BIOGRAPHY - TANYA J. CONLEY

Tanya Conley is a Supervising Attorney and Director of Appeals and Training in the Attorney for the Child Program at the Legal Aid Society of Rochester. She represents children in custody/visitation, abuse/neglect, Person in Need of Supervision and Juvenile Delinquency matters. She previously worked for three years as a Senior Attorney at the Legal Aid Society in Syracuse, where she represented battered women in all areas of civil litigation. In 2003 she broadened her practice to engage in full time attorney for children work, although she continues to represent battered women in a *pro bono* capacity through the Volunteer Legal Services Project of Monroe County. She also is an adjunct Professor of Law, teaching "Domestic Violence and the Law" at the Syracuse University College of Law.

Please help me welcome Tanya Conley.

Upd'd by TJC for Spring '11; ok per TJC for Fall '11

Attorney for the Child Program
Appellate Division, Fourth Department
Case Law Update

March 2011- March 2012

Prepared by:

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PINS

In the Matter of Sarah C.B., – 2012 WL 266088 - January 31, 2012

Matter originated as a JD proceeding and was ultimately converted to a PINS upon AFC's motion to convert. Order of Protection expired prior to perfection of appeal and was therefore moot.

In the Matter of Nicholas R.Y., 2012 WL 266 371 - January 31, 2012

Order of PINS placing child on probation is reversed and petition dismissed. Diligent efforts were alleged in a conclusory fashion. Failure to comply with statute is non-waivable jurisdictional defect.

In the Matter of Andrea F.P., 89 A.D.3d 1423

Although similar facts to Nicholas, Appellate Division relied on *Mercedes* to deny appeal. (Same judge familiar with prior attempts)

JUVENILE DELINQUENCY

Matter of Demitrus B.

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People v. Shawn Hunter

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ABUSE AND NEGLECT

IN THE MATTER OF MIRANDA F., BRANDY D. AND NICOLE D. – AD3d — (dec'd 1/31/12 (4th Dept. 2012)

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Matter of Mikayla L.P. – AD3d ----, dec'd 2/10/12(4th Dept. 2012)

MATTER OF LILIANA G. – AD3d ---- (4th Dept. 2012) dec'd 1/31/12

Matter of Jayden B. And Nathan F. – AD3d ----. Dec'd 1/31/12 (4th Dept.)

Matter of Bridget Y. __AD3d__, dec'd 12/30/11 (4th Dept. 2011)

Matter of Brian P., 89 AD3d 1530 (4th Dept. 2011)

Matter of Alexis H,, __AD3d__, dec'd 12/30/11 (4th Dept. 2011)

Matter of Damian G., 88 AD3d 1268 (4th Dept. 2011)

Matter of Nicholas W., __AD3d__ , dec'd 1230/11 (4th Dept. 2011)

Matter of Ariel C. W.-H. 89 AD3d 1438 (4th Dept. 2011)

Matter of Lydia C., 89 AD3d 1434 (4th Dept. 2011)

Matter of Chelsey B., 89 AD3d 1499 (4th Dept. 2011)

Matter of Kennedie M., 89 AD3d 1544 (4th Dept. 2011)

Matter of Alaysha M., 89 AD3d 1467 (4th Dept. 2011)

PERMANENCY HEARINGS LITIGATION

Matter of Jose T, 87 AD3d 1335 (4th Dept. 2011)

Matter of Lavalle W., 88 AD3d 1300 (4th Dept. 2011)

Matter of Thurston v Skellington 89 AD3d 1520 (4th Dept. 2011)

TERMINATION OF PARENTAL RIGHT CASES

MATTER OF ATREYU G. AND REYAUNA G.– AD3d ---- dec'd 1/31/12 (4th Dept.)

MATTER OF GERALD G., JR., AND SYLVANNA G. dec'd 1/31/12

Matter of Sean W., 87 AD3d 1318 (4th Dept. 2011)

Matter of Lastanzea L., 87 AD3d 1356 (4th Dept. 2011)

Matter of Harold L.S., 89 AD3d 1447 (4th Dept. 2011)

Matter of Shirley A.S., __AD3d__, dec'd 12/30/11 (4th Dept. 2011)

Matter of Tiffany M., 88 AD3d 1299 (4th Dept. 2011)

Matter of Royfik B., 89 AD3d 1423 (4th Dept. 2011)

Matter of Darius B., __AD3d ___, dec'd 12/23/11 (4th Dept. 2011)

Matter of Jacob E., 87 AD3d 1317 (4th Dept. 2011)

Matter of Elizabeth J., 87 AD3d 1406 (4th Dept. 2011)

Matter of Lestariyah A. 89 AD3d 1420 (4th Dept. 2011)

Matter of Kenneth L. (– AD3d ---- (4th Dept. Decided 2/12/12)

Matter of Lashawnda G. – AD3d ---- (4th Dept. 2012)

ADOPTIONS and SURRENDERS

Matter of Kristian J.P., 87 AD3d 1337 (4th Dept. 2011)

Matter of the Adoption of Collin, – AD3d---- (4th Dept. Decided 2/23/12)

CUSTODY CASES

Tin Tin v. Thar Kyi – AD3d---- (4th Dept. Decided 2/23/12)

N.Y.A.D. 4 Dept.,2012.
Delgado v. Frias
937 N.Y.S.2d 814, 2012 N.Y. Slip Op. 01039

Canfield v. Canfield 87 AD3d 1272 (4th 2011)

Kristian JP v. Jeanette IC 87 AD3d 1337 (4th 2011)

Fewell v. Koons 87 AD3d 1405 (4th 2011)

York v. Zullich 89 AD3d 1447 (4th Dept. 2011)

Marino v. Marino (Family Court decision)

MARCH 2012 CASES

Office of Attorneys for Children
Appellate Division, Fourth Department

Case Digest

Winter 2011

Covers August through December 2011 Decision Lists

CHILD ABUSE AND NEGLECT

Parents Neglected Their Children

Family Court adjudicated respondents' children to be neglected. The Appellate Division affirmed. A preponderance of the evidence established that the mother neglected her children by attempting to drive a motor vehicle in an intoxicated condition with the children in the vehicle. The record supported the court's determination that the father deliberately failed to take anti-seizure medication so he could consume alcohol and that he was aware that he was likely to become violent when he had a seizure and that he had two seizures on the day in question. The dissent would have reversed with respect to the father because he knew only that there was some unspecified possibility that he might have a seizure, might become violent, and that the children might be harmed if they were present. The dissent also would have reversed with respect to the mother because there was insufficient evidence that she was intoxicated or that her actions placed the children in imminent risk.

Matter of Damian G., 88 AD3d 1268 (4th Dept 2011)

Father Sexually Abused Child – Visitation Suspended

Family Court determined that respondent father sexually abused his child, granted petitioner mother sole custody of the child, and suspended visitation with respondent. The Appellate Division affirmed. The child's out-of-court statements were sufficiently corroborated by the testimony of the child's therapists, who both opined that the child's behavior following the alleged abuse was consistent with a child who had been sexually abused. Further, the child's out-of-court statements were corroborated by the unsworn testimony she gave on cross-examination at the fact-finding hearing. The court did not err in allowing the child's therapists to testify, even though they were not identified as potential witnesses in the abuse petition. The Family Court Act does not require petitioner to list all potential witnesses. The court did not err in suspending visitation. The court determined that respondent sexually abused the child and respondent refused to proceed with recommended sex offender treatment and mental health counseling. One of the child's therapists opined that visitation would be harmful to the child and the child did want to see the father or return to the father's home.

Matter of Lydia C., 89 AD3d 1434 (4th Dept 2011)

Neglect Finding Supported by Evidence of Prior Neglect of Mother's Other Children

Family Court adjudged that respondent mother neglected her children. The Appellate Division affirmed. The court did not err in conforming the pleadings to the proof. Respondent conceded that her objection to petitioner's motion was not based upon surprise and the record demonstrated that respondent suffered no demonstrable prejudice when the court conformed the pleadings to the proof and considered

evidence that occurred after the filing of the neglect petition. Petitioner established that respondent neglected the children. Respondent's parental rights were terminated with respect to one of her older children on the ground of mental illness during the proceedings concerning the subject children. The record contained evidence that respondent continued to experience mental health problems associated with her schizophrenia and had been hospitalized twice for mental health issues after her parental rights with respect to the older children were terminated.

Matter of Ariel C.W.-H., 89 AD3d 1438 (4th Dept 2011)

Finding of Derivative Neglect Supported by Finding of Severe Neglect of Father's Other Child

Family Court adjudged that respondent father abused his children. The Appellate Division affirmed. The court did not err in finding that respondent derivatively abused his children based upon the finding that he severely abused one of his other children, resulting in the child's death. The finding was appropriate in view of the nature and severity of the abuse of the child who died.

Matter of Alaysha M., 89 AD3d 1467 (4th Dept 2011)

Father's Older Daughter Severely Abused Child and Younger Daughter Derivatively Abused

Family Court determined that respondent severely abused his older daughter and that his younger daughter was derivatively abused. The Appellate Division affirmed. There was clear and convincing evidence that respondent committed felony sex offenses against his older daughter. The older daughter's out-of-court statements to a school counselor and a nurse practitioner were sufficiently corroborated by medical evidence of sexual intercourse and the testimony of petitioner's validator. Further, the court was entitled to draw the strongest possible inference against respondent based upon respondent's failure to testify.

Matter of Chelsey B., 89 AD3d 1499 (4th Dept 2011)

Mother Neglected Youngest Son and Derivatively Neglected Older Sons

Family Court determined that respondent mother neglected her youngest son and derivatively neglected her two older sons. The Appellate Division affirmed. Although respondent took her youngest son to the hospital when directed, the court's finding that she knew or should have known that the child was being abused by her live-in boyfriend and that she failed to take steps to avoid the risk of harm to the child when she continued to live with the boyfriend and allowed him to babysit, was supported by a preponderance of the evidence. Further, the court was entitled to draw a negative inference against respondent based upon her failure to testify.

Matter of Brian P., 89 AD3d 1530 (4th Dept 2011)

Finding of Neglect Supported by Father's Adult Stepdaughter's Testimony About Sexual Abuse

Family Court adjudged that respondent father neglected his children. The Appellate Division affirmed. The father's adult stepdaughter, who was the sole witness for petitioner, testified that respondent sexually abused her for a period of years beginning when she was 15. That testimony supported a finding of derivative neglect with respect to the subject children because the impaired level of parental judgment shown by respondent's behavior created a substantial risk to the subject children. The court could make a finding of derivative neglect even if the child who was sexually abused was not a subject of the neglect petition. The finding of neglect also was supported by the stepdaughter's testimony that respondent engaged in acts of domestic violence, occasionally in the presence of the children. The court properly admitted respondent's substance abuse treatment records because they were relevant to the issue of neglect.

Matter of Kennedie M., 89 AD3d 1544 (4th Dept 2011)

Neglect Adjudication Reversed

After respondent father pleaded guilty to a criminal charge of third degree assault based upon an incident where the father struck his oldest son in the face, the same judge granted petitioner summary judgment on its petition alleging that the father neglected his oldest son. The court also denied father's motion to dismiss the petition and his request for a fact finding hearing. The Appellate Division reversed. Petitioner failed to meet its burden of establishing that the acts underlying the criminal conviction constituted neglect as a matter of law and that the issues in the neglect proceeding were resolved by the father's guilty plea. Under the circumstances here, petitioner failed to establish that the father intended to hurt his son or that his conduct was a pattern of excessive corporal punishment. The case was remitted for further proceedings before a different judge.

Matter of Nicholas W., 2011 WL 6848376 (4th Dept 2011)

Neglect Adjudication Affirmed

Family Court adjudged that respondent mother neglected her children. The Appellate Division modified by vacating all references to respondent's alcohol abuse and related treatment in 2006. There was no mention of alcohol abuse and treatment in the court's decision and where there is a conflict between the order and the decision, the decision controls. Petitioner established by a preponderance of the evidence that the mental and physical condition of the children had been or was in imminent danger of becoming impaired as a result of respondent's failure to maintain the family's residence free from unsanitary or unsafe conditions and respondent's longstanding failure to seek treatment for substance abuse. The evidence presented by petitioner, together with the adverse

inference the court was allowed to draw based upon respondent's failure to testify, supported the court's findings about the imminency of the children's impairment and respondent's inability to exercise the degree of care required to provide proper supervision.

Matter of Alexis H., 2011 WL 6849038 (4th Dept 2011)

CHILD SUPPORT

Respondent Father Denied His Right to Counsel

Family Court confirmed the Support Magistrate's determination that respondent father willfully failed to obey an order of the court and sentenced him to six months in jail. The Appellate Division reversed. The court erred in allowing respondent to proceed pro se at the hearing. The court failed to make the requisite searching inquiry of respondent's awareness of the dangers and disadvantages of proceeding without counsel.

Matter of Commissioner of Genesee County Dept. of Social Services v Jones, 87 AD3d 1275 (4th Dept 2011)

Imputation of Income Proper Even Though Father Was Incarcerated

Family Court denied respondent father's objections to an order of child support imputing income to respondent based upon the minimum wage for a period of over three years and ordered arrears for that period in the amount of $1,870.68. The Appellate Division affirmed. Although it was undisputed that respondent was incarcerated for most of the relevant time period, to the extent that respondent's financial hardship was the result of his own wrongful conduct he was not entitled to a reduction in his child support obligation. Because respondent's income included imputed income, his income was not below the poverty income guidelines and he was not entitled to a reduction of arrears to $500. The Support Magistrate was not obliged to accept respondent's unsupported testimony that he had a medical condition that prevented him from working.

Matter of Niagara County Dept. of Social Services v Hueber, 89 AD3d 1433 (4th Dept 2011)

Imputation of Income Proper Even Though Father Was Incarcerated

Family Court denied respondent father's objections to an order of child support imputing income to respondent based upon the minimum wage for a period of about one year and ordered arrears for that period in the amount of $659.18. The Appellate Division affirmed. Although it was undisputed that respondent was incarcerated for most of the relevant time period, to the extent that respondent's financial hardship was the result of his own wrongful conduct he was not entitled to a reduction in his child support obligation. Because there was no evidence that the child's noncustodial mother had any income or was capable of earning income, there was no basis to apportion 50 % of the child support obligation to her. Petitioner was not required to produce the child's custodian, on whose behalf the proceeding was commenced, at the hearing on the petition. Further, if respondent wished to challenge the custodian's eligibility for welfare, he should have done so at the hearing where he had the opportunity to be heard.

Matter of Niagara County Dept. of Social Servs. v Hueber, 89 AD3d 1440 (4th Dept 2011)

Father Not Deprived of Right to Counsel Because Court Disqualified His Attorney

Supreme Court awarded maintenance, child support and attorney's fees to defendant mother. The Appellate Division affirmed. The court did not abuse its discretion in disqualifying plaintiff father's attorney based upon that part of rule 3.7 of the Rules of Professional Conduct, providing "[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." The record established that it was likely that plaintiff's original trial attorney would be called to testify about transferring plaintiff's funds in apparent violation of the court's order. Although it appeared that plaintiff's attorney did not testify at the second trial, the express language of rule 3.7 provides only that it is "likely" that the attorney would be called as a witness and here it was likely. The court was not required to make a searching inquiry about whether plaintiff understood the dangers and disadvantages of self-representation because there is no right to counsel in a divorce action.

Jozefik v Josefik, 89 AD3d 1489 (4th Dept 2011)

Court Erred in Dismissing Petition to Terminate Support Obligation Without Hearing

Family Court dismissed father's petition seeking to terminate his support obligation for the parties' son, alleging that respondent mother had frustrated the father's visitation rights and that his son had abandoned him. The Appellate Division reversed. The Referee erred in dismissing the petition without conducting a hearing. The father established a prima facie case for termination of his support obligation by submitting evidentiary material establishing that his son abandoned him. His submissions established that his repeated attempts at communication with his son had been refused and his son had expressed a clear desire to have nothing to do with the father. Additionally, the petition alleged that the mother refused to allow the father to exercise his visitation rights and such deliberate frustration of visitation rights can warrant the suspension of future child support payments.

Matter of Coleman v Murphy, 89 AD3d 1500 (4th Dept 2011)

Father's Total Income Must Be Recalculated

Family Court denied the parties' objections to an order increasing respondent father's child support obligation. The court determined that respondent's 2008 adjusted gross income from his subchapter S corporation was $707,511, including $109,106 in capital gains, $5,238 in entertainment expenses, and $562,113 in imputed income based upon increased depreciation. The Appellate Division reversed and remitted the matter for recalculation of the father's income and child support obligation. Contrary to respondent's contention, he was self-employed within the meaning of the CSSA and the court properly included in his income the $109,1096 in capital gains. Because petitioner mother failed to establish that respondent's entertainment expenses were personal in nature, it was an abuse of discretion to include the entertainment expenses

in the amount of $5,238 in respondent’s income. Although respondent’s income for child support purposes might ultimately include imputed depreciation income, the manner in which the court calculated the amount was incorrect under the Family Court Act because it was not calculated as depreciation “greater that depreciation calculated on a straight-line basis for the purpose of determining business income.”

Matter of Grosso v Grosso, 2011 WL 6849031 (4th Dept 2011)

CUSTODY AND VISITATION

Court Properly Granted Sole Custody to Mother

Family Court granted petitioner mother sole custody of the parties' children and denied the cross-petition of father for sole custody. The Appellate Division affirmed. Contrary to the attorney for children's contention, the court properly granted mother sole custody of the children. The court's determination, based on its assessment of the character and credibility of the parties, was entitled to great weight and would not be disturbed where, as here, the determination was the result of a careful weighing of appropriate factors and had a sound and substantial basis in the record.

Matter of Canfield v Canfield, 87 AD3d 1272 (4th Dept 2011)

Biological Parents Not Entitled to Post-Adoption Visitation Despite Contract

Family Court denied petitions of biological parents to enforce a visitation provision in the post-adoption contract agreement with respect to their biological children who had been adopted by respondents. Pursuant to Domestic Relations Law § 112-b (4) a court should not enforce an order incorporating a post-adoption contract agreement unless such enforcement was in the child's best interests and here there was a sound and substantial basis for the court's determination that visitation was not in the children's best interests. Moreover, petitioners were expressly warned before they signed the judicial surrenders that the post-adoption contract agreement was subject to modification. The court properly granted respondent's cross petition seeking an order requiring the biological father to stay away and refrain from contact with respondents and the children. Because this proceeding was in the nature of a visitation proceeding, the court had the authority to issue an order of protection setting forth reasonable conditions. Because the court did not state an expiration date for the order the Appellate Division modified by directing that the stay away provision be in effect until the youngest child turned eighteen.

Matter of Kristian J.P. v Jeannette I.C., 87 AD3d 1337 (4th Dept 2011)

Court Properly Granted Sole Custody to Father

Family Court granted sole custody of the parties' child to petitioner father with visitation to respondent mother. The Appellate Division affirmed. The father met his burden to show changed circumstances. The petition was prompted by an incident where the mother left the six-year-old child alone in a casino hotel for three hours while the mother gambled. A hotel patron found the child crying in a hallway and the police were called. As a result, the mother was arrested, the child missed her first day of first grade, and CPS issued an indicated report for inadequate guardianship and lack of supervision. After the casino incident the mother and child stayed overnight at the home of a man unknown to the child. The man and the mother went out for drinks, leaving the child in the care of the man's daughters. Additionally, the father, stepmother, and a social

worker testified that the child had poor hygiene when in the care of the mother and during the time the mother had sole custody, the child's teeth decayed to the point that she required 11 extractions and the placement of stainless steel crowns. The award of sole custody to the father was in the child's best interests because the father was better able to meet the child's financial, emotional and educational needs.

Matter of Grybosky v Riordan, 87 AD3d 1339 (4th Dept 2011)

Petition Alleging Violation of an Order of Visitation Properly Dismissed

Family Court dismissed the father's petition alleging that respondent mother violated a prior order of visitation with respect to the parties' son. The Appellate Division affirmed. A hearing on the petition was not required even where a factual dispute existed if the allegations in the petition were insufficient to support a finding of contempt. Here, the father failed to indicate how the mother allegedly violated the order and, as the court noted, the order was ambiguous.

Matter of Fewell v Koons, 87 AD3d 1405 (4th Dept 2011)

Grant of Primary Physical Custody of Children to Father Reversed

Family Court granted petitioner father primary physical custody of the parties' children. The Appellate Division reversed. Even assuming, arguendo, that the father showed a change in circumstances, it was in the children's best interests for primary physical custody to remain with the mother because the record established that the mother had been the children's primary caregiver throughout their lives and the children had a close relationship with the half-sibling residing in the mother's home.

Matter of Walker v Cameron, 88 AD3d 1307 (4th Dept 2011)

Prior Joint Custody Arrangement Unworkable

Family Court granted sole custody of the parties' child to the mother with visitation to the father and supervised contact with the stepfather. The Appellate Division affirmed. The mother met her burden of establishing a change in circumstances. Under the prior consent order, the parties shared residential custody of the child and that arrangement was no longer feasible because it caused confusion upon the child's attainment of school age. Further, the parties' relationship had deteriorated and their inability to co-parent rendered the existing joint custody arrangement unworkable. The father failed to preserve for review his contention that the court erred in precluding testimony concerning the "Abel test" administered to the stepfather or in failing to hold a *Frye* hearing with respect to the admissibility of testimony concerning that test.

Matter of York v Zullich, 89 AD3d 1447 (4th Dept 2011)

Court Properly Dismissed Violation Petition

Family Court denied the mother's petition for sole custody of the parties' children and granted the father's petition for sole custody. The Appellate Division affirmed. The court properly dismissed mother's violation petition because she failed to establish that the father willfully violated a clear mandate of the prior order or that his conduct defeated, impaired, impeded or prejudiced any right or remedy to which she was entitled. The court properly considered, as one of the factors in its determination, the support the father's parents gave to the children, which contributed to the children's stability and emotional comfort. The mother failed to preserve for review her contentions that the court improperly interjected itself into the hearing by questioning her about matters not addressed on direct or cross-examination and that the court erred in admitting into evidence the custody evaluation on the ground that it contained hearsay.

Matter of Oravec v Oravec, 89 AD3d 1475 (4th Dept 2011)

Sole Custody to Father With Supervised Visitation to Mother Affirmed

Family Court awarded sole custody of the parties' daughter to petitioner father, with supervised visitation to respondent mother. The Appellate Division affirmed. The court did not err in transferring temporary custody of the parties' daughter to the father before the custody hearing because the father demonstrated the requisite exigent circumstances. In any event, reversal would not have been required because the court subsequently conducted the requisite evidentiary hearing and the record of the hearing fully supported the court's determination following the hearing. Further, the court properly denied the mother's motion to reopen and reschedule a "mediation conference" that was held by the court after the custody hearing. The record of the custody hearing established that the court's decision concerning visitation to the mother was based entirely on evidence presented at the custody hearing, where the mother appeared with counsel and participated.

Matter of Ward v Ward, 89 AD3d 1518 (4th Dept 2011)

Return From Deployment Overseas Constituted Changed Circumstances

Family Court granted respondent mother primary physical custody of the child. The Appellate Division affirmed. Although petitioner father's return from overseas deployment with the United States Army constituted a change in circumstances warranting review of the existing custody arrangement, the court, after holding an evidentiary hearing and conducted an in camera hearing with the parties' children, made a custody determination that was supported by a sound and substantial basis.

Matter of Messimore v Messimore, 89 AD3d 1547 (4th Dept 2011)

Not Necessary to Strictly Adhere to Relocation Factors Where Initial Custody Determination

Family Court granted petitioner mother sole custody of the parties' infant son. The

Appellate Division affirmed. The father's contention was without merit that the Referee erred in failing to consider the *Tropea* factors before awarding custody to the mother, who had moved from Syracuse to North Carolina shortly after she commenced this proceeding. Because this was an initial custody determination, it was not necessary to strictly apply the factors to be considered in a potential relocation as enunciated in *Tropea*. Although the court failed to make an explicit finding that the award of custody to the mother was in the child's best interests, the record enabled the Appellate Division to do so and it concluded that custody to the mother was in the child's best interests. There was no dispute that as of the hearing date the father had never seen the child and that he did not avail himself of opportunities to visit the child during the pendency of the proceeding. The father failed to appear for a scheduled home visit with the attorney for the child, who sought to arrange visits between father and child.

Matter of Moore v Kazacos, 89 AD3d 1546 (4th Dept 2011)

Matter Remitted on Issue Whether Visitation Properly Denied

Family Court dismissed father's petition seeking visitation with the parties' child. The Appellate Division reversed. The court abused its discretion in denying the father visitation with the child because there was no evidence to support the conclusion that visitation with the father was detrimental to the child.

Matter of Diedrich v Vandermallie, 2011 WL 6462862 (4th Dept 2011)

Court Failed to Address Issue Whether Extraordinary Circumstances Existed

Family Court granted physical custody of the subject child to petitioner maternal grandmother and joint custody to father and maternal grandmother. The Appellate Division reversed. The court erred in failing to determine whether extraordinary circumstances existed before determining that it was in the child's best interests to grant physical custody of the subject child to petitioner maternal grandmother and joint custody to father and maternal grandmother. Because the record was insufficient to enable the Appellate Division to make that determination, the case was remitted to the court to determine whether extraordinary circumstances existed, after affording the parties the opportunity to submit additional evidence.

Matter of Vazquez v Vazquez, 2011 WL 6454260 (4th Dept 2011)

Father Awarded Increased Visitation

Family Court granted father's petition seeking increased visitation with the parties' child. The Appellate Division affirmed. The court did not preclude respondent mother's testimony concerning the father's alleged attempted suicide on the ground that it was too remote. Rather, the court allowed the testimony over the father's objection, but advised the mother that the testimony was not relevant to the best interests of the child in the absence of evidence concerning the father's recent mental health. The court also

allowed the mother to testify that the father struck her in 2001, although the court noted it was more interested in the five or six years prior to the hearing. The court did not abuse its discretion in limiting testimony about verbal altercations between the parties because the court was well aware of the parties' acrimonious relationship. There was no evidence in the record to indicate that the court should have ordered, sua sponte, a psychological or social evaluation of the father.

Matter of Canfield v McRee, 2011 WL 6848476 (4th Dept 2011)

Court Not Required to Abide by Child's Wishes

Family Court modified the parties' prior custody agreement by awarding petitioner father sole custody of the child. The attorney for the child appealed. The Appellate Division affirmed. The attorney for the child conceded that there was a showing of changed circumstances. The totality of the circumstances supported the award of custody to the father in light of the ample evidence of the mother's interference with the father's visitation, including after she was warned several times by the court that visitation must occur according to a strict schedule promulgated by the court. Additionally, the child's treating psychologist and the court appointed psychologist testified that a change in custody would be warranted if the parties could not abide by the visitation schedule. The child's wishes were not determinative, particularly where, as here, following the child's wishes would be tantamount to severing the child's relationship with her father.

Matter of Marino v Marino, 2011 WL 6849052 (4th Dept 2011)

DISCOVERY

Information Sought in Interrogatories Was Reasonable and Necessary

Defendant husband and non-party respondents opposed plaintiff wife's motion to direct non-parties to answer interrogatories. Defendant and the non-parties contended that the information sought was not relevant to the matrimonial action because defendant's sole involvement in the limited partnerships that were the subject of the interrogatories was as custodian for the interests held by the parties' children. Supreme Court compelled non-party respondents to answer the interrogatories, concluding that the information sought was limited in scope and that child support would be directly affected by any tax liability of the children or assets held by them. The Appellate Division affirmed. The information sought in the interrogatories was reasonable and necessary in plaintiff's prosecution of the matrimonial action.

D'Angelo v D'Angelo, 89 AD3d 1424 (4th Dept 2011)

FAMILY OFFENSE

Mother Failed to Establish Father Committed Family Offense

Family Court dismissed mother's family offense petition. The Appellate Division affirmed. The court did not err in taking sworn testimony from the mother before issuing a temporary order of protection. The court properly dismissed the family offense petition because the mother failed to meet her burden of establishing by a fair preponderance of the evidence that the father committed the family offense of harassment in the second degree. The court was entitled to credit the testimony of the father over that of the mother.

Matter of Helles v Helles, 87 AD3d 1273 (4th Dept 2011)

Respondent Committed a Family Offense

Family Court continued the prior schedule of visitation with respect to the parties' children, determined that respondent committed a family offense against petitioner, and ordered respondent to stay away from petitioner. The Appellate Division affirmed. There was a sound and substantial basis in the record for the court's determination to continue the prior visitation schedule. The record supported the court's determination that petitioner established by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree. Respondent verbally abused and threatened petitioner throughout a single day and left numerous threatening messages on petitioner's cellular phone that were played in court. The prior experience of petitioner with respect to respondent's assaultive behavior made the threats credible. Although obscenities alone will not constitute criminal conduct, the verbal acts made in the context described by petitioner were not constitutionally protected.

Matter of Beck v Butler, 87 AD3d 1410 (4th Dept 2011), *lv denied* __NY3d__

Evidence Insufficient to Establish Family Offense

Family Court determined that respondent husband committed the family offence of stalking in the fourth degree and ordered respondent to stay away from petitioner. The Appellate Division reversed. The evidence was insufficient to establish that respondent acted with "no legitimate purpose" within the meaning of the stalking statute. Letters and cards sent by respondent to petitioner were sent with the legitimate purpose of attempting to reconcile with petitioner, a purpose that was not unreasonable based upon the parties' lengthy marriage and history of separation and reconciliation. There was nothing on the face of the cards or letters that was improper or threatening. Petitioner's remote allegations of physical violence did not establish a cognizable pattern of behavior on respondent's part so as to render his behavior devoid of a legitimate purpose.

Matter of Ovsanik v Ovsanik, 89 AD3d 1451 (4th Dept 2011)

JURISDICTION

Court Properly Exercised Temporary Emergency Jurisdiction Under UCCJEA

Family Court, exercising temporary emergency jurisdiction under the UCCJEA, determined that the subject children were neglected and placed the children with DSS. The Appellate Division affirmed. The children's parents moved to New Mexico with the children in 2007. In 2008, the parents were arrested and charged with seven counts of child abuse. The charges stemmed from allegations that the parents left three of the children unsupervised in a bug-infested trailer miles from the family residence with inadequate food and limited supplies for a six to eight week period and that the parents, as a form of discipline, had confined the children to their bedrooms or to the garage for weeks or months at a time, where they received only bread, water, peanut butter and a sleeping bag and were allowed to go to the bathroom once or twice a day. As a result of the charges, the parents were ordered to avoid all contact with the children and the parents placed the children in the care of their maternal step-aunt and uncle in Chautauqua County. After the children were placed, the New Mexico Children, Youth and Families Department closed its file on the children and the parents notified the step-aunt and uncle that they were revoking the children's temporary placement and intended to place the children elsewhere. The aunt and uncle refused and filed a petition in Chautauqua County Family Court for custody of the children. Thereafter, the parents filed, pursuant to the UCCJEA, a petition against the step-aunt and uncle, confirming that they were the legal guardians of the children and appointing another temporary guardian until the criminal charges were resolved. Two days later, Family Court issued a temporary order of custody asserting temporary emergency jurisdiction pursuant to the UCCJEA and granted temporary custody of the children to the aunt and uncle. Thereafter, the New Mexico Court ordered the immediate transfer of the children to guardians the parents had selected who resided in Ohio. At a hearing on DSS's petition for an award of temporary custody of the children, a psychologist testified that the move to Ohio, orchestrated by the parents, would result in emotional abuse of the children. In light of the circumstances, including the emotional abuse by the parents, the absence of a neglect proceeding in New Mexico and the refusal of the New Mexico courts to protect the children, Family Court properly exercised temporary emergency jurisdiction because the children remained in imminent risk of harm. The dissent would have reversed because it found no imminent danger that the children would be returned to the parents or placed under their control.

Matter of Bridget Y., 2011 WL 6848352 (4th Dept 2011)

JUVENILE DELINQUENCY

Officers Had Articulable Reason For Initial Encounter With Respondent

Family Court adjudicated respondent to be a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a controlled substance in the third degree. The Appellate Division affirmed. The court properly refused to suppress the tangible evidence seized from respondent by police officers. Respondent's actions in meeting with two other individuals in a chronic open air drug sale location and immediately running upon seeing police officers, provided the officers with an articulable reason for their initial encounter with respondent. Immediately after the initial encounter, the officers observed a surveillance video that showed respondent in the store shoving a plastic sandwich bag down the rear of his pants. When the officers asked respondent what he shoved down his pants respondent said he did not know what they were talking about. Based upon the totality of the circumstances, the officers had probable cause to search respondent, resulting in the seizure of the bags of crack cocaine and money in his possession. The retrieval of a plastic bag protruding from respondent's buttocks was a strip search, not a body cavity search, and did not require a warrant.

Matter of Demitrus B., 89 AD3d 1421 (4th Dept 2011)

PERMANENCY HEARINGS

Permanency Goal Modified

After a permanency hearing, Family Court ordered that the permanency goal for the subject child was placement for adoption. The Appellate Division modified by changing the permanency goal to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parents. The court's determination regarding the child's permanency goal lacked a sound and substantial basis in the record. Petitioner met its burden of establishing by a preponderance of the evidence that its recommendation to modify the permanency goal from adoption to APPLA was in the child's best interests. At the time of the permanency hearing the child was 14 years old; the uncontroverted evidence was that depite petitioner's diligent efforts to counsel the child regarding adoption, the child refused to consent to adoption and wished to remain with his foster parents. Petitioner submitted evidence that the child's placement with his foster parents allowed the child to have continued contact with his older brother, with whom he was very close and that he resided in a home in which he was safe and happy. Also, under the APPLA, the child would have access to family and friends who lived in the same area as the foster parents. The child expressly wished to remain with the foster parents. Further, the foster parents were willing to be a permanency resource for the child. They unequivocally stated their willingness to serve as an ongoing resource for the child.

Matter of Jose T., 87 AD3d 1335 (4th Dept 2011)

Permanency Goal Modified

Family Court ordered that the permanency goal for the subject children was placement for adoption. The Appellate Division modified by changing the permanency goal of one of the children, Lavar, to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parent. The court's determination regarding Lavar's permanency goal lacked a sound and substantial basis in the record. The attorney for the children requested an APPLA at the hearing and petitioner supported that placement on appeal. Lavar, who was 16 years old at the hearing, testified that he did not want to be adopted, that he been pressured into considering adoption, and that he would refuse to consent to adoption. Lavar had resided with his foster parent for over one year and the foster parent testified that he was willing to be a permanency resource for him. The contention of the attorney for the children that the permanency goal for the other child, Lavalle, should be an APPLA was rejected because it was raised for the first time on appeal.

Matter of Lavalle W., 88 AD3d 1300 (4th Dept 2011)

Permanency Goal Modified

After a permanency hearing, Family Court ordered that the permanency goal for the

subject child was placement for adoption. The Appellate Division modified by changing the permanency goal to placement in an alternative planned permanent living arrangement (APPLA) with the child's foster parent. Although the appeal was moot because a superseding permanency order had been entered, the exception to the mootness doctrine applied because the issue was likely to recur, typically evaded review, and raised a significant question not previously determined. The court's determination regarding the child's permanency goal lacked a sound and substantial basis in the record. Petitioner met its burden of establishing by a preponderance of the evidence that its recommendation to modify the permanency goal from adoption to APPLA was in the child's best interests. At the time of the permanency hearing the child was 16 years old and the uncontroverted evidence was that despite petitioner's diligent efforts to counsel the child regarding adoption, the child refused to consent to adoption and wished to remain with her foster parent. Petitioner submitted evidence that the child had previously been adopted by another foster parent who had surrendered her parental rights to the child and that the child suffered from ongoing emotional stress from that adoption and she would be further mentally traumatized by being forced into another adoption. The child expressly wished to remain with the foster parent and the foster parent was willing to be a permanency resource for the child. Petitioner's failure to call the caseworker and indirect service coordinator who had worked with the child at the permanency hearing was not a rational basis for rejecting APPLA where the Referee had sufficient information to determine the child's best interests.

Matter of Latanya H., 89 AD3d 1528 (4th Dept 2011)

TERMINATION OF PARENTAL RIGHTS

Petitioner Properly Relieved of Reasonable Efforts Requirement

Family Court terminated respondent's parental rights with respect to her son on the ground of permanent neglect. The Appellate Division affirmed. The court properly granted petitioner's motion to be relieved of the requirement that it make reasonable efforts to reunite the mother and son. Petitioner established by clear and convincing evidence that the mother's parental rights had been terminated with respect to the son's half sibling and that she repeatedly failed to cooperate with programs to address her alcohol, drug use and mental health issues. The mother failed to establish that requiring reasonable efforts would be in the child's best interests and would likely result in reunification.

Matter of Jacob E., 87 AD3d 1317 (4th Dept 2011)

Social Services Law Did Not Implicate Family Court's Subject Matter Jurisdiction

Family Court terminated respondent mother's parental rights with respect to her son upon a finding of permanent neglect and freed the child for adoption. The Appellate Division affirmed. The mother was not denied effective assistance of counsel because the attorney counseled the parent to admit the allegations in the petition and there was no demonstration that mother's attorney's alleged failure to request a suspended judgment or post-termination contact resulted in actual prejudice. Instead, the evidence established that a suspended judgment or post-termination contact was not in the child's best interests. The mother's contention was without merit that the court lacked jurisdiction over the proceeding because it failed to comply with Social Services Law § 384-b (3) (c-1), which applies where one Family Court judge presides over a prior permanency hearing and a termination of parental rights petition involving the same child is assigned to a different Family Court judge. That statute did not implicate subject matter jurisdiction, but rather concerned venue which, as was the case here, if not raised is waived. Further, the statute contained a preference for the same judge to hear the most recent proceeding, not a mandate.

Matter of Sean W., 87 AD3d 1318 (4th Dept 2011), *lv denied* __NY3d__

Mother's Unexplained Failure to Appear Constituted a Default

Family Court denied respondent mother's motion to vacate a prior order revoking a suspended judgment and terminating her parental rights with respect to her five children. The Appellate Division affirmed. The mother failed to appear at the hearing on the revocation of the suspended judgment and although her attorney was at the hearing he did not participate. The unexplained failure to appear at the hearing constituted a default and the Appellate Division therefore dismissed that appeal. In terms of the appeal from the order denying mother's motion to vacate the default, the court properly exercised its discretion in denying the motion. The mother's incarceration at the time of

the hearing was not a reasonable excuse for her default because she failed to provide a credible explanation for her failure to advise her attorney, the court, or petitioner of her unavailability and she failed to demonstrate a meritorious defense.

Matter of Lastanzea L., 87 AD3d 1356 (4th Dept 2011)

Remittal For Hearing on Post-Termination Contact

Family Court revoked a suspended judgment and terminated respondent’s parental rights to his child. The Appellate Division modified by granting respondent’s request for a hearing to determine whether he should be afforded post-termination contact with the instant child. The father failed to demonstrate exceptional circumstances to warrant an extension of the suspended judgment. However, the court should have granted respondent’s request for a hearing to determine whether post-termination contact between th respondent and the child was in the child’s best interests.

Matter of Lestariyah A., 89 AD3d 1420 (4th Dept 2011)

TPR Warranted on The Ground of Mental Illness

Family Court terminated respondent’s parental rights on the ground of mental illness. The Appellate Division affirmed. The testimony and reports of petitioner’s experts, as well as the testimony of a caseworker who supervised the mother’s visitation with the child, established that the mother was suffering from a mental illness that was manifested by a disorder or disturbance in behavior, thinking or judgment to such an extent that if the child were in the custody of respondent the child would be in danger of becoming a neglected child.

Matter of Royfik B., 89 AD3d 1423 (4th Dept 2011)

TPR on Ground of Mental Illness Affirmed

Family Court terminated respondent mother’s parental rights on the ground of mental illness. The Appellate Division affirmed. There was clear and convincing evidence that mother was then and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for her children. Although the psychiatrist who testified on behalf of the mother recommended that the mother be given one last chance, once he learned of various misstatements made by the mother, his recommendation changed. Contrary to mother’s contention the psychiatrist’s ultimate recommendation was not equivocal. The court was entitled to draw an adverse inference from mother’s failure to testify.

Matter of Darius B., 2011 WL 6462861 (4th Dept 2011)

Family Services Progress Notes Properly Admitted

Family Court terminated father's parental rights with respect to his child and transferred custody and guardianship of the child to petitioner. The Appellate Division affirmed. The contention of the father that the court erred by admitting into evidence his records from a drug treatment facility was unpreserved and without merit. The court properly admitted in evidence the family service progress notes relating to the father. Petitioner properly laid a foundation for the admission in evidence of those notes through the testimony of its caseworker.

Matter of Shirley A.S., 2011 WL 6848477 (4th Dept 2011)

JUVENILE DELINQUENCY AND PINS CASELAW/LEGISLATIVE UPDATE

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Current through February 15, 2012

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.

Cybercrime Youth Rescue Act - Chapter 535 of the Laws of 2011, "The Cybercrime Youth Rescue Act," adds a new Title Eleven to Article Six of the Social Services Law, entitled "Education Reform Program."

New SSL § 458-L contains the following definitions:

"ELIGIBLE PERSON" MEANS AN INDIVIDUAL WHO IS THE SUBJECT OF A PENDING PETITION IN FAMILY COURT ALLEGING HE OR SHE HAS COMMITTED AN ELIGIBLE OFFENSE OR A PERSON WHO HAS BEEN CHARGED, IN CRIMINAL COURT, WITH AN ELIGIBLE OFFENSE AS THAT TERM IS DEFINED IN PARAGRAPH (B) OF THIS SUBDIVISION.

"ELIGIBLE OFFENSE" MEANS A CRIME OR OFFENSE COMMITTED BY AN ELIGIBLE PERSON THAT INVOLVED CYBERBULLYING OR THE SENDING OR RECEIPT OF OBSCENITY, AS DEFINED IN SUBDIVISION ONE OF SECTION 235.00 OF THE PENAL LAW, OR NUDITY, AS DEFINED IN SUBDIVISION TWO OF SECTION 235.20 OF THE PENAL LAW, WHEN THE SENDER AND THE RECEIVER THEREOF WERE BOTH UNDER THE AGE OF TWENTY AT THE TIME OF SUCH COMMUNICATION, BUT NOT MORE THAN FIVE YEARS APART IN AGE.

"PROGRAM" MEANS THE EDUCATION REFORM PROGRAM DEVELOPED PURSUANT TO SUBDIVISION TWO OF THIS SECTION.

THE OFFICE OF CHILDREN AND FAMILY SERVICES, HEREINAFTER THE "OFFICE," SHALL DEVELOP AND IMPLEMENT, IN CONSULTATION WITH THE DIVISION OF CRIMINAL JUSTICE SERVICES AND THE STATE EDUCATION DEPARTMENT, AN EDUCATION REFORM PROGRAM FOR ELIGIBLE PERSONS WHO HAVE BEEN REQUIRED TO COMPLETE SUCH PROGRAM PURSUANT TO ARTICLE THREE OR SEVEN OF THE FAMILY COURT ACT OR SECTION 60.37 OF THE PENAL LAW.

THE PROGRAM SHALL BE AVAILABLE IN EVERY JUDICIAL DISTRICT IN THE STATE; PROVIDED THAT IF THE OFFICE DETERMINES THAT THERE IS NOT A SUFFICIENT NUMBER OF ELIGIBLE OFFENSES IN A JUDICIAL DISTRICT TO MANDATE THE IMPLEMENTATION OF A PROGRAM, PROVISIONS SHALL BE MADE FOR THE RESIDENTS OF SUCH JUDICIAL DISTRICT TO PARTICIPATE IN A PROGRAM IN ANOTHER JUDICIAL DISTRICT WHERE A PROGRAM EXISTS IF PRACTICABLE WITH REGARD TO TRAVEL AND COST, OR TO COMPLETE THE EDUCATION COURSE ONLINE.

THE PROGRAM SHALL INVOLVE UP TO EIGHT HOURS OF INSTRUCTION AND SHALL PROVIDE, AT A MINIMUM, INFORMATION CONCERNING: (A) THE LEGAL CONSEQUENCES OF AND POTENTIAL PENALTIES FOR SHARING SEXUALLY SUGGESTIVE MATERIALS, EXPLICIT MATERIALS OR ABUSIVE MATERIALS, INCLUDING SANCTIONS IMPOSED UNDER APPLICABLE FEDERAL AND STATE STATUTES; (B) THE NON-LEGAL CONSEQUENCES OF SHARING SEXUALLY SUGGESTIVE MATERIALS, EXPLICIT MATERIALS OR ABUSIVE MATERIALS, INCLUDING, BUT NOT LIMITED TO, THE POSSIBLE

EFFECT ON RELATIONSHIPS, LOSS OF EDUCATIONAL AND EMPLOYMENT OPPORTUNITIES, AND THE POTENTIAL FOR BEING BARRED OR REMOVED FROM SCHOOL PROGRAMS AND EXTRACURRICULAR ACTIVITIES; (C) HOW THE UNIQUE CHARACTERISTICS OF CYBERSPACE AND THE INTERNET, INCLUDING THE POTENTIAL ABILITY OF AN INFINITE AUDIENCE TO UTILIZE THE INTERNET TO SEARCH FOR AND REPLICATE MATERIALS, CAN PRODUCE LONG-TERM AND UNFORESEEN CONSEQUENCES FOR SHARING SEXUALLY SUGGESTIVE MATERIALS, EXPLICIT MATERIALS OR ABUSIVE MATERIALS; AND (D) THE POTENTIAL CONNECTION BETWEEN BULLYING AND CYBER-BULLYING AND JUVENILES SHARING SEXUALLY SUGGESTIVE MATERIALS, EXPLICIT MATERIALS OR ABUSIVE MATERIALS.
UPON RECEIPT OF THE COURT ORDER, PURSUANT TO THE FAMILY COURT ACT OR SECTION 60.37 OF THE PENAL LAW, DIRECTING AN ELIGIBLE PERSON TO ATTEND THE PROGRAM, THE OFFICE, AFTER CONSULTATION WITH THE ELIGIBLE
PERSON AND THE ATTORNEY FOR SUCH PERSON, SHALL SCHEDULE THE ELIGIBLE PERSON TO ATTEND THE NEXT AVAILABLE SESSION OF THE PROGRAM AND SHALL SEND WRITTEN NOTICE OF THE SCHEDULING, ALONG WITH THE DATE, TIME AND LOCATION OF THE SESSION OR SESSIONS, TO THE ELIGIBLE PERSON, THE ATTORNEY FOR SUCH PERSON AND THE CLERK OF THE REFERRING COURT.
WITHIN TWENTY DAYS OF THE DATE UPON WHICH THE ELIGIBLE PERSON COMPLETES THE PROGRAM, THE OFFICE SHALL PROVIDE SUCH PERSON WITH A CERTIFICATION THAT HE OR SHE HAS SUCCESSFULLY COMPLETED THE PROGRAM.

Chapter 535 also amends Family Court Act §§ 315.3 (adjournment in contemplation of dismissal) and 353.1 (conditional discharge) to permit the court to require an eligible respondent who has committed an eligible offense to attend and complete an education reform program. Chapter 535 also amends Penal Law § 60.37 (probation and conditional discharge) to permit the court to direct that the defendant participate in an education reform program.
Chapter 535 also amends Family Court Act § 735 to include among PINS diversion services information on the availability of an educational reform program.
Chapter 535 takes effect March 21, 2012.

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

INITIAL APPEARANCE/PRE-PETITION HEARING - Undue Delay
DETENTION
CONFESSIONS - Necessity Of Questioning

Upon a pre-petition hearing, the Court determined that it had jurisdiction to detain respondents, but released them as a remedy for statutory violations committed by the police.

Under FCA § 305.2, an officer who takes a child into custody must release the child to the custody of the parent or "forthwith and with all reasonable speed take the child directly, and without his first being taken to the police station house, to the family court located in the county in which the act occasioning the taking into custody allegedly was committed." If the child is not released to the parent and the family court is not in session, the police must take the child to a place certified by the Office of Children and Family Services as a juvenile detention facility for the reception of children. There is a limited exception that permits an arresting officer who "determines that it is necessary to question the child" to "take the child to a facility designated by the chief administrator of the courts as a suitable place for the questioning of children or, upon the consent of a parent or other person legally responsible for the care of the child, to the child's residence and there question him for a reasonable period of time." Detention for questioning must be limited to "a reasonable period of time." The terms "necessary" and "reasonable" are terms of limitation, and "[b]y using the word 'necessary' the legislature clearly intended that there be a investigative need to question the juvenile, not that the officer merely finds it useful to do so." The reference to questioning at the child's home is a further indication that the Legislature intended that the police avoid detaining children at a police station. The juvenile should be produced in the family court on the day of the arrest and not later than the next day; the statutes do not contemplate that a child will be held overnight in custody in a police precinct.

People ex rel. Maxian o/b/o Roundtree, 164 A.D.2d 56 (1st Dept. 1990), *aff'd* 77 N.Y.2d 422 (1991), which addressed undue delay in arraignments in criminal cases, stands for the principle that an arrestee is not to be detained beyond the period allowed to achieve a recognized statutory purpose. Although courts may allow extended detention of adults where necessary to complete an investigation into suspected crimes, the Family Court Act specifies a different standard where the suspect is a child.

Here, respondents were arrested at about 7 p.m. on a Sunday night. They were taken to the precinct, their parents were notified and they were questioned by a detective in the presence of their parents within an hour. Instead of being taken to a juvenile detention facility after questioning, they were detained at the precinct and stood in a line-up at 12:45 a.m. on Monday. They were not taken to a detention center, and remained in the precinct until the detective called the Family Court at 8:30 a.m. on Monday morning.

Although the detective informed the person who answered his call that one juvenile was ready to be processed, he was advised to wait until he was ready to bring both to court. Thereafter, the detective decided to detain both respondents in the precinct awaiting a second line-up unrelated to the initial arrest. At this point, any statutory justification for detaining respondents was exhausted. Nonetheless, respondents remained in police custody for another twelve hours or more until they finally were brought to a juvenile detention center on Monday night. They were not produced before a judge until the next morning, approximately 39 hours after their arrest.

Statutory justification to detain respondents was exhausted as of Monday morning, and they should have been produced before a court at that time. Since they remained in detention for another 24 hours, they are entitled to release.

Matter of Louis D.
(Fam. Ct., Kings Co., 11/7/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21388.htm

* * *

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

DISMISSAL IN FURTHERANCE OF JUSTICE - Misconduct By Police

The Second Department reverses an adjudication of delinquency and dismisses the petition in furtherance of justice where an officer's affidavit stated that he observed respondent jump a fence into the backyard of a private residence, but testimony of police officers at the fact-finding hearing demonstrated that the attesting officer did not actually witness those events.

Since the defect did not become apparent until the fact-finding hearing, it was a latent defect and the petition is not subject to dismissal as a matter of law. The attesting officer's execution of the defective affidavit "constituted exceptionally serious misconduct of law enforcement personnel in the presentment of the petition. Such conduct poses a grave risk to the assurances of due process afforded to juveniles by the Family Court Act, and it should not be countenanced…."

There were no allegations that respondent or either of the two co-respondents caused any harm to any person or property, and the officers repeatedly testified that respondent and the co-respondents were merely standing in the backyard of the private residence at the conclusion of their lunch period. There is no evidence that respondent had previous or subsequent contact with law enforcement, and no indication that he has not complied with the terms of his probation.

Matter of Steven C.
(2d Dept., 2/7/12)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION – Least Restrictive Alternative

The First Department reverses an order that adjudicated respondent a juvenile delinquent upon a finding of menacing and imposed a conditional discharge, concluding that an adjournment in contemplation of dismissal would have been the least restrictive alternative.

Respondent came from a stable home environment. This incident was his first contact with the juvenile justice system, and his misconduct did not involve weapons, violence, or injury. There was no indication that he ever used drugs or alcohol or was affiliated with a gang. He accepted full responsibility for his offense and demonstrated sincere remorse and insight into his misconduct. Monitoring with regard to attendance at school and academic performance could have been provided for in the terms and conditions of an ACD. Since the period of the conditional discharge has expired, the Court dismisses the petition..

In re Hakeem F.
(1st Dept., 2/2/12)

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ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION – Least Restrictive Alternative

The First Department reverses an order adjudicating respondent a juvenile delinquent and placing him on probation for 12 months upon his admission to possession of an imitation firearm, and remands the matter with the direction to order a supervised adjournment in contemplation of dismissal.

There is no evidence of unlawful use or threatened use of the imitation firearm. Respondent was 14 years old at the time of the adjudication and this was his first offense. The family court promised respondent at the time of his admission that if he did not commit any further offenses and the probation report did not reveal any negative history not previously disclosed, it would grant an ACD. The report did not disclose any significant negative history, and, while respondent was living in an unstable home at the time of the offense, he was later placed in a stable foster home where he posed no behavioral problems and had been attending school without any absences or further disciplinary issues. There is no reason to believe respondent needs any court-imposed supervision beyond the supervision that can be provided under an ACD.

In re Jonnevin B.
(1st Dept., 11/3/11)

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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)

* * *

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL
DISPOSITION - Least Restrictive Alternative

The First Department finds no abuse of discretion where the family court denied respondent's request for an adjournment in contemplation of dismissal, and instead

adjudicated her a juvenile delinquent and imposed a conditional discharge. The seriousness of the underlying assault - the incident took place in a school, involved a weapon, and resulted in significant injuries to a fellow student, requiring 6 staples and 12 stitches - outweighed positive factors in respondent's background.

In re Kaina M.
(1st Dept., 11/1/11)

* * *

DISMISSAL IN THE INTERESTS OF JUSTICE

The Court, noting that the Integrated Youth Court was established to hear and determine, in a single forum, cases that are pending simultaneously in local criminal courts or county courts and family courts, and to provide a non-adversarial forum with a focus on identifying the specific needs of youth and their families and provide family court-based treatment and services which are not available in criminal courts, dismisses in the interests of justice a contempt charge that arose out of a dispute between defendant and her mother.

The Court notes, *inter alia*, that when defendant's mother is "not getting her way," she uses law enforcement and the courts in an attempt to "discipline" defendant; that despite seeking court intervention, defendant's mother has been uncooperative; that violating the terms of an order of protection is a serious crime, but no harm was caused to defendant's mother and court records suggest that it may have been defendant's mother who instigated the incident; and that 18-year-old defendant was abandoned and abused in the Philippines and brought to and adopted in the United States, and was diagnosed with mood disorders and ADHD and had 2 psychiatric hospitalizations.

Defendant "is a young woman needing help and guidance, not a criminal sentence or conviction." Being placed in a group home has been a positive influence. The Court has not been advised of any conflicts between defendant and her mother in the past several months since her placement. Her courtroom demeanor has changed from that of an angry youth to that of a happy teenager. As noted by the Supreme Court in *Eddings v. Oklahoma* (455 U.S. 104): "Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier year, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults."

The Legislature should re-examine statutes that criminalize acts by 16-18 year-old children and adopt instead a model similar to the family court model.

People v. Lily Basile
(Integrated Youth Part, West. County Ct., 1/31/12)

http://courts.state.ny.us/Reporter/3dseries/2012/2012_50130.htm

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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)

*   *   *

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)

* * *

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)

* * *

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)

Petitions

POSSESSION OF A WEAPON - Gravity Knife

The Court finds facially sufficient a charge of possession of a gravity knife where it is alleged that the officer tested the knife and that "the blade of said knife released from the handle by force of gravity or centrifugal force and locked in place by means of a button, spring, lever or other device in the handle." While the officer's training and experience have recently been given importance with regard to facial sufficiency, testing, and not training and experience, is a more conclusive way of establishing the true nature of a gravity knife.

People v. Reyes Octavio
(Crim. Ct., Richmond Co., 7/5/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21404.htm

*   *   *

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 - Dangerous Knife

The Second Department upholds the family court's order dismissing, as facially defective, charges of criminal possession of a weapon in the fourth degree and unlawful possession of weapons by persons under 16.

The officer alleged that on a public street at approximately 2:45 a.m., he observed the handle of a kitchen knife he described as a machete protruding from respondent's backpack, and thereafter removed the object and discovered that it measured approximately 14 inches in length, with a 9-inch blade that was wrapped in a plastic bag. A knife may be considered a "dangerous knife" when the circumstances of its possession demonstrate that the possessor considered it a weapon. Here, the circumstances did not demonstrate that respondent considered the knife a weapon.

Matter of Edwin O.
(2d Dept., 1/10/12)

*   *   *

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)

* * *

ASSAULT - Physical Injury

The Court finds facially sufficient a charge of assault in the third degree where a detective alleges that he observed defendant, together with a co-defendant, strike the complainant with a "closed fist about [her] arms and body causing lacerations, bruising, redness, swelling, and substantial pain," and observed defendant kick the complainant with her foot, "striking [the complainant] about [her] body causing lacerations, bruising, redness, and substantial pain."

Despite the absence of allegations regarding medical treatment, the factual allegations support a conclusion that the complainant suffered "substantial pain."

People v. Kanika Brown
(Crim. Ct., N.Y. Co., 12/9/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_52190.htm

* * *

ASSAULT - Physical Injury

The Court finds facially sufficient a charge of intentional assault in the third degree where it is alleged in the supporting deposition, which was obtained within four hours of the alleged incident, that the complainant suffered a split lip and bleeding and wanted to go to the hospital. This is a prima facie showing of impairment of physical condition.

Moreover, the complainant stated that her lip hurt, and, given the other facts she provided - a prior quarrel with defendant, defendant's anger, defendant swinging his arm and hitting her on the lip and splitting it open, and her desire to go to the hospital - there is a basis for a reasonable inference of substantial pain.

People v. Sean Oree
(Dist. Ct., Suffolk Co., 12/19/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_52251.htm

* * *

PHYSICAL INJURY

The Court dismisses as facially defective a charge of assault in the second degree (physical injury caused by a weapon) where it is alleged, inter alia, that during an altercation, defendant punched the victim in the face, that the victim retreated to his car,

where defendant hit him in the face with a stick, and that EMTs administered first aid to the cut on the victim's face and he did not seek further medical attention.

"The Appellate Courts are all over the place in what establishes physical injury." In *People v. Chiddick* (8 N.Y.3d 445), the Court of Appeals noted with respect to the "substantial pain" element that the injury - defendant broke the victim's fingernail and caused him to bleed - would normally be expected to bring with it more than a little pain, and that a victim's subjective description of what he felt may or may not be enough. Here, the allegations do not establish substantial pain.

People v. Clifford McDowell
(Lockport Town Ct., 8/16/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51646.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

*   *   *

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)

*   *   *

ACCUSATORY INSRUMENTS - Use Of Hearsay
HEARSAY - Excited Utterance

The accusatory instrument charging defendant with, inter alia, assault and criminal obstruction of breathing or blood circulation alleges that the officer, responding to a radio run regarding a family dispute, arrived at the location within a few minutes and observed the complainant standing outside in the cold without a coat on, wearing socks without shoes on; and that the complainant, who was crying, upset, afraid, and hysterical, stated in a screaming, crying voice that defendant choked her, that she could not breathe so she punched defendant to get him off of her, and that she had to leave and ran out of the apartment.

The Court holds that the accusatory instrument is not a valid information since the complainant's statements do not qualify as excited utterances. It is not known how much time passed between the 911 call and the radio run, or what the complainant was doing during that time. The fact that the officer saw the complainant "crying, upset, afraid and

hysterical" does not necessarily mean she had no time to reflect or had no opportunity to fabricate a story.

People v. Valentine
NYLJ, 9/26/11
(Crim. Ct., Kings Co., 9/8/11)

* * *

POSSESSION OF DRUGS - Identity Of Substance

The Court finds facially sufficient a charge of criminal possession of a controlled substance in the seventh degree where the lab report is not properly verified and the officer alleges only that she determined the substance to be heroin based upon her "previous narcotic arrests" and her unspecified "experience and training," but it is also alleged that defendant admitted to the officer that he used and possessed heroin.

People v. Kevin Huhn
(Dist. Ct., Nassau Co., 1/30/12)
http://courts.state.ny.us/Reporter/3dseries/2012/2012_50128.htm

* * *

POSSESSION OF DRUGS - Identity Of Substance

The Appellate Term finds facially sufficient a drug possession charge where it was alleged that the officer had seen defendant drop a glass pipe containing crack cocaine residue on the ground, and that she had identified the substance as crack cocaine residue based upon her professional training as a police officer in the identification of the substance and its packaging and her prior experience as a police officer in arrests for criminal possession of the substance.

People v. Roosevelt Jennings
(App. Term, 2d, 11th & 13th Jud. Dist., 12/27/11)

* * *

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/Collateral Estoppel

COLLATERAL ESTOPPEL

The Maryland Court of Appeals holds that collateral estoppel may not be applied against a criminal defendant to foreclose the jury from finding for itself all of the ultimate facts that make out the charged crime. "Offensive" collateral estoppel at a criminal trial is inimical to the Sixth Amendment guarantee of a jury trial in all criminal prosecutions.

Neither judicial economy nor public policy can trump a constitutional mandate. The Court also rejects the State's contention that the Sixth Amendment was not violated because the jury which sat at defendant's first trial determined the relevant elements even if the jury at the second trial did not. The same trier of fact must determine all the elements.

State v. Allen
2011 WL 5110242 (Md., 10/28/11)

* * *

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

The Court finds defendant fit to proceed despite the contrary opinions of three testifying experts.

All the experts agreed that defendant is oriented as to time and place and understands the roles of courtroom personnel. Two experts agreed that defendant understands the charges against him, the purpose of the CPL Article 730 evaluation, and the rules of confidentiality and how those rules did not apply to the doctors' examinations. Two experts agreed that defendant is able to perceive, recall, and relate. Two experts agreed that defendant handled the stress of the hearing appropriately, which, the Court believes, is a sign that defendant could handle the stress of a trial. One expert found that defendant understands the seriousness of the instant matter. Two experts agreed that defendant has sufficient contact with reality.

There appear to be only two areas in which the experts call into question defendant's capacity - his ability to work with his attorney and listen to and appreciate his attorney's advice, and his ability to understand his legal options and the consequences of choosing from those options. There is overwhelming evidence that defendant has the ability to undertake those important tasks. The experts believe that a psychiatric defense is in defendant's best interest, and, the Court believes, their desire for defendant to proceed in that manner has clouded their conclusions as to defendant's fitness.

The Court notes that defendant's supposed beliefs that his wife was having affairs, that she was trying to poison him with ginseng, and that his body was contaminated, causing pain to his penis, may bear upon an "insanity" defense, but fail to establish lack of fitness to proceed. An individual could have false beliefs and still be fit to proceed, and a defendant may be suffering from a psychiatric illness and not be incapacitated. Mental illness and competence are distinguishable concepts.

People v. D.X.Z
(Sup. Ct., Queens Co., 10/3/11)
http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202518922141

Discovery/Preservation Of Evidence

BRADY MATERIAL - Prior Inconsistent Statements
- Prejudice/Materiality

The Supreme Court finds reversible *Brady* error where the prosecution failed to disclose statements by an eyewitness contradicting his testimony.

Evidence is “material” within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. A reasonable probability does not mean that the defendant would more likely than not have received a different verdict, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.

Evidence impeaching an eyewitness may not be material if the State’s other evidence is strong enough to sustain confidence in the verdict, but that is not the case here. The witness’s testimony was the only evidence linking defendant to the crime, and the witness's undisclosed statements directly contradict his testimony. He told the jury that he had “[n]o doubt” that defendant was the gunman he stood “face to face” with on the night of the crime, but the officer’s notes show the witness saying that he “could not ID anyone because [he] couldn’t see faces” and “would not know them if [he] saw them.”

Although the witness made other remarks on the night of the murder indicating that he could identify the first gunman to enter the house, but not the others, that merely leaves the Court to speculate about which of the contradictory declarations the jury would have believed. The State’s contention that the witness feared retaliation offers a reason that the jury could have disbelieved the witness’s undisclosed statements, but gives the Court no confidence that it would have done so.

Justice Thomas dissented.

Smith v. Cain
2012 WL 43512 (U.S. Sup. Ct., 1/10/12)

* * *

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)

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MOTION TO VACATE JUDGMENT OF CONVICTION - Newly Discovered Evidence
BRADY MATERIAL
EXPERTS - Blood Alcohol Analysis

In this DWI case, defendant moves to vacate the judgment of conviction, citing "the well-documented problems with the Nassau County Police Department Laboratory."

The Court grants the motion. During the course of trial, evidence was presented by defendant in an effort to establish that the testing performed at the lab in this case was unreliable, and to highlight the problematic history of the instrument used to test and record defendant's blood alcohol content in this case. No evidence was offered at trial concerning the systemic problems which led to the lab's probation and subsequent closure. Had defendant been aware of this evidence prior to trial, she could have made a discovery demand pursuant to Criminal Procedure Law § 240.20(1)(k), or moved for a pre-trial hearing on the matter. Or the People might have decided themselves, or defendant could have argued, that the evidence was Brady material that must be turned over.

Since the systemic lab errors over a period of many years have resulted in the indefinite closure of the lab, which calls into question the integrity of the testing results that have come from the lab, and the People's evidence at trial was less than overwhelmingly strong, the Court finds that had the evidence been received at trial, the verdict would have been more favorable to defendant.

Quoting from another ruling, the Court notes: "'As a general proposition in cases involving potentially tainted evidence emanating from the Nassau County Police Laboratory, the question arises: How can the people include the damning American Society of Crime Laboratory Directors report in their discovery package and publically give a vote of no confidence to the laboratory results, and then in good conscience argue in a court of law that the factors which form the basis of the vote of no confidence, be excluded from jury consideration? To the contrary the factors which form the basis of that vote of no confidence, bear directly upon and is highly relevant to the integrity of the prosecutorial process and is a matter for jury consideration.'"

People v. Jaclyn Conneely
(Dist. Ct., Nassau Co., 7/29/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21408.htm

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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

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BRADY MATERIAL
MOTION TO VACATE JUDGMENT OF CONVICTION - Newly Discovered Evidence

The Court denies defendant's motion to vacate his drug sale/possession conviction, rejecting defendant's claims that the People violated *Brady* by failing to disclose 2005 and 2006 reports of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board and that a 2010 report by ASCLD/LAB constitutes newly discovered evidence that would probably change the result of the trial.

Defendant did make a pretrial request for documents pertaining to the maintenance and calibration of the instruments used by the detective in his test, to the solution and comparison samples, and to the test results. But this request related to a discrete test, while the 2005/2006 reports are about the laboratory generally, and thus the request was not "specific" and the reasonable probability test for materiality and prejudice applies.

There is no reasonable probability that the documents would have changed the outcome of the trial. The documents concern problems found and solved by the time of the test in defendant's case. Defendant's contention that the deficiencies reported in 2010 must have existed in 2005 and 2006 is unsupported and speculative.

People v. Germaine McCants
NYLJ, 9/14/11
(Sup. Ct., Nassau Co., 9/13/11)

* * *

DISCOVERY - Notice Of Intent To Offer Psychiatric Evidence

Defendant has filed untimely Notices of Intent to Offer Psychiatric Evidence, and argues that, due to defendant's two periods of psychiatric commitment and the evaluation processes that led to them, counsel was not afforded sufficient time to meet and properly communicate with defendant for the purpose of determining the facts of the case and whether or not a psychiatric defense was appropriate.

The Court rejects defense counsel's claims and also finds that the notices are insufficient because they lack any indication of the nature of the psychiatric evidence intended to be offered, but rules as follows: 1) Defendant must provide the People with an amended/supplemental notice, which contains enough information to enable the prosecution and the Court to discern the general nature of the alleged psychiatric malady and its relationship to a particular, proffered defense no later than thirty days from the date of the order; 2) Defendant must submit to examination by a psychiatrist or licensed psychologist designated by the People, to take place no later than thirty days from the People's receipt of defendant's amended/supplemental notice. Failure of defendant to

comply with either condition in a timely manner will result in preclusion of psychiatric evidence at trial.

The Court has a responsibility to weigh defendant's constitutional right to a defense against prejudice to the People. The extreme measure of preclusion has generally been reserved for cases in which the issue is raised on the eve of, or during trial.

People v. Victor Carrero
(Sup. Ct., Kings Co., 2/8/12)
http://courts.state.ny.us/Reporter/3dseries/2012/2012_50202.htm

* * *

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

* * *

SUBPOENAS - Service On Parties

Criminal Procedure Law § 610.40, enacted in 1970, provides: "A subpoena may be served by any person more than eighteen years old. Service must be made in the manner provided by the civil practice law and rules for the service of subpoenas in civil cases." In 2003, CPLR Rule 2303 was amended with the following language: "A copy of any subpoena duces tecum served in a pending action shall also be served, in the manner set forth in [CPLR Rule twenty-one hundred three of this chapter, on each party who has appeared in the action so that it is received by such parties promptly after service on the witness and before the production of books, papers or other things." In 2004, however, the Legislature amended the statute again and substituted the words "civil judicial

proceeding" for the word "action." A memorandum from the State Bar's CPLR Committee explained that the purpose of this amendment was to make clear that the 2003 service requirement applied to civil proceedings, not criminal actions.

The Court holds that the CPLR Rule 2303 service requirement does not apply in criminal proceedings. The text and legislative history of the 2004 amendment indicate that the Legislature did not intend the third-party subpoena duces tecum service requirement to apply to criminal proceedings. There are significant policy arguments in favor of applying this requirement to criminal cases.

People v. James Lomma
(Sup. Ct., N.Y. Co., 2/1/12)
http://courts.state.ny.us/Reporter/3dseries/2012/2012_22023.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)

Ethics and Judicial/Attorney Misconduct

SUBPOENAS
PROSECUTORIAL MISCONDUCT - Abuse Of Process

In this prosecution in which it is alleged that defendant, a building contractor, stole property from three suppliers, the Court grants defendant’s motion to dismiss the indictment because the integrity of the grand jury proceedings was impaired by the presentation of inadmissible hearsay evidence derived from illegally obtained defendant's bank records.

The subpoena duces tecum issued by the District Attorney directed that the records be turned over to the District Attorney. But subpoenas are process of the courts, not the parties. Thus, subpoenas should be made returnable to the court, which has the right to possession of the evidence and determine where the evidences should be deposited, and address any disputes regarding production. By circumventing the court, the District Attorney avoided all the protections provided against abuse of the subpoena process, and succeeded in transforming a court process into a function of her own office.

People v. Gary Doty
(County Ct., Essex Co., 9/7/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21312.htm

* * *

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)

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DOUBLE JEOPARDY - Prosecution After Mistrial
JUDGES - Bias

In this sexual assault prosecution, a Maryland Court of Appeals majority holds that retrial is barred on Double Jeopardy grounds where the bench trial judge declared a mistrial because she was aware of defendant's two prior sex crime convictions and had presided over a jury trial in one of the cases.

The judge was aware of the convictions before jeopardy attached, and also was aware that the complainant had delayed reporting the alleged offenses, that there would be no forensic evidence, and that defendant would testify and assert that the alleged offenses did not happen. The judge's knowledge, bearing as it did on the credibility of the complainant and of defendant, was related to the ultimate issue of guilt or innocence. The reasonable alternative of recusal existed, and thus there was no manifest necessity.

Mansfield v. State
2011 WL 4502107 (Md., 9/30/11)

*   *   *

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
- Ex Parte Acquisition Of Evidence

Reaching defendant’s unpreserved claim in the interest of justice, the Second Department orders a new trial where the court at this nonjury trial exhibited bias against defense witnesses on numerous occasions, repeatedly interjecting itself into the direct and cross examinations of the witnesses even though there was rarely any need to clarify their testimony, which reflected the court’s belief that the innocuous explanations provided by the witnesses were incredible.

Moreover, the court’s intern had looked on the internet and provided the court with information regarding the timing of an event discussed by the defense witnesses, which,

according to the court, “br[ought] into question” the witnesses’ credibility. Despite the insistence of the court that it would not consider this new information, the bias already expressly exhibited was compounded by the impropriety inherent in adducing facts from a source outside the confines of the trial.

People v. Larry Reynolds
(2d Dept., 12/20/11)

* * *

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)

Motion Practice

MOTION PRACTICE - Time Deadlines

The Court grants defendant’s motion to dismiss the indictment on the merits, concluding that the People failed to honor a cooperation agreement, and also concludes that the

motion must be granted because the People's opposing papers were untimely served and filed.

The motion papers were served 12 days prior to the return date. According to 22 NYCRR § 202.8(a), "[a] motion papers shall be filed with the court on or before the return date." The People's papers were served and filed after the return date. Although 22 NYCRR § 202.8(e)(2) provides that "[a]bsent agreement by the parties, a request by any party for an adjournment shall be submitted in writing, upon notice to the other party, to the assigned judge on or before the return date," the People did not request an extension of time or adjournment until after the return date, and until after their untimely papers were rejected.

People v. Marlaina Ponce
(County Ct., Sullivan Co., 1/12/12)
http://courts.state.ny.us/Reporter/3dseries/2012/2012_50024.htm

Confessions/Self Incrimination

CONFESSIONS - Fruits - Subsequent Statements
- Voluntariness

The Supreme Court reverses the Sixth Circuit's judgment granting habeas relief, concluding that the police were not barred from questioning petitioner because he had refused to speak to police without his lawyer on a previous occasion when he was not in custody. The Court has never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation.

Also, the police also did not violated the Fifth Amendment by urging petitioner to "cut a deal" before his accomplice did so. No holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so.

Although petitioner's first interrogation involved a deliberate question-first, warn-later strategy, no two-step interrogation technique of the type that concerned the Court in *Missouri v. Seibert* (542 U.S. 600) undermined the *Miranda* warnings petitioner received. In *Seibert*, the suspect's first, unwarned interrogation left "little, if anything, of incriminating potential left unsaid," making it "unnatural" not to "repeat at the second stage what had been said before." Here, petitioner steadfastly maintained during his first interrogation that he had "[n]othing whatsoever" to do with the murder victim's disappearance, and thus there is no concern that police gave petitioner *Miranda* warnings and then led him to repeat an earlier murder confession. Moreover, in *Seibert* the Court was concerned that the *Miranda* warnings did not "effectively advise the suspect that he had a real choice about giving an admissible statement" because the unwarned and warned interrogations blended into one "continuum." Here, four hours passed between the unwarned interrogation and petitioner's receipt of *Miranda* rights; during that time, he traveled from the police station to a separate jail and back again, claimed to have spoken to his lawyer, and learned that police were talking to his accomplice and had found the victim's body.

Warden v. Dixon
2011 WL 5299458 (U.S. Sup. Ct., 11/7/11)

* * *

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)

* * *

CONFESSIONS - Voluntariness

Denying habeas relief, the Ninth Circuit U.S. Court of Appeals holds that a polygrapher's empathic and maternal manner when giving 18-year-old petitioner instructions on the use of a polygraph (she told him she loved him, offered him a hug, compared him to her own sons, and stated, "I can get you through this ... I know what I'm doing"), her statements that may have suggested that she was not a law enforcement officer, her statements suggesting that if petitioner was telling the truth and was in fact innocent, she could help him get cleared, and her statements reminding petitioner of his obligation to his family to tell the truth and that his children were counting on him to do the right thing, did not render petitioner's confession involuntary.

Ortiz v. Uribe
2011 WL 5607625 (9th Cir., 11/18/11)

* * *

CONFESSIONS - Interrogation

The Third Department denies suppression where, at the police station following his arrest, an officer patted defendant down and asked him “if he had anything on him, any weapons,” and defendant replied that he had an ammunition clip in his pocket.

The officer testified that he asked the question to ensure the safety of detectives who were about to interview defendant, and that it was the routine practice of the Schenectady Police Department to ask suspects if they had weapons before such interviews. Thus, the inquiry was not an investigatory interrogation.

People v. Charles Ardrey
(3d Dept., 2/2/12)

* * *

CONFESSIONS - Voluntariness

The Court of Appeals of Maryland suppresses a 16-year-old juvenile's statement where he made no inculpatory statement until almost three hours after he first gave his side of the story and then repeatedly proclaimed his innocence; there was a deliberate and unnecessary delay in bringing him before a judicial officer; and he had repeatedly asked to speak with his mother.

Moore v. State
2011 WL 5041772 (Md., 10/25/11)

* * *

CONFESSIONS - Voluntariness
DEFENSES - Justification - Defense Of Premises
JUDGES - Excessive Interference In Trial

Officers responding to a report of a domestic dispute attempted forcibly to enter defendant's house by kicking in a door and breaking a window after receiving another report confirming that there was a man with a knife and a child inside. Defendant fired shots through the door, striking one of the officers, and later emerged and surrendered to the police. At a suppression hearing, several officers testified that they did not observe defendant struggle with officers when he was taken into custody. The officer who transported defendant to the police station was shown a series of photographs of defendant, taken at a jail after defendant had given his statements, that depicted certain marks and injuries; the officer testified that he did not see the injuries or marks prior to transferring defendant to the detectives who took his statements. There was testimony that defendant received medical treatment following his interview with the detectives, and medical records documented injuries including skin abrasions, swelling, and a sprained wrist.

The Second Department suppresses defendant's statements, concluding that the People failed to establish voluntariness beyond a reasonable doubt.

The Court also finds error in the denial of defendant's request for a justification charge. Defendant presented evidence that the officers did not identify themselves prior to their attempt forcibly to enter defendant's house, and that he reasonably believed that a person was attempting to commit a burglary of his dwelling.

Also, the trial judge improperly denigrated defense counsel, sometimes in the presence of the jury, and improperly interjected himself into the proceedings by interrupting defense counsel's cross-examination of a witness to clarify the witness's earlier testimony, and then reading to the jury from his personal notes concerning what the witness had said.

People v. Raymond Zayas
(2d Dept., 10/18/11)

* * *

CONFESSIONS - Custody
- Interrogation

After being informed by an eyewitness that defendant had engaged in oral sexual conduct with an incapacitated resident of the nursing home where defendant and the witness worked, a detective went to defendant's home, where he advised defendant that he "needed to speak" with him, that it was "inappropriate" to speak in defendant's house, and that he "needed" to speak with defendant in the detective's office. Defendant asked the detective what he needed to talk to him about, and the detective responded that he was a member of the Special Victims Squad and that he needed to speak to him about an

incident that happened at defendant's place of work. Defendant agreed to accompany the detective to the police station, and, on the way to the station, the detective advised defendant that they would not be talking about the case in the car. Once they arrived at the police station, defendant was placed in an "interview room," and the detective left to gather some paperwork. When the detective returned, defendant stated: "we're in your office, what do you want to talk about." The detective stated that defendant was at work that day and that "there was an incident and [the defendant] had to leave early because of this incident and that's what [they] would be talking about." Defendant then made an inculpatory statement, apologizing for his conduct.

The Second Department suppresses defendant’s statement. Defendant was in police custody at the time he made the statement, and the hearing court erred in concluding that the statement was spontaneous and not the result of interrogation or its functional equivalent.

At the time when they reached the detective's office and defendant again asked what the detective needed to talk to him about, defendant thought the interview had begun, and thus an interrogational environment existed. The detective’s statement explaining that there was an incident at work and that the defendant had to leave early from work as a result of the incident was not a mere recitation of a charge. Rather, it revealed to defendant that the detective had spoken to individuals at the nursing home who were aware of defendant's conduct. The detective should have reasonably anticipated that this statement would evoke a response.

The hearing court also erred in preventing defense counsel from cross-examining the detective as to whether defendant was free to leave the precinct at the time the statement was made. Although the determination regarding custody turns on what a reasonable person, innocent of any crime, would have thought had he or she been in the defendant's position, and not on the subjective intent of the officer, an officer's subjective intent to hold the defendant in custody is relevant insofar as it may have been conveyed, verbally or otherwise, to the defendant.

People v. Juan Tavares-Nunez
(2d Dept., 9/27/11)

*   *   *

CONFESSIONS - Voluntariness

The Supreme Court of Kentucky holds that despite defendant's bipolar disorder and low intelligence, his statement was not coerced where the police stated to defendant that his two young children could be removed from the family home pursuant to a court order if he failed to cooperate with the investigation. This was simply a statement of fact and not a threat.

The Court notes, however, that such information "should be conveyed in a professional manner, without threatening words or tone, because if not handled appropriately a trial court may well find that resulting statements are the product of coercion."

Stanton v. Commonwealth
2011 WL 4431166 (Ky., 9/22/11)

*   *   *

CONFESSIONS - Voluntariness

In this civil rights action, the Seventh Circuit U.S. Court of Appeals finds that plaintiff's confession was involuntarily made where the police told him that the only possible cause of the child victim's injuries was that he had been shaken right before he collapsed.

Plaintiff, not being an expert in shaken-baby syndrome, could not deny the officers' false representation of medical opinion. A confession so induced is worthless as evidence and as a premise for an arrest.

Aleman v. Village Of Hanover Park
2011 WL 5865654 (7th Cir., 11/21/11)

*   *   *

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

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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 - 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)

* * *

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 - Juveniles Over 16 Years Of Age

The First Department upholds the denial of suppression of respondent's confession, which was made after he turned 16, concluding that the special statutory procedures (see FCA § 305.2) for juvenile interrogations were not required.

In re Eduardo E.
(1st Dept., 1/17/12)

* * *

SELF INCRIMINATION - Defendant's Pre-Arrest Silence

A divided Minnesota Supreme Court holds that the Fifth Amendment did not prevent the State from proving that defendant did not respond to a mailed request for an interview sent to him by a police officer.

When the Government does nothing to compel a person who is not in custody to speak or remain silent, the voluntary decision to do one or the other raises no Fifth Amendment issue.

State v. Borg
2011 WL 4374579 (Minn., 9/21/11)

Search And Seizure

SEARCH AND SEIZURE - GPS Tracking Of Vehicle

In an opinion by Justice Scalia, joined by Justices Roberts, Kennedy, Thomas and Sotomayor, a 5-Justice Supreme Court majority holds that the Government's installation of a GPS tracking device on the undercarriage of a vehicle parked in a public parking garage, and use of the device to track the vehicle's movements over the next 28 days, was a physical trespass upon private property for the purpose of obtaining information, and thus constituted a search under the Fourth Amendment.

Although the Government argues that no search occurred because defendant had no "reasonable expectation of privacy" in the undercarriage of the vehicle or the locations of the vehicle on public roads that are visible to all, the Court need not address those contentions since it must assure preservation of that degree of privacy against Government trespass that existed when the Fourth Amendment was adopted. Justice Sotomayor filed a separate concurring opinion.

A concurring opinion by Justice Alito, joined by Justices Ginsburg, Breyer and Kagan, rejects the majority's trespass analysis and asks instead whether defendant's reasonable expectations of privacy were violated by the long-term monitoring of the movements of his vehicle. While relatively short-term monitoring accords with expectations of privacy our society has recognized as reasonable, law enforcement agents' tracking of every movement of defendant's vehicle for four weeks did not, and thus constituted a search.

United States v. Jones
2012 WL 171117 (U.S. Sup. Ct., 1/23/12)

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SEARCH AND SEIZURE - Emergency Doctrine

Police officers who were investigating a rumor that a student, Vincent Huff, had written a letter threatening to “shoot up” the school, and also knew that Vincent had been absent

from school for two days and was frequently subjected to bullying - which are common among perpetrators of school shootings - knocked on the door of Vincent's house and announced several times that they were with the Burbank Police Department, but no one responded. An officer called the home telephone and could hear the phone ringing inside the house, but no one answered. The officer tried calling the cell phone of Vincent's mother, and, when she answered, identified himself and inquired about her location. She stated that she was inside the house. The officer inquired about Vincent's location, and she stated that he was inside with her. The officer stated that he and the other officers were outside and requested to speak with her, but Mrs. Huff hung up the phone. One or two minutes later, Mrs. Huff and Vincent walked out of the house. An officer advised Vincent that the officers were there to discuss the threats. Vincent, apparently aware of the rumor, responded, "I can't believe you're here for that." An officer asked Mrs. Huff to continue the discussion inside the house, but she refused, which the officer, a juvenile bureau sergeant, found "extremely unusual." The officer also found it odd that Mrs. Huff never asked the officers the reason for their visit. When the officer asked if there were any guns in the house, Mrs. Huff immediately turned around and ran inside. The officer entered behind her, then Vincent entered, followed by another officer, and then the two other officers, who had been out of earshot, entered on the assumption that Mrs. Huff had given permission to enter. Upon entering, the officers remained in the living room with Mrs. Huff and Vincent. Eventually, Vincent's father entered the room and challenged the officers' authority to be there. The officers remained inside the house for 5-10 minutes, but did not conduct any search. The officers ultimately concluded that the rumor was false.

In this civil rights action, the Ninth Circuit affirmed the dismissal of claims against the officers who entered the house on the assumption that Mrs. Huff had consented, but found that the other officers were not entitled to qualified immunity because any belief that there was a risk of serious, imminent harm would have been objectively unreasonable.

The Supreme Court reverses. Reasonable police officers could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence because there was an objectively reasonable basis for fearing that violence was imminent.

Ryburn v. Huff
2012 WL 171121 (U.S. Sup. Ct., 1/23/12)

*   *   *

SEARCH AND SEIZURE - Discriminatory Police Conduct
- Stop And Frisk
- Reasonable Suspicion

Plaintiffs filed this putative § 1983 class action against the City of New York, Police Commissioner Raymond Kelly, Mayor Michael Bloomberg, and named and unnamed police officers, alleging that defendants have implemented and sanctioned a policy,

practice, and/or custom of unconstitutional stops and frisks by the NYPD on the basis of race and/or national origin in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the Constitution and laws of New York. Plaintiffs seek declaratory and injunctive relief, and the named plaintiffs seek compensatory and punitive damages for themselves. Defendants have moved for summary judgment on various claims.

Defendants' motion is granted in part and denied in part. The motion is granted as to plaintiff Floyd's Fourth Amendment claim regarding a stop and frisk. The officers observed two black men using keys to try to unlock the front door of a house in the middle of the afternoon, and also were aware of a midday burglary pattern in the neighborhood. Those factors created the requisite reasonable suspicion justifying a stop, and, because the officers suspected that the men were committing the violent crime of burglary, they were justified in frisking the men. However, since Floyd alleges that the officers searched his pockets after they frisked him without having felt anything that resembled a weapon or contraband, summary judgment is denied as to the allegedly unconstitutional search.

There are disputed issues of fact as to whether or not the City has acquiesced in a widespread custom or practice of unconstitutional stops and frisks. The Court accepts findings that 24.37 percent of recorded stops and frisks during the period 2004 through 2009 lack sufficiently detailed documentation to assess their legality, while 6 percent of stops lack legal justification. The questionable constitutionality of 30 percent of stops is sufficient to allege that the custom is widespread. There also is a triable issue of fact as to whether NYPD supervisors have a custom or practice of imposing quotas on officer activity, and whether such quotas were the "moving force" behind widespread suspicionless stops.

There also are disputed issues of fact regarding whether the City has a widespread pattern and practice of effecting stops and frisks in which the determinative factor is race rather than reasonable suspicion. While the NYPD should deploy greater numbers of officers to high crime areas, after controlling for crime rate and similar factors, the statistics still show that African-Americans and Latinos are stopped at higher rates than whites. While the statistical evidence is likely not strong enough to show discriminatory purpose standing alone, plaintiffs have presented proof of the inadequacy of the City's efforts to take remedial steps to reduce the racial disparity of stops.

There also is a triable issue of fact as to whether the NYPD leadership has been deliberately indifferent to the need to train, monitor, supervise, and discipline its officers adequately in order to prevent a widespread pattern of suspicionless and race-based stops.

Floyd v. The City of New York
NYLJ, 9/2/11
(SDNY, 8/31/11)

* * *

SEARCH AND SEIZURE - Reasonable Suspicion - Possession Of Gravity Knife

While driving in a police van, the officer made eye contact with defendant, who then turned around and walked in the opposite direction. The officer observed, protruding from the coin pocket of defendant's pants, a "brownish, reddish handle with silver around it" that he thought was a knife. He testified that when he exited the van and moved closer to defendant, he "thought it was a gravity knife," but did not explain why. The officer approached defendant and reached into defendant's pocket and took the knife. The officer asked defendant why he had the knife and defendant responded that he "used it for protection." The officer identified the knife as a switchblade, handcuffed defendant, tested the knife to see if it functioned, and then arrested defendant for possession of an illegal weapon. The motion court granted defendant's motion to suppress the knife and statement, concluding that the officer had no reasonable suspicion of danger warranting seizure of the knife.

The First Department affirms, reasoning instead that there was no reasonable suspicion because the officer did not articulate any facts from which he could have inferred that the knife was a gravity knife.

People v. Marcoangel Vargas
(1st Dept., 11/22/11)

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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 - Fruits/Attenuation
APPEAL - Scope Of Review

In a case in which drugs were recovered from defendant during a search upon arrest, the Court of Appeals dismisses defendant's appeal where the Appellate Division's reversal of a suppression order, while described as "on the law," was predicated upon a differing view concerning the issue of attenuation, which is a mixed question of law and fact.

Chief Judge Lippman and Judge Ciparick dissent, noting that the Appellate Division was not interested in the nature and quality of the illegality or of the attenuating conduct, and simply concluded that any alleged illegality, no matter how extreme or provocative, must have been attenuated by defendant's act of initiating physical contact with the officer even if that act consisted only of a push to get past the three officers illegally blocking his way. This was not attenuation analysis at all, but simply the announcement of an arbitrary rule. When courts making attenuation findings employ facile analytic shortcuts that shield from judicial scrutiny illegal and possibly highly provocative police conduct, an issue of law is presented that is this Court's proper function to resolve. The alternative is to turn a blind eye to tactics under which any person might be approached, detained, intimidated, harassed, even provoked into a display of aggression. This is not an exaggerated or purely academic concern in a jurisdiction where hundreds of thousands of pedestrian stops are performed annually by the police, only a very small percentage of which actually result in the discovery of evidence of crime.

People v. David Holland
(Ct. App., 12/20/11)

* * *

CONFESSIONS - Public Safety Exception
SEARCH AND SEIZURE - Exigent Circumstances

The Second Circuit holds that defendant's pre-*Miranda* statements regarding the presence and location of a gun were admissible under the public safety exception. When the officers entered the apartment, they reasonably believed that defendant might have a gun he had recently brandished during a dispute with his roommate. Although the

officers also asked about the reported dispute and whether defendant had a license for the gun, the questions about the dispute had the potential to shed light on the volatility of the situation and the extent to which defendant harbored potentially violent resentment toward the roommate.

However, two judges conclude that the warrantless search for the gun inside defendant's bedroom violated the Fourth Amendment. After rousing defendant from his bed in the middle of the night, the officers placed him against the wall in the common hallway, and made sure he had nothing in his possession that could harm them. One officer stood at the entrance of the bedroom, effectively guarding the room and monitoring defendant to make sure he did not re-enter. Defendant, dressed only in his underwear, was "very cooperative" and non-combative, and told the officers that the gun was in his bedroom. The roommate remained inside his separate bedroom. The apartment was "full of cops." Thus, before conducting the search, the officers had effectively allayed their safety concerns, and there is nothing to suggest that it would have been impracticable to continue securing the bedroom during the time necessary for one of the officers to obtain a warrant.

The dissenting judge notes that defendant was not in handcuffs; that the police had not done a protective sweep of the bedroom, which was dark at the time of the entry, and could not have been certain there was no one else in the room; that although defendant disclosed where the gun was, the police had no way of knowing that he was telling the truth; and that defendant's testimony supports the existence of reasonable anxiety on the officers' part as to the presence of another person.

United States v. Simmons
NYLJ, 10/31/11
(2d Cir., 10/26/11)

* * *

SEARCH AND SEIZURE - Request For Information
- Stop And Frisk - Reaching Towards Waistband Or Pocket
- Scope Of Frisk

The Fourth Department finds lawful an approach and request for identification where defendant and another man were standing, in a street next to an occupied parked vehicle in an area that the officer knew to be subject to violence, in a manner that forced any passing vehicles to drive around them into the opposing traffic lane.

The officer had reasonable suspicion justifying a frisk where, of the four men present, only the person in the driver's seat responded to the request for identification and his response was merely that he was not driving, and, when the officer exited her vehicle and again asked if the men had identification, no one spoke, but defendant and another man, who were wearing long hooded jackets that covered their pants below the pockets, quickly reached toward their pockets or the waistbands of their pants.

The officer was justified in lifting defendant's sweatshirt to check for weapons, and in patting down the outside of defendant's clothing. When the officer felt a hard object she concluded was a handgun, she lawfully reached into defendant's pocket and seized the gun.

However, the Court suppresses a bag of marihuana removed from defendant's waistband. A protective search without a warrant must be strictly limited to what is necessary for the discovery of weapons. Here, the officer observed the bag when she lifted defendant's sweatshirt and thought it was a kit used to test for marihuana. The hearing court's finding that the officer knew the bag contained marihuana is not supported by the evidence.

But, finding the bag of marihuana before discovering the gun neither eliminated nor diminished the safety factors confronting the officer.

People v. Mario Bracy
(4th Dept., 1/31/12)

* * *

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)

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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)

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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)

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SEARCH AND SEIZURE - Arrest - Use Of Handcuffs/Gunpoint Seizure

The First Department upholds the denial of suppression, concluding that defendant was not subjected to a full scale arrest requiring probable cause when the officers displayed their weapons, used force to bring defendant to the ground, and applied handcuffs.

The police entered a confusing, rapidly unfolding situation and were reasonably concerned for their safety. The police had been informed that the fleeing suspects were armed, and defendant and his accomplice did not comply with the officers' initial command that they not move.

People v. Gabriel Tiribio
(1st Dept., 10/18/11)

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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)

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SEARCH AND SEIZURE - Reasonable Suspicion - Bulge In Pocket/Flight

While the officers were patrolling in an unmarked car at night, they observed defendant, who was walking on the street, adjust something in his right pants pocket by cupping his hand over the outside of the pocket and pulling upward. Defendant repeated this movement three or four times. An object in defendant's pocket created a bulge and

looked heavy. The officers pulled their car up next to defendant, identified themselves as the police, and asked if they could talk to him. Defendant complied and approached the car, with both hands in his pants pockets. When one officer asked defendant to take his hands out of his pockets, he obeyed and produced identification. An officer observed the bulge more closely; it appeared to be made by a hard, five- or six-inch-long, oblong-shaped object, which the officer could not identify. The officer who was driving asked defendant where he was headed, and defendant replied that he had come from the subway and was walking towards an apartment building. The officer then told defendant to back away from the car door, and after defendant complied, the officer opened the door and stepped out. Defendant then fled. During the pursuit, defendant threw a gun onto the street.

The First Department orders suppression. The observation of the object in defendant's pocket may have provided an objective, credible reason to request information and ask defendant to remove his hands from his pockets as a precautionary measure, but defendant's flight, accompanied by nothing more than the presence of the object in his pocket that was unidentifiable even at close range, did not raise a reasonable suspicion.

People v. Denzel Crawford
(1st Dept., 11/1/11)

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SEARCH AND SEIZURE - Reasonable Suspicion

The police received a radio run, that was based on information provided by an informant in a face-to-face encounter with a station agent, about a "male black with a brown jacket, brown bag, with a firearm" located in the first car of a J train approaching the Essex Street station in Manhattan. The police, knowing that the man with a gun was in the first car, removed two black males with brown jackets and put them against the wall. An officer walked back into the train with his weapon drawn, and saw defendant trying to push his way into the crowd. The officer and defendant made eye contact, and the officer raised and pointed his weapon at defendant and told him to get off the train. A supervisor grabbed defendant and put him against the wall. Defendant did not obey the instructions, and the officer unclipped a bag hanging from defendant's chest, in which the police found a loaded firearm.

The First Department reverses an order granting suppression. The information furnished to the station agent did not, by itself, create reasonable suspicion. However, the informant was not an anonymous one; he imparted the information in a face-to-face encounter, thereby enhancing his reliability. Defendant's attempt to push his way into a group of people, which was akin to an attempt to flee by a person who met the description given to the police, created reasonable suspicion. The potential danger to both innocent bystanders and the officer in the confined subway car was obvious.

People v. Devon Wallace

(1st Dept., 11/17/11)

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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)

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SEARCH AND SEIZURE - Auto Search - Fear Of Weapon

After stopping a vehicle carrying five passengers for making an illegal turn, the officers saw the three backseat passengers making "a lot" of "furtive" movements, including bending forward and then looking back at the officers. The driver produced a registration, but was unable to produce a driver's license, and, although the officers told the men to stay in the car, a passenger began to get out, and the driver got out and shouted that his license was in the trunk. The trunk popped open, blocking the officer's view of the car's interior. After removing the passengers, including defendant, an officer leaned inside the vehicle, pointed his flashlight inside, and saw a revolver on the floor.

The First Department agrees with the hearing court's finding that the officer made a lawful protective check for weapons.

People v. Timothy Washington
(1st Dept., 1/24/12)

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SEARCH AND SEIZURE - Auto Search - Probable Cause
APPEAL - Preservation

At approximately 1:00 a.m., an officer driving an unmarked vehicle with two partners received a radio report of an armed robbery committed by two suspects, described as a black male and a Hispanic male, who fled in a two-door, silver sedan. Approximately 10 minutes later and 4 blocks away from the scene of the robbery, the officer observed a vehicle matching the description turn into a parking lot. After the vehicle parked, the officer pulled behind it. He observed the front-seat passenger reach down as the seat leaned forward, allowing the back-seat passenger, a Hispanic male later identified as defendant, to exit the vehicle. The officer approached the passenger's side, stopped defendant, and asked the front-seat passenger, a black male, to exit the vehicle. Once the female driver was also removed from the vehicle and the three occupants were secured, the officer reached under the front passenger seat and recovered a loaded pistol.

The Second Department orders suppression. The front-seat passenger's actions in reaching down and allowing defendant to exit were innocuous, and did not provide probable cause to suspect that the vehicle contained a gun. At the suppression hearing, the People did not rely on the theory that the police were entitled to perform a limited protective search based on a reasonable suspicion that a weapon located within the vehicle presented an actual and specific danger to their safety, and the hearing court did not address that theory. Thus, the People may not assert that theory for the first time on appeal.

People v. Stephen Vargas
(2d Dept., 11/1/11)

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SEARCH AND SEIZURE - Auto Stop - Traffic Violation

At approximately 3:45 a.m., a State Trooper observed defendant's vehicle approaching from the opposite direction with its high beams on, which caused the Trooper to squint his eyes. The Trooper turned his vehicle around, followed defendant's vehicle, and then pulled defendant over. The Trooper's partner approached defendant's vehicle, and from outside the vehicle, observed a handgun protruding from beneath the driver's seat.

Following a search of defendant's vehicle, the Troopers recovered the handgun, cocaine, and marihuana. The hearing court denied suppression.

The Second Department reverses (with one judge dissenting), and orders suppression, concluding that the stop was unlawful. A police officer may lawfully stop a vehicle based upon probable cause to believe there has been a Vehicle and Traffic Law violation. To establish a violation of Vehicle and Traffic Law § 375(3), the People must show the use of high beams when an approaching vehicle is within 500 feet, and interference with the vision of the other driver by reason of such high beams. The use of high beams must actually have an effect upon the other driver's operation of his or her vehicle. Here, the State Trooper was made to squint, but the high beams did not hinder or hamper his vision so as to affect the operation of his vehicle.

People v. Keagan Allen
(2d Dept., 11/1/11)

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SEARCH AND SEIZURE - Reasonable Suspicion - Possession Of Gun - Flight

At 2:00 a.m., two officers in plainclothes in an unmarked vehicle heard gunshots. They canvassed the area and, within seconds, came upon a group of men drinking alcohol on basketball courts in an area from which one officer believed the gunshots had come. No one else was in the area. One officer exited the vehicle and immediately identified himself as a police officer and approached the men. The men, except defendant, started to slowly walk off to the left, and defendant immediately ran to the right, toward a building in the housing complex, with his left hand swinging freely and his right hand pinned to his waist. An officer pursued, and, when defendant neared the building, the officer observed the barrel of a black firearm in one of defendant's hands. As the officer exited a sixth floor stairwell, he observed defendant, who no longer had a firearm in his hand, shutting the trash compactor. The officer "heard some clicking as it was going down, as if something metal had been thrown down there." The police recovered a .38 caliber handgun from the basement of building, inside the trash compactor.

The Second Department reverses an order suppressing the gun. Defendant's flight with one hand pinned to his waist, moments after the police heard gunshots in the area, gave rise to reasonable suspicion justifying police pursuit.

People v. Kevin Buie
(2d Dept., 11/1/11)

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SEARCH AND SEIZURE - Common Law Right To Inquire - Probable Cause - Drug Transactions

APPEAL - Waiver Of Right

The First Department holds that defendant's waiver of his right to appeal was invalid because the court conflated the appeal waiver with the rights automatically waived by the guilty plea.

The Court, with one judge dissenting, then upholds the denial of suppression, concluding that the officer had a founded suspicion that criminal activity was afoot where defendant's left hand and another man's right hand were "touching one another" for between ten and thirty seconds on more than one occasion, leading the officer to believe, based on his training and experience, that a drug transaction was taking place in the drug-prone location.

When he observed a plastic bag containing a white substance "peeking out" from defendant's closed right fist, the officer, based on his training and experience, believed that the white substance was a controlled substance and was justified in grabbing defendant's wrist and forcing open his hand, which revealed the plastic bag with a powder substance. At that time the officer had probable cause to arrest.

The dissenting judge asserts that while two men walking along with open hands touching may have been sufficient for a level one inquiry, it was not reasonable to suspect that criminal activity was afoot, and that if the officer actually saw a white substance as he approached, a level two inquiry might have been justified.

People v. Danny Martin
(1st Dept., 10/11/11)

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SEARCH AND SEIZURE - Request For Information
- Common Law Right To Inquire
- Probable Cause - Criminal Trespass

The First Department finds an objective credible reason to ask defendant where he was going where officers conducting a nighttime vertical patrol of a Housing Authority building saw defendant coming up the stairs in a ninth floor stairwell, and defendant, when he saw the police, "paused" and "looked around," displaying "nervous" behavior.

The encounter did not escalate to a common law inquiry when defendant replied that he was returning a jacket to a friend on the 15th floor, and an officer requested permission to accompany defendant and defendant agreed.

The police had probable cause to arrest defendant for criminal trespass after the occupant of the 15th floor apartment refused to open the door, denied that the person defendant was looking for was there, and denied knowing defendant, and the officers then asked defendant whether he lived in the building, and defendant replied that he lived on the

fourth floor, but did not know the apartment number. Even if the apartment occupant's response could be viewed as implying that the person identified by defendant did live in the apartment, it tended to establish that no one had given defendant permission to enter. Simply having a friend residing in a building barred to trespassers does not entitle a nonresident to invite himself or herself in.

People v. Salvador Lozado
(1st Dept., 12/27/11)

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

The First Department concludes that where the police had a warrant to search apartment 12A of a residential building, and, as the police came out of the elevators on the 12th floor, they saw defendant holding keys in his hand, which suggested that he was connected to one to of the eight apartments on that floor, the police had an objective, credible reason to ask defendant where he was coming from. While the large number of officers may have created a crowded condition, it was not so intimidating as to transform the encounter into a common-law inquiry.

When defendant responded that he was coming from apartment 12A, that answer, along with defendant's possession of keys, created reasonable suspicion that he was involved in the criminal activity that was the subject of the warrant. The fact that the officers were about to execute a warrant provided additional justification for detaining defendant for their safety and to ensure that he did not interfere with the search. The level of suspicion increased when defendant yelled that he had "changed [his] mind," and that he had come from apartment 12C, not 12A.

Thus, defendant's incriminating statements, made spontaneously when a woman later determined to be defendant's sister opened the door to Apartment 12C, were made while he was beingh lawfully detained.

People v. Donsha Jackson
(1st Dept., 10/4/11)

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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)

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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)

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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)

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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 - Auto Stop - Traffic Violations

The Court, in a decision finding reasonable suspicion justifying a vehicle stop where defendant was observed traveling 50 mph in a 30 mph speed zone, discusses in a footnote whether the applicable standard is reasonable suspicion or probable cause:

In light of Whren v United States (571 U.S. 806 [1996]), which rejected the argument that pretext stops were unlawful, there remains the question whether New York requires probable cause or reasonable suspicion to justify an automobile stop for a traffic

violation. Prior to 2001, the standard for stopping an automobile was reasonable suspicion of a violation of the VTL, pursuant to People v Ingle, 36 NY2d 413 [1975]). In 2001, the Court of Appeals in People v Robinson (97 NY2d 341, 346 [2001]), adopted Whren, and held that an automobile stop is lawful when an officer has probable cause to believe that an individual has violated the VTL. In People v Hawkins (45 AD3d 989 [3rd Dept. 2007]), the Appellate Court held that in pretext cases, the standard for stopping a vehicle has increased from reasonable suspicion to probable cause. In People v Prado (2 Misc 2d 1002(A) [Sup. Ct. NY Co. 2004]), the court held that the standard for non-pretext stop cases is still reasonable suspicion. As a practical matter, the distinction between probable cause and reasonable suspicion may not be significant in the context of an automobile stop for a traffic infraction (see Kamins, New York Search and Seizure § 5.02 [1][a], at 5-4 [2008]). In most cases, once a police officer observes a traffic infraction, that will be sufficient to constitute probable cause (Id. at 5-4).

People v. Mercedes Cepeda
(Sup. Ct., Kings Co., 9/8/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51905.htm

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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)

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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)

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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)

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SEARCH AND SEIZURE - Reasonable Suspicion - Description Of Suspect/Flight

The officer, in plainclothes and driving an unmarked car, responded to a call regarding a robbery committed by a “male black with a black jacket," and observed defendant, “a male black with a black jacket and a red and white, like a high school jacket, walking eastbound” “at a fairly fast pace.” When the officer slowed down, defendant looked at the vehicle, and began to run. The officer pursued, identifying himself as a police officer during the pursuit, and ultimately detained defendant. Three robbery victims appeared at the scene, identified defendant as the robber, and defendant was arrested. Physical evidence was recovered from defendant and he made a statement admitting his guilt.

The Second Department suppresses the physical evidence, identification testimony, and defendant's statement, finding no reasonable suspicion justifying the police pursuit and detention of defendant. The People failed to establish the distance between defendant’s

location when he was first observed and the location of the robbery, and also failed to establish that defendant knew the officer was a police officer at the time he started to flee. Defendant matched an extremely vague description, and, although there was reference to "a black jacket," defendant was wearing a red and white jacket over a black jacket. The radio call did not indicate the direction the suspect was traveling, and the testimony did not establish exactly when the robbery occurred.

People v. Leonard Beckett
(2d Dept., 10/18/11)

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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)

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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)

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SEARCH AND SEIZURE - Request For Information
- Probable Cause
- Strip Search
EVIDENCE - Preservation By Prosecution

The Fourth Department upholds the denial of suppression, concluding that the officers had an articulable basis for their initial encounter with respondent after they observed respondent meet with two other individuals in a "chronic open air drug sale location" and immediately run into a store upon seeing the officers approaching.

After the officers observed a surveillance video that showed respondent in the store shoving a "clear plastic sandwich bag" down "the rear of his pants in between his buttocks," and then respondent, when the officers asked him what he shoved down his pants, told them that he did not know what they were talking about, the officers, who had training and experience regarding the common methods of drug packaging, had probable cause to search respondent.

After respondent refused the officers' request to remove the plastic bag, the officers pulled back respondent's pants and, without touching respondent or invading his anal cavity, retrieved a plastic bag protruding from his buttocks. Thus, the officers conducted a strip search rather than a body cavity search for which a warrant would have been required in the absence of exigent circumstances.

Respondent's claim that the testimony of an officer regarding the surveillance video should have been precluded on the ground that petitioner was obligated to preserve the video is unpreserved, and without merit in any event because neither the police nor petitioner ever had possession or control of the video and thus petitioner had no obligation to preserve it.

Matter of Demetrius B.
(4th Dept., 11/10/11)

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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)

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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)

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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)

* * *

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 - Reasonable Suspicion

At approximately 7:00 p.m. in a high-crime area, defendant was walking near another individual who was slowly riding his bicycle unlawfully on the sidewalk. As the police pulled over their vehicle near the two individuals and began to approach the bicyclist, defendant's "right arm tensed up towards his body beneath his coat or at his coat line area around the vicinity of his waistband," and defendant then immediately ran away. As the officers pursued defendant, he discarded a gun and ammunition.

The Second Department orders suppression, concluding that there was no reasonable suspicion justifying the police pursuit.

People v. Raheem Carmichael
(2d Dept., 2/7/12)

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SEARCH AND SEIZURE - Reasonable Suspicion

At approximately 3:10 a.m., the police received a radio call that a male had been shot at a specific location in Brooklyn, and arrived at the scene less than one minute later. Many people were in the area, but an officer's attention was drawn to defendant, who was walking quickly towards the officer with his right hand on his waistband, his head "on a swivel," and his eyes "darting" around, appearing nervous. Upon making eye contact with the officer, who was wearing an "NYPD" jacket with a shield insignia, defendant took a step backwards. The officer put his hands on defendant's chest and waistband and felt what he believed to be the handle of a firearm. The officer placed defendant against a building and recovered a loaded firearm.

The Second Department reverses an order granting suppression. There was reasonable suspicion justifying the limited intrusion which produced the loaded firearm.

People v. Martese Davenport
(2d Dept., 2/7/12)

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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)

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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)

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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)

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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)

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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)

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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)

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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)

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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)

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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)

Identification

IDENTIFICATION - Non-Police-Arranged

In a case in which an eyewitness identified defendant, who was standing next to a police officer, when another officer asked her to describe the man she had seen trying to break into parked cars, the Supreme Court holds that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification that was not arranged by law enforcement officers.

"When no improper law enforcement activity is involved ... it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt."

The potential unreliability of a certain type of evidence does not alone render its introduction at trial fundamentally unfair. Trial judges may exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury.

Justice Sotomayor dissents, noting that this Court's "due process concern ... arises not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification. By rendering protection contingent on improper arrangement of the suggestive circumstances, the Court effectively grafts a *mens rea* inquiry onto our rule." Justice Sotomayor does not reach the question of whether due process is triggered in cases involving no police action whatsoever.

Perry v. New Hampshire
2012 WL 75048 (U.S. Sup. Ct., 1/11/12)

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IDENTIFICATION - Not Arranged By Law Enforcement

The Nebraska Supreme Court, citing the holding in *Perry v. New Hampshire* (2012 WL 75048) that suppression is appropriate only when unnecessarily suggestive circumstances were arranged by law enforcement, denies suppression where a woman who had

accompanied an eyewitness to a meeting with the prosecutor unexpectedly exclaimed that she recognized one of the photographs as the man she had seen the day of the shooting.

Because the prosecutor was unaware that the woman was able to identify one of the shooters, it is unclear what the prosecutor could have done to prevent the contamination, if any, of the witnesses' identifications of defendant.

State v. Nolan
2012 WL 163943 (Neb., 1/20/12)

* * *

IDENTIFICATION - Bolstering

A 4-judge Court of Appeals majority finds no error in the admission of the complainant's testimony regarding his showup identification of a co-defendant who was not on trial. The complainant's accuracy in identifying the co-defendant was relevant to whether the conditions at the scene were conducive to observing the other attacker and accurately identifying him at trial. To the extent that Appellate Division decisions stand for the proposition that the admission of evidence of a witness's identification of a co-defendant not on trial is improper, they are in error. This is not a case involving well-established restrictions on third-party testimony concerning a pretrial identification, known as the Trowbridge rule.

The dissenting judges assert that in this one-witness identification case in which there are issues regarding the complainant's opportunity to observe the perpetrators, the probative value of the identification was substantially outweighed by the unfair prejudice to defendant.

People v. Daniel Thomas
(Ct. App., 11/21/11)

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IDENTIFICATION – Suggestiveness
EXPERTS - Identification

Relying on scientific evidence suggesting that memory is malleable and causes eyewitness misidentifications, the New Jersey Supreme Court sets out new guidelines for the admissibility of identification evidence. The Court summarizes its decision as follows:

"We find that the scientific evidence considered at the remand hearing is reliable. That evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised. Study after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of

actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country."

"We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications. Those factors include system variables like lineup procedures, which are within the control of the criminal justice system, and estimator variables like lighting conditions or the presence of a weapon, over which the legal system has no control. To its credit, the Attorney General's Office incorporated scientific research on system variables into the guidelines it issued in 2001 to improve eyewitness identification procedures. We now review both sets of variables in detail to evaluate the current Manson/Madison test."

"In the end, we conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate."

"Two principal steps are needed to remedy those concerns. First, when defendants can show some evidence of suggestiveness, all relevant system and estimator variables should be explored at pretrial hearings. A trial court can end the hearing at any time, however, if the court concludes from the testimony that defendant's threshold allegation of suggestiveness is groundless. Otherwise, the trial judge should weigh both sets of variables to decide if the evidence is admissible."

"Up until now, courts have only considered estimator variables if there was a finding of impermissibly suggestive police conduct. In adopting this broader approach, we decline to order pretrial hearings in every case, as opposed to cases in which there is some evidence of suggestiveness. We also reject a bright-line rule that would require suppression of reliable evidence any time a law enforcement officer missteps."

"Second, the court system should develop enhanced jury charges on eyewitness identification for trial judges to use. We anticipate that identification evidence will continue to be admitted in the vast majority of cases. To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability. To that end, we have asked the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current model charge on eyewitness identification and address various system and estimator variables. With the use of more focused jury charges on those issues, there will be less need to call expert witnesses at trial. Trial courts will still have discretion to admit expert testimony when warranted."

"The factors that both judges and juries will consider are not etched in stone. We expect that the scientific research underlying them will continue to evolve, as it has in the more than thirty years since Manson. For the same reason, police departments are not prevented from improving their practices as we learn more about variables that affect memory. New approaches, though, must be based on reliable scientific evidence that experts generally accept.

The changes outlined in this decision are significant because eyewitness identifications bear directly on guilt or innocence. At stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials. Ultimately, we believe that the

framework described below will both protect the rights of defendants, by minimizing the risk of misidentification, and enable the State to introduce vital evidence."

State v. Larry Henderson
2011 WL 3715028 (N.J., 8/24/11)

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CONFESSIONS - Interrogation
IDENTIFICATION - Lineups - Suggestiveness

The Court suppresses defendant's statements where, after he invoked his right to remain silent, a detective displayed to defendant incriminating photographs taken from surveillance videos of the bank robberies. This was the functional equivalent of interrogation.

The Court also suppresses a lineup identification as unduly suggestive where the fillers ranged in age from 25 to 36, defendant was 48 and looked markedly older than any of the fillers, and the suspect had been described as about 50 years of age. However, the Court finds an independent source for an in-court identification.

People v. Edward Pride
(Sup. Ct., Kings Co., 1/27/12)
http://courts.state.ny.us/Reporter/pdfs/2011/2011_33575.pdf

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IDENTIFICATION - Lineups - Double Blind/Sequential
DISCOVERY - Court-Ordered Lineup

The Court grants the People’s motion for an order compelling defendant to appear in a corporeal lineup, rejecting defendant’s contention that the Court has no jurisdiction to order a lineup in the absence of a filed accusatory instrument. Moreover, although, in *Matter of Abe A.*, the Court of Appeals held, in the context of a forced blood draw that “the method by which the authorized intrusion is to be accomplished must be safe, reliable and impose no more physical discomfort than is reasonably necessary,” this requirement does not include the concept of reliable identification testimony.

However, the Court does have the authority to establish conditions for a lineup that are designed to promote fairness and accuracy and enhance the chances that reliable, relevant, and material evidence will be gathered. The Court orders as follows: (1) The lineup must be “double-blind,” meaning that neither the administrators of the lineup nor the witness shall know or be told before, during or after the lineup that defendant is the suspect; (2) The lineup must be “sequential,” meaning that each participant must be presented to the witness individually and that the witness must be allowed as much time as she requests to view each individual; (3) Defendant’s lawyer and her investigator must

be permitted to attend and observe the lineup, and be present during any pre-lineup instructions to the witness and present to observe and listen to the witness during the conduct of the lineup itself, including her words, if any, with respect to any identification or non-identification; and (4) The lineup procedure must be recorded - electronically, photographically or otherwise - in a fashion that will enable the Court to review the procedure for fairness should a hearing be later requested and ordered.

People v. Raymond Flowers
(County Ct., Monroe Co., 1/20/12)
http://courts.state.ny.us/Reporter/3dseries/2012/2012_22016.htm

* * *

EXPERTS - Identification

In a case which turns on the accuracy of eyewitnesses' recognition of an assailant's partially concealed face, the Court of Appeals finds reversible error in the exclusion of expert testimony on eyewitness identification.

According to *People v. LeGrand* (8 N.Y.3d 449), a trial court must engage in a two-stage inquiry. The first stage is deciding whether the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime. If that is the case, the court proceeds to the second stage and determines whether the proposed testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror. If sufficient evidence corroborates an eyewitness's identification, there is no obligation to proceed to the second stage.

Here, at the time when the court denied defendant's *in limine* motion, the facts satisfied the first stage standard. The trial court abused its discretion when it refused to allow testimony on studies showing that eyewitness confidence is a poor predictor of identification accuracy and studies regarding confidence malleability, and testimony on the effects of post-event information on eyewitness memory. Also, because the People did not dispute that the victim is a non-Hispanic Caucasian, the proposed testimony on inaccuracy of identifications of Hispanic people by non-Hispanic Caucasians appears relevant and is beyond the ken of the average juror. The court also should have given more consideration to whether proposed testimony concerning exposure time, lineup fairness, the forgetting curve, and simultaneous versus sequential lineups was relevant and beyond the ken of the average juror, and, if necessary, should have held a *Frye* hearing. By contrast, testimony concerning weapon focus, the effects of lineup instructions, wording of questions, and unconscious transference would have been irrelevant. The victim was not aware that her assailant had a weapon, and the record contains no evidence of improper lineup instructions, suggestive wording, or the presence of defendant's image in photographs the victim saw prior to identifying him in the photographic array she viewed.

The trial court also abused its discretion when, after the defense had rested, the court denied defendant's renewed request to call an expert witness on eyewitness identification. By this time, the People had introduced evidence of two other witness's identifications. However, one of the witnesses saw only part of the perpetrator's face and identified defendant with only 80% confidence, and his identification of defendant from photographs of a lineup may have been tainted by his memory of the photograph of defendant he had seen in a Spanish-language newspaper. The other witness's identification may have been influenced by his memory of the police artist's sketch of the assailant, which calls into question the independence of this evidence from the victim's own identification.

People v. Edwin Santiago
(Ct. App., 10/20/11)

* * *

VERDICT - Repugnancy
EXPERTS - Identification
APPEAL - Scope Of Review

A 4-judge Court of Appeals majority holds that, given the jury instructions, and viewed from a theoretical perspective without regard to the evidence presented, the jury verdicts convicting defendants of assault, but acquitting them of criminal possession of a weapon, are not legally repugnant. The assault counts do not include possession as an element. Those counts required that defendants injure the victims "by means of" the weapons, and that result could have been accomplished without possessing those instruments. For example, if an assailant throws someone in front of a moving bus or subway train, he can commit assault without "possessing" the bus or subway. The instructions may have caused the jury to believe that the intent to use the weapon unlawfully must have been formed at the time the weapons were initially acquired or possessed, and fail to recognize that the crimes could have occurred simultaneously and that intent to use the weapons unlawfully could reasonably be inferred from their criminal use. If the juries had been specifically informed that defendants' intent at the moment of the attacks was relevant to the weapon possession counts, the Court might agree that a split verdict would be factually irreconcilable.

The Court rejects defendant Muhammad's contention that the trial court abused its discretion when it excluded expert testimony on eyewitness identifications where the victim was the only witness who implicated defendant and the identification was not corroborated. The victim testified that he knew defendant for over a decade prior to the shooting, spoke to him shortly before the altercation and recognized defendant at the time of the attack. This prior relationship took any issue regarding human memory formation and recollection out of the case. An average juror would have been capable of assessing whether a person in the victim's situation had an adequate opportunity to observe someone he had known for so long.

Noting that the Appellate Division’s rationale for affirming the denial of suppression - i.e., exigent circumstances - was improper because the suppression court did not deny the motion on that ground, the Court remits the matter to the Appellate Division for consideration of the suppression issues that were not determined.

People v. Shahid Muhammad, People v. Gregory Hill
(Ct. App., 10/20/11)

* * *

IDENTIFICATION - Photos - Suggestiveness

The Supreme Judicial Court of Massachusetts declines defendant's invitation to revisit its conclusion in a previous case that it is too soon to conclude that sequential display is so plainly superior that any identification resulting from simultaneous display is unnecessarily suggestive and must be suppressed.

However, because an all-suspect photo array significantly and needlessly increases the possibility of a false positive identification, the police must include five non-suspect fillers for every suspect photo in an array.

Commonwealth v. Walker
953 N.E.2d 195 (Mass., 9/21/11)

* * *

IDENTIFICATION - Lineups - Suggestiveness

The First Department suppresses a lineup identification where the witnesses to the robberies described the driver of the getaway car, respectively, as "a huge, big, fat, black guy," "a real big, real huge black guy," and "very heavy-set [and] large,” and defendant, who weighed 400 pounds, was the only participant who fits these descriptions. Although the fillers were large men, and the lineup participants were seated, which can sometimes satisfactorily minimize differences in weight, there was a marked difference between defendant and the fillers.

The Court does not “suggest that the police are obligated to find grossly overweight fillers when dealing with the situation presented here,” and “recognize[s] the practical difficulties that would be involved in doing so. Instead, this situation would call for the use of some kind of covering to conceal the weight difference….”

People v. Eric Kenley
(1st Dept., 8/25/11)

* * *

IDENTIFICATION - Lineups - Suggestiveness
RIGHT TO COUNSEL - Effective Assistance
UNCHARGED CRIMES EVIDENCE

The robbery complainant viewed a lineup at which all participants wore baseball caps so that defendant's cornrow hairstyle would not distinguish him from the fillers. The participants were also seated to conceal differences in height. Most of the participants wore dark or blue sweatshirts, although one of the fillers wore a white T-shirt. Defendant was wearing blue shorts and a red T-shirt which had been turned inside-out to hide a distinguishing design. The court denied suppression. At trial, the complainant testified that he had mentioned to the detective that defendant was wearing a red T-shirt during the robbery.

The Second Department rejects defendant's claim that he was deprived of the effective assistance of counsel by defense counsel's decision not to move to re-open the Wade hearing upon hearing the testimony about the red shirt. The lineup was not unduly suggestive. The shirt was not so distinctive as to draw attention to defendant. The four fillers otherwise resembled defendant. The witness testified that he focused on defendant's face, not his clothes, and the police took the precaution of making defendant turn his shirt inside-out to hide a distinguishing design. The complainant had ample time in the well-lit subway car to observe defendant at close range, and he stated that he was "150 percent certain" of his identification.

The Court finds error, albeit harmless, in the admission of testimony that a small razor blade was found in defendant's pocket when he was arrested. The evidence was not probative of whether defendant acted in concert.

People v. Kaywon Mack
(2d Dept., 1/17/12)

*   *   *

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 - Notice Of Intent To Offer - Amended Accusatory Instrument

The Court grants defendant’s motion to preclude identification evidence, concluding that the People do not get a new 15-day period within which to file timely notice after a defendant is arraigned on an amended information.

The Court distinguishes this case from *People v. Littlejohn* (184 A.D.2d 790), in which the Second Department held that service of notice within 15 days after the defendant was arraigned on a superseding indictment was sufficient. An information is considered "superseding" when it charges a different offense or alleges facts different from the original charges. Here, the People have changed the theory of prosecution from reckless assault to intentional assault, but have not charged a different offense or different facts.

People v. Kurtis Porter
(City Ct. of Geneva, 5/16/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21352.htm

* * *

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)

* * *

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)

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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)

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IDENTIFICATION - Independent Source
- Showups - Suggestiveness
- Non-Police-Influenced
ORDER OF PROOF - Re-Opening Suppression Hearing
EXPERTS - Identification Issues

The Court granted defendant's motion to re-open the *Wade* hearing and take testimony from the three eyewitnesses where newly discovered notes made by an ADA suggest that the officer's testimony may have been incomplete and raise questions as to what, if any, instruction a witness was given by the police not to communicate his own identification to his wife and daughter, and whether, if so instructed, he failed to follow those instructions and unduly influenced the identifications of defendant by his wife and daughter. The Court based its suppression decision on its finding that the male witness made no suggestive statements to his wife or daughter.

Although the People contend that issues involving contact among the witnesses do not implicate due process and are beyond the scope of a *Wade* hearing, the Court, while agreeing that a hearing need not include inquiry into whether the conduct of a witness was unduly suggestive in the absence of police involvement, notes that the re-opened hearing could address whether the officers took steps to avoid the risks inherent in deputizing a civilian to assist in a show-up procedure, and whether any instructions were followed by the witness.

At the re-opened hearing, the People should be prepared for the possibility of an independent source hearing. The Court of Appeals has suggested that the People are generally well-advised to come forward with independent source evidence at a *Wade* hearing so that the court may, where appropriate, rule in the alternative.

The Court rejects defendant's contention that, at any independent source hearing, the Court should consider "estimator variables" over which the state has no control. In *State v. Henderson* (208 N.J. 208), the New Jersey Supreme Court specified numerous estimator variables courts must consider when evaluating the reliability of eyewitness identification evidence, but the court relied on the state constitution, and the New York Court of Appeals has not adopted the New Jersey approach. There appears to be no legal impediment to this Court considering both systemic and estimator variables, but defendant has failed to specify which estimator variables the Court should evaluate. Defendant will be permitted to renew his application at the hearing upon a showing of specific estimator variables which are relevant to this case.

The Court also denies defendant's request for permission to call an expert on eyewitness identification at an independent source hearing. Defendant has failed to identify an expert or the nature of the testimony, and to proffer legal authority supporting his request. In any event, the Court, employing the standards governing the admission of expert testimony at trial, notes that defendant was identified within 30 minutes of the incident, at the scene of the crime, upon his approach of the alleged victim, and was identified by three eyewitnesses, one of whom pointed defendant out to police without being prompted. Thus, defendant has not shown that the case turns on the identifications of the two eyewitnesses in question. Also, as noted before, defendant also has failed to specify relevant factors or estimator variables or what the nature of the expert testimony would be, and the need for expert testimony is greatly diminished when a court is the fact-finder. Defendant may renew the application at trial.

People v. Manuel Chuyn
(Sup. Ct., N.Y. Co., 12/13/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_52228.htm

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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)

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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)

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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)

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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)

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)

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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)

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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)

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RIGHT TO COUNSEL - Effective Assistance - Concession Of Guilt
ASSAULT - Serious Physical Injury

In a 3-2 decision, the First Department rejects defendant's claim that he was denied the effective assistance of counsel when his attorney, during summation, failed to challenge the sufficiency of evidence of first degree assault. While counsel might have made a colorable argument, "the mere ability to make such an argument is not the standard on an ineffective assistance claim." Counsel did mount a strong and ultimately successful argument that defendant was not guilty of attempted murder, and, in doing so, argued that the wounds were superficial and provided the jury with a basis for finding defendant not guilty of the assault charges as well. Although counsel did not explicitly argue that the jury should find defendant not guilty on the assault charges, his comments were not a concession of guilt.

The dissenting judges note that the victim's carotid artery was not severed; that the slash wounds, although shocking in appearance immediately after the attack, appeared to have healed well; and that although a wound to the forearm cut a tendon, the medical expert testified that such an injury could have resulted in nerve damage, and the victim testified that a small section of his arm was sometimes numb, the numbness appears to have been intermittent, and, in any event, the victim did not testify that he could not use the arm when it was numb. Counsel should have at least requested submission of second-degree assault as a lesser included offense.

People v. Akieme Nesbitt
(1st Dept., 11/3/11)

* * *

RIGHT TO COUNSEL - Effective Assistance
CONFESSIONS - Voluntariness
- Waiver Of Rights

The First Department, in a 3-2 decision, concludes that defendant was denied the effective assistance of counsel where the prosecution's case turned almost entirely on whether defendant's statements, extracted after hours of interrogation, were reliable and voluntary, but defense counsel, who argued that defendant's will had been overcome by the police due to defendant's "mental history," made no attempt to obtain relevant psychiatric and educational records or consult with an expert psychiatrist or psychologist.

The records supported a claim that defendant lacked the mental capacity to voluntarily confess. Defendant, at the age of 15, was admitted to and spent six months in a psychiatric hospital for "express[ing] suicidal ideation at school." His presenting problems included depression, a "history of auditory and visual hallucinations," and "multiple suicidal attempts." His psychiatrist reported that "[defendant] often hears a voice which he thinks is the voice of the devil … which tells him to kill himself," that there was "a strong streak of paranoia running through [defendant's] ideation," and that defendant felt "people were against him at school." Educational records showed that defendant had been diagnosed as learning disabled and placed in special education classes, and that his IQ of 78 placed him in the "borderline" range of mental retardation. His psychiatrist described his intelligence as "normal at best but probably dull normal." The psychiatrist retained by counsel in support of defendant's CPL § 440 motion opined that defendant's psychotic symptoms, and his learning disabilities and probable mental retardation, could have substantially impaired his ability to process, interpret and understand his Miranda rights and rendered him vulnerable to suggestion and coercion.

Although counsel believed he would have to turn over records to the prosecution, CPL § 240.30 provides that such records need be disclosed only "if the defendant intends to introduce such report or document at trial, or if the defendant has filed a notice of intent to proffer psychiatric evidence."

The dissenting judges cite the constraints placed on counsel by defendant, the potentially adverse consequences that might have resulted from pursuing a formal psychiatric defense, and the fact that the jury heard testimony concerning defendant's mental deficiencies, limited educational background, and psychiatric hospitalization.

People v. George Oliveras
(1st Dept., 12/27/11)

* * *

RIGHT TO COUNSEL - Effective Assistance
ORDER OF PROOF
SELF INCRIMINATION

The Maryland Court of Appeals holds that the trial court erred when it required that defendant testify prior to the testimony of a defense expert or forfeit the right to testify. This ruling deprived defendant of counsel's guidance in planning the defense case; the defendant and defense counsel are entitled to determine when the defendant will testify.

The ruling also violated defendant's right to remain silent because it pressured him to take the stand. The trial court's broad discretion in scheduling trials, prescribing the order of proof, and preventing delays, must bow to constitutional limitations.

However, the error was harmless.

Stoddard v. State
2011 WL 5248225 (Md., 11/3/11)

* * *

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)

Speedy Trial/Adjournments

SPEEDY TRIAL - Waiver

The Court of Appeals dismisses the indictment on statutory speedy trial grounds, rejecting the People's argument that defendant waived his rights under CPL § 30.30 by participating in plea negotiations for several months. Mere silence is not a waiver. Prosecutors would be well advised to obtain unambiguous written waivers in situations like these.

People v. Robert Dickinson
(Ct. App., 12/15/11)

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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)

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SPEEDY TRIAL - Special Circumstances

The Second Department rejects respondent's statutory speedy trial claim, concluding that special circumstances warranted successive adjournments based on the absence of the co-respondent's counsel due to illness and the preference for a single fact-finding hearing in cases involving multiple respondents.

Matter of Christiana R. H.
(2d Dept., 12/20/11)

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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)

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SPEEDY TRIAL - Exceptional Circumstances

Upon a hearing to determine whether the medical condition of certain law enforcement witnesses presents "exceptional circumstances" for statutory speedy trial purposes, the Court concludes that it does not.

The reports submitted by the People show each witness being taken to a hospital when injured, but no personal medical records have been submitted and the prosecutor has failed to say whether privacy rules such as HIPAA mitigate the failure to supply medical documents. There has been no testimony or evidence submitted regarding the actual condition of the witnesses.

People v. Kiason Shaw
(Sup. Ct., Bronx Co., 10/7/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51799.htm

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ADJOURNMENTS
APPEAL - Preservation
HEARSAY - State Of Mind - Present Intention
IMPEACHMENT - Motive To Fabricate
ROBBERY - Circumstantial Evidence

In this murder prosecution, two witnesses, who had significant criminal records, described an incident in which three attackers argued with the victim in the street, and then began to hit him with their fists, a stick or hammer, and a gun defendant Wright removed from the victim's pants. The victim fled, but the three attackers caught up and resumed the beating, defendant Becoats now using a broken bottle. The fracas moved to a nearby field, where the witnesses lost sight of it. Later, the attackers emerged from the field, with defendant Wright carrying a pair of sneakers. There was forensic evidence consistent with the witnesses' accounts, but no evidence of the attackers' identity except the eyewitness testimony. A jury convicted defendants of depraved indifference murder and first degree robbery, and the Appellate Division reduced the murder convictions to manslaughter in the second degree.

The Court of Appeals rejects, as unpreserved, defendants' duplicitous count claim, refusing to apply the exception to the preservation requirement applicable to "mode of proceedings" errors. Charging more than one crime in one count of an indictment is not a fundamental error of that type. If an unpreserved claim of duplicitousness could be raised on appeal, defendants who do not care how many counts they face, or prefer to face one count (and one conviction), would be able to obtain a new trial because of an error they consciously decided not to challenge because they thought it insignificant, or welcomed it.

A 5-judge majority finds no error in the denial of Becoats' request for an adjournment, on the eve of trial, to obtain the testimony of a witness in federal custody. Even if defense counsel is excused for his inaction while he was involved in another trial, there were almost two weeks during which counsel could have sought, and perhaps obtained, an order requiring the testimony. Instead, counsel complained about the People's conduct and asked for an adjournment. "It is unclear from the record whether counsel really wanted [the] testimony, or simply wanted delay, or was hoping to create an issue for appeal."

The Court also finds legally sufficient evidence that defendants forcibly stole the sneakers. "When three men beat a fourth man unconscious in a field, and emerge from the field as a group with one of them carrying a pair of sneakers, the inference that the sneakers came from the beating victim is a strong one."

However, the Court reverses defendant Wright's conviction, concluding that the trial court erred in excluding evidence that one of the witnesses told the police that she had

overheard a conversation in which an attack on the victim was being planned, and that Becoats and the other prosecution witness were present but Wright was not. Wright argues, perhaps correctly, that a statement by the witness that he was going to kill the victim was within the "statement of present intention" exception to the hearsay rule. But that does not matter since Wright was not offering any declarations for their truth. Wright wanted only to prove that he was not part of this meeting, and that the witness was. The Court rejects the People's contention that the relevance of the evidence was outweighed by its possible prejudice to Becoats. In a case wholly dependent on the testimony of two eyewitnesses, both of whom had criminal records that might have made the jury doubt their word, proof that one of the two had actually participated in planning the crime might have been decisive. Moreover, potential prejudice to Becoats would not justify exclusion of important exculpatory evidence, and carefully limiting the scope of the questions and answers might have protected Wright without unfairly prejudicing Becoats.

People v. Corey Becoats, People v. Jason Wright
(Ct. App., 10/20/11)

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SPEEDY TRIAL - Constitutional Due Process

The Third Department holds that the 8-month pre-indictment delay did not deprive defendant of his due process right to a speedy prosecution. For part of that time the People waited for results from defendant's blood alcohol test and for the completed accident reconstruction report. State Troopers took measurements and photographs on the night of the accident, but also returned to the scene later, which they testified was customary, and the report then had to go through three levels of review before it was considered final.

People v. Nicholas Swan
(3d Dept., 12/8/11)

Statute of Limitations

STATUTE OF LIMITATIONS - Tolling

Criminal Procedure Law § 30.10(3)(f) provides that the statute of limitations in a prosecution of a sex offense (other than those that are not subject to any limitations period) committed against a minor does not begin to run "until the child has reached the age of eighteen or the offense is reported to a law enforcement agency or statewide central register of child abuse and maltreatment, whichever occurs earlier."

The Court of Appeals holds that the complainant's revelation to the police that she became pregnant as a result of being raped by a classmate at school did not qualify as a "report" under the statute and cause the limitations period to start running with respect to

forcible intercourse and sexual molestation accusations made later against defendant, her step-grandfather.

The phrase "the offense is reported" means a communication that, at a minimum, describes the offender's criminal conduct and the particular harm that was inflicted on the victim. The statute was based on a societal acknowledgment that victims of childhood sexual abuse who do not (or, indeed, cannot) disclose such acts while they are minors should be given a reasonable period of time after becoming adults to divulge the abuse they suffered. Thus, the reporting requirement should be interpreted to cover only the specific criminal acts that are disclosed in a communication.

The Court also concludes that no tolling occurred under CPL § 30.10(4)(a)(ii), which excludes any periods of time following the commission of an offense if "the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence." Police knowledge that a crime was committed is a necessary prerequisite to the statute's application. Consequently, the limitations periods that apply to the non-sexual misdemeanors and petty offenses began to run when those crimes purportedly happened, and the Appellate Division properly concluded that those charges must be dismissed.

Judge Read dissents with respect to the ruling under § 30.10(3)(f), asserting that the statutory exception was intended to foreclose future prosecutions of anyone where the police, having received a specific allegation of sexual abuse of a minor, elect, for whatever reason, not to pursue the matter.

People v. Santos Quinto
(Ct. App., 2/9/12)

Right To Counsel

RIGHT TO COUNSEL - Choice Of Counsel

A 3-judge First Department majority holds that the trial court's discharge of The Legal Aid Society as defense counsel, without consulting defendant, when Legal Aid requested an adjournment to allow a new attorney sufficient time to prepare for trial in this complicated first degree robbery prosecution, was an abuse of discretion and violated defendant's right to counsel.

Defendant had a longstanding attorney-client relationship with Legal Aid. A Legal Aid attorney had represented defendant during the entire five-month period between arraignment and the time the court relieved Legal Aid and assigned new counsel. During that time, the attorney had filed necessary motions and engaged in protracted negotiations with the People for a plea resolution. Legal Aid had relied on the services of many of its employees, including supervisors, investigators and social workers, in preparing for the defense. During that five-month period, multiple assistant district attorneys appeared and requested adjournments, resulting in numerous delays. The court, however, treated the

People much differently when they requested time for reassigned ADA's. The court made disparaging remarks about The Legal Aid Society, and wrongly castigated the Legal Aid attorney for the delays. There was no reason the court could not have accommodated the Society's single request for an adjournment, particularly since the People would not be ready to proceed during that time because of the anticipated reassignment in the DA's office due to the ADA's pre-planned paternity leave.

Courts should be hesitant about micromanaging the institutional providers of legal services (the trial court had criticized The Legal Aid Society's procedures for the substitution of lawyers as not "professional or responsible," and stated that Legal Aid had an "enormous" turnover rate and suggested that Legal Aid should assign two attorneys to every case), and this Court expects trial courts to treat institutional indigent defense providers with the same courtesy and respect they show to the district attorney or non-institutional attorneys. And, in a case like this, "a defendant should not be treated as a mere spectator."

Harmless error analysis is inapplicable to a violation of a defendant's right to counsel of his own choosing, and, since the error implicated the integrity of the process, it was not waived by defendant's guilty plea. In addition, a Legal Aid supervisor's plea in desperation that Legal Aid be relieved if an adjournment was not granted is not dispositive. Counsel "was placed between the proverbial 'rock and a hard place.' Inasmuch as it could not be ready in two weeks in a complex case involving a life sentence, the Legal Aid supervisor had no choice but to ask to be relieved when the court denied his request for a reasonable adjournment, which effectively resulted in removal."

People v. Anthony Griffin
(1st Dept., 12/15/11)

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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 - Consultation During Trial
RIGHT TO A FAIR TRIAL - Physical Restraints During Trial
UNCHARGED CRIMES EVIDENCE
EVIDENCE - Third Party Culpability

The Court of Appeals finds no violation of defendant's right to counsel or right to a fair trial where court officers stationed themselves directly behind defendant with their toes placed on the back of his chair during the course of his trial. Defendant did not meet his burden to show that the positioning of the court officers impeded his ability to converse privately with his attorney. The trial court found that the relief sought by defense counsel - the court officers would sit in their normal places two inches farther away from defendant - would not have made communications any more confidential. Defendant had been charged with a disciplinary infraction for allegedly assaulting a corrections officer, and the trial court noted that defendant had acted aggressively in court during the pendency of this case before a different judge. At no point was defendant physically restrained in the presence of the jury.

The Court also finds no error in the trial court's *Molineux* ruling allowing witnesses to testify that defendant had previously assaulted and made threats against them and the victims. The evidence established a motive for the murders and the identity of the perpetrator, and provided necessary background information on the nature of the relationship between defendant and the victims.

The trial court also did not err when it shielded the jury from evidence demonstrating that there were other potential perpetrators who had a motive. Defendant failed to establish a nexus between an earlier shooting involving one of the victims and this shooting.

People v. Corey Gamble
(Ct. App., 2/9/12)

* * *

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 - Waiver - Pro Se Representation

In *People v. Crampe*, the Court of Appeals concludes that the court did not make the requisite searching inquiry at trial to insure that defendant was aware of the drawbacks of self-representation. The form the court read aloud only pointed out that proceeding pro se brought with it the danger of conviction - a risk that also exists when the accused is represented by counsel - and that criminal trials and proceedings are complicated.

In *People v. Wingate*, the Court of Appeals reaches the same conclusion with respect to the suppression hearing, and, while the trial court did conduct a sufficient inquiry, those warnings were incapable of retrospectively "curing" the suppression court's error.

The Court also notes that the scope of a searching inquiry turns on the context in which the right to counsel is waived. The purposes a lawyer can serve at a particular stage of the proceedings, and what assistance he could provide to an accused at that stage, affect the scope of the Sixth Amendment right to counsel and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

People v. Alexander Crampe
(Ct. App., 10/13/11)

* * *

RIGHT TO COUNSEL - Entry Of Counsel Into Proceeding
CONFESSIONS - Custody
HEARSAY - Co-Conspirator Statements
- State Of Mind

In this prosecution for the murder of defendant's husband by a hired killer, the Second Department holds that defendant was not in custody for Miranda purposes when she spoke to the police at the hospital and at the precinct on the day of the murder. The officer who accompanied defendant to the hospital and remained with her while she was treated had been instructed to do so to ensure that defendant, who had apparently undergone the trauma of seeing her husband being shot, was okay. The officer did not question defendant about the shooting or restrict her freedom of movement. The hospital interview by the detective lasted only 15-20 minutes, and his questions focused on defendant's relationship to the victim and her role as a witness. After defendant was medically cleared, she voluntarily agreed to go to the precinct. There, she was questioned more extensively over a period of approximately three hours, but the questioning was not continuous and remained investigatory, and the detectives emphasized the importance of

providing accurate information so they could find her husband's killer. Defendant was left alone and unsupervised in between the interviews, and was never accused of complicity in the crime.

However, defendant's statements at the precinct are suppressed because they were obtained in violation of her right to counsel. The attorney retained by defendant's sister had previously called the precinct, identified himself as defendant's attorney, asked to speak to her, and requested that she not be questioned until he had an opportunity to speak to her. Defendant did not repudiate the representation. She merely stated that she had not called an attorney, and did not know him. "To hold that the defendant, unaware that her sister had arranged for representation, and denied an opportunity to speak to the attorney who had been retained on her behalf, repudiated that attorney by merely stating that she did not call him and did not know who he was, would undermine the safeguards which the right to counsel is intended to provide in such circumstances." However, the error was harmless.

The Court also finds error in the admission of a hearsay statement by defendant's sister warning the victim's father that if the victim's family did not refuse custody of the couple's child and give her back, "[y]ou're going to lose your son on . . . Sunday." Although the People theorize that the sister was an uncharged co-conspirator, the only independent evidence of her possible participation in the murder conspiracy was testimony that she was with the child immediately prior to the shooting and, after the shooting, walked the child into the park instead of assisting the victim. This error also was harmless.

The Court finds no error in the admission of testimony by the victim's father that his son told him on the morning of his death that he was bringing the child to the park for defendant to pick up because she had asked him to do so. The state-of-mind exception permits testimony regarding the victim's future intent to bring the child to the park, and his prior arrangement with defendant to meet at that location. It can be inferred that the arrangement was made in the recent past, since, at the time when the statement was uttered, the victim had only had sole temporary custody of the child for six days.

The Court finds no error in a ruling permitting the attorney for the child to read to the jury a judge's oral decision removing temporary custody of the child from defendant and awarding temporary custody to the victim. The statements in the decision were not offered for their truth. The fact that the judge voiced extremely negative views of defendant's parenting skills circumstantially supported the People's theory that defendant believed that she might lose permanent custody and hired someone to kill her husband to secure the child's return.

People v. Mazoltuv Borukhova
(2d Dept., 10/25/11)

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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)

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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)

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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)

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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)

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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 - Eligibility For Assigned Counsel
SUPPORT - Legal Expenses

Finding that the record does not establish that respondent’s mother is indigent and unable to afford the expense of retaining an attorney for her son, the Court concludes that she is responsible for the cost of the legal services provided by the court-appointed attorney. At the conclusion of this proceeding, the attorney for respondent shall submit his claim for compensation, and the Court will determine the mother’s liability. She will be provided with an opportunity to submit updated financial documentation prior to any final determination by the Court.

Under New York law, a parent ordinarily is responsible for the support of his or her children until they reach the age of 21. This obligation to provide child support includes the expense of providing counsel in this proceeding. To provide publicly funded legal representation to individuals with an ability to afford their own counsel makes no sense. However, a parent's reluctance or outright refusal to hire an attorney for a child charged with juvenile delinquency cannot operate as a waiver of counsel or be permitted to impair the child’s right to a speedy resolution of the proceeding.

Matter of Samy F.
(Fam. Ct., Queens Co., 10/14/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51822.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
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 - Pleas

The Second Department reverses an order granting defendant's motion to withdraw his plea of guilty and vacate a judgment of conviction, concluding that defense counsel was not ineffective for failing to advise defendant that he would be subject to deportation.

It was never clear that defendant's plea to conspiracy in the fourth degree subjected him to mandatory deportation. The deportation consequences of the plea could not be determined from a simple reading of the statute. Indeed, defendant had argued to the Board of Immigration Appeals of the United States Department of Justice that his plea allocution did not include the elements of the underlying aggravated felony of assault in the first degree, and the Board determined that the underlying circumstances of the conviction constituted an aggravated felony only after examining the conviction record. This, counsel's statement that the plea might carry a risk of deportation was not ineffective.

People v. Marino-Affaitati
(2d Dept., 10/4/11)

* * *

RIGHT TO COUNSEL - Effective Assistance - Pleas

The Court denies defendant's motion to vacate the judgment of conviction where defendant claims that he was deprived of the effective assistance of counsel because his attorney failed to tell him that going to trial was "suicide."

The evidence against defendant was overwhelming, but defense counsel could not tell defendant that conviction was a certainty since that advice would have been coercive.

People v. Jimmy Ayala
(Sup. Ct., Kings Co., 10/24/11)
http://courts.state.ny.us/Reporter/pdfs/2011/2011_33572.pdf

* * *

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

The Court denies defendant’s motion to vacate the judgment of conviction, rejecting defendant’s claim that counsel’s mistaken advice regarding the immigration consequences of being convicted after trial caused defendant to reject a generous plea offer to a misdemeanor charge. Defendant has not established the existence of such an offer, and, even assuming that such an offer was made, defendant has not established prejudice since it is unlikely that any realistic plea offer would have placed defendant outside the scope of the federal statute providing for deportation for a conviction of a crime of moral turpitude.

The Court does hold that the Supreme Court’s holding in *Padilla v Kentucky* (130 S.Ct. 1473) requires counsel to provide accurate advice concerning immigration consequences of any conviction that results from a plea or a trial.

People v. Robert Bautista
(Sup. Ct., Bronx Co., 10/12/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_51825.htm

*   *   *

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
CONFESSIONS - Custody

After defendant's vehicle was stopped, he was placed in handcuffs and detained until an investigator arrived at the scene. The investigator asked defendant if he would accompany him back to the State Police Troop headquarters for questioning, but refused to tell him the subject matter. Still handcuffed, defendant was transported to the headquarters in a police car. At the headquarters, defendant was given *Miranda* warnings and then questioned for more than three hours. The police stated that they were investigating a homicide, twice showed defendant the deceased's photograph, and indicated that defendant was a suspect. He was asked to give a DNA sample and, on at least eight occasions, to take a polygraph examination, after having repeatedly denied any involvement in the murder. The interview terminated only when defendant stated, "I think I want to talk to a lawyer and I want to go." Defendant was allowed to leave, but returned later to retrieve his car, and was questioned again and made incriminating statements.

The Second Department suppresses defendant's statements. First, since the court below determined that defendant was in custody, the Court cannot entertain the People's contention that defendant was not in custody. CPL § 470.15(1) limits the Court's jurisdiction to a determination of any question of law or issue of fact involving error which may have adversely affected the appellant. In any event, defendant was in fact in custody.

The Court then holds that defendant's statement, "I think I want to talk to a lawyer," unequivocally invoked his right to counsel, and the statements subsequently given by defendant in the absence of counsel must be suppressed.

People v. James Harris
(2d Dept., 1/10/12)

* * *

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)

Trial In Absentia

TRIAL IN ABSENTIA - Material Stages Of Trial

The Appellate Term finds reversible constitutional error where the court considered the People's application to introduce uncharged crimes evidence at the bench outside of defendant's presence. Defendant was in the best position to deny or controvert the allegations with respect to the uncharged crimes, to point out errors in the prosecutor's account, and to provide counsel with the underlying facts. Without defendant's presence, the court failed to obtain sufficient information to weigh the probative value of the prior bad acts against their potential for prejudice, and the court's determination was predicated on the prosecutor's unrebutted view of the facts.

People v. Kevin Prendergast
(App. Term, 9th & 10th Jud. Dist., 10/31/11)

Interpreters

INTERPRETERS

In this juvenile delinquency prosecution involving the alleged robbery of a Chinese restaurant delivery worker, the complainant testified with the aid of a court-appointed Mandarin language interpreter. During trial, the Assistant Corporation Counsel alerted the Court to alleged errors in translation by the interpreter, and made an oral motion to

strike the testimony of the complaining witness. The Court interrupted the testimony and conducted a hearing on the factual issues raised by the Presentment Agency's motion.

Upon the hearing, the Court denied the motion. The limited case law suggests that interpretation should be word-for-word rather than summarized, and that there should be no conversation between the witness and the interpreter, no significant differences in the length of dialogue of the witness and the interpreter, and no bias or interest in the proceedings. The Office of Court Administration Court Interpreter Manual and Code of Ethics states that interpreters must faithfully and accurately interpret what is said without embellishment or omission, provide professional services only in areas where they can perform accurately, and inform the court when in doubt or where there has been an error, even if the error is perceived after the proceeding has concluded. The OCA "benchcard" for judges working with interpreters advises judges to assess as follows: 1. Are there significant differences in the length of interpretation as compared to the original testimony? 2. Does the individual needing the interpreter appear to be asking questions of the interpreter? 3. Is the interpreter leading the witness, or trying to influence answers through body language or facial expressions? 4. Is the interpreter acting in a professional manner? 5. Is the interpretation being done in the first person? 6. If the interpreter has a question, does he or she address the court in the third-person? The benchcard also suggests that judges swear in court interpreters, which the Court did not do in this case.

The interpreter in this case violated the standards by not interpreting word for word on one or two occasions, engaging in conversations with the witness, and erring in her translation of one or two words. However, the bulk of her work during 30-40 minutes of testimony did meet the standards, the errors were relatively minor and few and did not affect the main aspects of the witness's testimony, and the Court is able to discern the testimony notwithstanding the errors. Also, the main concern in assessing the fairness of a trial is the due process rights of the accused, and respondent is in favor of keeping the testimony of the complainant notwithstanding the errors of the interpreter. Thus, there has been no major prejudice to any party, and the drastic remedy requested by the Presentment Agency is not warranted. The trial will resume with a different Mandarin interpreter.

Matter of Yovanny L.
(Fam. Ct., Bronx Co., 10/11/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21354.htm

Order Of Proof/Re-Opening Hearing

ORDER OF PROOF - Re-Opening Suppression Hearing

The Second Department finds reversible error where, after the Judicial Hearing Officer recommended that suppression be granted and the court adopted the JHO's report, the court, upon the People's motion to reargue, directed that the hearing be reopened so the People could present the testimony of the second police officer involved in the incident, which led to a denial of suppression.

The People were given every opportunity to present their evidence at the original hearing and were not entitled to a second bite of the apple. Instead of reopening the hearing, the court should have granted reargument and, upon reargument, adhered to the suppression order.

People v. Kevin W.
(2d Dept., 1/10/12)

Evidence: Video Recordings

EVIDENCE - Video Recordings

The First Department reverses defendant's convictions, after a nonjury trial, for attempted petit larceny and attempted criminal possession of stolen property in the fifth degree.

The sole evidence that defendant stole cash while working as a store cashier was a recording of a 90-second video surveillance. The Court has viewed the tape and finds that it is impossible to determine that the unidentifiable object in defendant's hand was a safe-drop envelope containing cash, and no evidence explaining how defendant was able to take money out of the cash registers or the safe and move it to the counter area without being detected by her coworkers or by the store's surveillance system. The complainant, who was not present at the time of the alleged theft, reviewed the videotape and testified as to inferences he drew from it, but the complainant was in no better position to evaluate the tape than anyone else who viewed it.

People v. Saneisha Walcott
(1st Dept., 10/13/11)

Evidence: Photos

EVIDENCE - Photos

The Third Department rejects defendant's claim that photographs retrieved from a cell phone found next to the victim's body were not properly authenticated. While the individual who took the photographs was not available to testify, competent evidence was presented as to how the photographs were retrieved from the cell phone and how data in the phone, including the photographs, could not have been altered after the phone was recovered by the police. Moreover, each photograph depicted large sums of money on a table similar to that located in the hotel room where the victim was staying, and each was date stamped one day prior to the shooting.

People v. Tammara McCoy
(3d Dept., 11/10/11)

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 - Probative Of Identity

The First Department, finding no error in the admission of uncharged crimes evidence to prove identity, concludes that the assailant's behavior during the crimes was similar and unique enough to establish a pattern.

All three incidents occurred within 15 days of each other and involved an assailant who broke into a premises through a window at night, covered his victim's face with a pillow or cushion, demanded that the victim blindfold herself with an article of her own clothing or clothing found within the victim's premises, repeatedly told each victim to "relax," demanded money, threatened to kill the victim, forced the victim to perform oral sex, and either forced or tried to force the victim to engage in sexual intercourse.

People v. Reginald Swinton
(1st Dept., 8/25/11)

Right of Confrontation/Hearsay Evidence

RIGHT OF CONFRONTATION - Hearsay - Unavailability Of Declarant

In this habeas proceeding, the Seventh Circuit, granting relief, concluded that for purposes of the Confrontation Clause, the State's efforts to find a witness whose prior testimony was admitted were inadequate because the State failed to contact the witness' current boyfriend, whom she was with moments before the assault, or any of her other friends in the area; did not make inquiries at the cosmetology school where the witness had once been enrolled; and neglected to serve the witness with a subpoena after she expressed fear about testifying at trial.

The Supreme Court reverses, concluding that the State courts did not unreasonably apply clearly established Supreme Court precedents in finding that the State's efforts were adequate. The Court notes that "when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence ... but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising."

Hardy v. Cross
2011 WL 6141312 (U.S. Sup. Ct., 9/12/11)

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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)

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RIGHT OF CONFRONTATION - Hearsay

The Supreme Judicial Court of Massachusetts finds no Confrontation Clause violation where the prosecution introduced evidence from laboratory drug tests through the testimony of a substitute analyst rather than through the analyst who performed the tests.

There is no reason to conclude that cross examination of a substitute analyst offering an independent opinion cannot be meaningful or that the opinion cannot fairly be characterized as independent. A substitute analyst may be cross examined as to the risk of error in forensic analysis, the data on which the substitute analyst relied, the basis for that analyst's conclusion that the data were adequate, and the basis for concluding that the data had been prepared in conformity with accepted professional standards.

Commonwealth v. Munoz

2011 WL 6187421 (Mass., 12/15/11)

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RIGHT OF CONFRONTATION - Hearsay

The Ninth Circuit U.S. Court of Appeals finds no Confrontation Clause error where the court admitted testimony by government agents regarding the present sense impressions of nontestifying agents that were communicated before and during the drug sale for which defendant was prosecuted.

The statements were not testimonial. By communicating their observations, the nontestifying agents enabled the testifying agents to monitor the undercover operation and be ready to provide protection and be alerted when it was time for them to play their assigned roles. The purpose of the statements was not to create a record for trial.

United States v. Solorio
2012 WL 161843 (9th Cir., 1/19/12)

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RIGHT OF CONFRONTATION - Hearsay

The Fourth Circuit U.S. Court of Appeals finds no Confrontation Clause violation where the analysts who were responsible for conducting DNA tests, the results of which provided the basis for expert testimony and the preparation of the expert's report, did not testify.

The testifying expert was not a mere conduit for the analysts' conclusions; he evaluated the data and his opinion was an original product that could be and was readily tested through cross examination.

United States v. Summers
2011 WL 6276085 (4th Cir., 12/16/11)

*   *   *

HEARSAY - Present Sense Impression
DISCOVERY - Statements By Defense Witnesses

The Second Department finds reversible error where the trial court admitted a recording of an anonymous 911 emergency call under the present sense impression hearsay exception. The element of contemporaneity was not satisfied. The caller described the entire course of events using the past tense, indicating that he was recalling and describing events observed in the recent past, and not as they were occurring. Moreover, the People failed to demonstrate that the delay between the conclusion of the event and

the call was not sufficient to destroy the indicia of reliability upon which the present sense impression exception rests.

The Court also notes that defendant was entitled to a copy of the transcript of his own witness's grand jury testimony since the prosecutor made use of it to impeach the witness during cross-examination.

People v. Christopher Parchment
(2d Dept., 2/7/12)

* * *

RIGHT OF CONFRONTATION - Hearsay

Upon remand from the United States Supreme Court for reconsideration in light of *Michigan v. Bryant* (131 S.Ct. 1143), the Supreme Court of Pennsylvania holds that the 4-year-old child's statement to a child protective caseworker that her father had injured her infant brother was non-testimonial. The Court notes, *inter alia*, that the primary purpose of the interview was not to gather information for purposes of a criminal prosecution.

Commonwealth v. Allshouse
2012 WL 164838 (Pa., 1/20/12)

* * *

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)

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RIGHT OF CONFRONTATION - Hearsay

In *State v. Bennington*, the Kansas Supreme Court holds that admission of the victim's statements to a sexual assault nurse examiner (SANE), which were made in the presence of a law enforcement officer who asked questions, and which reported past events rather than information regarding an ongoing public safety or medical emergency, violated defendant's Confrontation Clause rights. The primary purpose of the questioning was prosecution, even if there was a dual purpose of assessment for medical purposes. Thus, the statements were testimonial.

The Court also concludes that statements made during questioning by the SANE were testimonial. The source of the questions was the officer, and when a SANE follows the statutory procedures for gathering evidence for prosecution, and asks questions prepared by an officer, she acts as an agent of law enforcement,

In *State v. Miller*, the Court finds that statements made to a SANE were not testimonial where there was no law enforcement officer present during the questioning. The Court notes that the victim complained that she was "hurting," her mother decided to seek medical treatment without any request to do so by law enforcement officers, the SANE asked questions common to all medical examinations, and the SANE did provide medical treatment.

State v. Bennington
2011 WL 5110263 (Kan., 10/28/11)
State v. Miller
2011 WL 5110265 (Kan., 10/28/11)

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RIGHT OF CONFRONTATION - Hearsay
- Opportunity To Cross Examine

The Supreme Court of Mississippi finds a Confrontation Clause violation where the witness whose prior statement was admitted as a recorded recollection testified, but had a total loss of memory with respect to the underlying events.

Goforth v. State
2011 WL 4089967 (Miss., 9/15/11)

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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)

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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)

* * *

RIGHT OF CONFRONTATION - Hearsay

The Illinois Supreme Court holds that defendant's right of confrontation was violated when the trial court permitted the State to introduce an unavailable witness's preliminary hearing testimony, since defense counsel did not have a fair opportunity at the hearing to effectively inquire into the witness's opportunity to observe, interest, bias, prejudice, and motive.

Although counsel's cross-examination at the hearing had the same "motive" and "focus" as would a similar cross-examination at trial, counsel would have done more with the witness had the hearing court not sustained objections and made it clear that it was not enthusiastic about proceeding with the hearing.

People v. Torres
2012 WL 312119 (Ill., 2/2/12)

* * *

RIGHT OF CONFRONTATION - Hearsay - Business Records

In this DWI prosecution, the Fourth Department holds that admission of a simulator solution certificate and a breath test calibration certificate did not violate defendant’s rights under the Confrontation Clause.

The statements contained in the breath test documents are not accusatory in the sense that they do not establish an element of the crimes. Standing alone, the documents shed no light on defendant’s guilt or innocence. The only relevant fact established by the documents is that the breath test instrument was functioning properly.

People v. Robert Pealer
(4th Dept., 11/18/11)

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RIGHT OF CONFRONTATION - Hearsay Evidence

The Fourth Department finds error, albeit harmless, where the trial court admitted in evidence a certified DNA report prepared by an analyst who did not testify at trial and the testimony of the analyst's supervisor regarding that report.

The supervisor had nothing to do with the analysis performed by the uncalled analyst and did not perform an independent review and analysis of the DNA data; her only involvement was reading the report after it was completed to ensure that the uncalled analyst followed proper procedure.

People v. William Morrison
(4th Dept., 12/23/11)

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HEARSAY - Declaration Against Penal Interest
- Constitutional Right To Present Hearsay

The First Department finds no error in the exclusion of evidence that the co-defendant told an officer that "everything in the [automobile] trunk was his."

The statement was not admissible as a declaration against penal interest. Defendant failed to demonstrate that the co-defendant, who had already pleaded guilty and been sentenced, still intended to invoke his Fifth Amendment privilege or was otherwise unavailable. The statement also did not bear sufficient indicia of reliability, particularly given the co-defendant's sworn statement at his plea proceeding that he and defendant jointly possessed the drugs and weapon.

In addition, since the evidence was neither reliable nor critical to establish defendant's defense, defendant was not constitutionally entitled to introduce it.

People v. Edgar Valette
(1st Dept., 10/4/11)

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HEARSAY - Witness Unavailable Due To Misconduct By Defendant
RIGHT OF CONFRONTATION - Hearsay - Forfeiture Doctrine

In this domestic violence prosecution, the Court, upon a *Sirois* hearing, concludes that the People established by clear and convincing evidence that defendant's misconduct induced his wife to recant, and that the People may offer out-of-court statements made by the complainant to a civilian witness, to police and medical personnel, and to personnel from the District Attorney's Office.

The complainant is, in fact, "unavailable." Ordinarily, forfeiture occurs where the defendant's misconduct procures or causes a witness's physical absence, but the

forfeiture-by-misconduct rule also applies when the defendant causes a witness to recant her initial accounts of the crime and offer a completely different version in proposed testimony.

The complainant does not specifically deny that defendant intimidated her into recanting the initial account, and, even if she had included a pointed denial in her affidavit, the Court would not credit it given the evidence which demonstrates that defendant caused her to recant. Despite an order of protection, defendant twice showed up at the complainant's home immediately after he was released from jail, and asked or directed her to get in his car, and then commenced an aggressive telephone campaign, calling the complainant approximately 348 times between November 28, 2010 and March 7, 2011. Even though the People failed to prove the content of the calls, the sheer number of calls sent an ominous message. In any event, the only fair inference is that actual conversation occurred during many of the calls. At least 62 of the calls lasted over two minutes and some calls lasted for substantially longer periods of time.

Defendant also made numerous recorded telephone calls to third parties in an attempt to use them to get the complainant to prepare a document or "affidavit" which defendant intended to submit to the "judge" to get the charges "tossed" out. The complainant informed the prosecutor that she would not testify "against" defendant, and would recant her initial account, only one week after defendant confirmed that she had received the affidavit (referred to as "that parcel") and only two weeks after defendant enlisted the help of the third parties.

People v. Chet Turnquest
(Sup. Ct., Queens Co., 1/25/12)
http://courts.state.ny.us/Reporter/3dseries/2012/2012_22019.htm

*   *   *

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)

* * *

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)

* * *

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 - 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 - Post-Arrest Silence

The Second Department, with one judge dissenting, reverses defendant's conviction for attempted murder in the second degree and attempted robbery in the first degree where the People were permitted to question him about his post-arrest silence, and to comment upon it in summation.

A defendant's post-arrest silence generally cannot be used for impeachment purposes. It is true that a defendant's credibility may be impeached with a significant omission when, instead of invoking his right to remain silent, he chooses to speak to the police about the crime. Here, however, defendant, upon his arrest and the administration of *Miranda* warnings, did not express his desire or willingness to speak to the police. When asked whether he would do so, the defendant responded "no." He merely denied his role in the incident in a general manner, and "maintained an effective silence."

People v. Henry Tucker
(2d Dept., 9/20/11)

*   *   *

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)

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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)

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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)

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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 - 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)

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IMPEACHMENT - Motive To Fabricate

In this prosecution in which defendant was charged with punching and brandishing a gun at an off-duty police officer who intervened during defendant's altercation with a third party, the Second Department finds error, albeit harmless, in the trial court's refusal to allow defendant to establish that the reason the officer falsely implicated him was because he and the third party had a friendly relationship and dragged raced cars together, and that the officer allowed the third party to deal drugs in front of his home. The evidence tending to establish the officer's motive to fabricate was not too remote and speculative.

People v. Andrew Spencer
(2d Dept., 8/30/11)

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IMPEACHMENT - Juvenile Delinquency Adjudication

An Illinois Supreme Court majority holds that under the state statute, a juvenile adjudication is typically not admissible to impeach the credibility of a testifying defendant, but may be admitted when a defendant opens the door.

Here, defendant did not open the door when he testified, in connection with his claim that he made a partially false statement to the police, that he had "never been in a situation like this before." Defendant's statement, in this context, did not falsely imply that he had no experience with the criminal justice system. At most, he implied that he had never been questioned by police, and thus opened the door only to cross-examination about prior police questioning.

People v. Villa
2011 WL 5999246 (Ill., 12/1/11)

Practice Note: New York Family Court Act § 344.1(1) permits impeachment of a witness with a prior conviction if the witness replies in the negative or in an equivocal manner when asked whether the conviction exists, but does not allow such questioning about prior juvenile delinquency adjudications. *Matter of Roseangela C.*, 232 A.D.2d 633 (2d Dept. 1996). However, any witness, including the respondent, may be asked about the underlying bad acts related to a juvenile delinquency adjudication if the examiner has a good faith basis for the questioning and the acts are sufficiently relevant to the witness's credibility. *Roseangela C.*, 232 A.D.2d 633. But the respondent may not even be asked about the alleged bad acts underlying a pending case. *People v. Betts*, 70 N.Y.2d 289 (1987); *People v. Chambers*, 184 A.D.2d 716 (2d Dept. 1992) (defendant could not be questioned about kidnapping conviction pending on appeal and the facts underlying it); *Matter of TM*, 26 Misc.3d 823 (Fam. Ct., Kings Co., 2009). And, under well-settled State evidence rules, the presentment agency may not prove the bad acts for impeachment purposes by presenting extrinsic evidence after the witness denies commission of the acts. *Badr v. Hogan*, 75 N.Y.2d 629 (1990).
Under FCA § 344.1(2), the presentment agency may prove a respondent's prior finding of delinquency for a crime the commission of which would tend to negate any good character trait or quality attributed to the respondent in a character witness's testimony.

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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)

* * *

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

EXPERTS - Assault Crimes
RAPE - Attempts
RIGHT TO A FAIR TRIAL - Shackling

A 4-judge Court of Appeals majority holds that harmless error analysis is applicable under the Federal and State Constitutions when a court has ordered the use of visible shackles without an individualized security determination that is articulated on the record, and finds harmless error in this case. The dissenting judges would shelter this type of error from harmless error analysis under the State Constitution.

The Court also finds error, albeit harmless, in the admission of testimony from physicians that certain injuries satisfied the definition of "physical injury" and created a risk of "serious physical injury." The facts that underlie physical injury and risk of serious physical injury can readily be stated to a jury so that the jurors can form an accurate judgment.

The Court also reverses an order dismissing a charge of attempted rape, concluding that the evidence was legally sufficient. Before the attack, defendant, a prison inmate, was seen lurking in an alleyway that civilian employees often walked along. He attacked a female victim in an otherwise empty corridor. He brought items that could be used to silence and restrain a person, and tried to incapacitate his victim. He spoke to his victim but did not ask her to help him escape from the prison or direct her to do anything other than be quiet, and he forced her to the floor. Defendant straddled his gagged victim and was in the process of binding her hands when he was disturbed by someone else's appearance. There was evidence from which the jury could infer that defendant ejaculated before he fled the scene.

People v. Raymond Clyde
(Ct. App., 11/22/11)

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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)

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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)

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EXPERTS - Frye Test

In this medical malpractice action, the Second Department holds that the trial court improperly applied the *Frye* test when it precluded certain expert testimony.

A *Frye* inquiry is directed at the basis for the expert's opinion and does not examine whether the expert's conclusion is sound. All that is required is that the expert's deductions are based on principles that are sufficiently established to have gained general acceptance as reliable. The court's job is not to decide who is right and who is wrong, but rather to decide whether or not there is sufficient scientific support for the expert's theory. The *Frye* general acceptance test is intended to protect juries from being misled by expert opinions that may be couched in formidable scientific terminology but are based on fanciful theories.

This Court has affirmed the preclusion of expert testimony as to causation in circumstances where there was a complete absence of any literature or studies supporting the particular

causation theory espoused by the expert. However, although plaintiffs' experts failed to produce a case or study involving circumstances exactly parallel to those at issue, or any literature expressly supporting their theory, plaintiffs demonstrated that their theory of causation was reasonably permitted by a synthesis of the medical literature discussed at the hearing. The absence of medical literature directly on point pertains to the weight to be given to the opinion testimony, but does not preclude its admissibility. The purpose of the *Frye* test is not to preclude expert opinion testimony based upon reasonable extrapolations from conceded legitimate empirical data.

Lugo v. New York City Health and Hospitals Corporation
(2d Dept., 9/13/11)

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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

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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)

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EXPERTS - Sexual Assaults

The First Department finds no error where the trial court permitted a licensed nurse practitioner who was certified as a sexual assault nurse examiner to testify about the relationship between the victim's genital injury and forcible sexual intercourse.

Given the witness's broad experience and training, she was qualified to testify about the physiological processes of a woman's body during sexual activity and about how the victim's injury might have occurred in light of those processes. The witness did not directly opine on the ultimate issue of whether the sexual conduct was forcible or consensual.

People v. Jose Vaello
(1st Dept., 1/24/12)

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EXPERTS - Drug Trafficking

The First Department finds no error in the admission of expert testimony concerning circumstances that indicate an intent to sell drugs. The Court rejects defendant's unpreserved claim that the expert improperly opined that defendant was a drug seller, and notes that, in any event, the testimony was permissible.

People v. Avial Peguero
(1st Dept., 10/25/11)

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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)

Missing Witness Inference

ROBBERY - Dangerous Instrument
POSSESSION OF A WEAPON

MISSING WITNESS INFERENCE
UNCHARGED CRIMES EVIDENCE - Opening The Door/Rebuttal Of Defense Claim

The Court of Appeals concludes that the People failed to prove that the stun gun used in the robbery was a "dangerous instrument." The stun gun was not recovered, and there was no testimony explaining to the jury what a stun gun is, or what it can do. The victim described pain, a burning sensation and temporary incapacitation, but the jury had no basis for concluding that the stun gun was readily capable of causing death or "serious physical injury."

The trial court erred in refusing to give a missing witness instruction. The victim's cousin and two other witnesses were eyewitnesses, friendly with the victim, and could have been expected to support his version of events, and all were available to the prosecution. It is irrelevant that they were also available to the defense, in the sense that defense counsel were allowed to interview them and the defense could have called them if it chose. "A missing witness instruction permits the jury to draw the common-sense inference that a failure to call a seemingly friendly witness suggests some weakness in a party's case. That inference is not rebutted when the opposing party chooses not to call the same witness — a witness who, by definition, the opposing party would expect to be hostile." However, defendant Hall did not preserve the error, and as to defendant Freeman it was harmless.

The Court finds no error in the admission of testimony about a previous assault defendants had committed together, since Freeman, on direct examination, tried to minimize his connection with Hall and thus opened the door. Since Hall, who did not testify, had not opened the door, the trial judge fashioned a fair solution: he did not allow the prosecutor to refer to the conviction, but did allow him to ask whether Freeman remembered "having a fight" along with Hall with another person. Although Freeman testified that "we all [including Hall] got locked up for so-called assaulting this guy," there is no reason to believe that either the prosecutor or the court saw that response coming. The prejudice might have been avoided by instructing Freeman in advance not to volunteer that information, but Hall did not request such an instruction and the court cannot be faulted for failing to anticipate what happened.

People v. Michael Hall, People v. John Freeman
(Ct. App., 11/21/11)

* * *

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)

Competency To Be Sworn

WITNESSES - Competency To Be Sworn

The First Department holds that the court properly permitted the five-year-old victim to give sworn testimony. The victim's voir dire responses established that he sufficiently understood the difference between truth and falsity, that lying was wrong, and that lying could bring adverse consequences.

In re Dandre H.
(1st Dept., 11/17/11)

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)

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)

Homicide/Assault

CRIMINALLY NEGLIGENT HOMICIDE - Duty To Provide Medical Care

In a 3-2 decision, the Third Department reverses defendant’s conviction for criminally negligent homicide, concluding that the trial court committed reversible error in failing to instruct the jury that defendant could be found guilty based on a failure to summon emergency medical care for his brother only if it could be shown that he was acting "in loco parentis," which refers to a person who has assumed all the obligations incident to the parental relationship and who actually discharges those obligations.

Different inferences could reasonably have been drawn by the jury. On the one hand, defendant fed his brother at times, told him to go to bed, checked on him after he went to bed, may have

called into school weeks earlier to report that his brother was ill, helped his brother put in eye drops when he came home from school with pinkeye, and told the police that he was "responsible" for his brother, and his brother told a school social worker that his older brother was caring for him at home while his grandmother was hospitalized. On the other hand, there was no evidence that defendant had agreed to care for all of his brother's needs in a parental capacity during the grandmother's hospitalization or had ever done so before, defendant's sister testified that she considered the grandmother to be the caretaker and parent to all three siblings, defendant and the sister left their sibling alone at times, including in the evenings, there was no evidence that defendant got his brother ready for school or helped him with homework, and defendant was not listed as an emergency contact at his brother's school (only the grandmother was) and did not call in to school to report his brother as sick the week he died.

People v. Shawn Munck
(3d Dept., 12/29/11)

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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)

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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)

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PHYSICAL INJURY

In this robbery prosecution, the First Department finds legally sufficient evidence of physical injury where defendant and her accomplices assaulted the victim for several minutes in order to take her jewelry, the victim sustained scrapes, scratches, and bruises, causing significant pain, and the victim sought medical treatment and received prescription-strength pain medication.

People v. Maxine Norfleet
(1st Dept., 2/14/12)

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MURDER - Depraved Indifference
ASSAULT
DEFENSES - Intoxication

The Second Department, with one judge dissenting, upholds defendant's convictions for murder in the second degree (depraved indifference), assault in the first degree, and operating a vehicle while under the influence of alcohol.

The Court notes, inter alia, that defendant was aware that he was driving the wrong way and deliberately chose to continue to proceed against traffic without regard for the grave danger to himself and others traveling on the parkway at night; that defendant stated to the police that he was in a "self-destructive mode" and depressed about the state of his life at the time; that defendant wrote a letter to a friend while incarcerated and awaiting trial, in which he proclaimed that he had lied to the police in an attempt to paint himself "as an unfortunate victim of circumstance worthy of leniency," rather than tell the police the truth about having been drinking at a friend's house that night; and that the evidence of intoxication did not preclude the jury from reasonably finding that defendant had the requisite mens rea for depraved indifference murder and assault.

People v. Martin Heidgen
(2d Dept., 9/13/11)

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MURDER - Depraved Indifference

The Third Department upholds defendant's conviction for depraved indifference murder where defendant repeatedly suffocated her children and forced them to undergo unnecessary medical procedures, callously causing repeated injury to them and, ultimately, her daughter's death.

On the day she last suffocated her daughter; the person defendant later described as a "home health nurse" arrived at defendant's home to find that the child was not breathing, had no pulse, and was limp, colorless and "ice cold," and that defendant had not called for help. Although this person repeatedly instructed defendant to perform rescue breathing, defendant did not do so. Instead, defendant "just [sat] there," tearless and doing nothing, while the person summoned rescue personnel and tended to the child. At the hospital; while medical personnel attempted to resuscitate her daughter, defendant remained outside the treatment room, calmly eating snacks. Defendant's wish to continue to profit from her children's pain and suffering was cruelly depraved.

People v. Brenda Synder
(3d Dept., 1/26/12)

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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)

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ASSAULT - Depraved Indifference
RECKLESS ENDANGERMENT

The Third Department, finding legally insufficient evidence of depraved indifference. upholds an order that set aside convictions for assault in the first degree and reckless endangerment in the first degree, and entered convictions for assault in the third degree and reckless endangerment in the second degree.

Defendant, a devout Muslim, had a verbal altercation with his 12-year-old son that resulted in him shoving the boy and, in his words, "popping" the child. When the family gathered for evening prayers, the son voiced objections to the family lifestyle and announced that he wanted to smoke and drink like his friends and join a youth gang. Defendant erupted, "snatched" the boy and threw him to the ground, grabbed the boy near the neck, and struck his head against the carpeted floor as many as five times. After the boy pleaded with defendant to stop and then defendant realized his son was unconscious, defendant attempted to revive him and provide first aid, and told the other children to call 911.

This did not constitute the type of prolonged torturous conduct necessary to support a finding of depraved indifference.

People v. Khalil Hakim-Peters

(3d Dept., 2/9/12)

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ASSAULT - Serious Physical Injury

The Third Department finds legally insufficient evidence of serious physical injury where the victim suffered eight stab wounds and all bled, but at least seven of them were described by doctors as superficial; the most serious wound was approximately 4 inches long and 2½ inches deep and transected the victim's rectus abdominis muscle, but the bleeding was stopped with a few sutures and no internal organs were punctured; at the hospital the victim's blood loss was not massive and his vital signs were essentially normal; a physician testified that the wounds collectively "could [] have caused substantial risk of death," but did not further explain that opinion or state that the wounds did create such a substantial risk; the surgeon who sutured the wounds testified that it was "possible" that the wounds taken collectively would have been fatal if they all had gone untreated, but that, left untreated, the most serious wound and the nearest wound to it probably would not have been fatal; the victim had chest and back scars, but there is no proof of serious or protracted disfigurement; the victim took pain medication for a few weeks and continued to feel some pain thereafter, but was completely pain free about 2½ months after the incident; and that the injuries affected the victim's ability to throw a ball and swing a baseball bat, but he did not elaborate on these effects and intended to try out for his college baseball team, and no medical evidence linked his diminished baseball skills to his injuries, as opposed to his reduced ability to practice after being injured.

People v. Darryl Tucker
(3d Dept., 1/12/12)

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ASSAULT - Serious Physical Injury

The Court of Appeals concludes that there was legally insufficient evidence of "serious physical injury" where the assault involved numerous blows with a sharp instrument, but the injuries were described by the treating emergency room physician as "superficial"; no organ damage or injury to muscle tissue was radiologically evident; three of the four wounds required only gauze dressing; the 6-7 centimeter wound on the victim's inner forearm was sutured, but the victim spent just one day in the hospital without follow-up medical care apart from the removal of his stitches; and the victim complained of daily pain attributable to his healing scars, but there was no basis for a finding that these sensations were indicative of or causally related to any protracted health impairment.

People v. Wayne Stewart
(Ct. App., 12/15/11)

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ASSAULT - Physical Injury

The Second Department finds legally sufficient evidence of "physical injury" where, as a result of an incident during which defendant was dragging the complainant against her will, she suffered facial lacerations, and injuries to her left forearm consisting of bruises and an abrasion described as a "skin tear" or a "scrape."

The trial court found that the complainant suffered "substantial pain" and cited various factors aside from the injuries in support of that finding, including the complainant's facial expressions and apparent screaming and crying as depicted in a surveillance video, defendant's "violent and very forceful dragging of the complainant" who "is a woman of slight frame compared to that of the defendant," the complainant's resistance and her apparent attempt to seek help from a neighbor, and the fact that defendant dragged the complainant when she was in a "weakened state due to severe facial injuries," which "further inflicted … an exacerbation" of those injuries.

People v. Hiram Monserrate
(2d Dept., 12/13/11)

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ASSAULT - Serious Physical Injury

The Third Department finds legally sufficient evidence of "serious physical injury" where the victim was shot in his left thigh, left buttock and right arm and his right humerus was broken by a bullet; surgeons left the bullet his thigh because it was more dangerous to remove it; more than a year after the incident, the victim could not fully extend or straighten his arm and was unable to lift the same amount of weight with that arm as he could before the incident; and a doctor opined that a bullet fracturing a humerus could permanently affect the arm and that the limitation on the use of the arm would constitute protracted impairment of the function of a bodily organ.

People v. Kyle Rice
(3d Dept., 12/15/11)

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ASSAULT - Intent To Prevent Officer's Performance Of Lawful Duty

A 5-judge Court of Appeals majority upholds defendant's conviction for second-degree assault, finding legally sufficient evidence of "intent to prevent a peace officer from performing a lawful duty" where, as a uniformed EMT was climbing into the driver's side of an ambulance as he and his partner were about to drive away from premises where they had just treated an injured woman, defendant blindsided him with a blow to the head, threw him to the ground and

pummeled him repeatedly about the face and head. Although defendant argues that there must be intent to prevent an EMT from performing a specific task, not merely to disrupt his passive status of being "on duty," it is not apparent why the EMTs' response to the request for medical assistance at those premises was finished once the EMTs left the apartment without the injured woman rather than when they actually drove away or returned to the hospital. Moreover, the jurors might have logically concluded that the victim was performing the routine job duties of an EMT in a lawful manner when he attempted to leave premises where he had furnished medical assistance, whether he was then on his way to another call or to his home base at the hospital.

Dissenting, Chief Judge Lippman and Judge Smith assert that although the victim's attempt to enter his ambulance may well be a lawful duty within the meaning of the statute, the proper focus should be on whether defendant had the specific intent to prevent the performance of a lawful duty.

People v. Christian Bueno
(Ct. App., 11/21/11)

* * *

ASSAULT - Recklessness
- Negligence

Defendant's then 15-year-old nephew began to engage in horseplay, splashing his sister and defendant with water from the sink. Defendant, in turn, spattered her nephew with water and, according to the children, stated that she was the "queen of pranks." The nephew left the kitchen to watch television in a different room. Shortly thereafter, defendant retrieved a pot of hot water from the stove and poured the water onto her nephew. When the water made contact with the nephew's skin, the skin started to bubble. Defendant applied a topical cream in an effort to alleviate the pain, and contacted the child's mother and accompanied them to the hospital. The child sustained first- and second-degree burns.

The Court of Appeals reduces defendant's conviction for reckless assault in the second degree to one for criminally negligent assault in the third degree. There is record support for a finding that defendant acted with criminal negligence when she lifted the pot of water from the stove and poured it over her nephew, but the evidence does not support the conclusion that defendant was aware of and consciously disregarded a known risk that her behavior would cause her nephew's skin to burn.

Because the Appellate Division's order manifests a lack of appreciation of its power to review the weight of the evidence, the Court also reverses and remits for a proper assessment of the weight of the evidence.

People v. Nadirah Brown

(Ct. App., 10/13/11)

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ASSAULT - Acting In Concert
POSSESSION OF A WEAPON

Defendant, the co-defendant and one or two other men approached the complainant, accused him of being a "snitch," and began beating and kicking him. When the co-defendant suddenly pulled out a knife, the complainant tried to grab it, cutting himself in the hand in doing so, and knocked it out of the co-defendant's hand. Defendant continued to punch the complainant. The attack lasted for approximately 30 seconds, and ended when police officers arrived.

The Second Department reverses defendant's convictions for assault in the second degree and criminal possession of a weapon in the fourth degree. The evidence failed to establish that defendant knew the co-defendant possessed the knife, much less shared the co-defendant's intent to use it to inflict physical injury on the complainant.

People v. Timothy Smith
(2d Dept., 9/27/11)

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ASSAULT - Serious Physical Injury

The First Department reduces defendant's conviction for gang assault in the second degree to one for assault in the third degree, concluding that evidence was legally insufficient to establish that either the broken nose or the three chipped teeth sustained by the victim constituted serious physical injury.

Following reconstructive surgery, the indentation in the nose, while qualifying as "disfigurement," did not constitute "serious disfigurement," which is established only upon proof that a reasonable observer would find the person's altered appearance distressing or objectionable.

Although the plastic material used to replace tooth enamel had to be replaced approximately every 10 years, and darkening of the affected teeth and improper healing of the nerves was "possible," the need for maintenance at relatively long intervals does not constitute serious disfigurement, or impairment of the victim's health or the functioning of his teeth. While a likelihood of adverse effects on appearance, functionality, or overall health may qualify as serious physical injury, the mere possibility of such consequences does not.

People v. Adan Rosado
(1st Dept., 10/4/11)

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PHYSICAL INJURY

In this assault prosecution, the First Department finds legally sufficient evidence of "physical injury" where, as a result of a punch to the shoulder delivered by defendant with a rock in his fist, the officer experienced an immediate sharp pain, followed by numbing and a tingling sensation; that evening the officer went to a hospital and reported significant pain and was prescribed a painkiller and advised to treat the area with ice; and for the next three to five days, the officer suffered extensive swelling and bruising, as well as pain and soreness.

People v. Eriverto Martinez
(1st Dept., 12/1/11)

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ASSAULT - Serious Physical Injury

In this highly publicized case involving the death in 2006 of seven-year-old Nixzmary Brown, the Second Department affirms defendant mother's convictions for, inter alia, manslaughter in the first degree and assault in the second degree.

The Court finds sufficient evidence of a "serious physical injury" where a laceration initially had to be closed with sutures, and, thereafter, did not properly heal; the child did not receive any further treatment for this injury; the wound appeared infected one month later and "got so ugly" that it caused the child's face to swell; and the autopsy photographs show that the laceration was still clearly visible and unhealed at the time of the child's death. Especially considering the prominent location of the wound on the face of a young girl, it is apparent that had the child lived, the injury would have resulted in a readily observable protracted disfigurement.

People v. Nixzaliz Santiago
(2d Dept., 8/23/11)

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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)

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)

* * *

SEX CRIMES - Consensual Sex Between Minors

The Court dismisses an application for an order annulling and vacating a determination of respondent Board of Examiners of Sex Offenders of the State of New York, rejecting petitioner's claim that his Florida *nolo contendere* plea to indecent assault does not constitute a conviction for purposes of the Sex Offender Registration Act.

A *nolo contendere* plea is generally deemed a conviction, and there is nothing about SORA suggesting that such a plea should be treated differently for purposes of SORA registration, and the fact that adjudication was withheld has no bearing. Indeed, the *nolo contendere* plea with adjudication withheld constitutes a conviction for purposes of Florida's sex registration requirements.

However, the Court expresses its "own dissatisfaction with requiring petitioner to register under the circumstances of this case. Assuming that the victim was a fifteen year-old high school classmate, that the victim consented to having sexual relations with plaintiff, and that the only basis for the prosecution was the victim's age, requiring petitioner to register for 20 years. . . appears to be an unduly harsh consequence for consensual sex between teenage classmates who were close in age. Commentators have criticized the continued criminalization of such teen sex, and the laws requiring such offenders to register. . . . These commentators also compellingly argue that offenders like petitioner simply do not present the danger of re-offending that other sex offenders do, and that their inclusion in the sex offender registries makes the sex offender registration laws a less effective tool in protecting the public from the offenders who are truly dangerous. . . ."

Matter of Kasckarow v. Board of Examiners of Sex Offenders of the State of New York
(Sup. Ct., Kings Co., 10/25/11)

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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)

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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)

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SEXUAL ABUSE - Sexual Gratification
FORCIBLE TOUCHING

The First Department upholds a finding of forcible touching where 10-year-old respondent approached the complainant, and, when he was face-to-face with her, used both of his hands to shove her with such force that she fell backwards onto the gym floor in school, respondent’s friend restrained the complainant by holding her arms above her head while she was still on floor, and respondent then stood over the complainant, and, using both of his hands, grabbed, squeezed and twisted the complainant’s breasts. Respondent’s mental state and purpose, which can be inferred from his conduct and the surrounding circumstances, was to degrade and abuse the complainant, who, shortly before the incident, had rebuffed respondent by telling him to leave her alone and that she did not “like” him.

However, the Court dismisses the charge of sexual abuse in the second degree, concluding that the evidence was not sufficient to establish beyond a reasonable doubt that he was acting for the purpose of obtaining sexual gratification. The Court notes respondent’s young age and the absence of any other evidence showing that he was acting to gratify a sexual desire.

In re Ibn Abdus S.
(1st Dept., 1/3/12)

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SEXUAL ABUSE - Sexual Gratification

The First Department reverses a finding of sexual abuse in the third degree where the then 13-year-old respondent made rude sexual comments and gave the then 13-year-old complainant a

quick slap on her buttocks in a classroom in which other students and their teacher were present. This was legally insufficient to establish beyond a reasonable doubt that respondent acted for the purpose of gratifying sexual desire. The finding also was against the weight of the evidence.

In re Jabari I.
(1st Dept., 12/13/11)

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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)

Possession Of A Weapon

POSSESSION OF A WEAPON - Constructive Possession - Automobile
CONFESSIONS - Exculpatory Testimony Regarding Statement

At trial, the officer testified that, after he explained to defendant that he was being charged with possessing a loaded firearm, defendant responded, "it wasn't armed, but that's okay, possession is nine/tenths of the law." Defendant testified that he told the officer "that I wasn't armed with anything. He said, I don't know what kind of games you playing here. Then I asked him, who is going to be my attorney because I know for a fact that nine/tenths of the law is possession." The trial court sustained the People's objection to defense counsel's subsequent question, "Why did you say if you recall nine-tenths of the law — possession is nine-tenths of the law?" Following summations, the court instructed the jury on the automobile presumption, stating that all persons occupying a vehicle are presumed to possess a firearm found within the vehicle.

The Appellate Division determined that while the court erroneously denied defendant an opportunity to explain the statements he allegedly made to the police, the error was harmless.

The Court of Appeals reverses, concluding that the error was not harmless. The evidence against defendant was not overwhelming. It was not his vehicle. He had been driving it for only a short period of time prior to the traffic stop, and then only to take someone to the train station. Several family members had access to the vehicle prior to this occasion. Defendant's statements were the sole evidence tending to establish that he knew the revolver was in the vehicle. Defendant's explanation may have created doubt in the jury's mind sufficient to rebut the presumption.

People v. Terrance Robinson
(Ct. App., 10/13/11)

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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)

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)

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 OFFENSES - Sex Trafficking Victims
- Juveniles
DISMISSAL IN THE INTEREST OF JUSTICE

The Court, citing the Safe Harbour Act, dismisses in the interest of justice a charge that 16-year-old defendant committed the violation-level offense of loitering for the purpose of prostitution.

The Safe Harbour Act specifically addresses the conduct charged here and provides for its non-punitive, non-criminal adjudication in Family Court. Although the Safe Harbour Act did not amend the Penal Law and provide a defense of infancy to a 16- or 17-year-old charged with a prostitution offense, a Penal Law prosecution of an individual whom the Legislature has defined as a "sexually exploited child" is inconsistent with the ameliorative intent of the Safe Harbour Act and other statutes. Moreover, as the Chief Judge of this State has recently pointed out, "New York is out of step with virtually every other jurisdiction in this country … with regard to the age of criminal responsibility…."

The District Attorney offered defendant the Saving Teens at Risk program, which is part of his office's own initiative to address prostitution by offenders under the age of 22 with counseling

rather than incarceration, but the Court would retain the power to sentence defendant to up to fifteen days in jail if she should ultimately fail to finish the STAR program and is then convicted of the charged offense, and her continued prosecution may traumatize her to a greater extent than the prosecution of an adult defendant would affect an adult.

The Court, specifically analyzing the factors in CPL § 170.40, notes that the circumstances of the offense are minimally serious since defendant is alleged to have loitered in the middle of the street for a total of twenty minutes and to have stopped two passers-by to engage them in "conversation"; that although prostitution may negatively impact all participants as well as the neighborhoods where it occurs, the extent of harm caused by this offense is minimal, and the harm to defendant's own physical and mental welfare is greater than any societal harm; that a sentence would do more harm than good, and the options available in Family Court are likely superior because of the focus on the child's "best interests"; that because of the definition of "youth" in Criminal Procedure Law Article 720, defendant would not be entitled to have a conviction replaced by a youthful offender finding; and that the public's confidence in the criminal justice system will be enhanced by a dismissal since "the public will be confident that our laws are not inflexible or unduly harsh and that they do not operate in isolation of a growing awareness that, in the appropriate case, the lessened culpability of a 16-year-old vis-á-vis an adult, as well as the recognition that she is exploited if not also victimized, may require that the allegations against her be addressed outside criminal court."

People v. Samatha R.
(Crim. Ct., Kings Co., 12/16/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_52245.htm

* * *

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)

Criminal Trespass

CRIMINAL TRESPASS - Apartment Building

The First Department finds facially sufficient a charge of criminal trespass where it is alleged that defendant entered a lobby through a locked door notwithstanding a conspicuous no-trespassing sign, and, when questioned, did not claim to be a resident or invited guest.

People v. Augustin Norales
(1st Dept., 10/13/11)

* * *

CRIMINAL TRESPASS - Public Housing Apartment Buildings

The Appellate Term finds criminal trespass charges facially sufficient where it was alleged that defendant was observed inside the lobby of a public housing project building that was marked by "no trespassing" signs and equipped with a locked entrance door and "buzzer system;" that defendant lived elsewhere; and that although defendant stated that he was in the building to visit an unnamed "friend" in a specified apartment, the officer, upon an investigation, could not locate anyone who had given defendant permission to be in the building.

People v. Livingston-Boyd
(App. Term, 1st Dept., 9/9/11)

* * *

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

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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

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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

Robbery/Larceny/Possession Of Stolen Property/Forgery Offenses

PETIT LARCENY - Subway Fare

The Court of Appeals reverses defendant's conviction for petit larceny, holding that although the misdemeanor information provided reasonable cause that defendant was engaged in the unlawful sale of New York City Transit Authority services and providing unlawful access to NYCTA services, it did not establish petit larceny where defendant, in exchange for money, swiped an unlimited MetroCard and allowed an unidentified person to pass through a subway turnstile.

Defendant did not take property belonging to the NYCTA, which never acquired a sufficient interest in the money to become an "owner" within the meaning of Penal Law § 155.00(5).

People v. Joseph Hightower
(Ct. App., 12/13/11)

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ROBBERY/LARCENY - Intent To Deprive Or Appropriate

In this first degree robbery prosecution, the Court of Appeals finds reversible error where the trial court failed to charge the jury with the statutory definition of "appropriate" and/or "deprive." Defendant's claim was preserved when defense counsel expressed concern that the jury might not understand the meaning of the phrase "[a]ppropriated for himself" and requested a particular charge as to intent with regard to that phrase, which the court rejected.

The concepts of "deprive" and "appropriate" are essential to a definition of larcenous intent, and they connote a purpose to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof. The jury evidently struggled with the issue of whether defendant intended to permanently deprive the victims of the property taken from them.

People v. Juan Medina
(Ct. App., 11/17/11)

* * *

POSSESSION OF A FORGED INSTRUMENT - Intent

The Court of Appeals finds legally sufficient evidence of possession of a forged instrument in the second degree - specifically, defendant's intent to defraud, deceive, or injure - where defendant was arrested in possession of a forged New York State driver's license bearing his photograph, a forged New York State non-driver identification card bearing his photograph, a forged social security card, a forged permanent resident card ("green card") bearing his photograph, four loose ID-sized photographs of defendant, and identification documents indicating defendant's true identity.

Defendant had a motive to assume a false identity because he was aware that the police were searching for him. The fact that three of the four documents bear defendant's photograph supports an inference that he posed for the photographs for the purpose of making the documents, and subsequently made or assisted in the creation of the documents or directed someone to make them. The tan corduroy jacket defendant was wearing when arrested appears to be the same jacket he is seen wearing in the photographs found in his possession. Also, defendant carried the false documents separately from his true identification, which supports an inference that he wanted to keep the two separate so that he could quickly and easily produce one or the other, as needed. Defendant also sent a letter to the court requesting to plead guilty.

People v. Isidro Rodriguez
(Ct. App., 10/18/11)

* * *

GRAND LARCENY - Value

The First Department concludes that the proof was not sufficient to establish the $1000 value element of fourth degree grand larceny where the People proved that the original price of the computer in December 2004 was a little over $2,000, and that the computer was still functioning and in good condition at the time of the theft in December 2007. The jury could only speculate whether the computer still had a value of more than $1000.

However, with respect to a different count, the Court finds sufficient evidence of value where the complainant purchased the television only nine months before the theft for approximately $1,500, and, after it was stolen, bought a replacement for about $1,300, and, when the stolen television was returned, preferred it to the newly purchased $1,300 substitute.

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

* * *

LARCENY - Intent
POSSESSION OF STOLEN PROPERTY
DISMISSAL IN THE INTEREST OF JUSTICE

The Court dismisses as facially defective charges of petit larceny and criminal possession of stolen property where it is alleged that after a police officer placed a bag containing a laptop on the sidewalk, defendant walked over to the bag, picked it up and walked away and held the bag close to his body, walked by a marked police car without attempting to return the property, and opened the bag and looked inside. The allegations do not establish how long defendant walked with the bag, or whether the bag contained a marking indicating that it belonged to someone and had not been discarded.

The Court also dismisses the charges in the interest of justice, noting that defendant is not likely to repeat this behavior because it is improbable that the same circumstances will occur again, and that this was a "bait and sting" operation that caused no real harm.

People v. Hiram Gonzalez
(Crim. Ct., N.Y. Co., 12/15/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_52271.htm

* * *

ROBBERY - Dangerous Instruments

A 4-judge Court of Appeals majority reverses defendant's conviction for robbery in the first degree, holding that the handwritten demand defendant passed to the victim, in which he threatened to shoot the victim with a gun, does not constitute legally sufficient evidence that defendant was in actual possession of a dangerous instrument at the time of the crime.

This type of statement, whether in the form of a verbal threat or a handwritten note, establishes only the threat of physical force necessary to support the charge of third-degree robbery. The People must furnish additional proof, separate and apart from a defendant’s statement, establishing that the defendant was in actual possession of a dangerous instrument.

The dissenting judges see no principled reason why a jury could not reasonably credit defendant’s admission. This is not a case in which defendant was apprehended at the scene immediately after the crime with no weapon in his possession. The majority’s conclusion effectively means that a defendant must actually produce the weapon in clear view during the course of the robbery or be arrested at the scene while still in possession of the weapon.

People v. John Grant
(Ct. App., 10/20/11)

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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)

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ROBBERY - Display Of What Appears To Be Firearm

A three-judge First Department majority finds unpreserved defendants' claim that because the object displayed by Howard during the robbery was actually a BB gun and not a firearm, the affirmative defense to first degree robbery was established as a matter of law, and their claim that the victim's testimony about defendant Stanley placing an object against his back was insufficient to support a first-degree robbery conviction.

In any event, where defendants surrounded the victim, defendant Howard stood in front and put a gun to the victim's head and neck, and defendant Stanley stood behind and placed an object against the victim's back, the victim could reasonably have perceived the object to be a gun. The fact that the victim acknowledged that the object could have been something other than a gun is of no legal consequence. Penal Law § 160.15(4) requires only that the object displayed reasonably appears to be a gun, not that it is in fact a gun or that it could be nothing but a gun. The victim's perception need not be visual, and may be limited to touch or sound.

The dissenting judges note that when defendants were apprehended, the only gun recovered was the BB or other air gun and not a firearm. The majority relies on one statement made by the victim during the trial: "He told me to put my back [sic] and I felt the other person was touching me with something else on my back. I don't know. I cannot say it was a gun or something else." The word "object" was used neither by the victim nor by the prosecutor.

People v. Malik Howard, People v. Hilbert Stanley
(1st Dept., 1/12/12)

* * *

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)

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).

* * *

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 - 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 - Restitution

The First Department upholds an order directing restitution in the amount of $500 where there was a sworn statement by the victim that respondent's acts had rendered her cell phone incapable of normal operation and that she had paid approximately $500 for the device, and, when respondent moved to modify the restitution order, the presentment agency responded with documentary proof of replacement cost.

In re Dwayne F.
(1st Dept., 10/11/11)

Practice Note: When the respondent wishes to contest a proposed restitution order, the respondent's attorney should request a separate hearing on restitution. Upon request, the court must hold a hearing to determine what amount of restitution, if any, should be ordered, and/or determine whether the respondent lacks the ability to pay restitution in whole or in part. *Matter of Jonathan D.*, 33 A.D.3d 996 (2d Dept. 2006).

Before ordering restitution, the family court must make a finding as to monetary value based on documentary or other reliable evidence presented at disposition. *Matter of Jonathan D.*, 33 A.D.3d 996; *Matter of Richard GG.*, 187 A.D.2d 846 (3rd Dept. 1992) (evidence insufficient to indicate how $150 amount was determined); *see also People v. Monette*, 199 A.D.2d 589 (3rd Dept. 1993) (statements made by victim and insurance carrier were insufficient); *People v. Jackson*, 180 A.D.2d 755 (2d Dept. 1992) (court's review of repair bill and defendant's reluctant consent to entry of civil judgment were insufficient). Insurance payments or other compensation obtained by the victim must be considered in the calculation. *Matter of Jonathan D.*, 33 A.D.3d 996.

When the respondent raises the issue of ability to pay, it is the respondent's own ability to pay that should be at issue. The court "may require that the respondent pay out of his or her own funds or earnings the amount of replacement, damage or unreimbursed medical expenses, either in a lump sum or in periodic payments in amounts set by the court" (emphasis supplied). FCA § 353.6(1)(a). The term "respondent" "means the person against whom a juvenile delinquency petition is filed...." FCA § 301.2(2). Section 353.6(1)(a) contains no reference to the respondent's parents or family, and their "funds or earnings." Thus, whatever the law might be with respect to a parent or other guardian's civil liability for the acts of his or her minor child, there is no authority in the Family Court Act for a restitution order that requires someone other than the respondent to pay.

* * *

RIGHT TO COUNSEL - Effective Assistance
SENTENCE - Mitigating Factors

The Court grants defendant's motion to vacate his sentence and for a new hearing, concluding that defense counsel provided ineffective assistance when he failed to investigate charges pending in Nassau County that involved possession of a shank.

This Court imposed the sentence that it did - well above the 84 to 105-month Guidelines range - because defendant was caught with a shank in prison. The Court viewed the shank as evidence of defendant's continued gang-involvement, overall violent lifestyle, and inability to be rehabilitated. However, defendant allegedly possessed the shank for self-defense, and the rationale for possessing the shank would change the character of the offense. The Court is aware of the dangers that cooperating gang-members face in prison, and possession of a shank to defend oneself from attack is quite different from possessing a shank to commit crimes and gang-related violence. There is more than a reasonable probability that the Court would have sentenced defendant differently had it known he had the shank for self defense.

Harris v. United States
NYLJ, 10/17/11
(EDNY, 10/7/11)

* * *

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 - 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)

Appeals

APPEAL - Scope Of Review
IDENTIFICATION - Photos - Suggestiveness

In *People v Ledwon* (153 N.Y. 10), the Court of Appeals held that a criminal conviction is not supported by legally sufficient evidence if the only evidence of guilt is supplied by a witness who offers inherently contradictory testimony about the defendant's culpability. In this case, the victim consistently told the jury that defendant was the person who robbed him, but his testimony conflicted with the testimony of other witnesses.

In a 4-3 decision, the Court of Appeals majority, noting that the limited rule of *Ledwon* does not govern here, concludes that the proof was sufficient to support defendant's conviction. *Ledwon* applies in rare cases where the crime is established by only one witness who provides inherently contradictory testimony. *Ledwon* does not control if the sole witness provides a credible explanation for the discrepant testimony. Where a witness makes pretrial statements inculpating the defendant yet testifies that the criminal was actually another person whose appearance was drastically different, *Ledwon* does not mandate reversal if the trier of fact has an objective, rational basis for resolving beyond a reasonable doubt the contradictory versions given by the witness. It follows that *Ledwon* does not apply when a conflict arises from the testimony of more than one witness. Here, there were serious conflicts in the trial proof about the perpetrator's physical appearance, but the victim was unwavering during his testimony at trial that defendant was the person who attacked him and that the detective's recollection of the perpetrator's description was simply incorrect.

This Court has no authority to upset a conviction because of differences between the pretrial and trial statements of a witness even if the Court believes that the jury got it wrong; such authority is vested exclusively in the intermediate appellate court, which has an obligation to review whether the weight of the evidence supported the verdict. The Court is "concerned, of course, about the incidence of wrongful convictions and the prevalence with which they have been discovered in recent years." Concerns about the propriety of a conviction are heightened in a case like this where there was some evidence that the robber used both of his arms but it was undisputed that only one of defendant's arms was fully functional. Whatever misgivings the Court may have

about the Appellate Division's conclusions, the limitations of the Court's jurisdiction prevents it from second-guessing.

However, a new trial is ordered because of an unduly suggestive photo array procedure. The victim's son participated in the photo array as a translator. The hearing court had been troubled by the son's role but denied suppression because the son did not know defendant. At trial, it was revealed that the son had known defendant for a "long time" before the photo array. The trial court erred when it denied defendant's motion to reopen the *Wade* hearing. The new evidence considerably strengthened defendant's suggestiveness claim given that the son had provided the detective with neighborhood gossip about a possible perpetrator; the detective was or should have been aware of the substantial risk that the son was familiar with defendant despite his assurance to the contrary; there was no apparent impediment to the detective utilizing a Spanish interpreter who did not have preexisting information about the possible perpetrator or a familial connection to the victim; and the detective could not be reasonably sure that the son would accurately translate the conversation. This suggestiveness is attributed not to the victim's son, but to the detective's decision to utilize him as the interpreter. Defendant could not have discovered, before the hearing court ruled, the true extent of the son's familiarity with defendant or what he misrepresented to the police. Defendant is entitled to a new trial, before which the People may attempt to demonstrate, by clear and convincing evidence, that the victim's ability to identify defendant has not been impermissibly influenced by the suggestive pretrial procedure.

The dissenting judges assert that there was no objective, rational basis upon which the jury could decide which version of events provided by the victim it should accept. Although there is no per se rule requiring dismissal because of inconsistency between a witness's trial testimony and earlier statements, failure to dismiss here violates the spirit of the rule against singular reliance on a witness who presents a hopelessly contradictory account of the events giving rise to the conviction.

People v. Sebastian Delamota
(Ct. App., 11/17/11)

*   *   *

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 - Dismissal Due To Unavailability Of Defendant-Appellant

The Appellate Division dismissed defendants' appeals where defendants filed timely notices of appeal, but were involuntarily deported by the Department of Homeland Security's Immigration and Customs Enforcement Bureau while their appeals were pending. In *People v. Ventura*, a 4-judge Court of Appeals majority concludes that the Appellate Division abused its discretion, and, in *People v. Gardner*, a unanimous Court reaches the same conclusion.

Dismissals have been predicated primarily on a policy-based rationale that courts should not aid in the deliberate evasion of justice through continued consideration of appeals. Here, however, defendants were involuntarily removed from the country. In fact, they, and similarly situated defendants, have a greater need to avail themselves of the appellate process in light of the tremendous ramifications of deportation. Moreover, an inability to obey the mandate of the court is not implicated here. Disposition of the appellate issues would result in either an affirmance or outright dismissal, and neither outcome would require the continued legal participation of defendants.

The importance of the fundamental right to an appeal, and the distinct role assumed by the Appellate Divisions, makes access to those courts imperative. The broad discretionary authority of those courts to dismiss pending appeals cannot be accorded such an expansive view as to curtail defendants' basic entitlement to appellate consideration.

The dissenting judges in *Ventura* reject the majority's holding that it is always an abuse of discretion for the Appellate Division to dismiss the criminal appeal of an involuntarily deported non-citizen on the sole basis of unavailability. In *Gardner*, defendant's wife, an American citizen, had filed a petition requesting that defendant's immigration status be adjusted, but the petition was denied because of defendant's criminal record. In contrast, in *Ventura* there is nothing in the record suggesting that the conviction from which Ventura appealed, as opposed to his unrelated conviction and sentence for burglary, caused his deportation or would prevent or complicate his return to the United States.

People v. Carlos Ventura, People v. Damian Gardner
(Ct. App., 10/25/11)

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

Based on respondent's contacts with investigators posing as underage girls, he was charged with endangering the welfare of a child. The case was adjourned in contemplation of dismissal and ultimately dismissed, and thus the records were sealed. Subsequently, respondent faced criminal charges in Pennsylvania after he engaged in lewd conduct in front of a "web cam" viewed by a police investigator posing as an underage girl. The court granted petitioner's ex parte application, made on behalf of the prosecutor and police department involved in the Pennsylvania case, to unseal the records from the ACD case for use in the pending criminal proceedings. Respondent's motion to vacate that order was denied.

The Third Department reverses, and vacates the unsealing order. Although there is an exception that permits a law enforcement agency to obtain sealed records if "justice requires that such records be made available to it," the statute's primary focus is unsealing for investigatory purposes prior to commencement of a criminal proceeding, not unsealing for use by a prosecutor in a pending proceeding. A Pennsylvania police department also sought the records, but there is no indication that its "investigation" was in any way separate from the pending prosecution. Indeed, the records were being sought for the purpose of being admitted at trial and being used to assist in sentencing and evaluation for sex offender registration purposes.

Matter of Albany County District Attorney's Office v. William T.
(3d Dept., 10/20/11)

* * *

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

Petition

PINS - Petition - Sufficiency

The Fourth Department finds a nonwaivable jurisdictional defect and dismisses the PINS petition where, in a report attached to the petition, Probation representatives stated in a conclusory fashion that Probation provided the requisite diversion services to respondent and his family prior to the filing of the petition. The petition failed to demonstrate that Probation had exerted documented diligent attempts to avoid the necessity of filing a petition.

Matter of Nicholas R.Y.
(4th Dept., 1/31/12)

ACD

PINS - Adjournment In Contemplation Of Dismissal
- Appeal - Preservation

After the respondent made an admission to truancy, the court entered an order on June 23, 2009 adjourning the matter in contemplation of dismissal until December 23, 2009, and directed that the matter be restored to the calendar prior to December 23, 2009, when the matter would be adjourned in contemplation of dismissal for an additional four-month period with supervision. The only application to restore the matter to the calendar was made on March 12, 2010, nearly three months after expiration of the adjournment period, and the matter was restored to the calendar three days later and respondent was placed in the custody of the Commissioner of Social Services.

The Second Department, permitting respondent to raise the unpreserved claim because it involves the court's statutory authority to issue these orders, reverses. Since the court determined that respondent required a period of supervision longer than six months, entry of an ACD was not a viable option. Moreover, the case was not restored to the calendar within six months, and thus any subsequent action by the court was a nullity. The court should have deemed the petition to have been dismissed in furtherance of justice.

Matter of Ramon H.-T.
(2d Dept., 9/27/11)

Truancy

PINS - Truancy

In this PINS proceeding alleging truancy, the Court, upon a hearing, dismisses the petition where respondent has Asperger's Syndrome, which affects his decision-making abilities. His failure to attend school is unintentional or excusable. A school district and the Department of Social Services should attempt to fashion a reasonable and appropriate learning environment for a child before commencing judicial proceedings. Respondent and his family could benefit from further diversion services, and additional steps can be taken by the school district to improve attendance. It would be unjust to adjudicate respondent a PINS and subject him to what probably would be destructive placements until after proper services have at least been attempted.

The first step would be to establish and implement an IEP, since respondent is a student with a disability which falls within the classifications under the IDEA. There is evidence that traditional modes of dealing with respondent are not sufficient. It has been recommended that rewards and positive reinforcement for good behavior be used rather than punishment. These recommendations should be included as part of an IEP or further diversion services. Home tutoring is not what is best for respondent in the long term, but with home tutoring and family counseling he may be able to re-enter a regular classroom setting in the future. While the Court has no authority to directly review the school's procedures and the decision of the Committee on Special Education, the Court is not bound to accept the school's decision without question.

Respondent's parents are placed on notice that they must take steps to insure their son's well-being. Their failure to cooperate with family counseling could form the basis for a neglect petition.

Matter of Benjamin A.
(Fam. Ct., Oswego Co., 9/26/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_52217.htm

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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)

Placement

PINS - Extension Of Placement
FOSTER CARE - Re-Entry Into Care

The Court denies respondent's request for an order directing that the Commissioner file a petition to extend his PINS placement where the last order extending placement expired on February 25, 2011. A petition to extend placement may not be filed after the expiration date of the prior order of placement. In addition, the decision as to whether or not to seek an extension of placement rest with the Commissioner. Courts may not compel a public official to perform discretionary acts which involve the exercise of reasoned judgment which could typically produce different acceptable results.

The Court also rejects respondent's request to re-enter foster care pursuant to FCA § 1091. The statute applies in the context of FCA Articles 10 and 10-A, but, while respondent's attorney makes cogent arguments for expanding the statute to apply to juveniles who are placed under FCA Article 7, the Court cannot find that the Legislature intended to apply § 1091 in PINS proceedings. And, while respondent's attorney contends that the omission of PINS juveniles from § 1091 creates a harsh result for those juveniles, a court may not assume the legislative role and rewrite the statute to satisfy its own sense of justice.

Matter of Jeffrey H.
(Fam. Ct., Queens Co., 12/6/11)
http://courts.state.ny.us/Reporter/3dseries/2011/2011_21428.htm

SELECTED CHILD WELFARE CASELAW

JULY 2011 – JANUARY 2012

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REMOVALS and GENERAL ISSUES IN NEGLECT and ABUSE

<u>Matter of N. Children</u> 86 AD3d 572 (2nd Dept. 2011)

Kings County Family Court erred in granting a summary judgment motion adjudicating neglect based on the testimony in the FCA §1028 hearing. Since that hearing allows hearsay that may not be permitted in a fact-finding, it cannot serve as the only basis for a summary judgment adjudication.

<u>Matter of Prince Mc.</u> 88 AD3d 885 (2nd Dept. 2011)

A Kings County Family Court's denial of a mother's request for a FCA §1028 hearing was reversed on appeal. The mother previously waived her right to a FCA §1028 hearing but the statute clearly says that even if the hearing is initially waived, a request can be made for such a hearing at any time during the pendency of the proceeding.

<u>Matter of Jaikob O,,</u> 88 AD3d 1075 (3rd Dept. 2011)

The Third Department reversed a neglect finding and remitted the proceedings for a new hearing based in ineffective assistance of defense counsel. The respondent lived with his wife and his girlfriend and had children by both women. The 4 children that he and his wife had in common did not reside in the home – 3 of them had been freed for adoption in another state. He and the girlfriend had 2 children who lived in the home and they were the subjects of the neglect petition. The allegations included that the father engaged in domestic violence against both women, that he used marijuana in front of the children and that he was an untreated sex offender. After the fact-finding, where the two women testified against him, Tioga County Family Court found that the father had neglected the children. At the dispositional hearing, the court also found that he had violated an order of protection to stay away from the girlfriend. The father was sentenced to a 6 month jail term and the court – without a written motion – relived the agency of any obligation to provide diligent efforts to reunite him with the children. No evidence regarding the best interests of the children was presented at the dispositional hearing.

The Appellate Division found that the defense counsel did not provide effective representation. The lawyer did not make an opening statement and did not cross examine the witnesses on obvious relevant issues such as the children's presence during the domestic violence. Instead the attorney cross examined the wife and girlfriend, both of whom were young victims of his client, with tasteless, irrelevant and prurient questions. The attorney made no motions at the close of the DSS' case and made not closing statements except to say "I think everything's been said". He did not submit any proposed finding of facts and conclusions of law although directed to do so by the court. Even though the court had not yet made a finding of neglect and deferred the decision, the defense attorney consented to a dispositional hearing on the spot. After being sentenced to jail on the contempt issue, the respondent father wrote a letter from jail to the attorney asking to have a new attorney appointed – again before the court had even actually ruled on the petition. The defense attorney responded with a threatening letter that he would not cooperate with any new counsel or provide the file to another attorney. He also commented in the letter that he made money from clients who had money to pay him and did not need to take assigned cases such as the respondent's. The respondent was held in contempt a second time for violating an order of no contact by sending a letter to the girlfriend and the children from the jail. The attorney did not raise any issues about the fact that the respondent had not been in court when the order of no contact was issued nor had he been served with the order. Lastly, the defense attorney never filed a notice of appeal regarding any of the court's orders.

Matter of Destiny EE. __AD3d__, dec'd 12/29/11 (3rd Dept. 2011)

The Third Department reviewed a respondent mother's argument that the Ulster County Family Court did not have jurisdiction over a neglect petition and affirmed the lower court's decisions. The mother had two boys and in 2001 was residing with them in Ulster County. Allegations of abuse and neglect were filed against her and her husband at that time alleging the husband's sexual abuse of the older son (who was his stepson) The children were placed in foster care until 2003 and a 3rd child, a daughter, was born to the mother. In 2003 the children were returned to the mother care with an order of protection that the father – whose location was unknown - have no contact with the sons. DSS supervised the mother and children until 2005 when the orders ended. The mother and children then relocated to Wisconsin. Approximately 18 months later, the mother returned to Ulster County and within a month filed an Art. 6 petition in court alleging that the father was living in Mississippi, that she had sent the younger son to visit him and that the

husband was now refusing to return the younger son to her. The mother complained in her papers that the father was using drugs, the father's girlfriend had struck the child and that the father would not let the child return to the mother's home. In response to her disclosure of this information, DSS filed an Art.10 petition against the mother for having allowed her younger son to go to the father in the first place, given the sexual abuse history. The lower court issued a warrant for the father's arrest and the younger son was returned to NYS. All three children were placed in foster care in 2007 and the mother admitted her actions were neglectful. In 2009 DSS filed to terminate her parental rights. The mother argued that the 2007 admission should be vacated as that court did not have jurisdiction in 2007. She claimed that NYS was not the children's home state as she and the children had only been back in NYS for about a month when the Art. 10 petition was filed. The lower court denied to motion to vacate and the mother appealed.

The UCCJEA controls in this matter. No other jurisdiction but NYS ever issued a custody order affecting these children and no applications for such relief were ever made anywhere else and therefore NYS had proper jurisdiction. These children did not in fact have a "home state" at the 2007 commencement of the Art. 10 as they were no longer living in Wisconsin and had not yet lived in NYS the requisite 6 months. Wisconsin did not have jurisdiction under UCCJEA as the children were no longer living there and no parent lived there. Although the mother now claimed in 2009 that her 2007 return to NYS was only intended to be "temporary" , all evidence is to the contrary – her actions were those of a person who intended to return to the NYS area that she had left only 18 months earlier. No other state exercised jurisdiction over the children who had the requisite "significant contacts" in NYS. The prior proceedings had taken place for over a 4 year time period and the DSS, the court and all the attorneys – including the very same attorney for the children – were very familiar with the children, the family and their history. All three of the children had been born in NYS and had lived their whole lives here save for the 18 month period in Wisconsin. The other fathers of the children resided in NYS.

Lastly, the mother argued that the prior finding should be vacated based on the recent Court of Appeals ruling in ***Afton C.,*** **17 NY3d 1 (2011)** regarding neglect and access to sexual predators. This was also rejected by the Third Department. The father in this matter had in fact sexually abused the subject child who was then in his care. The mother acknowledged that when she sent her younger son to see his father in Mississippi it was with the knowledge that the father had anally raped the child's older brother, forced that child to perform oral sex on him, forced that

child to "hump" on him and she had actually seen the older child try to run from the father when the father had his pants down around his ankles.

Matter of Bridget Y. __AD3d__, dec'd 12/30/11 (4th Dept. 2011)

In another case involving the UCCJEA, jurisdictional questions rose relating to a neglect matter that had begun in the state of New Mexico and wound up in Chautauqua County Family Court. Four sisters - 15 year old twins and their 13 and 11 year old sistesr – were alleged to be neglected by their father and their adoptive stepmother in the state of New Mexico. The father was alleged to be a well to do doctor. The allegations were fairly serious in that the children had been harshly disciplined including that they had been left with no adult supervision in a garage and one point and in a trailer at another point with limited food and water, clothing or bedding and limited access to bathroom facilities and that this occurred for weeks at a time. When this was discovered by the authorities in the state of New Mexico, the parents were charged criminally with seven counts of felony child abuse. The New Mexico court ordered that the parents could not have contact with the children while the charges were pending but allowed the parents to make a "safety contract" and send the children to live with relatives in Chautauqua County. Within a few weeks of the arrest, the CYFD (the New Mexico DSS equivalent) indicated that they would not be taking any action from their perspective and that they were exercising no legal authority over the children. The parents then advised the Chautauqua County relatives that they intended to move the children, perhaps back to New Mexico to reside with a work colleague of the father's. The NYS relatives responded by filing an Art. 6 petition in Chautauqua County Family Court. The parents responded by moving in the New Mexican court for the custody action to be heard there claiming that under the UCCJEA New Mexico was the children's home state. At that time, the parents indicated they wanted to place the children in the care of friends in the state of Ohio. The Chautauqua County DSS filed an Art. 10 petition against the parents alleging that the parents were simply moving the children around the country to continue to intimidate and isolate them. Chautauqua County Family Court issued an order assuming emergency jurisdiction under DRL §76-c and granted temporary custody to the NYS relatives. The New Mexico court responded by issuing an order that they were assuming jurisdiction and that New Mexico was the children's home state. (Counsel informs us that the New Mexico Judge was later convicted for taking bribes) Further the New Mexico court ruled that the parents still had the right to arrange to place the children with other caretakers in Ohio who were adequate and appropriate. Chautauqua County Family Court responded that the

children were at risk as no neglect proceeding was pending in New Mexico and the children had no legal representation there either. New Mexico fired back ordering that the children were to be moved to Ohio. The two courts continued to issue orders that each was the proper jurisdiction. Chautauqua County Family Court ultimately issued an order that the parent's attempts to remove the children from the NYS relatives was neglect and placed the children in the custody of the relatives under DSS supervision. By the time the parents appealed that order to the Fourth Department the two older girls had turned 18. The appellate court declared that the issues concerning those girls were now moot. As to the younger children, the appellate court concurred that the NYS court had acted properly in retaining jurisdiction as under UCCJEA, there was proper emergency jurisdiction even though New Mexico had been the children's home state. The children had been at imminent risk and the New Mexico courts had not acted to assure the protection of the children. Two Fourth Department Justices dissented and found that there was no reason for a NYS court to assume temporary emergency jurisdiction as the New Mexico court had already assumed proper jurisdiction over the children before the New York court had.

Matter of Serenity S., __AD3d__, dec'd 11/1/11 (2nd Dept. 2011)

The Second Department reversed the Kings County Family Court's denial of a motion by ACS to place a young baby in foster care and ordered the child to be placed. The child was the subject of a derivative neglect petition filed when she was born. The mother's four older children were already in foster care due to the mother's drug use. The lower court had released the baby to the mother and the child's father while the Art. 10 was pending. Less than two months after this temporary release, ACS moved to place the infant in care due to an incident at the homeless shelter where the family was living. At the FCA §1027 hearing, the lower court erred in refusing to take judicial notice of the prior neglect findings against the mother. Further, the lower court also erred when it ruled both the mother and the shelter staff provided credible testimony about the triggering event. In fact, the witnesses' descriptions were wildly disparate. The Second Department credited the staff at the shelter who described the mother as being physically aggressive and intoxicated while carrying the baby who was improperly dressed. The staff testified that the mother abruptly left the shelter at night with the child and without proper provisions for the child. The prior four neglect adjudications and the shelter supervisor's description of the incident provided a preponderance of evidence that the child's life or health were at imminent risk such that the child needed to be placed in care during the pendency of the petition.

<u>Matter of Giovanni S.,</u> __AD3d __, dec'd 11/1/11 (2nd Dept. 2011)

In a lengthy decision, the Second Department appointed new appellate counsel for a Kings County mother after her appointed counsel filed an ***Anders*** brief. The court reviewed in detail the history and rulings connected with filing an ***Anders*** brief and concluded that this matter did not support the filing of such a brief. The Second Department commented that a competent defense counsel could raise issues on appeal. There may be issues as to if ACS had proven by a preponderance of evidence that the mother sold drugs in the child's presence and if that act was in fact neglectful of the child. Further since the lower court had determined upon summary judgment that such an act was neglectful, that issue might also be raised on appeal.

<u>Matter of Max F.,</u> __AD3d___, dec'd 12/27/11 (2nd Dept. 2011)

The Second Department appointed new appellate counsel for a Nassau County mother after her counsel filed an ***Anders*** brief. The Court concluded that there may well be nonfrivolous issues to argue in the areas of the level of proof, if the lower court properly denied the mother's request for new trial counsel and if the mother received effective assistance of counsel at trial.

<u>Matter of Shernise C.</u> __AD3d__, dec'd 11/15/11 (2nd Dept. 2011)

The Second Department found FCA §1027(g), which requires the court to order medical examinations in abuse cases, unconstitutional as it was applied to a 16 year old subject of an abuse petition. The 16 year old had given birth to a baby when she was 13 years old. Two years later, DNA tests showed that her stepfather was the biological father of the toddler. The 16 year old, her 2 year old baby and the 16 year olds 4 year old sister were all removed from the home and abuse and derivative abuse petitions were filed against the stepfather and mother. At the first appearance, the Kings County Family Court ordered, as per §1027(g) ,forensic medical examinations of all the children including the taking of color photographs of any visible areas of trauma. The 16 year olds attorney obtained a stay of the order and appealed. The Second Department found that the statute – due to the

mandatory language of it – violated the 16 year olds Fourth Amendment's rights. The Appellate Court found that the statute provided no discretionary review by the court about the necessity of the order. Here DNA testing had already proven that the child had been sexually abused by her stepfather. Subjecting her to an intrusive medical procedure was unnecessary and had only the remotest possibility of revealing any additional evidence of abuse given the amount of time that had gone by. This intrusive search of her body is unreasonable and violates her Fourth Amendment rights.

GENERAL NEGLECT

<u>Matter of Nyia L.,</u> 88 AD3d 882 (2nd Dept. 2011)

An adoptive mother from Brooklyn neglected her child. The mother had taken the child to the hospital for a mental health evaluation and then upon the child's discharge, the mother refused to take her home. ACS offered the mother services, including some respite care arrangements but the mother refused the services and would not visit or communicate with the child. The mother was unwilling to have the child back in her home or have anything to do with the child and said adopting the child was the "biggest mistake" she had ever made. The Second Department concurred that such behavior was neglect on the part of the mother.

<u>Matter of Taylor C.,</u> 89 AD3d 405 (1st Dept. 2011)

A Bronx mother neglected her one month old baby by pushing the child such that the infant slid across the floor from one room to another. This single incident is enough to demonstrate that the child is at risk. A negative inference can be drawn by the mother's failure to appear and testify in court. The lower court did not need adjourn the fact finding as the mother had been told of the date, had frequently not appeared in the past with no explanation and provided incorrect contact information. She was represented by counsel.

Matter of Kinara C., **89 AD3d 839 (2nd Dept. 2011)**

The Second Department affirmed Queens County Family Court's adjudication of a father to have medically neglected his daughter. The child had diabetes and the evidence showed that the father was aware that she needed assistance and he did not monitor her insulin nor make sure she was compliant with the medical regimen. The father did not ensure she went to her medical appointment and in an 8 month period, the child missed 8 of 21 appointments. During that same period, the child had to be hospitalized on 3 occasions due to elevated blood sugar. The father did not make sure that the child had her medication and her monitoring devices. The lower court did err by incorporating the testimony from the FCA §1028 hearing into the fact finding without a finding that the witnesses were unavailable. However this was harmless error as the evidence at the fact finding alone was sufficient to make the finding. Although the father failed to appear for the last 2 days of the fact finding hearing, the lower court did not err in failing to grant defense counsel an adjournment where no reason was presented for the father's failure to appear.

Matter of Brian P., **89 AD3d 1530 (4th Dept. 2011)**

A Niagara County mother neglected her son and derivatively neglected his two older brothers. The mother did take her youngest son to the doctor and to the hospital when directed to do so but she knew or should have known that her boyfriend was abusing the child. She failed to take steps to protect the child from the boyfriend, she continued to allow the boyfriend to reside with her and allowed him to babysit the child. The court was permitted to draw a negative inference from her failure to testify on her own behalf.

Matter of Anastacia L., **__ AD3d___, dec'd 12/8/11 (1st Dept. 2011)**

The First Department agreed that a man neglected his children as he was a level three sex offender who had committed past sex offenses against children and he was now with the subject children unsupervised. There had been a recommendation that he obtain sex offender counseling in a prior neglect proceeding but he had not done so. The court used this point to distinguish this from the ***Afton C.*** ruling.

<u>Matter of Alexis H,,</u> __AD3d__, dec'd 12/30/11 (4th Dept. 2011)

An Onondaga County Family Court adjudication that a mother neglected her 3 children was affirmed on appeal. The Fourth Department did correct the order and vacated references to an old alcohol incident because the lower court had not referred to this issue in its oral decision. However, the mother did neglect the children because she did not maintain a safe residence for the children. The home was unsanitary and the mother had long term mental illnesses. She failed to comply with treatment for both her mental illness and her substance abuse. The mother failed to take the stand and that should be held against her. The children need not be actually injured as long as near or impending injury or impairment is demonstrated as here.

<u>Matter of Andre B.,</u> __AD3d__, dec'd 1/2/12 (1st Dept. 2012)

A Bronx father neglected his 2 week old baby by shaking him forcefully "like a rag doll". He also fed the infant bananas and referred to him as a "devil child". Given these risks to the child, proof of actual harm to the child was not necessary. This behavior reflects such a flawed understanding of proper parenting that he presents a risk of harm to any child in his care and therefore the older boy is also derivately neglected. The court placed the baby in foster care and the older child with his mother.

<u>Matter of Alexis AA.,</u> __AD3d__, dec'd 1/12/12 (3rd Dept. 2012)

A Clinton County father appealed the Family Court's decision that he had neglected two of his three children but the Third Department affirmed. The two children were toddlers and the father did not properly supervise them when he was the caretaker. One of the children was left unsupervised on a porch staircase and fell to the concrete below, injuring his head. The same child was burned on an exposed baseboard heating unit when he was left in a room unsupervised. The older toddler bit the younger child all over his body, some of them severe bites. The older toddler hit his head on the sidewalk. The father also did not stop the children from eating off the floor or licking puddles in the street. The children were properly placed in foster care due to these incidents as well as due to the unsafe condition of the home which was littered with garbage and debris and was unsanitary and unsuitable for young children.

Domestic Violence

<u>Matter of Ajay Sumert D.,</u> 87 AD3d 637 (2nd Dept. 2011)

The Second Department upheld a Queens County Family Court adjudication of neglect regarding a child's father. The father hit the mother in the face while the 2 year old child was present. The blow was so hard that the mother could not move her jaw or chew afterwards. The child began crying when the father hit the mother. A month later while the mother was holding the child, the father punched the mother in the stomach, cursed her and told her he would kill her if she left. These acts in front of the child placed the child in imminent danger of impairment.

<u>Matter of Aliyah B.,</u> 87 AD3d 943 (1st Dept. 2011)

The First Department affirmed all the decisions of the New York County Family Court in this matter. The mother neglected her children by committing acts of domestic violence against the father while the children were present. One child made out of court statements about the violence which were corroborated by the father, the mother's daughters' and the police officer's testimony. An expert is not needed to show that these violent acts exposed the children to imminent risk of harm. Further the children were educationally neglected . One child missed 64 out of 181 days of school and was late 38 times. The school had contacted the mother numerous times about the issue. The court correctly determined that the children should be placed with the father. The mother would not cooperate with the agency and would not address the domestic violence she had perpetrated. The father had cooperated with family services and was trying to create a stable home for the children. It was also appropriate for the court to order that the mother could not have contact with the children for a year. Lastly, the court did not err in allowing the father to move to Pennsylvania with the children. The mother did not preserve the issue and the evidence demonstrated that it was in the children's best interest in any event. The father moved to his sister's home to improve the children's lives and CPS there had assessed the sister's home and found it to be safe and appropriate for the children. The children also wanted to remain with their father in Pennsylvania.

<u>Matter of Sabrina D.,</u> 88 AD3d 502 (1st Dept. 2011)

The First Department affirmed a neglect finding on a Bronx father. He threw a glass vase or fish bowl at the child's mother which resulted in the item shattering near the child. He also allowed the child to be in the sole care of the mother knowing that the mother abused heroin and crack cocaine.

<u>Matter of Ariella S.,</u> 89 AD3d 1092 (2nd Dept. 2011)

The Second Department concurred with Queens County Family Court that a mother had neglected her child. The mother engaged in domestic violence against the father in the child's presence. She walked past the father's house with the child in a stroller dispute her having obtained an order of protection against the father. The father saw them and the father removed the child from the stroller and took her into his home. The mother did not contact the police but instead pursued him into the home, engaged him in a physical fight and stabbed him with a knife. At some points the child, who was less than 6 months old was present and at another point, the child was left unattended outside a closed door.

<u>Matter of Jaden C.,</u> __AD3d__, dec'd 12/13/11 (1st Dept. 2011)

The First Department reversed a neglect adjudication regarding a New York County father. The father walked with his 8 month old baby and the baby's mother from his home to the maternal grandmother's home and then after placing the child on a bed, indicated he would be leaving. This started an argument with the mother and her mother then blocked him from leaving the apartment. The father claimed that he tried to get out of the apartment but an uncle announced he was going to murder him, grabbed a gun and fired at the father. The gun jammed. The father then grabbed a box cutter and cut the uncle and the uncle in return pistol whipped the father causing him injury. While this fight was occurring the uncle's girlfriend stood by holding the baby. The father did get away and contacted the police and the baby was not injured. The lower court ruled that the father showed poor judgment in going to the location with the mother and the baby as the father had reason to believe that drug dealing was going on and that the situation could become dangerous. The First Department disagreed and ruled that no evidence was presented that the father knew that the uncle would be there or that there would be a fight. Although the emergency room doctor's notes said that the father knew the uncle was a drug dealer and kept drugs and weapons at this apartment,

there is no information as to the source of that claim and no indication that the person who claimed this was under any business duty to report. The father and the uncles' criminal record can't sustain a finding of neglect and the fact there was a fight does not make the father neglectful unless there is some proof that the father was the aggressor or that he brought the gun into the situation. The father's decision to simply accompany the mother and baby to the apartment was not neglect.

Matter of Zaire D., __AD3d___, dec'd 12/20/11 (2nd Dept. 2011)

A Kings County mother neglected her child in that the mother regularly used marijuana and committed acts of domestic violence against the father when the father was holding the child in his arms. The lower court properly drew a negative inference against the mother for not testifying and did not err in considering the father's testimony of the incidents and the drug use even though he was seeking custody. The court should not have admitted into evidence the police report that contained the father's out of court statements but it was harmless error as the court did not rely on this in its decision.

Matter of Imena V., __AD3d__, dec'd 1/12/12 (3rd Dept. 2012)

A Chemung County father appealed the neglect finding relative to his 3 children and 2 stepchildren. He claimed that the lower court incorrectly denied his FCA §1051(c) motion that the aid of the court was no longer needed. The father had relocated to Ohio over a year earlier and the mother had custody of the children who were the subjects of the petition. The Third Department concurred with the lower court that as the father still had visitation with his children and the children are all still minors, the aid of the court was needed as the finding of neglect could be important in future proceedings. The father also argued that neglect was not proven and the Appellate Court disagreed with him on that as well. The father had engaged in repeated domestic violence against the mother and this was often witnessed by the children. In one incident he pinned her to the floor and forcibly removed her clothing against her will while two of the children were present. One child described an incident where the father hit the mother in the face, threatened to kick her in the face and slammed her finger in the door. This child expressed fear for her mother's safety and indicated that this scared her. Another child said that the father "would not stop smacking his mom" and described an incident where the father punched the mother into a wall and that child said he had tried to

push his father away from his mother to protect her. The father was also aware that a babysitter for the children used marijuana while caring for the children and brought crack cocaine into the home and the father did nothing to stop this.

Matter of Imani O., __AD3d__ dec'd 1/12/12 (1st Dept. 2012)

The First Department reversed a neglect adjudication from the Bronx County Family Court. There was not adequate proof that the father had neglected the 2 children – who were 3 months and 2years old - through domestic violence. There was no admissible evidence that there had been any violence in front of the children. The mother did not testify in the fact finding and her out of court statements about what occurred were inadmissible hearsay as against the father. ACS offered into evidence written police reports that stated that there was a family history of domestic violence in front of the children. However, these written reports did not state how this information was known. Unless the information came from a source who had a business duty to so inform the police officer, then it was inadmissible hearsay. The written report did not state at what incident or incidents the children were present. The officer who prepared the report did not testify and so the origin of his claim that the children were witnesses was not known. Although the 3 month old had a bruise on the scalp, there was no evidence offered as to how this had been sustained.

Drug and Substance Abuse

Matter of Nasiim W., 88 AD3d 452 (1st Dept. 2011)

The First Department agreed with New York County Family Court that a mother neglected her son and that the child should be released to the father with no supervision needed. The evidence demonstrated that on one occasion at 7:15AM the mother was intoxicated and holding a "24 ounce can of beer" and approached the child who was with the stepmother and screamed and cursed and attempted to grab the child. On another occasion the mother went to the apartment of the father and the stepmother and was under the influence of alcohol and demanded to see the child. She was told to leave and she then vandalized the apartment lobby. She also showed up at an agency family conference meeting slurring her speech, smelling of alcohol, drooling and unable to participate in the conference. The

child reported that the mother was intoxicated during his visits and that she drank alcohol mixed with fruit juice from a glass bottle. This behavior triggers FCA §1046(a)(iii) and therefore ACS need not actually demonstrate the impact or imminent impact on the child. Even though the child was not present for some of these events, this is on no consequence. The mother did not testify on her own behalf and presented no evidence that she was voluntarily and regularly participating in a recognized alcohol program. Her position was that she did not misuse alcohol and only drank "socially".

<u>Matter of Virginia C.,</u> 88 AD3d 514 (1st Dept. 2011)

The Bronx Family Court's finding that a mother derivatively neglected her newborn was affirmed on appeal. Two prior orders had found the mother to have neglected her other children and she had failed to complete a drug treatment program. On cross examination the mother admitted to using cocaine even after the petition had been filed. The mother had opened the door to such post petition testimony when she testified on direct that even though she had left several drug treatments programs she did complete one and that she had never used drugs again and had not tested positive for drugs. In any event, the lower court based its finding on the failure to obtain drug treatment, not on post petition use of drugs. The court had also ordered that the mother was to stay away from the child and not communicate with the child or her caretaker except during agency supervised visitation. The mother also appealed that disposition but the Appellate Division found the issue moot as the order had expired. They did comment that if had not been moot, they would have reversed that order as it was made without any evidentiary basis and without the mother having an opportunity to be heard.

<u>Matter of Madison PP.,</u> 88 AD3d 1102 (3rd Dept. 2011)

The Third Department reviewed a neglect finding regarding a Clinton County child. Although both parents were found to have neglected the child, only the mother appealed. The appellate court concurred that DSS had proven neglect. The mother had a long standing problem with prescription drug abuse. There had been previous findings related to older children. The mother conceded that she had been addicted to pain medications but claimed not to be using them currently. However the DSS had filed the petition after she had appeared at the DSS offices in an apparent intoxicated condition and drug testing showed the presence of

opiates and oxycodone. DSS therefore established a prima facie case and the mother failed to offer any evidence in rebuttal. There had also been repeated acts of serious domestic violence between the parents and the mother refused to acknowledge the serious ongoing nature of the violence or to remove the child from the situation. She continued to live with the father despite the fact that she was well aware that he would drink and be violent toward her. She let him move back in after his release from jail where he had been due to assaulting her. The DSS had cross appealed arguing that the court did not have authority to place in the dispositional order that they were required to bring a violation proceeding if the mother was not compliant with treatment but the Third Department found that issue moot as the order had expired.

Matter of Damian G., 88 AD3d 1268 (4th Dept. 2011)

The Fourth Department affirmed an Oneida County Family Court adjudication that two parents neglected their children. The mother attempted to drive while she was intoxicated with the children in the car. She smelled of alcohol and behaved belligerently and irrationally. The father neglected the children by deliberately not taking his anti-seizure medication so that he could consume alcohol, knowing that he could have a seizure and become violent. In fact he did have 2 seizures, one of which occurred as the children were arriving at his home. The father threatened the police who had come to the scene. The father admitted to the caseworker that he had failed to take his medication. One Justice dissented, finding that there was not adequate proof that the father neglected the children. The fact that the father knew that he might have a seizure and that he might become violent and that the children might be harmed if they were present did not create a "near or impending" threat to the children. The dissent also disagreed with the majority in that there was not sufficient proof that the mother was in fact intoxicated on the evening in question or that in fact the children were going to be in the car as they were at a neighbor's home. (Counsel informs us that this case has been accepted by the Court of Appeals)

Matter of Megan L.G.H., 89 AD3d 843 (2nd Dept. 2011)

A Queens County mother neglected her child by being intoxicated and in possession of a knife and marijuana.

Matter of Niviya K., **89 AD3d 1027 (2nd Dept. 2011)**

Queens County Family Court found a father to have neglected his child and the Appellate Division concurred. He knew of the mother's drug use and failed to exercise a minimum degree of care to "ensure that the mother did not abuse drugs during her pregnancy".

Matter of Nicholas M., **89 AD3d 1087 (2nd Dept. 2011)**

A Suffolk County father neglected his son by leaving the child alone with the mother when he knew the mother was intoxicated on more than one occasion. He did not stop the mother, when she was intoxicated, from pushing the child in a stroller at night in an area with no sidewalks. He also engaged in domestic violence against the mother in the child's presence.

Matter of Colton A., **__AD3d__, dec'd 12/13/11 (2nd Dept. 2011)**

The Second Department reversed a neglect adjudication regarding a Suffolk County mother. The mother had been prescribed pain medications but there was no evidence presented that she had been advised by her doctor not to drive while taking the medication. There was not a preponderance of evidence that she neglected her children by driving under the influence of the pain medication. Although there was an out of court statement by one of the children that he had to supervise his siblings while the mother slept, this was not corroborated in any way. The mother established that she in fact she supervised the children appropriately.

Matter of Keoni Daquan A., **__AD3d__, dec'd 1/3/12 (1st Dept. 2012)**

The First Department upheld a New York County Family Court's neglect adjudication against a father. He was appropriately found to be a "person legally responsible" for the children in the home that were not his own. He was the mother's long term boyfriend , the father of some of the children and a regular visitor to the home. He watched the children, helped with their homework and took them to the doctor. He neglected the children by his drug use. He admitted that

he regularly smoked marijuana and this is prima facie evidence of neglect. There is no need to prove the impact of his drug use on the children unless he rebuts by showing that he is "voluntarily and regularly participating in a drug treatment program" FCA § 1046(a)(iii). Although he claimed in the FCA §1028 hearing that he was in a drug treatment program, he never provided any proof of that.

Excessive Corporal Punishment

<u>Matter of Joseph C,</u> 88 AD3d 478 (1st Dept. 2011)

A Bronx stepfather neglected his stepson and derivately neglected his own 2 year old son. He punished the child by requiring him to hold himself in a "push up" position and he also made the 11 year old kneel on uncooked rice grains for extended periods of time. These forms of punishment are not appropriate. The stepfather argued that the stepson was not injured by these punishments but the court found that the absence of actual injury does not preclude a finding. The step father testified that this was "not his finest parenting moment". This statement demonstrated that the stepfather did not appreciate the seriousness of the events or that the punishments were grossly disproportionate to the stepson's behavior. This punishment of the 11 year old demonstrated a "sufficiently faulty" understanding of his parental duties" that it warranted the inference that the toddler is in danger. However, the court cautioned that if there were future complaints of abuse or neglect concerning the biological son, they should be consider "on their own merits" and future evaluations should not be "unduly influenced" by the derivative finding. The stepson was placed in his own father's custody.

<u>Matter of James S.,</u> 88 AD3d 1006 (2nd Dept. 2011)

Richmond County Family Court adjudicated a mother to have neglected her children and the ruling was affirmed on appeal. One child made an out of court statement about the mother's use of excessive corporal punishment which was corroborated by the caseworker's observation of the injury to the child. A single incident of excessive corporal punishment is sufficient to sustain the finding and the conduct demonstrated a fundamental defect in her understanding of proper parenting such that the younger child was derivately neglected. The mother also had engaged in a pattern of erratic conduct and did not provide either of her children with proper supervision and guardianship.

<u>Matter of Steven M.,</u> 88 AD3d 1099 (3rd Dept. 2011)

A Columbia County father neglected – but did not abuse - his son by using excessive corporal punishment when the child had toileting failures. After visitation with his father, the child returned home with bruises and welts on his back and buttocks. The evidence included photographs and medical documentation and the mother testified that the father had told her that he hit the child with a leather strap. The Third Department found that the injuries did not rise to the level of abuse but did constitute neglect. The Appellate Division also ruled that the situation did not warrant the lower court issuing an order for no visitation for a year and conditioning further visitation only if the father engages in programs and services. A one year of no contact is a drastic remedy that is not warranted and while a court can order counseling as part of an order, it cannot order counseling before visitation will be allowed.

<u>Matter of Kennya S.,</u> 89 AD3d 570 (1st Dept. 2011)

The First Department reversed a neglect adjudication form New York County Family Court. This was only an isolated instance of excessive corporal punishment which resulted in relatively mild injuries as depicted in photographs taken.

<u>Matter of Nicholas W.,</u> __AD3d__ , dec'd 1230/11 (4th Dept. 2011)

An Ontario County Family Court adjudication that a father had neglected his son was reversed on appeal and remitted back to Family Court for a fact finding hearing. The father had pled guilty to assault in the 3rd degree in criminal court in front of the same Judge that was hearing the neglect petition in Family Court. But the criminal court plea had no allocution and so could not form the basis of the summary judgment motion for neglect in Family Court. Further, although one incident of excessive corporal punishment could be enough to establish neglect, here there was no proof offered that the father intended to hurt the child or that there was a pattern of excessive corporal punishment.

Unsafe Home

Matter of Alyson J., 88 AD3d 1201 (3rd Dept. 2011)

The Third Department concurred with Broome County Family Court that a mother of seven children had neglected them. The 7 children ranged in ages from a newborn (who added to the petition during the proceeding) to 10 years old. There were four different fathers but none of them lived with the family. Multiple witnesses testified to the unsafe conditions of the home. It was described as unsanitary and even "unlivable". There was garbage, dirty diaper, animal and human feces and dirty dishes all over. The bathrooms were not cleaned. The floors were sticky and food was left out. There were flies and cockroaches. Although services were offered for over a year, the conditions continued. The children went to school with dirty faces and clothes, lice in their hair and they smelled. The teachers would have to bathe them and give them clean clothes. The oldest children, a 10 year old and a 7 year old had toileting issue. The 10 year old was not toilet trained and wore diapers and the 7 year old frequently had accidents in his clothes. Other children at school reacted negatively and the boys would have to be sent home sometimes due to their odor. The children were also unsupervised - they fought with each other and ran "rampant". Children who were too young were allowed to carry the infant and the 3 year old was found playing in the street. Sex offenders and other questionable people were allowed around the children.

Some of the children were placed in foster care and some with relatives and the two oldest children remained at home under the supervision of DSS. The children's attorney adequately represented them. Attorneys for children are allowed to advise the court that their assessment of the best interests of the children deviates from the children's stated position. This attorney had represented the children for some time and he did specifically advise the court in the dispositional attorney that he was deviating from their position and did advise the court specifically as to the children's expressed position as well.

Mental Illness and Retardation

Matter of Naomi S., 87 AD3d 936 (1st Dept. 2011)

A New York County mother neglected her child based on the mother's long standing history of mental illness, including multiple hospitalizations, repeated relapses due to non compliance with medication and treatment. The child's

condition was in imminent danger of being impaired. Further it was in the best interests of the child to award custody to the father, who had filed an Art. 6 petition, at the combined dispositional hearing. The mother was incapable of safely parenting the child and had a lack of insight into her problems and the child was doing well in the care of the father.

Matter of Amber Gold J., 88 AD3d 1001 (2nd Dept. 2011)

A Queens County parents neglected their child in that the mother was mentally ill and paranoid which put the child in imminent danger of becoming impaired and the father should have known of the mother's behavior and failed to take steps to protect the child.

Matter of Ariel C. W.-H. 89 AD3d 1438 (4th Dept. 2011)

A Monroe County mother argued on appeal that she had not neglected her children but the Fourth Department affirmed the Family Court adjudication. While the neglect proceeding was pending, the mother's rights to an older child were terminated on the grounds of mental illness. As the petition for these two younger children was based on her inability to care for the children based on her ongoing mental illness, the TPR of the older child was relevant. Further there was evidence that the mother continued to have mental health issues and was hospitalized on two occasions after the TPR of the older child. The lower court did not err in conforming the petition to the proof upon the motion of DSS as such motions are to be liberally granted and mother's counsel conceded that there was no surprise or prejudice in granting the motion to add information regarding events that had occurred subsequent to the filing of the petition. The mother's attorney did not preserve for review the argument that the lower court had no authority to issue an order of protection in favor of the DSS caseworkers and the appellate court declined to address the issue "in the interests of justice"
Note: The Second Department has definitively ruled that there is no authority to issue an order of protection on behalf of the caseworkers in an Art. 10 proceeding **Matter of Robert B.H. 81 AD3d 940 (2nd Dept. 2011)**

<u>Matter of Joseph A.,</u> __AD3d__ dec'd 1/10/12 (2nd Dept. 2012)

The Second Department not only reversed a neglect finding by the Richmond County Family Court but criticized the amount of time the matter had taken. The children were 10 and 12 years old at the time the petition was filed alleging that the mother had neglected them. The Second Department ruled that although there was proof offered that the mother was mentally unstable, there was not adequate proof that the children's condition was impaired or in imminent danger of being impaired. Mental illness alone cannot support a finding if neglect –there must be a casual connection to harm or imminent harm to the children. There was vague and contradictory proof as to the children being left alone for long periods of time while the mother, a single parent, worked in New Jersey. However both children had near perfect attendance in school and were doing well academically – even doing better than grade level in some subjects. The children were up to date on medical appointments and vaccinations and were of appropriate height and weight. The children had been removed from the home and placed in non-kinship foster care that was at a location that limited the contact between the boys and their mother. It was 17 months after the removal before the fact finding began and the fact finding itself took another 16 months to try. (The appeal added another 9 months to the children remaining out of the home) The appellate court indicated that the issues in the case were not complicated and the actual amount of time it took to actually try the case was not lengthy and that this was an "inordinate" amount of time to resolve this matter. The Appellate Court ruled that since the children would now be reunified with a mother that they had not lived with for over 3 years, that the mother had to accept appropriate services.

<u>Matter of Briana S.,</u> __AD3d___, dec'd 1/5/12 (1st Dept. 2012

The New York County Family Court's adjudication of neglect was affirmed on appeal. The mother would be unable to care for her infant children as she was mentally retarded, mentally ill, exhibited poor impulse control and impaired judgment. She was depressed and not complaint with her medications. She has been repeated admitted to psychiatric hospitals. These problems resulted in her not taking one of the infants to medical appointments until he became so dehydrated that he had to be hospitalized. Expert testimony about the mother's mental illness and how it affected or not her ability to care for the children was not needed.

<u>Matter of Joseph MM.,</u> __AD3d__, dec'd 1/12/12 (3rd Dept. 2012)

The Third Department reviewed a neglect adjudication against two Schenectady County parents of a newborn. The parents lived in special supportive housing provided by the Schenectady County Association of Retarded Citizens when they had a baby. Although both parents were mildly mentally retarded, intellectual limitations alone are not neglect, there must be proof of factors which tend to show imminent danger to the infant. The infant had neurological deformities and medical problems. DSS proved that the neither parent could care for this special needs baby as both parents were not only mentally retarded but had a history of domestic violence and angry outbursts. The father had a seizure disorder and was partially paralyzed. He had epilepsy, cerebral palsy, depression and a personality disorder. The mother's cognitive limitations made it difficult for her to do the routine things needed for a baby, she was impatient and had to constantly be reminded as to what needed to be done for the baby. She did not understand the baby's issues and would feed the child incorrectly. On at least one occasion, she pretended that the baby had finished a bottle when she had in fact discarded the formula. The mother left the infant unattended on a couch. She had neglected her own hygiene and her nutritional needs while pregnant and she also engaged in self-mutilation, had poor impulse control and anger management issues. The mother was a risk to herself as well as to others, including the baby. The home was in a "state of squalor" and were refusing services and help from the Association of Retarded Citizens. They did not testify on their own behalf.

<u>Matter of Anton AA.,</u> __AD3d__, dec'd 1/12/12 (3rd Dept. 2012)

The Third Department affirmed Otsego County Family Court's adjudication that a mother neglected her newborn infant. The mother was developmentally disabled and mentally ill. She did not take prescribed medication for her mental illness. She had been living in a motel when she gave birth to the child and had no permanent shelter for the child and no winter clothing for him. After the child was born she was ejected from the motel and was living in a camp ground. There was ongoing domestic violence between the mother and the child's putative father during the pregnancy. In one incident, just 2 months before the child was born, the father grabbed the mother, throwing her down and physically assaulting her which resulted in his being arrested. However, the mother continued – even at the fact finding – to deny that the baby's father was violent toward her and minimized his conduct. Previously the mother had been adjudicated to have neglected an older

child who when that child was one month old suffered a broken leg at the hands of another boyfriend. At that time the mother was unwilling and uncooperative with services that led to that older child being removed. This was relevant evidence of the pattern of impaired judgment the mother demonstrated in regard to her choice of paramours.

SEX ABUSE

Matter of Kimberly Z., 88 AD3d 1181 (3rd Dept. 2011)

The Third Department reviewed and upheld sex abuse and neglect adjudications from Delaware County Family Court. The 15 year old daughter made out of court statements that her father had been drinking, came into her bedroom, sexually molested her and bruised her arm. She climbed out of a window and ran to a neighbor's home. She gave a subsequent written statement to the police. This corroborated her out of court statements as did the visible bruise on her arm, her behavior in climbing out of the window for help and her uncharacteristic demeanor after the incident. Further, the younger child made out of court statements that he saw his father enter his sister's room late at night and heard his sister crying and then saw his father leave her room. The father also admitted to the police that he had gone into the daughter's room to kiss her goodnight and that he "guessed" he fondled her but did not remember as he had had a lot to drink. The father was able to remember many other details of that night. Neither the father nor the mother testified on their own behalf.

The child and her younger brother as well as the mother all confirmed that the father drank to excess when he was not working. He would consume some 18 beers in a sitting, becoming loud and aggressive such that the children were fearful of him. The father's behavior warranted a derivative finding regarding the younger son. The mother was neglectful in that she was not a "protective ally" to the 15 year old after she disclosed the abuse. In fact the mother persuaded the teen to recant the allegations. Further she neglected both children by denying the father's drinking problem and failing to appreciate the effects his drinking were having on the children.

Matter of Lydia C., 89 AD3d 1434 (4th Dept. 2011)

A Steuben County father sexually abused his child. The child's out of court statements were corroborated in several ways. First the child's two therapists both testified that the child exhibited the behaviors of a sexually abused child and that the child's statements were credible. The child was consistent in her out of court statements as to what occurred. Further the child provided in court unsworn "testimony" and faced cross examination. (Counsel informs us that this 4 year old child was deaf and provided this testimony via close circuit and through an interpreter) DSS was not required to disclose in the petition itself that they intend to call expert witnesses. The Appellate Court also agreed that the father should not have visitation with the child given that he refused to get sexual offender or mental health treatment. One of the child's therapists said visitation would be harmful for the child and the child testified that she did not want to see her father or to return to his home. The child was placed in the home of the mother. The court was not required to order a FCA §1034 investigation regarding the mother's home as there was no evidence or allegations that the child had been maltreated in any way in the mother's home.

Matter of Chelsey B., 89 AD3d 1499 (4th Dept. 2011)

The Fourth Department affirmed an Erie County Family Court adjudication of severe abuse on a clear and convincing level. The father sexually abused his older daughter. This was proven by her out of court statements to school personnel which was corroborated by medical proof of sexual intercourse and by the testimony of a validator. The father's failure to take the stand can be held against him. The lower court also properly found the other child to be derivatively abused.

Matter of Kennedie M., 89 AD3d 1544 (4th Dept. 2011)

An Erie County father neglected his two children. The sole witness in the matter was the father's adult stepdaughter who testified that the father had sexually abused her for years starting when she was 15. This was an appropriate basis on which to determine that the children currently in the respondent's care were derivatively neglected. The stepdaughter also testified that the respondent engaged in domestic violence in front of the children as well. The respondent failed to preserve any argument that the attorney for the stepdaughter should not have participated in the fact finding. Further, the court properly admitted the

stepfather's substance abuse treatment records as the records were relevant to the adjudication.

Matter of Branden P., __AD3d__, dec'd 12/8/11 (3rd Dept. 2011)

A Clinton County father was properly adjudicated to have sexually abused his son and derivatively abused and neglected the other children. The child testified under oath in court about the father having subjected him to anal intercourse. The child demonstrated the position he assumed when the abuse occurred by leaning over the arm of a chair with his head toward the floor. The son had made the same out of court statements about anal penetration to the CPS worker and the police investigator and had previously demonstrated to them the physical position the father had him assume for the abuse. The child's out of court statements and in court testimony was supported by other statements by the other children. Corroboration also was presented by witness' descriptions of the child's behavior. One daughter told school employees that the father had sexually abused her and that her brother told her that the father had sexually abused him. Another daughter also made out of court statements that both her brother and sister had told her about being sexually abused. This sister observed that after her brother had been in the father's company he "picked at his butt", was quieter than usual and played roughly. The maternal grandmother testified that the boy told her of being sexually abused and that she observed the child "picking at his butt", openly masturbating and having nightmares where he screamed and woke covered with hives. In rebuttal the father brought in witnesses from his family members that testified that the father was not present around the child during the time frame that the child indicated the sexual abuse had occurred. However, the father did not substantiate this himself as he did not testify. The court can draw a negative inference from this. Although the child's sworn testimony was somewhat confused and inconsistent, the child had some mental limitations, this was understandable. Although he was 11 years old, the child functioned on the level of a first grader and could not tell time.

Matter of Kassandra V., __AD3d__, dec'd 12/20/11 (2nd Dept. 2011)

A Queens' Family Court sex abuse adjudication was affirmed by the Second Department. The child's out of court statements that her mother had sexually abused her were corroborated by the expert testimony of two psychologists who

concluded that the child exhibited behaviors that indicated sexual abuse. The mother also failed to protect the child from being sexually abused by the father as well. This flawed understanding of parental duties supported a derivative neglect finding regarding the other daughter.

Matter of Adelia V., __AD3d__, dec'd 1/10/12 (2nd Dept. 2011)

The Second Department reversed a sex abuse finding and a derivate neglect finding against a Richmond County mother. Originally, the father in the family was charged with abuse and neglect for punching and kicking his 16 year old son as well as perpetrating acts of violence against his wife, the older child's stepmother. The two younger children of the two parents were present when these incidents occurred. The father was also charged criminally for these acts. However, the father defended his actions by saying that he came home from work and saw the two younger children in the living room and heard his wife and his son together in the kitchen. He said he heard them talking about the 16 year old leaving the home when he was 18 so that the stepmother could come and visit him and then he said he heard the sounds of kissing and the removing of clothing. The father then burst into the kitchen and claimed he found his wife and his son engaged in a sexual act with each other. He admitted that in his anger, he pushed the mother and that her cheek struck the refrigerator and that he also pushed the son and he fell down the stairs. The mother had previously been the respondent in a sexual abuse petition regarding this same boy when he was 14 years old and she had at that time consented to a finding without an admission. The mother claimed that she was not having sex with her 16 year old stepson and in fact had not had sex with him when he was 14 either. She claimed that she had only consented to the prior sexual abuse finding in order to be allowed to reside with the children. She agreed that the father did overhear her and the stepson discussing the stepson's desire to leave home at 18 and that this is what made the father angry and resulted in him beating the both of them. The younger children said they had heard the father yelling and screaming and had seen the father hit both the stepson and the mother. The younger children also said that they had been running in and out of the kitchen and had not seen anything happening between the mother and their older half brother. The young daughter first said she saw her older half brother "touch" her mother but then she said she only repeated what her father told her and that she did not know what the word "touch" meant. The caseworker testified not only to what the younger children had said but admitted that the mother seemed loving and nurturing to the children and that the only evidence of a sexual

relationship between the mother and the oldest child that she could find were the claims of the father. The Family Court credited the father's testimony and combined that with the mother's prior sex abuse adjudication and found that the mother had sexually abused the stepson again and therefore derivately abused the younger children. The Appellate Division ruled that these findings were not supported by the record and disagreed that the father was credible in his claims to have seen them having sex. The father's testimony was inconsistent at various points, the injuries sustained by the mother were not consistent with the father's version of events and lastly the caseworker testified that the father had given three different versions of the events. There was not a preponderance of evidence that the mother had sexually abused the teen.

PHYSICAL ABUSE

Matter of Kayden E., 88 AD3d 1205 (3rd Dept. 2011)

The Third Department affirmed an Otsego County Family Court adjudication of severe abuse, derivative severe abuse and neglect as well as a dispositional order that there need not be "no reasonable efforts" made for reunification. The baby in this case was extensively injured – acute skull fracture, massive trauma to her brain, multiple rib fractures and a fractured leg. These injuries were life threatening and required extensive medical intervention. The baby had permanent injuries including severe seizure disorder, impaired vision, spastic quadriparesis. She will cognitively remain an "infant" for as long as she lives. The medical evidence indicated that the baby was injured within 24 hours of being brought to the hospital and that she had suffered blunt force trauma that was not accidental. The father claimed the baby must have been injured accidently but the medical experts did not agree. The parents were the sole caretakers of the baby during the relevant time period. Given the "aggravated circumstances", the lower court properly found that the agency need not offer any reasonable efforts to reunify this abused infant with her parents.

Matter of Delilah E.H., 89 AD3d 575 (1st Dept. 2011)

A stepfather abused his stepson by deliberately placing the child's hand on a stove burner for playing with matches. The child made consistent out of court

statements about this and also drew a picture of a stove burner and placed his hand on it to demonstrate. The child had second degree burns and blisters and was not taken to a hospital for almost 24 hours after he was injured. He had epidermal loss on two fingers of his left hand and had to be given pain medications. Given the nature of what the stepfather did and the substantial risk of protracted impairment to the target child, derivative findings regarding the two siblings was appropriate.

Matter of Jaiden T.G., 89 AD3d 1021 (2nd Dept. 2011)

The Second Department affirmed Kings County Family Court's dismissal of a child abuse petition against a mother. The four month old infant had a "greenstick fracture" of the right arm and prior to the petition, the mother offered multiple and inconsistent possible explanations. ACS filed res ipsa petitions against the mother and her boyfriend. The medical evidence was that such a fracture in a child of that age would not normally occur accidently and the mother's pre-petition explanation that the child fell off a bed days earlier was not consistent with such an injury. However, at the fact finding hearing the mother provided credible proof that she was not at home when the child would have been injured and that the other respondent – her boyfriend – was the caretaker at the time. The Second Department had issued a stay of the child's placement out of the home, but affirmed the lower court's dismissal of the petition against the mother such that the child was returned.

Matter of Alaysha M., 89 AD3d 1467 (4th Dept. 2011)

The Fourth Department affirmed that a Chautauqua County man derivately abused his living children based on his severe abuse one of the children which resulted in that child's death. Derivative abuse is appropriate given the nature and severity of the abuse that occurred to the deceased child. Since the father surrendered his parental rights to the children, his argument on appeal that the court erred in granting a FCA §1039-b "no reasonable efforts" order was considered moot.

Art. 10 Dispositions and Permanency Hearings

<u>Matter of Stephen Daniel A.,</u> 87 AD3d 735 (2nd Dept. 2011)

Decisions in two Queens County Family Court permanency hearings that had changed the child's goal to "adoption" were reversed and the matters remanded for new permanency hearings upon the Second Department's ruling that the court did not make the "searching inquiry" necessary when mother indicated that she wanted to proceed on a pro se basis. The court allowed her to proceed without an attorney but provided her with assigned counsel in an advisory capacity. However, the lower court did not make the inquires necessary to demonstrate that the mother knowingly, intelligently and voluntarily waived her right to counsel.

<u>Matter of Jatie P.,</u> 88 AD3d 1178 (3rd Dept. 2011)

A Franklin County child was found to have been neglected. The child was placed with the father under supervision of DSS and the father was ordered not to allow the mother any visitation with the child unless supervised. Eight months later, the father admitted allowing visitation with the mother in violation of the court order and the Family Court imposed a 30 day suspended sentence. Two months later the father again left the child with the mother. The father argued that he had a medical emergency (reflux disease, sinusitis and severe anxiety) and could find no one to care for the child while he went to the emergency room. After he was discharged from the hospital, he decided that he could not care for the child and allowed her to stay with the mother for a weekend. DSS moved to have him found in contempt and to lift the suspended sentence. The lower court, after a hearing, determined that he had willfully violated the order, now a second time, and sentenced him to 120 days in jail. Since he had already served this sentence by the time his appeal was heard in the Third Department, his argument that the sentence was too severe was considered moot. On the merits, the Appellate Court agreed that the father had violated the order willfully and that the "medical emergency" did not justify his behavior. Even if it was true that he had a medical emergency and could find no one to watch the child (and there was no reason he could not have taken the child to the emergency room with him) there was no real evidence as to why he could not obtain help after the trip to the emergency room instead of leaving the child unsupervised with the mother all weekend.

Matter of Joshua J. **32 Misc 3d 1234(A) (Family Court, Westchester County 2011)**

Westchester County Family Court placed a child with a father under supervision of DSS pursuant to FCA §1055. The father was to cooperate with DSS caseworkers, services and allow announced and unannounced visits to the home. After receiving a report from the school that the father appeared to be intoxicated, caseworkers went to his home unannounced to check on the child and the father refused them entrance and also refused to allow the police in when they were called. The police ultimately broke the door in and the child appeared safe but there was a large kitchen knife and a baseball bat under the bed easily assessable to the four year old. The next day, the child appeared to have a bruise under his eye and the child said his father had him. The court ruled that the father's behavior constituted neglect.

Matter of Jose T, **87 AD3d 1335 (4th Dept. 2011)**

An Erie County AFC for a 14 year old youth in foster care appealed the Family Court's determination that the child's goal should be adoption. The attorney had requested at the permanency hearing that the teen's goal be APPLA and not the goal the DSS sought – adoption. The youth testified that he did not want to be adopted, despite the DSS' diligent efforts to counsel him to agree to an adoption. He wished to remain in his foster home where he felt safe and happy and where he was allowed to continue his relationship with a brother. His foster family was willing to be his APPLA permanency resource. The lower court had ordered that the child's goal be adoption but the Fourth Department reversed and ruled that the proper goal for the child was APPLA.

Matter of Lavalle W., **88 AD3d 1300 (4th Dept. 2011)**

An Erie County AFC for a 16 year old youth in foster care appealed the Family Court's determination that the child's goal should be adoption. The attorney had requested at the permanency hearing that the teen's goal should be APPLA and not the goal the DSS sought – adoption. The youth testified that he did not want to be adopted, that the caseworkers had pressured him into agreeing to be adopted in the past, however he was not intending to consent to an adoption even if DSS located an adoptive family for him. He testified that he was happily living with a foster

mother who was fine with keeping him in her home until he achieved independence. He liked the 17 year old foster brother he had in the home and his foster mother was willing to be his APPLA permanency resource. The lower court had ordered that the child's goal be adoption but the Fourth Department reversed and ruled that the child's goal should be APPLA.

Matter of Luis O., 89 AD3d 735 (2nd Dept. 2011)

A Kings County mother appealed the Art. 6 order of custody that placed her child with the father. The Second Department affirmed the order although the lower court had not held an Art. 6 hearing. The mother had made admissions in an Art. 10 proceeding that she used marijuana and Xanax on a regular basis and that the Xanax was not prescribed to her, but obtained from a neighbor. At the dispositional hearing, there was evidence that she had continued to abuse drugs, had a history of mental illness, was inappropriate during visitation and had coerced the child into making false allegations against the father. The caseworker took the position that the child should be released to the father as did a psychologist who believed the mother should have more services before the child was returned. The child was released to the father with supervision by ACS for 6 months. Thereafter the father was awarded Art. 6 custody without a further hearing. The Second Department found that another hearing was not necessary given the information the lower court already had from the Article 10 dispositional hearing.

Matter of Thurston v Skellington 89 AD3d 1520 (4th Dept. 2011)

The Fourth Department reversed an Oswego County Family Court's order of Art. 6 custody to a grandmother after the child had been in foster care. DSS and the AFC had opposed the grandmother being given custody and argued that it was in the child's best interests to remain in foster care and the Appellate Court agreed. The grandmother loved the child and could provide a minimally fit home but she lacked the capacity to provide for the child's proper emotional and intellectual development. The grandmother had a history of indicated reports involving medical neglect, educational neglect, unsafe housing and inadequate food regarding her own children. For significant periods of time the grandmother's children had been in foster care. The grandmother currently was unemployed and lived on public funds, she had several health issues and did not drive. She had a limited education. The child has significant special needs and the caseworkers, a

clinical psychologist who evaluated the grandmother and a psychiatric social worker all expressed concern that the grandmother could not handle the child's needs. The foster mother, the principal, the child's social worker and DSS workers all testified that the child's behavior deteriorated with increased visitation with the grandmother. The Appellate Court said that while foster care is not an ideal situation for a child, here it is in the best interests of this child to remain in care and not be placed with his grandmother.

Matter of James NN., __AD3d__, dec'd 12/1/11 (3rd Dept. 2011)

After a mother's rights were terminated, the father, who had not been a respondent in the underlying Art. 10 proceedings, filed for Art. 6 custody of the child. The Third Department affirmed the Cortland County Family Court decision that there were extraordinary circumstances present and that it was in the best interests of the child to remain in foster care instead of in the custody of the father. Extraordinary circumstances existed in that the father had been completely absent from his 2 year old daughter's life for her first 18 months. This was due to his incarceration and a subsequent parole violation. During this time period and when the child was in foster care due to the neglect of the mother, the father made no effort to seek custody or to offer a relative to be the child's caretaker. Further extraordinary circumstances existed in that the father was currently unfit to care for the child. He has had a drug abuse problem for more than 25 years. He has mental health issues and has attempted suicide twice. He is unwilling to end his relationship with the child's mother who has a drug problem, has had her parental rights terminated and is not to have any contact with the child. He has even permitted contact with the mother during his visitation. The child has thrived in her foster home which is the only home she has ever known. They have the resources and skills to care for her.

Matter of James S. __ AD3d __, dec'd 12/1/11 (3rd Dept. 2011)

The Third Department affirmed a Schoharie County Family Court finding that a mother had violated the terms of an ACD and that the underlying neglect should be restored. The ACD terms included that she was to refrain from offensive conduct, domestic violence and arguing in front of the children. The mother's fiancé came to the home drunk and among other things, swore at one of the children. He went

to jail for this but the mother indicated that she wanted him back in the home regardless of the risk he posed. When speaking to the caseworker on the phone about the situation, the mother yelled obscenities and told the caseworker that she should take the kids and that she did not care what the caseworker did with the children. This was said with the children present. The mother also violated the ACD terms by allowing another individual to have access to the children that the court had ordered her verbally not to allow around the children. The mother had complied with many other terms of the ACD order but these violations showed that the mother was still "unpredictable, irrational and unstable" as had been originally alleged in the underlying neglect petition that was now properly restored.

Matter of Charles K., __AD3d__, dec'd 12/8/11 (3rd Dept. 2011)

A Cortland County child was placed in foster care in 2009 due to neglect by the child's mother. The child's incarcerated father sought visitation with the child in April 2010. The child was at that time three years old and the visit would require a 9 hour round trip car ride. The child had only seen her father twice in prison before she was 2 years old. The lower court denied visitation as not being in the child's best interests. She had no preexisting relationship with the father and he had never played any significant parental role in her life. The father appealed but while the case was on appeal, the child was freed for adoption and the visitation question was ruled moot by the Third Department as "…. there is no authority for allowing or ordering visitation once petitioner's parental rights were terminated….."

Matter of Tashia ZZ., __AD3d ___, dec'd 12/8/11 (3rd Dept. 2011)

When a freed Clinton County foster child who was almost 18 years old had a permanency hearing scheduled, the Family Court, sua sponte, indicated that it questioned if the child had the mental capacity to consent to her own continuation in foster care when she turned 18. The DSS then applied for and obtained in Surrogate's Court, a guardian appointed to her for the limited purpose of consenting to her remaining in care. When the matter then appeared on the Family Court calendar, the girl had in fact turned 18 and the lower court then refused to allow the appointed guardian to consent at that point, ruling that she had in fact

been discharged from care as she had turned 18 before there was any consent. The DSS kept the child in care – she had nowhere else to go, had been in an RTC and then a therapeutic foster home – and appealed the court's ruling. Before the appeal was heard, the court allowed the child to formally reenter foster care under the new proceedings in FCA § 1055 (e). Further the young lady was then adopted by her foster mother. The Third Department ruled that the appeal of the Family Court ruling on the consent to continuation in care was moot.

Matter of Telsa Z., __AD3d___, dec'd 12/8/11 (3rd Dept. 2011)

These two Clinton county girls' cases have been appealed some 4 times to the Third Department. This now is an appeal by the mother regarding a permanency hearing as it related to one of the children. The court ordered that the child continue in care and the mother continue to have no visitation with the child. This child, who had been repeatedly sexually abused by her father, had such serious mental health issues that she was placed in a residential treatment center. The experts treating her there opined that the child should not see her mother. The child had made inconsistent progress and could not handle any stress well. The mother had completely failed to communicate with or work with the child's therapists. It was not in the child's best interests to see the mother. The DSS made reasonable efforts toward reunification by offering the mother mental health services, sex offender counseling, family safety education and parenting classes. The DSS also offered financial help for all the services. The mother had repeatedly failed to participate in the services.

Matter of Julian T., __AD3d___, dec'd 12/13/11 (2nd Dept. 2011)

The Second Department affirmed a Nassau County Family Court summary judgment adjudication of abuse and severe abuse against a mother . She and her boyfriend severely beat her six year old son. She had pled guilty to assault in the second degree and endangering the welfare of a child and was incarcerated. There was an order of protection in place from the criminal conviction that prohibited her from having any contact with the child until July of 2017. The lower court properly awarded custody to the father who had a safe and stable home where the child was doing well. The father was willing to "foster a relationship" with the mother's extended family.

Matter of Salvatore M., ___AD3d__, dec'd 12/13/11 (2nd Dept. 2011)

After a forensic evaluation and sex abuse validation report was received that indicated that the allegations were unfounded, Suffolk County DSS withdrew a neglect petition they had filed against a father. The court then released the child to the father's custody. The mother objected and argued on appeal that the lower court should have held a hearing before releasing the child to the father but the Second Department agreed that Family Court was not required to hold a hearing.

Matter of Tsulyn A., __AD3d___, dec'd 12/13/11 (2nd Dept. 2011)

A Westchester mother appealed the Family Court's change of goal from reunification to adoption. The Second Department affirmed the goal change. The child had special needs and had been in foster care with a grandmother for more than half her life. The mother had not resolved her anger management and mental health issues.

Matter of Ayela S., __AD3d___, dec'd 12/20/11 (2nd Dept. 2011)

The Second Department agreed with Kings County Family Court that a child should not be moved to another foster home despite the mother's request that she be moved. The child had lived in the same home for years and was emotionally bonded to the foster mother. A forensic evaluator testified that the child had a positive relationship with the foster mother and that it would be detrimental to the child to be moved.

Matter of Alexus M., __AD3d__, dec'd 1/10/12 (2nd Dept. 2012)

The Second Department reversed a Kings County Family Court decision to place a child, who had been in foster care, into the custody of a nonrespondent father upon his Art. 6 petition after an adjudication that the mother neglected the child. Since the father lived out of state and the court was in effect placing the child out of state as a disposition to the Art, 10 and the Art.6, the court was obligated to seek an ICPC approval from the father's state which had not been done.

GENERAL TPRS

Matter of Sean W., 87 AD3d 1318 (4th Dept. 2011)

The Fourth Department reviewed a number of evidentiary issues in this termination of a mother's parental rights. First the mother did not preserve the issues of a suspended judgment or post termination contact as her trial counsel never asked for either one. In any event a suspended judgment was not appropriate given that the mother was unlikely to change her behavior and had only made a small amount of progress quite recently. Also the mother never offered any information about the child's best interests to warrant consideration of post termination contact. Next, her trial counsel was not ineffective for failing to ask for these two options as there was really no proof that could be offered as to these options being in the child's best interests. The mother also argued that the proceedings violated SSL §384-b (3)(c-1) in that the Judge who heard the TPR was not the one who had heard the prior permanency hearing. However, this statute is not about subject matter jurisdiction, it is about venue and as such unless raised at trial, venue issues are waived. Further this law simply expresses a preference for the TPR Judge to be the one who has been hearing it – a preference, but not a mandate. Finally, the issue of the foster parents' participation in the dispo hearing was also not preserved for the appeal. The mother argued that the foster parents should have made a written motion to intervene and they had not done so. In any event foster parents in this situation are entitled to intervene as a matter of right.

Matter of Lastanzea L., 87 AD3d 1356 (4th Dept. 2011)

An Oneida County mother did not appear at the hearing regarding her violation of a suspended judgment. Although her counsel was present, he did not participate and therefore in standing mute, the hearing was a default hearing, which cannot be appealed. Further the mother's argument that her motion to reopen the default was improperly denied was also rejected by the Fourth Department who ruled that the mother, although incarcerated, should have at least attempted to contact people to let them know why she was not at court. Further she waited some 11 months after her default to move to reopen it and provided no meritorious defense argument.

Matter of Harold L.S., **89 AD3d 1447 (4th Dept. 2011)**

The respondent did not appear for the fact-finding in this Monroe County abandonment termination proceeding. His counsel did appear but elected not to participate. The Fourth Department found that such action constitutes a default and therefore there can be no appeal of the termination.

Matter of Shirley A.S., **__AD3d__, dec'd 12/30/11 (4th Dept. 2011)**

An Erie County father appealed his termination and argued that his drug treatment records were improperly admitted into evidence. The Fourth Department found that the issue was not preserved as the father's counsel did not object on any grounds. The court commented that the father would have had to prove that the federal law applied in that the facility must be one that was regulated directly or indirectly by a department of the US government as per 42 USC §290dd-2 . Even if the records were from such a facility, there is a "good cause" exception for disclosure that the court could find. Lastly, for a TPR, the records do not need to be certified as per FCA§ 1046 as that applies to Art. 10 proceedings only. Caseworker records and notes were properly admitted as the foundation was properly made.

ABANDONMENT TPRS

Matter of Amaru M., **87 AD3d 1069 (2nd Dept. 2011)**

Kings County Family Court's dismissal of an abandonment petition against a mother was reversed by the Second Department who determined that she had in fact abandoned the child. While the mother did remain in communication and visit with her other children who were in foster care, but she did not substantially communicate with the agency about or visit this subject child during the relevant 6 month period. She was not discouraged or prevented in any way.

Matter of Chartasia Delores H., **88 AD3d 460 (1st Dept. 2011)**

A Bronx father abandoned his child. He admitted that he had no contact with the child or the agency for the relevant 6 months and his incarceration is no defense. Diligent efforts do not need to be shown in abandonment terminations and the agency need not even prove that it gave notice to the father of the child's whereabouts. The child should be adopted by her foster mother whom the child has lived with for years , wants to adopt the child and has a safe, stable, loving home where the child has thrived. The father's prison sentence will continue until the child is an adult. Although the paternal grandmother sought custody of the child, the grandmother herself had serious reservations about her ability to care for the child.

Matter of Baby Girl Hope **2011 NY Slip Op 21386 (Family Court, Queens County 2011)**

A mother abandoned her infant daughter at the hospital shortly after the birth, claiming that she wanted to invoke the "Baby Safe Haven" law. She refused to give her name or any identifying information. The child was taken into care on a neglect petition and adjudicated neglected after service was made by publication and no one came forward. After 8 months with no contact from anyone, an abandonment termination was filed and a motion was made to dispense with service. The Family Court ruled that service by publication was necessary as there were no provisions in law to modify in any way the service requirements for a so called safe haven baby.

Matter of Beverly EE., **88 AD3d 1086 (3rd Dept. 2011)**

A Cortland County child was placed in foster care at birth in 2007. At that time the mother named a particular person as the father but DNA tests showed that he was not the father. Over a year later , the mother's rights were terminated. Three months later, DSS brought a paternity petition against the respondent and DNA testing showed him to be the child's father. An order of filiation was entered 6 months after the filing of the paternity petition and DSS then filed abandonment proceedings against the father 2 months after the paternity adjudication. The respondent had never visited or communicated with the child who was now over

two years old. The respondent argued that he had only just been adjudicated some two months earlier and the mother had originally lied about someone else being the father and it was unfair not to give him more time. The Third Department did not find the father's argument persuasive. He had known of the possibility of his being the baby's father since the pregnancy and had talked to the mother about it. He never took any action to determine if he was the father, never sought a DNA test, never visited, never supported the child. He certainly had good reason to believe that he was the child's father both before and during the relevant 6 month period as the paternity proceeding was pending during that time. Even after the DNA test showed he was the father, he still did nothing. The Third Department affirmed the abandonment termination.

Matter of Braidyn NN., 88 AD3d 1218 (3rd Dept. 2011)

The Third Department affirmed a summary judgment adjudication of abandonment regarding a Rensselaer County child. The DSS provided several detailed sworn statements by the involved caseworkers that the father had not visited, written to or sought to contact the child in the last 11 months. Further, although the cause of action does not require such proof, the affidavits detailed the efforts the workers made to attempt to urge the father to become involved. Numerous letters were sent advising the father of times he could visit of service plan reviews and information about how to contact the caseworkers. The father did not respond to these letters and never showed for 8 scheduled visits. The father did not deny any of this but claimed that he was discouraged and frustrated in his attempts to see his child. He provided no evidence of this other than his statements and this was not enough to warrant a hearing.

Matter of Lily LL., 88 AD3d 1121 (3rd Dept. 2011)

A Schenectady County dismissal of an abandonment petition against a father was reversed on appeal. The child had been placed with the paternal grandfather shortly after the child's birth and a removal from the mother. The father had been incarcerated at that time but one month after he was released, the father told the grandfather that he would "assign his rights" to the child to the grandfather and thereafter the father had no significant contact with his daughter. At the most recent permanency hearing, the father's visits were changed such that they could

only occur at DSS offices. However, he did not visit the child and the DSS brought an abandonment proceeding. The only time he had seen the child in the relevant 6 months was when the grandfather had the child with him when he dropped some furniture off at the fathers. Even if he had seen the child on two other occasions as he claimed, this would not be enough to defeat the abandonment. The father did not support the child and did not communicate with the grandfather about the child. The lower court dismissed the petition ruling that the father did not have a lawyer during the relevant 6 months – including at the time of the permanency hearing change in his visitation provisions. The Third Department ruled that DSS was not obligated to prove that he had a lawyer in order to prove the statutory grounds of abandonment.

Matter of Cassandra Tammy S., 89 AD3d 540 (1st Dept. 2011)

A Bronx mother abandoned her children and admitted that she had not had contact with them during the relevant 6 months. Given that admission, she was not denied effective assistance of counsel at the fact finding and she was not prejudiced in any way when the court made the finding based on her admissions. The father's consent for one of the children was not necessary as he admitted that he did not support the child although he had the means to do so. His argument that the agency never asked for his support does not excuse him for not offering. Since however, it was shown that the parents had improved their situation and since the lower court did not hold a dispositional hearing on the issue of best interests, the First Department remanded the matter for another dispo hearing.

Matter of Jamaica M., __AD3d__, dec'd 12/1/11 (3rd Dept. 2011)

The Third Department affirmed Schenectady County Family Court's termination of a father's rights. It was undisputed that he had been incarcerated and had no contact with the two children for the relevant 6 months. He was able to make telephone calls and send letters from the prison and he in fact did so. Prior to his incarceration both the caseworker and the foster care agency worker had provided him with contact information. The father claimed that the workers did not try hard enough to locate him and that he did not know he could contact the children. DSS need not prove diligent efforts in an abandonment termination and his incarceration did not relive him of his duty to communicate with the workers about the children.

Matter of Keyevon Justice P., __AD3d___, dec'd 12/13/11 (1st Dept. 2011)

The First Department agreed that a New York County mother abandoned her children. She had no contact with the children for 2 years. Despite the fact that she might currently be engaged in services and have an alternative plan for her children, this is all belated. The court need not hold a dispositional hearing. The lower court also properly dismissed the grandmother's petition for custody as the children had not expressed any interest in seeing that side of the family. The grandmother has no preemptive rights.

Matter of Ryan Q., __ AD3d ___, dec'd 12/15/11 (3rd Dept. 2011)

A Schenectady County termination of an incarcerated father's rights to his son was upheld by the Third Department. The child was with relatives during the time in question. There was a period when the father was out of jail and he did have three one hour supervised visits with the child. He also sent one letter to the caseworker as well as one card and one voice mail to the relative caretakers. The Third Department found that this contact was not enough to defeat an abandonment. Although the father claimed to have made many more contacts, the lower court did not find his testimony regarding these other contacts credible.

MENTAL ILLNESS and MENTAL RETARDATION TPRS

Matter of Tyrique Alexandra B., 87 AD3d 915 (1st Dept. 2011)

A New York County mother lost her parental rights to her children based on the testimony of a court appointed psychologist that she was unable now and for the foreseeable future to safely parent them by reason of her mental retardation. As required, the agency did prove that the retardation had originated in the mother's developmental period. A dispositional hearing is not required in order to determine that termination is in the children's best interests despite their bond with their mother.

<u>Matter of Dileina M.F.,</u> 88 AD3d 998 (2nd Dept. 2011)

The Second Department upheld termination on both mental illness and permanent neglect grounds regarding a Kings County mother. A licensed psychologist interviewed the mother and reviewed her records and testified that the mother had mood disorder, post traumatic stress disorder and a personality disorder. The mother had poor insight into her problems and her prognosis of ever being able to safely care for the children was poor. Given her long standing pattern of functioning and her behaviors, the expert's opinion was that the child would be at risk of neglect if placed back in her care.

The mother was also properly found to be permanently neglectful of the child. The agency had provided diligent efforts by providing individual and family therapy, financial assistance for rent and food, encouraging her to take her medications and to keep her rent current and to obtain employment. The mother failed to attend visitation and therapy on a regular basis. She did not take her medications and did not obtain steady employment or stable housing.

<u>Matter of Tiffany M.,</u> 88 AD3d 1299 (4th Dept. 2011)

Although Erie County DSS had not alleged mental illness as a ground to terminate a mother's rights, the lower court correctly terminated her rights on that ground based on the evidence presented. The defense attorney at the hearing did not object to proof being presented on that cause of action. Further even though the lower court did not specifically rule that the mother was also too mentally retarded to care for the child safely in its decision, the court had determined that the evidence presented showed that the mother was too mentally limited to be able to care for the child safely and the mother's rights should also be terminated on mental retardation grounds.

<u>Matter of Shae Tylasia I.M.,</u> 89 AD3d 527 (1st Dept. 2011)

The First Department affirmed the termination of a Bronx mother's rights to her child based on the mother's mental retardation. The mother did complete numerous programs attempting to improve her parenting but the examining

psychiatrist indicated that the mother simply could not understand the child's special needs. She could not properly for the child due to her limitations. A dispositional hearing was not needed.

Matter of Timothy Reynaldo L.M., 89 AD3d 542 (1st Dept. 2011)

A New York County termination was affirmed on appeal. The mother's rights were terminated on mental illness grounds and the father's on mental retardation grounds. The expert witness regarding mother indicated that she was mentally ill, refused medication and was incapable of caring for a child now and for the foreseeable future. An expert witness testified that the father was mentally retarded since his developmental period and could not safely care for the child either.

Matter of Sharon Crystal F., 89 AD3d 639 (1st Dept. 2011)

A New York County child was freed for adoption when her mother's rights were terminated on mental illness grounds and the father's rights on permanent neglect. The First Department agreed that the expert proof indicated that the mother was a schizophrenic, paranoid type and had been hospitalized many times. Despite medication, the court appointed psychologist noted that the mother was still acutely symptomatic when he interviewed her. The father, who was at that time incarcerated, permanently neglected the girl. Diligent efforts were made to encourage the father to comply with the service plan but he refused to obtain a mental health evaluation, complete a drug treatment program or a domestic violence program. He visited intermittently but did not address the problems that had led to the child's placement. The child had lived her entire life in the foster home with a foster mother who wanted to adopt her. She was thriving there. The child should not have to wait any longer for the father to be released from prison and turn his life around.

Matter of Royfik B., 89 AD3d 1423 (4th Dept. 2011)

A Wayne County mother's rights were properly terminated on the grounds of mental illness. Both the experts and the caseworker who supervised visitation established that the mother was currently mentally ill and that the child would be in

danger of neglect if returned to the mother's home. A social worker from the mother's day treatment program did testify that she had made some progress but she provided no evidence one way or another of the issue of the mother's ability to parent this child.

Matter of Darius B., __AD3d ___, dec'd 12/23/11 (4th Dept. 2011)

An Erie County mother appealed the termination of her parental rights. The Fourth Department agreed that there was clear and convincing evidence that she was presently and for the foreseeable future unable to safely parent her children. Even though the court appointed expert had, at one time, indicated that the mother should have another chance, the expert based that opinion on information the mother had given him. Once the court appointed psychiatrist was made aware of the inaccuracies in the information the mother had given him, his opinion changed and he was clearly recommending that her parental rights be terminated. An adverse inference can be drawn due to the mother's failure to take the stand and she also offered no contradictory expert opinion on her ability to care for the child.

Matterof Victor B., __AD3d___, dec'd 1/10/12 (1st Dept. 2012)

The First Department affirmed a mental illness as well as a permanent neglect termination against a New York County mother. Expert testimony demonstrated that the mother had schizotypal personality traits, was mildly mentally retarded and did not understand how her behavior impacted her children. She was also permanently neglectful. The agency offered diligent efforts by making referrals for services, as well as setting up visitation and services to help with the children's special needs. The mother did not complete all the services and twice tested positive for drugs. The services she did complete did not modify her behavior and she did not have positive interactions with the children when she visited. The children both had foster families who wanted to adopt them and the families were stable, nurturing environments where it was in the best interests of the children to remain.

Matter of Burton C., __AD3d__, dec'd 1/12/12 (3rd Dept. 2012)

The Third Department affirmed an Essex County Family Court termination on mental illness grounds. The mother of two children was examined by two psychologists who did testing, reviewed the records and interviewed the mother. Both experts found her presently mentally ill and unable to safely care for her children currently and for the foreseeable future. The children also had significant special needs and were developmentally disabled. One psychologist found that the mother had a personality disorder, anxiety, extreme feelings of abandonment and a dependency on relationships with inappropriate men. She was unable to make good decisions and put her need for a relationship with a man above the safety of her children, including exposing the children to sex offenders. Medication or other services would not improve the mother's problems in this regard. The second psychologist opined that the mother had a borderline personality disorder, depressive disorder, anxiety disorder and had low intellectual functioning. This leads to the mother having poor impulse control, self image problems, inappropriate judgment, poor decision making and poor interpersonal functioning. While the mother is motivated to change her behaviors to obtain the return of her children, she simply cannot do so given her mental illness. The mother in this matter had made some recent improvements but both psychologists took the position that she was and would continue to be incapable of safely caring for the children. No contradictory opinions were offered. A dispositional hearing is not required in a mental illness termination.

PERMANENT NEGLECT

Matter of Dynasia C., 87 AD3d 929 (1st Dept. 2011)

The First Department affirmed the termination of a mother's rights to her child. The agency offered clear and convincing proof of that it made diligent efforts towards reunification. They created a service plan, arranged visitation, referred the mother to a parenting course, provided housing assistance and a GED program. The mother failed to maintain consistent visitation, failed to obtain housing or a stable source of income. It is in the child's best interests to be freed for adoption by her foster mother who has cared for the child for most of her life.

<u>Matter of Christopher John B.,</u> 87 AD3d 1133 (2nd Dept. 2011)

A Nassau County termination petition for two parents was dismissed and the dismissal was affirmed on appeal. The Second Department agreed that the DSS had not provided diligent efforts to the parents and that also there was not adequate proof that the parents had failed to plan or failed to maintain contact. The original placement had been on neglect admissions by the parents that the children had been exposed to some form of sexual activity by relatives of the parents. The agency required that the parents admit responsibility for the children's abuse but this was unreasonable given that the parents had always denied any direct involvement or knowledge of the abuse – and the adjudication on their neglect plea did not include their participation or knowledge. The parents were never told what the goal was that they needed to accomplish to have the children returned and were not asked to participate in any particular therapy toward that end. No services were offered to address the sexual abuse and diligent efforts were not made to provide appropriate contact and visitation with the children. The foster parents undermined efforts towards reunification and the agency did not move the children. The parents on the other hand, visited the children when they were allowed to do so and substantially complied with what the workers asked of them including individual therapy, family therapy when these were made available. They maintained contact with the caseworkers and had adequate housing.

<u>Matter of Jacob E.,</u> 87 AD3d 1317 (4th Dept. 2011)

Steuben County Family court properly ruled that DSS need not prove diligent efforts in a permanent neglect termination based on the court granting a motion for a FCA §1039-b order that DSS need not make "reasonable efforts" toward reunification. DSS proved clearly and consistently that the mother had her parental rights terminated to an older child. Further mother continued to fail to cooperate with any treatment programs for mental health and substance abuse issues. The mother was unsuccessful in proving that any reasonable efforts were in the child's best interests and was not contrary to the child's health and safety and would likely result in timely reunification and therefore could not defeat the motion.

Matter of Janell J., 88 AD3d 512 (1st Dept. 2011)

A New York County mother's rights were appropriately terminated. The agency proved clearly and convincingly that it had offered diligent efforts. The caseworker referred the mother to counseling, parenting skills, and anger management. She also provided visitation for the mother. The mother did complete many of the services but she "failed to gain insight into her parenting problems". She essentially made no progress in her counseling. Termination for adoption is in the best interests of the children as they have lived for several years with a foster mother who wishes to adopt them. The children have thrived in the foster mother's care.

Matter of Roxanne R., 88 AD3d 586 (1st Dept. 2011)

A Bronx grandmother does not have a preference for custody over a foster parent seeking to adopt. The lower court properly freed the child for adoption by the foster parent and the grandmother is free to seek visitation.

Matter of Sukwa Sincere G., 88 AD3d 592 (1st Dept. 2011)

The First Department affirmed the Bronx County Family Court's termination of the parental rights of a mother. The agency provided diligent efforts by referring the mother to multiple programs mandated by the service plan and caseworkers repeatedly advised the mother of her need to complete these programs. The child was in foster care for four years and the mother did not complete mental health treatment and never even enrolled in a drug treatment program. The child was in foster care with a paternal grandmother who wanted to adopt and who provided a loving and stable home.

Matter of Peter C. Jr., 88 AD3d 702 (2nd Dept. 2011)

A Suffolk County father lost his parental rights to his son. There was clear and convincing evidence of diligent and persistent efforts by the agency but the father refused to cooperated with all rehab programs, tested positive for drugs on one occasion, and failed to obtain financial stability. A suspended judgment was not

in the child's best interests given the father's lack of insight and his failure to address the issues that led to the child's placement in care.

Matter of Nakai H., 89 AD3d 434 (1st Dept. 2011)

The New York County Family Court terminated the parental rights of a mother to her children. The First Department concurred. The agency had made diligent efforts by referring the mother to parenting skills training, mental health services, housing assistance and a GED program and had set up visitation. The mother did not complete therapy, did not enroll in a GED program and refused a housing placement that would have meant one of the children could have been returned. The children have lived with the foster mother for over 7 years and they want to be adopted.

Matter of Juliana Victoria S., 89 AD3d 490 (1st Dept. 2011)

Bronx County Family Court was affirmed on appeal in the termination of a father's rights to his child. The agency had referred the father to anger management, domestic violence and parenting skills services. Visitation was set up. The father did not visit the child consistently, failed to gain any insight or benefits from the therapy sessions he did attend and did not engage in the other services. The child is thriving in the foster home and her sister is placed there as well. The foster home meets her special needs. Although a great aunt had filed for custody, the lower court correctly dismissed that petition. The children do not have much of a relationship with the great aunt and have not seen her that frequently.

Matter of Arnel Ashley B., 89 AD3d 504 (1st Dept. 2011)

The First Department affirmed a Bronx County Family Court permanent neglect adjudication and the termination of a mother's rights to her children. The agency exercised diligent efforts by creating a service plan, inviting the mother to service plan reviews and referring her to parenting and drug treatment programs. The agency offered a visitation plan. The mother did not modify her behavior or plan for the children's future. The children lived with the foster mother for more than 10 years and they wanted her to adopt them. The foster mother indicated that she would assist the children in continuing a relationship with their siblings.

Matter of Kie Asia T., **89 AD3d 528 (1st Dept. 2011)**

The First Department agreed with Bronx County Family Court that a mother was unable to demonstrate parenting skills despite completing the recommended services and her parental rights were terminated. She failed to consistently visit the children and would not separate from the father. The father was unable to remain sober and would show up for visits with the children smelling of alcohol. He did not complete anger management and one of the issues in the placement was domestic violence. The children were in a stable, nurturing foster home that wanted to adopt them where they had lived for over 3 years.

Matter of Jamal N., **89 AD3d 537 (1st Dept. 2011)**

A New York County termination of a mother's rights to her children was affirmed on appeal. There were two agencies involved with this family and they made referrals for appropriated services, made arrangements for visitation and set the mother up with services to help her deal with the children's special needs. The mother missed more than half of her visits and almost always appeared late when she did appear. She was unable to handle the children's special needs. The children are in a safe, stable and nurturing foster home and the family wishes to adopt them.

Matter of Breeana R. W., **89 AD3d 577 (1st Dept. 2011)**

A New York County Family Court termination of a mother's rights was affirmed on appeal. The agency made diligent efforts by referring the mother to services and setting up visitation. The mother did not consistently attend therapy and take her medications. She also did not visit consistently and did not remain in contact with the agency. Agency records on these issues were appropriately admitted into evidence as business records. Mother's counsel received all records in advance to enable her to object to anything specific, which she did not do.

Matter of Jamel Raheem B., **89 AD3d 933 (2nd Dept. 2011)**

The Second Department affirmed the termination of a Nassau County mother's rights to her son. Since the mother had no contact with the DSS and did not provide them with information on her whereabouts for some 7 months during the relevant period, the DSS was excused from having to prove that they provided diligent efforts as per SSL§ 384-b(7)(e)(i) . Within 3 months of the child's placement in care, the mother left her drug treatment programs, relapsed into drug use and was arrested for selling drugs. She, therefore, failed to plan for the child's return. Her current plan to find an apartment and a job as a chef was not realistic or viable. The child should be adopted by the foster mother who has cared for him his whole life and with whom he is bonded. There is no real relationship between the child and the birth mother.

Matter of Jonathan NN., **__AD3d___, dec'd 12/8/11 (3rd Dept. 2011)**

The Third Department reviewed and affirmed a permanent neglect matter from Chemung County Family Court. The respondent mother argued that the requisite "one year" period had not occurred. Although for the last 8 months of the relevant time period the child had been in foster care, the period before then the child was actually in an Art. 10 custody placement. (Although of course the Court of Appeals and the Appellate Divisions have recognized so called ***Dale P.*** TPRs since 1994 wherein the child was in Art. 10 custody the relevant time period, the respondent apparently was arguing that the year could not consist of partially foster care and partially Art. 10 custody) However since the parties stipulated to a subsequent TPR petition being filed after the child had in fact been in foster care for the full year the Third Department ruled the issue moot.

The respondent also claimed that the agency did not offer diligent efforts but the Third Department disagreed. Parenting classes, domestic violence counseling, mental health counseling were all offered. The caseworker kept the mother informed of the child's progress, modified the visitation schedule to accommodate the mother's schedule and provided gas voucher and bus passes. The caseworker also repeatedly advised the mother of the importance of keeping in touch with the child and of keeping her home sanitary and safe. The mother did participate in some services and did end a violent relationship with the father however she failed to complete most of the programs and was not in regular attendance with her mental health appointments. She did not maintain safe housing, moving

frequently and routinely having unsafe and dirty living areas – including dog feces, urine and debris in the home. She routinely missed visits – sometimes for weeks at a time - and did not have appropriate excuses for doing so. When she did visit with the child, she was inappropriate and the child would have nightmares and be stressed. This would decease when the visits did not occur. The court did provide the mother with a four month suspended judgment period but she was unable to resolve her issues and continued to have inconsistent visitation despite significant efforts on the part of the caseworkers and foster parents to help with the visitation. She also did not improve her unsafe home environment. The four year old boy had not lived with this mother for most of his life. His mother actually caused him significant distress as opposed to his foster family who wanted to adopt him.

<u>Matter of Angelina BB.</u> __AD3d___, dec'd 12/8/11 (3rd Dept. 2011)

A Schenectady County Family Court termination of a father's rights were affirmed on appeal. DSS offered diligent efforts by arranging visitation every week. Even after the father moved out of the county, DSS brought the child to him for visitation. He was provided with bus tokens for visits and parenting training was set up. The father missed 9 visits in the 25 out of 22 month period and failed on 4 occasions to advise DSS of his not coming for the visitation. As the father was a heroin addict, DSS also set up substance abuse programs with a service plan to coordinate the programs. The father however relapsed and continued to use drugs. He failed to complete several drug programs set up for him. He was criminally convicted for possessing and selling prescription drugs. He also refused to end a relationship with a drug abusing woman. When told that this relationship might impact his ability to get his child back he told the caseworker he would "take his chances." There was no point in offering a suspended judgment as the child has been in the same foster home for over 4 years and they would like to adopt her. The father continues the ill-advised relationship with his girlfriend. Although he has recently enrolled in new programs to fight addiction, it is too late and he has demonstrated that he continues to put his own interests above those of his child.

<u>Matter of Kamilah Aminah Abdulla K.,</u> ___AD3d___, dec'd 12/12/11 (1st Dept. 2011)

A Bronx mother permanently neglected her children. The older child had been in care for 4 years and the younger child for 2 years. The agency offered numerous

referrals for housing, drug treatment and told her of the importance of completing the service plan. The mother did complete anger management and parenting skills and visited consistently but she never obtained housing and never completed even one of the seven different drug treatment programs that were referred. She refused to comply the majority of time she was requested to take a drug test and she failed the five drug tests she did take. The children live with their maternal grandmother who is also their foster mother and she wants to adopt them. The home is stable and nurturing.

Matter of Emily Rosio G., __AD3d___, dec'd 12/15/11 (1st Dept. 2011)

Bronx County Family Court terminated the parental rights of a mother and the First Department affirmed. The agency made diligent efforts by referring her to programs that would fulfill the service plan and by repeatedly reminding her of the need to complete the programs. The mother however did not complete the individual counseling that was mandated. She was emotionally unstable and this resulted in stress to the child who was developmentally delayed. The mother continued to deny the reasons for the child's placement and her role in that and did not gain insight into in parenting and into meeting the child's special needs. The child is thriving with her foster mother who wants to adopt her and who can and meet her special needs.

Matter of Anthony R., __AD3d ___, dec'd 12/27/11 (2nd Dept. 2011)

Queens Court Family Court properly terminated a mother's rights to her two children. The agency offered diligent efforts by assisting the mother to maintain contact with and plan for the future of the children. The caseworkers offered visitation, made referrals to services and counseling and advised the mother of the need to obtain adequate housing. The mother however failed to plan for their future. The children should be freed for adoption to have a permanent family. A suspended judgment is not warranted where the mother has no insight into her problems, fails to acknowledge her issues and to address them.

Matter of Jacelyn TT., __AD3d___, dec'd 1/12/12 (3rd Dept. 2012)

The Third Department concurred that the out of state father of a Clinton County child had permanently neglected her. The father lived in North Carolina when the child went into foster care and continued to do so until after the TPR was filed. Despite the father being in another state, DSS offered him diligent efforts. The caseworker called and wrote to the father, keeping him informed of the child's status and progress. The caseworker set up weekly phone call sessions between the father and the child and offered travel assistance for the father to come to Clinton County. She scheduled visits with the child when the father did come and repeatedly talked to the father about what he needed to do to have the child placed in his care. The caseworker told the father how to obtain services in North Carolina and recommended mental health and substance abuse evaluations, parenting classes and domestic violence services. Further she evaluated relatives that the father suggested could be resources to assist him should the child be returned. The caseworker did recommend that the father move to Clinton County to establish a relationship with his daughter. The father failed to plan. He routinely failed to be present for the weekly phone call with the child, missed meetings with the caseworker and did not engage in any of the recommended services. He only visited the child when he was required to be in Clinton County anyway for court appearances. The quality of these limited visits was very poor – he would not interact with the child, would not even acknowledge her and would simply leave the visit for no apparent reason. None of the relatives he suggested would assist him with or take custody of the child were willing to do so.

Matter of Syles DD., __AD3d__ dec'd 1/12/12 (3rd Dept. 2012)

A Schenectady County mother's rights were terminated and this was affirmed on appeal. The child was removed due to excessive corporal punishment and the agency offered diligent efforts consisting of: parenting classes, individual counseling, domestic violence counseling, anger management, and help temporary shelter. The DSS provided weekly visitation, transportation to visitation and to all services, regular service plan reviews and counseling with the child.

The decision was quite detailed in its examination of the mother's failure to plan for the child's return. The mother acknowledged being upset with DSS for the removal and not cooperating with their offered services at first. She also refused to enroll in a parenting class in case she obtained employment and the classes

conflicted with any potential job hours. She did eventually take and finish parenting classes some 17 months after the child was removed. She refused to engage in preventive services as she believed the court had not specifically ordered her to do so although she claimed she would engage in them if it was required. She continued to have altercations with her fiancé that required police involvement but she refused to engage in domestic violence or anger management services. She refused to move to a domestic violence shelter but complained that the DSS did not help her with housing. She continued to live with her fiancé even though there was domestic violence. The mother claimed that this inappropriate and violent man would be a resource to help her care for her son when he was returned. She attended less than half of the child's counseling sessions and would not attend ADD evaluation procedures for the child. The mother did have weekly visitation that had even increased at one point to weekend unsupervised overnights. However, she had a disagreement with the foster mother over transportation such that the visitation had to be rearranged. The mother actually refused overnight weekday visits as she did not want to get up in the morning to help the child get to school. In one 6 month period, she only saw the child once due to her personal conflicts with her fiancé. She missed 44 of 66 visits during the relevant time. The child would fight with other children after scheduled visits - both when the mother showed and when she did not. The court said: "Although respondent had reasons for missing many of her visits and appointments, stability is important for this child, especially in light of his special needs. Her reasons for missing visits are irrelevant to him: any missed visit leaves him feeling unloved or forgotten and the possibility that respondent might not show up causes him anxiety before every visit."

There was no reason to offer a suspended judgment even though the mother had obtained employment and had attended some of the service offered. She continued to put her work schedule ahead of visitation, refused to work with service providers on the issue of the child's medication and demonstrated more concern about her "rights" and about her role in DSS decision making then showing concern about her child's situation. The mother was in denial about the child's issues and believed that his attachment and adjustment disorders would be resolved by returning the child to her. The foster mother wants to adopt the child and the child is attached to his foster brothers.

TPR DISPOS

Matter of Jahquavius W., 86 AD3d 576 (2nd Dept. 2011)

Orange County Family Court correctly terminated a mother's rights after finding that she violated the terms of her suspended judgment. A suspended judgment can be revoked if there is a preponderance of evidence that the parent has violated or failed to comply with one or more conditions. It is the parent's obligation to demonstrate that they are making progress in overcoming the problems that led to the placement. Literal compliance is not enough. Here the mother failed to comply with three of the conditions.

Matter of Alicia E.E., 86 AD3d 663 (3rd Dept. 2011)

The Third Department affirmed Albany County Family Court's disposition in a severe abuse termination**.** The father who was serving a prison sentence for the physical abuse of this 5 year old child, argued for a suspended judgment. Severe abuse termination dispositions must be proven on a clear and convincing level as opposed to dispositions in all other TPR grounds. The Appellate Division agreed with the trial court that it was in the child's best interests to be freed for adoption. The foster family had been meeting the child's special needs, she is doing well in school and other activities and they want to adopt her. The father on the other hand has been convicted twice for physically abusing this child and is incarcerated for that until at least 2014. The criminal court also issued an order of protection that he have no contact with the child until she is 18.

Matter of Vanisha J., 87 AD3d 696 (2nd Dept. 2011)

A Kings County grandmother appealed the Family Court dismissal of her Art. 6 custody petition when the court freed her grandchildren to be adopted by her foster parents. The Second Department affirmed. SSL § 383 (3) grants preference to foster parents who have had a child in their home for over a year and no preference is provided for relatives. The children have been in the foster parent's home for over 5 years and they had already adopted two of the children's siblings.

Matter of Alexander John B., 87 AD3d 927 (1st Dept. 2011)

Bronx County Family Court correctly denied the mother's motion to vacate termination orders entered on default. First the mother did not demonstrate a reasonable excuse for her failure to appear. She provided no documentation that she was in criminal court at the time as she claimed and she did not show that she had attempted to contact anyone about not being able to attend. Her claim that she thought the hearing was only about the children staying with their kinship foster home and not about her losing parental rights is also not substantiated. There is further no credible defense offered to the abandonment petition. Her claim that the foster parent would not let her visit because she was in drug treatment makes no sense since the period of time she was in drug treatment does not coincide with the time period in questions. She in fact has had no contact with the children for years. Finally the fact that the children are no longer in the relative foster home they were in and that no relatives are in a position to adopt the child does not require a new dispositional hearing. The birth mother's rights were appropriately terminated as she has not seen the children in years and she has failed to complete any drug treatment, psychotherapy or vocational programs.

Matter of Elizabeth J., 87 AD3d 1406 (4th Dept. 2011)

The Fourth Department found that Oneida County Family Court properly revoked a suspended judgment and terminated a mother's rights to her daughter. The mother was incarcerated and the earliest release date was 2 years after the suspended judgment ended. Further the mother failed to establish that post termination contact was in the child's best interests.

Matter of Aliyah Careema D., 88 AD3d 529 (1st Dept. 2011)

The First Department affirmed the termination of a Bronx mother's rights after she violated the terms of a suspended judgment. The mother was found to have abandoned the child but was given a suspended judgment which required her to submit to random drug testing, remain drug free, have regular and consistent visitation and obtain suitable housing and a source of income. Shortly after the suspended judgment was granted, she was convicted of criminal sale of a controlled substance and sentenced to 2 ½ years' incarceration. For four months

after her incarceration, she did not maintain contact. The child is in a kinship foster home with a mother who wants to adopt and has been providing quality care. NOTE: There is no statutory authority to dispose of an abandonment adjudication with a suspended judgment.

Matter of Chartasia H., 88 AD3d 576 (1st Dept. 2011)

Bronx County Family Court properly denied a grandmother's petition for custody in favor of freeing a child to be adopted by a foster mother. The grandmother has no preemptive right to custody of the child and lived several hundred miles away from the child. She had only seen the child two or three times and not at all in the last several months. The child has lived with the foster mother for several years and is a part of the mother's immediate and extended family. Her home is loving and stable and the child has thrived there, overcoming some of the initial problems she had had upon placement.

Matter of Lestariyah A. 89 AD2d 1420 (4th Dept. 2011)

The Fourth Department modified a Monroe County Family Court violation hearing on a suspended judgment disposition and ordered that the court must hold a "***Kahlil S.***" hearing on whether post termination visitation should be ordered in the best interest of the child. However, the respondent was not entitled to an extension of the suspended judgment as the father had violated the terms of the suspended judgment and did not prove that there were any exceptional circumstances that would justify and extension of the suspended judgment as opposed to a termination.

Matter of Kharyn O., __AD3d___, dec'd 12/20/11 (1st Dept. 2011)

A New York County mother admitted permanent neglect and the court terminated her parental rights in the dispositional hearing which was upheld on appeal. A preponderance of evidence was produced that it was in the child's best interests to be freed for adoption. The mother had made progress since being released from prison and was compliant for several months. But thereafter she left her drug treatment program, did not visit the child for two months and was re-incarcerated for a parole violation. The child was doing well with a foster mother who wanted to adopt her.

Matter of Chase F., **__AD3d__ dec'd 1/12/12 (3rd Dept. 2012)**

In this Tompkins County matter, the Third Department ruled that a father cannot appeal the lower court's decision to deny a grandparent's Art. 6 petition in a TPR disposition as only the grandparent can appeal that decision. Further as the defense attorney did not raise the issue of a suspended judgment, this issue is not preserved for appeal.

FATHER'S RIGHTS

Matter of Isis S.C., 88 AD3d 602 (1st Dept. 2011)

A New York County father was not a consent father when ACS petitioned to free the child for adoption. He did not maintain "substantial and continuous or repeated contact with the child" and had not provided child support while the child was in foster care. The father's repeated incarceration did not relieve him of his responsibility toward the child and belated expressions of interest in visiting after many years of no contact are insufficient.

Matter of Martin V.I., 88 AD3d 714 (2nd Dept. 2011)

The Second Department affirmed a Kings County Family Court ruling that a father was not a consent father. While the child was in foster care, the father did not maintain substantial and continuous or repeated contact through child support payment or regular visitation and communication. The fact that he was incarcerated did not absolve him of these responsibilities.

Matter of Janelle C., 88 AD3d 787 (2nd Dept. 2011)

A Suffolk County father was not a consent father when the court ruled on the termination of the mother's rights. He never paid support, only visited the child once and did not take basic steps to locate her whereabouts. Once he learned she was in foster care, he left one voicemail message for the caseworker during a seven month period. As per DRL 111 (1)(d), he did not maintain substantial and continuous or repeated contact with the child.

Matter of Nathan O. v Jennifer P. 88 AD3d 1125 (3rd Dept. 2011)

Six months before giving birth, a Saratoga County woman got married. Her husband's name was put on the child's birth certificate. Just after the child was born, the mother's former boyfriend filed a paternity and a custody petition regarding the child. Mother argued that he had no standing to file for paternity of a child born in wedlock. On appeal, the Third Department found that there is a "presumption" of legitimacy for a child born in wedlock but that a court has jurisdiction to address the paternity of a child born in wedlock. The petitioner alleged himself to be the father and had a basis to argue given that he filed within a month of the child's birth and alleged that he had sexual relations with the mother during the period of conception and at a point in time when she was not married. (DNA testing did prove the boyfriend to be the biological father and he was granted visitation)

Matter of Javon Reginald G., 89 AD3d 456 (1st Dept. 2011)

The First Department concurred that a New York County father was not a consent father. He did not maintain contact with the child and provided no financial support for the child. The fact that the father was incarcerated does not permit him to obviate his responsibility for support and maintaining contact. The child should be adopted by the foster parents who have lovingly cared for him since he was a month old. The home is nurturing and the family meets the child's extraordinary medical needs.

Matter of Dwayne J.B., v Santos H., 89 AD3d 838 (2nd Dept. 2011)

The Second Department reversed Nassau County Family Court's dismissal of a paternity petition without a hearing. The mother produced an acknowledgement of paternity signed by her and another man and the lower court ruled that the petitioner therefore lacked standing to sue for paternity. The Appellate Court disagreed, finding that the petitioner was not a party to the acknowledgement and therefore had a right to the hearing.

Matter of Felix O. v Janette M., 89 AD3d 1089 (2nd Dept. 2011)

Kings County Family Court's order for a genetic marker test was reversed on appeal. The child was born to a mother who was married and was the third child of six children born during the marriage. The husband was at the hospital, had lived with the child since her birth, was actively involved with her care and for over 4 years treated her as a daughter. The child called him and believed him to be her father. The petitioner had known since the child's birth that he could be the biological father but he instead he acknowledged and allowed the husband to act as the child's father. He did visit the child and buy her some clothing and gave the mother money on occasion but he did not assume the role of a father and the child never recognized him as a father. When the child was 4 years old, the petitioner brought paternity proceedings. The Second Department found on these facts that the petitioner was barred by equitable estoppel from seeking to be identified as the child's father.

Matter of Seth P v Margaret D. __AD3d __, dec'd 12/27/11 (2nd Dept.)

The Second Department affirmed a Kings County Family Court decision to apply equitable estoppel regarding a mother's opposition to paternity proceedings. The mother had been married when she engaged in an affair with the petitioner. She thereafter gave birth to twins. For the next approximately 8 years, she allowed the petitioner to hold himself out as the father of the twins and to develop a parent-child relationship with them as well as a relationship with the paternal grandmother. When the children were about 8 years old, she began to deny visitation and the father filed paternity petitions seeking visitation. Despite the mother having been married at the time of the children's birth, the lower court properly applied equitable estoppel in determining that the petitioner was the children's father and no hearing was needed to make that determination.

SURRENDERS and ADOPTIONS

Matter of Kristian J.P., 87 AD3d 1337 (4th Dept. 2011)

A Cattaraugus County couple sued under DRL §112-b to enforce their post adoption contact agreement. The Fourth Department ruled that the lower court

properly determined, after a full hearing, that it was no longer in the best interests of the children to enforce the agreed upon contact. The birth parents had been expressly warned when they signed the surrenders that the post adoption contact was subject to a modification if it was no longer in the children's' best interests. In an issue of first impression, the Fourth Department ruled that the lower court had authority to issue an order of protection to keep the birth father away from the children and the adoptive couple. Since an enforcement of contact under DRL § 112-b is in the nature of a visitation order, the court had authority to issue an order of protection. The Family Court had not specified how long such an order would issue and so the Fourth Department found that the order could continue until the 18th birthday of the child.

<u>Matter of Abel</u> 33 Misc 3d 710 (Family Court, Bronx County 2011)

Bronx County Family Court had before it an adoption petition regarding a 7 year old boy who had been in the same foster home since birth and was now freed for adoption. Everyone involved supports this family adopting this child and agrees that the adoption is in the best interests of the child. However, the adoptive father has a 1987 conviction for assault and a 1992 conviction for robbery in the 3rd degree and this 1992 conviction, since it involved violence to the victim, makes him ineligible to adopt this child pursuant to NYS law which since 2008 automatically disqualifies persons with such convictions as per requirements of federal law. The Bronx County Family Court declared the law unconstitutional as it applies to this case and permitted the adoption to occur. (Note: NYS is required to comply with these mandatory disqualifications or the state will not receive IV-E monies for its foster children)

<u>Matter of Mia T.</u> 88 AD3d 730 (2nd Dept. 2011)

A father to a Suffolk County foster child signed judicial surrenders that included conditions that the children would be adopted by their foster mother, that he would have monthly visits with the children and a visit on Father's Day that he could communicate by phone with the children and he could send pictures and cards. Before the children were adopted, the foster mother filed a petition to rescind the surrender or in the alternative to vacate the contact agreements in the best interests of the children. The lower court held a hearing and vacated the visitation terms of the surrender. The father appealed and the Second Department reversed. FCA

§1055-a permits any party to file a petition to enforce the agreement terms before the adoption but it does not give the court the power to terminate or vacate the agreement. The court can refuse to enforce the contact agreement if someone files to enforce the agreement and only if that is in the best interests of the children. Further the foster parent is not a party to a surrender of a birth child and cannot seek to vacate a surrender. The foster mother had no standing to seek to vacate the contact agreement .

Matter of Alana M., 2011 NY Slip OP 52321(U) (Family Court, Bronx County 2011)

Bronx County Family Court ruled that a foster child freed for adoption form her parents cannot be adopted until relatives previously appointed as guardians either consent to the adoption, are found to have abandoned the child or have had their guardianship revoked.

MISCELLANEOUS

Matter of Kimberly CC., 86 AD3d 728 (3rd Dept. 2011)

In a private custody matter from Tompkins County, the Third Department permitted the out of court statements of the subject child regarding sexual abuse to be admitted into evidence and with corroboration regarding the child's behavior and medical condition, determined that the child had been sexually abused by the father. Mother was awarded sole custody with limited supervised visitation to the father. The Third Department has repeatedly ruled that FCA §1046 (a)(vi) can be applied in private custody cases where there are allegations of abuse. Interestingly, the month before the custody petition, DSS had unfounded allegations that the child was being sexually abused by the father.

Matter of Ojofeitimi v OCFS 89 AD3d 854 (2nd Dept. 2011)

The Second Department concurred with a fair hearing decision that a CPS report should remain indicated. In a daycare center run by the subject of the report,

children were left unattended and a two year old escaped from her playpen and scratched an eight month old in a highchair on the face. The eight month old was bleeding and needed medical care.

Matter of Lamarcus E., __AD3d__, dec'd 12/1/11 (3rd Dept. 2011)

An Otsego County father appealed a neglect finding against him. The Third Department did not review the substance of the appeal as it ruled that the child's attorney on the appeal had denied the child effective assistance. The child was a 9 year old boy and is still represented in Family Court by his original trial counsel. Counsel on appeal admitted that she had never met with the 9 year old client. She claimed that she communicated with the trial counsel and in that way represented the child's position. There was no indication that the child's attorney was in fact not arguing the child's position but the Third Department found it to be ineffective assistance of counsel that the appellate attorney had not met with the child, consulted and counseled him about the appeal. The appellate court appointed a new attorney for the child and ordered that the appeal proceed when the new attorney was aboard.

Matter of Christopher T., __AD3d__, dec'd 12/1/11 (3rd Dept. 2011)

In a private custody case from Columbia County, the Third Department reversed a change in the parties' custody order that required the mother to keep the toddler children away from her boyfriend who had criminal conviction for rape of an underage girl. The boyfriend had not been required to register as a sex offender. DSS had been involved in the case in that they had been ordered to do a FCA §1034 investigation and had thereafter been involved in providing services for the mother and boyfriend. They had both cooperated with the services that DSS had found appropriate. The Third Department found that there was not enough evidence provided to warrant the limitation.

Matter of Parker v Carrion ___AD3d___ dec'd 12/15/11 (1st Dept. 2011)

A former foster mother brought an Art. 78 hearing after losing a fair hearing regarding her neglect of her former foster children. There was substantial evidence that she maltreated two former foster children and one child's account

was corroborated by the other. Hearsay is admissible and it does not matter that ACS' case was all hearsay as opposed to the petitioner who testified herself. Here, where she is indicating that she never wants to foster children again and that the foster children that she had in her home have all been adopted by others, reliance on hearsay even double hearsay does not violate her due process.