

**CASES OF INTEREST**  
**December 2009**

**People v. Colon & Ortiz**  
**Court of Appeals**  
**2009 WL 3850341**  
**November 19, 2009**

In a good **Brady** case, the district Attorney's office had engaged in a number of activities which benefited one of the People's witnesses. However, when questioned, the witness denied receiving any benefit for his cooperation and testimony and the prosecutor did not correct those misleading statements.

The Court held that a reversal and new trial were necessary in each of the cases, holding that in their role as public officers, prosecutors must deal fairly with the accused and be candid with the courts. They further found that this duty requires prosecutors not only **to disclose** exculpatory or impeaching evidence, but also **to correct** the knowingly false or mistaken material testimony of a prosecution witness.

**People v. Lazcano**  
**Appellate Division, Fourth Department**  
**66 AD3d 1474**  
**October 2, 2009**

Here, the Court found that the People had failed to meet their burden of going forward to show the legality of the police conduct. They **failed to establish** that the officer who conducted the pat-down search was **justified in reaching into defendant's pocket** and seizing a knife.

The officer who had done the search did not testify at the hearing, and the Court found that the testimony of the fellow officer who witnessed the search was insufficient to establish that the search was legal.

Unfortunately, the Court found that the refusal of the trial court to suppress the knife could not have contributed to the conviction here, and therefore found the error to be harmless.

**People v. Manges**  
**Appellate Division, Fourth Department**  
**2009 WL 3790403**  
**November 13, 2009**

The Court held that the trial court had erred in admitting in evidence a computer

printout. The printout was used to establish the identity of the true owner of the account from which the defendant attempted to obtain money with what turned out to be a forged check. Because the People failed to establish that the printout fell within the **business records exception** (CPLR 4518a) to the hearsay rule, it was held to be inadmissible.

Therefore, since it was the only evidence the People had used to establish the account owner's identity, the Court found that the People had failed to establish the defendant's knowledge that the check presented was forged, an essential element of the crime of criminal possession of a forged instrument.

**People v. Gunther**  
**Appellate Division, Fourth Department**  
**2009 WL 3931222**  
**November 20, 2009**

In this sexual abuse case, the Court found that the defendant should not have been convicted of a crime based on an uncharged theory, i.e. a theory that differed factually from the facts stated in the indictment.

The Court held that the accused had a right to be tried and convicted of **only those crimes and upon only those theories charged in the indictment**. Further, the Court held that the defendant was not required to preserve this contention for appellate review, as that right was fundamental and nonwaivable.

**People v. Lerow**  
**Appellate Division, Fourth Department**  
**2009 WL 3930908**  
**November 20, 2009**

This was a DWI case in which the defendant, an accident victim, was treated at a hospital out of state. The Trooper, despite being outside of his jurisdiction, directed that a blood sample be drawn, using the same procedure he would have followed had the defendant been located in New York.

The Court found that given New York's implied consent law [1194(2)(a)(1)], because the procedure of the statute was followed, the blood was drawn by an authorized individual at the direction of the officer and was based upon the requisite probable cause, it was error to suppress the results of that blood test.