confer standing. One does not have to await the occurrence of the threatened injury before obtaining relief; courts consider whether injury is imminent and "whether there is no better time" to resolve the issues, and also evaluate standing more flexibly when the threatened injury is particularly severe.

The Magistrate also concludes that the implementation of procedures that have led to positive results as a result of this litigation does not provide a basis for denying intervention or certification. If the class is not certified and the settlement agreement is not implemented, those procedures may be abandoned.

J.G. v. Mills
04-CV-5415 (EDNY, 12/28/10)

* * *

DISPOSITION - Least Restrictive Alternative

The Second Department reverses an order placing respondent with OCFS, and substitutes an order placing respondent on probation, where both the Department of Probation and the presentment agency recommended that respondent be placed on probation; respondent came from a relatively stable home environment and had support from her immediate and extended family; there was no evidence of prior contact with the police or the courts and no evidence that respondent's parents were unable or unwilling to supervise her; and respondent regularly attended school and there was no evidence of significant disciplinary problems at school or of alcohol or drug use.

Matter of Genny J.
(2d Dept., 11/30/10)

* * *

DISPOSITION - Least Restrictive Alternative

Upon respondent's admission to second degree robbery and a dispositional hearing, the Court places respondent in the custody of the New York State Office of Children and Family Services with a direction that he be placed with Lincoln Hall.

The Court notes, inter alia, that respondent's antisocial behavior commenced some time ago, yet his mother has not sought to interact with school officials to ensure his school attendance, proper behavior in school, and completion of his courses; that when respondent attended school, he wandered the hallways rather than attend class and engaged in fights, bullying and group violence, and is not passing the large majority of his classes; that neither respondent nor his mother seem to have significant insight into the problems he has at school or the impact which his failure to obtain an education will have upon his future; that respondent has never accepted personal responsibility for the violent robbery, and his admission to this robbery covered an uncharged violent robbery; and that "[g]iven respondent's need for remedial education, his diagnosed psychological condition, the inability of his mother or other adults to properly supervise him, and the violent behavior which brought him before this Court, there is little confidence that respondent can be safely maintained in the community, even through his participation in the JJI/MST program."

Matter of Naldo X.
(Fam. Ct., Queens Co., 10/4/10)
http://courts.state.ny.us/Reporter/3dseries/2010/2010_51706.htm

* * *

DISPOSITION - Least Restrictive Alternative

The First Department upholds an adjudication of delinquency that followed a finding of obstructing governmental administration in the second degree, and a disposition of enhanced supervised probation for 12 months, in light of respondent had a history of running away and drug use and her troubled relationship with her mother.

In re Lizzette F.
(1st Dept., 2/3/11)

* * *

SENTENCE – Vindictiveness

The Third Department orders that defendant be re-sentenced where defendant's sentence was increased from the term of imprisonment of no more than four years that was imposed upon his first conviction, to fifteen years to life imprisonment after defendant won an appeal and was convicted again.

No new evidence was presented during the second trial that would warrant such a dramatic increase in the sentence. Although the District Attorney asserts for the first time that he initially decided to settle for a sentence significantly less than life imprisonment because of concerns that the persistent felony offender statute was unconstitutional, the District Attorney does not represent that he was unable to pursue persistent felony offender status for defendant at the first trial or that information critical to that effort only became available after the application was withdrawn and sentence was first imposed.

Under the circumstances, the disparity between the two sentences reinforces the perception that defendant was punished for prosecuting a successful appeal.

People v. Gregory Brown
(3rd Dept., 10/28/10)

* * *

SENTENCE - Violation Of Plea Bargain

The Second Department finds reversible error where the court imposed an enhanced sentence because defendant was arrested on unrelated charges after the plea proceeding, but the court had not imposed a no-arrest condition. An express condition that the defendant avoid committing a crime is different from a no-arrest condition.

Furthermore, defendant's due process rights were violated. Although defendant challenged the validity of the arrest, the court denied defendant's request for an inquiry into the existence of a legitimate basis for the arrest.

People v. Takim Newson
(2d Dept., 2/22/11)

* * *

SENTENCE - Violation Of Plea Bargain By Defendant

In a case in which the court enhanced defendant's sentence on the ground that he violated a plea agreement by failing to be truthful with the probation department, the Second Department vacates the sentence because the court failed to conduct a sufficient inquiry pursuant to *People v Outley* (80 N.Y.2d 702). Defendant should have been given an opportunity to present evidence that his statements to the probation department did not contradict his statements to the court during the plea proceedings.

People v. Monther Zobe
(2d Dept., 3/15/11)

* * *

SENTENCE - Violation Of Plea Bargain By Defendant

The Third Department holds that where the court never explicitly required defendant to provide answers to the Probation Department that were in conformity with his responses during the plea allocutions, the court had no authority to enhance defendant's sentence after defendant provided answers to the probation officer's questioning that were not consistent with the representations defendant made at the time he entered his guilty pleas.

Only the failure to comply with explicit conditions can form the basis of a violation. Moreover, the probation officer informed defendant at the outset of the interview that he "need[ed] to be honest and truthful as to what [his] side of the story [was]," which is not necessarily the same as requesting that he provide a "truthful" and objective statement of fact.

People v. Robert Becker
(3d Dept., 1/1/11)

* * *

SENTENCE - Supervised Release Conditions

The Second Circuit upholds a special condition of supervised release that states that defendant shall not associate with any member or associate of a criminal street gang, in person or by mail (including email) or telephone.

However, the Court strikes as unconstitutionally vague a condition that prohibits defendant from the "wearing of colors, insignia, or obtaining tattoos or burn marks (including branding and scars) relative to [criminal street] gangs."

United States v. Green
2010 WL 3191434 (2d Cir., 8/13/10)

* * *

SENTENCE - Eighth Amendment
JURY TRIAL - Right To Jury

A Supreme Court of Missouri majority holds that no jury trial right attaches at a certification hearing upon which a juvenile is transferred to the criminal justice system to be prosecuted as an adult, and that the mandatory life sentence without parole imposed on defendant, who was 15 years of age when he committed first degree murder, does not violate the Eighth Amendment. Three judges dissent.

State v. Andrews
2010 WL 5209310 (Mo., 12/21/10)

* * *

SENTENCE - Rehabilitation Of Offender

The United States Supreme Court holds that the Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation. Congress has said was that when sentencing an offender to prison, the court shall consider all the purposes of punishment except rehabilitation because imprisonment is not an appropriate means of pursuing that goal.

The key Senate Report concerning the SRA recognized that decades of experience with indeterminate sentencing, resulting in the release of many inmates after they completed correctional programs, had left Congress skeptical about rehabilitation being induced reliably in a prison setting. "[T]he purpose of rehabilitation," the Report stated, "is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case."

Moreover, if Congress had meant to allow courts to base prison terms on offenders' rehabilitative needs, it would have given courts the capacity to ensure that offenders participate in prison correctional programs. But in fact, courts do not have this authority.

Tapia v. United States
2011 WL 2369395 (U.S. Sup. Ct., 6/16/11)

* * *

SENTENCE - Prior Crimes

The Court holds that a sentencing court may consider evidence related to a charge of which the defendant has been acquitted, where that evidence was not presented to the jury and the facts are established by a preponderance of the evidence.

A sentencing judge should show appropriate respect for a jury verdict, but does not have to ignore relevant evidence the jury was not asked to review merely because that evidence relates to an acquitted charge. The consideration of such evidence is not prohibited by statute, is permissible under the federal constitution as interpreted by the United States Supreme Court, and is consistent with the policy of providing sentencing judges with all reliable and relevant information regarding the defendant's background and the crime.

People v. Thomas Zowaski
(City Ct. of Middletown, 1/24/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21029.htm

Appeals

APPEAL - Preservation By Prosecution - Suppression Issues

In *People v Stith*, the Court of Appeals refused to consider the People's argument that the defendant lacked standing to challenge the legality of the seizure of a weapon because that argument was raised for the first time on appeal. Since then, three of the four Appellate Departments have since issued rulings counter to the *Stith* holding, concluding that because it is the defendant's initial burden to establish standing, the People may raise the defendant's lack of standing for the first time on appeal.

The Court, adhering to *Stith*, holds that the People must timely object to a defendant's failure to prove standing in order to preserve that issue for appellate review. The preservation requirement serves the added purpose of alerting the adverse party of the need to develop a record for appeal. Here, the People did not challenge defendant's claim that he possessed a legitimate expectation of privacy in his mother's apartment.

People v. Shawn Hunter
(Ct. App., 6/2/11)

* * *

APPEAL - Scope Of Review - Court of Appeals
CONFESSIONS - Fruits

Police arrested respondent for the theft of credit cards after he had made an inculpatory statement without being advised of his Miranda rights. He was transported to a precinct, left alone in an adult holding cell, and again questioned by the same detectives in a sergeant's office rather than a designated juvenile room. He made a written inculpatory statement after he and his mother were advised of the Miranda rights. The family court suppressed the inculpatory oral statement, but denied suppression of the written statement while finding that it was sufficiently attenuated from the earlier oral statement. A 3-judge Appellate Division majority also found that the written statement was sufficiently attenuated.

A 5-judge Court of Appeals majority dismisses the appeal. The issue of whether an inculpatory statement is attenuated from a prior un-Mirandized statement presents a mixed question of law and fact. Because the 2-justice dissent in the Appellate Division was not on a question of law, the Court is without jurisdiction to decide the appeal.

Chief Judge Lippman and Judge Ciparick dissent, asserting that the 2-justice dissent was on a question of law.

Matter of Daniel H.
(Ct. App., 10/26/10)

* * *

APPEAL - Preservation

The Eleventh Circuit U.S. Court of Appeals holds that there is no "vindictive judge or cowardly counsel" exception to the contemporaneous objection rule. The possibility that a judge may be unhappy with an objection does not excuse the failure to make it. "To suggest that judges, whose solemn duty it is to apply the law fairly and impartially to all parties before them, would vindictively respond to an attorney's objection by punishing the client is demeaning to the judiciary."

The Court disagrees with the Second Circuit's decisions in *United States v. Kaba* (480 F.3d 152) and *United States v. Leung* (40 F.3d 577), where the Second Circuit noted that a defendant would be "understandably reluctant" to suggest that an ambiguous remark made by a judge reveals bias just as the judge is about to select a sentence.

United States v. Rodriguez
2010 WL 5175110 (11th Cir., 12/22/10)

* * *

APPEAL - Preservation - Opportunity To Make Record

While finding a lack of preservation, the First Department notes that while defendant argues that the trial court prohibited "speaking objections" and instructed counsel to make unelaborated objections, defense counsel made no effort to make a record, at any point in the trial, of the grounds for his objections, and the court specifically invited counsel to make such a record at the first recess following an objection and offered to reconsider its rulings and take curative actions where appropriate.

People v. Mario Escobar
(1st Dept., 12/7/10)

Practice Note: An attorney "may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he may respectfully request reconsideration thereof." 22 NYCRR §§ 604.1(d)(4)(ii), 700.4(d). However, "[n]o attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on an objection without such permission." 22 NYCRR §§ 604(d)(4)(i), 700.4(d).

Thus, judges have considerable discretion to cut off argument on evidentiary issues, particularly after they have ruled. The best course is to specify the grounds for an objection and say all there is to say in support of the objection up front before the judge rules. If the judge simply will not permit the attorney to make a record at any point in the proceeding, an appeals court should not find a lack of preservation. *See Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000).

Motion To Vacate

MOTION TO VACATE JUDGMENT OF CONVICTION - Newly Discovered Evidence
RIGHT TO COUNSEL - Effective Assistance

The Second Department orders a hearing upon defendant's motion to vacate his conviction, which was denied without a hearing by the court below, where the sole eyewitness to the shooting recanted his trial testimony and stated that he could not identify the shooter and that his identification of the defendant was the product of improper police pressure. Although the court below found the witness's recantation to be entirely incredible, that determination was unwarranted in the absence of a hearing.

Although recantation evidence is considered to be the most unreliable form of evidence, the recantation here is not incredible on its face. The witness's statement that he could not recognize the shooter, a person who was a stranger to him, is supported by portions of his trial testimony which indicate that his ability to identify the shooter may have been compromised since he was looking out for the police while selling drugs and talking on a pay phone to his friend. Moreover, he was standing about 128 feet from the location of the shooting. The witness had a motive to lie at trial; it has been established that a detective pressured him into testifying falsely before the

grand jury, and at the first two trials, that he knew defendant prior to the shooting. The record contains no motive to lie in the witness's recantation.

In addition, the court below erred in denying, without a hearing, defendant' motion to vacate the conviction on the ground that he was denied the effective assistance of counsel due to his trial counsel' failure to investigate two additional alibi witnesses.

People v. Eric Jenkins
(2d Dept., 5/31/11)

* * *

MOTION TO VACATE - Sex Trafficking Victim
PROSTITUTION

Relying on a recent amendment to CPL Article 440, defendant moves to vacate eighty-seven convictions she accrued over the course of three years which stem from acts of prostitution or related acts, contending that she is the victim of sex trafficking.

The Court grants the motion as to all of the convictions save one (defendant withdrew her motion because the underlying offense, resisting arrest, is not a prostitution-related offense). Defendant has described in detail the people who acted as her captors and withheld her immigration documents. Defendant's familiarity with United States law was minimal at best, her command of English was non-existent, and she was scared about her immigration status and did not want to be deported. Her testimony that she would ask the police to arrest her just so she could get off the street and not have to have sex with anyone those nights explains the very high number of convictions in such a short period. Since 1995, defendant has not had another contact with the criminal justice system. Defendant's story was consistent with the generally accepted notion that victims of human trafficking are often too wary of authorities or too traumatized by their experiences to be able or willing to timely report their victimization.

Although the People argue that defendant is unable to corroborate her story, it is not atypical for pimps and captors to not use full names, or any names at all. Since a court has the discretion to weigh the credibility of a defendant, granting this defendant relief will not open the flood gates.

People v. Silvia Gonzalez
(Crim. Ct., N.Y. Co., 7/11/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21235.htm

Sealing Of Records

CONFIDENTIALITY - Records Of Proceeding - Sealing

Respondent moves for an order sealing the record of a manslaughter case which was filed against her in 2007 alleging that she caused the death of an infant to whom she gave birth in a bathtub, where the infant lay in the running water. The infant died as a result of respondent's actions, which included hiding the still living infant in a garbage bag in her closet for six days. Respondent entered an admission to manslaughter in the second degree, and, upon a dispositional hearing, was placed on probation for 18 months.

The Court grants the motion. The unfortunate events in this case were the result of a sex offense perpetrated against respondent when she was impregnated by her 18-year-old boyfriend, a "gang member" who was sometimes "mean" to her and was incarcerated soon after she learned of the pregnancy. The separation and divorce of her parents led to emotional distress and feelings of isolation, and her emotional distress led her to engage in "high risk" behavior which culminated in her relationship with the 18-year-old young man. She was psychologically damaged before she became pregnant. She was unprepared for motherhood and was emotionally unable to cope with the situation in which she found herself, which is why the juvenile delinquency adjudication was based upon a determination that she acted recklessly rather than intentionally. With no one to confide in, she hid her pregnancy for its entire duration and gave birth alone. She sought no help from her own mother or other family members after the delivery of the infant, an irrational decision which resulted in the death of the infant and psychological damage to herself. And, it seems inconceivable that the mother never noticed physical or emotional changes in her daughter and never suspected that she might have been pregnant.

The Court must consider respondent's behavior and circumstances subsequent to the incident, not simply focus upon the horrific circumstances which brought respondent before the Court in 2007. Respondent complied with all probation conditions, is now 19 years old, has indicated that she intends to pursue a career as a professional in the field of automotive technology. and has had no further involvement with the criminal justice system.

"The adjudication of juvenile delinquency in this case was never intended to constitute a Scarlet Letter which must be forever displayed to the public at large, and the notion of imposing punishment is contrary to the purposes underlying the juvenile delinquency statute."

Matter of Kiara C.
(Fam. Ct., Queens Co., 6/21/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51111.htm

III. PINS

Truancy

PINS - Truancy

The Second Department affirms a PINS adjudication, noting, inter alia, that the family court found that respondent was illegally absent from school at least 13 times during the 2009-2010 school year.

Matter of Alexander C.
(2d Dept., 4/26/11)

Disposition

PINS - Speedy Dispositional Hearing

In this PINS proceeding, the Third Department finds no error where the family court adjourned the dispositional hearing beyond the two-month time period allowed by FCA § 749(b). Article Seven does not expressly provide for dismissal for failure to provide a speedy dispositional hearing. Moreover, respondent's counsel consented to the adjournment.

Matter of Ashley EE.
(3d Dept., 2/17/11)