

APPELLATE HIGHLIGHTS
MARCH TO AUGUST 2011

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The following is a selection of particularly significant or interesting criminal cases decided by the New Jersey Supreme Court or the Appellate Division between March and August of 2011. When a case has been approved for publication but has not yet appeared in the advance sheets as of the date this article was written, it is identified as "? N.J. [or N.J. Super.] ?." When a member of the ACDL-NJ represented the defendant or amicus curiae in any of these cases, his or her name is included in parenthesis following the summary. For additional convenience, a LEXIS or Atlantic Second (A.2d) citation and/or a "hyperlink" to the judiciary website is included after the description of every case listed for publication that has not appeared in a published volume or advance sheet. A hyperlink to the judiciary website for unpublished cases decided after September 20, 2005, is also included. Two weeks from the date of issue, Supreme Court and Appellate Division opinions are moved to the archive on the Rutgers Law School-Camden Web site, a link to which is provided on the Judiciary's Web page.

APPELLATE PROCEDURE

State v. Bradley, 420 N.J. Super. 138 (App. Div. 2011)
- Dismissal of appeal affirmed. "Ernest Bozzi unsuccessfully attempted to file disorderly persons simple assault charges against Caryn Bradley in the Eastampton Municipal Court... Because Bozzi was not a "prosecuting attorney" as required by the rules, Judge Bookbinder dismissed his Law Division appeal from the municipal court administrator's decision not to issue the complaint. We agree that Bozzi lacks standing and therefore affirm... In our State, there is simply no circumstance in which a private complainant can act as a prosecuting attorney without the special approval and process provided in Rule 3:23-9(d). In fact, Bozzi lacks standing not only to have taken the initial appeal in the Law Division, but to further pursue the matter to this court... Bozzi also contends the Court Rules conflict with the Victim's Rights Amendment, as set forth in art I., ¶ 22 of the New Jersey Constitution... Both constitutionally and legislatively,

victims have been granted myriad rights, privileges, and accommodations. N.J.S.A. 52:4B-1 to -49. Nowhere in the constitutional or legislative scheme, however, are they granted the right to individually prosecute charges. The Victim's Rights Amendment entitled Bozzi to approach the municipal or county prosecutor, who would then have had the duty to assess, in his or her discretion, the denial of probable cause and decide whether taking an appeal was in the public interest. It did not authorize Bozzi to prosecute the matter directly."

State v. Amy Emery, unpublished opinion, App. Div. Docket No. A-2790-10T3 (August 29, 2011) - Conviction reversed. "Our review of the record reveals that the Law Division judge applied the wrong standard in deciding this case... Although the Law Division judge is required to give 'due' deference to the municipal judge's findings of fact, he is not 'bound' by them, as the judge stated in rendering his decision... Because the Law Division judge applied the wrong standard in the de novo trial on the municipal record, we remand to the judge for reconsideration and application of the appropriate standard. In the event of a conviction, the judge is directed to make complete findings of fact and conclusions of law, as required by Rule 1:7-4(a). They should include his analysis of whether the State provided each of the required elements of the offense set forth in N.J.S.A. 2C:20-3(a)."

<http://www.judiciary.state.nj.us/opinions/a2790-10.pdf>

State v. Kennedy, 419 N.J. Super. 475 (App. Div. 2011) - Sentencing court's refusal to order forfeiture of public employment reversed. "The primary issue presented by this appeal is whether the offense of tampering with physical evidence, in violation of N.J.S.A. 2C:28-6(1), is 'an offense involving dishonesty,' which requires the forfeiture of public office or employment under N.J.S.A. 2C:51-2(a)(1)... [A] forfeiture of public employment is a 'collateral' rather than a 'penal' consequence of a criminal conviction... Therefore, the general limitations upon the State's right to appeal from criminal convictions do not apply to this mandatory collateral consequence of a qualifying conviction... In fact, if a trial court fails to impose this collateral consequence at the time of sentencing, it may subsequently order forfeiture of the defendant's public employment upon application of the prosecutor or one of the other public officials listed in N.J.S.A. 2C:51-2(g)... And although the Code does not

contain express authorization for an appeal by the State from a trial court's denial of a prosecutor's application for a mandatory forfeiture of public employment, our courts have entertained such appeals as appeals from illegal sentences." See also SENTENCING - MISCELLANEOUS.

State v. Ernie Lane and Sam J. Livingston, unpublished opinion, App. Div. Docket No. A-3351-08T4 and A-5786-08T4 (May 27, 2011) - "This is the second time defendants' contention that the trial judge erred in denying their motion to suppress evidence has been before us. In a prior appeal, we concluded that questions remained about the grounds upon which the State relied to justify the warrantless search of a fenced-in backyard. State v. Lane, 393 N.J. Super. 132 (App. Div.), certif. denied, 192 N.J. 600 (2007). Although the trial judge partially addressed the issues required by our earlier mandate, his findings are so intertwined with -- indeed, completely overshadowed by -- his derogatory asides about our earlier decision, and other irrelevant comments regarding the state of the law, as to compel our determination that a new hearing is required... We recognize that the judge's decision does contain some of the additional findings we required, but the development of the facts required by our earlier mandate has not been adequately advanced. The judge chose instead to provide his own view about the legal grounds upon which our prior opinion rested. Contrary to the trial judge's accusations, our prior decision does not disregard the importance of a trial judge's 'feel of the case.' We have, in fact, drawn no conclusions at all. In disposing of the prior appeal, we remanded because we were not provided with findings on matters we deemed relevant and pivotal. We remand again because the judge chose to take issue with our decision rather than comply with our mandate... Accordingly, we remand for an examination of the reasonableness of the search and seizure -- in conformity with our prior opinion, without resort to the trial judge's prior findings, and by a different judge -- not only so that the issues may be fairly and impartially resolved but also so that justice may appear to have been done." <http://www.judiciary.state.nj.us/opinions/a3351a5786-08.pdf>

State v. Mark H. Petherbridge, unpublished opinion, App. Div. Docket No. A-3934-09T4 (April 6, 2011) - "Here, the Law Division judge appears to have surrendered his own independent view of the applicability of defendant's claim of self-defense and accorded controlling deference to the

municipal court's view... The State argues the case is 'hinged upon the credibility of the witnesses,' and that the Law Division merely recognized that the municipal court judge was in a better position to assess the credibility of the witnesses. If that is the import of the Law Division's statements, the conviction would be sustainable; however, if the Law Division judge was under the misapprehension that he had no latitude to consider the evidence anew and disagree with the municipal court judge's finding regarding the applicability of self-defense, that would be a mistaken exercise of the court's discretion... Here, the Law Division judge stated "there could have been a reason for self defense," and he offered that he 'probably would have reached a different conclusion than the ... Trial Judge." Yet, he stated the trial judge's 'finding is clear, . . . and I have to give deference to that.' At the very best, that ruling is ambiguous; at worst, it is contradictory. Unfortunately, we cannot discern whether this was an outright surrender of the court's authority and obligation to make an independent assessment of the facts or merely an acceptance of the municipal court's credibility determinations. Under such circumstances, we see no alternative but to remand to the Law Division for a clarification of the basis for its order and for further findings of fact and conclusions of law based upon the record created in the municipal court." (Robert N. Agre)
<http://www.judiciary.state.nj.us/opinions/a3934-09.pdf>

ATTORNEYS

State v. Warren Mcree, unpublished opinion, App. Div. Docket No. A-0651-09T4 (August 16, 2011) - Denial of PCR affirmed in part, reversed in part, remanded for a new hearing. "[D]efendant contends that he did not authorize PCR counsel to include in his supplemental brief defendant's statement to the investigator from the Office of the Public Defender or the letter he wrote to his attorney stating his version of what occurred on the date in question. In fact, defendant asserts, he instructed PCR counsel not to include these documents... [I]t appears that documents protected by the attorney-client privilege were improperly made part of the PCR record, and considering the direct impact those documents had upon the judge's assessment of defendant's credibility and, in turn, his disposition of this claim, we are compelled to remand for further proceedings on this claim only. See N.J.R.E. 504(1)... Because the "privilege belongs to the client,

rather than the attorney," Fellerman v. Bradley, 99 N.J. 493, 498 (1985), the client exclusively controls the decision whether or not the privilege should be voluntarily waived... As noted, defendant submitted specific examples of ineffective assistance of trial counsel, namely the failure to follow up on the fact that he had bruises at the time of his arrest, and the challenge to the credibility of Brown's testimony that she called the police on her cell phone. [A] remand is necessary to permit the PCR judge to consider them without regard to information protected by the attorney-client privilege. Furthermore, because this judge made specific negative findings with respect to defendant's credibility, we direct that this matter be heard by a different judge on remand." <http://www.judiciary.state.nj.us/opinions/a0651-09.pdf>

CONFESSIONS AND OTHER STATEMENTS

State v. Frebert Bonhometre, unpublished opinion, App. Div. Docket No. A-5616-07T1 (July 27, 2011) - Conviction for armed robbery reversed, other convictions affirmed. "Defendant argues that his confession should have been excluded at trial because the State failed to prove beyond a reasonable doubt that he knowingly and voluntarily waived his Miranda rights. He alleges that he invoked his right to counsel, but the detectives did not cease their interrogation as required by State v. Kennedy, 97 N.J. 278, 285 (1984). Prior to any custodial interrogation, an accused must be advised of his rights to remain silent and to have an attorney present during questioning and, '[o]nce an accused invokes the right to counsel, that right must be scrupulously honored.' State v. Chew, 150 N.J. 30, 61 (1997)... Here, in finding that defendant's alleged statement about counsel was ambiguous, the judge was required to construe that statement in defendant's favor, ..., and infer an invocation of the right to counsel, but he failed to do so. He simply found that the statement was ambiguous and then made fact-findings respecting the detectives' states of mind about the ambiguous invocation of counsel and whether defendant intended to assert his right to counsel... Instead, the judge was required to determine 'whether defendant's words or conduct could reasonably be viewed as an assertion of his right to [counsel]; if they could be, the officers were obligated to cease their questioning or limit their questions solely to clarify that issue.' [Citation omitted]. We are satisfied that defendant's words, taken in context, can reasonably be

construed to invoke his right to counsel... The judge also did not consider whether Ricciardi immediately ceased questioning, and caused Dugan to immediately cease questioning, after she heard an ambiguous statement from defendant that caused her to question whether he had invoked his right to counsel... Instead, she allowed Dugan to continue the interrogation for more than a minute, and then she pressed defendant to retract his invocation without giving him an opportunity to clarify whether he had invoked his right to counsel in the first place... Ricciardi's effort to persuade defendant to retract that invocation was contrary to the State's duty to scrupulously honor a request for counsel... Instead, she should merely have inquired if she was correct in understanding that he had invoked his right to counsel... These deficiencies, after an ambiguous invocation, mandated suppression of defendant's confession." <http://www.judiciary.state.nj.us/opinions/a5616-07.pdf>

State v. Christopher Etienne, unpublished opinion, App. Div. Docket No. A-3368-07T4 (March 16, 2011) - Convictions reversed. "Defendant argues that the assistant prosecutor's questioning him regarding his silence, upon seeing the police officers in the hotel hallway, was improper. He reasons that such questioning raises an erroneous inference that an innocent person would have questioned the police; or that defendant had a duty to question the police, rather than a right to remain silent... Here, the assistant prosecutor questioned defendant about his failure to ask the officers that confronted him in the hotel hallway to explain their actions. Such questioning does not give rise to an inference of defendant's consciousness of guilt. A reasonable person would not have naturally come forward to speak to the police, or question their presence in the hotel hallway. Moreover, defendant's silence at the hotel hallway cannot be used to impeach his trial testimony which was that: (a) he was in room 204 to smoke marijuana and to sell \$10 of marijuana to a co-worker; (b) he was not aware that cocaine and heroin were being sold in the room; and (c) he was on a cell phone call with his girlfriend when the police tackled him. There is no logical connection to argue that defendant's silence in the hallway cast doubt on the credibility of the testimony that he actually gave. Therefore, this questioning was impermissible; and plain error for the judge to allow it. "Defendant argues that the assistant prosecutor's questioning of defendant regarding his failure to provide

the police with a statement at the police station constituted plain error. The assistant prosecutor questioned defendant about his invocation of the right to remain silent at police headquarters, and argued on summation that defendant's failure to say anything to the police was evidence of his guilt... Here, defendant eventually gave the police an inculpatory statement. At trial however, the assistant prosecutor pressed defendant again and again about his silence at police headquarters after defendant had been given his Miranda warnings and declined to give a statement. We conclude that the improper delving into defendant's post-arrest silence constitutes plain error capable of producing an unjust result. Therefore, a reversal of the convictions is warranted." See also CONFRONTATION. <http://www.judiciary.state.nj.us/opinions/a3368-07.pdf>

State v. Anyoli R. Gonzalez, unpublished opinion, App. Div. Docket No. A-0962-07T1 (May 27, 2011) - Convictions reversed. "Defendant contends that he asserted his right to counsel at the beginning of the videotaped statement, but, instead of honoring his request, the police continued interrogating him. He argues, therefore, that these statements were obtained in violation of his constitutional rights and were improperly admitted at trial. We agree with defendant on this point and we conclude that the error was not harmless... [E]ven if there was some equivocation in defendant's assertion of the right to counsel in the totality of the circumstances, his subsequent statements were nevertheless required to be suppressed... When an ambiguous request for counsel is made, any further questioning initiated by the police must be narrowly circumscribed to clarification of the ambiguity... Charon and Ackerman simply did not adhere to this requirement. When defendant started to explain why he felt he needed a lawyer, Charon interrupted him and stopped him, telling him not to 'deviate from the question.' When defendant then flatly said, 'I want a lawyer,' Charon added the word 'later,' and, rather than the detectives focusing solely on whether defendant presently wanted a lawyer or only wanted to consider getting one later, they shifted the focus by asking the next two questions which we have previously quoted, namely: 'Do you understand that you may stop answering my questions at any time during this statement?', and 'With these Rights in mind, do you wish to continue with this statement and answer further questions?'... Rather than seeking clarification about defendant's statement that

he wanted a lawyer, and attempting to determine whether he meant he wanted a lawyer right now or at some future point, the detectives essentially changed the subject by asking whether he wanted to continue with his statement. It was apparent from all that had occurred until that time that defendant wanted to tell his version of the events. Therefore, he may well have wanted to continue to do so. However, that does not preclude the fact that he may have also wanted to consult with an attorney or have an attorney present before doing so. Thus, the follow-up to what was on its face an unequivocal assertion of the right to counsel and, which was at the very least an ambiguous assertion of the right, had the effect of confusing, rather than clarifying the ambiguity. It placed the burden on defendant to reassert his right to counsel, which would have been non-responsive to the succeeding questions, which pertained to a different subject. This record does not support a finding beyond a reasonable doubt that the police scrupulously honored defendant's assertion of his right to counsel in accordance with the requirements of the controlling authorities." <http://www.judiciary.state.nj.us/opinions/a0962-07.pdf>

State v. Edward B. Kraszewski, unpublished opinion, App. Div. Docket No. A-3080-09T2 (July 5, 2011) - Suppression of statement for failure to give Miranda warnings affirmed. "After approximately fifteen minutes, Bisogno revealed for the first time that defendant pointed a gun at him and directed that he leave defendant's property. Officer Patel related this to Officer Corforte, who approached Skarzenski with the information... At that point, Officers Haras, Corforte and Patel conferred with Sergeant Tortoriello. Next, Officers Haras and Corforte confronted defendant asking, 'Where's the gun?' Defendant replied it was in the bedroom, walked the officers to the bedroom and admitted the gun was under his pillow... Judge Ferencz granted the motion to suppress, finding probable cause was established by two independent sources of information, allowing the officers to interrogate and hold defendant so that objectively, defendant was not free to leave... [N]otwithstanding the officers' need to make an in-the-moment judgment to secure the weapon, we are persuaded defendant was not free to ignore the police interrogation, which incidentally was designed to elicit an incriminating response. Accordingly, Miranda warnings were required... Alternatively, for the first time on appeal, the State argues the police were not required to give

Miranda warnings prior to questioning defendant under the public safety exception announced by the United States Supreme Court in New York v. Quarles, 467 U.S. 649 ... (1984)... None of the parties suggested an immediate danger associated with the weapon, located in a private home, existed... Moreover, Bisogno, the victim, mentioned the gun as an afterthought, not a principal concern. Further, the police had separated all parties and there was no concern for defendant's volatility. The manner in which the police proceeded following their non-custodial questioning was investigatory, designed to obtain evidence to support defendant's arrest and conviction. The police conduct of conferring with one another, obtaining direction from their commanding officer, and then confronting defendant with a demand for the location of the gun, supports the trial court's finding that the questioning was custodial, not protective."

<http://www.judiciary.state.nj.us/opinions/a3080-09.pdf>

State v. Larry Peppers, unpublished opinion, App. Div. Docket No. A-6199-07T4 (April 29, 2011) - Conviction reversed. "Based on our review of the record and applicable law, we find error in the court's denial of defendant's motion to suppress post-arrest inculcating statements he made to the police... There is no dispute defendant was arrested and taken into custody, was not read Miranda warnings, and had invoked his right to counsel when he made the incriminating statement about shooting Alcius. Additionally, as recognized by the court, Detective Recktenwald's decision to transport defendant past the Hess station en route to the police station and his accusation then that defendant was a 'stone cold killer' was part of a premeditated investigatory tactic to obtain information... [When Recktenwald next saw defendant, he] was handcuffed to a chair and sitting in a room. Rather than issuing Miranda warnings to defendant, the detective encouraged defendant to talk with him outside the presence of counsel. The detective persisted despite defendant's express statement that his brother had told him he should have an attorney... There is no excuse for the police tactic of declining to Mirandize defendant at any time after he was arrested and placed in custody in the police car. We regard Detective Recktenwald's conduct as an improper stealth process designed to elicit incriminating evidence without express questioning of defendant. Although the detective did not attack defendant's character or review the evidence against him, he nonetheless subjected defendant to an interrogative

technique designed to encourage him to make incriminating statements. Contrary to the court's finding, Detective Recktenwald did not meet with defendant for casual conversation or to ask routine ministerial or 'pedigree' questions, but to question defendant about the shooting at the Hess gasoline station. Moreover, he continued to prod defendant even after defendant mentioned obtaining an attorney... This case presents the 'classic stationhouse interrogation contemplated by Miranda,' a defendant deprived of his freedom and questioned by a homicide detective in a coercive police atmosphere without being advised of his right to remain silent or retain an attorney... Because the police failed to inform defendant of his Miranda rights, defendant's statement cannot not be used against him."

<http://www.judiciary.state.nj.us/opinions/a6199-07.pdf>

CONFRONTATION

State v. Timyan Cabbell and John Calhoun, ? N.J. ?, 2011 N.J. LEXIS 788 (July 26, 2011) - Convictions reversed. "The primary issue in this appeal is whether defendants were provided the opportunity to cross-examine two key State's witnesses, Karine Martin and Tyson Privott, consistent with the confrontation-clause requirements of our Federal and State Constitutions. We conclude that defendants were denied their constitutional right to confront Martin, but not Privott... Defendants were never given the opportunity to cross-examine Martin before the jury, even though she was present in the courthouse and otherwise available. On direct examination, Martin repeatedly insisted that she did not wish to testify, but eventually she admitted that her statement to the police was truthful. Without giving defense counsel the opportunity to conduct cross-examination, the court convened a Rule 104 hearing to determine the admissibility of Martin's April 2004 statement to the police... At the Rule 104 hearing, Martin provided a number of non-informational responses, such as 'I don't remember,' and 'I do not wish to testify.' But she also gave answers at this bench hearing that directly undermined her credibility. Most importantly, at one point, she stated that she was under the influence of crack cocaine not only when she witnessed the shooting incident, but also when she gave her six-page statement to the police... The court expressed its opinion that further questioning of Martin would be 'fruitless,' but never made a finding that Martin was

unavailable as a witness. To the contrary, Martin was subjected to questioning at the 104 hearing and provided answers. A court has no authority to deny defendants their constitutional right of confrontation merely because it believes that cross-examination will be of little use... The admission of Martin's testimonial statement incriminating defendants -- without giving defendants the opportunity to cross-examine the witness before the jury -- violated the Sixth Amendment of the Federal Constitution and Article I, Paragraph 10 of our State Constitution... The introduction of Privott's prior statements to the police did not violate the Confrontation Clause because Privott, while before the jury, answered questions on direct and cross-examination concerning the events contained in those statements. Indeed, Cabbell could not have hoped for anything more than what he achieved -- Privott's renunciation of his prior statement." (Alison S. Perrone, Designated Counsel, for Calhoun)
<http://www.judiciary.state.nj.us/opinions/supreme/A89StatevCabbell.pdf>

State v. Christopher Etienne, unpublished opinion, App. Div. Docket No. A-3368-07T4 (March 16, 2011) - Convictions reversed. "Defendant argues that Detective Camilleri's reference to statements of non-testifying persons deprived him of the right to confrontation... Here, Camilleri referred to the statement of one of the occupants in a stopped car who had allegedly purchased CDS from Haitians at room 204. Because defendant was a Haitian present at room 204 the following night, the statement Camilleri referenced was testimonial evidence against defendant that violated defendant's right to confrontation." See also **CONFESSIONS AND OTHER STATEMENTS**.
<http://www.judiciary.state.nj.us/opinions/a3368-07.pdf>

State v. Rehmann, 419 N.J. Super. 451 (App. Div. 2011) - DWI and related convictions affirmed. "In this appeal, defendant argues the Confrontation Clause of the Sixth Amendment was violated when the State, in attempting to prove his blood alcohol content, relied upon the testimony of an expert who supervised but did not actually perform the test on defendant's blood sample... Here, the State called Maxwell to prove defendant's BAC. Although Mitchell, and not Maxwell, operated the gas chromatograph in examining defendant's blood sample, Maxwell testified that he supervised the test. He claimed he had personal knowledge of the equipment and the manner in which the

tests were performed and that he drew his own conclusions from the information provided by the gas chromatograph... In addition, Maxwell testified that he observed Mitchell conduct the tests and was with him 'every step of the way' as if he performed the tests himself because Mitchell was being retrained and, consequently, was not allowed to test the samples by himself... Because he was the author of the laboratory certificate and because he supervised another's operation of the gas chromatograph, Maxwell was the appropriate person to be called to testify about the results of the testing of defendant's blood sample... [W]e reject defendant's argument that the Confrontation Clause was violated in these circumstances."

State v. Dwayne E. Slaughter, unpublished opinion, App. Div. Docket No. A-1179-08T4 (July 6, 2011) - "In this appeal of his conviction for aggravated manslaughter and other related offenses, we agree with defendant's argument that the trial judge erred in permitting the State to utilize a witness's statement without requiring that the witness testify and be cross-examined in front of the jury. We find, however, that defendant was not disadvantaged, and as a result, the error was harmless... The judge recognized there were 'confrontation aspects' of what defendant was arguing but concluded that the right to cross-examine was satisfied during the N.J.R.E. 104 hearing... But what persists is the scope of unavailability for Confrontation Clause purposes. As a general matter, we think it unlikely that unavailability in the context of constitutional confrontation principles may be governed by a state evidence rule lest a state evidence rule's unduly broad definition of unavailability swallow constitutional confrontation requirements. We need not, however, attempt to resolve that question. In considering the application of constitutional confrontation principles to the case at hand, we are instructed and bound by [State v.]Brown, 138 N.J. 481, 544 (1994)], which recognized the right to confrontation is not violated by the admission of a statement of a witness who has feigned a lack of recollection... In essence, Brown demonstrates that -- for confrontation purposes -- prior cross-examination outside the jury's presence is insufficient. Although a pre-Crawford case, we are bound not only to Brown's interpretation of the requirements of our state constitution but also its interpretation of the federal constitution until such time as the Supreme Court of the United States determines otherwise... The trial judge's

decision to permit admission of Day's statement without the requirement that she testify in front of the jury seems to have been generated by concerns for Day's comfort or the potential that it would cause an undue expenditure of time. We hold that these circumstances are of insufficient weight to override defendant's right to have this witness subjected to cross-examination in front of the jury, and that the judge erred in concluding otherwise. The error was of constitutional dimension... Certainly, Day's out-of-court statement could have contributed to the guilty verdict... But that generalization of the evidence before the jury represents an oversimplification of the issue. Deeper analysis suggests the harmlessness of the error." <http://www.judiciary.state.nj.us/opinions/all179-08.pdf>

State v. Todd Stathum, unpublished opinion, App. Div. Docket No. A-3531-08T4 (April 11, 2011) - Convictions reversed. "We first address defendant's claim that his constitutional right to confrontation was violated by the admission of hearsay testimony... In this case, Pharo said that the investigation centered around an individual known as 'Todd' because of information 'promulgated through a confidential informant.' Pharo explained that a confidential informant was 'an individual ... that basically provides law enforcement officials with illegal information [sic] ... whether it be drugs. In ... this case, it was narcotic related.' The prosecutor asked Pharo to recount the information, and defense counsel objected... The prosecutor next asked Pharo if the information received 'concern[ed] making a purchase of heroin from Todd,' to which Pharo replied '[y]es, it did.' The question suggests that the purchase of heroin being referred to occurred in the past; in other words, to a purchase made by the confidential informant. Obviously, the confidential informant never testified... In this case, Pharo went beyond merely implying that some unknown person had implicated defendant in drug trafficking. The officer actually said that he focused his investigation around an individual named Todd as a result of 'information [] promulgated through a confidential informant.' Pharo went on to explain that a confidential informant is a person who provides law enforcement officials with information about crimes, including drug offenses, and then responded affirmatively when asked if the confidential informant had previously bought heroin from defendant. [T]he information was not about a completed crime which was under investigation. Instead, it implicated defendant in at

least one other drug transaction before the jury heard the substance of the State's case. Essentially, on statements made by a confidential informant who could not be cross-examined, the officer identified defendant as a person who had committed uncharged prior bad acts precisely the same as those for which he was standing trial." See also EVIDENCE.

<http://www.judiciary.state.nj.us/opinions/a3531-08.pdf>

COUNSEL, RIGHT TO/WAIVER

State v. Mierzwa, 420 N.J. Super. 207 (App. Div. 2011) - "[D]efendant was entitled to be represented by assigned counsel when the case was tried in the Garfield Municipal Court. Accordingly, the order entered by the Law Division is reversed and the matter is remanded to the municipal court for a new trial... In the present matter, the Garfield Municipal Court determined that defendant did not meet the indigency income threshold and declined to appoint a municipal public defender on July 2, 2009. However, orders had been previously entered by this court, as well as the Law Division, which explicitly found that defendant was indigent and entitled to the assignment of counsel. Additionally, the Bergen County Municipal Division Manager confirmed that counsel had, in fact, been assigned to represent defendant. Under these circumstances, the law of the case required the Garfield Municipal Court judge to provide defendant with assigned counsel at his second municipal court trial. Furthermore, our independent review of the record confirms that defendant was improperly denied appointed counsel."

State v. Hayes, 205 N.J. 522 (2011) - Denial of motion to withdraw guilty plea reversed, case remanded for new hearing. "Before defendant's sentencing proceeding began, his retained counsel advised the trial court that defendant sought an adjournment in order to secure counsel to prosecute a motion to withdraw his earlier entered guilty pleas; counsel explained that he could not press the withdrawal motion because he believed he would be a witness in that application and, therefore, was ethically bound to refrain from acting on that motion... [D]efendant, who was then in custody as a result of his revoked bail status, and his retained counsel explained the efforts made to secure substitute counsel... In light of the uncontested representations concerning the efforts made in seeking substitute counsel, prudence dictated that, at the least,

additional inquiry should have been made as to the availability of substitute counsel and a short adjournment granted to allow defendant to be represented by counsel in pressing the motion to withdraw his guilty pleas. In those circumstances, the effect of going forward on defendant's withdrawal motion equaled requiring that defendant proceed without counsel. In the context of a criminal proceeding, where liberty is at stake, that result cannot be countenanced... Here, because defendant was required to proceed on his oral application to withdraw his guilty pleas without the benefit of counsel, a fair and informed judgment of whether he should have been allowed to withdraw his guilty pleas cannot be reached. Therefore, this case must be remanded to the trial court for a properly counseled Slater [198 N.J. 145 (2009)] hearing, to be conducted under the 'interests of justice' pre-sentencing burden of proof codified in Rule 3:9-3(e), and not under the 'manifest injustice' post-sentencing burden of proof set forth in Rule 3:21-1." (Alison S. Perrone, Designated Counsel)

State v. Miller, 420 N.J. Super. 75 (App. Div. 2011) - Convictions affirmed. "The issue we address is whether the fact that defendant did not meet his substituted trial attorney until the morning scheduled for a suppression hearing and trial, by itself, constitutes deprivation of defendant's right to a fair trial, or whether defendant must show that he was prejudiced by the late contact with his trial attorney. Following precedents of our Supreme Court and our own prior decisions, we conclude that defendant is not entitled to a new trial without demonstrating ineffective assistance of counsel or other prejudice... Defendant has not argued he was denied effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution and by Article I, Paragraph 10 of the New Jersey Constitution. Instead, he asserts it is fundamentally unfair to compel a defendant to proceed in a criminal case on the same day that he first meets his assigned trial attorney. We agree that due process requires sufficient time for defense counsel and defendant to confer and prepare, but what is sufficient time is determined by whether defendant has been prejudiced... We do not dispute the statement that a fair system of criminal justice allows time for a defendant to meet with his attorney and to prepare his defenses. But defendant in this case was not summoned to stand trial in peremptory proceedings without adequate notice or time to

obtain representation and to prepare. Defendant may have been concerned by the substitution of a different attorney for the one who had represented him previously, and he may have lacked confidence in the new attorney, but those facts by themselves do not establish that he received less than effective assistance of counsel or was otherwise prejudiced at the suppression hearing or at trial. Nothing in the federal or State constitutions guarantees a criminal defendant good rapport with or confidence in his defense attorney. The constitutional guarantee is of effective assistance of counsel, not familiarity and confidence." Dissent by Judge Fuentes, who would hold that "I deem it self-evident that a rational and just criminal justice system cannot accept as valid a conviction predicated on a scenario in which a defendant, through no fault of his or her own, meets his or her lawyer for the first time on the day the case is scheduled for trial. I emphasize that this defendant played no role in the decision made by the Office of the Public Defender to replace his previously assigned counsel. This is not a case in which a defendant is trying to 'play the system' by attempting to discharge his lawyer in a manner intended to frustrate the administration of justice."

CRIMES AND OFFENSES - ELEMENTS

State in the Interest of B.P.C. and B.V.C., ? N.J. Super. ?, 2011 N.J. Super. LEXIS 142 (July 18, 2011) - "[T]he principal question we have been asked to determine is whether the conduct of these two juveniles constitutes 'sexual contact' as defined in N.J.S.A. 2C:14-1d, or merely youthful 'horseplay' that, although patently offensive, is nevertheless devoid of the sexual connotation underpinning the offense of criminal sexual contact, N.J.S.A. 2C:14-3. Because an adjudication of delinquency based on criminal sexual contact triggers the registration requirements under N.J.S.A. 2C:7-2b(2), we are keenly aware that our decision may have profound, lifelong ramifications for these two boys as well as others similarly situated... The core salient facts presented by the State nevertheless established that James and Daniel physically held down two twelve-year-old boys and placed their bare buttocks on the faces of the two younger boys, resulting in physical contact between their bare buttocks and the victims' faces. The trial court found James and Daniel committed these acts for the purpose of degrading or humiliating the younger boys.... James and Daniel used their bare buttocks, which by

implication must have also exposed all of their constituent anatomical parts, as key components of the message they sent to W.R. and O.D. Although James and Daniel may not have done this for their own sexual gratification, the record showed that the victims were humiliated and degraded by this message of sexual prowess and domination... Labeling these outrageous acts mere 'horseplay' runs counter to the clear language defining the offense of criminal sexual contact... The Family Part erred, however, when it denied James's post-conviction relief (PCR) petition. The affidavit submitted by James's trial attorney in support of this PCR petition made out a prima facie case of ineffective assistance of trial counsel. We are thus compelled to remand this matter for the court to conduct an evidentiary hearing to resolve the factual and legal issues raised by trial counsel's inadequate performance. We also remand Daniel's adjudication of delinquency because he was not fully informed of the registration requirements under N.J.S.A. 2C:7-2b(2) before he pled guilty to an act of delinquency predicated on fourth degree criminal sexual contact."

<http://www.judiciary.state.nj.us/opinions/a4322-08a5855-08.pdf>

State v. Fared Al-Deen, unpublished opinion, App. Div. Docket No. A-0124-10T3 (June 21, 2011) - Dismissal of indictment affirmed. "The motion judge held that the term 'anyone' used in N.J.S.A. 2C:28-7b, which makes **using a false document to defraud or injure anyone** a third degree offense, does not include the government. Defendant had submitted a false birth certificate to obtain a non-driver identification. Although we hold that 'anyone' can include a government agency, we affirm because the prosecutor did not instruct the grand jury on all elements of the offense... When a definition 'includes' certain items, that definition should be construed expansively. We conclude that the term 'anyone' used in N.J.S.A. 2C:28-7 should be interpreted to include a government agency, as we did in Felson [383 N.J. Super. 154 (App. Div. 2006)], construing the forgery statute, and Zorba Contractors [282 N.J. Super. 430 (App. Div. 1995)], construing the Consumer Fraud Act. Moreover, this interpretation does not render the grading subsection superfluous as found by the motion judge. Rather, the defendant commits a third degree offense only when he acts with the purpose to induce the government to do something. Stated differently, the defendant must seek to induce the party to do something in reliance on the

false government record. The simple act of filing a false document with the purpose that it be taken as part of the official record, even though it is filed with the government, does not amount to a third degree felony under the statute. Something more must happen for that degree of criminal liability to occur.... The grand jurors could have inferred from the evidence presented that defendant acted with the purpose that the application containing false information become a part of the records maintained by the MVC. However, when a grand juror asked a question, the prosecutor replied that defendant's motive was not relevant. That is true, but defendant had to act with purpose to defraud or injure anyone... The prosecutor's response had the clear capacity to read out of their deliberations the critical inquiry whether defendant acted with the 'purpose ... to defraud or injure anyone' (Sylvia M. Orenstein, A.D.P.D.)

<http://www.judiciary.state.nj.us/opinions/a0124-10.pdf>

State v. Bryant, 419 N.J. Super. 15 (2011) - Conviction for **endangering the welfare of a child** affirmed. "[W]e conclude that a conviction for a violation of N.J.S.A. 2C:24-4(a) does not require proof that a defendant knew that his sexual conduct would impair or debauch the victim's morals. Instead, the State must prove, or a defendant must admit, only that he knowingly engaged in sexual conduct with a child below the age of sixteen and that such conduct had the capacity to impair or debauch the morals of the child... [T]he mental culpability element of 'knowingly' is a required component of the first element of the statute, 'engages in sexual conduct.'... N.J.S.A. 2C:2-2(c) does not require the gap filler mens rea standard of 'knowingly' to apply to all elements of the offense... [W]e have considerable doubt that the Legislature intended the second element of N.J.S.A. 2C:24-4(a) to require proof that a defendant knew his conduct would impair or debauch the child's morals, as such a construction would weaken the very protection of children that the Legislature has for decades striven to achieve... Because the crime of endangering is committed regardless of whether the result of impairing or debauching the morals of the child is achieved, it makes little sense to require the actor to know that his conduct would cause such a result. Thus, we conclude N.J.S.A. 2C:24-4(a) does not require, as an element of the offense, that a defendant admit to, or know, at the time of the offense, that his conduct would impair or debauch the victim's morals. Instead, to support a

conviction, the State must prove only that a defendant knew he had engaged in sexual conduct with a child less than sixteen years old; and that such conduct had the capacity to impair or debauch the child's morals." (Robin Kay Lord)

State v. Kevin M. Campfield, unpublished opinion, App. Div. Docket No. A-5618-07T3 (June 28, 2011) - Conviction for **reckless manslaughter** reversed, case remanded for further proceedings on that count. "[Defendant] argues that there was [no factual basis for the plea to that charge] because there was no basis in fact for a finding that, through his actions, he recklessly subjected Bennett to a substantial and unjustifiable risk of death... At the plea hearing ... Campfield agreed that 'the fact that [Bennett] had his clothes off on a cold night and he was drunk and [Campfield] forced him to go into the wooded area' was 'reckless' on Campfield's part, which recklessness was 'a contributing cause to [Bennett's] death.'... The question before us then is whether Campfield's admissions at the plea hearing that his conduct in forcing Bennett into the wooded area at night in January when he was partially undressed, drunk, had undergone a serious fall, and had been punched following the fall was (1) 'reckless' and (2) 'a contributing cause to [Bennett's] death' provided a sufficient basis for conviction of reckless manslaughter. There can be little doubt that Campfield's conduct was 'an antecedent [event] but for which' Bennett's death 'would not have occurred.'... Consequently, the missing element is awareness. At the plea hearing, Campfield was not asked whether he appreciated that there was a risk, even a 'mere possibility,' that Bennett might die after he ran out into the woods under the circumstances then existing. Given the lack of any admission by Campfield that he was aware of a risk of death and the sparse nature of the facts to which Campfield did admit at the plea hearing, we are unable to conclude that there was a factual basis for the plea to reckless manslaughter. Even taking into account the reasonable inferences to be drawn from those facts, there is not enough to support a finding, beyond a reasonable doubt, that Campfield was actually aware of the risk of death and that he consciously chose to ignore it, elements of the offense to which he pled." <http://www.judiciary.state.nj.us/opinions/a5618-07.pdf>

State v. Colleen A. Davis, unpublished opinion, App. Div. A-5172-09T2 (June 3, 2011) - "Defendant Colleen A.

Davis appeals her conviction on one count of **disorderly conduct, contrary to N.J.S.A. 2C:33-2(a)**. We reverse... We do not address the issue of whether there was evidence in the record to support a finding that Davis actually acted 'purposely' to cause 'public inconvenience, annoyance or alarm' because the judge did not make a finding of purposeful conduct. Instead we turn to the issue of whether the record supports the judge's finding of **reckless** conduct... Davis was angry at the police officers and acting inappropriately, but we see no support in the record for a finding that she was 'consciously disregard[ing] a substantial and unjustifiable risk that' her conduct would result in 'public inconvenience, annoyance or alarm.' There was no evidence that there was 'public inconvenience, annoyance or alarm.' Although there was testimony by Lopez and Dill that members of the public had come out of their houses to observe what was going on, the municipal judge perceptively noted that there was 'no way of knowing why they came out of their houses.'... There was no testimony that anyone complained to the police about Davis's conduct, and no member of the public testified. In fact the police did not interview any of the bystanders. There was also no testimony that any member of the public took Davis's side during the encounter or in any way menaced or interfered with the police officers. A conclusion that there was 'public inconvenience, annoyance or alarm' or a realistic risk of such a condition would be based on pure speculation... While Davis's conduct was inappropriate and intemperate, it was not criminal under N.J.S.A. 2C:33-2. Consequently, we reverse the conviction and dismiss the charges against Davis." (Michael J. Pappa)
<http://www.judiciary.state.nj.us/opinions/a5172-09.pdf>

State v. Norman Jackson, unpublished opinion, App. Div. Docket No. A-5155-07T4 (March 15, 2011) - **Kidnapping** conviction vacated, other convictions and sentence affirmed. "Defendant argues his kidnapping conviction should be vacated because the State failed to introduce evidence that Chowdhury was transported a substantial distance or confined for a substantial period... Here, the evidence reveals that the State did not establish that defendant removed Chowdhury a substantial distance from the vicinity where he was found. Defendant entered Chowdhury's cab at the intersection of River and Lafayette Streets, robbed him of \$78, and exited a few blocks later. These circumstances establish only that the cab traveled a relatively short distance after the robbery occurred and

this distance was, thus, 'merely incidental' to the robbery... The purported confinement of Chowdhury was also insubstantial... According to Chowdhury, defendant entered his vehicle at approximately 8:30 p.m., and according to Sergeant Perales, defendant exited the cab at 8:30 p.m. Obviously, from Chowdhury's testimony, it may be assumed that the entire episode was more than instantaneous, but this testimony regarding the time at which defendant entered and exited the cab -- as well as the short distance traveled -- demonstrates that the event was very brief. In addition, there was no evidence to suggest that the risk to Chowdhury was enhanced by the so-called confinement or isolation. Chowdhury was at the greatest risk during the robbery; the risk was not increased or enhanced by his driving a few additional blocks with defendant in the vehicle." (Marcia Blum, A.D.P.D.)

<http://www.judiciary.state.nj.us/opinions/a5155-07.pdf>

State v. Elliott Malone, unpublished opinion, App. Div. Docket No. A-6176-09T4 (July 1, 2011) - Conviction for **improper use of a cell phone while driving, N.J.S.A. 39:4-97.3**, reversed, acquittal ordered. "[T]he Law Division incorrectly interpreted N.J.S.A. 39:4-97.3. In particular, contrary to the judge's findings: (1) the statute does not limit the use of a hands-free telephone to listening because a motorist using a hands-free wireless telephone is also permitted to hold the wireless telephone in one hand while activating, deactivating or initiating a function of the telephone; (2) initiating a function of the hands-free wireless telephone includes dialing; and (3) it may be necessary to press more than one button to 'activate, deactivate, or initiate a function of the telephone.' In sum, other than in an emergency, a motorist may only engage in a conversation on a cell phone if the telephone is equipped with a hands-free device; the motorist may not hold the telephone in one hand while talking to, or listening to, the person on the other end of the phone. A motorist is also prohibited from holding the telephone to send a text message or electronic mail. The only circumstance in which a motorist is permitted to hold a wireless cell phone in one hand, with the other hand on the steering wheel, is when the motorist is activating, deactivating or initiating a function of the telephone, which includes answering the phone, ending the phone call or dialing a phone number... [B]ecause the State did not prove that the 'pressing of buttons' in this instance constituted a violation of N.J.S.A. 39:4-97.3, defendant's

conviction must be reversed."

<http://www.judiciary.state.nj.us/opinions/a6176-09.pdf>

State v. Eric Rangel, ? N.J. Super. ?, 2011 N.J. Super. LEXIS 168 (August 22, 2011) - Convictions for **aggravated sexual assault committed during an aggravated assault on another** reversed. "We conclude that the proper interpretation of the phrase 'on another' in this section is that the aggravated assault must be on a third person, committed for the purpose of compelling the submission of the sexual assault victim. Elevation of the offense based on aggravated assault of the sexual assault victim is addressed in N.J.S.A. 2C:14-2(a)(6)... Because defendant was indicted and tried under N.J.S.A. 2C:14-2(a)(3), and the record does not establish that he assaulted a third party during his sexual assault of the victim, we vacate his convictions based upon that statutory section... The phrase 'on another' modifies only one of the seven predicate offenses listed in section (3), namely 'aggravated assault.' We deem it reasonable and logical to construe that anomaly as defining the situation in which an actor commits an aggravated assault, or attempts to commit such an assault, upon a third person such as a spouse or child, in order to compel a victim to submit to a sexual assault... [D]efendant seeks reversal only of count one. Count two, however, charges an attempt to violate N.J.S.A. 2C:14-2(a)(3); as such it suffers from the same deficiency we discuss below with respect to count one. Therefore, we exercise our original jurisdiction, pursuant to Rule 2:10-5, and reverse on that count as well." <http://www.judiciary.state.nj.us/opinions/a2051-09.pdf>

State v. Shelley, 205 N.J. 320 (2011) - Appellate Division judgment vacating defendant's conviction for **N.J.S.A. 2C:35-7 (distribution of CDS in a school zone)** affirmed. "Defendant admitted to selling cocaine to an undercover officer in the parking lot of a pub located within 1,000 feet of 'The Goddard School for Early Childhood Development of North Brunswick,' a local franchise of a nationwide chain of licensed day care providers offering programs for children from infancy through age six. This particular Goddard School included a kindergarten class with ten full-time students enrolled. The question raised by this appeal is whether the presence of a kindergarten class converts this childcare center into an '**elementary school**' for purposes of N.J.S.A. 2C:35-7. Because the plain language and legislative history of our

state's school-zone statute do not indicate that such enterprises as this Goddard School fall within its application, and because we must strictly construe the penal statute in issue, we affirm the Appellate Division judgment... During the legislative process, day care providers, nursery schools, and preschool programs clearly were removed from the bill's reach. Therefore, the law should be interpreted and applied consistent with that apparent legislative purpose. The plain legislative intent to exclude day care providers, nursery schools, and preschool programs suggests that the statute was not meant to apply to a facility such as the Goddard School, a licensed day care provider... Following the guidance provided by the legislative history, we find that the inclusion of a small kindergarten class does not transform a day care center into an elementary school for the purposes of construing and applying this criminal statute."

CUMULATIVE ERROR

State v. Ben McCallum, unpublished opinion, App. Div. Docket No. A-0857-09T3 (June 9, 2011) - Convictions reversed. "We need not decide whether any of the alleged errors individually require reversal of defendant's conviction and a new trial. Cumulatively, three errors committed at trial are of sufficient magnitude that the convictions must be reversed... We are hard-pressed to understand why the prosecution was permitted to present evidence of an entirely uncharged transaction and a seizure of drugs attributed not to defendant but to his brother Billy as evidence relevant to defendant's guilt. The prosecution's one-day presentation of evidence was divided almost equally between evidence relevant to defendant's transaction with Lopez, coupled with seizure of contraband from Lopez and the Chrysler, and Billy McCallum's transaction with the unidentified woman, coupled with seizure of contraband from the siding of the house... The prosecutor also asked the expert witness about the packaging and pricing of the cocaine seized from the siding and, by means of a lengthy hypothetical question reciting the facts relevant to Billy McCallum, to provide an opinion that the bags of cocaine seized from the siding were being concealed there for sale... Without any plausible connection to the crimes charged against defendant, the evidence pertaining to Billy should not have been admitted in defendant's trial... In the same vein, Detective Bender volunteered prejudicial testimony informing the jury that

he was familiar with defendant through prior arrests... The subject of defendant's prior arrests, however, was first raised unnecessarily by Detective Bender's unresponsive answer to a question about the contents of his police report. It was an improper insertion of information about defendant's prior contacts with the police that suggested a propensity to violate the law... Next, defendant argues persuasively that the prosecutor's examination of Detective Zorzi violated the strictures of case law limiting testimony from a narcotics expert. Detective Zorzi was asked a lengthy hypothetical question reciting the details of the surveillance of the two transactions, Billy McCallum's actions being designated as 'person A' in the hypothetical and defendant as 'person B.'... In soliciting these answers, the prosecutor neglected the holdings of several cases that admonished against using a narcotics expert to usurp the jury's fact-finding function... Here, the testimony of Detective Zorzi improperly and unnecessarily told the jury that a person might conceal drugs to hide it from the police and others and, more important, that a person engaged in conduct associated with defendant's actions was selling cocaine and hiding his stash in the tan Chrysler."

<http://www.judiciary.state.nj.us/opinions/a0857-09.pdf>

DEFENSES

State v. Robert Handy, ? N.J. Super. ?, 2011 N.J. Super. LEXIS 152 (August 4, 2011) - "This unusual case involves a defendant who, at a bench trial, was found not guilty of murder and other related offenses by reason of **insanity, but who sought to have a jury trial to seek acquittal on a theory of self-defense.** In rejecting defendant's motion to be tried first on his self-defense claim and instead proceeding solely with the insanity issue, the trial court was guided by our opinion in State v. Khan, 175 N.J. Super. 72 (App. Div. 1980), which prescribes a bifurcated procedure that gives primacy to the adjudication of an insanity defense. [W]e decline to adhere to the bifurcation sequence set forth in Khan... We instead hold that a defendant who wishes to present a substantive defense based upon at least some evidence, or who otherwise wishes to put the State to its burden of proving the elements of the offense beyond a reasonable doubt, should not be required to first submit to a trial restricted to the issue of insanity. Such an insanity trial, which might result in the defendant's indefinite

commitment in a mental institution, should not have to proceed first. Because, under the flawed mandate of Khan, defendant was not afforded the opportunity to present his claims of self-defense to a jury, we remand for further proceedings to provide that opportunity, on certain terms and conditions... Applying such double jeopardy principles here, we conclude that defendant is not precluded from seeking relief from his present disposition of a final judgment of not guilty by reason of insanity. However, as a fair condition of receiving the plenary trial on self-defense and other substantive issues that he desires on remand, defendant must voluntarily relinquish his insanity-based disposition in order to proceed with a trial on the merits. He is not entitled to both retain that judgment and obtain a new trial... We also refer the many issues of procedural design and potential rulemaking implicated by this case for prospective consideration by the Supreme Court's Committee on Criminal Practice." (Judith B. Fallon, First A.D.P.D.)

<http://www.judiciary.state.nj.us/opinions/a0401-09.pdf>

State v. Rivera, 205 N.J. 472 (2011) - Convictions affirmed. "Defendant William E. Rivera was convicted of the gruesome mutilation murder of his wife and the desecration of her remains. He did not deny killing his wife; his defense was that he was insane, and therefore should not be held culpable for his actions. At trial, defendant did not give notice of an intent to rely on diminished capacity as a defense and did not request that the jury be charged in respect thereof. For the first time on appeal, defendant asserted that the trial court had erred in failing to instruct the jury on **diminished capacity, that is, that he suffered from a mental disease or defect that would negate the knowing or purposeful state of mind required to be liable** for the crimes of which he had been convicted: the knowing or purposeful murder of his wife, and the knowing and unlawful desecration of her remains... Although we affirm the judgment of the Appellate Division [affirming the convictions], we reach that result via a different path, one that lies in parallel with the standard that governs a court's obligation to charge the jury sua sponte in respect of either lesser-included offenses or defenses. We hold that a trial court's obligation, on its own motion, to charge the jury in respect of theories that negate responsibility must be grounded in fact, and that duty does not arise unless, without scouring the record, it is clearly indicated or

clearly warranted by the evidence adduced. In this appeal, the psychiatric evidence presented by defendant focused only on his insanity defense and did not address whether defendant suffered from a diminished capacity sufficient to negate the mental state required to impose liability for the crimes of which he then stood charged. For that reason, we conclude that the trial court was not under a sua sponte duty to charge the jury on diminished capacity and, hence, the failure to do so did not constitute error." (Lon C. Taylor, A.D.P.D.; Michael A. Baldassare for amicus curiae ACDL-NJ)

State v. R.T., 205 N.J. 493 (2011) - Reversal of convictions affirmed by virtue of a 3-3 tie vote. "At issue in this appeal is the propriety of the trial court's issuance, sua sponte, of a **voluntary intoxication** instruction, over the objection of defense counsel who claimed that the instruction was unwarranted on the evidence and negatively impacted his trial strategy. Defendant was convicted of sexual offenses against a child and the Appellate Division, over a dissent, ordered a new trial based on the issuance of the charge. State v. R.T., 411 N.J. Super. 35, 53 (App. Div. 2009). The State appeals as of right. R. 2:2-1(a). The evidence in this case did not warrant a voluntary intoxication charge. Its issuance interfered with defendant's strategy and affected the fairness of his trial." [NOTE: Because of the tie vote, the opinion quoted from above has no precedential value in the New Jersey courts].

State v. Wilson, 421 N.J. Super. 301 (App. Div. 2011) - Convictions affirmed. "Defendant, who was diagnosed with Multiple Sclerosis (MS) in 2002, argues on appeal that he was entitled to a '**personal use defense**.'... 'Manufacture' is defined as 'the production, preparation, propagation, compounding, conversion or processing' of a CDS. N.J.S.A. 2C:35-2. The statute also states, however, that the definition 'does not include the preparation or compounding of a [CDS] ... by an individual for his own use.' Ibid. Therefore, the Legislature limited the exemption to only two of the six enumerated activities, and an individual who engages in the production, propagation, conversion, or processing of a CDS—even for his own use—commits a proscribed activity. [D]efendant's actions did not fall within the narrow personal use exemption because he did not engage in 'the preparation or compounding' of a CDS 'for his own use.' Ibid. Instead, defendant's actions

exemplified the 'production' of marijuana, which, by definition, includes planting, cultivation, growing, or harvesting.' Ibid... [T]he personal use defense for the preparation or compounding of a CDS does not apply to a charge of growing marijuana under N.J.S.A. 2C:35-5... As other courts have found, the purpose of the personal use exemption is to allocate culpability consistent with an individual's participation. Therefore, those who engage in 'a significantly higher degree of activity' with a CDS, such as growing it, cannot avail themselves of the exemption... Moreover, this interpretation is consistent with New Jersey's stated policy 'to distinguish between drug offenders based on the seriousness of the offense, considering principally the nature, quantity and purity of the [CDS] involved, and the role of the actor.' N.J.S.A. 2C:35-1.1(c)." (James R. Wronko)

DISCOVERY

State v. W.B., ? N.J. ?, 2011 N.J. LEXIS 567 (April 27, 2011) - Convictions affirmed. "While we now affirm the Appellate Division and sustain defendant's convictions, we hold that ... that an adverse inference charge may be given when a police officer destroys his or her investigatory notes before trial... Here, Det. Gade conceded on cross-examination that, after she wrote her report, she destroyed notes taken at interviews she conducted with both D.L. and defendant. She explained that she was taught by her superiors not to retain the contemporaneous notes... Our criminal discovery rules do not currently require the recordation of all statements of witnesses obtained by law enforcement officers. But they do provide for discovery of all statements whether signed or unsigned, of witnesses as well as police reports which are 'in the possession, custody and control of the prosecutor.' See R. 3:13-3(c)(6), (7) and (8). Therefore, we hold today that the Rule encompasses the writings of any police officer under the prosecutor's supervision as the chief law enforcement officer of the county. [Citations omitted]. If a case is referred to the prosecutor following arrest by a police officer as the initial process, or on a complaint by a police officer, see R. 3:3-1; R. 3:4-1, local law enforcement is part of the prosecutor's office for discovery purposes... Logically, because an officer's notes may be of aid to the defense, the time has come to join other states that require the imposition of 'an appropriate sanction' whenever an officer's written notes are not

preserved... starting thirty days from today, if notes of a law enforcement officer are lost or destroyed before trial, a defendant, upon request, may be entitled to an adverse inference charge molded, after conference with counsel, to the facts of the case. Although our holding regarding the discovery obligation is merely a reiteration of existing law, because defendant neither requested an adverse inference charge before the final jury instructions were given, nor raised the issue before filing his motion for new trial, we decline to hold he was entitled to such an instruction in this case." See also **EVIDENCE** and **JURY INSTRUCTIONS**. (Alison S. Perrone for amicus curiae ACDL-NJ)

<http://www.judiciary.state.nj.us/opinions/supreme/A8009StatevWB.pdf>

State v. Thomas Green, unpublished opinion, App. Div. Docket No. A-2507-09T4 (March 2, 2011) - Conviction reversed, new trial and discovery ordered. "[Defendant sought a new trial] to redress the Essex County Prosecutor's failure to disclose criminal charges that were pending against Taalib Muhammad for crimes committed in Newark when he testified at defendant's trial. Muhammad was the 'prosecution's chief witness,' and he implicated defendant ... in the kidnapping and fatal shooting... The first difficulty with the judge's decision is that he applied the wrong legal standard... This defendant's application was supported by adequate evidence of a Brady violation to require additional discovery. Defendant presented official records that indicate that there were serious charges pending against Muhammad on complaints of crimes committed in Newark when the prosecutor told the judge there were none. It is noteworthy that the judge directed the prosecutor to investigate further, but despite that direction, the State never uncovered or disclosed these charges... In our view defendant's showing was unquestionably adequate to require disclosure of the prosecutor's file on Muhammad's indictment and the State's full record of open complaints against him during the pertinent time period. Indeed, this is not a case where defendant's claim is so speculative and clearly immaterial that no discovery is required... The State's delay between the alleged crimes and the return of the indictment and its subsequent dismissal will likely confirm or dispel suspicion that Muhammad had a motive to cooperate with the State by helping the State by testifying against defendant. Moreover, the State must disclose the records sought if it

hopes to defeat what, on this record, is a well-warranted basis for imputing knowledge of Muhammad's pending charges to the prosecutor. Finally, discovery is likely to inform the essential task of assessing the probable impact of Muhammad's pending charges on the verdict. Indeed, information about Muhammad's possession of a machine gun shortly after Williams' death may provide extrinsic evidence with value beyond its relevance to Muhammad's motive for testifying against defendant." (Paul Casteleiro)

<http://www.judiciary.state.nj.us/opinions/a2507-09.pdf>

DOUBLE JEOPARDY

DYFS v. R.D., 207 N.J. 88 (2011) - Appellate Division judgment reversed, case remanded to Family Part for further proceedings. "The primary question presented in this appeal is whether determinations made in the adjudication of an abuse or neglect proceeding under Title Nine of the New Jersey Statutes, N.J.S.A. 9:6-8.21 to -8.73, can be given collateral estoppel effect in later guardianship/termination of parental rights proceedings under Title Thirty of the New Jersey Statutes, N.J.S.A. 30:4C-11 to -15.4. We conclude that, unless the parties are on notice that the Title Nine proceedings are to be conducted under the higher, clear and convincing evidence standard constitutionally required for Title Thirty proceedings and appropriate accommodations are made for the fundamentally different natures of these disparate proceedings, Title Nine determinations cannot be given collateral or preclusive effect in any subsequent and related Title Thirty proceedings." (Thomas G. Hand [on the brief] for R.D.)

State in the Interest of W.G., unpublished opinion, App. Div. Docket No. A-0559-09T4 (March 17, 2011) - Adjudication of delinquency for joyriding reversed. "[T]he 'purpose to withhold temporarily from the owner' required by [N.J.S.A. 2C:20-10](b) necessarily involves acts including the unauthorized taking, operation, or exercise of control over a motor vehicle. It is not reasonable to equate the mere act of being a passenger in a motor vehicle known to be stolen with any of these activities. In contrast, subsection (d) of the statute states: '[a] person commits a crime of the fourth degree if he enters and rides in a motor vehicle knowing that the motor vehicle has been taken or is being operated without the consent of the owner

or other person authorized to consent.' N.J.S.A. 2C:20-10(d). The language of that section clearly applies to this scenario. Here, the State proved only that the juvenile must have known the Honda was stolen because of the condition of the ignition and the use of an object, as opposed to a key, to start the car... Because the State could not prove anything more than the juvenile's presence in a patently stolen motor vehicle, we believe the failure is one of proof and not process, and that the double jeopardy clause bars retrial. Because no purposeful conduct was proven beyond the intent to hitch a ride in a stolen car, the State did not prove the elements of the subsection (b) offense. The State did not prove appellant's unauthorized taking, operation, or control, or the purpose to withhold temporarily from the owner." <http://www.judiciary.state.nj.us/opinions/a0559-09.pdf>

State v. Joseph Schubert, Jr., unpublished opinion, App. Div. Docket No. A-1110-09T4 (April 26, 2011) - "Defendant Joseph Schubert, Jr., appeals from the denial of his petition for post-conviction relief (PCR) seeking to vacate an April 30, 2008, amended judgment of conviction imposing community supervision for life (CSL) pursuant to N.J.S.A. 2C:43-6.4. We now reverse the denial of PCR and the post-judgment imposition of CSL, and reinstate the June 23, 2000, judgment of conviction... The judge made no mention of CSL when he imposed sentence. The judge entered a judgment of conviction on June 23, 2000, and sentenced defendant to three years of probation, required defendant to maintain full-time employment, ordered restitution, and imposed fines and penalties. The judge did not indicate that he sentenced defendant to CSL, even though the judgment of conviction form contained a place to check off this requirement. Defendant completed his term of probation and was released on June 18, 2003, without any violations. The State never moved pursuant to Rule 3:21-10(b)(5) during the term of probation to correct the sentence imposed. On October 3, 2007, the Parole Board wrote to the sentencing judge and asked him to review defendant's case and advise the Parole Board whether the sentence imposed should have included a special sentence of CSL pursuant to N.J.S.A. 2C:43-6.4a. A copy of that letter was sent to defendant's former attorney, but no copy of the letter was sent to defendant... On June 19, 2008, the Parole Board notified defendant of the amended judgment of conviction requiring CSL... Here, ... the time for the State to appeal had expired, and defendant had completed his

sentence before the amendment of his judgment of conviction and been released into the community. We recognize the salutary purposes of CSL, but we cannot enforce a legislative mandate where to do so would place defendant in jeopardy of being sentenced twice. Although he certainly was aware at his plea that he was subject to something called CSL, the State slept on its rights for a long period of time, during which defendant's expectation of finality arose." (Philip De Vences)

<http://www.judiciary.state.nj.us/opinions/a1110-09.pdf>

EVIDENCE

In the Matter Of Subpeona Duces Tecum On Custodian of Records, ? N.J. Super. ?, 19 A.3d 1032 (App. Div. 2011) - Quashing of subpoena affirmed. "The issue presented by this appeal is whether a **defendant's application for representation by the Public Defender and the factual materials submitted in support of that application are protected by the attorney-client privilege.** We conclude that under the circumstances of this case, where defendant's application for representation by the Public Defender and supporting materials may contain information the State could use against him in the prosecution of the charges for which he sought such representation, defendant may invoke the attorney-client privilege... Defendant is charged with offenses that directly relate to his financial condition and dealings, including failure to file tax returns, failure to pay gross income taxes, and money laundering. Thus, the materials sought by the Attorney General's subpoena could very well include documents or other materials that would be useful to the State in prosecuting the pending charges against defendant. If any of those materials would not be discoverable by the State under Rule 3:13-3(d), their production in response to the Attorney General's subpoena would place defendant in a position where his confidential disclosures to obtain representation by an attorney could be used against him in the very proceeding in which he sought representation. This would violate one of the basic purposes of the attorney-client privilege, which is to allow a person to seek legal representation without suffering any detrimental consequences. [Citation omitted]. Furthermore, the reason defendant submitted the materials the Attorney General sought to subpoena was to obtain representation by the Public Defender. Consequently, defendant would be subject to the potential use of those materials in the pending

criminal proceedings against him solely because of his putative indigency. This would be contrary to the principle that indigent clients who seek representation at public expense are entitled to the same degree of protection under the attorney-client privilege as non-indigent clients who seek to retain private counsel."

State v. W.B., ? N.J. ?, 2011 N.J. LEXIS 567 (April 27, 2011) - Convictions affirmed. "While we now affirm the Appellate Division and sustain defendant's convictions, we hold that Child Sexual Abuse Accommodation Syndrome (CSAAS) expert testimony cannot include any reference to the credibility of sexual abuse victims... Dr. Coco's testimony included an assertion that only 5-10% of children exhibiting CSAAS symptoms lie about sexual abuse. Such testimony creates an inference that D.L. told the truth in her original accusation, despite her motives to fabricate the allegations, and notwithstanding her trial testimony recanting them. Certainly, that is not the purpose of CSAAS testimony or the reason for its admission. Even Dr. Coco so acknowledged. Accordingly, we hold that expert testimony about the statistical credibility of victim-witnesses is inadmissible. Statistical information quantifying the number or percentage of abuse victims who lie deprives the jury of its right and duty to decide the question of credibility of the victim based on evidence relating to the particular victim and the particular facts of the case. Any CSAAS expert testimony beyond its permissible, limited scope cannot be tolerated... [However], the totality of the circumstances did not deprive defendant of a fair trial, and reversal is not warranted." See also DISCOVERY and JURY INSTRUCTIONS. (Alison S. Perrone for amicus curiae ACDL-NJ) <http://www.judiciary.state.nj.us/opinions/supreme/A8009Stat evWB.pdf>

State v. Mark Brantley, unpublished opinion, App. Div. Docket No. A-3180-07T4 (March 15, 2011) - Convictions reversed. Defendant contends "that the trial judge **erred in prohibiting him from cross-examining the ACU officers about a federal civil-rights lawsuit he filed against them** 'to demonstrate bias and motivation to testify falsely' at the time of trial. Defendant urges that this erroneous ruling deprived him of his Sixth Amendment right to confront witnesses against him. He asserts that this error cannot be considered harmless since '[t]he only other evidence supporting the State's case was the ACU officers'

testimony concerning their surveillance.'... First, there can be no question that the existence of the later-filed lawsuit was relevant to the officers' credibility at the time of trial, even though its existence did not directly impeach the arrest at issue here. But lack of impeachment for the arrest is not determinative and should not have been considered by the judge. The conclusion that it was not relevant was a 'clear error of judgment.'... Second, N.J.R.E. 404(b) was hardly helpful to the analysis of the issue. Although it bars evidence of '[o]ther crimes, wrongs, or acts,' the questions seeking to elicit Gould's or Schuster's knowledge of defendant's civil-rights lawsuit against them was not evidence of other crimes, wrongs, or acts because all that was sought to be elicited was the fact that defendant had sued them... As defendant quite correctly points out, the issue is governed by N.J.R.E. 607 and 403. Evidence of the existence of the lawsuit was clearly admissible under the former rule as it was 'relevant to the issue of credibility.' N.J.R.E. 607... Mere pendency of the lawsuit per se carried no undue prejudice, would not have confused the issues, and would not have misled the jury. The State could have met this evidence by establishing that the officers were unaware of it at the time of the arrest and that their testimony at trial was based on the events surrounding the arrest and not affected by the subsequent lawsuit... The evidence that the State touted on defendant's behalf as prejudicial was an altogether different issue and one properly the subject of analysis under N.J.R.E. 403. The judge's error was in conflating the two issues... Here, Schuster's credibility in identifying defendant as the seller was critically important because Garcia did not testify at the second trial and there was some uncertainty in his in-court identification during the first trial, making Schuster the only eyewitness to the drug transaction who testified live at the second trial. Precluding defendant from impeaching Schuster was a clearly mistaken exercise of discretion much to defendant's prejudice." (Richard W. Berg, Designated Counsel)

<http://www.judiciary.state.nj.us/opinions/a3830-07.pdf>

State v. Terrel Bridges, unpublished opinion, App. Div. Docket No. A-3343-08T4 (July 28, 2011) - Convictions reversed. "[D]efendant is entitled to a new trial because the State's **expert's testimony improperly invaded the province of the jury** to decide the ultimate question of defendant's guilt... The State had to prove that defendant

engaged in an illegal narcotics transaction with the buyer. Because the police never apprehended the buyer or the item or items defendant handed her, and because no one actually saw narcotics exchange hands, the narcotics seized from defendant's car was the only evidence showing that defendant may have engaged in a narcotics transaction. Thus, the State attempted to prove, through Detective Liput, that the item or items exchanged between defendant and the buyer was a portion of the drugs subsequently recovered from defendant's car. To do so, the prosecutor asked the detective a hypothetical question that mirrored the facts in evidence as to how the narcotics transaction occurred... Here, ..., the question was whether defendant had distributed narcotics. Detective Liput did more than merely opine whether the seller in the hypothetical scenario possessed the narcotics for personal use or distribution purposes. He opined that the transaction was 'an illegal hand-to-hand transaction for narcotics,' and 'the \$53 was proceeds from the illegal narcotic sales.' This testimony went to the ultimate issue of defendant's guilt in an area not beyond the ken of the average juror, thus invading the province of the jury to decide the ultimate question. Accordingly, Detective Liput's testimony as to the illegality of the transaction constituted plain error requiring a new trial." See also **SEARCH AND SEIZURE**. (Alison Perrone, Designated Counsel) <http://www.judiciary.state.nj.us/opinions/a3343-08.pdf>

State v. Calleia, 206 N.J. 274 (2011) - Convictions reinstated. "As a part of its case against defendant, the State sought to introduce statements made by the victim to the effect that she was unhappy in her marriage, that she wanted a divorce, and that she was seeking the assistance of lawyers. On the day before trial, defendant made a motion in limine to exclude the victim's statements. The court denied the motion, ruling that ... hearsay statements by Susan were admissible under N.J.R.E. 803(c)(3) as evidence of the victim's state of mind to show the nature of the relationship between the victim and defendant and whether their relationship had any significance in establishing defendant's motive to kill his wife... A deceased victim's then-existing state of mind cannot directly prove a defendant's motive; the state-of-mind exception to the hearsay rule does not permit imputation of a defendant's state of mind out of no more than a deceased person's feelings about that defendant. That is to say, subject to certain exceptions, a fact probative of the

victim's state of mind, standing alone, does not tend to prove any material fact about a defendant's conduct or state of mind... However, the legal premise urged by defendant -- that a decedent's hearsay statements are never admissible to prove defendant's motivation -- does not necessarily follow... Case law and treatises have recognized the special role of motive evidence and its unique capacity to provide a jury with an overarching narrative, permitting inferences for why a defendant might have engaged in the alleged criminal conduct... Thus, **when a victim's state-of-mind hearsay statements are relevant to show the declarant's own conduct, and when such conduct is known or probably known to the defendant, it also can give rise to motive, and the statements become admissible for that purpose**, subject to the usual balancing under N.J.R.E. 403. That conclusion is consonant with the broad leeway allowed for submissions of motive evidence... It takes no great leap of intuition to understand that divorce could motivate a person to kill... It is surely consistent with the essential role of the jury to assess whether a given defendant might be driven to kill to avoid a divorce, with its attendant costs, or whether the prosecution has failed to show that the asserted motivating factors could in fact drive the defendant to commit the acts alleged... All that said, we are not unconcerned, however, with the sheer amount of evidence the trial court permitted, all cumulative of the same essential point: that Susan Calleia intended to divorce her husband and had likely taken a number of actions to that effect... Here there was no hard evidence, nor any likelihood that could be inferred, that defendant was aware of many of the victim's specific actions revealed through the hearsay testimony of Susan's statements. We note that defendant knew generally of Susan's intentions about, but not the precise circumstances of, Susan's meeting with a divorce attorney, that marriage counseling did not change her mind about her interest in a divorce, and that she was looking at property into which she and her daughter could move... Nor does the record support any inference that defendant would have known of Susan's professed intent to sign a retainer agreement that night, or of Susan's individual conversations with each of the attorneys with whom she met. Nonetheless, we perceive no reversible error... In conclusion, a deceased victim's hearsay statements that do not express a fearfulness of defendant are not categorically prohibited from admission through the state-of-mind exception as evidence of motive. Any error in this case stemming from the cumulative nature

of the submissions and the potential overuse of the hearsay exception for a motive purpose is harmless."

State v. Dwayne Gillispie and Gregory Buttler, ? N.J. ?, 2011 N.J. LEXIS 639 (June 9, 2011) - Convictions reinstated. "We granted certification, following the Appellate Division's reversal of defendants' murder convictions at separate trials, to determine the **State's obligation to 'sanitize' the details of 'other-crimes' evidence introduced under N.J.R.E. 404(b) to prove defendants' identity**. During defendants' trials on offenses related to a double homicide that occurred in Barnegat on the evening of November 28, 2000, the State introduced other-crimes evidence concerning a robbery that had occurred at a barbershop in the Bronx twenty days earlier. The evidence established that the same handgun was used to perpetrate both the barbershop robbery and the subsequent murders, and the trial court admitted evidence of the barbershop robbery because it was deemed relevant to the disputed issue of identity... The fact that ballistics testing revealed that the gun used in the Bronx barbershop shooting was the same as the gun used in the Barnegat murders is highly relevant to the disputed material issue of identity given the evidence linking defendants to the Bronx barbershop shooting. Accordingly, because we are not dealing with a 'signature crime,' we agree with the Appellate Division's holding under the first prong [of the Cofield test]... However, there is no excuse for admitting the unduly prejudicial evidence of the details of the barbershop robbery, including that a bullet fell from the body of a victim. The fact that the gun used in the Bronx shooting was the same gun used in the Barnegat murders, coupled with Gillispie's admission to its possession while in custody in the Bronx, would have sufficed to prove identity without the details involving the actual shootings and the injury of Folks... Hence, we hold that while the first three prongs of the Cofield test were satisfied, the admission of the details of the barbershop robbery was unduly prejudicial and was not outweighed by any probative value. We thus agree with the Appellate Division that the admission of the detailed evidence concerning the barbershop shootings violated the fourth prong of Cofield and should not have been admitted... We take this occasion to remind litigants and trial judges that other-crimes evidence must be appropriately sanitized... In the present case, because of its ruling the trial court gave a general instruction that encompassed identification, motive, and

plan. Instead, the trial court should have instructed that the evidence regarding the barbershop robbery (including evidence of a shooting which led to the police possession of the cartridge casings -- but limited to its essentials) be considered only for the limited purpose of tying the murder weapon to Gillispie and his accomplice -- in other words, only for the issue of identity and not to bolster Mercer's credibility or as propensity evidence... It is the State's primary contention in its petition for certification that, despite the panel's finding of errors, Gillispie and Buttler both received fair trials, and **any alleged errors were harmless.** We agree." <http://www.judiciary.state.nj.us/opinions/supreme/A10109StatevGillispieandButtler.pdf>

State v. Gore, 205 N.J. 363 (2011) - Convictions reinstated, case remanded to Appellate Division for consideration of sentencing issues. The Appellate Division reversed this murder conviction because it "concluded that the trial court erred in **allowing the jury to have a copy of defendant's formal confession, which the State had transcribed as he was providing it, but which defendant neither signed nor acknowledged to be correct...** [Relying on] State v. Cleveland, 6 N.J. 316 (1951), the panel determined that defense counsel's failure to object to the use of the formal statement did not excuse its admission into evidence... Defendant does not challenge Detective Rios's recitation at trial from the formal transcribed statement as a refreshed recollection, which allows us to accept as a premise for purposes of this appeal that in all other respects the document met the requirements of Rule 803(c)(5). Defendant's only claim of reversible error rests on the trial court's belated admission into evidence of the unobjected-to transcribed formal statement of confession, which defendant had neither signed nor reviewed... Cleveland and its progeny preceded ... the 1967 codification of the New Jersey Rules of Evidence. Cleveland represents case law that has been superseded by the adoption of our formal rules of evidence, which represent a cohesive and comprehensive approach to the presentation of evidence in our trials, criminal as well as civil... It is inexplicable that an exhibit was allowed to be moved into evidence after the record had closed in defendant's trial. However, as noted earlier, it is not apparent that the late discovery worked any harm on defendant... Indeed, in light of the mass of evidence supporting his guilt, we are confident that no injustice

occurred in defendant's trial... Examining this record as a whole, there appears no reasonable likelihood that the exhibit S-2 caused the jury to reach a conclusion that it otherwise would not have reached." (Marcia H. Blum, A.D.P.D.)

State v. Julio Heisler, ? N.J. Super. ?, 2011 N.J. Super. LEXIS 94 (May 17, 2011) - Convictions reversed. "In this case, the State served defendant with a copy of the lab certificate and notice of intent to offer it into evidence, but the State did not furnish the related reports. More than ten days after receiving the certificate, defendant objected. The municipal court agreed with the State that defendant's objection was untimely, and allowed the certificate into evidence. On de novo review, the Law Division agreed and considered the lab certificate. We hold that the **trial court failed to comply with N.J.S.A. 2C:35-19 by admitting the lab certificate into evidence without testimony from its author.** We so hold because the ten-day period in which a defendant must object to the admission into evidence of a lab certificate begins to run only after the State has served upon the defendant all related lab reports. Therefore, defendant's objection was timely... To rule otherwise would undermine the dual goals of the notice and demand statute, N.J.S.A. 2C:35-19: (1) to enable defendants to make informed decisions regarding whether to object; and (2) to conserve time and resources of State Laboratory personnel by avoiding unnecessary court appearances... To harmonize the two deadlines included in section 19c, we conclude that the ten days within which a defendant must object or waive begins to run only after the State has disclosed the supporting data as well as the NOI. Thus, if the State fails to disclose the supporting data with the NOI, there is no automatic waiver of the right to confront the report's author. If the author does not appear as a witness at trial, admission of the lab certificate violates defendant's confrontation rights... [W]e reverse defendant's convictions for being under the influence of CDS, N.J.S.A. 2C:35-10(b), and for operating a vehicle while knowingly having CDS in his possession or in the motor vehicle, N.J.S.A. 39:4-49.1. Both convictions may have rested in part on the lab certificate... However, the State shall not have the opportunity to call the lab analyst and to cure the initial error of admitting the lab certificate. 'A remand is inappropriate in order to afford the State the opportunity to provide proofs it should have

provided in the initial trial which were necessary to support a conviction.' State v. McLendon, 331 N.J. Super. 104, 108 (App. Div. 2000)."

<http://www.judiciary.state.nj.us/opinions/a6281-08.pdf>

State v. Phillip Johnson, ? N.J. Super. ?, 2011 N.J. Super. LEXIS 165 (August 19, 2011) - "Because of two trial errors that prejudiced defendant's right to a fair trial, we reverse the conviction and remand for a new trial... Defendant argues prejudicial violation of the Supreme Court's directives regarding police testimony as set forth in State v. Bankston, 63 N.J. 263 (1973), and State v. Branch, 182 N.J. 338 (2005). He contends 'the trial court's instructions and the prosecutor's comments during summation that the State was precluded from asking Detective Sheppard about how he linked Snap to the shooting erroneously circumvented the limitations outlined in [Bankston and Branch], and deprived [him] of his rights to confrontation and due process.'... Here, the **jury charge and the prosecutor's summation remarks violated Bankston and Branch because they implied that the State had additional information about defendant's guilt from an undisclosed source.** That this inference was created by the prosecutor's summation and the court's instruction to the jury, rather than a police officer's testimony, makes it no less prejudicial. The prosecution could not circumvent the holdings of Bankston and Branch by suggesting to the jury information it could not have elicited directly from Detective Sheppard. The State argues that the doctrine of invited error should excuse the reference because defense counsel 'opened the door' when she argued to the jury that Sheppard 'both wanted and forced [the juvenile] to finger Snap.'... [E]ven if we were to apply the doctrine of invited error, the prosecutor's argument in summation went beyond appropriate rebuttal. By arguing that Sheppard 'knew he had information' about defendant's potential involvement in the crime before questioning the juvenile, the prosecutor improperly suggested that the State had additional evidence about defendant's guilt that was not presented to the jury... Defendant also argues he was **prejudiced when Detective Sheppard testified that he obtained his picture for the photo array from a 'Mug Master' database...** The reference suggested to the jury that defendant had a criminal record, adding to the inference improperly argued in summation and reinforced in the court's instructions that the State had additional information about defendant's guilt that it was not permitted to put in evidence. The

error compounded the prejudice to defendant and tainted the jury's evaluation of the admissible evidence." <http://www.judiciary.state.nj.us/opinions/a5686-08.pdf>

State v. D.K., unpublished opinion, App. Div. Docket No. A-1818-09T2 (June 1, 2011) - Convictions reversed. "In this appeal of defendant's conviction for the sexual abuse of his stepson, B.D., we reverse and remand for a new trial due to the judge's admission of photographs of defendant's stepdaughter, C.D. The State was permitted to use these so-called 'distasteful' photographs to challenge the credibility of defendant's testimony that he had a good parental relationship with his stepdaughter and never sexually abused her. Because the judge erred in admitting the photographs due to their slim nexus to the charges in question and their potential for prejudice -- an error exacerbated by the lack of cautionary instructions for the jury -- we remand for a new trial... We agree with the State that N.J.R.E. 404(b) did not authorize admission of the photographs, and we reject the State's argument that N.J.R.E. 405(b) may support their admission because the so-called 'good parent trait' is not an 'essential element' of the charges the jury was required to decide... The judge was not mistaken when he determined that defendant opened the door to an attack on his credibility on that point but we conclude that the use of the photographs remained improper because their limited probative value on that point was greatly overridden by the photograph's potential for prejudice... That error was further exacerbated by the judge's failure to instruct the jury as to the photographs' limited use, leaving the jury to speculate about their weight and application. Considering that the evidence regarding the charged offenses consisted mainly of the testimony of B.D. and defendant, the potentially incendiary nature of the photographs could have meant all the difference in this matter. We conclude that the State's use of the photographs deprived defendant of a fair trial." <http://www.judiciary.state.nj.us/opinions/a1818-09.pdf>

State v. Dana Leight, unpublished opinion, App. Div. Docket No. A-3036-08T4 (June 22, 2011) - Convictions reversed. "[P]rior to trial, the assistant prosecutor represented to defense counsel that the charges only involved three of the checks that the State had produced in discovery, specifically, the three Valley National checks totaling \$325.04. Even so, at trial, the trial court permitted M.M. to testify that five other checks did not

bear his signature. The jury found defendant guilty of forging all eight checks. We are convinced that the trial court **erred by allowing the State to introduce evidence to establish that defendant forged checks other than the three Valley National checks** and the error requires reversal of defendant's conviction on count two. We recognize that the assistant prosecutor said that she, too, had been surprised when M.M. testified that checks other than the three Valley National checks did not bear his signature. Nevertheless, the assistant prosecutor's surprise did not allow the State to disregard its agreement that count two only involved the three Valley National checks. The State argues, however, that the admission of the five First Union checks into evidence was permissible because, later in the trial, the court granted its application to amend the indictment... The amendment of the indictment to include the five First Union checks written prior to September 2004 was a charge of 'another or different offense from that alleged[.]' Therefore, the amendment was not permitted by Rule 3:7-4... Moreover, the record shows that defendant was prejudiced by the admission the First Union checks because his attorney was not afforded sufficient time to investigate those checks, although he may have believed otherwise during the trial. Defense counsel asserted that, after the trial, he found additional evidence which established that defendant had not forged several checks, including the \$509 First Union check... [I]t is clear that the jury's verdict on count four was based upon its finding that defendant had forged checks other than the three Valley National checks. Because the trial court erred by allowing the State to present the five First Union checks into evidence, the verdict on count four [identity theft] also must be reversed."

<http://www.judiciary.state.nj.us/opinions/a3036-08.pdf>

State v. Glen A. Mays, unpublished opinions, App. Div. Docket No. A-2857-09T1 (July 21, 2011) - Convictions reversed. "**Defendant was prejudiced** at trial ... when the prosecution requested during the jury charge conference, and the trial court agreed to give, a [State v.]Clawans[, 38 N.J. 162 (1962)] **adverse inference instruction** to the jury if defendant did not call his sister to testify in the defense case... This was not a case where the prosecutor merely commented in closing argument on the failure of the defense to call a witness but the court did not give a Clawans adverse inference instruction... The court ruled it would give a Clawans charge unless the defense called

Verges to testify... We also reject the State's argument that the Clawans issue became moot when defense counsel called Verges to testify, and she provided beneficial testimony for the defense. At the charge conference, defense counsel not only protested that he had no control over Verges but also stated he did not want to call her in the defense case because she had already been proven to have lied to the police several times in the course of their investigation after the stabbing. The prosecution's request and the court's ruling put the defense in the position of either calling a witness with questionable credibility that could and did harm the defense or facing the court's 'imprimatur' on the State's anticipated closing argument that her testimony would have harmed the defense. The prosecution took full advantage of Verges's presence on the witness stand and cross-examined her to its advantage by means of leading questions to demonstrate that her exculpatory version of the events was false... The prosecution's use of the witness's false testimony against defendant was prejudicial error that requires us to grant to defendant a new trial."

<http://www.judiciary.state.nj.us/opinions/a2857-09.pdf>

State v. Gino McCoy, unpublished opinion, App. Div. Docket No. A-1095-06T4 (April 18, 2011) - Convictions reversed. "We agree that the **questioning of Pasteur and Wolff regarding defendant's alleged drug use, as well as the cross-examination of defendant regarding his statement to Pasteur, was improper** and cannot be approved under any theory advanced by the State, either at trial or before us... There is no permissible basis for the questioning of Pasteur or Wolff regarding defendant's heroin use. It was not relevant ... and it was highly prejudicial... The physical description Pasteur obtained from Wolff was relevant, but the fact that Wolff told Pasteur that defendant had a drug problem was not. While that information might have led Pasteur to focus his investigation upon defendant, the detective's reason for focusing upon defendant was not an issue in dispute. Pasteur knew that Hill's earlier statement had already implicated defendant. Combined with the couple's arrest in Metuchen, there was ample evidence for the jury to understand why defendant was brought to the police station for questioning. Wolff's reasons for firing defendant were also irrelevant to any material issue at trial. Furthermore, the prejudicial effect of the testimony far outweighed any probative value... The evidence was also

inadmissible on the theory that defendant 'opened th[e] door' by asking Hill if she had a drug problem. We fail to see how Hill's alleged drug use, which she denied, had anything to do with defendant's alleged use of heroin or any material fact in dispute... The jury was permitted to hear from defendant's former employer -- the victim of the robbery -- that defendant was addicted to heroin, acknowledged that he had 'a monkey on [his] back[,] and was recently fired because he demanded to be paid on a daily, as opposed to weekly basis. The jury quite possibly concluded defendant's drug addiction provided a motive for the robbery; indeed, that supposition was strengthened by Pasteur's testimony that Wolff's description of defendant's drug use was a reason why the detective focused his attention upon defendant. The prosecutor's impermissible cross-examination of defendant regarding his statement to Pasteur quite probably planted in the jury's mind the belief that defendant was suspected of committing various other crimes of acquisition, including other robberies, a burglary and a forgery. The connection with defendant's heroin abuse was implicit."

<http://www.judiciary.state.nj.us/opinions/a1095-06.pdf>

State v. McGuire, 419 N.J. Super. 88 (App. Div. 2011) - Convictions and sentence affirmed. "Defendant argues more vigorously that Lesniak was erroneously permitted to testify as an **expert in tool mark analysis** and to conclude that the two sets of bags were a match. She argues that Lesniak was not qualified to testify about manufacturing of plastic bags and that his tool mark analysis was inadmissible 'junk science.'... In the trial court, defense objections to Lesniak's testimony did not include the argument made for the first time on appeal that tool mark analysis as a discipline is not scientifically reliable. We do not have a factual record to evaluate thoroughly defendant's new argument that expert tool mark analysis should not be admitted at all in our courts... Despite the absence of a factual record, we have considered defendant's arguments based on scientific literature issued since the time of her trial... We find no error in the trial court's implicit acceptance of tool mark analysis as a proper subject for expert testimony... Here, Lesniak testified that the FBI and ATF offer training courses in tool mark analysis, and a standardized proficiency examination has been devised to certify tool mark analysts. He explained the basic premises of the discipline and provided examples of how such tool mark analysis is performed. He stated he

had been conducting tool mark examinations for many years and had previously testified as an expert in that discipline. His testimony, therefore, established the general acceptance of the discipline in the forensic evidence community. Moreover, tool mark analysis is not a newcomer to the courtroom... 'Proof of general acceptance does not mean that there must be complete agreement in the scientific community about the techniques, methodology, or procedures that underlie the scientific evidence.' [Citation omitted]. Tool mark identification has been generally accepted and admitted in many courts, both within and outside New Jersey. On the record developed at trial in this case, and considering the arguments made now on appeal, we find no error in admission of tool mark analysis as a field appropriate for expert testimony."

State v. McLaughlin, 205 N.J. 185 (2011) - Convictions reversed. "In this appeal, we focus on the beginning portion of that [N.J.R.E. 803(c)(3)]: whether a **statement of a declarant's state of mind** is admissible as an exception to the hearsay rule when it imputes to a third party the present intention to commit a future act... The 'state of mind' hearsay exception should be construed narrowly, focusing specifically on the declarant's state of mind and whether that state of mind is directly relevant to the issues at trial... The governing principle is simply stated: to be admissible under the state of mind exception to the hearsay rule, the declarant's state of mind must be 'in issue.' [Citations omitted]. In sum, then, '[t]he necessary predicate to admission of such evidence is that: a) the statement reflects a mental or physical condition of the declarant which constitutes a genuine issue in the case or b) the statement is otherwise relevant to prove or explain the declarant's conduct.'... [Citations omitted]. For that reason, just as a 'victim's state of mind [is] not a relevant issue to be decided by the jury[,]...', so too an absent codefendant's state of mind hearsay statement concerning his own state of mind -- one that does not qualify as a co-conspirator declaration -- does not address a relevant issue to be decided by the factfinder... Furthermore, when, as here, the state of mind hearsay statement directly implicates the defendant, the identity of the non-declarant defendant must be redacted before the hearsay statement is admitted in evidence... In sum, then, the challenged hearsay testimony was plain: Jessica Pabón testified that Serrano told her that he and defendant were going to rob someone whose description matched the victim.

Because those hearsay statements do not qualify as having been made in the course and furtherance of a conspiracy, the grounds on which they initially were offered and admitted -- as a co-conspirator declaration under N.J.R.E. 803(b)(5) -- cannot sustain their admission. We further conclude, however, that because the declarant's -- Serrano's -- state of mind was not relevant to the questions of guilt being tried at defendant's trial, the unredacted hearsay statements also do not qualify under the state of mind exception to the hearsay rule codified at N.J.R.E. 803(c)(3) and that defendant's identity should have been redacted from the hearsay statement. We therefore hold that the trial court abused its discretion in admitting those unredacted statements as evidence in the case, ... , and that their admission was error 'of such a nature as to have been clearly capable of producing an unjust result[.]' [Citations omitted]."

State v. McLean, 205 N.J. 438 (2011) - Conviction reversed. "In this matter, we address the permissible scope of lay opinion testimony in the context of prosecutions involving alleged street-level narcotics transactions. More specifically, we consider whether a police officer, who observed defendant Kelvin McLean engage in behavior that the officer believed was a narcotics transaction, should have been permitted to testify about that belief pursuant to the lay opinion rule. See N.J.R.E. 701. Because we conclude that the **opinion offered by the officer does not meet the requirements needed to qualify it as a lay opinion**, and because we conclude that permitting the officer to testify about his opinion invaded the fact-finding province of the jury, we reverse defendant's conviction and remand for further proceedings... [T]he State suggests, and the appellate panel agreed, that there is a category of testimony ... that authorizes a police officer, after giving a factual recitation, to testify about a belief that the transaction he or she saw was a narcotics sale. We do not agree. Were we to adopt that approach, we would be transforming testimony about an individual's observation of a series of events, the significance of which we have previously held does not fall outside the ken of the jury, ... into an opportunity for police officers to offer opinions on defendants' guilt. To permit the lay opinion rule to operate in that fashion would be to authorize every arresting officer to opine on guilt in every case... [T]he testimony of the police detective, because it was elicited by a question that

referred to the officer's training, education and experience, in actuality called for an impermissible expert opinion. To the extent that it might have been offered as a lay opinion, it was impermissible both because it was an expression of a belief in defendant's guilt and because it presumed to give an opinion on matters that were not beyond the understanding of the jury. In the final analysis, the approach taken to this testimony by the trial court and the Appellate Division would effectively authorize an officer both to describe the facts about what he or she observed and to opine in ways that we have precluded previously. We decline to permit the lay opinion rule to be so utilized."

State v. Pittman, 419 N.J. Super. 584 (App. Div. 2011) - Convictions reversed. "At trial, Burlington City Detective James Barnes, a twenty-three year veteran of the city police force, testified that, at police headquarters, he tested defendant's clothes for the presence of blood using a **phenolphthalein test**, and that the result was positive... In the present case, there was **no evidence presented that the phenolphthalein test utilized by Detective Barnes was generally accepted in the scientific community to be reliable**. The prosecutor offered no expert testimony on the issue of general acceptance and thus the reliability of the evidence, and defendant did not stipulate to that fact... None of [the three ways a proponent of scientific evidence can prove general acceptance] was used in this case. Further, the testimony of Barnes himself, a lay witness, did not establish reliability. We note, as did the State, that the results of phenolphthalein tests have been recognized by courts of other jurisdictions as admissible, presumptive evidence of the presence of blood, and that in those cases, the presumptive nature of the test has been found to affect the weight, not the admissibility of the evidence... In those cases that have recognized the admissibility of the test results as presumptive evidence of the presence of blood without further confirmatory testing, the limitations of the test and the possibility of false positive results have been fully explained to the jury... In contrast, in the present case, defense counsel asked Barnes on cross-examination if he knew whether the phenolphthalein test was 100 percent accurate, and Barnes responded that he did not know. Barnes was also unable to confirm one way or another whether contact with enumerated substances other than blood could result in a false positive. Thus, the testimony found crucial in cases permitting the introduction of

evidence of the results of a non-confirmed phenolphthalein test was not offered here. Rather, the jury was left with the clear impression that the test was conclusive, not presumptive... No expert established at the trial of the present matter the manner in which the phenolphthalein test should be performed, concluded that the test performed by Barnes had, in fact, been done as directed, or established what the consequences would have been if improperly conducted. As a consequence of the foregoing, we conclude that the introduction into evidence of the result of the phenolphthalein test was erroneous."

State v. A.R., unpublished opinion, App. Div. Docket No. A-3405-08T3 (August 10, 2011) - Convictions reversed. "[T]he court committed **reversible error in permitting the jury to have unfettered access to the videotaped interviews of both the victim and defendant...** Defendant argues that the trial judge failed to follow the protocol set forth in State v. Burr, 195 N.J. 119 (2008), when he permitted the jury to view the videotaped interviews of defendant and Tammy while deliberating the verdict. Defendant further asserts that in addition to 'the prejudice produced through repeated viewings of the tape, the fact that the entire procedure was conducted in the jury room was reversible error.'... We agree that even without the benefit of the Court's decision in Burr, the trial judge took great pains to ensure that permitting the jury access to the videotapes was balanced against all other factors. Thus, we find no error, let alone plain error, in the court's exercise of its discretion to permit the jury to view the videotaped statements during deliberations. However, by permitting the jury to view the videotaped statements in the jury room, the jury had unfettered access to 'witness statements [that] could have much the same prejudicial effect as allowing a jury unrestricted access to videotaped testimony during deliberations.' Burr, supra, 195 N.J. at 134. That the jury was provided statements from both Tammy and defendant does not cure the danger inherent in affording a jury unfettered access to videotaped statements in the jury room because the jury is not prevented from unfairly emphasizing the video statement over other testimonial evidence. Further, permitting the jury to view the videotaped statements in the jury room strips the trial judge of the ability to maintain a record of what was viewed and how often it was viewed... We therefore conclude the trial judge erred when he permitted the jury to view the videotape in the jury room, rather than in open court.

We also conclude the error was one capable of producing an unjust result... Moreover, because the jury was permitted to view the videotaped statements outside of defendant's presence, he was deprived of the opportunity to be present at a critical stage of the trial, resulting in "structural error" affecting the "framework within which the trial proceeds" requiring reversal without the necessity of defendant showing 'specific prejudice.'" (Sylvia Orenstein, A.D.P.D.)

<http://www.judiciary.state.nj.us/opinions/a3405-08.pdf>

State v. Rose, ? N.J. ?, 19 A.3d 985 (2011) - Conviction affirmed as modified. "Defendant Zarik Rose was convicted, as an accomplice, of the purposeful murder of Charles Mosley. The State's theory at trial was that defendant arranged for the murder while in jail and about to go to trial on earlier charges that he had attempted to murder the victim. In this appeal, we address whether **evidence of defendant's previous indictment and incarceration on the pending attempted murder charges was admissible** in defendant's trial for murder... [T]he disputed evidence was admissible under a straightforward application of Evidence Rule 404(b). The evidence went to non-propensity purposes, chiefly motive, but also plan and intent by defendant, and the trial court provided instructions that properly limited the jury's use of the evidence to those legitimate purposes. That said, ... there exists confusion and uncertainty about use of the common law doctrine of res gestae and its status as a viable feature of New Jersey's evidence jurisprudence. Accordingly, we ... hold that **the doctrine of res gestae no longer has vitality in light of the formal Rules of Evidence**... [C]ontinued use of the moniker of res gestae adds nothing more than an interpretative descriptor that risks clouding an evidence-rule analysis or, worse, avoiding its required rigor through invocation of a result-infused term. The evidence rules that govern exceptions to the hearsay rule comprise a fully integrated doctrine and should be given the fulsome and comprehensive effect that they were intended to have. Moreover, our own case law reflects that the codified Rules incorporated the previous common law exceptions loosely categorized as res gestae hearsay. It is high time that ... consistency ... in respect of requiring the admission of hearsay evidence only through codified hearsay exceptions, be applied to hearsay evidence of all forms, including that which has heretofore been described as res gestae... To aid courts and litigants in

making the threshold determination of whether the evidence relates to 'other crimes' or is intrinsic to the charged crime, we look to the Third Circuit's statement of the test in United States v. Green. 617 F.3d 233 (3d Cir. 2010). Green provides a workable, narrow description of what makes uncharged acts intrinsic evidence of the charged crime, and therefore not subject to Rule 404(b)'s directed purpose requirements... The addition of a **notice requirement for all 404(b) evidence**, which has not been required to date, ...,but which we now endorse and will **require prospectively**, will encourage an orderly discussion and analysis of such evidence that will require parties and trial courts to engage in the rigorous and thoughtful analysis of the proper use of such testimony, and thus deter off-the-cuff conclusory explanations to which res gestae claims, and rulings, are prone." (Alison S. Perrone for amicus curiae ACDL-NJ)

State v. Jashawn J. Snowden, unpublished opinion, App. Div. Docket No. A-3375-07T4 (May 25, 2011) - Convictions reversed "[b]ecause we conclude that the trial court committed **reversible error when it admitted and relied upon a witness's un-sworn trial testimony as a basis for determining the admissibility of a prior out-of-court inconsistent statement...** At trial, the State called Jenkins ... to testify. Prior to questioning by the prosecutor, Jenkins was requested to take an oath or affirm to tell the truth pursuant to N.J.R.E. 603. Jenkins refused. Although the court attempted to persuade Jenkins to take the oath, he never did... Although Jenkins' statement was properly characterized as inconsistent when compared to the statements he made at trial after feigning any recollection of the facts contained in his pretrial statement, ... , the court erred in allowing the State to introduce the out-of-court statement because Jenkins had 'refused to take an oath or make an affirmation. To that extent, his assertions from the witness stand cannot fairly be characterized as "testimony" under N.J.R.E. 803(a)(1).'... Because of the highly prejudicial nature of the aforesaid two errors, we reverse and remand for a new trial."
<http://www.judiciary.state.nj.us/opinions/a3375-07.pdf>

State v. Todd Stathum, unpublished opinion, App. Div. Docket No. A-3531-08T4 (April 11, 2011) - Convictions reversed. "We next turn our attention to defendant's contention that the trial court **erred by admitting defendant's post-arrest statement for impeachment purposes**

in violation of the principles found in N.J.R.E. 404(b)...

In the statement, defendant admitted to making some fifteen drug sales in the prior six months... We agree with defendant that use of his statement for impeachment was erroneous in part because he denied only that his involvement in these drug transactions were distributions, and he never discussed his prior history. Even as to the transactions at issue, he did not deny participation – he only denied that he obtained the drugs for Adam for any reason other than to use drugs himself. The jury by virtue of this cross-examination heard other-crimes evidence which should have been scrutinized under the lens of N.J.R.E. 404(b) and excluded. It was highly prejudicial and its probative value was clearly outweighed by the potential for prejudice... The admission of the material conveyed to the jury the notion that defendant was a drug dealer even prior to his dealings with the undercover officer." See also **CONFRONTATION**.

<http://www.judiciary.state.nj.us/opinions/a3531-08.pdf>

State v. Gary Suttle, unpublished opinion, App. Div. Docket No. A-2417-08T3 (June 10, 2011) – Conviction reversed. "On this appeal defendant raises three issues: the Double Jeopardy Clause barred a re-trial on the murder charge; the trial court erroneously excluded evidence of third-party guilt; and the court erroneously excluded evidence of the victim's statement of a present sense impression. We reject defendant's first argument, but agree with his second and third arguments... In this case, the ransacking of the victim's apartment suggested that she was murdered by someone who was searching for something valuable there. There was evidence that the victim was a drug dealer who had heroin and other drugs in her apartment. The **third-party-guilt evidence** defendant sought to introduce would have shown the following: The victim's friends and acquaintances in the drug-using community, including James Hartley, knew or believed that she had a large amount of drugs and money in her apartment. James was a drug user who had purchased drugs from the victim and was familiar with her apartment. James was in need of money and tried to get the victim to cash a bad check, but she refused... [T]his evidence of third party guilt was more than remote and speculative. If the jury believed it, the evidence created a connection between James Hartley and the victim, and established a motive for James to murder the victim and ransack her apartment. His attempt, a couple of days after the murder, to wash bloody clothing,

and his admission that he was in a 'fight,' tends to prove that he was involved in some kind of violent activity near the time of the murder. And he told his sister and a friend that he was in some serious 'trouble' requiring that he change his identity and move far away. This evidence, together with Brown's testimony about a 'white man' pounding on the victim's door and yelling at her a couple of days before the murder, ..., could have made a difference to the outcome of this trial... Exclusion of the evidence about James Hartley is particularly troubling because defendant testified and his credibility was thus in issue.

"After he bought heroin again in Newark, defendant called Lois to see if she was 'ready for me to come back.' The State objected to defendant's proposed testimony as to what Lois responded. Defense counsel responded that the purpose of the question was only to show the instructions that Lois was giving defendant. Outside the presence of the jury, defendant testified that Lois told him this: 'No, she still was busy with her peoples.' The judge ruled that this was inadmissible hearsay. We conclude this was error. **The response that she 'still was busy with her peoples' was a statement of present sense impression.** N.J.R.E. 803(c)(1)... Lois's statement to defendant, that she 'still was with her peoples,' described her perception of an event or situation as it was then occurring. According to defendant, that was her explanation to him as to why he could not come to her apartment yet. While the State argues that the testimony was self-serving and defendant was not a credible witness, it was for the jury to decide what weight to give the testimony. We conclude it was a mistaken exercise of the trial court's discretion to exclude defendant's testimony about that statement."

<http://www.judiciary.state.nj.us/opinions/a2417-08.pdf>

State v. James Thomas, unpublished opinion, App. Div. Docket No. A-5801-08T4 (July 01, 2011) - Conviction for issuing a bad check reversed. "[D]efendant was entitled to present the defense that his failure to 'make good the check' within 10 days after Lasheras' notification was not conduct designed to wrongfully deprive Green Brook of its money, but conduct based on a reasonable belief that Green Brook was not entitled to the money... [W]e reject the judge's reasoning that evidence of defendant's subsequent decision to stop payment on the check issued to Green Brook due to inadequate repairs was irrelevant. Pursuant to N.J.S.A. 2C:21-5, defendant's knowledge and conduct at the time he issued the check is not the only relevant inquiry.

The additional relevant inquiry is whether defendant failed to make good the check within 10 days after notice of refusal. Both are pertinent to whether defendant intentionally issued the check 'knowing' that the bank would not honor it. On this issue, there is a factual dispute for the jury to resolve. Defendant alleged that when he wrote the check, he believed it would be honored by the bank because he intended to deposit funds to cover it. He also asserted that he later stopped payment on the check due to a good faith belief that Green Brook had not provided the services for which it had charged him. Therefore, the **judge abused his discretion by barring testimony from defendant explaining why he placed the stop payment order.**"

<http://www.judiciary.state.nj.us/opinions/a5801-08.pdf>

FIREARMS

In the Matter of Application of Casaleggio, 420 N.J. Super. 121 (App. Div. 2011) - Denial of application for permit to carry a handgun as a retired law enforcement officer affirmed. "Casaleggio contends that he qualifies for the permit pursuant to N.J.S.A. 2C:39-6(1) based on his prior employment as an assistant prosecutor and deputy attorney general [and] that he was entitled to a permit under the Law Enforcement Officers Safety Act of 2004 (LEOSA), 18 U.S.C.A. §§ 926B & 926C... In light of the language and objectives of N.J.S.A. 2C:39-6(1), we find that assistant prosecutors and deputy attorneys general do not qualify as 'full-time member[s] of a State law enforcement agency' for the purpose of obtaining permits to carry handguns... Unlike police officers and investigators, both assistant prosecutors and deputy attorneys general are 'lawyers first and foremost' whose 'essential responsibility is to provide legal advice.' [Citation omitted.] Their primary duty 'is to perform legal services in connection with law enforcement.' [Citation omitted]. 'Stated simply, they are not police officers.' [Citation omitted]. [T]he reference to LEOSA in N.J.S.A. 2C:39-6(1) does not encompass retired assistant prosecutors or deputy attorneys general. Rather, it is intended to accommodate retired law enforcement officers from out of state who have relocated to New Jersey. In light of the foregoing, we agree with the Law Division's determination that Casaleggio is ineligible for a retired law enforcement officer's permit to carry a handgun." (Frank Pisano III)

GRAND JURY

State v. Fabio Simon, ? N.J. Super. ?, 2011 N.J. Super. LEXIS 60 (April 12, 2011) - Convictions affirmed. "The threshold issue for our consideration is whether the indictment is fatally defective because the case against defendant was presented to the grand jury by a law student intern in the Office of the Mercer County Prosecutor (Prosecutor's Office) rather than by an assistant prosecutor. Defendant argues that the rule promulgated by the Supreme Court governing appearances by law students bars the appearance of law students before a grand jury... A law student participating in a clinical program is not an assistant prosecutor, but as an aide to the assistant prosecutor and under his or her tutelage, a law student cannot be considered a private citizen. Moreover, the Supreme Court has addressed the ability of third year students to appear in the trial courts... The presence of a prosecutor's intern as an observer in the grand jury and as the representative of the prosecutor presenting a matter to the grand jury is entirely consistent with the rule permitting the appearance of law students in the trial courts of this State as part of an approved clinical education program. The law student intern is governed by the Rules of Professional Conduct, see Rule 1:21-1(b), and there is evidence that an assistant prosecutor directly supervised the intern during his presentation. As a member of the prosecutor's staff, the intern's presence in the grand jury room does not run afoul of the strict restrictions on those who may be present in the grand jury room, Rule 3:6-6(a), or compromise secrecy of the grand jury proceeding, N.J.S.A. 2B:21-10; Rule 3:6-7. A law student who is a participant in an approved clinical education program and acts under the supervision of the prosecutor also does not subvert the constitutional role of the grand jury as a buffer between citizens and the State by determining in the first instance whether there is a basis to subject an accused to trial." (Olubukola O. Adetula)

<http://www.judiciary.state.nj.us/opinions/a3142-04.pdf>

GUILTY PLEAS

State v. Anthony S. Coplin, unpublished opinion, App. Div. Docket No. A-3243-09T3 (May 23, 2011) - Convictions reversed. "Defendant argues that the trial court erroneously denied his motion seeking to withdraw his

guilty plea. Citing State v. Slater, 198 N.J. 145 (2009), defendant contends the court failed to apply the requisite four-prong standard governing motions seeking to withdraw guilty pleas... Here, although the trial court made a determination that defendant's plea had been entered knowingly, intelligently, and voluntarily after consultation with counsel, the court failed to address the motion under the four-prong Slater standard. Applying that standard, we conclude that the trial court erroneously denied the motion and reverse... Defendant asserted his innocence throughout the proceedings until the time of his plea. In furtherance of that assertion, defendant possessed a videotape which purportedly supported his alibi that he was not present at the time of the incident. The mere fact that the prosecutor could not identify defendant on the videotape does not defeat defendant's alibi defense, particularly if defendant's witness can identify defendant on the videotape. The issue is for the factfinder... Although the prosecutor had notified defense counsel several days prior that the State intended to proceed to trial, defense counsel failed to inform defendant of that advice until shortly before the plea. After the court denied defendant's request for an adjournment to retain new counsel and denied his request for a short trial adjournment to accommodate his witness who would authenticate the videotape for purpose of introduction at trial, only then did defendant enter the plea. Defendant asserted that as a result of the lack of proper pretrial communication from his attorney and the court's denial of adjournment to accommodate his witness, that he felt pressured to enter the plea. We find defendant's assertions are supported in the record." <http://www.judiciary.state.nj.us/opinions/a3243-09.pdf>

State v. Jerome Damon, unpublished opinion, App. Div. Docket No. A-0983-08T2 (May 23, 2011) - Conviction reversed, case remanded for further proceedings. "The record clearly establishes that defendant filed a motion to withdraw his guilty plea prior to sentencing. Notwithstanding the court's cryptic comments expressing satisfaction that the plea had been freely and voluntarily entered based upon the court's purported recollection of the plea hearing, the record also makes clear that the judge refused to consider defendant's motion to withdraw his plea because the court believed no such motion had been made. Defendant had a right to have his motion considered and ruled upon by the court. Both attorneys corroborated

defendant's assertion to the court that he had indeed filed such a motion. Under the circumstances, the court had an obligation to make appropriate inquiries of the staff in the Criminal Case Management Office, rather than conclusively stating that no motion had been filed and summarily refusing to consider the matter... We therefore remand the matter to the trial court for consideration of defendant's motion to withdraw his guilty plea... Because defendant's motion was filed before sentencing, the motion should be decided based upon the criteria applicable to a pre-sentence motion. See State v. Slater, 198 N.J. 145, 157-58 (2009); R. 3:9-3(e); R. 3:21-1." <http://www.judiciary.state.nj.us/opinions/a0983-08.pdf>

State v. Hess, 207 N.J. 123 (2011) - Appellate Division affirmance of denial of PCR reversed, case remanded for further proceedings. "[T]he constraints embedded in the terms of the plea agreement -- drafted by the State and accepted by defense counsel -- denied the court of arguments that may have shed light on relevant sentencing factors and how they should be weighed. The terms of that plea agreement were incompatible with our holding in State v. Warren, 115 N.J. 433 (1989), and the decision in State v. Briggs, 349 N.J. Super. 496 (App. Div. 2002), and impinged not only on the role of counsel at sentencing, but also on the role of our courts as independent arbiters of justice... The Prosecutor explained that the intent of the gag provision was to minimize the possibility that the sentencing court would 'undercut' the sentencing provisions of the plea agreement... The intersection between Warren and Briggs is apparent. A plea agreement that prevents a defense attorney from presenting or arguing mitigating evidence to the sentencing court deprives the court of the information it needs to faithfully carry out its unfettered obligation to identify and weigh the appropriate sentencing factors. The unhindered adversarial process at sentencing allows the court to be fully informed about all the evidence and factors that will lead to a just sentence. A lopsided presentation by the State, and the virtual gagging of defense counsel, does not accomplish that goal... Our jurisprudence does not permit restrictions on the right of counsel to argue for a lesser sentence, or to argue against an aggravating factor or for a mitigating factor, or how the factors should be balanced, as this would deprive defendants of the needed advocacy of their attorneys and deny our courts the needed insight to administer justice."

See also INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) and VICTIMS RIGHTS.

INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)

State v. Barlow, 419 N.J. Super. 527 (App. Div. 2011) - Convictions reversed, case remanded for further proceedings with new counsel before a different judge. "Because we find that counsel was ineffective in her representation of defendant thereby depriving him of his constitutional right to counsel at a crucial stage of the criminal proceedings against him, we reverse... We perceive two issues to exist in this regard: (1) was counsel ineffective in failing to move on defendant's behalf to retract his plea following his request that she do so, and (2) was counsel ineffective as the result of her communications to the judge undercutting the merits of defendant's pro se arguments... [D]efendant in the present matter was deprived of his constitutional right to counsel when his attorney declined to pursue a motion on his behalf to withdraw his guilty plea. In that regard, we also note that R.P.C. 1.2(a) requires, in a criminal case, that defense counsel 'shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial and whether the client will testify.' We find implicit in that rule of professional conduct the requirement that counsel abide by a client's determination, after a plea of guilty has been entered, to seek its withdrawal... We further find that defendant was deprived of effective assistance of counsel as the result of counsel's undermining of defendant's assertions of innocence in connection with his application to withdraw his plea. In this respect, the case resembles the facts of State v. Rue, 175 N.J. 1 (2002)... Although the Court's decision in Rue turned on its interpretation of Rule 3:22-6(d), we find its holding with respect to the inadequacy of counsel's presentation of the defendant's petition to be equally applicable in the present case. As Justice Brennan has observed: 'To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court.' [Citations omitted]. Similarly, in the present case the trial judge placed great reliance on his searching inquiry at the time that the plea was entered, and upon defendant's unequivocal responses. But here, the judge's determination was also undoubtedly colored by defense counsel's statements completely undercutting defendant's claims of innocence and was

explicitly colored by defendant's statement in his letter to counsel regarding his potential willingness to accept a lower plea. Under these circumstances, ... we cannot determine whether defendant's plea withdrawal application, if properly presented, would have satisfied the standards for plea withdrawal set forth in State v. Slater, 198 N.J. 145 (2009)...."

State v. Nazar Burak, unpublished opinion, App. Div. Docket No. A-5009-09T2 (June 28, 2011) - "Although the State urges us to affirm the denial of the PCR petition, it acknowledges that the matter should be remanded to the trial court so that Burak can move to withdraw his guilty plea. The State concedes that Burak was improperly required to enter the plea as a condition for admission to the pretrial intervention program (PTI). Based upon our review of the record, we reverse the denial of PCR and remand for an evidentiary hearing on Burak's claim of ineffective assistance of counsel.... We have concluded that an evidentiary hearing is warranted in this case for the following reasons. There appears to be a factual issue as to whether Burak or his then attorney received notice of the September 17, 2004 hearing concerning termination of PTI. The order for hearing contained in the record, which does not actually set a date for the hearing, does not reflect that it was served on Burak or his attorney. There is no document in the record demonstrating that such notice was given. If Burak had no notice and opportunity to be heard on the issue of his termination from PTI, his attorney should have raised the issue at or before sentencing in January 2005.... Because we do not have a transcript of the plea hearing, we do not know what Burak was told at the time about reporting for PTI intake and making payments on his fines and penalties, nor do we know whether he had the benefit of an interpreter when such instructions were given, assuming he required one. It also appears that, by the time of the sentencing, the new charges relied on in connection with the termination of PTI had been dismissed. Absent a complete factual record, we cannot determine whether the PCR judge correctly determined that PTI would have been terminated had defense counsel actually raised the issue at sentencing, as we have concluded she should have." (John R. Klotz)
<http://www.judiciary.state.nj.us/opinions/a5009-09.pdf>

State v. Thomas J. Domke, unpublished opinion, App. Div. Docket No. A-2699-09T4 (April 8, 2011) - Denial of PCR

reversed, case remanded for new hearing. "After defendant filed his pro se petition, counsel was assigned to represent defendant. That attorney, however, did not file a brief in support of defendant's contentions. Rather, he advised the court that he had reviewed the file, the trial transcripts and discussed the matter in-depth with defendant and had not uncovered anything 'that would add anything, to make a difference in his case.' This statement, of course, contrasts with the State's concession with respect to defendant's conviction for aggravated assault. The trial court offered him the opportunity to prepare a brief on defendant's behalf, but he declined, saying he was ready 'to resolve it today' and did not 'have anything to add by way of a brief.'... Here, defendant's attorney filed no brief on his behalf and made no attempt to advance his client's position before the court. We may not affirm the trial court's order simply because, on first blush, it may appear that defendant's chances of prevailing are unlikely. Defendant is entitled to have his attorney advocate on his behalf." <http://www.judiciary.state.nj.us/opinions/a2699-09.pdf>

State v. Hess, 207 N.J. 123 (2011) - Appellate Division affirmance of denial of PCR reversed, case remanded for further proceedings. "[D]efendant was denied her constitutional right to the effective assistance of counsel at sentencing. Defense counsel deprived the court of mitigating evidence that was necessary for a meaningful sentencing hearing. That alone so undermined the adversarial process that counsel no longer was serving in the role of an advocate as envisioned in our criminal justice system.... The restrictive plea agreement entered into between defendant and the State required defendant to concede that the aggravating sentencing factors outweighed the mitigating factors and prohibited defendant from 'affirmatively' seeking a term of less than thirty years subject to NERA. On the other hand, the plea agreement did not bind the court to give any particular sentence, and the prosecutor disclaimed any intention to impinge on the court's exercise of its discretion. Nothing in the plea agreement denied defense counsel the opportunity to provide the court with the mitigation evidence known to him through his investigator's work.... Defense counsel had nine witness statements corroborating his client's account of physical and mental abuse at the hands of her husband as well as his threats against her life. The statements available to defense counsel painted a picture of Jimmy Hess as a

'controlling' husband who treated his wife like a 'slave' and as a man with a hair-trigger, explosive temper... Defense counsel's failure to bring relevant information in his file to the attention of the trial court so that the court could independently identify and weigh mitigating factors cannot be ascribed to strategy or reasonable professional judgment, particularly given that the plea agreement on its face did not prohibit defense counsel from conveying such information." See also **GUILTY PLEAS** and **VICTIMS RIGHTS**.

State v. Ygnacio Paulino-Fernandez, unpublished opinion, App. Div. Docket No. A-2375-09T4 (June 20, 2011) - Denial of PCR reversed, case remanded for evidentiary hearing on prejudice prong of Strickland, 466 U.S. 668 (1984). "[W]e are satisfied that defendant received incorrect advice from counsel regarding the consequences of his plea, particularly, because he was told that evidence of his cooperation with the prosecutor's office could constitute a mitigating factor in determining whether he would be deported, and he was not told that deportation in his case was mandatory. We are additionally satisfied that the principles set forth in Padilla v. Kentucky, 130 S.Ct. 1473 (2010)] and Nuñez-Valdéz [200 N.J. 129 (2009)] regarding counsel's duty to inform a defendant of the risk of deportation in a context such as that presented here do not constitute a new rule, and thus may be applied retroactively in this case. State v. Bellamy, 178 N.J. 127, 140-41 (2003). As a consequence, we hold that defendant has met the first of Strickland's prongs, and that the motion judge's contrary conclusion was legally and factually mistaken."

<http://www.judiciary.state.nj.us/opinions/a2375-09.pdf>

State v. Aaron Sheppard, unpublished opinion, App. Div. Docket No. A-2079-09T4 (July 12, 2011) - "[W]e reverse and remand for a hearing limited to the issues of ineffective assistance of counsel as it relates to defendant's allegations that he lacked the requisite mental state to waive his Miranda [v. Arizona, 384 U.S. 436 (1966)] rights and to knowingly and voluntarily enter a guilty plea, and to consideration of defendant's motion to withdraw his guilty plea... The issues for the PCR court to determine here were not whether the evidence presented by defendant was sufficient to establish a defense based upon his mental capacity or whether defense counsel customarily file suppression motions when a defendant pleads guilty to

an accusation. Instead, the issue was whether the evidence of defendant's mental state, based upon either the influence of drugs or his mental health, presented circumstances in which an attorney acting within 'the range of competence demanded of attorneys in criminal cases' would take further action to investigate whether defendant was able to make a knowing and voluntary guilty plea and a valid waiver of his Miranda rights. The PCR court was required to view the evidence in the light most favorable to defendant to determine whether he had made a prima facie showing of ineffective assistance of counsel. As the PCR court acknowledged, that evidence, unrefuted as of now, indicated defendant was substantially impaired due to drug use when interrogated and under the influence of psychotropic medication at the time he entered his guilty plea... The record here fails to show that defendant's trial counsel made any inquiry or investigation to determine whether there was a factual basis for challenging his statement to police or to be satisfied that he could enter a knowing and voluntary guilty plea... Similarly, the record fails to show any investigation by defense counsel of the unrefuted fact that, at least at the inception of questioning, defendant was apparently sufficiently 'under the influence' of heroin to cause the investigating officer to terminate the interview. We are satisfied the evidence provides a prima facie showing that required defense counsel to investigate whether defendant lacked the mental capacity to make a knowing and voluntary waiver of his rights at these two critical stages of his prosecution." <http://www.judiciary.state.nj.us/opinions/a2079-09.pdf>

State v. Telford, 420 N.J. Super. 465 (App. Div. 2011) - Denial of PCR affirmed. "In this appeal, we consider whether defendant was deprived of the effective assistance of counsel because -- prior to defendant's entry of a guilty plea to third-degree child endangerment in 2004 -- his attorney only advised that he 'might' rather than 'would' be deported. [W]e agree with the trial judge's determination that the deportation consequences at the time defendant entered his plea were too complex to require more specific advice... Indeed, not only were the deportation consequences of defendant's guilty plea uncertain in 2004 but they remain uncertain now. This lack of clarity results not only from (1) existing doubt about whether defendant pled guilty to an 'aggravated felony' but also (2) the scope of the examination that is undertaken to make that determination, and (3) the apparent erosion of the

rule of lenity developed by the Supreme Court of the United States in immigration matters... 'Aggravated felony' is defined elsewhere as including 'murder, rape, or sexual abuse of a minor.' 8 U.S.C.A. § 1101(a)(43)(A). Congress did not define the phrase 'sexual abuse of a minor' in this context. Thus, whether the undefined phrase 'sexual abuse of a minor' fits the conduct for which defendant pled guilty -- namely, engaging in 'sexual conduct which would impair or debauch the morals' of a child under the age of sixteen, N.J.S.A. 2C:24-4a -- is highly uncertain absent a clear understanding of Congress' intent. The congressional intent in enacting 8 U.S.C.A. §1101(a)(43)(A) was a matter of considerable debate when defendant pled guilty in 2004 and remains unresolved... This very nuanced approach suggests that deportation could very well turn on the precise wording of the indictment. In that circumstance, an attorney representing a noncitizen facing similar criminal charges would be hard-pressed to provide any clear advice regarding the deportation consequences of a guilty plea." (Alison Perrone, Designated Counsel)

IDENTIFICATION

State v. Cecilia X. Chen, ? N.J. ?, 2011 N.J. LEXIS 926 (August 24, 2011) - Appellate Division judgment affirmed as modified, case remanded for further proceedings. "Here, a husband suspected that his wife had been attacked by his ex-girlfriend. He showed his wife pictures of the woman to help her make an identification, and she then reviewed the photos many times. Afterward, the victim selected a photograph of the ex-girlfriend from a photo array and identified her at trial... Recent social science research reveals that suggestive conduct by private actors, as well as government officials, can undermine the reliability of eyewitness identifications and inflate witness confidence. We consider that evidence in light of the court's traditional gatekeeping role to ensure that unreliable, misleading evidence is not presented to jurors. We therefore hold that, even without any police action, when a defendant presents evidence that an identification was made under highly suggestive circumstances that could lead to a mistaken identification, trial judges should conduct a preliminary hearing, upon request, to determine the admissibility of the identification evidence... Today in Henderson, we modified the traditional Manson/Madison test. Specifically, we held that (1) defendants can obtain a pretrial hearing by showing some evidence of

suggestiveness that could lead to a mistaken identification, (2) the State must then offer proof to show that the proffered eyewitness identification is reliable, considering both system and estimator variables, and (3) the ultimate burden is on defendant to prove a very substantial likelihood of irreparable misidentification... Henderson, like Madison and Manson, addresses the reliability of identification evidence and the need to deter police misconduct. By definition, however, cases that do not involve police action raise no deterrence issues. Simply put, we cannot expect that private actors will conform their behavior to police standards they are unaware of. Absent police involvement, then, our principal concern is reliability. For that reason, we make one modification to Henderson in applying it to cases where there is no police action: we require a higher, initial threshold of suggestiveness to trigger a hearing, namely, some evidence of highly suggestive circumstances as opposed to simply suggestive conduct... Accordingly, we hold that the following modified approach shall apply to assess the admissibility of identification evidence when there is suggestive behavior but no police action: (1) to obtain a pretrial hearing, a defendant must present evidence that the identification was made under highly suggestive circumstances that could lead to a mistaken identification, (2) the State must then offer proof to show that the proffered eyewitness identification is reliable, accounting for system and estimator variables, and (3) defendant has the burden of showing a very substantial likelihood of irreparable misidentification. To reiterate, only the first prong is modified from the test in Henderson... For substantially the same reasons expressed in Henderson, today's holding applies to defendant Chen and in future cases only... As to others, the ruling will take effect thirty days from the date this Court approves new model jury charges." (Alan L. Zegas; William Nossen on the briefs)

<http://www.judiciary.state.nj.us/opinions/supreme/A6908StatevCeciliaChen.pdf>

State v. Larry R. Henderson, ? N.J. ?, 2011 N.J. LEXIS 927 (August 24, 2011) - Appellate Division judgment affirmed as modified, case remanded for further proceedings. "The current legal standard for assessing eyewitness identification evidence must be revised because it does not offer an adequate measure for reliability; does not sufficiently deter inappropriate police conduct; and

overstates the jury's ability to evaluate identification evidence. Two modifications to the standard are required. First, when defendants can show some evidence of suggestiveness, all relevant system and estimator variables should be explored at pretrial hearings. Second, the court system must develop enhanced jury charges on eyewitness identification for trial judges to use.... Research that has emerged in the years since Manson was decided reveals that an array of variables can affect and dilute memory and lead to misidentifications. The variables are divided into two categories: system variables, which are factors like lineup procedures that are within the control of the criminal justice system; and estimator variables, which are factors related to the witness, the perpetrator, or the event itself - like distance, lighting, or stress - over which the legal system has no control... Two principal changes to the current system are needed. First, the revised framework should allow all relevant system and estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness. Second, courts should develop and use enhanced jury charges to assist jurors in evaluating eyewitness identification evidence. Under our revised approach, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. The State must then offer proof to show that the proffered eyewitness identification is reliable, accounting for system and estimator variables. However, the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless. The ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. If, after weighing the evidence presented, a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions.... The Court directs that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case. Those instructions are to be included in the court's comprehensive jury charge at the close of evidence. In addition, instructions may be given during trial if warranted. Expert testimony may also be introduced at

trial, but only if otherwise appropriate. The Court anticipates, however, that with enhanced jury instructions, there will be less need for expert testimony. To help implement this decision, the Court asks the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current charge on eyewitness identification and submit them to this Court for review before they are implemented... Applying the relevant factors, the Court determines that today's ruling will apply to future cases only, except for defendant Henderson... As to future cases, today's ruling will take effect thirty days from the date this Court approves new model jury charges on eyewitness identification." (Joseph E. Krakora, Public Defender, and Joshua D. Sanders, A.D.P.D.; Alison S. Perrone for amicus curiae ACDL-NJ; Lawrence S. Lustberg on the brief for amicus curiae Innocence Project)
<http://www.judiciary.state.nj.us/opinions/supreme/A808StatevLarryHenderson.pdf>

INTERSTATE AGREEMENT ON DETAINERS (IAD)

State v. Nguyen, 419 N.J. Super. 413 (App. Div. 2011) - Convictions affirmed. "[D]efendant argues that the trial court should have dismissed the indictment because the State did not bring him to trial within 120 days after his arrival in New Jersey, as required by the Interstate Agreement on Detainers (IAD). We reject this argument because the record indicates that New York transferred custody of defendant under the Extradition Clause of the United States Constitution and the Uniform Criminal Extradition Act, and therefore, the speedy trial provision of the IAD did not apply to defendant's trial... [T]here is no evidence that custody of defendant was transferred from New York to New Jersey pursuant to the IAD. Instead, the record indicates defendant was transferred to New Jersey in accordance with the Uniform Criminal Extradition Act (UCEA), N.J.S.A. 2A:160-6 to -35, which does not contain any provision requiring a defendant to be brought to trial within a specified period of time. Therefore, defendant is not entitled to relief under the IAD." See also **SEARCH AND SEIZURE**. (Paul Casteleiro)

JOINDER AND SEVERANCE

State v. Bruce D. Sterling, unpublished opinion, Docket No. A-5579-06T4 and A-0048-08T4 (August 15, 2011) -

Convictions reversed. "[T]he trial court erred in allowing the three criminal events to be tried in a single trial, and further erred in allowing in the second trial evidence of one of the prior crimes. We also conclude that, with the exception of the certain persons conviction, these errors were not harmless, that they deprived defendant of fair trials, and that reversal of all of defendant's other convictions in both appeals is required... [T]he sexual assaults of K.G. and L.R. were not committed in an especially unique or distinctive manner, and the court improperly redefined the concept of 'identity' to allow joinder of the burglary charges of S.P. with the sexual assaults... [T]he trial court erred when it determined that the burglary charges and both sexual assault charges could be joined for trial. The S.P. burglary charge should not have been joined in the indictment with the sexual assault charges, because they failed to meet the requirements of Rule 3:7-6, and they shared no signature characteristics with the sexual assault charges that would allow all of the crimes to be tried together. The court also erred when it determined that the sexual assault charges for K.G. and L.R. could be tried together. There was no support for its determination that the circumstances of the attacks were nearly identical or, if they were, that the average juror would have the knowledge to determine whether those characteristics meant that the crimes likely were committed by the same person. If the State wanted to try the crimes against K.G. and L.R. together, it was required to present expert evidence to establish the signature-like characteristics of the crimes. If the State chooses on remand to proceed in this manner, we express no view as to whether such expert evidence would suffice...

"[D]efendant [also] is entitled to a new trial for the 2002 sexual assault of J.L. because the trial court erroneously admitted extensive prejudicial other-crimes evidence of the May 2005 burglary of S.P.'s home... The State makes no argument that the crimes against J.L. and S.P. bore any unique similarities that would identify defendant as the perpetrator of the attack on J.L. Instead, it argues that '[e]vidence surrounding' defendant's encounter with S.P. 'was admissible to show how defendant came to be charged with the offenses committed against [J.L.] in July 2002, in that police obtained a DNA sample from defendant and recovered the distinctive handgun he used on her in the subsequent search of his apartment.'... The circumstances of this case provide none of the bases for the admission of other-crimes evidence found in [prior

cases]. When defendant was arrested for the S.P. burglary, he had in his possession no items from J.L.'s assault three years earlier, including the handgun that he allegedly used to subdue J.L. A gun was found later in his home. Moreover, as with Hardaway, the extent of the proffered evidence of the unrelated burglary of S.P.'s home was unnecessary and highly prejudicial. In determining whether the probative value of particular other-crimes evidence is outweighed by its potential for undue prejudice, the court should consider whether other evidence is available to prove the same point... In this case, the State introduced evidence that defendant's DNA was found on cervical swabs of J.L. taken after the attack. This scientific proof provided strong evidence of defendant's identity as J.L.'s attacker. There was no need for the State to explain how it obtained defendant's DNA, or to rely on any link between defendant's crimes against S.P. and the attack on J.L. Evidence of the S.P. encounter served no purpose other than to suggest to the jury that defendant had a propensity to commit crimes against women. Moreover, even when evidence of the other crime is admitted properly, the trial court is required to sanitize the evidence to accommodate the right of the objecting party to minimize the inherent prejudice of such evidence...

"For the reasons we have already discussed, the errors we have described were extremely prejudicial and cannot be disregarded as harmless. We now expand on the harmless error issue in light of our Supreme Court's recent decision in State v. Gillispie, ___ N.J. ___ (2011)... Gillispie is distinguishable from the appeals before us because, unlike these cases, in Gillispie the other-crimes evidence was admissible on the issue of identity... Moreover, unlike Gillispie, defendant's first trial involved the actual joinder of the trials of three separate criminal episodes, rather than the admission of other-crimes evidence in a trial for one of them. The potential harmfulness of the other-crimes evidence was greatly enhanced by its interrelated effect on three separate convictions, rather than one."

<http://www.judiciary.state.nj.us/opinions/a5579-06a0048-08.pdf>

JURY DELIBERATIONS

State v. Miller, 205 N.J. 109 (2011) - Convictions affirmed, case remanded for resentencing. "During deliberations, the jury asked the trial judge to provide a

read-back or playback of the testimony of one of the victims. Because the trial was videotaped and no court reporter was present, the judge permitted the jury to watch a video of the victim's testimony -- both direct and cross examination -- in open court... Absent unusual circumstances, juries' requests to review trial testimony while deliberating should be granted. Although court reporters traditionally read from their notes to refresh memory, in recent years, court reporters have become increasingly less common, giving way to digital recording equipment. With the independent use of digital recording equipment to create the record, it is no longer possible to read back testimony promptly without delaying trials to transcribe the recorded testimony. To fulfill their task of determining facts and making credibility determinations, juries should be provided with the best available form of evidence, upon request, unless there is a sufficiently strong, countervailing reason not to proceed in that way. In the digital age, that means presumptively providing video playbacks in favor of read-backs... Trial courts that use video and digital recording equipment to create the entire record should use the following guidelines when exercising their discretion over the playback of testimony: (1) judges should ordinarily grant a jury's request to play back testimony; (2) after redacting sidebars and inadmissible testimony to which counsel objected, the entire testimony requested should be played, including direct and cross examination; (3) courts should honor a jury's specific request to hear only limited parts of a witness's testimony, provided that playback includes relevant direct and cross examination; (4) playbacks, like read-backs, should take place in open court with all parties present; (5) at the time the testimony is repeated, judges should instruct jurors to consider all evidence presented and not give undue weight to the testimony played back; (6) judges should make a precise record of what was played back to the jury; and (7) trial judges must continue to exercise discretion to deny playing back all or part of the evidence requested when necessary to guard against unfair prejudice. The party opposing a playback has the burden to object and demonstrate prejudice." See also JURY INSTRUCTIONS and SENTENCING - MISCELLANEOUS.

JURY INSTRUCTIONS

State v. W.B., ? N.J. ?, 2011 N.J. LEXIS 567 (April 27, 2011) - Convictions affirmed. "Defendant further

claims that his convictions must, in any event, be reversed because the jury charge amounted to an instruction to convict and usurped the jury's responsibility to assess credibility. In gauging this claim, we are mindful that the trial judge used the model charge as amended by this Court in P.H., [178 N.J. 378, 399-400 (2004)]... We adhere to P.H. and find no basis on which to reverse the conviction because the model **CSAAS charge**, as amended, was given and the 'fresh complaint' charge was not. We caution, however, that our suggested preface 'or one of similar wording' to the CSAAS charge and referral to the Model Charge Committee did not cast the suggested charge in stone. To the extent a defendant may believe the word 'automatically' unduly limits the jury's right and obligation to evaluate credibility or, as defendant puts it, 'constitute[s] a directive to the jury that it must accept the expert's CSAAS testimony and filter its view of the case through that testimony,' the word 'automatically' is to be substituted by the words 'may or may not conclude that . . .,' or words of like effect. We direct the Model Jury Charges (Criminal) Committee to study the issue on an expedited basis and report back to us with any further recommendations. Moreover, as with all charges, we reiterate that a trial judge should conduct a charge conference on the record and consider the parties' position on any issue they or the judge raises before deciding how to charge the jury on a given issue. See R. 1:8-7." See also **DISCOVERY** and **EVIDENCE**. (Alison S. Perrone for amicus curiae ACDL-NJ)
<http://www.judiciary.state.nj.us/opinions/supreme/A8009Stat evWB.pdf>

State v. Myndell Jackson, unpublished opinin, App. Div. Docket No. A-1643-08T3 (March 18, 2011) - **Aggravated Assault** conviction reversed. "In his next point, defendant contends that he was deprived of a fair trial because the trial court instructed the jury on 'a theory of aggravated assault that did not apply to the facts of this case.'... Because Bishop was not injured, the State's prosecution of the aggravated assault charge was based on the theory that defendant attempted to cause serious bodily injury to Bishop. Accordingly, the State was required to prove that defendant acted with the purpose to cause Bishop serious bodily injury... Nevertheless, the trial court did not limit the jury's consideration to the State's theory that defendant attempted to cause serious bodily injury to Bishop. Instead, the court's instructions included the

following: 'A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury purposefully, or knowingly, or under circumstances manifesting extreme indifference to the value of human life, recklessly causes such injury.' Moreover, the jury verdict sheet conflated the two forms of aggravated assault by defining the crime as 'either purposely, knowingly, or under circumstances manifesting extreme indifference to the value of human life, causing serious bodily injury or attempting to cause such injury to Jamila Bishop.' Because the jury charge and the verdict sheet failed to focus on the only applicable mental state-- purposeful conduct-- we reverse the aggravated assault conviction."

<http://www.judiciary.state.nj.us/opinions/a1643-08.pdf>

State v. Erick K. Kibuuka, unpublished opinion, App. Div. Docket No. A-3188-09T2 (April 1, 2011) - Conviction reversed. "Here, the judge did not define any of the terms contained in the statute. The judge failed to define 'knowingly' and 'purposely.' As a result, the jury was left to speculate concerning the requisite mens rea for the offense. We conclude, and the State agrees, that this failure is clearly capable of producing an unjust result and constitutes plain error warranting a new trial." <http://www.judiciary.state.nj.us/opinions/a3188-09.pdf>

State v. Kornberger, 419 N.J. Super. 295 (App. Div. 2011) - Convictions affirmed. "[D]efendant [argues] that the judge should not have instructed the jurors on the law of **attempt** before instructing them on the substantive crime of aggravated sexual assault, and that the judge gave an incorrect instruction on attempt... We find no error, plain or otherwise, in the judge's decision to explain to the jury the law of attempt, before explaining the elements of the substantive crime of aggravated sexual assault. With respect to the sexual assault on N.D., defendant was only charged with attempt, and therefore it made logical sense to explain the law of attempt first... Defendant next contends, and the State essentially concedes, that in addition to giving the jury the correct charge on attempt, the judge also included instructions on types of attempt that did not apply to this case... Here, the applicable type of attempt was the 'substantial step' described in N.J.S.A. 2C:5-1a(3) and -1b. However, in addition to instructing the jury about that type of attempt, the judge mistakenly included instructions concerning the two other

types of attempt. Primarily relying on Condon [391 N.J. Super. 609 (App. Div. 2007)], defendant argues that this error requires reversal, because we cannot be sure of the theory on which the jury convicted him... As in Condon, we agree that the judge committed a charging error. But, we reach a different conclusion as to the consequence of the error. Unlike Condon, in which the theory of defendant's guilt may have presented some complexity to a lay jury, this case presented no complexity whatsoever... Moreover, despite his initial mistake in adding inapplicable definitions of attempt, the judge clearly explained to the jurors how the instructions he was giving them related to the evidence presented. Additionally, the parties did not present conflicting theories on the attempt issue, such that an error in that portion of the charge would likely prove prejudicial." (Robin Kay Lord and Richard W. Berg)

State v. Miller, 205 N.J. 109 (2011) - Convictions affirmed, case remanded for resentencing. "The trial court ... instructed the jury that it should not consider in any way defendant's decision not to testify. The court based its instruction on the model jury charge in use at the time of trial... Defendant now argues that the use of the word "even" in the last sentence ['He is presumed innocent even if he chooses not to testify'] suggested that he had an obligation to testify... Because defendant did not object to the jury charge concerning his decision not to testify at trial, reversal is only appropriate if the charge was erroneous and 'clearly capable of producing an unjust result.' Read as a whole, the charge given had no capacity to lead the jurors astray because it clearly directed them that they could not consider defendant's decision not to testify." See also JURY DELIBERATIONS and SENTENCING - MISCELLANEOUS.

State v. Timothy D. Davis, unpublished opinion, App. Div. Docket No. A-2244-09T3 (June 21, 2011) - Convictions reversed because "[t]he **robbery, burglary, and in-court identification charges** were flawed and contributed to an unjust and unwarranted result... On the robbery charge, the judge failed to (1) charge second-degree robbery as a lesser-included offense, (2) define 'deadly weapon,' and (3) otherwise follow the model jury charge. These errors possessed the clear capacity to contribute to an unjust result... [A]s part of the robbery charge, the judge did not define 'deadly weapon.' The failure to define that term prevented the jury from understanding an element of

first-degree robbery... By omitting the definition, the jury was required to speculate about the meaning of 'deadly weapon,' an essential element of the charge. Finally, the judge was required to select from the ... choices from the model jury charge [that could raise robbery to first degree robbery]... The judge selected all three, required that the jury must find both 2a and 2b, and referenced a third-degree crime -- theft -- concerning 2c, rather than a crime of the first or second degree... In his re-charge, the judge included all three sections, substituted 'any crime of the first or second degree' in place of theft, and -- as the assistant prosecutor stated - 'hinted that [the jury] had the option of finding [defendant guilty] under second-degree.' The judge did not, however, instruct the jury that it must find defendant guilty of second-degree robbery, if it found that the State had not proven beyond a reasonable doubt that defendant was armed with, or used or purposely threatened the immediate use of a 'deadly weapon.' In other words, if the jury did not find that defendant used the knife as a deadly weapon, then it must acquit of first-degree robbery. Even though the judge 'hinted' that second-degree robbery was an option, it was not included on the verdict sheet.

"We find that the judge also committed plain error concerning the burglary charge. The judge omitted the definitions of 'armed with,' 'recklessly,' and 'attempt,' and although he charged third-degree burglary as a lesser-included offense, the verdict sheet did not provide for that option.

"We agree with defendant that the judge listed several irrelevant factors when he charged the jury on identification. There is no evidence to suggest that either Schaub or the victim identified defendant out-of-court. Nevertheless, the charge focused on a non-existent out-of-court identification... Furthermore, the victim's in-court identification of defendant was inherently suggestive; yet the trial judge provided no guidance to the jury to evaluate this circumstance. Schaub testified that he knew defendant for a couple of months before the incident. Although the victim attempted to identify defendant out-of-court, she was unable to do so. About three months after the incident, an investigator conducted a photographic array with the victim at the prosecutor's office. The investigator showed the victim eight photographs twice, but the victim was unable to identify anyone. It was not until fourteen months after failing to identify defendant at the prosecutor's office, that the

victim identified defendant for the first time at trial while defendant was seated at the counsel table. Thus, the identification charge was confusing and contributed to an unjust and unwarranted result." See also **LESSER INCLUDED OFFENSES**. (Daniel V. Gautieri, A.D.P.D.)
<http://www.judiciary.state.nj.us/opinions/a2244-09.pdf>

State v. David Smith, unpublished opinion, App. Div. Docket No. A-1670-09T4 (June 21, 2011) - Convictions affirmed in part, reversed in part. "We agree with defendant's argument ... that the part of the **verdict sheet relating to the charge of aggravated assault** upon Jones had the capacity to confuse the jury. Therefore, the conviction for that offense must be reversed and the case remanded for a new trial... The jury verdict sheet with respect to the charge of third-degree aggravated assault upon Jones was highly misleading. Although the State agreed that defendant could be found guilty of this offense only if the jury found he had 'attempted to cause' significant bodily injury to Jones, which requires a showing of a 'purpose' to inflict such injury, and the trial court instructed the jury on the basis of this theory, the verdict sheet indicated that defendant could be found guilty of this offense based on 'knowing' or 'reckless' conduct. Furthermore, the jury question regarding the charge of third-degree aggravated assault upon Jones appeared immediately after the three jury questions regarding the charges of third-degree aggravated assault upon Officers Souto and Sanabria and second-degree aggravated assault upon Jones, each of which indicated that the State had to show that defendant had 'attempt[ed] to cause' bodily injury or serious bodily injury. Therefore, a person reading the jury question relating to the charge of third-degree aggravated assault upon Jones could understandably have gotten the impression that even though defendant could be found guilty of the other aggravated assault charges only if he was found to have 'attempt[ed] to cause' bodily injury, he could be found guilty of the charge of third-degree aggravated assault upon Jones based on a showing that he acted 'knowingly' or 'recklessly.'" <http://www.judiciary.state.nj.us/opinions/a1670-09.pdf>

JUVENILES

State in the Interest of V.A., T.H., C.T., and M.R., 420 N.J. Super. 302 (App. Div. 2011) - Denial of waivers to adult court reversed. "After finding that the State had

established probable cause to conclude each of the four had committed an offense that subjected him to waiver, namely, second-degree aggravated assault, the judge denied the State's motion based on his conclusion that the State's decision to seek waiver constituted a patent and gross abuse of discretion. During the proceeding, the judge expressed his strong disagreement with the objectives of the waiver statute, N.J.S.A. 2A:4A-26, and voiced his objection to what he perceived to be the statute's impact on juveniles who are waived. We conclude that the judge impermissibly allowed his personal opinions and views, and his antipathy to the waiver statute, to color his evaluation of the legal issue before him, namely, whether the Prosecutor's waiver decision constituted a patent and gross abuse of discretion... Absent an abuse of prosecutorial discretion, which was not present here, N.J.S.A. 2A:4A-26(a) required the immediate waiver of the juvenile complaints against V.A., C.T. and M.R. to the Law Division as each was sixteen years of age or older and there was probable cause to conclude that each had committed a qualifying offense, namely second-degree aggravated assault.... The fourth juvenile, T.H., who was less than sixteen at the relevant time, is entitled to the opportunity to prove that 'the probability of his rehabilitation ... substantially outweighs the reasons for waiver' and if he does so, he will be entitled to remain in the Family Part. N.J.S.A. 2A:4A-26(e)."

State in the Interest of A.D. and A.D., juveniles, 420 N.J. Super. 144 (App. Div. 2011) - Order denying waiver of juveniles to adult court reversed. "After hearing the testimony of Investigator Miller at the waiver hearing, and considering the voluminous exhibits marked at that hearing, the trial court gave an oral decision setting forth its reasons for denying waiver. It stated there was no evidence of an agreement between A.D.#1 and A.D.#2 to commit murder, that A.D.#1 'didn't really comprehend what was about to transpire' when he went to his house, that A.D.#2 tried to convince Ramos not to proceed, that both were controlled 'by an older, aggressive male,' and that neither knew that the men in the car were armed. It deemed what it considered A.D.#1's renunciation "critical" to its determination as well as its finding that A.D.#2 never would have gone into the house if he understood his mother was about to be shot. After this court granted the State's motion for leave to appeal, we also granted its motion to expand the record to include a written opinion from the

trial court, issued approximately two weeks later, setting forth the trial court's reasons for denying a waiver application in another juvenile matter. Within that written opinion the trial court set forth its profound disagreement with the philosophy of the present statutory and procedural framework for deciding waiver applications... We recognize the concerns expressed by the trial court in terms of the consequences that may flow to an individual whose potential responsibility for committing an act is decided in the Law Division of the Superior Court rather than the Family Part. While we cannot fault the trial court for its concern about those consequences, we are satisfied it nonetheless strayed from its duty to apply controlling law... The State did not allege that A.D.#1 and A.D.#2 conspired together to murder Angel and grievously wound Lourdes. Rather, it alleged that they agreed to seek revenge against Luis, enlisted the aid of Ramos and, as a result, are responsible for the foreseeable consequences of their plan... The trial court's opinion did not address the concept of vicarious liability. It also, without explanation, disregarded significant portions of A.D.#2's several statements... In the course of its opinion, the court cited to what it termed A.D.#1's 'renunciation' and its view that both young men acted under compulsion from Ramos. Those issues, however, are defenses that must be resolved at trial... A jury may be persuaded to accept these defenses and absolve one or both of criminal responsibility for what occurred. A jury may equally, however, consider their alleged knowledge of Ramos's background, including his membership in the Latin Kings and conviction for shooting someone for looking at his girlfriend, and decide they were, or should have been, aware of the potential consequences of summoning him to the scene. It may also consider their decision to wait an extended period of time in the rain for his arrival. In the context of a probable cause hearing, the State was entitled to the benefit of the favorable inferences that could be drawn from the evidence it presented. Here, the overall thrust of the court's analysis was to disregard those inferences and draw inferences in favor of the juveniles. This it was not free to do." (Lon Taylor, A.D.P.D.)

LESSER INCLUDED OFFENSES

State v. Timothy D. Davis, unpublished opinion, App. Div. Docket No. A-2244-09T3 (June 21, 2011) - Convictions

reversed by the Appellate Division because on the robbery charge, the judge failed to charge **second-degree robbery** as a lesser-included offense of armed robbery. "Here, the facts clearly indicate that a charge for second-degree robbery as a lesser-included offense was warranted. Robbery is a crime of the second degree, but is a crime of the first degree 'if in the course of committing the theft the actor ... is armed with, or uses or threatens the immediate use of a deadly weapon.' N.J.S.A. 2C:15-1b. The victim was unable to identify the object in defendant's hand as a weapon. The judge acknowledged that 'it's a jury question whether [the victim] recognized [the 'long and pointy' object] as a weapon; whether [the victim] was put in fear of it" If the jury concluded that the object was not a weapon, they could still determine that the victim was put in fear of bodily injury by the mere presence of two men who entered her residence without permission through the back door at 9:00 in the evening. Thus, the jury could acquit on first-degree robbery and convict on second-degree robbery. The judge determined that the record supported a lesser-included offense, but he charged only third-degree theft. We discern that he charged theft, as a lesser-included offense, because the jury could find that defendant did not possess a weapon. Under that rationale, it was plain error not to charge second-degree robbery as well." See also **JURY INSTRUCTIONS**. (Daniel V. Gautieri, A.D.P.D.)
<http://www.judiciary.state.nj.us/opinions/a2244-09.pdf>

State v. Thor T. Frey, unpublished opinion, App. Div. Docket No. A-1716-09T2 (August 15, 2011) - Convictions reversed. "Defendant contends, for the first time on appeal, that the trial court should have charged the jury regarding the category of theft known as **receiving stolen property**, see N.J.S.A. 2C:20-7, which is a **lesser-included offense of robbery** [the predicate for the felony murder conviction], defined, in turn, inter alia, as theft with bodily injury, use of force, or threat of bodily injury. See N.J.S.A. 2C:15-1a.... If the jury believed defendant's version of events and discounted the State's circumstantial evidence, it could have rationally found him guilty of participating in a theft because he admitted having knowledge of a safe in the victim's home, helping O'Grady put the safe in a car outside of the victim's residence and hiding it in the woods; and guilty of theft/receiving by his conduct with the safe and by accepting money from O'Grady several days later after helping him break open the

safe. Moreover, the jury's acceptance of this version of events could have rationally given rise to an acquittal on the charge of robbery (and therefore felony-murder) on the basis that defendant simply did not actively participate in O'Grady's efforts inside the home and in using force against the victim in the course of stealing the safe. A theft/receiving charge was 'clearly indicated' by the evidence at trial, specifically, defendant's statement."
<http://www.judiciary.state.nj.us/opinions/a1716-09.pdf>

State v. William J. Quinonez, unpublished opinion, App. Div. Docket No. A-0894-08T4 (March 18, 2011) - Kidnapping conviction reversed. "Quinonez argues that the trial judge erred in refusing to charge the lesser-included offense of **criminal restraint**, N.J.S.A. 2C:13-2(a), as requested... There is no question that Ida was restrained. We disagree with the trial judge's conclusion that driving with a young child without a seatbelt in the front seat of a car does not expose the child to the risk of serious bodily injury... A jury could conclude that Quinonez had the requisite knowledge that requiring Ida to stand, without a seatbelt or car seat, in the front of the car exposed her to the risk of serious bodily injury... If the jury credited Quinonez's testimony, it could have acquitted him of kidnapping because he did not have the 'purpose' to 'terrorize,' and convicted him of criminal restraint because he 'knowingly restrained' Ida in 'circumstances' exposing her to 'risk of serious bodily injury.' N.J.S.A. 2C:13-2(a). While the jury did convict on the basis of a purpose to terrorize, it did so under circumstances in which its only other option was a complete acquittal. We cannot say on the present record that, given a choice, the jury would not have opted for criminal restraint over kidnapping."

<http://www.judiciary.state.nj.us/opinions/a0894-08.pdf>

MEGAN'S LAW

State v. G.L., ? N.J. Super. ?, 19 A.3d 1017 (App. Div. 2011) - Denial of motion to vacate convictions for failure to register affirmed. "In 1995, defendant, G. L., at age seventeen, pled guilty to conduct that, had he been an adult, would have constituted first-degree aggravated sexual assault on a twelve-year-old... As a result of the offense, defendant, who was given a three-year suspended sentence and two years of probation, was subject to Megan's Law, N.J.S.A. 2C:7-1 to -23... Thereafter, defendant wrote

to the prosecutor, among others, seeking to have his 1995 plea vacated because he was not informed of its Megan's Law consequences. Following an investigation, ... , the plea was vacated and defendant was permitted to plead to fourth-degree child abuse, in violation of N.J.S.A. 9:6-3, an offense that is not subject to Megan's Law... Approximately one year later, defendant moved to have his convictions for failure to register vacated. However, his unopposed motion was denied on the ground that the convictions for failure to register were based upon an adjudication that was in full force and effect at the time that the failures took place and therefore were validly entered... The registration provision, set forth in N.J.S.A. 2C:7-2, requires registration, in a statutorily prescribed manner, by '[a] person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of [an enumerated] sex offense.' [T]he terms 'convicted' and 'adjudicated delinquent' are 'unadorned by any modifier, such as "final judgment" or "valid."' [Citation omitted]... Nothing in the statute suggests that the requirement of registration should be retroactively annulled because a plea to a crime subject to Megan's act is later withdrawn. Thus, ... , no legal basis for vacating defendant's convictions for failure to register exists..."

MOTOR VEHICLES

State v. Nicole Holland/State v. Kenneth Pizzo, Jr., ? N.J. Super. ?, 2011 N.J. Super. LEXIS 61 (April 7, 2011) - Cases remanded for consolidated hearing on reliability of Alcotest results. "We granted leave to appeal in these two matters, consolidated for the purposes of this opinion, to resolve a common issue: whether blood alcohol concentration (BAC) results derived from an Alcotest 7110 MKIII-C (Alcotest) breath-testing device are admissible against defendants in driving while intoxicated (DWI) prosecutions when the device has been calibrated with a Control Company, Inc. (Control Company) temperature probe, or thermometer, instead of the Ertco-Hart temperature probe referenced in State v. Chun, 194 N.J. 54 ... (2008)... In our view, the AIR is not rendered inadmissible as an automatic consequence of the State's failure to produce a non-core foundational document. Granted, the Chun Court mentioned "Ertco-Hart" several times in requiring foundational documents identifying the temperature probe by serial number in the calibration reports, inclusion of that serial number in the firmware of the temperature measuring system, and

production of the temperature probe's NIST traceable certification. We do not read these references too strictly or literally as a mandate that only the Ertco-Hart device be used, but rather as a facile means of identifying the temperature probe used to calibrate the Alcotest machine in Chun, and as distinguished from the other thermometers employed in the calibration process... Because the use of another manufacturer's temperature probe to calibrate the Alcotest machine does not alone compel exclusion of test results, we reverse the contrary finding of the Law Division judge in the Holland matter. Of course, the fact that the Alcotest results are not rendered automatically inadmissible thereby does not end the inquiry. Although the Alcotest machine has been found to be generally reliable, the State still bears the burden of demonstrating the 'proper working order' of the device... Based on the foundational document itself, Holland raised sufficient questions as to the reliability of the Control Company's probe to warrant further inquiry. Specifically, the device was calibrated on May 26, 2009, by a State Police coordinator using a Control Company temperature probe with a serial number DDXAP2-149. During discovery, the State provided the Control Company Traceable Certificate of Calibration for Digital Thermometer as a foundational document, demonstrating the reliability of the temperature probe. However, contained on this certification are numerous serial numbers and 'due dates,' including a March 6, 2009 due date for temperature probe serial number 149. Although unexplained, the due date may possibly be the date the probe is due for re-certification... We reach the same result, as did the other Law Division judge, in the Pizzo matter... [T]hese two matters be consolidated and remanded to the Law Division for a hearing before a single judge to be designated by the Assignment Judge of Monmouth County to establish the reliability of the Alcotest results and the validity of the Traceable Certificate of Calibration for Digital Thermometer at the time of the Alcotest's calibration in each case." (John Menzel for Pizzo; Alexander M. Iler for Holland)

<http://www.judiciary.state.nj.us/opinions/a4384-09a4775-09.pdf>

State v. Nunnally, 420 N.J. Super. 58 (App. Div. 2011) - Order dismissing affirmed. "While driving a commercial vehicle, defendant Gerald E. Nunnally was arrested for a suspected violation of N.J.S.A. 39:3-10.13 (prohibiting

operation of a commercial motor vehicle by a driver 'with an alcohol concentration of 0.04% or more.'). After defendant refused to submit to an Alcotest, the arresting officer also charged him with violating the general refusal statute, N.J.S.A. 39:4-50.4a, instead of the statute pertaining to refusal by a person driving a commercial vehicle, N.J.S.A. 39:3-10.24 (CDL refusal statute). The Law Division dismissed the refusal charge, agreeing with the municipal judge that the State could not prosecute defendant under the general refusal statute in these circumstances and the State could not amend the complaint to charge defendant with CDL refusal, on the day of trial and after the ninety-day statute of limitations had run... Because CDL refusal is not a lesser included offense of general refusal, we agree that the State was precluded from amending the complaint to charge CDL refusal after the statute of limitations expired. We also hold that the driver of a commercial vehicle who is arrested and charged only with CDL DUI, N.J.S.A. 39:3-10.13, and who thereafter refuses a breath test, may only be charged under the cognate CDL refusal statute, N.J.S.A. 39:3-10.24, and may not be prosecuted under the general refusal statute, N.J.S.A. 39:4-50.4a... For future guidance, we note that a commercial vehicle driver whose conduct violates both the general and CDL DUI statutes may be arrested and charged under both statutes. If the driver then refuses a breath test after being advised of the consequences of refusal pertaining to both statutes, the driver may also be charged under both refusal statutes." (Terrence M. Scott)

State v. Rodriguez-Alejo, 419 N.J. Super. 33 (App. Div. 2011) - Refusal conviction reversed. "On appeal, defendant argues, as he did in both the municipal court and Law Division proceedings, that his limited proficiency in English prevented him from understanding the instructions regarding the breath sample. Additionally, although not specifically raised as a violation of his rights by defendant, he was not read the required portion of the approved instructions regarding the effect of a refusal. Finding defendant was not sufficiently informed of the breathalyzer process, we reverse... We find under these circumstances that defendant has met the burden of production and persuasion as to his limited knowledge of English. Although the Law Division and the municipal court found that defendant had some knowledge of English, neither found that he knew sufficient English to understand the breathalyzer instructions. The first portion of the

instructions on the standard statement form, which must always be read prior to administering a breathalyzer test, is lengthy and requires English fluency to be understood... If the rule pronounced in Marquez [208 N.J. 485 (2010)] is applied to these facts, these breathalyzer instructions should have been read to defendant in Spanish... We find that giving the decision in Marquez pipeline retroactive application is 'just and consonant with public policy.' State v. Nash, 64 N.J. 464, 469 (1974). Neither the purpose of the rule, reliance on the law preceding the decisions, nor administration-of-justice considerations justify limiting its application to cases arising after the decision was announced." (Albert P. Mollo)

State v. Schmidt, 206 N.J. 71 (2011) - Appellate Division judgment reversed, refusal conviction and sentence reinstated. "Those who are required to provide a breath sample in order to determine whether they have operated a motor vehicle while under the influence of intoxicating liquor are statutorily entitled to '[a] standard statement, prepared by the chief administrator [of the Motor Vehicle Commission, which] shall be read by the police officer to the person under arrest.' N.J.S.A. 39:4-50.2(e). That statement, prepared by the Executive Branch, differentiates between those who consent to providing the required breath sample and all others, and it requires that an additional statement 'be read aloud only if, after all other warnings have been provided, a person detained for driving while intoxicated either conditionally consents or ambiguously declines to provide a breath sample.'" State v. Spell, 196 N.J. 537, 539 (2008). Because defendant consented to provide the required sample of his breath yet, despite warnings, failed to do so, he remained among those who have consented and, hence, was not entitled to any additional readings... [T]he question is whether defendant's failure to provide proper breath samples despite repeated warnings, standing alone, was sufficiently 'ambiguous or conditional' to require the reading of the Additional Statement. Because defendant unequivocally consented to the breath test, his later failures to provide the necessary volume and length of breath samples did not render his earlier consent ambiguous or conditional... [W]e recommend to the Attorney General that the main text of the Standard Statement be supplemented to address specifically those instances where a DWI arrestee attempts to manipulate the results of the breath test, which supplement should inform the arrestee of the consequences of failing to submit fully and completely

to the breath test requirements. That notice should avoid any future due process claims arising out of facts similar to those present in this appeal." (Jeffrey S. Mandel for amicus curiae ACDL-NJ).

State v. Weil, 421 N.J. Super. 121 (App. Div. 2011) - "In this appeal, defendant urges us to revisit State v. Bringhurst, 401 N.J. Super. 421 (2008), and hold, in essence, that a defendant who files a Laurick [120 N.J. 1 (1990)] post-conviction relief (PCR) petition to obtain relief from enhanced penalties for driving while intoxicated (DWI) based on a purported uncounseled prior DWI conviction is absolved from establishing a prima facie case for relief where her time delay has resulted in destruction of most of the records pertaining to the prior conviction. We decline to do so and affirm defendant's conviction.... This is not a situation where defendant clearly disputed the documentary evidence and categorically denied being represented by counsel at the 1994 municipal court hearing. Nor did she certify to any good faith efforts to obtain information or locate documents in furtherance of her Laurick PCR petition. Rather, defendant appears to take the position that she need only assert the mere claim of an uncounseled first DWI conviction at a time when the bulk of the records are no longer available to obtain step-down relief. We are satisfied, in accordance with Bringhurst, that defendant must establish she is entitled to relaxation of Rule 7:10-2(g)(2)'s time limit and must also allege facts in the petition sufficient to establish a prima facie case for relief under Laurick and its progeny. Defendant has failed to carry her burden. Accordingly, her PCR petition was properly denied by the Law Division."

POST-CONVICTION RELIEF (PCR)

State v. W.B., unpublished opinion, App. Div. Docket No. A-5940-09T3 (June 23, 2011) - Denial of PCR reversed, case remanded for evidentiary hearing. "We agree with the argument contained in Point I that defendant should be afforded an evidentiary hearing to develop whether it was reasonable for defense counsel to choose not to seek a pretrial Michaels [136 N.J. 299 (1994)] hearing for the purpose of excluding statements that were allegedly the product of suggestive or coercive interrogative techniques.... [T]his argument was not asserted or pursued during the PCR proceedings in the trial court.... [E]ven if

we were to refuse to consider [this issue] because it was not previously raised in the trial court, it would inevitably lead to proceedings concerning the effectiveness of PCR counsel. Rather than prolong the proceedings by declining to hear this argument at this time, we deem it more expedient to consider the issue on its merits and, having done so, remand for an evidentiary hearing to develop whether trial counsel's failure to seek a pretrial Michaels hearing was strategic and, if so, whether the tactics employed were reasonable." <http://www.judiciary.state.nj.us/opinions/a5940-09.pdf>

State v. Michael Barcalow, unpublished opinion, App. Div. Docket No. A-1095-09T2 (March 7, 2011) - Denial of PCR reversed, case remanded for evidentiary hearing. "Defendant's final specific allegation of ineffective assistance is his contention that he asked his trial attorney to file a motion for what he characterizes as a change of venue. We interpret defendant's papers to refer not to a change of venue but, rather, to have his matter tried before someone other than the judge who handled it. Defendant said that he requested his attorney to raise the issue because the trial judge's secretary was a close friend to his former wife and, in fact, had been a bridesmaid at their wedding... If defendant's assertion is true, it would not be unexpected that the victim's friend, the judge's secretary, would express her opinions, both about the victim and defendant. We have no way of knowing whether such occurred and, if it did, what impact if any it may have had upon the proceedings. If such occurred, the question whether that could 'reasonably lead counsel or the Parties' to think that a 'fair and unbiased hearing' was precluded must be addressed. R. 1:12-1." <http://www.judiciary.state.nj.us/opinions/a1095-09.pdf>

State v. Fayyaadh Harris, unpublished opinion, App. Div. Docket No. A-5852-08T2 (July 18, 2011) - Denial of PCR reversed, case remanded for evidentiary hearing. "Defendant filed a petition for post-conviction relief (PCR) arguing among other things, that his trial counsel did not advise him that he could testify at the Miranda hearing... In his remarks at oral argument and in his opinion, the judge made credibility determinations and identified concerns and problems that informed the defense strategy. The latter finds no support in the record; the former cannot occur without an evidentiary hearing. Moreover, a comparison of the trial transcript and the

suppression hearing transcript reveals a marked difference. At trial, defense counsel and the trial judge made the requisite inquiry on the record about defendant's right to testify at trial. The transcript of the suppression hearing bears no such inquiry. Moreover, categorizing the omission at the suppression hearing as harmless error is not so apparent to us. Having presided at the trial, the trial judge made that assessment with the benefit of a full record. A different result may have occurred if defendant had testified at the suppression hearing. The fundamental concern, however, is the disputed nature of the advice given to defendant at that time. That issue must be resolved and can only be resolved at an evidentiary hearing. Furthermore, in light of the trial judge's high regard for defense counsel and the 'veteran homicide detective,' the hearing must be conducted before another judge."

<http://www.judiciary.state.nj.us/opinions/a5825-08.pdf>

State v. R.S., unpublished opinion, App. Div. Docket No. A-0161-09T4 (April 1, 2011) - Denial of PCR reversed in part, remanded for evidentiary opinion. "[D]efendant's arguments based on the absence of any evidence in the record that he was advised a civil commitment under the SVPA could be for life have sufficient merit to warrant an evidentiary hearing at which a full record can be developed... The requirement that a defendant who pleads guilty to an offense that will subject him to civil commitment under the SVPA receive such advice was recognized by our Supreme Court in State v. Bellamy, 178 N.J. 127 (2003)... [D]efendant argues that the information communicated to him by the plea form and his colloquy with the trial court did not satisfy Bellamy because it did not include the fact that such confinement 'may be for an indefinite period, up to and including lifetime commitment.' 178 N.J. at 140. This argument assumes that the only information defendant received concerning possible confinement under the SVPA was the information communicated to him by the plea form and colloquy with the trial court. Such an assumption fails to take into account the role of trial counsel in advising his or her client of the consequences of a plea. Defendant's counsel may very well have provided him with information concerning possible confinement under the SVPA in addition to the simple question and answer contained in the plea form and colloquy with the trial court... In addition, testimony should be adduced concerning the advice, if any, that defendant's

appellate counsel gave him about Bellamy, his possible confinement under the SVPA, and the availability of a claim of ineffective assistance of trial counsel based on the failure to advise him of the full possible consequences of the SVPA... Accordingly, we vacate the order denying defendant's petition and remand to the trial court for an evidentiary hearing in conformity with this opinion. The trial court is directed to make detailed findings of fact and conclusions of law based on the evidence presented at that hearing."

<http://www.judiciary.state.nj.us/opinions/a0161-09.pdf>

State v. Omar Villanueva, unpublished opinion, App. Div. Docket No. A-3209-09T1 (July 19, 2011) - Denial of PCR reversed, case remanded for evidentiary hearing. "Here, defendant made specific allegations of ineffective assistance of counsel and supported those allegations with his own verification of the PCR petition, with the transcripts of the proceedings at the time of his plea and sentencing, and with a certification from his defense attorney confirming defendant's claims of incorrect or inadequate legal advice. The attorney acknowledged that he had advised defendant he could be convicted of endangering the welfare of a child simply for weighing boys in the nude. He gave that advice because the trial court had denied defendant's pretrial motion to dismiss the indictment. The attorney also certified that he had not advised defendant about the consequences of community supervision for life. As we will further explain, these allegations were sufficient to establish a prima facie claim of ineffective assistance of counsel... Defendant's submissions showed that his attorney advised him nudity alone could constitute a violation of the statute. Without a more precise explanation of the necessary elements under the statute, that advice would be legally inaccurate. Defendant also adequately asserted that the allegedly faulty advice directly affected his acceptance of the stipulation admitting an element of the offense and his decision to plead guilty. Defendant's PCR petition and supporting evidence made a prima facie showing of deficient performance by counsel and prejudice to defendant in agreeing to plead guilty. The prima facie showing entitled defendant to an evidentiary hearing to prove his claims. Also, the absence of advice from defense counsel on the meaning and effect of community supervision for life could satisfy the Strickland standard. Defendant contends he would have elected to stand trial if he had been advised

more specifically about the highly-restrictive consequences of community supervision for life... We make no finding on this record that counsel's representation was in fact deficient, or that defendant was prejudiced by the absence of more detailed advice. We hold only that defendant presented a prima facie case of ineffective assistance with respect to community supervision for life, and he was entitled to an evidentiary hearing and an opportunity to prove his claims."

<http://www.judiciary.state.nj.us/opinions/a3209-09.pdf>

State v. Lenford Wray, unpublished opinion, App. Div. Docket No. A-3464-08T4 (March 24, 2011) - Denial of PCR reversed, case remanded for evidentiary hearing. "Defendant claimed that as a result of his guilty plea, he 'became a resident with [an] aggravated conviction which is an automatic deportation.'... Since defendant filed this appeal, our Supreme Court has decided State v. Nunez-Valdez, 200 N.J. 129 (2009), and the United State Supreme Court has decided Padilla v. Kentucky, 559 U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)... The PCR judge, of course, did not have the benefit of the holdings in Nunez-Valdez and Padilla when he decided this case. We have recently determined that the holding in Nunez-Valdez should be given '[p]ipeline retroactivity . . . [to] those cases pending appeal of an order denying post-conviction relief.' State v. Gaitan, ___ N.J. Super. ___, ___ n.9 (App. Div. 2011) (slip op. at 13). Defendant's appeal was pending when Nunez-Valdez was decided. That alone is reason to remand the matter... We are further convinced that the matter must be remanded because of the peculiar facts presented. [W]hen questioned by the judge during his guilty plea to the accusation, defendant indicated that he was a United States citizen. At the PCR hearing, the judge characterized that answer as a 'mistake[] innocently' made by defendant... Furthermore, in this case, defendant had appeared before the same judge with the same attorney several months earlier and indicated that he was not a citizen. That prompted the judge to discuss the 'possibility' of deportation based upon defendant's guilty plea. In denying this PCR petition, the judge concluded that defendant's knowledge of the possibility, as opposed to the probability, of deportation based upon the earlier plea proceedings was sufficient to deny the application. In light of the holdings in Nunez-Valdez and Padilla, on remand, the judge must consider what effect, if any, the information he conveyed to defendant in September 2006 may

have upon the ineffective assistance of counsel claim."
<http://www.judiciary.state.nj.us/opinions/a3464-08.pdf>

State v. Luz Zambrano, unpublished opinion, App. Div. Docket No. A-0661-09T3 (May 4, 2011) - Denial of PCR reversed, case remanded for evidentiary hearing. "We therefore reject any claim that she misunderstood the possible consequences of her plea based upon contrary or misleading advice rendered by her attorney. However, what is unclear from the record is whether 'the deportation consequence [wa]s truly clear,' [citations omitted]. [D]efendant's certification provided no details regarding the impact that her guilty plea has had upon her immigration status. PCR counsel alluded to adverse consequences only in the broadest terms. However, we note that pursuant to 8 U.S.C.A. § 1227(a)(2)(A)(iii), '[a]ny alien' is subject to mandatory deportation if 'convicted of an aggravated felony.' Pursuant to 8 U.S.C.A. 1101(a)(43)(G), 'a[ny] theft offense ... for which the term of imprisonment [is] at least one year' is deemed an 'aggravated felony.' Under the circumstances presented, we conclude a remand is necessary to permit the judge to consider the immigration consequences, if any, resulting from defendant's guilty plea, and their implications in light of the holdings in Nunez-Valdez and Padilla." <http://www.judiciary.state.nj.us/opinions/a0661-09.pdf>

PRE-TRIAL INTERVENTION (PTI)

State v. J.F.P., unpublished opinion, App. Div. Docket No. A-4380-09T1 (May 9, 2011) - Convictions reversed, case remanded for reconsideration of defendant's termination from PTI. "Although not raised by defendant, we note a factual ambiguity in the record concerning the proper amount of defendant's restitution. At oral argument, the State represented that the second check written by defendant was issued to replace the first. The timing of the second check, two days after the return of the first check for insufficient funds, seems to support that interpretation. The indictment charged defendant in only one count for writing both checks. However, the notations on the two checks are ambiguous. The second check could be a proffer of payment of the second half of the amount due or an attempt to replace the first check which was not honored... Only the amount defrauded by use of the two dishonored checks should be collected by the criminal justice system. Thus, if, as the State represented,

defendant issued the second check to cover the first check, his restitution should have been set at \$1435.50 rather than \$2871. Had the lesser amount been set, defendant would have completed his payments and been discharged from PTI without the extension of PTI and prior to the notice of termination."

<http://www.judiciary.state.nj.us/opinions/a4380-09.pdf>

PROSECUTORIAL MISCONDUCT

State v. Albert J. Dilts, unpublished opinion, App. Div. Docket No. A-3272-09T2 (July 20, 2011) - Convictions for armed robbery and weapons offenses reversed. "The reference to defense counsel and reading 'between the lines' immediately before and after the assertion that 'everybody' knew Dilts was guilty leads to the ineluctable conclusion that the prosecutor was suggesting to the jury that defense counsel knew his client was guilty... We have concluded that the prosecutor's statements, which clearly implied that defense counsel knew his client was guilty, extended beyond the leeway generally afforded to counsel in closing argument. In the context outlined above, the prosecutor's statements were also 'unjustified aspersions' on defense counsel, whom he criticized for focusing on the knife when 'everybody knew' Dilts was guilty. [Citations omitted]."

<http://www.judiciary.state.nj.us/opinions/a3272-09.pdf>

State v. Brian Holmes, unpublished opinion, App. Div. Docket No. A-3199-08T4 (July 29, 2011) - Convictions reversed based on multiple, cumulative prosecutorial misconduct. "Defendant also contends that his right to a fair trial was violated ... by the prosecutor's questions regarding the 'evidence' with which Hernandez had been presented resulting in his decision to inculcate defendant. The 'evidence' was Hernandez's polygraph test results, which were excluded from the trial. In addition to the line of questioning during which the prosecutor directly asked Hernandez about being confronted with evidence that he was lying about defendant's involvement, and his affirmative response, the prosecutor commented in closing about Hernandez being confronted about lying... The prosecutor's allusion clearly created a reasonable inference that the evidence inculcated defendant. Hernandez, when 'confronted' with the evidence, confessed not to his own involvement, ... but to defendant's involvement... No limiting instruction was given clarifying

that the State was not actually in possession of some other evidence, not available to the jury, incriminating defendant. Additionally, in this case, a guilty verdict necessarily required the jury to find Hernandez credible... That Hernandez was 'confronted with other evidence' that he lied about defendant's involvement in the crimes implied that the State had access to undisclosed evidence. It also created a real possibility of bolstering Hernandez's credibility by implying that, whatever the nature of the 'evidence' the prosecutor alluded to, it was strong enough to make Hernandez change his testimony and 'come clean.' It put defendant in the position of combating an inference that incriminating evidence existed outside of the record, when his only viable response was inadmissible evidence, namely, the polygraph results showing that Hernandez lied, which was itself unreliable and incriminating.

"In response to defendant's argument that the jury should be skeptical about Hernandez in light of the fact Kong did not testify, the prosecutor stated the following: '[Defense counsel] and I have something in common, and that is subpoena power. We both have the ability to subpoena witnesses ... and he didn't call [Kong] as a witness either.' Even if not an actual suggestion to the jury that it draw an adverse inference from defendant's failure to produce a witness, it nonetheless cut against the presumption of innocence. The comment was unrelated to exposing any deficiency in defendant's testimony or weakness in defendant's presentation of his case... The natural inference from the comment was that, if called, Kong's testimony would have been unfavorable to defendant. It was Hernandez who testified about Kong and who either stated or implied that Kong was the only other person with knowledge of defendant's involvement in the scheme... The comment made defendant appear to have avoided calling a witness because the testimony would have been unfavorable to him, even though he had no burden to call any witness.

"Defendant alleges further error occurred when Assistant Prosecutor Isenhour testified on direct ... to establish that, as four consecutive sentences were imposed, Hernandez did not receive a benefit from his plea agreement, thereby bolstering his credibility. Defense counsel objected... The law does not support the inferences the State urged the jury to adopt. Multiple prison sentences imposed for multiple offenses 'shall run concurrently or consecutively as the court determines at the time of sentence,' but there is 'no overall outer limit on the cumulation of consecutive sentences' N.J.S.A.

2C:44-5(a). As a result, Isenhour's testimony that, as a 'general principle, we don't impose more than two consecutive sentences' for multiple offenses was misleading... By urging the jury to infer that Hernandez did not obtain a benefit by agreeing to a plea deal, based upon a misleading recitation of the law on sentences, the State invited the jury to speculate about how a court would have sentenced Hernandez, if his case had ultimately gone to trial." (Jeffrey S. Mandel)
<http://www.judiciary.state.nj.us/opinions/a3199-08.pdf>

RETROACTIVITY

State v. Paul Barros, unpublished opinion, App. Div. Docket No. A-1288-10T2 (June 6, 2011) - Order granting PCR affirmed. "Rather than contest defendant's factual allegations, the State based its opposition on its contention that Padilla v. Kentucky, 559 U.S. ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and State v. Nuñez-Valdéz, 200 N.J. 129 (2009), should not be applied retroactively. That is, the State asserts that, when defendant pled guilty, the existing level of professional competence precluded counsel from providing misleading information but that it did not prevent counsel from 'declin[ing] to discuss deportation consequences at all with his client...' We reject the State's argument and affirm substantially for the reasons set forth in our recent decision in State v. Gaitan, ___ N.J. Super. ___ (App. Div.), cert. granted, ___ N.J. ___ (2011), which is not materially different from the case at hand. Padilla makes clear that attorneys cannot remain silent and must affirmatively advise noncitizen clients about the deportation consequences of their guilty pleas... The State's argument that this holding constitutes a new rule, which it believes should be applied only prospectively, is without merit." (Anthony J. Iacullo and Joshua H. Reinitz)
<http://www.judiciary.state.nj.us/opinions/a1288-10.pdf>

State v. Dock, 205 N.J. 237 (2011) - Convictions and sentence reinstated. "In 2004, defendant filed a petition for post-conviction relief (PCR), claiming, among other things, ... that he was 'deprived of his right to due process of law, a fair trial and to summon witnesses on his behalf ... when his star witness, Maurice Allen, was forced to testify in restraints and/or the court failed to issue[] an instruction that the restraints could not be used to determine Allen's credibility or the defendant's guilt.'

Those assertions were based on State v. Artwell, 177 N.J. 526 (2003), a decision rendered four years after defendant was convicted and sentenced, and two years after defendant's direct appeals were exhausted... We reverse and reinstate defendant's convictions and sentence because defendant would be eligible for the benefit of the rule in Artwell if and only if that decision were given full retroactive effect, a step that is unwarranted under New Jersey's well-settled retroactivity analysis... Artwell's ban on a defense witness testifying in restraints absent a showing of a security risk clearly 'breaks new ground[;] imposes a new obligation on the State[;] the result was not dictated by precedent existing at the time the defendant's conviction became final[;]' and is 'sufficiently novel and unanticipated.' [citations omitted]. In this narrow context, the conclusion that Artwell's ruling constitutes a new rule of law is simply unassailable... Artwell's fair-trial reasoning would not always be advanced by its retroactive application... [T]hose who administered our criminal trial system relied heavily on the ability to require restraints on witnesses without limitation. Finally, there is no doubt that giving Artwell's limited ban on restraints retroactive application will wreak havoc on the administration of justice, calling into question every trial in which a defense witness may have testified in restraints. For those reasons, we therefore conclude that the balance of the factors relevant to the second step of the retroactivity analysis must be struck against the retroactive application of Artwell's partial prohibition of defense witnesses testifying in restraints... Artwell's limited prohibition on the use of restraints on defense witnesses -- and, by extension, ..., on any witnesses in a criminal trial -- is to have prospective effect. We need not, on this record, consider whether Artwell would also be entitled to pipeline retroactivity in light of the fact that only full retroactivity, which we specifically decline to find here, would be required to provide the relief defendant seeks." (Paul J. Casteleiro)

State v. Jose Miranda, unpublished opinion, App. Div. Docket No. A-1567-10T4 (June 14, 2011) - Denial of suppression reversed, case remanded. "We granted leave to appeal to review an interlocutory order that denied defendant's motion to suppress evidence. The evidence in question was seized pursuant to a search warrant that did not particularize the apartment in a multi-dwelling structure to be searched. Instead, the warrant called for

further police investigation as to the particular apartment that may have contained contraband or other criminal activity; the warrant left it to police to ascertain the facts needed to particularize the place to be searched, and once ascertained, the warrant permitted the search without further examination of that new evidence by the issuing judge. Because the matter turns on the extent to which State v. Marshall, 199 N.J. 602 (2009), should apply to a search warrant issued in 2007 - a question not yet sufficiently developed in this case - we vacate the order denying suppression and remand for further proceedings... To summarize, we conclude Marshall is not distinguishable and -- but for the retroactivity question posed in this appeal -- requires suppression of the evidence seized pursuant to the search warrants in question. Because, however, the record does not provide sufficient information from which we may assess whether Marshall constitutes a departure from an 'appreciable past' and, if so, the extent to which Marshall should be applied retroactively, we remand for further development of the record." (Jane M. Personette and Brian J. Neary)
<http://www.judiciary.state.nj.us/opinions/a1567-10.pdf>

SEARCH AND SEIZURE

State v. Joseph Aduato, ? N.J. Super. ?, 2011 N.J. Super. LEXIS 98 (May 23, 2011) - DWI conviction affirmed. "In summary, when he arrived on the scene, Horton and his partner had a sufficient basis to make further inquiry under the concepts of both Pineiro [181 N.J. 13 (2004)] (field inquiry) and Martinez [260 N.J. Super. 244 (App. Div. 1992)] (community caretaking). Horton's decision to **turn his flashers on when he pulled behind Aduato's parked car did not, under the particular facts of this case, elevate that inquiry into a Terry stop...** We view the conduct as constitutionally ambiguous. The driver of such a car might be concerned that he or she was not free to drive away, ... , but would also have been reassured that the person parking behind was a police officer rather than a stranger with potentially unfriendly intentions. The use of the flashing lights enhanced Horton and his partner's safety, as well as Aduato's. Finally, common experience suggests that police officers routinely use their flashers when rendering roadside assistance... Once Horton ascertained that Aduato had the odor of alcohol on his breath, bloodshot and watery eyes, slurred speech, and that he had been drinking, he had a sufficient basis for a Terry

stop."

<http://www.judiciary.state.nj.us/opinions/a3419-09.pdf>

State v. Christian Blanco, unpublished opinion, App. Div. Docket No. A-4299-07T4 (March 8, 2011) - Denial of suppression motion affirmed in part, reversed in part. "We hold that Saucedo properly seized the small bag of marijuana on the front seat. However, having arrested defendant, secured him in a police car, and called for a tow truck, the police were **not confronted with exigent circumstances to justify the warrantless search** of the back seat of the car... Here, the motor vehicle stop was unexpected. Castellano had probable cause to believe there was contraband in the car. See State v. Nishina, 175 N.J. 502, 515-16 (2003) (the smell of marijuana itself constitutes probable cause). On the other hand, the stop took place on a Sunday afternoon when the traffic was light. A line of cars never formed as the officers effectuated the stop, arrested defendant, and searched the car. Furthermore, the officers called for a tow truck to remove the car as soon as defendant was arrested. The record is also bereft of any evidence that third parties knew of or had the occasion to remove or destroy the drugs in the car... The record contains not even a suggestion that one of the officers could not have remained with the car as the other sought a warrant. Under the circumstances of this case, the warrantless search of the back seat and the area behind the back seat was not reasonable." <http://www.judiciary.state.nj.us/opinions/a4299-07.pdf>

State v. Sean Brackin, unpublished opinion, App. Div. Docket No. A-5994-09T2 (May 4, 2011) - DWI conviction reversed. "[C]ounsel for defendant argued that the stop was unjustified. In support of that position, counsel relied on State v. Cryan, 320 N.J. Super. 325 (App. Div. 1999), in which we held that the fact that a vehicle, at 4:25 a.m., remained stopped at a light for five seconds after it turned green, then proceeded slowly to turn left, did not justify a police stop of the vehicle under the police's community caretaking function... [T]he State sought to distinguish Cryan on the basis that it concerned a five-second infraction, whereas the present case concerned a ten-second one... Although defendant's blood alcohol content was very high, and his conviction for driving while intoxicated was otherwise justified - a matter that we hope has been fully considered by defendant in determining the future course of his conduct - we agree

that a pause of the length that Officer Tobin testified to observing is not of sufficient length to have raised community caretaking concerns, particularly in circumstances in which defendant's driving after commencing to proceed through the light was unexceptionable... Officer Tobin could not have had a reasonable belief that a traffic law had been violated, ... , thereby justifying the stop, because as he testified, no cars followed defendant's, and thus there was indisputably no traffic to obstruct. Thus, we adhere to our conclusion that **a reasonable, articulable suspicion that a motor vehicle violation had been committed was not established.**" (Brian M. Dratch)
<http://www.judiciary.state.nj.us/opinions/a5994-09.pdf>

State v. Terrel Bridges, unpublished opinion, App. Div. Docket No. A-3343-08T4 (July 28, 2011) - Convictions reversed, **evidentiary hearing on defendant's suppression motion** to be held before re-trial. "Defendant contends ... that the judge erred in failing to conduct an evidentiary hearing on his motion to suppress. He argues he presented a material factual dispute as to whether Detective Holloway could have viewed the narcotics in plain view, that is, without physically intruding into the car... [T]he judge should have granted defense counsel's request at the first motion hearing to supplement the record to more clearly articulate defendant's argument... Also, once defense counsel clarified defendant's argument at the second motion hearing, the judge should have considered it... Here, defendant argued that Detective Holloway was outside of defendant's car and could not have seen the narcotics in the lower door pocket without physically intruding into the vehicle. This clearly created a material factual dispute as to whether the plain view doctrine applied. Where 'material facts are disputed, testimony thereon shall be taken in open court.' R. 3:5-7(c)... [H]ere, the judge should have held a hearing because the defendant's version of the facts would have presented an unlawful search." See also **EVIDENCE**. (Alison Perrone, Designated Counsel)
<http://www.judiciary.state.nj.us/opinions/a3343-08.pdf>

State v. Aaron Crooms, unpublished opinion, App. Div. Docket No. A-4118-09T1 (May 11, 2011) - Convictions reversed, suppression of evidence ordered. "Because we agree that there was an **insufficient showing of exigent circumstances to excuse law enforcement from seeking a search warrant**, we reverse the order denying defendant's motion to suppress the evidence seized from the car... The

first two prongs of the automobile exception are present. First, the patrolmen stopped defendant based on 'dumb luck.' Second, they had probable cause to believe that defendant's car contained contraband since the totality of circumstances support the patrolmen's well-grounded suspicion that they had witnessed a drug transaction... We conclude, however, that the third prong was not met because exigent circumstances that precluded obtaining a warrant were not present. Neither the officers' safety nor the preservation of evidence was in jeopardy, and it was not impractical to obtain a warrant prior to searching defendant's car... Here, there was no indication that the Freehold police officers did not have sufficient time to obtain a telephonic warrant from a municipal court judge pursuant to Rule 3:5-3(b). Although there was testimony that Superior Court judges cannot be contacted after 11:00 p.m., there was nothing to support that the officers could not contact a municipal court judge at that hour. Though it was late at night, there were three police officers initially present, four including the officer with the canine unit, at the scene with defendant, who was alone. The stop was located in a grocery store parking lot without any evidence of third parties who might tamper with the evidence, since Patrolman Otlowski indicated that no one had approached the vehicle during the stop. There was no testimony elicited at the suppression hearing suggesting that the officers or potential evidence in the car were in danger. Defendant was cooperative and had stepped away from the passenger compartment of the vehicle. Finally, there was no evidence that the Freehold Police were shorthanded, except the unsupported testimony of the officers stating that there is less manpower on the weekend." (Edward C. Bertucio)

<http://www.judiciary.state.nj.us/opinions/a4118-09.pdf>

State v. Raheem Cunningham, unpublished opinion, App. Div. Docket No. A-0105-08T2 (April 4, 2011) - Convictions reversed, suppression ordered. "The motion judge noted the time of day, the high-crime neighborhood, the verified call that shots had been fired, a second round of shots fired, defendant's actions in turning around and putting something in his pocket, and the officer's experience. Indeed, these are the same factors the State urges upon us as justification for a Terry stop... The judge did not conclude that they provided justification for an investigative detention... We view the facts in this case as similar to those presented in Williams II [410 N.J.

Super. 549 (App. Div. 2009)]... In this case, the early morning hour, the prior verified call of shots fired, and a second series of gunshots provide some distinctions from the facts in Williams II. The State urges that these distinctions make all the difference. However, Frett testified that he parked his car on the street at approximately 2:00 a.m., an hour or so after he investigated the call of shots fired. While it is unclear how long Frett remained in his car before noticing defendant, it is clear that numerous pedestrians passed the police cruiser... There was substantial vehicular traffic. None of these circumstances provided additional objective factors that supported a reasonable, articulable suspicion that defendant was engaged in criminality. Indeed, it was only defendant's decision to turn around and walk away that drew Frett's attention at all. Our reasoning in Williams II leads us to conclude that **under the totality of the circumstances, the investigatory stop of defendant was unreasonable...** In this case, **defendant's flight** for a short distance from the point where Frett issued his command **was not an 'intervening circumstance' sufficient to purge any taint from the improper investigatory stop.** Like the actions of the defendant in Williams II, the series of events unfolded quickly and seamlessly. After being ordered to stop on two occasions, defendant fled. Frett followed for a short distance in his police car before he saw defendant discard the drugs. During that time, defendant did not resist with force, as did the defendant in Williams I [192 N.J. 477 (2007)], or endanger other members of the public. Under these circumstances, the seizure of the drugs was not attenuated from the illegal investigatory stop."

<http://www.judiciary.state.nj.us/opinions/a0105-08.pdf>

State v. Antonio DeShazo, unpublished opinion, App. Div. Docket No. A-2856-09T1 (April 27, 2011) - Convictions reversed, suppression ordered. "There is no question that the stop of the vehicle defendant was driving was unexpected. However, defendant contests the finding of probable cause and the need to conduct an immediate search of the vehicle by reason of exigent circumstances... Here, the furtive movements by defendant after the vehicle was stopped, in conjunction with his identity and the recent information received from Officer Tully about defendant carrying a firearm in the console of his vehicle, figured prominently in building up to having probable cause to search. The situation first observed by Officer Bordonaro

had escalated from a suspicion of a stolen vehicle to a clear reasonable belief based on specific and articulable facts that defendant may be armed... We are satisfied that **the officers had probable cause to search the vehicle...** In this daytime search where defendant was in the backseat of Officer Davenport's car and the passenger was seated on the curb near the rear of the vehicle, the situation was under police control. There was no showing that a telephonic warrant could not have been expeditiously obtained... Here, this was a daylight search; the three officers outnumbered defendant and his passenger. The claim that defendant could return to the car and then have access to any potential weapon was belied by the fact that defendant did not have his driver's license, and the passenger had no identification at all. The officers could just as easily have had the car towed to a secure location and escorted defendant and the passenger to the police station until a driver with a license could come to the station to operate the vehicle for defendant. Once the vehicle was at the station, the officers could have secured a search warrant... Here, the search undertaken was extensive, including accessing the trunk from the passenger's compartment by pulling the cord hanging down from the backseat, which brought the rear seat flat to the seated portion of the vehicle. We are persuaded that **exigent circumstances did not exist to allow a warrantless search of the automobile driven by defendant.**" (Daniel V. Gautieri, A.D.P.D.)
<http://www.judiciary.state.nj.us/opinions/a2856-09.pdf>

State v. Earls, 420 N.J. Super. 583 (App. Div. 2011) - Convictions affirmed. "The primary issue presented by this appeal is whether the **use of cell phone site information, obtained by the police without a warrant from a suspect's cell phone provider** to determine his general location, violates the Fourth Amendment or Article I, paragraph 7, of the New Jersey Constitution. We conclude that the use of such information to determine a suspect's general location on public roadways or other places in which there is no legitimate expectation of privacy **does not violate the suspect's constitutional rights...** In an effort to locate defendant for these purposes, the police contacted T-Mobile, which was defendant's cell phone carrier. T-Mobile was able to determine defendant's general location at any given time... the use by the police of information obtained from T-Mobile concerning defendant's general location, derived from signals emitted by his cell phone, which together with visual surveillance resulted in discovery of

his car in a motel parking lot, did not violate any legitimate expectation of privacy defendant may have had regarding the location of his car... We reach the same conclusion under Article I, paragraph 7, of the New Jersey Constitution. Our courts have long recognized that the driver of an automobile does not have a constitutionally protected right of privacy in the movements of his car on public roadways... Our courts have also recognized that police officers may utilize modern technology in conducting surveillance of public places and private property that is not subject to constitutional protection... Our Supreme Court has construed the New Jersey Constitution to provide more extensive search and seizure protections than the Fourth Amendment only when a person has a reasonable expectation of privacy in particular information... We conclude for all the reasons previously set forth that a person has no reasonable expectation of privacy in their movements on public highways or the general location of their cell phone, and therefore, there is no basis in this context for construing the New Jersey Constitution more expansively than the Fourth Amendment. We have no occasion in deciding this appeal to determine whether a warrant would be required for the police to obtain cell phone information to determine the specific location of a suspect, particularly the suspect's location in a private place.

"We [also] conclude that, as in *Kim and Camp, Gates*, as the **lessee, had actual authority to consent to a search of the storage unit even though she did not possess the key to the lock when she gave that consent.** As far as the operator of the storage facility was concerned, Gates was the only person with a right of access. She provided her driver's license with her photo and her insurance information in applying to lease the unit, and the lease was solely in her own name. Any right of access defendant may have had was a purely private arrangement between him and Gates, to which the operator of the storage facility was not a party. Moreover, although Gates permitted defendant to use the storage unit, she also stored her own personal belongings in it. And even though defendant had the key to the lock when the search was conducted, Gates undoubtedly could have gained access to the unit at any time simply by executing the storage facility's 'Tenant Permission to Cut Off Lock' form, as she did after consenting to the search. Therefore, there was ... 'mutual use' and 'joint access' to the storage unit by Gates and defendant..." (Alison Perrone, Designated Counsel)

<http://www.judiciary.state.nj.us/opinions/a2084-07.pdf>

State v. Handy, 205 N.J. 588 (2011) - Suppression of evidence affirmed. "Germaine A. Handy was **arrested as a result of incorrect information regarding the existence of a warrant**, conveyed by a police dispatcher to an officer who had stopped Handy for riding his bicycle on the sidewalk in violation of a city ordinance. At issue before us is whether evidence uncovered in the ensuing search should be suppressed. We answer that question in the affirmative. The dispatcher had, in hand, a ten-year-old warrant for a California resident that did not match the spelling of Handy's name and bore a different date of birth, yet she advised the officer on the scene that there was an outstanding warrant for Handy. That conduct by the dispatcher, an integral link in the law enforcement chain, **was objectively unreasonable** and violated the Fourth Amendment to the United States Constitution and Article I, Paragraph 7, of the New Jersey Constitution, requiring suppression of the evidence... There was nothing reasonable about that conduct in light of what the dispatcher actually knew. Indeed, there were two reasonable paths for her: one was to tell Officer Drogo about the information on the warrant she had before her so that he could probe the issue further with Handy, the other was to say that there was no warrant matching the information she had been given. She chose neither course, deciding instead to tell Officer Drogo that there was an outstanding warrant against the errant Millville bicyclist who had been stopped for riding on the sidewalk, thus precipitating the arrest that could not otherwise have occurred in the face of an ordinance violation, and the cascade of events that followed... [T]he dissent's conclusion that a Fourth Amendment exclusionary rule analysis is limited to the conduct of the arresting officer is wrong. Under that construct, police operatives, like the dispatcher here, are free to act heedlessly and unreasonably, so long as the last man in the chain does not do so. Nothing in our jurisprudence supports that view... The police dispatcher here was plainly unreasonable in failing to take further steps when she recognized that she did not have a match on the warrant check. As such, our own constitution requires suppression." (Stephen P. Hunter, A.D.P.D.)

State v. Robert Horn and Damon Cannon, unpublished opinion, App. Div. Docket No. A-0495-10T2 (April 15, 2011_ -- Suppression of evidence affirmed. "The State had the

burden of proving that the detectives discovered the six additional bricks of heroin and the handgun by a constitutionally appropriate method. The State offered only the detectives' testimony to meet this burden. As the judge found, however, there are numerous factual inconsistencies between the detectives' testimony. Therefore, there is ample evidence in the record to support the judge's finding that the detectives' testimony was not credible with respect to the location of the additional six bricks and the firearm in the glove compartment. She found that the detectives secured Cannon and Horn and conducted a warrantless search of the Taurus. During this search, the detectives discovered the stash box and in it, the six bricks of heroin and the firearm. The judge concluded that Knight lied in order to include those items in the original search of the interior of the Taurus. She found, and we agree, that the **initial seizure of the first brick of heroin was permissible as a result of a plain view observation.** After securing Cannon and Horn, the **detectives' subsequent search of the Taurus was not valid** because at that point there was no justification for dispensing with the warrant requirement... Here, the detectives had probable cause to arrest defendants based on the plain view observation of the first brick of heroin. The subsequent warrantless search of the interior of the vehicle was not justified, however, **as a search incident to arrest once the detectives had secured Horn and Cannon and removed them from the Taurus.** The judge therefore correctly determined that the detectives' search of the Taurus was invalid and suppressed the six additional bricks of heroin and the firearm." (Maurice Snipes for Damon Cannon)

<http://www.judiciary.state.nj.us/opinions/a0495-10.pdf>

State v. Kaltner, 420 N.J. Super. 524 (App. Div. 2011) - Suppression of evidence affirmed. "We granted the State leave to appeal from the Law Division's order suppressing evidence of drugs seized from the third floor bedroom of defendant... [T]owards the end of September 2009, defendant and four other men, all Monmouth University students and at least two of whom were fraternity brothers, rented an off-campus home located in a residential neighborhood of Long Branch. The following month, on the evening of October 22, 2009, their home was host to a large party, resulting in a noise complaint to Long Branch Police... When none of the people inside the home answered the police request that the residents come forward, the officers separated and

canvassed the residence. According to Camacho, their purpose was to identify and locate the residents in order to clear out the party, abate the noise and ensure that no individual was in need of medical assistance, even though there were no reports of anyone in need of assistance or in physical distress... [T]he State argues that by hosting a loud party, defendant had no expectation of privacy in his home so that police conduct therein did not constitute a 'search,' and that even if it did, the police acted reasonably in their community caretaking function to abate the ongoing noise nuisance... [C]ontrary to the State's contention, we do not view as any lessened or diminished the legitimate expectation of privacy that defendant, who was not even present at the party, continued to enjoy in his residence, and even more so, in his third-floor bedroom. Nor, for obvious reasons, did defendant abandon his privacy interest by having the home indirectly exposed to the public by loud noise emanating therein... [T]he question in this case is whether, once legitimately inside, the police acted lawfully in fanning out in search of those in control of the premises in an attempt to abate the noise nuisance. In this regard, the State relies exclusively on the **community caretaker exception** to the warrant requirement... Balancing all of the constituent competing interests, we conclude that the **State has failed to demonstrate the objective reasonableness of its agents' claimed exercise of their community caretaking function.** In striking this balance against the constitutionality of the police action in this instance, we weighed, on the one hand, the important privacy interest in one's home as well as the breadth and extent of the invasion involving the entire premises, against, on the other hand, the limited nature of the community caretaking concern and the relatively low threat posed thereto, especially in light of the availability of less drastic options. Absent justification to search the entire house, Officer Camacho was not lawfully in the hallway outside defendant's bedroom when he viewed the ecstasy. Therefore, the entry into defendant's bedroom and seizure of the drugs therein cannot be sustained under the plain-view doctrine."

State v. Terrance L. Martin, unpublished opinion, App. Div. Docket No. A-2875-10T4 (July 20, 2011) - Suppression of evidence affirmed. "Here, the judge found that the State had failed to [prove] that Mercano had the right to be where he was when he observed the drugs. This finding, in turn, was based upon the judge's assessment that Mercano

was a credible witness who had acknowledged that 'he wasn't sure where and when he made those observations.' Because Mercano could not state with certainty that his entire body remained outside defendant's vehicle at all times prior to observing the drugs, the judge concluded the State had failed to meet its burden of proof... Here, the judge's findings supporting his decision to grant defendant's motion to suppress were based entirely on Mercano's testimony. As the judge noted, Mercano could have testified that he never inserted any part of his body into the vehicle. In fact, at one point Mercano stated just that. Upon further questioning, however, it was clear that Mercano was not certain that was accurate. This led the judge to note Mercano's 'candor' that, in turn, bolstered his credibility."

<http://www.judiciary.state.nj.us/opinions/a2875-10.pdf>

State v. Christopher J. Mauro, unpublished opinion, App. Div. Docket No. A-2085-09T3 (May 31, 2011) - Denial of suppression affirmed in part, reversed in part. "In this appeal we consider whether there was a basis upon which to conduct a Terry frisk of defendant for weapons and whether the subsequent warrantless search of defendant's vehicle was justified on the basis of exigent circumstances. We conclude that **none of the factors the Pena-Flores [198 N.J. 6 (2009)] Court articulated that justify the warrantless search of a vehicle were present here.** We therefore reverse the denial of defendant's suppression motion insofar as the search of defendant's vehicle but affirm the Terry frisk and evidence seized as a result thereof... Defendant's actions during the stop, together with Trooper Neuman's observation of redness around his nose and constricted pupils, led the officer to believe that defendant had just used drugs. These facts established the requisite probable cause to believe that defendant's vehicle contained drugs. Thus, the critical inquiry here is whether exigent circumstances existed... The determination of exigent circumstances is fact-sensitive and resolved on a case-by-case basis with consideration of the totality of the circumstances... These factors fall short of establishing the type of exigency that justified the warrantless search of defendant's vehicle. First, the stop occurred in broad daylight during morning rush hour, a time when courts are open for business. Second, although Trooper Neuman was alone when the stop was initiated, the Woodbine Station was less than six miles away and backup was readily available... There were other factors that

militated against a finding of exigency. Nothing in the record indicates that the traveled portion of the roadway was blocked because of events unfolding on the shoulder. Trooper Neuman acknowledged that defendant's vehicle could have been towed. Nor was the location of the stop in a high crime area. Trooper Neuman's description of the area as having 'higher crime' than other locations in the Woodbine Station area is not the equivalent of describing the location as a 'high crime' area. Further, there were no confederates who knew of the location of the vehicle and who were thus positioned to remove its contents before its removal. The fact that the vehicle was a company car did not make it more readily subject to removal by third persons. There was no indication that anyone from the company knew that the vehicle had been stopped at the time Trooper Neuman determined that he would search the vehicle.... Finally, defendant was handcuffed and secured in the troop vehicle, which was equipped with child safety locks. Consequently, defendant had no opportunity to gain access to any of the contents within the vehicle. In short, the State failed to prove that Trooper Neuman did not have time to call for a warrant without compromising his safety and the preservation of evidence." <http://www.judiciary.state.nj.us/opinions/a2085-09.pdf>

State v. Jonathan McEachin, unpublished opinion, App. Div. Docket No. A-3880-09T1 (April 19, 2011) - Case remanded for evidentiary hearing on suppression motion. "Defendant ... argues that the material facts were disputed, and contends that the judge erred by not taking testimony... The judge acknowledged that the credibility of the officer was in dispute and mentioned that he had 'no sworn affidavit to the contrary.' There is no such requirement, however, that to demonstrate a material disputed fact, one must produce an affidavit. All that is required is a counterstatement of facts contained within a brief... Here, defense counsel's brief states that 'according to both defendant and his cousin ... , neither of whom has a criminal record which could be used to impeach their credibility,' the gun was not in plain view. The judge stated that the shiny object could be something else, such as a 'reflection off of a wristwatch or something like that,' and 'that certainly would not be a basis for approaching this defendant and seizing the -- the handgun.' We conclude, therefore, that **a suppression hearing is required because the material facts are disputed.**" (Stephen A. Caruso, A.D.P.D.)

State v. Jerome McGhee, unpublished opinion, App. Div. Docket No. A-2278-10T3 (June 20, 2011) - Suppression of evidence affirmed. "The State argues first — correctly in our view — that this case did not involve a motor vehicle stop... [T]he happenstance that McGhee was apprehended in his idling motor vehicle that had not yet been moved from the curb does not bring this case within the niche of the law that touches and concerns searches and seizures relating to automobiles. Instead, we rely upon the more generalized law relating to the establishment of probable cause (for a warrantless search) derived from confidential informants as the touchstone for our analysis... In this case, the confidential informant's information was found to establish a basis to justify the initial stop of McGhee. This was a proper application of the law because the informant's information was corroborated when, as predicted, McGhee emerged from 571 Montgomery Avenue around 7:50 p.m., and walked to a gold Lincoln... However, notwithstanding a justification to stop McGhee, the motion court did not find that asking McGhee to remove his shoe to conduct a warrantless search was proper because 'there were no observations made by the Officers which showed any action by the Defendant which gave probable cause that the Defendant was engaged in criminal activity.' Also, it was noted that given the circumstances, the police had sufficient time to request a telephonic search warrant to further their investigation. The State contends that asking McGhee to alight from his vehicle was minimally intrusive, as was the demand that he remove his shoe. We cannot agree with this overly broad proposition, based upon the facts of this case. Although, arguably, it was a de minimis request to ask McGhee to step out of the automobile to talk with the police, the removal of McGhee's shoe at the insistence of police moved the encounter into a heightened sphere. Even under the totality of the circumstances, the **details provided by the confidential informant were not sufficient to establish probable cause to support the warrantless search...** When McGhee's sneaker was improperly removed and searched, and the contraband hidden inside found, that gaffe sent into motion the balance of the police investigation. As such, it was fatally infected, and the confidential informant's information did not suffice to inoculate the consent search from the earlier contagion. We note that at no time did the confidential informant indicate where on the seventh

floor of 571 Montgomery Street McGhee was residing. Thus, the **consent to search that was requested of Gadson was irretrievably connected to the apartment key improperly seized from McGhee.**"

<http://www.judiciary.state.nj.us/opinions/a2278-10.pdf>

State v. Nguyen, 419 N.J. Super. 413 (App. Div. 2011) - Convictions affirmed. "[D]efendant argues that the trial court erred in denying his motion to suppress evidence of a handgun later identified as the murder weapon, because it was discovered in the course of a search by Somerset County Prosecutor's Office investigators who were not authorized under the governing New York statute to conduct a search in New York. We reject this argument because the **violation of the New York statute by the New Jersey investigators who discovered the murder weapon was a technical violation that did not implicate privacy rights** protected by the Fourth Amendment or its New Jersey counterpart, and therefore, the remedy of exclusion of evidence was not required... Before addressing this argument, we first consider defendant's suggestion that the police had completed the search of the car authorized by the warrant before they began to drive it back to 1062 Lafayette Avenue, and therefore, the further search conducted at that location was a warrantless search that was not justified by exigent circumstances. The question whether a search warrant provides continuing authorization to search a place that the police have already searched is governed by the **"reasonable continuation" doctrine**... Under this doctrine, two conditions must be satisfied for a search to be considered a 'reasonable continuation' of the search authorized by the warrant: 'first, "the subsequent entry must ... be a continuation of the original search, rather than a new and separate search," and second, "the decision to conduct a second entry to continue the search must be reasonable under the totality of the circumstances."'... The continued search of the roof of the Honda at 1062 Lafayette Avenue satisfied both of these conditions. This search occurred within a short time after the original search in the parking lot at police headquarters. At that point, the murder weapon, which was the primary object of the warrant, had not yet been found. Consequently, the search was simply 'a continuation of the original search, rather than a new and separate search.'... Moreover, the search did not involve any additional intrusion into defendant's or Eng's privacy interests because the car had not yet been returned to Eng. Therefore, this further search was 'reasonable

under the totality of the circumstances.'... Defendant argues that the search of the car that revealed the handgun used in the murder violated section 690.25 and the terms of the warrant because it was conducted solely by Detectives Rinaldi and Braun of the Somerset County Prosecutor's Office and not by any police officer of the City of New York... [O]ur courts have held that evidence obtained by a police officer in a search conducted outside the boundaries of the officer's statutory jurisdiction is not subject to exclusion... The conclusion that a technical violation of a statute governing the execution of search warrants, such as a statute governing a police officer's territorial jurisdiction, does not provide a basis for the exclusion of evidence is also supported by our rules of court... There is no basis for concluding that the continued search of the 1996 Honda at 1062 Lafayette Avenue by Detectives Rinaldi and Braun, without participation by New York City police officers, was conducted in 'bad faith.'... Finally, we emphasize that any violation of section 690.25 of the New York Criminal Procedure Law was technical only. The representatives of the Somerset County Prosecutor's Office obtained the assistance of New York City police officers in applying for warrants to search the house where defendant was residing and the car he drove away from the murder scene." See also INTERSTATE AGREEMENT ON DETAINERS. (Paul Casteleiro)

State v. Larson O'Connor and Corey Moore, unpublished opinion, App. Div. Docket No. A-5577-09T4 (July 12, 2011) - Suppression of evidence affirmed. "By leave granted, the State appeals from the order of the trial court granting defendants Larson O'Connor and Corey Moore's motion to suppress evidence seized by the police during a warrantless search of their car. The police searched defendants' vehicle based on an anonymous tip that two African-American men inside an SUV parked in a particular location were displaying a firearm to bystanders... The record developed before the trial court does **not support a finding that the officers had a reasonable, articulable suspicion that defendants posed a danger to the officers' safety** justifying the warrantless search of defendants' vehicle... Here, the officers were directed to the vehicle in which defendants were found by virtue of the tip that came in to Sergeant Wyso's work cellular phone. There is no evidence in the record identifying the individual who called in the tip or his or her reliability as a law enforcement source. Although the State argued that Sergeant Wyso could have

traced back the call to determine the identity of the caller, no evidence was presented before the trial court to support a claim that the call was traceable... [T]he officers responding to the vehicle visually corroborated the information provided in the phone call as to the description and location of the vehicle and the general description of the individuals present both inside and outside of the car. However, as pointed out by the trial court, all of these facts are 'essentially non-incriminatory' and '[a] weapon was not seen being displayed.'... Nor did defendants' conduct after the investigatory stop give rise to an objectively reasonable suspicion that either one of them was armed." (Montell Figgins)

<http://www.judiciary.state.nj.us/opinions/a5577-09.pdf>

State v. John J. Rockford, III, unpublished opinion, App. Div. Docket No. A-6166-09T2 (August 9, 2011) - Conviction reversed, suppression of evidence ordered. "Defendant argues that the planned use of a flash-bang device outside his open garage door before knocking and announcing at the front door violated the knock-and-announce warrant issued by a Superior Court judge who denied the police request for a no-knock warrant... After reviewing the record in light of the contentions advanced on appeal, we find the **police disregard of the knock-and-announce provision of the warrant and use of a flash-bang device requires the suppression** of all evidence... The planned use of a flash-bang device such as the one used here might well be appropriate in this situation if the judge had approved a no-knock warrant... Our concern arises from the planned use of the flash-bang device before knocking and announcing, after the judge denied the no-knock warrant and without the occurrence of any unexpected danger or resistance on the part of defendant. The State frankly conceded at oral argument that it believed the judge erred in requiring the police to knock on the door and announce their presence before entering the residence to execute the search warrant... The police are not free to violate a provision in a warrant they do not agree with. The use of a flash-bang distraction device right outside of a home before knocking on the door makes it extremely difficult for people inside the home to respond promptly and calmly to a knock on the door... The police had the garage under surveillance for several days during which defendant at times left the home. They chose not to execute the warrant when defendant was absent, but rather

when defendant opened the garage door to facilitate a drug transaction. Although this decision to execute the warrant during a sale had some tactical advantages, it also exposed the officers to dangers that would not otherwise be present. Had they chosen to wait until defendant left the premises, the use of the flash-bang would have been completely unnecessary. It appears to us that the police chose this tactic in part to enable them to use the flash-bang device for the first time, as they had been trained in its use, but never had an opportunity to use the device in an actual operation... The State argues that even if the warrant was improperly executed, the exclusionary rule should not be applied because the police had a warrant. We disagree... The police officers' pre-planned unannounced entry into the open garage after using a flash-bang device without waiting to knock and announce themselves at the front door constitutes a flagrant violation of the requirements of the warrant and requires the exclusion of all evidence found in the home. Any evidence found in the vehicles must also be suppressed because the warrant did not authorize such a search." Dissent by Judge Baxter. (Steven E. Nelson)

<http://www.judiciary.state.nj.us/opinions/a6166-09maj%20and%20dis.pdf>

State v. Thomas J. Shannon, unpublished opinion, App. Div. Docket No. A-5821-08T4 (April 27, 2011) -- Conviction reversed. "In arguing that the contraband was unlawfully seized, defendant does not contest the finding that the State Trooper had probable cause or that the vehicle contained evidence of criminality, but asserts that **exigent circumstances did not exist to dispense with the warrant requirement**... [T]here is no indication that the State Trooper lacked sufficient time to obtain a telephonic warrant pursuant to Rule 3:5-3(b). It was not late at night, nor was Trooper Sanders impeded by tinted windows. Indeed, he did not have to look through any windows because the odor of raw marijuana apparently was pungent enough for him to smell. No one approached the vehicle during the stop. Nor was there any suggestion that any confederates were aware of the stop... The State did not even attempt to show that it was impracticable to obtain a telephonic warrant or that defendant could not have been placed under arrest, as he later was, in the rear of Trooper Sanders's vehicle, and driven to the Newark State Police barracks while a tow truck could have towed the Durango to a location where it could have remained secure while a search

warrant was obtained... We fail to see how there was an urgent need for the State Trooper to conduct a full search of the automobile during this daylight stop with another State Trooper assisting while defendant was outside of the vehicle and being watched over by the second trooper. The State made no effort to show that a telephonic warrant could not have been sought with expedition." <http://www.judiciary.state.nj.us/opinions/a5821-08.pdf>

State v. Don C. Shaw, unpublished opinion, App. Div. Docket No. A-1648-09T2 (July 6, 2011) - Conviction reversed, suppression of evidence ordered. "[T]wo teams of law enforcement officers in Atlantic City were participating in Operation Falcon[,] a nationwide initiative conducted by the United States Marshals Service in conjunction with federal, state and local law enforcement in a concerted effort to execute outstanding arrest warrants and apprehend fugitives... Before the second team arrived, Detective Brown approached the front of the apartment building and saw two men, later identified as defendant and Niam Gardner, exit together from the common doorway. As soon as defendant and Gardner saw police, the two men 'separated and went in two different direction[s].'... Brown later testified that he had decided to detain defendant until the other team arrived. After ... Palamaro arrived at the scene [he] immediately recognized defendant and ... Parole officer D'Amico immediately told Officer Palamaro, 'he's wanted by us [Division of Parole].' Detective Brown then arrested defendant on the outstanding parole warrant, handcuffed him, and conducted a search of defendant's person incident to the arrest... [D]efendant's refusal to provide his name when asked by Detective Brown did not provide an objective, articulable and reasonable basis to justify the stop of defendant. The fact that defendant and Gardner walked in opposite directions when they exited the apartment building was innocuous behavior which, even when combined with defendant's refusal to answer Brown's question, could not ... justify the stop of defendant... The police did not learn of defendant's outstanding parole warrant until after the stop of defendant had already occurred. Based on the totality of the circumstances, the **police did not have reasonable suspicion that defendant was either engaged in criminal activity or wanted on an outstanding warrant** at the time they ordered defendant to stop. Consequently, ... the **stop of defendant was unlawful**... [A]ny **diminished expectation of privacy that defendant had as a parolee was inapplicable**

here because: the parole conditions defendant signed only subjected him to a search supported by a reasonable and articulable basis to believe he was in possession of contraband, and there was no such basis here; and, from a conceptual prospective, defendant's status as a parolee has no bearing on the attenuation analysis... Accordingly, although defendant may be prosecuted for the matter in which there was an outstanding warrant, the fruits of the search that occurred as the result of that valid arrest must be suppressed."

<http://www.judiciary.state.nj.us/opinions/a1648-09.pdf>

State v. Rashad Walker, unpublished opinion, App. Div. Docket No. A-4672-08T1 (June 28, 2011) - Conviction reversed, suppression of evidence ordered. "Because the **confidential informant's tip did not establish probable cause and the exigent circumstances were police-created**, we reverse the denial of defendant's suppression motion... Here, the tip did not establish probable cause to enter defendant's home. First, although the confidential informant provided reliable information on ten previous occasions, this does not conclusively establish veracity... In fact, the 'current evidence' does not give the court 'an opportunity to make an independent evaluation of the informant's present veracity.'... The informant told the police that a black male was selling heroin, cocaine, and marijuana from a specific apartment, and he explained who would answer the door and how the transaction would occur; a black male did answer the door. This information does not allow the police to make an independent evaluation of the informant's present veracity because the only thing that was verified was that a black man answered the door of a specific apartment. In addition, the record does not reveal how the informant became aware of 'the alleged criminal activity.'... It does not reveal whether the informant purchased drugs from defendant, whether he saw someone purchase drugs from defendant, or whether he heard about defendant from a third party. Furthermore, this information does not imply that 'the informant's knowledge ... is derived from a trustworthy source.'... Importantly, the police never corroborated the information by staging a controlled buy... Here, if exigent circumstances existed, they were police-created. The plain-clothed officers knocked on defendant's door at approximately 11:00 p.m. Defendant answered, smoking a marijuana cigarette, and observed a police badge hanging around the neck of one of the officers, prompting his attempt to close the door and

run back into the apartment. Arguably, this created an exigent circumstance because it is likely defendant was running back into his apartment to destroy any drugs he may have had. [T]he police, thus, had a reasonable belief that contraband would be removed... In addition, defendant was aware that police were 'on [his] trail' because they were at his door and the contraband was certainly destructible... And the entry occurred at night... However, even though it may be concluded that exigent circumstances existed, they were police-created because the exigency did not arise until the officers made their presence known... In other words, prior to defendant seeing the officer's badge, police were not faced with 'exceptional conditions' creating exigent circumstances." <http://www.judiciary.state.nj.us/opinions/a4672-08.pdf>

State v. Witczak, 421 N.J. Super. 180 (App. Div. 2011) - Denial of motion to suppress reversed. "The primary question presented is whether the **community caretaker exception** enunciated in Cady v. Dombrowski [413 U.S. 433 (1973)] **applies to a warrantless search in the home**. Defendant contends that the motion judge erred by applying the exception, and urges us to follow the rationale expressed in Ray v. Township of Warren [626 F.3d 170 (3d Cir. 2010)], which held that the exception does not extend to searches of homes... We are not free to determine whether Ray's declaration of the reach of the federal constitution should apply here. We are bound only by the Supreme Court of the United States, which, as we have noted, has not addressed the split in the views of the federal circuits, and our own Supreme Court, which has applied the community caretaker exception to warrantless searches of the home. So limited, we consider whether the community caretaker exception, as described by our Supreme Court, authorizes the warrantless search that occurred here... Here, we find the **facts to be insufficient to establish as objectively reasonable the claimed exercise of the police caretaking function**. Officer D'Onofrio arrested defendant and entered the home to retrieve the gun. When the officer walked into the home, it was surrounded by up to eight officers, defendant was in custody, the victim was safe two blocks away, and defendant's bedridden mother was three floors away from the location of the gun. Officer D'Onofrio did not enter the home to ensure the safety and welfare of the bedridden woman. Even though the officer knew that defendant's mother was in the house, he did not speak to her. Once defendant was in custody and the victim

was safely secured, there no longer existed any emergency. Under these facts, we are unable to say that the purported 'community caretaker responsibility [was] a real one, and not a pretext to conduct an otherwise unlawful warrantless search.'... We agree with the motion judge that the State also **failed to demonstrate exigent circumstances** justifying a warrantless entry into his home... After defendant complied voluntarily with Officer D'Onofrio's request that he exit the house, it is undisputed that defendant's mother was the only occupant left... Once defendant was handcuffed and in custody, there was no risk that the gun would disappear, be destroyed or removed from the third floor... Here, Officer D'Onofrio entered the home to retrieve the gun related to the alleged offense for which defendant had just been arrested. The officer did not need to provide immediate assistance to the mother. Thus, the entry into defendant's home is **not justified as emergency aid.**"

SENTENCING - MISCELLANEOUS

State in the Interest of M.M., a Juvenile, unpublished opinion, App. Div. Docket No. A-2446-09T2 (August 12, 2011) - Adjudication of delinquency affirmed, case remanded for hearing on **restitution**. "[T]he record lacks sufficient support for the court's order of restitution in the amount of \$5000. Marc challenges his ability to pay, and argues that a hearing was required on that issue... The State argues that no hearing was necessary because the juvenile did not object to the amount of the victim's damages, nor question his ability to pay. We disagree. Where a defendant did not contest the restitution amount, nor dispute his ability to pay, we have held that a restitution hearing was unnecessary, but we did so in view of ample evidence in the record of his ability to pay, including defense counsel's concession on the record that his client had the funds to pay restitution, and evidence in the presentence report regarding defendant's education, employment, and earning capacity... The record before us contains no similar evidence about Marc's ability to pay, nor did defense counsel affirmatively concede the point. By contrast, where a restitution order was unsupported by the record, we have held that a hearing was necessary, even though the juvenile, as in this case, did not object to the restitution amount... The court shall consider Marc's present and future ability to pay, and the impact of the order on his prospects for rehabilitation." (Monique Moyse, Designated Counsel)

<http://www.judiciary.state.nj.us/opinions/a2446-09.pdf>

State v. Eric Dawson, unpublished opinion, App. Div. Docket No. A-5998-09T1 (July 25, 2011) - Order entering defendant into **Drug Court Program** over State's objection affirmed. "Here, the trial judge found a 'gross and patent abuse of prosecutorial discretion' because the prosecutor's listed reasons for rejection were not premised on an adequate consideration of all relevant factors. Since no substance abuse evaluation was ordered for defendant, the trial judge noted that it was unclear whether defendant's motive for his CDS related crimes was due to his addiction, or to 'profit motive.' [T]he trial judge was correct to inquire whether defendant was drug dependent at the time of the offense. Defendant was caught with a significant amount of drugs, reasonably leading the prosecutor to surmise that defendant had a motive to sell... [I]n his motion papers, defendant argued that he is an addict. Although defendant does have an extensive criminal history, considering his contention that he is an addict requiring help, a substance abuse evaluation should have been ordered to make the individualized determination whether he would have benefited from the Drug Court program. Likewise, since defendant did not possess weapons in any of his current or prior convictions nor is there any other evidence of a dangerous capacity in society, the prosecutor's concern that defendant was 'a threat to the community,' is unsupported by the record. Finally, defendant has two prior adult convictions for Possession of CDS with Intent to Distribute within 1,000 feet of School Property... However, defendant points out that under the guidelines for the Drug Court, there is nothing that allows a prosecutor to deny a defendant entry into the program because of juvenile adjudications of nonviolent crimes. Rejection into Drug Court cannot be based on an offense alone... Given that defendant presented proofs to support his assertion that the prosecutor did not consider his complete individual history, we affirm the trial court's determination of a gross and patent abuse of discretion... This does not mean that defendant is accepted into Drug Court, only that he is entitled to proceed to the next step of having the evaluation performed." <http://www.judiciary.state.nj.us/opinions/a5998-09.pdf>

State v. Gary L. Edelson, unpublished opinion, App. Div. Docket No. A-1968-09T4 (March 21, 2011) - Convictions affirmed, case remanded for re-sentencing. "Defendant

argues that while the court found mitigating factors seven and eleven, it failed to give sufficient weight to these factors. He notes that this is his first offense. He also notes that he is presently suffering from severe health problems... We are convinced that the court did not err by finding that the mitigating factors did not 'substantially outweigh' the aggravating factors. Therefore, a downgrade pursuant to N.J.S.A. 2C:44-1(f)(2) was not warranted. We conclude, however, that even if the mitigating factors did not 'substantially outweigh' the aggravating factors, greater weight should have been given to them and, therefore, imposition of a seven-year sentence was a mistaken exercise of discretion. We do not minimize the seriousness of defendant's offense. We also believe that there is a need to deter defendant and others from violating the law. We are convinced, however, that the trial court should have given more weight to the fact that this is defendant's first offense and he presently suffers from very serious medical problems. Therefore, we remand the matter to the trial court for reconsideration of the sentence."

<http://www.judiciary.state.nj.us/opinions/a1968-09.pdf>

State v. L.H., 206 N.J. 528 (2011) - "The judgment of the Appellate Division is reversed and the matter is remanded to the Law Division (1) for the entry of an order (a) vacating the entire award of 2,145 days of **gap-time credits** originally granted on September 18, 2009 and (b) remanding defendant L.H. to serve the sentence imposed on that date without any credit for gap time; and (2) for the entry of a corrected judgment of conviction reflecting no days of gap-time credit." Defendant is not entitled to gap time for the period between March 13, 2001 (sentencing on 1998 and 2001 offenses) and September 18, 2009 (sentencing on 1994 sexual assault which he was not charged with until 2008, when his DNA was linked to the crime)."

State v. Andrea Hernandez/State v. Derrick Rose, ? N.J. ?, 2011 N.J. LEXIS ? (June 8, 2011) - Cases remanded for reconsideration of **award of jail credits**. "We granted certification to consider the proper interpretation and application of Rule 3:21-8, the rule governing the award of jail credits, to cases involving defendants sentenced to imprisonment on multiple indictments. One case involves the disposition of charges in multiple counties; the other multiple charges in the same county. We hold that both defendants are entitled to precisely what the Rule

provides: credits against all sentences 'for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence' on each case... We ... reject Hernandez's contention that her gap-time credit should reduce her parole bar. However, those cases do not address our Rule 3:21-8 or jail credits for time spent in custody before sentencing following arrest on other charges... In this context it is inconceivable that two defendants sentenced to the same sentences for the same crimes in two different counties should actually serve different amounts of real time depending only on the sequence and timing of the imposition of sentence. Yet that may be the consequence of a rule which does not provide credits for all time spent in custody between arrest and imposition of the first sentence... Neither the Code of Criminal Justice nor our rules of procedure contemplate that the real time a defendant is to serve in custody should turn on which case a prosecutor or court decides to move first... Accordingly, Ms. Hernandez should be entitled to jail credit on the Passaic County sentence for the time she spent in custody between her Passaic County arrest and the date sentence was imposed in Ocean County (at which time her custodial status changed by virtue of the fact she began to serve a sentence)... The same principles apply to the Rose matter. Unless part of a negotiated agreement, the amount of real time to be served on a sentence should not depend on which matter is disposed first, if they are not simultaneously disposed, or even on the prosecutor's joinder practice. If multiple charges are embodied in a single indictment and two or more counts are disposed of, the total amount of jail credits reduces the aggregate custodial sentence imposed... To the extent the opinion may be deemed inconsistent with a prior interpretation of Rule 3:21-8, and because negotiated pleas and sentences in the 'pipeline' were possibly based on a different understanding of the Rule, this opinion shall apply only prospectively to sentences imposed as of tomorrow, except for those matters still on direct appeal in which the amount of jail credits was actually questioned or challenged by defendant at sentencing." <http://www.judiciary.state.nj.us/opinions/supreme/A6409StatEvHernandezandRose.pdf>

State v. Luis Hernandez, unpublished opinion, App. Div. Docket No. A-5489-07T4 (April 5, 2011) - "Defendant Luis Hernandez appeals from the sentences imposed following our remand for re-sentencing. Again, we are constrained to

reverse after concluding **the sentences imposed, although within the statutory maximum, were not adequately supported...** We first examine whether the offenses should have been **merged**. Defendant contends the three homicide offenses in counts one, three and four arise from the same facts yet 'only one act of homicide occurred here,' not three, and therefore merger applies... Here, defendant's vehicular homicide conviction entailed his operation of a motor vehicle, causing the death of the police officer. The death was caused by defendant's reckless operation of the motor vehicle and the death occurred within a school zone. Proof of recklessness, as applied here, includes that defendant was driving under the influence of drugs or alcohol or driving while his license was suspended... Additionally, defendant was convicted of aggravated manslaughter, which entails causing a death while attempting to elude a law enforcement officer... The State argues the statutes, particularly N.J.S.A. 2C:11-5(d), create separately punishable offenses, precluding merger. In our review, we determine the statute neither permits nor precludes multiple convictions if the culpable conduct evinces each offense. The statutory language does not mandate an intention to punish separate offenses arising from the same conduct... We agree, however, that merger of these two offenses is not mandated. In such instances, the normative choice is to impose concurrent rather than consecutive sentences. The trial court followed this procedure making the sentence for count four concurrent to the sentence in count one. We discern no basis to modify that determination. The other offense defendant suggests must merge with the death by auto conviction is third-degree causing death while an actor's driving privileges were suspended... Each of the elements of N.J.S.A. 2C:40-22(a) is subsumed in the elements of N.J.S.A. 2C:11-5(b)(1). The difference is the additional element of recklessness necessary to prove death by auto. Accordingly, the conviction for count three should have been merged with count one.

Next, we review defendant's challenge to the court's imposition of a discretionary extended term sentence on count one... As we did in our original review, we again conclude the court has failed to properly articulate the basis for imposing an extended term sentence and the maximum punishment on each sentence... [T]hroughout sentencing the trial judge repeatedly emphasized what he characterized as defendant's 'lengthy criminal history.'... [T]he court's findings relying upon defendant's past

criminal conduct and the inability of previously imposed sanctions, including a state prison sentence, to deter future criminal conduct, were adequate to support the trial court's determination that an extended term sentence was appropriate. We cannot reach the same conclusion after examining the findings offered to support the length of the sentences imposed... [O]n remand the trial judge did not enhance his findings as directed... We identify the deficiencies. First, with respect to the sentence on count one, the trial court at no time recognized the range of a permissible sentence started at the bottom of the first-degree range, of ten to twenty years ... and extended up to life imprisonment. The trial judge considered only imposing a life sentence, a term he did not justify. Second, we have grave concerns about whether the length of the sentence imposed can be justified on this record... [D]efendant's record reflects the seriousness of his offenses has diminished since his 1994 incarceration for burglary. His most recent offenses occurred in 2000 for drug possession. Without minimizing the seriousness of any of defendant's crimes, we observe the court inaccurately characterized the nature of defendant's record. Third, the court afforded absolute weight to the aggravating factors but never explained why each was weighted in such a way, other than attaching overarching significance to defendant's recidivist behavior... Fourth, after finding the most commonly imposed aggravating factors, ..., the trial judge never explained his "qualitative" assessment that 'each of these aggravating factors are of the 10 range' on a scale of one to ten. Again, the court's comments reiterated those regarding defendant's criminal history, which we have noted was unsupported by the credible evidence in the record. Consequently, the trial judge's weighing and balancing of the aggravating factors cannot serve as the justification for the longest sentence allowed by the Code. Finally, the trial court's suggestion that imposition of a maximum term for one offense warrants similar treatment for all others is inappropriate."

<http://www.judiciary.state.nj.us/opinions/a5489-07.pdf>

State v. Kennedy, 419 N.J. Super. 475 (App. Div. 2011) - Sentencing court's refusal to order **forfeiture of public employment** reversed. "The primary issue presented by this appeal is whether the offense of tampering with physical evidence, in violation of N.J.S.A. 2C:28-6(1), is 'an offense involving dishonesty,' which requires the forfeiture of public office or employment under N.J.S.A.

2C:51-2(a)(1)... [T]he offense of tampering with physical evidence proscribed by the first subsection of N.J.S.A. 2C:28-6, which prohibits the alteration, destruction, concealment or removal of genuine evidence for the purpose of denying investigators access to that evidence, ... involve[s] deceptive conduct designed to obstruct the administration of justice. Indeed, when a tampering offense involves the 'alteration' rather than the 'destruction' of physical evidence, it is very similar to the fabricating offense proscribed by N.J.S.A. 2C:28-6(2)." See also APPELLATE PROCEDURE.

State v. Victor J. Marrero, unpublished opinion, App. Div. Docket No. A-2951-09T2 (May 27, 2011) - Convictions affirmed, case remanded for resentencing. "We conclude that the trial court **improperly identified aggravating sentencing factor two** - 'the gravity and seriousness of the harm inflicted upon the victim,' N.J.S.A. 2C:44-1(a)(2). In applying aggravating factor (2), the court must rely on more than simply the death of the victim where death is an element of the offense itself... In determining the applicability of this sentencing factor, the court may consider 'whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance.' N.J.S.A. 2C:44-1(a)(2)... Feliciano had no such particular vulnerability. Indeed, he was a former professional boxer in his mid-40s who apparently was in good physical condition. We also conclude that the trial **court erred in giving 'very little weight' to defendant's absence of a criminal record**. The presence or absence of a criminal record is ordinarily a weighty factor in sentencing... The trial court did not identify any reason, and we do not perceive any reason, for failing to give defendant's lack of a criminal record significant weight in determining the appropriate length of his sentence for murder."

<http://www.judiciary.state.nj.us/opinions/a2951-09.pdf>

State v. Miller, 205 N.J. 109 (2011) - Convictions affirmed, case remanded for resentencing. "Trial judges have discretion to decide if sentences should run **concurrently or consecutively**. In exercising that discretion, courts should consider the criteria set forth in State v. Yarbough [100 N.J. 627 (1985)]. When a

sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal. However, if the court does not explain why consecutive sentences are warranted, a remand is ordinarily needed for the judge to place reasons on the record. Although sentences can be upheld where the transcript makes it possible to 'readily deduce' the judge's reasoning, such cases are the exception and require a record clear enough to avoid doubt as to the facts and principles the court considered and how it meant to apply them. In this case, the sentencing court mistakenly did not address the Yarbough factors, and its reasoning for imposing consecutive sentences cannot be sufficiently discerned from the record." See also JURY DELIBERATIONS and JURY INSTRUCTIONS.

State v. Robert W. Oliver/ State v. Keith D. Clarke, et. al. /State v. Rudell Anderson, unpublished opinion, App. Div. Docket Nos. A-5851-09T1, A-0593-10T1, and A-1505-10T2 (August 18, 2011) - Cases remanded for resentencing. "These back-to-back appeals, which we consolidate for purposes of this opinion, all implicate the same legal question: is a **defendant eligible to apply for resentencing pursuant to the 2010 amendments to N.J.S.A. 2C:35-7 if such defendant received a Brimage waiver of an extended term** or reduction of a mandatory minimum term under N.J.S.A. 2C:35-12? From our review of the record in these cases, we find that such a defendant is eligible to apply for resentencing, but the ultimate result of that reconsideration process is not determined by this opinion... [W]e find no ambiguity in the statute. We further conclude that the 2010 statute's explicit provision allowing incarcerated defendants to apply for resentencing was intended to extend to any person 'who, on the effective date of [L. 2009, c. 192], is serving a mandatory minimum sentence as provided by [N.J.S.A. 2C:35-7] and who has not had his sentence suspended or been paroled or discharged,' N.J.S.A. 2C:35-7a, including defendants who had already benefited from the largess of the State in the various prosecutors' waivers of the effect of N.J.S.A. 2C:43-6(f)... The State argues that the word 'authorized,' followed by the disjunctive 'or' in the same sentence means that as long as a defendant was eligible for enhanced sentencing under N.J.S.A. 2C:43-6(f), even if a prosecutor deployed a Brimage waiver and did not seek such enhanced sentencing, such a defendant is likewise unaffected by N.J.S.A. 2C:35-7(b), and cannot apply for resentencing under the 2010 law.

The State's argument essentially transforms the word 'authorized' — relating to the authority of the court to sentence a defendant — into the word 'eligible,' which refers to the status of a defendant. We view this position as untenable and contrary to the plain language of N.J.S.A. 2C:35-7a, which expressly provides for resentencing and contains no bar to resentencing based upon previous Brimage-validated waivers of an extended term." <http://www.judiciary.state.nj.us/opinions/a5851-09a0593-10a1505-10.pdf>

State v. Frederick L. Palmer, unpublished opinion, App. Div. Docket No. A-6010-08T4 (June 24, 2011) - Case remanded for re-sentencing a second time. "[T]he **consecutive sentences** imposed for unlawful possession of a handgun and possession of a firearm by a convicted person must be remanded again. This remand is required because the **judge relied on facts not supported by the record**. When addressing consecutive sentences on remand, the judge found, among other things, that defendant 'pled to a negotiated agreement with regard to the imposition of a consecutive sentence' and that defendant had used the handgun to shoot someone in a separate incident not charged in this indictment. There is no evidence in the record that provides direct or inferential support for those findings. There was no plea agreement, and the record does not reflect that defendant used this handgun in a crime prior to or during the episode at issue here. The gun was discovered tucked in defendant's waistband after he knelt down and raised his arms to submit to arrest. Where a sentencing determination is based on factual findings not supported by the record, this court cannot defer and where there is reason to question whether the judge would reach the same conclusion without the unsupported findings, a remand is necessary... [Defendant also] argues correctly that the judge did not comply with State v. Ellis, 346 N.J. Super. 583, 597 (App. Div.), aff'd o.b., 174 N.J. 535 (2002), which requires a judge to make "**specific findings**" **before requiring a defendant to serve a sentence with a period of parole ineligibility after sentences that are not so burdened.**" (Daniel V. Gautieri, A.D.P.D.) <http://www.judiciary.state.nj.us/opinions/a6010-08-resubmitted.pdf>

State v. Pennington, 418 N.J. Super. 548 (App. Div. 2011) - Denial of PCR reversed as to sentence. "Pennington's first argument relates to Rule 3:22-2(c),

imposition of an illegal sentence. He argues that the trial judge's **imposition of an extended life term was not permitted under N.J.S.A. 2C:44-5(b) because he was already serving an extended term arising from a crime committed after the robbery** for which he was being sentenced. Consequently, he argues, it was an illegal sentence. We agree... N.J.S.A. 2C:44-5(b) would not have applied [to prior cases relied on by the State because those defendants were not] being sentenced for an offense that occurred prior to the sentence he was serving. By its terms, N.J.S.A. 2C:44-5(b)(1) only applies when the sentencing offense occurred prior to the offense for which the existing extended term is being served... A plain reading of the statutory language and the available legislative history supports Pennington's argument that the imposition of a second extended term under the circumstances of this case was not permitted... We conclude, therefore, that the trial judge imposed an illegal sentence subject to correction in a PCR proceeding. R. 3:22-2(c)."

State v. C.W.R., unpublished opinion, App. Div. Docket No. A-0621-09T4 (March 9, 2011) - Convictions affirmed, case remanded for resentencing. "Count nine charged defendant with second-degree endangering the welfare of a child in Deerfield between May 18 and September 9, 2007. That endangering charge, like the others, was based on defendant's sexual conduct with G.W. and his having assumed responsibility for her care, N.J.S.A. 2C:24-4a. The judge imposed an eight-year term that is concurrent with the sentence on count one... The judge's discussion of the aggravating factors does not address their relevance to each conviction, and as noted at the outset of this section, a judge may not count an element of a crime as an aggravating factor. The **judge's findings** with respect to aggravating factors one and four **duplicate elements of the crimes charged** in counts two, five, seven, eight and nine; we cannot tell whether the judge considered factors one and four when imposing sentence for these counts. Accordingly, a remand is required so that the judge can reconsider the sentences imposed on those counts. **Merger** is another issue the judge must reconsider... [J]ustification for separate convictions does not apply ... when the sexual assault is criminalized because the defendant stands in loco parentis or has disciplinary or supervisory authority over the victim. Thus, with the exception of counts one and two, the judge should reconsider merger of counts five through eight with reference to the elements of the crime and

conduct... We turn to consider the propriety of the **consecutive sentences** imposed on counts one and two... The judge stated his reasons as follows: 'The Court finds that based upon the psychological and physical damage issues that the first-degree crime of aggravated sexual assault and the endangering the welfare of a child crime, the second degree, should be counted separately, and therefore, the defendant will be sentenced consecutively in that regard.' There is no discussion of the Yarbough factors, but instead, an apparent reliance on factors that the judge considered in fixing sentences near the top of the range for these crimes."

<http://www.judiciary.state.nj.us/opinions/a0621-09.pdf>

State v. Steele, 420 N.J. Super. 129 (App. Div. 2011) - Order **forfeiting defendant's pension** affirmed in part, reversed in part. "The primary question in this case, therefore, is the scope of the pension forfeiture mandated... The State argues that the judge erred in concluding that the statute permitted him to order forfeiture from the date of the offense going forward. We agree. The statute plainly and unambiguously requires forfeiture of 'all of the pension or retirement benefit earned as a member of ... [the] pension fund ... in which [defendant] participated at the time of the commission of the offense and which covered the office, position or employment involved in the offense.' (emphasis added). It does not give the judge discretion to limit the commencement of the forfeiture period to the date of the first criminal act alleged in the indictment. In so restricting this forfeiture, the judge effectively rewrote the statute and defeated the intent plainly expressed therein - denial of all pension benefits earned as a member of the pension fund that covered the office or employment involved in the crimes he admitted. That does not, however, end the inquiry. The State argues that defendant must forfeit his entire pension benefit, even the portion he earned as a member of PERS. To give the statute that broad a reach, we would have to ignore our obligation 'to construe and apply the statute as enacted.' [Citations omitted]. The statute simply does not reach the benefit defendant earned as a member of PERS and elected to transfer to TPAF pursuant to N.J.S.A. 18A:66-15.1. The Legislature drew the line at benefits earned as a member of the system that covered the office or employment abused. Had the Legislature intended the broader reach suggested by the State, it could have achieved that goal by eliminating

the qualifying and restrictive language and simply mandated forfeiture of all of the pension or retirement benefit earned as a member of any State or locally-administered pension fund or retirement system." (Peter W. Till)

State v. Antione D. Stevens, unpublished opinion, App. Div. Docket No. A-4180-08T2 (March 11, 2011) - Convictions affirmed, remanded for resentencing. "Aside from identifying the aggravating factors found, the court did **not explain what facts were relied upon to support the application of the aggravating factors** and did not balance the factors or explain how the factors led to the sentences imposed. In addition, the court **did not review the criteria established in Yarbough to determine the appropriateness of either a consecutive or concurrent sentence...** [T]he sole basis given by the court for the imposition of consecutive sentences was its view that this was a multiple victim crime. The fact that there are multiple victims is one of the offense-related factors identified in Yarbough for consideration in determining whether to impose consecutive sentences... However, the 'multiple victim' factor identified in Yarbough was inapplicable here. The only offenses against a person for which defendant was convicted involved the robbery, the victim of which was Antonio De la Cruz. [T.T.] and L.G. were not victims of the crimes committed by defendant. They were his accomplices, as was his co-defendant, Dafne Abad. It was error for the court to consider Dafne a victim and to consider that there were 'multiple victims' as that factor is considered in Yarbough for determining the appropriateness of a consecutive sentence. Moreover, reliance upon the fact that defendant employed juveniles amounted to **improper double-counting of an element of an offense** for which he was convicted, using a juvenile in the commission of a crime. When a fact is included among the aggravating factors identified in N.J.S.A. 2C:44-1(a), it may not be considered as an aggravating factor for sentencing purposes in any case." <http://www.judiciary.state.nj.us/opinions/a4180-08.pdf>

SPEEDY TRIAL

State v. Corey Misurella, ? N.J. Super. ?, 2011 N.J. Super. LEXIS 170 (August 26, 2011) - Conviction affirmed. "Judge Santiago determined that defendant's right to a speedy trial in the municipal court had not been violated such that the charge must be dismissed... The court's

decision, however, did not address defendant's speedy trial and due process argument regarding the twenty-seven months that passed before disposition of his appeal and trial de novo in the Superior Court... The State concedes that the right not to be subjected to unreasonable delay applies to an appeal, ... , and consequently, to a trial de novo on appeal to the Superior Court from a municipal court conviction.... We reject the State's argument that defendant was solely to blame for all these delays. We are particularly troubled by the Superior Court's dismissal of the appeal without giving notice to defense counsel and the prosecutor both before and after the order of dismissal was issued. For fifteen months, neither attorney was notified that the court had dismissed the appeal... But defendant and defense counsel were not completely free of blame. We also attribute responsibility to defendant and counsel for the fifteen-month period of inactivity. During the time the appeal was dismissed, defendant did not make any inquiry or pursue the case. Had he done so, that period of delay would have been significantly shortened. Because execution of sentence had been stayed, defendant apparently did not have a strong incentive to seek a speedy disposition of his appeal in the Superior Court... There is no evidence on this record that defendant asserted a right to speedy disposition of the de novo appeal at any time from filing the notice of appeal in July 2008 until the Superior Court heard argument on pretrial issues in August 2010... Also important, defendant was not prejudiced by the delay. His defenses had already been presented in the municipal court; they could not have been impaired by the delay."

<http://www.judiciary.state.nj.us/opinions/a1439-10.pdf>

VICTIMS RIGHTS

State v. Hess, 207 N.J. 123 (2011) - Appellate Division affirmance of denial of PCR reversed, case remanded for further proceedings. "[D]efense counsel was constitutionally ineffective for failing to challenge the unduly prejudicial video tribute to the victim scored to popular and religious music... The professionally produced seventeen-minute video entitled 'A Tribute to Officer James Hess' played at sentencing in this case includes features that have been specifically disapproved by courts in other jurisdictions: childhood photographs and music likely to appeal solely to emotion and engender undue prejudice. The video displays approximately sixty still photographs and

four home-video clips of the victim in various activities and phases of his life. The video includes photographs of the victim's childhood and his tombstone and a television segment covering his funeral. Three poems scroll over the photographs and video clips. The video is scored to popular, holiday, country, religious, and military music. The State provided the victim-impact video in advance to both the trial court and defense counsel. This practice should be followed in the future because it permits a vetting of the video before it is played in court. In this case, defense counsel should have objected to the video, and his failure to do so cannot be considered strategic or reasonable. The music and the photographs of the victim's childhood and of his tombstone, and the television segment about his funeral do not project anything meaningful about the victim's life as it related to his family and others at the time of his death. They should have been redacted from the video because they contain little to no probative value, but instead have the great capacity to unduly arouse or inflame emotions. Although we do not believe that the introduction of the video, alone, had the capacity to alter the outcome of the sentence, on remand the video should accord with the prescriptions in this opinion." See also **GUILTY PLEAS** and **INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)**.

State v. Victoria Stratos/Community Church of Paramus (Appellant), unpublished opinion, App. Div. Docket No. A-4487-09T4 (April 14, 2011) - "The Community Church of Paramus (the Church) was the victim of a theft by its volunteer bookkeeper, defendant Victoria Stratos, and filed a motion for reconsideration of her sentence after the prosecutor's office failed to notify the Church of Stratos's sentencing date as required by N.J.S.A. 52:4B-36. The Church appeals from an order denying its motion for reconsideration of Stratos's sentence. For the reasons that follow, we affirm... In this case, a specific provision of the plea agreement was that defendant would pay \$15,000 in restitution as a condition of probation. The prosecutor informed the court that this condition did not preclude the victim from pursuing additional restitution through civil litigation. In seeking reconsideration of the sentence, the Church seeks to set aside the plea agreement so that it may import its civil claim against defendant into the criminal proceeding. Although the Church was denied statutory rights under N.J.S.A. 52:4B-36, the relief it sought here would have constituted a substantial encroachment upon defendant's

constitutional rights and was properly denied."
<http://www.judiciary.state.nj.us/opinions/a4487-09.pdf>