New York State Defenders Association

Public Defense Backup Center
REPORT
Volume XIX Number 2 March-April-May 2004
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Defender News

High Courts "Spring" Into Action

The U.S. Supreme Court and the New York Court of Appeals have issued several decisions on important issues in the spring wrap-up of their calendars. Among them are (see summaries at p. 8 *et seq.*):

Supreme Court

- *Iowa v Tovar*—Federal constitution does not require courts to provide defendants specific advisements concerning the dangers of pleading guilty without counsel;
- *Crawford v Washington*—Federal confrontation clause prohibits admission of hearsay unless witness is unavailable and there was opportunity for cross examination (overruling *Ohio v Roberts*); and
- *Banks v Dretke*—Prosecution's concealment of witness's informant status and promise to produce all *Brady* material rendered lack of further investigation of these matters by defense reasonable.

Court of Appeals

- *Guido v Goord*—Jail time credit must be given for pretrial detention in federal or out-of-state institutions when the charges result in acquittal or dismissal or a concurrent sentence is imposed in New York or in the other jurisdiction;
- *Re K.L.*—The lack of a requirement in Kendra's Law that a person be found incapacitated before Assisted Outpatient Treatment was ordered is not unconstitutional;
- *People v Mateo*—A death sentence imposed following a trial held while the constitutionality of the guilty plea provisions of the statute was under consideration had to be reversed;
- *People v Williams*—One-by-one questioning of potential jurors after the initial selection round did not violate CPL 270.15(3), though the practice may needlessly prolong selection and should not be followed;
- *People v Gonzalez*—Intentional and depraved indifference murder are inconsistent counts;
- *People v Lewis*—Defense counsel who testified contrary to his client's interest at a *Sirois* hearing was ineffective;
- *People v Stultz*—The standard for ineffective appellate counsel is the same as for trial counsel under *People v Baldi*.

The New York high court also addressed: use, over objection, of photographs of a defendant's tattoos in support of motive (*People v Slavin*); extreme emotional disturbance (*People v Smith*); prompt outcry (*People v Shelton*); victim impact statements (*People v Hemmings*); supporting depositions for speeding tickets (*People v Tyler*); expert testimony by police concerning drug sales (*People v Hicks* and *People v Smith*); lineups (*People v Massie*, *People v Jones*, and *People v Mitchell*); orders of protection in criminal matters (*People v Nieves*); and *Allen* charges to deliberating juries (*People v Aponte).*

Both courts addressed double jeopardy in cases involving both tribal and non-tribal courts. *US v Lara*, 158 LEd2d 420; *Matter of Hill v Eppolito*, 772 NYS2d 634.

See You in Saratoga!

NYSDA Annual Meeting and Conference
July 25-28, 2004 (*see* p. 6)

Inside:

"Sentencing for Dollars," by Justice Strategies (the research, training, and policy division of the Center for Community Alternatives).

Mandatory Surcharges, Statutory Fees, Potential County Probation Fees, and Civil Penalties at a Glance.

Brochure inserted at centerfold of print copies only–available on the web at www.communityalternatives.org.

Contents

For regularly updated information about issues pending in the Court of Appeals, see the New York Court of Appeals Updates prepared by Robert Dean of the Center for Appellate Litigation, available on the NYSDA web site (www.nysda.org) in "Special Reports" under "Courts NY" in the "Hot Topics" section.

Resources in Abundance at www.nysda.org

Updated appellate court information is only one of many resources on the Association's web site. Selected state trial court rulings, federal court rulings, and other substantive and procedural legal materials are a few clicks away. Breaking news greets visitors on the home page. For example, in late April and early May, visitors could read an Apr. 25, 2004 news account of a Syracuse murder suspect's request for a brain scan to determine whether past head injuries had affected his mental functions. If that triggered curiosity about brain studies in the context of criminal law, a search of the site for "brain" led to several current articles about "brain fingerprinting" (a technological development that purports to prove through mapping brain activity whether a person has knowledge of given information such as crime details), a 2002 federal case dealing with defense counsel's failure to investigate a claim of brain damage due to the client's exposure to neurotoxins and child abuse, and information about a 1999 article saying that "Early Brain Damage [is] Linked to Bad Behavior."

From scientific developments to the latest listings of CLE seminars and job opportunities, NYSDA's web site filters the superabundance of information now available on the Internet to provide busy defense team members the most relevant developments.

Short News Items

It Takes Two to Replace Traficanti

Administrative Judge Jan H. Plumadore has been named the top administrator for courts outside New York City, a position formerly held by Deputy Chief Administrative Judge Joseph J. Traficanti, Jr. Judge Judy H. Kluger, Deputy Chief Administrative Judge for Court Operations, has become statewide director for drug treatment court programs, a post also formerly held by Traficanti. (*NY Lawyer*, 4/21/04.) Traficanti plans to pursue a career in international legal consulting, assisting developing countries to establish and strengthen judicial infrastructure and the rule of law. (UCS Press Release [online, www.courts.state.ny.us], 3/23/04.)

State Must Prove ID as to Prior Conviction

The federal 6th Circuit Court of Appeals reluctantly reversed a 2001 conviction for possession of ammunition by a previously convicted felon because the State failed to prove beyond a reasonable doubt that the defendant was the same person convicted of another crime in 1984. Nothing but a certified copy of the prior conviction was presented, so that reversal was required, the "consequence of being governed by the rule of law." (*NYLJ*, 5/10/04.) *US v Aaron L. Jackson*, No. 02-1264 (6th Cir. 5/6/04).

Hair, Sweat, and Saliva May Replace Urine for Drug Tests

Federal drug-testing programs would be able to use biological specimens other than urine under new regulations proposed by the Substance Abuse and Mental Health Services Administration (SAMHSA). Officials claim that scientific advances have made tests of hair, saliva, and even sweat as reliable as urine tests. Hair testing covers a wider time period, and is easily collected, transported, and stored. It is difficult to adulterate. Observing the collection of saliva samples is less problematic than collection of urine. Sweat-collection devices have their own advantages and disadvantages. The new rule would also require that all specimens collected be split to provide repeat testing, and addresses aspects of drug testing for designated federal workers and job applicants. Comments to the proposed rules, published in the *Federal Register* on April 13, 2004, may be submitted until July 12. (*Drug Enforcement Report*, 4/8/04.)

Shaken Baby Findings Questioned

A recent scientific article questions findings of child abuse based on bleeding and injury to a child's eyes, saying that the link between such injury and violent shaking

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is "not supported by objective scientific evidence." Authors P. E. Lantz, S. H. Sinal, C. A. Stanton, and R. G. Weaver Jr. set out the facts of one case, then review the published literature. They conclude, "Statements in the medical literature that perimacular retinal folds are diagnostic of shaken baby syndrome are not supported by objective scientific evidence." This article, an evidence-based case report entitled "Perimacular Retinal Folds from Childhood Head Trauma," was published in the *British Medical Journal*, Vol. 328, 27 March 2004, p. 754. It was discussed in a Mar. 26, 2004 article in *The Scotsman*, online at http://news.scotsman.com/latest.cfm?id=2701960. (*Indiana Defender*, May 2004)

Trooper's Absence Due to Military Service Yields Dismissal

Drunken driving and related charges were dismissed by a Middletown town justice because there was no indication when the arresting officer, now serving in the military, would be able to appear. (*NYLJ*, 4/1/04.)

Judge Bauer Suspended During Appeal

On May 11, 2004, the Court of Appeals suspended Troy City Judge Henry R. Bauer (with pay) pending an appeal of the determination of the Commission on Judicial Conduct. (*NY Lawyer*, 5/12/04.) The Commission had unanimously found misconduct on Bauer's part but split as to sanctions, with six members calling for removal from office and three finding that public censure would suffice. (*NYLJ*, 4/6/04.)

Among the allegations against Bauer were failing to properly advice defendants of their right to counsel, setting excessive bail, and coercing guilty pleas. (*See Backup Center REPORT*, Vol XIX, No. 1, p. 9 [Jan-Feb 2004]). The Commission's decision is available on the Web at www.scjc.state.ny.us.

NYSBA Opposes Peremptory Challenge Reductions

The New York State Bar Association (NYSBA) voted in April to oppose any reduction in peremptory challenges, which has been suggested by the Chief Judge and others. (*NYLJ*, 4/6/04.) Other jury issues were addressed as well.

Public Defense Developments Statewide

From layoff notices in New York City to continuing changes in upstate defense programs, and from a Commission appointed by New York's Chief Judge to a Committee formed by the New York State Bar Association (NYSBA), actions concerning public defense abound.

Old and New Programs Face Challenges

After the New York City Legal Aid Society (LAS) sent out 254 layoff notices, including 144 to criminal defense attorneys, hundreds of LAS lawyers and supporters protested at City Hall. It was not known at *REPORT* press time whether LAS cuts in compensation and/or benefits for non-union personnel, buy-outs offered to all employees, and continuing negotiations with funders could avoid at least some of the layoffs set for June 30. (*Newsday*, *NYLJ*, 5/18/04).

Meanwhile, on May 11th, Schenectady County approved a Conflict Defender Office to save money the county would otherwise spend on assigned counsel fees. This follows the creation of conflict offices in neighboring Albany and Rensselaer Counties. The New York Civil Liberties Union (NYCLU) expressed concern that the new office would be too understaffed to provide quality representation. ([Albany] *Times Union*, 5/12/04.)

The conflict office was proposed by new Schenectady County Public Defender Mark Caruso, who is reportedly revamping his own office in efforts to improve services. His innovations include: "jail nights," where lawyers go to the jail at least one night a week after regular business hours to meet with clients; negotiating with the sheriff to allow clients in jail to call their attorney directly, rather than collect; and convincing a County Court Judge and the prosecutor to change plea negotiations so that defendants learn of any offer in advance, allowing them time to think about it and consult with their lawyer and family. The local newspaper has endorsed these measures, saying that if combined with additional staffing and grant funding, they "could mean greatly improved public defense in Schenectady County." (Schenectady *Gazette*, 5/4/04.)

Further north, the conflict office under consideration in St. Lawrence County met assertions that it was not legal as proposed. (*Watertown Daily Times*, 3/14/04.) William J. Galvin, a senior assistant public defender in Jefferson County, was selected in early April to fill the St. Lawrence post and plans to begin work in Canton on June 1. (*Watertown Daily Times*, 4/11/04.)

Out west, Niagara County legislators have repeatedly revisited a proposal for a conflict defender office, resulting in the preparation of seven different budgets. (*Buffalo News*, 2/12/04.) No change has been implemented. Steuben County has changed its public defender office from part-time to full-time. (*The* [Corning] *Leader*, 4/1/04.) The new Public Defender is Byrum W. Cooper, Jr.

The Onondaga County Legislature decided in March to "end the Frank H. Hiscock Legal Aid Society's three decades of representing poor defendants in Syracuse City Court . . .", as reported in the local paper. Instead, Hiscock will represent eligible clients in Family Court, while the Assigned Counsel Program will take over representation in City Court. Onondaga County will pay a consultant up to $60,000 to study the county's delivery of services to

indigent criminal defendants and make recommendations by July 1. ([Syracuse] *Post Standard*, 3/2/04.)

No doubt other changes and challenges in public defense have occurred and will continue to occur in the near future. The Backup Center continues to assist county officials and public defense offices to meet those challenges.

State Bar Committee

NYSBA has announced creation of its Committee to Assure Quality Representation for Indigents and Children. The committee will recommend statewide standards for helping counties provide quality legal representation to children and the poor, to utilize the expertise and commitment of the private bar, and control costs, according to the committee's chair, Vincent E. Doyle III of Buffalo. (*State Bar News*, Mar/Apr 2004). Doyle is a NYSDA member. The other members appointed by NYSBA President Thomas A. Levin include several Chief Defenders and other NYSDA members. In addition to Doyle, the committee members are: George Paul Alessio, Gaspar M. Castillo, Jr., James F. Dwyer, David L. Edmunds, Jr., Norman P. Effman, Klaus Eppler, Harvey Fishbein, Marc Gann, James S. Hinman, Susan R. Horn, Matthew J. Kelly, Susan B. Lindenauer, Malvina Nathanson, Leslie S. Nizin, Edward J. Nowak, Robert F. Quinlan, David C. Schopp, Laurie F. Shanks, Kelli Jo Stenstrom, and James A. Vazzana. (*State Bar News* March/April 2004.) NYSBA Criminal Justice Section Chair Michael T. Kelly has noted that while there have been different reactions to the 2003 legislation increasing assigned counsel rates, there appears to be agreement "that there should be statewide oversight of training and standards." (*New York Criminal Law Newsletter*, Spring 2004.)

Kaye's Commission

Chief Judge Judith Kaye announced during her February State of the Judiciary speech the formation of a Commission on the Future of Indigent Defense Services. The Commission's charge, Kaye said, is "a top-to-bottom reexamination of our indigent defense system." (*NYLJ*, 2/10/04.) She repeated that mandate when the full membership of the Commission was announced. The Commission members are: *Chair*, Hon. Burton Roberts, Fishbein, Badillo, Wagner & Harding [retired Bronx Administrative Judge] (NYC); *Vice-Chair*, Prof. William Hellerstein, Brooklyn Law School (Brooklyn); Hon. Phylis Bamberger, Supreme Court (Bronx County); Christopher Chan, private practice (NYC); Hon. Penelope Clute, City Court (Plattsburgh); Paul Crotty, Verizon Communications (NYC); Hon. Janet DiFiore, Supreme Court (Westchester County); Carey Dunne, Davis, Polk & Wardell (NYC); John Dunne, Whiteman, Osterman & Hanna (Albany); John Elmore, private practice (Buffalo); Klaus Eppler, Proskauer Rose (NYC); Hon. Joseph Fahey, County Court (Onondaga County); Lawrence Goldman, Malman & Goldman (NYC); Frederick Jacobs, Hodgson Russ (NYC); Barry Kamins, Flamhaft, Levy, Kamins, Hirsch, Rendeiro (Brooklyn); Anita Khashu, Vera Institute of Justice (NYC); Hon. Sally Manzanet, Supreme Court (Bronx); Hon. Patricia Marks, County Court (Monroe County); Hon. Pauline Mullings, Criminal Court (Queens County); Hon. Martin Murphy, Criminal Court (New York County); Hon. Robert Russell Jr., City Court (Buffalo); Fern Schair, American Arbitration Association (NYC); Prof. Laurie Shanks, Albany Law School (Albany); Hon. Martin Smith, County Court (Broome County); John Speranza, private practice (Rochester); Hon. Elaine Jackson, Supreme Court (Nassau County); Hon. Charles Tejada, Supreme Court (New York County); Hon. Joseph Zayas, Criminal Court, (Queens County); Prof. Steven Zeidman, CUNY Law School (Flushing); Audra Zuckerman, former clerk to Chief Judge and formerly with the Legal Aid Society and Capital Defender's Office (NYC); Michelle Zulflacht, private practice (Hauppauge); Paul Lewis, Office of Court Administration (NYC). (UCS Press Release [online, www.nycourts.gov], 5/17/04.)

Chief Defenders Meet

The heads of public defense offices across the state met in Albany for a Chief Defender Convening on Mar. 30, 2004. Structural and programmatic changes in local defense systems, the formation of the entities described above, and other topics of interest were discussed. The Chiefs will meet again, in Saratoga Springs on July 25th, the day before CLE training begins at the NYSDA Annual Meeting and Conference. (See p. 6.)

Gideon Day Brings Broad Call for Public Defense Improvement

Speaking from a variety of experiences and viewpoints, participants in this year's Gideon Day press conference gave stark examples of persisting and worsening problems in public defense throughout New York State and the effects of those problems on a vulnerable client community. Groups represented included the Gideon Coalition, the League of Women Voters, the Committee for an Independent Public Defense Commission, the New York State Association of Criminal Defense Lawyers, NYSDA and the NYSDA Client Advisory Board campaign: "Defending the Right to Be Heard—Every County, Every Client." Well-attended by the press, the event received wide-spread coverage, with stories appearing on the Associated Press shortly after the March 16th event and the next day in the *New York Law Journal* and regional papers including the Albany *Times Union*, the Rochester *Democrat and Chronicle*, and the *Daily Star*. Recognition that mandated legal services were not "fixed" by the fee increase legislation of 2003 appears to be growing not

only among bar groups and others directly involved in the system, but in the public at large.

Client Advisory Board Fact Finding Continues

NYSDA's client-centered campaign, "Defending the Right to be Heard—Every County, Every Client" continues to focus its work and to host forums. The campaign provides opportunities for public defense clients, service providers, advocates, and defense attorneys to share their experiences in the public defense system and make recommendations on needed systemic improvements. On April 22nd in Cobleskill, in Schoharie County, NYSDA's Client Advisory Board heard largely from individuals with cases in Family Court.

"Hearing clients' stories can at times be disheartening," NYSDA's Community Organizer Karla Andreu observed. For example, the Schoharie hearings indicated that more training is needed for police, judges, and attorneys who deal with the complex issues—legal, factual and emotional—presented by cases involving domestic violence and child custody. NYSDA hopes to assist counties in dealing with such issues.

The campaign's next project gained momentum with the US Supreme Court decision in *Tennessee v Lane* about the Americans with Disabilities Act's applicability to state justice systems. (See p. 12.) The particular focus the campaign has chosen is public representation of eligible clients in the deaf and hard of hearing community. Starting in the city of Rochester, Andreu and the Client Advisory Board will meet with experts on deafness, the court system, or both, to frame the important issues regarding this very interesting area. Watch for further announcements about this campaign.

NYSDA Trains!

This spring, NYSDA provided CLE for almost 500 attorneys in New York City, Albany, Rochester, and Syracuse. Additional trainings are scheduled this summer in New York City, Buffalo, Albany and Saratoga.

March saw three major NYSDA sponsored or co-sponsored events. First was the 18th Annual Metropolitan New York Trainer, which brought more than 200 downstate attorneys up-to-speed on recent developments in criminal law and procedure, new motions, objections and strategies, and provided insight into New York's sentencing mazes. New Chief Defenders assembled at NYSDA's Albany offices to discuss office management issues and strategies with a group of experienced Chief Defenders as coaches. Finally, NYSDA co-sponsored the Albany "Bridges and Barriers" conference, a cross-disciplinary training on mental health and the criminal justice system.

April's Criminal Defense Tactics and Techniques VI training in Rochester emphasized sentencing, along with issues related to representing the defendant as victim, Internet ethics resources, homicide reinvestigation and impeachment tactics. In May, CJA and assigned counsel panel members in the Syracuse area attended the Federal Criminal Defense Update, which NYSDA co-sponsored with the Federal Public Defender Office. NYSDA also facilitated the training of attorneys at the Hiscock Legal Society about Family Court Article 10; the speakers were Tamara Guglin and Adele Fine from the Monroe County Public Defender office.

In June NYSDA will continue to provide broad CLE coverage by holding In-House Immigration Expert trainings in New York and Buffalo, a follow-up training for new Chief Defenders in Albany, and Intensive Sentencing Advocacy training in Buffalo. On July 25-28, NYSDA will hold its 37th Annual Meeting and Conference at the Gideon Putnam Hotel in Saratoga Springs, featuring a full year's worth of CLE credits (see p. 6). Attorneys interested in attending these events should contact NYSDA.

This year's Defender Institute Basic Trials Skills Program has been cancelled. Programs that need this training for their staff, and lawyers hoping to attend, are encouraged to look forward to next year's Institute.

The materials for the 18th Annual Metropolitan New York Trainer and the Criminal Defense Tactics and Techniques VI are immediately available from NYSDA at $25 per set. Attorneys interested in obtaining materials from any other training should contact the Backup Center for details.

PLS Attorney Dies

Sarah Betsy Fuller, a long-time Prisoners' Legal Services of New York attorney, died of breast cancer on April 21 in Ithaca. The lawsuits she filed on behalf of prisoners included one filed in 1995 to stop correction officers from videotaping strip searches of female inmates at Albion Correctional Facility, and another that led to a 1999 ruling allowing American Indians to practice their religion in New York prisons. She was still pursuing, at the time of her death, state and federal relief for prisoners subjected to overly restrictive diets (the "loaf"). Running law school clinics at Cornell and Syracuse Universities, she provided valuable training to law students and needed assistance to people who could not afford vital legal services. (*NY Times*, 5/10/04.) NYSDA extends sympathy to her family, colleagues, and clients.

Correction

An article in the Jan-Feb 2004 *REPORT* about wrongful convictions incorrectly identified Broward County as "Miami." The incidents in question were reported in the *Miami Herald*, but Miami is located in Dade County, FL; Broward County includes Ft. Lauderdale, and borders Dade County to the north. ⚖

Conferences & Seminars

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Collateral Consequences of Conviction
Dates and Places: June 11, 2004 - Brooklyn, NY
October 6, 2004 - Batavia, NY
Contact: Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

Sponsor: American Constitution Society for Law and Policy
Theme: Liberty and Equality in the 21st Century
Dates: June 18-20, 2004
Place: Washington, DC
Contact: ACS: (202)393-6181; e-mail convention @acslaw.org

Don't Miss the Training You Need!

Go to www.nysda.org for the Latest Seminar Information

The *REPORT* is posted there long before the printed issue is mailed!

See the "Training Calendar" for new developments.

Sponsor: New York State Bar Association
Theme: Ethics and Professionalism
Dates and Places: June 16, 2004 - Rochester, NY
June 18, 2004 - Albany, NY
June 18, 2004 - New York City
Contact: NYSBA CLE 1-800-582-2452 (in Albany area, 463-3724); web site www.nysba.org

Sponsor: Western Trial Advocacy Institute
Theme: 24th Annual Criminal Defense Seminar
Dates: July 10-16, 2004
Place: Laramie, WY
Contact: Lindsay Eckes: tel (307)766-2422; fax (307)766-6417; e-mail Trial_Advocacy@hotmail.com

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

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

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

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Appellate and Post-Conviction Practice
Date: September 10, 2004
Place: Brooklyn, NY
Contact: Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Handling a Criminal Case - An Afternoon with Gary Muldoon
Date: October 1, 2004
Place: Albany, NY
Contact: Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Defense of a Sex Abuse Case
Date: October 5, 2004
Place: Brooklyn, NY
Contact: Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

Back to the Gideon Putnam!

Following the success of the 2003 NYSDA Annual Meeting and Conference, WE'RE GOING BACK! Join us at the Gideon Putnam Hotel and Conference Center in Saratoga Springs, New York.

July 25-28, 2004

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Job Opportunities

Prisoners' Legal Services of New York (PLS) is seeking applicants for a newly created **staff attorney** position in the central office located in Ithaca, New York focusing on mental health law in the first year, with the possibility of becoming a general law position thereafter. PLS is a statewide program providing civil legal services to people incarcerated in New York State prisons. PLS attorneys engage in administrative advocacy and representation in individual lawsuits and impact litigation. The successful candidate will work on mental health law with the Associate Director and two newly hired paralegals. PLS is co-counsel on a statewide systemic mental health case in litigation, and is also beginning a three-year monitoring period on a recently settled class action pertaining to the rights of inmates with mental illness at prison disciplinary hearings. The attorney will also work with casehandling staff throughout PLS to develop advocacy and litigation strategies and to provide training. Required: commitment to providing legal services to people with disabilities. Preferred: applicants with experience in mental health law and admitted to practice in New York State or eligible for admission pro *hac vice* and willing to take next available bar exam; recent law school graduates with prior experience in public interest law may be considered. Competitive salary with outstanding benefit package including family health, dental, long term disability, and life insurance, as well as generous leave policies. PLS seeks to be a well-balanced, diverse organization. EOE. People of color, women, and people with disabilities encouraged to apply. Fluent Spanish-speaking staff needed. Send cover letter, resume, writing sample, and at least three (3) references by mail, fax or email to: Maria McGuinness, Human Resources Manager, Prisoners' Legal Services of New York, 114 Prospect Street, Ithaca, NY 14850. tel (607) 273-2283; fax (607) 272-9122; e-mail: mmcguinness@plsny.org (Word or WP format).

Don't Miss an Application deadline!

Check the *REPORT* as soon as it hits the web at **www.nysda.org**, and look at Job Opportunities (under NYSDA Resources) for notices received after the *REPORT* deadline.

The Albany County Alternate Public Defender Office now being formed in Albany, NY seeks **attorneys** to represent eligible clients. The office will offer public legal services in criminal cases and in Family Court where a conflict exists with the Albany County Public Defender Office. Applicants should be committed to offering quality representation to persons unable to afford retained counsel. Minorities and women are encouraged to apply. Salary $30,000, with medical benefits (contribution required) and pension system participation. Applications accepted until all positions filled. Fax resume and cover letter to: Gaspar Castillo, fax (518) 427-6720.

The Public Defender's Office of Cattaraugus County is accepting applications for a **part-time Assistant Public Defender**. Work is primarily in night courts. Required: law school degree, membership in good standing of the NY State bar, strong research and writing skills and a commitment to the representation of individuals who are unable to retain counsel, ability to work collaboratively with other lawyers and staff, and valid NY drivers license. Salary for approx. 20 hrs/week is $28,000, no benefits. EOE. Applications may be obtained at the address below or by accessing the county website at http://www.co.cattaraugus.ny.us/human-resources/hrinfo.asp?Parent=9500&did=9. Send cover letter expressing interest with application and/or resume to: Mark S. Williams, Esq., Cattaraugus County Public Defender, 201 North Union Street, Suite 207, Olean, NY 14760. tel (716) 373-0004; fax: (716) 373-3462 ⚖

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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

Discovery (Preservation of Materials) DSC; 110(25)

Illinois v Fisher, 540 US __, 124 SCt 1200, 157 LEd2d 1060 (2004)

In 1988 the respondent was arrested during a traffic stop for possession of cocaine. He filed a discovery motion in state court seeking "all evidence." Before trial, the respondent absconded. He was found ten years later. According to procedures, police had destroyed the substance found in the 1988 arrest. The respondent's motion to dismiss the charges based on the destruction of evidence was denied. At trial he denied possessing cocaine and claimed the police framed him. The jury returned a guilty verdict. On appeal, the conviction was reversed based on a violation of due process for failing to preserve the evidence after a request had been made. *Illinois v Newberry*, 166 Ill2d 310, 652 NE2d 288 (1995).

Holding: The respondent's federal due process rights were not violated because he did not show that police acted in bad faith by failing to preserve the drugs, "potentially useful evidence," for testing after ten years. Failure to disclose material exculpatory evidence violates due process. *Brady v Maryland*, 373 US 83 (1963); *US v Agurs*, 427 US 97 (1976). Failure to preserve "potentially useful evidence" does not violate due process unless law enforcement acted in bad faith. *Arizona v Youngblood*, 488 US 51, 58 (1988). A discovery request did not obviate the need for establishing bad faith by the police. Judgment reversed.

Concurring: [Stevens, J] "[T]here may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Youngblood*, 488 US at 61. The state court decision was based on state law and *certiorari* should have been denied.

Constitutional Law (United States Generally) CON; 82(55)

Search and Seizure (Search Warrants [Execution]) SEA; 335(65[f])

Groh v Ramirez, 540 US __, 124 SCt 1284, 157 LEd2d 1068 (2004)

The petitioner, a Bureau of Alcohol, Tobacco and Firearms agent, heard that the respondent had a weapons cache. The petitioner prepared a search warrant application for automatic weapons and similar items. The warrant, signed by a federal magistrate, did not identify the items to be seized; the petitioner when preparing the warrant mistakenly entered a description of the house instead of items to be seized. The respondent's wife said that the petitioner told her that he was looking for an "explosive device in a box." Nothing was recovered. The respondent filed suit under *Bivens v Six Unknown Fed. Narcotics Agents* (403 US 388 [1971]), and 42 USC 1983. The district court granted summary judgment to all defendants, which was affirmed on appeal except for 4th amendment violations, for which the petitioner was held liable.

Holding: The warrant was invalid because it did not specify the items to be seized, despite the description contained in the warrant application. *See Massachusetts v Sheppard*, 468 US 981, 988, n. 5 (1984). It could not be saved by the description in the application without incorporation by reference. *See US v McGrew*, 122 F3d 847, 849-850 (9th Cir. 1997). No action by the petitioner could have cured the omission, making it a warrantless and unreasonable search. *See US v Leon*, 468 US 897 (1984). The petitioner did not act reasonably by relying on a defective warrant, which he prepared, and was not entitled to qualified immunity. *See Harlow v Fitzgerald*, 457 US 800, 818-819 (1982). Judgment affirmed.

Dissenting: [Kennedy, J] The petitioner was entitled to qualified immunity. He had a reasonable belief that the warrant language was proper.

Dissenting: [Thomas, J] The search was not presumptively unreasonable. *Anderson v Creighton*, 483 US 635 (1987). Reliance on the defective warrant was distinguishable from a search conducted without a magistrate's review. The petitioner was entitled to qualified immunity; his actions were objectively reasonable at the time.

Discovery (*Brady* Material and Exculpatory Information) (Witnesses) DSC; 110(7) (35)

Misconduct (Prosecution) MIS; 250(15)

Banks v Dretke, 540 US __, 124 SCt 1256, 157 LEd2d 1166 (2004)

The petitioner was sentenced to death for murder. In a federal post-conviction motion, he claimed that the prosecution withheld exculpatory evidence revealing that a witness was actually a police informant who set him up, and that another witness had made a deal. The petitioner offered affidavits from both witnesses. Testimony revealed that the first witness had been paid for his

US Supreme Court *continued*

involvement in the case. A transcript of an interrogation of the other witness showed that prosecutors coached him. The conviction was upheld, but the sentence set aside based on ineffective assistance of counsel and failure to reveal the informant status of the first witness. The petitioner's *Brady* claim based on evidence of witness coaching in the newly discovered transcript was not reached. The matter was reversed on appeal because the petitioner did not pursue his state remedy on the informant witness claim and because the evidence was not material.

Holding: The petitioner's state application based on prosecution failure to turn over exculpatory evidence about the witness informant satisfied the exhaustion requirement for federal *habeas corpus*. 28 USC 2254(b) (1994 ed.); see *Rose v Lundy*, 455 US 509, 520 (1982). When the prosecution concealed that the witness was a paid informant and promised to produce all *Brady* material, it was reasonable for the petitioner not to investigate further. *Strickler v Greene*, 527 US 263, 281-282 (1999). The prosecution also failed to correct a witness's lies on the stand and knowingly deceived the court. *Giglio v United States*, 405 US 150, 153 (1972). "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." As to the second witness, a certificate of appealability should have issued; the matter had been aired before the magistrate judge. *See* Federal Rule of Civil Procedure 15(b). Judgment reversed.

Concurring and Dissenting: [Thomas, J] Nondisclosure of the first witness's informant status was not prejudicial under *Kyles v Whitley*, 514 US 419 (1995) and *Brady*.

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

Prisoners (Access to Courts and Counsel) (Rights generally) **PRS I; 300(2) (25)**

Muhammad v Close, 540 US __, 124 SCt 1303, 158 LEd2d 32 (2004)

The respondent was charged with threatening behavior towards a state prison guard and placed in special detention for six days until the charges were heard. He was acquitted of threatening behavior, but found guilty of the lesser offense of insolence, which did not require prehearing detention. The respondent served seven more days of detention and was deprived of privileges for 30 days. He filed a §1983 action claiming that the original charge was retaliatory for past lawsuits and grievance proceedings. He did not challenge the insolence conviction. The respondent sought monetary damages for the unjustified pre-hearing detention. Summary judgment was granted to the petitioner, and affirmed on appeal because the respondent was said to have sought expungement of the misconduct charge and did not meet the favorable termination requirement of *Heck v Humphrey*, 512 US 477 (1994).

Holding: Challenges to the validity of any confinement or to particulars affecting its duration are the province of *habeas corpus*, 28 USC 2254; *Preiser v Rodriguez*, 411 US 475, 500 (1973). Requests for relief turning on circumstances of confinement can be presented in a §1983 action. Some cases are hybrids, with a prisoner seeking relief unavailable in *habeas*, notably damages, and making allegations that not only support a claim for damages, but challenge either the underlying conviction or seek release from confinement. The respondent did not seek expungement. *Heck*'s favorable termination requirement was inapplicable because no claim was made that affected the respondent's sentence or good time credits, such as in a *habeas* action. Judgment reversed.

Appeals and Writs (Counsel) **APP; 25(30)**

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

Baldwin v Reese, 541 US __, 124 SCt 1347, 158 LEd2d 64 (2004)

The respondent sought review of his conviction through the state system alleging ineffective assistance of trial counsel in violation of the federal constitution, but did not state the same basis for the claim as it related to appellate counsel. After the state supreme court denied review, the respondent filed for federal *habeas corpus* relief. The court found that the respondent had not "fairly presented" his federal ineffective assistance of appellate counsel claim to the state courts. Reversed on appeal because the state court would have realized that the respondent's claim was based on a violation of federal law.

Holding: The respondent's petition to the state supreme court did not fairly present a federal claim for ineffective assistance of appellate counsel and the court was not required to find it by reading the lower court's opinion. Federal *habeas corpus* law did not require state supreme court judges to read lower court opinions to discover an unstated federal basis for a post-conviction claim. Such a requirement would add another unnecessary layer of review by judges with discretionary review powers, who might ordinarily rely on the briefs alone. The burden on the respondent to state the federal claim could have been met by citing the federal law source, a court decision or "by simply labeling the claim 'federal.'" *Cf Gray v Netherland*, 518 US 152, 163 (1996). Judgment reversed.

Dissent: [Stevens, J] Where the basis for an ineffectiveness claim under state and federal law are substantially the same, the state court had a fair opportunity to assess the respondent's federal claim.

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

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

Crawford v Washington, 541 US __, 124 SCt 1354, 158 LEd2d 177 (2004)

The petitioner, charged with assault and attempted murder for stabbing a man who attempted to rape his wife, claimed self-defense at trial. His wife did not testify, asserting the state marital privilege. To rebut the self-defense claim, the prosecution introduced a hearsay statement that the petitioner's wife gave to the police. The petitioner objected that this violated the confrontation clause of the federal constitution. The trial court admitted the statement on grounds of trustworthiness. The appellate court reversed, finding the statement was not trustworthy. The state supreme court reinstated the conviction.

Holding: Admission of testimonial hearsay of the petitioner's spouse, acquired through police interrogation, required unavailability and a prior opportunity for cross-examination under the confrontation clause. US Const Amend 6. Previously, an unavailable witness's out-of-court statement was admissible if it had adequate indicia of reliability, *ie* fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Ohio v Roberts*, 448 US 56, 66 (1980). However, the categorical requirement of the confrontation clause for a prior opportunity for cross-examination trumps any balancing test for reliability. *Roberts* is overruled. Judgment reversed.

Concurring: [Rehnquist, J] No historical justification exists for distinguishing between testimonial and non-testimonial out-of-court statements for confrontation clause analysis. *Roberts* should stand. *Idaho v Wright*, 497 US 805, 820-824 (1990).

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

Iowa v Tovar, 541 US __, 124 SCt 1379, 158 LEd2d 209 (2004)

The respondent, in court for his third offense after two convictions for drunk driving, challenged his first guilty plea claiming an invalid waiver of counsel. He asserted that the first court did not tell him about the "dangers and disadvantages of self-representation." The motion was denied. The respondent was convicted of felony drunk driving, which was reversed by state supreme court, which found the first conviction invalid saying: "[T]he trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked," and, "[t]he defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty,"

Holding: The state's requirement of scripted advice concerning the waiver of counsel at the plea stage were more than was necessary under the circumstances. "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v Ruiz*, 536 US 622, 629 (2002) (emphasis in original). The respondent never claimed he did not understand the charge or range of punishment, and did not identify other information he might have received from counsel before pleading guilty. *Patterson v Illinois*, 487 US 285 (1988). Where the facts and issues were straightforward, additional warnings might have been misleading. The Federal Constitution did not require specific admonitions about defenses and independent opinions. Judgment reversed.

Search and Seizure (Automobiles and other Vehicles) **SEA; 335(15)**

United States v Flores-Montano, 541 US __, 124 SCt 1582, 158 LEd2d 311 (2004)

The respondent attempted to drive a station wagon into the US from Mexico at a border checkpoint in Southern California. Customs inspectors had the gas tank removed and dismantled, and discovered 37 kilograms of marijuana bricks inside. Charged with marijuana possession and smuggling, the respondent moved for suppression based on lack of reasonable suspicion. Suppression was granted, and affirmed on appeal.

Holding: The government's interest in securing its borders and the lowered expectation of privacy at border crossings supported the right to conduct suspicionless inspections, including the removal, disassembling, and reassembling of a vehicle's fuel tank. *Carroll v United States*, 267 US 132, 154 (1925). "[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v Ramsey*, 431 US 606, 616 (1977). No evidence suggested that the inspection of the gas tank resulted in any damage to the respondent's property. It was a brief and minimally intrusive procedure. Judgment reversed.

Concurring: [Breyer, J] Custom inspection records citing the reason for searches reduces the risk of gas tank searches being done in an abusive manner.

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Constitutional Law (United States Generally) **CON; 82(55)**

Double Jeopardy (General) **DBJ; 125(7)**

United States v Lara, 541 US __, 124 SCt 1628, 158 LEd2d 420 (2004)

The respondent, an Indian, pled guilty to "violence to a policeman" in the tribal court of the tribe on whose reservation the respondent lived but was not a member. The federal government then charged him with assaulting a federal officer. The respondent's motion to dismiss on double jeopardy grounds was denied. The court applied the dual sovereignty doctrine to allow the double prosecution, based on a statute permitting an Indian tribe to prosecute nonmembers. On appeal, dual sovereignty was found not applicable because the tribe exercised delegated federal prosecutorial power, not inherent sovereignty.

Holding: The dual sovereignty doctrine applied so the federal prosecution following the tribal one was proper. Congress had the authority to lift restrictions on an Indian tribe's inherent sovereignty to prosecute crimes. US Const, Art I, §8, cl 3; Art II, §2, cl 2; *Cotton Petroleum Corp v New Mexico*, 490 US 163, 192 (1989). Limitations imposed on a tribe's power to prosecute nonmembers were not based on constitutional limits, but on circumstances that existed at the time. *Duro v Reina*, 495 US 676 (1990). Since then Congress enacted 25 USC 1301(2) recognizing the power already possessed by Indian tribes to prosecute nonmembers. Judgment reversed.

Concurring: [Stevens, J] Congress's power to authorize states to exercise inherent functions, otherwise prohibited by the constitution, strengthened the conclusion that it had the power to ease restrictions on Indian sovereignty.

Concurring: [Kennedy, J] Amendment to Indian Civil Rights Act showed legislative intent to restore inherent Indian sovereign power to prosecute nonmembers.

Concurring: [Thomas, J] Affirmation of inherent tribal power over nonmembers by Congress was consistent with federal policy.

Dissent: [Souter, J] Tribal exercise of criminal jurisdiction over nonmembers was based on delegation of federal power, and prohibited successive federal prosecution.

Defenses (Battered Spouse Syndrome) (Self-Defense) **DEF; 105(4) (45)**

Due Process (Fair Trial) (General) **DUP; 135(5) (7)**

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

Middleton v McNeil, 541 US __, 124 SCt 1830 (2004)

The respondent was charged with murder for killing her husband. The defense claimed that her husband tried to strangle her and she responded out of fear for her life. An expert on Battered Women's Syndrome testified. The court instructed the jury on imperfect self-defense, which supported a reduction from murder to voluntary manslaughter if the jury found the fear unreasonable but genuine. At the end of the instruction defining imminent peril, the judge added the words "as a reasonable person," to how the peril must have been viewed by the accused at the time. This was not part of the California Jury Instructions, and was included by mistake. The conviction was affirmed on appeal. Denial of the respondent's federal habeas petition was reversed on appeal.

Holding: The state court correctly determined that the erroneous imperfect defense instruction did not violate due process since the imminent peril "unreasonable belief" standard was brought out through the entire jury charge. At worst, the entire set instructions were ambiguous but not fatally erroneous. *Boyde v California*, 494 US 370, 378 (1990). There was no "'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v McGuire*, 502 US 62, 72 (1991). The state court correctly applied federal law in finding that the instruction was not reasonably likely to have misled the jury in view of the three other times where the charge correctly stated that respondent's belief could have been unreasonable. "Nothing in *Boyde* precludes a state court from assuming that counsel's arguments clarified an ambiguous jury charge." Judgment reversed.

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

Johnson v California, 541 US __, 124 SCt 1833 (2004)

The petitioner's conviction was reversed on his state appeal based on a violation of *Batson v Kentucky*, 476 US 79 (1986) and state court precedent. The court took note of the petitioner's evidentiary and prosecutorial misconduct claims but did not address them. The California Supreme Court reversed and remanded based on the *Batson* claim.

Holding: The US Supreme Court has the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 USC 1257. The petitioner's case, which was remanded for further proceedings by the state court, did not fall within any exceptions to the finality requirement. *Cox Broadcasting Corp. v Cohn*, 420 US 469 (1975). Even if the petitioner's conviction were affirmed on remand, he could again seek review of the *Batson* claim. The California Supreme Court published the portion of their opinion dealing with *Batson*, and in the unpublished portion they addressed the evidentiary claims as a guide for the court on retrial. Only the published portion was ini-

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tially filed in the Supreme Court, which could have determined earlier that the state decision was not final if both the published and unpublished portions of the decision had been presented. Rules 14.1(i); 15.2. Judgment dismissed for lack of jurisdiction.

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

Sentencing (Habitual Criminals) **SEN; 345(40)**

Dretke v Haley, 541 US __, 124 SCt 1847 (2004)

The respondent was convicted as a habitual felony offender under state law. One of his prior felony convictions was improperly counted, but this was not raised during sentencing or on appeal. His state habeas corpus petition was rejected for lack of preservation. The respondent sought federal *habeas corpus* relief. While the State conceded the sentencing error, it raised procedural default in response. The petition was granted on the basis that the innocence exception applied in noncapital sentencing cases, and was affirmed on appeal.

Holding: Before considering a claim of actual innocence, a federal court must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default. *Murray v Carrier*, 477 US 478 (1986). Whether the actual innocence exception to procedural default applied to noncapital sentencing errors was not addressed. Judgment vacated.

Dissent: [Stevens, J] "The unending search for symmetry in the law can cause judges to forget about justice." Based on the conceded error in sentencing respondent as a habitual offender, there has been a violation of due process; the respondent was entitled to immediate release. *Thompson v Louisville*, 362 US 199 (1960). The State's opposition, "even as it concedes that respondent has already served more time in prison than the law authorized, might cause some to question whether the State has forgotten its overriding 'obligation to serve the cause of justice.'" *US v Agurs*, 427 US 97, 111 (1976).

Dissent: [Kennedy, J] The respondent has been compelled to serve additional time in jail for being a habitual offender, which the state conceded he was not. The State should have exercised its discretionary power to prevent injustice.

Bribery (General) **BRI; 63(10)**

Constitutional Law (United States Generally) **CON; 82(55)**

Sabri v United States, No. 03-44, 5/17/04, 541 US __

The petitioner, a real estate developer, was charged with offering three separate bribes to a city councilman to resolve licensing and zoning issues. The bribes included: a $5,000 kickback; a $10,000 bribe; and an offer of a commission of 10% on some $800,000 in community economic development grants. The petitioner claimed the charging statute was facially invalid for failure to require proof of a connection between the federal funds and the alleged bribe as an element of liability. 18 USC 666(a)(2). Motion granted. Reversed on appeal.

Holding: The statute prohibiting bribery of state, local, and tribal officials of entities that received at least $10,000 in federal funds was a valid exercise of congressional power under Article I of the Constitution. Congress had the constitutional authority to enact a statute safeguarding the use of federal monies under the general welfare, Art. I, §8, cl. 1, and necessary and proper clauses, Art. I, §8, cl. 18. The threshold amount of the offense and a substantial bribe were sufficient to define the federal interest. *Cf Salinas v US*, 522 US 52, 56-57 (1997). The petitioner's further arguments lack merit. Judgment affirmed.

Concurring: [Kennedy, J] The majority did not question whether Congress, in enacting the challenged statute, had exceeded its legislative power under the Constitution. *US v Lopez*, 514 US 549 (1995)

Concurring: [Thomas, J] The statute was a valid exercise of congressional power to regulate commerce under the current interpretation of the commerce clause. *See Perez v US*, 402 US 146, 154 (1971). Doubts remain about that interpretation. The majority's approach improperly expanded the reach of Congress' power under the necessary and proper clause.

Discrimination (General) **DCM; 110.5(40)**

Equal Protection (General) **EQP; 140(7)**

Federal Law (General) **FDL; 166(20)**

Tennessee v Lane, No. 02-1667, 5/17/04, 541 US __

The respondents, who required wheelchairs for mobility, were unable to access the upper floors of a county courthouse. They sued the state under Title II of the Americans with Disabilities Act (ADA), 42 USC 12131-12165, claiming that they were denied access to the state court system by reason of their disabilities. The state's motion to dismiss on 11th Amendment grounds was denied. On appeal, denial of the State's motion to dismiss was affirmed.

Holding: Title II of the ADA concerning right of access to the courts was a valid exercise of congressional power to enforce the 14th Amendment. The 11th Amendment barred private lawsuits for violations of Title I. *Board of Trustees of Univ. of Ala. v Garrett*, 531 US 356, 360, n. 1. (2001). Congress has the power to abrogate states' 11th Amendment immunity by virtue of the enforcement mechanism of the 14th Amendment in appropriate cases. 42 USC 12202. *Fitzpatrick v Bitzer*, 427 US 445 (1976). Title

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II's requirement of program accessibility was congruent and proportional to its object of enforcing the right of access to the courts. *City of Boerne v Flores*, 521 US 507, 518. It was a reasonable preventive measure and reasonably targeted to a legitimate end. Judgment affirmed.

Concurring: [Souter, J] Concurrence with the majority opinion is subject to the same caveats about 11th Amendment cases set out in *Nev. Dep't of Human Res. v Hibbs*, 538 US 721, 740 (2003) (Souter, J., concurring).

Concurring: [Ginsburg, J] Congress considered a sufficient body of evidence about access barriers to public facilities and services.

Dissent: [Rehnquist, J] This decision is irreconcilable with *Garrett*.

Dissent: [Scalia, J] The enforcement mechanism of the 14th amendment was applied too broadly.

Dissent: [Thomas, J] Title II was not a congruent and proportional remedy to alleged state practice of denying access.

New York State Court of Appeals

Sentencing (Credit for Time Served) SEN; 345(15)

Guido v Goord, 1 NY3d 345, 774 NYS2d 113 (2004)

On Mar. 9, 1989, the defendant was arrested and incarcerated in Florida on charges from two Florida counties. A week later, New York lodged a warrant against him on other charges. He was acquitted in one Florida case, and the remaining charges were dismissed on Apr. 22, 1990. He had been in custody the whole time. The next day, he was extradited to New York, where he was convicted and sentenced to concurrent indeterminate terms of 12 1/2 to 25 years and 3 1/2 to 7 years in prison. The Department of Correctional Services (DOCS) credited him with 316 days of time spent in New York. His request for an additional 411 days credit from his Florida detention was denied. The court dismissed his article 78 petition because the New York warrant was not the sole basis for defendant's Florida detention. The ruling was affirmed on appeal.

Holding: The defendant, incarcerated out-of-state, with a New York warrant lodged against him, was entitled to credit for time spent in jail on charges that resulted in an acquittal or dismissal. The Penal Law authorizes jail time credit in "any case" where a defendant has been incarcerated on charges that were later dismissed or resulted in acquittal provided a warrant for the new case had been lodged during that time. Penal Law 70.30(3). It applies to defendants in custody in New York, another state, or federal detention. *People v Cerilli*, 80 NY2d 1016. DOCS relied on *Matter of Peterson v New York State Dept of Correctional Servs* (100 AD2d 73) and *Matter of Keffer v Reid* (100 AD2d 549), which are no longer to be followed. Order reversed.

Due Process (General) DUP; 135(7) (10)
Miscellaneous Procedures)

Insanity (General) ISY; 200(27)

Re K.L., 1 NY3d 362, 774 NYS2d 472 (2004)

The respondent had a schizoaffective disorder and a history of psychiatric hospitalization, noncompliance with prescribed medication and treatment, and aggressive behavior toward family members. A petition was filed seeking assisted outpatient treatment (AOT). The respondent challenged the failure of Kendra's Law to require a finding of incapacity before issuing an AOT. The challenges were denied by the hearing court and on appeal.

Holding: Kendra's Law provides sufficient safeguards for issuing an AOT order by mandating that particular criteria be established by clear and convincing evidence. Mental Hygiene Law 9.60(c). A finding of incapacity is required when an involuntarily committed patient is being compelled to take medication. *Rivers v Katz*, 67 NY2d 485. Kendra's Law does not permit forcible medical treatment, and no incapacity finding is needed. Mental Hygiene Law 9.60 [n]. The state's *parens patriae* interest supports AOT orders made on findings that patients are at risk without supervision and have a history of noncompliance that has resulted in hospitalization or violent behavior, among other factors. The law does not treat similarly situated people differently, such as incapacitated involuntarily committed psychiatric patients. *City of Cleburne v Cleburne Living Ctr, Inc*, 473 US 432, 439 (1985). Notice and hearing are not required for temporary detention of noncompliant patients. The 72-hour evaluation is not a substantial deprivation of liberty. The risk of erroneous deprivation is minimal, the procedural safeguards are significant, and the government's interest in removing from the streets noncompliant patients who might pose a risk to themselves and others is strong. *Mathews v Eldridge*, 424 US 319, 335 (1976). Order affirmed.

Evidence (Photographs and Photography) EVI; 155(100)

Self-Incrimination (General) SLF; 340(13) (15)
(Non-testimonial Evidence)

People v Slavin, No. 19, 2/17/04

Over the defendant's objections during his arrest, police photographed markings on the defendant's body. The photographs were shown to the grand jury. The court denied the defendant's motion to dismiss the indictment or preclude use of the photographs at trial. It permitted

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the prosecution to take additional pictures of the defendant's tattoos as relevant to motive. At trial, the photos were introduced and the meaning of the markings explained by an expert. The defendant was convicted of attempted murder and other felonies.

Holding: Using photographs of the defendant's tattoos depicting racist and anti-police symbols to show motive for committing a hate crime did not violate the 5th amendment privilege against self-incrimination. The tattoos were physical characteristics, not testimony. *See Schmerber v California*, 384 US 757, 764-65 (1966); *People v Berg*, 92 NY2d 701, 704. The defendant was not compelled to make the tattoos. *Compare US v Hubbell*, 530 US 27, 34-35 (2000). The privilege against self-incrimination did not prevent compelling disclosure of evidence voluntarily created by the defendant that revealed incriminating facts or beliefs. *US v Doe*, 465 US 605, 610-11 (1984). Nor was the defendant compelled to reveal the existence of the tattoos or explain them. Order affirmed.

Dissent: [Ciparick, J] Forcing the defendant to be photographed and using his tattoos as evidence of motive, *ie*, state of mind evidence with testimonial value, violated the 5th Amendment. *People v Hager*, 69 NY2d 141, 142. Since the tattoos were mostly hidden and not needed for identification, it was an invasion of privacy to photograph them. *People v More*, 97 NY2d 209.

Homicide (Murder [Defenses]) **HMC; 185(40[a])**

People v Smith, No. 20, 2/17/04

At a trial for intentional and felony murder, the court rejected the defendant's attempt to raise an extreme emotional disturbance defense. The defendant claimed the deceased had made sexual advances towards her on the night he was killed, and had been in a sexual relationship with her for several months. The defendant's testimony, along with other lay witnesses, was offered, but no expert psychiatric evidence.

Holding: The defendant's evidence of a sexual relationship with the deceased was an insufficient offer of proof to raise an extreme emotional disturbance defense. The defense can be established without psychiatric testimony. *People v Roche*, 98 NY2d 70, 76. Still, it requires proof of two elements. One is subjective—the defendant acted under extreme emotional distress. The other is objective—there was a reasonable explanation or excuse for the emotional disturbance. *People v Moye*, 66 NY2d 887, 890. The defendant's proffered testimony that she was affected by her longstanding sexual relationship with the deceased did not show that she acted under the influence of an extreme emotional disturbance at the time of the homicide. *People v White*, 79 NY2d 900, 903. Therefore, there is no need to decide whether pretrial notice was required. Order affirmed.

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

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

People v Shelton, No. 68, 2/19/04

Holding: The prompt outcry exception to the hearsay rule was properly applied. Prompt outcry has to be made "at the first suitable opportunity" (*People v O'Sullivan*, 104 NY 481, 486) and is "a relative concept dependent on the facts." *People v McDaniel*, 81 NY2d 10, 17. These factors were met in this rape trial, where the court found that the offense occurred late at night, the defendant warned the complainant not to tell anyone, and the defendant lived in the same apartment building as the elderly complainant. The complainant's daughter was properly allowed to testify. Order affirmed.

Death Penalty (General) (Legislation) (States [New York]) **DEP; 100(80) (105) (155[gg])**

Evidence (Other Crimes) (Uncharged Crimes) **EVI; 155(95) (132)**

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

People v Mateo, No. 21, 2/24/04

Trying to track down his girlfriend, who had left with their child after a series of domestic abuse incidents, the defendant, with the cooperation of his wife, abducted the decedent, who had a friend in common with the defendant's girlfriend. After the decedent was questioned, the defendant decided to kill him. When talking to police, the defendant alternated between taking responsibility for shooting the decedent and claiming that his wife did it. The defendant also described other homicides. He was charged with felony murder committed in furtherance of first-degree kidnapping or ordering someone else to commit murder as part of that offense. Before trial, the defendant challenged the plea provisions of the death penalty statute. The Appellate Division found them constitutional. While the issue was on appeal, the defendant went to trial. His wife was tried separately. On appeal after trial, the defendant claimed the prosecutor violated due process by presenting inconsistent factual theories and objected to admission of his statements about other murders.

Holding: The defendant's death sentence was reached under a two-tiered punishment system that discriminated against those who chose trial and faced the death penalty, compared to those who pled guilty with a maximum sentence of life in prison. US Const, Amend 5 &

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6; *US v Jackson*, 390 US 570 (1968); *Matter of Hynes v Tomei*, 92 NY2d 613. The improper plea provisions in effect at the time of the defendant's trial require reversal of his death sentence. *People v Harris*, 98 NY2d 452.

The prosecution's theories were not inconsistent in the defendant's or his wife's cases. The verdict was supported by sufficient evidence to show that the defendant kidnapped the decedent and, in furtherance of that crime, either intentionally shot and killed him or commanded the defendant's wife to do so. Before the defendant's trial, his wife was tried as the shooter. Acquitted of that charge, she was convicted of second-degree felony murder and first-degree kidnapping. The court in the defendant's case correctly allowed alternative theories based on reasonable views of the evidence and the defendant's admissions. *Nguyen v Lindsey*, 232 F3d 1236 (9th Cir. 2000).

The defendant challenged the court's jury instruction that he could be found guilty either as a commander of the killing or the shooter. Penal Law 125.27(1)(a)(vii). Only under the felony murder statute is accessorial liability limited to those cases where a defendant commands the killing. Penal Law 20.00; *People v Couser*, 94 NY2d 631, 635 (2000). Permitting the jury to consider command theory and actual killer theory together, without requiring unanimity on one, did not violate due process. *Schad v Arizona*, 501 US 624 (1991). They were different means to the same end, not different elements. *People v Farmer*, 196 NY 65, 76.

The defendant also challenged his conviction as against the weight of the evidence. Even under the heightened standard for review in death cases, the jury was justified in finding the defendant guilty of first-degree murder. *People v Crum*, 272 NY 348, 350.

By challenging at trial the voluntariness of his statements to the police, the defendant opened the door to admitting his entire statement, including the part about other uncharged murders, to rebut assertions that he gave false statements exaggerating his role to exculpate his wife. Police use of the defendant's concern about the release of his wife, which did not depend on his act of confession, was not improper. *People v Johnson*, 177 AD2d 791, 792. Judgment modified, remitted for resentencing.

Dissent: [G. Smith, J] Admission of defendant's confession to uncharged homicides violated *Molineux*, serving to show the defendant's propensity to kill. *People v Hudy*, 73 NY2d 40, 54.

Dissent: [Rosenblatt, J] The door was not opened wide enough to justify admission of the defendant's uncharged crimes. The decision to allow the evidence did not balance prejudice versus probity. The defendant did not testify and his attorney asked oblique questions about the circumstances of the interview, which amounted to innuendo at best.

Juries and Jury Trials (Selection) **JRY; 225(55)**

People v Williams, No. 38, 3/25/04

At the defendant's trial for weapons and drug possession, 18 prospective jurors were seated for the initial round of selection. Seven were selected. The court ordered one prospective juror at a time put into the box for questioning and challenges. Over both prosecution and defense objection, the court followed this procedure until jury selection was completed. The defendant's objection was that at least five jurors should have been placed in the box.

Holding: Seating one potential juror at a time in the box for questioning did not violate CPL 270.15(3). The court may "direct that the persons excluded be replaced in the jury box by an equal number from the panel or in its discretion, direct that all sworn jurors be removed from the jury box and that the jury box be occupied by such additional number of persons from the panel as the court shall direct." After the first round, it was within the court's discretion to seat as many prospective jurors as it saw fit. *People v Alston*, 88 NY2d 519, 524. "While the trial court's procedure was not unlawful, it may have needlessly prolonged jury selection, and should not be followed." Order affirmed.

Homicide (Murder [Evidence] [Intent]) **HMC; 185(40[j] [p])**

People v Gonzalez, No. 45, 3/25/04

The defendant was arrested for intentional and depraved indifference murder of a decedent shot several times, even after he fell to the ground. The defendant explained in his confession that he feared the decedent due to threats the latter made, so when he saw the decedent in a barbershop, he panicked, and "blanked out" due to fear. The defendant admitted to police that he was carrying a gun for protection, and to shooting the victim. At the close of the prosecution's case, the defendant's motion for dismissal because the evidence was insufficient to prove depraved indifference was denied. The defendant was acquitted of intentional murder, and convicted of depraved indifference murder and weapons possession. The Appellate Division reversed.

Holding: Depraved indifference murder "results not from a specific, conscious intent to cause death, but from an indifference to or disregard of the risks attending defendant's conduct." Based on a reasonable view of the evidence, the defendant could only have acted intentionally, Penal Law 15.05 (1), and not with depraved indifference. *See* Penal Law 125.25 (2), 15.05 (3); *People v Wall*, 29 NY2d 863, 864. The defendant could not have acted inten-

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tionally and recklessly to achieve the same end. *People v Gallagher*, 69 NY2d 525, 529. Intentional and depraved indifference murder were inconsistent counts. Acting out of fear and anger was relevant only to intent and a possible defense of extreme emotional distress; it had no bearing on recklessness. *People v Hafeez*, 100 NY2d 253, 259. Order affirmed.

Sentencing (Hearing) **SEN; 345(42)**

Victims (Rights) **VIC; 381(20)**

People v Hemmings, No. 37, 3/30/04

The defendant was charged with second-degree murder, weapons possession and other charges. He was only convicted of weapons possession. The prosecutor sought to have the decedent's family members and a friend offer victim impact statements. The defendant objected because hearing "any number of impact statements" would "becloud the judicial atmosphere" and confuse the sentencing process. All those who spoke asked for the maximum penalty. The defendant, 18 years old at the time of the crime, faced a sentence range between youthful offender status without incarceration and 15 years in prison. The judge, after consulting a three-judge sentencing panel, rejected the Probation Department recommendation for youthful offender treatment, sentencing the defendant to eight years, which was affirmed on appeal.

Holding: The court had discretionary power to allow more than one victim-surrogate to speak at sentencing. The legislative history of CPL 380.50(2), which raised from a privilege to a right the opportunity for a crime victim to speak at sentencing, does not show the statute was meant to restrict a sentencing court's discretionary authority to allow others close to the victim to also speak. Still, "[m]ultiple statements should not be allowed if the court concludes they will be unduly prejudicial to the defendant or will negatively impact the fair administration of justice." Courts can "restrict the number or length of such statements where they would be unhelpful, repetitive, inflammatory or otherwise inappropriate." The court here exercised its discretion appropriately, determining that the proffered statements would not be inflammatory or inappropriate. Order affirmed.

Traffic Infractions (Procedure) **TFI; 372(30)**

People v Tyler, No. 44, 3/30/04

On April 21, 2002, the police gave the defendant a speeding ticket. His scheduled court date was May 14. The reverse side of the ticket indicated that the defendant was entitled to a supporting deposition if he requested it "within thirty days from the date [he was] directed to appear in court as set forth on this appearance ticket." The defendant checked the box for requesting a supporting deposition and hand delivered the ticket to the local court the day after he received it. His court date was rescheduled from May 14 to May 1. On that day, he was arraigned, pled not guilty and repeated his request for a supporting deposition, which he received on May 31. His motion to dismiss because the deposition was not served within 30 days from his original request was denied. County Court reversed, finding a timely request had been made.

Holding: The defendant had the right to request a supporting deposition for a simplified traffic information before arraignment. CPL 100.25(2). The right to request a supporting deposition began when "charged by a simplified information," CPL 100.25(2); "being charged" occurred when the ticket was given. The defendant made his request before entry of a guilty plea or trial, and not more than 30 days after the date he was directed to appear in court. While a defendant cannot ask for a supporting deposition later than 30 days after the return date, CPL 100.25 did not prevent a request before the return date, provided a defendant had not pled guilty or started trial. Order affirmed.

Narcotics (Evidence) (Sale) **NAR; 265(20) (59)**

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

People v Hicks, No. 39, 4/1/04

Holding: The court properly exercised its discretion by allowing the arresting officer to testify that the packaging of the drugs found on the defendant was not consistent with personal use and was similar to packaging observed in previous drug sale arrests. The officer had spent ten years on the force and more than two years in the narcotics division, and had received continuing training in "identifying narcotics, packaging, and characteristics for sale." He had sufficient experience and training to give an opinion about the nature of the substance and the packaging. *See Mattot v Ward*, 48 NY2d 455, 459; *see also* Prince, *Richardson on Evidence* § 7-304 [Farrell 11th ed]. The officer's testimony was helpful to the jury in understanding the evidence and reaching a verdict. *See People v Lee*, 96 NY2d 157, 162. It was beyond the ken of the average juror to discern whether the quantity of drugs found on the defendant was for personal use or sale. *See People v Brown*, 97 NY2d 500, 505. An expert opinion on the ultimate issue was permissible, since it concerned a matter beyond the jurors' knowledge. *See People v Cronin*, 60 NY2d 430, 432-433. Order affirmed.

Narcotics (Evidence) (Sale) **NAR; 265(20) (59)**

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

People v Smith, No. 40, 4/1/04

The defendant was arrested for a drug sale that occurred near, but independent of, an undercover buy-and-bust operation. At trial, the undercover officer testified about the different roles and functions of people involved in multi-member street-level narcotic sales and how they worked together. In part, this was an explanation of why no drug-buy money was found. The defendant's conviction of selling drugs and sentence as a second felony offender were affirmed.

Holding: Since the evidence showed that the defendant acted alone, and his transaction was unrelated to the other operation, it was an abuse of discretion for the trial court to permit expert testimony about multi-individual, street-level narcotics operations. *People v Brown*, 97 NY2d 500. However, it was harmless error, since the proof against the defendant after excising the improper expert testimony was overwhelming. *People v Crimmins*, 36 NY2d 230, 242. Order affirmed.

Parole (Board/Division of Parole) PRL; 276(3)

Sentencing (Presentence Investigation and Report) SEN; 345(65)

Matter of Moore v Travis, No. 91 SSM 4, 4/1/04

Holding: The petitioner's belated request to expunge misinformation upon which the Division of Parole did not rely and which had already been corrected was reasonably denied. *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231. Order affirmed.

Counsel (Conflict of Interest) COU; 95(10)

Evidence (Hearsay) (Missing Witnesses) EVI; 155(75) (86)

People v Lewis, No. 41, 4/6/04

The defendant was charged with possession and sale of drugs, then released on bail. A prosecution witness, who planned to testify that he purchased drugs from the defendant, claimed that he received a threatening phone call from the defendant. The witness notified the police and refused to testify. The prosecution sought to admit the witness's written statement, arguing that the defendant waived his right of confrontation by intimidating the witness. At a *Sirois* hearing, the defendant admitted learning of the witness's statement from defense counsel but said he did not threaten the witness. Defense counsel, called by the prosecution without objection, admitted that he revealed the witness's statement solely to the defendant. The court held the defendant responsible, and admitted the witness's statement. The defendant's conviction was affirmed on appeal.

Holding: Defense counsel who testified at the *Sirois* hearing (*Matter of Holtzman v Hellenbrand and Sirois*, 92 AD2d 405, 415), contrary to the interests of his client, provided ineffective assistance of counsel. *People v Berroa*, 99 NY2d 134. "[A]ttorneys should withdraw when called to testify against their client on a significant issue." See Code of Professional Responsibility DR 5-102(d) (22 NYCRR 1280.21[d]); *People v Paperno*, 54 NY2d 294, 299-300. Counsel should have objected when called as a witness by the prosecutor, or the court should have addressed the potential conflict of interest. *People v Jones*, 55 NY2d 771, 773. Given the rupturing of the attorney-client relationship as a result of counsel's testifying without objection, a new trial is required. Order reversed.

Dissent: [R. Smith, J] It was error to allow the prosecutor to call defense counsel as a witness at *Sirois* hearing but defense counsel was not ineffective. At most only the hearing was tainted, not the whole trial.

Identification (Eyewitnesses) (Lineups) (Suggestive Procedures) (*Wade* Hearing) IDE; 190(10) (30) (50) (57)

People v Massie, No. 42, 4/6/04

The defendant was charged with the gunpoint robbery of a restaurant. At a hearing about the lineup procedure at which two employees picked the defendant's picture from an array of computer images, one witness testified that her initial reaction had been "it was 50/50, it could have been him, it could have been other people." Only after conferring with the other witness at the time did she become 100 percent certain it was the defendant. The witness also picked the defendant out of a lineup, conducted without defense counsel. A motion to suppress in-court identifications was denied, because the witnesses were found to have an independent source of knowledge.

Holding: The court exercised proper discretion in making its *in limine* ruling that defense questioning of an eyewitness about a pre-trial photographic identification would have opened the door to introducing evidence of the suppressed lineup to provide the jury with complete information. *People v Melendez*, 55 NY2d 445. This issue requires case-by-case analysis. Raising a new issue on cross-examination does not invite introduction of all evidence regardless of remoteness (redirect would be limited to the subject matter of cross bearing on the question at issue [*see People v Buchanan*, 145 NY 1, 24]) and only evidence sufficient to address the new matter would be allowable. *People v Schlessel*, 196 NY 476, 481. The response has to be measured against the degree to which the "door-opening" evidence or argument is incomplete and misleading. *People v Rojas*, 97 NY2d 32. Here, the defense

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wanted to attack the in-court identification by suggesting that the array identification process had tainted it. It was reasonable to conclude that allowing the array suggestiveness in while keeping out evidence of the lineup, not shown to have been suggestive, would have misled the jury. Order affirmed.

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

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

Evidence (Exclusionary Rule) (Exclusionary Rule Exceptions) **EVI; 155(53) (54)**

People v Jones, No. 43, 4/6/04

Based on photographic identifications by complainants in two separate robberies, police went to the defendant's apartment, entered without a warrant or permission, and arrested the defendant, who was later picked out of a lineup at which he did not have counsel. He sought to suppress the photo identifications as suggestive and the lineup identifications as based on the warrantless arrest. His subsequent conviction of one robbery was affirmed.

Holding: Warrantless entry into the defendant's apartment to arrest him absent exigent circumstances violated the 4th Amendment. *Payton v New York*, 445 US 573, 576 (1980). Under the State Constitution, the exclusionary rule does prohibit the use of inculpatory statements given during custodial interrogation without counsel made after an arrest in violation of *Payton*. *People v Harris*, 77 NY2d 434. This rule does not apply to lineups conducted without counsel after a *Payton* arrest. Sufficient deterrents already exist to dissuade police from violating *Payton*, *ie*, the *Harris* rule and legal action under 42 USC 1983. *See eg Loria v Gorman*, 306 F3d 1271, 1283-1284 (2d Cir. 2002). The illegal entry and arrest had a minimal impact on the lineup identification; it was not the fruit of the poisonous tree. Order affirmed.

Dissent: [Ciparick, J] The *Harris* exclusionary rule should apply to a breach of the defendant's right to counsel at the lineup; there was a causal link between the lineup and the earlier illegal warrantless entry to arrest. *People v Drain*, 73 NY2d 107, 110.

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

Juveniles (Right to Counsel) **JUV; 230(130)**

People v Mitchell, No. 18, 5/4/04

The defendant, 15 years old, was arrested for armed robbery. Police called his mother before placing him in a lineup and invited her to attend. She said she could not come and that the defendant had a lawyer; she asked if the police wanted that number. The police already knew that the defendant had counsel in an unrelated, pending case. No effort was made to contact the attorney. Two eyewitnesses picked the defendant out of the lineup. His conviction was affirmed.

Holding: The defendant's mother failed to exercise her authority to invoke her juvenile son's right to counsel. *People v Glover*, 87 NY2d 838, 839. The right to counsel, which attaches at the commencement of a criminal action (*People v Settles*, 46 NY2d 154) does not automatically apply to pre-accusatory, investigatory lineups, even in delinquency proceedings. *People v Hawkins*, 55 NY2d 474. The right to counsel can attach at an investigatory lineup when an attorney has entered the case (*People v LaClere*, 76 NY2d 670) or when a defendant in custody was represented by counsel on an unrelated case and invoked the right by requesting the police to contact that attorney. *People v Thomas*, 76 NY2d 902. Juveniles lack the knowledge and experience to fully understand the scope of their rights. New York law requires notice to parents when certain criminal proceedings involve an accused less than 16 years of age. CPL 1.20 (42); 140.20 (6). A parent or legal guardian can invoke the right to counsel for a juvenile. Suggesting that an attorney might be desired (*People v Fridman*, 71 NY2d 845); informing the police that counsel existed (*People v Roe*, 73 NY2d 1004); or asking whether counsel was necessary (*People v Hicks*, 69 NY2d 969), are insufficient to invoke the right. Although police were aware that the defendant had representation in an unrelated open case, the mother's statement was not an unequivocal invocation of the right to counsel on her son's behalf. Order affirmed.

Appeals and Writs (Arguments of Counsel) (Counsel) (Judgments and Orders Appealable) **APP; 25(5) (30) (45)**

People v Stultz, No. 61, 5/4/04

Nine months after the defendant's arrest for murder and before trial, a jail inmate came forward and identified another man as the murderer. At trial the witness refused to testify, asserting her privilege against self-incrimination. The prosecution declined to give her immunity and the court did not inquire about her fear of self-incrimination. Defense counsel did not try to offer her prior statements into evidence. The defendant's conviction was affirmed on appeal. He filed a writ of *coram nobis* claiming that appellate counsel was ineffective for not challenging trial counsel's failure to seek admission of the statements. Relief was denied.

Holding: The legislature has provided a mechanism for Court of Appeals review of *coram nobis* decisions. CPL 450.90 (L 2002, ch 498). The standard for ineffectiveness of appellate counsel is the same as for trial counsel, which

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was established in *People v Baldi* (54 NY2d 137), *ie* whether defense counsel provided "meaningful representation." Evidence of prejudice is significant, but not dispositive, in assessing meaningful representation under *Baldi*, which remains the state constitutional test, not the federal test set out in *Strickland v Washington* (466 US 668 [1984]). *See People v Henry*, 95 NY2d 563, 565. Here, two highly experienced criminal appeals lawyers prepared the 53-page brief. They raised due process issues related to the prosecution's refusal to grant immunity and the court's failure to learn why the witness invoked the 5th Amendment, citing federal and state law. The other issues raised were equally well researched and argued. *ABA Standards for Criminal Justice* 4-1.2 (3d ed 1993). Appellate counsel did not have to challenge the trial lawyer's decision not to seek admission of the witness's statements, which lacked the indicia of reliability required for admitting evidence from an unavailable witness according to *People v Robinson* (89 NY2d 648). Order affirmed.

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

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

People v Nieves, No. 52, 5/7/04

The defendant was convicted of reckless endangerment, weapons possession and related charges for shooting two men outside a nightclub. He was acquitted of the assault-related offenses but convicted of weapons possession. During sentencing, the court issued two permanent orders of protection, one for each of the complainants, to expire three years from the defendant's maximum release date. No objection was made. On appeal, the defendant challenged the orders as to duration and scope. Partial relief relating to consideration of jail time credit as to the orders of protection was granted on appeal.

Holding: A permanent order of protection is reviewable on appeal because it is part of the criminal judgment. CPL 450.10; *see People v Hernandez*, 93 NY2d 261. Orders of protection were intended to be issued for the benefit of victims and witnesses "[u]pon conviction of any offense." CPL 530.13(4). Thus they became part of the final adjudication of the criminal action. However, the defendant failed to preserve error by objecting at sentencing. It did not fall within the illegal sentence exception (*People v Samms*, 95 NY2d 52, 56) because an order of protection issued at sentencing is not part of the sentence. While permanent orders of protection are appealable, "sentencing courts are in the best position to amend permanent orders of protection, [so] the better practice—and best use of judicial resources—is for a defendant seeking adjustment of such an order to request relief from the issuing court in the first instance, resorting to the appellate courts only if necessary." *See gen People v Kinchen*, 60 NY2d 772. As to the defendant's appeal, order affirmed. As to the prosecution's appeal, dismissed on the ground that the Appellate Division's modification was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to . . . modification" (CPL 450.90[2][a])."

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

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

People v Aponte, No. 55, 5/11/04

The defendant was tried for third-degree sale of a controlled substance. Over the course of three hours, two prosecution witnesses and one defense witness testified. The key issue was the identification of the seller. The jury was charged in the morning, and near the end of the day they returned deadlocked. The judge advised them to "[c]ontinue deliberating. We await your verdict." At the end of the next day, the jury returned deadlocked again. The defendant's mistrial motion was denied. The court gave the jury a supplemental instruction that suggested "[s]omething happened in this case." The defense objected that the court had given an *Allen* charge (*see Allen v US*, 164 US 492 [1896]), which was coercive and would shame the jury into returning a decision. Five minutes later, the jury returned a guilty verdict. On appeal, denial of the defendant's CPL 330.30 motion to set aside the verdict was reversed.

Holding: The jury charge was unbalanced and coercive. *See People v Ford*, 78 NY2d 878. The Appellate Division correctly found that it: "(1) over-emphasized the need to get a result, (2) suggested that the jurors were failing in their duty, (3) stressed that 'something happened' in the case, (4) presented jurors with the prospect of prolonged deliberations, and (5) failed to caution jurors not to surrender their conscientiously held beliefs." Returning a verdict five minutes after a supplemental instruction suggested that the jury was coerced. *Lowenfield v Phelps*, 484 US 231, 240 (1988). The combined effect of these flaws required reversal. A court may encourage a verdict but may not try to coerce or compel one. *People v Pagan*, 45 NY2d 725, 726. Judgment affirmed, new trial ordered.

Search and Seizure (Arrest/Scene of the Crime Searches) **SEA; 335(10)**

People v Wheeler, No. 60, 5/13/04

To execute an arrest warrant for a probationer, police went to an apartment where they believed the probationer was staying. The police found the probationer and two

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other men sleeping in the living room. After the probationer was identified, he was asked to lean up. The police saw a loaded gun and a knife at his side. Another loaded weapon was discovered next to one of the other men. Meanwhile, the defendant was sitting on his hands and "mouthing off" to the officers and being uncooperative. One of the officers believed the defendant was hiding something and asked to him to shift around. He refused at first but eventually moved. Another loaded gun was discovered under his thigh. He denied ownership. Denial of the defendant's suppression motion was affirmed on appeal based on the rationale of a reasonable limited security sweep.

Holding: Discovering weapons while executing an arrest warrant in the room where the defendant was found provided police with a reasonable belief that he was armed and dangerous. Police actions were justified from their inception and were reasonably related to the circumstances surrounding the arrest. *See People v William II*, 98 NY2d 93, 98. Neither party at the suppression hearing relied on the protective sweep rationale found in *Maryland v Buie* (494 US 325 [1990]). Since there was no evidence of hidden dangers supporting a sweep, it was not applicable. The "reasonableness" test applied and was met. Judgment affirmed.

Juveniles (Delinquency—Procedural Law) (Disposition) **JUV; 230(20) (40)**

In the Matter of Robert J., Nos. 62, 63, 5/11/04

Respondent Robert J., at age 15, was adjudicated a juvenile delinquent for weapons possession; he was sentenced to probation. At a violation of probation hearing, the presentment agency recommended placing the respondent, then 16 years old, in the custody of the Office of Children and Family Services (OCFS). Over objection, Family Court ordered commitment to OCFS for a time period beyond his 18th birthday. Respondent Kareem R. was 16 years old when he was adjudicated a juvenile delinquent for criminal trespass and sentenced to probation. At a probation violation hearing, the court committed him to OCFS pending an investigation. After he turned 18, he objected to remaining in OCFS custody. Based on his progress under the care of OCFS, the court ordered that he be placed there for 12 months. Appeals were filed claiming that Family Court Act 355.3(6) did not allow the placement of juvenile delinquents with OCFS beyond the age of 18 except by consent or adjudication of designated felonies. Commitment orders affirmed on appeal.

Holding: The Family Court Act authorized initial placement of young persons who have been adjudicated juvenile delinquents and not convicted of designated felonies with the Office of Children and Family Services for a period extending beyond their 18th birthday. Family Court Act 352.2(1)(c). There was no maximum age limitation in the initial placement statute, and Executive Law 507-a(2) set the cap at 21 years of age. Extensions of placements were limited to "the respondent's eighteenth birthday without the child's consent and in no event past the child's twenty-first birthday." Family Court Act 355.3. Based on statutory and legislative history, the age limit in the extension statute was not meant to curtail the time limit of the initial placement statute to 18 years. *See gen Matter of Tabitha LL.*, 87 NY2d 1009. Judgment affirmed.

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

Conspiracy (Evidence) (Pleading) **CNS; 80(20)(25)**

People v Lugo, 309 AD2d 512, 765 NYS2d 23 (1st Dept 2003)

The defendant was convicted of criminal possession of a controlled substance and conspiracy. His post-conviction motion under CPL 440, claiming that the conspiracy count was jurisdictionally defective, was denied.

Holding: The indictment did not charge two separate conspiracies, but one conspiracy to sell and possess drugs. There was sufficient evidence of conversations between the other conspirators to establish overt acts connecting the defendant to a conspiracy to sell drugs by operating an organization that sold both heroin and cocaine. *See People v McGee*, 49 NY2d 48, 57-58 *cert den* 446 US 942. The defendant's conversation with a co-conspirator established more than a mere agreement to sell cocaine. *People v Menache*, 98 AD2d 335 *lv den* 62 NY2d 622. Even if the indictment alleged two conspiracies, it sufficiently alleged the requisite overt acts. Judgment affirmed. (Supreme Ct, New York Co (Snyder, J])

Admissions (Interrogation) **ADM; 15(22)**

Search and Seizure (Consent [Third Persons, by]) **SEA; 335(20[p])**

People v Arriaga, 309 AD2d 544, 765 NYS2d 314 (1st Dept 2003)

The defendant was convicted of reckless endangerment and weapons possession. His motions to suppress the gun and his statement were denied.

Holding: The defendant's sister voluntarily consented to a search of her bedroom. *See People v Gonzalez*, 39 NY2d 122, 128-130. An implied police threat of taking her to the station was permissible, since under all the circumstances she could have been arrested for hindering prose-

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cution. Penal Law 205.60; *see People v Storelli*, 216 AD2d 891 *lv den* 86 NY2d 803. The spent shells from the defendant's gun came into his view in the course of arrest procedure; police did not display the shells to him after he invoked *Miranda* to elicit an incriminating statement. *Compare People v Ferro*, 63 NY2d 316, 322 *cert den* 472 US 1007; *see People v Smith*, *see* 298 AD2d 182 *lv den* 99 NY2d 585. Judgment affirmed. [Supreme Ct, Bronx Co (Cirigliano, J)]

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

Discovery (*Brady* Material and Exculpatory Information) (Procedure) (Witnesses) **DSC; 110(7) (30) (35)**

People v Acosta, 309 AD2d 521, 765 NYS2d 35 (1st Dept 2003)

The defendant was convicted of kidnapping and robbery. He claimed that the prosecutor's failure to turn over the tape of a 911 call by the complaining witness's cousin violated *Brady v Maryland* (373 US 83 [1963]).

Holding: If evidence of a 911 call made by the complainant's cousin was *Brady* material, it was disclosed to the defendant late but with sufficient time for him to make effective use of it. *See People v Cortijo*, 70 NY2d 868. The defendant failed to show prejudice or an impact on his trial strategy caused by the delay; the defense called the cousin to describe the circumstances of the call and did not recall the complaining witness for further cross-examination on the subject. Where the codefendant's testimony supported the defendant's position at trial, the assertion that had the 911 tape been disclosed earlier the codefendant might not have testified is unpersuasive. The defendant's challenge to the reasonable doubt charge was unpreserved. *See People v Thomas*, 50 NY2d 467. It appears that there was a recording error by the court reporter. Even if reported accurately, the charge as a whole communicated the proper standard and did not mislead the jury. *See People v Fields*, 87 NY2d 821. Judgment affirmed. (Supreme Ct, New York Co [Sudolnik, J])

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

People v Valiente, 309 AD2d 562, 765 NYS2d 503 (1st Dept 2003)

Holding: The trial court's mid-trial order permitting the jury to take notes was improper, since the rules required the decision to be made before opening statements. 22 NYCRR 220.10(b). Since it was not a fundamental defect, or violation of a constitutional or statutory provision, the defendant was required to preserve the error by objection. *People v Agramonte*, 87 NY2d 765, 770. In any event, the ruling did not prejudice the defendant.

Evidence of the defendant's behavior after a newspaper published his picture and an article indicating he was wanted by police, including the defendant's sudden departure from his job, could support a reasonable inference of consciousness of guilt. Judgment affirmed. [Supreme Ct, New York Co (Yates, J)]

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

Robbery (Evidence) **ROB; 330(20)**

People v Adams, 309 AD2d 648, 765 NYS2d 630 (1st Dept 2003)

Holding: The defendant's second-degree robbery conviction must be reduced to third-degree. The evidence of physical injury was insufficient. The security guard's subjective testimony about his pain did not establish beyond a reasonable doubt that he suffered "substantial pain. " There was no contention that the guard suffered any impairment of his physical condition as a result of the defendant's biting and scratching when stopped for shoplifting. Judgment modified, robbery count reduced to second-degree, remanded for resentencing. (Supreme Ct, New York Co (Altman, J])

Evidence (Privileges) **EVI; 155(115)**

Subpoenas and Subpoenas Duces Tecum (General) **SUB; 365(7)**

Re Grand Jury Subpoena, Nowlin v People, 1 AD3d 172, 767 NYS2d 77 (1st Dept 2003)

The petitioner, charged with a felony, was suspected of providing her attorney with documents falsely backdated to exculpate her. A subpoena was issued to the attorney for 78 documents, and the attorney moved to quash.

Holding: The court properly refused to quash the subpoena with regard to documents already produced to the prosecution, which had amounted to a waiver of any claim of privilege. *See New York Times Newspaper Div. Of New York Times Co. v Lehrer McGovern Bovis, Inc.,* 300 AD2d 169, 172. The crime-fraud exception to a claim of privilege permitted discovery of original documents and oral communications made by the petitioner to counsel concerning the documents. There existed a factual basis for probable cause to believe that a fraud or crime had been committed, and that the communications were in furtherance of it. *See US v Jacobs*, 117 F3d 82, 87. The demand for "any medical records provided by [attorney] to [petitioner] at any time," lacked probable cause to believe a fraud or crime was committed each time a medical document was exchanged or that communications about each were in

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furtherance of fraud or crime. The subpoena request for those documents should have been quashed. *See In re US v Richard Roe Inc.*, 168 F3d 69, 71. Judgment modified, motion granted as to item #3 and otherwise affirmed. [Supreme Ct, New York Co (Cataldo, J)]

Counsel (Conflict of Interest) COU; 95(10)

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

People v Faden, 1 AD3d 200, 767 NYS2d 92 (1st Dept 2003)

Holding: The defendant did not preserve the claim that his adjudication as a second felony offender was improperly based on a prior Florida conviction, but the issue is reached in the interest of justice. The Florida felony, theft, "includes temporary as well as permanent deprivations or appropriations of property." *See* Fla Stat Ann 812.014(b). New York's grand larceny (Penal Law 155.30-155.42) "is restricted to substantially permanent deprivations or appropriations of property (*see* Penal Law § 155.00[3], [4]; § 155.05[1])." The sentence on the burglary was not affected by the second felony offender adjudication and need not be disturbed. The defendant was not entitled to new assigned counsel. No conflict was created by counsel's defense of his own performance, since the court's familiarity with the proceedings allowed an informed determination without reliance on counsel's statements that the defendant's claims of coercion and ineffective assistance were without merit. *See eg People v Vasquez*, 287 AD2d 334 *lv den* 97 NY2d 709. The other issues raised are without merit. Judgment modified, sentence on reckless endangerment and stolen property convictions reduced to two and one-third to seven years, and otherwise affirmed. (Supreme Ct, Bronx Co [Marcus, J])

Dismissal (General) DSM; 113(17)

Juveniles (Neglect) JUV; 230(80)

Re Jasmine S., 1 AD3d 257, 768 NYS2d 194 (1st Dept 2003)

Neglect petitions were filed against the respondents claiming that the mother's live-in boyfriend beat the children and the mother knew but took no steps to stop it, while the father also had a history of domestic violence. One child missed school and was left to care for the others. An Administration for Children's Services (ACS) caseworker failed to comply with discovery before the fact-finding hearing, due to office closure following 9/11; ACS witnesses were not ready on the adjourn dates. The caseworker did testify as to domestic violence and neglect before further adjournments. A co-respondent's attorney died, causing further delay. Due to ACS counsel's illness, a different attorney, unfamiliar with the case, appeared and asked for another adjournment. The case was dismissed for failure to prosecute.

Holding: Family Court Article 10 proceedings should not be dismissed before the completion of the fact-finding hearing without a written demand for prosecution, which was not made. CPLR 3216; Family Court Act 165; *Matter of Melissa B.*, 225 AD2d 452, 453. There was no evidence of willful failure to prosecute, despite the adjournment requests. *See Matter of L. Children*, 183 AD2d 624. The ACS caseworker's testimony supported the petitioner's contentions that the children received excessive corporal punishment and inadequate supervision. Dismissing the petitions frustrated prompt resolution of these serious allegations of neglect. Judgment reversed. (Family Ct, New York Co (Sturm, J])

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

Matter of Marino v Morgenthau, 1 AD3d 275, 769 NYS2d 10 (1st Dept 2003)

The petitioner made a Freedom of Information Law request to the District Attorney for "'a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article." Public Officers Law 87(3)(c). In response, the respondent provided a list enumerating 215 types of documents. An article 78 was brought claiming the list was incomplete, it did not contain "all prosecution case file(s)" and "each and every record contained in each prosecution case file(s)."

Holding: The proceeding was properly dismissed. The District Attorney's list of records did not have to refer to each and every document their agency maintained, but only categories of records in detail sufficient to permit an applicant to "identify the category of records that may include the records sought" *Matter of Allen v Strojnowski*, 129 AD2d 700, 701 *app dismsd and lv den* 70 NY2d 871. Judgment affirmed. [Supreme Ct, New York Co (Stallman, J)]

[***Ed. Note:*** NYSDA assisted in the NYCLA assigned counsel fee litigation, withdrawal noted below, and reported its progress on the web site (www.nysda. org) and in the *REPORT*. For example, see Vol. VXI, No. 3, May 2001, p. 14; Vol. XVII, No. 3, May-June 2002, p. 13, and Vol. XVIII, No. 5, Oct.-Nov.-Dec. p. 5. That last item noted that the suit had been settled in a way that "left intact the precedential value of the judge's decisions finding that New York's low rates had imperiled the constitutional rights of indigent New Yorkers to obtain counsel." (*NYLJ*, 11/13/03.)]

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Defense Systems (Compensation Systems [Attorney Fees]) **DFS; 104(25[b])**

New York County Lawyers' Association v State of New York, 2 AD3d 1489, 767 NYS2d 603 (1st Dept 2003)

Appeal from order and judgment (one paper) and motion seeking judicial notice, unanimously withdrawn in accordance with the stipulation of the parties. Withdrawal granted. No opinion. (Supreme Ct, New York Co (Suarez, J])

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

People v Marrero, 2 AD3d 107, 767 NYS2d 614 (1st Dept 2003)

Holding: The defendant's second felony offender adjudication was improper because his federal conviction was based on 18 USC 641, which proscribed broader conduct than its New York counterpart. Penal Law 155.30. While the prosecution can substitute another felony conviction to support second felony offender status at resentencing, *People v Candelario* (183 AD2d 440 *lv den* 80 NY2d 894) they cannot withdraw their consent to the plea if the defendant is not re-adjudicated a second felony offender. *See Matter of Kisloff v Covington*, 73 NY2d 445, 452. Judgment modified, remanded for resentencing. (Supreme Ct, Bronx Co (Fisch, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Scope]) **SEA; 335(10[m])**

People v Mitchell, 2 AD3d 145, 768 NYS2d 204 (1st Dept 2003)

The defendant was arrested during a buy and bust operation for drug sale and possession. At the scene, while waiting for the undercover officer to arrive, police observed the defendant moving his hands, handcuffed behind his back, toward his buttocks, back, belt and rear pants pockets. A pat down for weapons was done and nothing found. Then a strip search was conducted during the day in the street at the back of the police van. Two glassines of heroin were recovered from the area between the defendant's buttocks. His suppression motion was denied.

Holding: The search was not reasonable. *Bell v Wolfish*, 441 US 520, 559 (1979). A strip search in a public place was particularly invasive of the defendant's privacy rights. A strip search at a station house during arrest has been found to require reasonable suspicion of a concealed weapon or contraband. *See eg Weber v Dell*, 804 F2d 796, 802 (2d Cir. 1986) *cert den sub nom County of Monroe v Weber*, 483 US 1020. In an apartment, exigent circumstances are required. *People v More*, 97 NY2d 209, 213-214. A public strip search should not be conducted absent the most compelling circumstances, *ie*, those posing potentially serious risks to the arresting officer or others. *Accord Illinois v Lafayette*, 462 US 640, 645 (1983). Possession charges based on evidence from the strip search must be dismissed. Judgment reversed, remanded for new trial on sale charge. (Supreme Ct, New York Co [Beal, J])

Confessions (*Huntley* Hearing) **CNF; 70(33)**

People v Darrett, 2 AD3d 16, 769 NYS2d 14 (1st Dept 2003)

Holding: The defendant was entitled to a new *Huntley* hearing based on defense counsel's disclosure to the suppression court counsel's fear that the defendant would perjure himself. The revelation was made after the defendant's direct testimony; the fear of perjury had dissipated. *Contrast People v DePallo*, 96 NY2d 437, 441. Counsel unnecessarily disclosed details about privileged conversations regarding trial strategy, and said she believed the defendant had shot the decedent. At sentencing the court mistakenly said that the defendant had perjured himself at the hearing, showing prejudice from counsel's error. Attorneys who fear possible perjury must try to dissuade the client, limit information conveyed to a judge when that is deemed necessary, and when possible take measures out of the judicial presence to make a record of actions to resolve the ethical dilemma.

On a related matter, the defendant denied the murder charge when talking with police, but later admitted the shooting. At the suppression hearing the prosecutor cross-examined him about the truth of those statements, which is never relevant at a *Huntley* hearing (*People v Huntley*, 46 Misc 2d 209 *affd*. 27 AD2d 904 *affd* 21 NY2d 659) unless the defendant opens the door by affirmatively stating or even implying innocence. *See People v Ray*, 191 AD2d 1010. The defendant's selective references to the truthfulness of his statements during direct opened the door to the prosecutor's questions. Judgment held in abeyance, new *Huntley* hearing ordered. (Supreme Ct, New York Co [Snyder, J])

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

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

People v Degondea, 3 AD3d 148, 769 NYS2d 490 (1st Dept 2003)

The defendant was convicted in the homicide of an undercover police officer. Six years after the conviction, after completing appeals, he filed a CPL 440 motion. He claimed for the first time that the trial judge, who had died three years earlier, committed improper and prejudi-

First Department *continued*

cial conduct by sleeping through portions of *voir dire* and erroneously denying his for-cause challenge to a prospective juror, based on evidence received at a reconstruction hearing about *voir dire* of other jurors. The 440.10 motion was granted.

Holding: While it was unacceptable for a judge to sleep during portions of a trial, the defendant's silence and delay precluded raising the challenge now. *See People v Howard*, 12 NY2d 65, 66 *cert den* 374 US 840. Unlike actual judicial absence, alleged somnolence or inattention is not a "mode of proceedings" error requiring reversal even where unpreserved. The defendant, with knowledge of the relevant facts, was required to either to place the facts on the record or to preserve the claim by appropriate objection. Moreover, the defendant did not prove his claim by a preponderance of the evidence. *See* CPL 440.30(6). No prejudice was shown. *See US v White*, 589 F2d 1283, 1289 (5th Cir. 1979). Order reversed, conviction reinstated. (Supreme Ct, New York Co [Leff, J at trial, Kahn, J on motion])

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

People v Ingram, 2 AD3d 211, 770 NYS2d 294 (1st Dept 2003)

Holding: A police officer, qualified as an expert, may be asked to identify "what acts and circumstances are consistent with the sale of drugs—as opposed to mere possession" but not whether a defendant possessed drugs with the intent to sell. Here, a detective testified that in "his 'professional opinion,' defendant 'was not a user' and 'was going to resell that cocaine.'" The defense objection was erroneously overruled. *People v Wright*, 283 AD2d 712, 714. The error was not harmless where the only evidence of intent was the detective's opinion; $642 recovered from the defendant was not, without more, sufficient. Judgment modified, third-degree possession with intent to sell drugs dismissed, and otherwise affirmed. (Supreme Ct, New York Co [Snyder, J])

Guilty Pleas (General) GYP; 181(25)

Plea Bargaining (General) PLE; 284(10)

People v Wyatt, 2 AD3d 218, 768 NYS2d 469 (1st Dept 2003)

Holding: The defendant and co-defendant were convicted of petit larceny, but no verdict was reached on the robbery count. The trial court improperly required a plea arrangement that adjusted the defendant's sentence based on whether the co-defendant pled guilty. Linking plea agreements to facilitate all defendants pleading guilty saves resources and forestalls the risks of trial. *See People v Fiumefreddo*, 82 NY2d 536. Allowing the defendant alone to plead guilty, independent of the co-defendant, did not further those goals. After the co-defendant chose trial instead of pleading guilty and was convicted, the defendant received the higher sentence per the bargain. This served no legitimate public purpose. *Compare People v Avery*, 85 NY2d 503. The defendant's plea was knowing, intelligent and voluntary and will not be vacated. The sentence will be reduced to the lower bargained-for term. *See People v Wein*, 294 AD2d 78, 89-90. Judgment modified and as modified, affirmed. (Supreme Ct, New York Co (FitzGerald, J])

Juveniles (Adoption) (Parental Rights) JUV; 230(5) (90)

Re Madeline S., 3 AD3d 13, 769 NYS2d 22 (1st Dept 2003)

The biological parents of Madeline S., both actors, divorced after the mother moved in with a new companion, the petitioner, and fought bitterly over visitation. A March 1999 agreement did not end hostilities. Among barriers to the father's visitation were the mother's temporary moves out of state to accept jobs. In November 1999 the father accepted a job in Las Vegas. He did not report his move to the mother or try to contact his child, on the assumption that the mother would only use it against him. He returned to New York in August 2000, and a month later wrote asking to settle the visitation dispute, eventually filing a visitation petition. In November 2000, the petitioner sought to adopt Madeline.

Holding: While the father "'has been an inconsistent and inconsiderate parent'" as the court found, termination of parental rights requires a finding of abandonment. *Matter of Corey L. v Martin L.*, 45 NY2d 383, 391. Failures to visit and pay support are not determinative where they are properly explained. *Matter of Jonna H.*, 252 AD2d 839. The father's failure is largely explained by the mother's efforts to discourage visitation and undermine the father's parental relationship, including last minute cancellations of visits, refusing to re-start visitation when the father so requested in November before he left for Las Vegas, and others. The adoption petition was properly dismissed. Order affirmed. (Family Ct, New York Co [Bednar, J])

Homicide (Murder [Definition] [Evidence]) HMC; 185(40[d] [j])

Juveniles (Abuse) General) JUV; 230(3) (55)

People v Stephens, 3 AD3d 57, 769 NYS2d 249 (1st Dept 2003)

The decedent, a 9-year-old girl, lived with her sister (her legal guardian) and the defendant, the live-in father

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of the guardian's other children. The defendant punished and beat and burned the decedent, who had behavioral problems. The child eventually died as a result of recent blunt impact wounds to the head, as well as pneumonia caused by an infection that spread from her injured hands. The defendant and the guardian were charged with depraved indifference murder based on the defendant inflicting the injuries and both failing to seek medical attention. The defendant challenged the sufficiency of the evidence, saying he was not the child's legal guardian and had no responsibility to get medical help.

Holding: There was sufficient evidence that the defendant, acting in concert with the guardian under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of serious physical injury or death to the decedent, causing her death. The prosecution's alternate theory about the failure to seek medical attention based on *in loco parentis* was also supported by sufficient evidence. During the defendant's long-term live-in relationship with the guardian he had "assumed all the responsibilities of parenthood." *People v Myers*, 201 AD2d 855, 856. The defendant was a parent in fact, if not in name, and legally responsible for the child. *People v Carroll*, 244 AD2d 104, 107 *affd* 93 NY2d 564. Judgment affirmed. [Supreme Ct, Bronx Co (Hunter, J)]

Alibi (General) (Instructions) **ALI; 20(22) (25)**

Defenses (Notice of Defense) **DEF; 105(43.5)**

People v Rodriguez, 2 AD3d 296, 770 NYS2d 38 (1st Dept 2003)

During the defense case at trial, defense counsel orally disavowed an alibi notice, served more than a year earlier and re-served just before trial, because there had been some confusion about the date of the birthday party mentioned in the notice, said to have been served in error. The defendant presented a different alibi defense alleging he was with his girlfriend at the time in question. No prior notice of this defense had been given. The court allowed the prosecutor to introduce a redacted copy of the alibi notice on rebuttal to impeach the defendant's alibi witnesses. A limiting instruction was given.

Holding: The prosecutor was permitted to use the withdrawn alibi notice to impeach the defense witnesses, when the defendant withdrew the notice during its case at trial to present a different alibi defense. The facts are distinguishable from those in *People v Burgos-Santos* (98 NY2d 226, 235). *Burgos-Santos* prohibited impeachment of a defendant who chose not to proceed with an alibi defense after withdrawing his notice before trial. The defendant did not timely withdraw his notice, but waited and raised an "eleventh-hour" alibi at trial. The other defense contentions are without merit. Judgment affirmed. (Supreme Ct, Bronx Co (Silverman, J])

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

People v Diaz, 2 AD3d 300, 770 NYS2d 36 (1st Dept 2003)

Holding: Sentenced to five to 10 years for first-degree robbery committed in July 1995, the defendant moved to set the sentence aside as illegal because he was a first felony offender, not a second. The court resentenced him to five to 15 years under the mistaken impression that the minimum term had to be one-third of the maximum because the crime was committed before the 1995 sentencing revisions. However, the robbery was an armed felony offense under CPL 1.20(41) because a firearm had been displayed, making the original five to 10 year sentence legal. The court therefore lacked authority to resentence the defendant to five to 15 years. Judgments modified, robbery sentence vacated and sentence of five to 10 years imposed, and otherwise affirmed. (Supreme Ct, Bronx Co [Massaro, J])

Evidence (Character and Reputation) (Sufficiency) **EVI; 155(20) (130)**

Robbery (Evidence) **ROB; 330(20)**

People v Hanley, 2 AD3d 333, 770 NYS2d 62 (1st Dept 2003)

Holding: The defendant was charged with three counts of first-degree robbery and third-degree menacing based on three separate incidents. The robbery conviction as to the second incident was against the weight of the evidence. When the defendant entered a bar and ordered a drink, the bartender refused to serve him. The defendant threatened to "blast" the bartender, who then served him. The defendant took the drink, ordered drinks for several others, and put a $50 bill on the bar. The prosecution's theory was that he took his drink by force. The logical inference is that the defendant threatened the bartender for refusing to serve him, not to get a free drink as he paid for others.

While no gun was displayed in the other incidents, the evidence was sufficient to support the other two robbery convictions where the defendant acted in a way to appear as if he had and would use a gun. *People v Lopez*, 73 NY2d 214, 220. The defendant's other issues are unpreserved or lack merit. Judgment modified, one count of robbery dismissed, sentence for third-degree menacing reduced (*see* Penal Law 70.15(2); 120.15) and otherwise affirmed. [Supreme Ct, New York Co (Torres, J)]

Dissent: [Tom, J] The defendant was deprived of a fair trial by the exclusion of witnesses who would have

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testified that the bartender witnesses, who testified under subpoena compulsion, had bad reputations in the community for truthfulness and veracity. *People v Pavao*, 59 NY2d 282, 290-291.

Second Department

Aliens (Deportation) **ALE; 21(10)**

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

People v McKenzie, 772 NY2d 587 (2nd Dept 2004)

Holding: A week before the defendant pled guilty to first-degree sexual abuse, a federal law became effective mandating deportation of a noncitizen convicted of a crime of moral turpitude for which a sentence of one year or more may be imposed. *See* 8 USC 1227(a)(2)(A)(i), (ii). The defendant received probation, and deportation proceedings were begun. He sought to withdraw his plea, claiming that counsel affirmatively misrepresented the immigration consequences by advising that he would not be deported. The defendant's affidavit asserted that counsel said he would avoid deportation if he pled and did not get into further trouble, apply for citizenship, or leave the country. The prosecution's response, replete with hearsay, said counsel told the prosecutor that counsel would have told the defendant he would be deportable but might not be deported. Since either advice was wrong, given that deportation was mandatory, the defendant met the first prong of the ineffective assistance of counsel test. *See Strickland v Washington*, 466 US 668 (1984); *People v McDonald*, 1 NY3d 109. That the defendant admitted that he chose to plead guilty after being told of a possibility of deportation raised the question of whether he would have refused the plea but for the wrong advice. He is entitled to a hearing on his CPL 440.10 motion. Order reversed, matter remitted. (Supreme Ct, Kings Co [Feldman, J])

Guilty Pleas (Errors Waived By) (General) **GYP; 181(15) (25)**

People v Rubendall, 772 NYS2d 346 (2nd Dept 2004)

A superior court information charging second-degree robbery was subsequently amended by a handwritten notation to attempted robbery. The defendant waived grand jury indictment and pled guilty to attempted robbery with the expectation of a "six-month split" sentence. On the date set for sentencing, different attorneys appeared for the prosecution and the defense. The prosecution sought to have the plea withdrawn because the plea offer was supposed to have been for a seven-year sentence. The plea was vacated. The defendant was indicted, pled to second-degree robbery, and received a sentence of three and one-half years.

Holding: A court has no power to set aside a plea without the defendant's consent (*see Matter of Lockett v Juviler*, 65 NY2d 182, 186-187 *cert den* 479 US 832) but can correct its own error that is clear from the record. *See People v Wright*, 56 NY2d 613, 614. The prosecution's argument that the plea was obtained by fraud was raised only on appeal and is without merit. Factual errors in the plea allocution appear to be transcription errors or were not corrected by the prosecution. The court lacked authority to vacate the plea over defense objection. The defendant is not entitled to specific performance of the original promised sentence. The subsequent plea did not constitute a waiver of appeal of the first, valid plea. Judgment reversed, matter remitted to allow the defendant to withdraw the plea and proceed to trial or accept the initial plea and face imposition of an enhanced sentence. (Supreme Ct, Queens Co [Griffin, J])

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

People v Harrison, 4 AD3d 534, 772 NYS2d 376 (2nd Dept 2004)

Holding: The only evidence against the defendant was the testimony of the complainant, who was able to give the police only a very general description of a young black male. A month passed between the robbery of the complainant taxicab driver, who was shot twice in the legs, and the lineup. The defendant submitted very strong alibi evidence, with his own testimony corroborated by his brother and close friend, as well as telephone records. He had no prior record, was in school, had a stable, close-knit family, and was described by reputable members of the community as quiet and a good person. While the evidence was legally sufficient, the verdict was against the weight of the evidence. The prosecution did not oppose reversal. Judgment reversed, indictment dismissed. (Supreme Ct, Kings Co [Rivera, J])

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

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

People v Keene, 4 AD3d 536, 772 NYS2d 337 (2nd Dept 2004)

DNA testing on a shirt recovered from the complainant in this sex offense case was disallowed after a hearing because the laboratory had failed to "substantially perform scientifically accepted tests" and used methodology that "did not achieve scientifically reliable results" so that the match found could not be used. A defense application for retesting was denied, and the defendant was convicted in spite of his three alibi witnesses on the

Second Department *continued*

basis of the complainant's identification of the defendant. After his conviction was affirmed, the defendant moved for DNA testing under CPL 440.30(1-a).

Holding: The defendant had not failed to avail himself of an opportunity for DNA testing where the initial testing was flawed and retesting was denied. *Compare People v Perry*, 295 AD2d 452. He demonstrated a reasonable probability of a favorable verdict if retesting negated the proof of guilt. *See* Preiser, 1994 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 440.30, 2004 Pocket Part, at 310. The prosecution did not refute the contention that sufficient material remains for testing; judicial resources may have been wasted litigating issues that are academic if the evidence does not exist. Remitted for a hearing. (Supreme Ct, Queens Co [Cooperman, J])

Sentencing (General) (Youthful Offenders) **SEN; 345(37) (90)**

People v Torrez, 771 NYS2d 909 (2nd 2004)

Holding: The court properly imposed 10 years rather than 5 years probation on the defendant, who pled guilty to second-degree rape, a "sexual assault" (Penal Law 65.00[3][a][i]) and was adjudicated a youthful offender. A youthful offender finding substituted for conviction of any felony requires imposition of a sentence authorized for a class E felony. The authorized period of probation for a class E felony sexual assault is ten years. *See* Penal Law 65.00(2), (3). The defendant's contention that the order of protection should run from the date of the plea rather than the date of sentencing may be reviewed on appeal. It is without merit. *See People v Battipaglia*, 307 AD2d 783 *lv den* 100 NY2d 617. Sentence affirmed. (County Ct, Westchester Co [DiFiore, J])

Arrest (Police Officers) (Probable Cause) **ARR; 35(30) (35)**

Search and Seizure (Motions to Suppress [CPL Article 710]) **SEA; 335(45)**

People v Wilkinson, 773 NYS2d 111 (2nd Dept 2004)

Holding: The prosecution failed to establish probable cause for the defendant's arrest by an officer from the 103rd Precinct. The information that a detective from the 101st Precinct "was 'looking for' the defendant or that the defendant was 'wanted,'" came from a confidential informant, not a fellow police officer as needed to invoke the "fellow officer" rule. *Eg People v Ramirez-Portoreal*, 88 NY2d 99, 113. Even if the evidence regarding the informant met the *Aguilar-Spinelli* test (*see Aguilar v Texas*, 378 US 108 [1964); *Spinelli v US*, 393 US 410 [1969]), the information given by the informant to the arresting officer was insufficient to establish probable cause. Suppression was properly denied because the written statement was sufficiently attenuated from the illegal arrest five hours earlier, where a second confirmatory photographic identification by a witness and the defendant's *Miranda* warnings intervened. There was no flagrant police misconduct where the defendant, knowing the police were looking for him, had previously spoken to the detective about restitution in this matter. Even if his statement was improperly admitted, the error was harmless. Judgment affirmed. (Supreme Ct, Queens Co [Rosenzweig, J])

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

People v McCall, 772 NYS2d 857 (2nd Dept 2004)

Holding: The prosecution concedes that the court improperly allowed the prosecutor to peremptorily exclude a juror because of the juror's Jamaican ancestry. *See People v McCorkle*, 278 AD2d 249. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Kron, J])

Counsel (Conflict of Interest) (Right to Counsel) **COU; 95(10) (30)**

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

People v Kooy, 772 NYS2d 857 (2nd 2004)

Holding: The defendant's right to counsel was violated when his attorney effectively became a witness against the defendant by taking a position adverse to the defendant regarding his motion to withdraw a guilty plea. *See People v Elting*, 2 AD3d 455, 456. The court should not have decided the motion without assigning new counsel. Judgment reversed, matter remitted for decision *de novo* on motion to withdraw plea, on which appellate counsel shall represent the defendant, and if the motion is denied, for resentencing. (County Ct, Orange Co [Rosenwasser, J])

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

People v Schulz, 774 NYS2d 165 (2nd Dept 2004)

Holding: The proffered evidence of third-party culpability was properly excluded at trial as lacking in any probative value. *See People v Primo*, 96 NY2d 351. Counsel was not ineffective for failing to persuade the court to admit the evidence. The defendant's motion to vacate the judgment was properly denied, as the eyewitness who identified a third party as the perpetrator after the trial testified at the trial; the identification was not newly discovered evidence that could not have been procured with due diligence at the time. *See People v Salemi*, 309 NY 208, 215-216 *cert den* 350 US 950. Judgment and orders affirmed.

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(Supreme Ct, Suffolk Co [Copertino, J])

Evidence (General) (Photographs and Photography) **EVI; 155(60) (100)**

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

People v Chambers, 73 NYS2d 883 (2nd Dept 2004)

Holding: The prosecution failed to lay a proper foundation for expert bullet trajectory analysis under the circumstances of this case. The analysis was based solely on an examination of pictures of the vehicle in which the alleged shooting occurred and involved no examination of the actual vehicle. The testimony was based on methodology that was not shown to be generally accepted as reliable in the relevant scientific community. *See People v Wesley*, 83 NY2d 417, 422-423. The error was not harmless. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Braun, J])

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

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

People v Frazier, No. 2002-07179, 2nd Dept, 4/5/04

Holding: The court erred in refusing to allow the defendant to introduce a toxicology report showing that the decedent had PCP in his blood and expert testimony about the effect of PCP on behavior. The defendant claimed he stabbed the decedent in self-defense after the decedent, who approached him and insulted him while wearing a boa constrictor and smoking what appeared to be a PCP cigar, had left but returned and behaved threateningly. The decedent had allegedly taunted the defendant, thrown a bullet at him and put a hand in a pocket as if he had a gun, followed the defendant to a nearby park, where the decedent tackled the defendant and held him in a choke hold while a companion stabbed the defendant. The excluded evidence would have corroborated the defendant's assertion that the decedent had ingested PCP, relevant to whether it was objectively reasonable to perceive the decedent as dangerous. Excluding the evidence prejudiced the defendant's ability to present a complete justification defense. *See People v Chevalier*, 220 AD2d 114 *affd* 89 NY2d1050. Judgment modified, murder conviction reversed and new trial ordered on that count. (Supreme Ct, Westchester Co [Molea, J])

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

People v Scott, 774 NYS2d 349 (2nd 2004)

Holding: The prosecution incorrectly contends that the defendant lacked standing to challenge police entry into the apartment where he was an overnight guest. *See Minnesota v Olson*, 495 US 91 (1990). The warrantless arrest inside the premises was justified by the exigent circumstances exception to the rule against such arrests. *See Payton v New York*, 445 US 573 (1980). The police had probable cause to believe the defendant had wounded two people the night before and fled from Brooklyn to his mother's Staten Island apartment. Suppression of evidence recovered incident to the arrest was properly denied. *See People v Arriaga*, 309 AD2d 544. Judgment affirmed. (Supreme Ct, Kings Co [Barbaro, J])

Third Department

Sex Offenses (Corroboration) **SEX; 350(2)**

Witnesses (Child) (Credibility) **WIT; 390(3) (10)**

People v Petrie, 3 AD3d 665, 771 NYS2d 242 (3rd Dept 2004)

The defendant was convicted of first-degree sodomy and first-degree sexual abuse. At trial, the seven-year-old complainant told about one incident where the defendant had touched her private parts. She had told her grandmother, who had confronted the defendant and compelled an apology. The defendant told police that he did not intend to take the whole rap for one mistake. The complainant also testified about a second incident.

Holding: The complainant's unsworn testimony about first-degree sexual abuse was sufficiently corroborated by statements of her grandmother and the defendant. CPL 60.20 (2), (3); *People v Groff*, 71 NY2d 101, 103. The complainant's unsworn testimony about the second incident was not corroborated. The defendant's admission was limited to the first incident and could not be interpreted broadly. *See People v Guerra*, 178 AD2d 434. Unsworn testimony from a child witness cannot alone support a conviction; there must be sufficient evidence to show that the testimony was trustworthy. The first-degree sodomy charge must be dismissed. Judgment modified. (County Ct, St Lawrence Co [Nicandri, J])

Double Jeopardy (Collateral Estoppel) (General) **DBJ; 125(3) (7)**

Matter of Kelly v Bruhn, 3 AD3d 783, 771 NYS2d 561 (3rd Dept 2004)

The defendant was tried for multiple counts of sodomy and sexual abuse, and was only convicted of third-degree sodomy requiring no proof of forcible compulsion or lack of consent. *Compare* Penal Law 130.50(1), 130.65(1) and 130.55 with Penal Law 130.40 (2). On appeal, the conviction was reversed. Before retrial on statutory sodomy, the defendant moved for dismissal based on

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double jeopardy, which was denied. The defendant brought an article 78 proceeding in the Appellate Division to prohibit prosecution on the charge.

Holding: Retrial was not barred by statutory double jeopardy (CPL 40.20[2]), since the first prosecution was nullified by court order directing a new trial on the same accusatory instrument. CPL 40.30 (3); *see People v Adames*, 83 NY2d 89, 93. Constitutional double jeopardy principles did not bar the sodomy reprosecution; the two offenses arose out of the same transaction and "each of the offenses contains an element which the other does not." *People v Wood*, 95 NY2d 509, 513. The charge on retrial will not include forcible compulsion or lack of consent, but will include two elements missing from each of the charges of which the defendant was acquitted, *ie* that the actor be 21 or older and the complainant be less that 17. Collateral estoppel prevents the prosecution from relitigating whether the defendant's sexual contact with the complainant was forcible, and does not preclude a retrial. *See People v Hilton*, 95 NY2d 950, 952. Petition dismissed. (County Ct, Ulster Co)

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

Plea Bargaining (General) **PLE; 284(10)**

People v Parsons, 3 AD3d 790, 770 NYS2d 909 (3rd Dept 2004)

The defendant, charged with selling drugs, absconded after being released pending trial and was convicted and sentenced *in absentia*. Indictments for bail jumping and more drug crimes were later obtained. Three years later, the defendant was located and extradited to New York. He pled guilty to drug possession and bail jumping, waived his right to appeal, and was to be sentenced to two and one-third to seven years for criminal possession and one to three years for bail jumping, to run consecutive to one another but concurrent to the drug sentence. The bargain would have allowed him to withdraw his plea to bail jumping if an investigation into misconduct by two Schenectady police officers showed that the first drug conviction was illegally obtained. No misconduct was uncovered. The defendant was sentenced according to the agreement and appealed, claiming the promise to investigate police corruption was not fulfilled.

Holding: The claim that prosecutors failed to thoroughly investigate police corruption by the testifying officers was conclusory and unsupported by the record. The guilty plea was not induced by an unfulfilled promise that requires it to be vacated or the promise honored. *See People v McConnell*, 49 NY2d 340, 346. The voluntariness of the plea was not preserved for review by a motion to withdraw the plea or vacate the conviction. *See People v Urbina*, 1 AD3d 717. Judgment affirmed. (County Ct, Schenectady Co [Hoye, J])

Assault (General) **ASS; 45(27)**

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

People v Malone, 3 AD3d 795, 771 NYS2d 263 (3rd Dept 2004)

The defendant was charged with first-degree attempted rape, aggravated criminal contempt, first-degree criminal contempt, second-degree assault, third-degree assault, and unlawful imprisonment. He was said to have violated an order of protection and beaten his wife. A jury convicted him of both contempts, second-degree assault, and unlawful imprisonment. His motion to set aside the verdict (CPL 330.30) was granted as to the assault.

Holding: The assault conviction was properly dismissed, since there were no predicate offenses to support it. *See* Penal Law 120.05(6). The defendant was acquitted of attempted rape, which prevented its use as a predicate. *People v Johnson*, 250 AD2d 1026, 1027-1028. Aggravated criminal contempt did not qualify as a predicate because that would make every aggravated criminal contempt a second-degree assault under Penal Law 120.05[6]), which was not intended by the legislature. *People v Huck*, 1 AD3d 935. Similarly, first-degree contempt cannot serve as the predicate for second-degree assault. While the family offense provision of CPL 530.12 was inapplicable to the original offense of trespass on property belonging to the wife's cousin, even an erroneous court order must be obeyed where, as here, the court had jurisdiction and the order was not void on its face.

The unlawful imprisonment merged with the aggravated criminal contempt where the defendant's act of restraining his wife was incidental to the aggravated criminal contempt; the unlawful imprisonment charge should have been dismissed. *People v Cassidy*, 40 NY2d 763. Judgment modified, unlawful imprisonment count dismissed and sentence thereon vacated. (County Ct, Tompkins Co [Rowley, J])

Parole (Board/Division of Parole) (General) (Release [General]) **PRL; 276(3) (10) (35[d])**

Matter of Chan v Travis, 3 AD3d 820, 770 NYS2d 896 (3rd Dept 2004)

The petitioner, an inmate, was denied parole at his first Board of Parole appearance and his administrative appeal went unanswered. His article 78 petition to annul the Board's determination was granted and the matter sent back for rehearing. The Board appealed and the petitioner cross-appealed the court's dismissal of one of his claims. Thereafter, the Board granted the petitioner

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release as part of a regular appearance unrelated to the rehearing order.

Holding: The petitioner's failure to appear rendered his cross-appeal abandoned. The respondent's appeal became moot when the petitioner was released. *See Matter of Lichtel v Travis*, 287 AD2d 837, 838. Appeal dismissed as moot. (Supreme Ct, Albany Co [Sheridan, J])

***Admissions (General) (*Miranda* Advice)** **ADM; 15(17) (25)**

Confessions (Counsel) (General) (*Miranda* Advice) **CNF; 70(23) (32) (45)**

People v Lyons, 771 NYS2d 585 (3rd Dept 2004)

A year after a robbery, one of the victims was murdered. The defendant confessed to the robbery but not the murder, for which he implicated two others. He pled guilty to robbery. The others were arrested for murder, but police continued to suspect the defendant and interviewed him out-of-state after giving him *Miranda* warnings. His statement put him at the scene, but not as a participant. He was called to testify in the murder trial. Discovering that he had changed his story, indicating deeper involvement, the police arrested him for murder. After being Mirandized, the defendant reiterated his earlier statements. His motion to suppress was denied. He was convicted of intimidating a witness, but not murder.

Holding: The defendant's voluntarily statements to police as a witness for the prosecution were not obtained in violation of his right to counsel. The state constitutional right to counsel indelibly attaches with "the commencement of formal proceedings" or "where an uncharged individual has actually retained a lawyer * * *, or while in custody, has requested a lawyer" *People v West*, 81 NY2d 370, 373-374. The defendant's representation by counsel ended with the conclusion of the robbery case. *See People v Robles*, 72 NY2d 689, 692. When he voluntarily agreed to be a witness in the murder trial—not a part of his plea bargain—he was not represented by counsel. He was not in custody, so waiver of *Miranda* rights was not necessary. *See People v Harris*, 48 NY2d 208, 215. Police assertion that everything would be all right if the defendant told the truth was not a promise of immunity or leniency. *People v Richardson*, 202 AD2d 958, 958-959. Judgment affirmed. (County Ct, Albany Co [Breslin, J])

Burglary (Elements) (Evidence) **BUR; 65(15) 20)**

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

People v Thornton, 771 NYS2d 597 (3rd Dept 2004)

The defendant was convicted of two counts of second-degree burglary for crimes committed at two separate residences. He was sentenced to consecutive terms of 15 years of imprisonment and five-year periods of postrelease supervision.

Holding: Not a scintilla of evidence suggested that the defendant had permission to enter the residences. *See People v Graves*, 76 NY2d 16, 20. There was sufficient evidence to convict of burglary. The prosecutor's summation that included extended references and analogies to the Sept. 11, 2001 terrorist attacks on the World Trade Center a week before the trial was improper but did not deny the defendant due process in light of the overwhelming evidence of guilt. *Cf People v Russell*, 307 AD2d 385, 386-387. Consecutive sentences with a maximum aggregate of 30 years were statutorily authorized. Penal Law 70.02 [1] [b]; [3]; 70.20 [2]. However, they were too severe. The defendant was 22 years old, and his criminal history consisted of misdemeanors and a nonviolent drug possession felony. During plea negotiations, the prosecution offered a sentence of 10 years in satisfaction of both counts. The 15-year sentences should run concurrently, to be followed by the five-year period of postrelease supervision. *See* CPL 470.15(6) (b); *People v Holmes*, 304 AD2d 1043, 1045 *lv den* 100 NY2d 642. Judgment modified and as modified, affirmed. (County Ct, Albany Co [Breslin, J])

Homicide (Murder [Evidence]) (Negligent Homicide) **HMC; 185(40[j]) (45)**

People v Baker, 771 NYS2d 607 (3rd Dept 2004)

The defendant was charged with the death of a three-year-old child. The defendant, the decedent's babysitter, locked the decedent in a room on a warm night while the furnace ran due to a short circuit resulting in prolonged temperatures over 100 degrees. In her first statement the defendant admitted being aware of the extreme heat in the decedent's room, keeping the door locked because she had been directed to, not checking or adjusting the thermostat, and hearing the decedent kicking and screaming to be let out. The defendant denied making a second statement describing her intent to cause the decedent's death by turning up the thermostat, closing all heating vents except in the decedent's bedroom, and dressing the decedent warmly. The jury acquitted the defendant of intentional murder, rejecting the second statement, and convicted her of depraved indifference murder.

Holding: The evidence was insufficient to prove the gross recklessness and additional aggravating circumstances required for depraved indifference murder of a child under Penal Law 125.25 (4); *People v Sanchez*, 98 NY2d 373, 384. There was no obviously dangerous conduct by the defendant nor harmful physical contact between the defendant and the decedent, nor was the defendant shown to be aware of the risk of death. The

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defendant herself, of limited intelligence, remained in a room nearly as hot. A jury could have reasonably concluded that the defendant should have perceived a substantial and unjustifiable risk that excessive heat and her inaction would likely lead to the decedent's death. *See* Penal Law 125.10; *People v Manon*, 226 AD2d 774, 776. The defendant's conduct was a gross deviation from the standard of care of a reasonable person in the same circumstances. *See* Penal Law 15.05(4); *People v Rollins*, 118 AD2d 949, 951. Judgment modified, conviction reduced from depraved indifference murder to criminally negligent homicide, and matter remitted. (County Ct, Tioga Co [Sgueglia, J])

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

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

People v Munck, 771 NYS2d 733 (3rd Dept 2004)

The defendant pled guilty to the felony charges in the indictment without the benefit of a plea bargain. The court did not advise him at the plea or sentencing about the required period of postrelease supervision. After the conviction was affirmed, the defendant filed a CPL 440.20 motion to set aside his sentence due to the failure of the court to advise him about postrelease supervision. Penal Law 70.45 [1]. The motion was denied.

Holding: At the time of this plea and sentence, there was no requirement to advise the defendant about mandatory postrelease supervision when pleading to the charge. Now, when a defendant has not been advised about postrelease supervision before entering a negotiated plea, the sentence must be vacated and the plea withdrawn if requested. *People v Goss*, 286 AD2d 180. However, here the defendant pled without the benefit of a plea bargain so that postrelease supervision did not impact on the decision to plead guilty. *Compare People v Loudenslager*, 768 NYS2d 852; *People v Grose*, 768 NYS2d 847. Judgment affirmed. (County Ct, Broome Co [Smith, J])

Parole (General) (Release [Consideration for (includes guidelines)]) **PRL; 276(10) (35[b])**

Prisoners (Good Time) **PRS I; 300(20)**

Matter of Thomas v Time Allowance Committee at Arthur Kill Correctional Facility, 771 NYS2d 739 (3rd Dept 2004)

The petitioner was serving concurrent terms of 8 to 16 years and 6 to 12 years. The Time Allowance Committee denied the petitioner five years and four months of good time based on his "extensive history of refusal to attend substance abuse therapy, [his] denial of his addiction, [and] poor custodial adjustment." Affirmed on administrative appeal. The petitioner filed an article 78, which was dismissed upon a finding of a rational basis for withholding the petitioner's good time allowance.

Holding: Failure to participate in a recommended treatment program provided a rational basis for the denial of a good time allowance. *See Matter of Bolster v Goord*, 300 AD2d 711, 713. Good behavior allowances are a privilege, not an entitlement, and their awarding is discretionary. 7 NYCRR 260.2. Provided the decision was made in accordance with the law, it was beyond judicial review. *Matter of White v Goord*, 278 AD2d 694, 694-695. Judgment affirmed. (Supreme Ct, Albany Co [Malone Jr., J])

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

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

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

People v Carter, 772 NYS2d 615 (3rd Dept 2004)

The defendant pled guilty to burglary and was sentenced to a determinate term with five years postrelease supervision. On appeal, he asserted that he was not advised about the postrelease supervision requirement.

Holding: The defendant failed to object at the time of sentencing or move to withdraw his plea. The court does not exercise its interest of justice jurisdiction to review the matter. *People v La Valley*, 2 AD3d 1212 *lv den* (12/4/03); *People v Van Gordon*, 307 AD2d 547, 548. Judgment affirmed. (County Ct, Schenectady Co [Hoye, J])

Homicide (Manslaughter [Instructions]) (Murder [Degrees and Lesser Offenses] [Evidence] [Instructions]) **HMC; 185(30[j]) (40[g] [j] [m])**

People v Hartman, 772 NYS2d 396 (3rd Dept 2004)

The defendant faced murder charges for stabbing the decedent, who had physically abused the defendant for years. After they accidentally met, the decedent initiated a fight, left, returned for more, left, and returned again. At that point the defendant held out a knife as the two ran toward each other. The court rejected the defense request for an instruction on second-degree manslaughter as a lesser-included offense of depraved indifference murder. The jury convicted the defendant of depraved indifference, not intentional, murder.

Holding: There was a reasonable view of the evidence to support a finding that the defendant committed the lesser but not the greater offense. CPL 300.40 [1]; *People v*

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Henderson, 41 NY2d 233, 236. Depraved indifference murder requires reckless conduct that creates a grave risk of death to another person. Penal Law 125.25 [2]. Manslaughter involves recklessly causing the death of another person. Penal Law 125.15. Persons are reckless when they are aware of and consciously disregard a substantial and unjustifiable risk. Penal Law 15.05. On the instant facts, the jury could have reasonably made the fine distinction between "grave risk of death" and "substantial risk" and found that the defendant's actions created a substantial and unjustified risk of death but did not create a risk of death so high as to amount to purposeful homicide. *People v Register*, 60 NY2d 270, 469. This fine distinction is best left for the finder of fact; the requested instruction should have been given. Defense counsel should been allowed to comment on a meeting involving three prosecution witnesses, because it related to credibility. Judgment modified, second-degree murder conviction reversed, new trial ordered. (County Ct, Schenectady Co [Eidens, J])

Prisoners (Temporary Release Programs) PRS I; 300(35)

Sentencing (Credit for Time Served) SEN; 345(15)

Matter of Maccio v Goord, 772 NYS2d 745 (3rd Dept 2004)

The petitioner, serving a seven-year prison term, was a participant in a temporary work release program. His maximum expiration date was Dec. 14, 2003. While on release, he was arrested for driving while intoxicated and was sentenced to one year in prison consecutive to his existing term. Respondent Department of Corrections reassumed custody of him on Dec. 18, 2001, after he spent eight months in the local jail. At a tier III hearing, the respondent was found guilty of violating the rules of the release program. The petitioner's earliest conditional release and maximum expiration dates were adjusted to Aug. 16, 2003 and Aug. 16, 2004. He filed an article 78 to receive credit for the time spent in local jail. Motion denied, except for eight days.

Holding: When the petitioner failed to return to prison while on release, his sentence was interrupted, regardless of the reason or whether it was intentional. Penal Law 70.30 (7); *People ex rel Pughe v Parrott*, 302 AD2d 823, 825. That the petitioner was not found guilty of absconding was not relevant. He was not entitled to credit for the eight months spent in local jail, since his time did not exceed the one-year sentence for the DWI. Penal Law 70.30(70) (c); *People ex rel Rogers v New York State Bd. of Parole*, 161 Misc2d 875, 877. Judgment affirmed. (Supreme Ct, Albany Co [Eidens, J])

Double Jeopardy (General) DBJ; 123(7)

Matter of Hill v Eppolito, 772 NYS2d 634 (3rd Dept 2004)

The petitioner, a member of the Oneida Indian Nation, was charged in Oneida City Court with harassment based on an incident that occurred on Indian Nation property. At the same time, another complaint for harassment, drawn from the same incident, was filed in the Nation tribal court. Before the City Court case was heard, the petitioner was acquitted in the tribal court. A motion to dismiss on double jeopardy grounds was denied and the petitioner filed an article 78 to vacate the City Court's order, which was granted.

Holding: Indian tribal court was a court "of any jurisdiction" for double jeopardy purposes. CPL 40.30(1); *See Booth v State*, 903 P2d 1079 (Alaska 1995); *People v Morgan*, 785 P2d 1294 [Colo 1990]; but see *Washington v Moses*, 145 Wn2d 370 [2002]. Double jeopardy protection in New York bars separate prosecution for two offenses based on the same act or criminal transaction unless the offenses have substantially different elements. CPL 40.20(2) (a). The elements of the crimes of harassment as defined in the Oneida Indian Nation Penal Code and the New York Penal Law were the same. Judgment affirmed. (Supreme Ct, Albany Co [O'Brien III, J])

Conspiracy (General) CNS; 80(23)

Jurisdiction (General) JSD; 227(3)

People v Ormsby, 774 NYS2d 191 (3rd Dept 2004)

The defendant had filed a motion seeking reversal of a prior conviction from Clinton County. He supported the motion, with the help of an inmate in Cayuga County, with a false affidavit and a receipt fabricated by the inmate's sister and sent to the defendant's mother in Clinton County, who later mailed it to the defendant in Auburn Prison in Cayuga County. Although the motion was withdrawn, the defendant was indicted for tampering, perjury, making an apparently sworn false statement, and conspiracy. Convicted on all counts, he appealed, claiming that Clinton County did not have jurisdiction to try him.

Holding: Conspiracy is a statutory exception to the requirement that the prosecution bear the burden of showing that the crime was committed in the county of prosecution. CPL 20.40(1) (b). Conspiracy can be prosecuted in the county where a defendant entered into the conspiracy or any county where an overt act in furtherance of the conspiracy was committed by a defendant or co-conspirator. *People v Ribowsky*, 77 NY2d 284, 292. The burden on the prosecutor here was to prove by a preponderance of the evidence that a statutory exception applied. *People v Greenberg*, 89 NY2d 553, 555. There was

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sufficient evidence for the jury to find a conspiracy with acts by a co-conspirator in Clinton County. Judgment affirmed. (County Ct, Clinton Co [Ryan, J])

Double Jeopardy (*Res Judicata*) DBJ; 125(32)

Matter of Hernandez v Selsky, 773 NYS2d 178 (3rd Dept 2004)

At a prison tier III hearing, the petitioner was found not guilty of assaulting another inmate. Evidence, including the complainant's statement, showed that the petitioner was not the attacker. A year later, a letter from the complainant was intercepted that appeared to implicate the petitioner in the assault. Another hearing was held based on the same incident. The petitioner objected. Despite the complainant's denial that the petitioner was the attacker, and assertion that the petitioner did not fit the description, the petitioner was found guilty. His article 78 claim asserting *res judicata* was dismissed.

Holding: *Res judicata* usually gives conclusive effect to quasi-judicial determinations by administrative agencies. *Ryan v New York Tel. Co.*, 62 NY2d 494, 499 An exception for newly discovered evidence is to be narrowly construed. *Matter of Evans v Monaghan*, 306 NY 312, 324. The intercepted letter was ambiguous and the complainants clarified that it did not identify the petitioner. It was not "important material evidence" that justified an exception to *res judicata*. *Cf Gonzalez v Chalpin*, 233 AD2d 367. Judgment reversed, determination annulled, all references to this matter ordered expunged from the petitioner's prison records. (County Ct, Sullivan Co [La Buda, J])

Due Process (Prisoners) DUP; 135(25)

Prisoners (Disciplinary Infractions) PRS I; 300(13)

Matter of Lopez v Selsky, 772 NYS2d 884 (3rd Dept 2004)

The petitioner was charged with violating the prison disciplinary rule that prohibits the unauthorized use of a controlled substance based on a urine sample that tested positive for opiates. At his prison disciplinary hearing, the petitioner claimed it was a false positive caused by use of prescription and over-the-counter medications. The Hearing Officer did not accept the petitioner's documentation and had an unrecorded telephone conversation with the testing company's technical unit from which the petitioner was excluded. The petitioner was found guilty and filed an article 78 petition.

Holding: The hearing officer's rejection of the petitioner's documentation in support of his false positive defense and the off-the-record conversation with a witness outside the presence of the petitioner denied the petitioner a fair hearing. *See* 7 NYCRR 254.5(b); 254.6 (b); *Matter of Hill v Le Fevre*, 124 AD2d 383. The off-the-record basis for the decision mandated a new hearing. *See Matter of Wyche v Coughlin*, 191 AD2d 945, 946. Decision annulled. (Supreme Ct, Albany Co)

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

Witnesses (Experts) WIT; 390(20)

People v Morehouse, 774 NYS2d 100 (3rd Dept 2004)

Holding: Defense counsel asked for a week-long adjournment of the defendant's rape trial when counsel was diagnosed with Lyme disease. The court adjourned the matter for two days. Counsel admitted in an affidavit that he had trouble concentrating during the trial and was very tired. County Court found no indication that counsel's performance was adversely affected, no discernable drop off from counsel's "usual high level of professional competence." Allegations that counsel failed to hire experts, interview prosecution witnesses, pursue unspecified planned questions during cross exam, and provide adequate time for discussions with the defendant were all premised on the defendant's disagreement with counsel's tactics. Objective evaluation of counsel's performance indicates that the defendant received meaningful assistance.

The prosecution established a proper foundation for the testimony of a sexual assault nurse examiner (SANE) concerning the examination of the complainant. The witness had formal training and actual experience. *See Meiselman v Crown Hgts. Hosp.*, 385 NY 389, 398. She had treated five to eight rape patients a year for eight years before receiving 40 or more hours of SANE training involving evidence collection through gynecological exam as well as treatment (physical, pharmacological, and emotional). After SANE training she had treated 41 SANE cases, assisted in 13, and consulted in eight. Expert medical witnesses are not limited to doctors. *People v Munroe*, 307 AD2d 588, 591 *lv den* 100 NY2d 644. Judgment affirmed. (County Ct, Ulster Co [Bruhn, J])

Robbery (Degrees and Lesser Offenses) ROB; 330(10)

People v Coleman, 773 NYS2d 747 (3rd Dept 2004)

Holding: The facts at trial depicted a spontaneous dispute between someone named Deperna and the complainant, and a separate, equally spontaneous act of theft by the defendant. *See People v Letterlough*, 203 AD2d 589, 590 *app dism'd* 84 NY2d 862 *lv den* 84 NY2d 908. The evidence did not show that when Deperna grabbed the complainant and held him against a car for 10 seconds after they argued over comments about Deperna's girlfriend,

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Deperna did so to enable the defendant to walk over and rip off the complainant's necklace. There was no direct or inferential proof that the defendant and Deperna pulled up to the location with an intention to rob anyone. *Compare People v Washington*, 283 AD2d 661. There was no proof that Deperna developed an intent to rob or to aid the defendant in an act of forcible stealing during the brief altercation. *Compare People v Casmento*, 155 Ad2d 229 *lv den* 75 NY2d 768. The evidence merely showed the elevation of a petty verbal dispute "into a brief physical confrontation during which defendant took advantage of an easy opportunity to steal. . . ." The aggravating element of being aided by another actually present was not proven. There are seeming differences among the Appellate Divisions and the instant court on the somewhat related issue of whether a defendant's conviction of second-degree robbery is repugnant to a co-defendant's acquittal of the same charge. Legal authority and legislative history indicate that elevation of third-degree robbery to second-degree requires some evidence of shared intent to forcibly steal (*see* Penal Law 20.00) or at least some intent by the aider to provide assistance to one forcibly stealing. *See* Penal Law 115.00. Judgment modified, second-degree robbery reduced to third-degree robbery, and remitted for resentencing on that count. (County Ct, Albany Co [Breslin, J])

Death Penalty (Guilt Phase) (States [New York]) **DEP; 100(85) (155[gg])**

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

People v Glanda, 774 NYS2d 576 (3rd Dept 2004)

Holding: Assistant Attorney General Debra Whitson was present during the presentation of evidence to the grand jury leading to a second superceding indictment in this capital homicide case. Lack of authorization from the Board of Supervisors does not render invalid an appointment of an Assistant District Attorney pursuant to County Law 702 where no funding appropriation for the position is necessary. *See People v Anderson*, 237 AD2d 989, 989-990. Someone appointed under CL 702 is expressly authorized to appear before a grand jury. *See* County Law 702(2); CPL 1.20(31), (32); 190.25(3) (a). Appointment of Whitson did not have to be made pursuant to Executive Law 63-d, enacted to allow district attorneys to obtain help from the Attorney General in capital cases.

The defendant argued on appeal that where the person he had allegedly hired to kill the decedent failed to do so, and the defendant actually caused the death, he was not guilty of contract murder under Penal Law 125.27(1) (a) (vi). Both parties to a contract are liable regardless of which one directly causes the death. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law 125.27, at 391. Further, viewing the evidence in a neutral light, the jury could have concluded that the other contracting party actually killed the decedent.

The count of first-degree murder resting on an aggravating factor of burglary must be reduced to second-degree murder, as the intent for both the burglary and murder were the same. *People v Cahill*, 2003 NY Slip Op 18881 (11/25/03).

The defendant's possessory interest in the premises occupied by the decedent did not preclude his conviction of burglary. There was sufficient evidence to create a jury question of whether the defendant entered the decedent's dwelling "unlawfully, without license or privilege."

Denial of the defendant's for-cause challenge to seating a prospective juror does not mandate a new sentencing proceeding. The juror's responses do not unequivocally evince "life qualification," but while generally favoring capital punishment, the juror maintained the ability to be open-minded rather than automatically voting for death. No new penalty phase is required, especially where the defendant's aggregate sentence is life without parole.

Introduction of evidence concerning the defendant's financial circumstances was relevant to the issue of motive and fell within no exclusionary rule. Although evidence of steps taken by the decedent's divorce attorney was stricken two weeks after it was offered, there was no abuse of discretion. The jury was appropriately admonished and no prejudice has been shown.

The jury charge on accomplice testimony was adequate to bind the accomplice evidence to the defendant. *People v Breland*, 83 NY2d 286, 293. Evidence corroborating accomplice testimony on one crime provides the required corroboration as to other crimes in multiple-crime matters. The sentence is neither harsh nor excessive. Judgment modified as to one count, and as modified, affirmed. (Supreme Ct, Essex Co [Moynihan, J])

Obscenity (Definition) (Evidence) (General) **OBS; 270(10) (15) (17)**

Sex Offenses (General) (Juveniles) (Lewd Conduct) **SEX; 350(4) (12) (15)**

People v Gibeault, 773 NYS2d 751 (3rd Dept 2004)

Holding: A videotape of the 25-year-old defendant and a teenager peforming acts "more akin to a 'Wayne's World'–like skit than pornography", does not support convictions of use of a child in a sexual performance and possessing an obscene sexual performance. The teen's actions did not constitute "sexual conduct," an essential element of both charges. *See* Penal Law 263.00(1); 263.05, 263.11. The fleeting occasions of pretended masturbation and parodies of sexual intercourse and deviate sexual

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intercourse while fully clothed, "however boorish," do not meet the statutory definition of simulated sexual conduct. The setting, attire, and poses of fleeting exposures of the teen's penis "were decidedly not sexually suggestive" or intended to elicit a sexual response. Acts alleged to be "actual masturbation" lacked any element of self-gratification, which Penal Law 263.00(3) is construed to require. The defendant concedes his behavior endangered the welfare of a child. Judgment modified, convictions of use of a child in a sexual performance and possessing an obscene sexual performance reversed and dismissed, and affirmed as modified.

Dissent: [Cardona, PJ] Some depictions of the teen's penis were of greater duration than "a fraction of a second," lewd depictions are not limited to those which elicit a sexual response, and sexual gratification is not an element of sexual conduct under Penal Law article 263.

Self-Incrimination (General) **SLF; 340(13)**

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

People v Goldston, No. 12653A/B, 3rd Dept, 4/1/04

Four youths approached and threatened four other youths who were waiting for their school bus, and took $17 from one student and $3.20 from another. At the defendant's trial, the students each identified the defendant as one of the perpetrators. One co-defendant testified, also implicating the defendant, who was convicted of two counts of second-degree robbery and sentenced to concurrent 12-year prison terms.

Holding: The court erred by permitted the introduction of statements by two non-testifying co-defendants that implicated the defendant. The "background information" exception (*see People v Tosca*, 98 NY2d 660, 661) does not apply where a testifying codefendant provided the same information. *See US v Reyes*, 18 F3d 65, 70 (2d Cir. 1994). The court also erred in permitting questioning of the defendant about his refusal to tell police the name of a cousin to whose home the defendant said he had gone to sleep after leaving school sick on the day of the incident. The invocation of the right against self-incrimination may not be used against a defendant. This applies to situations where a defendant declines to answer selected questions. *See eg People v Sprague*, 267 AD2d 875, 879-880 *lv den* 94 NY2d 925. The errors are of constitutional dimension, and cannot be said to be harmless beyond a reasonable doubt. There were four eyewitness identifications, but it cannot be said there is no reasonable possibility that the improperly admitted evidence contributed to the defendant's conviction. Judgments reversed, new trial ordered. (County Ct, Albany Co [Rosen, J])

Trial (Public Trial) **TRI; 375(50)**

People v Ward, No. 13665, 3rd Dept, 4/1/04

Holding: The court closed the courtroom during a hearing on the defense motion to suppress a photo array identification by an undercover investigator and any evidence derived from an confidential informant who would not testify. The prosecution had requested closure after determining that the two spectators present were the defendant's mother and friend. The defense objected to closure, questioning how the two spectators posed a danger and the prosecutor responded only that "'it is for the safety of the undercover officer'" who was still working in the same village. The court made no inquiry and no finding of facts before granting closure. This was a clear violation of the right to a public trial. *See* US Const 6th Amend; Civil Rights Law 12; Judiciary Law 4; *see also People v Tolentino*, 90 NY2d 867, 869. The defense objection placed the burden on the prosecution to establish the need for closure, and that burden was not met. No claim was advanced that the fears of the investigator related in any way to the particular family member and friend the defense wished to have remain. A careful inquiry is required. Appeal held in abeyance, matter remitted for a new suppression hearing in open court unless a requisite showing is made to justify closure at the time of the new hearing. (County Ct, Ulster Co [Bruhn, J])

Motions (Adjournment) **MOT; 255(3)**

People v Rodriguez, No. 13967, 3rd Dept, 4/8/04

A Nov. 13, 2001 trial date was set for the defendant's murder case stemming from a July 1, 2001 killing. On Sept. 12, 2001, shortly after the court advanced the trial date to Nov. 7, 2001, the defense obtained an order authorizing evaluation of the defendant by a psychologist. The psychologist saw the defendant twice in two weeks but could not complete an evaluation without a neurological exam due to the defendant's self-reported, untreated head injuries. The court authorized such an exam on Sept. 25, 2001, directing that an order be submitted. Three days later the court severed the defendant's case from that of codefendants, and advanced the trial date by two weeks to Oct. 24, 2001 over objection. The defense submitted the requested order on Oct. 11, 2001, which the court five days later refused to sign, demanding more information. Counsel moved in writing for an adjournment to allow completion of neurological and psychological evaluations, detailing his unsuccessful efforts to contact neurologists. One neurologist who had initially responded positively declined to examine the defendant due to the time constraints of the trial date. In the absence of any prose-

Third Department *continued*

cutorial position, the court refused to adjourn the case because the defense had filed no notice of intent to present psychiatric evidence or affidavit asserting a psychological defense. The defendant was acquitted of conspiracy but convicted of murder and weapons possession following a trial at which the only defense offered was duress.

Holding: The request for an adjournment was made before trial and prejudice from the delay would have been minimal; denial of the request deprived the defendant of the constitutional right to present a defense and was an abuse of discretion. *See People v Matthews*, 148 AD2d 272, 276. The court inexplicably advanced the trial date by almost three weeks despite the uncompleted, authorized examinations, then denied an adjournment for lack of the very evidence those examinations may have produced. The court effectively shifted the burden of proof from that required for an adjournment to that required for a late notice of insanity. Appeal held, matter remitted for "defense counsel to identify a neurologist willing to evaluate defendant within 30 days of this Court's order…If defendant is unable to find a neurologist or [the psychologist] is unable to provide favorable psychiatric evidence, defendant would have suffered no prejudice. . . ." (County Ct, Greene Co [Pulver, Jr., J])

Probation and Conditional Discharge (General) **PRO; 305(18)**

Prosecutors (Special Prosecutors) **PSC; 310(45)**

Matter of Winn v Rensselaer County Conditional Release Commission, No. 95322, 3rd Dept, 4/15/04

The respondent was convicted of endangering the welfare of a child and making a false written statement in connection with the death of a child in her unlicensed day care center. A month after the respondent's one-year year sentence began, she applied for conditional release. The County Conditional Release Commission (Commission) invited the respondent to submit more information without the need to reapply after a tie vote on her application. She submitted additional information. Three months after her sentence began, her release was ordered. The Special District Attorney who had prosecuted the case challenged the release. The order was vacated and the respondent returned to jail.

Holding: By statute, a second application for conditional release cannot be made for 60 days after conditional release has been denied. *See* Correction Law 273(6). The issue of whether the Commission actually denied the respondent's first application was raised before the Supreme Court by the Commission, another respondent here. The Commission did not appeal the court's rejection of its argument. The respondent's claim that the court erred in ruling on the merits before she put in an answer, in which she would have raised this question, fails. She did not challenge the validity of the first decision earlier; the time to do so has passed. *See* CPLR 217(1). The second application was erroneously granted.

The Special District Attorney did not lack authority to challenge the respondent's release. *See* County Law 701(1) (b). The duties of a district attorney include ensuring that sentences are carried out. *See Matter of Lewis v Carter*, 220 NY 8, 15-16. A special district attorney is to discharge the duties of the district attorney for the length of the appointment. County Law 701(4). Judgment affirmed. (Supreme Ct, Rensselaer Co [Canfield, J])

Dissent: [Crew III, JP] The statute is ambiguous as to whether a tie vote is a denial.

Confessions (Counsel) (Interrogation) **CNF; 70(23) (42)**

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

People v Durant, No. 14760, 3rd Dept, 4/22/04

With an order of protection in effect prohibiting any offensive conduct by the defendant toward his wife, he elbowed her in the eye as they were lying in bed. After a caseworker saw the resulting black eye and called police, the defendant gave a written statement saying he tried to "nudge" his wife and accidentally hit her eye. He told the booking officer he elbowed his wife "'to get her off of me.'" He allegedly agreed with a transporting officer's comment after a preliminary hearing that resulted in his release expressing surprise; the defendant allegedly added that he was arguing with his wife and intended to elbow her ribs but hit her eye. He was indicted on first-degree contempt, suppression of his statements was denied, and he was convicted by a jury.

Holding: The defendant's right to counsel had attached once the accusatory instrument was filed and he had obtained counsel. Dismissal of charges at the preliminary hearing did not dispose completely of the matter, as an indictment could still be obtained. The police could not question him without counsel, and uncounseled statements should be suppressed unless they were spontaneous rather than eleicited by police conduct or questioning. *See People v Kisenik*¸ 285 AD2d 829, 830 *lv den* 97 NY2d 657. The transporting deputy's comment was not investigatory nor a disguised effort to elicit incriminating information and the resulting statement need not be suppressed.

The court properly ruled the defendant's wife a hostile witness after she testified that she had lied to the prosecutor before trial, allowing her to be impeached with her prior sworn statement. *People v Colon*, 307 AD2d 378, 381 *lv den* 100 NY2d 619. Judgment affirmed.

Third Department *continued*

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

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

People v Caruso, No. 14619, 3rd Dept, 4/29/04

The defendant was convicted of multiple counts of murder, burglary, use of a firearm, and grand larceny.

Holding: The defendant was convicted of first-degree murder for the death of his stepuncle. The court erred by refusing to instruct the jury with the lesser offenses of first- and second-degree manslaughter. The evidence showed that the defendant, absent without leave from the Army, entered a hunting camp and the decedent's home without permission, took various items, shot the decedent when the decedent suddenly returned home, and drove away in the decedent's car, at night. While a jury could conclude from the evidence that the defendant intended to kill the decedent, there is also a reasonable view of the evidence that would support a finding of a lesser offense. That is, the defendant, frightened and on the run, was surprised by a sound at the door and fired only to scare away or injure a would-be entrant to facilitate the defendant's escape. *Cf People v Baptiste*, 306 AD2d 562, 564-565 *lv den* 1 NY3d 594.

While the decedent's 911 call was a dying declaration, its admission was more prejudicial than probative where defense counsel had conceded in opening statement that the defendant shot the decedent, and two people who arrived to help testified that the decedent had identified the defendant as the shooter. If the tape is offered at retrial, and the court decides to admit it, only the identification portion, not the full tape, should be played. Judgment modified, first-degree murder counts reversed, new trial ordered on such counts, and as modified, affirmed.

Fourth Department

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

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

People v Mayo, 4 AD3d 827, 771 NYS2d 627 (4th Dept 2004)

Holding: Parents have a nondelegable affirmative duty to provide adequate medical care for their children. Failure to do so can form the basis of a homicide charge. *People v Steinberg*, 79 NY2d 673, 680. Viewed in a light most favorable to the prosecution, the evidence here showed that the four-year-old son of the defendant died because the defendant did not seek medical care for peritonitis that set in after the son suffered a broken rib. The defense expert "testified that the child would have exhibited signs of excruciating pain" from the broken rib and more from the peritonitis. Experts for both sides agreed peritonitis is curable if timely treated. The trier of fact could have rationally found the essential elements of criminally negligent homicide (Penal Law 125.10) established beyond a reasonable doubt by the circumstantial evidence here. *See People v Ficarrota*, 91 NY2D 244, 248, 249. Evidence of prior injuries inflicted in the privacy of the home is relevant to showing that injuries were not accidental, so there was no error in allowing the defendant to be cross-examined about evidence of prior child abuse. *People v Neer*, 129 AD2d 829, 829-830 *lv den* 70 NY2d 652. Judgment affirmed. (County Ct, Oneida Co [Donalty, J])

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

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

People v Russo, 771 NYS2d 768 (4th Dept 2004)

Holding: The defendant was not denied a fair proceeding when the judge who presided at trial conducted the reconstruction hearing ordered in *People v Russo* (283 AD2d 910 *lv dsmisd* 96 NY2d 867). The record shows no evidence that the judge had an interest in a particular conclusion or that there was a "'clash in judicial roles.'" *See People v Alomar*, 93 NY2d 239, 246. The proceedings from which the defendant may have been absent dealt with questions of law, scheduling, or juror requests for physical evidence, so there would have been no opportunity for meaningful input from the defendant. *People v Roman*, 88 NY2d 18, 27 *rearg den* 88 NY2d 920. Judgment affirmed. (County Ct, Chautauqua Co [Ward, J])

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

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

People v Jackson, 772 NYS2d 149 (4th Dept 2004)

Holding: The filing of a child abuse petition did not trigger the defendant's right to counsel, so the caseworker was not required to give the defendant *Miranda* rights before speaking with him. *See People v Brooks*, 184 AD2d 274, 275-276 *lv den* 80 NY2d 901. The caseworker here was not engaged in law enforcement activity. The sentence, with an aggregate maximum of over 50 years, was not unduly harsh or severe, but exceeded the statutory limitation in Penal Law 70.30(1)(e)(vi). The Department of Correctional Services should recalculate the sentence accordingly. *People v Crane*, 242 AD2d 783, 784. Judgment affirmed. (Supreme Ct, Monroe Co [Corning, AJ])

Fourth Department *continued*

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

Statute of Limitations (General) **SOL; 360(13)**

People v Wilcox, 4 AD3d 794, 771 NYS2d 454 (4th Dept 2004)

Holding: Count four as amended, which was reduced from the felony of attempted second-degree rape to the misdemeanor of attempted third-degree rape, was time barred. The crime was alleged to have occurred in November 1998, and the indictment was filed in December 2000. *See* CPL 30.10(2)(c). Judgment modified, count four vacated and dismissed. (County Ct, Oneida Co [Dwyer, J])

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

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

People v Quarcini, 771 NYS2d 784 (4th Dept 2004)

Holding: Charged by felony complaint with third-degree possession of stolen property (Penal Law 165.50), the defendant pled guilty to a superior court information charging fourth-degree possession under Penal Law 165.45(5). This is not an included offense of third-degree possession because it has the unique element that the stolen property must be a motor vehicle, making it possible to commit the greater offense without committing the lesser. The prosecution's contention that the superior court information was not jurisdictionally defective because the offense therein shared common elements of law and fact with that charged in the felony complaint (*see People v Johnson*, 89 NY2d 905, 907-908) is rejected because the principle cited applies only for plea purposes. A waiver of indictment is available "only within the express authorization of the governing constitutional and statutory exception." "There is no express authorization for a superior court information to charge a crime that shares only common elements of law and fact with the crime charged in the felony complaint." Judgment reversed, plea vacated, information dismissed. (Supreme Ct, Erie Co [Wolfgang, J])

Instructions to Jury (Missing Witnesses) **ISJ; 205(46)**

People v Brown, 4 AD3d 790, 772 NYS2d 168 (4th Dept 2004)

Holding: The court abused its discretion by denying the defense request for a missing witness charge. The prosecution's claim that the defendant raised this matter untimely is not preserved for review. *See People v Erts*, 73 NY2d 872, 874. The defendant met his initial burden by showing that the witness in question, the person against whom he was charged with intending to use a gun, had knowledge of a material issue and could be expected to testify favorably to the prosecution. *See People v Kitching*, 78 NY2d 532, 536-537. The key factual issues of whether the defendant possessed a loaded firearm and intended to use it (Penal Law 265.02[4)], 265.03[2]) turned on the testimony of two prosecution and two defense witnesses. One prosecution witness said the defendant had the gun at one location, while the other said the defendant fired it at the missing witness at another location. The defense witnesses, including the defendant, said that a third person had the gun, and that that person and the missing witness were chasing them. The missing witness's testimony would not have been "trivial or cumulative." *See People v Rodriguez*, 38 NY2d 95, 101. The missing witness was not an uncalled accomplice, and there was no verification that he would invoke his right against self-incrimination. The failure to give a missing witness charge was not harmless error. Judgment reversed, new trial ordered. (County Ct, Monroe Co [Marks, J])

Search and Seizure (Consent [Third Persons, by]) **SEA; 335(20[p])**

People v Haupt, 772 NYS2d 777 (4th Dept 2004)

Holding: Consent to enter a home is not "broad consent for the police to wander at will throughout the entire dwelling." *People v Flores*, 181 AD2d 570, 571. The prosecution failed to meet the heavy burden of showing that the defendant or his mother consented to police entry into the defendant's bedroom. *See gen People v Gonzalez*, 39 NY2d 122, 127-128. Consent by the defendant's mother to police coming into the entryway of the residence was not consent to enter the defendant's upstairs bedroom. *People v Russo*, 201 AD2d 940, 941 *lv den* 83 NY2d 857 *cert den* 513 US 889. The mother did not direct the police to the defendant's bedroom, but told them she would wake him. After the defendant came out of his room and agreed to speak with the police outside, an officer followed him back into his bedroom as the defendant went to get dressed. The bloodstained shorts seized by the officer in the bedroom and statements by the defendant after police illegally entered his bedroom should have been suppressed. *See People v Milaski*, 62 NY2d 147, 156-157. Judgment reversed, suppression granted in part, new trial granted. (County Ct, Ontario Co [Doran, J])

Guilty Pleas (Errors Waived By) **GYP; 181(15)**

Sentencing (Mandatory Surcharge) **SEN; 345(48)**

People v Camacho, 771 NYS2d 481 (4th Dept 2004)

Holding: The defendant contends that the court improperly denied his application to defer the mandatory

Fourth Department *continued*

surcharge. The defendant's waiver of appeal encompasses that contention. *See People v Smith*, 309 AD2d 1282, 1283. While a court has the authority to defer the mandatory surcharge, the court properly denied the application here. The "defendant failed to establish that he suffered any hardships different from those of other indigent inmates." S*ee People v Kistner*, 291 AD2d 856. Judgment affirmed. (County Ct, Wyoming Co [Dadd, J])

Sentencing (Presentence Investigation and Report) (Resentencing) (Second Felony Offender) — **SEN; 345(65) (70.5) (72)**

People v James, 4 AD3d 774, 772 NYS2d 151 (4th Dept 2004)

Holding: When resentencing the defendant as a second felony offender following appeal, the court erred by admitting over objection the accusatory instrument of a Florida matter without the certification required by CPLR 4540(c). *See People v Acebedo*, 156 AD2d 369. The matter must be remitted to give the prosecution an opportunity to overcome the technical defects in the proof. *See People v Hines*, 90 AD2d 621. The court did not err by refusing to order a new presentence report where the defendant had been continually incarcerated between the first and second sentencing proceedings. *People v Kuey*, 83 NY2d 278, 282-283. Resentence reversed, remitted for resentencing. (County Ct, Wayne Co [Nesbitt, J])

Evidence (Other Crimes) (Uncharged Crimes) — **EVI; 155(95) (132)**

People v Crawford, 4 AD3d 748, 772 NYS2d 182 (4th Dept 2004)

Holding: The court erred by admitting at the defendant's assault trial evidence about a prior incident involving the complainant and the defendant that resulted in injuries similar to those experienced in this case. There was not sufficient evidence that the complainant's prior symptoms were caused by criminal acts of the defendant; the complainant admitted he might simply have been drunk. If someone did drug the complainant's drink on the prior occasion, there was no evidence that it was the defendant. More than a unique method is required to make a prior uncharged crime relevant to a pending charge. Naked similarity between crimes proves nothing. *See People v Robinson*, 68 NY2d 541, 549, quoting *People v Molineux*, 168 NY 264. Judgment reversed, new trial ordered. (County Ct, Erie Co [D'Amico, J])

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

Homicide (Manslaughter [Evidence]) (Negligent Homicide) — **HMC; 185(30[d]) (45)**

People v Woodruff, 4 AD3d 770, 771 NYS2d 620 (4th Dept 2004)

In a hunting accident, the defendant shot the decedent, who bled to death. The defendant was indicted for second-degree manslaughter (Penal Law 125.15[1]) and first-degree reckless endangerment. Penal Law 120.25.

Holding: County Court erred in reducing the manslaughter count to criminally negligent homicide (Penal Law 125.10) and dismissing the reckless endangerment count. Grand jury evidence reviewed on a motion to dismiss the indictment (CPL 210.20[1][b]) must be considered in the light most favorable to the prosecution to determine whether, if unexplained and uncontradicted, it would support a petit jury conviction. *People v Jennings*, 69 NY2d 103, 114. Here, an experienced hunter, initially unaware that he had shot someone with a 20-gauge shotgun, heard the decedent's screams and the yells of a companion, then left the scene without reporting the accident or responding to the calls for help. A jury could infer that the defendant knew before leaving that the shooting had occurred and that it created a risk of death if the person shot did not receive prompt medical treatment. *People v Wong*, 81 NY2d 600, 608. Order reversed, charges reinstated, matter remitted. (County Ct, Steuben Co [Latham, J])

Dissent: [Lawton, J] The order should be affirmed for the reasons stated in the County Court's decision.

Retroactivity (General) — **RTR; 329(10)**

Sentencing (Mandatory Surcharge) — **SEN; 345(48)**

People v Hager, 773 NYS2d 317 (4th Dept 2004)

Holding: The prosecution concedes that ordering the defendant to pay a mandatory surcharge of $200 and a crime victim assistance fee of $10 was a violation of the *ex post facto* clause of the federal constitution. US Const art 1, §10(1). The amendment to the statute under which the fees were ostensibly set (Penal Law 60.35[1] [a]) was passed before the defendant's criminal conduct, but did not become effective until after the conduct had occurred. The amendment is inapplicable here. *See* Donnino, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law 60.35, 2004 Pocket Part, at 126; *see also People v Goldwire*, 301 AD2d 677, 678. Judgment modified, surcharge reduced to $150 and crime victim assistance fee to $5. (Supreme Ct, Erie Co [Tills, AJ]) ⚖

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