New York State Defenders Association

Public Defense Backup Center
REPORT
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Defender News

Courts Confront Crawford

A New York City trial court has declined to vacate the conviction of a man who raised a constitutional confrontation issue pursuant to *Crawford v Washington,* 541 US 36 (2004) in his Criminal Procedure Law 440.10 motion. The court held that *Crawford* "announced a new procedural rule that does not apply retroactively to cases already final on direct review." (*People v Christopher Vasquez* [Supreme Court, New York County] [*NYLJ* online, 1/25/05.])

Shortly thereafter, the Court of Appeals recognized that in light of *Crawford,* the New York confrontation holding in *People v Thomas*, 68 NY2d 194 (1986) is invalid; under *Crawford*, it was error to admit a non-testifying co-defendant's plea allocution into evidence. *People v Hardy*, No. 11 (2/17/05). A summary of the opinion will appear in a future *REPORT*. [Other Court of Appeals decisions are also summarized in this issue beginning at p. 18. Issues addressed include improper failure to instruct that the defendant had no duty to retreat in his own home before using deadly force and improper refusal to allow a defendant's drug counselor to be present during an undercover officer's testimony.]

Reckoning with Rockefeller Rush

Public defense lawyers and others are scrambling to ensure that the right to counsel guaranteed by the recent Rockefeller Drug Law reform legislation (see the last issue of the *REPORT*) is realized. Perhaps conditioned by years of having no right to legal assistance, not all prisoners convicted of A-1 drug felonies have requested counsel to prepare their applications for resentencing despite the counsel provision in the new law.

The first prisoner resentenced was represented by pro bono counsel, Angela G. Garcia of Skadden, Arps, Slate, Meagher & Flom. Her 69-year-old client, Ivan Wright, was ordered, on Jan. 20, 2005, to be released after serving 19 years for selling three ounces of cocaine. (*NYLJ* online, 1/21/05.) Wright, an undocumented immigrant, is subject to a standing deportation order and will return to Panama voluntarily, according to Lisa Schreibersdorf, of Brooklyn Defender Services and a member of NYSDA's Board of Directors, who also represented him. (*NY Times* online, 1/21/05.) This illustrates the potential complexity of resentencings sought under the reform; in many cases, there will be issues beyond a reduction in the length of prison terms.

On the effective date of a major portion of the act, the *New York Times* noted the complexity of the reform measure:

> The procedures required by the new law are complex and may end up being time-consuming, prosecutors and defense lawyers say. A prisoner with a previous conviction for committing a violent felony, for example, could actually receive a longer sentence.
>
> (*NY Times* online, 1/13/05.)

Spreading the Word

NYSDA and others are working to ensure that prisoners and attorneys know about Rockefeller reform and recognize the need to carefully prepare applications. All potential collateral consequences need to be analyzed. Possible timing issues need to be addressed (*e.g.*, would it

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be better to wait until a prisoner has completed a program than to apply immediately?). Efforts to spread the word have included letters sent by NYSDA to public defense offices in counties from which prisoners had been committed on A-1 drug sentences. Attorneys can find information on the NYSDA web site's "Hot Topics" page and on the web site of the Center for Community Alternatives, www.communityalternatives.org/justice_strategies/rockefeller.html. For additional assistance, contact the Backup Center.

The Legal Aid Society of New York City and many other offices have written to clients directly to advise them of the new law and the right to counsel.

Retroactivity An Issue in Pending Cases

Legal as well as factual issues must be confronted, not only in resentencings for already-sentenced A-1 prisoners but for defendants with cases pending as the law came into effect. For example, a justice of the Supreme Court of New York County has held that the revised sentence structure applies to defendants whose offenses were committed, but who had not been sentenced, before the effective date of Jan. 13, 2005. A footnote in the opinion found the prosecution's position that the defendant should be sentenced pursuant to the old law "difficult to reconcile" with District Attorney Robert Morgenthau's Dec. 6, 2004, press release endorsing Rockefeller reform: "Mr. Morgenthau now advocates a lesser sensibility, a lesser standard of justice, based on the mere fortuity of the date of the commission of the crime here." (*People v Luis Estela*, (*NYLJ* online, 2/3/05).

Other courts have found the reforms inapplicable to pending cases. In Brooklyn, 12 judges have sentenced 23 defendants under the old laws, while Justice Gerges has ruled the other way. In that case, the prosecutor handling the cases at first agreed that the law was retroactive, but then sought to renege. All five District Attorneys in New York City argue that the law applies only to individuals whose offenses occurred after the effective date of the act. (*NYLJ* online, 2/4/05.)

More Reform Needed

Proponents of Rockefeller reform, including NYSDA, have made clear from the time the recent legislation passed that further reform is needed. Working for proper implementation of the first set of reforms is not enough. In disparate locations, from the web site of DROP THE ROCK, the Campaign to Repeal the Rockefeller Drug Laws (www.droptherock.org) to Chief Administrative Judge Jonathan Lippman's call, while defending the Judiciary's 2005-2006 budget request at a legislative committee, for a return of sentencing discretion to judges (*NYLJ* online, 2/3/05), the call for reform continues.

Supreme Court Update

If you missed all the publicity when the US Supreme Court decided *US v Booker* (543 US_, 125 SCt 738, 160 LEd2d 621 [2005]) you can check the NYSDA web site to find headlines like "'Booker' Causes Consternation for Prosecutors and Defense Counsel Alike" and "Federal Sentencing: Where Do We Go From Here?" A summary of the decision, which found that applying the federal Sentencing Guidelines based on facts not found a jury or admitted by the defendant violates the 6th amendment, is summarized at p. 17, along with summaries of other recent cases from the high court including *Illinois v Caballes*, 543 US _, 125 SCt 834, 160 LEd2d 842 (2005), holding that walking a drug-detecting dog around a car during a lawful traffic stop is not unconstitutional.

As the *REPORT* went to press, the Supreme Court held that the constitution prohibits execution of individuals who were under 18 at the time of their capital offense. (*NY Times* online, 3/1/05.) The 5-4 decision was issued in the case of *Roper v Simmons,* No. 03–633. 3/1/05. In finding that standards of decency have evolved so as to bar capital punishment for juveniles, the majority examined death penalty statutes around the country, finding that "30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach." New York's death penalty statute, *see* Penal Law 125.27(1)(b), is among those. (New York's death penalty remains invalid [*see People v LaValle*, 3 NY3d 88], with former supporters of the statute expressing willingness to leave it that way. Helene E. Weinstein, chair of the Assembly Judiciary Committee, is among them. Reminded in an interview

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that she had been a long-standing death penalty supporter, she said, '"That is the wonderful thing about a mind: You can change when you hear evidence and make an intelligent choice.'" (*NY Times* online, 2/28/05.)

Administrative Rule On AC Fees Upheld

The Court of Appeals upheld on Feb. 15, 2005 a rule promulgated by Chief Administrative Judge Jonathan Lippman in 2001 permitting administrative judges to review trial court orders dealing with assigned-counsel compensation. A year ago, the Appellate Division (1st Dept.) found the rule improperly usurped judicial authority. That decision was reversed in a 6-0 opinion in which Chief Judge Judith S. Kaye took no part.

The unanimous *per curiam* opinion says that by failing to provide for any review of compensation awards alleged to be excessive, the Legislature created an administrative gap "that the Chief Administrator was entitled to fill." While concurring Judge Albert M. Rosenblatt encouraged the Legislature "to consider vesting the Appellate Division with the authority to review vouchers of this type." (*NYLJ* online, 2/16/05.)

The case is *Levenson v Lippman*, No. 1 (2/15/05). NYSDA filed an *amicus* brief authored by Backup Center Staff Attorney Stephanie J. Batcheller. A summary of the decision will appear in a future issue of the *REPORT*.

Public Defense Developments Abound

From broad-based studies to county-specific changes, public defense in New York continues in simultaneous flux and stagnation. The irresistible force of positive developments for change continues to grind away at the seemingly immovable, irreparably broken object that is the state's current system for delivering public defense services.

Kaye Commission Begins Public Hearings

The New York State Commission on the Future of Indigent Defense Services created by Chief Judge Judith Kaye in May 2004 has begun public hearings. Upcoming at the time this *REPORT* is being written are hearings in Rochester on March 11th and in Ithaca on March 23rd. An Albany hearing had been postponed, with a date TBA. Those interested in testifying should call 1-(800)551-7613 or e-mail nyscid@courts.state.ny.us. Please also let the Backup Center know you will be testifying.

Among those appearing at the first hearing, held in New York City on Feb. 11, 2005, was Donna Leiberman, Executive Director of the New York Civil Liberties Union. Lieberman said the NYCLU was prepared to seek judicial relief for public defense clients if the State does not correct the "abysmal state" of public defense. (*The Empire Journal* online, 2/14/05.) Her written testimony, available on the NYCLU's web site (www.nyclu.org), notes that NYCLU investigations of public defense in New York State reveal two underlying causes for the failure of the state's indigent defense system—inadequate state funding and lack of state oversight and standards.

NYSDA's Executive Director, Jonathan E. Gradess, also appeared. Documenting his testimony with NYSDA's many studies, analyses, and resulting calls for change over the years, Gradess told the Commission that public defense is in disarray in *every* part of the state, that the system has declined rather than improved in the years since it was first instituted, and that a new system, not tinkering with the existing one, should be the Commission's ultimate recommendation. The testimony is available on the NYSDA web site on the Public Defense Hot Topics page. [Gradess has also recently written an item about New York public defense issues, "What Do You Expect in NYS Government & Politics in the Coming Year? for the *Empire Page* (online at www.empirepage.com/forum2005_jg.html (Jan. 2005).[1]]

Public Defense Chiefs Convene

Thirty-five Public Defenders, Assigned Counsel Administrators, and Legal Aid managers from around the state met in Albany on Feb. 2, 2005. Among items on the agenda were the public hearings described above and the Kaye Commission decision to contract with The Spangenberg Group (TSG), a nationally-known research and consulting firm, for production of a report on public defense in New York State. Robert Spangenberg and Marea L. Beeman from TSG attended the convening. Also discussed were Rockefeller Drug Law reform implementation issues (see story above), Sex Offender Registration Act reclassification hearings, possible trends toward overuse of invasive "special conditions" of probation unrelated to a particular probationer's situation, and the status and distribution to localities of money from the Indigent Legal Services Fund created by the 2003 legislation raising assigned counsel fees.

Renew Witenski, *Reinvigorate* Gideon

Chief Defenders and other supporters of quality public defense will come to Albany again on Tuesday, March 15th to educate public officials about issues affecting the representation that public defense clients receive. March is the anniversary of the landmark federal decision in *Gideon v Wainwright*, 372 US 335 (1963). *Gideon*, along with the seminal New York right to counsel case—*People v Witenski* (15 NY2d 392 [1965]) is 40 years old this year—heralded the advent of a public defense system that, unfortunately, has yet to accomplish its constitutional mission.

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[1] NYSDA members are eligible for a 17% discount on the price of an *Empire Page* subscription.

Many issues that Gideon Day participants will be discussing in efforts to fulfill the promises of *Witenski* and *Gideon* are similar to issues raised in past years: restoration of funds omitted from the Governor's budget for NYSDA, Prisoners' Legal Services, Neighborhood Defender Service of Harlem, and the Indigent Parolee Program; restoration of Aid to Defense to its 1990 levels and extension of it to all counties that receive Aid to Prosecution; and creation of an independent, statewide defense commission to provide oversight and standards while distributing state funds to localities. Among new topics this year is the proposed conversion of the Capital Defender Office, threatened with destruction while the death penalty is debated, into a program to help counties with public defense.

For more information about Gideon Day 2005, call the Backup Center.

Changes Continue in Local Defense Programs

Greene County chose as its first full-time public defender Dominic J. Cornelius of Catskill. Cornelius, who has worked both as a prosecutor and a defense attorney (having been with the District Attorney's office since 2000), replaces part-time Public Defender Greg Lubow, who held the post 27 years. Cornelius has told the press that being a full-time public defender will allow him to facilitate more attorney-client contact. (*Daily Freeman* online, 2/3/05.)

Greg Lubow, who held the part-time position of Greene County Public Defender for 27 years, has taken issue with the county's precipitous handling of the changes. Among the issues he raised was the legality of the County Administrator's appointment of an interim public defender to replace Lubow pending selection of a full-time Public Defender despite statutory law that seeks to ensure a smooth transition from one office-holder to the next [*see* section five of the Public Officers Law]. (*The Daily Mail* online; *Daily Freeman* online, 1/11/05.) The detrimental impact of county politics on the constitutional and statutory mandate of a public defender office is not new or unique to Greene County. Standards requiring independence of the defense function (*see Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State*," adopted by the NYSDA Board of Directors and the Chief Defenders of New York State last year) call for all processes for providing mandated counsel—and the lawyers who provide mandated representation—to be "free from political influence and conflicts of interest."

Downstate, the primary program providing representation to eligible criminal defendants in the Eastern and Southern federal district courts will be a new free-standing, non-profit corporation, replacing the Federal Defender Unit of The Legal Aid Society (LAS) when LAS's $9.8 million federal contract expires in October. Recent financial difficulties at LAS were said to be "'the occasion but not the cause'" for the change. The reason given for the change was salary discrepancies between LAS attorneys and lawyers in the office of the US Attorney. (*NYLJ* online, 2/22/05.)

Reports Document Public Defense Crisis

As localities and concerned groups grapple with public defense issues across New York, the American Bar Association has released a new report saying that across the nation, defendants are too often represented by ill-trained, inept, and overburdened lawyers, resulting in up to 10,000 wrongful convictions a year. (*Times Union* online; *The Empire Journal*, 2/11/05.) "Gideon's Broken Promise: America's Continuing Quest for Equal Justice" is based on extensive testimony taken in 2003 from experts familiar with public defense in 22 states, including a variety of regions, populations, and delivery systems. It can be found on the Web at www.abanet.org/legalservices/sclaid/home.html.

A recent Canandian report on wrongful convictions also includes public defense problems among the recurring factors that combine to create miscarriages of justice. The report by federal, provincial, and territorial prosecutors and police was presented a conference of justice ministers in January. (*Macleans* online, 1/25/05.)

Court Grants Cert in Michigan Appellate Counsel Case

The US Supreme Court has granted *certiorari* in *Antonio Dwayne Halbert v Michigan*, _ US _, 125 SCt 823, 160 LEd 2d 609 (2005). This follows its decision in a related case, *Kowalski v Tesmer* (_ US _, 125 SCt 564 [2004]), noted in the last issue of the *REPORT*. In *Kowalski*, the court focused on attorneys' lack of standing rather than on the substance of their challenge to a statute denying public counsel to defendants seeking appeal from guilty pleas following a state constitutional amendment doing away with appeals by right in such cases.

NYSDA Receives Bar Foundation Grant

The New York Bar Foundation has awarded NYSDA a grant of $10,000. The funds were sought as part of the Backup Center's efforts to strengthen its ability to collect and analyze data related to public defense issues. The Bar Foundation's assistance is greatly appreciated.

As NYSDA's Executive Director said in testimony to the New York State Assembly Ways and Means Committee and New York State Senate Finance Committee, NYSDA's loss of its Social Science Research Unit as a result of funding cuts inaugurated in the 2001 budget came at a particularly unfortunate time. There has been great need for data-based analysis as a result of proposed and actuated changes in public defense these past three years.

The Backup Center is contractually obligated to "review, assess and analyze the public defense system, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." Working without a professional social science staff has hindered the Backup Center's efforts to help counties evaluate and fulfill their public defense needs, to respond to inquiries from legislators, judicial administrators, and bar leaders studying problems in public defense, and to advocate persuasively for much-needed public defense reform.

Prison Families of New York Train Lawyers, Others

Approximately 40 social workers and attorneys from The Legal Aid Society, Brooklyn Defender Service, and Neighborhood Defender Service of Harlem attended a training on Dec. 9, 2004, by Alison and Cecily Coleman of Prison Families of New York, Inc. (PFNY). The training received uniformly excellent evaluations. PFNY hopes to do additional Competency Training of criminal defense lawyers, law guardians, and others in the criminal judicial system, providing insight into what children of prisoners need and how to help them obtain it, as well as promoting the view of prisoners' children as "at potential" rather than "at risk." Their trainings are tailored to the needs of the audience, and fees vary depending on travel and the circumstances of the sponsoring group(s). For more information, contact PFNY at 40 North Main Avenue, Albany NY 12203. (518)453-6659. E-mail alison.coleman@rcda.org or childrenofprisoners@nycap.rr.com.

Forgotten Victims of Attica Settlement Reached

In mid-January, a $12 million settlement was announced in the lawsuit by the Forgotten Victims of Attica. An initial two-million dollar payment in the state's 2005 budget is to be followed by $10 million more over the next five years. The group, representing state employees who survived and the families of those who died in the deadly 1971 Attica prison uprising, was formed after the state agreed in 2000 to pay $12 million to brutalized inmates and the families of inmates killed at Attica. Genesee County Public Defender and NYSDA Board member Gary Horton represented the Forgotten Victims during negotiations with the state. (*Democrat and Chronicle* online, 1/13/05.)

3rd Dept Disapproves Ruling Allowing Cameras

The Appellate Division has prohibited a judge in Rensselaer County Court from allowing media cameras in the courtroom during further proceedings in the case of a defendant who futilely objected to the presence of cameras during his arraignment for first-degree murder. The trial judge had interpreted the words of Civil Rights Law 52, which prohibits cameras in any proceeding where subpoenaed witnesses may be called and without a request from any party or movant to permit audiovisual coverage, "so narrowly so as to permit that which the Legislature has expressly forbidden." By doing so, the judge "acted in excess of his authority," the appellate court said. Allowing cameras would violate the defendant's "fundamental right to a fair trial in a way which cannot be adequately addressed on appeal," the court went on, because "the extent to which cameras in the courtroom affect that right—including whether jurors will be unwilling to serve, witnesses reticent to testify, or attorneys prone to grandstanding—is unknown and largely unmeasurable (see Minority Report of the Committee on Audio-Visual Coverage of Court Proceedings, Dec. 1994, at 39-48)." *Matter of Heckstall v McGrath,* No. 96480 (3rd Dept 2/24/05). ⚖

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; 202-662-1738. For more information, also see the Project's web site: www.probono.net/deathpenalty.

Book Review

Innocent: Inside Wrongful Conviction Cases

By Scott Christianson. NYU Press, 2004; 196 pages

By Barbara DeMille*

Systematically, with successive case histories of persons accused, convicted, imprisoned, and eventually proved innocent, Scott Christianson builds his case for our sympathy and against the means by which these wrongfully accused are convicted. Interwoven with the text of *Innocent: Inside Wrongful Conviction Cases* are photographs of the accused and convicted, photographs of their defenders, photographs of the lying or mistaken accusers–at times law enforcement and prosecutors. Also included are depositions, court and police records, and results of lie detector tests and laboratory examinations.

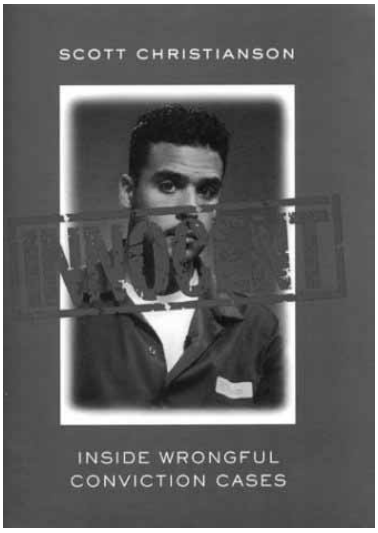
These prosecutors, these judges, these detectives and investigators, these eyewitnesses and jailhouse finks, these railroaded defendants themselves, all have a human face. And accompanying the human face is error, zeal, overwork, mistaken personal conviction, and, at times, downright mendacity and falsification of evidence resulting in the failure of our justice system to *protect* as well as convict.

And systematically, Christianson covers these failures: mistaken identification; prejudice against the defendant from prior convictions and associations; falsification of evidence or forensics; shoddy or overworked defense attorneys; extortion of confessions; perjury (often by arresting officers); and prosecutorial misconduct, in the name of law and order and zeal to convict. All of it, in the context of a justice system overloaded and overworked, administered by frail humanity, is understandable. All of it, in view of lives lost, families and reputations destroyed, is deplorable.

I do not argue with Christianson's intent, as I interpret it; but I would argue that at times he needs to make a more substantial case. As he catalogues each injustice to a wrongly accused and/or convicted citizen, he provides little about extenuating circumstances or a description of the context in which this citizen has come to be accused.

In some instances, I wanted more substantiation, as in his previous closely argued and researched history of imprisonment in this country.[1] Nevertheless, as in his inquiry into and documentation of those executed in Sing Sing prior to New York State's abolition of the death penalty,[2] Christianson succeeds in giving an immediacy to both the abuses and failures of imagination contributing to a them-v-us mind-set resulting often in callous cruelty.

Upstanding, tax-paying, employed citizens are rarely falsely accused or convicted. Those with financial resources with which to present a skilled defense have much less chance of a miscarriage of justice, including the ultimate injustice, the execution of an innocent. Many of these wrongfully convicted and imprisoned are victims of a plea-bargain system encouraging admission to a lesser charge in return for a lesser sentence. Protesting your innocence, insisting upon a trial, often merely assures the maximum sentence. And prosecutors and police are most eager to point that out to all defendants, including those wrongfully or mistakenly accused.



It occurred to me upon reading of these various and nefarious means by which both law enforcement and prosecutors obtain results, however suspect, that the root cause is largely based in our cultural acceptance of a simplistic formula of win and lose. This ethic is reflected in our sports culture, our celebrity culture, our electoral process, our foreign policy, to name a few instances. It is this culture, also pervading our communities, which encourages the police to "rearrange" evidence, coach witnesses, and perjure themselves in court to the end of closing a case and "winning" the war on crime. This same ethic, and the constant need to win reelection, provides a similar impetus for district attorneys to withhold evidence, fail to notify the defense of witnesses favorable to their case, to grandstand to the press over their "victory" upon receiving a conviction.

In the words of Lamont Branch, one of those eventually exonerated after spending thirteen years in Shawangunk Correctional Facility, wrongfully convicted through mistaken identification and sentenced to twenty-five years to life for the murder of a drug dealer: "Prison is a place where you lose respect for the law. That is because you see it raw, naked, twisted, bent, ignored, and blown out of proportion to suit the people who enforce it." Unfortunately, Christianson has substantiated Lamont's charge all too well. ⚖

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* ***Barbara DeMille*** *holds a PhD in English Literature, earned at SUNY at Buffalo. Her work was heard on Northeast Public Radio from 1993 to 1995. She has published numerous essays and articles.*

[1] Scott Christianson, *With Liberty for Some: 500 Years of Imprisonment in America*, Northeastern University Press (1998).

[2] Scott Christianson, *Condemned: Inside the Sing Sing Death House*, NYU Press (2000).

Job Opportunities

Reentry Net, a collaborative network of individuals and organizations in NYS that advocate for people who have criminal records, those reentering the community after incarceration, and their families, seeks a highly qualified candidate to function as a "virtual" community organizer and resource **Coordinator**. This position will be supervised by and located at The Bronx Defenders in New York City. The Coordinator will provide strategic, editorial, and technological advice; work to increase involvement by groups and individuals with a strong interest in reentry issues; and serve as a critical communication link between partner organizations. The Coordinator will work with project stakeholders, build and maintain an extensive online support center and resource library, and monitor the project's effectiveness. Required: strong self-motivation and initiative, very web-savvy and fluent in the discussion of web-based tools; demonstrated ability to work well with people, coordinate team projects, and communicate effectively; excellent and proven project management skills; ability to foster and facilitate collaborations creatively; comfortable with public speaking and training; excellent communication and writing skills, particularly the ability to make technology understandable to people without technical skills; willingness and ability to travel frequently (based in New York City). Additional technical knowledge such as html, bilingual skills, experience with social justice campaigns, and experience in and/or with the criminal justice system or the reentry community a plus. EOE. Women, people of color, and people with disabilities are encouraged to apply. Salary commensurate with experience. Excellent benefits. Applications encouraged by Mar. 18, 2005. Please send cover letter, résumés, writing sample, and three references to: McGregor Smyth, The Bronx Defenders, 860 Courtlandt Ave., Bronx NY 10451.

Prisoners' Legal Services of New York (PLS) is accepting applications for **Staff Attorney** positions in the Ithaca office. 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@plsny.org (Word or WP format).

Don't Miss an Application Deadline!

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

The Albany County Alternate Public Defender Office, in Albany NY, seeks **attorneys** to represent eligible clients; 35 hours per week, outside practice allowed. The office offers public legal services in criminal cases and in Family Court where a conflict exists with the Albany County Public Defender Office. Applicants should be committed to offering quality representation to persons unable to afford retained counsel. Minorities and women encouraged to apply. Spanish-speaking a plus. Salary up to $40,800 DOE, with medical benefits (contribution required) and pension system participation. Applications accepted until positions filled. Fax resume and cover letter to: Gaspar M. Castillo, Jr. fax# (518)447-7416.

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, 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.

The Criminal Justice Act Committee of the US Court of Appeals for the 2nd Circuit is accepting applications for service on the Court's Criminal Justice Act (CJA) Panel. Panel Members represent indigent criminal defendants and petitioners for habeas corpus. Admission to practice before this Court necessary. The Court seeks attorneys of superior experience and proven competence in federal appellate criminal defense work. The qualifications of applying attorneys will be examined by the CJA Committee's Attorney Advisory Group, which will make recommendations for membership on the Panel. Panel membership will be for one to three years, at the discretion of the Court. Attorneys currently serving on the panel need not reapply until the expiration of their present term. Application forms for membership on the CJA Panel are available at the Court's website (www.ca2.uscourts.gov) or by calling (212)857-8702. A signed original application, one copy of each of your appellate briefs, and three paper copies of the completed application and your resumé, along with a diskette containing both your completed application and resumé, must be received by the Clerk of Court by 5:00 p.m. on Mon. Apr. 18, 2005. Please check the Court's website periodically for CJA developments. ⚖

Conferences & Seminars

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Nassau Trainer
Date: April 8, 2005
Place: Mineola, NY
Contact: Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

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Sponsor: Chicago-Kent College of Law and Illinois Institute of Technology
Theme: 22nd Annual Section 1983 Civil Rights Litigation Conference
Dates: April 14–15, 2005
Place: Chicago, IL
Contact: Office of Continuing Legal and Professional Education, Chicago-Kent College of Law: (312) 906-5090; e-mail clestaff@kentlaw.edu; web site www.kentlaw.edu/depts/cle/sect1983/

Sponsor: National Association of Criminal Defense Lawyers
Theme: Spring Seminar
Dates: April 14–17, 2005
Place: New York City
Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; web site www.nacdl.org/meetings

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Newbies Training Camp
Date: April 22, 2005
Place: New York City
Contact: Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

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Sponsor: New York State Bar Association
Theme: Three Hot Topics in Criminal Law
Dates and Places: April 29, 2005 Rochester, NY
May 6, 2005 Albany, NY
May 19, 2005 Uniondale, NY
May 20, 2005 New York City
Contact: NYSBA web site www.nysba.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Syracuse Trainer
Date: April 30, 2005
Place: Syracuse, NY
Contact: Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross to Kill
Date: May 13, 2005
Place: New York City
Contact: Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

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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; web site www.triallawyerscollege.com

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Sponsor: National Legal Aid and Defender Association
Theme: Trial Advocacy College
Dates: June 12–16, 2005
Place: Philadelphia, PA
Contact: NLADA: tel (212)452-0620; fax (202)872-1031; web site www.nlada.org

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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

Sponsor: New York State Defenders Association
Theme: DEFENDER INSTITUTE BASIC TRIAL SKILLS PROGRAM
Dates: June 19–25, 2005
Place: Troy, NY
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail sladue@nysda.org; web site www.nysda.org

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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; web site www.nysda.org ⚖

Immigration Practice Tips

2nd Circuit Leaves Open Question of Whether 2nd Drug Possession Offense Constitutes "Aggravated Felony"

By Manuel D. Vargas of NYSDA's Immigrant Defense Project (IDP)*

On Feb. 1, 2005, the US Court of Appeals for the 2nd Circuit amended an earlier decision to withdraw a holding that a second drug possession offense constituted an "aggravated felony" for deportation purposes. *Durant v U.S.I.N.S.*, 2004 US App LEXIS 27904 at n.1 (2d Cir. 2005), amending the earlier opinion reported at 393 F3d 113 (2d Cir. 2004).

The question of what drug offenses may be deemed aggravated felonies for deportation purposes—and therefore lead usually to mandatory detention and deportation—remains confused under 2nd Circuit and Board of Immigration Appeals (BIA) case law. The immigration statute defines "aggravated felony" (AF) to include "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." See INA 101(a)(43)(B). In the past, the BIA has interpreted 101(a)(43)(B) to hold that a state drug offense qualifies as an AF only if either (1) it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined, or (2) regardless of state classification as a felony or misdemeanor, it is analogous to a felony under the federal Controlled Substances Act. *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), reaffirmed by *Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999). In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including offenses involving possession with intent to distribute), but simple possession drug offenses are generally potentially punishable as felonies only when the defendant has a prior final drug conviction. See 21 USC 801 *et seq.*, and especially 21 USC 844 (Penalties for simple possession). In 1996, the 2nd Circuit (covering cases arising in New York, Connecticut, and Vermont) deferred to this former BIA interpretation in *Matter of L-G-*. *See Aguirre v INS*, 79 F3d 315 (2d Cir. 1996); see also *Gerbier v Holmes*, 280 F3d 297 (3d Cir. 2002); *Cazarez-Gutierrez v Ashcroft*, 382 F3d 905 (9th Cir. 2004).

In 2002, however, the BIA modified its position. In *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the BIA indicated that a state simple possession drug offense would now be deemed an AF if it is classified as a felony under state law, even if it would not be classified as a felony under federal law, unless the case arises in a federal court circuit with a contrary rule. At the same time, the BIA held that state *misdemeanor* simple possession drug offenses would not be deemed an AF even if they might have been classified as a felony under federal law. See *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002) (applying new BIA approach in the Fifth Circuit); *Matter of Elgendi*, 23 I&N Dec. 515 (BIA 2002)(applying new BIA approach even in the 2nd Circuit).

Nevertheless, in cases arising in the 2nd Circuit, many Immigration Judges appear to continue to follow the 1996 2nd Circuit decision in *Aguirre v INS* and only deem state simple possession offenses to be AFs if they would be treated as felonies under federal law even if they are felonies under state law. This contrasts with the separate line of 2nd Circuit cases that hold, for illegal reentry enhanced sentence purposes, the term "aggravated felony" includes state felony drug possession offenses. See, *e.g.*, *US v Pornes-Garcia*, 171 F3d 142 (2d Cir.), *cert. denied*, 528 US 880 (1999).

However, this adherence to the federal felony approach of *Aguirre* also means that, in cases arising in the 2nd Circuit, the federal immigration authorities will argue that second possession offenses constitute aggravated felonies, even if deemed a misdemeanor under state law, because second possession offenses may be prosecuted as felonies under federal law. See 21 USC. 844. The 2nd Circuit's amended decision in *Durant*, and its earlier amended decision in *US v Simpson*, 319 F3d 81, at 86, n.7 (2d Cir. 2002, as amended Jan. 23, 2003) leave this question open in the immigration context.

The bottom line: In criminal proceedings involving drug charges, noncitizens and their criminal defense counsel should be aware that the law in this area remains in a state of flux. A first misdemeanor possession offense should not be deemed an AF; however, there continues to be a risk that a second possession offense, even if it is a misdemeanor, as well as a first possession offense if it is a felony, will be deemed an AF for immigration purposes. As for sale or intent to sell offenses, virtually any such offense will be deemed an AF, with the possible exception of misdemeanor sale of marijuana.

The 2nd Circuit's amendment of the *Durant* decision means that noncitizens convicted of more than one drug possession offense, and their lawyers in immigration or federal court proceedings governed by 2nd Circuit law, may continue to argue that a second possession offense is not an AF for immigration purposes. For support for this argument, one can point to the decisions of two other

(continued on page 16)

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* *IDP provides backup support concerning criminal/immigration issues for defense attorneys, other immigrant advocates, and immigrants themselves.* ***Manuel D. Vargas*** *is Consulting Attorney and former Director of the Project. 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.*

Legislative Review 2004

by Al O'Connor*

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[***Ed. Note:*** *The Legislative Review, summarizing New York legislative action relevant to criminal defense and related fields, appears annually in the* REPORT. *Copies of the feature dating from 1998 to the present can also be found on the NYSDA web site, www.nysda.org, under Hot Topics—Legislation NY. As noted below, a summary of the 2004 amendments to the Rockefeller Drug Laws was published in the last* REPORT.]

Penal Law

Chap. 738 (Rockefeller Drug Law Reform). Effective: Generally effective on January 13, 2005. Some provisions effective December 14th and 27th, 2004.

See, "A Summary of the Rockefeller Drug Law Reform Legislation" in the Backup Center REPORT, Vol XIX, No 4, pg. 15 (Sept–Dec 2004).

Chapter 459 (S.7488) (LWOP for certain cases of murder in the second degree). Effective: Applies to offenses committed on or after November 1, 2004.

This law adds a subdivision to the statute defining murder in the second degree, which applies to intentional murders committed during the course of certain sex crimes when the victim is less than 14 years-old and the actor is at least 18. The new crime is punishable by a mandatory sentence of life without parole:

Penal Law § 125.25 (Murder in the second degree)

A person is guilty of murder in the second degree when:

> (5) being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest as defined in section 255.25 of this chapter, against a person less than fourteen years old, he or she intentionally causes the death of such person.

Chap. 1 (A. 11723) (Anti-terrorism bill of 2004). Effective: July 23, 2004.

In the immediate aftermath of September 11, 2001, Governor Pataki introduced an ambitious bill that sought to enact state criminal penalties for acts of "terrorism," ones which, if serious, would almost certainly be prosecuted as federal crimes. In addition to criminalizing the possession and use of chemical and biological weapons, the bill proposed to abolish the statute of limitations, the exclusionary rule, and the accomplice corroboration rule in certain cases, and to authorize so-called "roving wiretaps." After the Assembly resisted passage for several sessions, the bill was stripped of many of its objectionable provisions and passed both houses in 2004. The bill criminalizes possession and/or use of chemical and biological weapons. The most serious of these new crimes are punishable by life without parole. It also enacts four felony degrees of money laundering in support of terrorism offenses (new Penal Law §§ 470.21, 470.22, 470.23, 470.24), which are defined by monetary amounts ranging from over $1000 to $75,000. The bill establishes an eight-year statute of limitations for terrorism prosecutions, but eliminates the limitations period entirely for terrorism crimes that "resulted in or created a foreseeable risk of death or serious physical injury." Finally, in response to the fake anthrax scares of several years ago, the bill adds "hazardous substance" to the laws criminalizing the placing of a false bomb (Penal Law §§ 240.61, 240.62 and 240.63).

Penal Law § 490.37 criminal possession of a chemical weapon or biological weapon in the third degree.

A person is guilty of criminal possession of a chemical weapon or biological weapon in the third degree when he or she possesses any select chemical agent or select biological agent under circumstances evincing an intent by the defendant to use such weapon to cause serious physical injury or death to another person.

(Class C violent felony)

Penal Law § 490.40 criminal possession of a chemical weapon or biological weapon in the second degree.

A person is guilty of criminal possession of a chemical weapon or biological weapon in the second degree when he or she possesses any chemical weapon or biological weapon with intent to use such weapon to:

> (a) cause serious physical injury to, or the death of, another person; and
> (b) (i) intimidate or coerce a civilian population;
> (ii) influence the policy of a unit of government by intimidation or coercion; or

*Al O'Connor** is a Backup Center Staff Attorney. He coordinates the Association's amicus and legislative work.

(iii) affect the conduct of a unit of government by murder, assassination,or kidnapping.

2. cause serious physical injury to, or the death of, more than two persons.

(Class B violent felony).

Penal Law § 490.45 criminal possession of a chemical weapon or biological weapon in the first degree.

A person is guilty of criminal possession of a chemical weapon or biological weapon in the first degree when he or she possesses:

1. any select chemical agent, with intent to use such agent to:
   (a) cause serious physical injury to, or the death of, another person; and
   (b)(i) intimidate or coerce a civilian population;
   (ii) influence the policy of a unit of government by intimidation or coercion; or
   (iii) affect the conduct of a unit of government by murder, assassination, or kidnapping.
2. any select chemical agent, with intent to use such agent to cause serious physical injury to, or the death of, more than two other persons; or
3. any select biological agent, with intent to use such agent to cause serious physical injury to, or the death of, another person.

(Class A-I felony — punishable by mandatory sentence of life without parole)

Penal Law § 490.47 criminal use of a chemical weapon or biological weapon in the third degree.

A person is guilty of criminal use of a chemical weapon or biological weapon in the third degree when, under circumstances evincing a depraved indifference to human life, he or she uses, deploys, releases, or causes to be used, deployed, or released any select chemical agent or select biological agent, and thereby creates a grave risk of death or serious physical injury to another person not a participant in the crime.

(Class B violent felony)

Penal Law § 490.50 criminal use of a chemical weapon or biological weapon in the second degree.

A person is guilty of criminal use of a chemical weapon or biological weapon in the second degree when he or she uses, deploys, releases, or causes to be used, deployed, or released, any chemical weapon or biological weapon, with intent to:

1. cause serious physical injury to, or the death of, another person; and
2. (a) intimidate or coerce a civilian population;
   (b) influence the policy of a unit of government by intimidation or coercion; or
   (c) to affect the conduct of a unit of government by murder, assassination, or kidnapping.

(Class A-II felony)

Penal Law § 490.55 criminal use of a chemical weapon or biological weapon in the first degree.

A person is guilty of criminal use of a chemical weapon or biological weapon in the first degree when:

1. with intent to:
   (a) cause serious physical injury to, or the death of, another person; and
   (b)(i) intimidate or coerce a civilian population;
   (ii) influence the policy of a unit of government by intimidation or coercion; or
   (iii) affect the conduct of a unit of government by murder, assassination, or kidnapping;

   he or she uses, deploys, releases, or causes to be used, deployed, or released any select chemical agent and thereby causes serious physical injury to, or the death of, another person who is not a participant in the crime.
2. with intent to cause serious physical injury to, or the death of, more than two persons, he or she uses, deploys, releases, or causes to be used, deployed, or released any select chemical agent and thereby causes serious physical injury to, or the death of, more than two persons who are not participants in the crime; or
3. with intent to cause serious physical injury to, or the death of, another person, he or she uses, deploys, releases, or causes to be used, deployed, or released any select biological agent and thereby causes serious physical injury to, or the death of, another person who is not a participant in the crime.

(Class A-I felony — punishable by a mandatory sentence of life without parole).

Penal Law § 490.70 limitations:

1. The provisions of sections 490.37, 490.40, 490.45, 490.47, 490.50, and 490.55 of this article shall not apply where the defendant possessed or used:
   (a) any household product generally available for sale to consumers in this state in the quantity and concentration available for such sale;
   (b) a self-defense spray device in accordance with the provisions of paragraph fourteen of subdivision a of section 265.20 of this chapter;
   (c) a chemical weapon solely for a purpose not prohibited under this chapter, as long as the type and quantity is consistent with such a purpose; or
   (d) a biological agent, toxin, or delivery system solely for prophylactic, protective, bona fide

research, or other peaceful purposes.

2. for the purposes of this section, the phrase "purposes not prohibited by this chapter" means the following:
   (a) any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other peaceful activity;
   (b) any purpose directly related to protection against toxic chemicals and to protection against chemical weapons;
   (c) any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm; and
   (d) any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

Chap. 568 (S.6649) (Probation Term — Public Lewdness). Effective: Applies to offenses committed on or after November 1, 2004.

Extends the period of probation for the Class B misdemeanor of public lewdness (Penal Law § 245) from one year to "no less than one year and no more than three years."

Chap. 393 (A.7201-b) (Nuclear facilities — use of force) Effective: August 17, 2004.

Amends Penal Law § 35.20 to add security personnel and employees of nuclear electric generating facilities to the list of persons authorized to use physical or deadly physical force in defense of premises or to prevent a burglary.

Chap. 40 (Technical Amendment — Oral Sexual Contact). Effective: April 20, 2004.

Technical amendment to Penal Law § 130.05 (2)(d) to replace the antiquated reference to "deviate sexual intercourse" with the terms of "oral sexual conduct" and "anal sexual conduct."

Chaps. — various (Peace officer status). Effective: as indicated

Confers New York State peace officer status on:

Chap. 17 (A.9693) — Syracuse University peace officers appointed by the chief law enforcement officer of the city of Syracuse. Effective: March 23, 2004.

Chap. 347 (A.10015-a) — watershed protection and enforcement officers appointed by the city of Peekskill. Effective: August 10, 2004.

Chap. 235 (A.3980) — court security officers employed by the Wayne County sheriff's office. Effective: July 27, 2004.

Chap. 241 (A.7993-a) — arson investigators and fire inspectors from the Department of State`s office of fire prevention and control. Effective: July 27, 2004.

Chap. 110 (A.9159) — federal police officers and police supervisors assigned to the United States Merchant Marine Academy in Kings Point. Effective: June 15, 2004.

By a separate chapter law (L. 2004, chap. 178) the authority conferred on Merchant Marine police officers was limited to duties performed "within the geographical area of their employment or within one hundred yards" thereof.

DNA Databank Law

Chap. 138 (S.7659) (DNA databank law — new offenses — Discovery for DNA-related 440.30 (1-a) motions). Effective: Signed July 6, 2004. DNA databank additions apply to offenses committed prior to that date where service of the sentence imposed upon conviction of the designated offense had not been completed prior to July 6, 2004.

This legislation adds many additional offenses to the DNA databank law (Executive Law § 995), including any sex crime (misdemeanor or felony) that is included in Megan's Law (Correction Law § 168-a). The list of new offenses includes:

Any sex offenses or sexually violent offenses defined in Correction Law § 168-a (2)(a)(b) or (c)

Any of the following offenses, or attempts thereof where the attempt is a felony:

P.L. § 120.12 — Aggravated assault upon a person less than 11 years-old
P.L. § 120.13 — Menacing in the first degree
P.L. § 120.25 — Reckless endangerment in the first degree
P.L. § 120.55 — Stalking in the second degree
P.L. § 125.10 — Criminally negligent homicide
P.L. § 125.12 — Vehicular manslaughter in the second degree
P.L. § 125.13 — Vehicular manslaughter in the first degree
P.L. § 130.53 — Persistent sexual abuse
P.L. § 130.65-a — Aggravated sexual abuse in the fourth degree
P.L. § 130.85 — Female genital mutilation
P.L. § 130.90 — Facilitating a sex offense with a controlled substance
P.L. § 135.10 — Unlawful imprisonment in the first degree

P.L. § 135.50 — Custodial interference in the first degree
P.L. § 140.17 — Criminal trespass in the first degree
P.L. § 145.20 — Criminal tampering in the first degree
P.L. § 145.45 — Tampering with a consumer product in the first degree
P.L. § 160.05 — Robbery in the third degree
P.L. § 190.79 — Identity theft in the second degree
P.L. § 190.80 — Identity theft in the first degree
P.L. § 205.25 — Promoting prison contraband in the first degree
P.L. § 215.11 — Tampering with a witness in the third degree
P.L. § 215.12 — Tampering with a witness in the second degree
P.L. § 215.13 — Tampering with a witness in the first degree
P.L. § 215.51 (b)(c) and (d) — Criminal contempt in the first degree
P.L. § 215.52 — Aggravated criminal contempt
P.L. § 215.56 — Bail jumping in the second degree
P.L. § 215.57 — Bail jumping in the first degree
P.L. § 230.05 — Patronizing a prostitute in the second degree
P.L. § 230.06 — Patronizing a prostitute in the first degree
P.L. § 230.30 — Promoting prostitution in the second degree
P.L. § 230.32 — Promoting prostitution in the first degree
P.L. § 235.21 — Disseminating indecent materials to minor in the second degree
P.L. § 235.22 — Disseminating indecent materials to minor in the first degree
P.L. § 240.06 — Riot in the first degree
P.L. § 240.06 — Criminal anarchy
P.L. § 250.45 — Unlawful surveillance in the second degree
P.L. § 250.50 — Unlawful surveillance in the first degree
P.L. § 260.32 — Endangering the welfare of a vulnerable elderly person in the second degree
P.L. § 260.34 — Endangering the welfare of a vulnerable elderly person in the first degree
P.L. § 263.05 — Use of a child in a sexual performance
P.L. § 263.10 — Promoting an obscene sexual performance by a child
P.L. § 263.11 — Possessing an obscene sexual performance by a child
P.L. § 263.15 — Promoting a sexual performance by a child
P.L. § 263.16 — Possessing a sexual performance by a child
P.L. § 265.02 — Criminal possession of a weapon in the third degree
P.L. § 265.11 — Criminal sale of a firearm in the third degree
P.L. § 265.16 — Criminal sale of a firearm to a minor
P.L. § 485.05 — Hate crimes
P.L. § 490.25 — Crimes of terrorism

In an apparent trade-off, the legislation strengthens the law governing post-judgment motions for DNA testing. First, it eliminates the requirement that the conviction have been entered prior to January 1, 1996. All criminal convictions are now subject to a motion to vacate pursuant to CPL § 440.30 (1-a). Second, the legislation provides defendants with some means of discovering whether testable material still exists, or has been destroyed.

CPL § 440.30 (1-b) now provides:

> In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section. The court, on motion of the defendant, may also issue a subpoena duces tecum directing a public or private hospital, laboratory or other entity to produce such specified evidence in its possession and/or information and documentary evidence in its possession concerning the location and status of such specified evidence.

Criminal Procedure Law

Chap. 518 (A.10803) (Order terminating charges contained in felony complaint). Effective: November 1, 2004.

This legislation finally provides a mechanism in the CPL to dispose of a felony complaint that has been outstanding for a long time without grand jury action. The elaborate new procedure (CPL § 180.85) authorizes the defendant, the People or a local criminal court or superior court (acting *sua sponte*) to move for termination of a felony complaint that has been outstanding for at least one year. The motion must be in writing and on at least 30 days notice. If the district attorney consents to termination or does not respond to the motion, the court must enter an order terminating the prosecution. If the district attorney opposes, the court may defer action on the motion for 45 days to allow the People an opportunity to present the matter to a grand jury. An additional 45 day deferral period is available for good cause. If the matter has not been resolved by a grand jury at the conclusion of the deferral period, the court may enter an order terminating the prosecution, from which the People may appeal as-of-right. The defendant need not appear in court as a prerequisite to relief. Nor is the time during which the motion is pending excludable for speedy trial purposes. Termination of the prosecution pursuant to this section does not foreclose the People from subsequently indicting the defendant and seeking to defend the indictment against dismissal under the speedy trial statute.

The procedure is not available when the felony complaint includes a homicide charge (Penal Law Article 125).

Relief under section 180.85 constitutes a termination of the criminal action in favor of the accused subject to the sealing provisions of CPL section 160.50. Where, however, following the entry of a termination order, the People indicate their intention to seek an indictment, the court is required to stay sealing under CPL 160.50, for up to thirty days to allow the People to access to "official records and papers" needed to pursue an indictment.

For criminal cases commenced prior to November 1, 2004, the motion for termination may be made no earlier than 12 months from the date of arraignment or December 31, 2004, whichever is later.

Chap. 167 (S.6573) (Audio Visual Court Appearances — Warren County). Effective: July 20, 2004.

Amends CPL § 182.20 to add Warren County to the list of jurisdictions authorized to participate in the experimental program of audio-visual arraignments and court appearances via two-way closed circuit television.

Chap. 172 (S.6653) (Sunset Extended — Audio-Visual Court Appearances). Effective: Sunset extended to December 31, 2006.

Extends the sunset provisions of CPL Article 182, which authorizes an experimental program of audio-visual arraignments and court appearances via two-way closed circuit television in certain counties, to December 31, 2006.

Chap. 107 (A.10974) (Not responsible pleas or verdicts — order of conditions). Effective: June 8, 2004.

In 2003, the Legislature expressly authorized courts to issue an order of protection in the context of an order of conditions issued to a person found not responsible by reason of mental disease or defect. This legislation directs that the stay away order be issued in a separate document and makes other technical amendments concerning enforcement of such orders.

Chap. 362 (S.556) (Age of "child witness" increased to 14). Effective: November 1, 2004.

Redefines a "child witness" eligible to testify by closed-circuit television pursuant to CPL Article 65 as a witness 14 years old or younger (from 12). [Amends CPL § 65 (1) and FCA § 343 (1)(4)]

Chap. 56 (pt. F, § 1) (S.6056-b) (Mandatory surcharge and crime victim assistance fee applicable to youthful offender adjudications). Effective: February 16, 2005.

Amends Penal Law § 60.35 to provides that mandatory surcharge and crime victim assistance fees (Penal Law § 60.35) "shall apply to a sentence imposed upon a youthful offender and the amount . . . which shall be levied at sentencing shall be equal to the amount specified in such section for the offense of conviction for which the youthful offender finding was substituted."

Chap. 415 (S.7598) (Appearance Tickets — Local Zoning, Building and Sanitation Codes). Effective: August 24, 2004.

Amends CPL § 150.40 (2) to provide that, in contrast to all other non-parking related appearance tickets, which must be personally served, appearance tickets issued for alleged violations of local zoning, building and sanitation codes "may be served in any manner authorized for service under [section 308 of the CPLR]."

Sex Offender Legislation

Chap. 106 (A.9779) (Sex Offender Registration Act — False Notice). Effective: August 7, 2004.

In 2003, the Legislature passed a poorly drafted bill concerning false sex offender registration act notices. The 2003 legislation has been repealed (Correction Law § 168-v) and a new penal law offense has been enacted:

Penal Law § 240.48 disseminating a false registered sex offender notice.

A person is guilty of disseminating a false registered sex offender notice when, knowing the information he or she disseminates or causes to be disseminated to be false or baseless, such person disseminates or causes to be disseminated any notice which purports to be an official notice from a government agency or a law enforcement

agency and such notice asserts that an individual is a registered sex offender. (Class A misdemeanor)

Chap. 410 (A.11599) (Sex Offender Registration Act — Out-of-State offenders). Effective: November 15, 2004.

This legislation requires DCJS to notify offenders subject to New York's registration laws that registration requirements may continue if they relocate to another state or U.S. possession. In addition, the bill requires DCJS to regularly notify officials in all other states and territories of the duty to notify the Division of Criminal Justice Services when an offender who is subject to sex offender registration laws relocates to or establishes employment or attends school in New York State.

Chap. 361 (A.11590) (Sex Offender 900 telephone line free of charge). Effective: September 9, 2004.

The bill amends section 168-p of the correction law to eliminate charges for the "900" telephone number established for public inquiries about registered sex offenders. The bill also allows non-profit and not-for-profit youth service organizations to inquire about as many as 20 individuals in a single phone call.

Chapter 146 (S.4168) (Sex Offender Registration Act — out-of-state offenses). Effective: July 13, 2004.

Amends Correction Law § 168-a (2)(d)(i) to define a crime committed in another jurisdiction as a registerable offense when it includes all of the essential elements of forcible touching or sexual abuse in the third degree (Penal Law §130.52, §130.55) and the defendant otherwise would have been subject to the Sex Offender Registration Act had the offense been committed in New York State (In-state offenders are subject to Megan's Law for these crimes only when the victim was under age 18 or when the defendant has a prior sex offense conviction.)

Chap. 56 (pt. E, § 1) (S.6056-b) (Sex offender supplemental victim fee). Effective: Signed August 20, 2004. Purportedly applies to offenses committed on or after April 1, 2004, but may not be validly imposed for offenses committed before signature date.

Amends Penal Law § 60.35 to imposes a supplemental fee of $1000 on all persons convicted of a sex offense defined in Penal Law Articles 130 and 263, or incest, to be paid in addition to the mandatory surcharge and crime victim's assistance fee (also applies to youthful offender adjudications).

Vehicle and Traffic Law

Chap. 59 (pt. E, § 1) ($ 750 Driver Responsibility Assessment — VTL § 1199). Effective: Applies to offenses committed on or after November 18, 2004.

Requires DMV to impose a new $750 driver responsibility financial assessment, payable in three annual installments of $250, when a person is convicted of driving while impaired or intoxicated under VTL § 1192. The assessment also applies to chemical test refusals under VTL § 1194 "not arising out of the same incident as a conviction" under VTL § 1192. The assessment additionally applies to prosecutions under the navigation law for boating while intoxicated, and the parks, recreation and historic preservation law for snowmobiling while intoxicated. Nonpayment will result in a mandatory driver's license suspension.

Chap. 59 § 2 (part E) (Driver Responsibility Assessment). Effective: November 18, 2004.

Adds VTL § 503 (4) to require the Commissioner of Motor Vehicles to impose a driver responsibility assessment on "any person who accumulates six or more points on his or her driving record for acts committed within an eighteen month period." The assessment is $100 per year for a three-year period for the first six points on a driver's record and an additional twenty-five dollars per year for each additional point on such driver's record. The penalty for non-payment is suspension of one's driver's license.

Chap. 515 (A.9265) (Vehicle and Traffic Law — Fine reimbursement). Effective: October 28, 2004.

Amends VTL § 242 to provide that a motorist shall have the right to a refund of any fine and/or penalty within 30 days of an order overturning the violation, less any amount owed by the motorist for other outstanding violations. Provides that the Parking Violations Bureau shall pay a late charge which shall "accrue at the same rate as that imposed for failure to make timely payment of a fine."

Chap. 672 (S.173) (Leaving the scene of an accident involving injury to certain animals — increased penalties). Effective: November 1, 2005.

Amends VTL § 601 to increase fines for leaving the scene of an accident involving injury to an animal when the animal is a guide dog, hearing dog or service dog: $50–$150 (first offense), $150–$300 (second or subsequent offense).

Chap. 673 (VTL § 511 (3) — Aggravated unlicensed operation of a motor vehicle in the first degree). Effective: November 1, 2005.

Technical amendment to VTL § 511 (3)(a)(ii) to clarify that a person is guilty of aggravated unlicensed operation of a motor vehicle in the first degree when he or she "*commits the offense of aggravated unlicensed operation of a motor vehicle in the third degree*" and is "operating a motor vehicle while such person has in effect ten or more suspensions, imposed on at least ten separate dates for failure to answer, appear or pay a fine . . ."

Judiciary Law

Chap. 240 (A.7518) (Respite/incompetency period following jury service). Effective: July 27, 2004.

Amends Judiciary Law § 524 to increase the respite period following jury service to 6 years (from four) and, if the juror served more than 10 days, to eight years. A shorter respite period of two years or more is authorized if a juror served fewer than three days of jury service.

Correction Law

Chap. 553(S.5408) (Merit Time eligibility for sentences of 1–3 years). Effective: October 5, 2004.

When the merit time law was enacted in 1997, it inexplicably applied to sentences "in excess" of one year. Thus, inmates serving 1–3 year sentences were ineligible to earn merit time. Correction Law § 803 (1)(d) has now been amended to apply to sentences of "one year or more."

Chap. 555 (S.5873) (Warren County Jail). Effective: October 5, 2004.

Amends Correction Law § 500-a to permit the Warren County Jail to be used for the detention of persons under arrest who are awaiting arraignment.

Chap. 559 (S.6065) (Putnam County Jail). Effective: October 5, 2004.

Amends Correction Law § 500-a to permit the Putnam County Jail to be used for the detention of persons under arrest who are awaiting arraignment.

Miscellaneous

Chap. 111 (A.10103) (CPLR — Confidential names and addresses). Effective: July 15, 2004.

Adds a new rule to the CPLR (§ 2103-a) to provide that any party in a civil proceeding may "keep his or her residential and business addresses and telephone numbers confidential from any party in any pleadings or other papers submitted to the court, where the court makes specific findings on the record supporting a conclusion that disclosure of such addresses or telephone numbers would pose an unreasonable risk to the health or safety of a party."

Chap. 190 (A.8586-a) (Animal Fighting). Effective: July 20, 2004.

Amends Agriculture and Markets Law § 351 to prohibit the breeding, selling or offering to sell any animal under circumstances evincing an intent that such animal engage in animal fighting (Class E felony).

Chap. 514 (A.8636-c) (Tongue Splitting). Effective: November 1, 2004.

Adds a new section to the Public Health Law (§ 470) to prohibit the practice of tongue splitting except by physicians and dentists (first offense: Class A misdemeanor; second offense: Class E felony). ⚖

Immigration Practice Tips (continued from p. 9)

circuits that have found that—even if an individual has a prior drug conviction—a state drug possession offense should not be considered an "illicit trafficking" aggravated felony for federal immigration purposes if the conviction did not require the prosecution to allege and prove the prior conviction as is required under the federal Controlled Substances Act for a second possession offense to be treated as a felony. See 21 USC 851(a)(1) ("No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon"); *Steele v Blackman*, 236 F3d 130 (3d Cir. 2001)(finding that second New York drug conviction is not an aggravated felony because state criminal proceedings did not involve findings or a plea satisfying the prior conviction element of an offense under the Controlled Substances Act punishable by imprisonment for more than a year); *Oliveira-Ferreira v Ashcroft*, 382 F3d 1045 (9th Cir. 2004)(finding that second state possession conviction should not be treated as punishable by more than one year's imprisonment and therefore a felony under federal law by virtue of a recidivist sentence enhancement). ⚖

[***Ed. Note:*** *See p. 23 for information on the approaching Apr. 26, 2005 deadline for reopening old immigration cases to seek 212(c) waivers of deportation for lawful permanent residents (LPRs) who have been ordered deported because of criminal convictions for crimes to which the LPRs agreed to plead guilty or no contest before Apr. 1, 1997.*]

For more information on Immigration Law Relating to Criminal Proceedings, Visit the IDP page, under NYSDA Resources, at www.nysda.org

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

Conspiracy (Evidence) (General) **CNS; 80(20) (23)**

Federal Law (Crimes) **FDL; 166(10)**

Whitfield v United States, 543 US __, 125 SCt 687, 160 LEd2d 611 (2005)

In the petitioners' money laundering trial, evidence was presented that they were members of the board of the Greater Ministries International Church, which had a gifting program promising investors double their money back. The petitioners' garnered millions in a few short years but did not deliver a return on the investments. They requested a jury instruction that placed the burden on the prosecution to prove beyond a reasonable doubt that at least one of the co-conspirators had committed an overt act in furtherance of the money laundering conspiracy. The request was denied, the petitioners' convictions were affirmed.

Holding: Conviction under 18 USC 1956(h) for conspiracy to commit money laundering does not require proof of an overt act in furtherance of the conspiracy. The statute contains no such requirement. Since Congress presumably knew of earlier case law on this issue and did not expressly include an overt act element in the money laundering conspiracy statute, the Court would not read one into it. *See US v Shabani*, 513 US 10 (1994). Judgment affirmed.

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

Sentencing (Aggravated Penalties) (Guidelines) (Mandatory) **SEN; 345(5) (39) (47.5)**

United States v Booker, 543 US __, 125 SCt 738, 160 LEd2d 621 (2005)

After a jury trial, respondent Booker was convicted of possessing 92.5 grams of crack. The judge found by a preponderance of the evidence that respondent Booker had possessed 566 grams of crack and was guilty of obstructing justice. Based on the US Sentencing Guidelines (USSG) the court imposed, instead of a sentence of 21 years and 10 months, a 30-year sentence that was reversed on appeal.

Respondent Fanfan was convicted of possessing at least 500 grams of cocaine. Under the USSG, without additional findings of fact, the maximum sentence was five or six years. A judge found respondent Fanfan possessed 2.5 kilograms of cocaine and 261.6 grams of crack, and was the leader behind the activity. While the USSG mandated a sentence of 15 or 16 years after such findings, the judge found that under *Blakely v Washington* (124 SCt 2531 [2004]) those portions of the USSG were unconstitutional, and imposed a sentence based on the USSG as applied only to the jury's verdict. The prosecution's appeal was denied.

Holding: Opinion in Part: [Stevens, J] Applying the USSG based on facts not found by the jury or admitted by the defendant violates the 6th Amendment. *See Apprendi v New Jersey*, 530 US 466, 490 (2000).

Opinion in Part: [Breyer, J] The provisions making the USSG mandatory (18 USCA 3553[b][1]; 3742[e]) conflict with the 6th Amendment and must be severed and excised from the statute. The remainder of the Federal Sentencing Act is now advisory. Guideline ranges are to be considered by the courts, but they are permitted to tailor sentences based on other statutory criteria. *See* 18 USCA 3553(a)(4). Judgment in Booker affirmed, matter remanded; judgment in Fanfan vacated, matter remanded.

Dissenting in Part: [Stevens, J] Mandatory provisions of USSG were not unconstitutional. The decision to sever and excise them was not consistent with Congressional intent.

Dissent: [Scalia, J] Nullifying mandatory sections of USSG undermined the legislative intent to eliminate discretionary sentencing.

Dissenting in Part: [Thomas, J] The remedy should have been tailored to the individual cases, finding the statute unconstitutional as-applied, not on its face.

Dissenting in Part: [Breyer, J] The 6th Amendment did not preclude a sentencing judge from determining the *manner* or *way* in which a defendant carried out the crime. *Apprendi* and *Blakely* did not extend to the USSG, since there was no guarantee of a lower sentence based on a jury's fact finding. A federal defendant faced a sentence within the statutory range, regardless of the USSG range.

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

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

Bell v Cone, 543 US __, 125 SCt 847, 160 LEd2d 881 (2005)

The respondent's murder conviction and death sentence were affirmed on appeal. The state supreme court held that the penalty phase jury's finding that the crime was "especially heinous, atrocious, or cruel" was supported by the evidence. In a federal habeas corpus motion, the

US Supreme Court *continued*

respondent claimed that the "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague under the 8th Amendment. Denial of that claim was reversed on appeal.

Holding: Where the state court applied narrowing construction to the "especially heinous, atrocious, or cruel" aggravating circumstance, it was not unconstitutionally vague. The state court's narrowing construction in *State v Dicks* (615 SW2d 126 [Tenn 1981]) was the same as the one used in *Proffitt*. *See Proffitt v Florida*, 428 US 242 (1976). This and other decisions by the state court interpreting and applying the narrowed construction of the "heinous, atrocious, or cruel" aggravator supported the conclusion that the same interpretation had been applied in the respondent's case, although such case law was not cited. Therefore, the aggravator was not vague nor "contrary to" clearly established federal law under 28 USC 2254(d)(1). The federal appeals court erred in presuming that the state failed to apply the narrowing construction, even if the aggravator was unduly vague. Judgment reversed.

Concurring: [Ginsburg, J] Raising an issue in a state court proceeding did not uniformly mean that it had been decided.

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

Illinois v Caballes, 543 US __, 125 SCt 834, 160 LEd2d 842 (2005)

The respondent was stopped for speeding. A state trooper with a narcotics-detection dog came to the scene after hearing a radio transmission concerning the traffic stop. As the first officer was writing a warning ticket, the second trooper walked around the car with the detection dog, who alerted at the trunk. The respondent was charged with possession of marijuana found during a search of the trunk. Denial of his motion to suppress was affirmed on appeal, then reversed by the state supreme court.

Holding: The respondent's privacy interests were not violated when a well-trained narcotics-detection dog sniffed his vehicle during a lawful traffic stop. *Cf Kyllo v US*, 533 US 27 (2001). The initial stop for speeding was based on probable cause and did not become unreasonable when canine drug detection was introduced. The respondent did not have a privacy interest in possessing contraband. *US v Jacobsen*, 466 US 109, 124 (1984). Judgment vacated.

Dissent: [Souter, J] An assumption that the canine sniff was infallible and only revealed contraband was not justified. *Cf US v Place*, 462 US 696 (1983). Dog alerts were not *sui generis* and risked violating protected 4th Amendment interests.

Dissent: [Ginsburg, J] Expansion of routine traffic stop into drug investigation through use of canine alert violated the Fourth Amendment and was not reasonably related to the scope of the circumstances. *Terry v Ohio*, 392 US 1 (1968).

New York State Court of Appeals

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

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

People v Prado, No. 180, 12/16/2004

Holding: Defense counsel's failure to make a specific objection concerning the lack of evidence corroborating the defendant's confession under CPL 60.50 did not constitute ineffective assistance of counsel. Defense counsel moved at the end of the prosecution's case to dismiss the counts charged, which was denied. Although a general objection alone would not have been enough to preserve the confession corroboration issue (*see People v Gray*, 86 NY2d 10), it was adequate when combined with the trial judge's specific findings as to corroboration. Therefore, the ineffectiveness issue was preserved. CPL 470.05. The judicial bias claim was not preserved for appellate review. Order affirmed.

Dissent in Part: [Smith, RS, J] The confession corroboration issue, nested in the ineffectiveness of counsel claim, should have been decided, since it was preserved for review and briefed, albeit under a different heading.

Dissent: [Smith, GB, J] Defense counsel was ineffective for not raising the lack of corroboration. *See* CPL 60.50. At trial, the child denied being abused, and there was no physical evidence to support it. The trial judge assumed a prosecutorial role by discrediting the child's testimony and ordering the prosecutor to impeach the witness with her grand jury testimony. Evidence that the defendant and the child had been home alone one night and the child's "prompt outcry" to the mother three years later were insufficient evidence of corroboration. *See People v McDaniel*, 81 NY2d 10. The defendant was denied a fair trial.

Defenses (Justification) (Self-defense) **DEF; 105(37) (45)**

People v Jones, 3 NY3d 491 (2004)

The defendant and his live-in girlfriend shared the same home. During a heated argument, she picked up a steak knife; he choked her to death. At trial, the prosecution argued that the defendant could have left the apart-

NY Court of Appeals *continued*

ment before strangling his girlfriend. The court gave a self-defense instruction but refused to instruct the jury that the defendant had no duty to retreat in his own home before using deadly force. The defendant's first-degree manslaughter conviction was affirmed.

Holding: A self-defense instruction with explanation of the duty to retreat was required when the defendant and the decedent occupied the same home. *See* Penal Law 35.15 (2)(a)(i); *People v Tomlins*, 213 NY 240. The failure to give the retreat instruction was compounded by the prosecutor raising on cross-examination and in closing argument the failure to retreat. However, the error was harmless. *See People v Crimmins*, 36 NY2d 230, 242. The evidence showed that the girlfriend had dropped the knife before the defendant started choking her; the defendant's belief that she was about to use deadly force was unreasonable. *See People v Watts*, 57 NY2d 299. Order affirmed.

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

Transcripts (General) (Right to) **TSC; 373.5(20) (40)**

People v Parris, Nos. 178; 179 12/21/2004

Defendant Parris was convicted after a jury trial in May 1998. During the course of the appeal, a record was filed with the Appellate Division on May 8, 2001, including an affidavit from the court reporter that her notes for Apr. 30 and May 4, 1998 were lost. A trial court worksheet showed that on Apr. 30th the court heard speedy trial and *Sandoval* motions. On May 4th, jury selection was completed. Parris filed his brief on Nov. 12, 2002.

Defendant Hofler pled guilty on Sept. 26, 1996. The court reporter's affidavit dated Aug. 1, 2002 indicated that the notes for Sept. 26th were gone. Hofler and Parris asked for reversals or reconstruction hearings. Both convictions were affirmed on appeal.

Holding: Loss of reporters' minutes alone did not justify reversals. *See People v Glass*, 43 NY2d 283. The defendants did not overcome the presumption of regularity by showing prejudice, *ie*, inability to identify appealable or reviewable issues from other sources. *People v Rivera*, 39 NY2d 519, 523. A reconstruction hearing is appropriate when: (1) after trial, a defendant acted with reasonable diligence to mitigate the harm, or (2) after a guilty plea, a defendant identified grounds for appeal based on what occurred during the untranscribed proceeding. Defendant Parris, convicted after trial, did not act with diligence, taking no action during the 18 months from when he discovered the missing minutes to filing his appeal. Defendant Hofler, who pled guilty, failed to allege any grounds for appeal that could have been raised had the minutes still existed. Neither defendant was entitled to a reconstruction hearing. Orders affirmed.

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

Transcripts (General) (Right to) **TSC; 373.5(20) (40)**

People v Marquez, No. 168 SSM 29, 12/21/2004

Holding: The Appellate Division must determine whether the defendant acted with due diligence after discovering that a portion of the minutes of his trial had been lost. *See People v Parris*, No. 178, 12/21/2004. If he did, then he was entitled to a reconstruction hearing; if not, then the conviction should be affirmed. Order reversed, case remitted to Appellate Division.

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

People v Nazario, No. 23, 2/10/2005

At the defendant's trial for selling drugs, the court granted the prosecution's request to close the courtroom to protect the safety of undercover police officers. The defendant's request to allow his drug counselor to attend was denied because he was not a family member. The conviction was affirmed.

Holding: The trial court denied the defendant his right to a public trial by rejecting admission of his drug counselor to the courtroom without inquiry. When a defendant showed a special relationship with a proposed spectator, who could provide moral and emotional support similar to a family member, that person should have been admitted to a closed courtroom unless the prosecution showed a specific reason for exclusion. *See People v Hinton*, 31 NY2d 71. Restrictions on the public's right to access courtroom proceedings should not be overbroad. *See Waller v Georgia*, 467 US 39, 48 (1984). A defendant's family members are usually exempt from this restriction unless the prosecution produces specific reasons for their exclusion. *See People v Nieves*, 90 NY2d 426, 430. This would include the equivalent of a family member, such as a girlfriend or boyfriend. *See People v Garcia*, 95 NY2d 946, 947. After the prosecution established a safety concern warranting closure, the burden shifted to the defendant to establish that the proposed spectator was connected by more than ordinary friendship. In this case, the non-family member was the defendant's drug counselor, *prima facie* evidence of a significant personal relationship similar to a psychiatrist or member of the clergy. It could be inferred that the drug counselor would have given the sort of moral and emotional support in the courtroom provided by family members. Further inquiry to determine the quality of the relationship would be proper. Order reversed.

First Department

Trial (Verdicts [Repugnant Verdicts]) TRI;375(70[c])

People v Maldonado, 11 AD3d 114, 781 NYS2d 636 (1st Dept 2004)

The complainant, an ice cream vender, had seen the defendant and codefendant talking and "surveilling" his truck on two prior occasions. When the codefendant asked about ice cream, the complainant heard the back door of his truck open, saw the defendant with a knife, and on the defendant's demand, handed money to the defendant, who left. The complainant saw the two defendants together in a nearby park and notified police. A jury acquitted both of first-degree robbery, found the defendant guilty of second-degree robbery, and the codefendant guilty of only third-degree robbery. After the verdict was returned, before the jury was discharged, the defendant's lawyer had asked to approach the bench, where the codefendant's lawyer moved, joined by the defendant's lawyer, to set aside the verdict as repugnant. The court reserved decision and without directing the jury to resume deliberations and reconsider its verdict discharged the jury without objection.

Holding: The verdict was repugnant, because the prosecution's theory was that the two defendants aided one another while actually present. *See People v Hampton*, 61 NY2d 963. The case cited by the prosecution, *People v Green* (71 NY2d 1006), can be distinguished. The issue of repugnancy was preserved by the request to set aside the verdict, but was waived by failure to object to discharging the jury without meeting the requirements of CPL 310.50(2). Resubmitting the matter to the jury would have provided an opportunity to remedy the defective verdict. *See People v Satloff*, 56 NY2d 745. The failure to request resubmission may have been a strategic choice to avoid exposing the codefendant to conviction of a more serious crime, as in *People v Alfaro* (66 NY2d 985, 987). Judgment affirmed. (Supreme Ct, Bronx Co [Barone, J])

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

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

People v Coleman, 10 AD3d 487, 781 NYS2d 510 (1st Dept 2004)

Holding: The defendant moved *pro se* to vacate his conviction pursuant to CPL 440.10 for ineffective assistance of counsel where his lawyer had failed to call more than one alibi witness. The motion was fully supported by affidavits of the other witnesses, containing the substance of their proposed testimony, and by an affidavit swearing that counsel had been told about them and their willingness to testify. Cases offered by the prosecution, such as *People v Ford* (46 NY2d 1021) are distinguishable. The affirmation of trial counsel denying that he knew of the witnesses was not "'unquestionable documentary proof'" conclusively refuting the defendant's proffered affidavits. *See* CPL 440.30(4)(c). It only created a question of fact to be addressed at a hearing. The failure of the one alibi witness called at trial to testify that other family members were present did not constitute a conclusive refutation of the affidavits. The issue here is not whether the motion to vacate should have been granted but whether a hearing should have been conducted. It was error to summarily deny the motion. *See People v Park*, 211 AD2d 828 *lv den* 86 NY2d 739. Issues of fact exist as to counsel's knowledge of the witnesses and whether failing to present those witnesses constituted ineffective assistance. Order reversed, matter remanded for a hearing and decision *de novo*. (Supreme Ct, Bronx Co [Byrne, J])

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

People v Claudio, 10 AD3d 531, 782 NYS2d 28 (1st Dept 2004)

Holding: The defendant made a *prima facie* showing of discrimination when raising a claim under *Batson v Kentucky* (476 US 79 [1986]). Counsel alerted the court to a potential problem when the prosecution's peremptory challenges included two Hispanic prospective jurors, who were not dismissed at that point. Later, the defense raised a specific *Batson* challenge when the prosecutor challenged the only other Hispanic prospective juror. The court did not explicitly rule on whether the defense had met its initial burden, but shifted the burden to the prosecutor by asking for comment. The prosecutor explained that she had challenged the two female Hispanic jurors because they were secretaries and she had not gotten "a strong feeling" about either, and that the male Hispanic juror wasn't very verbal and she hadn't gotten a strong feeling about his roots in the community or about him. *Batson* does not require at the second step a persuasive or even plausible explanation but merely one that is race neutral. The court then failed to make the requisite determination as to discriminatory intent. After saying that peremptories are "exercised 'primarily on instinct'" and that the court didn't believe "'there is any intended pattern made out by the prosecutor," the court seated one challenged juror but not the other two, as "a fair exercise of attempting to avoid any kind of racially motivated peremptory challenge . . ." The court made no factual findings as to the defense arguments that the prosecutor failed to challenge a non-Hispanic secretary and that the jurors' significant period of residence and employment contradicted the prosecutor's explanation about community ties. Remand for further findings being impossible in this case, a new trial is required. Judgment reversed. (Supreme Ct, New York Co [Snyder, J])

First Department *continued*

Juveniles (Youthful Offender) JUV; 230(150)

People v Garcia, 10 AD3d 535, 782 NYS2d 32 (1st Dept 2004)

Holding: Investigating officers did not access the defendant's confidential youthful offender file, but matched a fingerprint from the crime scene with the defendant's fingerprints in a central registry where they had been placed as a result of an arrest resulting in youthful offender treatment. Even assuming without deciding that using the fingerprints without a court order violated the youthful offender statute (*but see People v Morris*, 220 AD2d 808 *lv den* 87 NY2d 976), suppression is not required. Violations of CPL 720.35 confidentiality requirements, like violations of the sealing provisions (CPL 160.50), do not "implicate constitutional considerations.'" *See People v Patterson*, 78 NY2d 711, 716. Judgment affirmed. (Supreme Ct, New York Co [Bradley, J])

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

People v Cochran, 10 AD3d 563, 782 NYS2d 74 (1st 2004)

The defendant pled guilty to first- and second-degree robbery. He was sentenced as a second felony offender to concurrent terms of eight years and five years.

Holding: The defendant was improperly adjudicated a second felony offender on the basis of a1992 Maryland robbery conviction. The Maryland statute does not require that the intent to steal exist at the time force is used. *Compare People v Smith*, 79 NY2d 309, 312 *with Stebbing v State*, 299 Md 331, 351, 473 A2d 903, 914 (1984) *cert den* 469 US 900. Conduct that would not be felonious in New York could result in conviction in Maryland, so the Maryland conviction cannot be a predicate felony. *See Somerville v Conway*, 281 FSupp2d 515, 520 (2003). The court clearly intended to impose minimum permissible terms. Sentences reduced to five years and three and one half years. Judgment modified. (Supreme Ct, Bronx Co [Webber, J])

Narcotics (General) (Sale) NAR; 265(27) (59)

People v Robbins, 10 AD3d 570, 782 NYS2d 80 (1st Dept 2004)

The defendant was convicted of selling drugs within 1000 feet of a school in violation of Penal Law 220.00(14)(b).

Holding: The officer took measurements and provided enough information to reliably calculate, by means of the Pythagorean theorem, the distance between the charged drug sale and a school as 907.63 feet. It was proper to use a straight-line determination rather than the distance a pedestrian would have to travel, including around obstructions. A straight-line measurement furthers the statutory purpose of providing a corridor of safety for school children. *See* Mem of State Exec Dept, 1986 McKinney's Session Law of NY, at 2892-2893; *People v Gaines*, 167 Misc2d 923, 925. This interpretation is consistent with federal statutes. *See eg US v Henderson*, 320 F3d 92, 102 (1st Cir 2003) *cert den* 539 US 936. Other issues raised are without merit. Judgment affirmed. (Supreme Ct, New York Co [Stone, J])

Appeals and Writs (Briefs) (Counsel) APP; 25(15) (30)

Counsel (Anders Brief) COU; 95(7)

People v Canals, 11 AD3d 215 782 NYS2d 255 (1st Dept 2004)

Holding: Assigned appellate counsel's letter to the defendant, with a copy of the filed brief, did not meet the requirements of *People v Saunders* (52 AD2d 833). It is not sufficiently established that the defendant has been made aware of any potential issues concerning the *Wade* hearing, that he has made an informed decision not to raise any such issues, and that he may raise such issues in a *pro se* brief if he wishes to do so. Motion to be relieved denied without prejudice, counsel to communicate with the defendant as directed. (Supreme Ct, New York Co [Snyder, J])

Identification (Lineups) (Show-ups) IDE; 190(30) (40)

People v Wilson, 11 AD3d 204, 782 NYS2d 267 (1st Dept 2005)

Holding: "The suppression court should have granted defendant's motion to suppress his lineup identification on the ground that it had been rendered unduly suggestive by the single-photo showup that had immediately preceded it. The time interval between the display of the photo and the lineup was so brief that there is no basis for finding any attenuation." The proper finding of an independent source for the complainant's in-court identification of the defendant rendered the in-court identification admissible, but the lineup should still have been suppressed. *See People v Adams*, 53 NY2d 241, 250-252. The error was harmless, as the in-court identification was highly reliable and there was other compelling evidence placing the defendant at the scene and showing that he left in a getaway car. Therefore, there was no prejudice from the further error of summarily denying the branch of the defendant's CPL 440.10 motion alleging that trial counsel erred by not calling prior counsel in support of the claim that the lineup had been held in violation of the right to counsel. Judgment affirmed. (Supreme Ct, New York Co [Tejada, J])

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

First Department *continued*

People v Johnson, 11 AD3d 224, 783 NYS2d 5 (1st Dept 2004)

Holding: Despite repeated appellate court disapproval of "two-inference" jury instructions (*see eg People v Cruz*, 172 AD2d 383) the court here told the jury that where two factual inferences of equal weight and strength could be drawn from the evidence, one consistent with guilt and one with innocence, a defendant is entitled to the factual inference of innocence. Such instructions have been said to be "'potentially confusing to the jury,'" allowing the jury to find guilt where an inference of guilt is stronger but not beyond a reasonable doubt. The court here went on to tell the jury that there are two different burdens of proof operating simultaneously, one finding a factual inference more likely than not ("50.1 beating 49.9") and the other being the prosecution's duty to prove guilt beyond a reasonable doubt. Instead of reducing the risk that the jury might negatively infer that where the two possible inferences are not balanced, that is enough to convict, the court's further instructions increased the risk. Additionally, in its final instructions the court attempted to contrast close majority elections and unanimous verdicts using the same numerical expression ("50.1 vote to 49.9") used in the preponderance standard earlier, thus reinforcing the improper instruction. Trial judges "'should think long and hard about the wisdom of departing from the standard charge in such elementary matters as reasonable doubt [and] burden of proof' (*People v Nunez*, 182 AD2d 527 . . . [Sullivan, J., concurring]" *lv den* 80 NY2d 836 [1992]). Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [McLaughlin, J])

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

Auxiliary Services (Interpreters) **AUX; 54(30)**

People v Marrero, 11 AD3d 298, 783 NYS2d 346 (1st Dept 2004)

Holding: Appellate counsel sought to be relieved, after writing to the defendant, pursuant to *People v Saunders* (52 AD2d 833). "Although counsel's letter to defendant properly explained the substance and expected consequences of counsel's *Saunders* brief and advised him of his right to file a pro se supplemental brief, it was inadequate because it was written in English while the record reflects that defendant was aided by a Spanish interpreter at the plea and sentencing proceedings, and there is nothing to indicate that defendant understood the letter or that anything was done to communicate its substance to him in Spanish (*see United States v Leyba*, 379 F3d 53 [2d Cir 2004])." Appeal held in abeyance, motion denied without prejudice, counsel to communicate to the defendant in Spanish the information already provided in English. (Supreme Ct, New York Co [Richter, J])

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

People v Augustin, 11 AD3d 290 782 NYS2d 718 (1st Dept 2004)

Holding: As the prosecution concedes, the second-degree forged instrument conviction was not supported by legally sufficient evidence. While the document in question bore the defendant's assumed name, "it was a genuine driver's license that did not qualify as a forgery within the meaning of Penal Law § 170.00 (*see People v Asaro*, 94 NY2d 792 . . . [1999])." Judgment modified, forged instrument conviction vacated and that count dismissed. (Supreme Ct, New York Co [Cataldo, J])

Sentencing (General) (Mandatory Surcharge) **SEN; 345(37) (48)**

People v Febres, 11 AD3d 319, 783 NYS2d 545 (1st Dept 2004)

Holding: As the prosecution concedes, the defendant committed the instant crime before the effective date of Penal Law 70.45, providing for post-release supervision, and before the effective dates of amendments to Penal Law 60.35, providing for sex offender registration and DNA databank fees and increasing mandatory surcharge and crime victim assistance fees. Judgment modified by vacating or reducing fees accordingly, and otherwise affirmed. (Supreme Ct, Bronx Co [Barrett, J])

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

People v Collins, 12 AD3d 33; 784 NYS2d 489 (1st Dept 2004)

Holding: A "catalogue of prosecutorial improprieties" was committed during jury summation. The defendant failed to object to a majority of the comments, to seek further curative instructions after some objections were sustained, and to move for a mistrial on the ground that some objections were overruled, leaving those claims unpreserved. However, the summation contained a substantial number of improper remarks, the cumulative effect of which was to deprive the defendant of a fair trial. *See People v Calabria*, 94 NY2d 519. Defendants are entitled to a full measure of fairness; the prosecutor's mission "'is not so much to convict as it is to achieve a just result.'" Here the prosecutor repeatedly referred to the defendant as a liar, using words such as "'unbelievable,' 'ridiculous,' 'absurd' and 'fantastical'" to describe his testimony. She said that "'we know that he is a liar. . . . He's lied before'" and that "'to credit the defendant would be wrong to do.'" She vouched for the credibility of the prosecution's witnesses, saying of the undercover officer, "'Remember how forthright he was . . .'" and concluding at one point, "'he's telling you the truth.'" It was error to imply that to acquit the defendant the jury must find the prosecution witnesses lied (*see People v Levy*, 202 AD2d 242, 245), to imply that

First Department *continued*

the defendant was obliged to present more evidence than his own testimony, and to denigrate as "technical" the defense theory of agency. The prosecutor ignored court warnings about not implying that the defendant had a duty to talk in a pretrial interview and not using a prior drug sale, admitted to show intent, to argue propensity to commit the charged crime. The errors were neither harmless nor cured. Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Soloff, J on motion, Cataldo, J at trial and sentence])

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

Re Johanna C., 11 AD3d 348, 783 NYS2d 32 (1st Dept 2004)

Holding: The three orders adjudicating the appellant a juvenile delinquent involved three different incidents on different dates. Each of the petitions alleged third-degree assault and menacing. At disposition, the appellant made no admissions as to the first petition. As to the second, the appellant admitted only third-degree menacing. As to the third, she admitted only third-degree assault. "As the presentment agency concedes, there was no factual basis for the first order." Nor was there a factual basis for the finding of assault in the second order and menacing in the third. One order reversed and petition dismissed, other orders modified. (Family Ct, Bronx Co [Cordova, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause (Informants)]) **SEA; 335(10[g(iii)])**

Matter of Jahad R., 12 AD3d 154; 783 NYS2d 578 (1st Dept 2004)

The respondent-appellant was adjudicated a juvenile delinquent for possessing a weapon.

Holding: The anonymous, radio-transmitted tip that four or five black males were trying to shoot a gun into a vacant lot, uncorroborated by any police observation before the respondent-appellant was detained, did not provide reasonable suspicion justifying the detention. See Florida v J.L., 529 US 266 (2000); cf People v Appice, 1 AD3d 244 lv den 1 NY3d 594. The respondent-appellant's inculpatory statements made on the way to the station and while being questioned at the station were a direct result of the initial unlawful detention and should have been suppressed. See Dunaway v New York, 442 US 200 (1979). This conclusion is not changed by the fact that after the respondent-appellant's detention, a second radio transmission was received saying that a gun had been thrown into the vacant lot, followed by the finding of a gun. Order of disposition reversed, petition dismissed. (Family Ct, Bronx Co [Cordova, J]) ⚖

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