CRIMINAL LAW

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CONTENTS

INTRODUCTION

This *Survey* covers developments in criminal law and procedure in

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New York during the period of July 1, 2009 to June 30, 2010. The *Survey* encompasses decisions by the Court of Appeals (the "Court") involving issues of criminal law and procedure and, where appropriate, discusses decisions from trial and intermediate appellate courts. The *Survey* also includes a discussion of legislative enactments pertaining to criminal law and criminal procedure during the relevant time period.

I. APPEALS

In *People v. McLean*, the Court held "that the lack of an adequate record bars review on direct appeal" of unpreserved constitutional right to counsel claims "not only where vital evidence is plainly absent . . . but [also] wherever the record falls short of establishing conclusively the merit of the defendant's claim."[1] Previously, the Court "recognized . . . that right to counsel claims are [exempted] from the general rule that unpreserved issues cannot be reviewed on appeal."[2] However, the exception to the preservation requirement has important limitations, and can be applied only in instances where "the constitutional violation was established on the face of the record" and the record was sufficient to permit appellate review.[3] As such, the Court held "that the lack of an adequate record bars review on direct appeal not only where vital evidence is plainly absent . . . but [also] wherever the record falls short of establishing conclusively the merit of the defendant's claim."[4] Accordingly, "where the record does not make it clear, irrefutably, that a right to counsel violation has occurred, the . . . violation can be reviewed only [via] a post-trial motion under [Criminal Procedure Law (CPL)] section 440.10, not on direct appeal."[5]

In October 2009, the Court held in *People v. D'Alessandro* that a second writ of error coram nobis, filed by defendant, that raised different, novel, and more substantial argument not addressed in defendant's first writ of error coram nobis application, could not properly be treated or characterized by the appellate division

1. 15 N.Y.3d 117, 121, 931 N.E.2d 520, 523, 905 N.Y.S.2d 536, 539 (2010).

2. *Id.* at 120, 931 N.E.2d at 522, 905 N.Y.S.2d at 538 (citing People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) ("The failure to object . . . on right to counsel grounds is not fatal since we are concerned with the deprivation of a fundamental constitutional right.")); *see also* People v. McLucas, 15 N.Y.2d 167, 172, 204 N.E.2d 846, 848, 256 N.Y.S.2d 799, 802 (1965).

3. *McLean*, 15 N.Y.3d at 121, 931 N.E.2d at 522, 905 N.Y.S.2d at 538 (citations and quotation omitted).

4. *Id.*, 931 N.E.2d at 523, 905 N.Y.S.2d at 539.

5. *Id.*; *see also* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005 & Supp. 2011).

as a motion to reargue.[6] The Court held that the determinative question in ascertaining whether a new or novel argument was presented in a subsequent application was not "whether the argument on the second [application] fell within the same broad legal category as the argument in the first [application], but whether the specific argument was the same [argument] previously raised, but overlooked or misapprehended by the reviewing court . . . ."[7]

In *People v. Caban*, the Court held that defendant's argument that the trial court erred in admitting into evidence defendant's driver's license suspension was preserved for appeal, despite the fact that defendant's counsel never expressly objected to this evidence on the record, where the objection was clear from the prosecutor's summary of his position.[8] The Court concluded that the issue was adequately preserved for review "[b]ecause the trial judge was made aware, before [his] rul[ing] on the issue, that the defense wanted him to rule otherwise . . . ."[9]

In October 2009, the Court in *People v. McNair* reviewed a defendant's challenge to "the sufficiency of [a] plea allocution for the first time on direct appeal."[10] This type of challenge invokes:

> [A] "narrow exception" to the preservation requirement . . . [which] applies only "[i]n that rare case . . . where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea," thereby [requiring] the trial court ". . . to inquire further to ensure that defendant's guilty plea is knowing and voluntary."[11]

Because defendant, during his plea allocution, "made remarks that 'cast significant doubt' on his guilt," the trial court properly conducted an "inquiry to ensure that defendant's plea was knowingly and

6. 13 N.Y.3d 216, 221, 918 N.E.2d 126, 129, 889 N.Y.S.2d 536, 539 (2009). *See* N.Y. CRIM. PROC. LAW § 2221(d)(2) (McKinney 2010) (A motion to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion . . . ."); *see also* People v. Bachert, 69 N.Y.2d 593, 597, 509 N.E.2d 318, 320-21, 516 N.Y.S.2d 623, 626 (1987) (It is well settled that a motion to reargue "is not an appropriate vehicle for raising new questions which were not previously advanced . . . .") (quotation and citation omitted).

7. *D'Alessandro*, 13 N.Y.3d at 220, 918 N.E.2d at 128, 889 N.Y.S.2d at 538.

8. 14 N.Y.3d 369, 373, 927 N.E.2d 1050, 1051-52, 901 N.Y.S.2d 566, 567-68 (2010).

9. *Id.*, 927 N.E.2d at 1052, 901 N.Y.S.2d at 568.

10. 13 N.Y.3d 821, 822, 920 N.E.2d 929, 929, 892 N.Y.S.2d 822, 823 (2009).

11. *Id.* (quoting People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6, 529 N.Y.S.2d 465, 466 (1988)).

voluntarily made."[12] As such, the Court held that because defendant failed to move to withdraw his plea after the trial court's inquiry, defendant waived further challenge to the allocution and the issue was not preserved for the Court's review.[13]

In *People v. Wilson*, a case where defendant's misdemeanor was tried in the supreme court, defendant contended that the supreme court lacked subject matter jurisdiction because defendant was prosecuted via misdemeanor information, rather than an indictment or superior court information (SCI) issued upon waiver of indictment.[14] The Court held that a claim that the "trial court lacked subject matter jurisdiction to issue a judgment of conviction may be considered on appeal, despite [defendant's] failure to timely raise the issue, because it falls within an exception to the preservation rule."[15] The Court concluded that defendant was not entitled to a reversal on jurisdictional grounds because the "Supreme Court possesses concurrent subject matter jurisdiction over the trial of unindicted misdemeanor offenses."[16] Defendant also argued that the judgment of conviction must be vacated because the transfer of the case from New York City Criminal Court to supreme court was impermissible under the New York Code of Rules and Regulations.[17] The Court held that because the supreme court was empowered to hear the case, defendant's claim was akin to a claim of improper venue, a claim not jurisdictional in nature, which defendant failed to preserve for review.[18]

II. DEFENSES

In *People v. Zona*, the Court rejected the argument that a defendant "must establish that he previously owned or possessed the property at issue in order to assert the claim of right defense" under Penal Law (PL) section 155.15(1).[19] Rather, the Court held that the "defense merely

12. *Id.* at 822-23, 920 N.E.2d at 929, 892 N.Y.S.2d at 823.

13. *Id.* at 823, 920 N.E.2d at 929, 892 N.Y.S.2d at 823 (citing *Lopez*, 71 N.Y.2d at 668, 525 N.E.2d at 8, 529 N.Y.S.2d at 468).

14. 14 N.Y.3d 895, 896, 931 N.E.2d 69, 69, 905 N.Y.S.2d 100, 100 (2010).

15. *Id.* at 897, 931 N.E.2d at 69-70, 905 N.Y.S.2d at 100-01 (citing People v. Casey, 95 N.Y.2d 354, 365, 740 N.E.2d 233, 239, 717 N.Y.S.2d 88, 94 (2000); People v. Nicometi, 12 N.Y.2d 428, 430-31, 191 N.E.2d 79, 80, 240 N.Y.S.2d 589, 590-91 (1963)). *See also* People v. Correa, 15 N.Y.3d 213, 222, 933 N.E.2d 705, 710, 907 N.Y.S.2d 106, 111 (2010).

16. *Wilson*, 14 N.Y.3d at 897, 931 N.E.2d at 70, 905 N.Y.S.2d at 101 (citation omitted).

17. *Id.*

18. *Id.*

19. 14 N.Y.3d 488, 494, 928 N.E.2d 1041, 1045, 902 N.Y.S.2d 844, 848 (2010). Penal Law section 155.15(1) provides as follows: "In any prosecution for larceny committed

requires a good faith belief 'that the property was appropriated under a claim of right.'"[20]

In *People v. Diaz*, the Court held that a defendant seeking to raise an extreme emotional disturbance defense is required to provide notice pursuant to Criminal Procedure Law section 250.10, even if the defendant's intent is to rely solely on lay testimony for "psychiatric evidence" to prove the affirmative defense.[21] To prevent unfair surprise and allow the People the opportunity to obtain evidence from any source, expert, lay, or otherwise, the Court, for purposes of the notice provision under Criminal Procedure Law section 250.10, broadly construed the term "psychiatric evidence" to encompass "any" mental health evidence offered by a defendant.[22] Recognizing that preclusion for lack of notice is a drastic sanction, which "bears [heavily] on a defendant's constitutional rights to present a defense and call witnesses," the Court held that trial courts have broad discretion to grant permission to submit a late notice in the interest of justice and, at any time, prior to the close of evidence or allow the People additional time to gather rebuttal evidence.[23]

In *People v. Valencia*, the Court upheld the appellate division's reversal of a defendant's conviction for first-degree assault involving intoxication on the grounds that defendant's state of mind when he consumed alcohol was too temporally remote from the act of driving to support a conviction of assault in the first-degree.[24] Specifically, the

by trespassory taking or embezzlement, it is an affirmative defense that the property was appropriated under a claim of right made in good faith." N.Y. PENAL LAW § 155.15(1) (McKinney Supp. 2010). It is important to note that the Court has held that a good faith claim of right is a defense rather than an affirmative defense and, as such, it is the People's burden to disprove said defense beyond a reasonable doubt. *See* People v. Green, 5 N.Y.3d 538, 542, 841 N.E.2d 289, 291, 807 N.Y.S.2d 321, 323 (2005) (citing People v. Chesler, 50 N.Y.2d 203, 209-10, 406 N.E.2d 455, 459, 428 N.Y.S.2d 639, 643 (1980)); *see also* N.Y. PENAL LAW § 25.00(1) (McKinney 2009).

20. *Zona*, 14 N.Y.3d at 494, 928 N.E.2d at 1045, 902 N.Y.S.2d at 848 (quoting N.Y. PL 155.15(1)).

21. 15 N.Y.3d 40, 45-47, 930 N.E.2d 264, 267-69, 904 N.Y.S.2d 343, 346-48 (2010). Under Criminal Procedure Law section 250.10(2), a defendant may not raise any defense predicated on a mental infirmity, including extreme emotional disturbance, if the defendant fails to file and serve a timely notice of intent to present psychiatric evidence. *See* N.Y. CRIM. PROC. LAW § 250.10(2) (McKinney 2002). The Criminal Procedure Law defines "psychiatric evidence" as "[e]vidence of mental disease or defect to be offered . . . in connection with" the defenses of "lack of criminal responsibility by reason of mental disease or defect," (i.e., insanity), "extreme emotional disturbance," or any other defense. N.Y. CPL 250.10(1)(a)-(c).

22. *Diaz*, 15 N.Y.3d at 45-47, 930 N.E.2d at 268-69, 904 N.Y.S.2d at 347-48.

23. *Id.* at 47, 930 N.E.2d at 269, 904 N.Y.S.2d at 348.

24. 14 N.Y.3d 927, 928, 932 N.E.2d 871, 872, 906 N.Y.S.2d 515, 516 (2010) (Graffeo,

Court held that all of the elements of depraved indifference assault were not satisfied.[25] The Court left open the issue of "[whether] the voluntary consumption of alcohol to the point of extreme inebriation preclude[s] the formation of a depravedly indifferent state of mind[.]"[26] The Court recognized that "there remains [a] disagreement between courts as to whether the transformation of depraved indifference into a subjective state of mind precludes intoxication as a defense to that mens rea."[27] Short of any legislative amendments to resolve this issue, the Court held that "the mens rea component of depraved indifference assault may not be satisfied by considering the defendant's state of mind at a point much earlier in time [than the time of defendant's actus reus]."[28]

In *People v. Davis*, the Court held that drug possession is not a lesser included offense of a drug sale count, despite the fact that an agency defense is charged.[29] The Court reasoned that since "the agency defense is a defense, not a separate crime under the sale statute," the appellate division correctly held that the trial court "did not err in refusing to submit the charge of criminal possession of a controlled substance in the seventh degree to the jury as a lesser included offense of criminal sale of a controlled substance in the third degree."[30]

III. EFFECTIVE ASSISTANCE OF COUNSEL

In *People v. Carncross*, the Court held that in determining whether defendant was denied effective assistance of counsel, the Court examines whether:

> [T]he evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of representation, reveal that the attorney provided meaningful representation. All of the evidence must be weighed in context and as of the time of representation to assess the alleged deficient representation. Although rare, a single, substantial error by counsel may so seriously compromise a defendant's right to a fair trial that it will qualify as ineffective representation. Only where the single error is sufficiently egregious and prejudicial will counsel

J., concurring).

25. *Id.* The Penal Law recognizes that intoxication may be used "by the defendant whenever it is relevant to negative an element of the crime charged." N.Y. PENAL LAW § 15.25 (McKinney 2009). But it is also well settled that voluntary intoxication does not excuse a reckless state of mind. *See* N.Y. PENAL LAW § 15.05(3) (McKinney 2009).

26. *Valencia*, 14 N.Y.3d at 928, 932 N.E.2d at 872, 906 N.Y.S.2d at 516.

27. *Id.* at 931, 932 N.E.2d at 874, 906 N.Y.S.2d at 518.

28. *Id.* at 934, 932 N.E.2d at 876, 906 N.Y.S.2d at 520.

29. 14 N.Y.3d 20, 24, 923 N.E.2d 1095, 1097-98, 896 N.Y.S.2d 707, 709-10 (2009).

30. *Id. See* discussion *infra* notes 124-27.

be deemed ineffective.[31]

In December 2009, the Court in *People v. Konstantinides* "held that, where a defendant makes a conflict-based claim of ineffective assistance of counsel," the trial court must determine "whether there was a potential conflict of interest" and whether the conduct of the defense "was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation."[32] The Court rejected defendant's argument that a conflict of interest operated on the defense, where defendant was fully informed of the potential conflict and was simultaneously represented by conflict-free counsel.[33] The Court also declined to establish a "per se rule mandating reversal . . . where a defense attorney is accused of criminal misconduct directly related to the representation of [a] defendant."[34] In instances such as this, defendant need not show "that the conflict affected the outcome of the [case]"; rather the defendant must make a minimal showing "that the conflict operated on the defense."[35]

In the case of *People v. Baker*, the Court held that defense counsel's failure to object to the court's proposed charge submitting counts of depraved indifference murder of a child and first-degree manslaughter to the jury for consideration simultaneously, rather than in the alternative, did not amount to ineffective legal assistance.[36] The Court reasoned that defense counsel may have made a valid tactical decision to allow both counts to go to the jury simultaneously, rather than in the alternative, as the counts did not have to be charged in the alternative.[37]

31. 14 N.Y.3d 319, 331, 927 N.E.2d 532, 539, 901 N.Y.S.2d 112, 119 (2010) (quotation and brackets omitted) (citing People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981); People v. Hobot, 84 N.Y.2d 1021, 1022, 646 N.E.2d 1102, 1103, 622 N.Y.S.2d 675, 676 (1995); People v. Caban, 5 N.Y.3d 143, 152, 833 N.E.2d 213, 220, 800 N.Y.S.2d 70, 77 (2005)).

32. 14 N.Y.3d 1, 10, 923 N.E.2d 567, 572, 896 N.Y.S.2d 284, 289 (2009) (citing People v. Abar, 99 N.Y.2d 406, 409, 786 N.E.2d 1255, 1257, 757 N.Y.S.2d 219, 221 (2003); People v. Ortiz, 76 N.Y.2d 652, 656-57, 564 N.E.2d 630, 633, 563 N.Y.S.2d 20, 23 (1990)). The standard of review for this issue is very narrow, as the finding of the trial court will only be disturbed if "it lacks any record support." *Id.* (citations omitted).

33. *Id.* at 11, 923 N.E.2d at 572-73, 896 N.Y.S.2d at 289-90.

34. *Id.* at 13-14, 923 N.E.2d at 574-75, 896 N.Y.S.2d at 291-92.

35. *Id.* at 14, 923 N.E.2d at 575, 896 N.Y.S.2d at 292.

36. 14 N.Y.3d 266, 271-72, 926 N.E.2d 240, 244, 899 N.Y.S.2d 733, 737 (2010).

37. *Id.* at 272-73, 926 N.E.2d at 244-45, 899 N.Y.S.2d at 737-38 (citing People v. Carter, 7 N.Y.3d 875, 876-77, 860 N.E.2d 50, 51, 826 N.Y.S.2d 588, 589 (2006)).

IV. EVIDENCE

In a June 2010 case, *People v. Reome*, the Court held that CPL section 60.22(1), requiring corroborative evidence to support a conviction based on the testimony of an accomplice, did not "require that all corroboration [dependant] to any degree on the accomplice's testimony be ignored."[38] In so holding, the Court overruled its own longstanding rule in *People v. Hudson*, wherein the Court held that "[t]o meet the statutory mandate the corroborative evidence must be truly independent; reliance may not to any extent be placed on testimony of the accomplice for to do so would be to rely on a bootstrap."[39] Thus, the former rule in *People v. Hudson* required that the trial court consider only evidence that is "independent" in the sense that it could be viewed as connecting defendant to the crime even if the accomplice testimony did not exist.[40] Turning away from its prior holding in *People v. Hudson*, which did not permit the consideration of corroborative evidence that depended "to any extent" on accomplice testimony under CPL section 60.22(1), the Court held that trial courts "may [now] consider harmonizing evidence as well as independent evidence, while giving due weight to the difference between the two."[41]

In *People v. Carncross*, the Court discussed the evidentiary requirements for a causal connection to be established between a defendant's conduct and the death of a trooper who engaged in a high-speed chase with the defendant that resulted in the trooper's death.[42] The Court held that "where a defendant's flight naturally induces a police officer to engage in pursuit, and the officer is killed in the course of that pursuit, the causation element of the crime will be satisfied."[43]

38. 15 N.Y.3d 188, 194, 933 N.E.2d 186, 190, 906 N.Y.S.2d 788, 792 (2010). *See also* N.Y. CRIM. PROC. LAW § 60.22(1) (McKinney 2003) ("A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.").

39. 51 N.Y.2d 233, 238, 414 N.E.2d 385, 387, 433 N.Y.S.2d 1004, 1007 (1980).

40. *Id.*, 414 N.E.2d at 387-88, 433 N.Y.S.2d at 1007.

41. *Reome*, 15 N.Y.3d at 194, 933 N.E.2d at 190, 906 N.Y.S.2d at 792. *See also* N.Y. CPL 60.22(1).

42. 14 N.Y.3d 319, 325-26, 927 N.E.2d 532, 535, 901 N.Y.S.2d 112, 115 (2010).

43. *Id.* at 325, 927 N.E.2d at 535, 901 N.Y.S.2d at 115. *See also* People v. DaCosta, 6 N.Y.3d 181, 184, 844 N.E.2d 762, 764, 811 N.Y.S.2d 308, 310 (2006) ("To be held criminally responsible for a homicide, a defendant's conduct must actually contribute to the victim's death by setting in motion the events that result in the killing. Liability will attach even if the defendant's conduct is not the sole cause of death if the actions were a sufficiently direct cause of the ensuing death. More than an obscure or merely probable connection between the conduct and result is required. Rather, an act qualifies as a sufficiently direct cause when the ultimate harm should have been reasonably foreseen.") (quotation, brackets, and citations omitted); People v. Matos, 83 N.Y.2d 509, 511, 634

The "essential inquiry" in determining whether a causal connection exists is "whether defendant's conduct was a sufficiently direct cause of the trooper's death . . . ."[44]

In the case of *People v. Caban*, the Court held that evidence of a driver's license suspension was relevant to the issue of criminal negligence under PL section 15.05(4), where defendant's driver's license was suspended for conduct similar to the charged offense at trial.[45] The Court cautioned that such evidence is subject to exclusion where "its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" and that prior "bad acts" or "uncharged crimes" are "generally inadmissible when they serve only to show the defendant's criminal propensity."[46] However, in this instance, the Court concluded that:

> When the issue is criminal negligence, a prior similar act for which defendant has been punished shows more than propensity; a defendant who is repeatedly negligent in the same way may be found to be unable or unwilling to learn from her mistakes—and thus to be guilty not just of deviation, but of "gross deviation," from reasonable care . . . . [And] [t]he prior conduct is thus directly relevant to the extent of defendant's negligence in the case on trial—to her mens rea.[47]

In a November 2009 case, *People v. Gillyard*, the Court refused to expand its holding in *People v. Molineux* governing situations when evidence of uncharged crimes may be used to prove guilt of the offense charged to include instances of "familiarity and access."[48] Similarly,

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N.E.2d 157, 157, 611 N.Y.S.2d 785, 785 (1994).

44. *Carncross*, 14 N.Y.3d at 326, 927 N.E.2d at 535, 901 N.Y.S.2d at 115.

45. 14 N.Y.3d 369, 374, 927 N.E.2d 1050, 1052, 901 N.Y.S.2d 566, 568 (2010). Penal Law section 15.05(4) defines criminal negligence as follows:

> A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

N.Y. PENAL LAW §15.05(4) (McKinney 2009).

46. *Caban*, 14 N.Y.3d at 374-75, 927 N.E.2d at 1052-53, 901 N.Y.S.2d at 568-69 (citing People v. Scarola, 71 N.Y.2d 769, 777, 525 N.E.2d 728, 732, 530 N.Y.S.2d 83, 86 (1988); People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901)).

47. *Id.* at 375, 927 N.E.2d at 1053, 901 N.Y.S.2d at 569.

48. 13 N.Y.3d 351, 355-56, 920 N.E.2d 344, 346-47, 892 N.Y.S.2d 288, 290-91 (2009). *See Molineux*, 168 N.Y. at 293, 61 N.E. at 294 (holding that evidence of uncharged crimes may be used to prove guilt of the offense charged only "when [the evidence] tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other

the Court refused to expand the exceptions in *People v. Molineux* to include instances of "specialized crime," where the nature of the crime "require[s] unusual skills, knowledge and access to the means of committing [the crime]."[49]

In *People v. Colon*, the Court held that, as public officers, prosecutors "must deal fairly with the accused and be candid with the courts."[50] To fulfill this duty, prosecutors must not elicit and must "correct the knowingly false or mistaken [or inaccurate] material testimony of a prosecution witness."[51] The failure to do so mandates reversal and a new trial, "unless there is no 'reasonable possibility' that the error contributed to the conviction."[52] The Court also reversed a jury verdict on the grounds that "the cumulative effect of a prosecutor's improper comments during summation may [have] overwhelm[ed] [the] defendant's right to a fair trial."[53] It is important to note that the Court so held, despite the fact that the trial court repeatedly sustained defense counsel's objections during the prosecutor's summation and, furthermore, instructed the jury to disregard objectionable parts of the prosecutor's summation.[54]

In *People v. Abney*, the Court considered two appeals involving the admissibility of expert testimony on the issue of reliability of eyewitness identification.[55] The Court affirmed the case which excluded expert testimony on reliability of eyewitness identification where other corroborating evidence was present to connect defendant to the crime and overturned the case which excluded expert testimony on reliability of eyewitness identification where there was no evidence other than the eyewitness identification connecting defendant to the

that proof of one tends to establish the others; [or] (5) the identity of the person charged with the commission of the crime on trial."). Although this list is not exhaustive, evidence of defendant's other crimes is admissible only if probative of some fact at issue other than the defendant's criminal propensity. *See* People v. Rojas, 97 N.Y.2d 32, 37, 760 N.E.2d 1265, 1268, 735 N.Y.S.2d 470, 473 (2001).

49. People v. Arafet, 13 N.Y.3d 460, 466, 920 N.E.2d 919, 923, 892 N.Y.S.2d 812, 816 (2009).

50. 13 N.Y.3d 343, 349, 918 N.E.2d 936, 939, 890 N.Y.S.2d 424, 427 (2009) (citing People v. Steadman, 82 N.Y.2d 1, 7, 623 N.E.2d 509, 511, 603 N.Y.S.2d 382, 384 (1993)).

51. *Id.*

52. *Id.* (citing People v. Pressley, 91 N.Y.2d 825, 827, 689 N.E.2d 525, 525, 666 N.Y.S.2d 555, 555 (1997); *Steadman*, 82 N.Y.2d at 8-9, 623 N.E.2d at 512-13, 603 N.Y.S.2d at 385-86).

53. People v. Riback, 13 N.Y.3d 416, 423, 920 N.E.2d 939, 943, 892 N.Y.S.2d 832, 836 (2009) (citing People v. Calabria, 94 N.Y.2d 519, 523, 727 N.E.2d 1245, 1248, 706 N.Y.S.2d 691, 694 (2000)).

54. *Id.*

55. 13 N.Y.3d 251, 256, 918 N.E.2d 486, 487, 889 N.Y.S.2d 890, 891 (2009).

crime.[56] In reaching its decision, the Court held,

> that expert testimony proffered on the issue of the reliability of eyewitness identification "is not admissible per se"; rather, "[this] decision . . . rests in the sound discretion of the trial court," which should be guided by "whether the proffered expert testimony would aid a lay jury in reaching a verdict". . . .
>
> . . . [or] whether "the expert [could] tell the jury something significant that jurors would not ordinarily be expected to know already" . . . .[57]

The dispositive rule on this issue was summarized by the Court in *People v. LeGrand* as follows:

> [W]here [a] case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that 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.[58]

In a December 2009 case, *People v. Sanchez*, the Court held that "a defendant [could] be found guilty of gang assault, if [the defendant] acts with the requisite mens rea and aid, even if one or more of the persons who aid do not share his or her intent to cause physical harm."[59] In so holding, the Court defined the element of "aided by two or more other persons actually present," an element taken from the robbery statute under PL section 160.10(1), to mean that "the other person must actually be present, at least in the immediate vicinity of the crime, and be capable of rendering immediate assistance to an individual

56. *Id.* at 268-69, 918 N.E.2d at 495-96, 889 N.Y.S.2d at 899-900.

57. *Id.* at 266, 918 N.E.2d at 494, 889 N.Y.S.2d at 898 (citing People v. Lee, 96 N.Y.2d 157, 162, 750 N.E.2d 63, 66, 726 N.Y.S.2d 361, 364 (2001); People v. Young, 7 N.Y.3d 40, 44-45, 850 N.E.2d 623, 626, 817 N.Y.S.2d 576, 579 (2006)).

58. *Id.* at 267, 918 N.E.2d at 495, 889 N.Y.S.2d at 899 (quoting People v. LeGrand, 8 N.Y.3d 449, 452, 867 N.E.2d 374, 375-76, 835 N.Y.S.2d 523, 524-25 (2007)).

59. 13 N.Y.3d 554, 566, 921 N.E.2d 570, 577, 893 N.Y.S.2d 803, 810 (2009). *See* N.Y. PENAL LAW § 120.07 (McKinney 2009) ("A person is guilty of gang assault in the first degree when, with intent to cause serious physical injury to another person and when aided by two or more other persons actually present, he causes serious physical injury to such person or to a third person."); N.Y. PENAL LAW § 120.06 (McKinney 2009) ("A person is guilty of gang assault in the second degree when, with intent to cause physical injury to another person and when aided by two or more other persons actually present, he causes serious physical injury to such person or to a third person.").

committing the crime."[60] Thus, to satisfy the element of "aided by two or more other persons actually present" of gang assault statutes, "[n]o particular mental state is expressly required of those who comprise the gang."[61] Rather, "[t]hey must simply be present and render aid to the defendant."[62]

In a February 2010 case, *People v. Ochoa*, the Court held that questions asked by the prosecutor did not constitute improper rehabilitation.[63] Specifically, "[o]n redirect [examination], the prosecutor sought to question [the witness] about [matters the witness] was 'confused' about during [the witness's] grand jury testimony."[64] Defense counsel objected on the grounds that this testimony was an attempt to rehabilitate the witness with a prior consistent statement.[65] The Court affirmed the trial court's overruling of defense counsel's objection and held that the "questions on redirect were addressed to matters raised by defense counsel on cross-examination, and did no more than to explain, clarify and fully elicit a question only partially examined by the defense."[66] On cross-examination, defense counsel elicited from a witness that she had lied in statements made to police.[67] "On redirect, the prosecutor sought to [ask the witness] what was correct and incorrect about [her] statements" to the police.[68] Defense "counsel objected [on the grounds] that a prior consistent statement could not be elicited except upon a claim of recent fabrication."[69] The Court affirmed the trial court's overruling of defense counsel's objection of impermissible bolstering because "[w]here only a part of a statement is drawn out on cross-examination, the other parts may be introduced on redirect examination for the purpose of explaining or clarifying that statement."[70]

In *People v. Baker*, the Court held that the defendant was not

60. *Sanchez*, 13 N.Y.3d at 564-65, 921 N.E.2d at 575-76, 893 N.Y.S.2d at 808-09 ("[T]he element of 'aided by two or more persons actually present' is taken from the current robbery statute . . . ."); *see* N.Y. PENAL LAW § 160.10(1) (McKinney 2010).

61. *Sanchez*, 13 N.Y.3d at 565, 921 N.E.2d at 576, 893 N.Y.S.2d at 809.

62. *Id.*

63. People v. Ochoa, 14 N.Y.3d 180, 186, 925 N.E.2d 868, 871, 899 N.Y.S.2d 66, 69 (2010).

64. *Id.*

65. *Id.*

66. *Id.* (quotation and citations omitted).

67. *Id.*

68. *Ochoa*, 14 N.Y.3d at 186, 925 N.E.2d at 871, 899 N.Y.S.2d at 69.

69. *Id.*

70. *Id.* at 187, 925 N.E.2d at 871-72, 899 N.Y.S.2d at 69-70 (quotation and citation omitted).

denied a fair trial even though the trial court allowed the prosecution to use "a projector to display the legal definitions of depraved indifference and recklessness to the jury during summation."[71] Although defendant argued that the use of the projector placed an "undue emphasis on those definitions during [jury] deliberations and that the prosecutor usurped the trial judge's duty to explain the law to the jury," the Court concluded that "the judge's instructions were sufficient to dispel any possibility that the jury would give precedence to or place undue emphasis on the prosecutor's use of the slides."[72]

In the case of *People v. Taylor*, the Court held that the "intent to defraud element" under PL section 175.35, offering a false instrument for filing in the first degree, does not require that the agency receiving the allegedly false instrument take action in reliance upon the false filing or itself be misled to its detriment by the false filing.[73] Rather, the Court held that the "intent to defraud" language of PL section 175.35 "refers only to a defendant's state of mind in acting with a conscious aim and objective to defraud."[74]

In *People v. Kisina*, the Court held that the falsifying business records statute contains no limitations or conditions on the type of person who may fall within the ambit of said crime.[75] As such, the Court reasoned that a conviction under the falsifying business records statute did not require that a defendant be employed by or be an agent of

71. 14 N.Y.3d 266, 273-74, 926 N.E.2d 240, 245, 899 N.Y.S.2d 733, 738 (2010).

72. *Id.* (citing People v. Tucker, 77 N.Y.2d 861, 863, 569 N.E.2d 1021, 1022, 568 N.Y.S.2d 342, 343 (1991)).

73. 14 N.Y.3d 727, 729, 926 N.E.2d 591, 592, 900 N.Y.S.2d 237, 238 (2010). Penal Law section 175.35 states as follows:

> A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state, he offers or presents it to a public office, public servant, public authority or public benefit corporation with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office, public servant, public authority or public benefit corporation.

N.Y. PENAL LAW § 175.35 (McKinney 2010).

74. *Taylor*, 14 N.Y.3d at 729, 926 N.E.2d at 592, 900 N.Y.S.2d at 238 (citing N.Y. PENAL LAW § 15.05(1) (McKinney 2009) ("A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.")); *see also* N.Y. PL 175.35.

75. 14 N.Y.3d 153, 158, 924 N.E.2d 792, 795, 897 N.Y.S.2d 684, 687 (2010). For example, "[f]alsifying business records in the first degree [occurs] when a 'person,' with the requisite intent, makes or causes a false entry in the 'business records' of an enterprise . . . [and] [t]he 'person' . . . act[s] with an 'intent to defraud,' which includes 'an intent to commit another crime or to aid or conceal the commission thereof.'" *Id.* (citing N.Y. PENAL LAW §§ 175.05(1), 175.10 (McKinney 2010)).

the entity to which the allegedly falsified business records are submitted.[76]

In *People v. Assi*, a case where defendant committed attempted arson of a building of religious worship because of his anger toward a particular religious group, the Court rejected defendant's argument "that religiously-motivated property crimes did not fall within the ambit" of the Hate Crimes Act.[77] The Court held that "subdivision (1)(b) of section 485.05 broadly applies to specified offenses—including property crimes such as trespass, burglary, arson and grand larceny—that are motivated by a belief or perception of another person's religion."[78] The Court also rejected defendant's argument that General Construction Law sections 20 and 25-a(1) operated to postpone the effective date of the Hate Crimes Act under Legislative Law section 43.[79] The Court held that the General Construction Law sections relied on by defendant only operated to extend filing dates for legal papers and other documents and, as such, did not operate to alter the Legislature's exclusive power under Legislative Law section 43 to determine when legislation becomes effective.[80]

In the case of *People v. Hardy*, the Court held that defendant escaped from the lawful custody of deputies without authorization in violation of Penal Law section 205.10(2), when defendant left the courthouse after the court issued an order increasing his bail and deputies handcuffed defendant, seated him in a public hallway, and told him to remain there.[81] The Court rejected defendant's argument that his

76. *Id.* at 158-59, 924 N.E.2d at 795, 897 N.Y.S.2d at 687. "Nowhere does the Penal Law state that 'outsiders' or 'third parties' not employed by or agents of the recipient enterprise are immune from prosecution under this statute." *Id.* at 158, 924 N.E.2d at 795, 897 N.Y.S.2d at 687.

77. 14 N.Y.3d 335, 342, 928 N.E.2d 388, 391, 902 N.Y.S.2d 6, 9 (2010). Under Penal Law section 485.00, "hate crimes" refers to criminal acts against "victims [who] are intentionally selected, in whole or in part, because of their race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation." N.Y. PENAL LAW § 485.00 (McKinney 2008).

78. *Assi*, 14 N.Y.3d at 341, 928 N.E.2d at 391, 902 N.Y.S.2d at 9 (citation omitted).

79. *Id.* at 342-43, 928 N.E.2d at 392-93, 902 N.Y.S.2d at 10-11. *See* N.Y. LEGIS. LAW § 43 (McKinney 1991) ("Every law, unless a different time shall be prescribed therein, shall take effect on the twentieth day after it shall have become a law."); N.Y. GEN. CONSTR. LAW §§ 20, 25-a(1) (McKinney 2003) (defining the twenty day computation period along with computations of said period for public holidays, Saturdays or Sundays, and extension of time where performance of an act is due on Saturday, Sunday, or a public holiday).

80. *Assi*, 14 N.Y.3d at 342-43, 928 N.E.2d at 392-93, 902 N.Y.S.2d at 10-11.

81. 13 N.Y.3d 805, 806-07, 918 N.E.2d 884, 884-85, 890 N.Y.S.2d 372, 372-73 (2009). Under Penal Law section 205.10(2), "[a] person is guilty of escape in the second degree when: . . . [h]aving been arrested for, charged with or convicted of a class C, class D or class E felony, he escapes from custody . . . ." N.Y. PENAL LAW § 205.10(2) (McKinney

conviction for escape in the second degree was not legally or factually sufficient because the court did not sign a securing order or issue specific directions to take defendant into custody.[82] The Court concluded that the restraint or control of defendant by deputies was authorized pursuant to the court's order increasing bail.[83] This, taken together with defendant being immediately placed in handcuffs, made it abundantly clear that defendant was not just free to leave and, therefore, removed himself from lawful custody without authorization.[84]

V. GUILTY PLEAS

In a February 2010 case, *People v. Brown*, the Court considered the voluntariness of a guilty plea conditioned on defendant being granted a release from custody to see a seriously ill family member.[85] The Court held that where "the record raises a legitimate question as to the voluntariness of the plea, an evidentiary hearing is required."[86] Key factors in the Court's decision to vacate the guilty plea were the trial court's awareness of the central influence the furlough had on defendant's decision to plead guilty and the trial court's denial of defendant's previous request to be released from custody to visit his ill son in the hospital.[87] Although the Court stopped short of holding that a plea bargain granting a furlough is per se invalid, the Court, recognizing the potentially coercive nature of the plea terms, cautioned that such pleas "may require special scrutiny by the court," along with a "thorough inquiry to establish that defendant is pleading guilty willingly after considering other legitimate alternatives."[88]

1999). Under Penal Law section 205.00(2), "custody" is defined as "restraint by a public servant pursuant to an authorized arrest or an order of a court." N.Y. PENAL LAW § 205.00(2) (McKinney 1999).

82. *Hardy*, 13 N.Y.3d at 806-07, 918 N.E.2d at 885, 890 N.Y.S.2d at 373.

83. *Id.* at 807, 918 N.E.2d at 885, 890 N.Y.S.2d at 373.

84. *Id.*

85. 14 N.Y.3d 113, 115-16, 924 N.E.2d 782, 783-84, 897 N.Y.S.2d 674, 675-76 (2010). "[T]o be valid and enforceable, a guilty plea must be entered voluntarily, knowingly and intelligently." *Id.* at 116, 924 N.E.2d at 783, 897 N.Y.S.2d at 675 (citing People v. Hill, 9 N.Y.3d 189, 191, 879 N.E.2d 152, 153, 849 N.Y.S.2d 13, 14 (2007)). A plea is voluntary only when "it represents an informed choice freely made by defendant among other valid alternatives." *Id.* (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970); People v. Grant, 61 A.D.3d 177, 182, 873 N.Y.S.2d 355, 358-59 (2d Dep't 2009)).

86. *Id.* at 116, 924 N.E.2d at 783-84, 897 N.Y.S.2d at 675-76. "[T]he nature and extent of the fact-finding inquiry 'rest[s] largely in the discretion of the Judge to whom the motion is made' and a hearing will be granted only in rare instances." *Id.* at 116, 924 N.E.2d at 783, 897 N.Y.S.2d at 675 (quoting People v. Tinsley, 35 N.Y.2d 926, 927, 324 N.E.2d 544, 544, 365 N.Y.S.2d 161, 162 (1974)).

87. *Brown*, 14 N.Y.3d at 117, 924 N.E.2d at 784, 897 N.Y.S.2d at 676.

88. *Id.* at 117-18, 924 N.E.2d at 784, 897 N.Y.S.2d at 676.

In *People v. Dreyden*, the Court rejected the argument that, by pleading guilty, a defendant forfeited his right to challenge the accusatory instrument charging him with the crime to which he admitted guilt.[89] The Court held that "[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution," and defined the test for a jurisdictional defect as "whether the accusatory instrument failed to supply defendant with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy."[90] Because the misdemeanor complaint failed to give support or explanation for the arresting officer's conclusion that defendant had a gravity knife, the complaint failed to comply with the "reasonable cause" requirement under Criminal Procedure Law section 100.40(4)(b).[91] As such, the Court concluded that the misdemeanor complaint contained a non-waivable jurisdictional defect.[92]

VI. IDENTIFICATION

In a June 2010 case, *People v. Perkins*, the Court held that Criminal Procedure Law section 60.30, applying to the admissibility of testimony of a prior corporeal identification, does not rule out testimony regarding prior photographic identification evidence in the event that defendant "thwarts a lineup" by refusing to participate.[93] As such, the

89. 15 N.Y.3d 100, 103, 931 N.E.2d 526, 527, 905 N.Y.S.2d 542, 543 (2010).

90. *Id*., 931 N.E.2d at 527-28, 905 N.Y.S.2d at 543-44 (citations omitted). "The distinction between jurisdictional and nonjurisdictional defects 'is between defects implicating the integrity of the process . . . and less fundamental flaws, such as evidentiary or technical matters.'" *Id*. (citing People v. Hansen, 95 N.Y.2d 227, 231, 738 N.E.2d 773, 776, 715 N.Y.S.2d 369, 372 (2000)).

91. *Id.* at 102-03, 931 N.E.2d at 527-28, 905 N.Y.S.2d at 543-44. The factual part of a misdemeanor complaint must allege facts of an evidentiary character demonstrating reasonable cause to believe the defendant committed the crime charged. *See* N.Y. CRIM. PROC. LAW §§ 100.15(3), 100.40(4)(b) (McKinney 2004).

92. *Dreyden*, 15 N.Y.3d at 103, 931 N.E.2d at 528, 905 N.Y.S.2d at 544.

93. 15 N.Y.3d 200, 205, 932 N.E.2d 879, 882, 906 N.Y.S.2d 523, 526 (2010). Criminal Procedure Law section 60.30 states as follows:

> In any criminal proceeding in which the defendant's commission of an offense is in issue, a witness who testifies that (a) he observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question and (c) on a subsequent occasion he observed the defendant, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, and then also recognized him as the same person whom he had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he observed on the first or incriminating occasion, also describe his

Court concluded that the People were allowed to introduce the victim's identification of defendant from "pictures taken the same day as and in lieu of the aborted lineup."[94] Significant to this holding was that the jury was made aware that defendant's photograph was taken the day of the photographic lineup and was not in the custody of the police by reason of defendant's previous contact with law enforcement.[95] The Court also concluded that "[w]hen a defendant's misconduct obstructs a corporeal identification, the determination of whether the People have been prejudiced such that evidence of a photographic identification is admissible lies within the trial court's discretion."[96]

VII. INDICTMENT AND INFORMATION

In *People v. Frederick*, the Court held that, absent any constitutional or statutory double jeopardy bar, "the trial court possessed the inherent authority to reinstate [an] original indictment after dismissing [a] superseding indictment."[97]

In the case, *People v. Pierce*, the Court held that a third degree criminal possession of stolen property charge did not have sufficiently comparable elements in law to be properly included in defendant's waiver of indictment and SCI on the theory that it was joinable with a grand larceny offense charged in a superior court felony complaint.[98]

> previous recognition of the defendant and testify that the person whom he observed on such second occasion is the same person whom he had observed on the first or incriminating occasion. Such testimony constitutes evidence in chief.

N.Y. CRIM. PROC. LAW § 60.30 (McKinney 2003). Historically, there are two reasons why a witness was barred from testifying that he had identified the defendant prior to trial, whether from a lineup or from photographs, and thus could only testify to the extent of a previous identification by himself of the defendant in the flesh. *See* People v. Huertas, 75 N.Y.2d 487, 493-94, 553 N.E.2d 992, 996, 554 N.Y.S.2d 444, 448 (1990); People v. Caserta, 19 N.Y.2d 18, 21-22, 224 N.E.2d 82, 83-84, 277 N.Y.S.2d 647, 648-49 (1966). First, it is "possible to distort pictures as affecting identity," and second, "a jury [could] infer that the police possessed a defendant's photograph because of previous run-ins with the law." *Perkins*, 15 N.Y.3d at 205, 932 N.E.2d at 882, 906 N.Y.S.2d at 526 (citing *Caserta*, 19 N.Y.2d at 21-22, 224 N.E.2d at 83-84, 277 N.Y.S.2d at 649).

94. *Perkins*, 15 N.Y.3d at 205, 932 N.E.2d at 882, 906 N.Y.S.2d at 526.

95. *Id.* at 204, 932 N.E.2d at 882, 906 N.Y.S.2d at 526.

96. *Id.* at 206, 932 N.E.2d at 882-83, 906 N.Y.S.2d at 526-27.

97. 14 N.Y.3d 913, 916-17, 931 N.E.2d 517, 520, 905 N.Y.S.2d 533, 536 (2010).

98. 14 N.Y.3d 564, 574, 930 N.E.2d 176, 183, 904 N.Y.S.2d 255, 262 (2010). Criminal Procedure Law section 195.20 provides that the offenses for which an indictment may be waived "include any offense for which the defendant was held for action of a grand jury and any offense or offenses properly joinable therewith pursuant to sections 200.20 and 200.40." N.Y. CRIM. PROC. LAW § 195.20 (McKinney 2007); *see also* N.Y. CRIM. PROC. LAW § 200.15 (McKinney 2007) (defining a superior court information); N.Y. CRIM. PROC. LAW §§ 200.20, 200.40 (McKinney 2007) (general joinder provisions that determine whether offenses are properly included in the same indictment).

Accordingly, the Court held that "the improper inclusion of an offense in a waiver of indictment and SCI is a jurisdictional defect that, when raised on direct appeal, requires reversal of the conviction and dismissal of the SCI."[99]

VIII. JURISDICTION

In the case of *People v. Correa*, the Court held that administrators of the Unified Court System (UCS) had constitutional and statutory authority to issue directives creating Integrated Domestic Violence (IDV) parts of the supreme court and to authorize transfer of certain misdemeanor prosecutions from local criminal courts to the supreme court for trial.[100] Specifically, the Court determined that "UCS administrators [did not] exceed their authority [or] impermissibly tread in the legislative domain when they issued the BCD or IDV directives."[101] The Court also rejected the argument that Criminal Procedure Law section 210.05 "precludes [the] Supreme Court from exercising trial jurisdiction over misdemeanor cases concurrent with other UCS courts" as, under the New York Constitution, the supreme court, a court possessing both general and concurrent jurisdiction over all causes of action, is vested with the power to hear any case that any other court in the UCS could hear.[102]

In a June 2010 case, *People v. Mitchell*, the Court interpreted Criminal Procedure Law section 410.80(2), providing that, upon transfer of a probationer to another jurisdiction, the court within the jurisdiction of the receiving probation department "shall assume all powers and duties of the sentencing court and shall have sole jurisdiction in the case . . . ."[103] The issue before the Court was

99. *Pierce*, 14 N.Y.3d at 574, 930 N.E.2d at 183, 904 N.Y.S.2d at 262.

100. 15 N.Y.3d 213, 223-24, 933 N.E.2d 705, 711, 907 N.Y.S.2d 106, 112 (2010).

101. *Id.* at 226, 933 N.E.2d at 713, 907 N.Y.S.2d at 114. *See* N.Y. CONST. art. VI, § 15(a).

102. *Correa*, 15 N.Y.3d at 232-33, 933 N.E.2d at 717-18, 907 N.Y.S.2d at 118-19. Criminal Procedure Law section 210.05 provides that: "The only methods of prosecuting an offense in a superior court are by an indictment filed therewith by a grand jury or by a superior court information filed therewith by a district attorney." N.Y. CRIM. PROC. LAW § 210.05 (McKinney 2007).

103. 15 N.Y.3d 93, 96, 931 N.E.2d 84, 86, 905 N.Y.S.2d 115, 116 (2010). Criminal Procedure Law section 410.80(2) states as follows:

> Upon completion of transfer as authorized pursuant to subdivision one, the probation department in the receiving jurisdiction shall assume all powers and duties of the probation department in the jurisdiction of the sentencing court. Upon completion of transfer, the appropriate court within the jurisdiction of the receiving probation department shall assume all powers and duties of the sentencing court and shall have sole jurisdiction in the case including jurisdiction over matters specified in article

> whether [Criminal Procedure Law] section 410.80(2) encompasses "all powers and duties" that might be exercised by a sentencing court under article 410 of the Criminal Procedure Law, which governs probation, conditional discharge and parole supervision, or "all powers and duties" possessed by a sentencing court more generally, including powers and duties under Criminal Procedure Law article 440 [governing motions to vacate judgment and set aside sentence].[104]

By interpreting legislative history, the Court concluded that Criminal Procedure Law section 410.80(2) was not intended to divest sentencing courts of their jurisdiction under Criminal Procedure Law article 440 and, as such, Criminal Procedure Law section 410.80(2) was only "meant to transfer from sentencing courts to receiving courts the full range of powers and duties necessary for the judiciary to carry out its responsibilities to enforce the terms and conditions of probationers, and to deal with relief from forfeitures and disabilities."[105]

IX. JURY MISCONDUCT

In *People v. Samandarov*, the Court declined to find juror misconduct in a case where defense counsel submitted an affidavit relying on a newspaper article which reported that jurors were aware of potential mob involvement, together with information from an unnamed neighbor, who told defense counsel that the jury foreperson discussed his jury experience with coworkers and acknowledged that the jury talked about defendant's involvement with mob.[106] The Court reasoned that, even disregarding its hearsay nature, "if the jurors in the case did converse among themselves about the [mob], there [was] no reason to [conclude] that anything outside the courtroom prompted that conversation."[107] Thus, absent evidence of some "outside influence" on the jury, there were no grounds for impeaching the jury's verdict.[108]

As held by the Court in *People v. Simms*, to properly accept a jury's verdict, the trial court must also ensure that there was no "duress [arising] out of matters extraneous to the jury's deliberations or not properly within their scope, although perhaps occurring *within* the jury

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> twenty-three of the correction law. Further, the sentencing court shall immediately forward its entire case record to the receiving court.

N.Y. CRIM. PROC. LAW § 410.80(2) (McKinney Supp. 2011).

104. *Mitchell*, 15 N.Y.3d at 96, 931 N.E.2d at 86, 905 N.Y.S.2d at 117.

105. *Id.* at 98-99, 931 N.E.2d at 87, 905 N.Y.S.2d at 118.

106. 13 N.Y.3d 433, 437-38, 920 N.E.2d 930, 932-33, 892 N.Y.S.2d 823, 825-26 (2009).

107. *Id.* at 438, 920 N.E.2d at 933, 892 N.Y.S.2d at 826.

108. *Id.*

room."[109] Thus, when a juror stated that she felt "pressured to make [her] decision," the Court held that the trial court must conduct a further inquiry to ensure "that a verdict is not the product of actual or threatened physical harm" and that the juror's verdict is based on the evidence.[110]

Interpreting the language of Criminal Procedure Law section 310.70, the Court, in *People v. Rivera*, held that when a jury reaches a partial verdict as to some, but not all, of the counts, and "there is a reasonable possibility of ultimate agreement on any of the unresolved counts," the trial court may either "(1) order the jury to render a partial verdict and continue deliberating upon the remainder of the counts submitted to the jury, or (2) refuse to accept a partial verdict and order the jury to continue its deliberations upon the entire case."[111] Thus, the Court held that the trial court violated the partial verdict procedure under Criminal Procedure Law section 310.70 and impinged on defendant's right to a trial by jury where the jury informed the trial court that it had reached a partial verdict as to some of the eleven counts submitted to it, the jury was ordered to render its partial verdict in open court, and the trial court then refused to accept the partial verdict and ordered the jury to resume deliberations.[112]

Although a "presumption of regularity" typically attaches to judicial proceedings, the Court, in *People v. Cruz*, held that defendant rebutted the presumption of regularity by substantial evidence when he established that the jury requested an exhibit not in evidence.[113] Defendant's additional evidence which rebutted the presumption of regularity included "the trial judge's statement at the reconstruction

109. 13 N.Y.3d 867, 871, 921 N.E.2d 582, 584, 893 N.Y.S.2d 815, 817 (2009) (emphasis added) (citing People v. Pickett, 61 N.Y.2d 773, 775, 461 N.E.2d 294, 295, 473 N.Y.S.2d 157, 158 (1984)). Criminal Procedure Law section 310.80 provides in relevant part:

> After a verdict has been rendered, it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their verdict. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the verdict announced by the foreman is in all respects his verdict. If upon either the collective or the separate inquiry any juror answers in the negative, the court must refuse to accept the verdict and must direct the jury to resume its deliberation.

N.Y. CRIM. PROC. LAW § 310.80 (McKinney 2002).

110. *Simms*, 13 N.Y.3d at 871, 921 N.E.2d at 584, 893 N.Y.S.2d at 817.

111. 15 N.Y.3d 207, 210-11, 933 N.E.2d 183, 185, 906 N.Y.S.2d 785, 787 (2010) (quotation and brackets omitted) (citing N.Y. CRIM. PROC. LAW §§ 310.70(1)(b)(i)-(ii) (McKinney 2002)).

112. *Id.* at 211, 933 N.E.2d at 185, 906 N.Y.S.2d at 787.

113. 14 N.Y.3d 814, 816, 927 N.E.2d 542, 543-44, 901 N.Y.S.2d 122, 123-24 (2010).

hearing that [the trial judge] never saw the [jury] note, that he did not reconvene with counsel, and . . . did not know if the exhibit was ever shown to jury."[114]

X. JURY TRIAL AND INSTRUCTION

In *People v. Carr*, the Court held that a defendant seeking a missing witness charge, who made the request more than a week after the People provided their witness list and after the People rested their case-in-chief, waited too long and was not entitled to the instruction.[115] Significant was the fact that "defendant knew at the outset of the trial that the People did not intend to call three of the [witnesses] who were present at the time of the alleged crime."[116]

In *People v. Kadarko*, the Court held that a trial court's failure to disclose to counsel the specific numerical breakdown of votes listed in a deadlocked jury's note, prior to giving the jury another *Allen* charge, did not deprive defense counsel of meaningful notice of the jury note's contents or an opportunity to respond, so as to constitute a mode of proceedings error.[117] Although it was held error for the judge not to read the entire note to counsel, until after giving another *Allen* charge to the jury and until after the jury resumed deliberation, the Court held that the error was not a mode of proceedings error because the trial court corrected the error "without objection or request for further instructions by [defense counsel]."[118] Similarly, in a case where the trial court

114. *Id.*, 927 N.E.2d at 543, 901 N.Y.S.2d at 123.

115. 14 N.Y.3d 808, 809, 926 N.E.2d 253, 254, 899 N.Y.S.2d 746, 747 (2010). "A party seeking a missing witness instruction has the burden of making the request 'as soon as practicable.'" *Id.* (quoting People v. Gonzalez, 68 N.Y.2d 424, 428, 502 N.E.2d 583, 586, 509 N.Y.S.2d 796, 799 (1986)).

116. *Id*. "Whether such a request is timely is a question to be decided by the trial court in its discretion, taking into account both when the requesting party knew or should have known that a basis for a missing witness charge existed, and any prejudice that may have been suffered by the other party as a result of the delay." *Id.*

117. 14 N.Y.3d 426, 428-30, 928 N.E.2d 1025, 1025-27, 902 N.Y.S.2d 828, 828-30 (2010). Under Criminal Procedure Law section 310.30, the court has the duty to notify counsel about the jury note and its specific contents and provide a meaningful response. *See* N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2002); *see also* People v. O'Rama, 78 N.Y.2d 270, 276-80, 579 N.E.2d 189, 192-94, 574 N.Y.S.2d 159, 162-64 (1991). A court's failure to disclose the specific contents of the jury note may have the effect of entirely preventing defense counsel from participating meaningfully in a critical stage of the trial and thus could represent a significant departure from "the organization of the court or the mode of proceedings prescribed by law." *O'Rama*, 78 N.Y.2d at 279, 579 N.E.2d at 193, 574 N.Y.S.2d at 163 (citation omitted). An *Allen* charge conveys the concept that it is the jurors' "duty to decide the case if they could conscientiously do so." *See* Allen v. United States, 164 U.S. 492, 501 (1896).

118. *Kadarko*, 14 N.Y.3d at 429-30, 928 N.E.2d at 1026-27, 902 N.Y.S.2d at 829-30.

sought clarification of a jury note's meaning prior to informing counsel of the contents of the note, the Court held that no mode of proceedings error occurred because the jury's note related only to the foreperson's concern about the matter in which the verdict was to be delivered and was, therefore, "nothing more than an inquiry of a ministerial nature."[119] As such, the Court held that "the judge was not required to notify defense counsel [or defendant,] nor provide them with an opportunity to respond, as neither . . . could have provided a meaningful contribution."[120]

To the contrary, in *People v. Tabb*, a case where the jury sent a note to the trial court asking for an explanation of the legal standard for self defense, and there was "nothing in the record [to show] that the [trial] court informed defense counsel and the prosecutor about the contents of the note," the Court held that "a mode of proceedings error occurred requiring reversal."[121]

In the case of *People v. Sanchez*, the Court held that no error was committed by the trial court in charging the jury that a gang assault charge was governed by the accessorial liability standard.[122] The Court reasoned that the accomplice liability rules charged by the trial court were relevant to the gang assault count, "as the jury could consider whether any of defendant's actions could be attributed to the codefendants who shared the intent to harm [the victim]."[123]

In a November 2009 case, *People v. Davis*, the Court reaffirmed its holding in *People v. Glover* with regard to the charging of lesser included offenses.[124] In *People v. Glover*, the Court developed a two-part test to determine when a defendant is entitled to have a lesser included offense charged.[125]

119. People v. Ochoa, 14 N.Y.3d 180, 188, 925 N.E.2d 868, 872, 899 N.Y.S.2d 66, 70 (2010).

120. *Id.*

121. 13 N.Y.3d 852, 853, 920 N.E.2d 90, 90, 891 N.Y.S.2d 686, 686 (2009).

122. 13 N.Y.3d 554, 567, 921 N.E.2d 570, 577, 893 N.Y.S.2d 803, 810 (2009).

123. *Id.*

124. 14 N.Y.3d 20, 23, 923 N.E.2d 1095, 1097, 896 N.Y.S.2d 707, 709 (2009). *See generally* People v. Glover, 57 N.Y.2d 61, 439 N.E.2d 376, 453 N.Y.S.2d 660 (1982). Under Criminal Procedure Law sections 300.50(1) and (2) a criminal defendant may request that the jury consider any "lesser included offense" of a count charged in an indictment that is reasonably supported by the evidence. N.Y. CRIM. PROC. LAW §§ 300.50(1), (2) (McKinney 2002 & Supp. 2011). Also, under Criminal Procedure Law section 1.20(37), an offense is "lesser included" if "it is impossible to commit [the charged] crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree." N.Y. CRIM. PROC. LAW § 1.20(37) (McKinney 2003 & Supp. 2011).

125. *Davis*, 14 N.Y.3d at 22-23, 923 N.E.2d at 1096, 896 N.Y.S.2d at 708 (citing *Glover*, 57 N.Y.2d at 64, 439 N.E.2d at 377, 453 N.Y.S.2d at 661).

> First, the proposed lesser offense must be "an offense of lesser grade or degree" and it must be in "all circumstances . . . impossible to commit the greater crime without concomitantly, by the same conduct, committing the lesser offense." Second, there must be a "reasonable view of the evidence in the particular case that would support a finding that [defendant] committed the lesser offense but not the greater."[126]

The Court held that "whether it is possible to commit the greater offense without committing the lesser must be determined by a 'comparative examination of the statutes defining the two crimes, in the abstract.'"[127]

In June 2010, the Court decided *People v. Williams*, a case where defendant "argue[d] that he did not waive his *Antommarchi* right to be present at conferences with potential jurors to explore issues of possible [juror] bias."[128] The Court rejected defendant's argument, reasoning that because defendant was advised by the trial judge that he was welcome to be present at any time the court discussed any topic with counsel, the "court articulated a right to be present that was broader than the law requires . . . necessarily includ[ing] the rights guaranteed by *Antommarchi*."[129]

XI. RIGHT TO CONFRONTATION AND PUBLIC TRIAL

In the case of *People v. Brown*, the Court held that a DNA report processed by a subcontracting laboratory to the Office of the Chief Medical Examiner (OCME) containing machine-generated raw data, graphs, and charts of DNA characteristics of a specimen isolated from the victim's rape kit was not testimonial in nature.[130] As such, the

126. *Id.*

127. *Id.* at 23, 923 N.E.2d at 1097, 896 N.Y.S.2d at 709 (citing *Glover*, 57 N.Y.2d at 64, 439 N.E.2d at 377, 453 N.Y.S.2d at 661).

128. 15 N.Y.3d 739, 740, 934 N.E.2d 309, 309, 907 N.Y.S.2d 740, 740 (2010). *See generally* People v. Antommarchi, 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992).

129. *Williams*, 15 N.Y.3d at 741, 934 N.E.2d at 310, 907 N.Y.S.2d at 740.

130. 13 N.Y.3d 332, 340, 918 N.E.2d 927, 931-32, 890 N.Y.S.2d 415, 419-20 (2009). *See also* Davis v. Washington, 547 U.S. 813, 821 (2006) (holding that only statements that are "testimonial" implicate the Sixth Amendment right to confront witnesses); Crawford v. Washington, 541 U.S. 36, 51 (2004) ("Testimony . . . is . . . a solemn declaration or affirmation made for the purpose of establishing or proving some fact." It includes ex parte in-court testimony and extrajudicial statements "such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . .") (citation omitted)); *but cf.* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009) (Certificates of analysis from a state laboratory concluding two essential elements of the charged crime, that the seized substance was cocaine and of a certain weight, without any

Court reasoned that admission of the DNA report through testimony of the OCME forensic biologist did not violate defendant's Sixth Amendment right to confrontation.[131] As in *People v. Rawlins*, significant to the Court's analysis was that the OCME forensic biologist was the individual who conducted the actual analysis linking defendant's DNA to the profile found in the victim's rape kit and also testified that she was familiar with the subcontracting laboratory's procedures, protocols, and accreditation.[132]

In *People v. Wrotten*, the Court held that a trial court did not commit error by allowing televised testimony, based on its finding that the People established by clear and convincing evidence that the victim was unable to travel to New York without seriously endangering his health and was, as a result, unavailable to testify.[133] The Court held that, despite the absence of any legislative authorization specifically granting the trial court the power to permit the admission of televised testimony, the trial court had the necessary authority to allow televised testimony under Judiciary Law section 2-b(3).[134] The Court also held that once a finding of necessity and reliability was made by the trial court, allowing televised testimony did not violate defendant's right to confrontation under the Confrontation Clause of the Federal or State Constitutions.[135] In this regard, the Court concluded that even assuming, without deciding, that two-way video does not always satisfy the Confrontation Clause's "face-to-face meeting" requirement, the public policy of "justly resolving criminal cases while at the same time protecting the well-being of a witness" justified live two-way video testimony in the "rare" case where a key witness cannot travel to New

testimony from the analysts who made such conclusions, violated defendant's Sixth Amendment right to confront witnesses. The certificates were sworn to by the analysts before a notary public and were created for the sole purpose of being introduced in court during the prosecution of the case).

131. *Brown*, 13 N.Y.3d at 340-41, 918 N.E.2d at 931-32, 890 N.Y.S.2d at 419-20. *See also* People v. Rawlins, 10 N.Y.3d 136, 158-59, 884 N.E.2d 1019, 1034-35, 855 N.Y.S.2d 20, 35-36 (2008) (holding that the introduction of a DNA report from a private subcontractor laboratory that tested the victim's rape kit was not a *Crawford* violation.).

132. *Brown*, 13 N.Y.3d at 339-41, 918 N.E.2d at 931-32, 890 N.Y.S.2d at 419-20; *Rawlins*, 10 N.Y.3d at 159, 884 N.E.2d at 1035, 855 N.Y.S.2d at 36.

133. 14 N.Y.3d 33, 40, 923 N.E.2d 1099, 1103, 896 N.Y.S.2d 711, 715 (2009). *See generally* People v. Cintron, 75 N.Y.2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990) (holding the use of two-way televised testimony of a vulnerable child witness was not a violation of either the federal or state constitutions).

134. *Wrotten*, 14 N.Y.3d at 40, 923 N.E.2d at 1103, 896 N.Y.S.2d at 715. Judiciary Law section 2-b(3) grants the court power "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." N.Y. JUD. LAW § 2-b(3) (McKinney 2002).

135. *Wrotten*, 14 N.Y.3d at 38, 923 N.E.2d at 1102, 896 N.Y.S.2d at 714.

York.[136]

In the case of *People v. Baker*, the Court held that defendant was not denied his right to a public trial when the trial court granted the People's motion to exclude the mother of defendant's children from trial because she was a potential witness.[137] Noting that courts have the discretion to exclude potential witnesses from the courtroom without violating defendant's Sixth Amendment right to a public trial, the Court concluded that it was not unreasonable to exclude the mother of defendant's children from the courtroom, as she could have been called as a rebuttal witness for the prosecution.[138]

XII. RIGHT TO COUNSEL

In *People v. Carncross*, the Court upheld a trial court's decision granting the People's motion to disqualify defendant's counsel, although defendant, in open court, indicated that he was willing to waive any conflict.[139] The Court held that "[w]hen examining a defense counsel's possible conflict of interest, a court must balance the defendant's constitutional right to the effective assistance of counsel against the defendant's right to be defended by counsel of his own choosing."[140] The Court also noted that "a trial court's 'discretion is especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review.'"[141]

XIII. SEARCH AND SEIZURE

In a March 2010 decision, *People v. Tolentino*, the Court rejected defendant's argument that defendant's preexisting Department of Motor Vehicles (DMV) records were subject to suppression, based on an

136. *Id.* at 39-40, 923 N.E.2d at 1103, 896 N.Y.S.2d at 714-15.

137. 14 N.Y.3d 266, 274, 926 N.E.2d 240, 245-46, 899 N.Y.S.2d 733, 738-39 (2010); People v. Baker, 58 A.D.3d 1069, 1070, 872 N.Y.S.2d 229, 231 (3d Dep't 2009).

138. *Baker*, 14 N.Y.3d at 274, 926 N.E.2d at 246, 896 N.Y.S.2d at 739.

139. 14 N.Y.3d 319, 326-27, 927 N.E.2d 532, 536, 901 N.Y.S.2d 112, 116 (2010).

140. *Id.* at 327, 927 N.E.2d at 536, 901 N.Y.S.2d at 116 (citing People v. Gomberg, 38 N.Y.2d 307, 312, 342 N.E.2d 550, 553, 379 N.Y.S.2d 769, 773 (1975)). *See also* People v. Ortiz, 76 N.Y.2d 652, 655-56, 564 N.E.2d 630, 632-33, 563 N.Y.S.2d 20, 22-23 (1990).

141. *Carncross*, 14 N.Y.3d at 330, 927 N.E.2d at 538, 901 N.Y.S.2d at 118 (citing People v. Tineo, 64 N.Y.2d 531, 536, 479 N.E.2d 795, 798, 490 N.Y.S.2d 159, 162 (1985)). *See generally* People v. Konstantinides, 14 N.Y.3d 1, 10-11, 923 N.E.2d 567, 572, 896 N.Y.S.2d 284, 289 (2009) (holding that where a defendant makes a conflict-based claim of ineffective assistance of counsel, the Court will "disturb an Appellate Division determination on this issue only if it lacks any record support").

illegal stop of defendant.[142] The police learned defendant's identity when they stopped his car and ran a computer check that led to the retrieval of defendant's DMV records.[143] Defendant argued that, but for the illegal stop, the police would not have learned his name and would not have been able to access his DMV records.[144] The Court held that "when the police [illegally] stop or seize a defendant, learn [the defendant's] name, and [then] use that name to check preexisting [official] files [or records], the records are not subject to suppression."[145] As such, defendant's DMV records were not suppressible as the fruit of the purportedly illegal stop, as "there is no sanction . . . when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence."[146]

In *People v. Mothersell*, the Court held that an affidavit, submitted in support of a search warrant application, alleging two controlled purchases had been made at a residential apartment by a known and reliable informant over a two-week period did not provide sufficient probable cause for the judge to issue an all-persons-present warrant.[147] Restating the standard set forth in *People v. Nieves*, the Court held that the stringent probable cause requirement for an all-persons-present private residence warrant is: "[T]he facts before the issuing Judge at the time of the warrant application, and reasonable inferences from those facts, must establish probable cause to believe that the premises are confined to ongoing illegal activity and that every person within the orbit of the search possesses the articles sought."[148] The Court held that the warrant at issue was not supported by probable cause, as the affidavit submitted in support of the warrant did not describe with particularity the individuals from whom the drug purchases were made,

142. 14 N.Y.3d 382, 386-87, 926 N.E.2d 1212, 1215-16, 900 N.Y.S.2d 708, 711-12 (2010).

143. *Id.* at 385, 926 N.E.2d at 1215, 900 N.Y.S.2d at 710.

144. *Id.* at 384, 926 N.E.2d at 1214, 900 N.Y.S.2d at 709.

145. *Id.* at 385, 926 N.E.2d at 1214, 900 N.Y.S.2d at 710.

146. *Id.* at 385-86, 926 N.E.2d at 1215, 900 N.Y.S.2d at 710 (citing United States v. Guzman-Bruno, 27 F.3d 420, 422 (9th Cir. 1994)). *See generally* People v. Pleasant, 54 N.Y.2d 972, 973-74, 430 N.E.2d 905, 906, 446 N.Y.S.2d 29, 30-31 (1981) (denying suppression of identification of defendant as fruits of an unlawful arrest where victim independently identified defendant, said identification was not tainted by the unlawful seizure, and where only defendant's identity was obtained as a result of the unlawful seizure).

147. 14 N.Y.3d 358, 362-66, 926 N.E.2d 1219, 1223-25, 900 N.Y.S.2d 715, 718-20 (2010).

148. *Id.* at 364, 926 N.E.2d at 1224, 900 N.Y.S.2d at 719 (citing People v. Nieves, 36 N.Y.2d 396, 404, 330 N.E.2d 26, 34, 369 N.Y.S.2d 50, 60 (1975)).

failed to state whether an innocent use of the premises was observed, and failed to include information regarding the number or behavior of persons ordinarily present at the premises at the time of the warrant's contemplated execution.[149] The Court also held that neither probable cause that a person possesses contraband, or the presence of all-persons-present warrant, may be used as a basis for a strip or visual body cavity search.[150] Specifically, where a strip search is to be performed, there must also exist "specific facts to support a reasonable suspicion that a particular person has secreted contraband beneath his or her clothes or in a body cavity."[151]

In a June 2010 case, *People v. Devone*, the Court held that there is a legitimate, but reduced, expectation of privacy in an automobile and, as such, a canine sniff of an exterior of an automobile constitutes a search under the Constitution of the State of New York.[152] As the Court previously recognized in *People v. Yancy*, "there is a 'diminished expectation of privacy attributed to individuals and their property when traveling in an automobile.'"[153] Accordingly, the Court held that police only need to meet the lower standard of "founded suspicion" that criminality is afoot before conducting a canine sniff of the exterior of a lawfully stopped vehicle.[154]

In *People v. Edwards*, the Court considered a case where defendant was driving a vehicle that was stopped by the police for a traffic infraction and, during the course of the investigation, drug residue was

149. *Id.* at 365, 926 N.E.2d at 1225, 900 N.Y.S.2d at 720. The *Nieves* court set forth numerous factors necessary to be considered in the discharge of a court's duty with regard to an application seeking an all-persons-present warrant. *Nieves*, 36 N.Y.2d at 404-05, 330 N.E.2d at 34, 369 N.Y.S.2d at 60. Such warrants are subjected to "rigid scrutiny." *Id.* Specifically, the warrant application:

> [M]ust carefully delineate the character of the premises, for example, its location, size, the particular area to be searched, means of access, neighborhood, its public or private character and any other relevant fact. It must specifically describe the nature of the illegal activity believed to be conducted at the location, the number and behavior of persons observed to have been present during the times of day or night when the warrant is sought to be executed.

Id.

150. *Mothersell*, 14 N.Y.3d at 366-67, 926 N.E.2d at 1225-26, 900 N.Y.S.2d at 720-21.

151. *Id.* at 367, 926 N.E.2d at 1226, 900 N.Y.S.2d at 721 (citing People v. Hall, 10 N.Y.3d 303, 311, 886 N.E.2d 162, 168, 856 N.Y.S.2d 540, 546 (2008) (If a strip search is to be performed, there must independently exist "particular, individualized facts known to the police that justify subjecting an arrestee to these procedures.")).

152. 15 N.Y.3d 106, 113, 931 N.E.2d 70, 74, 905 N.Y.S.2d 101, 105 (2010).

153. *Id.* (quoting People v. Yancy, 86 N.Y.2d 239, 246, 654 N.E.2d 1233, 1236, 630 N.Y.S.2d 985, 988 (1995)).

154. *Id*.

observed on the defendant's hand leading to the arrest of defendant and a search of his vehicle.[155] The Court reversed a decision of the appellate division "concluding that once the police officers determined that a traffic infraction had occurred, the purpose for [defendant's] detention was exhausted and the continued seizure [of defendant] was unlawful."[156] The Court held that it was proper for the police to return to defendant's vehicle to complete the traffic stop and, as the drug residue was first seen by the police while the police had a valid basis to continue defendant's detention for the traffic infraction, the observation of the drug residue provided the police with probable cause to arrest and search defendant along with his vehicle.[157]

XIV. SENTENCING AND PUNISHMENT

In a February 2010 decision, *People v. Williams*, the Court reaffirmed the long recognized precedent that trial courts have the inherent authority to correct illegal sentences.[158] In doing so, the Court rejected defendants' argument that CPL section 440.40, "which allows the People to move to set aside an invalid sentence within one year of its imposition," imposes a one-year limitation on a court's authority to rectify an illegal sentence (e.g., the failure to impose post-release supervision (PRS) as a mandatory component of a sentence for a crime punishable by a determinate prison term pursuant to Penal Law section 70.45(1)).[159] "[A] court may decline to impose PRS during resentencing only when the People issue the statutorily required consent under Penal Law section 70.85."[160] With regard to a temporal limitation on a court's ability to resentence a defendant, the Court concluded that even where a defendant's sentence is illegal (e.g., a case where PRS was

155. 14 N.Y.3d 741, 742, 925 N.E.2d 576, 576, 898 N.Y.S.2d 538, 538 (2010).

156. *Id*., 925 N.E.2d at 576-77, 898 N.Y.S.2d at 538-39.

157. *Id*., 925 N.E.2d at 577, 898 N.Y.2d at 539.

158. 14 N.Y.3d 198, 212, 925 N.E.2d 878, 886, 899 N.Y.S.2d 76, 84 (2010). As a general principle, a sentence cannot be changed once a defendant begins to serve it; however, this applies only if the "sentence is in accordance with law." N.Y. CRIM. PROC. LAW § 430.10 (McKinney 2005).

159. *Williams*, 14 N.Y.3d at 212-13, 925 N.E.2d at 886-87, 899 N.Y.S.2d at 84-85. *See also* N.Y. PENAL LAW § 70.45 (McKinney 2009); N.Y. CRIM. PROC. LAW § 440.40(1) (McKinney 2005).

160. *Williams*, 14 N.Y.3d at 213, 925 N.E.2d at 886-87, 899 N.Y.S.2d at 84-85; *see also* N.Y. PENAL LAW § 70.85 (McKinney 2009). "[I]n cases where PRS [is] required but not explicitly pronounced at sentencing, the matter may be returned for resentencing pursuant to Correction Law § 601-d, and the court may decide to reimpose the original determinate sentence without PRS 'only on consent of the district attorney.'" *Williams*, 14 N.Y.3d at 213, 925 N.E.2d at 886-87, 899 N.Y.S.2d at 84-85; *see also* N.Y. CORRECT. LAW § 601-d (McKinney Supp. 2011).

not formally pronounced by the sentencing court pursuant to CPL section 380.20), the defendant acquires a legitimate expectation of finality once the defendant is "released from custody and returns to the community after serving the period of incarceration that was ordered by the sentencing court, and the time to appeal the sentence has expired or the appeal has been finally determined . . . ."[161] The Court concluded that at this point, although illegal under the Penal Law, the sentence "is final and the Double Jeopardy Clause prevents a court from modifying the sentence to include a period of post-release supervision."[162] Based on the foregoing, the Court held in three cases that the Double Jeopardy Clause of the United States Constitution precluded the Supreme Court from adding PRS to a defendant's sentence after defendant was released from prison.[163]

In *People v. Murray*, the Court declined to reverse an adult sentence where a defendant was promised that he would "probably" be treated as a youthful offender and, after the entry of the guilty plea, defendant failed to appear at sentencing necessitating the issuance of a warrant.[164] The Court reasoned that the trial court's decision not to treat defendant as a youthful offender based on his non-appearance at the original sentencing date "was rooted in the terms of defendant's plea and evident to all concerned; this was not a situation in which the court arbitrarily trifled with the legitimate expectations of the defendant based on the plea."[165] In addition, the Court held that defendant failed to preserve the issue of a nonconforming PRS sentence, as defendant was made aware of the PRS part of his sentence prior to its imposition.[166]

In a June 2010 case, *People v. Ballman*, the Court interpreted the term "conviction" under Vehicle and Traffic Law (VTL) section 1192(8), as amended in 2006, a statute designed to eliminate a loophole that allowed offenders convicted of Driving While Intoxicated (DWI) to face lesser penalties simply because prior convictions occurred out of

161. *Williams*, 14 N.Y.3d at 219-20, 925 N.E.2d at 891, 899 N.Y.S.2d at 89; *see also* N.Y. CRIM. PROC. LAW § 380.20 (McKinney 2005).

162. *Williams*, 14 N.Y.3d at 219-20, 925 N.E.2d at 891, 899 N.Y.S.2d at 89.

163. *See* People v. Hassell, 14 N.Y.3d 925, 926, 931 N.E.2d 539, 539-40, 905 N.Y.S.2d 555, 555-56 (2010); People v. Jordan, 15 N.Y.3d 727, 728, 931 N.E.2d 1053, 1053, 905 N.Y.S.2d 797, 797 (2010); People v. Williams, 14 N.Y.3d 924, 925, 931 N.E.2d 539, 539, 905 N.Y.S.2d 555, 555 (2010).

164. 15 N.Y.3d 725, 726, 932 N.E.2d 877, 878-79, 906 N.Y.S.2d 521, 522-23 (2010).

165. *Id.* at 726, 932 N.E.2d at 878, 906 N.Y.S.2d at 522.

166. *Id.* at 726-27, 932 N.E.2d at 879, 906 N.Y.S.2d at 523 (citing People v. Louree, 8 N.Y.3d 541, 545-46, 869 N.E.2d 18, 21-22, 838 N.Y.S.2d 18, 21-22 (2007) (holding that preservation is unnecessary to address a nonconforming PRS sentence only in instances where defendant has not been made aware of that part of the sentence)).

state.[167] The Court considered the language of the 2006 amendment to VTL section 1192(8) and its enabling language and held that out-of-state convictions occurring prior to the November 1, 2006 (the effective date of the statute) could not be used to raise a DWI offense from a misdemeanor to a felony.[168]

In a February 2010 case, *People v. Fiammegta*, the Court rejected a due process argument that a defendant who faces termination from a drug treatment program on account of disputed allegations of misconduct or wrongdoing is entitled to a preponderance of the evidence hearing to resolve disputed factual issues similar to the hearings afforded defendants accused of probation or parole violations.[169] Rather, the Court concluded that where a defendant is terminated from a drug treatment program for misconduct, due process is satisfied if the court "carr[ies] out an inquiry of sufficient depth to satisfy itself that there was a legitimate basis for the program's decision, and must explain, on the record, the nature of its inquiry, its conclusions, and the basis for them."[170] In instances where, after the requisite inquiry into the merits of defendant's discharge from a drug treatment program, the court concludes that the program, in fact, did not possess a legitimate basis for terminating defendant, and defendant could not continue participating in the program for some reason (e.g., the consent of the People to participation in the drug treatment program is necessary and is withdrawn), the court could allow defendant the opportunity to withdraw his plea (if one was entered) and restore the case to the trial calendar.[171]

In *People v. Zephrin*, the Court held that PL section 60.01(2)(d) together with PL section 65.00 mandate that:

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167. 15 N.Y.3d 68, 71-74, 930 N.E.2d 282, 283-86, 904 N.Y.S.2d 361, 362-65 (2010). Vehicle and Traffic Law § 1192(8), as amended in 2006, reads as follows:

> A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties imposed under this section . . . provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of this section.

N.Y. VEH. & TRAF. LAW § 1192(8) (McKinney 1996 & Supp. 2010).

168. *Ballman*, 15 N.Y.3d at 74, 930 N.E.2d at 286, 904 N.Y.S.2d at 365.

169. 14 N.Y.3d 90, 97-98, 923 N.E.2d 1123, 1128-29, 896 N.Y.S.2d 735, 740 (2010).

170. *Id.* at 98, 923 N.E.2d at 1129, 896 N.Y.S.2d at 740. *See also* People v. Outley, 80 N.Y.2d 702, 712, 610 N.E.2d 356, 360, 594 N.Y.S.2d 683, 687 (1993) ("[T]he sentencing process . . . must satisfy the requirements of the Due Process Clause. To comply with due process . . . the sentencing court must assure itself that the information upon which it bases the sentence is reliable and accurate." (citations omitted)).

171. *Fiammegta*, 14 N.Y.3d at 98-99, 923 N.E.2d at 1129, 896 N.Y.S.2d at 740-41.

> [W]here a court imposes a split sentence, the term of imprisonment and term of probation together may not exceed, in most cases, five years. In other words, for most felonies, the relevant statutory provisions create a cap of five years that the two components of a split sentence together may not exceed.[172]

Thus, the Court concluded that "in cases where a defendant has been incarcerated pending sentencing and, as a result, receives credit for time served toward the term of imprisonment of a split sentence, that defendant's probationary term is also reduced by the period the defendant was incarcerated prior to sentencing."[173] The Court also noted that: "[A] defendant's term of probation should not be reduced by time-served credit longer than the sentence of imprisonment. In the case of a split sentence the probationary term can only be reduced by time-served credit up to six months."[174]

In *People v. Alford*, the Court applied PL section 70.25(2) in a case where defendant was convicted of predatory sexual assault against a child.[175] Count one of the indictment alleged that defendant committed the crime of sexual act in the first degree and count four of the indictment alleged that defendant committed the crime of course of sexual conduct against a child in the first degree.[176] The Court held that "it [was] impossible to determine whether the act that formed the basis for the jury's guilty verdict on count one . . . was also one of the two or more acts that formed the basis for its guilty verdict on count four."[177] As such, applying PL section 70.25(2), the Court reasoned that the trial

172. 14 N.Y.3d 296, 299-300, 926 N.E.2d 246, 248, 899 N.Y.S.2d 739, 741 (2010). PL section 65.00(3)(a) authorizes a five-year term of probation for most felony offenses. N.Y. PENAL LAW § 65.00(3)(a)(i) (McKinney 2009 & Supp. 2011). However, PL section 65.00(2), states that, where a split sentence is imposed, the limitations set forth in PL section 60.01(2)(d) may trump the time period set forth in section 65.00(3)(a). N.Y. PENAL LAW § 65.00(2) (McKinney 2009 & Supp. 2010) ("When a person is sentenced to a period of probation the court shall, except to the extent authorized by paragraph (d) of subdivision two of section 60.01 of this chapter, impose the period authorized by subdivision three of this section and shall specify . . . the conditions to be complied with.").

173. *Zephrin*, 14 N.Y.3d at 300, 926 N.E.2d at 248, 899 N.Y.S.2d at 741 (citing N.Y. PENAL LAW § 70.30(3) (McKinney 2009 & Supp. 2011)).

174. *Id.* at 301, 926 N.E.2d at 249, 899 N.Y.S.2d at 742 (citations omitted).

175. 14 N.Y.3d 846, 847, 927 N.E.2d 552, 552, 901 N.Y.S.2d 132, 132 (2010). PL section 70.25(2) states in relevant part:

> When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently.

N.Y. PENAL LAW § 70.25(2) (McKinney 2009 & Supp. 2011).

176. *Alford*, 14 N.Y.3d at 847, 927 N.E.2d at 552, 901 N.Y.S.2d at 132.

177. *Id.* at 848, 927 N.E.2d at 552, 901 N.Y.S.2d at 132.

court should have ordered the sentences on counts one and four to run concurrently.[178] The Court admonished that "[i]f the People wish[ed] to seek consecutive sentence[es] . . . they should have request[ed] a form of verdict that . . . require[d] the jury to explicitly delineate that an act constituting one offense is not a material element of another offense."[179] Demonstrating this point, in *Frederick*, the Court held that the trial court was free to sentence defendant consecutively for killing the victim to sentences previously imposed for an earlier and separate knife attack on the victim, because "there [was] no uncertainty about whether the facts supported a consecutive sentence [as a result of] a lack of specificity in the jury charge."[180]

In *People v. Gravino*, the Court held that because registration under the Sex Offender Registration Act (SORA) was a collateral consequence of defendant's guilty plea, the trial court's failure to address SORA registration requirements before accepting defendant's guilty plea did not, by itself, demonstrate that defendant's plea was not knowing, voluntary, and intelligent.[181] Similarly, the Court held that a sex offender's terms and conditions of probation were also a collateral consequence of defendant's guilty plea and, as such, the trial court's failure to apprise defendant that he would lose the fundamental right to have contact with his children did not, by itself, demonstrate that defendant's plea was not knowing, voluntary, and intelligent.[182] The Court reasoned that judges "cannot be expected to predict . . . every potential condition of probation that [may] be recommended in [a] presentence report . . . given the individualized nature of probation supervision."[183]

178. *Id.*

179. *Id.*

180. People v. Frederick, 14 N.Y.3d 913, 917, 931 N.E.2d 517, 520, 905 N.Y.S.2d 533, 536 (2010).

181. 14 N.Y.3d 546, 559, 928 N.E.2d 1048, 1056, 902 N.Y.S.2d 851, 859 (2010). *See also* People v. Windham, 10 N.Y.3d 801, 802, 886 N.E.2d 179, 180, 856 N.Y.S.2d 557, 558 (2008) ("[A] SORA risk-level determination is not part of a defendant's sentence . . . it is a collateral consequence of a conviction for a sex offense designed not to punish, but rather to protect the public." (citations omitted)). Collateral consequences are "not known at the time a court accepts a guilty plea, and therefore cannot have a definite, immediate and largely automatic effect on [a] defendant's punishment." *Gravino*, 14 N.Y.3d at 556, 928 N.E.2d at 1054, 902 N.Y.S.2d at 857 (quotation omitted) (citing People v. Catu, 4 N.Y.3d 242, 244-45, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005)).

182. *Gravino*, 14 N.Y.3d at 558-59, 928 N.E.2d at 1055-56, 902 N.Y.S.2d at 858-59.

183. *Id.* at 558, 928 N.E.2d at 1055-56, 902 N.Y.S.2d at 858-59.

XV. SEX OFFENDER REGISTRATION ACT

In *People v. Alemany*, the Court held that homelessness may be considered an inappropriate living situation within the meaning of "Living or Employment Situation," the fifteenth risk factor of the Risk Assessment Instrument (RAI), an evaluative scheme employed by the court and the probations department for the purpose of rating a sex offender's potential threat to the community posed by a defendant covered under SORA.[184] The Court noted that "sex offenders are more likely to reoffend if their living situation . . . gives them access to victims or a reduced probability of detection."[185] Therefore, the Court concluded that:

> A sex offender who has no address, does not frequent a shelter or participate in any community programs and is unemployed is, for these reasons, more difficult for law enforcement authorities to locate. This living situation presents a "reduced probability of detection" because the inability to find a sex offender reduces law enforcement authorities' capacity to discover or investigate any future crimes the sex offender might commit, to connect him to those crimes, or to apprehend him. And a lessened likelihood of getting caught is thought to increase the risk of recidivism.[186]

The Court also noted that it was "not creating [a] per se rule such that a sex offender who is homeless must always be [awarded] points under [the Living or Employment Situation] risk factor."[187] Rather, each case needs to be evaluated on an individual basis to consider evidence that a sex offender may have "a history of living in shelters, or community ties" or whether the offender "would likely live on the streets . . . ."[188]

XVI. SPEEDY TRIAL

In *People v. Price*, the Court held that a 275-day period during which an appeal from an appellate division decision was pending in an unrelated criminal prosecution did not constitute "exceptional circumstances" under CPL section 30.30(4)(g), a rule requiring exclusion of "periods of delay occasioned by exceptional

184. 13 N.Y.3d 424, 428-32, 921 N.E.2d 140, 142-45, 893 N.Y.S.2d 448, 449-53 (2009).

185. *Id.* at 430, 921 N.E.2d at 143, 893 N.Y.S.2d at 451 (quotation and citation omitted).

186. *Id.* at 430, 921 N.E.2d at 144, 893 N.Y.S.2d at 452.

187. *Id.* at 431, 921 N.E.2d at 145, 893 N.Y.S.2d at 452.

188. *Id.* at 431-32, 921 N.E.2d at 144-45, 893 N.Y.S.2d at 452-53.

circumstances" from speedy trial calculation in defendant's case.[189] Defendant was arraigned in county court on a felony complaint charging attempted disseminating indecent materials to minors in the first degree on February 2, 2006.[190] Defendant's communication did not involve transmission of sexual images.[191] On July 25, 2006, the Second Department held, in an unrelated case, that defendant could not be convicted of attempted disseminating indecent materials to minors in the first degree if the communication transmitted did not contain sexual images.[192] As such, the People did not indict defendant and left his criminal complaint pending.[193] On April 26, 2007, the Court, in *Kozlow*, reversed the Second Department, holding that a person may properly be convicted of attempted disseminating indecent materials to minors in the first degree, even if the communication did not contain sexual images.[194] At this time, the People presented defendant's case to the grand jury and "[d]efendant was arraigned on [the] indictment on June 14, 2007, more than sixteen months after he was arraigned on the felony complaint."[195] The Court held that although the unrelated case was pending on appeal, involved legal issues similar to those in defendant's prosecution, and was ultimately reversed by the Court; exclusion under CPL section 30.30(4)(g) was not intended to permit defendant's complaint to "pend for an open-ended and potentially lengthy period on the mere prospect that a change in the law might render it again viable."[196] The Court noted that the People could have

189. 14 N.Y.3d 61, 63-64, 923 N.E.2d 1107, 1109-10, 896 N.Y.S.2d 719, 721-22 (2010). Under CPL Section 30.30 the People must be ready for trial within six months of the commencement of a felony prosecution. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2003 & Supp. 2011). However, CPL section 30.30(4) excludes certain periods of time excluded from the six months readiness calculation and includes a provision for:

> [O]ther periods of delay occasioned by exceptional circumstances, including but not limited to, the period of delay resulting from a continuance granted at the request of a district attorney if (i) the continuance is granted because of the unavailability of evidence material to the people's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period; or (ii) the continuance is granted to allow the district attorney additional time to prepare the people's case and additional time is justified by the exceptional circumstances of the case.

N.Y. CPL 30.30(4)(g).

190. *Price*, 14 N.Y.3d at 62, 923 N.E.2d at 1108, 896 N.Y.S.2d at 720.

191. *Id.* at 63, 923 N.E.2d at 1108, 896 N.Y.S.2d at 720.

192. *Id.* (citing People v. Kozlow, 31 A.D.3d 788, 788, 821 N.Y.S.2d 212, 212-13 (2d Dep't 2006), *rev'd*, 8 N.Y.3d 554, 870 N.E.2d 118. 838 N.Y.S.2d 800 (2007)).

193. *Id.* at 63, 923 N.E.2d at 1108, 896 N.Y.S.2d at 720.

194. *Id.*; *Kozlow*, 8 N.Y.3d at 560-61, 870 N.E.2d at 121-22, 838 N.Y.S.2d at 803-04.

195. *Price*, 14 N.Y.3d at 63, 923 N.E.2d at 1109, 896 N.Y.S.2d at 720.

196. *Id.* at 65, 923 N.E.2d at 1110, 896 N.Y.S.2d at 722.

withdrawn their complaint against defendant and, after the change in the law, recommenced the prosecution.[197]

XVII. STATUTE OF LIMITATIONS

In *People v. Ramos*, the Court rejected the argument that the prosecution was barred by the five year statute of limitations under CPL section 30.10(2)(b) with regard to an indictment filed ten years after the alleged incident.[198] The Court reasoned that the statute of limitations was tolled because "defendant's whereabouts were 'continuously unknown and continuously unascertainable,' despite the reasonable diligence of the detectives assigned to the case, until his DNA profile from the rape kit taken from the victim was matched to DNA evidence taken from defendant pursuant to a subsequent incarceration."[199]

XVIII. LEGISLATIVE DEVELOPMENTS

The Legislature enacted a wide variety of changes to the Penal Law, the Criminal Procedure Law, and the Vehicle and Traffic Law, which are discussed below.

A. Penal Law

The crime of mortgage fraud under PL section 187 was amended by changing the definition of "person" due to a technical error with that definition.[200] In addition, a new PL section 187.01 was created to provide an exemption from mortgage fraud for an individual person who applies for a loan and who intends to occupy the mortgaged property, other than as part of a criminal conspiracy.[201]

The PL was amended by adding seven new sections 176.40, 176.45, 176.50, 176.55, 176.60, 176.65 and 176.70 known as the "Fraudulent Life Settlement Act."[202] The legislation was designed to address the "life settlement" business, specifically, where owners of life

197. *Id.* at 64-65, 923 N.E.2d at 1110, 896 N.Y.S.2d at 721.

198. 13 N.Y.3d 881, 881-82, 921 N.E.2d 598, 599, 893 N.Y.S.2d 831, 831-32 (2009). *See* N.Y. CRIM. PROC. LAW § 30.10(2)(b) (McKinney 2003 & Supp. 2010) ("A prosecution for any other felony must be commenced within five years after the commission thereof . . . .").

199. *Ramos*, 13 N.Y.3d at 881-82, 921 N.E.2d at 599, 893 N.Y.S.2d at 831-32 (quotation and citations omitted).

200. Act of December 15, 2009, ch. 507, 2009 McKinney's Sess. Laws of N.Y. 1399-1400 (codified at N.Y. PENAL LAW §187.00 (McKinney 2010)).

201. *Id.* at 1400-01 (codified at N.Y. PENAL LAW §187.01 (McKinney 2010)).

202. Act of November 19, 2009, ch. 499, 2009 McKinney's Sess. Laws of N.Y. 1324-25 (codified at N.Y. PENAL LAW §§ 176.40, 176.45, 176.50, 176.55, 176.60, 176.65, 176.70 (McKinney 2010)).

insurance may sell their policy for less than the death benefit in order to obtain immediate cash.[203] The "life settlement fraud" crimes are modeled after the "insurance fraud" crimes set forth in the same PL article 176.[204] The legislation defines "fraudulent life settlement act," followed by five degrees of the crime of "life settlement fraud" and one degree of the crime of "aggravated life settlement fraud."[205]

The Legislature amended the PL and the Executive Law "in relation to consecutive sentences for certain felony offenders and their eligibility for parole and medical parole."[206]

To provide enhanced penalties for the assault of certain victims, the PL was amended by adding two new sections, 240.72 (aggravated interference with health care services in the second degree; a class E felony) and 240.73 (aggravated interference with health care services in the first degree; a class C felony), in relation to the crime of aggravated interference with health care services.[207] The two new provisions prohibit intentionally injuring, intimidating, or interfering (or attempting to do so) with a person by force, threat of force, or physical obstruction because that person was obtaining or providing reproductive services.[208]

A new subdivision was added to PL section 125.26 to include, as "aggravated murder," the intentional killing of a child less than fourteen

203. *Id.*

204. *Id.*; N.Y. PENAL LAW § 176.00 (McKinney 2010).

205. 2009 McKinney's Sess. Laws of N.Y. at 1324-25 (codified at N.Y. PENAL LAW 176.40, 176.45, 176.50, 176.55, 176.60, 176.65, 176.70). *See* N.Y. PENAL LAW (fraudulent life settlement act defined); N.Y. PENAL LAW 176.45 (defining life settlement fraud in the fifth degree as committing a fraudulent insurance act and making it a class A misdemeanor); N.Y. PENAL LAW 176.50 (defining life settlement fraud in the fourth degree as an offense dealing with property in excess of $25,000 and making it a class E felony); N.Y. PENAL LAW 176.55 (defining life settlement fraud in the third degree and an offense dealing with property in excess of $50,000 and making it a class D felony); N.Y. PENAL LAW 176.60 (defining life settlement fraud in the second degree as an offense dealing with property in excess of $100,000 and making it a class C felony); N.Y. PENAL LAW 176.65 (defining life settlement fraud in the first degree as an offense dealing with property in excess of one million dollars and making it a class B felony); N.Y. PENAL LAW 176.70 (defining aggravated life settlement fraud as a second conviction within five years of any offense where essential element is commission of fraudulent life settlement act and making it a class D felony).

206. Act of November 16, 2009, ch. 495, 2009 McKinney's Sess. Laws of N.Y. 1280-82 (codified at N.Y. PENAL LAW § 70.25 (McKinney 2009 & Supp. 2011), N.Y. EXEC. LAW §§ 259-r, 259-s (McKinney 2010)).

207. Act of October 28, 2009, ch. 493, 2009 McKinney's Sess. Laws of N.Y. 1264 (codified at N.Y. PENAL LAW §§ 240.72, 240.73 (McKinney Supp. 2011)).

208. N.Y. PENAL LAW 240.72, 240.73. The crime of aggravated interference with health care services in the second degree requires physical injury and in the first degree requires serious physical injury. *Id.*; *see* N.Y. PENAL LAW §§ 10.00(9), 10.00(10) (McKinney 2009) (defining "physical injury" and "serious physical injury").

which was preceded by torture.[209] The new crime was passed after the torture killing of seven-year old Nixzmary Brown and duplicates the crime of "murder in the first degree" premised on torture.[210] Upon conviction for aggravated murder of a child, a sentence of life without parole is permissible, but not mandated.[211] The court may, in the alternative, impose an indeterminate sentence of imprisonment, with a maximum term of life and minimum period of imprisonment fixed by the court between not less than fifteen years and not more than twenty-five years.[212]

The PL relating to aggravated sexual abuse, sections 130.00, 130.65-a, 130.66, 130.67, 130.70, were amended to include to add "anus" as one of a person's body parts into which a finger or "foreign object," as the applicable criminal statute provides, may not be inserted, absent a valid medical purpose.[213]

Section 195.20 of the PL was amended by adding a provision making it a crime to use property, services or resources of the state or political subdivision of the state, or a governmental instrumentality within the state, for private business purposes or other compensated nongovernmental purposes.[214]

The PL with regard to endangering the welfare of vulnerable elderly persons was expanded to include incompetent or physically disabled persons, encompassing individuals "who [are] unable to care for [themselves] because of physical disability, mental disease or defect."[215]

Section 60.27 of the PL was amended by adding the requirement that,

209. Act of October 9, 2009, ch. 482, 2009 McKinney's Sess. Laws of N.Y. 1237-38 (codified at N.Y. PENAL LAW §125.26 (McKinney Supp. 2011)).

210. Act of October 9, 2009, ch. 482, 2009 McKinney's Sess. Laws of N.Y. 1237-38 (codified at N.Y. PENAL LAW 125.26; N.Y. PENAL LAW § 125.27 (McKinney 2009) (murder in the first degree); *Nixzmary Brown*, WIKIPEDIA, http://en.wikipedia.org/wiki/Nixzmary_Brown (last visited Apr. 2, 2011) (describing New York's legislative response to Nixzmary Brown's death).

211. 2009 McKinney's Sess. Laws of N.Y. at 1237-38 (codified at N.Y. PENAL LAW 125.26 & N.Y. PENAL LAW § 70.00(5) (McKinney 2009 & Supp. 2010)).

212. *Id.* at 1237-39 (codified at N.Y. PL 125.26; N.Y. PENAL LAW § 60.06 (McKinney 2009 & Supp. 2011) & N.Y. PENAL LAW § 70.00 (McKinney 2009 & Supp. 2011).

213. *Id.* at 1248-49 (codified at N.Y. PENAL LAW §§ 130.00, 130.65-a, 130.66, 130.67, 130.70 (McKinney Supp. 2011)).

214. Act of February 12, 2010, ch. 1, 2010 McKinney's Sess. Laws of N.Y. 1 (codified at N.Y. PENAL LAW § 195.20 (McKinney Supp. 2011)).

215. Act of March 23, 2010, ch. 14, 2010 McKinney's Sess. Laws of N.Y. 45-46 (codified at N.Y. PENAL LAW § 260.34 (McKinney Supp. 2011)). *See* N.Y. PENAL LAW § 260.32 (McKinney 2008 & Supp. 2011).

> where a transfer of probation has occurred pursuant to section 410.80 of the [CPL] and the probationer is subject to a restitution condition, the department of probation in the county in which the order of restitution was imposed shall notify the appropriate district attorney. Upon notification by the department of probation, such district attorney must file a certified copy of the judgment with the clerk of the county in the receiving jurisdiction for purposes of establishing a first lien and to permit institution of civil proceedings pursuant to . . . the criminal procedure law.[216]

Under PL section 265.20, the manufacturers of firearm silencers are now covered under a series of "exemptions" from criminal liability for either per se possession or possession of various weapons.[217] These exemptions generally exist for public servants, for those who are licensed to possess a weapon, for those engaged in the business of a gunsmith or dealer in firearms, and for those who possess a weapon for a limited purpose.[218]

B. Criminal Procedure Law

Section 530.11 of the CPL was amended to expand the jurisdiction of the criminal courts and family court to include concurrent jurisdiction over any proceeding concerning acts which would constitute misconduct, forcible touching, sexual abuse in the third degree, and sexual abuse in the second degree as set forth in PL subdivision one of section 130.60.[219] The CPL was also amended in relation to orders of protection and reporting domestic violence incidents to the supervising probation department or the division of parole.[220]

The CPL was amended to provide defendants the ability to call any telephone number located in the United States or Puerto Rico, for the purpose of obtaining counsel and informing a relative or friend that they have been charged with a crime.[221]

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216. N.Y. PENAL LAW § 60.27(14) (McKinney Supp. 2011); N.Y. CRIM. PROC. LAW §§ 410.80, 420.10 (McKinney 2005 & Supp. 2010).

217. Act of April 28, 2010, ch. 61, 2010 McKinney's Sess. Laws of N.Y. 121 (codified at N.Y. PENAL LAW § 265.20 (McKinney Supp. 2011)).

218. *Id.*; *see also* N.Y. PENAL LAW 265.20.

219. Act of September 16, 2009, ch. 476, 2009 McKinney's Sess. Laws of N.Y. 1223, 1225 (codified at N.Y. CRIM. PROC. LAW § 530.11 (McKinney Supp. 2010)).

220. *See* N.Y. CRIM. PROC. LAW §§ 140.10, 160.55 (McKinney Supp. 2010). *See also* N.Y. CRIM. PROC. LAW §§ 530.12, 530.13 (McKinney Supp. 2010) (conferring upon the court the power to issue temporary orders of protection for victims of family and non family offenses).

221. Act of May 25, 2010, ch. 94, 2010 McKinney's Sess. Laws of N.Y. 157 (to be codified at N.Y. CRIM. PROC. LAW § 120.90); Act of May 25, 2010, ch. 96, 2010 McKinney's Sess. Laws of N.Y. 159 (to be codified at N.Y. CPL 120.90). *See* N.Y. CRIM.

Section 410.91 of the CPL was amended to rectify the legislative oversight of coordinating this section with the Drug Law Reform Act of 2004, establishing determinate sentencing provisions for drug law offenses and authorizing imposition of a parole supervision sentence as an alternative punishment for certain drug felonies.[222] The new legislation corrected this oversight by adding the determinate sentence to the definition of parole supervision sentence, so the statute applies to both determinate and indeterminate sentences.[223]

C. Vehicle and Traffic Law

"Leandra's Law" was enacted.[224] The Legislature amended the VTL enacting ignition interlock requirements.[225] Under the new law, in addition to any other penalties allowed, a court may require that any individual convicted of DWI, intoxicated per se, aggravated DWI per se, or convicted of certain other crimes of which an alcohol-related violation is an essential element and who has been sentenced to a period of probation, must install and maintain, as a condition of probation, a functioning ignition interlock device, which requires the driver to pass a breathalyzer test prior to starting a car's engine.[226] Leandra's Law also makes it a felony for anyone to drive drunk with a child younger than fifteen in their car.[227] Vehicular assault in the first degree (PL section 120.04) and aggravated vehicular assault (PL section 120.04-a) were amended to add that an individual commits such crime when operating a motor vehicle while a child who is fifteen years of age or less is a passenger in such motor vehicle and causes serious physical injury to

PROC. LAW § 140.20 (McKinney 2004 & Supp. 2010); N.Y. CRIM. PROC. LAW §§ 170.10(b), 180.10(3), 210.15(2) (McKinney 2007 & Supp. 2010).

222. Act of June 15, 2010, ch. 121, 2010 McKinney's Sess. Laws of N.Y. 292-93 (codified at N.Y. CRIM. PROC. LAW § 410.91 (McKinney Supp. 2011)).

223. *Id.*

224. Act of November 18, 2009, ch. 496, 2009 McKinney's Sess. Laws of N.Y. 1282-85 (codified at N.Y. VEH. & TRAF. LAW §§ 1192, 1193, 1198 (McKinney Supp. 2011)).

225. *Id. See* N.Y. VEH. & TRAF. LAW § 1198 (McKinney 1996 & Supp. 2011).

226. *Id.* (codified at N.Y. VEH. & TRAF. LAW 1192, 1193, 1198); *see also* N.Y. VEH. & TRAF. LAW §§ 1192-a, 1192(2), 1192(3) (McKinney 1996 & Supp. 2010); N.Y. VEH. & TRAF. LAW 1198(2). Chapter 496 of the act of November 18, 2009 also amended New York Executive Law section 259-c by adding section 15-a, which mandates the board of parole to require a person serving a sentence for a violation of PL sections 120.03, 120.04, 120.04-a, 125.12, 125.13 or 125.14, or for a felony as defined in Vehicle and Traffic Law section 1193(1)(c), and released on parole or conditional release, to install and maintain an ignition interlock device in any motor vehicle owned or operated by such person during the term of said parole or conditional release for said crime. 2009 McKinney's Sess. Laws of N.Y. at 1291 (codified at N.Y EXEC. LAW §259-c(15-a) (McKinney 2010)).

227. 2009 McKinney's Sess. Laws of N.Y. at 1283 (codified at N.Y. VEH. & TRAF. LAW 1192(12)).

such child.[228] Vehicular manslaughter in the first degree (PL section 125.13) and aggravated vehicular homicide (PL section 125.14) were also amended to add that an individual commits such a crime while operating a motor vehicle while a child who is fifteen years of age or less is a passenger in such motor vehicle and causes the death of such child.[229]

228. *Id.* at 1288-89 (codified at N.Y. PENAL LAW §§ 120.04(6), 120.04-a(6) (McKinney Supp. 2011)).

229. *Id.* at 1289-91 (codified at N.Y. PENAL LAW §§ 125.13(6), 125.14(7) (McKinney Supp 2011)).