NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XIX Number 1 January-February 2004

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Defender News

Jail Time Includes Out-of-State and Federal Detention

The Court of Appeals has reversed a long-standing and erroneous rule that effectively precluded credit for pre-trial custody served in out-of-state and federal facilities. On February 12th the court held in *Matter of Guido v Goord*, ___ NY3d ___ (2004) that Penal Law 70.30(3) draws no distinction between pre-trial custody served in New York institutions and ones operated by sister states and the federal government.

Under a long-standing rule first adopted in *Matter of Peterson v Department of Correctional Services*, 100 AD2d 73 (2d Dept 1984), jail time served in out-of-state and federal institutions was credited to a New York sentence only when the defendant could prove he or she was financially capable of posting bail on the foreign charge, so that the foreign detention could be considered "solely attributable" to the New York charge. In *Guido v Goord*, the Court of Appeals rejected this discriminatory rule. "Notwithstanding the widespread acceptance of *Peterson* and its offspring, those cases have established a rule that conflicts with the plain statutory language, and they should no longer be followed. Penal Law § 70.30 (3) makes no distinction whatsoever between inmates who are detained in New York and those who are detained by sister states or the federal government . . . Penal Law § 70.30 (3) does not contemplate the place of detention as a factor DOCS should consider when computing jail time credit."

This means defendants held in out-of-state or federal facilities are entitled to jail time credit on the same terms as if they had been housed in New York State. For example, a defendant held out-of-state or in federal *pre-trial* detention (*i.e.*, not as a sentenced prisoner) who is later sentenced to concurrent time in New York is entitled to jail time credit against the New York sentence for all pre-trial custody served in the other jurisdiction. Second, a defendant serving an out-of-state or federal sentence that runs concurrently with a New York sentence may be entitled to jail time credit against the New York sentence for the foreign pre-trial custody, at least for time served after a securing order has been issued on the New York charge. Third, jail time may be available if the out-of-state or federal charge results in acquittal or dismissal, and a detainer for the New York charge was filed during the pendency of the foreign detention

The *Guido* holding must be applied retroactively, so eligible inmates may now apply for additional jail time credit. However, if the out-of-state or federal sentence is *longer* than the New York sentence, inmates should proceed cautiously. Federal law (and possibly some state law) precludes jail time credit if the time was otherwise credited to another jurisdiction's sentence. Thus, the crediting of jail time in New York might result in loss of jail time credit on the federal sentence. The Court of Appeals made clear it is the inmate's duty to provide a certified record of the foreign detention to properly claim the credit. DOCS has "no obligation to collect such documentation on behalf of an inmate."

Backup Center staff attorney Al O'Connor represented Mr. Guido.

AC Fee Review: Reviewed and Found Wanting

The Appellate Division, 1st Department, has decided *Levenson v Lippman*. This combined declaratory judgment action brought in the Supreme Court of New York County involved a challenge to the constitutionality of Chief Administrative Judge's Rule 127.2(b). The rule permitted *sua sponte* administrative review of extraordinary compensation orders issued by trial judges pursuant to County Law 722-b. The 1st Department declared that the rule, which attempted to usurp appellate jurisdiction of the power of review over orders issued by Supreme Court Justices and vest such

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jurisdiction in other Supreme Court Justices with coordinate jurisdiction, was *ultra vires*.

The 1st Department discarded the semantic reckoning of *Werfel v Agresta* and *Matter of Bodek*, bedrock cases on the issue of whether and to what extent an order of compensation issued by a trial judge pursuant to County Law article 18-B may be reviewed. In their place, the Court relied upon the constitutional power of review vested in the Appellate Division over all orders and actions of Supreme Court Justices. The court did recognize that such power of review is limited by the trial court's statutorily vested authority to award extraordinary fees as a matter of its discretion under 722-b. Thus, any such action taken by a trial court as a matter of its discretion is reviewable by the appellate courts only for abuse.

With regard to the Chief Administrative Judge's reliance on his constitutional authority to administer the courts, and on the prior judicial determinations that awarding of compensation is an administrative act, the 1st Department said:

> Merely by denominating the award of assigned counsel fees as an administrative exercise, appellate jurisdiction has been removed from the Appellate Division and transferred to the Chief Administrative Judge. Defendants have identified no authority for this obvious departure from the constitutional scheme, but rather have resorted to the employment of a semantic device.

Rule 127.2(b) was declared null and void. The orders modifying the orders of compensation in question were vacated and the original orders of compensation were reinstated, thereby giving the plaintiffs full relief.

Justice Ernst Rosenberger wrote the opinion for a unanimous court. Hale & Dorr filed the brief for the plaintiffs, supported by *amici curiae* briefs filed on behalf of NYSDA, New York State Association of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers, New York County Lawyers' Association, Association of Justices of the Supreme Court of the State of New York and Association of Supreme Court Justices for New York City.

A summary of the decision in *Levenson v Lippman*, No. 01228, 2/24/04, can be found online at http://www.courts.state.ny.us/reporter/3dseries/2004/2004_01228.htm

A print copy of the opinion, and copies of the briefs and pleadings, may be obtained from the Backup Center. (For other assigned counsel fee news see p. 5).

Innocence Cases Illustrate Recurring Issues

Perjurous jailhouse informant testimony. Prosecutorial misconduct. False confessions. Under-resourced and ineffective representation that fails to bring the other matters to light. These are common themes in cases where defendants have been proven innocent. The proliferating instances of post-conviction exonerations in New York and nationwide have become drumbeats for reform.

Cardozo Innocence Project Moves Onward and Upward

An institution responsible for overturning many wrongful convictions, the well-known Innocence Project, recently moved four blocks uptown from the Benjamin N. Cardozo School of Law with which it had long been associated. Established in 1992 by Barry Scheck and Peter Neufeld, pioneers in the post-conviction use of DNA evidence, the project was underwritten at its inception by Cardozo. It is now a non-profit corporation.

Along with its new address (*see* http://www.innocenceproject.org/), the Innocence Project is taking on a mission beyond overturning individual instances of wrongful conviction. "'We have to become a think tank of criminal justice reform,'" Scheck told the *New York Law Journal.* Defense issues "'can be appropriately reframed as good law enforcement issues,'" Scheck noted. "'Every time an innocent person is arrested, the bad guy goes free.'" (*NYLJ*, 12/23/03.)

An example of such law enforcement loss is a news account of an Oklahoma man convicted of rape in 1983 who was exonerated by DNA late last year. Now, the article noted, "there is no hope of finding and prosecuting the real rapist because the statute of limitations has expired." In other cases, witnesses may have died, memories faded, or physical evidence been destroyed.

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Conscientious prosecutors should be concerned. As the Assistant District Attorney in the Oklahoma case noted, "'You do your job and you think you have righted a wrong, and it turns out 20 years later you haven't.'" (yahoo.com/news, 12/3/03.)

DNA Exonerations "Commonplace," Follow-up Not

"The sight of inmates walking free, out of prison gates or down courthouse steps, after DNA tests prove their innocence has become almost commonplace" states an October 2003 *Chicago Tribune* story. DNA evidence, the basis of the Innocence Project's work from the beginning, is believed by some to have entered the mainstream of criminal justice practice, at least in capital cases, and perhaps in other high profile matters. "DNA testing at the outset of a prosecution is now routine, so that more recent convictions will not be subject to challenges on this basis," a *New York Times* reporter wrote a year ago with regard to death penalty cases. (*NY Times*, 2/23/03.) Recently, charges against a New York man arrested on Jan. 31, 2004 for four different incidents of rape were dropped when DNA evidence exonerated him of one and alibis for the other three were substantiated. (*NY Times*, 2/27/04.)

But when DNA does prove a prisoner was wrongfully convicted, that same DNA might not lead to the actual perpetrator—especially if no one even looks. The *Chicago Tribune* examined 115 murder and rape cases nationwide where the release of a prisoner on the basis of DNA left a crime unsolved. While DNA was quickly used to link other suspects to the crime in several cases, 97 cases remained open. In 44 of those, authorities had failed to submit the genetic profile in their possession to the FBI's national DNA database. In some instances, the statute of limitations has expired, in others, law enforcement turf wars or laboratory testing issues intervened, according to the *Tribune*. In some cases, the *Tribune* investigation concluded, "law-enforcement authorities have refused to submit DNA profiles because they continue to believe that freed defendants are guilty." (www.chicagotribune.com, 10/26/03.)

Prosecutor and Police Misconduct or Errors Yield Wrongful Convictions

Dogged determination that they have the right person is not a trait to be admired in prosecutors and police when that determination leaves them blind to the possibility that they are wrong. In New York, it is axiomatic, if not always honored in practice, that prosecutors have a duty "'not only to seek convictions but also to see that justice is done.'" *People v Pelchat*, 62 NY2d 97, 105. An old Tennessee case says that a prosecutor "ought not suffer the innocent to be oppressed or vexatiously harassed." *Fout v State*, 4 Tenn. 98 (1816).

And yet, across the country, law enforcement authorities too often cling to a decision, once made, not only refusing to give up wrongful convictions, but bolstering weak cases with dubious investigative tactics and doubtful evidence. Among such tactics is uncritical acceptance (or solicitation) of fabricated jailhouse informant or police testimony and extraction of false confessions—or both.

Use of jailhouse informants is a time-honored practice, many times shown to lead to injustice. The first recorded American case of wrongful conviction involved the testimony of an informant planted in the defendant's cell, resulting in his conviction for the death of his brother-in-law, who turned up alive shortly before the defendant was to hang. According to a study by Northwestern University School of Law's Center on Wrongful Convictions, of 97 death row inmates exonerated nationwide between 1972 and 2002, 16 had been wrongfully convicted based partially or wholly on jailhouse informant testimony. About 23% of the first 70 cases of prisoners exonerated through DNA testing with the help of the Innocence Project involved informants. In Illinois, the first 13 of 17 exonerated death row inmates had jailhouse informant testimony offered in their cases; when then-Gov. George Ryan commuted all 167 Illinois death sentences in 2003, he noted that 46 of approximately 300 people who had been placed on death row in that state had been convicted on the testimony of jailhouse informants. (*Newsday*, 12/8/03.)

While some jurisdictions have taken steps to limit the use of jailhouse informant testimony, most, like New York, have not.

James Vargason, Cayuga County district attorney and then-president of the New York State District Attorneys Association, acknowledged to *Newsday* that jailhouse informants' claims should be examined "'with a jaundiced eye' and evaluated for reliability, probability and corroboration." But defense lawyers, including former prosecutors, said that too often prosecutors accept and use any testimony that coincides with their view of the case, resulting in what has come to be known as "'framing the guilty.'"

If prosecutors limited their use of jailhouse informants, they might not only "do justice" but do themselves a favor. Following a 1988 scandal in which a jailhouse informant in Los Angeles demonstrated on national television his ability to gather facts to fabricate another's "confession," policies and laws were adopted that all but ended use of jailhouse informant testimony. The result—no decline in convictions and, as a lawyer noticed, one less issue for defendants to raise later. (*Id.*)

A recent Connecticut federal case shows that jailhouse informants are not the only source of misleading evidence. A police radio tape used at trial to support testimony that the incident unfolded in less than a minute rather than taking more than two, as the defense asserted,

was later determined to have originally contained "dead air"—silent spots—that were omitted when the tape was played at trial. The conviction was overturned. (Connecticut *Law Tribune*, 2/10/04.)

The way in which law enforcement conducts its investigations may also result in wrongful convictions if not exposed by the defense prior to or at trial. The lawyer for a homeless man tried on molestation charges in California on the word of three children noted that the police seriously erred "by interviewing the girls in a group rather than individually, a circumstance that made it easy for them to tell the same story." While this particular injustice was resolved at trial, with the admission by the complainants that they had made the story up as an excuse for being late from school, the defendant was jailed for 251 days and had resolved to kill himself if convicted. (www.cbsnews.com, 2/23/04)

Erroneous jailhouse informant accusations and police evidence present the defense with investigative challenges, but even more daunting is a defendant's own false confession. Absent visible (and documented) physical evidence of coercion, fact-finders and defense lawyers themselves may be hard pressed to believe a client who insists that one or more incriminating statements made to the police were not true. Still, there is growing recognition that false confessions are not uncommon and can be explained. Publicity around the exoneration of the teenagers convicted of attacking the Central Park Jogger brought the issue of false confessions into the public eye, though whether that publicity will yield reform remains to be seen.

Documenting police interrogations on video protects defendants and helps prosecutors win cases, too. The American Bar Association recently approved it. (*NYLJ*, 2/10/04.) NYSDA's board resolved in July, 2003 that "to promote the orderly and fair resolution of criminal prosecutions" NYSDA "supports the passage of a rule of law mandating uninterrupted electronic recording throughout the interrogation process of individuals by law enforcement personnel." In many cities, it's the law. But:

> To New York cops, it's anathema—which is why the Central Park jogger debacle won't be the last.
>
> —Curtis Stephen, "Record Time," *City Limits Monthly*, Nov. 2003.

According to Stephen's article for *City Limits Monthly*, a publication of the Center for an Urban Future, increasing numbers of police departments around the country are turning to complete recording of interrogation sessions. These include Alaska, Minnesota, Illinois, Connecticut, Washington, DC, and individual police departments such as San Antonio and Broward County (Miami). The policy has reportedly actually assisted in obtaining convictions. But in New York City, reasons not to require recording range from fiscal constraints to refusal to bow to outside pressure ("'an instinctive reaction of being picked on whenever reforms are attempted in the wake of blatant misconduct'" such as the Central Park Jogger case, according to Harlem City Council member Bill Perkins).

Academic research cited in the *City Limits Monthly* article supports the need for recording police questioning. Saul Kassin, a professor of psychology and chair of Legal Studies at Williams College, has conducted extensive research on interrogations. Among the flaws he says are often found in the process is the "inability of some detectives to entertain the possibility that someone other than the suspect committed the crime."

At least until law enforcement in New York recognizes the self-interest it may have in recording interrogations in an age of growing juror skepticism about police tactics, defense lawyers must continue to deal with confessions obtained under circumstances known only to their often bewildered and psychologically beaten-down clients and the interrogators. Those interrogators may have been trained in a nine-step interrogation technique set out in the handbook, *Criminal Interrogation and Confessions*, by John E. Reid and Associates, Inc.

In challenging a confession, counsel may seek to have an expert explain why an innocent person would confess. To date, efforts to introduce such testimony have been largely unsuccessful in New York. *See eg People v Green*, 250 AD2d 143 *lv den* 93 NY2d 873. That is no reason not to try. As columnist Steve Chapman wrote recently:

> Juries are regularly allowed to hear confessions from defendants and urged to believe them. Why shouldn't they be allowed to learn about the grounds for doubt?
>
> Anything that reduces the frequency of wrongful convictions ought to be embraced by prosecutors and police. False confessions aren't good for them or anyone else—except the guilty.
>
> —*Washington Times*, 12/26/03

Misconduct Carries Costs

Prosecutorial and police misconduct can take other forms in addition to elicitation of false or misleading testimony. Simply hiding exculpatory evidence from the defense is one such form.

Albert Ramos served over seven years after his 1984 wrongful conviction of sexually abusing a child at a day care center. Released in 1992 because the trial prosecutor withheld exonerating evidence later disclosed when the complainant's parents sued the city, Ramos was recently awarded $5 million, the largest wrongful conviction settlement in New York state history. While investigating the suit, Ramos' lawyer reportedly uncovered dozens of cases of prosecutorial misconduct in the Bronx District Attorney's office from 1975 to 1996 that had resulted in no disciplinary action. (www.democracynow.org, 12/18/03; *NY Times*, 12/17/03.)

When public defense lawyers lack time and resources to investigate cases fully, such prosecutorial behavior is unlikely to be found. An investment in quality defense representation could save New York jurisdictions liability for wrongful convictions, while increasing public trust in the criminal justice system.

Supremes Say State Has to Set Record Straight

The US Supreme Court said plainly in February: "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Texas prosecutors had said early in the capital case against Delma Banks that all discovery to which the defense was entitled would be turned over without litigation. However, Texas then withheld evidence that one of its witnesses was a paid police informant and allowed that witness to testify without contradiction that he had not talked to police about the case until shortly before trial. The prosecution also failed to disclose a pretrial transcript showing that another witness's trial testimony had been intensively coached, and allowed that witness to convey that his testimony was unrehearsed. The federal Court of Appeals for the 5th Circuit was wrong, the high court said, when it rejected Banks's *habeas corpus* arguments on the basis that he "had documented his claims of prosecutorial misconduct too late and in the wrong forum." Banks was represented by George Kendall. A summary of *Banks v Dretke,* No. 02-8286, (2/24/04), will appear in a future issue of the *REPORT*.

This issue of the *REPORT* contains examples of similar, and other, prosecutorial misconduct in New York cases. In some instances, the misconduct, while not excused, was held not grounds for reversal. *See People v Taylor* [failure to object to "indefensible" prosecutorial summation could have been tactical], p. 20; *People v Jamal*, p. 26; *People v Milligan*, p. 30; *People v Pagan* [error held harmless], p. 32. *People v Prude* [issue improperly raised], p. 45.

City No Longer Lacks Assigned Counsel

The increase in assigned counsel fees, along with other factors, has reportedly alleviated the shortage of lawyers for Family Court work in New York City. The Legal Aid Society's contract, requiring it to pick up at least 86% of all arraignments in Criminal Court, severely restricted the amount of criminal work available for 18-B attorneys, spurring some to seek Family Court work to make up the difference, the *New York Law Journal* said in early January. Also said to contribute to ending the lawyer shortage was a 20% drop in city neglect filings. The assigned counsel panels in Bronx and Manhattan reportedly increased by about 15%. The increase in the other three borough counties was only 6%, but the lawyers on the panel were said to be accepting more cases. (*NYLJ,* 1/6/04.)

A related press story in late December claimed that some assigned counsel lawyers in New York City had delayed cases to get the higher fees that went into effect in January. Deputy Administrative Judge for Justice Initiatives Juanita Bing Newton indicated that the Office of Court Administration had not received reports of such delays prior to publication, but would look into the allegations. (*NY Daily News*, 12/28/03.)

LAS Faces Budget Crisis

The Legal Aid Society's increased percentage of criminal arraignments, noted above, was coupled with a $6 million increase in city funding for each of the last two years for its state criminal court operations. However, Attorney-in-Charge Daniel L. Greenberg pointed out recently that the Society's current $66 million in annual funding compares poorly with the $79 million it received before Mayor Rudolph Giuliani's administration began LAS cutbacks in 1994. The number of criminal cases Legal Aid handles has remained relatively level, having increased to 215,000 this year compared with 210,000 in 1993, but current numbers include far more misdemeanor cases.

Greenberg announced recently that Legal Aid is facing a $21 million shortfall in this fiscal year. Multiple causes account for the problem, according to Greenberg. Costs from the 9/11 terror attack, which forced a relocation of Legal Aid headquarters, was one cause. The economic downturn in recent years adversely affected private donations (an important source for the Society's work in civil matters) and caused a retrenchment in government grants. This past year, the Society lost $1 million in state funding for its criminal defense operations.

Family Court and federal defender operations have been less affected than the units that defend criminal cases in the state courts and handle civil matters for the poor, Greenberg said.

Efforts to increase borrowing, and meetings with funders and staff around a range of proposals to enhance revenues and reduce spending, are underway. Among the proposals are pay delays, further integration of services, charging for continuing legal education courses instead of allowing lawyers to come in exchange for promises of taking *pro bono* cases, and refusing to provide services beyond those for which LAS receives revenues. For example, Greenberg said that Legal Aid has in the past assigned lawyers paid with city funds to handle parole revocation hearings, which are conducted administratively by the state Parole Board at Rikers Island. Unless funds are added to handle the hearings, Legal Aid will have to steeply cut back that work.

Chief Defender News

NYSDA tries to make it easy to find the person who heads the public defense office in a particular New York State county. The "Chief Defender Listing" at www.nysda.org (under "About NYSDA") contains every public defense office in New York State and includes the name of the person in charge. The list is updated regularly, but a recent increase in changes and proposed changes in county public defense plans has had the Backup Center hurrying to keep up.

Chief Changes Noted

Changes to the Chief Defender Listing over the past twelve months, not all resulting from system change, included: Gaspar M. Castillo, Jr., Division of Alternate Public Defender, Albany County; Robert Salzman, Legal Aid Society of Mid-New York, Inc, Broome County; Richard W. Rich, Jr., Public Advocate, Chemung County; Alan E. Gordon, Chenango County Public Defender; William T. Meconi, Assigned Counsel Coordinator, Clinton County; Laura Johnson, Attorney-in-Charge, The Legal Aid Society Criminal Appeals Bureau; Michael J. Violante, Niagara County Public Defender; David L. Gruenberg, Conflict Defender, Rensselaer County; Connie Fern Miller, Schuyler County Public Defender; Michael J. Mirras, Seneca County Public Defender; Mark J. Caruso, Schenectady County Public Defender; Joel M. Proyect, Sullivan County Conflict Legal Aid Bureau; Sterling T. Goodspeed, Warren County Public Defender.

The *REPORT*'s job opportunities section in this issue (p. 10) includes a notice for the new position of Steuben County Public Defender, while St. Lawrence County was planning to close applications for a Conflict Public Defender before this *REPORT* reached members' mailboxes.

Some Chief Defenders who remain on the list have changed titles, or head offices whose functions have changed in anticipation of or following last year's hike in assigned counsel fees. Last year, Monroe County created a Conflict Defender Office that also houses the assigned counsel plan. Richard W. Youngman, formerly Assigned Counsel Administrator, is now Monroe County Conflict Defender.

Other changes may be coming. Prior issues of the *REPORT* have briefly chronicled county discussions of changed systems in contemplation of last year's legislation increasing assigned counsel fees.

For example, Onondaga County is considering a proposal to shift defense representation responsibilities there. Lawyers with the Frank H. Hiscock Legal Aid Society would no longer represent defendants in misdemeanor cases in Syracuse City Court, but would take on Family Court cases involving allegations of neglect, abuse and missing support payments, while the current Hiscock caseload would go to the Assigned Counsel Program. The local newspaper asked whether the county would be sacrificing valuable experience and institutional expertise, and observed that a central question in the debate about these proposed changes should be "Would the changes mean better legal representation for the poor?" (*Post-Standard*, 2/12/04.)

Implementation of the proposal would make Onondaga the only county in the state to expand the use of assigned counsel in response to the rate increases. (*Post-Standard*, 2/24/04.)

Former Chief Welch Dies

David L. Welch, former St. Lawrence County Public Defender, died on Jan. 24, 2004 at the age of 52. He had also served as attorney for the St. Lawrence County Social Services Department and as acting Potsdam Village Justice. (*St. Lawrence Plaindealer*, 1/27/04.)

Federal Defender Clauss Departs

William Clauss, who has trained for NYSDA and other defender groups, resigned as Federal Public Defender for the Western District of New York to move into private practice in January. No successor has been named.

IDP Sees Staffing Shift

After years of skillfully guiding NYSDA's Immigrant Defense Project (IDP), Manny Vargas has stepped down as the Director but will continue in a consulting role on certain ongoing IDP Projects. NYSDA, and the many immigrants and their advocates who have benefited from his tremendous work, thank him for all his past efforts and for his willingness to continue that work in a new role. IDP staff attorney Marianne Yang, who has been serving as Acting Director, will be the new Director. With her leadership and Manny's continuing active involvement, the IDP will remain a critical resource for attorneys protecting and effectuating the rights of their non-citizen clients. For the latest IDP immigration law tips see p. 11.

Beyond the Courtroom: Prison and Client Issues

Many reentry struggles, prison problems, and other issues facing the client community result from criminal justice policies that marginalize clients and their lawyers. Lack of time and defense resources, coupled with the ascendancy of prosecutorial power over not only charging decisions but often disposition as well, conspire to reduce the defense role to little more than passing on to clients the best plea offer. Individualized sentencing is lost to judges under the Rockefeller Drug Laws and other mandatory sentencing statutes. Prosecutors alone decide

in many instances whether a defendant will get treatment or prison. Prison policy is debated in terms of economic benefit to certain communities while concomitant costs—fiscal and human—are ignored.

NYSDA Provides Testimony on Disciplinary Confinement of Prisoners with Mental Illness

The New York State Assembly Standing Committee on Correction and Mental Health, Mental Retardation and Developmental Disabilities heard testimony on Jan. 13, 2004 on "Disciplinary Confinement and Treatment of Prison Inmates With Serious Mental Illness." NYSDA's Executive Director, Jonathan E. Gradess, provided an analysis of pending bill A.8849. His supportive suggestions including clarifying that prisoners' lawyers are among the persons who could refer a prisoner held in disciplinary confinement for an assessment triggering protections for those suffering from mental illness. Gradess's testimony is available from the Backup Center. More information about the confinement of persons with mental illness in Special Housing Units is available on the NYSDA web site on the "Prisoners' Rights" page in the "Hot Topics" section.

REENTRY.NET Planning Proceeds

The Bronx Defenders and Pro Bono Net, as partners and supported by the JEHT Foundation, have been engaged in a planning process to create the Reentry Resource Center, a collaborative online training and support center for individuals and organizations in New York State that advocate for people who have criminal records or are reentering the community after incarceration. A demonstration of what the Center might look like has been created at www.reentry.net.

Approximately 70 people have participated in five meetings in New York City, Albany, and Rochester, including a meeting held at the NYSDA office in Albany in January 2004. Advocates from civil legal aid programs, defender organizations and social service agencies, as well as representatives from national organizations in Washington DC and New York City, have been included in this process to date.

For more information, contact McGregor Smyth, Project Director, Bronx Defenders' Civil Action Project, at (718) 838-7885 or mcgregors@bronxdefenders.org.

Prison Issues Considered on King Holiday

Individuals and representatives of groups from New York City, Albany, Rochester and Auburn came to the Legislative Office Building in Albany on January 19th for "The People's Celebration of Martin Luther King's Life and Principles." The Center for Law and Justice, Prison Families of New York, the Center for Constitutional Rights, the Prison Families Community Forum at the Fifth Avenue Committee, and the Women in Prison Project of the Correctional Association sponsored the event. Attendees participated in panel discussions, exchanged information on plans, recognized exceptional efforts, and designed strategies for advocating fair and effective criminal justice policies.

One panel was organized around the MCI contract with New York State that provides telephone services for New York State prisons. The contract causes prison families to pay outrageous fees for collect calls from their loved ones in prisons. Barbara Olshansky from the Center for Constitutional Rights, Alison Coleman from Prison Families, and Frank Dunbaugh from the Maryland Justice Policy Center presented. A statement was read from the Public Utilities Law Project on their work with this issue.

(In another development concerning fees for prisoners' calls, NYSDA and the Office of the Appellate Defender have joined three individual plaintiffs in a suit against the Department of Correctional Services (DOCS) and MCI Worldcom Communications, Inc. The suit was filed in the Supreme Court, Albany County on Feb. 25, 2004. The Center for Constitutional Rights is representing the plaintiffs. [A copy of the petition and complaint is available from the Backup Center.])

Another panel at the King Day event discussed the impact of incarceration on women. Facts presented included what women are incarcerated for (80% of their crimes are drug related), the conditions that women face in jail, how their children are affected, and how, after they serve their time, women who are former prisoners must struggle in their daily lives.

NYSDA's Executive Director facilitated a brainstorming discussion with participants to identify criminal justice issues of importance and strategize around them. NYSDA's Community Organizer also attended the event.

For more information on the Martin Luther King Day event or any of these issues, contact the Center for Law and Justice at (518) 427-8361.

Client Organizing at Black and Puerto Rican Caucus

During the Black and Puerto Rican Caucus weekend, February 13-15, NYSDA's Client Advisory Board staffed a booth presenting public defense issues and information in the Empire State Plaza Concourse. Lenore Banks, Juan Dones, and Advisory Board Chair Marion Hathaway, along with Community Organizer Karla Andreu, spoke to passers-by about public defense issues. Discussions included funding for defense services, current problems in representation of public defense clients, and the creation of a public defense commission. Video clips of testimony by public defense clients, compiled with the technical assistance of MIS Director David L. Austin, helped the booth stand out from the many others surrounding it.

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Conferences & Seminars

Sponsor: New York Association of Criminal Defense Lawyers
Theme: Mad Dog & Friend
Date: April 2, 2004
Place: Mineola, NY
Contact: Patricia Marcus (212)532-4434; e-mail nysacdl@aol.com.

Sponsor: National Institute for Trial Advocacy
Theme: Advanced Criminal Trial Advocacy Skills
Dates: April 21-25, 2004
Place: Louisville, CO
Contact: NITA: tel (800)225-6482; fax (574)271-8375; e-mail nita.1@nd.edu; web site www.nita.org

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Sponsor: New York Association of Criminal Defense Lawyers
Theme: Annual Syracuse Trainer
Date: April 24, 2004
Place: Syracuse, NY
Contact: Patricia Marcus (212)532-4434; e-mail nysacdl@aol.com.

Sponsor: National Association of Criminal Defense Lawyers
Theme: Spring Meeting & Seminar: In Their Defense—Representing the Client Everyone Loves to Hate
Dates: April 28-May 1, 2004
Place: Nashville, TN
Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; web site www.nacdl.org

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Sponsor: Louisiana Association of Criminal Defense Lawyers
Theme: Law and All That Jazz
Dates: April 22-24, 2004
Place: New Orleans, LA
Contact: LACDL: tel (225)387-3261; fax (225)387-3262; web site www.lacdl.org

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Sponsor: Defender Services Training Branch, Administrative Office of the United States Courts
Theme: Winning Strategies 2004
Dates: May 20-May 22, 2004
Place: Boston, MA
Contact: tel (800)788-9908; www.uscourts.gov/adminoff.html; www.fd.org

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Sponsor: National Association of Sentencing Advocates
Theme: Death Penalty Mitigation Institute: Defending Life, Liberty, and Hope
Date: May 23, 2004
Place: Milwaukee, WI
Contact: NASA: (202)628-1071; e-mail nasa@sentencingproject.org; web site www.sentencingproject.org/nasa

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Sponsor: National Legal Aid and Defender Association
Theme: Defender Advocacy Institute
Dates: June 3-June 9, 2004
Place: Dayton, OH
Contact: For substantive questions contact Ira Mickenberg (518)583-6730 or iramick@worldnet.att.net; for registration questions contact Jon Mosher at (202)452-0620 xtn 213 or j.mosher@nlada.org; web site www.nlada.org

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Sponsor: Trial Lawyers College
Theme: Death Penalty Seminar
Dates: June 11-18, 2004
Place: Dubois, WY
Contact: tel (760)322-3783; fax (760)322-3714; website www.triallawyerscollege.com

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Sponsor: National Criminal Defense College
Theme: Trial Practice Institute 2004
Dates: June 13-26, 2004
July 18-31, 2004
Place: Macon, GA
Contact: NCDC: tel (478)746-4151; e-mail office@NCDC.net; web site www.ncdc.net

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Sponsor: New York State Defenders Association
Theme: 37th Annual Meeting and Conference
Dates: July 25-28, 2004
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; web site www.nysda.org

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Sponsor: National Association of Criminal Defense Lawyers
Theme: Annual Meeting and Seminar
Dates: July 28-July 31, 2004
Place: San Francisco, CA
Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; web site www.nacdl.org

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Sponsor: Santa Clara University School of Law
Theme: Bryan R. Schechmeister Death Penalty College
Dates: July 31-August 5, 2004
Place: Santa Clara, CA
Contact: Ellen Kreitzberg, (408)554-4724; e-mail ekreitzberg@scu.edu ⚖

Defender News *(continued from page 7)*

NYSDA's participation in the event was part of a public education campaign entitled "Defending the Right to be Heard: Every County. Every Client."

Judge's Obligations to Defendants Debated Before Commission

Acting as a referee for the Commission on Judicial Conduct, former Court of Appeals Justice Richard Simons filed a report in December 2003 concerning *Matter of Henry Bauer*. Simons's report sustained essentially all charges against the judge for failing to properly advise defendants of their right to counsel, setting excessive bail, coercing defendants into pleading guilty, convicting a defendant without a plea of guilty, and imposing illegal and unauthorized sentences. The *Bauer* matter was heard by the Commission at its Jan. 30, 2004 meeting to determine misconduct and sanction, if any.

The matter has drawn considerable interest because the judge, by choosing to open the proceeding to the public, offered a rare public view of how the normally confidential Commission proceedings are conducted. The case raised issues about the responsibility of the judiciary to do justice to unrepresented defendants. One of the more interesting issues concerns unreasonable bail. The New York State Constitution, Article 1 § 5, prohibits imposition of "excessive" bail but does not define "excessive." A judge is statutorily required to "consider the kind and degree of control or restriction that is necessary to secure his court attendance when required." Criminal Procedure Law 510.30. The law lists eight factors to be considered, but does not indicate how those factors should be translated into a bail amount.

Judge Bauer took the view that bail considerations were independent of the seriousness of the charges. He imposed $25,000 bail on a homeless defendant charged with riding a bicycle on the sidewalk, punishable by a maximum fine of $100, because the defendant had a long history of minor involvement with the law. The judge imposed $20,000 bail on a teenager charged with simple possession of marijuana because she was from out of state, notwithstanding that jail was not an authorized sentence for simple possession of marijuana and the maximum fine was only $100. Other similar actions were charged. While Judge Bauer was charged with failing to consider the factors listed in CPL 510.30, the charges did not say how such consideration should have been done, how it should have been recorded, and whether a judge could consider and then decide to disregard particular factors.

At argument, the Commission seemed to agree that the bails were highly excessive and unreasonable, but struggled to find a rationale to explain why. There appeared to be concern lest a broad rationale impose a burdensome or impossible duty on the judiciary to justify bails set. One Commission member suggested that where the bail is a routine amount there may be little obligation to explain the bail, but as the bails become higher there may be a greater obligation to explain the factors involved. A decision in the matter is pending.

Association Members Honored

The New York State Bar Association Criminal Justice Section and the New York State Association of Criminal Defense Lawyers (NYSACDL) both held their annual awards programs in January. Various criminal defense luminaries were honored, including several current and former NYSDA Board Members and members.

At the NYSACDL Annual Dinner, NYSDA Board Member Ed Hammock received the *Gideon Champion of Justice Award*. Former NYSDA Board Member Kathryn Kase presented the *Thurgood Marshall Award* to New York State Capital Defender Kevin M. Doyle. Former (2003) NYSACDL President Richard J. Barbuto welcomed the new president, Martin B. Adelman.

Malvina Nathanson, a NYSDA member, was lauded on both occasions. She received the *Outstanding Service to the Criminal Bar Award* from NYSACDL and the *Outstanding Contribution to the Bar and Community Award* from NYSBA. NYSDA Board Member Michelle Maxian received the *Bar Association Award for Outstanding Public Defense Practitioner*.

NYSBA also honored Terence Kindlon, a past recipient of NYSDA's Service of Justice Award, with the *David S. Michaels Memorial Award for Courageous Efforts in Promoting Integrity in the Criminal Justice System*, and former

(continued on page 13)

Job Opportunities

The Wyoming County Public Defender Office and Attica Legal Aid seeks a **Staff Attorney**. Duties include traditional public defender functions and prisoners' rights litigation. Felony trial experience is preferred. Salary approx. $50,000 DOE. Full benefits. Sent résumé and writing sample to: Norman Effman, Executive Director, Wyoming County Public Defender Office and Attica Legal Aid, 14 Main Street, Attica NY 14011; tel (585) 591-1600; fax (585) 591-1602; e-mail attlegal@iinc.com.

Steuben County seeks a **Public Defender**. This is a full time position that involves responsibility for providing defense services to all indigent persons charged with crimes and all indigent persons entitled to representation in Family Court and Surrogate Court proceedings. Required: graduation from regionally accredited or NYS certified law school and four years practicing criminal law, including three years involving extensive court trial appearances, and NYS bar admission at the time of appointment. Salary $65-85 K DOE. NYS retirement and excellent benefits. AA/EOE. Send résumé and cover letter **no later than Mar. 31, 2004** to: Robert F. Blehl, Personnel Officer, Steuben County Personnel, 3 East Pulteney Square, Bath NY 14810-1578. fax (607)776-2345; e-mail bob@co.steuben.ny.us.

The Legal Aid Society of Orange County seeks a **Staff Attorney** for Criminal/ Family courts. Required: NY bar admission and related job or clinic experience. Salary: 43,000-51000 DOE. Send résumé to LAS of Orange County, PO 328, Goshen NY 10924, or fax (845)294-2638.

The Genesee County Public Defenders Office seeks a **Case Manager**. Required: high school or NYS Department of Education recognized equivalent and: a Master's in the human services field (social work, psychology, nursing, rehabilitation, education, counseling, community mental health, child and family studies, and criminal justice); or a bachelor's degree in the Human Services field and 2 years full time paid experience in providing direct services to substance abusers or addicted individuals or in linking mentally disabled patients/ clients to a broad range of services essential to successfully living in a community setting, (*eg* medical, psychiatric, social, education, legal, housing and financial services); or a bachelor's in human services with certification as a NYS Alcoholism and Substance Abuse Counselor, 1 year of full time paid experience as defined above. To perform case management activities for clients in need of public defender intervention, including identifying alternatives to incarceration and the prevention of repeat offender status. Work under the general direction of the Public Defender with input and approval from individual attorneys. Do related work, as required. Submit résumé to Genesee County Public Defenders Office, 1 West Main Street, Batavia NY, 14020 **by Mar. 26, 2004**.

St. Lawrence County seeks **Attorneys** (full time positions) for new Conflict Defender's Office. Responsibilities will include representing indigent clients in criminal and/or family court. Salary $41,246 to $58,776 DOE. AA/EOE. Submit résumé to: Conflict Defender's Office/County Administrator, 48 Court Street, Canton NY 13617.

The Louisiana Crisis Assistance Center, a non-profit capital trial office based in New Orleans, LA, specializing in the defense of indigent people charged with capital crimes, seeks an **experienced Trial Attorney.** Significant felony trial experience required; capital defense experience important. Must be admitted in Louisiana or willing to sit the next Louisiana bar. Opportunity to work in cutting edge capital office with fiercely dedicated staff. Modest salary. EOE. Contact Kim Watts at (504)558-9867; e-mail lcac@thejusticecenter.org.

Management Sciences for Development (MSD), Inc., an international consulting firm specializing in rule of law and human rights programs in partnership with US Agency for International Development, is searching for candidates for Director-type or technical specialist positions for programs in Central and South America. The programs work toward the transition from an inquisitorial criminal justice system to one more closely resembling the oral/accusatorial tradition. Anticipating a broad-sweeping program in Mexico that will center on the re-drafting of that country's criminal procedure code and the strengthening of criminal justice institutions to meet the requirements and nuances of the new code, MSD is interested in **attorneys** with strong litigation experience, professional proficiency in Spanish, cultural sensitivity (toward a country as large and as strategically significant as Mexico), and ideally, some knowledge of how USAID does business. MSD is also searching for candidates who might contribute to justice programs in Panama and Bolivia. Contracts to be in accordance with salary history (primarily the past three years), plus benefits such as post differential (around 10% for Mexico), housing allowance, education allowance for dependent children, health and employment compensation insurance, and transportation expenses. As a firm, MSD also offers other benefits depending on employment commitment to the firm and performance in-country. For more information, contact Richard Spencer, MSD Associate, Management Sciences for Development, Inc., 4455 Connecticut Avenue NW, Suite A-100, Washington DC 20008; tel (202)537-7410; fax (202)537-5099; e-mail rspencer@ msdglobal.com; web site www.msdglobal.com

The Public Defender's Office of Cattaraugus County seeks **Assistant Public Defenders**. Candidates must be law school graduates and members in good standing of the NY State bar, with commitment to undertake cases before Cattaraugus County Family Court. Strong research and writing skills and a commitment to the representation of individuals who are unable to retain counsel required. Ability to work collaboratively with other lawyers and staff necessary. Starting salary $35,000 for recent law school grad, negotiable with experience. Great government benefits. EOE. Send cover letter expressing interest with application and/or résumé to: Mark S. Williams, Esq., Cattaraugus County Public Defender, 201 North Union Street, Suite 207, Olean NY 14760. tel (716)373-0004; fax (716)373-3462. There may be multiple positions; applications accepted until position(s) filled. Applications available at the above address or on the county web site: www co.cattaraugus.ny. us/civil/exam. ⚖

Immigration Practice Tips

Defense-Relevant Immigration News

By Marianne C. Yang of
NYSDA's Immigrant Defense Project (IDP)*

Counsel's Incorrect Advice About Deportation Issues May Allow Noncitizen Defendants To Seek Vacaturs of Guilty Pleas

The New York Court of Appeals recently held that a defense attorney's affirmative misstatements to a noncitizen client on the immigration consequences of a guilty plea may, under certain circumstances, constitute ineffective assistance of counsel. *People v McDonald*, No. 110, (11/24/03) (acknowledging federal court cases ruling same, *e.g., US v Couto*, 311 F3d 179 [2d Cir. 2002] [noted in *Backup Center Report*, Vol. XVII, No. 6, Nov-Dec 2002, p. 18]). In *McDonald*, the petitioner, a Jamaican citizen who has lived in the US for more than 25 years as a lawful permanent resident, sought to withdraw his guilty plea to felony drug sale and possession charges on the ground that he received ineffective assistance of counsel. His defense attorney had incorrectly advised him that conviction would not result in deportation because he was a long-term US resident and his children were American citizens by birth and living in the United States.

The Court of Appeals held that this type of affirmative misrepresentation by defense counsel falls below an objective standard of reasonableness and constitutes deficient performance. However, the Court denied Mr. McDonald relief after finding that the factual allegations in his motion to vacate judgment did not make out a *prima facie* showing of prejudice. The factual allegations "merely" stated that counsel misinformed the defendant as to the deportation consequences of his guilty plea and that the defendant relied on that incorrect advice in entering his plea. Defense practitioners should be aware that to succeed on an ineffective assistance of counsel claim, the defendant must also specifically allege that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (citing *Hill v Lockhart*, 474 US 52, 56 [1985]).

In light of the Court of Appeals ruling, Mr. McDonald brought a new Article 440.10 motion that included the required allegations and, after a hearing before the trial judge, ultimately prevailed in having his pleas vacated.

McDonald leaves undisturbed the Court of Appeals' 1994 ruling that a counsel's "mere" failure to advise a defendant of the deportation consequences of a guilty plea does not, *per se*, constitute ineffective assistance of counsel. *See People v Ford*, 86 NY2d 397 (1994).

For more information, see *Backup Center REPORT*, Vol. VXIII, No. 5, Oct-Nov-Dec 2003, pp. 3, 12, and 13.

N.B.: Address, Phone & Fax for the Immigrant Defense Project

We continue to receive letters, faxes, and phone calls at our old address. Please note that our new address, hotline phone number, and fax number are:

NYSDA Immigrant Defense Project
2 Washington Street, 7 North
New York, NY 10004
Hotline: (212) 898-4132
Fax: (212) 363-8533

BIA Issues Decision that Increases Likelihood Certain NY Crimes Will Be Deemed A "Crime of Violence" For Immigration Purposes

The Board of Immigration Appeals (BIA) recently ruled that a conviction under subsections 1 or 2 of New York's first-degree manslaughter statute (Penal Law 125.20) is a "crime of violence" and therefore an "aggravated felony" for immigration purposes. *Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004).

Vargas-Sarmiento increases the possibility that convictions for some other New York State felony offenses (for example, certain felony assault offenses) will also be deemed aggravated felonies. *See* INA 101(a)(43)(F) ("aggravated felony" definition includes a "crime of violence" with a prison sentence of at least one year). Conviction of an aggravated felony generally results in mandatory deportation of noncitizens from the United States.

The decision also increases the possibility that some New York felony convictions arising from domestic violence situations will trigger the separate "crime of domestic violence" ground of deportability. *See* INA 237(a)(2)(E) ("crime of domestic violence" is defined as a "crime of violence" against certain protected persons, including but not limited to current or former spouses).

For immigration purposes, a "crime of violence" is defined as: (1) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. *See* 18 USC 16.

Marianne C. Yang *is Acting Director of NYSDA's Immigrant Defense Project (see p. 2). The IDP provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. For hotline assistance, call the IDP on Tuesdays and Thursdays from 1:30 to 4:30 p.m. at (212) 898-4132.*

The 2nd Circuit last year held that a conviction under New York's second-degree manslaughter statute (Penal Law 125.15[1] ["recklessly causes the death of another person"]) does not fall under the second prong of the above definition of "crime of violence". *See Jobson v Ashcroft*, 326 F3d 367 (2nd Cir. 2003) (interpreting that second prong to require that an offense pose a substantial risk that a defendant will *use physical force*, and that the risk is of an *intentional* use of that force). Applying a categorical approach, the *Jobson* Court held that the minimum conduct necessary to violate the second-degree manslaughter statute is not "by its nature" a crime of violence because (1) the risk that a defendant will *use* physical force in the commission of an offense is materially different from the risk that an offense will result in physical injury, and the state statute requires only the latter (passive conduct or omissions alone are sufficient for a conviction) and (2) an unintentional accident caused by mere recklessness, which would sustain a conviction under the state statute, cannot properly be said to involve a substantial risk that a defendant will use physical force.

Ruling that subsections 1 and 2 of first-degree manslaughter fall under the second prong of the "crime of violence" definition despite *Jobson*, the BIA distinguished the second-degree manslaughter statute addressed in *Jobson* as one that required a *mens rea* of recklessness only. The BIA reasoned that because subsections 1 and 2 of first-degree manslaughter require proof of intent to cause serious physical injury to or death of another person and that the defendant succeeds in causing such injury or death, it is likely that the defendant will be required to engage in affirmative conduct (citing *Chery v Ashcroft*, 347 F3d 404 [2nd Cir. 2003] [distinguishing *Jobson* in holding that conviction for Connecticut second-degree sexual assault is a "crime of violence" because it requires affirmative conduct by the defendant, namely sexual intercourse]). The BIA further reasoned that the crime *by its nature* involves a substantial risk that such conduct *may* involve the intentional use of force, even though force may not be present in all circumstances (citing *Dickson v Ashcroft*, 346 F3d 44 [2d Cir. 2003] [hypothetical situations that may not require the use of physical force to sustain a conviction for New York first-degree unlawful imprisonment are useful "only to a point" because the "inquiry under 16(b) is broader and more flexible, and involves asking whether the crime is one that *by its nature* involves a substantial *risk* that force *may* be used."]). For more information on *Jobson*, see *Backup Center REPORT*, Vol. XVIII, No. 3, May-June 2003, pp. 10-11. For more information on *Dickson*, see *Backup Center REPORT*, Vol. XVIII, No. 3, Oct-Nov-Dec 2003, pp. 11-12.

Although the BIA also held that Penal Law 125.20 is a divisible statute because a conviction under subsection (3) ("commits upon a female pregnant for more than twenty-four weeks an abortional act which causes her death . . .") may not inherently involve a risk that force will be used, the BIA looked to the charging document to conclude that the defendant must have been convicted under subsection 1 or 2 because he was initially charged with second-degree murder under section 125.25(1) "because 'with intent to cause death of [his victim, he] caused [her] death . . . by stabbing her with a sharp instrument.'" The BIA noted that the offense of first-degree manslaughter under either subsection 1 or 2 is a lesser-included offense of intentional second-degree murder under New York law. The BIA did not analyze current subsection 4 of Penal Law 125.20 because it was added to the statute after the date of the defendant's conviction.

The issue of whether New York's first-degree manslaughter statute is a "crime of violence" is pending in the 2nd Circuit.

The bottom line: *Vargas-Sarmiento* is bad news for criminal defense attorneys and their noncitizen clients. Absent a contrary ruling by the 2nd Circuit, a conviction for New York first-degree manslaughter subsections 1 or 2 will now certainly be deemed a crime of violence aggravated felony if a prison sentence of at least one year is imposed, and a crime of domestic violence if the record of conviction establishes that it was committed against certain protected persons, triggering negative immigration consequences for the noncitizen client. Moreover, certain other New York convictions—for example, certain felony assault offenses—are now more likely to be deemed crimes of violence or crimes of domestic violence.

Vargas-Sarmiento addressed whether an offense may fall under the second prong of the "crime of violence" definition, which requires that an offense be a felony. The defense lawyer should bear in mind, however, that any felony conviction under New York law must be analyzed under both prongs of the "crime of violence" definition. In addition, any *misdemeanor* conviction under New York law must be analyzed under the first prong of the "crime of violence" definition, which does not require that the offense be a felony.

Practitioners should also be aware that even if a conviction may not trigger the crime of violence aggravated felony or the crime of domestic violence grounds of deportability, the same conviction might trigger another ground of removal, such as the "crime involving moral turpitude" ground.

For further guidance on whether a conviction under a particular New York statute may be a crime of violence aggravated felony or a crime of domestic violence, practitioners are urged to call the IDP hotline at 212-898-4132 (Tues/Thur 1:30-4:30 p.m.).

Late-Breaking News:
Cert Granted on DWI with Bodily Injury as Crime of Violence

On Feb. 23, 2004, the Supreme Court granted *certiorari* in *Leocal v Ashcroft*, No. 03-583. At issue is whether a

Immigration Practice Tips *continued*

Florida offense of driving while intoxicated with serious bodily injury is a crime of violence under 18 USC 16(a) and therefore an "aggravated felony" for immigration purposes. The Court's decision may affect many noncitizens convicted of other offenses that may arguably fall under the "crime of violence" definition. It may affect numerous noncitizens convicted of offenses that under current 2nd Circuit law would not be deemed crimes of violence. *See, eg, Chrzanoski v Ashcroft*, 327 F3d 188 (2d Cir. 2003) (CT simple assault statute identical in substance to NYPL 120.00 Assault 3d is not a crime of violence); *Jobson v Ashcroft*, 326 F3d 367 (NY recklessly causing death of another is not a crime of violence).

Defense counsel representing noncitizens charged with offenses that involve bodily injury should therefore consider both current law and the pending Supreme Court case in advising their clients on the immigration consequences of their pleas, and in structuring plea arrangements that may eliminate or reduce the likelihood of a "crime of violence" determination. Practitioners may call the IDP hotline for further information.

Updated Removal Defense Checklist in Criminal Charge Cases Available

The IDP continues to update the Removal Defense Checklist in Criminal Charge Cases. For access to this resource, updated to reflect legal developments through Dec. 15, 2003, visit the NYSDA website at: <http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/03_RemovalDefenseChecklistDec2003.pdf>.

Other new or updated resources that defense lawyers and others representing or counseling immigrants in criminal or immigration proceedings may find useful are also available on NYSDA's website, and on The Defending Immigrants Partnership page of the website of the National Legal Aid and Defender Association. For access to this latter Internet resource, which includes practice tips, case blurbs, how-to question and answer exchanges, selected training resources and model pleadings, agency developments, and state and federal offenses immigration consequences charts, visit <http://www.nlada.org/Defender/Defender_Immigrants>. ⚖

Defender News *(continued from page 9)*

NYSACDL President Ira London with the *Charles F. Crimi Memorial Award for Outstanding Private Defense Practitioner*.

Web Resources Sighted

The Backup Center uses, and helps members and other learn about and use, information available on the Internet. The "News Resources - New Web Sites" section of the "Defense News" area of the NYSDA web site (www.nysda.org) provides information on a variety of sites potentially helpful to defense practitioners. One such site is a new federal government site about consular notification, described below.

NYSDA's own site is not only a place to obtain new information but also the continuing repository of information helpful to defense lawyers and others. While most information is available to all, NYSDA members will find some special benefits, an example of which follows.

Empire Page Provides News

The *Empire Page*, at http://www.empirepage.com, is one of the premiere web sites for New York and national governmental news. *Empire* editors select links to the latest headline stories, columns and press releases from dozens of news sources. Thanks to the generous support of Peter G. Pollak, Editor in Chief of the *Empire Page* and CEO of Empire Information Services, NYSDA staff have benefited from free access to this invaluable news source. Furthermore, NYSDA members are eligible to receive a 17% discount, paying only $32.95 per year rather than the normal subscription price of $39.95. The Association appreciates renewal of this benefit. NYSDA members who wish to take advantage of the offer should visit this special promotion site: https://www.empirepage.com/subscribe/subscription_form_defend.html, or click to the link appearing on the NYSDA home page.

New Web Site Set Up About Rights to Consular Notification and Access

Need to convince a court that the police should have contacted your noncitizen client's consulate? Or that the police had no excuse for not doing so? A new web site maintained by the Department of Justice contains information concerning foreign nationals in the US and their rights to consular assistance. Specifically, the site provides instructions and guidance relating to the arrest and detention of foreign nationals and to other situations such as the appointment of guardians for minors or incompetent adults who are foreign nationals. The instructions and guidance are for all federal, state, and local government officials, whether law enforcement, judicial, or other. Designed to help ensure that foreign governments can extend appropriate consular services to their nationals in the US and that the US complies with its legal obligations to such governments, the web site is located at http://travel.state.gov/consul_notify.html.

Steinberg Becomes Justice

Long-time NYSDA Board Member David Steinberg was sworn in as Hyde Park Town Justice on Jan. 1, 2004.

(continued on page 47)

The following is a synopsis of recent case law of interest to the public defense community. The index headings appearing before each case are from the Association's Subject Matter Index. These case briefings are not exhaustive, nor are they designed to replace a careful reading of the full opinion.

Citations to the cases digested here can be obtained from the Backup Center as soon as they are published.

United States Supreme Court

Search and Seizure (Entries and Trespasses [Knock and Notice Entries]) **SEA; 335(35[a])**

United States v Banks, 540 US __, 124 SCt 521, 157 LEd2d 343 (2003)

State police and FBI agents executed a knock-and-announce search warrant at the respondent's apartment, where he was believed to be selling cocaine. When they arrived, officers in front called "police search warrant" and knocked loudly enough on the front door for officers in the back to hear. There being no response after 15 to 20 seconds, they broke down the door. The respondent, in the shower, heard nothing until the door was smashed. Weapons, crack cocaine, and other evidence were discovered. The respondent moved to suppress the evidence claiming the officers "waited an unreasonably short time before forcing entry," violating the 4th Amendment and 18 USC 3109. The motion was denied. The respondent pled guilty. The 9th Circuit reversed.

Holding: Assessing the appropriate waiting period for executing a knock-and-announce warrant when no response is forthcoming requires looking at the totality of the circumstances and the development of exigent circumstances. *US v Ramirez*, 523 US 65, 70-71 (1998). A delay of 15 or 20 seconds was reasonable considering the risk of losing easily-disposable evidence. The respondent's inability to hear the knock, or a natural delay in answering, was not relevant; only the facts known to a reasonable officer at the scene were important. *Graham v Connor*, 490 US 386, 396 (1989). The vital consideration was the length of time needed to eliminate evidence, not to answer the door. Post-knock exigencies here, created by no response and disposable evidence, were equivalent to a no-knock situation. Under different circumstances, the reasonableness of the waiting period might vary. *US v Arvizu*, 534 US 266 (2002). Judgment reversed.

Federal Law (Procedure) **FDL; 166(30)**

Habeas Corpus (Federal) **HAB; 182.5(15)**

Castro v United States, 540 US __, 124 SCt 786, 157 LEd2d 778 (2003)

The petitioner, convicted on federal drug charges, filed a *pro se* motion for a new trial under Fed Rule Crim Proc 33. Prosecutors claimed that the relief sought was better suited to a *habeas corpus* motion under 28 USC 2255. Dismissing on the merits, the court referred to the petitioner's motion alternately as a Rule 33 and a *habeas corpus* motion, without objection. The dismissal was affirmed. The petitioner then filed a *pro se* 2255 motion, which was denied; it included an ineffectiveness of counsel claim not raised in the earlier motion. On appeal, the matter was remanded, held to be a successive motion, and dismissed for having been filed without permission. This was affirmed.

Holding: A *pro se* prisoner's motion for post-judgment relief cannot be recharacterized as *habeas corpus* unless the court informs the litigant of the intent to recharacterize and the risk of "second or successive" motion restrictions, and provides an opportunity to withdraw or amend the filing. ". . . [T]he warning is to help the *pro se* litigant understand not only (1) whether he should withdraw or amend his motion, but also (2) whether he should *contest* the recharacterization, say, on appeal." Converting the motion into a first 2255 filing increased the risk of dismissal without fair warning or a chance to change the pleading. *See eg Adams v US*, 155 F3d 582, 583 (CA2 1998). Failure to meet these requirements rendered the court's designation of the first motion invalid. The petitioner's failure to object was immaterial. *US v Palmer*, 296 F3d 1135, 1147 (CADC 2002). Judgment reversed.

Concurring: [Scalia, J] "Even if one does not agree with me that, because of the risk involved, pleadings should *never* be recharacterized into first §2255 motions, surely one must agree that running the risk is unjustified *when there is nothing whatever to be gained by the recharacterization*. That is the situation here" [emphasis in original].

Arrest (Probable Cause) **ARR; 35(35)**

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches] [Probable Cause Searches]) (Consent) **(SEA; 335(15[k] [p]) (20)**

Maryland v Pringle, 540 US __, 124 SCt 795, 157 LEd2d 769 (2003)

The respondent was a front-seat passenger in a car stopped by police for speeding. When the driver opened the glove compartment to reach for his registration, the officer saw a large amount of rolled-up money. The driver denied having weapons or narcotics, but consented to a vehicle search. Police found five baggies of cocaine behind the back-seat armrest. After all were arrested and taken to the station, the respondent waived his *Miranda* rights and

US Supreme Court *continued*

confessed to drug possession. His motion to suppress the statement as fruit of an illegal arrest was denied. His conviction of drug possession and intent to sell was reversed by the state's highest court. Location of drugs alone, without specific facts showing respondent's knowledge and dominion or control, was insufficient for probable cause.

Holding: The presence of $763 cash in the glove compartment near the respondent, where no one admitted ownership of drugs found in the car, was sufficient to establish probable cause to believe the respondent solely or jointly possessed the drugs. *Wyoming v Houghton*, 526 US 295, 304-305 (1999). Drugs with a large amount of cash suggested "likelihood of drug dealing," and a reasonable belief that it was a "common enterprise" among the occupants. Probable cause required "a reasonable ground for belief of guilt," particularized with respect to the person being searched or seized. *Ybarra v Illinois*, 444 US 85, 91 (1979). The events leading up to the arrest had to be viewed from the "standpoint of an objectively reasonable police officer." *Ornelas v US*, 517 US 690, 696 (1996). In light of all the facts, the police here had probable cause to arrest the respondent for drug possession. Judgment reversed.

Search and Seizure (Automobiles and Other Vehicles [Roadblocks]) **SEA; 335(15[s])**

Illinois v Lidster, 540 US __, 124 SCt 885, 157 LEd2d 843 (2004)

Police set up a highway checkpoint to collect information about a recent hit-and-run accident in the area. The police stopped each car for 10 to 15 seconds, inquired about the accident and handed each driver a flyer. While heading for the checkpoint, the respondent's vehicle swerved and nearly hit a police officer. The respondent was arrested for drunk driving. The trial court rejected his challenge to the checkpoint stop. The decision was reversed on appeal based on *Indianapolis v Edmond*, 531 US 32 (2000).

Holding: A checkpoint aimed to elicit information from the driving public, as opposed to evidence of criminal conduct by those being stopped, is a constitutionally valid information-seeking stop if its justification and administration are reasonable based on the circumstances. *See Brown v Texas*, 443 US 47, 51 (1979). *Indianapolis v Edmond* is distinguishable since it involved a checkpoint used general crime control purposes, *ie* to find evidence of drug crimes committed by vehicle occupants, without individualized suspicion or special circumstances. *Edmund* does not preclude every law enforcement objective. Lack of individualized suspicion alone did not invalidate the stop, especially in light of the information-seeking nature of the activity. *See Michigan Dept. of State Police v Sitz*, 496 US 444 (1990). The stops here were brief, nonintrusive, and not designed to elicit self-incriminating information. *Florida v Royer*, 460 US 491, 497 (1983). The information-seeking roadblock was reasonable in the context of a hit-and-run investigation on the same highway, a short time after the occurrence, and using minimally intrusive means. Judgment reversed.

Concurring and Dissenting: [Stevens, J] *Edmond* did not apply. The state should have an opportunity to reexamine the issue applying the reasonableness standard.

Admissions (*Miranda* Advice) **ADM; 15(25)**

Confessions (Advice of Rights) (*Miranda* Advice) **CNF; 70(10) (45)**

Fellers v United States, 540 US __, 124 SCt 1019, 157 LEd2d 1016 (2004)

After the petitioner was indicted on a drug conspiracy charge, police went to his home. They asked to discuss his use and distribution of methamphetamine, advised him that he had been indicted, and that they had an arrest warrant. The petitioner admitted knowing the others mentioned in the indictment and using drugs. Fifteen minutes later, police moved the petitioner to the jail, where they first gave him *Miranda* warnings. He repeated and expanded on his statements. Before trial, the statements made at home were suppressed, but the jailhouse statements were admitted. The petitioner's conviction after trial was affirmed.

Holding: Deliberate elicitation by law enforcement of incriminating statements from a suspect in violation of the 6th Amendment right to counsel requires suppression despite the absence of interrogation. *Michigan v Jackson*, 475 US 625, 632, n. 5 (1986). Any statements deliberately elicited from a suspect post-indictment and in the absence of counsel violate the right to counsel (*Massiah v US*, 377 US 201, 206 [1964]) unless there was a valid waiver. *Patterson v Illinois*, 487 US 285 (1988). Absence of an "interrogation" earlier did not prevent suppression of later jailhouse statements that were fruits of deliberately elicited inculpatory responses. Whether *Oregon v Elstad*, 470 US 298 (1985) applied to the petitioner's incriminating statements made after a knowing and voluntary waiver of his right to counsel despite earlier police questioning in violation of the 6th Amendment was not addressed. Judgment reversed.

New York State Court of Appeals

Civil Practice (General) **CVP; 67.3(10)**

Jeffreys v Griffin, 1 NY3d 34, 769 NYS2d 184 (2003)

NY Court of Appeals *continued*

The plaintiff claimed that the defendant, a doctor, orally sodomized her when she was sedated. A lawsuit was filed for assault and battery; an indictment brought on charges of sodomy and related counts, and disciplinary charges were filed by the NYS Department of Health's Board for Professional Medical Conduct (Board). The defendant was convicted of sodomy and sentenced to prison. The Board, knowing of the conviction, revoked the defendant's license after a hearing. The plaintiff won summary judgment in her civil case based on the conviction. The defendant's criminal conviction was reversed on appeal and he was acquitted upon retrial. The summary judgment order was vacated.

Holding: The Board's finding of sexual misconduct, with an awareness of the sex offense conviction but not of the later acquittal, did not collaterally estop the defendant from challenging civil liability for assault and battery. Collateral estoppel, or issue preclusion, requires identity of material issues decided by an administrative agency and a full and fair opportunity to contest the issues. *Ryan v New York Tel. Co.*, 62 NY2d 494. The plaintiff did establish issue identity with the Board's sexual misconduct finding, and the hearing was quasi-judicial and fully litigated. Public Health Law 230. However, the court properly declined to apply collateral estoppel in light of the "the realities of the litigation." The Board's decision was made with a consciousness of the defendant's conviction but not the later acquittal. The defendant should hot be precluded from contesting liability in the civil action. Judgment affirmed.

Due Process (Fair Trial) **DUP; 135(5)**

Misconduct (Judicial) **MIS; 250(10)**

People v Stiggins, No. 143, 11/20/03

Holding: The defendant was tried for misdemeanor assault and related offenses. He was denied a fair trial because the town justice who tried the case failed to maintain the integrity of the proceedings by providing adequate supervision and following appropriate procedures. The judge was not familiar with the "mechanics of a jury trial." Despite defense counsel's objection, the trial went forward. The judge was "guided by the prosecutor through every aspect of jury selection — he attempted to seat a jury before *voir dire* began, failed to elicit basic information regarding the qualifications of the prospective jurors and issued an oath to the trial jurors that did not comply with CPL 270.15(2) — all of which resulted in the Judge 'relinquish[ing] control' over the jury selection process." *People v Toliver*, 89 NY2d 843, 844. The prosecutor continued to guide the judge throughout the proceeding. "During the charge to the jury, the Judge read inapplicable instructions and was unaware that each element of the charged crimes must be explained to the jury, eliciting yet another intervention by the prosecutor." The prosecutor had to assume "the important function of maintaining control of jury deliberations." *People v Bayes*, 78 NY2d 546, 551. Judgment reversed.

Counsel (Competence/Effective Assistance/Adequacy) **COU; 95(15)**

People v McDonald, 1 NY3d 109 (2003)

The defendant, a lawful permanent resident (LPR) of the US, was indicted on felony drug charges. Based on advice of counsel, he pled guilty. Soon after, INS began deportation proceedings since the offenses were aggravated felonies. 8 USC 1101 (a) (43) (B), 1227 (a) (2) (A) (iii) and 1229 (b). Defense counsel moved to vacate the judgment based on ineffectiveness of counsel. Counsel affirmed that he had misadvised the defendant about the risks of deportation and that the defendant had originally "maintained his innocence" but agreed to the plea bargain based on counsel's advice. Denial of the motion was affirmed on appeal.

Holding: A valid guilty plea depends on "'a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v Lockhart*, 474 US 52, 56 (1985). Failing to advise a defendant of the "possibility of deportation" alone was not ineffective. *People v Ford*, 86 NY2d 397, 404 (1995). However, affirmative misstatements did rise to that level. *US v Couto*, 311 F3d 179, 188 (2d Cir 2002). Under *Strickland v Washington* (466 US 668, 687 [1984]), not only must defense counsel's performance fall below an objective standard of reasonableness, it must also have prejudiced the defendant. The Appellate Division erred in holding that the prejudice inquiry necessitated a prediction analysis as to the likely outcome of the case absent a plea, *ie* whether the defendant would have prevailed at trial. However, counsel's affidavit that the defendant relied on his erroneous advice did not state that but for the advice, the defendant would not have pled guilty. Judgment affirmed.

Appeals and Writs (Judgments and Orders Appealable) **APP; 25(45)**

Post-Judgment Relief (CPL §440 Motion) **PJR; 289(15)**

People v Huang, No. 115, 11/24/03

After pleading guilty and being sentenced, the defendant moved to withdraw his plea because his attorney's advice caused him to misunderstand his immigration status and the impact of the plea. Alternatively, he asked to vacate his plea under CPL 440.10 (1). Judgment had not been entered. The court treated the motion as a CPL 220.60 (3) application and granted it, and in the alternative

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granted the CPL 440.10 (1) motion. On appeal, the prosecutor alleged the court lacked authority to permit withdrawal of the plea under CPL 220.60, and that, without entry of judgment, CPL 440.10 grounds were also unavailable. The Appellate Division rejected the defendant's ineffectiveness of counsel claim on the merits.

Holding: The Appellate Division lacked jurisdiction to hear the prosecution appeal challenging the trial court's decision to permit withdrawal of a guilty plea. The CPL 220.60 (3) decision was a nonappealable order; and without entry of a judgment, no appeal was possible from the CPL 440.10 decision. CPL 450.20. Judgment reversed.

Forfeiture (General) **FFT; 174(10)**

County of Nassau v Canavan, 1 NY3d 134 (2003)

The defendant was arrested for driving while intoxicated and other traffic offenses. Nassau County police seized her car and notified her that it might be forfeited. It remained impounded while the criminal case proceeded. Ultimately, the defendant pled guilty to speeding and driving while impaired. When she then demanded the return of her car, the county started a civil forfeiture action under Nassau County Administrative Code 8-7.0 (g)(3) and won a summary judgment. This was reversed on appeal.

Holding: Three factors must be weighed to determine whether due process is satisfied when the government seeks to maintain possession of property before a final judgment: the private interest affected; the risk of erroneous deprivation; and the government's interest. *Mathews v Eldridge*, 424 US 319, 335 (1976). A prompt post-seizure hearing is needed to minimize the risk of erroneous deprivation, yet under this statute, an action seeking forfeiture need not be begun until 120 days after the initial seizure; the action may not be resolved for months or years. The statute does not limit forfeitures to vehicles not subject to a defense of innocent ownership. While retention is a rational means of protecting the public from an increased risk of drunk drivers, the county must establish its right to such justifiable retention after giving the defendant an opportunity to be heard. Retaining a vehicle throughout the pendency of forfeiture proceedings is not the only way to keep the vehicle from being sold or destroyed—defendants could post bond, and injunctions or restraining orders could be issued. While the county has already taken steps to address issues at issue here, the statute suffers from a variety of procedural defects. The county might be well served to rewrite it. The Appellate Division erred in finding the language of the ordinance void for vagueness. Judgment affirmed.

Dismissal (In the Interest of Justice) **DSM; 113(20)**

Motor Vehicles (General) **MVH; 260(17)**

People v Berrus, No. 144, 11/25/03

The defendant was given a simplified traffic information for driving a tractor in the early evening without rear lights. The local town court dismissed the ticket in the interest of justice believing that a tractor was not a motor vehicle requiring lights under Vehicle and Traffic Law 375 and 376. County Court affirmed

Holding: The simplified traffic information must be reinstated because Vehicle and Traffic Law 376, erroneously relied upon by the local court based on advice from the Court Administration Resource Center, was repealed by Laws of 1994, Chapter 654, § 5, effective Jan. 29, 1995. However, Vehicle and Traffic Law 376(1)(a), requiring lights on farm vehicles such as tractors was in effect on the day the ticket was issued. Dismissing the action in the interest of justice was improvident, because the court failed to consider "individually and collectively" the statutory criteria, and to state its reasons on the record. CPL 170.40, 210.40. Judgment reversed.

Death Penalty (Guilt Phase) (Penalty Phase) **DEP; 100(85) (120)**

Evidence (Sufficiency) **EVI; 155(130)**

Juries and Jury Trials (Challenges) (Qualifications) (Voir Dire) **JRY; 225(10) (50) (60)**

People v Cahill, No. 123, 11/25/03

The defendant, charged with beating his wife into unconsciousness, was later indicted for poisoning her in the hospital. A jury convicted the defendant of two counts of first-degree murder relying on witness elimination and burglary as aggravators. He was sentenced to death; appeal was directly to the Court of Appeals.

Holding: The defendant's challenge for cause against a prospective juror was wrongfully denied, entitling the defendant to the statutory remedy contemplated in CPL 270.20 (2). *See eg People v Bludson*, 97 NY2d 644. The panelist's experience with domestic violence and unwillingness to consider both death and life without the possibility of parole (LWOP) options prevented him from being impartial. CPL 270.20 (1)(f); *People v Harris*, 98 NY2d 452, 484. The prosecutor's challenge for cause to another prospective juror was improperly granted. *Wainwright v Witt*, 469 US 412 (1985). Despite reservations about the death penalty, that panelist promised to consider all options impartially. Reversal of the sentence, not retrial, is the proper remedy. *See Gray v Mississippi*, 481 US 648 (1987).

Witness elimination murder required motivation to remove a witness to be a "substantial factor," even if there

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were mixed motives. Penal Law 125.27 [1][a][v]. The defendant's intent was to kill his wife, not prevent her from being a witness. The prosecution's evidence showed that the defendant acquired the poison before there was any indication his wife would recover sufficiently to be a witness. While the evidence was legally sufficient, the verdict was against the weight of the evidence. CPL 470.15 (5); *People v Bleakley*, 69 NY2d 490, 495.

Evidence of the burglary aggravator also failed. The same intent to kill cannot raise the defendant's trespass to burglary and elevate the killing to capital murder under Penal Law 125.27 (1)(a)(vii). *Williams v State*, 818 A2d 906 (Del 2002).

The many other issues raised are without merit, including denial of a change of venue, unavailability of a bench trial, consolidation of the indictment, and additional jury selection and penalty-phase claims. Judgment modified to one conviction of second-degree murder, remanded for resentencing.

Concurring: [Smith, J] A deadlocked jury instruction risked coercing jurors otherwise inclined towards LWOP to vote for death to avoid a judicial sentence of 25 years to life. CPL 400.27(10). Lack of guidelines for prosecutorial decisions to seek led to inconsistent and discriminatory enforcement. CPL 250.40.

Concurring and Dissenting: [Graffeo, J] The burglary aggravator was supported under felony-murder analysis, *People v Wood*, 8 NY2d 48. The witness elimination murder conviction was not against weight of the evidence. The juror bias decisions were correctly decided by trial court.

Concurring and Dissenting: [Read, J] Burglary was not merged into the homicide. *People v Miller*, 32 NY2d 157. The juror qualification decisions were consistent with *Harris.*

Guilty Pleas (General) (Withdrawal) **GYP; 181(25) (65)**

People v Pichardo, 1 NY3d 126 (2003)

In New York County, the defendant was sentenced to 20 years to life for second-degree murder. Later in Bronx County, he pled guilty to a drug sale charge and received a promised sentence of 1-3 years concurrent with the murder sentence. The murder conviction was later vacated, and the defendant was acquitted on retrial, by which time he had completed the drug sentence. He filed a CPL 440.10 motion asking the trial court to vacate the drug conviction. The motion was granted but reversed on appeal and the conviction reinstated.

Holding: The defendant had the right to withdraw a plea induced by a promise of lesser punishment and concurrent time once the earlier sentence was overturned, making the court's promise impossible to keep. *People v Taylor*, 80 NY2d 1. The essence of the promise was that in exchange for a plea, the defendant would not receive any more prison time. The trial court's promise was made with clear reference to an existing unexpired sentence. That the defendant had served out his lesser sentence when the earlier sentence was vacated did not change the nature of the inducement. *People v Fuggazzatto*, 62 NY2d 862. The defendant's decision to forgo his pre-trial and trial rights in the drug case was premised on an existing murder sentence. *People v Rogers*, 48 NY2d 167. "[A] better practice might be for the parties in similar circumstances to spell out, on the record, the consequences that will follow upon vacatur of the conviction." *People v Rivera*, 195 AD2d 389, 390. Judgment reversed.

Dissent: [Graffeo, J] It was not manifestly injust to hold the defendant to the plea bargain. *People v Hooper*, 302 AD2d 894, 895.

Double Jeopardy (Dismissal) (Lesser Included and Related Offenses) (Mistrial) **DBJ; 125(5) (15) (20)**

People v Biggs, No. 142, 12/2/03

Before charges, including first and second-degree murder, were submitted to a jury, the court found insufficient evidence of intentional murder and only instructed on depraved indifference second-degree murder and second-degree manslaughter, a lesser-included offense. No motion was made to dismiss the intentional murder charges. The jury found the defendant not guilty of murder but deadlocked on manslaughter. Facing retrial for first and second-degree manslaughter, the defendant moved to dismiss the first-degree charges as barred by double jeopardy. The motion was denied. The resulting first-degree manslaughter convictions were affirmed on appeal.

Holding: Dismissing a count due to insufficient evidence is an acquittal barring reprosecution. *Smalis v Pennsylvania*, 476 US 140, 142 (1986); *People v Mayo*, 48 NY2d 245, 249. By not submitting the intentional murder count to the jury, the court effectively acquitted on that charge despite the absence of a motion to dismiss. *United States v Martin Linen Supply Co.*, 430 US 564, 571 (1977). It would be better practice for defense counsel to move in such instance for an order of dismissal. *See* CPL 290.10. First-degree manslaughter (Penal Law 125.20[1]) was a lesser included of second-degree murder. Penal Law 125.25[1]); *Brown v Ohio*, 432 US 161, 168 (1977); *People v Wood*, 95 NY2d 509, 514. No element in addition to those supporting second-degree murder is required to convict of the lesser offense of first-degree (*see Blockburger v United States*, 284 US 299, 304 [1932]); it is impossible to intend to kill someone without simultaneously intending to seriously physically injure them. Retrial was barred by federal and state double jeopardy protections. Judgment

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reversed, remanded for retrial on second-degree manslaughter.

Appeals and Writs (Judgments and Orders Appealable) **APP; 25(45)**

Evidence (Newly Discovered) **EVI; 155(88)**

People v Santos, No. 175, 12/18/03

Holding: "The Court here lacks power to review the lower courts' exercise of discretion in vacating the criminal conviction and granting a new trial on the basis of newly discovered evidence . . ." *People v Baxley*, 84 NY2d 208, 212; *People v Fields*, 66 NY2d 876, 878. Judgment affirmed.

Defenses (Justification) **DEF; 105(37)**

People v Andrew, No. 158, 12/18/03

Holding: The defendant raised a justification defense to first-degree assault. The jury convicted the defendant and the Appellate Division affirmed. The court had admitted the complainant's hospital record into evidence, redacting the portion of the examining doctor's note that indicated the complainant was unable to consent to surgery "because he was too drunk." Redaction of this information which potentially supported a justification defense was a proper exercise of the court's discretion. The defendant had access to the complainant's toxicology in laboratory tests that could have been introduced. The defendant did not rely on the complainant's intoxication as the gravamen of his defense.

The defendant's right to be present during the issuance of supplemental jury instructions was not violated. He did not produce substantial evidence to rebut the presumption of regularity that attaches to all criminal proceedings. *People v Foster*, 1 NY3d 44; *see gen People v Harris*, 61 NY2d 9, 16. Judgment affirmed.

Search and Seizure (Automobiles and Other Vehicles [Impound Inventories] [Investigative Searches]) **SEA; 335(15[f] [k])**

People v Johnson, No. 155, 12/22/03

Plainclothes officers in an unmarked police car saw the defendant speeding in a rental car across several lanes without signaling. They pulled him over; an officer saw him open and close the glove compartment. Asked for his registration or rental agreement, the defendant denied having it and refused to open the glove compartment. A license check showed that the defendant's privileges were suspended. He was asked to leave the car and wait at the back of the vehicle. Another officer found a loaded handgun in the glove compartment. The defendant claimed he was a bodyguard and needed the gun for protection. He was charged with driving with a suspended license and weapons possession. At the suppression hearing, the police said they found the weapon during an inventory search. A motion to suppress the gun and statement granted was granted, but reversed on appeal.

Holding: There was insufficient evidence of departmental policies or proof that the procedure used was rationally designed to meet objectives justifying inventory searches (*People v Galak*, 80 NY2d 715, 719) such as listing the contents of an impounded vehicle to protect the defendant's property, forestall claims for lost property, and protect police personnel from dangerous instruments. *Florida v Wells*, 495 US 1, 4 (1990). Police left this gun in the car, failed to make a list, and stopped searching after finding the weapon. The standard for pretext stops (*People v Robinson*, 97 NY2d 341, 348-349), used by the Appellate Division, did not apply to inventory searches. Judgment reversed.

Evidence (Hearsay) **EVI; 155(75)**

People v Johnson, No. 156, 12/22/03

When police arrived, the defendant was holding an ice pick with blood on it while the complainant was bleeding from the eye and immediately exclaimed, "he stabbed me." The complainant made a statement to the police at the hospital about the incident. He could not be located for trial, and the prosecution introduced his statements, over objection, as excited utterances. The defendant was convicted of first-degree assault.

Holding: The later statement was not an excited utterance. It was made an hour after the attack, made in response to police questioning at a hospital where, medical records showed, the complainant was calm and reflective. An excited utterance must be "made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication." *People v Edwards*, 47 NY2d 493, 497. Time between the event and statement is critical, and the facts determine whether the declarant was "capable of studied reflection and therefore incapable of fabrication." *People v Brown*, 70 NY2d 513, 518. Injury is not a conclusive factor, nor is police inquiry. Improper admission of the statement was harmless error in light of police eyewitness testimony and the complainant's on-the-scene statements. Judgment affirmed.

Dissent: [Smith, J] The defendant's right of confrontation (cross-examination) was violated by admission of hearsay as substantive evidence without indicia of reliability. *Kentucky v Stincer*, 482 US 730, 737 (1987).

NY Court of Appeals *continued*

Counsel (Competence/Effective Assistance/Adequecy) **COU; 95(15)**

Misconduct (Prosecution) **MIS; 250(15)**

People v Taylor, No. 157, 12/23/03

The defendant was tried for intentional murder. His cousin testified for the prosecution that she heard the defendant plan the murder with his partner, witnessed it, and listened to them talk about it later. One alibi witness testified, the mother of the defendant's daughter. The defendant appealed his conviction asserting ineffectiveness of counsel.

Holding: The defendant did not meet the burden of showing that his attorney's failure to raise objections during cross-examination or closing was beyond the reasonably objective range of performance. US Const, 6th Amend; NY Const, art I, §6; *Strickland v Washington*, 466 US 668, 687-688 (1984). Counsel was effective in cross-examining key witnesses, presenting an alibi defense, and giving a thorough summation critical of the prosecution's evidence. *People v Ryan*, 90 NY2d 822, 823. Failure of defense counsel's strategy to discredit the defendant's cousin was not ineffectiveness. *People v Baldi*, 54 NY2d 137, 147. Moreover, not objecting to the prosecution's indefensible cross-examination, after having made 50 objections already, was within the purview of trial strategy, potentially allowing the prosecutor to alienate the jury. *People v Tonge*, 93 NY2d 838, 840. The record does not show that the prosecutor's false statement to defense counsel that the alibi witness had a history of prostitution, which the prosecutor later claimed was a "joke," affected counsel's performance. Judgment affirmed.

Appeals and Writs (Time) **APP; 25(95)**

Reynolds v Dustman, No. 173, 12/23/03

The petitioner filed an Article 78 to challenge calculation of his jail time credit. The court dismissed it on the merits. The document was labeled "decision" and concluded with a sentence indicating it was an order. It was not stamped or signed by the clerk of the court. The County Attorney sent a copy to the petitioner on Aug. 8, 2002, and in a cover letter indicated it was filed in the clerk's office on Aug. 6. On Feb. 13, 2003, the petitioner filed a notice of appeal, dated Feb. 10, 2003. The appeal was dismissed as untimely.

Holding: A cover letter indicating that an ambiguously prepared court document was filed with the clerk's office was insufficient to serve as a notice of entry (of an appealable document) triggering the statutory time limit to file an appeal. The statute, CPLR 5513 (a), limited appeal as of right to 30 days after service of a "judgment or order." Despite the ambiguous characterization of the document, it was an appealable paper. CPLR 411, 5512 [a]. The County Attorney's letter indicating that that the decision had been filed was not a "notice of entry of a judgment or order." CPLR 5513 (a). The cover letter was insufficient to warn the petitioner that the document was appealable. Notations on the document did not satisfy this requirement, and it lacked the stamp and clerk's signature necessary for a notice of entry. CPLR 5016 [a]; *Norstar Bank of Upstate NY v Office Control Sys.*, 78 NY2d 1110. The time to appeal did not expire (or begin) and the appeal should be heard. Judgment reversed.

First Department

Instructions to Jury (Burden of Proof) **ISJ; 205(20)**

Trial (Presence of Defendant [Trial in Absentia]) **TRI; 375(45)**

People v Rivas, 306 AD2d 10, 762 NYS2d 34 (1st Dept 2003)

When the jury returned a guilty verdict for the codefendant, on trial with the defendant for attempted murder and other felonies, the defendant exclaimed: "You got a witness right here. You got the murder's [sic] wife." The court warned the defendant that if he was not quiet the court would remove him. Then the co-defendant spoke out, twice, and the court ordered them both removed. The verdict against the defendant was received in their absence. The court said at sentencing that removal had been based on the clamor being made by the defendants' friends and relatives in the gallery.

Holding: The defendant's constitutional and statutory right to be present in court (CPL 260.20; *see Illinois v Allen*, 397 US 337 [1970]), including at the reading of the jury's verdict (*People v Morales*, 80 NY2d 450, 455-456), a material stage of his trial (*see People v Williams*, 186 AD2d 161), was violated when he was removed despite following the court's order not to speak out. *See People v Parker*, 57 NY2d 136, 139-140. The record does not support the prosecution's assertion that the defendants shared a community of purpose in the disruption. *People v Allah*, 71 NY2d 830, 832.

The defendant's challenge to the court's reasonable doubt charge was unpreserved. At the re-trial the court is cautioned to employ the standard reasonable doubt charge *See* NY Criminal Jury Instructions 2d Presumption of Innocence; Burden of Proof, Reasonable Doubt. Judgment reversed. [Supreme Ct, Bronx Co (Tonetti, J)]

First Department *continued*

Appeals and Writs (Record) **APP; 25(80)**

People v Walker, 306 AD2d 56, 761 NYS2d 35 (1st Dept 2003)

The defendant was convicted of first-degree assault and weapons possession and sentenced to 25 years to life. During jury selection defense counsel gave race-neutral reasons for peremptorily challenging certain panelists. The court found the reasons pretextual and seated the jurors.

Holding: The jury selection issue cannot be resolved because the records of that portion of the trial have been irretrievably lost, and after reconstruction proceedings, the record would still be insufficient for effective appellate review. *People v Harrison*, 85 NY2d 794, 796. The record is so inconclusive that the court's finding of pretext cannot be reviewed even under the standard of "great deference." *See People v Hernandez*, 75 NY2d 350, 356, *affd* 500 US 352. Given the need for a new trial, the issue of a lesser included offense charge need not be resolved. However, second-degree assault should have been charged as a lesser included of first-degree assault. There was a reasonable view of the evidence by which the jury could have concluded that defendant indended to cause physical injury rather than serious physical injury. *See People v Mahoney*, 122 AD2d 815 *lv den* 68 NY2d 1002. [Supreme Ct, NY Co (Sudolnik, J)]

Instructions to Jury (General) **ISJ; 205(35)**

Juries and Jury Trials (Deliberation) (Hung Jury) **JRY; 225(25)(40)**

People v Aponte, 306 AD2d 42, 759 NYS2d 486 (1st Dept 2003)

The undercover officer described a suspect in a "buy and bust" operation to backup officers as a Hispanic male wearing a "white durag" (do rag) and other nondescript clothing. At trial, the officer testified that the suspect also wore a black baseball cap. The defendant, one of a group of Hispanic males stopped by police, was not wearing a white do rag or a black hat. He was arrested based on an undercover's "drive-by" identification, which was the only real issue at trial. The jury deadlocked twice during deliberations.

Holding: A trial court confronted with a deadlocked jury can either declare a mistrial or give the jury a supplementary instruction directing it to continue deliberating to reach a verdict. *Allen v United States*, 164 US 492, 501 (1896). The *Allen* charge given here, over defense objection, was coercive. It presented the prospect of unending deliberations. It failed to inform jurors that, while they each should be open to considering other views, no juror should feel compelled to abandon conscientiously held beliefs. *People v Alvarez*, 86 NY2d 761, 763. This instruction focused on the need to get a result and on the fact that "something happened" (focusing on the occurrence of a drug sale and not on the defendant's alleged role as the seller), and sought to shame jurors into acting by suggesting they were failing to do what they said they would do. Judgment reversed. [Supreme Ct, NY Co (McLaughlin, J)]

Dissent: [Sullivan, J] The issue was unpreserved due to delay in objecting and a non-specific objection by the defense. The supplemental charge was proper in light of main charge.

Search and Seizure (Stop and Frisk) **SEA; 335(75)**

People v Celaj, 306 AD2d 71, 760 NYS2d 482 (1st Dept 2003)

Minutes after a 911 call about a dispute between two men with guns in a red Skylark, police arrived and found one man matching the description but no car. The arresting officer saw that the defendant, a "white male in his 60s," had a conspicuous bulge under his jacket in his waistband. The officer approached, opened the defendant's jacket and found a gun. The defendant's motion to suppress was denied. He pled guilty to weapons possession.

Holding: A limited frisk was justified in light of a radio report that someone fitting the defendant's description was involved in a dispute with guns, the police arrival within minutes of the 911 call, and the expectation of a possible confrontation with an armed and dangerous individual. *Terry v Ohio*, 392 US 1 (1968); *People v De Bour*, 40 NY2d 210, 221. Moreover, police observed that the defendant had a waistband bulge, a good indicator of a weapon. *People v Benjamin*, 51 NY2d 267, 271. No evidence suggested that the police had an improper motive or pretext to single out the defendant. *People v Prochilo*, 41 NY2d 759, 762. Judgment affirmed. (Supreme Ct, Bronx Co [Mogulescu, J)]

Dissent: [Ellerin, J] The generic description of the suspect was too vague. *People v Dodt*, 61 NY2d 408, 415. When police arrived the defendant was alone, and did not appear to pose a danger. A waistband bulge alone did not establish reasonable suspicion. *People v Barreto*, 161 AD2d 305, 307. The officer only had a "hunch" that it was a gun. *People v Sobotker*, 43 NY2d 559, 564.

Misconduct (Prosecution) **MIS; 250(15)**

People v LaPorte, 306 AD2d 93, 762 NYS2d 55 (1st Dept 2003)

Holding: The prosecutor's remarks in summation at the defendant's robbery trial were prejudicial, inflamma-

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tory, irrelevant, excessive and improper. *People v Ashwal*, 39 NY2d 105, 109. He personally attacked defense counsel, referring to his closing as "double talk" and asserting that counsel was trying to manipulate the jury. *People v McReynolds*, 175 AD2d 31. He also ridiculed the defense theory, calling it "mumbo jumbo." *People v World*, 157 AD2d 567, 568. The prosecutor emphasized the respect owed the complainant because of his status as a WWII veteran, and bolstered his credibility in identifying the defendant. *People v Bailey*, 58 NY2d 272, 277. Rhetorical questions about the lack of defense evidence, such as a lineup expert, impermissibly shifted the burden of proof. *People v Grice*, 100 AD2d 419, 422. Although the defendant did not testify, the prosecutor put his character in issue by emphasizing that he lived as a homeless person to fulfill criminal ambitions, *People v Richardson* (222 NY 103, 107) and was a predator. *People v Chapin*, 265 AD2d 738, 739. These comments were not justifiable or a fair response to counsel's summation. *People v Galloway*, 54 NY2d 396. Their cumulative effect was to substantially prejudice the defendant's rights. *People v Calabria*, 94 NY2d 519, 523. Judgment reversed. (Supreme Ct, Bronx Co [Hunter, J])

Speedy Trial (Cause for Delay) (Statutory Limits) **SPX; 355(12) (45)**

People v Mannino, 306 AD2d 157, 761 NYS2d 189 (1st Dept 2003)

A felony complaint was filed on July 20, 2000. The defendant claimed that the prosecution was not ready for trial within 184 days from that date. CPL 30.30[4]. On Feb. 27, 2001, the prosecution requested a seven-day adjournment but the court adjourned the case until Mar. 27, 2001, because the defendant was on trial in another county. On Apr. 17, 2001, the defendant's attorney was absent without notifying the court. The prosecution requested an adjournment to re-present several dismissed counts to the grand jury. The case was adjourned until May 15, 2001. The court charged a total of 35 days to the prosecution and dismissed the indictment on speedy trial grounds.

Holding: Time when the defendant was without counsel through no fault of the court was excludable from speedy trial calculations. CPL 30.30(4)(f); *People v Lassiter*, 240 AD2d 293, 294. The prosecution's lack of readiness and intention to re-present the charges were not relevant when defense counsel did not appear for a scheduled court date. *People v David*, 253 AD2d 642, 644. The seven-day period when the defendant was on trial in another jurisdiction was not chargeable to the prosecution. CPL 30.30(4)(a); *People v Jenkins*, 286 AD2d 634. The total time period attributable to the prosecution was 167 days, which was within the six-month statutory limit. Judgment reversed. (Supreme Ct, Bronx Co [Williams, J])

Appeals and Writs (Record) **APP; 25(80)**

People v Rodriguez, 306 AD2d 145, 761 NYS2d 59 (1st Dept 2003)

The defendant was convicted of second-degree robbery after a jury trial in 1998. He was sentenced to 7 to 14 years as a predicate felony offender.

Holding: Effective appellate review of the defendant's trial was no longer possible after it was determined that the entire transcript had been irretrievably lost. The trial court's written account, without input from either prosecution or defense counsel, was insufficient. The prosecution's failure to provide affidavits for the reconstruction hearing, after agreeing to do so, foreclosed them from seeking another reconstruction hearing after the appeal was perfected. Judgment reversed, new trial ordered. (Supreme Ct, NY Co [Figueroa, J])

Speedy Trial (Cause for Delay) (Statutory Limits) **SPX; 355(12) (45)**

People v Andrews, 306 AD2d 166, 763 NYS2d 540 (1st Dept 2003)

Holding: The prosecution's adjournment request that resulted in 140-day delay was chargeable to them, since they did not meet their burden to show that the time was to be used for filing opposition papers or a trial court decision on earlier motions. CPL 30.30; *People v Jamison*, 87 NY2d 1048. Nothing prevented the prosecution from filing a certificate of readiness during that interval. *People v Collins*, 82 NY2d 177, 181-182. Combined with an earlier 53 days of includable time, this amounted to a violation of the defendant's statutory speedy trial rights. Indictment dismissed. Judgment reversed. [Supreme Ct, Bronx Co (Williams, J)]

Forgery (Elements) (Evidence) (Possession of a Forged Instrument) **FOR; 175(10) (15) (30)**

People v Smith, 306 AD2d 225, 760 NYS2d 855 (1st Dept 2003)

Holding: The defendant, who signed his own name to a screenplay written by someone else, did not commit forgery and was not guilty of second-degree criminal possession of a forged instrument. *People v Levitan*, 49 NY2d 87, 90. Conviction vacated. That was the only crime of which the defendant was convicted. Judgment reversed, indictment dismissed. [Supreme Ct, NY Co (Wetzel, J)]

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Evidence (Newly Discovered) **EVI; 155(88)**

People v Santos, 306 AD2d 197, 761 NYS2d 651 (1st Dept 2003)

The defendant, an inmate, moved to vacate his assault conviction after discovering new evidence that showed the complainant, a Department of Corrections captain, had been charged with assaulting prisoners and falsifying records to conceal those assaults. After the defendant's trial, the complainant pled guilty to three assaults on inmates in an administrative proceeding. The trial court held the evidence to be central to the defense and granted the motion.

Holding: The trial court was entitled to exercise its discretion in assessing the value of the defendant's newly discovered evidence. CPL 440.10(1)(g); *People v Bryce*, 88 NY2d 124, 128. The complaint's history of assaultive behavior was critical to the defendant's defense at trial, and not collateral. The court properly found that the new evidence was "of such character as to create a probability that the information concerning the complainant's prior assaultive behavior would have resulted in a more favorable verdict for the defendant." *People v Salemi*, 309 NY 208, 216. Evidence related to the credibility of complainant was highly relevant in the defendant's assault trial. Judgment affirmed. (Supreme Ct, New York Co [Cropper, J])

Dissent: [Tom, J] The new evidence was not likely to have changed the outcome of the trial. The complainant's testimony was corroborated by another officer, and the defendant's witnesses were dubious. *People v Taylor*, 246 AD2d 410, 412.

Evidence (Uncharged Crimes) **EVI; 155(132)**

Witnesses (Experts) (Police) **WIT; 390(20) (40)**

People v Resek, 307 AD2d 804, 763 NYS2d 282 (1st Dept 2003)

The defendant was convicted of possession of drugs and sentenced as a second felony offender to a term of 5 to 10 years. He had been arrested for driving a stolen vehicle. An inventory search and a search of his person uncovered drugs. The grand jury did not indict on the stolen vehicle charge.

Holding: Evidence of the defendant's arrest for possession of a stolen vehicle was properly admitted to complete the narrative of his arrest. *People v Till*, 87 NY2d 835. That the grand jury did not indict him for that crime was irrelevant. *People v Goodman*, 69 NY2d 32, 40. The officer was properly permitted to testify as an expert on whether the quantity of drugs recovered from the defendant was "consistent with selling." *People v Wright*, 283 AD2d 712, 714. Limits imposed on cross-examination of a police chemist were appropriate since they precluded information already elicited by the defense. *Delaware v Van Arsdall*, 475 US 673, 678-679 (1986). Judgment affirmed. (Supreme Ct, New York Co [Cropper, J])

Dissent: [Rosenberger, J] The prejudice created by evidence that, when arrested, the defendant was in a stolen car outweighed its probative value. *People v Hudy*, 73 NY2d 40, 55. It was not required to fill in the background. *People v Foster*, 295 AD2d 110, 113. Police expert evidence on drug quantity to "mean that person was probably a dealer," overrode the jury's fact-finding responsibility. *People v Wright*, 283 AD2d 712, 713.

Sentencing (Concurrent/ Consecutive) (Excessiveness) (Second Felony Offender) **SEN; 345(10) (33) (72)**

Weapons (Possession) **WEA; 385(30)**

People v Riddick, 307 AD2d 821, 763 NYS2d 319 (1st Dept 2003)

The defendants were convicted of two counts each of second and third-degree criminal possession of a weapon and sentenced as second felony or second violent felony offenders, respectively, to concurrent terms of 10 years and 5 years, to be served consecutively to concurrent terms of 10 years and 5 years.

Holding: The third-degree weapon possession convictions are vacated in the interests of justice, since they were based on the same possessions of identical weapons underlying the second-degree weapon possession convictions. *People v Montgomery*, 293 AD2d 369, 371. The sentences were excessive and their terms should be reduced to concurrent time. Judgment modified. (Supreme Ct, New York Co [Stackhouse, J])

Domestic Violence (General) **DVL; 123(10)**

Juveniles (Neglect) **JUV; 230(80)**

Re Daphne G, 308 AD2d 132, 763 NYS2d 583 (1st Dept 2003)

The subject child was remanded to the custody of the Commissioner of Social Services shortly after birth. Later, the respondent was arrested for multiple felony offenses and convicted of attempted second-degree assault against the child's mother. The child was not present during the assault but was in the custody of the Administration for Children's Services. A finding of neglect was made.

Holding: A neglect finding cannot be based solely on the respondent father's act of domestic violence on the mother outside the presence of the child. Family Court Act 1012(f). The act alone was insufficient to establish that

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the child's physical, mental or emotional condition was in imminent danger of becoming impaired. *Matter of Tali W*, 299 AD2d 413. When a child has been exposed to domestic violence a neglect finding can be supported. *Matter of Jeremiah M*, 290 AD2d 450. However, spousal abuse cannot be imputed to neglect of the child. Family Court Act 1046(a)(i). Judgment reversed. (Family Ct, New York Co [Sturm, J])

Dissent: The attack on the mother exposed the child to a substantial risk of harm. A child who witnesses domestic violence might be in imminent danger of becoming emotionally impaired. *Matter of Athena M*, 253 AD2d 669. Violence might also harm a child who was not present but lives in the aftermath of an abusive environment. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 Hastings LJ 1, 84.

Impeachment (of Defendant [Including *Sandoval*]) **IMP; 192(35)**

Trial (Presence of Defendant [Trial in Absentia]) **TRI; 375(45)**

People v Fabricio, 307 AD2d 882, 763 NYS2d 619 (1st Dept 2003)

The defendant was convicted of second-degree murder and first-degree robbery and sentenced to 25 years to life.

Holding: Exclusion of the defendant from a sidebar conference concerning a pure issue of law, *ie*, the good faith basis for a prosecutor's question about a prior inconsistent statement, did not violate the defendant's right to be present at a material stage of the trial. *People v Rodriguez*, 85 NY2d 586, 591. The record was insufficient to show that the defendant's ability to hear and participate in the sidebar was impaired. *People v Elston*, 251 AD2d 109. Judgment affirmed. (Supreme Ct, New York Co [Berkman, J])

Dissent: [Rosenberg, J] A sidebar conference, held during cross-examination of the defendant, was a *Sandoval* hearing. The prosecutor wanted to ask the defendant about an alleged prior, uncharged robbery. The defendant had a due process right to be present and participate. US Constitution, 6th and 14th Amends, NY Const, art I, § 6; *People v Dokes*, 79 NY2d 656, 662. Moreover, the defendant, who only spoke Spanish, did not have a chance to challenge the proffer. *People v Ortega*, 78 NY2d 1101, 1103.

Domestic Violence (General) **DVL; 123(10)**

Juveniles (Neglect) **JUV; 230(80)**

Re Dominique A, 307 AD2d 888, 764 NYS2d 37 (1st Dept 2003)

A neglect petition had been filed against the appellant mother based on an act of domestic violence committed by the father in the mother's apartment after the mother placed the one child who was home into another room. The appellant had previously obtained an order of protection, which expired. The appellant had asked the father to leave and obtained an order of protection against him in 1996 when his verbal abuse escalated into physical abuse. Despite one violent street encounter in 1997, she did not renew the order once he "stopped bothering" her.

Holding: There was insufficient evidence that the child's exposure to a single incident in 1998 in which the father was at the apartment when the mother and child returned home impaired the child's well being or placed her in imminent danger. Family Court Act 1012(f)(i); *Matter of Lonell J*, 242 AD2d 58, 60-61. The mother took measures to shield the children from witnessing her physical abuse. The children had not been questioned by the court and the caseworker believed a neglect finding against the appellant was unwarranted. *See Matter of Kayla B*, 262 AD2d 137. Judgment reversed. (Family Ct, NY Co [Larabee, J])

Counsel (Standby and Substitute Counsel) (Waiver) **COU; 95(39) (40)**

People v Providence, 308 AD2d 200, 764 NYS2d 32 (1st Dept 2003)

At his trial for possession of drugs, the defendant was allowed to proceed *pro se*. with counsel appointed to serve as legal advisor.

Holding: A waiver of counsel may be knowing, intelligent and voluntary despite absence of a specific colloquy. *People v Arroyo*, 98 NY2d 101, 104. The court adequately explained the risks of self-representation and the critical importance of having a lawyer knowledgeable in criminal defense. *People v Smith*, 92 NY2d 516, 520. It cautioned the defendant that he was unprepared due to his lack of legal knowledge, although he demonstrated a rudimentary knowledge of legal procedures and motion practice. The court informed him that he would be held to the standards of an attorney. The 38-year-old defendant had earned his GED and had lengthy experience with the criminal justice system. He made appropriate objections, cross-examined prosecution witnesses and developed a coherent strategy. Judgment affirmed. (Supreme Ct, New York Co [Tejada, J])

Dissent: [Tom, J] The court failed to make a "searching inquiry" into the defendant's *pro se* request by probing all the factors required by *People v Arroyo* 98 NY2d 101. Presence of information in the court file about his age,

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occupation and experience did not prove that the court had considered them.

Guilty Pleas (General) (Withdrawal) **GYP; 181(25) (65)**

Sentencing (Addiction, Effect on Sentencing) (Alternatives to Incarceration) **SEN; 345(2) (7)**

People v Jiminez, 307 AD2d 880, 763 NYS2d 751 (1st Dept 2003)

The court agreed to dismiss at sentencing the charge of attempted third-degree sale of drugs provided the defendant successfully completed a drug treatment program. If he failed, he was to be sentenced to 3 to 6 years in prison. The defendant pled guilty and entered a program. The program discharged him. At sentencing, he requested leniency. The court sentenced him to prison after acknowledging the inability of the program to handle the defendant's medical problems, which including depression, panic disorders and epilepsy.

Holding: The defendant's promise to satisfactorily complete the program is implied in an agreement to program placement as an alternative to prison. Here, the defendant was unable to do so because of medical conditions that the program was unable to manage. The defendant's request for leniency should have been considered, and he should have been "placed in a treatment program with the capacity to meet his medical condition. If no suitable program were available, defendant should have been given the opportunity to withdraw his plea." Judgment modified, matter remanded for court to exercise its discretion to either place the defendant in an appropriate treatment facility or allow him to withdraw his plea. (Supreme Ct, New York Co [Obus, J])

Evidence (Hearsay) **EVI; 155(75)**

In re Duane F., 309 AD2d 265, 764 NYS2d 434 (1st Dept 2003)

The defendant, a juvenile, was charged with menacing. The complainant was the sole eyewitness, but refused to testify, claiming the defendant made threats against her. At a *Sirois* hearing, the court relied on the complainant's prior out of court statements to find witness tampering and excused her appearance at the fact-finding hearing. A *Wade* hearing was held on the assumption that the defendant and the complainant knew each other. The stationhouse showup was found to be confirmatory on the basis of police testimony. At the fact-finding hearing, prior police testimony and the complainant's sworn affidavit were introduced. The court sustained the menacing charge.

Holding: Trial court improperly relied upon the truth of untested out-of-court statements of a single eyewitness. Fundamental fairness required the presentment agency to either produce the complainant at the *Sirois* hearing or explain why she was unavailable. At minimum, the court should have interviewed her *in camera* and not relied on hearsay. *People v Geraci*, 85 NY2d 359, 365. Assumption of a prior relationship between the defendant and the complainant was improperly accepted without scrutiny. A *Rodriguez* hearing should have been held. *People v Rodriguez*, 79 NY2d 445. *Wade* hearing testimony was improperly relied upon at the fact-finding hearing since the police officer was available to testify. Family Court Act 342.2[1]; CPL 670.10(1). Judgment reversed. (Family Ct, Bronx Co [Martinez-Perez, J])

Juveniles (Neglect) **JUV; 230(80)**

Re Israel S., 308 AD2d 356, 764 NYS2d 96 (1st Dept 2003)

A neglect petition was brought against the appellant father for permitting the mother, who had been incarcerated for excessive punishment of the one of the children, to visit with the children twice in his absence in violation of an extended temporary order of protection. Neither the father nor the caseworker knew about the extension of the order. The first visit was when the mother came home to shower and pick up clothing after she had been released from jail; she saw the children briefly in the yard, with a babysitter. The second visit was when the father was in jail for breaking a welfare office window; a caseworker did not remove the children when the mother was found to be in charge of them.

Holding: The appellant was not shown to have failed to exercise the minimum degree of care necessary in protecting the children or acted unreasonably under the circumstances. *Matter of Alena O*, 220 AD2d 358; Family Court Act § 1012[f][i][B]. He conscientiously supervised them, and provided more than the "minimum degree of care." The evidence was insufficient to show that he had observed or knew of the mother's use of excessive corporal punishment prior to the incidents in question, which occurred when he was not living with the children. *Matter of P Children*, 272 AD2d 211. Judgment reversed. (Family Ct, Bronx Co [Fields, J])

Juries and Jury Trials (Challenges) (Voir Dire) **JRY; 225(10) (60)**

People v Noone, 308 AD2d 368, 764 NYS2d 353 (1st Dept 2003)

The defendant, who was white, raised a *Batson* (*v*

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Kentucky, 476 US 79 [1986]) claim as to the prosecutor's use of peremptory challenges against the only two white members of the jury panel. The court held the challenge was insufficient. The defendant was convicted of attempted first-degree assault.

Holding: The defendant made out a prima facie case of racial discrimination based on a strong numerical argument and by the fact that both panelists had backgrounds viewed as favorable to the prosecution. *People v Bolling*, 79 NY2d 317, 325. Ultimately allowing one of the panelists to sit as an alternate did not make the issue moot. Appeal held in abeyance, matter remanded for hearing to permit the prosecution to state reasons for its peremptory challenges. *People v Wint*, 225 AD2d 362. (Supreme Ct, Bronx Co [Gross, J])

Second Department

Misconduct (Prosecution) **MIS; 250(15)**

Trial (Summations) **TRI; 375(55)**

People v Jamal, 307 AD2d 267, 761 NYS2d 874 (2nd Dept 2003)

Holding: The prosecutor's comments during summation, which unfairly and prejudicially described evidence and the burden of proof, were improper. Considered cumulatively, they require reversal. Among the statements and arguments made were: certain evidence was withheld from the jury for "legal reasons," *People v Calabria,* 94 NY2d 519; the indictment was evidence of guilt, *People v Mejias,* 72 AD2d 570, 571; personal vouching for witness testimony and the defendant's guilt, *People v Bailey,* 58 NY2d 272; and describing the prosecution evidence as "undisputed," which referred to the defendant's decision not to testify. *People v Smith,* 288 AD2d 496, 497. Although unpreserved by the defendant, the issue was reached in the interest of justice. CPL 470.15[6][a]. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [McGann, J])

Counsel (Competence/Effective Assistance/Adequacy) **COU; 95(15)**

Post-Judgment Relief (CPL §440 Motion) **PJR; 289(15)**

People v Fogle, 307 AD2d 299, 762 NYS2d 104 (2nd Dept 2003)

The defendant was tried for murder and related offenses. Four civilian witnesses testified that two people were involved in the shootings, and only one identified the defendant as a suspect. Two police witnesses said the defendant acted alone. No witnesses testified for the defense. After the defendant's conviction was affirmed on appeal, he filed a CPL 440.10 motion, which was denied.

Holding: Defense counsel's failure to conduct any investigation was a fundamental deprivation of the effective assistance of trial counsel. *Thomas v Kuhlman,* 255 FSupp2d 99; *People v Donovan*, 184 AD2d 654, 655. The court erred failing to make any findings of fact. CPL 440.30[5]. The court excused counsel's failure. It also rejected the affidavits of two eyewitnesses located after trial who identified someone other than the defendant, based on speculation that the witnesses would not have been available to testify. The court failed to resolve whether trial counsel sought or obtained an unredacted copy of a complaint follow-up report of one of the trial witnesses. The court must re-examine both asserted instances of ineffective assistance. Appeal held in abeyance, matter remitted for further findings of facts. (Supreme Ct, Kings Co [Tomei, J])

Sex Offenses (Sentencing) **SEX; 350(25)**

People v Brooks, 308 AD2d 99, 763 NYS2d 86 (2nd Dept 2003)

The defendant pled guilty to first-degree sexual abuse and was sentenced to two and one-half to five years in prison. Three months before his release from prison, the Board of Examiners of Sex Offenders informed the sentencing court it was recommending risk level three. A hearing was held one week before the defendant's release date without his presence. In response to an order to appear, he had written back, "I Brooks, Derrick # 94R2388 refuse to attend my above scheduled court date (3-14-00). Reason: Time before CR date is too short." Defense counsel objected to proceeding without the defendant, having had no contact with him. The court found that defense counsel had ample notice of the hearing, and found genuine the defendant's refusal to appear upon an order to produce. Relying on the case summary prepared by the Board, the court assigned the defendant risk level three. Correction Law 168- l[5].

Holding: A Sex Offender Registration Act (SORA) hearing can proceed in a defendant's absence provided there was evidence to satisfy the waiver-forfeiture analysis in criminal cases. The defendant had a right to appear at the risk assessment hearing. Correction Law 168-n(3); *Doe v Pataki*, 3 FSupp2d 456, 471-472 (SDNY 1998). Such hearings fall between criminal proceedings requiring a full panoply of rights and a simple administrative hearing affording less process. Reliable hearsay could be used to prove that the court had, as required, advised the defendant of the hearing date, his right to be present, and that the hearing would be conducted in his absence. The defendant's response was sufficient. Without indication from the defendant that he might have appeared at a later

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hearing date, there was no justification for an adjournment until after his release. Correction Law 168-l[8]. The defendant can seek reconsideration of the risk level determination. Correction Law 168-o(2); *People v Wroten*, 286 AD2d 189. Judgment reversed. (Supreme Ct, Kings Co [Goldberg, J])

Trial (Presence of Defendant [Trial in Absentia]) TRI; 375(45)

People v Heslop, 307 AD2d 975, 763 NYS2d 327 (2nd Dept 2003)

Holding: The defendant's right to public trial was denied when the trial court excluded his friends without evidence that they presented a danger to the testifying undercover police officer. US Const 6th Amend; Civil Rights Law 12; Judiciary Law 4; *People v Ematro,* 284 AD2d 408, 409. No evidence in the record showed that the defendant's friends lived or worked in the area where the undercover performed his duties, or posed a threat. *People v DeJesus,* 274 AD2d 400. The closure order was broader than needed. *People v Rentas,* 253 AD2d 469. Judgment reversed. (Supreme Ct, Kings Co [Dowling, J])

Impeachment (of Defendant [Including *Sandoval*]) IMP; 192(35)

Trial (Presence of Defendant [Trial in Absentia]) TRI; 375(45)

People v Morales, 308 AD2d 229, 764 NYS2d 104 (2nd Dept 2003)

At a *Sandoval* hearing (*see People v Sandoval,* 34 NY2d 371) attended by the defendant and his counsel, the court ruled that the defendant could be impeached with the fact of all his prior convictions but not with the facts underlying them. No mention of alias evidence was made on the record. Days later, counsel said on the record that the defendant had not been present when the court ruled as to use of aliases. Counsel added, "And, I think that defense is entitled to know what names." The prosecutor objected, and the court asked if that took care of everything, with no further record response. Just before trial, the court ruled admissible the identification of a fingerprint at the scene as the defendant's based on comparison to prints taken at the defendant's prior arrest under an alias.

Holding: No appellate decision mandates a *Sandoval* determination about the use of aliases to impeach a defendant, although this procedure is clearly advisable. The defendant was present at the court's ruling permitting questioning about his prior convictions, which were inextricably intertwined with the aliases. The defendant thus had a meaningful opportunity to participate in the decision as to use of the aliases for impeachment. The alias evidence related to the fingerprint was not offered as impeachment but to establish the defendant's guilt by showing the thoroughness of the investigation. Alias evidence does not necessarily implicate a *Sandoval* analysis (*see People v Walker*, 83 NY2d 455) and did not implicate it here. Judgment affirmed. (Supreme Ct, Kings Co [Douglass, J])

Juries and Jury Trials (Challenges) JRY; 225(10)

People v Feliciano, 308 AD2d 459, 764 NYS2d 196 (2nd Dept 2003)

Holding: The court improperly allowed the prosecutor to belatedly exercise a peremptory challenge to a still unsworn prospective juror after defense counsel made his peremptory challenges. *See* Criminal Procedure Law 270.15(2); *People v Williams*, 26 NY2d 62. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Kron, J])

Instructions to Jury (General) ISJ; 205(35)

Juries and Jury Trials (Alternate Jurors) (Discharge) JRY; 225(5) (30)

People v Gomez, 308 AD2d 460, 764 NYS2d 109 (2nd Dept 2003)

Holding: The court did not err in replacing one juror with an alternate without the defendant's written consent. "Based on the settled record, the jury had not yet begun to deliberate (*see* CPL 270.35[1])." The court did err by replacing another juror, after deliberation had begun, with an alternate juror who had previously been discharged. The court is statutorily required to declare a mistrial when a juror is discharged during deliberations and no alternate juror is available as a replacement. The defendant's other issues are without merit. A detailed instruction on identification is not required as a matter of law (*see People v Knight*, 87 NY2d 873), although it is desirable. The general instruction on weighing witnesses' credibility and proof of identification beyond a reasonable doubt was an accurate statement of the law. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rosenzweig, J])

Insanity (Civil Commitment) (Post-commitment Action) ISY; 200(3) (45)

Matter of Norman D., 309 AD2d 143, 764 NYS2d 129 (2nd Dept 2003)

The appellant was found to suffer from a dangerous mental disorder as defined by Criminal Procedure Law 330.20(1)(c) and was committed to the custody of the

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Commissioner of the New York State Office of Mental Health. The appellant sought rehearing and review of the initial commitment order. A rehearing and review was granted, but was adjourned repeatedly over three years. Eventually, it was stipulated that, while mentally ill, the appellant no longer suffered from a dangerous mental disorder. Eight months later, the court concluded the review of the initial commitment hearing and found that evidence supported the initial finding. The court held that therefore all future proceedings concerning retention and release should still be governed by 330.20 rather than by Mental Hygiene Law provisions governing involuntary commitments.

Holding: Amendments to 330.20 contained in the Insanity Defense Reform Act of 1980 were prompted by concern that the convicting court lacked continuing supervision over acquittees, and that once committed, they were constitutionally entitled to treatment equal to that of involuntary patients generally. Acquittees found to have a dangerous mental disorder are tracked separately. A rehearing and review proceeding ascertains the acquittee's mental condition at the time it is held and must include the most recent evidence of that condition. Undue delay substantially erodes the right to rehearing and review. However, the proceeding does not substitute for appellate review of the initial commitment order, and may not be used to modify the track status established by the original commitment order. Order affirmed. (County Ct, Ulster Co [Bruhn, J])

Speedy Trial (Prosecutor's Readiness for Trial) (Statutory Limits) — **SPX; 355(32) (45)**

People v Mapp, 308 AD2d 463, 764 NYS2d 194 (2nd Dept 2003)

The court dismissed the indictment because of failure to meet the statutory time limit.

Holding: The prosecution contended that once a bench warrant was ordered after the defendant failed to appear, all time that elapsed until the defendant was produced was not chargeable to them under Criminal Procedure Law 30.30(4)(c) (ii). The prosecution was not required to exercise due diligence once the defendant failed to appear for arraignment. This included the time after the defendant's arrest and incarceration on an unrelated matter. *See People v Howard*, 182 Misc2d 549, 553. Once New York City police interviewed the defendant, knowledge of his whereabouts must be imputed to the prosecution. *See People v McLaurin*, 38 NY2d 123, 126. However, once the prosecution had actual knowledge of the defendant's whereabouts, the delay would be excluded only if the prosecution could show due diligence was exercised trying to obtain his presence for trial. *See* CPL 30.30(4)(c)(i); *People v Knight*, 163 AD2d 583, 585. No such showing was made here.

The contention that responsibility for securing the defendant's appearance for arraignment on the indictment lies exclusively with the court is not preserved and is without merit. *See* CPL 30.30(3)(b); *People v Carter*, 91 NY2d 795, 799. Order affirmed. (Supreme Ct, Kings Co [Greenberg, J])

Discrimination (Race) — **DCM; 110.5(50)**

Juries and Jury Trials (Challenges) (Voir Dire) — **JRY; 225(10) (60)**

People v Battle, 308 AD2d 597, 765 NYS2d 251 (2nd Dept 2003)

Holding: At the hearing previously ordered (*People v Battle*, 299 AD2d 416) under *Batson v Kentucky* (476 US 79 [1986]), the prosecutor's testimony "amounted to little more than a denial of discriminatory purpose" concerning two black panelists. *People v Bozella*, 161 AD2d 775, 776. The prosecution failed to meet their burden of overcoming the presumption of discrimination previously found. *People v Blunt*, 176 AD2d 741, 742. Judgment reversed. (Supreme Ct, Queens Co [Rosenzweig, J])

Sentencing (General) — **SEN; 345(37)**

People v Smith, 308 AD2d 604, 764 NYS2d 873 (2nd Dept 2003)

Holding: The duration of an order of protection issued at sentencing (CPL 530.13[4]) after a guilty plea to second-degree assault was set without taking jail time credit into account. *People v Nieves,* 305 AD2d 520. Sentence modified, matter remitted for new determination of duration of order of protection. (Supreme Ct, Westchester Co [Angiolillo, J])

Arrest (Warrantless) — **ARR; 35(54)**

Witnesses (Confrontation of Witnesses) — **WIT; 390(7)**

People v Reynoso, 309 AD2d 769, 765 NYS2d 54 (2nd Dept 2003)

Holding: The defendant was arrested at the threshold of his residence, and did not implicate his rights under *Payton v New York* (445 US 573 [1980]). Admission of a codefendant's statement that "'lookouts were on the street'" did not violate the defendant's right to confront the witnesses against him as enunciated in *Bruton v US* (391 US 123 [1968]). Defense counsel opened the door to admission of the statement by claiming in opening that the defendant's statement was the detective's statement

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when the defendant's statement that he acted as a lookout, standing by the gas pump on the street, differed from what the detective had heard from the codefendant. Judgment affirmed. Supreme Ct, Queens Co [Naro, J])

Dissent: [McGinity, J]) The "doorway exception" to *Payton*'s proscription of warrantless arrests inside a home was not applicable here, where the defendant's mother testified that when she and the defendant put their heads outside the door jamb to see who was calling at midnight, police pushed her, reached in and pulled the defendant out of his home. Further, the codefendant's statement was improperly admitted to prove that the lookouts had been in the street, not by the gas pumps where the victims had seen no one. The codefendant was available to testify and no hearsay exception applied. This error was not harmless.

Sentencing (Credit for Time Served) (General) **SEN; 345(15) (37)**

People v Serrano, 309 AD2d 822, 765 NYS2d 662 (2nd Dept 2003)

Holding: As the prosecution concedes, the court erred by imposing a post-release supervision period of three and one-half years for first-degree sexual abuse. The maximum period of supervision authorized for Class D violent felonies is three years. *See* Penal Law 70.45(2); *People v Babcock*, 304 AD2d 912. It is clear the court intended to impose the maximum period of supervision permitted.

The court's determination of the duration of the order of protection issued at sentencing under Criminal Procedure Law 530.13(4) should have taken into account the defendant's jail-time credit. *See People v Nieves*, 305 AD2d 520. Sentence modified, period of post-release supervision reduced to three years, and remitted for new determination of the duration of the order of protection taking into account jail-time credit due. (County Ct, Westchester Co [Dickerson, J])

Sentencing (Concurrent/Consecutive) **SEN; 345(10)**

People v Riley, 309 AD2d 879, 765 NYS2d 890 (2nd Dept 2003)

Two men were robbed at gunpoint. The robbers then took the car of one of the two men, forcing the two to come along. Eventually the robbers stopped and ordered the two men to stand by a wall. One, shot there, eventually died. The other was shot while running away, but lived. The defendant and two codefendants were convicted of two counts of second-degree murder (felony murder and intentional murder), second-degree attempted murder, and two counts first-degree robbery. The defendant's sentences for attempted murder and each robbery conviction were made consecutive to each other and to the murder sentences, for an aggregate sentence of 58 1/3 years to life. The court denied his later motion to set aside his sentence as illegal.

Holding: The sentences for one robbery and felony murder cannot run consecutively because the robbery constituted the underlying felony and constituted a material element of the felony murder charge. *See People v Benitez*, 281 AD2d 487, 488. Neither the indictment nor the jury instruction specified which robbery count served as the predicate for the felony murder. Since it is impossible to tell which robbery was separate and distinct from the felony murder (*People v Parks*, 95 NY2d 811, 815), the sentences for both robberies must run concurrently to that for the felony murder. Since separate acts caused the death of one man and the injuries of the other, the murder and attempted murder sentences need not run concurrently. *See People v Braithwaite*, 63 NY2d 839, 843. Similarly, the sentence for the robbery of the decedent may run consecutively to that for the intentional murder of the decedent. The sentence for the attempted murder may run consecutively to the sentence for the robbery of the same complainant. *See People v Williams*, 245 AD2d 400, 401. Order reversed, sentence vacated, and remitted for resentencing. (Supreme Ct, Queens Co [McGann, J])

Probation and Conditional Discharge (Conditions and Terms) **PRO; 305(5)**

People v Rocco, 309 AD2d 882, 766 NYS2d 58 (2nd Dept 2003)

The defendant pled guilty to a Tax Law violation relating to importation of motor fuel into New York from New Jersey without reporting it for tax purposes. The plea agreement required incarceration in jail for 60 days, restitution, and three years probation. Before sentencing, the defendant was convicted of a misdemeanor in Connecticut for harassing his former wife by e-mail. The probation report recommended a probation condition prohibiting the use of e-mail.

Holding: Probation conditions which have a rehabilitative purpose or "are necessary or appropriate to ameliorate the conduct which gave rise to the offense or" to prevent the defendant's incarceration are authorized. Penal Law 65.10. Among the probation conditions imposed were that the defendant not use "any computer for the purposes of sending e-mail or conducting business." The prohibition on use of e-mail is appropriate to prevent further criminal conduct relating to such use, as other technologically efficient means of communication are available, such as fax or phone. The blanket prohibition on use of a computer for conducting business is not related to any legitimate purpose. *See People v Letterlough*, 86

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NY2d 259. It is difficult if not impossible to conduct business without computer access, and the condition is inconsistent with the other conditions imposed (*see* Penal Law 65.10[2] [c], [f]) such as working at suitable employment, supporting the defendant's dependents, and meeting other family responsibilities. Judgment modified, condition prohibiting use of any computer for conducting business deleted, and affirmed as modified. (County Ct, Suffolk Co [Farneti, J])

Juries and Jury Trials (Challenges) (General) **JRY; 225(10) (37)**

Trial (Presence of Defendant [Trial in Absentia]) **TRI; 375(45)**

People v Francis, 309 AD2d 874, 766 NYS2d 45 (2nd Dept 2003)

Holding: During the prosecution's case, a court officer told the court that a juror mentioned hand motions by the defendant toward the jury box. The court summoned the juror and, in the presence of defense counsel and the defendant, asked about the juror's concerns. The juror said the defendant had made motions with his hands resembling a pistol, which had unnerved the juror and others. She said this would not affect her impartiality. With counsel's consent the court sent a court officer to ask which other jurors had expressed similar concerns. The officer returned with two others, saying that when the court officer asked if others felt the same way, "'apparently they all didn't know what I was really talking about.'" The court improperly delegated its judicial responsibility to inquire into potential juror bias. *See People v Torres*, 72 NY2d 1007, 1008-1009. The defendant's absolute right to be present at all material stages of trial was also violated. *See gen People v Ciaccio*, 47 NY2d 431, 436. Counsel's acquiescence in the procedure followed did not constitute a waiver or preclude review. *See People v Ahmed*, 66 NY2d 307. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Barbaro, J])

Guilty Pleas (Withdrawal) **GYP; 181(65)**

People v Ruiz, 309 AD2d 883, 766 NYS2d 57 (2nd Dept 2003)

Holding: The record of the defendant's guilty plea does not show or imply that the defendant understood that the court could impose a harsher sentence than that bargained for if the defendant failed to appear for sentencing or was arrested for a subsequent offense. While the defendant did fail to appear and was later arrested in a different state, the court could not impose a sentence longer than the three and one-third to 10-year sentence agreed upon without first giving him an opportunity to withdraw the plea. *See People v Arbil C.*, 190 AD2d 856. The indictment now being over 12 years old, the prosecution would be prejudiced by allowing the defendant to go to trial. The sentence should be reduced to conform to the plea agreement, as requested. *See People v White,* 144 AD2d 711. Judgment modified, sentence reduced. (County Ct, Suffolk Co [Farneti, J])

Evidence (Circumstantial Evidence) (General) **EVI; 155(25) (60)**

Instructions to Jury (Circumstantial Evidence) **ISJ; 205(32)**

People v Lynch, 309 AD2d 878, 766 NYS2d 60 (2nd Dept 2003)

Holding: While evidence showed that the defendant was present in a house where a burglary occurred on the day that money was taken, there was no direct evidence establishing the identity of the burglar. The court's failure to tell the jury that the evidence was solely circumstantial left the jury unaware of its duty to apply the circumstantial evidence standard to the prosecution's entire case. *See People v Sanchez*, 61 NY2d 1022. The evidence of guilt was not overwhelming, and the defendant is entitled to a new trial. The court also erred by allowing the prosecutor to question the defendant's father about whether the defendant ever denied being identified as the person seen in the house in question on the day of the burglary. *See People v Lewis*, 69 NY2d 321. Judgment reversed, new trial ordered. (County Ct, Orange Co [Rosenwasser, J])

Evidence (General) Prejudicial) **EVI; 155(60) (106)**

Identification (Lineups) (Show-ups) (Suggestive Procedures) **IDE; 190(30) (40) (50)**

Misconduct (Prosecution) **MIS; 250(15)**

People v Milligan, 309 AD2d 950, 767 NYS2d 38 (2nd Dept 2003)

Holding: Lineup identifications of the defendant were suppressed because the photographic array from which by the two complainants simultaneously selected him was unduly suggestive in that there were physical dissimilarities between the defendant and the "fillers." In-court identification was permitted after the court found that bases independent of the lineup, *ie* the crime scene viewings of the robber, existed. *See People v Brown*, 295 AD2d 442, 443-444. Over objection, the prosecutor elicited trial testimony that after the detective took the defendant to the precinct and had the complainants come there also, the defendant was arrested. This improperly allowed the jury to infer that the complainants identified the defendant at the precinct. *See People v Howard*, 87 NY2d 940. The

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court improperly allowed the detective to also testify that after he spoke to another suspect, he focused on the defendant; this was impermissible bolstering. *See People v Jones*, 305 AD2d 698. The testimony that a detective had phoned the number of a stolen pager and asked the person who answered it to relay a message to "Maurice" (the defendant's first name), which the person agreed to do, permitted the jury to make too many tenuous inferences. The defendant was deprived of any ability to test the truthfulness or accuracy of the statements attributed to the person answering the phone. The prosecutor also improperly vouched for prosecution witnesses in summation. *See People v Smith*, 288 AD2d 496. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rosengarten, J])

Evidence (Prejudicial) **EVI; 155(106)**

Identification (General) (Lineups) **IDE; 190(17) (30)**

People v Fields, 309 AD2d 945, 766 NYS2d 365 (2nd Dept 2003)

Holding: A detective testified that the detective arrested the defendant following a lineup after asking the complainant if she recognized anyone. This implicitly bolstered the complainant's testimony by confirming the complainant's identification. *See People v Trowbridge*, 305 NY2d 471. A violation of the rule against bolstering cannot be overlooked unless the identification evidence is so strong that there is no serious issue about identification. *See People v Bacenet*, 297 AD2d 817, 818. The error here was not harmless. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Roman, J])

Accomplices (Instructions) **ACC; 10(25)**

Instructions to Jury (General) (Theories of Prosecution and/or Defense) **ISJ; 205(35) (50)**

People v Taylor, 1 AD3d 619, 767 NYS2d 640 (2nd Dept 2003)

Holding: The accomplice liability charge given for the first-degree felony murder charge was erroneous. Penal Law 20.00 does not apply to first-degree felony murder "unless the defendant's criminal liability * * * is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter." Penal Law 125.27(1)(a)(vii). *See People v Couser,* 258 AD2d 74. By giving the Penal Law 20.00 definition of accomplice liability to the jury for the first-degree murder count, the trial court permitted the jury to speculate that the defendant committed murder without finding that he commanded another person to cause the death of the decedent. The error did not affect the convictions of second-degree murder. *Cf People v Pons*, 68 NY2d 264. Judgment modified, first-degree murder count reversed, remitted for new trial on that count. (Supreme Ct, Suffolk Co [Mullen, J])

Counsel (Conflict of Interest) (Competence/Effective Assistance/Adequacy) **COU; 95(10) (15)**

Guilty Pleas (Withdrawal) **GYP; 181(65)**

People v Elting III, 767 NYS2d 828 (2nd Dept 2003)

The defendant pled guilty to possessing drugs. Before sentencing he moved to vacate his plea because his attorney had previously advised him that he would not get a fair trial. Defense counsel denied giving such advice. New appointed counsel related what prior counsel had done and said he saw no reason for the court to permit the defendant to withdraw his plea. The defendant's motion was denied.

Holding: The defendant's right to counsel was violated when a second appointed attorney became a witness against him by relating the discussions had with first counsel and undermining the defendant's motion to withdraw his plea. *People v Jones,* 223 AD2d 559. Appellate counsel is to represent the defendant at a new hearing on the defendant's motion to withdraw his plea. Appeal held in abeyance, matter remitted for a new hearing. (Supreme Ct, Dutchess Co [Dolan, J])

Defenses (Justification) **DEF; 105(37)**

Instructions to Jury (Theories of Prosecution and/or Defense) **ISJ; 205(50)**

People v Ross, 767 NYS2d 819 (2nd Dept 2003)

The court instructed the jury on the charges of attempted second-degree murder, first-degree assault, the lesser-included offense of second-degree assault, and fourth-degree criminal possession of a weapon. It also instructed that justification was a defense to all the assaultive counts, but failed to instruct them that if they found defendant not guilty by reason of justification on the top counts, they were not to consider the lesser-included crime. The defendant was found guilty of second-degree assault and acquitted on the other counts.

Holding: A finding of not guilty on greater charges based on justification precludes consideration of lesser counts. *People v Roberts,* 280 AD2d 415, 416. The failure of the court to provide instruction on this point was reversible error. *People v McManus,* 67 NY2d 541, 543. A new trial is required since it is impossible to know whether the acquittal on the top counts here was based on

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a finding of justification that would require acquittal on the lesser-included offenses. Indictment dismissed with leave to re-present on appropriate charges no higher than second-degree assault. *People v Beslanovics,* 57 NY2d 726. Judgment reversed, indictment dismissed without prejudice. (Supreme Ct, Queens Co [Lewis, J])

Defenses (Justification) **DEF; 105(37)**

Instructions to Jury (Theories of Prosecution and/or Defense) **ISJ; 205(50)**

People v Gavigan, 768 NYS2d 652 (2nd Dept 2003)

Holding: The defendant worked in a bar and asked the complainants to leave before a fight ensued. At trial, his defense was that he reasonably believed that the complainants were committing criminal trespass, and physical force was needed to protect the premises. The court instructed the jury on justification only as to self-defense, not defense of premises and the defendant was convicted of second-degree assault. Viewing the record in the light most favorable to the defendant (*People v Watts,* 57 NY2d 299, 301), a reasonable view of the evidence supported the defendant's request for a jury instruction on justification in defense of premises. Penal Law 35.20(2); *People v Daniels,* 248 AD2d 723, 724. Failure to so charge was reversible error. *People v Padgett,* 60 NY2d 142, 145. Judgment reversed. [Supreme Ct, Suffolk Co (Farneti, J)]

Probation and Conditional Discharge (Conditions and Terms) (Modification) **PRO; 305(5) (25)**

People v Lee, 770 NYS2d 412 (2nd Dept 12/29/2003)

The defendant pled guilty to grand larceny for welfare fraud and was sentenced to a one-year conditional discharge and restitution of $6,319. The restitution payments were scheduled to be $100 per month for the year; at the end of that time he was to sign a confession of judgment for the rest. Although he made the payments, the defendant refused to sign the confession of judgment. Two years after the sentence expired, the prosecution obtained a declaration of delinquency. The court, without a hearing, amended the sentence directing the prosecution to prepare a confession of judgment for $3,174 and to seek enforcement under CPL 420.10(6) if the confession of judgment was not signed.

Holding: The court did not have the authority to modify conditions of a conditional discharge after it expired (CPL 410.20[1]), nor did it have the power to order the defendant to sign a confession of judgment then. Penal Law 65.05. The prosecution waited too long to seek a continuation of the one-year sentence to enforce compliance with the requirement that the defendant sign a confession of judgment (Penal Law 65.05[3]) or seek a declaration of delinquency under CPL 410.30 and Penal Law 65.15(2). Judgment reversed and vacated, appeal dismissed. (Supreme Ct, Dutchess Co [Dolan, J])

Misconduct (Prosecution) **MIS; 250(15)**

Trial (Summations) **TRI; 375(55)**

People v Pagan, 769 NYS2d 741 (2nd Dept 2003)

Holding: The prosecutor's comments during summation, which unfairly and prejudicially described evidence and burdens of proof, denied the defendant a fair trial. *People v Calabria,* 94 NY2d 519. Among the statements and arguments made by the prosecutor were: accusing defendant of lying, *People v Shanis,* 36 NY2d 697; accusing the defense of confusing and misleading jury, *People v Ortiz,* 125 AD2d 502; vouching for the credibility of the prosecution's witnesses, *People v Blowe,* 130 AD2d 668; shifting the burden of proof by asking the jury to find that the complainant lied as a condition to acquitting the defendant, *People v Bull,* 218 AD2d 663; and insinuating the defendant should not have gone to trial because he was "caught red-handed." *People v Rivera,* 116 AD2d 371. Since the evidence was not overwhelming, this was not harmless error. *People v Crimmins,* 36 NY2d 230, 237. Although unpreserved, the issue is reached in the interest of justice. CPL 470.15[6][a]. Judgment reversed. (Supreme Ct, Kings Co [Chambers, J])

Arson (Buildings) (Evidence) **ARS; 40(10) (30)**

People v Fox, No. 2001-04937 (2nd Dept 1/26/2004)

Holding: The defendant was convicted of second-degree arson and other charges for starting a fire at a structure erected by a group of homeless people for overnight lodging located below an overpass. It was sandwiched between two fences with two walls consisting of carpets draped over a clothesline, and a piece of plywood for additional support on one side. The entrance was covered by shower curtains and blankets. The shelter was covered by large blue tarp. The residents slept in sleeping bags or on mattresses, and the ground was covered with carpeting. Electricity came from an extension cord plugged into a light socket at a nearby subway station. Electric and kerosene space heaters were also used. A "building" includes any structure used for overnight lodging. Penal Law 150.00(1). Applying its plain or ordinary meaning, McKinney's Cons Laws of NY, Book 1, Statutes § 232, the term encompasses a structure of a permanent nature enclosing a space with walls and possibly a roof. *Rouse v Catskill & NY Steamboat Co,* 59 HUN 80, 13 NYS 126, 127. It does not have to be completed or occu-

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pied. *People v Richberg,* 56 AD2d 279; Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law art. 150, at 144-145. The shelter here was a "building" due to its function as overnight lodging or because it fit within the ordinary meaning of the term. Judgment affirmed. (Supreme Ct, Kings Co [Reichbach, J])

Discrimination (Race) **DCM; 110.5(50)**

Juries and Jury Trials (Challenges) (Voir Dire) **JRY; 225(10) (60)**

People v Chin, No. 2001-05071 (2nd Dept 1/26/2004)

During jury selection, the prosecutor used peremptory challenges to strike one black and two Hispanic panelists in the first round, and one Hispanic in the second round. The defendant made out a prima facie case of discrimination under *Batson v Kentucky* (476 US 79 [1986]). The prosecutor failed to provide an adequate race-neutral reason for eliminating an Hispanic panelist. The court held the reason was pretextual, but the panelist was no longer available for service.

Holding: Offering the defendant an additional peremptory challenge after a successful *Batson* challenge concerning a juror who had been otherwise excused was an appropriate remedy satisfying equal protection. *McCrory v Henderson,* 82 F3d 1243. The defendant's remedies for a successful *Batson* challenge made after the first round of jurors has been excused were limited. Without the juror, it was impossible to disallow the challenge and seat that person. *People v Frye,* 191 AD2d 581. Judgment affirmed. (Supreme Ct, Queens Co [Braun, J])

Third Department

Appeals and Writs (Arguments of Counsel) (Briefs) (Counsel) **APP; 25(5) (6) (30)**

Counsel (Anders Brief) **COU; 95(7)**

People v Williams, __ AD2d __, 767 NYS2d 307 (3rd Dept 2003)

The defendant was convicted of several charges arising from an incident at the prison where he was incarcerated.

Holding: Appellate counsel challenged the sufficiency of the evidence and the effectiveness of trial counsel. Noting in the brief that the defendant also wanted to raise issues concerning his right to testify before the grand jury and the racial composition of the jury, appellate counsel argued that these issues lacked merit. It can be discerned that counsel did not find the appeal to be wholly frivolous, warranting an *Anders* (*Anders v California*, 386 US 738 [1967]) brief. However, appellate counsel's disparagement of the additional issues affirmatively undermined arguments the defendant wanted to have reviewed and precluded the defendant from presenting them effectively in a *pro se* brief. *People v Vasquez*, 70 NY2d 1, 4. Appellate counsel is relieved, new counsel is to be assigned.

Accusatory Instruments (Amendment) **ACI; 11(5)**

People v Plaisted, __ AD2d __, 768 NYS2d 236 (3rd Dept 2003)

Holding: The defendant's convictions and sentence stemmed from an alleged rape of a 16-year-old visiting his daughter. The court had *sua sponte* constructively amended the complaint at the close of proof to consider not only the originally-alleged time frame of August 2000, but also August 1999. While Criminal Procedure Law 200.70(1) allows amendment of the indictment at any time before or during trial with regard to matters of time, such amendment must not change the prosecution's theory or "tend to prejudice the defendant on the merits." *See People v Perez,* 83 NY2d 269, 274. The amendment here created a real potential of prejudice. The court denied defense counsel's request, prior to opening statements, for alleged *Rosario* material relating to allegations by the complainant against the defendant in 1999, saying that "a 1999 incident 'has nothing to do with this charge * * * [I]t is about this allegation, this offense, this date, this charge is what the People are required to turn over.'" Evidence at trial cast doubt on whether the incident in question could have occurred in 2000. Over objection, the court instructed the jury that it could disregard the date in the indictment if it was satisfied that the conduct alleged had occurred on the earlier date indicated in some testimony. The defense strategy, centered on showing that the incident could not have happened in 2000, was developed in reliance on representations and rulings including the prosecutions' claim during discussion of the potential *Rosario* material that the 1999 incident involved allegations of improper touching, not intercourse, and the denial of that possible *Rosario* material to the defense. Judgment reversed, matter remitted for new trial. (County Ct, St. Lawrence C [Nicandri, J])

Grand Jury (Procedure) **GRJ; 180(5)**

New York State Agencies (Law, Department of) **NYA; 266.5(165)**

People v Fezza, __ AD2d __, 769 NYS2d 613 (3rd Dept 2003)

The Attorney General's Organized Crime Task Force (OCTF) was investigating a purported multicounty drug ring. The District Attorney (DA) appointed an Assistant Attorney General (AAG) of OCTF to the position of

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Assistant District Attorney (ADA) in January 2001. The DA and the Governor gave OCTF authority to conduct civil and criminal proceedings related to the investigation. The AAG/ADA appeared before a county grand jury and obtained an indictment against the defendant for allegedly assaulting the complainant for cooperating in the investigation. County court dismissed the indictment because the AAG/ADA was not authorized to present to the grand jury. *See* Criminal Procedure Law 210.35(5).

Holding: Executive Law 70-a(7), under which the OCTF and the AAG/ADA were empowered, was enacted to address complex problems presented by organized, multijurisdictional criminal activity. The authority afforded OCTF must not be interpreted in an unduly restrictive way, but care must be taken that its powers do not grow beyond those bestowed by the Legislature. Separate letters from the Governor and the DA authorized OCTF to take several actions including appear before a county grand jury concerning alleged crimes by named individuals, including the defendant's brother, and their customers, suppliers, co-conspirators, and agents. This clearly met two of the three statutory factors. *See People v Rallo*, 39 NY2d 217, 222. The grand jury proceeding also met the third criterion, that it concern multicounty or interstate conduct. A familial relationship between a named target and a defendant who was not named is not dispositive. The defendant knew her brother was a target of investigation and that the complainant was a potential witness, the brother was named in the letters, the complainant had ostensibly provided assistance in the investigation, and the assault on the complainant was motivated by the complainant's cooperation. This established a sufficiently close nexus to the multijurisdictional criminal activity without giving OCTF too much power. Order reversed, indictment reinstated. (County Ct, Cortland Co [Ames, J]

Appeals and Writs (Remittiturs) **PP; 25(85)**

Guilty Pleas (Withdrawal) **GYP; 181(65)**

People v Toms, __ AD2d__, 767 NYS2d 692 (3rd Dept 2003)

Holding: After the defendant entered a negotiated guilty plea, he was ordered to pay restitution although no reference to that had been included in the plea agreement. On appeal, the sentences were vacated and the matter remitted for further proceedings because the agreed-upon sentence had been enhanced without the defendant being advised of his right to either withdraw the plea or accept the enhancement. *People v Toms*, 293 AD2d 768, 739 NYS2d 652. Upon remittal, the defendant was sentenced to the originally-agreed-upon terms of imprisonment. There was no order of restitution. This was not inconsistent with the remittal order. Only if county court insisted on imposing restitution would the defendant be entitled to an opportunity to withdraw his plea. Judgment affirmed. (County Ct, Saratoga Co [Scarano, Jr., J])

Counsel (Competence/Effective Assistance/Adequacy) **COU; 95(15)**

Witnesses (Confrontation of Witnesses) (Cross Examination) **WIT; 390(7) (11)**

People v Plaisted, __AD2d __, 767 NYS2d 518 (3rd Dept 2003)

Holding: The complainant's testimony that the defendant forced her to engage in sex acts after they left a bar was legally sufficient to establish sexual intercourse and deviate sexual intercourse by forcible compulsion. Nor was the verdict against the weight of the evidence when the record is examined in a neutral light and deference given to the jury's opportunity to hear and see the witnesses. *See* CPL 470.15(5). The court did not err in limiting cross-examination of the complainant with regard to theft, giving a false statement to police, and making threats. Counsel failed to show that the absence of convictions for these alleged crimes was due to other than dismissal or acquittal. *People v Stabell*, 270 AD2d 894 *lv den* 95 NY2d 804. The court did not categorically bar cross-examination of the complainant about prior bad acts, and counsel did so at length. Any probative value of unsworn statements by the complainant on the Jerry Springer show before the charged incident was outweighed by the danger that this evidence would confuse the jury. *See People v Davis*, 43 NY2d 17, 27. Defense counsel was allowed to elicit from the complainant that she had been treated for mental illness; any added lay testimony about her mental health would have lacked probative value. Counsel was not ineffective for conceding that the defendant and the complainant had sex, where the defense's strongest evidence, *ie* the complainant's delay in reporting and continued dealings with the defendant, including residing in his home until she entered a substance abuse program, supported a claim of consent. Counsel made cogent presentations in opening and closing, vigorously cross-examined witnesses, called witnesses, and made appropriate motions and objections. Judgment affirmed. (County Ct, St. Lawrence Co [Nicandri, J])

Sentencing (Appellate Review) (Presentence Investigation and Report) **SEN; 345(8) (65)**

People v Thomas, __ AD2d __, 768 NYS2d 519 (3rd Dept 2003)

The defendant, already indicted for fourth-degree

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grand larceny and under investigation for fraud, was arrested and indicted on drug charges. He agreed to plead guilty to a reduced drug charge, the pending grand larceny charge, and to another undetermined charge from the pending investigation. He was to receive concurrent sentences. After pleading guilty per the agreement, he was sentenced on all but the fourth-degree grand larceny charge (due to the absence of the special prosecutor) in accordance with the plea and ordered to pay $92,000 restitution.

Holding: The defendant's plea waived any challenge to the grand jury's indictment based on allegedly uncorroborated accomplice testimony and claims of ineffective assistance of counsel that did not undermine the voluntariness of his pleas. The claim that allegedly unreliable information (most notably a hearsay reference to the defendant threatening a young accomplice) should be redacted from the presentence report is rejected. The defendant seeks "to avoid future prejudice in parole and other discretionary determinations." The purpose of a presentence report is to give a sentencing court the best available information on which to render an individualized sentence. *People v Perry*, 36 NY2d 114, 120. While the court agreed in its discretion not to consider the challenged material, "we see no basis for physical redaction of the report." As to the sentence, there was no abuse of discretion or extraordinary circumstances warranting a modification. Judgment affirmed. (County Ct, Chemung Co [Buckley, J])

Accusatory Instruments (General) **ACI; 11(10)**

Harassment (Elements) **HRS; 184(10)**

People v Polanco, No. 14170, 3rd Dept, 12/24/03

Holding: The defendant pled guilty to aggravated harassment of a prison employee by an inmate under Penal Law 240.32. He was charged with expelling semen into an envelope that he sent to a correctional facility employee. The statute requires that the person charged must have caused or attempted to cause an employee to come into contact with specified biological material, including semen, "by throwing, tossing or expelling" the material. Thus, the legislature did not include in the statute efforts to expose prison employees to bodily materials "by any means an inmate could contrive." While the defendant did expel semen, his act of mailing the envelope containing such semen was his attempt to cause contact. Mailing is not "throwing, tossing or expelling." The acts alleged in the indictment did not constitute the crime charged, making the indictment jurisdictionally defective. Judgment reversed, indictment dismissed. (County Ct, Washington Co [Hemmett, Jr., J])

Probation and Conditional Discharge (Conditions and Terms) (Revocation) **PRO; 305(5) (30)**

People v York, No. 14451, 3rd Dept, 12/24/03

A week after being sentenced to probation, the defendant tested positive for drug use. A petition charging that he had violated the special probation condition requiring him to avoid the use of drugs was filed. An amended petition was filed charging, among other things, possession of cocaine in violation of a special condition that the defendant not violate any law. After a hearing limited to the first petition, the court determined that the defendant had violated probation and sentenced him to a prison term of one to four years.

Holding: While the court revoked the defendant's probation pursuant to Criminal Procedure Law 410.10(2), which makes commission of a new crime grounds for probation revocation, the record shows that violation of the special condition with regard to use of drugs was established by a preponderance of the evidence. *See* CPL 410.70(3); *People v Van Valkenburgh*, 304 AD2d 986. While the special condition was poorly drafted—"[a]void the use of all illegal drugs in medication which have not been specifically prescribed for [him] by a [p]hysician"—it makes sufficiently clear that illegal drugs is prohibited if not prescribed by a doctor. The defendant received adequate notice that using cocaine would be a violation. *See People v Tucker*, 302 AD2d 752, 753. No sentence modification is warranted. Judgment affirmed. (County Ct, Madison Co [McDermott, J])

Sentencing (General) **SEN; 345(37)**

People v Murray, No. 14801, 3rd Dept, 12/24/03

Holding: During the plea allocution in March 2000, the defendant was told he would receive a determinate sentence of two years. He was not told about the three-year period of post-release supervision imposed by Penal Law 70.45. After the court stated that the sentence being imposed included post-release supervision, the defendant signed a waiver of the right to appeal. He did not appeal, but in January 2003, he moved to vacate his conviction and withdraw his plea because he was not told about post-release supervision at the time of his plea. The court granted the 440.10 motion. Notwithstanding his waiver, the defendant could have raised the issue on a direct appeal. The record was sufficient for appellate review. *See People v Swansbrough*, 307 AD2d 389 *lv den* 100 NY2d 624. Failure to pursue the issue in an appeal precludes its consideration in this 440 motion. *See* Criminal Procedure Law 440.10(2)(c); *People v Lindsey*, 302 AD2d 128 *lv den* 100 NY2d 583. Order reversed. (County Ct, Cortland Co [Smith, J])

Fourth Department

Appeals and Writs (Judgments and Orders Appealable) **APP; 25(45)**

Sentencing (General) (Resentencing) **SEN; 345(37) (70.5)**

People v Matthews, 306 AD2d 863, 763 NYS2d 385 (4th Dept 2003)

Holding: The court granted a prosecution motion to vacate the defendant's second-felony offender sentence of five years imprisonment and two years post-release supervision. Penal Law 70.45(2) mandates that the post-release supervision imposed for a class D felony (here, second-degree assault under Penal Law 120.05[2]) be five years. The defendant asserts for the first time on appeal that because the court violated the original sentencing promise by resentencing him to the requisite five years of post-release supervision, he should be allowed to withdraw his plea. The question is unpreserved. *See People v Larweth*, __ AD2d __ (3/21/03). Further, the court had said at the plea that a longer post-release supervision period would be imposed if required by law, so the defendant could not have expected finality as to the lesser, illegal period that was imposed. *People v Williams*, 87 NY2d 1014, 1015. Issues concerning the defendant's original sentencing, including the denial of his motion to withdraw his plea at that point and the failure to file a second felony offender statement, are not reviewable on appeal from the resentence. *See* Criminal Procedure Law 450.30(3); *see also People v Ferrin*, 197 AD2d 882 *lv den* 82 NY2d 849. Resentence affirmed. (Supreme Ct, Erie Co [Forma, J])

Dismissal (In the Interest of Justice [*Clayton* Hearing]) **DSM; 113(20)**

People v Taylor, 306 AD2d 887, 760 NYS2d 918 (4th Dept 2003)

Holding: "'[T]erminal illness, even in cases where the diagnosis [is] far more certain and far more dire that the speculative prognosis here, will [not] *per se* permit a defendant to evade the consequences of his criminal behavior' (*People v Baghai-Kermani*, 221 AD2d 219, 221 . . .)." The court did not err in denying the defendant's motion to dismiss in the interest of justice under Criminal Procedure Law 210.40(1) based on his medical condition. Judgment affirmed. (Supreme Ct, Erie Co [Pietruszka, J])

Evidence (General) (Hearsay) **EVI; 155(60) (75)**

People v White, 306 AD2d 886, 760 NYS2d 916 (4th Dept 2003)

Holding: The complainant's medical records containing her statements about the incident, and the testimony of a pediatrician and nurse about what the complainant said about the incident, did not impermissibly bolster the complainant's testimony. *See People v Harris*, 151 AD2d 981 *lv den* 74 NY2d 810. Patient statements made to medical personnel relevant to diagnosis and treatment are admissible as an exception to the rule against hearsay. *See People v Dennee,* 291 AD2d 888, 889 *lv den* 98 NY2d 650. Judgment affirmed. (Supreme Ct, Erie Co [Tills, J]

Evidence (Weight) **EVI; 155(135)**

People v Wallace, 306 AD2d 802, 760 NYS2d 702 (4th Dept 2003)

Holding: The evidence upon which the defendant was convicted of first-degree sexual abuse was contrary to experience and self-contradictory. *See People v Garafolo*, 44 AD2d 86, 88. The record shows that the jury failed to accord the evidence the proper weight. *People v Bleakley*, 69 NY2d 490, 495. The complainant, the defendant's grandniece, testified that when the defendant visited the complainant's family home, the defendant put his hand under her dress and fondled her in front of her mother, the defendant's wife, and others. The complainant gave conflicting testimony about her position on the couch and whether she and the defendant were playing "top of the mountain" at the time. The complainant's mother testified similarly, adding that she was angry when she saw the defendant fondle her daughter, but allowed them to continue playing and said nothing to the defendant or his wife, who remained for an hour. The complainant was not taken to a doctor, and a statement was not made to police until six days later. The defendant denied the allegations. His wife corroborated his testimony and denied seeing him commit the alleged acts. The jury deadlocked for two days and sent out many notes, rendering a verdict only after an *Allen* charge. Judgment reversed, indictment dismissed. (County Ct, Genesee Co [Noonan, J])

Dissent: [Scudder, J] The complainant's mother testified that she told the complainant to move when she saw the defendant's hand under the complainant's dress, that the defendant's wife was not in a position to see this, and that the complainant told her mother about the incident, when asked, after the defendant left. The mother took the complainant to the police that day, although a deposition was not taken until six days later. The jury rejected the defendant's version of events. Reversal is not proper just because the reviewing court would hesitate to reach the conclusion drawn by the jury.

Assault (Evidence) **ASS; 45(25)**

Sentencing (Persistent Felony Offender) **SEN; 345(58)**

People v Goico, Jr., 306 AD2d 828, 761 NYS2d 562 (4th Dept 2003)

Holding: Legally sufficient evidence supported the

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defendant's conviction on two counts of second-degree assault under Penal Law 120.05(3). The two State Police officers testified that the defendant tried to flee as they arrested him, preventing performance of their lawful duty. The officers' injuries were not extensive, but sufficient to present a jury question as to whether "physical injury" occurred within the meaning of Penal Law 10.00(9). *See People v Gray,* 189 AD2d 922, 923 *lv den* 81 NY2d 886. The jury was entitled to credit the officers' statements that they suffered "substantial pain."

The circumstances of the defendant's criminal conduct "are not such that extended incarceration and lifetime supervision" would best serve the public interest. *See* Criminal Procedure Law 400.20(1). Judgment modified in the interest of justice, sentence as persistent felony offender on the assault counts vacated, matter remitted for resentencing as a nonpersistent felony offender on those counts. (County Ct, Herkimer Co [Kirk, J])

Sentencing (General) **SEN; 345(37)**

People v Minter, 306 AD2d 801, 760 NYS2d 806 (4th Dept 2003)

Holding: The court denied the defendant's CPL article 440 motion to vacate the judgment for the wrong reasons. The defendant sought to challenge the voluntariness of his guilty plea based on the court's failure to advise him of the mandatory period of post-release supervision that would follow his incarceration. That issue had not been preserved and was rejected on direct appeal. The court should have denied the 440 motion because the defendant's direct appeal was pending at the time of the motion and there was a sufficient record to permit adequate review on appeal. The court's reliance on *People v Bloom* (269 AD2d 838 *lv den* 94 NY2d 945) was misplaced. *Bloom* held that there is no need for the sentencing court to specify a period of post-release supervision where a five-year period is mandated unless a shorter period is set by the court. Penal Law 70.45(2). Order affirmed. (County Ct, Monroe Co [Connell, J])

Escape (Elements) (General) **ESC; 145(15) (21)**

Search and Seizure (Consent [Third Persons, by]) (Standing to Move to Suppress) **SEA; 335(20[p]) (70)**

People v D'Antuono, 306 AD2d 890, 762 NYS2d 198 (4th Dept 2003)

Holding: The defendant lost his reasonable expectation of privacy in the hotel room he had occupied the previous night where the rental period expired before the room was searched. The hotel's general manager had the authority to consent to the search. *See People v Rodriguez*, 104 AD2d 832, 833-834. The search yielded probable cause to arrest the defendant for first-degree robbery, so the defendant was in custody for purposes of the escape charge. *See People v Maldonado,* 86 NY2d 631, 634. Judgment affirmed. (County Ct, Niagara Co [Noonan, J])

Sentencing (General) **SEN; 345(37)**

Sex Offenses (Sentencing) **SEX; 350(25)**

People v Petrusch, 306 AD2d 889, 760 NYS2d 921 (4th Dept 2003)

Holding: The court erred in granting an order of protection as to the defendant's wife as part of a judgment convicting the defendant of third-degree rape for having sexual relations with a 16-year-old. The defendant was not convicted of any crime or violation involving his spouse or any member of his family or household as set out in Criminal Procedure Law 530.12(5). Judgment modified, order of protection vacated. (County Ct, Oswego Co [Hafner, Jr., J])

Accusatory Instruments (Variance of Proof) **ACI; 11(20)**

Evidence (General) (Sufficiency) **EVI 155(60) (130)**

People v Burnett, 306 AD2d 947, 760 NYS2d 800 (4th Dept 2003)

Holding: The defendant was convicted by a jury of several charges including three counts of second-degree promoting prison contraband under Penal Law 205.20(1). These counts, alleged to have occurred '"on or about a day in the month of October 2000,'" were never linked sequentially or otherwise to the proof. There was testimony about more than three incidents of promoting prison contraband during the specified time. Those counts must be reversed. *See People v Shaughnessy*, 286 AD2d 856, 857 *lv den* 97 NY2d 688. The charge of official misconduct must also be reversed for insufficient evidence, because there was a variance between the proof and the indictment or bill of particulars, and the proof was directed exclusively to a new theory rather than the one charged in the indictment. *People v Smith*, 161 AD2d 1160, 1161 *lv den* 76 NY2d 865. These unpreserved contentions are reviewed because there is a fundamental right to be tried and convicted of only crimes and upon only theories charged in the indictment. *People v Rubin*, 101 AD2d 71, 76 *lv den* 63 NY2d 711. Denial of the motion to suppress statements made to an investigator is moot; the statements were not introduced. The testimony of a second Department of Corrections investigator who interviewed inmates did not constitute

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improper bolstering; the testimony related to the investigator's observation of the inmates' demeanor, not their statements. *See People v Williams*, 216 AD2d 211, 212 *lv den* 87 NY2d 920, 926. Judgment modified, and as modified, affirmed. (County Ct, Seneca Co [Bender, J])

Parole (Board/Division of Parole) (General) **PRL; 276(3) (10)**

Matter of Blanche v Travis, 306 AD2d 888, 760 NYS2d 919 (4th Dept 2003)

Holding: The respondent correctly concedes that the Board of Parole (Parole) "erred in rescinding petitioner's open parole release date in reliance upon findings of guilt with respect to two charges in a prison disciplinary proceeding that were reversed and expunged on administrative review." While there was substantial evidence of the petitioner's guilt of one prison rule violation (*see Matter of McHaney v Albaugh*, 280 AD2d 963 *lv den* 96 NY2d 716), the conduct underlying the two reversed and expunged charges should not have been considered. *See Matter of Garrett v Coughlin,* 128 AD2d 210, 212-213. As is also correctly conceded, it is impossible to tell whether Parole would have reached the same determination without considering those charges. Determination annulled, petition granted, matter remitted for a *de novo* hearing before a different panel. Transferred from Supreme Ct, Wyoming Co [Dadd, J].

Sentencing (Second Felony Offender) **SEN; 345(72)**

People v Chandler, 307 AD2d 770, 762 NYS2d 565 (4th Dept 2003)

Holding: While the defendant's waiver of appeal encompassed the contention that the court erroneously believed seven years was the most lenient sentence it could impose, the issue is reviewed as a matter of discretion in the interest of justice. *See* Criminal Procedure Law 470.15(6)(a). The defendant was subject, as a second felony offender, to a determinate sentence for a class C violent felony of at least five and not more than 15 years. Penal Law 70.06(6)(b). Because the predicate felony was a class E nonviolent felony, first-degree criminal contempt, rather than a violent felony, the determinat seven-year sentence imposed was improper. *See* Penal Law 70.04(3)(b) and 215.51. This mistake of law warrants correction. Judgment modified, sentence vacated, matter remitted for resentencing. (County Ct, Erie Co [D'Amico, J])

Forensics (General) **FRN; 173(10)**

Post-Judgment Relief (CPL §440 Motion) **PJR; 289(15)**

People v Jones, 307 AD2d 721, 761 NYS2d 928 (4th Dept 2003)

Holding: The court denied the defendant's CPL 440.30(1-a) motion for forensic DNA testing of evidence from his trial. He sought retesting of a washcloth used by the assailant to clean semen from the first complainant. No DNA was found when the washcloth was tested before trial. The statute does not provide for retesting. In any event, because DNA found on other evidence matched the defendant's DNA, there is no reasonable probability that the verdict would have been favorable to the defendant even if retesting showed the washcloth contained different DNA. *See People v Jones,* 236 AD2d 846, 847-848 *lv den* 90 NY2d 859. Order affirmed. (Supreme Ct, Erie Co [Wolfgang, J])

Probation and Conditional Discharge (Revocation) **PRO; 305(30)**

People v Moye, 307 AD2d 774, 762 NYS2d 859 (4th Dept 2003)

Holding: The defendant admitted violating probation and was sentenced to a three-year determinate sentence on the underlying second-degree burglary charge. Penal Law 110.00, 140.25(2). However, at the time the defendant committed the crime (August 1998), Penal Law 70.00 (former [1]) required imposition of an indeterminate sentence in these circumstances. The minimum must be fixed at one half the maximum term. *See* Penal Law 70.00 (former [3][b] and 70.02 (former [4]). Judgment modified, sentence vacated, matter remitted for resentencing. (Supreme Ct, Erie Co [Tills, J)

Freedom of Information (General) **FOI; 177(20)**

Matter of Pennington v Clark, 307 AD2d 756, 763 NYS2d 191 (4th Dept 2003)

Holding: The petitioner commenced a CPLR article 78 proceeding after his Freedom of Information Law (FOIL) request for photographic reprints was denied. The petition and an order to show cause were denied. The petitioner did exhaust his administrative remedies. He submitted a "Freedom of Information Appeal" when he received no response to his initial request, and received an agreement by respondents to provide photocopies of the requested photographs for a fee. The petitioner clarified that he wanted photographic reprints, receiving a denial of that request a month later. The respondents' failure to tell the petitioner of his right to appeal at the time of the denial (by virtue of the failure to respond to the initial request) negates the claim of failure to exhaust. The second letter is deemed an administrative appeal, with relief

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granted. As to the petitioner's third letter, the respondents failed to respond within the requisite five or ten day limits (five for initial requests, ten for appeals). *See* Public Officers Law 89(3) and 89(4)(a). They also again failed to tell the petitioner of his right to appeal.

The respondents were not required to make photographic reprints, which was the petitioner's preference. *See Dismukes v Department of Interior*, 603 FSupp 760, 763. The Assistant District Attorney did not violate 21 NYCRR 1401.7(b) by acting as both records access officer and appeals officer, as he did not sit in judgment of his own decisions. The prosecutor's office could represent itself in this matter without impropriety. *See Eisenberg v District Attorney of County of Kings*, 847 FSupp 1029, 1032-1033. Judgment affirmed. (Supreme Ct, Erie Co [Flaherty, J])

Search and Seizure (Entries and Trespasses [Knock and Notice Entries]) (Search Warrants [Execution] [Issuance]) **SEA; 335(35[a]) (65[f] [k])**

People v Henderson, 307 AD2d 746, 762 NYS2d 553 (4th Dept 2003)

Holding: The court did not err in issuing a search warrant authorizing nighttime execution even though the warrant application did not request such authorization. A court may make a search warrant executable at any time of the day or night if it is satisfied that grounds exist for so authorizing. CPL 690.40(2). The affidavit here requested no-knock authorization because drugs and implements to administer them could be easily disposed of or destroyed; the showing supports the nighttime search. *See People v Harris*, 47 AD2d 385, 388-389. The indictments '"properly aggregated all the drugs simultaneously found in defendant's constructive possession" and so "were not defective in charging only one count of each possessory offense." *People v Bryan*, 270 AD2d 875 *lv den* 95 NY2d 904. Judgment affirmed. (County Ct, Monroe Co [Connell, J])

Family Court (General) **FAM; 164(20)**

Matter of Vanessa Z., 307 AD2d 755, 761 NYS2d 424 (4th Dept 2003)

The court dismissed a petition to extend foster care placement on the grounds that it was filed late and the petitioner had failed to prove that the child's parents were presently unable to care for the child.

Holding: Where, as here, no good cause is shown for a delay in filing a request to extend placement, the court may dismiss the petition or treat it as a *de novo* neglect petition. *Matter of Changa W.*, 123 AD2d 435, 346. Because the child is over 18, a *de novo* neglect petition is not an option. However, the petition should not have been dismissed. The brief delay in filing did not infringe on parental rights, especially when compared to the potentially adverse impact that termination of placement would have on the child. *See* Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Fam Ct Act 1055, at 268. The petitioner presented testimony that neither parent attended two case review conferences, the father continued to refuse a mental health evaluation and men's group counseling sessions, and the mother refused to participate in counseling, as the child services plan provided. The petitioner established that the best interests of the child would be served by the child's continued placement in foster care. Order reversed, petition granted. (Family Ct, Monroe Co [Kohout, J])

Civil Practice (General) **CVP; 67.3(10)**

Martinetti v Town of New Hartford Police Department, 307 AD2d 735, 763 NYS2d 189 (4th Dept 2003)

Holding: The court erred in granting summary judgment dismissing the cause of action for false arrest. There is an issue of fact whether the warrant was procured by police in reckless disregard for the truth after refusing to consider exculpatory evidence presented by one of the plaintiffs. Summary judgment was properly denied in the cause of action for assault because there is an issue of fact whether the police actions in taking the plaintiff into custody were objectively reasonable, especially where there was no evidence of risk of flight, attempt to resist arrest, or threaten the peace, property, or safely of anyone. *Harvey v Brandt*, 254 AD2d 718, 719. The court erred in dismissing the cause of action pertaining to the training and supervision of the police. The court erred in failing to dismiss the claim for punitive damages, which cannot be assessed against a municipality. *Rekemeyer v Cerone*, 252 AD2d 22, 26. Order modified and as modified, affirmed. (Supreme Ct, Oneida Co [Ringrose, J])

Sex Offenses (Sentencing) **SEX; 350(25)**

People v Carabello, 309 AD2d 1227, 765 NYS2d 724 (4th Dept (2003)

Holding: The petitioner sought to vacate the State Board of Examiners of Sex Offenders (Board) determination that the petitioner must register as a sex offender in New York based on a Florida conviction for lewd or lascivious exhibition that required him to register in Florida. He asserted that if he had committed the Florida acts in New York he would not have to register, and that requiring him to do so violated his state and federal constitutional rights to equal protection. The court denied his peti-

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tion and assigned him a risk level of one. The court lacked subject matter jurisdiction, which may properly be raised for the first time on appeal. *See Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718. The Board is the agency empowered to determine whether one must register as a sex offender. *See* Correction Law 168-k(2). The court is limited to determining risk level and whether a defendant is a sexual predator. The agency determination is not properly raised in the court proceeding on risk level, but should have been challenged through a CPLR article 78 proceeding. *See Matter of Mandel*, 293 AD2d 750 *app dismd* 98 NY2d 727. The facial validity of the statute should be challenged in a declaratory judgment action. *See Stahlbrodt v Commissioner of Taxation & Fin. Of State of N.Y.*, 171 Misc2d 571, 575. Order modified, petition dismissed. (Supreme Ct, Erie Co [Wolfgang, J])

Driving While Intoxicated (General) **DWI; 130(17)**

Sentencing (Fines) **SEN; 345(36)**

People v Smith, 309 AD2d 1282, 764 NYS2d 732 (4th Dept (2003)

Holding: The court erred by imposing a fine of $1,000 on the felony count of driving while intoxicated. The statute provides that a person convicted of DWI as a class D felony shall be punished by a fine of not less than $2,000 or more than $10,000 or by imprisonment "'or by both *such* fine and imprisonment' (emphasis added)." If the court chose to impose a fine the fine had to be a minimum of $2,000. Judgment in appeal No. 2 modified, sentence on felony DWI vacated, and remitted for resentencing on that count. (County Ct, Erie Co [Drury, J])

Sentencing (General) **SEN; 345(37)**

People v Stanley, 309 AD2d 1254, 767 NYS2d 712 (4th Dept 2003)

Holding: The defendant's waiver of appeal did not encompass his contention that the court was unaware of the extent of its discretion as to post-release supervision. While a court need not specify the period of such supervision (*see People v Bloom*, 269 AD2d 838 *lv den* 94 NY2d 945), a court may impose, for a class C felony, a period less than the statutory default, though not less than two and one-half years. Penal Law 70.45(2). The court here said it was not its place to examine the defendant's request for a period of less than five years. This indicated the court's mistaken belief that it could not exercise discretion as to a shorter post-release supervision period. *People v John*, 288 AD2d 848, 850 *lv den* 97 NY2d 705. Judgment modified, sentence vacated, matter remitted for resentencing. (County Ct, Erie Co [DiTullio, J])

Juveniles (Abuse) (Neglect) **JUV; 230(3) (80)**

Matter of A.R., 309 AD2d 1153, 764 NYS2d 746 (4th Dept 2003)

Holding: At proceedings brought by the petitioner alleging that the respondents sexually abused and neglected the respondent mother's three daughters, the court found that the respondent boyfriend had sexually abused the oldest child and neglected the younger two, and that the respondent mother had neglected the oldest child. Other allegations were dismissed. The court did not err in taking judicial notice of a prior PINS adjudication involving the oldest child. *See* CPLR 4511; Family Court Act 164. If this was error, it was harmless. A finding of derivative abuse of the younger children by the respondent boyfriend is appropriate. *See Matter of V. Children*, 274 AD2d 399. The respondent boyfriend, who engaged in escalating sexual activity with the oldest child, entered the bedroom of the middle child at night and stroked her back and stomach, and told the oldest child outside the middle child's bedroom that "it didn't go well" after saying before entering the room that he was going to try and engage the middle child in sexual activity. The court should also have found that the respondent mother neglected the younger children as well as the oldest. She refused to believe an investigator who told her about the older two children's disclosures and allowed the respondent boyfriend back into the home after a child protective services worker said the boyfriend should have no contact with the younger children. The petitioner established by a preponderance of the evidence that the respondent mother knew or should have known her children were in imminent danger of being sexually abused. She demonstrated a fundamental defect in understanding of parenthood and created an atmosphere detrimental to the well being of the younger children. Order modified, and as modified, affirmed. *Matter of Jennifer G.* [appeal No. 2], 261 AD2d 823. (Family Ct, Monroe Co [Kohout, J])

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) **SEA; 335(15[k])**

People v Washburn, 309 AD2d 1270, 765 NYS2d 76 (4th Dept 2003)

Holding: The court erred in finding that the police were justified in stopping the defendant's motor vehicle to request information. The Court of Appeals has made clear that one of three things must be shown for a stop to be legal. *People v Sobotker*, 43 NY2d 559, 563. These are: that the stop was a routine nonpretextual traffic check,

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that police had at least reasonable suspicion that a crime was being, had been, or was about to be committed by a vehicle's occupant(s), or probable cause to believe the driver had committed a traffic violation. No routine stop or probable cause was asserted. The court found that reasonable suspicion did not exist until after the stop. The motion to suppress resulting evidence, which was the only evidence supporting the charge, should have been granted. Judgment reversed, guilty plea vacated, indictment dismissed. (County Ct, Monroe Co [Marks, J])

Competency to Stand Trial (General) CST; 69.4(10)

Grand Jury (General) (Witnesses) GRJ; 180(3) (15)

People v Bones, 309 AD2d 1238, 764 NYS2d 743 (4th Dept 2003)

The defendant was convicted by a jury of first-degree rape and other charges.

Holding: Reversal is not required based on the court's refusal to assign new counsel based on conflict of interest where it became necessary for defense counsel to question the propriety of decisions made by a fellow public defender about the defendant's grand jury appearance. The defendant's attorney "'"competently and vigorously examined his fellow public defender concerning the events that led up to the defendant's testimony before the grand jury, and thus it cannot be said that "'the conduct of his defense was in fact affected by the operation of the conflict of interest"' (*[People v] Ortiz*, 76 NY2d [652] at 657)." A physician testified that the defendant was a paranoid schizophrenic with borderline mental retardation, that the physician's opinion as to competency at the time of the defendant's grand jury testimony would be highly speculative, and that a patient with the defendant's afflictions could change from competent to incompetent quickly. This equivocal testimony failed to rebut the presumption of competency. *See People v Gelikkaya*, 84 NY2d 456, 459. The court properly denied the defense motion to suppress the defendant's grand jury testimony, which was challenged on the basis that he was incompetent to waive immunity and testify. Judgment affirmed. (County Ct, Niagara Co [Sperrazza, J])

Family Ct (General) FAM; 164(20)

Juveniles (Abuse) (Neglect) JUV; 230(3) (80)

Matter of Yorimar K.-M., 309 AD2d 1148, 765 NYS2d 283 (4th Dept 2003)

The respondent was found to have abused one daughter and neglected another.

Holding: The defendant contended that the petitioner failed to show that the expert validation testimony offered was reliable enough to corroborate the abuse complainant's unsworn out-of-court statements. This issue is unpreserved and without merit. The expert did not say the complainant had been abused, but did say that the complainant's behavior was consistent with that of children who have been sexually abused. *See Matter of Shawn P.*, 266 AD2d 907 *lv den* 94 NY2d 760. The decision in *Matter of Tomas E. [Appeal No. 2]* (295 AD2d 1015) does not require a different finding. There was ample corroboration even without the validation testimony, where a school psychologist and a child protective services caseworker each opined without objection that the complainant was abused and truthful in her statements. Repetition of a statement is not corroboration, but consistency in out-of-court statements of abuse enhances the reliability of such statements. *Matter of Rebecca S.*, 269 AD2d 833. Issues raised by the Law Guardian for the neglected child are beyond review where the Law Guardian failed to file a notice of appeal. The issue purportedly adopted by the respondent is not preserved because it is raised for the first time in the respondent's reply brief. *See Greene v Xerox Corp.*, 244 AD2d 877, 878 *lv den* 91 NY2d 809. Order affirmed. (Family Ct, Onondaga Co [Klim, J])

Driving While Intoxicated (General) DWI; 130(17)

Sentencing (Persistent Felony Offender) SEN; 345(58)

People v Beckwith, 309 AD2d 1253, 767 NYS2d 713 (4th Dept 2003)

The defendant was convicted by a jury of two counts of felony driving while intoxicated, pursuant to Vehicle and Traffic Law 1192(2), (3) and 1193 (1)(c)(ii). He was sentenced as a persistent felony offender (*see* Penal Law 70.10[a]) to concurrent terms of 16 years to life on each count.

Holding: The imposition of persistent felony offender status did not constitute cruel and unusual punishment. *See People v Turner*, 234 AD2d 704, 707. It did not violate the defendant's right to equal protection. *See People v Bowers*, 201 AD2d 830 *lv den* 83 NY2d 909. As a matter of discretion in the interest of justice the finding of persistent felony offender is vacated and the sentence reduced to indeterminate terms of two and one-third to 7 years on each count. Judgment modified and as modified, affirmed. (County Ct, Ontario Co [Harvey, J])

Harassment (Elements) (General) HRS; 184(10) (17)

Jails (General) (Guards) (JAL) 212(10) (15)

People v Pysadee, 767 NYS2d 544 (4th Dept 2003)

Holding: The cellblock in the City of Salamanca

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Police Station was a "local correctional facility" or "correctional facility" within the meaning of Penal Law 240.32, prohibiting aggravated harassment of an employee by an inmate. The definition of "local correctional facility" set out in Correction Law 40(2) includes a "police station jail." "Correctional facility" is defined by Correction Law 40(3) as including "any local correctional facility, or any place used, pursuant to a contract with the state or municipality, for the detention of persons charged with or convicted of a crime." Judgment affirmed. (County Ct, Cattaraugus Co [Himelein, J])

Accomplices (Corroboration) **ACC; 10(20)**

People v Johnson, 767 NYS2d 548 (4th Dept 2003)

Holding: The evidence offered to corroborate the testimony of an alleged accomplice failed to establish anything more than the defendant's mere presence at the scene of the accomplice's criminal activity. This fails to satisfy the corroboration requirements of Criminal Procedure Law 60.22. The accomplice's guilty plea to third-degree possession of marihuana included a requirement that she testify against the defendant. She testified that at the defendant's request she carried marihuana belonging to him by hiding it under her coat as they left her residence, got in his car, and left. She tossed the marihuana under the car when police approached. The only evidence to corroborate this story was the officer's statement that when he was preparing to execute a search warrant at the accomplice's residence, he saw her leave with the defendant and when he and another police officer stopped the car and talked to the defendant, the accomplice opened the passenger door and dropped the marihuana. This is insufficient to corroborate the accomplice's testimony that the defendant was a culpable participant in the possession of the marihuana, "'which did not occur 'in an open manner so that the fact of criminality must [have been] know to all present.'" *People v Wasserman*, 46 AD2d 915, 916. Judgment reversed, indictment dismissed. (County Ct, Erie Co [DiTullio, J])

Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches]) (General) **SEA; 335(15[p]) (42)**

People v Smith, 767 NYS2d 327 (4th Dept 2003)

Holding: While the lack of a license plate generally justifies the stop of a vehicle for violation of Vehicle and Traffic Law 402, the police officer here realized upon stopping the defendant that the vehicle had a rear Florida plate and no front plate was required. The officer realized his mistake before approaching the defendant. *See People v Perez*, 149 AD2d 344, 345. A mistake of fact, but not of law, may justify a search and seizure. *See People v Gonzalez*, 88 NY2d 289, 295. The officer's observations after the unlawful stop were properly suppressed. *See People v Brooks*, 266 AD2d 864. Order affirmed. (Supreme Ct, Erie Co [Buscaglia, J])

Article 78 Proceedings (General) **ART; 41(10)**

Evidence (Hearsay) **EVI; 155(75)**

Matter of Hoch v New York State Department of Health, 768 NYS2d 53 (4th Dept 2003)

Holding: The Supreme Court should have transferred this matter initially. The appeal is considered as a matter *de novo.* Hearsay can be the basis of an administrative determination and can constitute the "substantial evidence" required if sufficiently relevant and probative. Under the circumstances here, including total lack of corroborative evidence, the determination that the petitioner violated Public Health Law 1399-cc (2) by selling tobacco to a person under 18 is not supported by substantial evidence. The investigator who saw the sale of cigarettes to a "student aide" employed by the Department of Health (DOH) was asked how the aide's age was verified. The investigator said that aides had to present documentary evidence verifying their ages in order to be hired. "The investigator did not testify that he, personally, verified the aide's age. The DOH refused to present the documentary evidence allegedly provided by the aide, nor did the DOH present any testimony from the aide." Judgment vacated, determination annulled, petition granted. (Supreme Ct, Lewis Co [McGuire, J])

Assault (Aggravated) **ASS; 45(3)**

Contempt (Elements) (General) **CNT; 85(7) (8)**

People v Huck, 767 NYS2d 555 (4th Dept 2003)

Holding: The defendant's assault conviction arose from an incident in the complainant's home. The defendant, the complainant's boyfriend, violated an order of protection by being there. The defendant correctly contended in his *pro se* supplemental brief that aggravated criminal contempt could not serve as the predicate for a second-degree assault conviction under Penal Law 120.05(2). This issue was not preserved, but is reviewed as a matter of discretion in the interest of justice. Aggravated criminal contempt requires that during a violation of an order of protection, the defendant intentionally or recklessly causes physical injury to the person for whose protection the order was issued. Penal Law 215.52. Second-degree assault requires that physical injury be caused during and in furtherance of the commission of a felony.

Fourth Department *continued*

Penal Law 120.05(6). If aggravated criminal contempt could serve as the predicate for second-degree assault, every aggravated criminal contempt would also constitute second-degree assault. The legislature intended to raise third-degree assaults from class A misdemeanors to class D felonies when committed against someone for whom an order of protection was issued. The legislature did not intend to elevate such conduct to class D violent felonies, which second-degree assault is. *See* Penal Law 70.02(1)(c). Judgment modified, second-degree assault vacated and dismissed. (Supreme Ct, Monroe Co [Affronti, J])

Sentencing (Resentencing) **SEN; 345(70.5)**

People v Irons, 767 NYS2d 721 (4th Dept 2003)

Holding: After the defendant was sentenced pursuant to a plea bargain to a split sentence of six months incarceration and five years probation, she was permitted to remain free for an additional week. She failed to surrender herself on the date specified, and a warrant issued. When she was brought into court, she and her attorney told the court that the defendant had tried to surrender herself on the specified date and date following, but was denied admittance at the jail for want of an order of commitment. The court "did not 'dispute'" this explanation, but *sua sponte* vacated the sentence and imposed a definite sentence of one year. This summary rejection of a plausible, exculpatory explanation deprived the defendant of her right to dispute the single aggravating factor influencing the increased punishment. *People v Banks*, 161 AD2d 957, 958. The defendant was entitled to a summary hearing at a presentence conference or other fair means. Judgment modified, resentence vacated, matter remitted for resentencing before a different justice. (Supreme Ct, Monroe Co [Affronti, J])

Discovery (*Brady* Material and Exculpatory Information) **DSC; 110(7)**

People v Valentin, 767 NYS2d 343 (4th Dept 2003)

Holding: The prosecution's failure to disclose prior convictions of the sole eyewitness violated the obligations set out in *Brady v Maryland* (373 US 83 [1963]). Material evidence, including a criminal record, that impeaches the credibility of a witness whose testimony may be determinative of guilt or innocence, constitutes *Brady* material. That the prosecutor lacked contemporaneous actual knowledge of the eyewitness's convictions as a result of the prosecutor's self-professed practice of not checking such matters is not determinative. The witness's record was readily available to the prosecutor and known to others in his office who had recently prosecuted the witness. *See People v Pressley*, 234 AD2d 954 [appeal No. 2] *affd* 91 NY2d 825. However, there was no request for the material in question, and no reasonable probability that disclosure would have led to a different result. Judgment affirmed. (County Ct, Monroe Co [Geraci, Jr., J])

Evidence (Sufficiency) **EVI; 155(130)**

Narcotics (Possession) **NAR; 265(57)**

People v Finch, 767 NYS2d 543 (4th Dept 2003)

Holding: The court erred by denying the defendant's motion to dismiss the indictment because the evidence at trial was insufficient. Police executing a search warrant found a plastic bag with a golf-ball-sized rock of crack cocaine on the floor of a trailer bathroom. The defendant and another were in the bathroom when police entered the trailer, and neither were seen possessing the cocaine. It was discovered after both were told to lie down, the defendant had been handcuffed and pat-searched, and the other had been led out of the room. The defendant's presence in the room where the drugs were found was insufficient alone to establish his possession of them. *See Matter of Dallas L.*, 183 AD2d 897, 898-899. He did not live in the trailer or exercise dominion and control over any part of it. *See People v Butts*, 177 AD2d 782, 784. The cocaine was found in a location equally accessible to another. Judgment reversed, indictment dismissed. (County Ct, Oneida Co [Dwyer, J])

Sentencing (Determinate Sentencing) (General) **SEN; 345(30) (37)**

People v Endresz, Jr., 767 NYS2d 732 (4th Dept 2003)

Holding: The defendant was convicted of second-degree assault and resisting arrest. The court wrongly believed that a determinate sentence was mandatory for second-degree assault. While authorized by Penal Law 70.02(2)(b); (3)(c), it is not required. Some imprisonment is mandated (*see* Penal Law 60.05(5) but a definite term of a year or less, or an intermittent term, is also authorized. *See People v Housman*, 291 AD2d 665, 666 *lv den* 98 NY2d 638. A split sentence of prison and probation is also authorized. Penal Law 60.01(2)(d). Judgment modified, sentence on count three vacated, matter remitted for resentencing on that count. (County Ct, Oswego Co [Hafner, Jr., J])

Accusatory Instruments (Amendment) **ACI; 11(5)**

Admissions (Evidence) **ADM; 15(15)**

People v Taplin, Jr., 767 NYS2d 5 (4th Dept 2003)

Holding: The court erred by allowing the prosecution

Fourth Department *continued*

to amend the indictment at trial to allege that the defendant committed third-degree sodomy by having penis-to-anus contact with the complainant. Such amendment changed the theory of the prosecution as to the manner in which Penal Law 130.40(2) was violated. *See gen People v Thompson*, 217 AD2d 929, 930. The defendant's statements, recorded during a phone conversation initiated by the complainant as an agent of the police, were recorded with the complainant's consent, and the court used the proper standard in admitting the recording. *See People v Pike*, 254 AD2d 727. The complainant did not make a threat that created a substantial risk of the defendant falsely incriminating himself. *People v Stroman*, 286 AD2d 974, 975 *lv den* 97 NY2d 688. The other issues raised are without merit. Judgment modified, conviction of third-degree sodomy vacated and that count of the indictment dismissed. (County Ct, Oswego Co [Hafner, Jr., J])

Accusatory Instruments (Amendment) (Variance of Proof) **ACI; 11(5)(20)**

Bill of Particulars (General) **BOP; 61(10)**

Rape (Evidence) (General) **RAP; 320(20) (22)**

People v Greaves, 767 NYS2d 530 (4th Dept 2003)

Holding: The first count of the indictment charged that the defendant engaged in sexual intercourse with another by forcible compulsion, constituting first-degree rape. The defendant's demand for a bill of particulars sought clarification of the exact manner in which he was alleged to have forcibly compelled another. The response was that "the defendant did physically threaten the victim indicating that he knew people who would come over and 'take care of the situation' if she did not comply." The defendant objected at trial when the prosecution sought to introduce evidence that the defendant threatened to hit the complainant if she did not stop struggling. The objection was overruled. The prosecution also introduced evidence that the defendant dragged the complainant toward a bedroom, tried to remove her clothes, and pinned her to the bed. The prosecution's presentation of theories different from those set out before trial violated the defendant's right to be tried only on crimes charged in the indictment (*People v Rubin*, 101 AD2d 71, 77 *lv den* 63 NY2d 711) as limited by the bill of particulars. *See gen Matter of Corbin v Hillery*, 74 NY2d 279, 290. The error was exacerbated by the instructions given to the jury. Unlike the facts in *People v Grega* (72 NY2d 489), where only facts of actual physical force were adduced, the error of charging the jury on both physical force and threat of force was not harmless here. The complainant testified to the use of force not set out in the indictment and to an additional threat. Judgment modified, conviction of first-degree rape vacated, and new trial granted on that count. (County Ct, Steuben Co [Bradstreet, J])

Homicide (Manslaughter [Vehicular]) **HMC; 185(30[v])**

Sentencing (Fines) **SEN; 345(36)**

People v Atwood, 768 NYS2d 918 (4th Dept 2003)

Holding: The defendant was convicted by a jury of two counts of second-degree vehicular manslaughter and other offenses. He was sentenced to imprisonment and $5,000 fines on each vehicular manslaughter count. Both counts were committed through a single act. Imposition of two fines was improper. *See* Penal Law 80.15; *People v Mack*, 273 AD2d 939 *lv den* 95 NY2d 966. Judgment modified, fine imposed on the second count of vehicular manslaughter vacated. (County Ct, Cattaraugus Co [Himelein, J])

News Media (General) **NEW; 269(10)**

People v Nance, 770 NYS2d 524 (4th Dept 2003)

Holding: "Although County Court was without authority to allow two televisions stations to videotape or broadcast the trial (*see Matter of Santiago v Bristol*, 273 AD2d 813, 814, *appeal dismissed* 95 NY2d 847, *lv denied* 95 NY2d 848; *see also* Civil Rights Law § 52; 22 NYCRR 29.1[a]), we cannot conclude that defendant was thereby deprived of a fair trial absent a showing of actual prejudice (*see Chandler v Florida*, 449 US 560, 581-582 [1981]; *see also People v Burdo*, 256 AD2d 737, 738-379). Defendant has failed 'to show that the media's coverage of his case * * * compromised the ability of the jury to judge him fairly' or 'had an adverse impact on the trial participants sufficient to constitute a denial of due process' (*Chandler*, 449 US at 581)." Judgment affirmed. (County Ct, Erie Co [DiTullio, J])

Grand Jury (Procedure) **GRJ; 180(5)**

Witnesses (Defendant as Witness) **WIT; 390(12)**

People v Pennick, 768 NYS2d 886 (4th Dept 2003)

Holding: Keeping the defendant in the presence of a deputy sheriff and handcuffed during his grand jury testimony without a judicial determination and articulation on the record of a reasonable need to do so was error. *See People v Felder* [appeal No. 2], 201 AD2d 884, 885 *lv den* 83 NY2d 871. However, the prosecutor's cautionary instructions to the grand jurors dispelled any possible prejudice. *See People v Neubauer*, 296 AD2d 557 *lv den* 98 NY2d 731. The defendant failed to meet his burden of showing defects that impaired the integrity of the grand jury proceeding giving rise to the possibility of prejudice. *People v Santmyer*, 255 AD2d 871, 871-872 *lv den* 93 NY2d 902.

Fourth Department *continued*

Judgment affirmed. (County Ct, Erie Co [Pietruszka, J])

Impeachment (General) **IMP; 192(15)**

People v Sanders, 768 NYS2d 900 (4th Dept 2003)

Holding: A party may impeach its own witness if that witness gives testimony on a material issue that tends to disprove the position of the party (*People v Maerling*, 64 NY2d 134, 141), but only where the testimony to be impeached was elicited during direct examination by the party seeking to impeach its own witness. *People v Tirado*, 203 AD2d 309, 309-310 *lv den* 83 NY2d 915. The scope of defense counsel's cross-examination did not exceed the scope of direct so that the witness was transformed into a defense witness. *Cf People v Dolan*, 172 AD2d 68, 75-76 *lv den* 79 NY2d 946. In a criminal case, any relevant proposition may be proven through cross-examination regardless of the scope of direct. *People v Kennedy*, 70 AD2d 181, 186. Defense counsel elicited relevant information about the nature of the relationship between the defendant and the complainant, and the actions of the complainant after the alleged rape. The testimony sought to be impeached was elicited on cross-examination, and impeachment on redirect was improper. *See People v Fuller*, 66 AD2d 27, 36-37 *affd* 50 NY2d 628. The evidence of guilt was not overwhelming; the error cannot be said to be harmless. Judgment reversed. (County Ct, Erie Co [D'Amico, J])

Forgery (Elements) (Evidence) **FOR; 175(10) (15)**

Lesser and Included Offenses (Instructions) **LOF; 240(10)**

People v Gause, 770 NYS2d 531 (4th Dept 2003)

Holding: The defendant used shipping labels while at work as a Staples shipping clerk to send eight packages, containing items that he had not purchased, with a total value of $400 to $500, to his home. He was convicted by a jury of one count of petit larceny and eight counts of second-degree forgery. The court erred by denying the defendant's request for a jury charge on the lesser-included offense of third-degree forgery. There is an element in second-degree forgery (Penal Law 170.10[1]) that is not present in third-degree forgery (Penal Law 170.05), *ie* that the writing in question must affect a legal right, interest, obligation, or status. As the defendant contended, a shipping label might be viewed as directing delivery of an item without affecting the legal right thereto. Judgment modified, convictions on counts one through eight reversed and vacated, new trial ordered on those counts. (County Ct, Monroe Co [Connell, J])

Accomplices (Instructions) **ACC; 10(25)**

Instructions to Jury (General) (Witnesses) **ISJ; 205(35) (55)**

People v Prude [appeal No. 1], 769 NYS2d 680 (4th Dept 2003)

Holding: The defendant was convicted of crimes arising from four separate incidents. The court erred in failing to submit to the jury the question of whether a witness to one incident was an accomplice. The witness admitted waiting in a stolen vehicle and watching commission of the robbery, then driving the defendant from the scene. This is not a case where the witness learned of the crime after it was committed, as occurred in *People v Brazeau* (162 AD2d 979, 980 *lv den* 76 NY2d 891). There is a reasonable view of the evidence that would support a finding that the witness was a participant in the charged offense. *See* Criminal Procedure Law 60.22(2)(a); *People v Basch*, 36 NY2d 154, 156-157. The requested instruction should have been given. *See People v Cody*, 190 AD2d 684, 684-685 *lv den* 81 NY2d 969. Judgment modified, two counts of first-degree robbery reversed and vacated, new trial granted on those counts. (County Ct, Monroe Co [Marks, J])

Appeals and Writs (Judgments and Orders Appealable) **APP; 25(45)**

Grand Jury (Witnesses) **GRJ; 180(15)**

Misconduct (Prosecution) **MIS; 250(15)**

People v Prude [appeal No. 2], 768 NYS2d 912 (4th Dept 2003)

Holding: A witness at the defendant's murder trial had been granted partial immunity for his grand jury testimony. The defendant moved to vacate his conviction because the prosecution failed to disclose this fact and affirmatively misrepresented it to the jury. The court properly denied the motion because sufficient facts appear on the record to have permitted review of the contention on direct appeal. *See* Criminal Procedure Law 440.10(2)(b). The defendant claimed not to know about the alleged immunity agreement until years after his trial, when he got a copy of the same witness's testimony at a separate co-defendant's trial. However, the defendant and that co-defendant were jointly indicted after the witness testified at a single grand jury proceeding. "Those minutes would confirm the nature of the immunity that the witness received, allowing for review of defendant's present contention on direct appeal." Judgment affirmed. (County Ct, Monroe Co [Marks, J])

Misconduct (Prosecution) **MIS; 250(15)**

Fourth Department *continued*

People v Hendricks, 769 NYS2d 432 (4th Dept 2003)

Holding: The prosecution disclosed in discovery that they had agreed to grant a witness favorable treatment on a misdemeanor charge in exchange for information regarding this case. At the defendant's murder and robbery trial, the witness testified that she had received an adjournment in contemplation of dismissal on a seventh-degree drug charge but that she had not received a benefit for the information she provided about the charges against the defendant. A prosecutor faced with knowledge that a witness's testimony denying a promise of leniency is false "has no choice but to correct the misstatement and to elicit the truth." *People v Piazza*, 48 NY2d 151, 162-163. This issue is not preserved for review because the defendant failed to object or seek sanctions when the witness testified. In any event, the error was harmless. Judgment affirmed. (County Ct, Oneida Co [Dwyer, J])

Defenses (Justification) **DEF; 105(37)**

Instructions to Jury (Theories of Prosecution and /or Defense) **ISJ; 205(50)**

People v Liggins, 770 NYS2d 263 (4th Dept 2003)

Holding: The court erred in holding that the defendant was not entitled to a justification charge as to the assault counts. The defendant testified that he stumbled into the complainant when the complainant began choking him. The complainant testified that the defendant intentionally "head-butted" him; he saw the defendant draw his head back and come forward before the blow. A defendant is entitled to a justification charge if a reasonable view of the evidence supports it, even if the defendant alleges that the complainant's injuries were accidentally inflicted. *See People v Daniels,* 248 AD2d 723. This is true even if a justification defense is inconsistent with other aspects of the defense offered. *See People v Huntley*, 87 AD2d 488, 494 *affd* 59 NY2d 868. The defendant did not have to admit to an intentional act to be entitled to the charge. *See People v Khan*, 68 NY2d 921, 922. Judgment modified, counts of second-degree assault reversed and vacated, new trial granted on those counts. (County Ct, Oneida Co [Donalty, J])

Double Jeopardy (General) (Pleadings and Pleas) (Punishment) **DBJ; 125(7) (25) (30)**

People v Searcy, 770 NYS2d 493 (4th Dept 2003)

A felony complaint was amended as part of a plea agreement to charge the misdemeanor offense of second-degree criminal contempt. The defendant was to receive a one-year sentence. After discussion, the decision was made to proceed immediately with sentencing. When the defendant addressed the court, he expressed dissatisfaction with his lawyer. The court said, "'Why don't we do this, we'll vacate the plea.'" The defendant replied that he did not want that and was ready to be sentenced, but the court vacated the plea over objection. Counsel then said to the defendant: "'No. I told you, you did it. It's over, it's going to Grand Jury.'" New counsel was assigned. The defendant was indicted on first-degree criminal contempt, and was convicted by a jury.

Holding: The court lacked authority to vacate the plea without the defendant's consent. No new evidence, fraud, or clerical error existed to justify vacatur. *Matter of Randolf v Leff,* 220 AD2d 281. Because the defendant was then tried on the indictment charging him with the same acts alleged in the felony complaint amended in City Court and to which he pled guilty, he was twice prosecuted for one offense, violating the double jeopardy provision of the federal and state constitutions and Criminal Procedure Law 40.20(1). *See* CPL 40.30(1)(a); US Const 5th Amend; NY Const Art I §6. The defendant having served over a year in prison, a sentence that does not credit him with time served would further violate his double jeopardy rights. Judgment reversed, indictment dismissed, felony complaint reinstated as amended, plea thereon reinstated, matter remitted for sentencing to time served and a three-year order of protection from the date of the original guilty plea, in accordance with the plea agreement. (County Ct, Onondaga Co [Aloi, J])

Admissions (*Miranda* Advice) **ADM; 15(25)**

Confessions (*Miranda* Advice) **CNF; 70(45)**

People v Warren, 770 NYS2d 266 (4th Dept 2003)

Holding: The defendant was not orally advised of his *Miranda* rights before being questioned. He was given a copy of them, said he could read and write, and was seen reading the rights before he signed a written waiver. It is not essential that the rights be given orally. *US v Sledge*, 546 F2d 1120, 1122 (4th Cir. 1977). The prosecution is reminded, however, that they have a heavy burden to prove that a person in custody knowingly and intelligently waived the privilege against self-incrimination and the right to counsel. While each case depends on its own facts, preferred practice would include an oral recitation of the *Miranda* warnings and delivery of a written explanation of them to the accused, with a request that a legally sufficient waiver be executed before interrogation begins. Judgment affirmed. (County Ct, Ontario Co [Doran, J])

Fourth Department *continued*

Lesser and Included Offenses (General) **LOF; 240(7)**

Weapons (Firearms) **WEA; 385(21)**

People v Wegman, 769 NYS2d 682 (4th Dept 2003)

The defendant was convicted of multiple charges, including second-degree assault and attempted second-degree murder.

Holding: "We further disagree with both defendant and the People that count five, charging defendant with assault in the second degree, is an inclusory concurrent count of count four, charging defendant with attempted murder in the second degree (*see* CPL 300.30 [4]). It is possible to commit the greater offense without also committing the lesser… We further conclude, however, that count 10, charging defendant with criminal use of a firearm by committing a class B felony while displaying what appears to be a revolver, must be dismissed as a non-inclusory concurrent count of count three (*see* 300.30[4]; *People v Brown,* 67 NY2d 555, 560-561, *cert denied* 479 US 1093." Count three charged first-degree burglary by knowingly entering or remaining in a dwelling intending to commit a crime therein and displaying what appeared to be a revolver. When display of a firearm is an element of a class B felony, display of the same weapon cannot also be the predicate for first-degree display of a firearm. Judgment modified, first-degree use of a firearm reversed and dismissed. (County Ct, Steuben Co [Furfure, J]) ⚖

Defender News *(continued from page 13)*

While the bench's gain is not the defense bar's loss—thoughtful, knowledgeable judges benefit all who appear before them—David's colleagues will miss his regular participation in defense events and conversations. The remarks he made at his swearing in demonstrate the qualities we so admire, particularly his "respect for all and courtesy to all."

Remarks by David Steinberg at Town Hall, Hyde Park, New York, upon his swearing in as Hyde Park Town Justice:

Honored Guests, Friends and Fellow Citizens of Hyde Park:

By the oath I took several moments ago, I assume the great responsibilities of enforcing the law and assuring the fair administration of justice in the Town of Hyde Park. This is a responsibility I gratefully accept. This is a challenge I embrace.

It is a responsibility borne by those who came before me—those who lit the light on the path of justice: Gene Simpson, Harold Mangold, Matthew Fitzgerald, Valentino Sammarco, Alice Mann and others who went before them.

These are large shoes to fill. But today, I am inspired by the words of Winston Churchill when he became Prime Minister of England on the eve of the Second World War. Churchill said, "Everything I have done in my life has prepared me for this moment."

It is not necessary to dwell upon the path that brought me to this moment, but it began with a mother and father who taught me, fundamentally, respect for all and courtesy to all. I know they look down on me today.

I am keenly aware that by words and conduct, we who hold the office of Town Justice in our community come to personify justice in Hyde Park

Justice is an elusive concept. Those who enter this room when court is in session, whether they be victim or accused, plaintiff or defendant, seek justice, however they may define it. We revere the pursuit of justice. In the Book of Deuteronomy, it states, "Justice, Justice Shall You Pursue."

We hear about the path to justice as if there is a way to travel, a road to take. That road is a process, the hallmarks of which are equal justice under law and a dedication to the rule of law. So, I believe that justice is a process, not just a result.

With this office and trust bestowed upon me today, I step beyond my prior role as an advocate in the courtroom. As I do, my duty will be to apply the law and to bring the sum total of my knowledge and life's experience to the pursuit of justice.

Over twenty-four hundred years ago, Socrates spoke about the qualities of a judge: He said, "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially.["]

Ladies and Gentlemen, I aspire to do no more; I intend to do no less. I thank you and wish you all a Happy and Healthy New Year. ⚖

NYSDA Membership Application

I wish to join the **New York State Defenders Association** and support its work to uphold the Constitutional guarantees of all citizens accused of crimes to legal representation and to advocate for an effective system of public defense representation for the poor.

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I have also enclosed a tax-deductible contribution: ☐ $500 ☐ $250 ☐ $100 ☐ $50 ☐ Other $_____

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