



Public Defense Backup Center  
**REPORT**

Volume XIX Number 3

June-July-August 2004

A PUBLICATION OF THE DEFENDER INSTITUTE

**Defender News**

**A Supreme End of Term**

The US Supreme Court decided a number of important cases near the end of its term. *Habeas corpus*, death penalty, search and seizure, and other issues received the attention of the often split court. A number of the cases are summarized beginning at p. 14.

Some decisions were, unsurprisingly, not defense wins. In a search case that received press attention, the court upheld a statute requiring individuals to identify themselves to police when stopped on the basis of suspicious activity. Appellant Larry Dudley Hiibel and *amici* such as the American Civil Liberties Union and advocates for the homeless asserted that the statute in question criminalized silence, but a majority of the court disagreed, in the context of Hiibel’s circumstances. (*Washington Post*, 6/28/04.)

Two cases out of Washington State have generated a greater stir in criminal law. One, *Blakely v Washington*, applying *Apprendi v New Jersey*, 530 US 466 (2000), led immediately to challenges to the federal sentencing guidelines and other practices. The high court, in an unusual move, agreed to hear on the first day of the new term in October two cases involving the guidelines. *US v Fanfan*, No. 04-105 (*certiorari* to the 1st Circuit) and *US v Booker*, No. 04-104 (*certiorari* to the 7th Circuit). Watch the *Apprendi* page of the NYSDA web site (under Hot Topics) for new developments and for cites or links to reports, blogs, and other sources of *Apprendi/Blakely* news. More than sentencing guidelines are at issue; if sentence enhancements must be charged in the indictment and juries must make factual findings on such specifications, defense counsel will face new challenges.

A second major case, *Crawford v Washington*, strengthened the right of confrontation, overruling the constitutional hearsay holding in *Ohio v Roberts*, 448 US 56 (1980). While not generating further Supreme Court action as quickly as *Blakely*, *Crawford* promises to generate a deluge of challenges to existing hearsay exceptions. A fine CLE presentation on *Crawford* was a highlight at NYSDA’s recent Annual Meeting. (See p. 2.)

In specialized decisions not likely to impact directly on state defense cases, the court addressed the Bush administration’s efforts to limit the rights of prisoners in the “War on Terror.” Information about these highly publicized cases, *Hamdi v Rumsfeld* (\_\_\_ US \_\_\_, 124 SCt 2633, 159 LEd2d 578 [2004]), *Rasul v Bush* (124 SCt 2686, 159 LEd2d 548 [2004]) and *Rumsfeld v Padilla*, 542 US \_\_\_ (124 SCt 2711, 159 LEd2d 513 [2004]) and other developments can be found on the NYSDA web site on the Terrorism Laws page.

**Terrorism Again in NY Legal News**

The legislature recently enacted a state anti-terrorism bill first introduced two years ago. According to a press report, it “eliminates the statute of limitations on terrorism-related crimes, creates a new crime of possession and use of chemical or biological weapons with life-without-parole punishment, and raises penalties for money laundering in support of terrorism.” (*Albany Times Union*, 7/22/04.) NYSDA will be providing more information on this new law soon; watch for the annual Legislative Review in a future issue of the *REPORT*, and check the web site.

Federal arrests in early August, following a sting operation focused on two men connected to an Albany mosque, generated a substantial amount of commentary expressing doubts about the propriety and political timing of government actions. Such publicly expressed doubts have grown after a “key” piece of evidence from a notebook was revealed to have been mistranslated. (*NYLJ*, 8/25/04; *Times Union*, 8/26/04.)

A man who allegedly made threats against county employees was charged with only harassment in Onondaga County, but faces trial

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under terrorism laws in Madison County. The District Attorney said that the terrorism charge, rather than harassment, was not brought to get the higher penalty (up to seven years in prison rather than county jail time) but because the threats to Madison County employees was made indirectly and with the intent to influence policy. Reports indicate that only 16 other people have been charged under the 2001 state law. (*Post-Standard*, 8/20/04.)

## **Timely CLE, Timely Awards, Timeless Location: NYSDA's 37th Annual Conference**

Returning to Saratoga Spa State Park for a second year, the Association held its 37th Annual Meeting & Conference at the Gideon Putnam Hotel on July 25–27, 2004. If you weren't there, you may be asking what you missed.

### **Who among the many heroes of public defense received awards this year?**

David Steinberg, recognized for his dedication to the Association, who recently ended his long tenure on the NYSDA Board of Directors and his admired work as Chief Assistant Public Defender in Dutchess County by becoming Hyde Park Town Court Justice (*Backup Center REPORT*, Vol XIX, No. 1, Jan-Feb 2004).

Al O'Connor, senior Staff Attorney at the Backup Center, recognized by the New York State Bar Association's Pro Bono Department with the Dennison Ray Award for his work on behalf of clients, who was applauded at the banquet not only for what he does for clients, but for all he has done for those present.

The appellate lawyers at the Capital Defender Office (CDO), who received the Association's Service of Justice Award for "skillfully and tirelessly toiling to preserve human life and dignity [a]nd for the special victory in *People v LaValle* that reminds New York that we should be a state without the death penalty." (The decision in *People v LaValle*, No. 71 (6/24/04), which invalidated New York's death penalty because the mandated jury instructions regarding imposition of a determinate sentence if the jury failed to unanimously return a sentence of death or life without parole is coercive, is summarized at p. 20).

Justice Steinberg's remarks in receiving his own award highlighted the work of the CDO appellate attorneys. Observing that creativity is the hallmark of great lawyers, he said that he was sure it is the "creativity to construct a better, more compelling argument" that makes the appellate team being honored "the exceptional lawyers and advocates that they are."

### **What was included in the two days of CLE presentations?**

Penetrating analysis of issues arising from a recent important US Supreme Court case. Updates on recent Court of Appeals decisions. Sentencing pointers and sentencing policy. Practical suggestions for DWI defense. Relevant ethics issues including the oft-debated question of what to do about possible client perjury and the oft-ignored ethical problem of "triaging" when caseloads are excessive. [*"This may be the best conference you've done. Great location, excellent speakers, good facilities."*]

### **Confronting Hearsay: Crawford v Washington Analyzed**

Andrew Fine, Director of Court of Appeals Litigation for The Legal Aid Society's Criminal Appeals Bureau, and Michele Maxian, Director of the Society's Criminal Defense Division, walked CLE participants through many issues and strategies stemming from the March decision in *Crawford v Washington*, 124 SCt 1354, 158 LEd2d 177 (2004). *Crawford* radically changed settled constitutional law, under the Confrontation Clause, regarding some hearsay. Fine and Maxian's presentation made the importance of the decision clear. In the words of one participant, "The *Crawford* continuum really brought home to participants how they need to reevaluate MUCH of what they do/have not previously done regarding hearsay." Handouts from the Fine/Maxian presentation are included in the full conference materials.

NYSDA alerted lawyers to *Crawford* in the first *Backup Center REPORT* published after the decision was issued (Vol XIX, No. 2, Mar-Apr-May 2004), and placed links to

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materials about *Crawford* in the "Practice Pointers" area of the Association's web site as they became available. Of course, citing *Crawford* does not guarantee success with every hearsay objection, certainly not in courts bent on limiting it. The summary of a recent Court of Appeals memorandum opinion finding *Crawford* inapplicable to undisclosed facts, *People v Reynoso*, appears on p. 20.

One of many issues to consider in the wake of *Crawford* is whether lab reports are admissible if the person who conducted the reported tests or drew the reported conclusions does not testify. Of course, not all hearsay questions raised by scientific or expert evidence are *Crawford* questions.

(One such question that may arise when an expert does testify is whether impermissible hearsay is being proffered in the guise of that expert's testimony. See Elliott Scheinberg, "Expert Testimony as a Backdoor to Impermissible Hearsay," *NYLJ*, 7/29/04). According to Scheinberg, lawyers in child custody proceedings (and elsewhere) have wrongly interpreted *People v Sugden*, 35 NY2d 453 (1974) to allow experts free reign to filter hearsay from collateral sources (such as teachers, neighbors, nannies, etc.) without requiring the cross examination of the declarants. Scheinberg's article reminds attorneys that such a "professional reliability rule" should not be blindly accepted.)

#### **Details in Defending DWI (and DWAI Drug) Cases**

Most of the second day of CLE at the conference was devoted to Vehicle and Traffic Law provisions concerning driving and alcohol or drugs. Three lawyers from Gerstenzang, O'Hern, Hickey & Gerstenzang, a firm well-known for DWI defense work, presented a four-part series dealing with specific aspects of such representation: DWAI Drug—The Drug Recognition Protocol, Getting and Using Discovery Materials, Suspension Pending Prosecution, and Chemical Test Refusals. NYSDA and conference participants greatly appreciated the time, effort, and expertise of Peter Gerstenzang, Thomas O'Hern, and Eric Sills. ["*The emphasis by all three DWI presenters on getting what you need, doing what needs to be done, and ways to do it—dogged advocacy wins!*"]

#### **Juvenile Interrogations and More**

Allison Redlich of Policy Research Associates, Inc. in Delmar NY charted for conference participants the dichotomy between how young persons alleged to have been the victim of crime and young persons alleged to have committed offenses are treated during questioning. ["*Redlich on Juvenile Interrogation was excellent collaboration of law and psychology issues. . .*"] The topic of juvenile interrogation lies at the convergence of a number of current legal and popular concerns including false confessions, adolescent development, and high incarceration rates.

NYSDA will continue to address these issues, in the *REPORT*, on the web site, and at future trainings. See for example, the Juvenile Law & Family Court portion of the Hot Topics page, the Suspect Confessions segment of Innocence/Wrongful Convictions under NYSDA Resources, and the Defense News headlined on the web site.

Prof. Monroe Freedman's presentation on Ethical Issues in Criminal Cases included discussion of what counsel should do if perjury by a client is feared. ["*Ethics—always an ongoing soul search.*"] Freeman focused on *People v DePallo*, 96 NY2d 437. [*DePallo* was cited in a case summarized in this issue, see *People v Adrades*, 4 AD3d 180, summary p. 24.]

Other CLE topics at the Annual Meeting and Conference included Ed Nowak's, Recent Developments in New York Criminal Law and Procedure ["*Nowak keeps getting better—this year—riveting.*"], Sentencing Advocacy: A Client-Centered Approach with Al O'Connor and Alan Rosenthal. ["*Al O'Connor—even higher than a 5!*" "*Sentencing for Dollars was very insightful.*" "*Ignorance is almost like bliss until you really get the sentencing and financial consequences to sentencing lecture. This was great stuff—dust off the cobwebs and do the math!!*"] The conference materials are available for \$35 from the Backup Center.

#### **Where is next year's conference?**

Due to record attendance and an overwhelming, positive response to the location and facilities, the Board announced at the end of this year's annual conference that NYSDA will return to the same venue again next year (see p. 11). Other venues are being studied for the 2006 conference.

#### **Chief Defenders Take Action**

Each public defense program in New York State faces unique problems. Every public defense program shares certain common problems. When the heads of these programs meet, they bring their varied experiences to bear as they seek ways to improve public defense in their offices and across the state. Years of discussion and information-sharing by Chief Defenders recently culminated in two important actions.

#### **Standards for Mandated Legal Representation Adopted**

The Chief Defenders of New York State, convening in conjunction with the NYSDA Annual Meeting and Conference, unanimously adopted "Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State." These standards have been under development for several years. (See p. 7.) Following the Chiefs' action, the NYSDA Board also adopted the standards, which have been sent to public defense offices across the state and will soon see wider

distribution. Additional standards specifically addressing appeals have been drafted and will be considered at future meetings.

### **Independent Public Defense Commission Endorsed**

The Chiefs also endorsed the creation of an independent public defense commission for the State of New York. The Chiefs are the latest of many groups to adopt this idea, including the Committee for an Independent Public Defense Commission, the League of Women Voters of New York State, the InterCounty Legislative Committee of the Adirondacks, the InterCounty Association of Western New York, and the NYSDA Board.

### **NY Public Defense: New Rules, New Faces, New Efforts to Solve Old Problems**

#### **2nd Department Issues Rules**

The rules of the 2nd Department have been amended to prohibit entirely the acceptance by assigned counsel of a retainer (payment, promise of payment, etc.) to represent of a public defense client in the assigned criminal case or any other matter during the pendency of the assigned case. The previous exception allowing assigned counsel to accept payment if permitted by court order has been struck. Only if specifically permitted by statute may anything of value be accepted. 22 NYCRR 691.16 as amended by ADM 2004-0623, 6/23/04. A copy of the order is available from the Backup Center.

#### **Press Focusing on Public Defense Issues**

The continuing struggle of public defense programs to provide necessary services in the absence of adequate funding too often goes on outside the public eye. The struggle has assumed a higher profile in recent months, with stories appearing in local publications, not just the *New York Law Journal*.

In Onondaga County, issues regarding representation of public defense clients have been aired in the news. One story contrasted the number of times two assigned counsel lawyers, paid about the same in county funds in the past year, visited their clients held in the jail. One lawyer made 549 visits, the other 23. Jail prisoners complained more than 1,000 times a month to Jail Ministry about lack of contact with their lawyers, the article noted, which in turn has led the New York Civil Liberties Union to begin an investigation. (*Post-Standard*, 5/30/04). Citing the jail visit story and other sources, the paper later editorialized that state legislators should consider the pending bills to create a state commission to oversee public defense, set standards, require accountability for legal representation of the indigent, and administer state funds for legal services. (*Post-Standard*, 6/17/04). This is the type of com-

mission supported by the Chief Defenders and others (see p. 7).

The *Schenectady Gazette* reported in late July on the factfinding hearings held in Schoharie County by NYSDA and the League of Women Voters of New York State. "At the end of the hearing, one message was clear: people feel they aren't getting adequate representation when it comes to having a lawyer assigned to them," the article said. (*Gazette*, 8/23/04.)

Downstate, the *New York Times* published an extensive article regarding the financial problems, including alleged mismanagement, that led to the June 9th resignation of Daniel L. Greenberg, president, chief executive and attorney-in-chief of The Legal Aid Society. (*New York Times*, 7/8/04.) No attorneys have been laid off in the Society's continuing financial woes, but over 50 non-union employees have been cut, according to recent reports. (*New York Lawyer*, 8/4/04).

#### **Chiefs Moving On**

The Association provides information about public defense to assist offices, attorneys, and clients in all 62 counties of New York. The heads of all public defense offices are invited to Chief Defender Convenings such as the recent one held in conjunction with the annual conference, and are encouraged to contact one another for information and problem solving. To help Chiefs keep in touch, as well as to help clients and others locate and contact the appropriate office, new defense program web sites and changes in public defense programs or Chief Defender status are promptly noted in the Chief Defender Listing on the NYSDA web site, under About NYSDA. Recent changes are noted below.

#### **Lonski Leaves Post and NYSDA Board**

Robert D. Lonski has resigned his position as Administrator of the Erie County Bar Association Aid to Indigent Prisoners Society, Inc. to teach in the Buffalo City schools. He has also tendered his resignation as a NYSDA Board member. We wish him well. The new Administrator of the assigned counsel plan is Claudia Schultz, a former member of the NYSDA Board.

#### **Other Chief Changes Announced**

Essex County Public Defender Mark Montanye has resigned. While he cited "personal reasons" in his resignation, press accounts indicate that funding issues, particularly related to staffing and workload, were involved. Montanye had cited an increased caseload when asking that a third full-time defender and a full-time investigator-clerical assistant be hired. "In order for the system to function, there's going to have to be an increase in staffing," the local newspaper quoted Montanye as saying. Another issue facing Essex County defenders is the

county's new arrangement to house Essex County prisoners in Schoharie County, making client-attorney communication virtually impossible.

Daniel Gaffney has been appointed Acting County Public Defender in Ulster County. A Kingston lawyer, Gaffney was already an assistant public defender. He succeeds Paul Gruner, who has been appointed acting Surrogate's Court Judge and faces election for that judgeship in November.

The new Executive Director and Attorney-in-Chief of The Legal Aid Society in New York City is Steven Banks. Banks started as a summer intern at LAS 24 years ago and had risen to Associate Attorney-in-Chief in 2002. (NYLJ, 7/30/04]

### **NYSDA Joins Amici in Leocal**

The Association, through the Immigrant Defense Project, joined several other *amici* in May on a brief in the US Supreme Court. The case, *Leocal v Ashcroft*, No. 03-583, deals with whether the Florida DUI statute constitutes a "crime of violence" under federal law, making it an aggravated felony and therefore grounds for removal when the person convicted is not a US citizen. The brief is available on the Immigrant Defense Project page of the NYSDA web site, under NYSDA Resources.

### **DNA Continues in the News**

The influence of DNA on the practice of criminal law at every level continues to grow. Used to exonerate persons wrongly convicted and to convict the accused (also sometimes wrongly), DNA is a powerful tool that, like all tools, is no better than the skill of the person(s) employing it. One way to keep up on developments relating to this scientific marvel is to check regularly the DNA page under Hot Topics on the NYSDA web site. A sample of such developments follows.

### **Databank Sampling Held Constitutional**

Federal Judge Kevin Thomas Duffy has rejected a 4th Amendment challenge to New York's statute mandating DNA samples from persons convicted of designated felonies (Criminal Procedure Law 440.30 [1-a]), finding that if DNA sampling is assumed to constitute a search, that search is reasonable. While using a "simple balancing test," he likened DNA to fingerprints: "the information derived is substantially the same, *i.e.*, an identifying marker unique to that individual." Duffy relied on the statute's limitation of how the sampled DNA is to be used: "New York's DNA law requires that analysis be done solely on those markers that have identification purposes. . . . nor is any additional usage permitted." *Nicholas v Goord*, 01 Civ. 7891 (RCC) (GWG) (SDNY, filed 6/24/04).

### **More DNA Lab, Evidence Errors Revealed Nationwide**

In upholding New York's DNA databank, the federal court above assumed that "DNA can be used as a powerful tool in solving both past and future crimes." However, DNA and other crime laboratory evidence should be carefully scrutinized and frequently challenged by the defense. Recent examples of why such evidence should be viewed with suspicion include a Seattle newspaper report, detailing recurring errors in the Washington State Crime Lab's DNA testing and elsewhere (*Post-Intelligencer*, 7/22/04), and an Associated Press story online describing major problems in the Houston Police Department's evidence room.

The discovery of improper storage and handling of evidence from 8,000 Houston cases followed, or may be considered a continuation of, problems revealed in a 2002 audit that led to closing of the DNA section of the crime lab. Police Chief acknowledged that the "former head of the department's DNA lab, was responsible for improperly documenting about 900 submissions . . ." Nearly 400 DNA cases are under active review. (AP story on Yahoo.com, 8/26/04.)

Challenging DNA or other scientific evidence presents special problems if jurors are "CSI" or "CSI: Miami" fans. A recent press story notes that these television shows have raised many jurors' expectations. This can be problematic for the defense if jurors' viewing habits make them "rely too heavily on scientific findings and unwilling to accept that those findings can be compromised by human or technical errors." Prosecutors face problems from the "CSI effect" as well, which some are trying to solve by offering "negative evidence witnesses" to "assure jurors that it is not unusual for real crime-scene investigators to fail to find DNA, fingerprints and other evidence at crime scenes." (*USA Today*, 8/5/04.)

When dealing with DNA or other forensic issues, lawyers may find that more reliable information than "CSI" offers is available to help jurors' understanding. The *Post-Intelligencer* report noted above included a one-page chart of DNA lab testing (using the polymerase chain-reaction process). That chart is reprinted here with permission [see next page]. ☞

### **Tell Us about Job Openings!**

The *REPORT* carries job notices we hear about. Send us yours.

Watch the Web for the latest Job Notices! Job listings received between issues are posted on our web site, & the *REPORT* is posted there before the print version is mailed. Job seekers should check in often.

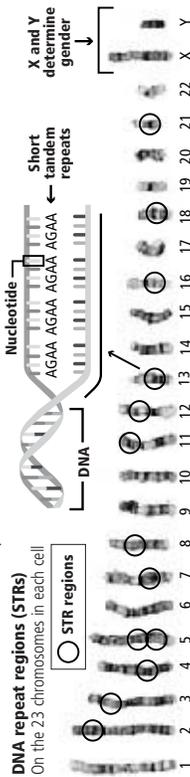
## HOW DNA IS TESTED IN CRIME LABS

DNA testing is widely used by law enforcement to link suspects with evidence found at the scene of a crime. The most common technology used today pairs the PCR method (polymerase chain-reaction) with DNA sequencing. This combination is considered to be highly accurate but it is not fool-proof. There are opportunities for errors that can produce false results. The following is an example of how the test might be done on a small sperm sample found on a rape victim's clothing.

### WHAT IS DNA?

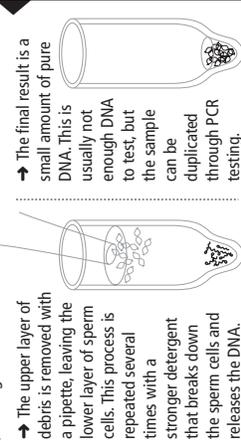
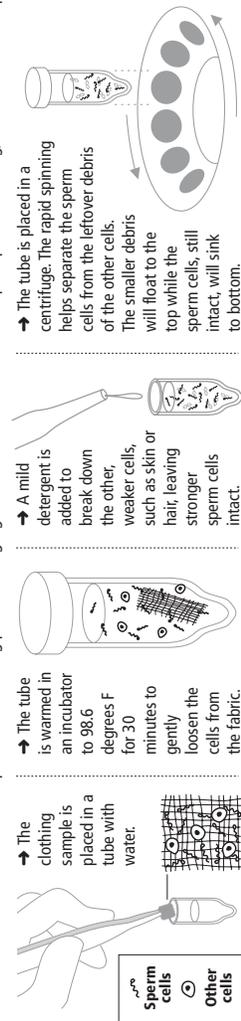
Every cell in the human body (except red blood cells) contains 23 pairs of chromosomes. Each chromosome is made up of a tightly wound strand of DNA. Uncoiled, DNA resembles a twisted ladder with the rungs of the ladder made of chemicals called nucleotides. DNA has four different types of nucleotides (A: adenine, T: thymine, G: guanine and C: cytosine) that form interlocking pairs. The order of the bases along the length of the ladder is called a DNA sequence (For example: AGAA AGAA AGAA).

→ The majority of DNA does not differ from person to person but there are 13 specific regions where certain nucleotide patterns are repeated again and again. These regions are called Short Tandem Repeats or STRs. The number of repeated sequences determines the length of an STR. This length varies among people and is what scientists measure and use for comparison.



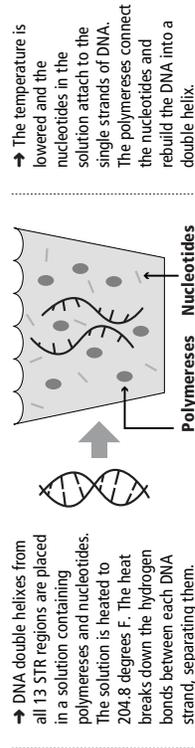
### ISOLATING THE DNA

The first step in the DNA testing process is singling out the desired DNA. In this example a piece of clothing, believed to contain sperm, is being tested.



### EXPANDING THE SAMPLE

Once the DNA has been isolated, PCR testing allows scientists to rapidly replicate the portions of the DNA containing STRs, creating a large sample in a short amount of time. This portion of the process is handled by a machine called a thermal-cycler.

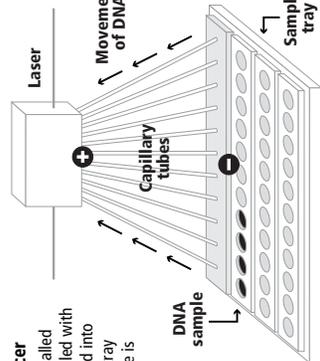


### READING THE DNA

Now that there is a workable amount of DNA, the length of the strand can be measured by a process called electrophoresis. This is handled by a machine called a DNA sequencer.

### Inside the sequencer

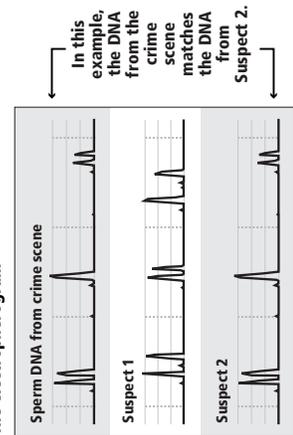
→ Tiny glass tubes, called capillary tubes, are filled with gel. The DNA is placed into holes on the sample tray and one capillary tube is inserted into each hole. A positive current is applied at the top of the tubes. This current draws the negatively charged DNA up through the tubes.



→ The gel inside the tubes acts as a sieve and slows the movement of the DNA. Shorter pieces move faster and thus the DNA strands reach the top of the tubes ordered by length, shortest to longest. They pass through a laser beam inside a detection cell and the laser measures the length of the DNA. This information is recorded by a computer.

→ The computer takes that data and translates it into a line with peaks representing the lengths of the DNA strands from each of the 13 STR regions. The results can be compared with DNA from suspects involved in the case. If the criminal is unknown, the results can be entered into a national DNA database to search for matches.

### The electropherogram



### STAGES OF TESTING WHERE MOST ERRORS OCCUR

DNA is very fragile. The science behind the testing is exact but human error can result in faulty results. The sample is most vulnerable to human error in the stages before the PCR processing (which is done in a machine). Once the PCR process begins, any DNA present will be replicated so handlers have to be careful not to expose samples to other sources of DNA, such as their own hair, skin, or saliva.

### Contamination errors

- ▶ Wearing dirty gloves or no gloves at all
- ▶ Touching the area where the DNA is believed to be
- ▶ Coughing, sneezing or talking over evidence
- ▶ Using tools that are not clean
- ▶ Exposing collected samples to direct sunlight or excessive heat
- ▶ Placing evidence in a plastic bag instead of dry paper bag or envelope
- ▶ Mislabeling samples

Sources: Washington State Patrol; William C. Thompson, professor of criminology and law at the University of California-Irvine; The New York Times

Source: "How DNA Is Tested in Crime Labs," *Seattle-Post Intelligencer*, July 22, 2004.

# From My Vantage Point

By Jonathan E. Gradess\*

At the Chief Defender Convening held on July 25, 2004 in conjunction with NYSDA's Annual Meeting and Conference, the Chiefs adopted standards for systems and lawyers providing public defense and other mandated representation, and they voted to support creation of an independent statewide public defense commission. In doing so they revived a NYSDA effort that had been sidelined for far too long, and, hopefully, set the stage for a real reform of the state's public defense system.

## Standards

The new "Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State" draw on existing national and other standards. They are tailored to New York's public defense scheme and set out requirements covering: Independence (of defense services), Funding, Workload, Scope of Representation, Training and Supervision, and Eligibility (of Clients). Also addressing Duties of Counsel (in both criminal and family court representation), the standards provide a concise set of best practices. A few hours after the Chiefs adopted the standards, the NYSDA Board of Directors followed suit. The vote in both bodies was unanimous.

Created with input from large urban defender programs and chiefs in rural counties, from county public defender offices, legal aid societies, and assigned counsel programs, and from Chiefs across the political spectrum with myriad views on how best to conduct and improve mandated legal services, these standards are not aspirational. They contain what those in the best position to know agree is *required* of public defense programs and practitioners. They come into existence at a propitious moment, as the State Bar and the Unified Court System are examining indigent defense, the legislative and executive branches prepare to monitor implementation of last year's fee increase, the NYSDA Client Advisory Board continues to develop its own standards, and headlines about wrongful convictions stir the public's concern about how justice is—or is not—being done. The work of the Chiefs, ratified by the NYSDA Board, should inform all these ongoing reform efforts.

These timely standards did not spring suddenly into existence. Their development could be dated to December 2000, when the Chiefs agreed to participate in a project to create standards for the provision of public defense. That decision followed a discussion on public defense reform in which Chiefs and representatives from the League of

Women Voters of New York State and the New York State Association of Criminal Defense Lawyers joined. Standards were an agenda item at many Chief Convenings thereafter, as one year, then another, rolled by.

Efforts to create standards for New York State public defense could also be said to have begun much earlier than the year 2000. In 1983, NYSDA's Board of Directors set up a committee to work toward adoption of NYSDA standards for public defense. Norman Shapiro chaired that Standards and Goals Committee. Thereafter, the Association sought comment on those proposed standards by publishing them serially in *The Defender*, NYSDA's magazine. As life would have it, way led on to way. The Model Public Defense Case and System were published by NYSDA and used in a series of technical assistance visits throughout the state. But standards development for a time stalled.

Before that effort and in the years since then, standards have proliferated nationally, all reflecting basic principles including the importance of independence, sufficient funding, and proper training. Many deal with specific types of representation (such as the ABA's newly revised "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases"). In addition to such national benchmarks, local and state standards have appeared, reflecting the different circumstances in which public defense services are provided.

The newly adopted standards now take their place among those other standards. We have already distributed them to public defense offices across the state, and will soon embark on a wider distribution.

Two decades after we began, we finally have New York guidelines to help us explain to funders and judges that public defense clients and their lawyers should not have to make-do with using the same expert that the prosecutor or DSS uses, should not have to converse for the first and only time about the case in a whisper before the bench or in a lockup with many other people listening in, *should* have resources in parity with the agency seeking to deprive a person of liberty or rights.

These standards have been a long time coming. They belong to everyone who represents clients entitled to mandated legal representation, and to those clients. Use them. Use them to get what you need. Let us know how we can help you use them. Let us know how you have used them. Let adoption of the standards lead a long-needed improvement of public representation in New York State.

## Independent Public Defense Commission

In addition to adopting standards, the Chiefs voted in July to support the creation of a statewide independent public defense commission. Like the standards, this has been, as readers of this column well know, a long time coming.

(continued on page 35)

\* The REPORT periodically features a column by the Association's Executive Director on major issues concerning public defense in New York State.

### Gates of Injustice: The Crisis in America's Prisons

By Alan Elsner. Prentice Hall, 2004;  
264 pages

By Barbara DeMille\*

Daniel Defoe, placing Moll Flanders in Newgate Prison around 1680 for stealing two lengths of brocaded silk, evokes the “hellish noise, swearing, and clamor, the stench . . . an emblem of hell itself.” More than three hundred years after, Alan Elsner, in *Gates of Injustice*, describes similar conditions in US prisons, going beyond his statistics of rapid increase in inmate population and prison growth. In doing so he has created a human face for the US Bureau of Justice Statistics. He writes of the “widespread abuse(s) and violation(s) of human rights. . . . hundreds of thousands of men . . . raped . . . racist and neo-Nazi gangs run(ning) drugs, gambling, and prostitution rings . . . buying and selling weak and vulnerable inmates as sex slaves, while the authorities turn a blind eye.”

As Dickens, in mid-nineteenth century England, describes the Hulks, decaying ships used as holding cells anchored in the malarial marshes of the lower Thames, from which Magwitch attempts escape rather than be transported to Australia, so Elsner tells of former Staten Island ferries now holding prisoners sent to Riker's Island. As Defoe has Moll recall “degenerat(ing) into stone. . . . turn(ing) first stupid and senseless, then brutish and thoughtless, and at last, raving mad . . . ,” so Elsner recounts the horrors of our prisons as last-resort measures for the mentally ill. As treatment facilities closed in the 60's, with the belief that former residents would live and be cared for within communities for which adequate funding never did appear, prisons and jails have become our *de facto* solution. At the present time, according to Elsner, “the three largest mental health institutions in the world are the Los Angeles County Jail, Riker's Island, and the Cook County Jail in Chicago.”

Oscar Wilde, convicted of sodomy and imprisoned at Reading in 1895, suffered greatly—dysentery, cold, isolation, shame. Exercising in the prison yard in single file, one man's hand upon the other's shoulder, he heard a voice murmur: “I pity you, for you must be suffering more than we are.” According to Richard Ellmann, his biographer, he answered without turning: “No my friend, we are all suffering equally.”

Truly, as one is nearly overwhelmed with the grim statistics in Elsner's account of what constitutes incarcer-

ation and punishment in our nation's prisons—Supermax security cells allowing four hours of “exercise” a week; beatings and humiliations by guards and other inmates; deprivation of family contact; overcrowding; and the rampant rule of the strong over the weak as the authorities acquiesce in the name of a nominal control—there is little to indicate that we as a society have improved in the twenty-first century upon the suffering described in 1680 or 1850 or 1895. As prisons then and now are the eventual destination of those of us who fall between the cracks of our social net, who miss the education, housing, health care, and community reinforcement that keeps the majority of us on the straight and narrow, not much has changed since Moll Flanders was cast into Newgate.

Surely, there are fewer offenses punishable by death, and surely, in our present day, there are nominal nods towards due process and better sanitation, if only because we have learned in those three hundred years that rampant disease eventually kills more than convicted criminals. It is Elsner's position that our indifference, our consideration of the convicted as “other,” our mistaken belief that force—retaliation rather than rehabilitation—encourages reform is destroying our social health as certainly as an epidemic kills, spreading beyond our prisons, infecting our culture as a whole.

Methodically he lists outrages against our collective human dignity—the brutal “cell extractions,” performed by five-man teams; the transporting of prisoners, many with less than five year sentences, from Connecticut to rural Virginia to fill unused cells in a Supermax facility where total isolation rules; women separated from and losing custody of their children through misguided provisions in the “welfare reform” instituted in 1996. He substantiates his argument by ending with Justice Anthony Kennedy's speech to the American Bar Association in 2003 deploring “the inadequacies and injustices” of the US prison system.

It is both Kennedy's and Elsner's belief that much of what occurs in our nation's prisons comes from our collective sigh of relief as we see a convicted criminal removed from the social orbit. Out of sight is out of mind, as we disregard the treatment this person receives while in prison. Often this is lack of treatment for HIV or tuberculosis; or prison brutality reinforcing the despair of an already alienated and angry person; or the deprivation of education and drug abuse programs that might prevent him, once released, from returning to whatever crimes put him in prison in the first place. In Justice Kennedy's words:

As a profession, and as a people, we should know what happens after a prisoner is taken away. To be sure, the prisoner has violated the social contract; to be sure, he must be punished to vindicate the law; . . . to deter future crimes. Still the prisoner is a person; still, he or she is part of the  
(continued on page 35)

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# Immigration Practice Tips

## Defense-Relevant Immigration News

By Marianne C. Yang and Manuel D. Vargas of  
NYSDA's Immigrant Defense Project (IDP)\*

### **DMV Policy Results in Criminal Charges Lodged Against Noncitizens—How to Defend Against Charges to Minimize Immigration Consequences**

In early 2004, the New York State Department of Motor Vehicles (DMV) began sending out hundreds of thousands of letters threatening to revoke the driver's licenses of residents whose recorded Social Security numbers did not match their names. The overwhelming majority of affected residents are noncitizens who have not yet legalized their immigration status in this country and therefore did not have valid social security numbers to submit when they registered with the DMV.

Many of these noncitizens are now facing criminal prosecution in connection with their alleged submission to the DMV of false social security numbers or possession of false social security cards. In many cases, these New York residents are already in the process of legalizing their immigration status, or may have a basis to do so in the future. Because certain criminal dispositions may permanently bar noncitizen defendants from legalizing their immigration status and increase the risk of their deportation, defense attorneys should be aware of which criminal dispositions may trigger such a bar, advise their noncitizen defendants accordingly, and, if dismissal is not an option, craft a plea result that will avoid or minimize such a consequence.

In most cases reported to NYSDA, the criminal charges people are facing as a result of the DMV policies are misdemeanor and felony Criminal Possession of a Forged Instrument (Penal Law 170.20, 170.25) and Offering a False Instrument for Filing (PL 175.30, 175.35). The following are some tips practitioners may follow in defending noncitizen clients against these charges:

- **Avoid a disposition for a "crime involving moral turpitude."** In general, "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime" is barred from adjusting her immigration status to that of lawful permanent resi-

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\*Marianne C. Yang is the Director of NYSDA's Immigrant Defense Project; Manuel D. Vargas is Consulting Attorney. 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.

dent or otherwise becoming lawfully "admitted" to the United States. Under immigration laws, any crime that has as an essential element the intent to deceive or defraud will almost certainly be deemed a crime involving moral turpitude. Offenses related to forgery have also generally been held to be crimes involving moral turpitude. Practitioners should therefore avoid guilty pleas to the New York Criminal Possession of a Forged Instrument offenses, whether misdemeanor or felony (both PL 170.20 and 170.25 include an element of intent to "defraud, deceive or injure"), and for the felony Offering a False Instrument for Filing, 1st Degree (PL 175.35 includes an element of intent to defraud). A conviction for the misdemeanor Offering a False Instrument for Filing, 2d Degree (PL 175.30), the misdemeanor Making a Punishable False Written Statement (PL 210.45), or the misdemeanor Tampering with Public Records, 2d Degree (PL 175.20) might also be deemed a "crime involving moral turpitude." Some caselaw exists, however, to support the argument that such a conviction is not a crime involving moral turpitude because fraudulent intent is not an element of either offense.<sup>1</sup> Some alternative dispositions that would not be crimes involving moral turpitude include New York's Disorderly Conduct (PL 220.40) and New York's Adjournment in Contemplation of Dismissal. One public defender reported successfully negotiating a plea to the Class A misdemeanor Criminal Trespass (PL 140.15), also not likely to be a crime involving moral turpitude.

- **If you can't avoid a disposition for a "crime involving moral turpitude", avoid a felony disposition and avoid an actual sentence imposed of more than six months.** An automatic exception to the "crime involving moral turpitude" bar to adjustment of status exists for one crime involving moral turpitude that is not punishable by more than one year (*i.e.* that is not a New York felony) and for which an actual sentence of imprisonment imposed is six months or less. If your client does not have any prior conviction for a crime involving moral turpitude, then a conviction for the misdemeanor Criminal Possession of a Forged Instrument or for the misdemeanor of Attempted

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<sup>1</sup> See *Matter of Di Filippo*, 10 I&N Dec. 76 (BIA 1962)(conviction under Canadian statute for making false statement is not a crime involving moral turpitude where conviction can be obtained without proof that the false statement was made for the purpose of obtaining benefits); *Matter of BM*, 6 I&N Dec. 806 (BIA 1955)(8 USC 1001 offense of making a "false, fictitious, or fraudulent statement" did not necessarily involve fraud because the statute is written in the disjunctive and only required a willful and knowingly false statement, not one done with evil intent); but see *Matter of Correa-Garces*, 20 I&N Dec. 451 (BIA 1992)(citing *Kabongo v. INS*, 837 F2d 753 (6<sup>th</sup> Cir. 1988) for the proposition that convictions for making false statements have been found to involve moral turpitude, and finding that conviction for making a false statement in an application for a passport is crime involving moral turpitude because was done in order to obtain the passport fraudulently).

Offering a False Instrument for Filing, 1st Degree, in each case with a sentence imposed of six months or less, would fall under this “petty offense” exception. Because a conviction for the misdemeanor Offering a False Instrument for Filing, 2d Degree (PL 175.30), the misdemeanor Making a Punishable False Written Statement (PL 210.45), and the misdemeanor Tampering with Public Records, 2d Degree (PL 175.20) carry some risk of also being deemed a crime involving moral turpitude as explained above, avoiding a sentence of more than six months for these offenses as well would preserve the benefit of the petty offense exception.

- **In any event, avoid any admissions on the record of an intent to deceive or defraud.** This might preserve an argument that your client’s offense is not a crime involving moral turpitude.

The above practice tips assume that your client is not a lawful permanent resident (greencard holder), but is otherwise a noncitizen who may want to avoid the bars to becoming a lawful permanent resident. If your client is a lawful permanent resident, or for any other additional advice on how to defend against these DMV-related criminal charges, defense counsel may call the IDP hotline Tuesdays and Thursdays, from 1:30pm to 4:30pm, at 212-898-4132.

### ***2nd Circuit Holds that an Individual with a pre-1996 Trial Conviction May Be Able to Pursue Waiver of Deportation Existing under pre-1996 Law***

The Court of Appeals for the 2nd Circuit held that an individual convicted after trial, before the 1996 repeal of an immigration provision giving the government discretion to waive deportation based on such a conviction, may be able to challenge the retroactive application of the 1996 repeal. *Restrepo v McElroy*, 369 F3d 627 (2d Cir. 2004).

Prior to its decision in *Restrepo*, the 2nd Circuit had ruled against retroactive application of the 1996 waiver repeal only in cases involving guilty plea convictions, based on a narrow reading of the 2001 US Supreme Court decision in *INS v St. Cyr*, which held that lawful permanent resident immigrants who pled guilty prior to 1996 could not be retroactively barred from applying for such relief. *INS v St. Cyr*, 533 U.S. 289 (2001). The Second Circuit refused to extend *St. Cyr* to cases involving trial convictions. See *Rankine v Reno*, 319 F3d 93 (2d Cir. 2003); *Theodoropoulos v INS*, 313 F3d 732 (2d Cir. 2003) (finding that “a petitioner convicted after a trial rather than on a guilty plea has not faced a substantial change in expectations... [because a] jury’s verdict, not the potential of discretionary waiver or the IIRIRA’s removal thereof, determined the legal consequence of the decision to seek trial.”).

In *Restrepo*, the 2nd Circuit did not retreat from its prior precedents rejecting challenges to retroactive application of the waiver repeal in trial conviction cases. The Court found, however, that, regardless of whether petitioner Restrepo’s conviction was based on plea or trial, he may have subsequently foregone his right to apply for 212(c) relief “affirmatively”—that is, before being placed in deportation proceedings—in reliance on his ability to apply for 212(c) relief later when he was placed in such proceedings. The Court then remanded to the district court “to determine whether Petitioner can himself claim the benefit of this argument.” The Court stated: “We do so because we deem it wise to let the district court decide, in the first instance, whether an alien such as Petitioner must make an *individualized* showing that he decided to forgo an opportunity to file for 212(c) relief in reliance on his ability to file at a later date (and, if he must, whether Petitioner can do so), or whether, instead, a *categorical* presumption of reliance by any alien who might have applied for 212(c) relief when it was available, but did not do so, is more appropriate.” Petition by the government for rehearing was denied, and the case is now pending on remand before US District Judge Jack Weinstein in the Eastern District of New York.<sup>2</sup>

In a related positive development for New York and other immigrants who are detained by federal immigration authorities in New Jersey and Pennsylvania and whose cases are heard in immigration courts in those states, the 3rd Circuit rejected the reasoning of the 2nd Circuit in *Rankine* in a case involving a New York immigrant detained in Pennsylvania. *Ponnapula v Ashcroft*, 373 F3d 480 (3rd Cir. 2004) (*amicus* brief filed by NYSDA and the National Association of Criminal Defense Lawyers). The 3rd Circuit stated: “Our disagreement with the courts that have held that IIRIRA’s repeal of § 212(c) relief is not impermissibly retroactive with respect to aliens who went to trial is that those courts have erected too high a barrier to triggering the presumption against retroactivity.” The Court then applied the presumption, holding that individuals such as Ponnapula “who affirmatively turned  
(continued on page 35)

<sup>2</sup> In a subsequent 2nd Circuit decision, the author of the *Restrepo* decision, Judge Guido Calabresi, clarified: “One can imagine a case in which the INS has for years declined to bring deportation proceedings against an alien, despite his conviction for a deportable crime, because, in the INS’s estimation, the alien would be a very strong candidate for 212(c) relief. . . . Such an alien might reasonably rely on the INS’s inaction and decide on that basis to make important commitments to his residency in the United States (such as by marrying, establishing a business, and losing ties with his home country) only later to find that, after Congress had eliminated 212(c) relief, the INS seeks to deport him. Under these circumstances—and where Congress’s intent as to the retroactivity of the elimination of 212(c) relief is unclear—an alien might argue with some force that he has demonstrate the kind of reasonable reliance and settled expectations . . . that would render the elimination of 212(c) relief impermissibly retroactive if applied to him.” *Thom v. Ashcroft*, 369 F3d 158 (2d Cir. 2004)(citations omitted).

# CONFERENCES & SEMINARS

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Keeping Your Client Driving: A DWI Update  
**Date:** October 1, 2004  
**Place:** Nyack, NY  
**Contact:** Patricia Marcus, (212)532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com)

**Sponsor:** National Association of Criminal Defense Lawyers & Southern Center for Human Rights  
**Theme:** Making the Case for Life VII  
**Dates:** October 1-3, 2004  
**Place:** Arlington, VA  
**Contact:** NACDL Dir. Of Education Gerald Lippert: tel (202)872-8600 x236; fax (202)872-8690; e-mail [gerald@nacdl.org](mailto:gerald@nacdl.org); web site [www.nacdl.org](http://www.nacdl.org)

**Sponsor:** American Bar Association Commission on Homelessness and Poverty  
**Theme:** Taking the Court to the Streets  
**Date:** October 8, 2004  
**Place:** San Diego, CA  
**Contact:** Amy Horton-Newell, (202)662-1693; e-mail [hordona@staff.abanet.org](mailto:hordona@staff.abanet.org); web site [www.abanet.org/homeless/home.html](http://www.abanet.org/homeless/home.html)

**Sponsor:** National Association of Criminal Defense Lawyers & National College for DUI Defense, Inc.  
**Theme:** Annual DWI Seminar  
**Dates:** October 14-16, 2004  
**Place:** Las Vegas, NV  
**Contact:** NACDL: tel (202)872-8600 x 230; fax (202)872-8690; e-mail [tamara@nacdl.org](mailto:tamara@nacdl.org); web site [www.nacdl.org](http://www.nacdl.org)

**Sponsor:** National Child Abuse Defense & Resource Center  
**Theme:** 12th International Conference, Child Abuse Allegations: Separating Fact from Fiction  
**Dates:** October 14-16, 2004  
**Place:** Las Vegas, NV  
**Contact:** (419)865-0513; e-mail [ncadrc@aol.com](mailto:ncadrc@aol.com); web site [www.falseallegation.org](http://www.falseallegation.org)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Fall Meeting and Seminar: The Battle for Civil Rights: Exposing Police & Prosecutorial Misconduct in the Quest for Equal Justice  
**Date:** October 14-17, 2004  
**Place:** Atlanta, GA  
**Contact:** NACDL: tel (202)872-8600 x 230; fax (202)872-8690; e-mail [tamara@nacdl.org](mailto:tamara@nacdl.org); web site [www.nacdl.org](http://www.nacdl.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Domestic Violence, Orders of Protection and Sex Abuse  
**Date:** October 16, 2004  
**Place:** Syracuse, NY  
**Contact:** Patricia Marcus, (212)532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Handling a Criminal Case: An Afternoon with Gary Muldoon  
**Date:** October 22, 2004  
**Place:** Brooklyn, NY  
**Contact:** Patricia Marcus, (212)532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Everything You've Wanted to Know about the NYC Department of Corrections  
**Date:** November 5, 2004  
**Place:** New York City  
**Contact:** Patricia Marcus, (212)532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Annual Mid-Hudson Trainer  
**Date:** November 19, 2004  
**Place:** Poughkeepsie, NY  
**Contact:** Patricia Marcus, (212)532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com)

**Sponsor:** **New York State Defenders Association**  
**Theme:** **37th Annual Meeting and Conference**  
**Dates:** **July 24-26, 2005**  
**Place:** **Saratoga Springs, NY**  
**Contact:** **NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail [info@nysda.org](mailto:info@nysda.org); web site [www.nysda.org](http://www.nysda.org)**

## **Once More at the Gideon Putnam!**

**By popular demand,  
the 2006 NYSDA  
Annual Meeting and Conference  
will be held at the  
Gideon Putnam Hotel  
and Conference Center  
Saratoga Springs, NY**

# Defense Practice Tips

## DWI Slangue—Part I\*

by Glenn Edward Murray and Gary Muldoon\*\*

**AUO.** Aggravated Unlicensed Operation. Driving on a [Ed. Note: This compilation is a quick reference to statutory and caselaw citations for concepts such as the “two-hour rule.” New lawyers and experienced lawyers who have not previously ventured into the specialized area of New York DWI, or “dee-wee” as it is sometimes known, may particularly want to keep this compilation of DWI terms handy. When reading reports and preparing for negotiations, client conversations, and court appearances, this reference will ease the learning curve and avoid having to ask too many times, “the WHAT?”]

suspended or revoked license. VTL § 511.

**BAC.** Blood Alcohol Content. Element of *per se* DWI and DWAI, based on illegal BAC. VTL § 1192.

**BWI.** Boating While Intoxicated. Navigation Law § 49-1.

**Blood-breath partition ratio.** Presumed ratio between concentration of alcohol in alveolar (deep lung) air and the blood: approximately 2100:1 (aka “Blood-breath presumption”), which if not in fact as presumed may cause breath test error.

**Blood sucker order.** Authorizes involuntary blood test—usually granted by court if defendant is charged with DWI incident to personal injury traffic accident. VTL § 1194(3).

**CDL.** Commercial Drivers License. In the context of DWI charges, may affect penalties, depending on kind of vehicle operated. See VTL §§ 1192(5) and (6); 15 NYCRR § 134.7.

**CL.** Conditional License. VTL § 1196. Limited use license some DWI/DWAI defendants are eligible for, but only if convicted of DWAI or DWI. If charges dismissed and breathalyzer refusal found by DMV, there is no eligibility for a CL. Thus, for driving privileges, some motorists are better off convicted than acquitted. *Cf.* Hardship privilege (based on BAC of .08%+. VTL § 1193(2)(e)(7)(e)).

\*Part II will appear in a future issue of the REPORT.

\*\*Glenn Edward Murray is a lawyer in Buffalo, New York; he can be contacted at [www.glennmurraylaw.com](http://www.glennmurraylaw.com). Gary Muldoon is a lawyer in Rochester, NY. His e-mail is [muldg@aol.com](mailto:muldg@aol.com). The terms here are excerpted from their publication, *Criminal Law Slangue of New York*, 2d, with over 500 slang expressions and citations to them, published by Gould Publications, Inc. [www.gould-law.com](http://www.gould-law.com).

**CMV.** Commercial Motor Vehicle. BAC limits are lower if operating a commercial motor vehicle when DWAI or DWI. See VTL §§ 1192(5) and (6). Operation of a CMV on a CL is sometimes allowed if a CRD is granted, but not if motorist was convicted of DWAI or DWI operating a CMV. See VTL §§ 1196(7)(g), 530(5).

**CRD.** Certificate of Relief from Civil Disabilities. Corr L §§ 700 *et seq.* Post-conviction relief that avoids some collateral consequences. In the context of DWI charges, it may allow operation of CMV with a CL, but only if DWI/DWAI operation was not of a commercial motor vehicle and if CL eligible. See CMV.

**Checkpoint.** A roadblock that stops motorist for inspection of vehicle and condition of operator. *People v Scott*, 63 NY2d 518 (1984); *People v Chaffee*, 183 AD2d 208 (4th Dept 1992).

**Chemical test.** A breath or blood test to determine BAC. VTL § 1194(2).

**Common Law DWI.** Driving while intoxicated charge (VTL § 1192(3)) based on physical condition rather than on (or to supplement) proof of *per se* illegal BAC.

**Coram Nobis motion.** A motion to vacate an allegedly unlawful conviction. CPL Art 440. Vacatur may avoid enhanced charges, enhanced sentencing, and may render motorist eligible for DDP. *People v DeJesus*, 122 Misc2d 190 (Sup. Ct. 1983); *Smith v Passidomo*, 125 Misc2d 942 (Sup. Ct. 1984).

**Corroboration rule.** Conviction is prohibited upon evidence of confession unless corroborated by additional proof that the offense charged has been committed. CPL 60.50; *People v Kaminiski*, 143 Misc2d 1089 (Crim. Ct. 1989) (DWI dismissed upon uncorroborated confession by defendant that he was operating vehicle); *cf. People v Booden*, 69 NY2d 185 (1987).

**Cruz standard.** Standard of proof for “common law” DWI: whether voluntary consumption of alcohol rendered motorist “incapable” of employing physical and mental abilities to operate in a “reasonable and prudent” manner. *People v Cruz*, 48 NY2d 419 (1979).

**DDP.** Drinking Driver Program. An educational program that is a prerequisite to a CL, but only allowed if the motorist is convicted of DWAI or DWI. VTL § 1196(4). *Clark v Abrams*, 161 AD2d 1200 (4th Dept, 1990) (court order that DMV enroll motorist in DDP held invalid because motorist ineligible by statute).

**DRE.** Twelve-step Drug Recognition Examination.

Field sobriety testing, including measurement of jerking eye movements. See “HGN.”

**DUI.** Driving Under the Influence. What in NY is called DWI or DWAI is called DUI in most other states. Each state has its own legislative scheme for drinking/driving offenses and penalties, but all have adopted .08% BAC or less as a legal threshold. In Canada it’s called “ID” (“Impaired Driving”) or “08.” Is DUI an offense in New York? Yes, but there are several kinds and they are commonly called by their sub-species. VTL § 1192 is entitled: “Operating a motor vehicle under the influence of alcohol or drugs” and includes the offenses of: DWAI, DWI (common law and per se), DWAID and CMV DWI/DWAI.

**DWAI.** Driving While Ability Impaired (traffic infraction). A lesser included offense of DWI (misdemeanor). Not a lesser included offense of misdemeanor Driving While Impaired by Drugs (VTL § 1192(4)).

**DWAID.** Driving While Ability Impaired by Drugs (misdemeanor). In theory, there is no lesser included offense of DWAID (VTL § 1192(4)); but in reality, DWAI convictions are commonly accepted by plea, rendered by verdict in many courts and recorded by DMV.

**DWI.** Driving While Intoxicated. Misdemeanor (VTL §§ 1192(2)(3)) or felony (if prior DWI conviction within 10 years per VTL § 1193(1)(c)).

**Donaldson test.** Four-point criteria for admissibility of Breathalyzer® test result. *People v Donaldson*, 36 AD2d 37 (4th Dept 1971); *People v Todd*, 38 NY2d 755 (1975).

**Enhanced crimes (aka “Charge enhancement”).** When prior conviction raises the classification of an offense and maximum punishment because of a prior conviction (e.g. felony DWI (misdemeanor DWI enhanced to class E felony DWI, if prior DWI conviction within 10 years per VTL § 1193(1)(c); See *People v Knack*, 128 AD2d 307 (2d Dept 1987)(People not required to prove constitutionality of prior conviction); Cf. *People v Lazzar*, 3 Misc2d 328 (Just. Ct. 2004) (prior DWAI convictions neither pleaded nor proven, therefore 4th DWAI classified as traffic infraction, not misdemeanor); *People v Powlowski*, 172 Misc2d 240 (City Ct. 1997).

**Enhanced sentence (aka “Sentence enhancement”).** Increased punishment upon proof of prior conviction. (e.g. upon 2d DWAI conviction, 90-day license suspension increases to 6-month revocation if prior DWAI conviction within 5 years). VTL § 1193 (b)(1).

**FST.** Field Sobriety Test. The NHTSA only endorses only three FSTs as sufficiently reliable: a) walk and turn, b) one leg stand and c) HGN tests; but other tests are routinely admitted to convict motorists, including the alphabet test, finger count, etc.

**GVWR.** Gross Vehicle Weight Rating. In the context of DWI/DWAI charges, may affect penalties, depending on kind and weight of the vehicle operated. See VTL §§ 1192(2)(3); 1194(2)(d)(1)(c).

**Gursey rule.** Qualified right to counsel by DWI arrestee. *People v Gursey*, 22 NY2d 224 (1968) (motorist should be given opportunity to contact attorney unless delay will jeopardize administration of chemical test); See *Cook v Adduci*, 205 AD2d 903 (3d Dept 1994).

**HGN.** Horizontal Gaze Nystagmus (eye jerking), a DRE field sobriety test. *People v Vanderlofske*, 186 Misc2d 182 (Co. Ct 2000); *People v Heidelberg*, 314 AD2d 767 (3d Dept, 1995); *People v Erickson*, 156 AD2d 760 (3d Dept 1989) (harmless error to admit test results). *People v Quinn*, 153 Misc2d 139 (Dist Ct., 1991) *revd on other grounds* (158 Misc2d 139 (App. Term 1993)).

**Hardship privilege.** Discretionary limited driving privileges that a court may grant to ameliorate suspension pending prosecution based on BAC of .08%+. VTL § 1193(2)(e)(7)(e); *People v Bridgman*, 163 Misc2d 818 (City Ct. 1995)(“extreme hardship” factors).

**Hematocrit levels.** Presumed percentage of blood composed of whole blood cells. Higher hematocrit reflects lower percentage of water, which may affect liquid-air coefficients of alcohol and water, causing blood test errors.

**IID.** Ignition Interlock Device. A device installed in a motor vehicle that measures a driver’s blood alcohol content and prevents a vehicle from being started if the connected breath test device detects a BAC exceeding the calibrated setting. May be imposed as a condition of probation in any DWI case. Cost of installation must be borne by the defendant. VTL §§ 119-a, 1198(5). Penal Law § 65.10(2)(k-1), VTL §§ 1193(1-a,b). A 2nd DWI conviction within 5 years requires installation of IID (§ 1193 (1-a)(c)) and 5 days jail or 30 days community service (§ 1193 (1-a)(a)); and a 3rd DWI within 10 years, requires 10 days jail or 60 days community service. (§ 1193 (1-a)(b)).

**Ingle motion.** Ruling/Admissibility—reasonable cause required to stop vehicle. “routine traffic check” is not a proper basis to stop. *People v Ingle*, 36 NY2d 413 (1975); *Byer v Jackson*, 241 AD2d 943 (4th Dept 1997) (erroneous belief of VTL violation did not rise to reasonable suspicion for stop). ⚡

*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

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

Habeas Corpus (Federal) 182.5(15)

**Yarborough v Alvarado**, 541 US \_\_, 124 Sct 2140, 158 LEd2d 938 (2004)

Police asked the parents of the 17-year-old respondent to bring him in for questioning. The parents were not present during the interrogation. No *Miranda* warnings were given. After two hours, the respondent admitted his role and was released. Charged with murder and attempted robbery, the respondent moved to suppress his statement. Suppression was denied. His conviction was affirmed on appeal. Denial of federal *habeas* relief was reversed on appeal.

**Holding:** The state court's decision finding that this juvenile was not in custody during police interview was a reasonable application of clearly established law. 28 USC 2254(d)(1). The respondent appeared at the police station under his own power, no threats were made, his parents were outside, and the interview was brief. *Berkemer v McCarty*, 468 US 420 (1984). Police appealed to the respondent's interest in telling the truth. *Oregon v Mathiason*, 429 US 492 (1977). He was offered the chance to take breaks and was released at the end of questioning. A reasonable person would have felt free to leave. The respondent's age, inexperience, or history of police interrogations were subjective factors not relevant to *Miranda* custody analysis, an objective test. *California v Beheler*, 463 US 1121 (1983). Judgment reversed.

**Concurrence:** [O'Connor, J] A suspect's age might be relevant to *Miranda* custody analysis.

**Dissent:** [Breyer, J] A reasonable person in the respondent's position would not have felt free to leave. *Thompson v Keohane*, 516 US 99, 112 (1995). He was summoned for questioning, suggesting involuntary behavior. The interview was not brief; the parents were excluded. The respondent's perception during the interview was vital. Police questioning focused on his role as a participant, not a witness. Absence of threats or coercion was not relevant to custody analysis. Asking the respondent if he wanted to take a break underscored police restraints on his freedom of movement. His youth was a relevant objective factor known to police. *Schall v Martin*, 467 US 253, 265 (1984)

Death Penalty (Cruelty) DEP; 100(40) (80) (155[a])  
(General) (States  
[Alabama])

**Nelson v Campbell**, 541 US \_\_, 124 Sct 2117, 158 LEd2d 924 (2004)

Past drug abuse had severely compromised the petitioner's veins, making them inaccessible by a needle. When the petitioner was scheduled to be executed by lethal injection, the prison warden ordered a cut-down procedure, making a 2-inch incision in the petitioner's arm or leg one hour before execution, with local anesthesia. The petitioner filed an action under 42 USC 1983 seeking an injunction and stay of execution, claiming that the cut-down procedure was cruel and unusual punishment and showed deliberate indifference to his serious medical needs. Dismissal of the complaint because the action was a functional equivalent of an unauthorized successive *habeas* application was affirmed.

**Holding:** A 1983 action seeking a stay and injunction was an appropriate mechanism to challenge the "cut down" procedure for lethal injection as cruel and unusual punishment in violation of the 8th Amendment. A federal *habeas* application concerns the fact of conviction or duration of sentence. *Preiser v Rodriguez*, 411 US 475, 489 (1973). However, conditions of confinement fall outside *habeas*, and within 1983. *Muhammad v Close*, 540 US \_\_; 158 LEd2d 32 (2004). The cut-down procedure was not a statutorily mandated part of the lethal injection protocol, and the petitioner did not reject alternative methods of vein access. So long as success on the merits of the 1983 action did not "necessarily imply" the invalidity of the petitioner's conviction or length of sentence, a favorable termination of a *habeas* action was not required as a prerequisite. *Heck v Humphrey*, 512 US 477, 487 (1994). The state court will need to resolve the issues surrounding this procedure. The question of how to treat method-of-execution claims generally remains open. Judgment reversed, matter remanded.

Search and Seizure (Arrest/Scene SEA; 335(10[a])  
of the Crime Searches  
[Automobiles and Other Vehicles])

**Thornton v US**, 541 US \_\_, 124 Sct 2127, 158 LEd2d 905 (2004)

While driving an unmarked car, a police officer noticed the petitioner slow down to avoid being next to him. The officer checked the petitioner's plates, which belonged to a different car. Meanwhile, the petitioner drove into a parking lot and got out. The officer approached him, asked for his driver's license, and advised him that the plates did not match the car. The petitioner appeared nervous. The officer, concerned for

**US Supreme Court** *continued*

his safety, asked the petitioner if he had weapons or narcotics on him or in the car. The petitioner said no, but a pat down search revealed illegal drugs. After the petitioner was handcuffed, the officer searched the car and found a gun under the driver's seat. The search was held to be valid and the resulting conviction was affirmed on appeal.

**Holding:** The search of the car was justified by concerns for safety and to preserve evidence. In *New York v Belton*, 453 US 454 (1981), police pulled over a vehicle, and approached the occupants in the car. Suspecting they had drugs, police ordered them out of the car, arrested them, and searched the entire passenger compartment. Whether the petitioner in this case was in or out of the car when the officer approached, or ordered out of the car, was irrelevant. *Chimel v California*, 395 US 752 (1969). Judgment affirmed.

**Concurrence:** [O'Connor, JJ] Judicial approval of vehicle searches incident to arrest of recent occupants is eroding the rationale of *Belton* and *Chimel*.

**Concurrence:** [Scalia, JJ] *Belton* searches should be limited to cases in which it is reasonable to believe evidence relevant to the offense of arrest might be found in the vehicle.

**Dissent:** [Stevens, JJ] Expansion of *Belton's* bright line rule is unwarranted. Once the petitioner was handcuffed, the safety justification evaporated.

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

**US v Benitez**, 542 US \_\_, 124 Sct 2333,  
159 LEd2d 157 (2004)

The respondent, indicted on federal drug charges, told the court that assigned counsel was encouraging him to plead guilty, and that he wanted a "better deal" and did not intend to go trial. He later pled guilty on the condition he receive a safety-valve reduction, allowing a sentence below the mandatory minimum 10 years. The agreement stated in part that he could not withdraw his plea if the court refused to accept the prosecutor's recommendations, but the court omitted the verbal warning—about not being able to withdraw his plea—during the colloquy. A probation investigation revealed the respondent's criminal history, making the safety-valve reduction inapplicable, and he was sentenced to 10 years. The decision that he could not withdraw his plea was reversed on appeal.

**Holding:** The respondent, challenging his guilty plea based on plain error under Rule 11, had to show a reasonable probability that, but for the error, he would not have entered the plea. *Cf US v Bagley*, 473 US 667, 682 (1985). When the prosecutor agreed to a nonbinding sentencing recommendation, Rule 11(c)(3)(B) required the court to "advise the defendant that the defendant has no right to

withdraw the plea if the court does not follow the recommendation or request." In view of the evidence against him, omission of the warning would have made little difference under the standard of reasonable probability. The plea agreement was read to the defendant, and it warned him that he could not withdraw his plea. Judgment reversed.

**Concurrence:** [Scalia, JJ] The reasonable probability standard should not be applied to plain error. The proper standard was more likely than not.

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

**Pliler v Ford**, 542 US \_\_, 124 Sct 2441,  
159 LEd2d 338 (2004)

The respondent filed two *pro se* federal *habeas corpus* petitions containing unexhausted claims, and motions to stay allowing him to complete unexhausted claims in state court. The district court offered three options: dismiss without prejudice (allowing refile); proceed on exhausted claims only; or challenge exhaustion determinations made by the magistrate. Both petitions were dismissed without prejudice. After the state court denied the respondent relief, the federal court dismissed refile as untimely. On appeal, the petitions were held timely.

**Holding:** The district court was not required to give stay-and-abeyance procedure warnings. "District judges have no obligation to act as counsel or paralegal to *pro se* litigants." The court would not have been able to consider motions to stay unless they were amended and the unexhausted claims dismissed. Federal claims would have been time-barred, absent equitable tolling, if the petitions were dismissed without prejudice to exhaust claims in state court. *McKaskle v Wiggins*, 465 US 168, 183-184 (1984). Mixed petitions filed near end of the statute of limitations ran the risk that if they were dismissed, the statute might run out before claims could be exhausted in state court and refiled in federal court. 28 USC 2244(d)(1); *Rose v Lundy*, 455 US 509 (1982). Remand is required "for further proceedings given the Court of Appeals' concern that respondent had been affirmatively misled . . .". Judgment vacated and remanded.

**Concurrence:** [O'Connor, JJ] Propriety of the stay-and-abeyance procedure is not addressed. If the respondent was misled, equitable tolling might be appropriate.

**Concurrence:** [Stevens, JJ] Remand to consider propriety of equitable tolling.

**Dissent:** [Ginsburg, JJ] If the stay-and-abeyance procedure were a choice the respondent could have made, then the judge erred by not informing him of that option. Ripe issues regarding stay-and-abeyance procedures should be addressed.

**Dissent:** [Breyer, JJ] The stay-and-abeyance procedure was lawful and allowed the respondent to complete *habeas* with one filing. *See Crews v Horn*, 360 F3d 146, 152 (3rd Cir. 2004).

US Supreme Court *continued*

Police (General)	POL; 287(20)
Search and Seizure (General) (Stop and Frisk)	SEA; 335(42) (75)
Self-Incrimination (Conduct and Silence) (General)	SLF; 340(5) (13)

**Hiibel v Sixth Judicial District Court of Nevada, 542 US \_\_, 124 Sct 2451, 159 LEd2d 292 (2004)**

A police officer investigating a report of an assault encountered the petitioner behind a truck matching the report description and asked if the petitioner had “any identification on [him],” meaning a driver’s license or something equivalent. The petitioner refused. After 11 refusals, the officer arrested him for obstruction of justice for interfering with a statute that empowered police to detain suspects to learn their identity. The conviction was affirmed.

**Holding:** The statute that empowered police to ask for identification during a *Terry* stop based on reasonable suspicion did not violate the 4th Amendment. *INS v Delgado*, 466 US 210, 216 (1984). The stop-and-identify statute permitted law enforcement to ask a suspect’s identity. Nev Rev Stat. (NRS) 171.123. *Accord* NY Crim Proc Law 140.50(1). Requesting a suspect’s name was a routine part of a *Terry* stop. *Terry v Ohio*, 392 US 1 (1968); *US v Hensley*, 469 US 221, 229 (1985). It served important government interests in focusing on the correct suspect. The petitioner’s refusal to disclose his identity was not due to a fear that the information would be used to incriminate him, violating the 5th Amendment. *Hoffman v US*, 341 US 479, 486 (1951). Judgment affirmed.

**Dissent:** [Stevens, J] The 5th Amendment interdicted a law that compelled criminal suspects to reveal their identity or face prosecution based on mere suspicion of criminal activity. *Miranda v Arizona*, 384 US 436, 467 (1966). Identity information is testimonial. *Crawford v Washington*, 541 US \_\_, \_\_ 158 LEd2d 177 (2004).

**Dissent:** [Breyer, J] Suspects are not required to reveal their identity during a *Terry* Stop. *Berkemer v McCarty*, 468 US 420, 439 (1984).

Death Penalty (Penalty Phase)	DEP; 100(120)
Sentencing (Mitigation)	SEN; 345(50)
<b>Tennard v Dretke, 542 US __, 124 Sct 2562; 159 LEd2d 384 (2004)</b>	

The petitioner was convicted of capital murder. Penalty phase evidence showed that the petitioner had an IQ of 67. Despite arguments concerning his low intelligence as a mitigating factor, the jury found against him on

deliberateness and future dangerousness. His request for federal *habeas* relief based on *Penry v Lynaugh*, 492 US 302 (1989) was denied, as was his request for a certificate of appealability (COA).

**Holding:** Evidence of low intelligence required the same consideration as a *Penry* claim during the sentencing phase of this capital case, and a COA should have been issued. The petitioner was required to make “a substantial showing of the denial of a constitutional right.” 28 USC 2253(c)(2). Reasonable jurists would have found the district court’s rejection of the constitutional claim debatable or wrong. *Miller-El v Cockrell*, 537 US 322, 336 (2003). Relevance of evidence introduced for mitigation is to be read broadly. *McKoy v North Carolina*, 494 US 433, 440-441 (1990). Once relevance was shown, the jury had to be able to give the evidence effect. *Boyde v California*, 494 US 370, 377-378 (1990). Evidence of the petitioner’s low intelligence should not have been screened out. *Skipper v South Carolina*, 476 US 1, 5 (1986). Impaired intellectual functioning was inherently mitigating. *Atkins v Virginia*, 536 US 304, 316 (2002). Judgment reversed, COA ordered.

**Dissent:** [Rehnquist, J] The district court correctly found that evidence of the petitioner’s low intelligence, which was not equivalent to mental retardation, was within the effective reach of the jury. *Johnson v Texas*, 509 US 350, 375 (1993).

**Dissent:** [Scalia, J] There is no constitutional basis for a right to unchanneled sentence discretion. *Graham v Collins*, 506 US 461 (1993).

**Dissent:** [Thomas, J] COA should not have been issued based on an insubstantial right derived from *Penry*, which does not merit the force of *stare decisis*.

Constitutional Law (United States Generally)	CON; 82(55)
Sentencing (Aggravated Penalties) (Enhancement)	SEN; 345(5) (32)

**Blakely v Washington, 542 US \_\_, 124 Sct 2531, 159 LEd2d 403 (2004)**

The petitioner pled guilty to kidnapping with a maximum sentence of 53 months. After hearing from the complainant, the court found the petitioner had acted with deliberate cruelty, a statutory aggravator, and imposed an exceptional sentence of 90 months. On appeal, the petitioner claimed that the sentencing procedure violated the 6th Amendment. His conviction was affirmed.

**Holding:** Facts relied upon in increasing the petitioner’s sentence by three years were not admitted by the petitioner nor found by a jury; the procedure violated the 6th Amendment. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a

**US Supreme Court** *continued*

jury, and proved beyond a reasonable doubt.” *Apprendi v New Jersey*, 530 US 466, 490 (2000). The “statutory maximum” under *Apprendi* was the maximum sentence a judge may impose without any additional factual findings. *Ring v Arizona*, 536 US 584 (2002). The 90-month sentence could not have been imposed on the facts from the guilty plea alone. A judge cannot impose a higher sentence based on finding a specified fact, one of several specified facts, or, as here, any aggravating fact. Judgment reversed.

**Dissent:** [O’Connor, J] The legislature had the power to determine which facts were relevant to guilt and sentencing, and the determinate scheme gave violators notice of the risks of conviction.

**Dissent:** [Kennedy, J] Expansion of *Apprendi* to sentencing guidelines harms collaboration between courts and legislatures. *Mistretta v US*, 488 US 361, 408 (1989).

**Dissent:** [Breyer, J] The state’s sentencing scheme did not add a new element to the criminal offense nor change the fixed maximum penalty, but curtailed discretion of judges within a limited range.

<b>Death Penalty (Penalty Phase)</b>	<b>DEP; 100(120)</b>
<b>Habeas Corpus (Federal)</b>	<b>HAB; 182.5(15)</b>
<b>Sentencing (Mitigation)</b>	<b>SEN; 345(50)</b>

**Beard v Banks, 542 US \_\_, 124 Sct 2504, 159 LEd2d 494 (2004)**

The respondent was convicted of capital murder. Shortly after direct review ended in 1987, states were held to be prohibited from requiring jurors to find mitigating factors unanimously. *Mills v Maryland*, 486 US 367 (1988); *McKoy v North Carolina*, 494 US 433 (1990). The state court refused to apply this holding to the respondent retroactively, and a federal court reversed.

**Holding:** *Mills* was a new rule of criminal procedure and could not be applied retroactively. *Teague v Lane*, 489 US 288 (1989). This case fits within the *Teague* bar to retroactive application, set out *inter alia* in *Graham v Collins* (506 US 461, 468 [1993]). The respondent’s conviction became final before *Mills* was issued, *Mills* broke new ground, and *Mills* was not compelled by then existing precedent. Finally, the exception for new rules that implicate fundamental fairness and accuracy of the criminal proceeding does not apply; the *Mills* rule did not work a fundamental shift in core procedural principles. Judgment reversed.

**Dissent:** [Stevens, J] *Mills* was warranted by precedent at the time of the respondent’s case. It was a natural outgrowth of cases condemning mandatory imposition of

the death penalty. *Roberts v Louisiana*, 431 US 633 (1977).

**Dissent:** [Souter, J] Accuracy of capital sentences is more important than finality. *Schriro v Summerlin*, 124 Sct 2519 (2004) (Breyer, J dissenting).

<b>Death Penalty (Penalty Phase)</b>	<b>DEP; 100(120)</b>
<b>Habeas Corpus (Federal)</b>	<b>HAB; 182.5(15)</b>
<b>Sentencing (Mitigation)</b>	<b>SEN; 345(50)</b>

**Schriro v Summerlin, 542 US \_\_, 124 Sct 2519; 159 LEd2d 442 (2004)**

The respondent was convicted of capital murder. His death sentence, based on a finding of aggravating factors by the trial judge, was affirmed on appeal. While his case was pending in a federal appeals court, two new constitutional cases were decided, *ie Apprendi v New Jersey* (530 US 466 [2000]) and *Ring v Arizona* (536 US 584 [2002]), which prevent judges from imposing sentences above the statutory maximum based on facts not admitted by the defendant or found by a jury. The federal appeals court reversed based on these decisions.

**Holding:** The rule in *Ring* was procedural, not substantive, since it did not alter the range of conduct or the class of persons punishable by the death penalty. *Bousley v US*, 523 US 614, 620-621 (1998). Also, it was not a watershed rule of criminal procedure that implicated fundamental fairness. *Saffle v Parks*, 494 US 484, 495 (1990). Judgment reversed.

**Dissent:** [Breyer, J] *Ring*’s rule is central to an accurate determination that the death penalty is the appropriate punishment. *Teague v Lane*, 489 US 288, 313 (1989). *Teague* supports retroactive application of *Ring* because the factfinder’s role in assessing aggravating factors involves community-based value judgments better applied by a jury than a judge, because death cases require greater accuracy than non-capital cases, *Gilmore v Taylor*, 508 US 333, 342 (1993), and because of the relatively small number of death sentences compared to all sentences, retroactivity would not unduly impact on the administration of justice.

<b>Habeas Corpus (Federal)</b>	<b>HAB; 182.5(15)</b>
<b>Counsel (Competence/Effective Assistance/Adequacy)</b>	<b>COU; 95(15)</b>

**Holland v Jackson, 542 US \_\_, 124 Sct 2736, 159 LEd 2d 683 (2004)**

The respondent was convicted of murder in state court. In post-conviction motions, he claimed that his trial attorney had been ineffective by failing to conduct an adequate investigation. *See Strickland v Washington*, 466 US

US Supreme Court *continued*

668 (1984). Later, the respondent unsuccessfully sought a new trial based on newly discovered evidence, a witness who did not testify at the first trial and who would now contradict a key eyewitness. After the state court affirmed, denial of federal *habeas corpus* under 28 USC 2254(d)(1) on the basis that the state court’s decision was a reasonable application of *Strickland* was reversed on appeal.

**Holding:** The state court’s application of *Strickland* was reasonable based on the evidence before it, and it was error for the appeals court to rely on other evidence in assessing the state court’s action. *Yarborough v Gentry*, 540 US 1 (2003). The state court had an independent ground for its *Strickland* analysis, *ie* that the new evidence of a contradictory eyewitness was not properly before it for use in making its ineffectiveness of counsel assessment. Moreover, the state court applied the correct standard of proof for such a claim, reasonable probability. *Woodford v Visciotti*, 537 US 19, 23-24 (2002). Judgment reversed.

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

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

**Missouri v Seibert, 542 US \_\_, 124 Sct 2601, 159 LEd2d 643 (2004)**

The respondent was arrested for murder. The police purposely did not Mirandize her, and questioned her 30 to 40 minutes before she confessed. Then a tape recorder was turned on, *Miranda* warnings given, and a signed waiver of rights obtained. The questioning recommenced, drawing out the respondent’s earlier admissions. Her pre-warning statement was suppressed, but the postwarning statement admitted. Her conviction was reversed by the state supreme court, because the second statement was a continuation of first.

**Holding:** Statements taken first without and later with *Miranda* warnings resulting from two-stage interrogation violated the 5th Amendment. *Miranda v Arizona*, 384 US 436 (1966). Questioning first and warning later undermined the effectiveness of *Miranda* warnings to give suspects the ability to make a free and rational choice. *Duckworth v Eagan*, 492 US 195, 203 (1989). An objective analysis showed that *Miranda* warnings inserted into the middle of a continuing interrogation had the effect of misleading and impairing a respondent’s ability to understand his rights at that point. *Moran v Burbine*, 475 US 412, 424 (1986). Judgment affirmed.

**Concurrence:** [Breyer, JJ] Fruits of initial unwarned questioning should be excluded unless the failure to warn was in good faith.

**Concurrence:** [Kennedy, JJ] Prewarning and postwarn-

ing statements should be evaluated under *Oregon v Elstad*, 470 US 298 (1985), where the postwarning admission was upheld since it did not thwart the goals of *Miranda*—detering police misconduct and preserving a suspect’s 5th Amendment rights. An exception is where a deliberate two-step strategy was used without curative measures sufficient to communicate the importance of the *Miranda* warning and waiver.

**Dissent:** [O’Connor, JJ] A two-step interrogation procedure should be analyzed under an involuntariness standard.

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

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

**Evidence (Exclusionary Rule) EVI; 155(53)**

**US v Patane, 542 US \_\_, 124 Sct 2620, 159 LEd2d 667 (2004)**

The respondent was arrested for violating a temporary restraining order. During the arrest, he interrupted the officer’s recitation of *Miranda* and asserted that he knew his rights. Questioned about an illegal weapon, the respondent admitted possession and told the police where to find it. He was indicted for weapons possession. The gun was suppressed. Suppression was affirmed based on the gun being fruit of the unwarned statement.

**Holding:** The *Miranda* rule was intended to protect against a violation of the Self-Incrimination Clause. That clause was not implicated by admission into evidence of physical fruit of a voluntary statement. The core protection provided by *Miranda* was the 5th Amendment right not to testify against oneself at trial. *Chavez v Martinez*, 538 US 760, 764-768 (2003). Failure to give *Miranda* warnings alone does not violate a suspect’s rights. “Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.” Admitting evidence derived from an unwarned statement did not increase the risk that the statement would be used against the respondent at trial. The fruit of the poisonous tree doctrine did not apply. *Nix v Williams*, 467 US 431, 441 (1984). Judgment reversed.

**Concurrence:** [Kennedy, JJ] It is not necessary to decide whether the failure to give complete *Miranda* warnings was a violation of *Miranda* or whether there was anything to deter as long as the unwarned statements were not introduced.

**Dissent:** [Souter, JJ] Failure to apply the fruit of the poisonous tree doctrine to incomplete or omitted *Miranda* warnings opens the door to abuse when physical evidence is at stake.

**Dissent:** [Breyer, JJ] Physical evidence derived from unwarned questioning should be excluded unless the failure to warn was in good faith.

## New York State Court of Appeals

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

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

**Matter of Cerbone, 2 NY3d 479, 780 NYS2d 106 (2004)**

**Holding:** The Commission on Judicial Conduct's findings of fact are not challenged. The petitioner, without his client's knowledge, deposited a tax refund check made out to the client, executrix of an estate, into the petitioner's escrow account and paid himself fees there from. As a result of a dispute with the county prosecutor, the petitioner took several actions including giving form letters to criminal defense attorneys appearing before him and asking the lawyers to fill out the letters (which disclaimed any relationship between the petitioner and the defendant) and mail them to the District Attorney. This charge stemmed from a prior disciplinary action in which the petitioner had called a complaining witness *ex parte*, resulting in the withdrawal of a criminal complaint. The petitioner had received prior letters of dismissal and complaint and had been admonished and cautioned. The petitioner appears "incapable of understanding, despite repeated warnings, that a Judge performing judicial duties must both act and appear to act as an impartial arbiter serving the public interest, not someone with an axe to grind." Determined sanction accepted, petitioner removed from office.

**Counsel (Choice of Counsel)** **COU; 95(9.5) (39)**  
**(Standby and Substitute Counsel)**

**People v Linares, No. 77, 6/3/04**

Preceding the defendant's drug trial, he wrote to the court expressing dissatisfaction with assigned counsel and planning to hire a new attorney. He claimed that counsel failed to provide him with documents and was not acting in his best interests. When the defendant appeared at a suppression hearing in handcuffs, the same assigned attorney claimed that the defendant verbally abused him and threatened to cut his face. The defendant denied the threats, adding that he had no confidence in counsel, who wanted him to plead guilty. His request for new counsel was denied.

**Holding:** The trial court's refusal to substitute assigned counsel did not violate the defendant's right to counsel in the absence of good cause. *People v Medina*, 44 NY2d 199, 207. The court, required to consider the timing of the request, its effect on the case, and whether counsel was likely to provide meaningful assistance, conducted a thorough inquiry and permitted the defendant to make his position clear. The court noted that counsel, experienced and conscientious, had made suppression and speedy trial motions, communicated with the prosecutor,

and hired an investigator and interpreter. The court's denial of the request for substitution in the absence of specific reasons was a proper exercise of discretion. Order affirmed.

**Grand Jury (Procedure)**

**GRI; 180(5)**

**People v Aarons, No. 76, 6/8/04**

After deliberations had begun, the foreperson of the grand jury informed the prosecutor that they were having a problem reaching a decision. The prosecutor requested that they stop deliberations to allow her to present additional evidence. After hearing from another witness, the grand jury returned an indictment for burglary and related charges. The defendant moved to dismiss, claiming that the grand jury's failure to find 12 votes for indictment was a dismissal and the prosecutor had to ask for permission from the court to present additional evidence. The grant of the motion was reversed on appeal.

**Holding:** Formal vote of 12 grand jurors was required to dismiss a charge, since it was an affirmative official action. CPL 190.25 (1). Legislative history and historical practices support the conclusion that 12 grand jurors had to concur before a charge could be dismissed. Dismissal cannot be inferred from inaction. CPL 190.60; 190.75. Since no dismissal occurred, the prosecutor had the right to ask the grand jurors to stop deliberating in order to present more evidence without permission of the court. Order affirmed.

**Dissent:** [Ciparick, J] The prosecutor did not have the right to offer more evidence and resubmit the case after the grand jury failed to vote a true bill. Dismissal did not require a vote of 12 jurors; such requirement was not implied by the statute's enumerated list of affirmative official actions. *People v Montanez*, 90 NY2d 690, 694.

**Evidence (Sufficiency)**

**EVI; 155(130)**

**Identification (Expert Testimony)**  
**(Eyewitnesses)**

**IDE; 190(5) (10)**

**People v Calabria, No. 88, 6/8/04**

A single eyewitness, the complainant, identified the defendant twice. She claimed that she "got a good look" and "absolutely" saw him long enough to remember him. He was convicted after a jury trial of robbery and burglary. The Appellate Division affirmed.

**Holding:** Evidence from a single eyewitness found credible by the jury was legally sufficient to support the conviction. *People v Arroyo*, 54 NY2d 567, 578. The standard of review for legal sufficiency was whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements beyond a reasonable doubt. *People v Contes*, 60 NY2d 620, 621. Eyewitness evidence had to be

**NY Court of Appeals** *continued*

filled with “hopeless contradictions” to make the testimony incredible or unreliable as a matter of law. *People v Foster*, 64 NY2d 1144, 1147-1148. The complainant, a religious schoolteacher, testified consistently while under oath. The defendant did not seek to submit expert testimony about eyewitness identification. This court lacked power to review the weight of the evidence. The jury’s verdict had a rational basis. *People v Leonti*, 18 NY2d 384, 390. Order affirmed.

**Concurrence:** [Rosenblatt, J] This single-eyewitness identification evidence was not insufficient as a matter of law. However, there were contradictions warranting the prosecutor’s re-investigation of the case.

**Dissent:** [G.B. Smith, J] The evidence was legally insufficient to prove the identity of the perpetrator, who the eyewitness observed for only a few seconds while upset and disoriented. There was little other evidence linking the defendant to the crime, and his alibi witnesses were unavailable to testify at this retrial following reversal for prosecutorial misconduct.

**Forgery (Checks) (Elements Evidence) FOR; 175(5) (10) (15)**

**People v Cunningham, No. 86, 6/10/04**

The defendant was entrusted with paying bills as a consultant in a new business venture. He had access to blank signed checks, but was not authorized to sign them. The business owner claimed the defendant stole money by improperly issuing and signing checks. The defendant was charged with grand larceny, second-degree forgery, and second-degree criminal possession of a forged instrument. His conviction, only of forging a check he signed with his own name, was affirmed.

**Holding:** The check was not a forgery since the defendant signed his own name without misrepresenting himself. *People v Levitan*, 49 NY2d 87, 90. The statute says that “[a] person ‘falsely makes’ a written instrument when he makes or draws a complete written instrument \* \* \* which purports to be an *authentic creation of its ostensible maker or drawer*, but which is not such \* \* \* because the ostensible maker or drawer \* \* \* did not authorize the making or drawing thereof’ (emphasis supplied).” Penal Law 170.00(4). The defendant was the ostensible maker, since he did not represent himself to be anyone else, alternatively, as a consultant the check was still an authentic creation of the company. *People v Briggins*, 50 NY2d 302, 307. Order reversed.

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

**Sentencing (Appellate Review) (General) SEN; 345(8) (37)**

**People v Konieczny, No. 87, 6/10/04**

Upon the defendant’s conviction for disorderly conduct, reduced from passing a bad check, the court issued an order of protection for one Gary M. as requirement of the conditional discharge. The court based the order on a social services abuse report and information from concerned citizens that the defendant was abusing Gary M. Later, police found the defendant at Gary M.’s home. Arrested for second-degree criminal contempt, the defendant pled guilty. The court extended the order of protection, making it permanent, without objection. On appeal, the defendant challenged the validity of the order because Gary M. was not a complainant or witness relating to the bad check charge. County Court found the claim was forfeited by guilty plea.

**Holding:** The court “cannot condone the misuse of CPL 530.13 to issue an order of protection in favor of a party unrelated to a pending prosecution.” However, a challenge to an order of protection as invalid was not jurisdictional and was forfeited by guilty plea. An order of protection issued at the conclusion of a criminal action is appealable as part of the judgment of conviction. *People v Nieves*, \_\_\_ NY2d \_\_\_ (5/6/04). The defendant did not appeal from the disorderly conduct conviction or raise an objection to the issuing of the order. The complaint was jurisdictionally sufficient. The underlying order of protection was analogous to an arrest warrant, which could have been challenged pre-trial. *People v Alejandro*, 70 NY2d 133. Order affirmed.

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

**People v Reynoso, No. 135, 6/10/04**

**Holding:** Arrest occurring after the defendant left his home voluntarily or while he stood in his doorway did not violate *Payton v New York* (445 US 573 [1980]). The statement of a non-testifying codefendant, made to a detective, was offered to show the officer’s state of mind, not truth of matter asserted. Therefore, it did not violate the Confrontation Clause. *Crawford v Washington*, \_\_\_ US \_\_\_, 124 S Ct 1354, 1369 n9 (2004). Order affirmed.

**Death Penalty (Penalty Phase) (States [New York]) DEP; 100(120) (155[gg])**

**Sentencing (Instructions to Jury) SEN; 345(45)**

**People v LaValle, No. 71, 6/24/04**

The defendant was found guilty of first-degree murder in the course of and in furtherance of first-degree rape (Penal Law 125.27 [1][a][vii]) and sentenced to death.

## NY Court of Appeals *continued*

**Holding:** The jury deadlock instruction given pursuant to CPL 400.27(10) was unconstitutional under Article I, section 6 of the State Constitution. Only the legislature can remedy the statutory defect. The court, over prior objection, advised the jury that they had to reach a unanimous verdict on whether the defendant should be sentenced to death or to life without parole (LWOP); failing agreement, the court would sentence the defendant to life imprisonment with parole eligibility after serving a minimum of 20 to 25 years. New York's instruction is unique; no other state provides that a judge could impose a third, more lenient, sentence if the jury fails to agree on death or LWOP. Studies show that jurors are inclined to impose a death sentence in an unwarranted case out of fear that a defendant might be released someday. *See eg Bowers & Steiner, Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex L Rev 605, 648 (1999). This deadlock instruction raised the specter that the defendant might be paroled in 20 to 25 years unless the jury reached a unanimous decision. This fear of the defendant's eventual release resembled future dangerousness, which was not a statutory aggravator. Thus the deadlock instruction had an unconstitutionally coercive effect upon jurors, compelling some to join those favoring death in order to break the deadlock. *See Morris v Woodford*, 273 F3d 826 (9th Cir 2001) *cert den* 537 US 941. The deadlock instruction raises the "unacceptable risk that it may result in a coercive, and thus arbitrary and unreliable, sentence." *Woodson v North Carolina*, 428 US 280, 305 (1976). The instruction violates the New York State's Constitution. Absence of a deadlock instruction would lead to death sentences that were based on speculation.

It was not error for the trial court to deny the defendant's challenges for cause against select panelists. The defendant claimed that they were not impartial, holding views that substantially impaired their ability to consider a life sentence. CPL 270.20(1)(b); *People v Chambers*, 97 NY2d 417, 419. While one panelist initially believed the defendant to be guilty, he assured the court of his ability to be fair and impartial. *People v Johnson*, 94 NY2d 600, 613-614.

Denial of the defendant's application to proceed with new counsel or *pro se* was proper. The defendant and his lawyers disagreed over trial strategy; the defendant wanted to challenge everything and assert innocence. Lead counsel moved to withdraw, and associate counsel, who agreed to follow the defendant's trial strategy, moved to the lead position with the defendant's concurrence. The defendant's request to represent himself was not clearly and unequivocally invoked. *People v McIntyre*, 36 NY2d 10, 1.

Two months after jury selection started, police obtained written statements from two witnesses saying the defendant had been under the influence of drugs or

alcohol before the crime. A week before trial, prosecutors informed defense counsel about the statements but did not turn them over. The witnesses would not cooperate with the defendant's investigators. After reviewing the statements *in camera*, the court held that they were not *Brady* material. *Brady v Maryland*, 373 US 83 (1963). A renewed motion for disclosure during the penalty phase was denied. While the evidence was *Brady* material, it was not suppressed since the defense knew or should have reasonably known about the defendant's substance abuse (*People v Doshi*, 93 NY2d 499, 506) and had a week in which to subpoena the witnesses.

The defendant objected to testimony by the decedent's husband during the guilt phase as improper victim impact evidence. *People v Caruso*, 246 NY 437. Most of the evidence was relevant to establishing the timeline of events, and the irrelevant personal details about the decedent were harmless in light of the overwhelming evidence of guilt.

The defendant's mistrial motion was insufficient to preserve the error created by the prosecutor inviting jurors to relive the decedent's suffering, degrading the defendant, and asking for vengeance. Although some remarks were improper, they did not warrant reversal. *Eg People v Harris*, 98 NY2d 452, 473.

Judgment modified, death sentence vacated, conviction upheld, matter remitted for resentencing.

**Concurrence:** [Rosenblatt, JJ] While the deadlock instruction can coerce both ways, its coerciveness leads to unreliable verdicts and is unconstitutional.

**Dissent:** [R.S. Smith, JJ] The deadlock instruction is not coercive, and if invalid is severable from the statute. It is not unconstitutional to make a jury aware that a defendant sentenced to life might be released. *California v Ramos*, 463 US 992 (1983).

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### Grand Jury (Procedure)

GRJ; 180(5)

#### Matter of Cantwell v Ryan, No. 138 SSM 18, 6/24/04

**Holding:** The Appellate Division properly granted the District Attorney's petition prohibiting enforcement of a County Judge's orders directing the prosecutor to present a case to a second grand jury on lesser charges after one grand jury returned a no true bill. The statute relied upon by the judge, CPL 190.75(3), applies only to resubmission of the same charge to a different grand jury, not different (*ie* lesser) charges. Judgment affirmed.

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### Search and Seizure (Automobiles and Other Vehicles [Investigative Searches])

SEA; 335(15[k])

#### People v Yates, No. 139, 6/24/04

**Holding:** The defendant, sole passenger in a lawfully

**NY Court of Appeals** *continued*

stopped taxi, was properly detained temporarily by a police officer for the limited purpose of determining whether the defendant had paid his fare. The officer testified that he believed the defendant was trying to leave the taxi too fast to have paid the fare, which would have been a violation of Penal Law 165.15. The broader issue of whether a police officer may, as a matter of course, compel a passenger to remain inside a lawfully stopped vehicle was not reached. *See People v McLaurin*, 70 NY2d 779, 781. Order affirmed.

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

**In the Matter of New York Civil Liberties Union v City of Schenectady, No. 95, 6/29/04**

The New York Civil Liberties Union (NYCLU) made a Freedom of Information Law (FOIL) request to the City of Schenectady for “[i]ncident reports prepared by police officers pertaining to use of force.” There was no response by the City or the Records Access Appeals Officer. The Department of State Committee on Open Government Advisory Opinion concluded that the City failed to comply with FOIL. The denial of Article 78 relief was affirmed on appeal. After the briefs were filed in the Court of Appeals, the City said that they did not utilize “Use of Force” forms. Such information appeared in standard incident reports, and searching thousands of reports for such information would have been unduly burdensome.

**Holding:** Schenectady police officer reports on the use of force were subject to disclosure under FOIL. Since it was unclear what records were available, the City had to produce all pertinent records subject to court review. “[G]overnment records are ‘presumptively open,’ statutory exemptions are ‘narrowly construed,’ and the City must articulate a ‘particularized and specific justification’ for nondisclosure.” *Gould v New York City Police Dept*, 89 NY2d 267, 274-275. Order reversed.

**Counsel (Right to Self-Representation)      COU; 95(35)**

**People v Providence, No. 102, 6/29/04**

The defendant, arrested for selling drugs, was 38 years old, had a GED, was a full-time student, and had an extensive criminal history. His request to proceed *pro se* with standby counsel was deferred until trial. After a lengthy colloquy in which the trial court repeatedly warned the defendant about the dangers of self-representation, the defendant unequivocally asserted his desire to represent himself and was allowed to do so. He made motions, raised objections, cross-examined witnesses,

conducted jury selection, and delivered opening and closing statements. His conviction was affirmed.

**Holding:** The defendant waived his right to represent himself at trial after the court undertook a searching inquiry followed by a knowing, voluntary and intelligent waiver of the right to counsel. *People v Arroyo*, 98 NY2d 101, 103; *see Faretta v California*, 422 US 806, 835 (1975). The court’s inquiry did not have to follow a catechism (*People v Smith*, 92 NY2d 516, 520 [1998]), but had to make the defendant aware of the dangers and disadvantages of proceeding without counsel. *People v Slaughter*, 78 NY2d 485, 492. Failure to ask specific pedigree questions outlined in *Arroyo*—age, education, occupation, experience with legal procedures and other factors—did not mandate reversal. The entire record, not only the colloquy, provided a reliable basis for review. *People v Vivenzio*, 62 NY2d 775. In this case, the defendant’s CJA interview sheet and NYSID report, which were part of the case file, contained pedigree information. That, combined with the trial judge’s many opportunities to evaluate the defendant’s abilities, age, literacy and knowledge of the criminal justice system, showed that the defendant’s right to counsel was effectively waived. Order affirmed.

**First Department**

**Homicide (Murder [Degrees and Lesser Offenses]) (Instructions)      HMC; 185(40[g] [m])**

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

**People v Doyle, 3 AD3d 126, 770 NYS2d 318 (1st Dept 2004)**

The defendant was indicted, in a stabbing death, for second-degree intentional murder and, alternatively, reckless murder with depraved indifference to human life. At trial, the defendant admitted the stabbing and attempted to ameliorate his culpability. The court denied a request to charge second-degree manslaughter as a lesser included of the intentional murder count, but did so do regarding the depraved indifference count.

**Holding:** Second-degree manslaughter was a potential lesser included for intentional homicide. *People v Tai*, 39 NY2d 894. Failure to give a second-degree manslaughter charge under intentional murder count was error (*see CPL 300.50[2]*), but harmless. It did not prejudice the defense since the lesser was given in connection with the depraved indifference count before deliberations. Therefore, despite additional instructions to consider all charges under intentional murder before considering depraved indifference murder, the jury was able to consider second-degree manslaughter. *People v Boettcher*, 69 NY2d 174, 180. Judgment affirmed. (Supreme Ct, New York Co [Torres, JJ])

**First Department** *continued***Burglary (Elements) (Evidence)** BUR; 65(15) (20)**Evidence (Sufficiency)** EVI; 155(130)**Robbery (Elements) (Evidence)** ROB; 330(15) (20)**People v Peralta**, 3 AD3d 353, 770 NYS2d 339  
(1st Dept 2004)

The defendant was convicted of first-degree robbery and second-degree burglary. The complainant testified that the defendant pressed a “hard object,” believed to be a gun, against his back during the event. Police found no weapon or similar object when they arrested the defendant at the crime scene.

**Holding:** Witness belief that a perpetrator had a weapon was insufficient alone to prove there was a weapon. *People v Moore*, 185 AD2d 825. First-degree robbery (Penal Law 160.15[3]) and second-degree burglary (Penal Law 140.25[1][c]) require proof that the defendant used or threatened the use of a “dangerous instrument.” *People v Pena*, 50 NY2d 400, 407 *cert den* 449 US 1087 (robbery); *People v White*, 155 AD2d 934, (burglary). The defendant’s statement that he had a weapon was insufficient. The prosecution failed to prove that the defendant actually possessed and used, or threatened to use, some object or substance that was “readily capable of causing death or other serious physical injury.” Penal Law 10.00[13]; *People v Hilton*, 147 AD2d 427, 429. Judgment modified, both charges reduced to third-degree, remanded for resentencing. (Supreme Ct, Bronx Co [Sheindlin, JJ])

**Freedom of Information (General)** FOI; 177(20)**Chebere v Johnson**, 3 AD3d 365, 770 NYS2d 357  
(1st Dept 2004)

The petitioner, a prisoner, filed a Freedom of Information Act (FOIA) request for the respondent prosecutor’s interview notes containing a witness’s statements made prior to his testimony at trial. Two years later, respondents rejected the request citing an exemption for endangerment of life and safety (Public Officers Law 87[2][f]), and the public interest privilege, which protects statements made by a witness to prosecutors. *Matter of Kassebaum v Morgenthau*, 270 AD2d 71 *lv den* 95 NY2d 756.

**Holding:** The prosecutor was unable to show that a witness, serving a lengthy prison sentence, would be endangered by releasing pretrial notes concerning the witness’s testimony at the petitioner-requestor’s trial. The petitioner showed that many of the documents had been given to his defense lawyer, who no longer has them. The respondent failed to show that releasing the documents would endanger a witness already known to all parties. The documents in question should be submitted for *in*

*camera* inspection and determination of whether denial of release was proper. *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349 *lv den* 94 NY2d 791. Order reversed, matter remanded. (Supreme Ct, New York Co [Ruiz, JJ])

**Domestic Violence (Spousal Abuse)** DVL; 123(50)**Evidence (Uncharged Crimes)** EVI; 155(132)**People v Vega**, 3 AD3d 239, 771 NYS2d 30 (1st Dept)

The evidence against the defendant at his trial for the murder of his wife was mainly circumstantial. The defendant denied having been present at the time of the offense. Few people had access to the apartment, and there was no evidence of sexual assault or robbery. The defendant was convicted and sentenced to 25 years to life.

**Holding:** Evidence of uncharged crimes in the nature of domestic violence was admissible to show the identity of the defendant as the most likely perpetrator among those with access to the apartment. It was relevant to motive for killing the decedent, where there was no evidence of sexual assault, robbery, or random violence. It also related to intent, contradicting the defendant’s assertion that the marriage was in a good state. *People v Bierenbaum*, 301 AD2d 119 *lv den* 99 NY2d 626, *cert den* 124 SCt 134. Although the challenged evidence tended to show a propensity to commit the crime, it was relevant and not unduly prejudicial. *People v Molineux*, 168 NY 264. Judgment affirmed. (Supreme Ct, Bronx Co [Globerman, JJ])

**News Media (General)** NEW; 269(10)**Search and Seizure (Search Warrants [Issuance])** SEA; 335(65[k])**Re Newsday, Inc. v Morgenthau**, 4 AD3d 162,  
771 NYS2d 639 (1st Dept 2004)

**Holding:** The public and media did not have a qualified 1st Amendment right of access to contents of a search warrant application in criminal proceedings. Relevant considerations include whether the place and process in question have historically been open and whether access plays a significant positive role in the process’s functioning. *See Press-Enterprise Co. v Superior Ct.*, 478 US 1 (1986). Warrant applications have not historically been open to the public; access to them would hinder law enforcement investigations. *Times Mirror Co. v US*, 873 F2d 1210, 1215 (1989). Nor was there a right of access under common law. *See People v Burton*, 189 AD2d 532, 535-536. The prosecution’s interest in protecting the identity of a confidential informant and an ongoing investigation were substantial and outweighed the generalized public interest in the warrant application process. *See People v Castillo*, 80 NY2d

**First Department** *continued*

578, 583 *cert den* 507 US 1033. Judgment denying application to unseal warrant records affirmed. (Supreme Ct, New York Co [Soloff, JJ])

**Ethics (Defense) ETH; 150(5)**

**People v Andrades, 4 AD3d 180, 772 NYS2d 60 (1st Dept 2004)**

**Holding:** Defense counsel’s statement to the court before a suppression hearing in this murder case that he had an “ethical dilemma,” had failed to dissuade his client from testifying, and planned to present his client’s testimony in narrative form, was not ineffective assistance of counsel. Code of Professional Responsibility DR 7-102 [22 NYCRR 1200.33]; *Nix v Whiteside*, 475 US 157 (1986); *People v DePallo*, 96 NY2d 437. The statement was not an “unequivocal announcement” of the defendant’s intent to perjure himself, but a passive act by defense counsel refusing to aid perjury. *Lowery v Cardwill*, 575 F2d 727, 730 (9th Cir 1978). This is unlike the situation in *People v Darrett* (2 AD3d 16). The *ex parte* discussion between defense counsel and the court of this ethical issue, without the defendant, did not violate his right to be present. Judgment affirmed. (Supreme Ct, Bronx Co [Moore, JJ])

**Counsel (Right to Counsel) COU; 95(30)**

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

**Matter of Tyrone G. v Lucretia S., 4 AD3d 205, 771 NYS2d 645 (1st Dept 2004)**

**Holding:** Family Court’s refusal to assign the petitioner a new attorney did not violate due process. After allowing a previous attorney to withdraw due to lack of cooperation from the client without good cause, the court gave the petitioner an adjournment to find new counsel and allowed him to proceed *pro se* when he appeared without counsel. See *Matter of Biskupski v McClellan*, 278 AD2d 912, 912. Judgment awarding sole custody of child to respondent affirmed. (Family Ct, Bronx Co [Martinez-Perez, JJ])

**Records (Expungement) (Sealing) REC; 327(15) (40)**

**Rodriguez v Johnson, 4 AD3d 216, 772 NYS2d 264 (1st Dept 2004)**

**Holding:** The petitioner erroneously brought an article 78 against the Bronx District Attorney’s office to make ministerial corrections of alleged inaccuracies in his criminal record. The proper party was the Division of Criminal Justice Services. *Matter of Ortiz v Supreme Court of New*

*York County*, 199 AD2d 160. One of the petitioner’s convictions, reversed for legal insufficiency of evidence, resulted in the proper remedy of dismissal of indictment and sealing of records. To the extent that expungement is sought based on allegations of prosecutorial misconduct, the petitioner has not established entitlement to any relief. As for the conviction that was affirmed, no basis for relief exists. Order denying article 78 affirmed. (Supreme Ct, Bronx Co [Esposito, JJ])

**Civil Rights Actions (General) CRA; 68(20)**

**Discovery (Matters Discoverable) DCS; 110(20)**

**Finn v City of New York, 4 AD3d 218, 772 NYS2d 46 (1st Dept 2004)**

**Holding:** A request for discovery in an action alleging federal civil rights violations must be considered in light of federal rules. At issue here are requests to obtain certified copies of certain records relating to the plaintiffs at Family Court, Administration for Children’s Services, a mental health center, and the police department, and to unseal records in a criminal matter. No specific federal rule exists regarding the request for sealed records in a criminal action decided favorably to the defendant. The plaintiffs failed to articulate the particular relevance of the documents sought. Privacy interests protected by CPL 160.50 outweighed the unarticulated interests of the plaintiffs. *King v Conde*, 121 FRD 180, 188-189 [ED NY 1988]. Order, except as to documents already produced, affirmed. (Supreme Ct, Bronx Co [Esposito, JJ])

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

**People v White, 4 AD3d 225, 772 NYS2d 309**

The defendant was convicted of burglary and other offenses.

**Holding:** If the defendant’s unpreserved confrontation claim were reviewed, the defendant would be found to have forfeited the right to confront the complainant. That the defendant compelled the complainant’s recantation through misconduct is not challenged. Introduction of the complainant’s grand jury testimony in the prosecution’s case in chief, even though the complainant was present at trial and testified on the defendant’s behalf, was justified. *Geraci v Senkowski*, 211 F3d 6, 9 (2000) *cert den* 531 US 1018; see also *People v Cotto*, 92 NY2d 68. Deeming a testifying but recanting witness “available” would provide an incentive to induce witnesses to recant. Judgment affirmed. (Supreme Ct, New York Co [Richter, JJ])

**Discovery (Procedure [Enforcement]) DSC; 110(30[a])**

**First Department** *continued***People v Downey, 4 AD3d 233, 772 NYS2d 307**  
(1st Dept 2004)

**Holding:** The trial court barred the defendant's introduction of exhibits in a complex stock fraud case because the defense missed by 26 minutes a deadline for delivering such exhibits to the prosecution. The difficulty of the case and excusable nature of the brief delay, caused by traffic problems in New York City shortly after September 11th, 2001, made preclusion of the exhibits unreasonable. The preclusion was an improvident exercise of the court's discretion to manage trial proceedings. Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Bradley, JJ])

**Civil Practice (General) CVP; 67.3(10)****Kantrowitz v LaRoche, 5 AD3d 101, 771 NYS2d 890**  
(1st Dept 2004)

**Holding:** The Individual Assignment System court had no basis for issuing a protective order for 13 years in this matrimonial action when the plaintiff sought only a three-year period. No evidence was presented concerning domestic violence or child abuse after the temporary order of protection issued, and expert witnesses described the defendant as a loving and caring parent. Care and caution being warranted, a three-year order of protection should be issued, and plaintiff will have the option to seek extensions if needed. Domestic Relations Law 240[3][c], 252[3]. Judgment modified. (Supreme Ct, New York Co [Stackhouse, JJ])

**Bail and Recognizance (Forfeiture and Failure to Appear) (General) BAR; 55(25) (27)****Sentencing (Mitigation) (Pronouncement) SEN; 345(50) (70)****People v Anonymous, 5 AD3d 112, 772 NYS2d 335**  
(1st Dept 2004)

The defendant was convicted of a drug sale. Released on bail to assist in narcotics investigations, he missed a scheduled court appearance. Five years later, he was found and charged with bail jumping.

**Holding:** The court determined that mitigation was warranted and sentenced him to concurrent time on the new charge. This concurrent sentence for a bail jumping offense based on mitigation was not supported by a recitation of facts as required by statute. *See* Penal Law 70.25(2-c); *People v Garcia*, 84 NY2d 336, 338. A review of the record reveals statements by the defendant contradicting those of the prosecutor handling the defendant's "cooperation," yet the court neglected to make determi-

nations as to credibility. Judgment modified, matter remanded for new mitigation hearing. (Supreme Ct, New York Co [Allen, JJ])

**Juries and Jury Trials (Challenges) (Qualifications) (Voir Dire) JRY; 225(10) (50) (60)****People v Webb, 5 AD3d 115, 772 NYS2d 333**  
(1st Dept 2004)

Before the defendant's trial for possessing a forged instrument in the form of a bent fare card began, the court ruled that the prosecutor could use one of the defendant's prior convictions for the same crime, under *People v Molineux* (68 NY 264, 293), to show knowledge and intent. A potential juror admitted that he would be biased by a prior conviction. The court denied a defense challenge for cause.

**Holding:** The court failed to get an unequivocal declaration or assurance of impartiality from the prospective juror. *See People v Butler*, 287 AD2d 647, 648. The juror's statement was sufficient for a challenge for cause. His failure to respond to a final general query to the panel about being unable to keep an open mind in the fact of a prior conviction did not overrule his last response when questioned individually. Incorrect denial of the cause challenge and the exhaustion of the defense's peremptory challenges before the end of jury selection compelled reversal. *See People v Chambers*, 97 NY2d 417, 419. Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [Tejada, JJ])

**Burglary (Possession of Tools) BUR; 65(30)****Re Andrew U., 5 AD3d 118, 773 NYS2d 24**  
(1st Dept 2004)

The appellant was adjudicated a juvenile delinquent for acts that would constitute attempted second-degree burglary and possession of burglar's tools.

**Holding:** Since the appellant did not have actual or constructive dominion or control over a screwdriver found on the roof of the building where the burglary was committed, there was insufficient evidence to prove possession of burglar's tools. *See People v Manini*, 79 NY2d 561. The screwdriver was located in a place where several people had access to it (no one exclusively), putting a heavy burden of proof as to constructive possession on the prosecution. *People v Casanova*, 117 AD2d 742, 743. No testimony placed the screwdriver in the defendant's hand or near the place where he was arrested. The fact-finding as to possession of burglar's tools must be vacated. Judgment modified. (Family Ct, Bronx Co [Lynch, JJ])

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

**First Department** *continued*

**Juveniles (Permanent Neglect)** JUV; 230(105)

**Matter of Frankie R., 5 AD3d 133, 773 NYS2d 30 (1st Dept 2004)**

**Holding:** A permanent neglect finding resulting in loss of respondent father’s parental rights and custody of his 13-year-old son was not based on sufficient evidence. The fact-finding hearing showed that the petitioner, Jewish Child Care Association of New York, was not diligent in assisting the respondent with housing and financial problems that were specifically noted in the denial of custody. *See Matter of Jamie M.*, 63 NY2d 388, 394. Also, there was no clear and convincing evidence that the respondent did not plan for his son’s future. The respondent attended a parenting skills program, counseling, sought employment, and submitted to random drug testing and other agency requirements. While he missed a public assistance appointment, causing delay, he was employed as of the date of the hearing. He regularly visited his son and had a close relationship. Housing was the only open issue, which the respondent has been attempting to resolve. Judgment reversed. (Family Ct, New York Co [Larabee, JJ])

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

**Peric v New York City Police Department, 5 AD3d 142, 772 NYS2d 507 (1st Dept 2004)**

**Holding:** An application for a rifle/shotgun permit was properly denied by the police department based on circumstances surrounding the petitioner’s prior arrest for assault. 38 RCNY 3-03(a). That those charges were adjourned in contemplation of dismissal and eventually dismissed did not prevent consideration of the circumstances surrounding the arrest. *See Matter of Abramowitz v Safir*, 293 AD2d 352. Judgment affirmed. (Supreme Ct, New York Co [DeGrasse, JJ])

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

**People v Schachter, 6 AD3d 111, 774 NYS2d 24 (1st Dept 2004)**

**Holding:** Viewing the circumstantial evidence charge in its entirety and the strength of the prosecution’s evidence, the failure to give a full charge was not reversible error. When the entire case rests on circumstantial evidence, a jury instruction is required. *People v Roldan*, 88 NY2d 826. However, the phrase “moral certainty” did not have to be included when the court instructed the jury “in substance” that it “must appear that the inference of guilt is the only one that can fairly and reasonably be drawn

from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence.” *People v Sanchez*, 61 NY2d 1022, 1024. The charge as a whole, in which the jury heard that the defendant was entitled to every inference in his favor and that they should not infer guilty from a fact from which an inference of innocence could reasonably be drawn, conveyed the correct legal principles. *People v Coleman*, 70 NY2d 817, 819. The instructions made clear that circumstantial evidence must exclude every reasonable hypothesis of innocence. *People v Kurtish*, 165 AD2d 670, 670-671 *lv den* 76 NY2d 1022. Additionally, there were no gaps in the proof for jurors to “leap,” the danger that the circumstantial evidence instruction is intended to reduce. Judgment affirmed. (Supreme Ct, New York Co [Wetzel, JJ])

**Venue (Change of Venue)** VEN; 380(5) (10)  
**(Determination of)**

**Howard v New York State Board of Parole, 5 AD3d 271, 773 NYS2d 300 (1st Dept 2004)**

The petitioner filed an article 78 petition in New York County challenging a determination made at Woodbourne Correctional Facility in Sullivan County to deny the petitioner parole. The respondent NYS Board of Parole successfully sought to change venue to Albany.

**Holding:** The respondent did not follow statutory procedures, including a written demand, for seeking a change of venue. *See CPLR 511(a) and (b)*. Although venue would be properly designated in the place where the respondent has its principal office (*see CPLR 506(b)*), failure to follow procedure was fatal. The respondent was not entitled to change of venue as of right. *Banks v New York State & Local Employees’ Retirement Sys.*, 271 AD2d 252. Discretionary venue change under CPLR 510(2) or (3) was not available without meeting statutory requirements. While New York County was not a proper venue, the action may proceed there. *Eg Phillips v Tietjen*, 108 App Div 9, 10. Judgment reversed. (Supreme Ct, New York Co [Stallman, JJ])

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

**People v Torres, 5 AD3d 304, 773 NYS2d 541 (1st Dept 2004)**

**Holding:** Imposition of the maximum sentence after the defendant left a drug treatment program and voluntarily returned to court was inequitable. The defendant’s sentence of 3½ to 7 years for fifth-degree criminal sale of a controlled substance as a second felony offender is reduced to 2 to 4 years. Judgment modified. (Supreme Ct, New York Co [Ward, JJ])

**First Department** *continued***Parole (Release [Conditions])** PRL; 276(35[a])**People ex rel. Stanley Preileau v Warden, Rikers Island Correctional Facility, 6 AD3d 178, 778 NYS2d 4 (1st Dept 2004)**

**Holding:** The petition for a *habeas corpus* writ was properly denied. A special parole condition that required the petitioner to report to police detectives who were investigating an outstanding assault charge against him was valid. It did not require the petitioner to make a statement or waive his 5th Amendment rights, and did not prevent him from appearing with counsel or invoking his rights to counsel and against self-incrimination. *Cf People v Dyla*, 142 AD2d 423, 442-443 *lv den* 74 NY2d 808. Judgment affirmed. (Supreme Ct, Bronx Co [Fisch, JJ])

**Juveniles (Delinquency—Procedural Law)** JUV; 230(20)**Re Jermaine J., 6 AD3d 87, 775 NYS2d 287 (1st Dept 2004)**

**Holding:** The Family Court followed requirements for allocuting a respondent in a juvenile delinquency proceeding in a plea deal that resolves numerous charges under more than one docket number. The respondent was originally charged with robbery and related offenses. He offered to plead to the top count in exchange for a dismissal of the related charges and a separate accusatory instrument concerning an unrelated charge. The judge's questions about the offense were sufficiently detailed to eliminate uncertainty in the respondent's one-word answers during the allocution. Family Court Act 321.3(1). There was evidence to show that both counsel and the court explained the possible consequences of the plea to the respondent, and there was adequate time for reviewing the implications. Second-degree robbery (Penal Law 160.10[1]) can be clearly understood from a simple recitation of the charge. While the term "personal property" is not a term used everyday, it was clearly understandable in context. There was no requirement that the juvenile had to state the facts. Order affirmed. (Family Ct, Bronx Co [Lynch, JJ])

**Witnesses (Confrontation of Witnesses)** WIT; 390(7)**People v Newland, 6 AD3d 330, 775 NYS2d 308 (1st Dept 2004)**

**Holding:** Police testimony about talking to a witness, which led the officer to evidence implicating the defendant, to the extent it could be considered an implicit assertion by a nontestifying declarant, was not offered for the truth of the matter asserted. It was background evidence

to complete the narrative of events and explain why the officer acted. *People v Tosca*, 98 NY2d 660. Furthermore, a brief, informal remark to an officer during a field investigation, and not in response to "structured police questioning" was not testimonial; its admission in evidence did not violate the Confrontation Clause. *See Crawford v Washington*, 158 LE2d 177, 124 SCt 1354, 1363 (2004). Judgment affirmed. (Supreme Ct, New York Co [Beal, JJ])

**Family Court (General)**

FAM; 164(20)

**Juveniles (Adoption)**

JUV; 230(5)

**Brett K. v Brian L, 6 AD3d 349, 777 NYS2d 35 (1st Dept 2004)**

**Holding:** Consent of a biological father is required for adoption of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth provided the father has maintained a "substantial and continuous or repeated contact with the child." Domestic Relations Law 111(1)(d). Here, the respondent did not provide any financial support for the child for most of the child's seven years of life, and inconsistent support during the first two years. This did not meet the test of providing a fair and reasonable amount of financial assistance under Domestic Relations Law 111(1)(d)(i). Nor did he prove that he maintained regular contact with the child, offering no substantive proof of alleged letters and phone calls. *Matter of Shaolin G.*, 277 AD2d 312 *lv den* 96 NY2d 710. The respondent's consent to the adoption was not required, and it should not have been stopped by his objections. Visitation was improperly ordered. *See DeJesus v Tinoco*, 267 AD2d 308. Judgment reversed. (Family Ct, New York Co [Rand, JJ])

**Appeals and Writs (Judgments and Orders Appealable)**

APP; 25(45)

**Defense Systems (Assigned Counsel System) (Compensation Systems [Attorney Fees])**

DFS; 104(5) (25[b])

**Levenson v Lippman, 5 AD3d 86, 772 NYS2d 286 (1st Dept 2004)**

Plaintiffs, assigned counsel under article 18-B of the County Law, received fee awards above the statutory cap based on "extraordinary circumstances." County Law 722-b. The director of the Assigned Counsel Plan sought review of the awards by the administrative judge for New York County under 22 NYCRR 127.2(b). The fee awards were reduced to the statutory cap. Plaintiffs brought an action to invalidate the rule permitting review of excess fee awards by the administrative judge, which was denied.

**Holding:** The administrative trial judge did not have

**First Department** *continued*

authority to exercise appellate jurisdiction by modifying orders awarding assigned counsel legal fees above the statutory cap. Rule 127.2(b) of the Chief Administrator of the Courts is null and void as an unlawful delegation of appellate jurisdiction to administrative judges. Judgment reversed. (Supreme Ct, New York Co [Abdus-Salaam, JJ])

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

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

**People v Caban, 4 AD3d 274, 772 NYS2d 675 (1st Dept 2004)**

The defendant was tried for conspiracy in the murder of a rival drug dealer. A prosecution witness testified that he heard the defendant offer a bounty for killing the decedent. The defendant was acquitted of murder and manslaughter, but convicted of conspiracy.

**Holding:** Admission of coconspirators’ statements was proper. *People v Rastelli*, 37 NY2d 240, 244 *cert den* 423 US 995. The prosecution made out a *prima facie* case of conspiracy (*People v Bac Tran*, 80 NY2d 170, 179) without resorting to the hearsay statements. *People v Salko*, 47 NY2d 230, 238 *rearg den* 47 NY2d 1010. The defendant’s admissions established his offer of money for the death of the decedent, and the perpetrators’ actions showed their acceptance, forming the required agreement. Penal Law 105.00; *People v Elias*, 163 AD2d 230, 231-232 *lv den* 76 NY2d 985. The prosecution witness was not an accomplice as a matter of law requiring that the jury be so instructed. Evidence that he had participated in an earlier attempted killing of the decedent was not conclusively linked to the conspiracy; whether he was an accomplice was a factual issue for the jury. CPL 60.22(1); *People v Besser*, 96 NY2d 136, 143. Judgment affirmed. (Supreme Ct, Bronx Co [Moore, JJ])

**Concurrence:** [Tom, JJ] Failure to instruct on accomplice as a matter of law was unpreserved; the issue of the witness’s status was fully considered by the jury.

**Dissent:** [Andrias, JJ] The jury’s finding that the witness was not an accomplice was against the weight of the credible evidence.

**Dissent:** [Rosenberger, JJ] There was only one conspiracy to kill the decedent, and the prosecution witness was an accomplice as a matter of law. A jury instruction was required; there was insufficient evidence for conviction based on the witness’s uncorroborated testimony. *People v Berger*, 52 NY2d 214, 219.

**Insanity (Civil Commitment)** ISY; 200(3)

**Re Application of Richard H. v Consilvio, 6 AD3d 7, 773 NYS2d 356 (1st Dept 2004)**

The Commissioner of Mental Health sought a retention order for the petitioner, who had been diagnosed with paranoid schizophrenia and was first involuntarily committed (CPL 330.20) in 1985 after being pleading not guilty by reason of mental disease or defect under CPL 220.15. The petitioner was ordered retained in a secure facility because he suffered from a dangerous mental disorder. He sought review of the latest retention order under CPL 330.20(16). A supervising physician testified that the petitioner should not be transferred to a non-secure facility. A treating physician testified that eventually the petitioner could be so transferred. The petitioner testified that he was mentally ill and taking medication, but was not dangerous. The court agreed with an advisory jury finding that the petitioner had a mental illness requiring in-patient care but was not a physical danger to himself or others, and ordered transfer to a non-secure facility.

**Holding:** The petitioner’s admission of mental illness did not preclude rehearing and review pursuant to CPL 330.20(16) or mandate keeping him in a secure facility. He was constitutionally and statutorily entitled to a jury trial on the question of involuntary commitment in a psychiatric hospital regardless of his own statements or the opinions of the doctors at his retention hearing. Mental health Law 9.35; *Baxstrom v Herold*, 383 US 107, 10 (1966); *People v Lally*, 19 NY2d 27. Review of the evidence showed that the petitioner suffers from a “dangerous mental disorder” as defined by CPL 330.20(1)(c) and belongs in a secure facility. *Matter of George L.*, 85 NY2d 295,307-308. Judgment modified. (Supreme Ct, New York Co [Kornreich, JJ])

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

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

**Matter of Peter G., 6 AD3d 201, 774 NYS2d 686 (1st Dept 2004)**

After a fact-finding hearing, Family Court found the father used excessive corporal punishment against his son and the mother knew or should have known about it and failed to protect him. Both parents were found guilty of neglect.

**Holding:** Evidence of neglect caused by the father’s corporeal punishment was insufficient. Family Court Act 1012(f)(i). One child’s out-of-court statements, made during an interview with a school psychologist and repeated to an Administration for Children’s Services caseworker, lacked context, detail and specificity concerning the frequency or severity of the corporeal punishment. *See Matter of P. Children*, 272 AD2d 211 *lv den* 95 NY2d 770. The child’s statements were also uncorroborated—repetition

**First Department** *continued*

of the statements to others was insufficient. *See Matter of Steven GG*, 279 AD2d 651, 653. The child's statements were contradicted by part of another child's comments. The opinion of a school psychologist that the child was being truthful only vouched for his credibility and was not sufficient corroboration. *See Matter of Tomas E.*, 295 AD2d 1015, 1019. The evidence did not show that the father used more force than was reasonable. *Matter of Rodney C.*, 91 Misc2d 677. Judgment reversed. (Family Ct, New York Co [Sturm, JJ])

**Concurrence:** [Marlow, JJ] Absence of actual physical injuries or bruises was relevant. The lack of specificity and the partial internal inconsistency of the children's statements made the statements too weak to be relied upon in the absence of corroborating evidence.

**Dissent:** [Ellerin, JJ] The children's statements cross-corroborated each other and along with all the evidence supported a finding of neglect due to physical abuse. Family Court Act 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 124.

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**Conflict of Interest (General)** COI; 75(10)

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

**Re Adoption of Gustavo G., 776 NYS2d 15  
(1st Dept 2004)**

The law firm that represented the adoption agency in termination of parental rights proceedings then began representing the petitioner, maternal grandmother of the child, in adoption proceeding. Family Court *sua sponte* challenged the petitioner's counsel under the *per se* disqualification rule, relying on 1998 Ops NYS Bar Assn Comm on Prof Ethics No. 708. The court, without any reference to the child's best interest or any consideration of the petitioner's ability to provide him with a stable and permanent home, dismissed the petition.

**Holding:** Attorneys representing the petitioner advised her of the potential conflict and obtained her consent to represent her, thus fulfilling their ethical obligation and removing any reason for disqualification. DR 5-105 (22 NYCRR 1200.24). No actual conflict existed, since the petitioner and adoption agency did not have adverse interests and were involved in totally different proceedings. The law firm showed that it exercised independent professional judgment on the petitioner's behalf. *Matter of Harley v Ziems*, 98 AD2d 720. A *per se* disqualification rule conflicts with the client's interest in retaining the attorney of her choice. *Solow v W.R. Grace & Co.*, 83 NY2d 303, 310. Judgment reversed and remanded for completion of adoption. (Family Ct, Bronx Co [Gribetz, JJ])

**Concurrence:** [Marlow, JJ] Law guardian should have been appointed for the child (*see* Family Court Act 249[a]) where the same law firm represented the agency in the termination proceeding and later the prospective adoptive parent.

**Dissent:** [Tom, JJ] Successive and dual representation created an inherent conflict of interest going to the core of the adoption proceeding, undermining public confidence in our court system, and giving the appearance of professional impropriety. *See gen Greene v Greene*, 47 NY2d 447, 452.

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**Jurisdiction (General)**

JSD; 227(3)

**Perjury (Evidence) (General)**

PER; 280(15) (17)

**People v Cohen, 773 NYS2d 371 (1st Dept 2004)**

The defendants were convicted of perjury based on their testimony before the National Association of Securities Dealers (NASD) regarding defendant Cohen, a former broker, overseeing a stock brokerage retail sales operation despite an SEC order barring him for life from such work.

**Holding:** No conflict existed between federal and state jurisdictions over prosecution of perjury charge based on false statements given to the NASD. NASD is not a federal entity. This self-regulatory body enforces both state and federal securities laws. The existence of a federal perjury statute did not preclude a state prosecution for perjury involving the same act. *People v Materon*, 107 AD2d 408, 411. The defendants intentionally made false statements to NASD meeting the requirements for first-degree perjury. Penal Law 210.15. Judgment affirmed. (Supreme Ct, New York Co [Fried, JJ])

**Second Department**

**Misconduct (Prosecution)**

MIS; 250(15)

**Self-Incrimination (Conduct and  
Silence) (General)**

SLF; 340(5) (13)

**People v Augustine, 6 AD3d 543, 774 NYS2d 397  
(2nd Dept 2004)**

**Holding:** The prosecutor's questions about whether the defendant filed a police report or made an outcry after his arrest violated the defendant's right to remain silent. *See People v Haines*, 139 AD2d 591. The court properly sustained the defendant's objections before the questions were answered but erred by denying a request for curative instructions. The evidence of guilt was not overwhelming and the error is not harmless. *Cf People v Henry*, 306 AD2d 539. Judgment reversed. (Supreme Ct, Queens Co [Cooperman, JJ])

**Second Department** *continued*

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

**People v Blake, 6 AD3d 545, 775 NYS2d 62 (2nd Dept 2004)**

**Holding:** “Under the unusual facts of this case, the trial court erred in denying the defendant’s motion for mistrial at the close of the codefendant’s summation.” At their joint trial, the codefendant had testified, implicating the defendant, while the defendant had taken the stand and denied participating in the stabbing at issue. The defendant’s attorney objected to the summation by counsel for the codefendant, who said, “(n)ow, somebody might believe that my client arrived in that bedroom without help from [the defendant]. That would be like saying, How did he get into that bedroom, on the second floor, without anybody knowing about it, without the door being unlocked on that day? \* \* \* It just doesn’t make any sense. And just the coincidence of all this happening, that he happened to be there on that day, when [the defendant] was going there to—.” The court told the jury that the burden was on the prosecution to prove the defendant’s guilt, but this was insufficient to cure the prejudice, especially as evidence of guilt was not overwhelming. *Cf People v Garriga*, 159 AD2d 634. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [D’Emic, JJ])

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

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

**People v Melio, 6 AD3d 552, 775 NYS2d 3 (2nd Dept 2004)**

**Holding:** This appeal was held in abeyance and the matter remitted to the trial court. A hearing was held to determine whether the defendant had been advised by his lawyer that the defendant would be subject to a period of postrelease supervision, and if he had not been so advised, whether that affected his decision to plead guilty to first-degree sexual abuse. The court found that the defendant lawyer had not advised the defendant about postrelease supervision, but that the defendant “was otherwise aware of postrelease supervision” and the attorney’s failure to advise did not affect the decision to plead. The record supports that finding. The defendant did not move to withdraw his plea or vacate the conviction on the ground that his plea was not knowing and involuntary because he was not told of the ramifications of the Sex Offender Registration Act (Correction Law art 6-C). This claim is unreserved. Judgment affirmed. (Supreme Ct, Suffolk Co [Jones, JJ])

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

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

**People v Taylor, 6 AD3d 556, 774 NYS2d 386 (2nd Dept 2004)**

**Holding:** DNA evidence is circumstantial evidence. *See eg People v Dolan*, 2 AD3d 745, 746. “Although the evidence against the defendant was entirely circumstantial, the trial court instructed the jury, over objection, to the contrary.” This was error. *See People v Sanchez*, 61 NY2d 1022. In this case it cannot be said the error was harmless. *See Criminal Procedure Law 300.10(2); cf People v Brian*, 84 NY2d 887, 889. Other contentions are without merit or are not reached. Judgment reversed, new trial ordered. (County Ct, Suffolk Co [Pitts, JJ])

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

**People v Bussey, 6 AD3d 621, 775 NYS2d 364 (2nd Dept 2004)**

**Holding:** The defendant was entitled to have his lawyer conduct appropriate factual and legal investigations to determine if matters could be developed for a defense, and to allow time for reflection and preparation for trial. *People v Bennett*, 29 NY2d 462, 466. Trial counsel first visited his client in prison only two days before trial, when he learned that there could be as many as seven alibi witnesses. Counsel did not conduct an investigation into the defendant’s alibi. He did not obtain a report from the investigator hired to interview two potential alibi witnesses whose names had been provided to the prosecutor under CPL 250.20. His excuse at the hearing was that he did not want to risk having the prosecution examine the alibi witnesses about the murder here having been retaliation for an earlier killing. However, the court had granted counsel’s motion in limine precluding such evidence. While matters of trial strategy will not be second-guessed on appeal, the record, including a hearing held on trial counsel’s performance, shows no sound reason for counsel’s failure to investigate the defendant’s alibi or call alibi witnesses at trial. *See People v Maldonado*, 278 AD2d 513,514. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Spires, JJ])

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

**Possession of Stolen Property (Evidence)** PSP; 288.5(15)

**People v Derrell, 6 AD3d 625, 774 NYS2d 805 (2nd Dept 2004)**

**Holding:** The evidence showed that in 2002 the defendant, a real estate salesperson, bought a 2001 Lincoln

**Second Department** *continued*

Navigator from someone at a gas station in Queens for \$16,000 cash, did not get a bill of sale or title, and had no way of contacting the seller after the transaction was over. The complainant had paid \$65,000 for the vehicle a few months before. Viewed in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620), the evidence was sufficient to prove beyond a reasonable doubt the offense of third-degree possession of stolen property. Nor was the verdict against the weight of the evidence. See CPL 470.15(5). Judgment affirmed. (Supreme Ct, Queens Co [Hollie, JJ])

**Evidence (Other Crimes)** **EVI; 155(95)****People v Flemings, 6 AD3d 626, 774 NYS2d 804**  
(2nd Dept 2004)

**Holding:** The defendant was convicted of second-degree possession of a controlled substance. His 1996 conviction of and three-to-six-year sentence for attempted third-degree sale of a controlled substance should not have been admitted as part of the prosecution's direct evidence. The trial court improperly allowed it, over objection, saying, "it is a weight case" when in fact the prosecution was not required to prove knowledge of weight. See Penal Law 15.20(4). The evidence of the prior conviction was not relevant and was highly prejudicial. See *People v Nieves*, 207 AD2d 502, 503. It served only to establish criminal propensity and divert the jury's attention from the actual crime at issue. *People v Sims*, 195 AD2d 612, 613. The defendant's remaining contentions are without merit or are not addressed. Judgment reversed, new trial ordered. (County Ct, Suffolk Co [Mullin, JJ])

**Juries and Jury Trials (Challenges)** **JRY; 225(10) (60)**  
(*Voir Dire*)**People v Grate, 6 AD3d 627, 774 NYS2d 803**  
(2nd Dept 2004)

**Holding:** The defendant made a *prima facie* showing that the prosecutor purposefully discriminated in his use of peremptory challenges against several black prospective jurors. There must be an inquiry into the prosecutor's explanations for the challenges. See *Batson v Kentucky*, 476 US 79 (1986). If the prosecutor offers race-neutral reasons for the challenges, the defendant should have the opportunity to establish that they are perpetual. *People v Jenkins*, 75 NY2d 550, 559-560. The County Court "shall file its report with all convenient speed." Application for writ of *coram nobis* held in abeyance, matter remitted. (County Ct, Nassau Co)

**Defenses (Justification)** **105(37)****Instructions to Jury (Theories of Prosecution and/or Defense)** **ISJ; 205(50)****People v Minaya, 6 AD3d 728, 775 NYS2d 367**  
(2nd Dept 2004)

The defendant was charged with assault and related offenses stemming from a melee between two groups of people, some armed with weapons such as belts, bats, and chains. The defendant told police that when he saw his friends being attacked, he drove a car toward them to provide a means of escape, but others jumped on the car and began striking it. Evidence showed the car was damaged. He accelerated, then stopped suddenly. He did not strike the wall toward which he had driven, but the complainant was thrown from the car and injured. The prosecution sought to show that the defendant struck the complainant deliberately or acted with depraved indifference. He sought a justification charge, which was denied. A jury acquitted the defendant of intentional assault (Penal Law 120.10[1]) but convicted him of depraved indifference assault (Penal Law 120.10[3]) and lesser charges.

**Holding:** A reasonable view of the evidence supports the theory that the defendant's initial use of the car was to rescue his outnumbered friends, and was beset upon by armed attackers who smashed the windshield and rear window. This supports the argument that use of the car was justified, that the defendant stopped short to escape a continuing onslaught, resulting in the complainant being thrown. The court erred in denying the requested justification charge. See *People v Neal*, 254 AD2d 752. Judgment reversed, new trial ordered. (Supreme Ct, Westchester Co [West, JJ])

**Trial (Public Trial)** **TRI; 375(50)****People v Ortiz, 6 AD3d 731, 775 NYS2d 550**  
(2nd Dept 2004)

**Holding:** The trial court, at the prosecution's request, excluded the defendant's brother from the courtroom as a potential witness. Defense counsel had told the court that counsel represented the brother in a pending case and would invoke his 5th Amendment privilege if called in this case. Counsel objected to exclusion, saying the prosecution had shown no nexus between this case and the brother's pending matter. Because counsel had demonstrated that the brother was unavailable due to his assertion of the 5th Amendment (see *People v Savinon*, 100 NY2d 192, 198), thereby successfully challenging the prosecution's good faith basis for exclusion (cf *People v Marsalis*, 3 AD3d 509), exclusion was error. The court failed to make adequate findings that the brother could provide relevant testimony, supporting exclusion. Cf *People Jones*, 96 NY2d 213, 217. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Eng, JJ])

**Fourth Department**

**Sentencing (Enhancement) (Youthful Offenders)** SEN; 345(32) (90)

**People v Clarence S., 5 AD3d 982, 773 NYS2d 315 (4th Dept 2004)**

**Holding:** The court erred in enhancing the sentence, imposing a definite one-year term in lieu of the maximum six months plus probation that was promised at the time of the defendant’s guilty plea, and denying youthful offender status. The record shows that the defendant’s appearance at sentencing was not made an explicit condition of the court’s sentencing commitment. Enhancement of the sentence without first giving the defendant an opportunity to withdraw his plea was error. *See People v Sundown*, 305 AD2d 1075, 1076. Given the circumstances, particularly the fact that the defendant has completed the sentence, the judgment is modified only to the extent of adjudicating the defendant a youthful offender. *See People v Watkins*, 300 AD2d 1074. Judgment modified. (Supreme Ct, Erie Co [Wolfgang, JJ])

**Appeals and Writs (Preservation of Error)** APP; 25(63)

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

**People v Torres, 5 AD3d 1097, 773 NYS2d 726 (4th Dept 2004)**

**Holding:** Contrary to County Court’s reasoning in relying on the City Court’s finding of reasonable cause, the requisite preponderance of the evidence standard that must be met for probation violation is a more stringent standard. *See gen People ex rel. Wallace v State of New York*, 67 AD2d 1093, 1094. Even if the defendant’s contention that County Court erred in revoking probation based solely on the City Court’s finding was unpreserved, it would be reviewed as a matter of discretion in the interest of justice. *See CPL 470.15(6)(a)*. Judgment reversed, new hearing ordered. (County Ct, Monroe Co [Marks, JJ])

**Motions (Suppression)** MOT; 255(40)

**People v Pucci, 5 AD3d 1099, 773 NYS2d 729 (4th Dept 2004)**

**Holding:** The court was not required to conduct a hearing on the defendant’s motion to suppress evidence found during a warrantless search of a storage room in his apartment building merely because the prosecution consented to a hearing. *See People v Mendoza*, 82 NY2d 415, 430. The defendant may not rely on trial evidence to challenge the determination of the suppression motion. *See People v Torrance*, 298 AD2d 857 *lv den* 99 NY2d 540. The other issues raised are without merit or are unpreserved

for review. Judgment affirmed. (Supreme Ct, Monroe Co [Affronti, JJ])

**Guilty Pleas (Alford Plea)**

GYP; 181(5)

**People v Oberdorf, 5 AD3d 1000, 773 NYS2d 334 (4th Dept 2004)**

**Holding:** The unpreserved issue of whether the court erred by accepting the defendant’s *Alford* plea (*see North Carolina v Alford*, 400 US 25 (1970)) is addressed as a matter of discretion in the interest of justice. *See CPL 470.15(6)(a)*. An *Alford* plea is allowed in New York only when it is based on a voluntary and rational choice and the record contains strong evidence of actual guilt. *Matter of Silmon v Travis*, 95 NY2d 470, 475. The court here did determine that the defendant was making a knowing and voluntary choice. The record lacks the requisite evidence of guilt of burglary or larceny. The court erred in denying the defendant’s motion to withdraw her guilty plea. Judgment reversed, motion granted, matter remitted for further proceedings. (County Ct, Ontario Co [Doran, JJ])

**Possession (General)**

POS; 288.3(10)

**Sentencing (Concurrent/Consecutive)**

SEN; 345(10)

**People v Zaso, 5 AD3d 1023, 773 NYS2d 644 (4th Dept 2004)**

**Holding:** The defendant’s contention that the sentences imposed for third-degree possession of a weapon (Penal Law 265.02[8]) and second-degree possession of marijuana should run concurrently is rejected. The items underlying these charges were recovered from the defendant’s apartment at the same time during execution of a search warrant. However, the *actus reus* of each offense was the possession of a different illegal item. “Thus, the underlying acts ‘are entirely separate and distinct’ (*People v Bryant*, 92 NY2d 216, 231. . .), and consecutive terms of imprisonment therefore were properly imposed (*cf.* § 70.25[2]).” Judgment affirmed. (County Ct, Ontario Co [Harvey, JJ])

**Grand Jury (General)**

GRJ; 180(3)

**Transcripts (General)**

TSC; 373.5(20)

**People v Smith, 6 AD3d 1188, 775 NYS2d 688 (4th Dept 2004)**

**Holding:** The court did not err by correcting a typographical error in the grand jury minutes dealing with the date of the crime, based on testimony by the grand jury stenographer that she had made a mistake in transcribing her notes. The court properly exercised its authority to preside over the grand jury (CPL 190.20), which is “a ‘part of [the] court’ (CPL 190.05). . .” The defendant’s further

**Fourth Department** *continued*

contentions are rejected or are not reviewable. Judgment affirmed. (Supreme Ct, Monroe Co [Mark, JJ])

**Sentencing (Credit for Time Served)** SEN; 345(15)**People v Thomas, 6 AD3d 1101, 775 NYS2d 631**  
(4th Dept 2004)

**Holding:** The termination dates of the orders of protection issued in this robbery case are erroneous. The court failed to take into account credit to which the defendant is entitled for time spent in jail. *See People v Richardson*, 1 AD3d 956. The orders must be vacated and the matter remitted for the court to determine the credit to which the defendant is entitled. The new termination date for the orders of protection must be three years from the maximum expiration date of the sentence less that credit. *See* CPL 530.13(4)(ii). Judgment modified, matter remitted. (County Ct, Monroe Co [Geraci, Jr., JJ])

**Courts (General)** CRT; 97(17)**Guilty Pleas (Vacatur) (Withdrawal)** GYP; 181(55) (65)**People v Brown, 6 AD3d 1210, 775 NYS2d 700**  
(4th Dept 2004)

**Holding:** The defendant claimed that his plea was not voluntarily entered and that he had been denied meaningful representation of counsel because he had not been advised that deportation was a possible consequence of a guilty plea. Two months after County Court granted the defendant's motion to vacate that plea, it decided that it had erred in doing so, and vacated the order. This was error, as the court lacked revisory or appellate jurisdiction to *sua sponte* vacate its own order. *See Osamwonyi, v Grigorian*, 220 AD2d 400, 401. The record does not support a finding that the original order was obtained by fraud or misrepresentation; the inherent power to vacate an order so obtained did not apply. *See People v Franco*, 158 AD2d 33, 35. In these circumstances, the prior plea and judgment rendered thereon were beyond reinstatement once that judgment had been vacated, the plea withdrawn, and a new not guilty plea entered. *People v Jovet*, 41 AD2d 608, 609. Order reversed, order of Nov. 7, 2002 reinstated. (County Ct, Niagara Co [Broderick, Sr., JJ])

**Impeachment (General)** IMP; 192(15)**Sentencing (Presentence Investigation Report)** SEN; 345(65)**People v Gates, 6 AD3d 1062, 775 NYS2d 621**  
(4th Dept 2004)

**Holding:** The court properly allowed the prosecution to impeach the codefendant using a presentence investigation report from a set of convictions several years before. The codefendant testified on direct that he committed the offenses with a different individual, but the presentence report shows no such allegation. Using the report for this limited purpose did not violate public policy. *See People v Cohen*, 201 AD2d 494, 495 *lv den* 83 NY2d 965. The defendant's other contentions are rejected or unpreserved. Judgment affirmed. (County Ct, Niagara Co [Dadd, JJ])

**Misdemeanors (General)** MSD; 251(10)**Probation and Conditional Discharge (Conditions and Terms) (Eligibility) (General) (Revocation)** PRO; 305(5) (15) (18) (30)**People v Haslip, 6 AD3d 1061, 775 NYS2d 620**  
(4th Dept 2004)

**Holding:** The defendant was convicted of fourth-degree criminal possession of a weapon, a class A misdemeanor. Penal Law 265.02(2). He was acquitted of more serious charges stemming from a death. The time he spent in jail awaiting trial exceeded the highest possible jail sentence for the offense of which he was convicted. The court imposed a sentence of conditional discharge and required as a condition that the defendant perform 200 days with the county work program. A court may not impose community service as a condition of conditional discharge for a misdemeanor without consent. Penal Law 65.10(2)(h). Upon revocation of a conditional discharge for failing to meet its conditions, a court may not impose jail time beyond the maximum term for the misdemeanor conviction. *See* Penal Law 65.05(3)(b). Judgment modified, conditional discharge vacated. (County Ct, Niagara Co [Broderick, Sr., JJ])

**Sentencing (Persistent Felony Offender)** SEN; 345(58)**People v Ruffins, 6 AD3d 1153, 776 NYS2d 405**  
(4th Dept 2004)

**Holding:** The contention that the persistent felony offender statute is unconstitutional is unpreserved and is without merit. *See People v Rosen*, 96 NY2d 334-335 *cert den* 534 US 899. The defendant's sentence must be set aside because the statutorily-required procedures were not followed. *See* CPL 400.20. This unpreserved claim is reviewed as a matter of discretion in the interest of justice. The court failed to set out on the record the reasons that it found extended incarceration and lifetime supervision

**Fourth Department** *continued*

warranted. *People v Johnson*, 275 AD2d 949, 951 *lv den* 95 NY2d 965. Contrary to the prosecution’s contention, a proper court-issued statement and a hearing were required, with a notice of hearing. *See* CPL 400.20(3)(4)(7)(9). The court could not rely solely on the presentence investigation report when sentencing the defendant as a persistent felony offender. *Cf People v Virgil*, 269 AD2d 850 *lv den* 95 NY2d 806. While the defendant was asked if he was waiving his right to challenge his prior convictions, he did not waive his right to the hearing required under CPL 400.20, including other matters. *Cf People v Pringle*, 226 AD2d 1072, 1073 *lv den* 88 NY2d 940. Further, the defendant did not receive meaningful representation in the context of the persistent felony offender sentencing. *See gen People v Washington*, 96 AD2d 996, 997-998. Judgment modified, sentence vacated, matter remitted for assignment of new counsel and resentencing. (Supreme Ct, Erie Co [Forma, JJ])

**Evidence (Preservation)** **EVI; 155(107)**

**Forensics (General)** **FOR; 175(173)**

**People v Barnwell, 6 AD3d 1147, 775 NYS2d 659 (4th Dept 2004)**

**Holding:** The court properly denied the defendant’s motion for DNA testing of evidence relating to his 1987 trial. *See* CPL 440.30(1-a). A defendant must show that the evidence to be tested exists, and is available in quantities sufficient for testing. *People v Ahlers*, 285 AD2d 664, 665 *lv den* 97 NY2d 701. There is no need for a hearing on destruction of the evidence where the prosecution was under no duty to preserve the evidence after the defendant exhausted his direct appeals in 1990. Order affirmed. (Supreme Ct, Monroe Co [Mark, JJ])

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

**Double Jeopardy (Dismissal) (Waiver)** **DBJ; 125(5) (40)**

**People v Bastian, 6 AD3d 1187, 775 NYS2d 687 (4th Dept 2004)**

**Holding:** The defendant’s conviction of scheme to defraud violated the constitutional double jeopardy bar because he was prosecuted for and convicted of the same offense in another county. *People v Bastian*, 294 AD2d 882 *lv den* 98 NY2d 694. Defense counsel’s comments at sentencing did not constitute a waiver of the double jeopardy claim where the plea also encompassed a count for which no such claim existed. The defendant did not waive, either by express waiver or a general waiver of the right to

appeal, his right to appeal this claim. Judgment modified, scheme to defraud conviction reversed, sentence on that count vacated, and count dismissed. (County Ct, Monroe Co [Geraci, Jr., JJ])

**Accusatory Instruments (General)** **ACI; 11(10) (15)**  
**(Sufficiency)**

**Sentencing (Excessiveness)** **SEN; 345(33)**

**People v Clark, 6 AD3d 1066, 776 NYS2d 656 (4th Dept 2004)**

**Holding:** The defendant was indicted for possession of only one firearm. The prosecution presented proofs showing that the defendant, either as a principal or an accomplice, possessed two different ones. Nothing in the bill of particulars or in the court’s instructions specified which gun the defendant was alleged to have possessed. It is possible that the defendant was convicted of an unindicted crime. *See People v McNab*, 167 AD2d 858. The remaining terms of incarceration should be reduced as a matter of discretion in the interests of justice. *See People v Delgado*, 80 NY2d 780. The defendant, with no prior felony convictions or violent crime history, was offered a plea bargain of three and one-half years. The codefendant who masterminded the offenses and does have a long history of violent crime received a sentence of five years due to his cooperation. The concurrent terms of 15 years imposed on the defendant were unduly harsh and severe. Judgment modified, second-degree weapons possession reversed and dismissed, sentences on remaining counts reduced to seven years. (County Ct, Monroe Co [Geraci, Jr., JJ])

**Dissent:** [Scudder and Hayes, JJ] The sentence reduction in unwarranted. The defendant refused to admit responsibility for his acts.

**Constitutional Law (New York State generally) (United States generally)** **CON; 82(25) (55)**

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

**People v Bonilla, 6 AD3d 1059, 775 NYS2d 619 (4th Dept 2004)**

**Holding:** The court applied the wrong standards in denying the defendant’s CPL 440.10 motion without a hearing. The defendant complained that he had not been advised of the mandatory period of postrelease supervision. The court rejected the defendant’s federal and state constitutional challenge to the knowing and voluntary nature of his plea due to ineffective assistance of counsel based on a harmless error analysis applicable under the Federal Rules of Criminal Procedure. *See US v Good*, 25

**Fourth Department** *continued*

F3d 218, 220 (4th Cir. 1994). New York's harmless analysis rule requires a determination of whether a defendant improperly advised of the consequences of the plea would not have entered a guilty plea if properly advised. *People v Mason*, 2 AD3d 272, 272-273. The federal constitutional standard is whether a reasonable probability exists that but for counsel's errors the defendant would have insisted on going to trial rather than plead guilty. *People v McDonald*, 1 NY3d 109, 115. The state constitutional standard is whether the defendant received meaningful representation. See *People v Ford*, 86 NY2d 397, 404. The court below has discretion to deny the motion without a hearing under CPL 440.30(4) if, for example, allegations essential to the motion are contradicted by the record and there is no reasonable possibility the allegations are true. See *People v Mills*, 194 AD2d 1016 *lv den* 82 NY2d 899. Order reversed, matter remitted for determination of the motion under the proper standards. (County Ct, Cayuga Co [Corning, JJ]) ☞

### **Pro Bono Counsel Needed for Death Row Prisoners**

Nearly 3,500 people are on death row across the United States. Hundreds of them have no legal help. Many states do not appoint lawyers to handle capital habeas cases. Many that do pay only token fees and provide few or no funds for necessary investigation and expert assistance. Shortened Federal habeas time limits are running out for many prisoners who have no way to exhaust their state remedies without the assistance of attorneys, investigators, mental health professionals, and others. Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The **ABA Death Penalty Representation Project** seeks lawyers in firms with the necessary resources to devote to this critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact the project: Robin M. Maher, Director, ABA Death Penalty Representation Project, 727 15th St. NW, 9th Floor, Washington, DC 20005; e-mail: [maherr@staff.abanet.org](mailto:maherr@staff.abanet.org); 202-662-1738. For more information, also see the Project's web site: <http://www.probono.net> (Death Penalty Practice Area).

**From My Vantage Point** (cont. from p. 7)

Now able to speak with one voice for reform, lawyers who provide mandated legal representation in New York can join the client community and others who care about justice in pushing for true reform.

**Stay Tuned**

I am delighted to report these two steps toward justice for our clients. I will be even more ecstatic to announce in the future that a truly independent, statewide public defense commission has successfully enforced statewide standards for mandated legal services. Stay tuned. ☞

**Book Review** (cont. from p. 8)

family of humankind. . . . The subject of prisons and corrections may tempt some of you to tune out. You may think, 'Well I'm not a criminal lawyer.' . . . In my submission you have the duty to stay tuned in. The subject is the responsibility of every member of our profession and every citizen. . . . This is your justice system; these are your prisons.

With an estimated two million now incarcerated in US prisons and jails, I would add it is more than a responsibility, it is a necessity. Brutality, rage, vengeance, inhuman living conditions, wherever they occur, eventually color and infect us all. ☞

**Immigration Practice Tips** (cont. from p. 10)

down a plea agreement had a reliance interest in the potential availability of § 212(c) relief."

**Updated Removal Defense Checklist in Criminal Charge Cases Available**

The IDP's valuable resource, "Removal Defense Checklist in Criminal Charge Cases," was recently updated to reflect legal developments through July 1, 2004. Find it on the NYSDA web site, [www.nysda.org](http://www.nysda.org) and look under NYSDA Resources for the Immigrant Defense Project page, where the checklist and other materials can also be found. ☞

# NYSDA MEMBERSHIP APPLICATION

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