



# Public Defense Backup Center REPORT

Volume XIX Number 4 September–December 2004

A PUBLICATION OF THE DEFENDER INSTITUTE

## Defender News

### Actions and Inactions in Albany at Year's End

A lackluster legislative year in many respects, 2004 ended with a flurry of activity on issues of interest to public defense providers and clients, as noted below. Watch for NYSDA's Legislative Review, coming soon.

#### A Step Toward Rockefeller Reform

In the wake of an Albany County district attorney race with Rockefeller Drug Law reform as a winning platform plank, and continuing pressure from a growing constituency across the state for that reform, the Legislature has taken action. On Dec. 14, the Governor signed a bill that he and legislative leaders claim will significantly soften the harsh drug laws. Many reform advocates said the measure was at best a beginning, certainly not the total change that is needed. (*NYLJ* [online], 12/9/04; [Albany] *Times Union* [online], 12/15/04.)

With this bill, we "will still have lengthy mandatory sentences for drugs and no treatment upon demand," noted NYSDA's Executive Director, Jonathan E. Gradess. NYSDA immediately prepared an initial analysis of the new law for Chief Defenders. For details about the measure, see Al O'Connor's summary, p. 15 and a chart prepared by Alan Rosenthal of the Center for Community Alternatives showing the new sentencing scheme, p. 18.

#### Veto Override Raises Minimum Wage

In news affecting the public defense client community, the Senate overrode the Governor's veto of an increase in the minimum wage increase. The 50-8 vote on December 6 came months after the Assembly overrode the veto. The bill will raise the state's minimum wage to \$6 per hour in January and to \$7.15 per hour in January 2007. ([Rochester] *Democrat and Chronicle*, 12/7/04.)

### New Assessments Imposed in DWI, Other VTL Cases

The Vehicle and Traffic Law (VTL) has been amended to add a "Driver Responsibility Assessment." The law now requires the DMV commissioner to impose an assessment in the amount of \$250.00 per year for 3 years for persons convicted of DWI or DWAI (VTL 1192) or found to have refused a chemical test (VTL 1194). *See*, VTL 1199 (new).

Persons found to have accumulated six points or more in an 18 month period will also be liable for payment of an assessment. The amount is \$100.00 per year for 3 years for the first six points and an additional \$25.00 for each additional point. *See* VTL 503 (as amended).

Failure to pay will result in a suspension until paid. These Driver Responsibility Assessments became effective Nov. 20, 2004.

### Death Penalty Gets NY Legislative Hearings

At a hearing on December 15, District Attorney Robert M. Morgenthau of Manhattan, legal experts, families of murder victims and others tried to persuade lawmakers not to restore New York's death penalty. The state's capital punishment statute was effectively struck down by the Court of Appeals in June. (*NY Times* [online], 12/16/04.) [The unconstitutionally coercive provision required telling juries that failure to agree unanimously on the death penalty or life without the possibility of parole (LWOP) would result in imposition of a parole-able life sentence. (*People v LaValle*, 3 NY3d 88).] Another hearing is scheduled in January, in Albany.

Since that decision, some prosecutors have proceeded in first-degree murder cases with the expressed hope for a retroactive "fix" of the

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death penalty statute. (See e.g., [Troy] *Record*, 12/12/04.) Some state legislators have announced a change in their position on the death penalty. Among reasons given for possible votes against it are that New York now has LWOP as an alternative and the growing number of wrongful convictions disclosed by DNA testing and other means. (See e.g., *Binghamton Press & Sun-Bulletin* [online], 12/15/04.) Assembly Speaker Sheldon Silver said in late December that he now has doubts about whether New York needs a death penalty. While his remarks engendered speculation that he was using the issue as a bargaining chip with the Governor, they also indicate that Silver is willing to consider maintaining a status quo in which LWOP is New York's harshest enforceable sentence. (*NY Times* [online], 12/23/04.)

### **National Innocence Protection Act Passed**

Nationally, DNA proof of wrongful convictions has led to passage of the federal Innocence Protection Act, as part of the Justice for All Act of 2004, Public Law No: 108-405. This bill, which became law on Oct. 30, 2004, creates a DNA testing program and authorizes grants to states for capital prosecution and capital defense improvement and assistance to victims' families. More information on this act can be found on the Death Penalty Information Center web site. [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org). NYSDA provides updated information on death penalty developments, and links, on its own web site as well. [www.nysda.org](http://www.nysda.org).

### **Seeking Quality Death Penalty Representation Across the Country**

Amid political and public debate on capital punishment, hundreds of death row prisoners facing execution have no legal representation. Some states do not provide a right to counsel for post-conviction challenges to convictions following direct appeal. Trying to fill this gap, the American Bar Association (ABA) Death Penalty Representation Project solicits law firms to take these cases *pro bono*. Lawyers need not oppose capital punishment to take on these cases, and death penalty supporters are among those recruited by the Project's director, Robin Maher. (*Washington Post* [online], 11/30/04.)

What is required for *pro bono* representation of post-conviction capital cases are the time and resources to handle extensive, exhausting, complex litigation. (See ad p. 14.) Lawyers new to capital litigation have to be brought up to speed on what they should do, and what prior counsel should have done. Tools for this learning process include the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (revised 2003). These standards, first adopted by the ABA in 1989 after they were developed by the National Legal Aid and Defender Association (NLADA), have been cited in US Supreme Court decisions and elsewhere. (Cases cit-

### **The Death Penalty: An Opponent's Perspective**

*"The state's presumption of the power to take life, codified, disgraces that civilization, and the law, and thus those who practice it. . . [N]ot every attorney is against the death penalty and not every attorney against it believes practicing law is any less noble because of the death penalty, but, for those of us who oppose the death penalty, because we know it mocks the law's basic purpose, which is the nonviolent resolution of conflict, we must acknowledge that our profession in New York has become absurd in some respect at its foundation, and we really have trouble quantifying what bad faith costs."*

—Gary Abramson, Chief Attorney, Legal Aid Society Orange County, at 1998 NYSDA/League of Women Voters of New York State hearings on public defense

ing the standards can be seen on the Project's web site, [www.abanet.org/deathpenalty](http://www.abanet.org/deathpenalty).)

## **NYSDA: Standards, Services, and So Much More**

### **Speaking of Standards . . .**

As reported in the last issue of the *REPORT*, the NYSDA Board and the Chief Defenders adopted *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* during the Annual Meeting in July. Work continues on drafting commentary

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**Executive Director Jonathan E. Gradess prepares for Panel Discussion at NLADA conference in Washington, DC.**

to the standards, which are now posted on the NYSDA web site under Defense Resources.

Copies of the new standards were distributed at a recent meeting of the American Council of Chief Defenders (ACCD) at the NLADA Annual Conference in Washington DC, at which NYSDA's Executive Director was a panel presenter. The vital role of standards in establishing and maintaining efficient and effective public defense services systems is a recurring topic at ACCD and NLADA programs.

One session at the recent NLADA conference was dedicated solely to the use of standards in the context of death penalty defense. Some lessons learned in building the ABA death penalty guidelines into accepted authority should be applicable in using noncapital standards to convince courts, funders, and the public of the need to improve how New York State provides public defense.

Attorneys who use the new standards to argue for additional time or resources in a public defense case, civic organizations that refer to the standards in educational materials and presentations about the importance of public counsel's role in the judicial system, chief defenders who persuasively incorporate references to the standards in budget requests for adequate funds, and anyone else who cites the standards are encouraged to share that information by faxing or emailing written materials or descriptions of how the standards have been used to Mardi Crawford, Backup Center Staff Attorney. (fax) (518)465-3249; e-mail [mcrawford@nysda.org](mailto:mcrawford@nysda.org).

### **Web Site Has Updates, Info, for Everyone**

Get the web address for a blog that follows the impact of a major US Supreme Court decision like *Blakely v Washington*. Find new developments not only in criminal law but also in juvenile and family law. Compare what is

happening in public dense across the state and the nation with what is happening in your jurisdiction. Find out if there has been legislative action on a criminal justice reform issue you care about. For these things and much more, go to the NYSDA web site. The *REPORT* appears there as soon as it is finished, so you need not wait for printing and mailing. Unlike the *REPORT*, the site can't be easily thrown into a briefcase or the car and read during a break between cases, on the subway, or in a waiting room, but the site contains much more information, and is just a few clicks away whenever you are online: [www.nysda.org](http://www.nysda.org).

### **Counsel's Control in Criminal Cases Considered**

Certain decisions in a criminal case are so vital that they must be made personally by the defendant, the person whose life will ultimately be affected by the case. These decisions include the decisions as to how to plead and whether to accept a plea offer, whether to be tried by a jury or by a judge as fact-finder, whether or not to testify on one's own behalf, and whether or not to appeal. Other decisions on tactics and strategy are ultimately for counsel to make after consultation with the client. *See, ABA, Standards for Criminal Justice, Defense Function* (3rd Ed, adopted 1991), Standard 4-5.2; *see also, NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004), Standards VIII(A) (8)(b)(7), (8)(b). This demarcation of attorney and client roles was recently scrutinized by the federal and New York high courts.

The US Supreme Court considered a capital defendant's contention that his counsel derogated the defendant's right to decide about pleading guilty where counsel conceded during trial the defendant's guilt in order to credibly argue reasons that the defendant should not be sentenced to death. Noting that counsel had met his obligation under *Boykin v Alabama* (395 US 238, 242 [1969]) to consult with the defendant about whether to admit guilt and that the defendant had been unresponsive to counsel, the court held that concession of guilt by the lawyer during trial was not equivalent to a guilty plea. The defendant had a trial at which the prosecution was required to make its case; the defendant did not give up any rights associated with a plea of guilty. *Florida v Nixon*, No. 03-931 (12/13/04). Case summary on p. 20.

Meanwhile, the Court of Appeals considered the effect of a defendant's directives to counsel as to how to conduct the defense at trial. Before opening statements, the defendant ordered counsel to take *no* further actions. While Justice G.B. Smith recognized in dissent that decisions as to trial strategies and tactics are for counsel, not the client, the majority found that the defendant, by ordering counsel not to proceed, had waived effective assistance of counsel claims based on the lawyer's adherence

to the defendant's directive to do nothing. *People v Henriquez*, No. 121 (Ct Apps 10/19/04). Case summary on p. 22.

## **Client Advisory Board Members' Activities Noted**

### **Prison Families of New York Recognized, Growing**

Alison Coleman, a member of NYSDA's Client Advisory Board, accepted the 2004 Samuel J. Duboff Award on behalf of Prison Families of New York, Inc. in early December. Presented by the Fund for Modern Courts, the Samuel J. Duboff Memorial Award recognizes non-lawyers who make extraordinary contributions toward improving the quality of justice in New York State. The award is named for the late Samuel J. Duboff, who served as Chair of Modern Courts' Executive Committee for 19 years.

Cecily Coleman, who will soon receive her degree in criminal justice, understands the difficulties children face when a member of their family is incarcerated. Her knowledge is not simply academic; as a child whose father has been incarcerated for all but one year of her life. Cecily knows the importance of having support from family and other loved ones, educators, doctors, clergy, and communities. As she works to build a new program, "Children of Prisoners," Coleman speaks to individuals and programs about what to say to prisoners' children and how to help them with the feelings and situations they face. She also talks directly with prisoners' children, providing information and the comfort of talking to someone who truly knows what a child is going through. ([Schenectady] *Daily Gazette*, 12/12/04.)

Cecily can be reached at: Cecily J. Coleman, c/o Prison Families of New York, Inc., 40 North Main Avenue, Albany NY 12203. Phone: (518)453-6659. E-mail: [childrenofprisoners@nycap.rr.com](mailto:childrenofprisoners@nycap.rr.com).

### **Groups to Observe Martin Luther King, Jr. Holiday in Albany**

Community groups, families members of prisoners, activists and concerned citizens from across New York State are invited to "A Special MLK Celebration: The Devastating Impact of Mass Incarceration on Children," Monday, Jan. 17, 2005, 9:00 a.m. in Hearing Room C, Legislative Office Building, Albany, New York. Sponsors include: the Center for Law and Justice, whose Executive Director, Alice Green, is a member of NYSDA's Advisory Board; Children of Prisoners Initiative/Prison Families of New York; the Women in Prison Project; Prison Families Community Forum of the Fifth Avenue Committee; Hour Children; and the New York Campaign for Telephone

Justice. For more information contact Dan Salvin at the Center for Law and Justice. (518)427-8361.

## **Update of Parole Manual Coming Soon**

A new update of *Parole Representation in New York State* is now in production. Originally written by Roger Brazill, Marty Rosenbaum, and Donald Zuckerman, the manual has again been generously updated by David Werber, Director of The Legal Aid Society Parole Revocation Defense Unit. Based on the latest and best practices in parole work, the manual analyzes significant changes in regulations and court decisions vital to handling parole hearings and appeals. Details on cost and how to order the manual will soon be available on the NYSDA web site.

## **US Supremes New Term Begins**

While criminal defense practitioners wait for much-anticipated rulings from the US Supreme Court on hot issues such as the viability of sentencing guidelines after the *Blakely* decision (*see Backup Center REPORT*, Vol XIX No. 3 [June-July-Aug. 2004], pp. 2, 16), the court has begun issuing decisions in less highly-publicized cases.

## **Court Limits Attorneys' Systemic Challenges**

A majority of the court has rejected efforts by Michigan lawyers to assert the rights of future defendants affected by state legislation prohibiting appointment of appellate counsel for indigent defendants whose convictions stem from a guilty plea. Passage of the statute followed a state constitutional amendment doing away with appeals by right following guilty pleas. The 6th Circuit finding that the attorneys had standing was reversed. *Kowalski v Tesmer*, No. 03-407 (12/13/04). (Summary p. 20.)

The case assumed without deciding that the attorneys' allegation of "injury in fact," flowing from their contention that Michigan had reduced the number of cases in which the lawyers could be appointed and paid as assigned appellate counsel, was sufficient to meet the case-or-controversy requirement of the US Constitution, Article III.

Michigan attorneys do not intend to give up their efforts to overturn the statute. According to James R. Neuhard, the State Appellate Defender in Michigan:

Tesmer is far from over. We still fervently believe that you cannot limit only the poor's access to the appellate system as Michigan is attempting to do. The relief rate from errors in sentences alone makes the right to counsel on appeal essential. Guilty pleas resolve only liabili-

ty and set the stage for the second phase—the sentence. In Michigan, given our decimated public defense system at trial, the lack of training and the complexity of our sentencing scheme, counsel on appeal is critical to not only correct errors, but also to let the players at trial know that they might be reversed. This keeps the high volume plea process somewhat in check.

For these reasons we remain confident that we will ultimately prevail.

What *Tesmer* might mean to other efforts to challenge system-wide public defense problems remains to be seen. Standing has presented problems to other systemic challenges. A Sept. 15, 2004 ruling by United States District Judge Joanna Seybert, in a suit alleging that inadequate fees paid to assigned counsel effectively deny effective assistance of counsel to defendants eligible for publicly funded representation, appears consistent with *Tesmer*. All claims predicated on the violation of indigent defendants' rights were dismissed on summary judgment. The ruling left open further proceedings only on a claim relating to alleged substantive due process violations of the named plaintiff attorney and all others similarly situated. *Liotti et al v Nassau County*, 00-CV-0225 (JS) (MLO) (EDNY 9/15/04).

## **Public Defense Developments**

### **LAS Avoids Bankruptcy**

The Legal Aid Society of New York City, which was said during November union negotiations to be facing bankruptcy (*NYLJ* [online], 11/23/04), announced in December that it had reached agreements-in-principle with all creditors. Since early summer, LAS has lost 221 positions. Among these were 17 lawyers, all in managerial slots. Both union and non-union staff have seen their pension plans reduced and have given up bonuses. A fund drive has raised \$9 million from law firms and corporations, primarily those with members on Legal Aid's 50-person board. The Society agreed to give up an \$18 million building in Harlem that opened last year, and arranged for the consolidation of offices in Brooklyn and Queens. New positions and procedures are being instituted to avoid future financial and accounting problems. (*NYLJ* [online], 12/23/04.)

### **AC, Other Costs Cause Contemplated Changes**

#### **Steuben Co PD Seeks Added Staff**

Steuben County Public Defender Tad Cooper, who was hired earlier this year to reorganize the office (and contain costs), warned county officials in November that annual costs for assigned counsel could be \$100,000 more

than originally predicted. Basing his estimate of the cost overrun on 2003 caseload statistics, he said the overrun was due to the recently-increased hourly rates, not an increase in cases. Because some less-serious cases are assigned out to prevent excessive caseloads for public defender staff, Cooper said the county should hire another full time assistant public defender. County Attorney Frederick Ahrens, Jr., said that many of the less-serious felony cases could be reduced to misdemeanors at arraignment or during pre-sentencing conferences but Cooper said, "That is not a practical reality." (*Corning The Leader* [online], 1/7/04.) In December, Cooper asked for two full-time attorneys and a full-time secretary. (*The Leader* [online], 12/7/04.)

### **NYCLU Interest in Public Defense Continues**

In Schenectady County, the New York Civil Liberties Union (NYCLU) offered testimony to the county legislature in October urging adequate funding of the Public Defender and Conflict Defender offices there. Acknowledging that the county was faced with an unfounded state mandate to provide all necessary public defense services, and that progress had been made in improving client services, the NYCLU urged the county to realize that it must provide all needed funds and institute further reforms or face the consequences. "Other counties that continue to skimp on funding, staffing, and resources for indigent defense are paying a dear price," concluded the Executive Director of the Capital Region Chapter NYCLU, Melanie Trimble. She pointed out that one Public Defender had resigned when a county failed to provide adequate resources for his office, and that in another county a public defender client was seeking to overturn a conviction due to the alleged ineffective assistance provided by an "overworked, underresourced, and understaffed Public Defender Office . . ." ([www.nyclu.org](http://www.nyclu.org)).

### **Essex Co Cost Concerns Continue**

The resignation of the Essex County Public Defender, referred to in the NYCLU testimony, was reported here earlier. (*Backup Center REPORT*, Vol XIX, No 3 [June-July-Aug 2004], pp. 4-5.) A proposed budget will give the new public defender, Livingston Hatch, a substantial raise and provide the office with a defender investigator. ([*Plattsburgh Press-Republican* [online], 11/16/04.) Among the problems Essex county public defense clients face as a result of cost issues is a revision of how financial eligibility for public defense services is determined. County Probation Department Director Scott McDonald has said since his office took over eligibility determinations that there was a need to examine issues including "presumed eligibility" and reimbursement for services received by clients later determined to be ineligible. (*Press-Republican* [online], 12/18/04.)

Eligibility determination is a significant issue in public defense and is addressed in detail in the new *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* reported above (see Standard VII). The standards call for "an effective, efficient, and fair system for determining the eligibility of potential clients that effectuates the constitutional and statutory right to counsel." (Standard VII[B]) The standards disapprove of any post-representation reimbursement (Standard VII[F]) and require extensive procedural safeguards if partial payment is to be required (Standard VII[G]).

### **IAC Allegations Focus on County Funding**

The ineffective assistance claim in Greene County mentioned in the NYCLU testimony reported above has received substantial local publicity. According to one account, current counsel for the former client of the Public Defender office contends that "the Greene County Legislature's handing of the public defender's budget - and the fact that lawmakers discussed the budget in secret - cost his client a fair trial." ([Kingston] *Daily Freeman* [online], 10/18/04.) While the proceedings remained pending the county legislature formed a committee to recruit a full-time public defender, a position that Public Defender Greg Lubow said he had been requesting for years. (*Daily Freeman* [online], 11/19/04.)

Greene County Judge George Pulver Jr. rejected the claims at the end of the year, finding some irrelevant to the former client's case and saying that prison visitation logs, offered to show that the client received only 17 minutes of counsel during eight months in jail, probably underrepresented public defender visits. (*Daily Freeman* [online], 12/30/04.)

## **Awards Created to Honor Public Defense Lawyers**

### **Kevin M. Andersen Memorial Award**

Kevin M. Andersen was a public defender throughout his career. Kevin worked in the Monroe County Public Defenders Office and spent twelve years with the Genesee County Public Defenders Office. In June 2004, Kevin lost a courageous battle with cancer. Those who worked with him knew him to have the ability to be angered to the center of his being by injustice, the will to fight ferociously for his client, and the compassion to grant the client the dignity each deserved as a human being despite whatever human frailties they might present.

The Genesee County Public Defenders Office wishes to remember and honor Kevin's dedication to the defense of the indigent by sponsoring the Kevin M. Andersen Memorial Award. This award will be presented to an

attorney who has been in practice less than fifteen years, practices in the area of indigent defense and exemplifies the sense of justice, determination and compassion that were Kevin's hallmarks.

### **Nominations Sought**

Nominations with supporting materials should be forwarded to the Genesee County Public Defenders Office, One West Main Street, Batavia NY 14020, and must be received no later than Mar. 31, 2005. The award will be presented at the New York State Defenders Association Annual Meeting in July 2005.

### **Wilfred R. O'Connor Award**

Wilfred R. O'Connor was a founding member of the New York State Defenders Association. Committed to his community, his family, and his clients, he served as a legal aid lawyer in Brooklyn and Queens, as director of the Queens Legal Aid office, as a member of Legal Aid's Attica Defense Team, as director of the Prison Legal Assistants Program, and as president of the New York State Defenders Association from 1978 to 1989. He went on to complete his career as a judge in New York City. His beliefs were clear: every defendant, regardless of race, color, creed or economic status, deserves a day in court and zealous client centered representation.

The NYSDA Board wishes to remember Bill and honor his sustained commitment to the client-centered representation of the poor by sponsoring the Wilfred R. O'Connor Award. This award will be presented to an attorney who has been in practice fifteen or more years, practices in the area of public defense and exemplifies the client-centered sense of justice, persistence and compassion that characterized Bill's life.

### **Nominations Sought**

Nominations with supporting materials should be forwarded to the New York State Defenders Association, 194 Washington Avenue, Suite 500, Albany NY 12210-2314, and must be received no later than Mar. 31, 2005. The award will be presented at the New York State Defenders Association Annual Meeting in July 2005.

## **Judges Disciplined**

Removal from the bench of Troy City Court Judge Henry R. Bauer by the State Commission on Judicial Conduct has been confirmed by the state's highest court. The Bauer disciplinary proceedings had been, at the judge's request, reported publicly. (*See Backup Center REPORT*, Vol XIX, No. 1 [Jan-Feb 2004], p. 9.) Discipline was imposed based on a pattern of exorbitant bail so extraordinary that it was abusive and coercive, a resistance to advising some defendants of their right to counsel,

*(continued on page 8)*

# Defense Practice Tips

## DWI Slangue—Part II\*

by Glenn Edward Murray and Gary Muldoon\*\*

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

**Lifetime revocation.** VTL § 1193(2)(c)(3) bars DMV from issuing license to motorist twice convicted of per se DWI or DWAI, if both incidents caused “physical injury.” See *Rosato v Department of Motor Vehicles*, \_\_ AD3d \_\_, 777 NYS2d 186 (2d Dept 2004).

**Martin hearing.** Ruling/Admissibility of chemical test refusal at DWI trial. *People v Martin*, 143 Misc2d 341 (Just. Ct. 1989); *People v Lynch*, 195 Misc2d 814 (City Crim Ct. 2003). See VTL § 1194(2)(f). A refusal finding allows inference of consciousness of guilt. VTL § 1194(2)(f).

**Mertz rule.** Reversible error to preclude defense from asserting blood alcohol content at time of vehicle operation was different than at time of breath test. *People v Mertz*, 68 NY2d 136 (1986).

**Negative units.** DWAI and DWI, like AUO, don’t result in “points” as so-called “moving violations” for the purpose of “point accumulation” which can result in suspension or revocation, but they do result in “negative units” under 15 NYCRR Part 136, entitled “Licensing or Relicensing after Revocation Action.” Motorists with horrible driving records are often notified of year+ waiting periods before DMV will consider relicensure. Negative units are assigned depending on whether the offense occurred: a) 1–3 years prior to application, or b) within 1-year prior to application. For instance, a 1st time DWAI within 1-year prior to application is assessed -8, -11 and -14 negative units for 1st, 2d and 3d offenses respectively. Accidents are also assigned negative units.

\*Part I appeared in the June-July-August issue of the REPORT.

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

**Nuccio rule.** Failure to provide supporting deposition per CPL 100.25 mandates dismissal, but without prejudice. *People v Tyler*, 1 NY3d 493 (2004); *People v Nuccio*, 78 NY2d 102 (1991); *People v Beattie*, 80 NY2d 840 (1992) (plea or failure to object waives ground for dismissal).

**PBT.** Portable Breath Tester, designed to measure BAC in exhaled breath, also called an Alcosensor® or “screening device.” See VTL § 1194(1)(b); *People v Thomas*, 121 AD2d 73 (4th Dept 1986) *affd* 70 NY2d 823 (1987) (inadmissible except for reasonable cause to arrest).

**PCCL (pronounced “Pickle”).** Pre-Conviction Conditional License. VTL § 1193(2)(e)(7)(d). Motorist eligible for PCCL 30 days after suspension pending prosecution based solely on BAC, but only if eligible for post-conviction CL.

**Persistent refusal rule.** To admit evidence of “chemical test” refusal at trial, prosecution has burden by “preponderance of evidence” to show that motorist “persisted” in refusing chemical test. *People v Lynch*, 195 Misc2d 814 (City Crim Ct. 2003); *People v Conway*, 2 Misc3d 1001(a) (Just. Ct. 2004). See VTL § 1194(2)(f).

**Pringle hearing.** Under BAC-based prompt suspension law, court must hold summary hearing before the conclusion of the proceedings required for arraignment and before the driver’s license may be suspended. *Pringle v Wolfe*, 88 NY2d 426 (1996), *cert den*, 519 US 1009 (1996).

**Prompt suspension law.** Mandates suspension pending: a) refusal hearing, b) prior VTL § 1192 conviction within 5 years, or c) BAC of .08%+. Hardship privilege is discretionary for suspension based on BAC of .08%+. For suspension pending refusal hearing, or suspension pending disposition based on prior VTL § 1192 conviction within 5 years, court must suspend without any eligibility for hardship privilege.

**Refusal hearing.** DMV administrative civil hearing to determine “substantial evidence” that motorist refused to submit to chemical test, under penalty of revocation. VTL § 1194(2)(b). In contrast, a criminal court may also conduct a “refusal hearing” to determine whether evidence of the defendant’s refusal to take the chemical test is admissible at trial, at which People have burden by a “preponderance of the evidence” to establish sufficient warning and the defendant “persisted” in refusal. Refusal may be established by words or conduct. *People v D’Angelo*, 244 AD2d 788 (3d Dept 1997); *People v Massong*, 105 AD2d 1154 (3d Dept 1984). See *Martin* hearing.

(continued on next page)

### DWI Slangage *(continued from page 7)*

**Retrograde extrapolation.** Technique of estimating the rate at which alcohol ingested is absorbed and eliminated. *People v Dombrowski-Bove*, 300 AD2d 1122 (4th Dept 2003). See *Mertz* rule.

**SWI.** Snowmobiling While Intoxicated. Parks, Recreation and Historic Preservation Law § 25.24. *People v Davis*, 179 AD2d 714 (3d Dept 1991).

**Scott hearing.** Ruling/Admissibility of evidence derived from checkpoint. *People v Scott*, 63 NY2d 518 (1984); *People v Bigger*, 2 Misc3d 937 (Just. Ct. 2004); *People v Jackson*, 99 NY2d 125 (2002).

**Simplified traffic information.** An accusatory instrument, aka “UTT” or “traffic ticket.” CPL § 100.25(a). Sufficiency on face is governed by CPL § 100.40(2).

**Simulator solution.** A bottle of heated and agitated solution of alcohol and water with a known solution of 0.08% alcohol to water. Vapor is measured after motorist breath test to verify if Breathalyzer® is operating properly. 10 NYCRR § 59.2(a)(1)(2)(2).

**Six-month rule.** Failure to calibrate breathalyzer for six months resulted in suppression, but many courts don’t follow this rule. *People v Mickle*, 187 Misc2d 718 (Just. Ct. 2001); *People v Todd*, 38 NY2d 755 (1975); cf. *People v*

*Pompilio*, 137 Misc2d 997 (1987).

**TSLE&D (pronounced “T-sled”).** Traffic Safety Law Enforcement and Deposition Program. DMV’s traffic ticket management information and accountability program.

**Twenty-day order.** Authorizes 20 days of full driving privileges following conviction and license surrender only if eligible for enrollment in DDP. VTL § 1193(2)(d)(2).

**Two-hour rule.** Statute provides for admissibility of chemical test consented to by motorist within 2 hours of arrest. VTL § 1194(2)(a). Blood alcohol tests are admissible, despite being given after the two hour time limit. *People v Hoffman*, 283 AD2d 928 (4th Dept 2001); *People v Atkins*, 85 NY2d 1007 (1995).

**UTT.** Uniform Traffic Ticket (aka “Uniform Traffic Information”). See Simplified traffic information.

**Zero tolerance law (aka “Baby DWI”, aka “Z-T”).** Unlawful for motorist under age 21 to operate motor vehicle after having consumed virtually any alcohol. *Per se* BAC is .02-.07% for civil administrative finding/penalties, include 6-month license suspension upon finding of violation, or 1-year revocation upon a chemical test refusal. VTL §§ 1192-a, 1194-a, 1193(2)(a)(2). In some cases, administrative Z-T adjudication is available for under 21 motorist charged with DWAI by transfer upon consent from a local criminal court to DMV. ↵

### Defender News *(continued from page 6)*

and in two instances entry of convictions without a trial or guilty plea led to the removal. Also contributing to imposition of the harshest possible sanction was the judge’s attitude toward the complaints against him. Three judges dissented as to the sanction. (Associated Press on MSNBC.com, 10/15/04.) A summary of the decision, *Matter of Bauer*, No. 125 (10/14/04) appears on p. 21.

Another judge embroiled in a high-publicity disciplinary matter recently suffered a setback, losing in Westchester County Supreme Court an article 78 challenge to the constitutionality of New York restrictions on judicial speech. Albany Supreme Court Justice Thomas J. Spargo has admitted many of the allegations against him, claiming that he had a 1st Amendment right to engage in certain political activities and that the rules of judicial conduct prohibiting such activity are unconstitutionally vague. He has denied that he improperly solicited donations from lawyers in his court, and maintains that his

representation of then Albany County District Attorney Paul Clyne was disclosed in cases involving Clyne’s office. (NYLJ [online], 12/13/04.) The case is *Spargo v New York State Commission on Judicial Conduct*, 5336-04. (NYLJ [online], 12/16/04.)

Two other judicial officeholders have been admonished by the Commission for overstepping the restrictions on judicial speech. Disciplined were Newstead Town Justice Richard L. Campbell, an Erie County Republican who endorsed legislative candidates, and Rensselaer County Judge Patrick J. McGrath, a Troy Democrat who appeared on national television about a high profile criminal case over which he had provided. He said on the show that he “felt no mercy” for a mother who suffered from mental illness, sentenced by McGrath for drowning one child and trying to drown another. (NYLJ [online], 11/30/04.)

*(continued on page 13)*

## Job Opportunities

The Public Defender's Office of Cattaraugus County is accepting applications for an **Assistant Public Defender**. Candidates must be law school graduates and members in good standing of the NY State bar, with commitment to undertake cases before Cattaraugus County Family Court and various local courts. Strong research and writing skills and a commitment to the representation of individuals who are unable to retain private counsel required. Ability to work collaboratively with other lawyers and staff necessary. Starting salary for recent law school graduate \$35,000–\$37,000; may be negotiable with experience. Great government benefits. EOE. Send cover letter expressing interest with application (from [www.co.cattaraugus.ny.us](http://www.co.cattaraugus.ny.us), under Human Resources) and/or résumé to: Mark S. Williams, Esq., Cattaraugus County Public Defender, 201 North Union Street, Suite 207, Olean NY 14760. tel (716)373-0004; fax (716)373-3462.

Prisoners' Legal Services of New York (PLS) is accepting applications for **Staff Attorney** positions in the Buffalo and Ithaca offices. PLS is a statewide program, with regional offices in Albany, Buffalo, Ithaca and Plattsburgh, providing civil legal services to people incarcerated in New York State prisons. PLS handles cases involving mental health and medical care, prison disciplinary matters, excessive use of force, conditions of confinement, sentence calculation and jail time credit. PLS attorneys engage in administrative advocacy and representation in individual lawsuits and impact litigation. PLS seeks attorneys committed to providing legal services to the disadvantaged. Required: admitted to practice in NY State or eligible for admission *pro hac vice* and willing to take the next available bar exam; minimum of three years of legal practice experience preferably in the areas of civil legal services, civil rights, poverty law or federal litigation; interest in litigating in state and federal court.

Recent law school graduates with prior experience in public interest law may be considered. The attorney will work with office staff and collaborate with other PLS staff throughout the state.

Competitive salary with outstanding benefit package including free health, dental, long term disability, and life insurance, as well as generous leave policies. PLS seeks to be a well-balanced, diverse organization and encourages people of color, women, and people with disabilities to apply. We have a serious need for staff who are fluent in Spanish. Please send cover letter, résumé, writing sample, and at least three (3) references by mail, fax or e-mail 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@plsnny.org](mailto:mmcguinness@plsnny.org) (Word or WP format).

The Sentencing Project in Washington, DC seeks a **Director of Advocacy**. The Project works for a fair and effective criminal justice system by promoting alternatives to incarceration, reforms in sentencing law and practice, and better use of community-based services and institutions. The Director of Advocacy will report to the Executive Director, work in conjunction with senior staff in research and communications on a day-to-day basis, be responsible for developing comprehensive, forward-looking recommendations for sentencing reform, promote the organization's recommendations among allied organizations and policy-makers, and coordinate efforts to encourage and facilitate community-based and "grassroots" advocacy. A more detailed description of the position and the organization is available on the web site: [www.sentencingproject.org](http://www.sentencingproject.org). Required: dynamic, organized and motivated individual with minimum of five years of experience as a lawyer and/or a sentencing or criminal justice advocate, who can work

### Don't Miss an Application Deadline!

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

with existing staff to expand upon and develop sets of specific recommendations for change in sentencing-related criminal law and practice; ability to promote recommendations effectively to different audiences and be a strong spokesperson; considerable knowledge of sentencing law, policies, and practices; proficiency in legal analysis; experience promoting an organization's positions to policy-makers and allied groups; excellent organizational skills and attention to detail; ability to meet deadlines, juggle multiple demands and work both independently and as part of an overall team effort. Salary commensurate with experience and duties, plus benefits. EEO; the office recruits without regard to gender, race, color, age, religion, ethnicity, sexual orientation, or disabilities. Qualified people are invited to apply by submitting cover letter and résumé showing relevant experience. Include names and contact information for at least three current professional references and one personal reference. Send to: The Sentencing Project, Attn: Search Box 3, 514 Tenth Street, NW, Suite 1000, Washington DC 20004.

Other current vacancies at The Sentencing Project, including **Operations Manager** and **Development Manager**, along with updates of the search progress, are available on the website. [www.sentencingproject.org](http://www.sentencingproject.org). Please, no telephone calls, fax or email applications. ☺

## Defense-Relevant Immigration News

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

### **US Supreme Court Rules that State DWI Offenses That Require Mere Accidental or Negligent Conduct Are Not "Crimes of Violence" for Immigration Purposes**

On Nov. 9, 2004, the US Supreme Court ruled unanimously that a Florida offense of driving under the influence and causing serious injury is not a "crime of violence" and therefore not an "aggravated felony"<sup>1</sup> for immigration purposes. See *Leocal v Ashcroft*, 125 SCt 377 (2004). Conviction of an aggravated felony generally results in the mandatory deportation of noncitizens from the US.

The Court held that the definition of "crime of violence" referenced in the immigration statute<sup>2</sup> requires a higher *mens rea*, or intent level, than the merely accidental or negligent conduct required in a DUI offense such as the Florida offense at issue in the case. A conviction for NY DWI under Vehicle and Traffic Law 1192, which does not have a *mens rea* component, therefore will not be deemed a crime of violence aggravated felony. *Leocal* also provides helpful guidance for defense attorneys representing noncitizens on other charges that require less than reckless conduct but that, before *Leocal*, arguably fell under the "crime of violence" definition. For example, a conviction under VTL 600, Leaving Scene of Incident Without Reporting, should not be deemed a crime of violence even though that offense may involve serious physical injury or even death.

*Leocal* does not address whether a state offense that requires proof of reckless conduct may qualify as a crime of violence. It therefore leaves undisturbed the 2nd Circuit's recent decision in *Jobson v Ashcroft*, 326 F3d 367

\* IDP provides backup support concerning criminal/immigration issues for defense attorneys, other immigrant advocates, and immigrants themselves. Marianne Yang is Director of the Project, and Benita Jain is a Staff Attorney. For hotline assistance, call the IDP at (212) 898-4132. IDP staffs the hotline Tuesdays and Thursdays from 1:30 to 4:30 p.m. and returns all messages left outside those times. IDP is located at 2 Washington Street, 7 North, New York NY 10004.

<sup>1</sup> The "aggravated felony" definition includes a "crime of violence" (as defined in 18 USC 16) with a prison sentence imposed of at least one year. See INA 101(a)(43).

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

(2d Cir. 2003), which held that NY second-degree manslaughter—recklessly causing death of another—is not a crime of violence. It may also leave undisturbed other 2nd Circuit and Board of Immigration Appeals (BIA) decisions that analyzed certain other state offenses under the crime of violence definition. See, e.g., *Chrzanoski v Ashcroft*, 327 F3d 188 (2d Cir. 2003)(CT simple assault statute identical in substance to NYPL 120.00(1) Assault 3rd is not crime of violence); *Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004)(conviction under subsection (1) or (2) of NY first degree manslaughter is crime of violence). For more information on *Jobson*, *Chrzanoski* and *Vargas-Sarmiento*, see *Backup Center REPORT*, Vol XVIII, No 3 [May-June 2003] p. 9 *et seq.* and Vol XIX, No 1 [Jan-Feb 2004] p. 11 *et seq.*

Practitioners should remember that although clients who end up in removal proceedings in any jurisdiction may avail themselves of the decision in *Leocal*, clients in removal proceedings outside the 2nd Circuit may be subjected to broader interpretations of the "crime of violence" definition than those set forth in *Jobson* and *Chrzanoski*, *supra*. Practitioners should also be aware that even if a conviction may not trigger the crime of violence aggravated felony ground of deportability, the same conviction might trigger another ground of removal, such as the "crime involving moral turpitude" ground.

For further guidance on whether a conviction under a particular New York statute may be a crime of violence aggravated felony in light of *Leocal*, practitioners are urged to call the IDP hotline at (212) 898-4132.

NYSDA, together with the National Association of Criminal Defense Lawyers, the Defending Immigrant Partnership, the American Civil Liberties Union, and the American Immigration Lawyers Association, submitted an *amici curiae* brief to the Supreme Court in support of Mr. Leocal. The law firm of Wilmer Cutler Pickering Hale and Dorr drafted and submitted the brief as *pro bono* counsel to *amici*.

### **"Operation Predator" Targets Noncitizen Residents Convicted of Sex-Related Offenses—How to Defend Against Charges to Minimize Immigration Consequences**

On Dec. 1, 2004, US Immigration and Customs Enforcement agents arrested dozens of New York City noncitizen residents as part of a continuing nation-wide enforcement agenda known as "Operation Predator," which targets for immigration detention and deportation noncitizens previously convicted of sex-related offenses. Scores of other New York residents were arrested as part of an earlier Operation Predator raid this past August. Even long-time lawful permanent residents (LPR or green-card holders) with one misdemeanor sex-related offense have fallen under Operation Predator's broad sweep.

In defending an LPR client against sex-related offenses

es, defense counsel should bear in mind that each sex-related charge must be analyzed under several distinct categories of deportability:

- Crime of violence with a prison sentence imposed of at least one year, thus constituting an “aggravated felony”;
- Rape, or sexual abuse of a minor, constituting an “aggravated felony” regardless of sentence imposed;
- Crime of domestic violence or crime against child, regardless of sentence imposed;
- Crime involving moral turpitude (CIMT), if it is (i) a New York Class A misdemeanor or higher offense level committed within five years of the client’s admission to the United States, or (ii) one of two or more CIMTs of any offense level committed at any time. Offenses in which sex-related conduct is a necessary element are almost always deemed CIMTs.

In general, LPRs would want most to avoid a conviction for an “aggravated felony,” because such a conviction triggers mandatory detention and deportation without the opportunity to apply for most forms of relief from deportation.

The following are some tips practitioners may follow to avoid the “crime of violence” or “rape or sexual abuse of a minor” categories of aggravated felony:

- Get young client “youthful offender” disposition. If client is a juvenile offender, remove case to family court. New York youthful offender dispositions and family court juvenile delinquency findings are not “convictions” for immigration purposes.<sup>3</sup>
- Avoid prison sentence imposed of one year or more. If your client is pleading to an offense that could be considered a “crime of violence” as defined in 18 USC 16, keeping the imposed sentence to under one year (*i.e.* 364 days or less) would avoid triggering the crime of violence “aggravated felony” category. It would NOT, however, work to avoid the “rape, or sexual abuse of a minor” category, which does not depend on sentence imposed and must be analyzed separately.
- Avoid a plea to an offense that will or might constitute rape, such as New York offenses of rape, sodomy, aggravated sexual abuse, or sexual misconduct;
- Avoid a plea to an offense that will or might constitute sexual abuse of a minor. The immigration statutes do not define what constitutes sex abuse of

a minor, but the following practices might minimize risk that a conviction be considered to fall under that category:

- Avoid a plea to any offense that has as required elements *both* sex-related conduct and that the victim be a minor (almost certainly sex abuse of minor).
- If the elements of the offense do not necessarily establish that the victim was a minor, try to keep out of the record of conviction any admission or other evidence that the victim was a minor.
- If the elements of the offense do not necessarily require that the offending conduct be sex-related, try to keep out of the record of conviction any admission or other evidence that the conduct was sex-related.
- Offer a plea to an appropriate non-sex offense of the same or higher level that would not be considered sex abuse of a minor. Keep in mind, however, that you would have to analyze that other offense for its own potential immigration consequences.

- The following example of potential alternative plea offers to avoid the “rape or sexual abuse of a minor” aggravated felony category comes from IDP’s *Representing Noncitizen Criminal Defendants in New York State*, 3rd ed., by Manuel Vargas:

Instead of pleading guilty to a Class D or E felony or Class A or B misdemeanor that might constitute rape or sexual abuse of a minor, your client could offer, if a factual basis exists, to plead to:

- unlawful imprisonment in the second or first degrees (PL 135.05 and 135.10) (Class A misdemeanor and Class E felony);
- coercion in the second or first degree (PL 135.60 and 135.65) (Class A misdemeanor and Class D felony);
- criminal trespass in the third, second, or first degrees (PL 140.10, 140.15, and 140.17) (Class B misdemeanor, Class A misdemeanor, and Class D felony);
- burglary in the third degree (Penal Law 140.20) (Class D felony);
- endangering the welfare of a child (Penal Law 260.10) (Class A misdemeanor); or
- unlawfully dealing with a child in the first degree (Penal Law 260.20) (Class A misdemeanor).

When possible, LPRs facing sex-related charges should also avoid convictions that would trigger the crime of domestic violence/crime against child and crime involving moral turpitude grounds of deportability.

<sup>3</sup> *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000).

The above practice tips assume that your client is an LPR. Immigration-sensitive defense approaches for non-citizens who are not LPRs are quite different. For additional advice on how to minimize immigration consequences for any noncitizen defendant, whether LPR or otherwise, facing sex-related charges, defense counsel may call the IDP hotline at (212)898-4132.

### ***New Regulations Issued on "212(c)" Waivers of Deportation for LPRs With Convictions Pre-April 1, 1997; Nunc Pro Tunc Relief Granted for Immigrants Improperly Denied 212(c) Relief Before Having Served Five Years for an Aggravated Felony***

The Department of Justice issued final regulations<sup>4</sup> implementing *INS v St. Cyr*, 533 US 289 (2001), a Supreme Court decision that held that lawful permanent residents (LPRs or greencardholders) who pled guilty or *nolo contendere* prior to Apr. 24, 1996 (or in some cases Apr. 1, 1997) could not be retroactively barred from applying for discretionary relief from deportation under former section 212(c) of the Immigration and Nationality Act (INA). The new regulations took effect Oct. 28, 2004.

Prior to 1996, most LPRs who had served less than five years for an "aggravated felony" conviction were allowed to file for 212(c) relief before an Immigration Judge in removal proceedings. This form of relief allowed many LPRs with significant ties to the US and other equities to remain in the country. In 1996, Congress repealed 212(c) relief and replaced it with a new form of relief called Cancellation of Removal. Cancellation is barred to anyone with an aggravated felony conviction, regardless of sentence or time served. The continued availability of 212(c) relief under *St. Cyr* therefore is critical for many LPRs with convictions that pre-date the 1996 changes in the law.

Under the new regulations, LPRs previously ordered deported must file special motions to reopen their proceedings by Apr. 26, 2005. Those LPRs, and others who only now are in deportation proceedings, may apply for 212(c) relief if they show that:

- they agreed to plead guilty or *nolo contendere* before Apr. 24, 1996, or, in some cases Apr. 1, 1997. The date the parties agreed to the plea, rather than the date that the plea is entered in court, is the relevant date;
- they have accrued seven years of lawful unrelinquished domicile in the US by the time a final order of deportation was issued or, if not previously ordered deported, by the time they apply for 212(c) relief; and

<sup>4</sup> See 69 Fed.Reg. 57826 (Sept. 28, 2004) (codified at 8 CFR Parts 1003, 1212, and 1240).

- they are otherwise eligible to apply for 212(c) relief as it existed at the time their plea was made.

The regulations also provide that the "five years served" bar to 212(c) relief will not be applied retroactively to persons who pled guilty to an aggravated felony before Nov. 29, 1990, the date that Congress enacted that "five years served" bar.

The regulations limit the scope of people who may apply for 212(c) relief in ways that were not dictated by *St. Cyr*. For example, under the regulations people who were convicted after trial are not eligible to seek 212(c) relief. Nor are people who are now outside the country after having been deported. Practitioners should bear in mind, however, that there may be arguments for availability of 212(c) relief despite these regulatory limitations. See, e.g., *Restrepo v McElroy*, 369 F3d 627 (2d Cir. 2004) (holding that an individual convicted after trial pre-1996 may be able to challenge the retroactive application of the repeal of 212(c) relief based on an argument that she may have subsequently foregone her right to apply for 212(c) relief "affirmatively," i.e. before being placed in deportation proceedings, in reliance on her ability to apply for that relief at a later date); *Wilson v Ashcroft*, No. 98-6880 (SDNY Sept. 3, 2004) (following *Restrepo* and further applying a categorical presumption of reliance-rather than requiring an individualized showing of reliance-by any immigrant who might have affirmatively applied for 212(c) relief when it was available but did not do so); *Ponnapula v Ashcroft*, 373 F3d 480 (3d Cir. 2004) (extending *St. Cyr* to people with trial convictions). For further discussion of *Restrepo* and *Ponnapula*, see *Backup Center REPORT*, Vol XIX, No 3 [June-July-Aug 2004] p. 9 *et seq.*

Finally, other issues related to the availability of 212(c) relief continue to be litigated in the courts. Most recently, on Dec. 17, 2004, in the consolidated cases *Falconi v INS* and *Edwards v INS*, \_\_\_F3d\_\_\_; 2004 WL 2915020 (2d Cir. Dec. 17, 2004), the 2nd Circuit granted equitable relief to two lawful permanent residents who were erroneously denied the opportunity to apply for a 212(c) waiver of deportation post-1996 for their pre-1996 plea convictions.

At the time Ms. Falconi and Mr. Edwards were first denied 212(c), they met all eligibility requirements for 212(c) relief, including the requirement that they not have served five years for an aggravated felony or felonies. Nevertheless, they were denied 212(c) relief at the agency level because that form of relief had been repealed by Congress in 1996. By the time their cases were reopened pursuant to 2nd Circuit and Supreme Court decisions prohibiting retroactive application of the statute repealing 212(c), they had served five years and for that reason were again denied 212(c) relief. The 2nd Circuit ruled that because the initial denial was error, "Petitioners' applications for §212(c) relief should be judged . . . *nunc pro tunc*, that is, as if the Petitioners had not yet accrued five years' imprisonment." *Edwards*, 2004 WL at \*1.

Notably, the Court indicated a willingness to use equitable remedies not only to correct inadvertent errors, but also to correct erroneous decisions that “expressed exactly the intention of the [agency] at the time it was made.” *Id.* at \*7. The Court stated that “[f]or more than sixty years, the Attorney General and the Board of Immigration Appeals have recognized its importance in mitigating potentially harsh results of the immigration laws. . . . It is . . . beyond question that an award of nunc pro tunc may, in an appropriate circumstance, be granted as a means of rectifying error in immigration proceedings.” *Id.*

IDP recruited the law firm of Wilmer Cutler Pickering Hale and Dorr to represent Ms. Falconi at the 2nd Circuit.

For more information on the new *St. Cyr* regulations and the availability of 212(c) relief more generally, call the IDP hotline. See also the American Immigration Law Foundation's Practice Advisory, dated Oct. 19, 2004, available at [www.aifl.org/lac/lac\\_pa\\_101904.pdf](http://www.aifl.org/lac/lac_pa_101904.pdf).

**The Bottom Line:** Many noncitizen criminal defendants with pre-1996 criminal convictions, including some who have already been ordered deported, may now be eligible for 212(c) relief from deportation. Defense counsel should bear this in mind as they analyze the potential immigration consequences of current criminal charges. In addition, federal defendants facing charges of illegal reentry after deportation may have as a defense that their initial deportation was unlawful because they were wrongfully denied the opportunity to apply for 212(c) relief in the underlying deportation proceedings.<sup>5</sup>

### ***DMV Policy Continues to Result in Criminal Charges Lodged Against Noncitizens***

As more fully reported in the last issue of the *REPORT*, the New York State Department of Motor Vehicles (DMV) implemented a policy earlier this year to check whether social security numbers submitted by driver's license applicants matched their names. As a result, many noncitizen New York residents have been criminally prosecuted in connection with their alleged submission to the DMV of false social security numbers or possession of false social security cards. Others remain at risk of future prosecution. For practice tips on how to defend your noncitizen client against these DMV-related criminal

<sup>5</sup> See, e.g., *US v Copeland*, 376 F3d 61 (2d Cir. 2004) (immigration judge's failure to inform immigrant-respondent of right to seek 212(c) relief, if prejudicial to the immigrant, renders deportation proceedings fundamentally unfair and thus possibly subject to collateral attack in federal illegal reentry cases); *US v Sosa*, 387 F3d 131 (2d Cir. 2004) (same); *US v Perez*, 330 F3d 97 (2d Cir. 2003) (upholding dismissal of indictment charging illegal reentry after deportation in a case where defendant's immigration lawyer in the prior deportation proceedings had failed to file an application for relief that might have prevented deportation).

charges, see *Backup Center REPORT*, Vol XIX, No 3 [June-July-Aug 2004] p. 9 *et seq.*

### ***Continuation of the National Defending Immigrants Partnership***

Under renewed funding for 2005-06, IDP will continue its work as part of the Defending Immigrants Partnership (DIP), a joint initiative among IDP, the Immigrant Legal Resource Center in California, the National Legal Aid and Defender Association, and the National Immigration Project of the National Lawyers Guild. Launched in 2002, DIP offers information, education, technical assistance and legal backup to state and federal public defenders, appointed counsel, and private defense counsel on the immigration consequences of crime. DIP's initial mandate was to address the law and practices in California, Florida, Illinois, New Jersey, New York, and Texas—the six most immigrant populous states, as well as to work with the federal defender programs across the country. Going forward, DIP will continue its efforts in those jurisdictions but also expand its work to additional states. DIP believes that the best way to ensure that immigrant defendants have informed, effective counsel is for the defender community to embrace the issue of immigration consequences as its own.

### ***Updated Removal Defense Checklist in Criminal Charge Cases Available on NYSDA Website.***

IDP has updated its Removal Defense Checklist in Criminal Charge Cases to include relevant new legal developments over the past several months. The checklist provides a fairly exhaustive list of removal defense arguments and strategies, complete with legal citations, to assist lawyers counseling or representing non-citizens in removal proceedings based on criminal charges. The checklist is also a useful tool for defense attorneys who are trying to weigh the risk of various plea agreements. To access or download this resource material (now updated through Oct. 15, 2004), visit NYSDA's website at [www.nysda.org](http://www.nysda.org) and click on Immigrant Defense Project Resources. ⚡

## ***Defender News*** (continued from page 8)

Saratoga Springs City Court Douglas C. Mills was censured by the Commission on Dec. 6, 2004, for improperly jailing a college student for several days after holding him in contempt for interrupting during a post-acquittal lecture and for causing a courtroom spectator to be arrested for using an expletive to his spouse in the courthouse parking lot. (*Times Union* [online], 12/10/04.)

Information about the State Commission on Judicial Conduct, including its published decisions, is available through a link on NYSDA's web site, or directly at [www.scjc.state.ny.us](http://www.scjc.state.ny.us). ⚡

# CONFERENCES & SEMINARS

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** 2005 Advanced Criminal Law Seminar  
**Dates:** January 23–28, 2005  
**Place:** Aspen, CO  
**Contact:** NACDL: tel (202)872-8600 x 232; fax (202)872-8690; e-mail [assist@nacdl.org](mailto:assist@nacdl.org); web site [www.criminaljustice.org](http://www.criminaljustice.org)

**Sponsor:** Minnesota Society for Criminal Justice  
**Theme:** 20th Annual Getting Tough on DWI: The Defense  
**Dates:** February 17–20, 2005  
**Place:** Las Vegas, NV  
**Contact:** Becky Harris or Courtney Laufenberg: (612)321-0122; e-mail [bharris@eventlab.net](mailto:bharris@eventlab.net) or [claufenberg@eventlab.net](mailto:claufenberg@eventlab.net)

**Sponsor:** California Public Defenders Association and California Attorneys for Criminal Justice  
**Theme:** 2005 Capital Case Defense Seminar: Executing Justice Not People  
**Dates:** February 18–21, 2005  
**Place:** Monterey, CA  
**Contact:** CACJ/CPDA Capital Case Defense Seminar: (916)448-8868; fax (916)448-8965

**Sponsor:** National Institute for Trial Advocacy  
**Theme:** Building Trial Skills Mid-Atlantic Regional  
**Dates:** March 5–11, 2005  
**Place:** Philadelphia, PA  
**Contact:** NITA: (800)225-6482; fax (574)271-835; e-mail [nita.1@nd.edu](mailto:nita.1@nd.edu); web site [www.nita.org](http://www.nita.org)

**Sponsor:** **New York State Defenders Association**  
**Theme:** **19th Annual New York Metropolitan Trainer**  
**Date:** **March 12, 2005**  
**Place:** **New York City**  
**Contact:** **NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail [info@nysda.org](mailto:info@nysda.org); web site [www.nysda.org](http://www.nysda.org)**

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** Life in the Balance 2005: A Capital Case Training for Mitigation Specialists, Defense Investigators and Defense Attorneys  
**Dates:** March 19–22, 2005  
**Place:** New Orleans, LA  
**Contact:** NLADA: tel: (202)452-0620; fax (202)872-1031; web site [www.nlada.org](http://www.nlada.org)

**Sponsor:** Trial Lawyers College  
**Theme:** Death Penalty Seminar  
**Dates:** June 5–12, 2005  
**Place:** Dubois, WY  
**Contact:** L. Joane Garcia-Colson: (760)322-3783; e-mail [info@triallawyerscollege.com](mailto:info@triallawyerscollege.com); web site [www.triallawyerscollege.com](http://www.triallawyerscollege.com)

**Sponsor:** National Criminal Defense College  
**Theme:** Trial Practice Institute  
**Dates:** June 12–25, 2005  
July 17–30, 2005  
**Place:** Macon, GA  
**Contact:** NCDC: (478)746-4151; web site [www.ncdc.net](http://www.ncdc.net)

**Sponsor:** **New York State Defenders Association**  
**Theme:** **38th Annual Meeting and Conference**  
**Dates:** **July 24–26, 2005**  
**Place:** **Saratoga Springs, NY**  
**Contact:** **NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail [info@nysda.org](mailto:info@nysda.org); web site [www.nysda.org](http://www.nysda.org)**

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

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

## A Summary of the Rockefeller Drug Law Reform Legislation

By Al O'Connor\*

[Ed. Note: A summary of other 2004 legislation will appear in the next issue of the REPORT.]

### Introduction

The Rockefeller Drug Law reform bill signed by Governor Pataki on December 14 offers relief to some of the untold thousands of people who have been victimized by these unjust laws over the past thirty years. But it does not fundamentally change the State's approach to drug addiction and drug crime. First-time offenders convicted of Class B street-level sales still face mandatory imprisonment, and those with a prior felony conviction will still only manage to escape prison with the consent of a prosecutor. The reform law includes no new treatment alternatives to New York's 70 crowded prisons.

What the law does is extend the hope of decreased sentences to approximately 450 inmates who are serving 15 to 25 years to life for Class A-I felony convictions. They are now eligible for discretionary resentencing under a new determinate scheme for all drug offenses. Inmates previously convicted of Class A-II through Class E level felonies are not eligible for resentencing, but may earn earlier parole release consideration and shortened parole terms. The new sentencing law does not alter mandatory imprisonment requirements: first time offenders with Class C, D and E level convictions continue to be eligible for definite sentences, probation and split sentences as under the old law. However, all state prison commitments for drug and marijuana offenses will now be determinate terms with post-release supervision, and the opportunity to earn up to 2/7 off the term in good time and merit time credits. In addition, sentencing judges now have authority to place defendants directly into prison-based drug treatment programs (CASAT). Successful participation in CASAT could result in work release up to 2 years prior to an inmate's earliest conditional release date.

Here is a summary of the legislation.

### Class A Drug Offenses

#### Weights Doubled for Possession Offenses

The bill doubles the weight threshold for the Class A-I felony of criminal possession of a controlled substance in the first degree (Penal Law § 220.21) from four to eight

ounces, and for the Class A-II felony of criminal possession of a controlled substance in the second degree (Penal Law § 220.18) from two to four ounces. But the weight thresholds for sale offenses remain the same. These changes became effective on Dec. 14, 2004 and should therefore apply to pending cases. If the weight is less than the newly prescribed amounts, pending A-I and A-II possession indictments should be reduced accordingly.

### Revised Sentencing Scheme

The reform bill calls for determinate sentences for all drug convictions that result in imprisonment. For offenses committed on or after Jan. 13, 2005, and perhaps crimes committed earlier (see last section below), Class A felony convictions will be punishable as follows.

<u>Class A-I Drug Offenses</u>	<u>Determinate Sentence Range</u>
First Felony Offense	Between 8 and 20 years
Second Felony (prior non-violent)	Between 12 and 24 years
Second Felony (prior violent)	Between 15 and 30 years
Plus 5 years post-release supervision (all cases)	

<u>Class A-II Drug Offenses</u>	<u>Determinate Sentence Range</u>
First Felony Offense	Between 3 and 10 years
Second Felony (prior non-violent)	Between 6 and 14 years
Second Felony (prior violent)	Between 8 and 17 years
Plus 5 years post-release supervision (all cases)	

### Class A-I Felony Convictions—Right to Petition For Resentencing

Inmates currently serving A-I felony sentences for drug offenses may petition for resentencing under the new determinate scheme beginning Jan. 13, 2005. The bill grants these inmates a right to assigned counsel to prepare the resentencing application and to advocate for a determinate sentence under the new scheme. Counsel fees for such representation will be a county charge. Whenever possible, the application will be assigned to the original sentencing judge. Otherwise, it will be randomly assigned to a new judge.

The court "may consider any facts or circumstances relevant to the imposition of a new sentence" including the inmate's institutional record. Because the bill provides that no new pre-sentence report shall be ordered, it will fall to defense counsel to independently investigate and present facts supporting resentencing. The court "shall offer an opportunity for a hearing and bring the applicant before it." The court may also conduct a hearing to "determine any controverted issue of fact relevant to the issue of sentencing." Unless "substantial justice dictates" that the application be denied, the court must offer the inmate

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a determinate sentence as an alternative to the 15 to 25 year to life sentence he or she is now serving. The inmate has the option to accept or reject the new determinate sentence. But in either case, he or she has the right to appeal from a determinate sentence so offered or imposed on the ground that it is harsh and excessive.

There are reportedly 446 inmates who are eligible for resentencing under this reform. As of Sept. 30, 2004, they were serving sentences from the city of New York and 27 counties (Albany, Broome, Cayuga, Chemung, Columbia, Dutchess, Erie, Fulton, Jefferson, Monroe, Nassau, Oneida, Onondaga, Ontario, Orange, Putnam, Rockland, Schenectady, Seneca, Steuben, Suffolk, Sullivan, Tioga, Tompkins, Ulster, Wayne, Westchester).

### **Revised Sentencing Scheme—Class B through E Level Drug and Marijuana Offenses**

Lower level felony drug and marijuana offenses will also be punishable by determinate sentence when the court commits the defendant to state prison. For offenses committed on or after Jan. 13, 2005, and perhaps earlier (see last section below), the new scheme will be as follows.

	<b>Determinate Sentence Range (years)</b>
<b>First Felony Offender</b>	
Class B	Between 1 and 9
Class B (sale in or near school grounds)	Between 2 and 9
Class C (imprisonment not mandatory)	Between 1 and 5½
Class D (imprisonment not mandatory)	Between 1 and 2½
Class E (imprisonment not mandatory)	Between 1 and 1½
<u>Plus post-release supervision</u>	
Class B or C—Between 1 and 2 years	
Class D or E—1 year	
<b>Second Felony Offender (prior non-violent)</b>	
Class B	Between 3½ and 12 years
Class C	Between 2 and 8 years
Class D	Between 1½ and 4 years
Class E	Between 1½ and 2 years
<u>Plus post-release supervision</u>	
Class B or C—Between 1½ and 3 years	
Class D or E—Between 1 and 2 years	
<b>Second Felony Offender (prior violent)</b>	
Class B	Between 6 and 15 years
Class C	Between 3½ and 9 years
Class D	Between 2½ and 4½ years
Class E	Between 2 and 2½ years
<u>Plus post-release supervision</u>	
Class B or C—Between 1½ and 3 years	
Class D or E—Between 1 and 2 years	

### **Good Time and Merit Time Reductions**

**Determinate Sentences**—All drug offenders serving determinate sentences will be eligible for a standard 1/7th reduction of the term as good time. They will also be eligible for an additional 1/7th reduction as merit time. To earn merit time, drug offenders will be required to participate in assigned work and treatment programs, and obtain a.) a GED, or b.) an alcohol and substance abuse certificate, or c.) a vocational trade certificate, or d.) perform 400 hours in a community work crew.

**Indeterminate Sentences**—Class A-I drug offenders serving indeterminate sentences may continue to earn up to 1/3 off their minimum terms as merit time, and Class A-II through E drug offenders may continue to earn up to 1/6th off their minimum terms. The bill includes a bonus 1/6th merit time allowance for Class A-II through E felony offenders who committed the offense prior to Jan. 13, 2005, and received an indeterminate term. By participating in two or more of the above-listed programs, they will be eligible for an additional 1/6th merit time allowance, or a total of 1/3 off their minimum terms.

### **Early Termination of Parole—Indeterminate Sentences**

The bill provides for mandatory early termination of parole after three years of unrevoked supervision for persons serving indeterminate sentences for Class A-I and A-II felony drug offenses, and after two years for all other drug offenses. This section of the bill becomes effective on Feb. 12, 2005.

### **Expanded CASAT and Judicial Placements**

Under current law, certain non-violent inmates are eligible for the Comprehensive Alcohol and Substance Abuse Treatment program (CASAT) when they are within two years of initial parole eligibility or conditional release (indeterminate and determinate sentences). After six months of prison-based treatment, they are eligible for work release and community-based treatment for an additional 18 months. The Department of Correctional Services (DOCS) selects inmates for participation in the CASAT program.

For drug offenses, the reform bill advances the eligibility date to inmates within 2 years and 6 months of their anticipated parole or conditional release date (giving advance credit for available good time and merit time credits). Second felony Class B drug offenders serving determinate sentences, however, must serve a minimum of 18 months (jail time and prison time) before transfer to a residential treatment program. The bill also authorizes

judges to select defendants at the time of sentence for future participation in the CASAT program, a change that become effective on Dec. 14, 2004.

## **SHOCK and Willard Drug Treatment Program**

No real substantive changes were made to the eligibility criteria for SHOCK. The statute (Correction Law § 865) has been amended to accommodate the new determinate sentencing scheme. Drug offenders with determinate sentences, who are under 40 and have never been previously committed to DOCS, and who will become eligible for conditional release within 3 years may participate in SHOCK. However, second felony Class B drug offenders are ineligible for the program, even if they are within the three-year time frame at the time of DOCS reception. (The new minimum determinate sentence in this category is 3½ years.)

Under the new determinate sentencing scheme, the Willard program will continue to be available to clients convicted of Class E felony drug offenses and, with the consent of the district attorney, Class D felony drug offenses. The law has been clarified to eliminate the confusing restriction on Willard eligibility for defendants who are “subject to an undischarged term of imprisonment.” This language was never intended to mean defendants who were on parole at the time of the instant offense. The amended statute makes clear that only those defendants who are in state prison or “awaiting delivery” to DOCS for another offense are ineligible for Willard placement.

These changes become effective Jan. 13, 2005 and apply to offenses committed on or after that date.

## **Lifetime Probation Sentences for Material Assistance**

The period of probation supervision for Class B first felony offenders who offer material assistance in the prosecution of drug offenses has been reduced to 25 years (from life). For Class A-II and second felony Class B offenders the probation term remains life. This change goes into effect on Jan. 13, 2005.

## **Plea Restrictions**

CPL § 220.10 (5) (a)(ii) has been amended to authorize a plea to a Class B drug offense from an indictment charging a Class A-I drug offense. This provision became effective on Dec. 27, 2004. (The bill has an apparent drafting error and actually says the thirteenth, not the thirtieth day after the Governor’s signature.)

## **Effective Date of New Sentencing Scheme**

The language and structure of the reform bill suggests that determinate sentences will be available only for offenses committed on or after the effective date of the new sentencing provisions, 30 days after the Governor’s signature, or Jan. 13, 2005. These changes are included in sections 35 and 36 of the bill, which become effective “on the thirtieth day after it shall have become a law . . . and shall apply to crimes committed on or after the effective date thereof.” Moreover, the bill includes provisions specifically designed to benefit defendants whose crimes were committed prior to that date and who receive indeterminate terms. For example, Class A-I offenders will automatically be eligible for resentencing on Jan. 13, 2005. All other drug offenders will be eligible to earn merit time equal to 1/3 of their minimum indeterminate terms, as well as early termination of parole after two or three years of unrevoked supervision.

On the other hand, to the extent that a current client may substantially benefit from the new determinate sentencing options, you may wish to cite *People v Behlog*, 74 NY2d 237 (1989), as authority for applying the new scheme to offenses committed prior to Jan. 13, 2005. In *Behlog*, the Court of Appeals held that 1985 amendments increasing the dollar amounts of the larceny statutes were “ameliorative” and could be applied to offenses committed prior to the effective date of the legislation. “The rationale for this exception is that by mitigating the punishment the Legislature is necessarily presumed – absent some evidence to the contrary – to have determined that the lesser penalty sufficiently serves the legitimate demands of the criminal law. Imposing a harsher penalty in such circumstances would serve no valid penological purpose” (at 240). ⚖

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## New Sentencing Chart for Drug Offenses Under Rockefeller Drug Law Reform

Class Felony	Determinate Sentence Term	Post-Release Supervision	Probation Permitted	Alternative Definite Sentence Permitted	Y.O. Permitted	Attempt	Parole Supervision Sentence Permitted	Shock Permitted	CASAT Sentence Permitted
<b>A-I First Offense</b>	8 - 20	5	No	No	No	A-I	No	No	Yes
<b>A-I Prior Non-Violent</b>	12 - 24	5	No	No	No	A-I	No	No	Yes
<b>A-I Prior Violent</b>	15 - 30	5	No	No	No	A-I	No	No	Yes
<b>A-II First Offense</b>	3 - 10	5	Yes/Life <sup>1</sup>	No	No	A-II	No	Yes <sup>3</sup>	Yes
<b>A-II Prior Non-Violent</b>	6 - 14	5	Yes/Life <sup>1</sup>	No	No	A-II	No	No	Yes
<b>A-II Prior Violent</b>	8 - 17	5	Yes/Life <sup>1</sup>	No	No	A-II	No	No	Yes
<b>B First Offense</b>	1 - 9	1 - 2	Yes/25 <sup>1</sup>	No	Yes	C	No	Yes <sup>3</sup>	Yes
<b>B Sale Near School</b>	2 - 9	1 - 2	Yes/25 <sup>1</sup>	No	Yes	C	No	Yes <sup>3</sup>	Yes
<b>B Prior Non-Violent</b>	3 ½ - 12	1 ½ - 3	Yes/Life <sup>1</sup>	No	NO	C	No	No	Yes
<b>B Prior Violent</b>	6-15	1 ½ - 3	Yes/Life <sup>1</sup>	No	NO	C	No	No	Yes
<b>C First Offense</b>	1 - 5 ½	1 - 2	Yes/5	Yes 1 or less	Yes	D	No	Yes	Yes
<b>C Prior Non-Violent</b>	2 - 8	1 ½ - 3	NO	NO	NO	D	No	Yes <sup>3</sup>	Yes
<b>C Prior Violent</b>	3 ½ - 9	1 ½ - 3	NO	NO	NO	D	No	No	Yes
<b>D First Offense</b>	1 - 2 ½	1	Yes/5	Yes 1 or less	Yes	E	No	Yes	Yes
<b>D Prior Non-Violent</b>	1 ½ - 4	1 - 2	NO	NO	NO	E	Yes <sup>2</sup>	Yes <sup>3</sup>	Yes
<b>D Prior Violent</b>	2 ½ - 4 ½	1 - 2	NO	NO	NO	E	No	No	Yes
<b>E First Offense</b>	1 - 1 ½	1	Yes/5	Yes 1 or less	Yes	A misd.	No	Yes	Yes
<b>E Prior Non-Violent</b>	1 ½ - 2	1 - 2	NO	NO	NO	A misd.	Yes	Yes <sup>3</sup>	Yes
<b>E Prior Violent</b>	2 - 2 ½	1 - 2	NO	NO	NO	A misd.	No	No	Yes

<sup>1</sup> Requires recommendation of DA and material assistance in prosecution of drug offense.

<sup>2</sup> Requires consent of DA.

<sup>3</sup> Cannot have previously served time in state prison. Prior felony cannot have been for any offense listed in Correction Law §865(1). Only if less than 3 years to conditional release.

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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

Aliens (Deportation) (General) ALE; 21(10) (30)

**Leocal v Ashcroft, 543 US \_\_; 125 Sct 377 (2004)**

The petitioner, a Haitian citizen, was a lawful permanent resident of the United States when, in Florida, he pled guilty to driving under the influence of alcohol (DUI) and causing serious bodily injury. He was sentenced to over two years in prison. The Board of Immigration Appeals (BIA) ordered him deported because the offense was a "crime of violence," making it an "aggravated felony." INA 237(a). The order was affirmed.

**Holding:** The Florida DUI conviction, which lacked a *mens rea* requirement, was not a crime of violence. Therefore, it was not an aggravated felony. See 18 USC 1101(a)(43)(F). A "crime of violence" could be either an offense that included the "use, attempted use, or threatened use of physical force against the person or property of another" or a felony that involved a substantial risk that physical force may be used while committing the offense. See 18 USC 16. The Florida DUI statute required proof of causation, operating a vehicle under the influence and causing serious bodily injury to another, but not *mens rea*. Florida Stat. 316.193(3) (c)(2); *State v Hubbard*, 751 So2d 552, 562-564 (FL 1999). Attempted or threatened use of force, required by 18 USC 16, were not elements of the Florida DUI. The use of physical force required a higher degree of intent than negligent or accidental behavior. See *US v Trinidad-Aquino*, 259 F3d, 1140, 1145. Judgment reversed.

Death Penalty (Penalty Phase) DEP; 100(120)

Sentencing (Mitigation) SEN; 345(50)

**Smith v Texas, 543 US \_\_, 125 Sct 400 (2004)**

During the penalty phase of the petitioner's capital murder trial, the court gave a nullification instruction directing the jury to credit mitigation evidence only by negating affirmative responses to two special issues relating to deliberateness and future dangerousness. The jury heard about the petitioner's low IQ, learning disabilities, youth, and family background, and a drug-addicted father involved in gang violence. Nonetheless, they answered both special issues in the affirmative. The peti-

tioner's death sentence was affirmed by the Texas Court of Criminal Appeals.

**Holding:** The court's nullification charge violated the 8th Amendment by preventing the jury from giving effect to the petitioner's relevant mitigation evidence. See *Penry v Johnson*, 532 US 782 (2001) (*Penry II*); *Tennard v Dretke*, 542 US \_\_, 159 LEd2d 384, 124 Sct 2562 (2004). Jurors were compelled to return a verdict on a form without any reference to mitigating evidence. The supplemental oral instruction required the jury to provide false answers to the questions of deliberateness and future dangerousness if they credited the mitigation evidence. Judgment reversed.

**Dissent:** [Scalia, J] The nullification instruction was sufficient to allow consideration of mitigating evidence. See *Walton v Arizona*, 497 US 639, 673 (1990).

Arrest (Probable Cause)

ARR; 35(35)

**Devenpeck v Alford, No. 03-710, 12/13/2004, 543 US \_\_**

The respondent stopped to help stranded passengers on a state highway. His car flashed "wig-wag" headlights, and he immediately left the scene when one petitioner, a state patrol officer, passed by. The officer pulled the respondent over, believing that he was impersonating a police officer, and saw a police scanner and handcuffs in the respondent's car. The officer found the respondent's answers to questions about his activities untruthful and evasive. The petitioner's supervisor noticed an activated tape recorder on the car seat. Charges that the respondent violated the Washington Privacy Act, Wash. Rev Code 9.73.030 (1994) and others were dismissed by the trial court. The respondent filed a 1983 action and a state complaint for unlawful arrest and imprisonment, claiming that the petitioners did not have probable cause to arrest him. Judgment for the petitioners was reversed on appeal because tape recording police officers during a traffic stop was not a crime. The argument that probable cause existed to arrest the respondent for impersonating a law-enforcement officer was rejected because that offense was not closely related to the Privacy Act arrest.

**Holding:** Probable cause need not be based on facts "closely related" to the offense originally suspected by the police. The closely related offense rule focused on police motivation and subjective state of mind, which are irrelevant to probable cause. *Whren v US*, 517 US 806, 812-813 (1996). The rule led to arbitrary results, and undermined the practice of informing an arrestee of the reason for the arrest. The outcome of a warrantless arrest predicated on probable cause should not depend on which of several possible criminal charges, impersonating a police officer or obstructing justice, the officers chose to relate to the respondent. The court below did not consider whether there was probable cause to arrest on impersonating an officer. Judgment reversed, matter remanded.

**US Supreme Court** *continued*

**Attorney/Client Relationship (General)** ACR; 51(20)

**Counsel (Competence/Effective Assistance/Advocacy) (Duties)** COU; 95(15) (20)

**Florida v Nixon, No. 03-931, 12/13/2004, 543 US \_\_**

The respondent, charged with capital murder, gave a detailed confession to police. Several witnesses who had observed him with the decedent corroborated details of his statement. Defense counsel concluded that the evidence of guilt was overwhelming, and decided that conceding guilt would provide the best chance for obtaining a life sentence. The respondent was unresponsive to his lawyer’s advice and absented himself from most of the trial. The attorney conceded his client’s guilt, but did make objections to prejudicial evidence, cross-examine witnesses, and challenge portions of the jury charge. He asked the jury to focus on mitigation, and during the penalty phase presented expert evidence about the respondent’s mental health problems. The respondent’s death sentence was reversed by the state court on appeal.

**Holding:** Defense counsel’s strategy to concede guilt in a capital case without the express consent of the defendant was not automatically ineffective assistance. The respondent had the ultimate power to decide whether or not to plead guilty. *Jones v Barnes*, 463 US 745, 751 (1983). The attorney was obligated to consult with his client about it. *Boykin v Alabama*, 395 US 238, 242 (1969). However, the lawyer’s concession of guilt was not equivalent to a guilty plea. The respondent did not give up any of the rights associated with a guilty plea, and the prosecution was still required to make its case. Due to the respondent’s resistance to communicating with his lawyer, the lawyer did not have to obtain express consent before proceeding. Since counsel did not abandon his adversarial role, presumption of prejudice did not apply. *US v Cronin*, 466 US 648 (1984). The strategy had to be shown to be unreasonable and prejudicial to the defense. *Strickland v Washington*, 466 US 668 (1984). Judgment reversed.

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

**Constitutional Law (General) (United States Generally)** CON; 82(20) (55)

**Kowalski v Tesmer, No. 03-407, 12/13/2004, 543 US \_\_**

Michigan, which amended its constitution to do away with appeals by right in guilty plea cases, passed a statute prohibiting appointment of appellate counsel for indigent defendants who pled guilty. Mich. Comp. Laws Ann. 770.3a. Before it became effective, the respondents, two lawyers and three indigent defendants, brought a 42 USC 1983 action alleging violations of due process and equal

protection. The federal district court found the statute unconstitutional and enjoined denial of counsel to indigent defendants seeking to appeal. On appeal, the attorneys were found to have standing, but the indigent defendants were dismissed as plaintiffs under the abstention doctrine.

**Holding:** The attorneys could not assert the rights of hypothetical third parties, future indigent defendants, to challenge the constitutionality of a state statute curtailing appointment of appellate counsel. *See Warth v Seldin*, 422 US 490, 498 (1975). Third party standing requires the party asserting the right to have a close relation to the person possessing the right, and the existence of a hindrance preventing that person from protecting the right. *Powers v Ohio*, 499 US 400, 411 (1991). Future attorney-client relationships did not meet this test. *See Caplin & Drysdale, Chartered v US*, 491 US 617 (1989) (existing attorney-client relationship conferred standing in given circumstances). No hindrance was shown to *pro se* defendants challenging the statute in state or federal court. Judgment reversed.

**Concurring:** [Thomas, J] Third party standing rules are overbroad.

**Dissent:** [Ginsburg, J] The respondents showed injury in fact by the economic loss they, as assigned appellate attorneys, would suffer. *See Singleton v Wulff*, 428 US 106, 112 (1976). They also had a sufficiently close relation to those directly affected. *See eg Carey v Population Services Int’l.*, 431 US 678, 683 (1977). *Pro se* defendants face a hindrance in raising challenges to the statutes, due to their low literacy levels, insufficient education, lack of resources, and complex appellate procedures. *Evitts v Lucey*, 469 US 387, 393 (1985).

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

**Police (Misconduct)** POL; 287(32)

**Brosseau v Haugen, No. 03-1261, 12/13/2004, 543 US \_\_**

The petitioner, a state police officer, shot the respondent in the back as he fled in a jeep after ignoring the officer’s orders to get out of the vehicle. She believed he was a danger to the officers pursuing on foot and citizens in the street. The respondent was eventually convicted of the crime of eluding. He filed a 42 USC 1983 action claiming that the petitioner used unconstitutionally excessive force. The district court’s grant of summary judgment to the petitioner based on qualified immunity was reversed on appeal because the petitioner was found to have used excessive force.

**Holding:** No view is expressed as to the correctness of the decision on the constitutional question in this holding that the court below was wrong on the issue of qualified immunity. Police are entitled to immunity for decisions that, while unconstitutional, were reasonable misappre-

**US Supreme Court** *continued*

hensions of what was lawful. *See Saucier v Katz*, 533 US 194, 201 (2001). The petitioner's decision to fire her gun at a fleeing suspect unresponsive to police commands and a risk to others fell within the gray area between excessive and acceptable force, but were not clearly established constitutional violations. *See eg Smith v Freland*, 954 F2d 343 (CA6 1992). She is entitled to immunity. Judgment reversed.

**Concurring:** [Breyer, J] The requirement that constitutional violations be resolved before reaching qualified immunity issue is unduly burdensome.

**Dissent:** [Stevens, J] It was objectively unreasonable for the petitioner to use deadly force to prevent the respondent's escape, since he made no threats with a weapon, he was suspected of a nonviolent crime, and the officer was not acting in self-defense. The reasonableness of the petitioner's conduct to forestall the consequences of the respondent's flight for purposes of determining immunity was a fact specific question for the jury. *See Hunter v Bryant*, 502 US 224, 229 (1991).

**New York State Court of Appeals**

**Sentencing (Addiction, Effect on Sentencing) (Hearing)** SEN; 345(2) (42)

**People v Valencia, No. 124, 10/14/2004**

The defendant pled guilty to felony drug sale on the condition that if he successfully completed a drug treatment program, he would be permitted to withdraw his guilty plea and plead guilty to a misdemeanor possession charge and receive time served. Failure to finish the program or comply with its rules, or the commission of new crimes would violate the agreement, and the defendant would be sentenced as a second felony offender. Based on allegations that the defendant left four different treatment programs, the court made an inquiry. After finding the defendant in breach of the plea agreement, the court sentenced him to five to ten years, which was affirmed.

**Holding:** The sentencing court's inquiry was sufficient under due process to find that the defendant violated the drug treatment condition of his plea agreement. *People v Outley*, 80 NY2d 702 (1993). Since the defendant admitted committing the acts that breached the plea agreement, an evidentiary hearing was unnecessary. *Torres v Barbary*, 340 F3d 63, 71 (2d Cir 2003). Order affirmed.

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

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

**Matter of Bauer, No. 125, 10/14/2004**

The petitioner, a Troy City Court judge, sought review of a State Commission on Judicial Conduct finding that he had violated the rights of criminal defendants by not advising them at arraignment of their right to counsel, sentencing them in excess of the legal maximum, setting excessive bails, coercing guilty pleas, and convicting defendants without a trial or guilty plea.

**Holding:** The Commission found the petitioner violated several rules of judicial conduct, including: 22 NYCRR 100.1; 22 NYCRR 100.2; 22 NYCRR 100.3 (B)(1); and 22 NYCRR 100.3 (B)(6). Consistently incarcerating indigent criminal defendants in violation of their rights constituted serious judicial misconduct. The petitioner did not have discretion to only selectively advise defendants about their right to counsel (*People v Felder*, 47 NY2d 287, 295 [1979]), and other rights at arraignment, based on his evaluation of the defendants' experiences. *See CPL 170.10 (3); People v Witenski*, 15 NY2d 392 (1965). Setting shockingly high bail without regard to the statutory standards where the offense did not carry a jail penalty, remanding defendants when no legally sufficient accusatory instruments had been filed, or compelling indigent defendants to remain in jail until the maximum time for the offense or speedy trial expired were abuses of the bail statute. CPL 510.30. In addition, the petitioner imposed excessive sentences and convicted some defendants without pleas of guilty or findings of guilt. This pattern of abuse, failure to uphold and follow the law, and lack of contrition were supported by the record, and justified removal of the petitioner from the bench. Sanction accepted.

**Dissent:** [Read, J] Regularly setting high bail, a discretionary act, did not support a finding of judicial misconduct. Censure was the proper remedy for the failures to fulfill the obligations of CPL 170.10.

**Dissent:** [R.S. Smith, J] The net effect of the petitioner's misconduct, which was wrong but not deliberate, did not rise to the level of seriousness warranting removal.

**Insanity (Post-commitment Actions)** ISY; 200(45)

**Matter of Norman D., No. 119, 10/19/2004**

Upon the petitioner's plea of not responsible by reason of mental disease or defect to arson, the court held a commitment hearing to determine the petitioner's "track status." *See CPL 330.20 (6)*. It found that he suffered from a dangerous mental disorder and designated him a track one insanity acquittee, and remanded him to Mid-Hudson Forensic Psychiatric Center. The petitioner filed for a rehearing and review of his commitment order. At the hearing nearly three years later, all parties stipulated that the petitioner no longer suffered from a dangerous mental disorder, but was mentally ill. He requested reassessment of his track one status, which requires heightened supervision under the Criminal Procedure Law, and a reduction to track two, governed by the

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Mental Hygiene Law. Continuation of his original track status was affirmed.

**Holding:** Confinement and release issues can be challenged by rehearing or appeal. The petitioner had the right to a rehearing and review held before a different judge or a jury within 30 days after the initial order, under CPL 330.20 (16). Such rehearing, under Mental Hygiene Law 9.35, would be a *de novo* proceeding that considered the petitioner’s current condition. Another option was for the petitioner to seek leave to appeal the order to an intermediate appellate court. CPL 330.20 (21) (a) (ii). Such appeal would review the record at the time of the original hearing, which was closest in time to the offense. Insanity acquittee track status can only be challenged on appeal. CPL 330.20 (21) (a) (ii). It was error for the trial court to review the petitioner’s initial track determination. Order affirmed.

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

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

**People v Payne, No. 120, 10/19/2004**

After an argument, the defendant shot the decedent at point-blank range. The defendant admitted the shooting and presented a justification defense. The jury acquitted him of intentional murder but found him guilty of depraved indifference murder.

**Holding:** Point-blank shooting against a particular victim, which showed an intent to kill, was not depraved indifference murder. *See People v Gonzalez*, 1 NY3d 464. Depraved indifference murder occurs when someone recklessly engages in conduct that creates a grave risk of death to another under circumstances evincing a depraved indifference to human life, causing that other person’s death. Penal Law 125.25 (2). Such a charge applied to defendants who endangered bystanders (*People v Jernatowski*, 238 NY 188), fired into a crowd (*People v Fenner*, 61 NY2d 97) or killed an innocent during a gun battle (*People v Russell*, 91 NY2d 280). Exceptionally brutal homicides directed toward a particular victim might qualify too, such as beating an infant to death. *See People v Bryce*, 88 NY2d 124. An intentional one-on-one shooting can be treated as murder, manslaughter, criminal negligence, but not depraved indifference murder. Excessive use of force against a victim only demonstrates more intent, not more depraved indifference. The defendant’s insufficiency claim was preserved because the court reserved decision on his trial order of dismissal (TOD) at the close of the prosecution’s case. *See CPL 290.10*. A case in which a TOD was promptly denied (*People v Hines*, 97

NY2d 56) is distinguished. “We decline to expand *Hines* and elevate preservation to a formality that would bar an appeal even though the trial court, aware that the motion was pending, had a full opportunity to review the issue in question.” Order reversed, indictment dismissed.

**Concurring:** [R.S. Smith, J] *Hines* should be narrowly interpreted.

**Dissent:** [Read, J] Denial of a TOD after the prosecution’s case and presentation of defense evidence was not reviewable on appeal. Insufficiency cannot be addressed in a motion to set aside verdict. *See CPL 330.30(1)*.

**Counsel (Competence/ Effective Assistance/ Adequacy) (Duties) (Right to Counsel) (Right to Self-Representation) (Standby and Substitute Counsel)** **COU; 95(15) (20) (30) (35) (39)**

**People v Henriquez, No. 121, 10/19/2004**

On trial for intentional murder and other crimes, the defendant was represented by assigned counsel at pretrial hearings and during *voir dire*. Before opening statements, the defendant ordered counsel not to take any further actions in the case. Counsel’s request to be relieved was denied; the court ordered counsel to remain available in case the defendant changed his mind. However, the defendant did not, but also did not act *pro se* or participate in the trial. His subsequent conviction was affirmed.

**Holding:** The defendant, who rejected *pro se* representation and curtailed the actions of assigned counsel, was not denied the right to a fair trial. His actions effectively waived his right to effective assistance of counsel. *See US ex rel. Testamark v Vincent*, 496 F2d 641, 643-644 (2d Cir. 1974). Where the defendant would not allow counsel to take action, and refused to act *pro se*, the trial court properly denied counsel’s request to be relieved. *See People v Kelly*, 44 NY2d 725, *affg* 60 AD2d 220. The defendant’s knowing, voluntary, and intelligently-made decisions were his to make. *See People v Bodie*, 16 NY2d 275, 279. Order affirmed.

**Dissent:** [G.B. Smith, J] The defendant’s right to counsel and fair trial were violated when counsel refrained from all participation in the trial and the court condoned it. The right to make decisions concerning trial strategies and tactics belonged to defense counsel, not the defendant. Abiding by the defendant’s restrictions permitted the prosecution’s case to proceed unchallenged. The continued, although muted, presence of counsel underscored the defendant’s exercise of his right to representation. It was the lawyer’s responsibility to take actions despite defendant’s direction to do nothing. ABA Criminal Justice Standards 4-1.2, 4-5.2 (3d ed. 1993); *Jones v Barnes*, 463 US 745, 751 (1983). There was no adversarial process or effec-

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tive assistance of counsel. *See US v Cronin*, 466 US 648, 659 (1984).

**Defenses (General)** DEF; 105(31)**People v Santi, Nos. 122, 123, 10/21/2004**

Defendant Corines, a licensed physician, ran a medical office where defendant Santi worked as a medical assistant after her medical license had been suspended. Corines was charged with unauthorized practice of medicine by aiding and abetting Santi, who administered anesthesia in the treatment of three patients. Convictions on all counts affirmed on appeal.

**Holding:** Licensed practitioners, *eg* doctors, can be criminally prosecuted for aiding and abetting the unauthorized practice of a profession, *eg*, medicine, recognized under Title VIII of the New York State Education Law. *See* Education Law 6512 (1); Penal Law 20.00. Orders affirmed.

**Confessions (Counsel) (Interrogation)** CNF; 70(23) (42)**Counsel (Attachment) (Right to Counsel)** COU; 95(9) (30)**People v Carranza, No. 136, 10/21/2004**

While the target of a murder investigation, the defendant was represented by a Legal Aid attorney on an unrelated case. The lawyer faxed letters to the New York State Police and to the Orange County District Attorney asserting the defendant's right to remain silent and his right to counsel, and saying he would not be giving any statements. The attorney did not speak with the Monticello police, who later took the defendant into custody, or to the Newburgh police, who questioned him. The Newburgh police did not know of the lawyer's letter. The defendant gave statements to the police after waiving his *Miranda* rights.

**Holding:** Written notice to state police and the local prosecutor from a lawyer representing the defendant on an unrelated case was insufficient to put local police on notice not to question the defendant. *See People v Arthur*, 22 NY2d 325, 329. The questioning police officer did not know and could not be charged with knowing that the defendant had a lawyer, and had no obligation to refrain from asking questions. *Cf People v Pinzon*, 44 NY2d 458, 463. Order affirmed.

**Family Court (General)** FAM; 164(20)**Juveniles (Neglect)** JUV; 230(80)**Nicholson v Scopetta, No. 113, 10/26/2004**

New York City Administration for Children's Services (ACS) removed children for neglect when they were exposed to domestic violence against the mothers. The plaintiff filed a federal class action suit against ACS to challenge the policy. Before the federal appeals court would consider the constitutional questions, it referred the case to the state Court of Appeals to respond to three state law questions.

**Holding:** "Neglect of a child" under NY Family Court Act 1012(f), (h) does not presumptively include a parent or custodian who allowed the child to witness domestic abuse against that caretaker. Before removing a child for neglect, ACS is required to prove two elements by a preponderance of evidence: actual (or imminent danger of) physical, emotional or mental impairment to the child (*see Nassau County Dept. of Social Servs. on Behalf of Dante M. v Denise J.*, 87 NY2d 73, 78-79) and the parent's failure to exercise a minimum degree of care expected of a reasonable and prudent parent. *See Matter of Hofbauer*, 47 NY2d 648, 656.

The actual or potential injury to a child by witnessing domestic abuse against a parent or caretaker does not presumptively create an immediate danger or risk to the child's life or health as defined in NY Family Court Act 1022, 1024, 1026-1028 warranting the child's removal.

That the child witnessed such abuse does not alone show that removal is necessary under NY Family Court Act 1022, 1024, 1027, or that removal was in the child's best interests under NY Family Court Act 1028, 1052(b)(i)(A). ACS is required to produce additional, particularized evidence to justify removal. There is no "blanket presumption" favoring removal, every case is fact-specific. Family Court Act Article 10. Certified questions answered in accordance with the opinion herein.

**Civil Practice (General)** CVP; 67.3(10)**Prisoners (Family Relationships) (General)** PRS I; 300(16) (17)**Covington v Walker, No. 126, 10/26/2004**

Plaintiff wife and defendant husband were married in 1983. In 1985 the defendant was convicted of murder and other felonies, and sentenced to a prison term of 25 years to life. The plaintiff, imprisoned for the same offenses, filed suit for divorce in 2000 on the grounds that the defendant had been confined for a period of three or more consecutive years after their marriage. *See* Domestic Relations Law 170 (3). The defendant claimed the action was time-barred by the five-year statute of limitations of Domestic Relations Law 210. Dismissal of the plaintiff's action on summary judgment was affirmed by a divided Appellate Division.

**Holding:** A cause of action for divorce based on

**NY Court of Appeals** *continued*

imprisonment of the defendant spouse accrued on the date he completed his third consecutive year of incarceration, but based on the continuing wrong doctrine, the statute of limitations would not start to run until the date he was released. Legislative history did not indicate that the statute of limitations was meant to run as early as possible. See *1968 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York*. The divorce statute was intended to avoid hasty dissolutions and promote reconciliations. Moreover, every day the defending spouse was incarcerated the action accrued anew under the continuous wrong doctrine. See *gen Grubman v Grubman*, 156 AD2d 200. Order reversed.

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

**Instructions to Jury (Cautionary Instructions)** **ISJ; 205(25)**

**People v Resek, No. 149, 11/23/2004**

The defendant was arrested after police observed him driving a reportedly stolen car. Drugs were discovered in the car and on the defendant's person. The grand jury indicted him for drug possession with intent to sell, but not possession of a stolen car. At trial, the court permitted police to testify about the stolen car allegation as background for the drug arrest. The court also gave a limiting instruction to the jury: "[i]t is not in any way to be inferred by you that the defendant did or did not steal the car or anything of the kind." The conviction was affirmed.

**Holding:** Prejudice of the uncharged crime testimony, where the jury was not told that the grand jury had dismissed the charge, outweighed the probative value of completing the narrative of the defendant's arrest. See *gen People v Rojas*, 97 NY2d 32, 37. The stolen car evidence was offered to explain the arrest and dispel the idea that police wrongfully targeted the defendant or otherwise abused their authority. However, the testimony, admitted over defense objection, left the jury with an incomplete and prejudicial narrative. The limiting instruction added confusion by leaving disposition of the theft as an open question. A simple instruction that the arrest was lawful, and no speculation about it was permitted, would have been sufficient. Order reversed.

**Dissent:** [Graffeo, JJ] Admission of the uncharged crime testimony with limiting instructions was not an abuse of discretion. See *People v Tosca*, 98 NY2d 660.

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

**Juvenile (Delinquency - Procedural Law)** **JUV; 230(20)**

**Matter of Michael M., No. 157, 11/23/2004**

Michael M., a juvenile, was arrested for a group assault and bicycle theft based on a felony complaint supported by a police officer's interview of the complainant. At arraignment, a removal order transferring the case to Family Court was approved. It was based on three factors: Michael M. did not act alone; removal would reduce trauma for the 13-year-old complainant; and there would be no negative impact on the criminal justice system. The Family Court found him guilty of attempted robbery and related offenses based on the complaint and removal order. The Appellate Division rejected his challenge to the court's jurisdiction, raised there for the first time, and to the sufficiency of the charging papers.

**Holding:** A Family Court petition comprised of a removal order and complaint must be based on non-hearsay allegations. Family Ct Act 311.2[3]. While the removal order alone could contain hearsay, it was only one part of the petition in a juvenile delinquency proceeding. The entire petition had to include non-hearsay allegations supporting every element of the crimes charged. The provisions of Family Court Act 311.1(7) do not excuse a removal order from the requirements of 311.2. The holding in *Matter of Desmond J.* (93 NY2d 949) does not control because there, nonhearsay allegations were included in a supplemental deposition. A petition that does not meet 311.2 contains a non-waivable jurisdictional defect. See *Matter of Neftali D.*, 85 NY2d 631, 636-637. Preservation was not required. Order reversed.

**Dissent:** [R.S. Smith, JJ] The hearsay defect in the juvenile delinquency petition was waived. See *People v Case*, 42 NY2d 98.

**Trial (Confrontation of Witnesses)** **TRI; 375(5)**

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

**People v Waver, No. 160, 11/23/2004**

During the defendant's bench trial for selling drugs, the undercover officer was permitted to testify anonymously over defense counsel's objection. The conviction was affirmed on the basis of harmless error.

**Holding:** The prosecution did not show a necessity for shielding the undercover officer's identity. The court failed to follow the sequential three-step inquiry mandated by *People v Stanard* (42 NY2d 74): 1) the prosecution must show why the witness's identity, address and/or occupation should not be revealed, *eg*, revealing the information will harass, annoy, humiliate or endanger the witness; 2) the defense must then show that the information sought is material to guilt or innocence; and (3) the court must weigh the defendant's right to cross-examination against the witness's interest in anonymity. Since the undercover's testimony was central to the prosecution's case and the defendant's ability to cross-examine his

**NY Court of Appeals** *continued*

accuser was merely speculative, the failure to adhere to the required inquiry was not harmless error. Order reversed.

**Contempt (Elements) (General)** CNT; 85(7) (8)**People v Inserra, No. 161, 11/30/2004**

The defendant was convicted of second-degree criminal contempt (Penal Law 215.50 [3]), for violating an order of protection. Evidence showed that the defendant attempted to contact the protected person by banging on her door and shouting. A police officer's sworn deposition established that the defendant's signature appeared on the order of protection. The defendant challenged the sufficiency of the complaint and prosecutor's information for not showing he had knowledge of the terms of the order. His conviction was reversed and the information ordered dismissed.

**Holding:** Evidence of the defendant's name on the signature line of the order of protection was sufficient to allege the element of knowledge as required. *Cf Mesibov, Glinert & Levy, Inc v Cohen Bros Mfg Co*, 245 NY 305, 310. This evidence supported an allegation that the defendant received and read the order, going beyond a showing that he had merely been informed of it. See *People v McCowan*, 85 NY2d 985. The protected party did not have to be home at the time of the defendant's visit for there to be a violation, since the order prohibited going near her home whether she was there or not. Order reversed, and remitted to Appellate Term.

**Alibi (General)** ALI; 20(22)**People v Rodriguez, No. 152, 11/30/2004**

His first lawyer submitted an alibi notice indicating that the defendant was at a party with his uncle at the time of the offense. At trial, the defendant called his girlfriend to testify that she was asleep with the defendant during the time of the shooting. She had not been identified as an alibi witness; no objection was made. During her cross-examination, the court granted the prosecutor's motion for a *Dawson* hearing (*People v Dawson* (50 NY2d 311) to investigate whether the girlfriend had justification for withholding exculpatory information. The defendant's second lawyer disavowed the alibi notice, which had led him to bring the uncle in from out of the country only to find that the date was wrong in the notice, but did not formally withdraw it. In its rebuttal case, the prosecutor introduced the alibi notice to impeach the girlfriend, although it did not contain her statements. In summation, he argued that the alibi notice showed the defendant's

consciousness of guilt. The defendant's conviction was affirmed on appeal.

**Holding:** The prosecutor should not have been permitted to use the alibi notice to discredit the testimony of defendant's witnesses or as evidence of guilt. *Cf People v Burgos-Santos*, 98 NY2d 226, 235. An alibi notice is a limited form of pretrial discovery. See CPL 250.20. The defendant's abandonment of the alibi notice was not done in bad faith and did not prejudice the prosecution. It was based on developments that occurred during trial. The prosecution did not utilize the statutory remedy for an improper alibi notice by making a timely objection, which might have led to exclusion or an adjournment to investigate. See CPL 250.20 (3). Overwhelming evidence of guilt, two eyewitnesses and the defendant's statement made the improper use of the alibi notice harmless error. Order affirmed.

**Concurring:** [Grafano, JJ] Limiting the trial court's option to excluding the defendant's late alibi evidence would have unduly restricted the right to present a defense, since an adjournment would have been valueless under the circumstances. *Michigan v Lucas*, 500 US 145, 149, 153 (1991).

**Civil Practice (General)** CVP; 67.3(10)**Search and Seizure (General)** SEA; 335(42)**Lyles v State of New York, No. 145, 11/30/2004**

On Mar. 27, 1999, while driving a car recently bought at an auction, claimant Lyles was stopped by State Police. They ticketed him for a faulty tail pipe and searched his person and the car without consent. He was held for nearly an hour and a half before being released. The same officers then stopped him again, for having an obstructed windshield, and held him for another hour. They handcuffed him and searched the trunk of his car, throwing the contents on the side of the road. No ticket was given, and nothing illegal was found. On June 22, 1999, the claimant filed a notice of intention to file a claim for damages against the State based federal and state constitutional violations. The claim was served on the Attorney General on Mar. 18, 2002, and with the court the following day. The State moved to dismiss for filing beyond the two-year deadline under Court of Claims Act 10. The claimant urged that the statute only applied to common-law torts, not constitutional torts, and his constitutional claims were timely under CPLR 213 (1), which allows six years for state claims and three years for federal claims. Dismissal was granted and affirmed.

**Holding:** New York State retained its sovereign immunity against the claimant's suit under Court of Claims Act 8, because the claimant failed to meet the time limits required by Court of Claims Act 10 to establish subject matter jurisdiction. The state waived immunity only

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when a claimant complied with the statute. *See Alston v State*, 97 NY2d 159, 163. Order affirmed.

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

**People v Fabricio, No. 162, 12/2/2004**

While the defendant was on the stand for cross-examination, a sidebar was held at the prosecutor’s request. The defendant did not participate. The conference concerned an alleged statement by the defendant about how he obtained money for airline fare, which the prosecutor claimed was the fruit of an uncharged robbery. Defense counsel objected to the statement, of which he lacked notice. Without characterizing the discussion as a *Sandoval/Ventimiglia* (*People v Sandoval*, 34 NY2d 371; *People v Ventimiglia*, 52 NY2d 350) situation, the court allowed the inquiry. The defendant’s conviction was affirmed.

**Holding:** The sidebar conference concerned only a legal issue, *ie*, whether the prosecution had a good faith basis for asking the defendant about his prior statement, which did not require the defendant’s presence. *People v Rodriguez*, 85 NY2d 586, 591. The sidebar did not amount to a *Sandoval* or *Ventimiglia* hearing, where the defendant’s presence would have been useful on factual issues. *See* CPL 260.20; *People v Spotsford*, 85 NY2d 593, 596. Defense counsel’s objection was based on lack of notice of the statement, and no objection was raised that the defendant’s presence was necessary to address the underlying facts of the uncharged robbery. Order affirmed.

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

**Sentencing (Resentencing) (Second  
Felony Offender)** SEN; 345(70.5) (72)

**People v Marrero, No. 151, 12/2/2004**

**Holding:** “Upon remitting the matter for resentencing based on the sentencing court having—as a result of the parties’ mutual mistake—adjudicated defendant a second felony offender, the Appellate Division allowed the People to allege a different prior felony conviction as a basis for the adjudication.” The Appellate Division correctly held, citing *Matter of Kisloff v Covington* (73 NY2d 445, 452), that if the defendant could not properly be adjudicated a second felony offender, the prosecution could not withdraw consent to the plea. Order affirmed.

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

**People v Duggins, No. 150, 12/2/2004**

Within an hour and a half, the defendant killed two rival gang members at locations within the same housing project. He believed that they were planning to kill him and carried out the shootings as a preventive measure. The prosecution charged him with two counts of first-degree “same transaction” murder. Over the defendant’s objection, the court instructed the jury by relying on the definition of “criminal transaction” found in CPL 40.10(2). The defendant’s conviction was affirmed.

**Holding:** Legally sufficient evidence proved the defendant committed first-degree murder by killing multiple victims during the “same criminal transaction,” *ie* acts that were close in time and place and compelled by a single purpose. “Criminal transaction” in Penal Law 125.27(1)(a)(viii) carries the same meaning as it does in CPL 40.10(2). *See People v Reed*, 265 AD2d 56, 66-67. The phrase “criminal transaction” was properly defined in a technical sense rather than in its “ordinary and usual” meaning. *See Matter of Moran Towing & Transp. Co v New York State Tax Commn.*, 72 NY2d 166, 173. Nothing in the text or legislative history of the murder statute showed that the Legislature wanted “criminal transaction” to have a meaning different from CPL 40.10(2). Order affirmed.

**Dissent:** [R.S. Smith, JJ] The court’s definition of “criminal transaction” undermines the “common scheme or plan” portion of the serial murder statute that applies to “separate criminal transactions.” *See* Penal Law Section 125.27(1)(a)(xi).

**First Department**

**Insanity (Civil Commitment) (General)** ISY; 200(3) (27)

**Re Application of Eileen Consilvio v Alan L, 7 AD3d 252,  
776 NYS2d 33 (1st Dept 2004)**

The respondent was adjudicated not responsible by reason of mental disease or defect on rape and related charges and committed to a secure psychiatric facility. In response to the hospital’s retention application, the court found that he was not a physical danger to himself or others and ordered him to be transferred to a non-secure facility.

**Holding:** The determination that the respondent was no longer a danger to himself or others was not based on any fair interpretation of the evidence. CPL 330.20(1)(c); *Matter of Boggs v New York City Health & Hosps. Corp*, 132 AD2d 340, 362 *app dismd* 70 NY2d 972. One of the respondent’s treating doctors concluded he had a dangerous mental disease, antisocial personality disorder, requiring treatment in a secure facility. Another hospital report showed that the respondent was resisting treatment efforts, unwilling to deal with his addictions or accept responsibility for criminal behavior. A court-appointed psychiatrist, ignorant of the respondent’s criminal history, reached the opposite conclusion. The trial court could

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consider nature and recency of the criminal behavior (here, occurring only five years before) and the presumption (particularly strong where the crime was violent) that the mental illness resulting in dangerousness continued after the crimes. *Matter of George L*, 85 NY2d 295, 306. Also relevant are “relapses into violent behavior, substance abuse or dangerous activities” and likelihood of noncompliance with medication therapy. The respondent had sexually abused a fellow patient only three years earlier, failing to show any remorse or insight into his actions. Judgment reversed. (Supreme Ct, New York Co [Suarez, JJ])

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

**People v Anonymous, 7 AD3d 309, 776 NYS2d 282  
(1st Dept 2004)**

After the defendant was acquitted of sexual abuse, the court granted the prosecutor’s oral motion to stay sealing of the record for 30 days, without explanation. The prosecution sought to extend the stay to facilitate an Office of Professional Medical Conduct (OPMC) investigation. Defense counsel’s motion to vacate the stay for noncompliance with CPL 160.50 was denied and the extension granted.

**Holding:** An order staying the sealing of a criminal action is civil in nature. *Matter of Hynes v Karassik*, 47 NY2d 659, 661, fn. 1. It is therefore appealable under CPLR 5511. After an acquittal, the trial court must seal the record unless the prosecutor shows, on motion with not less than five days notice to the defendant or defense counsel, that the interests of justice require a stay. CPL 160.50 (1). The prosecutor stated no basis for the initial stay, not raising the OPMC investigation until an extension was sought. Even if OPMC is considered a law enforcement agency, there was no showing that OPMC’s investigation would be frustrated if the records remained sealed, as OPMC “has sufficient information to conduct a thorough investigation, including interviews with defendant and access to the person alleging the sexual misconduct.” Judgment reversed. (Supreme Ct, New York Co [Carro, JJ])

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**Ethics (General)** **ETH; 150(7)**

**Matter of Harnisch, 7 AD3d 58; 777 NYS 2d 58  
(1st Dept 2004)**

The Departmental Disciplinary Committee for the 1st Department moved to disbar the respondent after he was convicted of the federal felony of conspiracy to commit mail fraud under 18 USC 371, 1341, 1346.

**Holding:** The respondent’s plea in federal court was

to a crime equivalent to a New York felony, justifying automatic disbarment. See Judiciary Law 90(4)(b); *Matter of Kim*, 209 AD2d 127. The offense only needed to be similar, not identical, to a New York felony. See *Matter of Margiotta*, 60 NY2d 147. The content of the respondent’s plea allocation was sufficient for first-degree scheme to defraud under Penal Law 190.65(1)(b), a New York felony. This warrants automatic disbarment. See *Matter of Mercado*, 1 AD3d 54, 55-56. Disbarment motion granted.

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**Attorney/Client Relationship (General)** **ACR; 51(20)**

**Ethics (General)** **ETH; 150(7)**

**Re Law Firm of Wilens & Baker, 9 AD3d 213,  
777 NYS2d 116 (1st Dept 2004)**

Departmental Disciplinary Committee for the 1st Department filed against the respondent 36 charges involving 11 client matters. The basis for the charges was the respondents’ representation of illegal aliens, many non-English speaking, in immigration cases. Clients unable to meet the respondents’ fee payment schedule were not allowed to speak with the attorneys and rudely ordered out of the office. Cases were neglected, and the attorneys did not fully explain to their clients the status of their immigration cases. Finally, after being discharged, the respondents refused to turn over client files unless the client waived fee reimbursement. A referee found that the respondent firm was offensive to their clients, and intimidated them for additional fees, warranting public censure for their misconduct. The Committee agreed and petitioned for public censure.

**Holding:** The respondent firm showed a pattern of misconduct in which they acted in a rude and demeaning manner to their immigration clients in violation of the Code of Professional Responsibility. *Matter of Heller*, 195 AD2d 134, 135. This constituted “one of the ‘rare instances’ where a law firm should be disciplined since the pattern of misconduct indicated a firm-wide problem and the highly visible misconduct of a name partner must have been apparent to all members of the WB firm.” Mitigating conduct for reforming firm practices did not undercut the necessity of public censure, as in the absence of this conduct, suspension might have been justified. Petition granted.

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**Juveniles (Support Proceedings)** **JUV; 230(135)**

**Velazquez v State of New York, 7 AD3d 449,  
776 NYS2d 804 (1st Dept 2004)**

**Holding:** The trial court ordered that proposed administrative directives and notices indicate that pre-1994 child support orders would not be enforced and that receiving public assistance or Supplemental Security Income is relevant, significant, but rebuttable evidence

**First Department** *continued*

that a person is indigent and unable to pay child support. This interpretation of means-tested public assistance (*Matter of Rose [Clancy] v Moody*, 83 NY2d 65, 70 *cert den sub nom Attorney Gen of N.Y. v Moody*, 511 1984) required public notice. Order affirmed. (Supreme Ct, New York Co [Schlesinger, JJ])

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

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

**People v Arzu, 7 AD3d 458, 777 NYS2d 485 (1st Dept 2004)**

The defendant was convicted of attempted second-degree assault for hitting the complainant in the head with a hammer. The trial court refused to give a justification charge.

**Holding:** When any reasonable view of the evidence would allow the jury to find that the defendant's actions were justified, a self-defense instruction is required. *People v McManus*, 67 NY2d 541, 549, 505 NYS2d 43. A witness testified that the complainant previously threatened the defendant with a gun. This supported a conclusion that the defendant as well as the witness reasonably believed that deadly physical force was imminent. See *People v Roldan*, 222 AD2d 132, 138. Moreover, the complainant refused to leave the witness's house, where the defendant was living at the time; there was no duty to retreat. See Penal Law 35.15(2)(a)(i); *People v Van Allen*, 216 AD2d 39 *lv den* 86 NY2d 804. Justification is established where a reasonable belief exists that physical force was necessary to defend against imminent use of deadly physical force and retreat was not required or safely possible. See *People v Goetz*, 68 NY2d 96. Judgment reversed. (Supreme Ct, Bronx Co [Price, JJ])

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

**Matter of Consilvio, 8 AD3d 22, 777 NYS2d 497 (1st Dept 2004)**

The respondent, after completing a prison sentence for a violent felony assault, was hospitalized and eventually became a patient in Manhattan Psychiatric Center (MPC). After his arrival, MPC suspected him of drug use, and noted threatening and abusive behavior toward staff and patients, including attacking a patient unprovoked. MPC moved for a retention order. MPC's treating doctor testified that the respondent was a paranoid schizophrenic, and a danger to himself or others because he was assaultive. The respondent testified that he was taking his medication and learning behavior modification, and

assured the court he would attend outpatient treatment and take his medication. The court found the respondent was not mentally ill and inpatient treatment was not necessary.

**Holding:** The testimony of the MPC doctor, though he was not completely certain of the respondent's diagnosis, the diagnosis that the respondent had several mental disorders, including antisocial personality disorder and bipolar disorder with psychotic features, and the respondent's clinical records showing his history of assaultive behavior were sufficient to find by clear and convincing evidence that the respondent was mentally ill, in need of supervised care, and a danger to himself and others. *Matter of Ford v Daniel R*, 215 AD2d 294, 295. Order reversed. (Supreme Ct, New York Co [Suarez, JJ])

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

**People v Rivera, 8 AD3d 53, 778 NYS2d 28 (1st Dept 2004)**

**Holding:** The telephone statement by the girlfriend of the complainant to the complainant's sister, identifying the defendant as the attacker, was admissible under the excited utterance exception to the hearsay rule. Within minutes of the stabbing, the crying, screaming witness, under the stress and excitement caused by the event, made a statement without reflection. See *People v Brown*, 70 NY2d 513. No constitutional claim was preserved. The statement was not testimonial and therefore beyond the scope of *Crawford v Washington*, \_\_ US \_\_, 158 LEd2d 177. Judgment affirmed. (Supreme Ct, Bronx Co [Cohen, JJ])

**Search and Seizure (Consent [Coercion and Other Illegal Conduct]) (Entries and Trespasses [Trespasses])** SEA; 335(20(f)) (35[j])

**People v Robinson, 8 AD3d 131, 779 NYS2d 40 (1st Dept 2004)**

**Holding:** Suppression of identification evidence, testimony about the search of the defendant and absence of narcotics or buy money, and narcotics found in his apartment should not have been granted. The police ruse of claiming to investigate a noise complaint in order to enter the defendant's apartment after an undercover buy did not violate *Payton*. See *People v Williams*, 222 AD2d 721 *lv den* 87 NY2d 978. The defendant was asked to leave his apartment and not ordered or coerced by drawn guns. Directing a suspect to come out of his home is not covered by a blanket prohibition. See *People v Minley*, 68 NY2d 952. After leaving his building, the defendant was taken to the front of it, where the undercover officer observed him. Had there been a *Payton* violation, suppression of this confirmatory identification would not have been

**First Department** *continued*

required. See *People v Jones*, 2 NY3d 235. The detective's affidavit establishing that the declarant knew the undercover was sufficient in light of the fellow officer rule. There was not need to set forth a separate basis for believing the undercover to be reliable. Judgment reversed. (Supreme Ct, Bronx Co [Bamberger, JJ])

**Juveniles (Custody)** JUV; 230(10)**Matter of Hyacinth Angela W., 8 AD3d 129,  
779 NYS2d 42 (1st Dept 2004)**

The child of Willie W. was placed into the care of an agency by her grandmother while Willie W. was incarcerated and after the parental rights of the child's mother were terminated. After his release, Willie W. regularly visited his daughter and advised the agency that he opposed putting his daughter up for adoption. Still the family court terminated his rights just prior to her 14th birthday.

**Holding:** The court should have held a separate dispositional hearing given the imminence of the child's fourteenth birthday. See *Matter of Miguel Angel Andrew R.*, 263 AD2d 354. The child, who was living in a group home, had steadfastly expressed her wish to remain with her biological family. The daughter has now passed the age of commitment on the ground of permanent neglect. If the merits of the appeal were reached, the agency would be found not to have proven that Willie W. permanently neglected his daughter or that it encouraged the parental relationship. Social Services Law 384-b. Also, Willie W. was denied his right to the effective assistance of counsel by the unwarranted swiftness of the family court's actions. *Matter of James R. Jr.*, 238 AD2d 962, 962-963. Judgment reversed. (Family Ct, New York Co [Larabee, JJ])

**Juveniles (Delinquency)** JUV; 230(15)**Prostitution and Related Offenses  
(Defenses)** PST; 315(5)**Matter of Nicolette R., 9 AD3d 270,  
779 NYS2d 487 (1st Dept 2004)**

**Holding:** That the twelve-year-old appellant's age made her legally incapable of consenting to any sexual act that violated Penal Law article 130 (Penal Law 130.05[3][a]) was irrelevant to finding that she had committed an act that, if committed by an adult, would constitute the crime of prostitution. Penal Law 230.00. That statute has no age requirement. The court had the discretion to refuse to dismiss the petition. However, the family court did not consider the least restrictive available alter-

native in its dispositional order. Family Court Act 352.2(2)(a); *Matter of Gomez*, 131 AD2d 399. The appellant required specialized services not available at a limited secure facility; she should be placed in a residential facility. Order modified, appellant to be placed at Hawthorne Cedar Knolls. (Family Ct, Bronx Co [Lynch, JJ])

**Evidence (Hearsay)** EVI; 155(75)**Judges (Disqualification) (General)** JGS; 215(8) (9)**People v A. S. Goldmen, Inc., 9 AD3d 283,  
779 NYS2d 489 (1st Dept 2004)**

**Holding:** Improper admission at the defendants' enterprise corruption trial of plea allocutions from various participants in the charged fraud scheme was harmless. While plea allocutions are testimonial hearsay under *Crawford v Washington* (541 US 36 [2004]), none of the numerous allocutions directly linked the defendants to specific crimes and were marginal to the prosecution's case.

The court properly exercised its discretion in refusing to recuse itself from the defendants' trial after an allegation that a codefendant had hired someone to kill the judge, where that codefendant's case was severed and there was no indication the court could not remain fair and impartial as to the others. See *People v Moreno*, 70 NY2d 403, 405. The other issues raised are without merit. Judgment affirmed. (Supreme Ct, New York Co [Snyder, JJ])

**Evidence (Hearsay)** EVI; 155(75)**People v Woods, 9 AD3d 293, 779 NYS2d 494  
(1st Dept 2004)**

**Holding:** Introducing at the defendant's assault trial evidence of the plea allocution of a co-defendant who invoked his 5th Amendment right not to testify, changing the names of the other co-defendants to A and B, violated the Confrontation Clause. See *Crawford v Washington*, 541 US 36 (2004). Admission of the plea allocution, which was testimonial, and "extremely important" evidence, was not harmless error. See *People v Kello*, 96 NY2d 740, 743. The evidence corroborated the complainant's testimony, ability to observe the act, and identification of the defendant. The court instructed the jury to consider the allocution in evaluating the complainant's credibility and reliability. The complainant's testimony had been at times confused and inconsistent, thus increasing the value of the co-defendant's plea allocution. It was improper for the prosecutor to take the complainant back to the prosecutor's office during lunch, after the complainant gave confusing identification testimony, to see photographs of the defendant. See *Perry v Leeke*, 488 US 272, 282 (1989). Judgment reversed. (Supreme Ct, Bronx Co [Cirigliano, JJ])

**First Department** *continued*

**Ethics (General)**

**ETH; 150(7)**

**Matter of Anschell, 781 NYS2d 310 (1st Dept 2004)**

**Holding:** The 1st Department’s Departmental Disciplinary Committee sought reciprocal discipline of disbarment of the respondent based on his disbarment by the Supreme Court of Washington. The Washington court found that the respondent had, among other things, failed to communicate with his clients about the status of their cases. New York does not have a provision identical to the Washington state provision RPC 1.4, which requires attorneys to keep clients “reasonably informed about the status of a matter,” to “promptly comply with reasonable requests for information,” and to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” However, conduct such as the respondent’s is a form of neglect under New York’s Code of Professional Responsibility. DR 6-101(A)(3). *See eg Matter of Denhoffer*, 127 AD2d 230, 232. Washington had also found that the respondent represented a client against a former client in a related matter, violating a provision similar to DR 5-108(A)(1). *See Matter of Ghobashy*, 185 AD2d 23 *lv den* 82 NY2d 701 *cert den* 510 US 1045. The respondent did not take reasonable steps to protect his client’s rights when withdrawing from a case, violating a provision similar to DR 2-110(A). Deference is given to Washington’s sanction since that is where the respondent practiced at the time of the offenses. *Matter of Reiss*, 119 AD2d 1, 6. Order granted, the respondent disbarred.

**Admissions (General) (Interrogation) ADM; 15(17) (22)**

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

**People v Davenport, 9 AD3d 316, 780 NYS2d 14 (1st Dept 2004)**

**Holding:** Admission of the defendant’s statement, made after police allegedly denied her an opportunity to call her children to obtain a lawyer, was harmless error in view of the overwhelming evidence of guilt. *People v Crimmins*, 36 NY2d 230. The record is insufficient for review of the claim that the police who arrested her were responding to an anonymous call. *See People v Tutt*, 38 NY2d 1011, 1012-1013. Judgment affirmed. (Supreme Ct, New York Co [White, JJ])

**Juveniles (Delinquency) (Disposition) JUV; 230(15) (40)**

**Matter of Charles H., 9 AD3d 316, 780 NYS2d 13 (1st Dept 2004)**

The appellant, 14 years old, was adjudicated a juvenile delinquent for committing an act that, if committed by an adult, would constitute second-degree reckless endangerment. While “horsing around,” he threw pennies at a subway train, and unknowingly hit the conductor in the face. The court ordered a 12-month conditional discharge.

**Holding:** A 12-month conditional discharge for a juvenile who accidentally hit a subway conductor in the face with a few pennies was not the least restrictive available alternative in view of the best interests of the appellant and protecting the community. *See Family Court Act 352.2(2)(a)*; *see also Matter of Gomez*, 131 AD2d 399, 401. The appellant had not been in trouble before, he had a stable home environment, and there was no intentional or malicious conduct behind his actions. An adjournment in contemplation of dismissal provided the probation department with supervisory powers to monitor his activities, school attendance, and curfews. *Family Court Act 315.3[2]*; *Uniform Rules for the Family Court 205.24(a)(14), (b)*. A juvenile delinquency finding was not necessary. *See Matter of Jasper I.*, 186 AD2d 134. Order reversed, matter remanded for order granting adjournment in contemplation of dismissal. (Family Ct, New York Co [Bednar, JJ])

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

**People v Carillo, 780 NYS2d 143, 9 AD3d 333 (1st Dept 2004)**

The defendant objected to the prosecution’s exclusion of Hispanic prospective jurors. During jury selection, the prosecutor used six out of eight peremptory challenges against Hispanics. The court asked the prosecutor for race-neutral reasons for the challenges. At issue on appeal was the court’s finding non-pretextual the prosecutor’s claims that one venire person was too positive about the presumption of innocence and another did not give him a good feeling.

**Holding:** The prosecution’s response that one juror did not give him a good feeling was vague, nonspecific and highly suspicious, leading to an inference of improper discriminatory motive. *See People v Jackson*, 213 AD2d 335, 336 *app dismd* 86 NY2d 860. *Batson v Kentucky* (476 US 79 [1986]) requires a three step analysis: (1) prima facie showing of discrimination; (2) rebuttal with race-neutral reasons, if any; and (3) court’s factual determination as to whether the race-neutral reasons were pretextual. *People v Smocum*, 99 NY2d 418, 419-420. The court’s error in failing to require the defense to demonstrate a prima facie showing of discrimination became moot once the prosecutor had responded and the court had ruled on the ultimate issue of discrimination. The explanation as to at least one juror being unacceptable, an equal protection violation

**First Department** *continued*

was established. *People v Allen*, 86 NY2d 101, 109. The argument as to the other challenge need not be addressed. Judgment reversed. (Supreme Ct, Bronx Co [Massaro, JJ])

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**Sentencing (Persistent Violent Felony Offender) SEN; 345(59)**
**People v Cardona, 9 AD3d 337, 781 NYS2d 9 (1st Dept 2004)**

In 1991, the defendant was convicted of burglary in Rhode Island, based on a *nolo contendere* plea. Three years later in New York, he pled guilty to attempted second-degree burglary and was adjudicated a predicate violent felon. In 2001, he pled guilty to attempted second-degree burglary and was sentenced to 12 years to life as a persistent violent felon. He moved to set aside the 1994 predicate felony conviction, claiming that the Rhode Island burglary did not meet all the elements of the New York statute. The motion was granted.

**Holding:** The Rhode Island burglary statute uses “breaking” in a technical sense that can be met by opening a closed door. *State v Fernandes*, 783 AD2d 913, 916. Knowledge that an entry is unlawful cannot be inferred from “breaking” alone when so defined. As the Rhode Island conviction did not require the defendant to knowingly enter a premises unlawfully, it did not satisfy New York requirements for burglary. An out-of-state conviction must have all the “essential elements” of a New York felony to serve as a predicate. Penal Law 70.04(1)(b)(i). Rhode Island law did not require proof that the defendant knew his entry was unlawful or without permission; therefore, it was not a predicate, since the New York statute required knowing unlawful entry. Penal Law 140.20. Judgment affirmed, remanded for resentencing as second violent felon. (Supreme Ct, Bronx Co [Cohen, JJ])

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**Instructions to Jury (Witnesses) ISJ; 205(55)**
**People v Williams, 780 NYS2d 335 (1st Dept 2004)**

The defendant was charged with selling drugs. The prosecution presented the undercover officer who bought the drugs and the arresting officer, but not the “ghost,” another member of the team. No pre-recorded “buy” money or additional drugs were found on the defendant. Questions were raised about the identification of the defendant as the seller. Defense counsel stressed the absence of the ghost from the prosecution’s witness list. The court instructed the jury not to speculate about the lack of evidence, which defense counsel argued referred to the ghost, thus undermining his closing argument.

**Holding:** The defense was entitled to comment on the

absence of a prosecution witness in summation; the court’s instruction may have erroneously misled the jury to believe they could not consider the prosecution’s failure to call the witness. *See People v Tankleff*, 84 NY2d 992, 994 *rearg den* 93 NY2d 1034. In the absence of a missing witness charge (1 CJIN Y 8.54, 8.55) and any inquiry by the jury, the court should have been silent about the prosecution’s failure to call a witness. *See People v Ruine*, 258 AD2d 278 *lv den* 93 NY2d 929. The statement that “no one is required to come to court and testify” was inaccurate, and comments about “evidence or lack of evidence” were confusing, interfering with the mistaken identification defense. The identification rested on uncorroborated testimony; the error was not harmless. Judgment reversed. (Supreme Ct, Bronx Co [Cohen, JJ])

**Dissent:** [Tom, JJ] The evidence of guilt was overwhelming and the court’s charge, which emphasized the prohibition against juror speculation, was sufficient.

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**Ethics (General) ETH; 150(7)**
**Matter of Percy, 10 AD3d 66, 781 NYS2d 319 (1st Dept 2004)**

The respondent pled guilty to conspiracy to commit health care fraud, 18 USC 371, in federal court. The Departmental Disciplinary Committee for the 1st Judicial Department filed a petition seeking automatic disbarment.

**Holding:** Automatic disbarment based on a federal felony conviction must be upheld provided the federal offense was essentially similar to a New York felony, or shown to be similar by the contents of the indictment, plea allocution or other testimony. *Matter of Bertel*, 252 AD2d 256, 257-258. The federal health care fraud conviction was not essentially similar to New York’s scheme to defraud. The New York statute requires that the person charged have obtained something valued at over \$1000. *See* Penal Law 190.65. The record did not show that the respondent “obtained” anything. Only conspiracy was admitted; automatic disbarment was not warranted. *See Matter of Hochberg*, 259 AD2d 94. However, a federal felony was a serious crime. Judiciary Law 90(4)(d)(f); 22 NYCRR 603.12(b). Remanded for hearing as to why final order of censure, suspension, or disbarment should not be entered.

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**Accusatory Instruments (General) ACI; 11(10)**
**People v Lopez, 10 AD3d 264, 780 NYS2d 350 (1st Dept 2004)**

The defendant’s allocution during a plea proceeding was halted when the court found that while the defendant’s name was on the indictment cover sheet, only the codefendant’s name was included in the actual counts. At the next court appearance, the defense requested that the

**First Department** *continued*

indictment be dismissed and the prosecution asked that a superior court information (SCI) be substituted. The defendant signed the SCI and a waiver of indictment, and pled guilty to possession of drugs in or near school grounds, the charge to which he had attempted to plead earlier.

**Holding:** The defendant’s assertion that he could not waive indictment because the grand jury had already acted (*see* NY Const, art I, § 6; *People v Boston*, 75 NY2d 585, 589) is rejected. The irregularity in the indictment precluded the court from determining whether or not the grand jury had indicted the defendant. This was a defect under Criminal Procedure Law 210.20(1)(a), mandating dismissal of the entire indictment under Criminal Procedure Law 210.20(4). This differs from cases in which one or more counts are defective but not the entire indictment. *See People v Casdia*, 78 NY2d 1024 *affg* 163 AD2d 604. While the grand jury may have acted, dismissal and the need to re-present effectively puts the matter back to a “formal preindictment track.” [Internal quotes omitted.] *See People v Bonnet*, 288 AD2d 161 *lv den* 97 NY2d 751. There was no need for the court to formally grant leave to re-present where the understanding was clearly that the dismissal was with leave. Dismissal of the indictment in these circumstances did not eliminate the underlying felony complaint, which remained to form the basis of charges to be re-presented. Judgment affirmed. (Supreme Ct, Bronx Co [Collins, JJ])

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

**Juveniles (Custody)** **JUV; 230(10)**

**Matter of Linda J. v Nakisha P., 10 A3d 287,  
781 NYS2d 20 (1st Dept 2004)**

**Holding:** The court erred by awarding permanent custody of a child to his paternal grandmother based on evidence received at a neglect hearing and without testimony from the respondent mother about her ability to care for him and provide a good home environment, guidance, and support for his intellectual and emotional development. By acting under Family Court Act article 6 without reaching the question of disposition under article 10, the court failed to determine whether the disposition is in the son’s best interests. Such a placement must be limited to an initial period of one year. Family Court Act 1052(a); 1055; *Matter of David S.*, 221 AD2d 241. The petitioner, who has the burden of proving that the respondent relinquished her superior right to custody though inadequate guardianship (*see Matter of Joseph S. v Michelle R.F.*, 3 AD2d 446), did not make the showing necessary to rebut the presumption of custody favoring the parent. *See*

*Matter of McNeill v Ressel*, 258 AD2d 64 *app dismd* 94 NY2d 838. In view of the controverted allegations about the extent to which the child was locked in the bedroom as punishment, a full hearing was required. *See Matter of Hudgins v Goodley*, 301 AD2d 524. Order reversed, matter remanded for dispositional hearing. (Family Ct, New York Co [Cohen, JJ])

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

**Matter of Seguin v Fraser, 10 AD3d 284,  
781 NYS2d 73 (1st Dept 2004)**

Arrested in New York County in February 1998 and on a separate matter in Westchester County in November 1998, the petitioner spent periods of time in and out of jail in both counties awaiting dispositions of the matters. He pled guilty to attempted first-degree robbery in November 1999 in Westchester County, receiving a determinate term of three and a half years. In March 2000, he pled to third-degree bribery in New York County, receiving an indeterminate sentence of one to three years consecutive to the Westchester sentence. He sought credit for all jail time on both sentences.

**Holding:** The Individual Assignment Court erred in finding that the petitioner was entitled to credit against both sentences. Where multiple sentences are to run consecutively, jail credit is applied against the aggregate minimum and aggregate maximum terms. *See* Penal Law 70.30[3][b]). Where the time at issue had already been credited against the Westchester sentence, crediting against the New York County sentence as well violates 70.30(3)(b). Order and judgment reversed. (Supreme Ct, New York Co [Schlesinger, JJ])

**Juries and Jury Trials (Deliberation)** **JRY; 225(25) (37)  
(General)**

**People v Kelly, 781 NYS2d 75 (1st Dept 2004)**

The defendant stabbed his former girlfriend’s father with a bayonet that the defendant brought to the scene in his waistband. He said he intended to return it to the former girlfriend and tried to give it to the father, who attempted to pull it from the sheath. A struggle ensued during which the father was stabbed. The prosecution asserted that the defendant deliberately killed the father. The parties agreed that exhibits would be given to the jury if requested. A court officer brought the bayonet and sheath to the jury upon their written request during the third day of deliberations. Concerned for the jurors’ safety, the officer refused their request to handle the exhibits, but did remove the bayonet from its sheath and answer questions about doing so. He then disclosed the occurrence to the court. The parties agreed to a curative instruction that the jury disregard the demonstration. Eventually,

**First Department** *continued*

the jury convicted the defendant. In post-conviction proceedings, evidence was adduced about the incident and about court officers' duty regarding juror requests to handle weapons.

**Holding:** The officer's actions in refusing to release control of the bayonet was ministerial, not a usurpation of a judicial act. That the officer told the court about the incident rather than telling the jurors they could make their request in writing led to the same result—the court acted upon the jury's request. The defense could have asked that the jury be told it could write out its request, or sought a mistrial, but instead agreed to the instruction. This also waived the defendant's meritless complaint about not being present during the officer's demonstration. Further, the demonstration did not hurt the defendant as it could be said to support the defense theory, and was not a factor in the verdict according to post-conviction information. Judgment affirmed. (Supreme Ct, New York Co [Allen, JJ])

**Attorney/Client Relationship (General)** ACR; 51(20)

**Counsel (Attachment) (Choice of Counsel)** COU; 95(9) (9.5)

**People v Espinal, 10 AD3d 326, 781 NYS2d 99  
(1st Dept 2004)**

An attorney who had represented the defendant since shortly after his 1998 arrest was apparently not present at the 2000 trial date at which the matter was adjourned one day for hearings only. The next day, counsel said that due to having completed a murder trial only six days earlier and having another murder trial the next week, he was not ready to proceed. The court relieved him as attorney. Counsel sought reconsideration, setting out the hours he had worked on the case, his good relationship with the defendant, and details about the other cases. The motion was denied, new counsel was appointed, and this case was tried in January 2001, resulting in conviction on several charges.

**Holding:** The "court failed to make findings sufficient to justify the dismissal of an assigned counsel with whom defendant had an established and longstanding relationship." The distinction between retained and assigned lawyers narrows significantly once an attorney client relationship has formed. See *People v Childs*, 247 AD2d 319, 325. A court should not arbitrarily interfere with the right to continue with an assigned lawyer. See *People v Knowles*, 88 NY2d 763, 766. While dismissal of counsel may be necessitated by prolonged unavailability for trial (see *People v Bracy*, 261 AD2d 180 *lv den* 93 NY2d 966), the court here did not inquire as to the length of counsel's

upcoming trial, or consult with the other judge. The court made no findings that the attorney had engaged in a long-standing pattern of dilatory tactics or lack of candor, and this argument by the prosecution on appeal was unpreserved. See *People v More*, 97 NY2d 209, 214. The harmless error doctrine is inapplicable. See *People v Arroyave*, 49 NY2d 264, 273. The guilty plea in a separate indictment, induced by the promise of a sentence concurrent with the trial counts, must also be reversed. Judgments reversed. (Supreme Ct, New York Co [Visitacion-Lewis, JJ])

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

**Insanity (Defense of)** ISY; 200(10)

**People v Hill, 10 AD3d 310, 781 NYS2d 106  
(1st Dept 2004)**

**Holding:** The court properly exercised its discretion in declining to permit a psychiatric examination of the defendant more than three years after the killing for which he was charged. New counsel assigned in October 2000 said three months later that because the prosecution's expert had found the defendant to be a malingerer, no insanity defense would be pursued although CPL 25010(1)(b) and (c) applied. The defense did retain a psychiatrist to examine the case materials but affirmatively declined to have the defendant examined. When trial began in February, counsel sought to proceed with insanity and extreme emotional disturbance defenses and sought to have the defendant examined. In contrast to *People v Gracius* (6 AD3d 222), the delay in seeking an exam here was three years, not less than a month, and was based on vacillation about trial tactics, not law office error. Further, the defendant's sanity in *Gracius* was clearly at issue, which was not so clearly shown on this record. The claim that the defendant was denied the right to present a defense was unpreserved and without merit. Judgment affirmed. (Supreme Ct, Bronx Co [Hunter, JJ])

**Dissent:** [Andrias and Gonzalez, JJ] The defendant would have been better off if precluded from presenting an insanity defense altogether than being allowed to present one without examination by an expert. There is no question that the initial notice was timely filed and that new counsel promptly moved to obtain a psychiatric expert, whatever deficiencies there may have been in prior representation. A new trial is warranted.

**Second Department**

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

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

**Second Department** *continued*

**People v Wilson, 7 AD3d 549, 776 NYS2d 98  
(2nd Dept 2004)**

**Holding:** A prospective juror’s initial statements indicated a hostility toward black people. She “informed the court that she would not be able to judge the defendant fairly because she and her family had been victims of crimes committed by ‘people of color.’” While the juror said she would be objective and try to set aside her experiences, she was unable to say that those experiences would not influence her ability to be objective: “I don’t know. I have to look at the evidence I guess and see. You see the thing is I know what happened in the past does haunt me, but I try not to think about it.” The most she could say about setting aside her past experiences was, “I should be able to do it.” Because the juror never unequivocally stated that her bias would not influence her verdict or that she could render an impartial verdict, the defense challenge for cause should have been granted. *See People v Torpey*, 63 NY2d 361. Judgment reversed, new trial ordered. (County Ct, Nassau Co [Calabrese, JJ])

**Criminal Mischief (Elements) CMM; 99(10) (15)  
(Evidence)**

**People v Deolall, 7 AD3d 635, 777 NYS2d 173  
(2nd Dept 2004)**

**Holding:** The evidence at the defendant’s trial was insufficient to prove that the damage alleged exceeded \$1,500 as required for second-degree criminal mischief under Penal Law 145.10. There was no expert testimony as to value, nor any documentary proof as to the cost of repair or replacement. The complainant’s testimony alone was insufficient. *See People v Wilson*, 284 AD2d 420. The conviction must be reduced, but no resentencing is required as the defendant has already served the maximum permissible sentence for fourth-degree criminal mischief. *See* Penal Law 145.00 and 70.15(1). Judgment reversed, conviction reduced. (Supreme Ct, Queens Co [Erlbaum, JJ])

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

**People v Collazo, 7 AD3d 595, 775 NYS2d 887  
(2nd Dept 2004)**

The Board of Examiners of Sex Offenders classified the defendant as a level two sex offender. The prosecution moved to raise the classification to a level three over the defendant’s objection. The court’s decision was based on the defendant’s history of drug or alcohol abuse, which added 15 points on the Sex Offender Registration Act Risk Assessment Instrument.

**Holding:** The prosecution failed to meet its burden of proving the facts underlying the court’s decision by clear and convincing evidence as required by Correction Law 168-n(3). The defendant’s one time receipt of marijuana from a visitor while in prison was insufficient to show a history of drug use or abuse. *See gen People v Santiago*, 2001 WL 1657275, 2001 NY Misc. Lexis 690 (10/5/01). The defendant must be reclassified as a level two sex offender. *See People v Mallory*, 293 AD2d 881. Judgment reversed. (Supreme Ct, Richmond Co [Rienzi, JJ])

**Evidence (Hearsay)**

**EVI; 155(75)**

**People v Baez, 7 AD3d 633, 777 NYS2d 162  
(2nd Dept 2004)**

**Holding:** The defendant was convicted of third-degree possession of a weapon. A radio report overheard by the arresting officer and his partner describing a suspect was properly admitted into evidence at the defendant’s trial to explain the officers’ presence at the scene, and to limit jury speculation. *See People v Stephens*, 274 AD2d 487, 488. The court’s instruction, emphasizing that the radio report was not offered for the truth of the report’s contents but only to explain the officers’ presence, and that the jury should disregard facts in the report not relevant to explaining their presence, eliminated the risk of prejudice to the defendant. *People v Burrus*, 182 AD2d 634. Judgment affirmed. (Supreme Ct, Kings Co [Leventhal, JJ])

**Admissions (Co-defendants)**

**ADM; 15(5)**

**Confessions (Accomplice)  
(Co-defendants)**

**CNF; 70(5) (15)**

**People v Johnson, 7 AD3d 732, 777 NYS2d 190  
(2nd Dept 2004)**

**Holding:** On direct examination of the police detective, the prosecutor improperly brought out that the defendant was arrested after a police interview with a nontestifying codefendant. This implied that the codefendant implicated the defendant. *See People v Jones*, 305 AD2d 698. It was also improper for the prosecutor to have the detective testify that the defendant agreed to make a statement after he heard that police possessed statements from two codefendants and showed him the statement of another nontestifying codefendant. *See Bruton v US*, 391 US 123 (1968). The defendant claimed that one nontestifying codefendant set him up because of an earlier altercation. The jury had asked to see the nontestifying codefendant’s statement, which they mistakenly believed had been admitted into evidence. *People v Hamlin*, 71 NY2d 750. The improperly admitted testimony was not harmless error. Judgment reversed. (County Ct, Nassau Co [Belfi, JJ])

**Second Department** *continued***Evidence (Character and Reputation)** **EVI; 155(20)****Search and Seizure (Arrest/Scene of the Crime Searches [Scope])** **SEA; 335(10[m])****Weapons (Possession)** **WEA; 385(30)****People v Chisolm, 7 AD3d 728, 777 NYS2d 502 (2nd Dept 2004)**

The defendant was charged with weapons possession. At a suppression hearing, the police officer testified that he observed the defendant ride his bike on the sidewalk through two red lights. When the defendant saw the police, he fled. The officer arrested him and found a loaded gun in his waistband. A search of the defendant's knapsack, revealed a magazine buyer's guide about guns that was introduced at trial.

**Holding:** Search of the knapsack was improper; the defendant had been handcuffed and it was beyond his control. *See People v Gokey*, 60 NY2d 309. Introduction of the magazine undermined the defense theory of temporary innocent possession; the defendant said that he found the gun in the street and planned to turn it in for a reward. It was also error for the court to deny the defendant's request to introduce character witnesses to testify about his reputation for peacefulness in the community. The indictment charged third-degree criminal possession of a weapon. This is a violent offense. *See Penal Law 70.02 (1)(c)*. A reputation for peacefulness is relevant to guilt or innocence of weapons possession. *See People v Lopez*, 258 AD2d 388. Judgment reversed. (Supreme Ct, Kings Co [Dowling, JJ])

**Instructions to Jury (Burden of Proof) (General)** **ISJ; 205(20) (35)****Juries and Jury Trials (General)** **JRY; 225(37)****People v Cotterell, 7 AD3d 807, 779 NYS2d 500 (2nd Dept 2004)**

**Holding:** The court's jury charge was insufficient and its responses to jury requests for clarification improper. *See CPL 300.10[2]*, 310.30. The judge omitted instructions on reasonable doubt and burden shifting, and omitted critical elements of the assault and weapons charges, such as "intent." *See CJI[NY] 9.31*, at 502. He also mixed up "dangerous instrument" (Penal Law 10.00[13]) and "deadly weapon" (Penal Law 10.00[12]). *See People v Sanders*, 69 NY2d 860, 861-862. Added error would alone require reversal; the court charged the jury that the "[c]lub was the weapon." This removed an element from the jury's consideration. *See People v Flynn*, 79 NY2d 879, 881-882.

The justification instruction was also insufficient. *See 1 CJI[NY] 35.15[1]*, at 856-863; *People v Goetz*, 68 NY2d 96.

Other fundamental principles poorly related to the jury included the presumption of innocence (*People v Roldos*, 112 AD2d 388), the concept of "evidence;" and the treatment of sustained objections and stricken answers. *See CPL 70.20; 1 CJI[NY] 3.10* at 97-100, 3.21 at 107-110. The court neglected to admonish the jury not to discuss the case and similar restrictions before each recess during deliberations. *See CPL 270.40, 310.10(2); People v Nunez-Ramos*, 160 AD2d 1029, 1030-1031. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Douglass, JJ])

**Search and Seizure (Stop and Frisk)** **SEA; 335(75)****People v Stevenson, 7 AD3d 820, 779 NYS2d 498 (2nd Dept 2004)**

**Holding:** The arresting officer did not have reasonable suspicion to believe that the defendant had committed or was about to commit a crime. *See People v Harris*, 149 AD2d 730. The detective's observation of a bulge in the center of the defendant's waistband, around which the defendant adjusted his clothes, was insufficient to forcibly detain or frisk the defendant. *See People v De Bour*, 40 NY2d 210, 216. The bulge did not have the outline of a weapon. The observations were susceptible of innocent as well as guilty explanation. At best, the observations supported a common-law inquiry to determine whether criminal activity was afoot. Approaching the defendant and asking him if he had a weapon was proper, but frisking him when he did not answer was not. *People v Howard*, 50 NY2d 583, 586 *cert den* 449 US 1023. There was no evidence that the detective was in fear for his safety or had other information indicative of criminality. Judgment reversed. (Supreme Ct, Richmond Co [Rienzi, JJ])

**Juries and Jury Trials (Challenges) (Qualifications) (Voir Dire)** **JRY; 225(10) (50) (60)****Trial (Mistrial)** **TRI; 375(30)****People v Kenner, 8 AD3d 296, 777 NYS2d 669 (2nd Dept 2004)**

**Holding:** During *voir dire* in the defendant's murder trial, a prospective juror stated she would hold the defendant's failure to testify against him, and was equivocal on her ability to follow the court's instructions to the contrary. Another panelist expressed doubts about her impartiality based on her religious beliefs, and was equivocal about following the court's instructions. The court improperly denied defense challenges for cause as to both jurors. *See CPL 270.20(1)(b); People v Bludson*, 97 NY2d 644, 645. Since the defendant exhausted all of his peremptory challenges before the end of jury selection, it requires reversal. *See CPL 270.20(2); People v Torpey*, 63 NY2d 361.

The complainant, who witnessed his friend's death during the robbery, refused to answer the prosecutor's

**Second Department** *continued*

questions after a certain point and stated that he was going to leave the matter “in the hands of the Holy Spirit.” The court struck his entire testimony but refused to declare a mistrial. Striking this testimony was not enough to remove the prejudice created by the complainant’s previous statements. *See People v Gonzalez*, 187 AD2d 630. Judgment reversed, new trial ordered. (Supreme Ct, Westchester Co [Perone, JJ])

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

**Search and Seizure (Motions to Suppress [CPL Article 710]) (Stop and Frisk)** SEA; 335(45) (75)

**People v Brogdon**, 8 AD3d 290, 778 NYS2d 45 (2nd Dept 2004)

A police officer watched the defendant “hanging out” during the late evening and early morning in the vestibule of a residential building known to be a drug prone location. The defendant had two shopping bags with him at the time he spoke to a man who had been banned from the building and arrested for drug possession. The two left together. The officer approached them to arrest the man for trespassing. The defendant ran when the officer looked at him. When he was caught, the defendant threw down one bag, which contained a loaded handgun and some loose rounds of ammunition. Before administering *Miranda* warnings, the officer asked the defendant where he got the gun. The defendant denied ownership. Drugs were found on him.

**Holding:** The defendant’s conduct and the circumstances did not suggest criminal activity. The officer had a basis for a common law inquiry, but the circumstances combined with the defendant’s flight did not raise the level of the encounter. *See People v Holmes*, 81 NY2d 1056, 1057-1058. Since the pursuit was not justified, the abandoned gun, the drugs, and the defendant’s statement should have been suppressed. In any case, the statement had to be suppressed because it was made during custodial interrogation without the benefit of *Miranda* warnings, and not for purposes of clarification. *See People v O’Connor*, 6 AD3d 738. Judgment reversed. (County Ct, Westchester Co [Lange, JJ])

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

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

**People v Wright**, 8 AD3d 304, 778 NYS2d 59 (2nd Dept 2004)

Police received a radio report that two men were breaking into a car. At the scene, they found the defendant and a codefendant in the front seat of a car, and two other men trying to break into a nearby house. The defendant had no proof of vehicle ownership. According to police, the defendant’s explanation about his presence was suspicious. All four men were wearing the same kind of shirt. They were arrested for attempted burglary and auto theft. After being Mirandized, the defendant said that one of the codefendants intended to steal a car. The statement was suppressed.

**Holding:** Under the totality of the circumstances, police had probable cause to arrest the defendants. *See People v Guo Fai Liu*, 271 AD2d 695, 696. An articulable reason, based on the radio report, existed to approach the defendants in the car and ask about their identity, vehicle ownership, and their reason for being there. *See People v Hollman*, 79 NY2d 181, 191. The defendant’s inability to prove car ownership and evidence of a burglary in progress created reasonable suspicion to believe the defendants were involved in criminal activity. Detaining the defendant while police pursued the other men was justified. The attempted burglary, and the uniformity of the men’s clothing, gave the officers probable cause to arrest the defendant. *See People v Bigelow*, 66 NY2d 417, 423. Order reversed. (Supreme Ct, Queens Co [Grosso, JJ])

**Dissent:** [Goldsten, JJ] The car had not been reported stolen, there was no sign of forced entry, and the defendant did not try to flee. Wearing a popular shirt proved nothing. The defendant was not required to prove that he was an authorized user of the vehicle to avoid arrest, and his vantage point did not implicate him in the burglary.

**Insanity (Post-commitment Actions)** ISY; 200(45)

**Matter of Sheldon S.**, 9 AD3d 92, 778 NYS2d 180 (2nd Dept 2004)

The defendant entered a plea of not responsible by reason of mental disease or defect to attempted rape and other charges. At his commitment hearing, psychiatrists testified that he suffered from a dangerous mental disorder and required treatment in a secure psychiatric facility. A court appointed doctor disagreed. The court found the defendant to be mentally ill, but not with a dangerous mental disorder, and ordered a six month commitment and treatment plan. After discovering that the defendant had assaulted two jail guards previously and severely decompensated, the prosecution sought a recommitment order claiming that the defendant now suffered from a dangerous mental disorder. The defendant’s motion to dismiss for lack of jurisdiction was denied. At a new hearing, all the doctors agreed that defendant had a dangerous mental disorder. The court ordered him committed to a secure facility.

**Holding:** The prosecutor’s application for recommit-

**Second Department** *continued*

ment and change in the defendant's track status was valid. *See* CPL 330.20[14]; *Matter of Francis S.*, 87 NY2d 554. There are three track options for an insanity acquittee: tracks one and two result in different levels of placement while track three results in discharge possibly with order of conditions. *See* CPL 330.20[6]; [7]; *People v Stone*, 73 NY2d 296, 300. At an initial hearing, the prosecutor must prove by a preponderance of the evidence that a defendant fits into either track one or two. *See People v Escobar*, 61 NY2d 431, 439-440. There is no showing that the prosecution here withheld information at the initial hearing. The defendant was subject to an order of conditions when a recommitment order was sought. New evidence of the defendant's deteriorated mental state and violent behavior justified adjusting his status from track two to track one. Judgment affirmed. (Supreme Ct, Kings Co [Barros, JJ])

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**Accomplices (Accessories) (Aiders and Abettors)** ACC; 10(5) (10)

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

**People v Hart**, 8 AD3d 402, 778 NYS2d 94 (2nd Dept 2004)

**Holding:** The defendant and another person participated in a drag race. The other driver entered oncoming traffic and crashed into a third car, killing himself and the third driver. The defendant's conduct in entering a drag race was a sufficiently direct cause of the co-participant's death to support a second-degree manslaughter conviction under Penal Law 125.15(1). According to testimony from the passenger in the co-participant's car, the defendant instigated the race. The evidence showed beyond a reasonable doubt that his reckless conduct set in motion the events that ultimately resulted in the accident involving the third driver under circumstances that should have been reasonably foreseen. *See People v Kibbe*, 35 NY2d 407, 412. The defendant did not have to be the sole cause of death. *See Matter of Anthony M.*, 63 NY2d 270, 280. The co-participant's reckless conduct did not absolve the defendant. *See eg People v Duffy*, 79 NY2d 611. There was legally sufficient evidence that the defendant intentionally aided the co-participant's actions, resulting in accessorial liability for the third driver's death and injuries to the co-participant's passenger. Judgment affirmed. (County Ct, Nassau Co [DeRiggi, JJ])

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**Juries and Jury Trials (Alternate Jurors) (Deliberation) (General)** JRY; 225(5) (25) (37)

**People v Romano**, 8 AD3d 503, 778 NYS2d 517 (2nd Dept 2004)

**Holding:** Based on the post-conviction testimony of several jurors and alternates, there was sufficient basis for the trial court to find that some jurors and alternates committed misconduct and to grant the defendant's CPL 330.30(2) motion to set aside the verdict. *See People v Brown*, 48 NY2d 388, 394. Some jurors had discussed trial testimony, witness credibility, and the defendant's guilt or innocence before deliberations. Some had read and discussed press coverage of the case. Also, there were improper communications between the jurors and alternates during deliberations. *See People v Litwa*, 230 AD2d 638. The testimony was not speculative. The court's fact-finding and credibility determinations are entitled to great deference. The court properly found a substantial risk that the misconduct prejudiced the defendant's rights. Order affirmed. (Supreme Ct, Queens Co [Cooperman, JJ])

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

**Sex Offenses (General) (Juveniles)** 350(4) (12)

**People v Quinones**, 8 AD3d 589, 779 NYS2d 131 (2nd Dept 2004)

**Holding:** Since first-degree sexual conduct against a child is a continuing offense (*see* Penal Law 130.75[1][a]; *People v McLoud*, 291 AD2d 867), it was error to charge the defendant with two counts based on an arbitrary division of the time span. One count was based on acts alleged from Sept. 1, 1998 to Dec. 31, 1998, and another count for the period from Jan. 1, 1999 to May 30, 1999. These counts were based on the same course of conduct, making them multiplicitous. *See People v Aarons*, 296 AD2d 508. The issue was unpreserved for review. *See* CPL 470.05(2); *People v Cruz*, 96 NY2d 857. It is nonetheless reached in the court's interest of justice jurisdiction. Judgment modified, conviction under count three vacated and dismissed. (Supreme Ct, Kings Co [Starkey, JJ])

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**Appeals and Writs (General) (Preservation of Error for Review)** APP; 25(35) (63)

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

**People v Soto**, 8 AD3d 683, 779 NYS2d 251 (2nd Dept 2004)

**Holding:** The defendant preserved his challenge to the legal sufficiency of the evidence of intent to commit attempted second-degree murder by asserting specific grounds in his motion for a trial order of dismissal at the end of the prosecution's case. *See* CPL 290.10; *People v Finger*, 95 NY2d 894, 895. A defendant waives the right to attack the quantum of proof adduced in the prosecution's case if, following denial of a motion for dismissal, the

**Second Department** *continued*

defendant presents witnesses whose testimony supplies additional evidence of guilt. *People v Hines*, 97 NY2d 56. The *Hines* decision deals with waiver, not sweeping changes to the preservation of error doctrine. To the extent *People v Harris* (300 AD2d 675) appears to say otherwise, it is overruled. A motion under CPL 290.10 at the close of the prosecution's case asserting specific grounds is sufficient to preserve those arguments in a challenge on appeal to the sufficiency of evidence. The verdict here was not against the weight of the evidence. *See* CPL 470.15[5]. Judgment affirmed. (County Ct, Orange Co [Rosenwasser, JJ])

**Conspiracy (Acts of Co-conspirator) (Evidence) (General)** **CNS; 80(10) (20) (23)**

**Juveniles (Delinquency)** **JUV; 230(15)**

**People v Austin, 9 AD3d 369, 780 NYS2d 23 (2nd Dept 2004)**

The respondents allegedly agreed with each other and two juveniles to sell drugs in a housing project. The court dismissed a first-degree conspiracy count (Penal Law 105.17) because the juveniles had not committed or caused another to commit a class A Felony. Multiple counts charging sale of drugs in or near school grounds were dismissed because the prosecutor asked leading questions in the grand jury about whether the sales were within 1,000 feet of a school. Without the resulting testimony, the court found insufficient evidence to support those counts.

**Holding:** First-degree conspiracy required an illicit agreement (*see People v Berkowitz*, 50 NY2d 333, 343) and an overt act by one of the conspirators in furtherance of the conspiracy. *See* Penal Law 105.20; *People v McGee*, 49 NY2d 48, 57 *cert den sub nom Waters v New York*, 446 US 942. The statute does apply to a conspiracy between an adult and a juvenile regardless of the age of the person committing or causing the class A felony. The intent behind the statute was to punish adults who conspired with juveniles more severely than adult conspirators alone. *See* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law Art. 105, at 40. There was no requirement that the juvenile perform the overt act. Also, the prosecutor's questions in the grand jury did not affect the indictment. *See* Penal Law 220.44; *People v Swamp*, 84 NY2d 725, 730. Orders reversed or vacated, matter remitted. (Supreme Ct, Kings Co [Gerges, JJ])

**Admissions (Interrogation) (Miranda Advice)** **ADM; 15(22) (25)**

**People v Vitiello, 10 AD3d 372, 780 NYS2d 380 (2nd Dept 2004)**

The defendant surrendered to police regarding the shooting of the decedent. After being Mirandized, he told police that the gun went off accidentally. He also advised his girlfriend not to cooperate because she could be charged as an accomplice. When questioned by police, she said she did not know the location of the weapon. Then, the defendant requested an attorney. The police advised the girlfriend that they could not speak to the defendant about the gun, but she could. The defendant tried to tell the police about the gun's location, but they refused to speak to him. After meeting privately with his girlfriend, the defendant and his girlfriend told police they would reveal the gun's whereabouts. Based on the girlfriend's statement, the gun was found. A motion to suppress the gun was denied.

**Holding:** The police violated the defendant's right to counsel by using his girlfriend, a private citizen, to elicit incriminating information. *See Maine v Moulton*, 474 US 159 (1895). The police did not honor the defendant's right to cut off questioning and should have know the effect of asking his girlfriend to speak with him after he had announced his desire to reveal the location of the gun. Doing so was a form of interrogation. *See People v Ferro*, 63 NY2d 316, 322 *cert den* 472 US 1007. No exigent circumstances existed, as the crime scene was secure and there was no reason to believe that the gun was a danger to public safety. *See Matter of John C.*, 130 AD2d 246, 254. Admission of the gun and expert testimony about its condition was not harmless error. *People v Crimmins*, 36 NY2d 230. Judgment reversed. (Supreme Ct, Queens Co [Eng, JJ])

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

**Witnesses (Credibility) (Cross Examination)** **WIT; 390(10) (11)**

**People v Stein, 10 AD3d 406 (2nd Dept 2004)**

The defendant was convicted of rape, sodomy, and related offenses. His motion under CPL 440.10 to vacate the judgment of conviction was denied.

**Holding:** The prosecution erred by failing to reveal that two complainants filed notices of claim against the defendant's school district employer alleging that the district was responsible for the defendant's actions under *Giglio v US* (405 US 150 [1972]). The complainants' attorney and the school district informed prosecutors about the suit before the defendant's trial. Negligence as the cause does not excuse the failure to reveal evidence material to the defense. *See People v Simmons*, 36 NY2d 126, 132.

**Second Department** *continued*

Knowledge of the lawsuits was relevant to the credibility of the witnesses who planned to sue. *See People v Novoa*, 70 NY2d 490, 496. The failure to reveal the evidence to the defense was compounded by the prosecutor's statement in closing argument that no civil lawsuits had been brought. *See People v Wallert*, 98 AD2d 47. There was a reasonable probability that the nondisclosure affected the outcome of the trial. *See People v Bryce*, 88 NY2d 124, 128. The trial court also erred by limiting the defendant's cross-examination of a complainant regarding a false police report he allegedly filed against his father, since it concerned credibility. *See People v Mills*, 146 AD2d 810. Judgment reversed. (County Ct, Westchester Co [Zambelli, JJ])

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

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

**People v Turner, 10 AD3d 458, 781 NYS2d 163  
(2nd Dept 2004)**

**Holding:** Appellate counsel was ineffective for not asserting ineffective assistance by the defendant's trial counsel. Trial counsel had objected to instructing the jury on first-degree manslaughter as a lesser included of second-degree murder, but failed to include in his objection the grounds that the charge was barred by the statute of limitations. *See CPL 30.10(2)(a)*. While the murder charge was timely, the lesser-included offense was time barred. *See People v Di Pasquale*, 161 App Div 196. The defendant was convicted of the lesser-included time-barred offense. *See People v Hughes*, 220 AD2d 529. Contrary to the prosecution's argument, the law was not "unresolved" about the application of the statute of limitations to lesser-included offenses. Failure to raise the statute of limitations was not a tactical choice, and it was extremely prejudicial to the defendant. It fell below the level of effective assistance of counsel. *See People v Benevento*, 91 NY2d 708, 712. Judgment reversed, indictment dismissed. (Supreme Ct, Kings Co )

**Search and Seizure (Search Warrants    SEA; 335(65[a] [p])  
[Affidavits, Sufficiency of]  
[Suppression])**

**People v Diaz, 782 NYS2d 286 (2nd Dept 2004)**

**Holding:** The detective who obtained the search warrant had made a diligent effort to ascertain the true character of the premises to be searched, described in the warrant as a one-family residence. The validity of the warrant turned on the information available at the time it was obtained. *See Maryland v Garrison*, 480 US 79, 85 (1987).

Subsequent discovery that the premises were a two-family residence did not require suppression of the evidence found when the warrant was executed. Judgment affirmed. (Supreme Ct, Kings Co [Juviler, JJ])

**Defenses (Agency)**

**DEF; 105(3)**

**Narcotics (Defenses)**

**NAR; 265(8)**

**People v Johnson, 783 NYS2d 48 (2nd Dept 2004)**

**Holding:** The court properly refused to instruct the jury on an agency defense. The defendant conceded that, desperate for drugs and lacking money, he had a drug-related intent when he approached the person who turned out to be an undercover officer. The defendant concededly initiated a drug transaction with the expectation of receiving a benefit in the form of drugs. *See People v Alvarez*, 235 AD2d 484, 485. Upon arrest after the transaction, the defendant was found to have the prerecorded money and six zip lock bags of cocaine. The jury could not reasonably have concluded that the defendant acted solely as an agent or extension of the buyer. *See People v Herring*, 83 NY2d 780, 782. Judgment affirmed. (Supreme Ct, Kings Co [Carroll, JJ])

**Bail and Recognizance (Appeal)  
(Pre- and Post-conviction)**

**BAR; 55(10) (30)**

**Habeas Corpus (State)**

**HAB; 182.5(35)**

**Sex Offenses (General)**

**SEX; 350(4)**

**People ex rel. Hinspeter v Senkowski,  
783 NYS2d 386 (2nd Dept 2004)**

While free on bail pending sex charges involving a child, the appellant appeared in court whenever required. After conviction he was remanded. Following sentencing he sought a stay upon posting bail pending appeal, which was denied as statutorily prohibited in serious child sexual assault cases. He petitioned for a writ of *habeas corpus*.

**Holding:** This is an issue of first impression: "whether habeas corpus relief is available to challenge the constitutionality of CPL 530.50, amended by L. 2000, ch 1, § 14, [Sexual Assault Reform Act], following the mandatory denial of post-conviction bail pending appeal." The Court of Appeals, which has held *habeas* proceedings appropriate for review of pre-conviction bail (*See People ex re. Klein v Krueger*, 25 NY2d 497, 499), has not ruled on the use of *habeas* as to post-conviction bail. The statutory authority for *habeas* review of bail does not distinguish between pre- and post-conviction bail. *See CPLR 7010(b)*. Review is limited to whether bail is excessive or was arbitrarily denied. *See People ex rel. Rosenthal v Wolfson*, 48 NY2d 230, 232. There is no constitutional right to post-conviction bail. The court's denial of bail as required by statute was not an abuse of discretion. What offenses are bailable is primarily

**Second Department** *continued*

ly a legislative question, existing independently of whether a particular person is a flight risk. *See Matter of Gold v Shapiro*, 62 AD2d 62, 68 *affd* 45 NY2d 849. This *habeas* proceeding is a second attempt to seek bail pending appeal. Defendants are statutorily limited to one application. *See* CPL 460.50(3); *Matter of Lefkowitz v Cioffi*, 46 AD2d 473, 475. *Habeas* relief is not available. Judgment affirmed. (Supreme Ct, Westchester Co [DiBlasi, JJ])

**Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause (Furtive Conduct)]) (Stop and Frisk)** SEA; 335(10[g(i)]) (75)

**People v Febus**, 783 NYS2d 55 (2nd Dept 2004)

The trial court suppressed evidence resulting from a police stop and eventual arrest of the defendant.

**Holding:** The observation from a distance of five feet, by a police officer familiar with common methods of packaging drugs, of the defendant holding a plastic bag containing smaller pink ziplock bags, provided a reasonable suspicion to stop the defendant. The defendant's action in shoving the bags into his pocket while looking startled and his lie in response to the officer's question about what he had put in his pocket raised the level of the encounter. *See People v Alvarez*, 100 NY2d 549, 550. Therefore, the officer had probable cause to believe the defendant possessed narcotics, justifying his search and arrest. *See People v Fleury*, 8 AD2d 585. Order reversed, suppression denied. (Supreme Ct, Kings Co [Brennan, JJ])

**Instructions to Jury (Preliminary Instructions)** ISJ; 205(48)

**People v Davis**, 783 NYS2d 850 (2nd Dept 2004)

**Holding:** The court's instructions to the jury about the elements of the charge, given before opening statements, created the possibility of premature deliberations. *See People v Townsend*, 67 NY2d 815. While there was no objection, the error affects the "mode of proceedings" required by law. It violated the order of trial proceedings set out in CPL 260.30. Judgment reversed, remitted for new trial. (Supreme Ct, Kings Co [Rappaport, JJ])

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

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

**People v Stanley**, No. 2003-03026, 2nd Dept, 11/8/2004

**Holding:** Adjudication of the defendant as a second

felony offender was not supported by the record. Information contained in the predicate felony statement (*see* CPL 400.21[2]) indicated that the 1987 conviction did not qualify as a predicate felony under Penal Law 70.06(1)(iv) and (v). Apparent on the face of the record (*cf People v Sullivan*, 153 AD2d 223, 233) and involving the right to be sentenced according to law, this error need not be preserved for review. *See People v Samms*, 95 NY2d 52. Judgment modified, sentence vacated, matter remitted. (Supreme Ct, Queens Co [Kron, JJ])

**Third Department**

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

**People v Thomas**, 2 AD3d 982, 768 NYS2d 519 (3rd Dept 2004)

**Holding:** The defendant's guilty plea waived issues raised on appeal, including alleged defects in the indictment and ineffectiveness of counsel for failing to challenge those defects. The allegedly unreliable information contained in the presentence investigation report, including hearsay regarding the defendant having threatened a 14-year-old accomplice, was challenged at the sentencing proceeding. The court agreed not to consider that information, and sentenced the defendant in accordance with the plea agreement. The defendant's claim on appeal that the report should be redacted "to avoid future prejudice in parole and other discretionary determinations" is rejected. The purpose of the report is to give the court the best available information for sentencing. *See People v Kerry*, 36 NY2d 114, 120. While the court opted not to rely on the contested information, "we see no basis for physical redaction of the report." Judgment affirmed. (County Ct, Chemung Co [Buckley, JJ])

**Sentencing (Hearing) (Presentence Investigation and Report)** SEN; 345(42) (65)

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

**People v Brown**, 7 AD3d 831, 776 NYS2d 366 (3rd Dept 2004)

After serving a Colorado sentence for aggravated incest, the defendant moved to Warren County, New York. He registered as a sex offender. The Board of Examiners of Sex Offenders recommended risk level III classification, violent sex offender. At a risk assessment hearing in county court, the only evidence presented was the risk assessment instrument, a case summary, documentation related to the Colorado offense and letters from the defendant's family—no testimony. The defendant objected to the summary and documentation as unreliable hearsay. The court confirmed the Board's recommendation.

**Third Department** *continued*

**Holding:** Documentary evidence consisting of a risk assessment instrument, case summary and records relating to the sex offense were not based on reliable hearsay and did not constitute sufficient evidence to sustain a risk assessment finding. The Sex Offender Registration Act (see Correction Law art 6-C) (SORA) required the prosecution to prove the facts underlying the risk assessment by clear and convincing evidence. *See* Correction Law 168-n [3]; *People v Wroten*, 286 AD2d 189, 199 *lv den* 97 NY2d 610. The case summary was based on second-hand information from the Colorado authorities. There was no independent verification. No presentence investigation report was prepared after the defendant's arrival in Warren County. Judgment reversed, remitted for reclassification hearing. (County Ct, Warren Co [Austin, JJ])

**Informants (Disclosure)** INF; 197(15)**People v Stanfield, 7 AD3d 918, 777 NYS2d 546 (3rd Dept 2004)**

The defendant was arrested after a controlled drug buy involving another person and a confidential informant. Police observed the defendant making a transfer with the other person, and then that person made the sale to the informant. At the defendant's trial for third-degree possession of a controlled substance, the court denied his request for disclosure of the informant's identity.

**Holding:** The confidential informant's testimony about the circumstances of the alleged transaction involving the defendant was relevant to guilt or innocence and required disclosure of his identity to the defense. *See People v Goggins*, 34 NY2d 163, 170 *cert den* 419 US 1012; *Rovario v US*, 353 US 53, 60-61 (1957). The defendant raised a question about whether the item handed to the informant was the same one that was seen transferring earlier. Either the district attorney can reveal the informant's identity before trial or keep the identity secret and not prosecute the case. Judgment reversed, remitted for new trial. (Supreme Ct, Albany Co [Teresi, JJ])

**Evidence (Hearsay)** EVI; 155(75)**Witnesses (Confrontation of Witnesses)** WIT; 390(7)**People v Rogers, 780 NYS2d 393 (3rd Dept 2004)**

The defendant was convicted of rape and sodomy of a complainant incapable of consent. The defendant's CPL 440.10 motion to vacate the judgment was denied.

**Holding:** Admission of a blood test report without an opportunity to challenge through cross-examination the authenticity of the sample used violated the 6th Amendment and the Confrontation Clause. The prosecu-

tion ordered the blood test to generate evidence against the defendant, making the results testimonial. *See* US Const 6th Amend, *Crawford v Washington*, 158 LEd2d 177 (2004). It was used to show the complainant's blood alcohol content at the time of the alleged attack and related to her capability to consent. Not allowing the defendant to cross-examine the author of the report was reversible error. *See People v Crimmins*, 36 NY2d 230, 241-242. The defendant's constitutional and statutory speedy trial rights were not violated. The testimony of the sexual assault nurse examiner and the complainant's hospital records were properly admitted. Judgment reversed, remanded for new trial. (Supreme Ct, Albany Co [Lamont, JJ])

**Accusatory Instruments (General)** ACI; 11(10) (15) (Sufficiency)**People v Levandowski, 780 NYS2d 384 (3rd Dept 2004)**

**Holding:** Some of the original 44 counts of rape and other related sexual offenses for which the defendant was convicted were duplicitous. Each count of an indictment may charge only one offense. CPL 200.30 (1). When a single count alleges the commission of a particular offense occurring repeatedly over the course of time, it covers more than one offense. *People v Keindl*, 68 NY2d 410, 417-418. Certain counts not facially duplicitous are shown to be so by examination of the grand jury testimony on which they are based. *See People v Corrado*, 161 AD2d 658, 659. The complainant's testimony that she had been raped at least once during a set time period created a duplicitous count.

The prosecutor committed misconduct requiring reversal. Prior consistent statements of the complainant were used at trial to bolster in-court testimony despite the grant of a motion *in limine* to prevent such use. *See People v McDaniel*, 81 NY2d 10. The prosecutor improperly impugned the complainant's mother, expressing a personal opinion about her credibility *See eg People v Russell*, 307 AD2d 385, 386. The prosecutor suggested in summation that the defendant was required to prove the complainant had a motive to lie, shifting the burden of proof. During summation the complainant, her friends, and members of the prosecution staff wore ribbons in support, impairing the defendant's right to a fair trial. *See Matter of Montgomery v Muller*, 176 AD2d 29, 32 *lv den* 80 NY2d 751. Judgment reversed, remanded for new trial. (Supreme Ct, Rensselaer Co [Ceresia, JJ])

**Instructions to Jury (Burden of Proof)** ISJ; 205(20)**People v Long, 779 NYS2d 640 (3rd Dept 2004)**

**Holding:** The trial court's response to a jury question about standard of proof was not meaningful. *See* CPL

**Third Department** *continued*

310.30; *People v Malloy*, 55 NY2d 296, 302 *cent den* 459 US 847. At the start of deliberations, the jury asked the meaning of preponderance of the evidence. Not finding the term mentioned in its instructions, the court advised the jury as much and recommended giving the term its ordinary dictionary meaning if it came up. This response was too vague to be meaningful. See *People v Steinberg*, 79 NY2d 673, 684. The standard of proof is a fundamental issue. Since preponderance of the evidence played no role in the case, the court should have reinstructed the jury on the correct standard of proof, eliminating any confusion. Where at least one juror may have reached a verdict based on an inapplicable legal standard, the error prejudiced the defendant. See *People v Lourido*, 70 NY2d 428, 435. Judgment reversed, new trial required. (County Ct, Saratoga Co [Scarano, JJ])

**Assault (Evidence) (Lesser Included Offenses) (Serious Physical Injury)** **ASS; 45(25) (50) (60)**

**People v Horton, 780 NYS2d 654 (3rd Dept 2004)**

The defendant was convicted of first-degree assault for shooting in the neck one of two persons present at an encounter. During trial, evidence showed that the complainant had a gunshot wound, a small hole in his neck, which was not life threatening and did not involve any major organs or blood vessels. No testimony was given about the long-term effects of the injury. The complainant left the hospital after two days.

**Holding:** Evidence concerning the complainant’s gunshot wound to the neck was insufficient to show serious physical injury. See Penal Law 120.10 (1). No evidence was presented to show that the wound caused protracted health impairment, disfigurement, or loss or impairment of any organ. See Penal Law 10.00 (10); *People v Santos*, 161 AD2d 816 *lv den* 76 NY2d 864. The complainant did sustain a “physical injury,” and endured substantial pain. Therefore, the first-degree assault charge is reduced to the lesser-included offense of second-degree assault. See Penal Law 120.05 (2); *People v Snyder*, 294 AD2d 381 *lv den* 98 NY2d 702. Judgment reversed, remanded for resentencing. (County Ct, Albany Co [Breslin, JJ])

**Arrest (General) (Warrantless)** **ARR; 35(12) (54)**

**Search and Seizure (General)** **SEA; 335(42)**

**People v Hines, 780 NYS2d 419 (3rd Dept 2004)**

The defendant contacted the police to determine if an arrest warrant had been issued, saying that he was being falsely accused of rape. He spoke with a police officer he

knew from a previous interview concerning assault charges brought by the same complainant. The officer falsely said that a warrant had been issued. The defendant came to the police station and gave a post-Miranda statement proclaiming innocence. Later he was formally arrested. After trial, the defendant was convicted of burglary, sexual abuse, and rape.

**Holding:** Police actions that misled the defendant into believing that an arrest warrant had been issued, causing him to leave his home, come to the police station, and make a statement, were not an unreasonable search and seizure. See US Const 4th Amend; NY Const, art I, § 12. The defendant’s arrest outside his home did not violate *Payton v New York* (445 US 573 [1980]). *People v Roe*, 73 NY2d 1004, 1006. Generally, police can use subterfuge to investigate or solve a crime, including misinformation or a ruse to get suspects to leave their home. See *People v Williams*, 222 AD2d 721, 721. The police conduct here was not coercive; the defendant initiated the call, raised the question of an arrest warrant and false accusations, voluntarily walked to the station where he was Mirandized, and was not arrested until later. Judgment affirmed. (County Ct, Chemung Co [Buckley, JJ])

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

**Witnesses (Credibility) (Cross Examination)** **WIT; 390(10) (11)**

**People v Daley, 780 NYS2d 423 (3rd Dept 2004)**

**Holding:** While the defendant was an inmate in Cossackie Correctional Facility, he was accused of promoting prison contraband and menacing for allegedly swinging a razor blade at a prison guard. At trial the defendant attempted to question the accusing guard about pending federal litigation concerning the guard’s alleged assault of another prisoner. The trial court urged a prosecution objection, characterized the question as “Mark Furman syndrome,” and instructed the jury to disregard it. The court abused its discretion. The defendant had a right to cross-examine his accuser about specific acts of misconduct provided there was, as here, a good faith basis. *People v Hasenflue*, 252 AD2d 829, 831 *lv den* 92 NY2d 982. The court’s actions in initiating an objection, curtailing impeachment where credibility was a close issue, and issuing a negative jury instruction were error. *People v Jones*, 193 AD2d 696, 697-698. Credibility being key in this case, which ended in one hung jury and in which jurors at the second trial inquired at one point about what would happen if they did not agree, the error was not harmless. Judgment reversed, remanded for new trial. (County Ct, Greene Co [Pulver Jr., JJ])

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

**Third Department** *continued***Search and Seizure (“Poisoned Fruit” Doctrine)** SEA; 335(55)**People v Richardson, 9 AD3d 783 (3rd Dept 2004)**

The defendant was charged with participating in a home invasion and related crimes. Based on the complainant’s description of the perpetrator’s car, the defendant was taken into custody and Mirandized. He denied the charges but admitted he was the sole driver of his car during the relevant time frame and had no alibi. While the defendant was being held, the complainant was unable to make a positive identification from a photo array. The police continued to hold the defendant and contacted his parole officer, who searched his home, found weapons and other contraband, and filed a parole violation. The defendant was then taken to jail, where pursuant to a warrant his clothing and shoes were taken and tested for DNA, which ultimately was said to match blood from the complainant and the defendant. Then the complainant picked the defendant from a lineup. One trial ended in a mistrial, the second in the defendant’s conviction.

**Holding:** The evidence seized according to a valid search warrant from the defendant’s clothing and shoes was obtained independently of his illegal detention. The exclusionary rule did not apply. *See People v Arnau*, 58 NY2d 27, 32-33. There was probable cause to arrest the defendant for burglary before the illegal detention began. The evidence was not the result of exploiting the illegal detention, and therefore, it was not the fruit of the poisonous tree. It was not shown that the defendant’s illegal detention was used to discover new evidence. *See People v Rogers*, 52 NY2d 527 *cert den* 454 US 898. Judgment affirmed. (County Ct, Rensselaer Co (McGrath, JJ))

**Parole (Board/Division of Parole) (Release [General])** PRL; 276(3) (35[d])**Matter of Lewis, 780 NYS2d 243 (3rd Dept 2004)**

The petitioner had been convicted of second-degree murder and first-degree robbery and sentenced to 20 years to life and 7 to 21 years, respectively. At his first appearance before the parole board, release was denied; the board focused mainly on the petitioner’s conviction. His article 78 challenge to the decision was denied.

**Holding:** The petitioner asserted that the parole board unduly emphasized the petitioner’s conviction, although aware of his substantial achievements and disciplinary record. The board is not required to explicitly discuss all factors considered or give all equal weight. *See Matter of Larrier v New York State Bd. of Parole Appeals Unit*, 283 AD2d 700. Consideration of the instant offense is not error. *See Executive Law 259-i [1] [a], [2] [c] [A]; Matter of*

*Silmon v Travis*, 95 NY2d 470, 476. The board here erred by referring to the petitioner’s conviction as first-degree murder instead of second degree. Since the determination was based on incorrect information, it must be annulled. Judgment reversed, remitted to Board of Parole. (Supreme Ct, Albany Co [Spargo, JJ])

**Insanity (Defense of)** ISY; 200(10)**Due Process (General)** DUP; 135(7)**People v Rodriguez, 10 AD3d 737, 781 NYS2d 755 (3rd Dept 2004)**

**Holding:** This matter was remitted to afford the defendant an opportunity to be examined by a neurologist and then to have a psychologist report whether or not the facts revealed would support a defense of not responsible due to mental disease or defect. *People v Rodriguez*, 6 AD3d 814, 817. The psychologist opined that a cognitive disorder resulting from repeated head trauma likely affected the defendant’s ability to appreciate the nature and consequences of his actions. The court therefore had improperly deprived the defendant of the right to present a potential defense. Judgment reversed, matter remitted for new trial. (County Ct, Greene Co [Pulver, Jr., JJ])

**Evidence (Uncharged Crimes)** EVI; 155(132)**Instructions to Jury (Cautionary Instructions)** ISJ; 205(25)**People v Ward, 10 AD3d 805, 782 NYS2d 158 (3rd Dept 2004)**

This matter was remitted for a new suppression hearing due to improper courtroom closure at the original hearing. *People v Ward*, 6 AD3d 741. The court again denied suppression. The remaining claims on appeal are rejected.

**Holding:** It was defense counsel who, in the course of pursuing a mistaken identification issue, elicited from an undercover officer testimony that the defendant had sold cocaine to a confidential informant on the date that the officer and the defendant first met. Therefore the prosecution was entitled on redirect to pursue more fully the question “only partially examined” on cross. *See People v Melendez*, 55 NY2d 445, 451. The court should have given a cautionary instruction as to the admission on redirect of drugs sold by the defendant on the date the undercover officer was describing, but the error was harmless.

The objection on relevancy grounds to testimony by a police sergeant that he had known the defendant for five years did not preserve for review the question of whether such testimony improperly implied that the defendant had a criminal record. In any event, the testimony was properly limited to prior knowledge of the defendant

**Third Department** *continued*

without reference to criminality. Judgment affirmed. (County Ct, Ulster Co [Bruhn, JJ])

**Due Process (General)** **DUP; 135(7)**

**Parole (Revocation Hearings [Due Process])** **PRL; 276(45[b])**

**People ex rel. Sumter v O’Connell, 10 AD3d 823, 782 NYS2d 135 (3rd Dept 2004)**

The petitioner, sentenced to consecutive sentences for crimes committed in 1981 and returned to prison following his initial release on parole, was re-released on parole in April 2001. After receiving notice of alleged additional violations, he waived preliminary examination and was eventually found guilty by an administrative law judge. The Board of Parole increased the time assessed for this violation to 36 months. Rather than file an administrative appeal, the petitioner commenced a *habeas corpus* action that was denied for failure to exhaust administrative remedies.

**Holding:** The claim that the petitioner had not received the statutorily required written statement indicating the reasons for the Board’s determination has merit. *See* Executive Law 259-i(3) (f) (xi); *see also* 9 NYCRR 8005.20(f). The statute requires an administrative law judge to prepare a written statement indicating the evidence relied upon and the reasons for revoking parole. Neither the failure to pursue an administrative remedy nor the absence of prejudice forecloses review of this claim, which implicates fundamental due process. *See Morrissey v Brewer*, 408 US 471, 489 (1972). There is no indication that the Board’s decision was provided to the petitioner, though it is included in the respondent’s answering papers. The petitioner’s acknowledgment that he received a time computation printout reflecting the new time assessment is insufficient to satisfy the statutory requirements. *Cf People ex rel Knowles v Smith*, 54 NY2d 259. Judgment reversed, matter remitted for further proceedings. (Supreme Ct, Ulster Co [Kavanagh, JJ])

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

**Matter of Wan Zhang v Travis, 10 AD3d 828, 782 NYS2d 156 (3rd Dept 2004)**

**Holding:** The determination of the Board of Parole that the petitioner not be released should not have been annulled by the Supreme Court, which found that the Board’s determination was not sufficiently detailed to allow appropriate judicial review. While the Board must consider the factors set forth in Executive Law 259-i(2)(c),

the Board does not have to give each factor equal weight. *See Matter of Geames v Travis*, 284 AD2d 843 *app dismd* 97 NY2d 639. The Board need not articulate every factor. *See Matter of Angel v Travis*, 1 AD3d 859, 860. “In the instant case, the parole review interview, confidential inmate status report and parole hearing transcript reveal that the Board, in making its determination, considered petitioner’s institutional record, including his disciplinary record and program accomplishments, his potential deportation and postrelease living arrangements, as well as the violent circumstances of crimes of which he was convicted. Notwithstanding the Board’s failure to specifically mention each of these factors in its determination, the record is, in our view, sufficiently detailed to permit intelligent judicial review of the grounds for the Board’s denial of parole release.” The Board considered the appropriate factors. There is no “showing of irrationality bordering on impropriety” as required by *Matter of Silmon v Travis* (95 NY2d 470, 476). Judgment reversed, determination confirmed, petition dismissed. (Supreme Ct, Washington Co [Sise, JJ])

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

**People v Wong, 784 NYS2d 158 (3rd Dept 2004)**

Two trial witnesses identified the defendant as the prisoner who stabbed another in 1987. A correction officer who had been on an 80-foot tower claimed that he saw, from a distance of 120 yards, one of the 600-700 similarly-dressed prisoners stab another. He raised his binoculars and watched the defendant until he was apprehended. A prisoner testified that from 15 feet away he saw the defendant “hit” the decedent. That witness, now out of prison, has recanted. Other prisoners have testified about admissions of the actual perpetrator, now deceased.

**Holding:** Although credibility determinations of the hearing court are generally entitled to great deference (*see People v Baxley*, 84 NY2d 208, 212), the finding that the recantation is incredible is rejected. The witness recanted despite his belief that he could be prosecuted for perjury. The record shows that he had incentive to lie at trial based on promises that he would be transferred closer to his family and be recommended for parole on first application, both of which occurred despite his earlier escape from a prison camp. The other prisoners said that they would not have testified against the actual perpetrator during his lifetime because to do so would have put them in peril. The decedent’s widow corroborated the motive attributed to the now-deceased suspect. The medical evidence at trial indicated that there would have been blood splatters, yet none were found on the defendant. No other physical evidence existed, nor was the defendant shown to have any motive. The lower court wrongly found that the character of the newly discovered evidence did not create a probability that, had it been received at trial, the

**Third Department** *continued*

verdict would have been more favorable to the defendant. Order reversed, matter remitted for new trial. (County Ct, Clinton Co [McGill, JJ])

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**Counsel (Competence/Effective Assistance/Adequacy)** **COU; 95(15)**
**People v Miller, 783 NYS2d 130 (3rd Dept 2004)**

**Holding:** Alleged statements by the defendant during interrogation were crucial in his trial. The day after his six-year-old granddaughter said he had touched her vaginal area, he was taken to the sheriff's office where he initially asserted his innocence but eventually admitted unzipping the child's pajamas and placing his hand inside them. At trial he testified that his confession followed questioning of one to two hours at a time when he had the flu and was suffering from diabetes, and after he had been promised counseling. Yet trial counsel did not seek a *Huntley* hearing or otherwise challenge the testimony about the alleged statement. Nor did counsel seek a *Sandoval* ruling about use of the defendant's prior aggravated harassment conviction, used to impeach the defendant, who was the only source of testimony in his defense. See *People v Mandigo*, 176 AD2d 386, 387 *lv den* 81 NY2d 888. Neither of these errors necessarily reflect ineffective assistance. Nor do other unexplained omissions by counsel such as failure to seek discovery or make any other pretrial motions and "waiving for no apparent reason hearings that could potentially produce useful evidence" (*ie* preliminary hearing and presentment to the grand jury, consenting to being prosecuted by superior court information). The cumulative effect of these and other actions, such as giving "very cursory opening and closing arguments," was representation that was less than meaningful. See *People v Dove*, 287 AD2d 806, 807. Counsel's omissions were inexplicable. Judgment reversed, remitted for new trial and other appropriate proceedings. (County Ct, Delaware Co [Becker, JJ])

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**Contempt (Elements) (General)** **CNT; 85(7) (8)**
**People v Cordwell, 783 NYS2d 409 (3rd Dept 2004)**

**Holding:** An unrelated reckless endangerment charge against the defendant was disposed of by plea. The defendant agreed to abide by the terms of an order of protection. The order erroneously provided that it remain in effect until Feb. 24, 2003, the day before it was signed. The issuing court orally informed the defendant that the order would remain in effect during the conditional discharge period. A subsequent indictment charging the defendant with criminal contempt for violating the order of protec-

tion was dismissed by the court because the conduct occurred after the order's expiration date. A criminal contempt charge requires a written court order. See Penal Law 215.51. The provision under which the subject order was issued directs that such order is to plainly state the date it expires. See CPL 530.13(5). The court properly dismissed the indictment. (County Ct, St. Lawrence Co [Nicandri, JJ])

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**Speedy Trial (Prosecutor's Readiness for Trial)** **SPX; 355(32)**
**People v Van Hoesen, 783 NYS2d 89 (3rd Dept 2004)**

The prosecution announced readiness for trial at arraignment and served a notice under CPL 710.30 reiterating readiness and indicating that they would introduce a formal narcotic analysis report at trial. The prosecution failed to order laboratory tests of substances, seized from the defendant's apartment, that had field-tested positive for cocaine and marijuana. On the day of trial, the drug possession counts were dismissed for lack of prosecution readiness. The defendant pled guilty to the remaining counts regarding drug paraphernalia. The prosecution appeals the dismissal.

**Holding:** There is no clear decisional authority as to whether, in a drug case, the prosecution can be "ready for trial" under CPL 30.30 if the alleged illegal drugs have not been formally tested. *People v Hyndman*, 194 Misc2d 335, 338. The case relied upon by the defense, *People v Swamp* (84 NY2d 725), held that no laboratory analysis is necessary to support an indictment. That court did note a statutory requirement that drugs be formally tested within 45 days of receipt (CPL 715.50) but neither that statute nor the *Swamp* holding compels the prosecution to have a formal analysis in their possession in order to be ready for trial. The prosecution did obtain formal testing before trial, if only by three days, meeting the *Swamp* expectation that testing would be conducted "'prior to trial.'" The purpose of 715.50 is avoiding the risks inherent in prolonged storage of dangerous drugs and has no bearing on trial readiness. Order modified, counts reinstated. (Supreme Ct, Albany Co [Teresi, JJ])

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**Parole (Board/Division of Parole) (Revocation Hearings [Evidence])** **PRL; 276(3)(45[c])**
**Matter of Fryar v Travis, 782 NYS2d 876 (3rd Dept 2004)**

**Holding:** The Supreme Court found there was no evidence to support the petitioner's classification by the Board of Parole as a category one parole violator under 9 NYCRR 8005.20(c) (1) (vi). Partially granting the petitioner's CPLR article 78 application, the court ordered imposition of a new time assessment. Judicial review of Board action with respect to what to do once a parole violation is

**Third Department** *continued*

established is so limited as to make the action almost unreviewable. *See People ex rel. Baker v Follette*, 33 AD2d 1952, 1053. The testimony of arresting officers about the circumstances of the petitioner’s arrest, including the petitioner’s acts resisting that arrest and the need to use a police dog, was sufficient. Judgment modified, partial grant of petitioner’s application reversed, application denied. (Supreme Ct, Franklin Co [Feldstein, JJ])

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

**Matter of Williams v Travis**, 783 NYS2d 413 (3rd Dept 2004)

**Holding:** The petitioner is serving a sentence of four years to life on a 1999 plea-based conviction of attempted third-degree possession of a weapon, entered in satisfaction of a lengthy indictment that including an attempted first-degree murder charge for firing at a police officer. At the parole interview, the petitioner took advantage of the opportunity to object to the inaccuracy of the presentence report description of the incident. He admitted possessing a loaded gun and fleeing from police, but denied firing the gun or trying to hide it in an occupied baby carriage. The determination to deny parole was annulled by the court on the grounds that the Board of Parole improperly relied on the disputed firing of the gun, which was not an element of the crime to which he pled. *See Penal Law 110.00, 265.02(4)*. The petitioner may not now challenge the accuracy of the presentence report; that should have been done before sentencing. *Matter of Sciaraffo v New York City Dept. of Probation*, 248 AD2d 477. The Board is required to consider evidence of the seriousness of the petitioner’s offense, including the presentence report. *See Executive Law 259-I(1) (a), (2) (c) (A)*. Nothing in the record suggests the decision was affected by an error of fact. The Board’s detailed decision did not focus on the disputed conduct but set out a number of reasonable and appropriate statutory factors such as criminal history and bad parole record. Judgment reversed, determination confirmed. (Supreme Ct, Albany Co [Stein, JJ])

**Fourth Department**

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

**People v Woods**, 6 AD3d 1126, 776 NYS2d 410 92 (4th Dept 2004)

**Holding:** The defendant failed to preserve for review his contention that the court should have held a hearing pursuant to *People v Gombert*, 38 NY2d 307. The assistant

public defender initially representing the defendant did not know that his office also represented the confidential informant until the prosecutor revealed the informant’s name. There was no basis for belief that before then the defendant received less than effective assistance of counsel due to the alleged conflict. *See People v Harris*, 99 NY2d 202, 210-211. New counsel was appointed when the defendant so requested upon learning of the dual representation. The defendant was not denied a fair trial by the actions of his lawyers, having received meaningful representation. *See People v Baldi*, 54 NY2d 137, 147. The verdicts were not inconsistent where the count of which he was convicted and the count of which he was acquitted did not allege possession of the same cocaine. *See People v Tucker*, 55 NY2d 1, 3 rearg den 55 NY2d 1039. Judgment affirmed. (County Ct, Oneida Co [Donalty, JJ])

**Counsel (Choice of Counsel)** COU; 95(9.5)

**Sentencing (Concurrent/Consecutive) (Determinate Sentencing)** SEN; 345(10) (30)

**People v Shorter**, 6 AD3d 1204, 775 NYS2d 712 (4th Dept 2004)

**Holding:** The court did not err in denying the defendant’s repeated requests for substitution of his fourth assigned attorney. The defendant failed to show “good cause” such as a conflict of interest or irreconcilable conflict with his lawyer. *See People v Sides*, 75 NY2d 822, 824. While counsel did admit failing to visit the defendant at the jail, he said that communication had improved before trial. Disagreement between attorney and client about trial strategy and tactics is not sufficient for substitution. *See People v Johnson*, 256 AD2d 1157, 1158 lv den 92 NY2d 875. The court “erred in directing that the definite sentences imposed on the misdemeanor counts shall run consecutively to the indeterminate sentence imposed on the felony count (*see Penal Law § 70.35*). . .” Judgment modified, definite sentence to run concurrently with the indeterminate sentence, and as modified, affirmed. (County Ct, Ontario Co [Doran, JJ])

**Sentencing (Presence of Defendant and/or Counsel) (Resentencing)** SEN; 345(59.5) (70.5)

**People v Dennis**, 6 AD3d 1211, 775 NYS2d 701 (4th Dept 2004)

**Holding:** More than 30 days after sentencing the defendant for second-degree assault, the court determined that the sentence was illegal and resentenced him *in absentia* to a determinate term of five years incarceration plus three years of postrelease supervision. *See Penal Law 70.45(2)*. The court erred in not having the defendant produced to be present and have an opportunity to speak on

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his own behalf. See CPL 180.40(1); 380.50(1); *People v Brown*, 261 AD2d 890. Resentence reversed, matter remitted for further resentencing. (County Ct, Oswego Co [Hafner, Jr., JJ])

**Juveniles (Custody)** JUV; 230(10)**Matter of Ashley B.**, 6 AD3d 1231, 775 NYS2d 732 (4th Dept 2004)

Guardianship and custody of the respondent's daughter were transferred to the child's father and step-mother and a permanency plan approved.

**Holding:** The court should have conducted a dispositional hearing to determine the best interests of the respondent's daughter. There was no specific waiver of the hearing, which is required by statute. See *Matter of Tylens S.*, 4 AD3d 568, 572. The child should remain in her father's custody pursuant to the earlier placement. Order modified, matter remitted for a dispositional hearing or a specific on-record waiver by the parties. (Family Ct, Cayuga Co [Corning, JJ])

**Prisoners (Disciplinary Infractions and/or Proceedings)** PRS I; 300(13)**Matter of Pena**, 6 AD3d 1106, 775 NYS2d 737 (4th Dept 2004)

**Holding:** As the respondent concedes, the determination that the petitioner violated inmate rule 180.10 (7 NYCRR 27.3[B] [26] [i]) was not supported by substantial evidence. That part of the determination must be annulled, and the respondent is to expunge all reference thereto from the petitioner's record. Where a single penalty was imposed and there is no relation between the violations and that penalty specified on the record, the penalty is vacated. Determination modified, matter remitted for imposition of appropriate penalty. (Supreme Ct, Wyoming Co [Dadd, AJ])

**Reckless Endangerment (Elements)** RED; 326(10)**Trial (Verdicts [Repugnant Verdicts])** TRI; 375(70[c])**People v Robinson**, 8 AD3d 1028, 778 NYS2d 808 (4th Dept 2004)

**Holding:** While the defendant failed to preserve his contention that the verdict is repugnant insofar as he was convicted of both attempted first-degree murder and first-degree reckless endangerment, the matter is reviewed as a matter of discretion in the interest of justice. See CPL 470.15(6)(a). A defendant cannot be convicted of inten-

tional and reckless behavior arising from the same act and causing the same result. See *People v Gallagher*, 69 NY2d 525, 529. Those counts must be reversed. Upon retrial, if both attempted murder and reckless endangerment charges are submitted to the jury, they should be submitted in the alternative. See *People v Slater*, 270 AD2d 925 *lv den* 95 NY2d 858. The other issues are without merit. Judgment modified. (County Ct, Erie Co [DiTullio, JJ])

**Juries and Jury Trials (Challenges)** JRY; 225(10) (50) (60) (Qualifications) (Voir Dire)**People v Smith**, 8 AD3d 965, 778 NYS2d 615 (4th Dept 2004)

**Holding:** The court erred by denying a defense challenge for cause to a prospective juror in a retrial following a hung jury in this case involving charges of sexual abuse. The juror told the court that the juror had been "touched by a man" and was not sure if that experience would affect her ability to sit as a juror. While she thought she could be fair, she conceded that her experience had been "traumatic" and "emotional." Asked if she could say she would not seek retribution for what had happened to her, she said no. The juror did not unequivocally state that her prior state of mind would not affect her verdict. See *People v Bludson*, 97 NY2d 644, 645. The claim that the evidence was insufficient at the first trial was not preserved (see *People v Gray*, 86 NY2d 10,19) but is reviewable for purposes of double jeopardy analysis on appeal from the conviction at retrial. See *People v Tinguie*, 91 AD2d 166, 167-168. The evidence was not insufficient. Judgment reversed, new trial granted. (County Ct, Steuben Co [Bradstreet, JJ])

**Evidence (Hearsay) (Prejudicial)** EVI; 155(75) (106)**Motor Vehicles (General)** MVH; 260(17)**People v Crombleholme**, 8 AD3d 1068, 778 NYS2d 256 (4th Dept 2004)

**Holding:** The defendant was convicted of second-degree manslaughter, first-degree reckless endangerment, aggravated unlicensed operation and other counts stemming from a vehicle crash while the defendant was a passenger. The court erred in admitting statements made by the driver, claiming that the defendant grabbed the steering wheel, causing the vehicle to swerve. The driver's injuries and pain did not alone warrant the conclusion that her statements were excited utterances. See *People v Johnson*, 1 NY3d 302, 307. The statements were made at least 10 minutes after the crash and after fire officials had decided to tend first to the occupant of the other car. It cannot be said that the statements were not the result of studied reflection and possible fabrication. Where the driver and the defendant were the only two witnesses

**Fourth Department** *continued*

with knowledge of how the collision occurred, the error was not harmless.

Allowing testimony that the defendant had grabbed the wheel earlier in the evening was not error. The defendant claimed that he did not grab the wheel and if he did it was to prevent the driver’s reckless driving. The probative value of the evidence about his earlier action outweighed its potential for prejudice. *See People v Alvino*, 71 NY2d 233, 242. The contention that the defendant could not “operate” a vehicle as a passenger is rejected where there was evidence the defendant controlled the direction of the vehicle. Judgment reversed, new trial granted on specified counts. (County Ct, Oswego Co [Hafner, Jr., JJ])

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

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

**People v Holt**, 8 AD3d 1044, 778 NYS2d 365  
(4th Dept 2004)

**Holding:** The defendant was indicted on charges that included first- and second-degree sodomy and second-degree rape. *See People v Martinez*, 285 AD2d 387, 388. Because the court was authorized to accept the plea only to a lesser offense of any or all of the charges, his plea to first-degree sexual abuse (Penal Law 130.65) was jurisdictionally defective. The crime pled to was not a lesser included offense of any crime charged. *See CPL 220.10(4)(b)*. The issues raised in the other appeal in this consolidated matter lack merit. Judgment in Appeal No. 2 reversed. (County Ct, Genesee Co [Noonan, JJ])

**Sentencing (Appellate Review)** SEN; 345(8) (33)  
(Excessiveness)

**People v Bailey**, 8 AD3d 1024, 778 NYS2d 340  
(4th Dept 2004)

**Holding:** In a *pro se* supplemental brief the defendant challenged the severity of her prison sentence of 25 years to life for second-degree murder. The sentence was harsh and excessive. All other issues raised lack merit. Judgment modified, sentence reduced to 15 years to life, and as modified affirmed.

**Double Jeopardy (Jury Trials)** DBJ; 125(10) (20)  
(Mistrial)

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

**People v Speicher**, 8 AD3d 1008, 778 NYS2d 583  
(4th Dept 2004)

**Holding:** The court ordered that the trials of the defendant and co-defendant be held separately after each moved to exclude the statement of the other. Severance came after the jury in the joint trial had been sworn but before any witnesses had been called. Discharging that jury, with defense consent, and proceeding with a different trial (*see gen People v Quaranta*, 74 AD2d 910) did not violate double jeopardy. *See People v Paquette*, 31 NY2d 379, 380. The claim that counsel was ineffective for not objecting is rejected. *See People v Buffin*, 244 AD2d 925, 926 *lv den* 91 NY2d 924. The court erred in allowing the prosecution to cross-examine the defendant about a youthful offender adjudication. *See People v Gray*, 84 NY2d 709, 712. The error was harmless. *See People v Stevenson*, 266 AD2d 68 *lv den* 94 NY2d 953. The other issues raised lack merit. Judgment affirmed. (County Ct, Steuben Co [Latham, JJ])

**Double Jeopardy (General)** DBJ; 125(7) (10)  
(Jury Trials)

**Sentencing (Concurrent/Consecutive)** SEN; 345(10) (33)  
(Excessiveness)

**People v Mathis**, 8 AD3d 966, 778 NYS2d 613  
(4th Dept 2004)

**Holding:** The defendant was convicted of first-degree rape and first-degree sodomy. The imposition of consecutive terms of imprisonment rendered the sentence unduly harsh. *See Criminal Procedure Law 470.15(6)(b)*. Counsel was not shown to be ineffective for offering into evidence DNA testing showing the presence of other men’s semen, neither relevant nor admissible in the circumstances of this matter. *See CPL 60.42, 60.43; People v Mount*, 285 AD2d 899, 900 *lv den* 97 NY2d 642. Counsel’s examination of the defense expert urologist did not help, and may have harmed, the defense, but did not so seriously compromise the right to a fair trial as to constitute ineffective assistance. *See People v Hobot*, 84 NY2d 1021, 1022. That the defendant was acquitted of the first count of sodomy and convicted of the second did not implicate the double jeopardy prohibition of different jurors convicting the defendant of different alleged acts. The prosecutor’s statements as to the sequence of events and the complainant’s chronological testimony were clear. *See People v Alston*, 275 AD2d 997 *lv den* 96 NY2d 756. Judgment affirmed. (Supreme Ct, Monroe Co [Egan, JJ])

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

**People v Williams**, 8 AD3d 963, 778 NYS2d 244  
(4th Dept 2004)

**Holding:** The defendant did not preserve for review his complaint that the court erred by projecting the jury charge on the wall when the charge was given orally. Only fundamental defects qualify as “mode of proceeding”

**Fourth Department** *continued*

errors" that can be reviewed unpreserved. *See People v Agramonte*, 87 NY2d 765, 770. The court met the statutory requirement that the charge be delivered orally. *See* CPL 300.10(1). The challenged conduct did not go to the essential validity of the proceedings. *See People v Patterson*, 39 NY2d 288, 296 *affd* 432 US 197. The defendant has not demonstrated even a potential for prejudice. The projected charge was essentially the same as the oral one, and was done under the supervision of the judge. The jurors were not left to interpret the law themselves. *See People v Tucker*, 77 NY2d 861, 863. Judgment affirmed. (County Ct, Monroe Co [Marks, JJ])

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**Prisoners (Disciplinary Infractions and/or Proceedings)** **PRS I; 300(13)**
**Matter of Gonzalez, 8 AD3d 970, 778 NYS2d 381 (4th Dept 2004)**

**Holding:** "We agree with petitioner that the Hearing Officer erred in refusing to allow him to offer documentary evidence at his Tier III hearing in support of his defense that his interest in 'Tina' was sexual and not indicative of his ability to procure drugs for inmates at the facility." This evidence was relevant to his defense to the claimed violation of inmate rules 103.20 (7 NYCRR 270.2[B][4][ii] [solicitation of goods]) and 113.25 (7 NYCRR 270.2[B][14] [xvi] [sale of drugs]). While the petitioner has already served the penalty, the record does not make clear the possible relationship between the reversed findings and the recommended loss of good time. It must be reconsidered. Judgment modified, matter remitted. (Supreme Ct, Erie Co [Drury, AJ])

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**Sentencing (Presentence Investigation and Report)** **SEN; 345(65)**
**People v Smith, 8 AD3d 1043, 778 NYS2d 366 (4th Dept 2004)**

**Holding:** The court did not state reasons for excepting from the presentence report the complainant's statement. *See* CPL 390.50(2) (a). Upon remittal, the court should either disclose the statement to the defendant or set forth its reasons for exercising its decision not to disclose the statement. *See People v Butler*, 54 AD2d 59-60. Judgment modified, sentence vacated, matter remitted for resentencing. (County Ct, Orleans Co [Punch, JJ])

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**Motor Vehicles (Unauthorized Use)** **MVH; 260(35)**
**People v Canute, 8 AD3d 1125, 778 NYS2d 247 (4th Dept 2004)**

**Holding:** The defendant was charged with first-degree aggravated unlicensed operation of a motor vehicle (Vehicle and Traffic Law 511[3] [a]) and driving while intoxicated. The unlicensed operation charge was dismissed. While the Vehicle and Traffic Law does not specifically address lawn tractors, such vehicle fits the broad definition set out in the statute. *See* Vehicle and Traffic Law 125. The court's determination that the lawn tractor was excluded as a "farm type tractor" was error. Even if the type of vehicle in question might be so considered, the exemption applies only to vehicles used exclusively for agricultural purposes or snow plowing. The defendant was engaged in neither. Whether the defendant knew his privilege to operate the vehicle was suspended is a matter for proof at trial. *See* Vehicle and Traffic Law 511(1) (a). Order reversed, motion denied. (County Ct, Steuben Co [Bradstreet, JJ])

**Dissent:** [Pigott, Jr., PJ and Kehoe, JJ] No license is required to operate a lawn tractor.

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**Family Court (General)** **FAM; 164(20)**
**Juveniles (Neglect)** **JUV; 230(80)**
**Matter of Jocelyne J., 8 AD3d 978, 778 NYS2d 624 (4th Dept 2004)**

**Holding:** The respondents adopted a child, Jocelyne J., in Haiti in 1997. A Haitian court terminated the adoption in 2001. While that rendered moot the respondent's petition for a surrender instrument, it did not deprive the court of jurisdiction over the respondents or a neglect proceeding that commenced three days after the termination. The respondents were legally responsible for the child's care at the time they were alleged to have neglected her. *See* Family Court Act 1012(a), (g); *Matter of Julie K.*, 272 AD2d 986, 987. The record does not show that the court was biased against the respondents. They sent the child back to Haiti without making appropriate arrangements for her return to their care and custody. The record shows that the child suffered impairment of her mental health attributable to the respondents' unwillingness or inability to exercise a minimum degree of care toward her. *See* Family Court Act 1012(h); *cf Matter of Cheyenne F.*, 238 AD2d 905. Evidence of their conduct toward the child Jocelyne did not provide any reliable indicators that they neglected another child, Walna J. *See Matter of Dutchess County Dept. of Social Servs. V Douglas E.*, 191 AD2d 694. The record shows that they cared for Walna appropriately and her law guardian joined the respondents' motion to dismiss that petition. Order modified, petition as to Walna dismissed. (Family Ct, Oneida Co [Romano, JJ])

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

**Fourth Department** *continued*

**(Statutory Limits)**

**People v Walter, 8 AD3d 1109, 778 NYS2d 642 (4th Dept 2004)**

**Holding:** The defendant met his initial burden with respect to a statutory speedy trial claim by showing that the case against him was brought eight years before the prosecution announced readiness for trial. The burden then shifted to the prosecution to identify any exclusions upon which they could rely. *See People v Brossoit*, 256 AD2d 919, 919-920. The law in effect at the time this action was commenced required that prosecutorial diligence in locating the defendant and/or securing the presence of the defendant be shown in order to invoke the exclusion of absence or unavailability of the defendant. *See CPL 30.30(4)(c); People v Bolden*, 81 NY2d 146, 155. No such diligence is shown here. Order of dismissal affirmed. (County Ct, Erie Co [Troutman, JJ])

**Trespass (Elements) (Evidence) TSP; 379(10) (15)**

**Matter of Lawrence K., 8 AD3d 1078, 778 NYS2d 393 (4th Dept 2004)**

**Holding:** The respondent was adjudicated a juvenile delinquent based on a finding that he committed an act that would constitute third-degree criminal trespass if he were an adult. Penal Law 140.10. The statute requires that the building in question be fenced or enclosed in a way to exclude intruders. Penal Law 140.10(a); *see People v Santos*, 182 Misc2d 764, 767-768. There was no showing here that the building at issue was so enclosed. Order reversed, petition dismissed. (Family Ct, Oneida Co [Flemma, JHO])

**Grand Jury (Procedure) (Witnesses) GRJ; 180(5) (15)**

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

**People v Hill, 8 AD3d 1076, 778 NYS2d 653 (4th Dept 2004)**

**Holding:** The decision to grant a defendant's request to call a witness at the grand jury is solely within the grand jury's discretion. CPL190.50(6). The defendant here had been identified by one witness as looking like the perpetrator. The defendant requested that eight witnesses be called. The grand jury questioned the relevance of the names given because none of them had been referred to by name in the prior testimony. The prosecutor, who knew from the defendant's letter that the proposed testimony was in the nature of alibi, told the grand jury, "I can't tell you anything. I don't know." This inaccurate and misleading answer to a legitimate inquiry by the grand jury substantially undermined the integrity of the

process. The grand jury voted to deny the defense request to present witnesses. The prosecutor's error at the least potentially prejudiced the defendant. *See People v Huston*, 88 NY2d 400, 409-410. The court properly dismissed the indictment. Order affirmed. (County Ct, Onondaga Co [Aloi, JJ])

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

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

**People v Griffin, 9 AD3d 841, 781 NYS2d 177 (4th Dept 2004)**

The defendant, indicted with others following a multi-year investigation by the Attorney General, was convicted of second-degree conspiracy and first- and second-degree possession of drugs. The drugs had been found in a hidden compartment of a car registered to one coconspirator and driven by another. The defendant was found to lack standing to challenge the search that revealed the drugs. At trial, his attorney cross-examined prosecution witnesses about the compartment, including whether the defendant knew it was there. At the close of the prosecution's case, after a defense motion to dismiss the possession charges, the court *sua sponte* invited the prosecution to amend the bill of particulars to add a theory of constructive possession.

**Holding:** The defendant knew all along what the actual theory of prosecution was. Amendment of the indictment is permitted where, as here, it causes no undue prejudice and is in good faith. *See CPL 200.95(8); People v Lewis*, 277 AD2d 1010, 1011 *lv den* 96 NY2d 736. The court erred in denying a circumstantial evidence charge where possession of the contraband had to be inferred from the direct evidence of control over the area. *See People v David*, 234 AD2d 787, 790 *lv den* 89 NY2d 1034. Judgment modified, possession counts reversed, new trial granted. (Supreme Ct, Onondaga Co [Brunetti, AJ])

**Dissent in Part:** [Green, JP and Scudder, JJ] There should be no new trial. The amendment to the bill of particulars prejudicially changed the theory of the case.

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

**People v Goston, 9 AD3d 905, 779 NYS2d 699 (4th Dept 2004)**

**Holding:** The sentence imposed on count four is illegal. Third-degree possession of a weapon under Penal Law 265.02(4) is a violent felony offense. *See Penal Law 70.02(1)(c), 265.02(4)*. A defendant found to be a second felony offender for a violent felony must receive an indeterminate sentence. Penal Law 70.06(6). The indeterminate sentence imposed on that count must be vacated and remitted for resentencing. The many other contentions raised on appeal, including challenges to the propriety of the identification showup, the court's *Sandoval* ruling, suf-

**Fourth Department** *continued*

iciency of the evidence, the denial of jury instructions on lesser included offense, delay in disclosure of *Rosario* material, and constitutionality of the second felony offender statute under *Apprendi v New Jersey*, 530 US 466 (2000) are unpreserved or without merit. Judgment modified, matter remitted. (County Ct, Erie Co [DiTullio, JJ])

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

**Search and Seizure (Search Warrants [Suppression])** 335(65[p])

**People v Afrika, 9 AD3d 876, 779 NYS2d 692 (4th Dept 2004)**

Suspecting the defendant in a robbery and sexual assault case, Erie County police found that the defendant had a prior rape conviction and had been implicated in a Monroe County rape case that had been dismissed. A forensic serologist examining semen samples concluded that the donor of the Monroe County sample could not be excluded as the donor of the Erie County sample. The prosecution obtained an order allowing them to take a blood sample from the defendant. *See* CPL 240.40(2)(b). The resulting sample was offered in the Erie County case and a subsequent Monroe County prosecution. The Monroe County judge suppressed the evidence.

**Holding:** The defendant's motion to suppress in the Erie County case should have been granted. That the defendant was the donor of the semen sample in the Monroe County case could not be established without resort to hearsay. The prosecution cited no source for that hearsay, making no showing that it would satisfy the *Aguilar-Spinelli* test. *See People v Johnson*, 66 NY2d 398, 402. There was not sufficient evidence to establish probable cause to believe the defendant had committed the Erie County crimes. The prosecution's reliance on the doctrine of inevitable discovery is misplaced. Judgment reversed. (County Ct, Erie Co [Pietruszka, JJ])

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

**People v Almethoky, 9 AD3d 882, 779 NYS2d 709 (4th Dept 2004)**

**Holding:** Prosecutorial misconduct during summation requires reversal. *See gen People v Mott*, 94 AD2d 415, 421-422. "The prosecutor's comments on summation were irrelevant and inflammatory (*see People v Downing*, 112 AD2d 24, 25) and 'had "a decided tendency to prejudice the jury."' (*People v Halm*, 81 NY2d 819, 921, quoting *People v Ashwal*, 39 NY2d 105, 110)." Judgment reversed. (County Ct, Oneida Co [Donalty, JJ])

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

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

**People v Gathers, 9 AD3d 912, 779 NYS2d 706 (4th Dept 2004)**

**Holding:** As part of a plea bargain in this case, the defendant agreed to cooperate with the police and the prosecution in unrelated investigations. The prosecutor agreed not to recommend that the defendant be sentenced as a persistent felony offender, and to recommend a lesser sentence if the defendant did cooperate. The court's statement to the defendant at sentencing after the prosecutor recommended a specific sentence that the court was bound to impose what the prosecutor sought revealed an improper abdication of sentencing authority. Sentencing decisions are a matter of court discretion. *See People v Farrar*, 52 NY2d 302, 305. Judgment modified, sentence vacated, matter remitted for the defendant to withdraw his plea or for resentencing. *See Cheatham*, 266 AD2d 875 *lv den* 94 NY2d 917. (County Ct, Oneida Co [Walsh, JJ])

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**Juveniles (Parental Rights)** JUV; 230(90) (105)  
(Permanent Neglect)

**Matter of Moniea C., 9 AD3d 888, 779 NYS2d 685 (4th Dept 2004)**

**Holding:** The respondent stipulated to the finding of permanent neglect and so is not aggrieved. *See Matter of Cheryl P.*, 192 AD2d 1084 *lv den* 82 NY2d 652; CPLR 5511. The evidence supports the finding that termination of parental rights was in the best interests of the child. *See* Family Court Act 631. Order affirmed. (Family Ct, Erie Co [Rosa, JJ])

**Dissent:** [Green, JP] The court abused its discretion in terminating parental rights based solely on the respondent's admitted failure to abstain completely from the use of marijuana.

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**Motor Vehicles (Driver's License)** MVH; 260(5) (17)  
(General)

**People v Edenholm, 9 AD3d 892, 779 NYS2d 688 (4th Dept 2004)**

**Holding:** The defendant pled guilty to felony driving while intoxicated and third-degree aggravated unlicensed operation of a motor vehicle. The sentence of 90 days for aggravated unlicensed operation was illegal. The sentence must be a fine of no less than \$200 and no more than \$500, imprisonment of not more than 30 days, or both. Vehicle and Traffic Law 511(1)(b). Judgment modified, sentence on that count reduced to 30 days. (County Ct, Genesee Co [N Noonan, JJ]) ⚖️

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