# CRIMINAL LAW

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## INTRODUCTION

This *Survey* of developments in New York State criminal law between July 1, 2010 and June 30, 2011 includes all significant New York State Court of Appeals decisions and New York State laws enacted in the area of criminal law and procedure.

## I. AGGRAVATED UNLICENSED OPERATION OF A MOTOR VEHICLE

The Court held that a driver who drives in violation of a conditional license issued after a driving while intoxicated conviction resulting in a revocation, may be prosecuted for the traffic infraction of driving outside of the terms of that license, but not for the crime of aggravated unlicensed operation of a motor vehicle.[1] Citing the plain meaning and legislative history of New York Vehicle and Traffic Law section 511, as well as all previous decisions on this very issue, the Court rejected the prosecutor's argument that by driving while intoxicated, which was a violation of the terms of his conditional license, the defendant was operating outside of the conditions of that license and therefore effectively driving in violation of his revoked license.[2]

## II. APPELLATE

### *A.* People v. Rivera

The Court held that the error by defense counsel in failing to file a

1. People v. Rivera, 16 N.Y.3d 654, 655-56, 949 N.E.2d 964, 965, 926 N.Y.S.2d 16, 17 (2011).

2. *Id.* at 656-58, 949 N.E.2d at 966-67, 926 N.Y.S.2d at 18-19; *see also* N.Y. VEH. & TRAF. LAW § 1196(7)(f) (McKinney Supp. 2012).

timely notice of appeal was a due process clause violation requiring a reversal of the defendant's conviction without any showing by the defendant that there were meritorious issues that would have been raised on appeal.[3] The Court also carved out a second exception to the rule precluding the filing of a notice of appeal after expiration of the statutory one year time period.[4] Late filing would be permitted not only when it was necessitated by prosecutorial inaction, but also in instances where the defendant's attorney, despite a timely request that he do so, fails to file the notice within the time period and the defendant could not have discovered the failure within that time period.[5] The Court, in remitting the cases to the appellate division, also held that a writ of *coram nobis*, seeking merely the right to file the appeal, was an appropriate vehicle to achieve relief under this new exception.[6] The Court, because the issue was not raised at the appellate division, declined to entertain the prosecutor's argument that relief only be granted where a defendant has proven he exercised due diligence to discover his attorney's error within the statutory time period.[7]

### *B.* People v. LaFontaine

The Court reaffirmed and reasserted its holding in *People v. LaFontaine* that Criminal Procedure Law (CPL) section 470.15(1) bars the appellate division "from affirming a judgment, sentence or order on a ground not decided *adversely* to the appellant by the trial court . . . ."[8] In other words, CPL section 470.15(1) is "a legislative restriction on the [a]ppellate [d]ivision's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court."[9] The Court held that since the trial court denied defendant's motion to suppress the cocaine found in his van based on the inevitable discovery doctrine, while finding in favor of the defendant on the consent to search issue, the appellate division could not find that the defendant consented to the search after ruling the inevitable discovery doctrine inapplicable.[10] The Court

3. People v. Syville, 15 N.Y.3d 391, 395, 398, 938 N.E.2d 910, 912, 914, 912 N.Y.S.2d 477, 479, 481 (2010).

4. *Id.* at 398, 938 N.E.2d at 915, 912 N.Y.S.2d at 482.

5. *Id.* at 399, 938 N.E.2d at 915, 912 N.Y.S.2d at 482 (citing N.Y. CRIM. PROC. LAW § 460.30(1) (McKinney 2005)).

6. *Id.* at 401, 938 N.E.2d at 916, 912 N.Y.S.2d at 483.

7. *Id.* at 401-02, 938 N.E.2d at 917, 912 N.Y.S.2d at 484.

8. People v. Concepcion, 17 N.Y.3d 192, 195, 953 N.E.2d 779, 780, 929 N.Y.S.2d 541, 542 (2011).

9. *Id.* (quoting People v. LaFontaine, 92 N.Y.2d 470, 474, 705 N.E.2d 663, 665, 682 N.Y.S.2d 671, 673 (1998)).

10. *Id.* at 195, 196, 953 N.E.2d at 781, 929 N.Y.S.2d at 543.

found the appellate division's ruling clearly erroneous under *LaFontaine* because the trial court had ruled in the defendant's favor on the consent to search issue.[11] The question which remained to be decided was "whether granting suppression—if this is the decision reached by the trial court on remittal—would be harmless with respect to defendant's conviction" for the additional counts of weapon possession and assault.[12] If harmless, the convictions remain; if not, a new trial on the possession and assault charges would be necessary.[13] The Court held that such determinations must be made "on a case-by-case basis, with due regard for the individual facts of the case, the nature of the error and its potential for prejudicial impact on the over-all outcome."[14] The most important consideration when assessing "spillover error is whether there is a reasonable possibility that the jury's decision to convict on the tainted counts influenced its guilty verdict on the remaining counts in a meaningful way."[15] The Court then found there to be "no reasonable possibility" that the tainted drug count had a spillover effect on the other guilty verdicts because the verdicts for weapon possession and assault arose from defendant's shooting of the victim and were supported by proof in the form of victim testimony, identification, and personal knowledge.[16]

### *C.* People v. Alonso

The Court held that the prosecutor had the statutory right to appeal the trial court's dismissal of the indictment for an egregious *Brady* violation[17] because the dismissal appeared to have been entered pursuant to CPL section 210.20(1)(h) authorizing a court to dismiss an indictment where "[t]here exists some other jurisdictional or legal impediment to conviction,"[18] and not solely upon CPL section 240.70, which authorized the court to take any other appropriate action in response to a "discovery violation."[19] The Court noted that the prosecutor may only ap-

11. *Id.* at 196, 953 N.E.2d at 781, 929 N.Y.S.2d at 543.

12. *Id.*, 953 N.E.2d at 781-82, 929 N.Y.S.2d at 543-44.

13. *Concepcion*, 17 N.Y.3d at 196, 953 N.E.2d at 782, 929 N.Y.S.2d at 544.

14. *Id.* at 196-97, 953 N.E.2d at 782, 929 N.Y.S.2d at 544 (quoting People v. Baghai-Kermani, 84 N.Y.2d 525, 532, 644 N.E.2d 1004, 1007, 620 N.Y.S.2d 313, 316 (1994)).

15. *Id.* at 197, 953 N.E.2d at 782, 929 N.Y.S.2d at 544 (quoting People v. Doshi, 93 N.Y.2d 499, 505, 715 N.E.2d 113, 116, 693 N.Y.S.2d 87, 90 (1999)).

16. *Id.*

17. People v. Alonso, 16 N.Y.3d 581, 583, 949 N.E.2d 471, 471-72, 925 N.Y.S.2d 380, 380-81 (2011).

18. *Id.* at 585, 949 N.E.2d at 473, 925 N.Y.S.2d at 382 (quoting N.Y. CRIM. PROC. LAW § 210.20(1)(h) (McKinney 2007)).

19. *Id.* (quoting N.Y. CRIM. PROC. LAW § 240.70(1)); *see generally* Brady v. Maryland,

peal a dismissal of an indictment where that dismissal was "entered pursuant to section 170.30, 170.50 or 210.20, or an order terminating a prosecution pursuant to subdivision four of section 180.85."[20] Rejecting the defendant's contention that the dismissal was entered pursuant only to CPL 240.70, and therefore could not be appealed, the Court agreed with the prosecutor that although the trial judge did not refer to CPL section 210.20(1)(h), the record made it clear that the trial court considered the *Brady* violation to be a "legal impediment to conviction" necessitating the dismissal.[21]

### *D.* People v. Gilford

The Court held that "[w]hether a showup is reasonable under the circumstances and/or unduly suggestive are mixed questions of law and fact."[22] Therefore the denial of the suppression motion by the trial court, later upheld by the appellate division, was beyond the scope of appellate review because it was supported by evidence in the record.[23]

## III. ASSAULT

The Court defined "serious disfigurement" within the meaning of assault in the first degree under Penal Law section 120.10(2).[24] The Court, distinguishing "serious disfigurement" from the standard for "severe disfigurement" described in *Fleming v. Graham*, held that "[a] person is 'seriously' disfigured when a reasonable observer would find her altered appearance distressing or objectionable."[25] In finding insufficient evidence of serious disfigurement, the Court noted that the prosecution failed to meet its burden where the record consisted of descriptions by counsel of the injury as "scars, little black and blues right now" and "two large brown bite wounds," but did not consist of a contemporaneous photograph of the injury or a description of the injury as observed by the jury.[26]

373 U.S. 83 (1963).

20. *Alonso*, 16 N.Y.3d at 583-84, 949 N.E.2d at 472, 925 N.Y.S.2d at 381 (quoting N.Y. CRIM. PROC. LAW § 450.20(1)).

21. *Id.* at 585-86, 949 N.E.2d at 473-74, 925 N.Y.S.2d at 382-83; *see generally Brady*, 373 U.S. 83.

22. People v. Gilford, 16 N.Y.3d 864, 868, 948 N.E.2d 920, 922, 924 N.Y.S.2d 314, 316 (2011).

23. *Id.*

24. People v. McKinnon, 15 N.Y.3d 311, 315, 937 N.E.2d 524, 526, 910 N.Y.S.2d 767, 769 (2010) (citing N.Y. PENAL LAW § 120.10(2) (McKinney 2009)).

25. *Id.*; *see also* Fleming v. Graham, 10 N.Y.3d 296, 301, 886 N.E.2d 769, 773-74, 857 N.Y.S.2d 8, 12-13 (2008).

26. *McKinnon*, 15 N.Y.3d at 316, 937 N.E.2d at 526, 910 N.Y.S.2d at 769.

## IV. ATTEMPTED STALKING

The Court held that "where a penal statute imposes strict liability for committing certain conduct, an attempt is legally cognizable, since one can attempt to engage in conduct,"[27] and that attempted stalking in the third degree was therefore a legally cognizable offense and not a legal impossibility, as the defendant contended, because a defendant could attempt to engage in the course of conduct proscribed by the statute.[28]

## V. ATTENUATION

The Court addressed whether or not a defendant's inculpatory statement was sufficiently attenuated from his unlawful arrest to render it admissible.[29] The trial court ruled that the defendant's arrest was lawful and refused to suppress his statement subsequently elicited by the police.[30] The appellate division found the trial court erred by holding the arrest to be lawful but determined the statement to be admissible because it was sufficiently attenuated from the unlawful arrest.[31] The Court reiterated that an "application of the attenuation doctrine is a mixed question of law and fact," therefore, it required a finding that the appellate division's holding may only be overruled if it was completely without support in the record.[32] The Court then held that the elicitation of the statement was attenuated from the unlawful arrest because, among other factors: the defendant was provided with *Miranda* warnings after the arrest, he waived his rights, he was not interrogated for another two hours, during which he was confronted with the evidence against him,[33] and there was no evidence that the unlawful arrest had been "motivated by bad faith or a nefarious police purpose."[34]

The Court held that the search of a dwelling based upon the consent offered by a resident was lawful despite the fact that the police ille-

27. People v. Aponte, 16 N.Y.3d 106, 109, 944 N.E.2d 204, 205, 918 N.Y.S.2d 766, 767 (2011) (quoting People v. Prescott, 95 N.Y.2d 655, 659, 745 N.E.2d 1000, 1002, 722 N.Y.S.2d 778, 780 (2001)).

28. *Id.*, 944 N.E.2d at 205-06, 918 N.Y.S.2d at 767-68; *see also* N.Y. PENAL LAW §§ 110.00, 120.50(3).

29. People v. Bradford, 15 N.Y.3d 329, 331, 937 N.E.2d 528, 529, 910 N.Y.S.2d 771, 772 (2010).

30. *Id.* at 333, 937 N.E.2d at 530, 910 N.Y.S.2d at 773.

31. *Id.*, 937 N.E.2d at 531, 910 N.Y.S.2d at 774.

32. *Id.*

33. *Id.* at 333-34, 937 N.E.2d at 531, 910 N.Y.S.2d at 774.

34. *Bradford*, 15 N.Y.3d at 334, 937 N.E.2d at 532, 910 N.Y.S.2d at 775.

gally entered the residence in the first place.[35] The Court, applying the test created in *People v. Borges*, held that the search was attenuated from the illegal entry because the consent was not solicited and the police misconduct was not flagrantly intrusive.[36] Despite the fact that the police entered the dwelling in an obvious effort to recover a stolen computer they had electronically traced to the home, the Court found that the consent was attenuated from the illegal entry because "[t]here was no evidence that the illegal entry was undertaken for the purpose of obtaining the consent or seizing the fruits of the search."[37] Judges Ciparick, Lippman, and Jones dissented, contending that the consent was not attenuated from the illegal entry.[38] The dissent noted that the voluntariness of the consent was not determinative, but was merely a factor to be considered in the analysis, and that the consent in this case was obtained immediately after the illegal entry and likely in response to the illegal entry.[39] The dissent also noted that the sudden warrantless entry into the private dwelling by a group of police officers, the details of which the police could neither recall nor explain during the suppression hearing, was the type of flagrant misconduct that supported a lack of attenuation.[40]

## VI. *BRADY* MATERIAL

In a decision that certainly will not discourage prosecutors and the police from gathering only evidence that supports an arrest while ignoring evidence of innocence, the Court held that the prosecutor satisfies his *Brady* obligations when he advises the defendant that exculpatory evidence once existed at the scene of an alleged crime but was not collected by the police.[41] The case involved the inexplicable failure of the police to gather evidence brought to their attention by witnesses at the scene that showed that the assault defendant acted with justification.[42] The Court reasoned that the information did not qualify as *Brady* mate-

35. *In re* Leroy M., 16 N.Y.3d 243, 247, 944 N.E.2d 1123, 1125, 919 N.Y.S.2d 484, 486 (2011).

36. *Id.* at 246-47, 944 N.E.2d at 1125, 1126, 919 N.Y.S.2d at 486, 487 (citing People v. Borges, 69 N.Y.2d 1031, 1033, 511 N.E.2d 58, 59-60, 517 N.Y.S.2d 914, 916 (1987)).

37. *Id.* at 245, 247, 944 N.E.2d at 1124, 1126, 919 N.Y.S.2d at 485, 487.

38. *Id.* at 249, 944 N.E.2d at 1127, 919 N.Y.S.2d at 488 (Ciparick, J., dissenting).

39. *Id.* at 248, 944 N.E.2d at 1126-27, 919 N.Y.S.2d at 487-88 (Ciparick, J., dissenting).

40. *Leroy M.*, 16 N.Y.3d at 249, 944 N.E.2d at 1127, 919 N.Y.S.2d 484 at 488 (Ciparick, J., dissenting).

41. People v. Hayes, 17 N.Y.3d 46, 49-50, 52, 950 N.E.2d 118, 121, 122, 926 N.Y.S.2d 382, 385, 386 (2011); *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963).

42. *Hayes*, 17 N.Y.3d at 49-50, 950 N.E.2d at 121, 926 N.Y.S.2d at 385.

rial because, although the prosecution is obligated to preserve evidence once it is acquired, neither they nor the police have an obligation to acquire the evidence in the first place and the prosecution cannot therefore disclose what they never possessed.[43]

## VII. COMPETENCE TO STAND TRIAL

The Court held that a defendant's fitness to stand trial is a legal decision not a medical decision, and that even when presented with significant medical and other evidence of a defendant's inability to assist in his defense, the trial court's decision, based in part upon its own observations of the defendant, is to be accorded substantial deference.[44] In dissent, Chief Judge Lippman disagreed with the trial court's decision as to the defendant's fitness, noting that there was more than sufficient evidence in the record to support a finding of unfitness, including the findings of two qualified psychiatrists, the hospital's forensic committee led by a doctor with a Ph.D. in clinical neuropsychology, the results of MRI brain scans revealing damage to both sides of the brain resulting in a "severe impairment of his ability to think and communicate" and rendering the defendant unable "to establish a working relationship with an attorney" or "to listen to the advice of counsel," and the opinion of defense counsel, who "was in the best position to assess [the] defendant's capacity."[45] Chief Judge Lippman, acknowledging that the Court's "review of a fitness determination is limited to whether the evidence is legally sufficient to support the determination," cautioned that "[t]his did not mean, however, that a determination of fitness must be upheld because there is some evidence to support it."[46]

## VIII. DEPRAVED INDIFFERENCE

### *A. People v. Prindle*

In setting aside a depraved indifference murder conviction, the Court, with three judges dissenting, held that the defendants act of flee-

43. *Id.* at 51, 950 N.E.2d at 122, 926 N.Y.S.2d at 386; *see also Brady*, 373 U.S. at 87-88.

44. People v. Phillips, 16 N.Y.3d 510, 517, 948 N.E.2d 428, 433, 924 N.Y.S.2d 4, 9 (2011).

45. *Id.* at 521, 522, 523, 532, 535, 948 N.E.2d at 436-37, 444, 446, 924 N.Y.S.2d at 12-13, 20, 22 (Lippman, Chief J., dissenting) (quoting People v. Gelikkaya, 84 N.Y.2d 456, 460, 643 N.E.2d 517, 519, 618 N.Y.S.2d 895, 897 (1994)).

46. *Id.* at 528, 948 N.E.2d at 441, 924 N.Y.S.2d at 17 (Lippman, Chief J., dissenting) (citing People v. Mendez, 1 N.Y.3d 15, 20, 801 N.E.2d 382, 385, 769 N.Y.S.2d 162, 165 (2003)); *see also* People v. Jordan, 35 N.Y.2d 577, 581, 324 N.E.2d 131, 133, 364 N.Y.S.2d 474, 477 (1974).

ing the police and causing his vehicle to collide with another, killing an occupant, did not evince the requisite mental state of depraved indifference to human life.[47] The Court reasserted that the *Register* standard, measuring the degree of the defendant's recklessness by the factual circumstances in place at the time the act occurred,[48] was explicitly replaced in *People v. Feingold*, where the Court held instead that "depraved indifference . . . is a culpable mental state."[49]

### *B. People v. Taylor*

The Court again held, as it had in *Feingold*, that depraved indifference is a culpable mental state characterized by "an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not"[50] and is rarely applicable, especially in "one-on-one killings" and where there is evidence the defendant intended to injure or kill.[51] The issue was preserved by defense counsel when he moved to dismiss the charge for legal insufficiency.[52]

### *C. People v. DiGuglielmo*

The Court held that the standard recently created in *People v. Feingold*, for the review of evidentiary sufficiency claims in depraved indifference murder cases, is inapplicable to cases on collateral review.[53] Following *Feingold*, the defendant, who was convicted and had exhausted his direct appeal, moved, pursuant to CPL 440, to vacate his conviction. The Court held that "[t]he standard enunciated in *Feingold* . . . does not apply retroactively to cases on collateral review, and defendant's claim that such a result violates the federal Due Process

47. People v. Prindle, 16 N.Y.3d 768, 769, 771, 944 N.E.2d 1130, 1131, 1132, 919 N.Y.S.2d 491, 492, 493 (2011).

48. *Id.* at 770, 944 N.E.2d at 1132, 919 N.Y.S.2d at 493 (citing People v. Register, 60 N.Y.2d 270, 278, 457 N.E.2d 704, 708, 469 N.Y.S.2d 599, 603 (1983)).

49. *Id.* at 770-71, 944 N.E.2d at 1132, 919 N.Y.S.2d at 493 (quoting People v. Feingold, 7 N.Y.3d 288, 294, 852 N.E.2d 1163, 1167, 819 N.Y.S.2d 691, 695 (2006)); *see also* N.Y. PENAL LAW § 120.25 (McKinney 2009).

50. People v. Taylor, 15 N.Y.3d 518, 523, 939 N.E.2d 1206, 1208-09, 914 N.Y.S.2d 76, 78-79 (2010) (quoting People v. Suarez, 6 N.Y.3d 202, 214, 844 N.E.2d 721, 730, 811 N.Y.S.2d 267, 276 (2005)).

51. *Id.* at 522, 939 N.E.2d at 1207-08, 914 N.Y.S.2d at 77-78 (citing *Suarez*, 6 N.Y.3d at 210, 844 N.E.2d at 727, 811 N.Y.S.2d at 273); *see generally Feingold*, 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691; *see also* N.Y. PENAL LAW § 120.25.

52. *Taylor*, 15 N.Y.3d at 522, 939 N.E.2d at 1207, 914 N.Y.S.2d at 77.

53. People v. DiGuglielmo, 17 N.Y.3d 771, 772, 952 N.E.2d 1068, 1068, 929 N.Y.S.2d 74, 74 (2011); *see generally Feingold*, 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691.

Clause is without merit."[54]

### *D. People v. Lewie*

The Court held the evidence sufficient to establish defendant's guilt as to her second degree manslaughter charge, but found the evidence insufficient to support her reckless endangerment conviction.[55] The Court affirmed the manslaughter conviction because the evidence was sufficient to support the jury's finding that defendant "was aware of, and consciously disregarded, a substantial and unjustifiable risk" that leaving her child with her live-in boyfriend would lead to her child's death.[56] Second degree manslaughter requires that the defendant actually knew, and consciously disregarded, a risk to the child's life.[57] The evidence supported this finding.[58] As for the reckless endangerment conviction, the Court stated that the crime requires the defendant to have acted recklessly and with depraved indifference to human life.[59] "In other words, a person who is depravedly indifferent is not just willing to take a grossly unreasonable risk to human life—that person does not care how the risk turns out. This state of mind is found only in rare cases."[60] The evidence showed that the defendant did care how the risk turned out, but that she "weakly and ineffectively" protected her child.[61] The Court held that "[s]ince a [depraved indifference] murder conviction could not stand on this record, as a matter of logic the conviction of depraved indifference reckless endangerment cannot stand either."[62] The defendant also claimed that statements she made to police were taken in violation of her "'indelible' right to counsel."[63] She was appointed a Legal Aid lawyer by Family Court in response to an effort to remove the child from defendant's home.[64] The child died shortly

54. *DiGuglielmo*, 17 N.Y.3d at 772-73, 952 N.E.2d at 1068, 929 N.Y.S.2d at 74-75 (citing Wainwright v. Stone, 414 U.S. 21, 23, 24 (1973)).

55. People v. Lewie, 17 N.Y.3d 348, 353, 953 N.E.2d 760, 762, 929 N.Y.S.2d 522, 524 (2011).

56. *Id*. at 357, 953 N.E.2d at 765, 929 N.Y.S.2d at 527.

57. *Id*.

58. *Id*.

59. *Id*. at 358, 953 N.E.2d at 765, 929 N.Y.S.2d at 527 (citing N.Y. PENAL LAW § 120.25 (McKinney 2009)).

60. *Lewie*, 17 N.Y.3d at 359, 953 N.E.2d at 766, 929 N.Y.S.2d at 528 (internal citations omitted) (internal quotation marks omitted).

61. *Id.*

62. *Id*. at 360, 953 N.E.2d at 767, 929 N.Y.S.2d at 529.

63. *Id*.

64. *Id*.

thereafter, however.[65] The prosecutor was notified of the appointment at 4:06 p.m., and the child died at 6:18 p.m., thereby ending the attorney-client relationship.[66] Defendant tried to suppress statements made to police during this two hour interval, but the Court held that "while an attorney-client relationship formed in one criminal matter may sometimes bar questioning in another matter in the absence of counsel, a relationship formed in a civil matter is not entitled to the same deference."[67] Here, since no relationship was formed in a criminal case, no indelible right attached.[68] The defendant also argued "that the trial court erred in its response when, during jury deliberations, one of the jurors sent an . . . inappropriate note asking for the opportunity to thank all concerned" for the privilege of serving, stating that her marriage had ended, that the prosecutor was a "Cutie," and asking that the prosecutor be given her number.[69] The Court held that the judge acted appropriately when he disclosed the note to counsel, interviewed the juror in counsel's presence, explained that the note was inappropriate, and obtained her assurance that she would be fair to both sides.[70] The Court stated that nothing in the note demonstrated bias and that "a sworn juror may [only] be discharged . . . if . . . she 'is grossly unqualified to serve . . . or has engaged in misconduct of a substantial nature.'"[71] Lastly, the Court held that the trial judge committed only a minor error when he explained that in evaluating "conscious disregard of a known risk," the jury can consider what the defendant should have seen.[72] Reviewing the context and content of the entire charge, the Court held that such was unlikely to confuse the jury given the judge's multiple accurate explanations and the fact that "it is not possible 'consciously' to disregard something one 'should have' seen but did not."[73] In dissent, Judge Jones, with whom Chief Judge Lippman concurred, thought that the manslaughter conviction was not supported by legally sufficient evidence because "the majority, without support, equates knowledge of a risk of physical abuse with knowledge of a risk of death."[74]

65. *Lewie*, 17 N.Y.3d at 360, 953 N.E.2d at 767, 929 N.Y.S.2d at 529.

66. *Id.*

67. *Id*. at 361, 953 N.E.2d at 767, 929 N.Y.S.2d at 529.

68. *Id*., 953 N.E.2d at 768, 929 N.Y.S.2d at 530.

69. *Id*.

70. *Lewie*, 17 N.Y.3d at 361, 953 N.E.2d at 768, 929 N.Y.S.2d at 530.

71. *Id.* at 361-62, 953 N.E.2d at 768, 929 N.Y.S.2d at 530 (quoting N.Y. CRIM. PROC. LAW § 270.35(1) (McKinney 2002)).

72. *Id*. at 362, 953 N.E.2d at 769, 929 N.Y.S.2d at 531.

73. *Id*. at 363, 953 N.E.2d at 769, 929 N.Y.S.2d at 531.

74. *Id*. at 367, 953 N.E.2d at 772, 929 N.Y.S.2d at 534 (Jones, J., dissenting in part).

## IX. DISORDERLY CONDUCT

The Court held that there was sufficient evidence to support a disorderly conduct conviction where the trial evidence showed that the defendant engaged in a loud, protracted, profanity-laced argument with his wife and the police in a public place occupied by other members of the public.[75] The Court rejected the defendant's argument that the proof was insufficient because there was no evidence that any member of the public reacted to the incident and therefore insufficient evidence that he actually created public inconvenience, annoyance, or alarm.[76] The Court, citing *People v. Munafo*, *People v. Todaro*, and *People v. Kennedy*, held that the defendant need only recklessly create a risk of public inconvenience, annoyance, or alarm, and that the evidence that the undisputed conduct occurred in a public place occupied at the time by many people was sufficient to sustain a conviction.[77]

## X. DOUBLE JEOPARDY

The Court held that defense counsel impliedly consented to a mistrial when, after the jury returned a partial verdict but indicated an inability to arrive at a verdict on the remaining counts, he failed to object either before or immediately after the court's decision to accept a partial verdict and declare a mistrial on the remaining counts.[78] The Court held that as a result of the defendant's implied consent, a retrial on the remaining counts would not place the defendant in jeopardy two times for the same offense.[79] In dissent, Judge Ciparick, joined by Chief Judge Lippman, found that defense counsel did enter a timely objection immediately after the judge discharged the jury and that he could not have done so earlier because "[t]he court never gave defense counsel an opportunity to respond to its decision to declare a mistrial, and defendants, petitioners here, cannot be said to have implicitly consented."[80] The dissent also concluded that, in the absence of consent, a mistrial could

75. People v. Weaver, 16 N.Y.3d 123, 126, 129, 944 N.E.2d 634, 635, 637, 919 N.Y.S.2d 99, 100, 102 (2011); *see also* N.Y. PENAL LAW §§ 240.20(1), (3) (McKinney 2009).

76. *Id*. at 128, 944 N.E.2d at 636, 919 N.Y.S.2d at 101.

77. *Id*., 944 N.E.2d at 636-37, 919 N.Y.S.2d at 101-02 (citing People v. Munafo, 50 N.Y.2d 326, 331, 406 N.E.2d 780, 783, 428 N.Y.S.2d 924, 926 (1980); People v. Todaro, 26 N.Y.2d 325, 258 N.E.2d 711, 310 N.Y.S.2d 303 (1970); People v. Kennedy, 19 N.Y.2d 761, 226 N.E.2d 186, 279 N.Y.S.2d 360 (1967)).

78. Marte v. Berkman, 16 N.Y.3d 874, 876-77, 949 N.E.2d 479, 481, 925 N.Y.S.2d 388, 390 (2011).

79. *Id*. at 877, 925 N.E.2d at 481, 925 N.Y.S.2d at 390; *see also* N.Y. CONST., art. I, § 6; *see also* U.S. CONST. amend. V.

80. *Marte*, 16 N.Y.3d at 878, 925 N.E.2d at 482, 925 N.Y.S.2d at 391.

only be justified if the record showed that the jury was hopelessly deadlocked and that no reasonable probability remained that they could reach a verdict.[81] Finding that the trial judge "never inquired whether further deliberation might be productive," the dissent contended that the declaration of a mistrial barred a second prosecution.[82]

## XI. DRIVING WHILE INTOXICATED

The Court held that the holding in *People v. Todd* should never have been interpreted as establishing that breath-alcohol test results were inadmissible if the machine used to conduct the test had not been calibrated within the preceding six months.[83] The Court held that the proponent can lay a proper foundation for the admissibility of such evidence by showing that the "detection instrument was in 'proper working order' at the time a test was administered."[84]

## XII. DRUG LAW REFORM ACT OF 2009

### *A. People v. Paulin*

The Court, in a consolidated case, held that "prisoners who have been paroled, and then reincarcerated for violating their parole, are not for that reason barred from seeking relief under the [2009 Drug Law Reform Act (DLRA)]."[85] The Court addressed the petitions of two defendants seeking resentencing under the 2009 DLRA.[86] In *Paulin*, the defendant's maximum sentence for his original drug conviction had expired, but he was sentenced "in another case involving a later crime while he was still imprisoned on the earlier charge."[87] If he was resentenced under the DLRA on the earlier charge, "that resentencing could affect the time credited toward his later sentence."[88] In *Pratts*, the defendant's maximum sentence expiration date had not yet been reached.[89] The Court further noted that both defendants "fit squarely

81. *Id*. at 878-79, 925 N.E.2d at 482, 925 N.Y.S.2d at 391.

82. *Id.* at 880, 925 N.E.2d at 484, 925 N.Y.S.2d at 393.

83. People v. Boscic, 15 N.Y.3d 494, 497-98, 938 N.E.2d 989, 991, 912 N.Y.S.2d 556, 558 (2010) (citing People v. Todd, 38 N.Y.2d 755, 756, 343 N.E.2d 767, 767, 381 N.Y.S.2d 50, 50 (1975)).

84. *Id.* at 498, 938 N.E.2d at 991, 912 N.Y.S.2d at 558 (quoting People v. Gower, 42 N.Y.2d 117, 120, 366 N.E.2d 69, 70, 397 N.Y.S.2d 368, 369 (1977)).

85. People v. Paulin, 17 N.Y.3d 238, 242, 952 N.E.2d 1028, 1029, 929 N.Y.S.2d 36, 37 (2011); *see* N.Y. CRIM. PROC. LAW § 440.46 (McKinney Supp. 2012).

86. *Paulin*, 17 N.Y.3d at 242, 952 N.E.2d at 1029, 1030, 929 N.Y.S.2d at 37, 38.

87. *Id*., 952 N.E.2d at 1030, 929 N.Y.S.2d at 38.

88. *Id*.

89. *Id*.

within the text of the 2009 DLRA" because, at the time they applied for resentencing, both were in the Department of Corrections' custody, had been convicted of class B felonies defined in Penal Law article 220, were serving indeterminate sentences with a maximum exceeding three years, the felonies were committed before January 13, 2005, and none of the exceptions to CPL 440.46(5) applied.[90] Thus, the Court held neither defendant's petition for resentencing was moot, and therefore both defendants were entitled to resentencing.[91]

### *B. People v. Santiago*

The Court held a defendant who applies for resentencing under the 2009 DLRA while incarcerated is still entitled to resentencing even after being released from the Department of Corrections' custody.[92] In so holding, the Court reasoned that the plain language of the DLRA "does not require that custody continue until the application is decided."[93] The Court further reasoned that "to read that requirement into the statute would have significant disadvantages[, including] produc[ing] gamesmanship and unnecessarily arbitrary results, by leading the parties . . . to try to accelerate or slow progress toward a decision in the expectation that parole release will cause the application to fail."[94] Accordingly, the Court held that the defendant was entitled to resentencing under the DLRA, notwithstanding the fact that she had been paroled before her resentencing application was decided.[95]

## XIII. EAVESDROPPING WARRANT

The Court held that compliance with CPL section 700.15(4), requiring the applicant to show "that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ,"[96] and CPL section 700.20(d), requiring the warrant application to contain "[a] full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the

90. *Id*. at 243, 952 N.E.2d at 1030-31, 929 N.Y.S.2d at 38-39.

91. *Paulin*, 17 N.Y.3d at 242, 952 N.E.2d at 1030, 929 N.Y.S.2d at 38.

92. People v. Santiago, 17 N.Y.3d 246, 247, 952 N.E.2d 481, 481, 928 N.Y.S.2d 665, 665 (2011).

93. *Id*. at 248, 952 N.E.2d at 482, 928 N.Y.S.2d at 666.

94. *Id*. at 248-49, 952 N.E.2d at 482, 928 N.Y.S.2d at 666.

95. *Id.* at 247-48, 952 N.E.2d at 481, 928 N.Y.S.2d at 665.

96. N.Y. CRIM. PROC. LAW § 700.15(4) (McKinney 2009).

evidence sought,"[97] does not require law enforcement to prove that they have already exhausted all possible investigative techniques and that "[a]n affidavit describing the standard techniques that have been tried and facts demonstrating why they are no longer effective is sufficient to support an eavesdropping order even if every other possible means of investigation has not been exhausted."[98]

## XIV. EFFECTIVE ASSISTANCE OF COUNSEL

### *A.* People v. Feliciano

The Court held that the defendant was not denied effective assistance of appellate counsel where his appellate counsel failed to claim ineffective assistance of the trial counsel at a violation of probation hearing, where the alleged ineffectiveness was based upon the failure to raise an issue that was unique and would "call for an extension of or change in—not an application of existing law."[99] Despite a delay of over six years from the time the detainer was lodged against the defendant and the time of the hearing, the Court held that the failure of trial counsel to request a timely violation of probation hearing pursuant to CPL section 410.30 was not an issue "so strong that 'no reasonable defense lawyer could have found [them] . . . to be not worth raising.'"[100]

### *B.* People v. Cummings

The Court held that the failure of trial counsel, at the close of the prosecution's case, to move for a trial order of dismissal with respect to a burglary in the second degree charge, alleging a failure to prove the building in question was a dwelling, did not deprive the defendant of a fair trial.[101] Noting that defense counsel made a pretrial motion to dismiss based upon insufficient grand jury evidence on this same ground and that the prosecutor presented additional evidence at trial to support their contention that the building was a dwelling, the Court held that the defense counsel's failure to make the trial order of dismissal motion was

97. *Id.* § 700.20(d).

98. People v. Rabb, 16 N.Y.3d 145, 153, 945 N.E.2d 447, 452, 920 N.Y.S.2d 254, 259 (2011) (quoting United States v. Terry, 702 F.2d 299, 310 (2d Cir. 1983)).

99. People v. Feliciano, 17 N.Y.3d 14, 28, 950 N.E.2d 91, 100-01, 926 N.Y.S.2d 355, 364-65 (2011).

100. *Id.* at 28, 950 N.E.2d at 100, 926 N.Y.S.2d at 364 (quoting People v. Turner, 5 N.Y.3d 476, 483, 840 N.E.2d 123, 128, 806 N.Y.S.2d 154, 159 (2005)); *see also* N.Y. CRIM. PROC. LAW §§ 410.30, 410.70.

101. People v. Cummings, 16 N.Y.3d 784, 785, 944 N.E.2d 1139, 1141, 919 N.Y.S.2d 500, 502 (2011); *see also* N.Y. PENAL LAW § 140.25(2) (McKinney 2010).

not an error "'so egregious and prejudicial' as to deprive defendant of a fair trial."[102]

### *C.* People v. Brown

The Court held that the defendant was not denied effective assistance of counsel where his attorney, during the prosecutor's summation, did not object to an improper "safe streets" argument and an irrelevant and baseless claim that the defendant was a drug dealer.[103] The Court held that the defendant "failed to meet his burden of demonstrating a lack of strategic or other legitimate reasons for his . . . lawyer's failure to object"[104] because "[it] is entirely plausible that counsel chose not to object because the prosecutor's remarks impugned the People's witnesses as well as defendant and therefore were consistent with his own theory that the People's witnesses were simply not credible."[105]

## XV. ESCAPE

The Court held that a defendant's flight from a non-secure juvenile detention facility cannot support a charge of escape in the second degree.[106] The Court held that the Family Court Act differentiates between secure and non-secure detention facilities,[107] and, citing *People v. Ortega*, held again that "'a nonsecure facility does not constitute a detention facility within the meaning of Penal Law [section] 205.00(1),' and . . . that one may not commit the crime of escape in the second degree by leaving such a facility without permission."[108]

## XVI. GUILTY PLEA

### *A.* People v. Hill

The Court held that defendant's plea was not knowing, voluntary,

102. *Cummings*, 16 N.Y.3d at 785, 944 N.E.2d at 1141, 919 N.Y.S.2d at 502 (quoting *Turner*, 5 N.Y.3d at 480, 840 N.E.2d at 126, 806 N.Y.S.2d at 157).

103. People v. Brown, 17 N.Y.3d 742, 743, 952 N.E.2d 1004, 1005, 929 N.Y.S.2d 12, 13 (2011).

104. *Id.* at 744, 952 N.E.2d at 1005, 929 N.Y.S.2d at 13 (citing People v. Rivera, 71 N.Y.2d 705, 709, 525 N.E.2d 698, 700, 530 N.Y.S.2d 52, 54 (1988)).

105. *Id.*

106. *In re* Dylan C., 16 N.Y.3d 614, 615-16, 949 N.E.2d 949, 949, 926 N.Y.S.2d 1, 1 (2011); *see also* N.Y. PENAL LAW § 205.10(1).

107. *Dylan C.*, 16 N.Y.3d at 616-17, 949 N.E.2d at 950, 926 N.Y.S.2d at 2 (citing N.Y. FAM. CT. ACT §§ 301.2(4), (5) (McKinney 2008)).

108. *Id.* at 617, 949 N.E.2d at 950, 926 N.Y.S.2d at 2 (quoting People v. Ortega, 69 N.Y.2d 763, 764, 505 N.E.2d 613, 614, 513 N.Y.S.2d 103, 104 (1987)); *see* N.Y. PENAL LAW § 205.00(1).

and intelligent where, during a plea to intentional assault, he stated that he did not intend to cause the requisite serious physical injury, and that the trial judge's subsequent inquiry did not cure the defect.[109] In reversing the order of the appellate division based upon their determination that the trial judge's inquiry regarding the element of intent amounted to a "limited *Alford* colloquy," the Court made it clear that there is no such thing as a limited *Alford* colloquy and that "[e]ven absent a recitation as to every essential element, the court may still accept the plea—now an *Alford* plea," but only when that plea is "the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt."[110]

### *B.* People v. Stewart

The Court held that a *Catu* claim, challenging a guilty plea as involuntary because the court failed to advise the defendant that the sentence included a period of post-release supervision, may not be raised in a CPL section 440.10 motion, but must be raised instead on direct appeal.[111]

### *C.* People v. Cornell

The Court, citing *People v. Catu*, reversed a defendant's conviction because there was insufficient evidence in the record that the trial court fulfilled its obligation to inform the defendant that his sentence would include a period of post-release supervision.[112] The Court reasoned that in the absence of an advisement about such a direct consequence of pleading guilty, the defendant may, for the first time on appeal, move to vacate the plea as not knowing, voluntary, and intelligent.[113]

#### *1.* People v. Albergotti

The Court held that to comply with its decision in *People v. Outley*, a court need not conduct an evidentiary hearing before giving

109. People v. Hill, 16 N.Y.3d 811, 813-14, 946 N.E.2d 169, 170-71, 921 N.Y.S.2d 181, 182-83 (2011).

110. *Id.* at 814, 946 N.E.2d at 171, 921 N.Y.S.2d at 183 (quoting Silmon v. Travis, 95 N.Y.2d 470, 475 n.1, 741 N.E.2d 501, 503 n.1, 718 N.Y.S.2d 704, 706 n.1 (2000)); *see generally* North Carolina v. Alford, 400 U.S. 25 (1970).

111. People v. Stewart, 16 N.Y.3d 839, 840, 947 N.E.2d 1182, 1182-83, 923 N.Y.S.2d 404, 404-05 (2011) (citing People v. Catu, 4 N.Y.3d 242, 825 N.E.2d 1081, 792 N.Y.S.2d 887 (2005)).

112. People v. Cornell, 16 N.Y.3d 801, 802, 946 N.E.2d 740, 741, 921 N.Y.S.2d 641, 642 (2011) (citing *Catu*, 4 N.Y.3d at 245, 825 N.E.2d at 1082, 792 N.Y.S.2d at 888).

113. *Id.*

the defendant an enhanced sentence, but must merely provide the defendant with an "ample opportunity to refute the court's assertions that [the] defendant had violated the plea terms."[114]

## XVII. HEARSAY

The Court, in a consolidated case, held that otherwise inadmissible hearsay statements within medical records were admissible pursuant to the business records exception where they were statements necessary to the diagnosis and treatment of the patient.[115] In *People v. Benston*, the Court held, in the context of an alleged domestic assault, that statements in hospital records by the complainant that the perpetrator was an "old boyfriend" and conclusions by the treatment provider that the injuries resulted from "domestic violence" necessitating a "safety plan" for the complainant, were admissible as relevant to the diagnosis and treatment of the complainant, because domestic violence victims are known to suffer from psychological as well as physical trauma.[116] The Court did find error, though harmless, in the trial court's decision to admit statements within the hospital records describing the color of the belt allegedly used to assault the complainant.[117] In a concurring opinion, Judge Pigott, stated that the admission of references to "domestic violence" and the "safety plan" violated the Confrontation Clause and should have been redacted from the records because they were not relevant to diagnosis and treatment.[118] He stated that the reference to "'domestic violence' . . . should have been redacted because whether complainant was strangled by a former intimate partner or by a stranger was irrelevant to the type of treatment she received for her physical injuries" and that the "safety plan" for use after the complainant left the hospital was not pertinent to the diagnosis and treatment of her immediate injuries and is therefore not part of the record that is contemplated by the exception."[119] In *People v. Ortega*, the Court held that a statement in medical records by the complainant-patient that he was "forced to" ingest drugs was relevant to the diagnosis and treatment, contending, without explanation, that the treatment of someone who was forced to ingest drugs

114. People v. Albergotti, 17 N.Y.3d 748, 750, 952 N.E.2d 1010, 1011, 929 N.Y.S.2d 18, 19 (2011); *see also* People v. Outley, 80 N.Y.2d 702, 712-13, 610 N.E.2d 356, 361, 594 N.Y.S.2d 683, 688 (1993).

115. People v. Ortega, 15 N.Y.3d 610, 617, 942 N.E.2d 210, 214, 917 N.Y.S.2d 1, 5 (2010).

116. *Id.* at 618-19, 942 N.E.2d at 215, 917 N.Y.S.2d at 6.

117. *Id.* at 619-20, 942 N.E.2d at 216, 917 N.Y.S.2d at 7.

118. *Id.* at 623, 942 N.E.2d at 218-19, 917 N.Y.S.2d at 9-10 (Pigott, J., concurring).

119. *Id.* at 623-24, 942 N.E.2d at 218-19, 917 N.Y.S.2d at 9-10 (Pigott, J., concurring).

would differ from the treatment of someone who voluntarily ingested drugs.[120]

## XVIII. INDICTMENT

Reiterating that an indictment is "multiplicitous when a single offense is charged in more than one count," the Court affirmed the dismissal of two counts of an indictment where the defendant was charged with two counts of sexual abuse for each of his attacks on two woman during which he forcible grabbed both of their breasts and buttocks.[121] Acknowledging that "[t]here is no infallible formula for deciding how many crimes are committed in a particular sequence of events," the Court noted that "[a]s a general rule, however, it may be said that where a defendant, in an uninterrupted course of conduct directed at a single victim, violates a single provision of the Penal Law, he commits but a single crime."[122]

## XIX. INTOXICATION DEFENSE

The Court held that the defendant was not entitled to a jury instruction on the intoxication defense where "the uncontradicted record evidence, including defendant's own account, supports the conclusion that his overall behavior on the day of the incident was purposeful."[123] Judge Jones dissented, contending that because "a defendant is entitled to the 'most favorable view of the record'" in determining whether or not a defense theory should be charged, evidence that the defendant "consumed two large glasses (approximately [twelve] to [fifteen] ounces each) of Southern Comfort whiskey and ingested a Xanax pill" not long before the incident, should have entitled him to the requested charge despite some seemingly contradictory evidence regarding his intoxication.[124] Judge Jones reasoned that the trier of fact should have been given the intoxication instruction empowering them to either credit or discredit the evidence of intoxication and that it was error for the trial court not to have done so because the charge is required "where there is

120. *Ortega*, 15 N.Y.3d at 620, 942 N.E.2d at 216, 917 N.Y.S.2d at 7.

121. People v. Alonzo, 16 N.Y.3d 267, 269, 945 N.E.2d 495, 496, 920 N.Y.S.2d 302, 303 (2011).

122. *Id.* at 270, 945 N.E.2d at 496, 920 N.Y.S.2d at 303; *see also* N.Y. PENAL LAW § 130.65(1) (McKinney Supp. 2012).

123. People v. Sirico, 17 N.Y.3d 744, 746, 952 N.E.2d 1006, 1007, 929 N.Y.S.2d 14, 15 (2011); *see also* N.Y. PENAL LAW § 15.25.

124. *Sirico*, 17 N.Y.3d at 746, 747, 952 N.E.2d at 1007, 1008, 929 N.Y.S.2d at 15, 16 (Jones, J., dissenting) (quoting People v. Steele, 26 N.Y.2d 526, 529, 260 N.E.2d 527, 529, 311 N.Y.S.2d 889, 891 (1970)).

a reasonable view of the record evidence that would support such an instruction."[125]

## XX. JURY INSTRUCTIONS

### *A.* People v. Williams

The Court held that it was not error for a trial court to respond to a jury verdict inconsistent with its instructions without first providing notice to defense counsel of its proposed explanation and giving him a chance to be heard, because the defective verdict was not tantamount to a jury request for further information or instructions and was not therefore governed by the notice requirement of CPL section 310.30.[126]

### *B.* People v. Rodriguez

The Court held that a defendant who testified that he only entered the vehicle that ultimately struck and killed a pedestrian in an effort to prevent it from continuing to roll downhill, was not entitled to a justification charge on the "choice of evils" defense with respect to the manslaughter in the second degree and assault in the second degree counts, but was entitled to the justification charge with respect to the driving while intoxicated counts.[127] The Court reasoned that there was no reasonable view of the evidence that supported a justification charge on manslaughter in the second degree and assault in the second degree counts because the defense of justification in Penal Law section 35.05(2) is only applicable where the defendant is forced to commit a crime in an effort to prevent a greater "evil," and the defendant here did not claim to have committed the crimes of manslaughter and assault in an effort to prevent a greater harm.[128] The Court however did hold that it was error to deny the defendant the justification charge with respect to the driving while intoxicated counts because he was forced to choose between committing the crime of driving while intoxicated and preventing a greater harm.[129] While the Court deemed this error less,[130] Chief Judge Lippman, in dissent, disagreed, contending that the error was not harmless because there was not overwhelming evidence

125. *Id.* at 747, 952 N.E.2d at 1008, 929 N.Y.S.2d at 16 (Jones, J., dissenting).

126. People v. Williams, 16 N.Y.3d 480, 486, 947 N.E.2d 130, 134, 922 N.Y.S.2d 239, 243 (2011); *see also* N.Y. CRIM. PROC. LAW §§ 310.30, 310.50(2) (McKinney 2009).

127. People v. Rodriguez, 16 N.Y.3d 341, 344-45, 946 N.E.2d 726, 728-29, 921 N.Y.S.2d 628, 630-31 (2011); *see also* N.Y. PENAL LAW § 35.05(2).

128. *Rodriguez*, 16 N.Y.3d at 345, 946 N.E.2d at 729, 921 N.Y.S.2d at 630-31.

129. *Id.*, 946 N.E.2d at 729, 921 N.Y.S.2d at 631.

130. *Id.*

refuting the justification defense and therefore a reasonable possibility existed that the requested charge would have resulted in a different verdict.[131] Judge Ciparik also dissented, contending that the justification charge should have been provided with respect to all counts because a reasonable view of the evidence supported the theory that the defendant recklessly operated the vehicle while intoxicated in an effort to prevent injury to others.[132]

*1.* People v. Muhammad

The Court held that the trial court's jury instruction did not fail to adequately convey that criminal possession of a forged instrument must be knowing, where the judge, in delivering the instruction, did not use the term "knowingly" each time the word "possession" was used.[133]

*2.* People v. Hecker

The Court held that during the first step of a *Batson* inquiry, the prima facie showing of racial or gender discrimination in the exercise of a peremptory challenge necessary to shift the burden to the non-moving party to offer a race or gender neutral explanation need not meet specific, predetermined criteria, but must instead, upon a review of "the totality of the relevant facts[, reveal] an inference of discriminatory purpose"[134] and may include an analysis of legally significant factors including, but not limited to: whether or not there exists a "group identity" between the defendant and the prospective juror in question, whether or not "members of [a] cognizable group were excluded while others with the same relevant characteristics were not," and whether or not the non-moving party "has stricken members of [a] group who, because of their background and experience, might . . . be favorably disposed to the party."[135] The resulting race-neutral explanation will result in an analysis of the credibility of the explanation and among the factors to be considered may be the "[demeanor of the opposing party]; by how reasonable, or how improbable, the explanations are; and by whether the

131. *Id.* at 346-47, 946 N.E.2d at 729-30, 921 N.Y.S.2d at 631-32 (Lippman, Chief J., dissenting in part).

132. *Id.* at 348, 946 N.E.2d at 731, 921 N.Y.S.2d at 633 (Ciparick, J., dissenting).

133. People v. Muhammad, 16 N.Y.3d 184, 188, 945 N.E.2d 1010, 1013, 920 N.Y.S.2d 760, 763 (2011); *see also* N.Y. PENAL LAW § 170.25 (McKinney Supp. 2012).

134. People v. Hecker, 15 N.Y.3d 625, 650-51, 942 N.E.2d 248, 263-64, 917 N.Y.S.2d 39, 54-55 (2010) (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986)).

135. *Id.* at 651-52, 942 N.E.2d at 264, 917 N.Y.S.2d at 55 (internal citations omitted) (internal quotation marks omitted).

proffered rationale has some basis in accepted trial strategy."[136] The Court held that the "mootness doctrine" articulated in *People v. Smocum*, which precludes the trial court from revisiting the sufficiency of the prima facie showing after the proffer of the race- or gender-neutral explanation, does not preclude consideration of the merit of the prima facie case during its determination, at step three of the *Batson* inquiry, into whether or not the race or gender-neutral explanation is merely a pretext for impermissible discrimination.[137] However, the party against whom a *Batson* challenge is made will waive an examination of whether or not the moving party established a prima facie case by responding with allegedly race-neutral reasons before the court passes on the sufficiency of the moving party's challenge.[138] Refusing to depart from precedent, the Court reiterated that, under New York state law, an erroneous denial of a peremptory challenge is not subject to a harmless error analysis, but instead requires reversal.[139] The Court also held that the trial court's ten-minute limit for the questioning of panelists, under the circumstances of the case, "severely curtailed" the defendant's right to a "meaningful voir dire," and buttressed the defense counsel's explanation that the peremptory challenge of the juror in question was based not upon race but upon the fact she simply knew almost nothing about the juror. [140]

*3.* People v. Johnson

The Court held that the trial court committed reversible error in not asking follow-up questions during a voir dire when a potential juror stated, in response to questions from counsel, that she had a "strong bias" with respect to the insanity defense and "might be biased in the way that [she] interpret[ed] the evidence . . . ."[141] The juror had written a college research paper on the insanity defense, and without asking follow-up questions, the trial court denied counsel's challenge "for cause," thereby forcing defense counsel to use his last peremptory challenge.[142] The Court stressed that "[w]hen potential jurors themselves say they

136. *Id.* at 656, 942 N.E.2d at 268, 917 N.Y.S.2d at 59 (quoting Miller El v. Cockrell, 537 U.S. 322, 339 (2003)).

137. *Id.*, 942 N.E.2d at 267, 917 N.Y.S.2d at 58; *see also* N.Y. CRIM. PROC. LAW § 270.25(2) (McKinney 2002).

138. *Hecker*, 15 N.Y.3d at 652, 942 N.E.2d at 264, 917 N.Y.S.2d at 55; *see also* N.Y. CRIM. PROC. LAW § 270.25(2).

139. *Hecker*, 15 N.Y.3d at 661, 942 N.E.2d at 271-72, 917 N.Y.S.2d at 62-63.

140. *Id.* at 657-58, 942 N.E.2d at 269, 917 N.Y.S.2d at 60.

141. People v. Johnson, 17 N.Y.3d 752, 753, 952 N.E.2d 1008, 1009, 929 N.Y.S.2d 16, 17 (2011).

142. *Id.*

question or doubt they can be fair in the case, Trial Judges should either elicit some unequivocal assurance of their ability to be impartial when that is appropriate, or excuse the juror when that is appropriate."[143]

*4.* People v. Steward

The Court held that given the particular issues in the case, the trial court's five minute time limitation on counsel for questioning of potential jurors during each round was reversible error.[144] The Court held that in formulating jury selection restrictions:

> relevant considerations would include: the number of jurors and alternate jurors to be selected and the number of peremptory challenges available to the parties; the number, nature and seriousness of the pending charges; any notoriety the case may have received in the media or local community; special considerations arising from the legal issues raised in the case, including anticipated defenses such as justification or a plea of not responsible by reason of mental disease or defect; any unique concerns emanating from the identity or characteristics of the defendant, the victim, the witnesses or counsel; and the extent to which the court will examine prospective jurors on relevant topics.[145]

Although acknowledging the discretion afforded the trial judge, the Court, citing *People v. Jean*, held that under the circumstances of the case, the five minute limit did not "afford . . . counsel a fair opportunity to question prospective jurors about relevant matters."[146] The holding was based in part upon the fact that the inadequacies of the trial record made it impossible to determine whether the jurors defense counsel contended he was precluded from adequately examining as a result of the time constraints, were ever seated, and therefore impossible to refute the defendant's claim of prejudice.[147] Of note is the fact that defense counsel successfully preserved the court's error for appellate review by making a timely objection to the time restrictions, explaining that five minutes was inadequate given the seriousness of the charges and complexities of the case, and even citing specific examples of topics he

143. *Id.* (internal quotation marks omitted).

144. People v. Steward, 17 N.Y.3d 104, 113-14, 950 N.E.2d 480, 486-87, 926 N.Y.S.2d 847, 853-54 (2011).

145. *Id.* at 110-11, 950 N.E.2d at 484, 926 N.Y.S.2d at 851.

146. *Id.* at 110, 950 N.E.2d at 484, 926 N.Y.S.2d at 851 (quoting People v. Jean, 75 N.Y.2d 744, 745, 551 N.E.2d 90, 91, 551 N.Y.S.2d 889, 890 (1989)); *see also* N.Y. CRIM. PROC. LAW § 270.15 (McKinney 2002).

147. *Steward*, 17 N.Y.3d at 114, 950 N.E.2d at 486-87, 926 N.Y.S.2d at 853-54.

would have covered with prospective jurors if given additional time.[148]

## XXI. MODE OF TRIAL

The Court held that the trial court did not commit a mode of proceedings error denying the defendant his constitutional right to a jury trial when it failed to halt deliberations while a court officer separated one deliberating juror from the others to respond to a personal issue raised by that juror.[149] The Court held that CPL section 310.10, requiring that jurors be "continuously kept together," is not violated by a "brief, momentary separation of the juror from deliberations."[150]

## XXII. POST-RELEASE SUPERVISION

In a consolidated case, the Court, citing *People v. Williams*, held that *Sparber* errors, where the sentencing court erroneously fails to impose a mandatory period of post-release supervision, may be corrected by resentencing the defendant where the defendant is either in custody and has not completed his originally imposed prison sentence or has completed his prison sentence but, at the time the error is discovered, has been returned to prison on a conditional release violation.[151] The Court held that resentencings in these situations do not violate due process because they do not "shock the conscience" and do not constitute double jeopardy because the defendants had not completed their originally imposed prison sentences.[152] Three judges dissented, contending that for defendants that have completed their originally imposed prison sentences but have not reached the maximum expiration of their entire sentence, a resentencing would be barred by double jeopardy.[153] The dissent argued that the holding in *Williams* "that an expectation of finality arises for [the] purposes of double jeopardy when a defendant completes the lawful portion of an illegal sentence," was directed to the defendant's "release from confinement" and not the end of his sentence

148. *Id.* at 113, 950 N.E.2d at 486, 926 N.Y.S.2d at 853.

149. People v. Kelly, 16 N.Y.3d 803, 804, 946 N.E.2d 738, 739, 921 N.Y.S.2d 640, 640-41 (2011).

150. *Id.*, 946 N.E.2d at 739, 921 N.Y.S.2d at 641 (quoting N.Y. CRIM. PROC. LAW § 310.10(1)).

151. People v. Lingle, 16 N.Y.3d 621, 629-32, 949 N.E.2d 952, 955-56, 926 N.Y.S.2d 4, 7-8 (2011); *see also* People v. Williams, 14 N.Y.3d 198, 217, 925 N.E.2d 878, 889-90, 899 N.Y.S.2d 76, 87-88 (2010); Gonzalez-Fuentes v. Molina, 607 F.3d 864, 882, 884, 885 (1st Cir. 2010).

152. *Lingle*, 16 N.Y.3d at 633, 949 N.E.2d at 957, 926 N.Y.S.2d at 9.

153. *Id.* at 637-38, 949 N.E.2d at 961-62, 926 N.Y.S.2d at 13-14 (Ciparick, J., dissenting in part) (citing People v. Williams, 14 N.Y.3d 198, 216-17, 925 N.E.2d 878, 888-89, 899 N.Y.S.2d 76, 86-87 (2010)).

and therefore bars the resentencing of a defendant to post-release supervision who was returned to prison for a violation of the terms of his release.[154]

## XXIII. PRESERVATION

The Court held that the defendant's claim that the trial court's jury charge inadequately explained the prosecutor's burden to disprove his alibi defense was unpreserved where defense counsel neither objected to the proposed charge nor objected after it was delivered. [155]

## XXIV. REASONABLE SUSPICION

The Court, in a pair of consolidated cases, held that in order to constitute the reasonable suspicion required to justify a stop and frisk, the police must do more than observe what appears to be a pocketknife, they "must have reason to believe that the object observed is indeed a gravity knife, based on his or her experience and training and/or observable, identifiable characteristics of the knife."[156]

## XXV. REPUTATION EVIDENCE

The Court, in affirming the appellate division's reversal of the defendant's conviction for various sex crimes, agreed that it was reversible error for the trial court to refuse to admit the testimony of the defendant's parents about his niece-accuser's poor reputation for truth and veracity in the community of their extended family and friends.[157] Rejecting the argument that one's family and friends is too limited a community for purposes of offering reputation evidence, the Court, citing *People v. Bouton*, held that "[a] reputation may grow wherever an individual's associations are of such quantity and quality as to permit him to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability."[158] The Court reiterated that "the presentation of reputation evidence by a criminal defendant is a matter of right, not discretion, once a proper foundation has been

154. *Id.* (Ciparick, J., dissenting in part) (quoting *Williams*, 14 N.Y.3d at 216, 925 N.E.2d at 888, 899 N.Y.S.2d at 86).

155. People v. Melendez, 16 N.Y.3d 869, 870, 948 N.E.2d 1290, 1291, 925 N.Y.S.2d 6, 7 (2011).

156. People v. Brannon, 16 N.Y.3d 596, 599, 949 N.E.2d 484, 486, 925 N.Y.S.2d 393, 395 (2011).

157. People v. Fernandez, 17 N.Y.3d 70, 72, 74, 78, 950 N.E.2d 126, 127, 129, 132, 926 N.Y.S.2d 390, 391, 393, 396 (2011) .

158. *Id*. at 76, 950 N.E.2d at 131, 926 N.Y.S.2d at 395 (quoting People v. Bouton, 50 N.Y.2d 130, 139, 405 N.E.2d 699, 704, 428 N.Y.S.2d 218, 223 (1980)).

laid"[159] and that "[a]ssuming the proper foundation has been laid, we conclude that family and family friends can constitute a relevant community for such purpose."[160]

## XXVI. RIGHT TO CONFRONTATION

The Court, applying the "primary purpose" test articulated in *Davis v. Washington*, held the trial court in an assault case did not violate the defendant's right to confront the witnesses against him, when it admitted evidence of a child's statement to a treating physician, because "the primary purpose of the pediatrician's inquiry was to determine the mechanism of injury so she could render a diagnosis and administer medical treatment."[161] Despite conceding that the physician had already determined that the injuries were the result of a scalding from hot water and acknowledging that the physician may have intended to elicit evidence that could be used to initiate a child abuse investigation when she asked the complainant why he did not get out of the tub, the Court found that the complainant's response "he wouldn't let me out" was not testimonial because, in their view, the diagnosis and treatment of the complainant was the stronger of the physician's two motives.[162]

## XXVII. RIGHT TO COUNSEL

### *A.* People v. Lopez

The Court held that the rule set forth in *People v. Rogers*, barring all questioning of an incarcerated defendant on any matter once he is represented by, or requests, counsel, may not be circumvented where the police simply claim not to have been aware that the defendant was represented by counsel.[163] The Court, noting that the indelible right to counsel, once attached, remains where the police have either actual or constructive knowledge of the entry of counsel, held that:

> an officer who wishes to question a person in police custody about an unrelated matter must make a reasonable inquiry concerning the defendant's representational status when the circumstances indicate that

159. *Id.* at 78, 950 N.E.2d at 132, 926 N.Y.S.2d at 396.

160. *Id.* at 77, 950 N.E.2d at 131, 926 N.Y.S.2d at 395; *see generally* People v. Pavao, 59 N.Y.2d 282, 451 N.E.2d 216, 464 N.Y.S.2d 458 (1983).

161. People v. Duhs, 16 N.Y.3d 405, 409, 947 N.E.2d 617, 619-20, 922 N.Y.S.2d 843, 845-46 (2011); *see generally* Davis v. Washington, 547 U.S. 813 (2006).

162. *Duhs*, 16 N.Y.3d at 409-10, 947 N.E.2d at 619-20, 922 N.Y.S.2d at 845-46.

163. People v. Lopez, 16 N.Y.3d 375, 377, 947 N.E.2d 1155, 1156, 923 N.Y.S.2d 377, 378 (2011); *see also* People v. Rogers, 48 N.Y.2d 167, 169, 397 N.E.2d 709, 710, 422 N.Y.S.2d 18, 19 (1979).

> there is a probable likelihood that an attorney has entered the custodial matter, and the accused is actually represented on the custodial charge.[164]

The Court held that the police were charged with constructive knowledge that the defendant, jailed on $10,000 bail following his arraignment in Pennsylvania on felony drug charges, was represented by counsel, and at a minimum, were obligated to engage in a reasonable inquiry into his representational status instead of electing to remain ignorant of this fact.[165] The Court, reviewing this violation of the defendant's indelible right to counsel under the harmless error doctrine and finding no reasonable possibility that the error affected the jury's verdict, affirmed the conviction.[166]

### *B.* People v. Gibson

The Court held that even though the defendant's right to counsel had attached, the collection of the defendant's DNA from a cigarette offered to him by police during a custodial interview did not violate his right to counsel because the "voluntarily deposited" DNA was not a communicative act which disclosed "the contents of [the] defendant's mind" and was therefore not a response or statement subject to exclusion under New York's right to counsel rules.[167] The Court noted that the defendant had initiated the police contact, the detective had not questioned him on any criminal matter, and that providing the cigarette was not an action "reasonably likely to elicit an incriminating response."[168]

### *C.* People v. Porto

In a consolidated case, the Court held that only when a defendant moving for the substitution of appointed counsel makes a "seemingly serious request" based upon specific factual allegations of "serious complaints about counsel" must the trial court engage in no less than a "minimal inquiry" in an effort to determine if the complaint has merit.[169] In *Porto*, the Court held that the trial court did not abuse its dis-

164. *Lopez*, 16 N.Y. 3d at 383, 947 N.E.2d at 1160-61, 923 N.Y.S.2d at 382-83.

165. *Id.*, 947 N.E.2d at 1161, 923 N.Y.S.2d at 383.

166. *Id.* at 388, 947 N.E.2d at 1164, 923 N.Y.S.2d at 386.

167. People v. Gibson, 17 N.Y.3d 757, 759, 952 N.E.2d 1026, 1027, 929 N.Y.S.2d 34, 35 (2011) (quoting People v. Harvish, 8 N.Y.3d 389, 395, 866 N.E.2d 1009, 1014, 834 N.Y.S.2d 681, 686 (2007)).

168. *Id.*

169. People v. Porto, 16 N.Y.3d 93, 99-100, 942 N.E.2d 283, 287, 917 N.Y.S.2d 74, 78 (2010) (internal citation omitted) (internal quotation marks omitted).

cretion when it denied the defendant's pro se motion for substitution of counsel without ever addressing the defendant, where the defendant submitted a form motion, devoid of specific factual allegations, on the day of trial, and where the trial court engaged defense counsel in a colloquy regarding the defendant's motion.[170] In dissent, Judge Pigott stated that the "minimal inquiry" is only adequate where it is "diligent and thorough" and that the trial court failed to meet this threshold when it only questioned the lawyer about whom the complaint was made and not the defendant, who had taken the time to file a written motion, in an effort to determine if the defendant could demonstrate that there was good cause for the assignment of new counsel.[171] In *People v. Garcia*, the Court held that the trial court did not abuse its discretion in denying the defendant's motion for substitute counsel, where the basis of defendant's motion for substitute counsel, made on the day of sentencing, remained vague even after the court's sufficiently detailed inquiry of both the defendant and his counsel and where the record suggested that the motion was possibly a delay tactic.[172]

### *D.* People v. Pacquette

The Court held that the defendant's right to counsel on a Brooklyn homicide charge had not attached where his attorney, appointed moments earlier on a Manhattan drug charge, told the Brooklyn homicide detectives who had arranged for the defendant's release on that charge and were about to arrest him, that "he is represented by counsel, do not question him."[173] The Court held that the attorney's admonition was insufficient to attach the right to counsel on the Brooklyn charges because the attorney did not represent him on that charge and that "[w]e have never held that an attorney may unilaterally create an attorney-client relationship in a criminal proceeding in this fashion, and decline to do so now."[174] The Court attempted to distinguish these circumstances from the nearly identical factual situation in *People v. Ramos*, where the Court held that an attorney could preclude an uncounseled waiver of the right to counsel in an unrelated matter where he did not ultimately represent the defendant, and in fact accomplished this, by stating on the

170. *Id.* at 100-01, 942 N.E.2d at 288, 917 N.Y.S.2d at 79.

171. *Id.* at 102-04, 942 N.E.2d at 289-91, 917 N.Y.S.2d at 80-81 (Pigott, J., dissenting) (quoting People v. Linares, 2 N.Y.3d 507, 511, 813 N.E.2d 609, 612, 780 N.Y.S.2d 529, 532 (2004)).

172. *Id.* at 101-02, 942 N.E.2d at 288-89, 917 N.Y.S.2d at 79-80.

173. People v. Pacquette, 17 N.Y.3d 87, 91, 92, 93, 97, 950 N.E.2d 489, 491, 492, 493, 495, 926 N.Y.S.2d 856, 858, 859, 860, 862 (2011).

174. *Id.* at 95, 950 N.E.2d at 494, 926 N.Y.S.2d at 861.

record to the judge and the police from another jurisdiction, who were about to arrest the defendant, that he had advised his client not to make any statement to the police officers.[175] In dissent, Chief Judge Lippman and Judge Jones contended that the circumstances were essentially indistinguishable from those in *Ramos* and that the matter should be remitted for a proper determination of the suppression motion because the record was unclear as to whether or not the attorney on the Manhattan charges effectively entered the proceedings on the Brooklyn charges.[176]

## XXVIII. RIGHT TO PUBLIC TRIAL

### *A.* People v. Martin

The Court held that it was reversible error per se for the trial court to have violated the defendant's right to a public trial by excluding the defendant's family from the courtroom during jury selection without first identifying "an overriding interest that is likely to be prejudiced" and then exploring all reasonable alternatives to exclusion.[177]

### *B.* People v. Campbell

The Court held that the exclusion of a portion of the defendant's family from the courtroom during the testimony of an undercover officer was not an error where the excluded persons resided near the area where the officer conducted his undercover operations.[178] The Court held that the evidence adduced at the pretrial *Hinton* hearing supported the trial judge's conclusion that the exposure of the officer to the excluded family members could compromise his effectiveness and safety.[179]

## XXIX. SENTENCING

### *A.* People v. McKnight

The Court held that consecutive sentences were authorized for at-

175. *Id.* at 95-96, 950 N.E.2d at 494, 926 N.Y.S.2d at 861 (citing People v. Ramos, 40 N.Y.2d 610, 616, 618, 357 N.E.2d 955, 959, 960, 961, 389 N.Y.S.2d 299, 303, 304 (1976)).

176. *Id.* at 98, 101-02, 950 N.E.2d at 496, 499, 926 N.Y.S.2d at 863, 866 (Lippman, Chief J., dissenting).

177. People v. Martin, 16 N.Y.3d 607, 609, 611, 949 N.E.2d 491, 493, 494, 925 N.Y.S.2d 400, 402, 403 (2011) (quoting Waller v. Georgia, 467 U.S. 39, 48 (1984)).

178. People v. Campbell, 16 N.Y.3d 756, 757, 944 N.E.2d 645, 646, 919 N.Y.S.2d 109, 110 (2011).

179. *Id.*, 944 N.E.2d at 646-47, 919 N.Y.S.2d at 110 (citing People v. Hinton, 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972)).

tempted murder and murder where the defendant was convicted of firing ten shots at his intended victim, two of which struck and killed another person.[180] The Court reasoned that although all ten shots were fired with the same criminal intent, to kill the intended victim, each of the shots were "separate and distinct acts" and therefore justified consecutive sentences.[181] In dissent, Chief Judge Lippman contended that the prosecutor failed to sustain their burden of proving that the convictions were based on separate and distinct acts because the "the actus reus of the attempted murder encompasses the entire actus reus of the murder."[182] Chief Judge Lippman reminded the majority that the Court previously held that "a single 'act' within the meaning of section 70.25(2) can be perpetrated by multiple bodily movements" and that the firing of ten shots in rapid succession at the intended victim qualified as a single act requiring the imposition of concurrent sentences.[183]

### *B.* People v. Smith

The Court held that the imposition by a trial court on a defendant of the City of New York's Gun Offender Registration Act (GORA) registration and reporting requirements, which apply to those convicted of certain weapons offenses in the city, is not reviewable on direct appeal because the GORA requirements were not an integral part of the defendant's sentence in that they are an administrative matter between the city and the offender, and the defendant would be subject to the requirements whether or not imposed by the court.[184]

### *C.* People v. Stepter

The same day, the Court reasserted this reasoning, while finding moot the defendant's claim where the prosecutor conceded that the defendant's crime of conviction did not subject him to the requirements of GORA.[185]

180. People v. McKnight, 16 N.Y.3d 43, 45-46, 47, 942 N.E.2d 1019, 1020-21, 917 N.Y.S.2d 594, 595, 596 (2010).

181. *Id.* at 48-49, 942 N.E.2d at 1022-23, 917 N.Y.S.2d at 596-98 (quoting People v. Laureano, 87 N.Y.2d 640, 643, 664 N.E.2d 1212, 1214, 642 N.Y.S.2d 150, 152 (1996)); *see also* N.Y. PENAL LAW § 70.25(2) (McKinney Supp. 2012).

182. *McKnight*, 16 N.Y.3d at 50, 942 N.E.2d at 1024, 917 N.Y.S.2d at 599, (Lippman, Chief J., dissenting).

183. *Id.* at 51-52, 942 N.E.2d at 1024-25, 917 N.Y.S.2d at 599-600 (Lippman, Chief J., dissenting) (citing N.Y. PENAL LAW § 70.25(2)).

184. People v. Smith, 15 N.Y.3d 669, 672, 673, 942 N.E.2d 1039, 1041-42, 917 N.Y.S.2d 614, 615, 616 (2010).

185. People v. Stepter, 15 N.Y.3d 940, 941, 940 N.E.2d 918, 918, 915 N.Y.S.2d 213, 213 (2010).

### *D.* People v. Bell

The Court declined to depart from recent precedent when it held that the New York State Constitution does not require evidence of a defendant's prior convictions, which could result in an enhanced sentence, to be determined by a jury.[186]

### *E.* People v. Frazier

Recognizing that Penal Law section 70.25(2) requires concurrent sentencing "for two or more offenses committed through a single act or omission, or through an act or omission which in [and of] itself constituted one of the offenses and also was a material element of . . . [an]other."[187] The Court held that consecutive sentences for burglary in the second degree and grand larceny in the third degree were permissible because the burglary was complete upon the act of entry with the intent to commit larceny and the larceny subsequently committed was a separate and distinct act.[188] In rejecting the defendant's argument that consecutive sentences would effectively punish him twice for the same act because the larceny was the crime that satisfied the intent requirement of the burglary, the Court, citing *People v. Day*, held that "[t]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent."[189]

### *F.* People v. Harnett

The Court held that the failure of the trial court to advise the defendant of the potential for his continued incarceration beyond the expiration of his prison sentence through the application of the Sex Offender Management and Treatment Act (SOMTA) did not invalidate his conviction.[190] The Court reasoned that the potential requirements of

186. People v. Bell, 15 N.Y.3d 935, 936, 940 N.E.2d 913, 913-14, 915 N.Y.S.2d 208, 208-09 (2010) (citing Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998)); *see also* Apprendi v. New Jersey, 530 U.S. 466, 488 (2000); People v. Quinones, 12 N.Y.3d 116, 119, 906 N.E.2d 1033, 1034, 879 N.Y.S.2d 1, 2 (2009); People v. Rivera, 5 N.Y.3d 61, 63, 833 N.E.2d 194, 195, 800 N.Y.S.2d 51, 52 (2005); People v. Rosen, 96 N.Y.2d 329, 334, 335, 752 N.E.2d 844, 847, 728 N.Y.S.2d 407, 410 (2001).

187. People v. Frazier, 16 N.Y.3d 36, 40, 941 N.E.2d 1151, 1153, 916 N.Y.S.2d 574, 576 (2010) (quoting N.Y. PENAL LAW § 70.25(2)).

188. *Id.* at 41, 941 N.E.2d at 1153-54, 916 N.Y.S.2d at 576-77; *see also* N.Y. PENAL LAW §§ 140.25(2), 155.35(1).

189. *Frazier*, 16 N.Y.3d at 41, 941 N.E.2d at 1153-54, 916 N.Y.S.2d at 577 (quoting People v. Day, 73 N.Y.2d 208, 212, 535 N.E.2d 1325, 1327, 538 N.Y.S.2d 785, 787 (1989)).

190. People v. Harnett, 16 N.Y.3d 200, 203, 945 N.E.2d 439, 440, 920 N.Y.S.2d 246,

SOMTA, much like the requirements of GORA and potential immigration consequences, were collateral consequences of the conviction because they are "peculiar to the individual's personal circumstance and . . . not within the control of the court system" and are not direct consequences because they do not have a "definite, immediate[,] and largely automatic effect" on the sentence.[191] The Court nonetheless did recommend that trial courts advise defendants of the possible effects of SOMTA,[192] and suggested that relief in appropriate circumstances could result from a motion to withdraw the guilty plea based upon a claim that the plea was not voluntary because the potential consequences were not disclosed.[193]

### *G.* People v. Battles

The Court held that consecutive sentences were authorized for the defendant's convictions for depraved indifference murder and two counts of depraved indifference assault, where the depraved indifference was demonstrated by the defendant's separate and distinct acts of separately pouring gasoline on three people in a room where people were smoking and then causing a fire to ignite which killed one man and seriously injured three others, and not by the single act of igniting the fire but that a concurrent sentence required for injuries to another person not doused with gasoline.[194] Chief Judge Lippman, citing *Apprendi v. New Jersey* and its progeny, dissented in part, contending that the defendant, with respect to the two counts of depraved indifference assault, should have been sentenced as a second felony offender as opposed to a persistent felony offender because he did "not believe our persistent felony offender sentencing provisions can ultimately survive constitutional scrutiny."[195] Judge Jones dissented in part, arguing that consecutive sentences were not authorized because the crimes were accomplished by the defendant's single act of starting the fire.[196]

247 (2011); *see also* N.Y. MENTAL HYG. LAW §§ 10.01-10.17 (McKinney 2011).

191. *Hartnett*, 16 N.Y.3d at 205-06, 945 N.E.2d at 441-42, 920 N.Y.S.2d at 248-49 (quoting People v. Ford, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267-68, 633 N.Y.S.2d 270, 272-73 (1995)).

192. *Id.* at 207, 945 N.E.2d at 442, 920 N.Y.S.2d at 249.

193. *Id.*, 945 N.E.2d at 443, 920 N.Y.S.2d at 250.

194. People v. Battles, 16 N.Y.3d 54, 57, 59, 942 N.E.2d 1026, 1027, 1029, 917 N.Y.S.2d 601, 602, 604 (2010); *see also* N.Y. PENAL LAW § 70.25(2) (McKinney 2009).

195. *Battles*, 16 N.Y.3d at 62, 942 N.E.2d at 1031, 917 N.Y.S.2d at 606 (Lippman, Chief J., dissenting in part); *see also* Apprendi v. New Jersey, 530 U.S. 466 (2000); N.Y. CRIM. PROC. LAW § 400.20 (McKinney 2005); *see also* N.Y. PENAL LAW § 70.10.

196. *Battles*, 16 N.Y.3d at 71-73, 942 N.E.2d at 1038-39, 917 N.Y.S.2d at 612-13 (Jones, J., dissenting); *see also* N.Y. PENAL LAW § 70.25(2).

### *H.* People v. Acevedo

In a consolidated case, the Court held that where a defendant is resentenced after the discovery of a *Sparber* error, the original sentence date on that conviction is still the date used when determining whether or not the defendant is a predicate felony offender for purposes of sentencing on a later conviction.[197] In *Acevedo,* for example, the defendant was convicted in 2001 and sentenced to a four year determinate term and then in 2006 convicted and sentenced as a prior violent felony offender, based upon the 2001 conviction, to another determinate term of six years with three years of post-release supervision.[198] The defendant, in an interesting tactical maneuver, moved pursuant to *People v. Sparber* to be resentenced on the 2001 conviction because he had received an illegally lenient sentence, in that the mandatory post-release supervision had not been imposed.[199] After he was resentenced in 2008, the defendant then moved to vacate his 2006 second felony because the 2001 conviction it had been vacated and therefore could not serve as a predicate felony conviction because the 2008 sentencing date now postdated the 2006 crime.[200] The Court held that "resentence is not a device appropriately employed simply to alter a sentencing date and thereby affect the utility of a conviction as a predicate for the imposition of enhanced punishment."[201] In dissent, Judge Jones, citing Penal Law section 70.06(1)(b)(ii), contended there is no question that for a prior conviction to serve as a predicate offense the sentence on that offense must occur before the commission of the instant felony.[202] Judge Jones therefore concluded that

> the failure to pronounce defendant's mandatory [postrelease supervision (PRS)] terms at the predicate sentencing created the circumstance which mandated that defendants be resentenced.[203] Because their resentencing under *Sparber* took place after the subsequent felony conviction, defendants' proper sentences were not imposed until after the commission of the present felony; as such, defendants can no longer

197. People v. Acevedo, 17 N.Y.3d 297, 302, 952 N.E.2d 1047, 1050, 929 N.Y.S.2d 55, 58 (2011); *see generally* People v. Sparber, 10 N.Y.3d 457, 889 N.E.2d 459, 859 N.Y.S.2d 582 (2008).

198. *Acevedo*, 17 N.Y.3d at 299-300, 952 N.E.2d at 1048-49, 929 N.Y.S.2d at 56-57; *see generally Sparber*, 10 N.Y.3d 457, 889 N.E.2d 459, 859 N.Y.S.2d 582.

199. *Acevedo*, 17 N.Y.3d at 300, 952 N.E.2d at 1049, 929 N.Y.S.2d at 57.

200. *Id.*

201. *Id.* at 303, 952 N.E.2d at 1051, 929 N.Y.S.2d at 59.

202. *Id.* at 305, 952 N.E.2d at 1052, 929 N.Y.S.2d at 60 (Jones, J., dissenting); *see also* N.Y. PENAL LAW § 70.06(1)(b)(ii) (McKinney 2009).

203. *Acevedo*, 17 N.Y.3d at 305, 952 N.E.2d at 1052, 929 N.Y.S.2d at 60 (Jones, J., dissenting).

be classified as second felony offenders.[204]

## XXX. SPEEDY TRIAL

### *A.* People v. Beasley

The Court held, with respect to a speedy trial motion to dismiss, that "once the People identify the statutory exclusions on which they intend to rely, the defendant preserves challenges to the People's reliance on those exclusions for appellate review by identifying any legal or factual impediments to the use of those exclusions."[205] The Court held that the defendant failed to preserve his argument on appeal that a thirteen-day portion of the forty-two day time period in dispute was not excludable when he merely moved to dismiss and then failed to respond when the People argued that the entire period was excludable because during that time period a decision by the Court on the sufficiency of the grand jury minutes was pending.[206]

### *B.* People v. Farkas

The Court held that a prosecutor's announcement of readiness for trial as well as the excludable periods relating to the original accusatory instrument charging assault, menacing, and harassment, applied to a subsequent indictment charging theft related offenses, where those charges sufficiently related to the original charges in that they were based upon the same event and many of the same acts.[207]

## XXXI. STANDING

The Court, reaffirming the vitality of its holding in *People v. Stith* and ordering that subsequent seemingly contrary decisions from the Second, Third, and Fourth Department are not to be followed, held that the prosecutor must allege a defendant's lack of standing before the trial court to preserve the issue on appellate review.[208]

204. *Id.*, 952 N.E.2d at 1053, 929 N.Y.S.2d at 61 (Jones, J., dissenting) (internal citations omitted).

205. People v. Beasley, 16 N.Y.3d 289, 292, 946 N.E.2d 166, 168, 921 N.Y.S.2d 178, 180 (2011) (quoting People v. Goode, 87 N.Y.2d 1045, 1047, 666 N.E.2d 182, 183, 643 N.Y.S.2d 477, 478 (1996)).

206. *Id.* at 292-93, 946 N.E.2d at 168, 921 N.Y.S.2d at 180.

207. People v. Farkas, 16 N.Y.3d 190, 191-94, 944 N.E.2d 1127, 1128-30, 919 N.Y.S.2d 488, 489-91 (2011); *see generally* N.Y. CRIM. PROC. LAW §§ 1.20, 30.30 (McKinney 2003).

208. People v. Hunter, 17 N.Y.3d 725, 726, 950 N.E.2d 137, 138, 926 N.Y.S.2d 401, 402 (2011); *see also* People v. Stith, 69 N.Y.2d 313, 320, 506 N.E.2d 911, 915, 514 N.Y.S.2d 201, 205 (1987).

## XXXII. SUFFICIENCY OF EVIDENCE

The Court held that the evidence was insufficient to support the defendant's conviction for attempted sexual abuse in the first degree, requiring proof that the complainant was "physically helpless" when she was subjected to "sexual contact," because it would be extremely unlikely, especially under the facts of this case, for an effort to touch the complaint to have been unsuccessful.[209]

## XXXIII. UNAUTHORIZED USE OF A MOTOR VEHICLE

The Court held that while the crime of unauthorized use of a motor vehicle cannot be supported by evidence of entry alone, it does not require proof that that defendant operated, moved, or rode in the vehicle, and that "a violation of the statute occurs when a person enters an automobile without permission and takes actions that interfere with or are detrimental to the owner's possession or use of the vehicle."[210] The Court found that the defendant's acts of entering the vehicle, vandalizing it, and stealing a part amounted to "a temporary use of the car 'for a purpose accomplished while the vehicle remained . . . stationary.'"[211]

## XXXIV. LEGISLATIVE DEVELOPMENTS

### *A. Penal Law*

On August 13, 2010, the governor signed into law Bill A10161AS6987A-2009 (the "Bill") relating to criminal obstruction of breathing or blood circulation and strangulation.[212]

The Bill amends portions of the Penal, Criminal Procedure, Domestic Relations, Executive, Social Services, Mental Hygiene, and Vehicle and Traffic Law, as well as the Family Court Act.[213] The Bill increases penalties for intentionally impeding or impairing another's breathing or circulation including, but not limited to, instances where such conduct causes unconsciousness for any period of time or any oth-

209. People v. Cecunjanin, 16 N.Y.3d 488, 490-92, 947 N.E.2d 149, 151-52, 922 N.Y.S.2d 258, 260-61 (2011); *see also* N.Y. PENAL LAW §§ 130.00(3), (7) (McKinney 2009).

210. People v. Franov, 17 N.Y.3d 58, 64, 950 N.E.2d 473, 477, 926 N.Y.S.2d 840, 844 (2011); *see also* N.Y. PENAL LAW § 165.05.

211. *Franov*, 17 N.Y.3d at 65, 950 N.E.2d at 477, 926 N.Y.S.2d at 844 (citing People v. McCaleb, 25 N.Y.2d 394, 399, 255 N.E.2d 136, 138, 306 N.Y.S.2d 889, 893 (1969)).

212. *A10161*, N.Y. STATE ASSEMBLY, *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A10161&term=2009&Summary=Y&Actions=Y&Memo=Y&Text=Y (last visited Apr. 23, 2012).

213. *Id.*

er physical injury or impairment.[214] The Bill was designed to address the fact that under current law, conduct involving the obstruction of breathing or circulation resulting in no physical injury may only be able to be prosecuted as the noncriminal offense of harassment in the second degree.[215]

The Bill adds "Strangulation in the First Degree" to the Penal Law section 70.02 list of class C violent felony offenses and "Strangulation in the Second Degree" to the Penal Law section 70.02 list of class D violent felony offenses.[216] In addition, Article 121.00 ("Strangulation and Related Offenses") was added to of the Penal Law.[217] Penal Law section 121.11 creates the class A misdemeanor of "Criminal obstruction of breathing or blood circulation" where, with the intent to impede breathing, pressure is applied to an airway.[218]

Penal Law section 121.12 creates the class D violent felony offense of "Strangulation in the Second Degree" where a person commits the aforementioned misdemeanor thereby causing stupor, loss of consciousness, or physical injury.[219] "Strangulation in the First Degree" (Penal Law section 121.13) is a new class C violent felony which contains the same elements of the class D offense, except that serious physical injury results.[220] Penal Law section 121.14 provides for the affirmative defense of "medical or dental purpose" in cases where such "strangulation" or "obstruction" has a valid medical purpose.[221]

Penal Law section 130.65, "Sexual abuse in the first degree," was amended to criminalize sexual contact between an actor who is twenty-one years old or older and a person less than thirteen years old.[222]

Penal Law section 225.00 subdivision 7-a was amended to clarify the definition of a "coin operated gambling device."[223] The statute now provides that a machine which awards free or extended play is not necessarily a gambling device for the purposes of the statute just because free or extended play may constitute something of value. Rather, such a

214. *Id.*

215. *Id.*

216. Act of August 13, 2010, ch. 405, 2010 McKinney's Sess. Laws of N.Y. 1209 (codified at N.Y. PENAL LAW § 70.02 (McKinney Supp. 2012)).

217. *Id.* at 1210 (codified at N.Y. PENAL LAW art. 121).

218. *Id.* (codified at N.Y. PENAL LAW § 121.11).

219. *Id.* (codified at N.Y. PENAL LAW § 121.12).

220. *Id.* (codified at N.Y. PENAL LAW § 121.13).

221. Act of August 13, 2010, ch. 405, 2010 McKinney's Sess. Laws of N.Y. 1210-11 (codified at N.Y. PENAL LAW § 121.14).

222. Act of August 13, 2010, ch. 321, 2010 McKinney's Sess. Laws of N.Y. 1070 (codified at N.Y. PENAL LAW § 130.65).

223. *Id.* (codified at N.Y. PENAL LAW § 225.00(7-a)).

machine is not considered a gambling device under the statute so long as the outcome of the game depends on the skill of the player and "not in a material degree upon an element of chance."[224]

Subdivision 8 of the statute was amended to eliminate from the definition of "slot machine" the provision that "[a] machine which awards free or extended play is not a slot machine merely because such free or extended play may constitute something of value provided that the outcome depends in a material degree upon the skill of the player and not in a material degree upon an element of chance."[225]

Penal Law section 120.05, subdivisions 3 and 11, were amended to make assault on a sanitation enforcement agent a Class D violent felony offense.[226]

Penal Law section 120.05, subdivisions 3 and 11, were also amended to make assault on a registered or licensed practical nurse a Class D violent felony offense.[227]

Penal Law section 225.30, pertaining to possession of gambling devices, was amended to allow for the lawful transportation and possession of a slot machine for purposes of product development, research, or additional manufacture or assembly.[228]

Penal Law section 155.30(9) was amended to include in the definition of grand larceny in the fourth degree theft of property consisting of a display of religious symbols which has a value of at least one-hundred dollars and is located on the curtilage of a building or structure used for religious worship.[229]

Penal Law section 155.35 was amended to include in the crime of grand larceny in the third degree the theft of an automated teller machine (ATM) or its contents.[230]

Penal Law section 155.43 was amended to attached criminal liability for aggravated grand larceny of an ATM, a class C felony, where one has committed grand larceny in the third degree, as defined in section 155.25(2), and has been convicted of grand larceny in the third de-

224. *Id.*

225. *Id.* (codified at N.Y. PENAL LAW § 225.00(8)).

226. Act of August 13, 2010, ch. 318, 2010 McKinney's Sess. Laws of N.Y. 1068 (codified at N.Y. PENAL LAW § 120.05).

227. *Id.*

228. Act of August 13, 2010, ch. 321, 2010 McKinney's Sess. Laws of N.Y. 1070 (codified at N.Y. PENAL LAW § 225.30).

229. Act of August 30, 2010, ch. 479, 2010 McKinney's Sess. Laws of N.Y. 1313-14 (codified at N.Y. PENAL LAW §155.30(9)).

230. Act of Aug. 30, 2010, ch. 464, 2010 McKinney's Sess. Laws of N.Y. 1295-96 (codified at N.Y. PENAL LAW §155.35(2)).

gree within the past five years.[231]

Penal Law section 220.03 was amended to legalize the possession of a residual amount of a controlled substance that is in or on a syringe that the person obtained and possesses pursuant to a needle exchange program set forth in Public Health Law section 3381.[232]

Penal Law section 220.45 was amended to legalize the possession of a hypodermic needle or syringe pursuant to Public Health Law section 3381.[233]

Penal Law section 460.10(1) (a) was also amended to add "Strangulation in the First and Second Degrees" to the list of offenses constituting a "criminal act" within the meaning of the enterprise corruption article (Penal Law section 460.10(1)).[234]

Penal Law section 60.05 was amended to include "Strangulation in the Second Degree" among the Class D felony offenses requiring sentencing pursuant to Penal Law section 70.00 ("Sentence of imprisonment") or 85.00 ("Sentence of intermittent imprisonment").[235]

Penal Law section 485.05 allows "Strangulation in the First and Second Degrees" to be prosecuted as hate crimes[236] and Penal Law section 130.91 allows the same offenses to be prosecuted as sexually motivated felonies.[237]

### *B. Criminal Procedure Law*

CPL section 440.10 was amended to allow victims of sex trafficking who have been convicted of prostitution-related offenses due to the trafficking to apply to have the conviction vacated.[238] The statute further provides that official documentation of the defendant's status as a sex trafficking victim from a federal, state, or local government agency is not required; however, such documentation creates a presumption that the defendant's participation in the offense was a result of having been a victim of persons or sex trafficking.[239] A motion to vacate under this statute must be made with due diligence, after the defendant has ceased

231. *Id*. at 1296 (codified at N.Y. PENAL LAW §155.43).

232. *Id.* (codified at N.Y. PENAL LAW §220.03).

233. *Id.* (codified at N.Y. PENAL LAW §220.45).

234. Act of August 13, 2010, ch. 405, 2010 McKinney's Sess. Laws of N.Y. 1213 (codified at N.Y. PENAL LAW § 460.10(1)(a)).

235. *Id*. at 1214 (codified at N.Y. PENAL LAW § 60.05(5)).

236. *Id*. at 1215 (codified at N.Y. PENAL LAW § 485.05(3)).

237. *Id.* (codified at N.Y. PENAL LAW § 130.91(2)).

238. Act of August 13, 2010, ch. 332, 2010 McKinney's Sess. Laws of N.Y. 1083 (codified at N.Y. CRIM. PROC. LAW §440.10(i) (McKinney's Supp. 2012)).

239. *Id.* (codified at N.Y. CRIM. PROC. LAW §440.10(i)(ii)).

to be a victim or sought services of trafficking.[240] Exceptions are provided for "reasonable concerns" about the safety of the defendant, family members, or other victims, or reasons consistent with the statute.[241]

CPL section 190.25(3) adds the three new crimes to the list of offenses where professionals like child psychologists, rape crisis counselors, and social workers, are allowed to be present in the grand jury.[242] CPL section 700.05(8) adds "First and Second Degree Strangulation" to the list of "designated offenses" for obtaining eavesdropping and video surveillance warrants.[243] Lastly, CPL section 530.11, and Family Court Act section 812(1), provide concurrent jurisdiction between the Family Court and criminal courts for all three strangulation offenses.[244]

### *C. Executive Law*

On July 7, 2010, Governor Paterson issued an Executive Law amending the hate crime sentencing statute such that a hate crime sentence may now include a requirement that the defendant complete a program, training, or counseling session targeted at hate crime education and prevention.[245] The law also requires that the Division of Criminal Justice Services (DCJS) contract with organizations to provide training and assistance to prosecutors who prosecute hate crimes.[246]

The Executive Law (section 995(7)) was also amended to make the misdemeanor of Criminal Obstruction of Breathing or Blood Circulation a "designated offense" requiring the submission of a DNA sample.[247]

### *D. Domestic Relations Law*

Domestic Relations Law section 115-d (3-a) adds "First and Second Degree Strangulation" to the definition of "spousal abuse."[248] Social Services Law section 378-a adds the same offenses to the definition of "spousal abuse" for the purpose of obtaining records of convictions

240. *Id.* (codified at N.Y. CRIM. PROC. LAW §440.10(i)(i)).

241. *Id.* (codified at N.Y. CRIM. PROC. LAW §440.10(i)(i)).

242. Act of August 13, 2010, ch. 405, 2010 McKinney's Sess. Laws of N.Y. 1211 (codified at N.Y. CRIM. PROC. LAW § 190.25(3)(h)).

243. N.Y. CRIM. PROC. LAW § 700.05(8)(b).

244. *Id.* § 530.11.

245. Act of July 7, 2010, ch. 158, 2010 McKinney's Sess. Laws of N.Y. 805 (to be codified at N.Y. CRIM. PROC. LAW § 485.10).

246. *Id.*

247. N.Y. EXEC. LAW § 995(7) (McKinney Supp. 2012).

248. N.Y. DOM. REL. LAW §115-d(3-a)(c) (McKinney 2010) (citing N.Y. PENAL LAW §§ 121.12, 121.13 (McKinney Supp. 2012)).

for prospective foster parents.[249] Mental Hygiene Law section 10.03 makes perpetrators of either felony offense, if the offense was sexually motivated, eligible for sex offender civil commitment.[250]

### *E. Vehicle and Traffic Law*

Vehicle and Traffic Law section 509-cc adds strangulation in the first degree and strangulation in the second degree to the list of conviction offenses that can disqualify a person from driving a school bus.[251]

### *F. Alcohol Beverage and Control Law*

#### *1. A5537A—Alcoholic Beverage Control Law—Loitering—Effective Immediately*

This Act amended the loitering provisions in the Penal, Alcoholic Beverage Control, Criminal Procedure, Executive, and General Business Laws and repeals certain Penal Law provisions relating to such.[252] The bill repeals three subdivisions of Penal Law section 240.35 which different appellate courts have held unconstitutional.[253] Subdivisions 1 and 3 of the above stated loitering law proscribe loitering for the purpose of begging or soliciting particular sexual acts.[254] Subdivision 7 prohibits a person lacking a satisfactory explanation from loitering or sleeping in a transportation facility.[255] The legislature determined that these three subdivisions serve no useful purpose and create the risk of police officer confusion as to the current state of the law.[256] Courts have found the statute's blanket prohibition on begging in all public places violated the First Amendment.[257] Other courts have found subdivision 3 unconstitutional because it punishes conduct anticipatory to consensual sodomy and have found subdivision 7 unconstitutionally vague.[258]

249. N.Y. SOC. SERV. LAW § 378-a(j) (McKinney 2010).

250. N.Y. MENTAL HYG. LAW § 10.03 (p)-(q) (McKinney Supp. 2012).

251. Act of August 13, 2010, ch. 405, 2010 McKinney's Sess. Laws of N.Y. 1216 (codified at N.Y. VEH. & TRAF. LAW § 509-cc(4)(c) (McKinney Supp. 2012)).

252. Act of July 30, 2010, ch. 232, 2010 McKinney's Sess. Laws of N.Y. 975 (repealing N.Y. PENAL LAW §§ 240.35(1), (3), (7)).

253. *Id*.

254. N.Y. PENAL LAW §§ 240.35(1), (3); *see also* People v. Uplinger, 58 N.Y.2d 936, 937, 447 N.E.2d 62, 62, 460 N.Y.S.2d 514, 515 (1983).

255. N.Y. PENAL LAW § 240.35(7); *see also* Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 701 (2d Cir. 1993).

256. NEED SOURCE

257. *Loper*, 999 F.2d at 705.

258. *Uplinger*, 58 N.Y.2d at 937-38, 447 N.E.2d at 62-63, 460 N.Y.S.2d at 515.

*2. A8645B—Alcohol Training Awareness Program—Unlawfully Dealing with a Child in the First Degree—Effective 30 Days After It Becomes Law.*

This Act amended the Alcoholic Beverage Control Law, in relation to alcohol training awareness programs, and amending the penal law in relation to unlawfully dealing with a child in the first degree.[259] The Act seeks to encourage and incentivize licensed sellers of alcohol and their employees to attend alcohol training awareness programs in order to stem underage drinking and over consumption.[260]

The Act amends Alcohol Beverage Control Law section 65(4) to make the language gender neutral and moved the affirmative defense, in a license revocation proceeding, that a licensed seller reasonably relied on what appeared to be a valid ID, from Alcohol Beverage Control Law section 65(4) to Alcohol Beverage Control Law section 65(6).[261]

Penal Law section 260.20 was amended by providing an affirmative defense to prosecution for unlawfully dealing with a child in the first degree if, at the time of the alleged violation, the defendant had not been convicted of violating sections 260.20 or 260.21 of the Penal Law within the previous five years and, subsequent to prosecution, the defendant has completed an alcohol training awareness program.[262] The Act also provides for a reasonable adjournment to enable such a defendant to complete training.[263] Further, the Act provides that the alcohol awareness programs shall be attended in person, through distance learning methods, or through an internet based online program.[264]

259. Act of August 30, 2010, ch. 435, 2010 McKinney's Sess. Laws 1256 (codified at N.Y. ALCO. BEV. CONT. LAW §§ 65(4), 65(6)(a) (McKinney 2011).

260. *See generally id.*

261. *Id.*

262. N.Y. PENAL LAW §§ 260.20, 260.21 (McKinney 2008).

263. *Id*. § 260.20.

264. Act of August 30, 2010, ch. 435, 2010 McKinney's Sess. Laws 1258.