NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

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# Defender News

## *Federal* Habeas *Under Attack*

As this issue of the *REPORT* was nearing completion, Congress was considering legislation to drastically curtail the availability of *habeas corpus* relief, which has already been greatly eroded in the past decade. An editorial captured the irony in the proposal's timing: "Congress has a novel response to the rash of prisoners over the past few years who have been exonerated of capital crimes after being tried and convicted: Keep similar cases out of court." (*Washington Post* online, 7/10/05.)

A day later, the irony intensified, when a St. Louis paper published an article entitled, "Was the wrong man executed?" The story noted the results of a yearlong investigation financed by the NAACP Legal Defense and Educational Fund and said that new information had convinced the St. Louis prosecutor to reopen the investigation of the murder of Quintin Moss. (*Post Dispatch* online, 7/11/05.)

Larry Griffin was executed for Moss's killing in 1995, a year before Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) establishing draconian deadlines and other limits on state prisoners seeking federal review. Since then, federal courts have turned away hundreds if not thousands of prisoners, including many on death rows across the country. The proposed legislation, entitled the "Streamlined Procedures Act of 2005," would go even further.

Among those testifying against the measure was Eric M. Freedman of the ABA Death Penalty Representation Project Steering Committee. One of the provisions he criticized would shift responsibility for reviewing habeas petitions from the courts to the Attorney General. Such a policy, Freedman said, would "allow states with inadequate systems for the provision of counsel to erect more barriers to reviewing the results of trials that are simply unreliable in ascertaining the truth." Freedman told the Senate Committee on the Judiciary that what Congress should do instead is provide more resources to states to implement the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. (ABA News Release online at http://www.abanet.org/media/releases/news071305.html, 7/13/05.)

## *End-of-Term Decisions: Public Defense, Defense Counsel, and Much More*

At the close of its term, the United States Supreme Court issued a number of cases of interest to defense lawyers, clients, and all those interested in justice. Among the decisions were:

- *Halbert v Michigan*, No. 03-10198, 6/23/05—held unconstitutional Michigan's statutory bar to appointment of counsel for persons unable to hire counsel for first-tier review of convictions based on guilty pleas;

- *Rompilla v Beard*, 125 SCt 2456—overturned the death sentence of a man whose trial attorneys relied only on information from family members in preparing for the penalty phase, failing to review court and school records that contained information revealing the defendant's past mental illness, alcoholism, and childhood trauma. In determining what was expected of counsel, the opinion cites, among other things, the American Bar Association Standards for Criminal Justice;

- *Wilkinson v Austin*, 125 SCt 2384—held that prisoners have a liberty interest in avoiding incarceration in "supermax" facilities, but found that revised policies presented in the specific case provided due process, precluding relief.

Summaries of these and other Supreme Court opinions, including cases dealing with *Batson* issues of race discrimination in jury selection, medical use of marijuana, inconsistent prosecutorial theories, and federal *habeas* issues, begin at p. 8.

### Contents

## Cameras Out, PFO Still In—Court of Appeals News

The New York Court of Appeals has also issued several important decisions recently. Among those is an opinion upholding the statutory ban on cameras in courtrooms, *Courtroom Television Network v State of New York*, No. 88, 6/16/05. The *amicus* brief filed by the Association in the case, written by Backup Center Stephanie J. Batcheller, is available in the Publications area (under NYSDA in the Courts) of the NYSDA web site.

The court also refused to overrule *People v Rosen*, 96 NY2d 329, interpreting the persistent felony offender statute (Penal Law 70.10) to meet a challenge under developing US Supreme Court case law. The court said that a persistent felony offender sentence requires only a finding of two prior felony convictions. The part of the statute that requires findings about the "nature and circumstances of the crime" and the "history and character of the defendant" is not legally necessary. It merely operates as a device to ensure the judge's rationale is recorded so that interest of justice review can take place in the Appellate Division. In other words, the court eliminated the requirement that a sentencing court make specific fact findings before imposing the life sentence. *People v Rivera*, No. 86, 6/9/05. (Just days before *Rivera,* the 2nd Circuit upheld New York's persistent felony offender statute as applied by the Court of Appeals. *Brown v Greiner*, 409 F3d 523 [2nd Cir 2005]; *NYLJ* online, 6/7/05. [Keep up with other developments in this line of cases by checking the *Apprendi-Blakely* Hot Topics page of the NYSDA web site.])

*Court TV, Rivera,* and many other Court of Appeals decisions are summarized beginning at p. 13.

The Supreme Court and Court of Appeals summaries, plus summaries of selected Appellate Division decisions beginning on p. 18, will be added to NYSDA's Case Digest System, available on CD-ROM by subscription. The summaries are also available on the Association's web site.

## Federal Courts Scrutinize NY IAC Standard

Senior United States District Judge Jack B. Weinstein recently took up a discussion about New York's ineffective assistance of counsel standard begun by the 2nd Circuit as noted in the last *REPORT.* Following an evidentiary hearing on remand from the 2nd Circuit, Weinstein re-affirmed his denial of *habeas* relief to petitioner Patrick Barclay, saying among other things: "The court is satisfied that petitioner's state counsel exercised reasonable calculated discretion in not calling a physician to support the claim that the petitioner was incapable of committing the crime because he was 'disabled.'" *Barclay v Spitzer*, 02-CV-2184 (JBW), 03 Misc 0066 (EDNY 6/9/06).

The court opined in the beginning of the *Barclay* decision that the New York test for ineffective assistance of counsel seemed "more useful" than the more "mechanical-like" federal test:

> This litigation reveals the need for great care before a competent attorney's representation in a state criminal prosecution is characterized as inadequate by federal courts in a habeas proceeding. In a case like the instant one the gestalt-like test for counsel competency of the New York Court of Appeals seems more useful in solving the problem of whether the defense was acceptable under notions of due process than does the federal mechanical-like rule applied by the Court of Appeals for the Second Circuit. *See Henry v. Poole,* 2005 U.S. App. LEXIS 9447, No. 03-2884, 2005 WL 1220468, at *18-*21 (2d Cir. May 24, 2005) (discussing why it is bound by its own precedent not to accept the New York rule and apply appropriate deference standards to New York court decisions).

The court added later in the opinion that "Skepticism is particularly called for when an excellent attorney doing a highly credible job for the defense suddenly pleads ineptitude."

This comment focuses on the question left open by the 2nd Circuit in *Poole,* that is whether courts may permissibly consider, when determining whether a defendant was prejudiced by a lawyer's error, the competency of the lawyer's performance in areas of the case. A certificate of appealability was granted in *Barclay* "in view of the interest of the Court of Appeals in this case."

The Court of Appeals briefly touched on the issue a few days after *Barclay*. The court said that New York's

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standard of meaningful representation does not require a defendant to fully satisfy *Strickland's* prejudice test, but focuses on the "'fairness of the process as a whole rather than its particular impact on the outcome of the case'" [citation omitted]. Concluding that the state standard "thus offers greater protection than the federal test," the court "necessarily" rejected the defendant's federal constitutional challenge by concluding that "he was not denied meaningful representation under the State Constitution." *People v Caban*, No. 98, 6/14/05. (See summary p. 15.)

## NYSDA's IDP Moves

The Association's Immigrant Defense Project (IDP) has a new home, subletting from the Center for Community Alternatives office in Brooklyn. The IDP will continue to take calls from defense attorneys and immigrants with questions about criminal law/immigration issues on Tuesdays and Thursdays, 1:30 to 4:30 p.m. (and return messages left outside those hours as time permits). The new hotline number is (718) 858-9658 ext. 201. The address is: 25 Chapel Street, Suite 703, Brooklyn, NY 11201.

The IDP web page has not moved, but is now accessible through an easy to remember URL: www.immigrantdefenseproject.org. Visitors will be immediately redirected to the IDP page on the NYSDA website. The page is still directly accessible from the NYSDA home page under the Resource Highlights section.

## Lack of Immigration Papers = Trespass?

Noncitizens discovered during routine traffic stops to lack immigration papers are being charged with trespassing. The chief of police in New Ipswich, NH, began the practice because he was frustrated that Immigration and Customs Enforcement (ICE) officials were not responding to requests to pick up undocumented persons. According to a press account in May, police around the country were thinking of following New Ipswich's example. A spokesperson for ICE noted that a local police chief was not authorized to determine whether someone is in the country illegally. (Boston *Globe* online, 5/22/05; *Concord Monitor* online, 6/18/05.)

In July, the *New York Times* reported that 10 noncitizens had been charged with criminal trespass in Hudson, NH in recent weeks. Lawyers for Jorge Mora Ramirez, the first to be charged, have asked that the case be dismissed. The judge postponed decision until other cases could also be heard. (*NY Times* online, 7/13/05.)

## Good Investigation Gets Good Results

Surely all defense lawyers recognize that stellar investigation can impact every aspect of a case. A good investigator may uncover police and prosecutorial error, find a witness that saw someone other than the client run toward the victim with a weapon, locate an expert who goes head-to-head with the prosecution's expert and wins, or discover mitigation evidence that lessens a client's exposure or sentence. Such investigative work should not be reserved for celebrity trials or clients of means, but should be available to every individual charged with a crime (or subjected to other state efforts to deprive individuals of liberty interests such as child custody).

As reported in a recent issue of the National Defender Investigator Association's newsletter (The *Eagle's Eye*, Feb 2005), clients in Cattaraugus County benefited just last year from all the investigative feats described above.

Assigned counsel attorneys and offices that lack investigative staff can contact the Backup Center for contact information for investigators who may be available to assist in a particular case. Relevant resources on the NYSDA web site include the "NYC Assigned Counsel Expert Witness Directory" and other expert locators. Feedback and new information is vital to our continuing ability to make helpful referrals. Attorneys who have had good experiences with a particular investigator are asked to fax or e-mail contact information and a short recommendation regarding that investigator (or other expert) to the Backup Center. (Problems with experts currently listed should be reported as well.)

## Counselless Summary Default Sentence Overturned

A 180-day jail sentence imposed *in absentia* by Fulton County Family Court Judge David F. Jung upon a woman jailed in an adjoining county was recently overturned in a Supreme Court *habeas* proceeding. (Schenectady *Daily Gazette*, 6/28/05.) Due to a Fulton County Family Court policy that incarcerated individuals must make a written request to be present, Angelic Constantino had not been produced for proceedings there in early April. No attorney was present on her behalf, and allegations in a petition filed by the Department of Social Services claiming that Constantino had violated an order of protection were accepted by default; no evidence was adduced. (Determinations were also made with regard to the custody of Constantino's children; as those could not be included in a request for *habeas* relief, they remain in effect).

James T. Murphy of Legal Services of Central New York (LSCNY) filed the *habeas* petition and produced several witnesses in Supreme Court on Constantino's behalf. Murphy received cooperation from, among others, public defenders who represented Constantino in Schenectady County and Saratoga County cases at the time of the default. In particular, Van Zwisohn of the Saratoga

*(continued on page 35)*

# Conferences & Seminars

**Sponsor:** National Association of Sentencing Advocates
**Theme:** 13th Annual Conference and Death Penalty Mitigation Institute
**Dates:** July 31–August 3-6, 2005
**Place:** Chicago, IL
**Contact:** NASA: tel (202)628-0871; fax (202)628-1091; web site http://sentencingproject.org/nasa/conference_annual.cfm

**Visit the Training page at www.nysda.org often!**
**Information about CLE events may reach the *REPORT* too late for publication; regional training events may not be listed here.**

**Sponsor:** National Association of Criminal Defense Lawyers
**Theme:** Making the Case For Life VIII
**Dates:** Sept. 30–Oct. 2, 2005
**Place:** Oklahoma City, OK
**Contact:** ACDL: tel (202)872-8600; fax (202) 872-8690; e-mail assist@nacdl.org; web site www.nacdl.org

**Sponsor:** National Association of Criminal Defense Lawyers
**Theme:** 9th Annual DUI Seminar
**Dates:** Sept. 28–Oct. 1, 2005
**Place:** Las Vegas, NV
**Contact:** NACDL: tel (202)872-8600; fax (202) 872-8690; e-mail assist@nacdl.org; web site www.nacdl.org

**Sponsor:** New York State Association of Criminal Defense Lawyers
**Theme:** Sex Abuse and Domestic Violence
**Date:** October 15, 2005
**Place:** Rochester, NY
**Contact:** Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

**Sponsor:** New York State Association of Criminal Defense Lawyers
**Theme:** Cross to Kill
**Dates:** October 21, 2005
**Place:** Nyack, NY
**Contact:** Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

**Sponsor:** New York State Association of Criminal Defense Lawyers
**Theme:** Weapons for the Firefight
**Date:** October 28, 2005
**Place:** Brooklyn, NY
**Contact:** Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

**Sponsor:** New York State Association of Criminal Defense Lawyers
**Theme:** Annual Mid-Hudson Trainer
**Date:** November 18, 2005
**Place:** Poughkeepsie, NY
**Contact:** Patricia Marcus, (212)532-4434; e-mail nysacdl@aol.com

**Sponsor:** National Legal Aid and Defender Association
**Theme:** Annual Conference
**Dates:** November 16–19, 2005
**Place:** Orlando, FL
**Contact:** NLADA: tel (202)452.0620; fax (202).872.1031; e-mail info@nlada.org; web site www.nlada.org

**Sponsor:** **New York State Defenders Association**
**Theme:** **39th Annual Meeting and Conference**
**Dates:** **July (date tba), 2006**
**Place:** **Corning, NY**
**Contact:** **NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; web site www.nysda.org** ⚖

## *Job Opportunity*

Prisoners' Legal Services of New York (PLS) seeks an **Executive Director**. PLS is a civil legal services program for inmates in New York State prisons. State funded, it has regional offices in Albany, Buffalo, Ithaca and Plattsburgh. The Executive Director may locate at any one. 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. The Executive Director is responsible for the management of the program and for insuring that it provides high quality, effective and efficient legal services to clients. Applicants should have extensive legal practice experience preferably in legal services, civil rights, poverty law or federal law. They should also have significant leadership/management experience. Excellent communication skills, strong analytical ability, and a history of working well with others are essential. Frequent travel is required. Major Responsibilities: Provide overall leadership to the organization. Work with Board, managers and staff to develop and implement strategic plan. Be the spokesperson for PLS and develop strategic partnerships to advance the vision and mission of the organization. Work with managers and staff in setting and reviewing annual priorities, office and organizational work plans and budget. Secure funding, through state contracts, foundation grants, major donations, and other sources in order to effectively grow the organization within its vision and mission. Ensure sound financial and fiscal management. Assure that high quality, diverse staff are recruited, hired and maintained. Work with the Board to ensure effective oversight, Board development and organizational growth. Work with inmate populations to assess needs of clients and develop service plans. PLS pays a competitive public interest salary commensurate with experience and provides excellent fringe benefits. EOE. Applicants should email their cover letter, resume, writing sample and a list of three (3) references with telephone numbers to: Paul J. Curran, Esquire, Kaye Scholer, 425 Park Avenue, New York, NY 10022. E-mail: pcurran@kayescholer.com. ⚖

# From My Vantage Point

**by Jonathan E. Gradess***

## Islands of Hope

Yes, there is still much repression. Courts are fearful. Executive authority has been released from constitutional moorings. The Legislature panders. It is a bad time to be labeled a sex offender, or an anarchist or a drunken driver, and a bad time to represent one also. All true. I know it and you know it.

Yet as we approach our annual membership meeting and conference, I cannot help but think about the good things that have happened this year. And in these I see islands of hope.

### The Death Penalty Remains Blocked

Twelve months ago the Court of Appeals imposed a court-ordered moratorium on the death penalty in New York. At our last summer meeting we honored the men and women of the Capital Defender Office (CDO) for that victory. But now, a year later, more islands of hope have emerged, building on what was feared to be but a temporary victory. Thousands of citizens across our state have called for an end to the death penalty. The New York State Assembly held unprecedented hearings between December and February with 170 witnesses, almost all of whom spoke against capital punishment. Consensus grew that the system was broken beyond repair. A permanent statewide infrastructure for New Yorkers Against the Death Penalty has been created and relationships among a broad spectrum of death penalty opponents have solidified. Two legislative committee chairs, long time advocates of the death penalty, publicly switched their votes. Many other members—including Republicans—also switched, less publicly, and the Assembly Codes Committee held the Governor's "quick fix" bill in Committee. Though the CDO has become a casualty of its own success—struck a budget deathblow by the Governor—New York has pursued a course long hoped for. On April 12th we became the first state since *Furman v. Georgia* (1972) to have reinstated capital punishment (1995) and then abolished it (2005). Much continues to be done to hold the line and preserve this victory, but surely this has been a great year for death penalty abolitionists and for those wishing for a fairer system of criminal justice.

### New Statewide Standards Offer Guidance; Commission Support Grows

The year also saw the passage of defender standards and broadening support for the Independent Public Defense Commission. Last summer the Chief Defenders approved and the NYSDA Board adopted *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State*. The Chiefs also voted in favor of the Commission, which the Board had already done.

The Association's Client Advisory Board, which has been drafting and refining Client-Centered Representation Standards for some time, presented those standards publicly on Gideon Day this March.

And in April, the House of Delegates of the New York State Bar Association passed *Standards for Providing Mandated Representation*. Together, all these standards are already helping to show the way toward better practice.

The new standards can be used to encourage quality representation, but New York needs an entity to *enforce* statewide standards, and recent progress in that direction is encouraging. In four public hearings held around the state since February, the New York State Commission on the Future of Indigent Defense Services [Kaye Commission] has heard witness after witness call for state oversight and standards and increased state funding. It is clear that a broad consensus exists for standards-driven, state funded, structured oversight of the public defense function, and equally clear that many New Yorkers enthusiastically endorse NYSDA's call for an Independent Public Defense Commission.

Significantly, a host of witnesses and some organizations are calling for even greater State involvement, with suggestions for complete State takeover of the defense function (New York State Association of Counties), the creation of a Defender General or State Defender (New York State Association of Criminal Defense Lawyers), and full state funding and administration of public defense services (American Civil Liberties Union and the National Association of Criminal Defense Lawyers). And the New York Civil Liberties Union is exploring lawsuits against the State to require it to live up to its constitutional obligation to administer an adequate system of public defense representation.

Against this backdrop, the Spangenberg Group is performing a statewide defense assessment for the Kaye Commission. State Chief Administrative Judge Jonathan Lippman has produced a new rule to try and assure more prompt appointment of counsel, and we continue to be called upon to help structure improved defender delivery systems.

### Legislative Reform Offers Hope

The last year has delivered two reforms of the Rockefeller drug laws, the Forgotten Victims of Attica have received compensation, and we are death penalty free. At the end of March, state money for public defense flowed to counties for the first time from the Indigent Legal Services Fund. These are all islands of hope.

*(continued on page 7)*

** **Jonathan E. Gradess** is NYSDA 's Executive Director.*

# Court of Appeals Update

## Significant Criminal Cases Pending in the New York Court of Appeals

**Courtesy of Robert Dean,**
**Center for Appellate Litigation**

*[Ed. Note: An expanded version of this update is available on the NYSDA website (www.nysda.org) on the Courts NY Hot Topic page, and on the Center for Appellate Litigation website (www.appellate-litigation.org.)]*

### I. CASES AWAITING DECISION

*People v Felix Gomez* — Whether general consent to a car search includes consent to a search that involves taking the car apart.

*People v Harold L. Dunbar* — Whether police had the requisite reasonable suspicion to search the defendant.

### II. CASES SCHEDULED FOR ARGUMENT

*People v Christopher Rodriguez* — Whether murder in the second degree under PL §125.25(1) and PL §125.25(3) are lesser-included offenses, and hence inclusory concurrent counts, of murder in the first degree under PL §125.27(1)(a)(vii).

*People v Richard Miller* — (1) Whether murder in the second degree under PL §125.25(1) and PL §125.25(3) are lesser-included offenses, and hence inclusory concurrent counts, of murder in the first degree under PL §125.27(1)(a)(vii). (2) Whether instructions by a court officer to a deliberating jury that a requested item, marked for identification only, is not in evidence, is ministerial or, instead, requires counsel's and the defendant's presence pursuant to CPL §310.30. (3) Whether a mode-of-proceedings error occurred when a sitting juror was allowed to act as an "interpreter" for a vocally impaired witness.

*People v Herman Turner* — Whether original appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to preserve (by objecting on the wrong grounds) the submission of a time-barred lesser-included offense, where the Court of Appeals held only in a later case that such a submission would have been erroneous.

*People v Trevor Green* — Whether the "claim of right" defense to robbery is available when the owner of specific chattel uses force to reclaim his property. In *People v Reid*, 69 NY2d 469, 475-476 (1987), the Court held that such a claim is no defense to robbery of cash, but explicitly left open the question whether it might be a defense to the forcible retaking of specific personal property.

*People v Craig Lewis* — Whether, in this burglary prosecution, the court erred by charging the jury that the element of intent to commit a crime therein could be satisfied merely by evidence that the defendant committed contempt by entering his girlfriend's dwelling in violation of an order of protection.

*People v Bartolome Brito* — (1) Whether the concededly erroneous preclusion of the testimony of a defense witness, because she had been present in the courtroom during prior testimony, can be deemed harmless error. (2) The court's denial of a for-cause challenge to a prospective juror who could not give an unequivocal assurance that she would give the case her undivided attention. (3) Whether the search of the attic at defendant's residence exceeded the scope of the search warrant. (4) Whether the eavesdropping warrants were properly issued.

*People v Alvaro Carvajal* — Whether territorial jurisdiction was proper in New York for prosecution of possession of drugs seized in California, where defendant resided. (2) Whether the court should have submitted question of territorial jurisdiction to the jury, as it is nonwaivable. (3) Whether trial counsel was ineffective for withdrawing the question of territorial jurisdiction from the jury's consideration.

*People v James Robbins* — Whether, in a prosecution for drug sale in or near school grounds, the distance from the sale to the schoolyard is measured by the shortest walking distance, or the distance of the shortest direct but impassable line ("as the crow flies").

*Matter of Kadeem W.* — Whether the evidence was sufficient to prove that the juvenile shared the intent of his companion to possess or use the pellet gun concealed beneath his clothing, where the companion unexpectedly used the gun against a security guard who had ejected them from a playground.

*People v Corby Norcott* — (1) Whether the court erred in precluding defense counsel from eliciting testimony intending to show that the prosecution's main witness had a motive to lie to implicate the defendant, i.e., that the investigating detective had told her (falsely) that the defendant had implicated her in the murder; harmless error. (2) Sufficiency of the evidence. (3) Charge on acting in concert.

*People v Andrew Goldstein* — (1) The admissibility of the prosecution's psychiatric witness's testimony concerning out-of-court statements she relied upon to form her opinion where defendant had no opportunity to cross-examine the persons who made the statements (*Crawford v Washington*, 541 U.S. 36). (2) The court's preclusion of defense psychiatric testimony about defendant's extreme emotional disturbance due to insufficient CPL §250.10 notice.

*People v Tyrone Hicks* — (1) Whether the court properly refused to dismiss a sworn juror; whether the court conducted a "probing and tactful" inquiry. (2) Prosecutorial misconduct on summation. (3) The refusal to set aside the verdict based on newly discovered evidence.

*People v James Jacobs* — Whether the defendant was deprived of the effective assistance of counsel when

(unbeknownst to all) one of his two trial lawyers was not admitted to practice law. Lead counsel had been duly admitted.

*People v Joan Suarrcy-Bongarzone* — (1) When a family member hires an attorney for the defendant, and then the attorney communicates her representation to the proper police authority, has the suspect's right to counsel indelibly attached such that the suspect cannot disavow that representation outside the presence of that attorney? (2) When a person enters a police station and confesses to murder, is that person then in custody for the purposes of Miranda warnings?

*People v Matthew Waldron* — (1) CPL §30.30: the excludability of pre-indictment delay where defense counsel sought to postpone the grand jury proceeding in order to secure a favorable plea bargain. (2) Whether trial counsel was ineffective for not objecting to the prosecutor's opening and closing statements.

*People v Santos Suarez* — Whether, where the defendant deliberately stabbed the deceased three times with a kitchen knife, the evidence made out "depraved indifference" murder (*People v Payne*, 3 NY3d 266)

*People v Calvin Moore* — Whether, by walking away from the police, a defendant elevates the predicate supplied by an anonymous tip from a level two to a level three (reasonable suspicion), thereby justifying a stop and frisk.

*People v Sandro Lopez* — Whether the intermediate appellate court has a residuum of authority to sua sponte, and in extraordinary cases, review the excessiveness of a sentence despite a valid waiver of the right to appeal.

## III. NEW LEAVE GRANTS

*People v Winston Nicholson* — (1) Whether appellant's waiver of the right to appeal was unknowing and involuntary when he was advised that he waived the right to appeal "by pleading guilty." (2) Whether, alternatively, the intermediate appellate court has a residuum of authority to sua sponte, and in extraordinary cases, review the excessiveness of a sentence despite a valid appeal waiver.

*People v Yolanda Billingslea* — (1) Whether appellant's waiver of the right to appeal was unknowing and involuntary when she was advised that the appeal waiver was an automatic consequence of the guilty plea. (2) Whether, alternatively, the intermediate appellate court has a residuum of authority to sua sponte, and in extraordinary cases, review the excessiveness of a sentence despite a valid appeal waiver.

*People v John Boyer* — The scope of the Wharton "confirmatory identification" exception to the CPL §710.30 notice requirement: Whether a police officer's fleeting glimpse of a suspect many floors above him on a fire escape at night permits the subsequent show-up identification to be classified as "confirmatory" and thus not subject to ID notice.

*People v Gerald Garson* — (1) Whether grand jury evidence of counts of receiving reward for official misconduct was insufficient, where judge's duty as a public servant was defined solely by reference to the Rules of Judicial Conduct. (2) Whether count charging official misconduct was multiplicitous.

*People v Trisha McPherson* — (1) Whether there was sufficient proof of depraved indifference (as opposed to intentional) murder, where the People's proof showed only that the defendant stabbed her abusive boyfriend a single time after he pushed her during an argument. (2) In a case in which trial counsel raised a battered woman's defense, whether counsel was ineffective for failing to investigate abuse witnesses and to obtain corroborative hospital records.

## IV. CAPITAL APPEALS PENDING

*People v Robert Shulman* — 21 issues. For details see the Court of Appeals Update in the last issue of the *REPORT* or on the website.

*People v John Taylor* — Appeal as of right directly to Court of Appeals from Queens County conviction for capital offense. Defendant was convicted in the "Wendys" slayings. Appellant's brief due April 2006. ⚖

## *From My Vantage Point* *(cont'd. from page 5)*

### Defender Institute BTSP Participants Represent Hope

What represents the most permanent island of hope for me came just weeks prior to this writing, at our Defender Institute. This year's class of 56 defenders from across the state came to the week filled with remarkable zeal. They soaked up information, contributed wise counsel to one another, and went away with a resounding commitment to client-centered representation. Each member of the class represented an island of hope for me, for our staff, and for the dedicated coaches who come from across the country to help train these committed members of the defender community.

### Cherish These Glimpses of a New Day

I know for some of you this column may sound a little too rosy. I know this from the 1200 cases we do with you each year, from our visits to your offices, your counties and your legislative bodies, and from your many calls regarding budgets. This year has not been rosy in the trenches. The daily battles with time-driven judges, discretion-challenged DAs and resource-starved offices are depressing, exhausting and recurring. But we never know how close we are to a new day.

This year gave us some glimpses of that day to cherish. I hope you will cherish them with me. ⚖

***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

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

**Deck v Missouri, 544 US __, 125 SCt 2007, 161 LEd2d 953 (2005)**

During the petitioner's death penalty sentencing, he was required to wear leg irons, handcuffs, and a belly chain. Defense counsel's many objections were overruled; including a motion to strike the jury panel because the shackles gave the impression that the petitioner was currently violent. The death sentence was affirmed on appeal.

**Holding:** Requiring a capital defendant to wear visible shackles during the penalty phase violates due process unless it is justified by an essential, specific state interest. *Holbrook v Flynn*, 475 US 560, 568-569 (1986). Routine use of visible shackles on a defendant during the guilt phase of a trial violates due process. ABA Standards for Criminal Justice: Discovery and Trial by Jury 15-3.2, pp. 188-191 (3d ed. 1996). The exception is when a trial court has found a specific need, such as maintaining security or guarding against risk of flight. *Estelle v Williams*, 425 US 501, 503, 505 (1976). Shackling violates the presumption of innocence, *Coffin v United States* (156 US 432, 453 [1895]), impinges on the right to counsel, *Gideon v Wainwright* (372 US 335, 340-341 [1963]), and detracts from the dignity of the judicial process. *Illinois v Allen*, 397 US 337, 343-344 (1970). These same considerations apply with equal force to the penalty phase, where guilt and innocence were superseded by life and death. The jury here was aware of the shackles, the court's decision to allow them was an abuse of discretion without justification, and visible restraints were inherently prejudicial. Judgment reversed.

**Dissent:** [Thomas, J] An historical prohibition against visibly shackling defendants at trial and current state practices offered inconclusive support for a due process embargo on a sentencing court's power to maintain order.

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

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

**Andersen v United States, 544 US __, 125 SCt 2129, 161 LEd2d 1008 (2005)**

The petitioner, Arthur Andersen, LLP, was the auditor for Enron Corporation. In 2000, Enron's financial performance deteriorated, and senior management began to leave. An SEC investigation was rumored. Throughout, the petitioner encouraged employees on the Enron team to continue the practice of document destruction according to its policy. Later, Enron declared bankruptcy and the Department of Justice charged that the petitioner "did knowingly, intentionally and corruptly persuade . . . other persons, to wit: [petitioner's] employees, with intent to cause" them to withhold documents from, and alter documents for use in, "official proceedings, namely: regulatory and criminal proceedings and investigations." 18 USC 1512(b)(2)(A) and (B) [2000]. At trial the jury deadlocked; the trial judge gave an *Allen* charge. The conviction that followed was affirmed on appeal.

**Holding:** The definition of "corrupt persuasion" in an obstruction of justice/witness tampering charge was not communicated properly to the jury. It was not criminal for a manager to advise his employees to follow the company's document retention policies. "[I]t is striking how little culpability the instructions required. For example, the jury was told that, 'even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty.' " To corruptly persuade another to commit an unlawful act must be done knowingly. *United States v X-Citement Video, Inc*, 513 US 64, 68 (1994). The jury instructions diluted the meaning of "corruptly" to encompass innocent conduct. They also failed to establish a connection between "persuasion" to destroy documents and an existing government investigation. *US v Aguilar*, 515 US 593 (1995). Judgment reversed.

**Prisoners (Religion)** **PRS I; 300(21)**

**Cutter v Wilkinson, 544 US __, 125 SCt 2113, 161 LEd 2d 1020 (2005)**

The petitioners, current and former Ohio prison inmates who belonged to "nonmainstream" religions, *ie*, the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian, claimed that the respondents, prison officials, denied their religious freedom under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 USC 2000cc-1(a)(1)-(2). The respondents claimed that the statute, as applied to prisoners, violated the 1st Amendment's Establishment Clause. Motion to dismiss denied, reversed on appeal.

**Holding:** RLUIPA was a permissible government accommodation of prisoners' religious practices under the Establishment and Free Exercise clauses of the 1st Amendment. The statute prevented government from imposing a substantial burden on the free exercise of religion by incarcerated persons unless it was for a compelling governmental interest and used the least restrictive means. RLUIPA satisfied the Establishment Clause because it removed exceptional government-created bur-

## US Supreme Court *continued*

dens on private religious exercise. *Board of Ed of Kiryas Joel Village School Dis. v Grumet*, 512 US 687, 705 (1994). The statute protected prisoners who depended on government officials to allow them to attend religious services and observances. Moreover, RLUIPA did not differentiate among bona fide faiths. State polices of prison security and public safety were not shown to have been compromised by RLUIPA. The constitutionality of the statute should be judged in response to as-applied challenges. Judgment reversed.

**Concurring:** [Thomas, J] RLUIPA was constitutional under the Establishment Clause, which historically did not completely seal religion from legislative activity.

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

**Narcotics (Marijuana)** **NAR; 265(40)**

**Gonzales v Raich, 545 US __, 125 SCt 2195 (2005)**

California's Compassionate Use Act of 1996 exempted medicinal marijuana users and growers from criminal prosecution. Federal Drug Enforcement Administration (DEA) agents came to the home of one respondent, who required the drug to alleviate severe pain, and seized and destroyed her plants, although they determined their use was lawful. Denial of the respondents' motion for a preliminary injunction to prohibit enforcement of the federal Controlled Substances Act, 21 USC 801 *et seq*, was reversed.

**Holding:** The Commerce Clause empowered Congress to prohibit local cultivation and use of marijuana for medicinal purposes. US Const, Art I, § 8; *Wickard v Filburn,* 317 US 111, 128-129 (1942). There was a rational basis for finding that the respondents' activities—quintessentially economic—substantially affected interstate commerce. *Perez v US,* 402 US 146, 155-156 (1971). Inclusion of medicinal marijuana under Schedule I might be successfully challenged in the future. *Conant v Walters,* 309 F3d 629, 640-643 (CA 9 2002). The medical necessity issue was not reached. Judgment vacated.

**Concurring:** [Scalia, J] Power to regulate activities that substantially affect interstate commerce is also derived from the Necessary and Proper Clause. It includes the power to make laws concerning intrastate activities to effectuate laws regulating interstate commerce, such as controlling the market in Schedule I controlled substances.

**Dissent:** [O'Connor, J] Overboard regulation under the Commerce Clause curtailed state power to engage in legislative experiments to advance public welfare. *States v Lopez,* 514 US 549, 557 (1995).

**Dissent:** [Thomas, J] Respondents' local cultivation and consumption of medicinal marijuana was a purely noncommercial intrastate activity.

**Due Process (Prisoners)** **DUP; 135(25)**

**Prisoners (Conditions of Confinement)** **PRS I; 300(5)**

**Prisons (Classification) (Conditions)** **PRS II; 300.5(5) (6)**

**Wilkinson v Austin, 545 US __, 125 SCt 2384 (2005)**

The respondents, current and former Ohio State Penitentiary (OSP) inmates, filed a 1983 action against the prison system claiming that a policy (Old Policy) for placement in the Supermax facility violated due process. The Old Policy did not provide notice or adequate safeguards. On the eve of trial, a New Policy was issued with provisions for review and notice. Relief granted, affirmed on appeal.

**Holding:** The New Policy is sufficient to safeguard the inmates' liberty interest in not being assigned to a Supermax facility. The existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement had to be rooted in the nature of those conditions "in relation to the ordinary incidents of prison life." *Sandin v Conner,* 515 US 472 (1995). Avoidance of extreme and indefinite isolation, and disqualification from parole eligibility is a liberty interest. Due process requires consideration of: (1) a private interest affected by official action; (2) risk of erroneous deprivation and the probable value, if any, of additional or alternative procedural safeguards; and (3) the Government's interest. *Mathews v Eldridge,* 424 US 319 (1976). Under the New Policy, inmates received notice of the facts underlying the placement, and a fair opportunity for rebuttal. *Greenholtz v Inmates of Neb. Penal and Correctional Complex,* 442 US 1, 15 (1979). The basis for the decision has to be noted by every official body during the multi-level review process, and the inmate can submit objections before final review. Decisions against OSP placement cannot be reversed. The state's interest in prison security and limited resources are significant factors. The policy's rejection of an adversarial hearing, where the inmate could call witnesses, is reasonable in light of security and cost factors. The modifications ordered to the New Policy were improper. Judgment affirmed in part and reversed in part.

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

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

**Bradshaw v Stumpf, 545 US __, 125 SCt 2398 (2005)**

The respondent and another man, Wesley, robbed the home of a married couple. The wife was shot and killed. Charged with aggravated murder, and other counts, the respondent agreed to a plea bargain. He claimed that he participated under the influence of Wesley, who shot the

## US Supreme Court *continued*

wife. The prosecutor claimed that the respondent killed the wife, or alternatively he was liable as an accomplice. The court sentenced him to death finding he was the primary offender and guilty of killing the wife. Meanwhile, Wesley was tried separately on the theory that he shot the wife, based on additional evidence from a cellmate. He received a life sentence. Denial of the respondent's motion to withdraw his plea was affirmed. Denial of federal *habeas* relief was reversed.

**Holding:** The respondent's guilty plea to a death eligible offense was intelligent, knowing and voluntary. *See Brady v US,* 397 US 742 (1970). His denial of actually shooting the decedent was not relevant since the charge covered aiding and abetting with the specific intent to cause death. *See In re Washington,* 691 NE2d 285 (Ohio 1998). Although the plea bargain might not have been the best deal, it was not assailable unless based on constitutionally defective advice of counsel. *Tollett v Henderson,* 411 US 258, 267 (1973). The prosecution's inconsistent positions were immaterial as to the plea since both defendants were liable under an accomplice theory. However, whether the prosecution's alleged inconsistent theories in prosecuting the respondent and another for the same offense might have impacted on the sentencing must be reviewed. Judgment reversed and remanded.

**Concurring:** [Souter, J] If on remand the prosecution's inconsistent positions are found to constitute a due process violation, questions will be raised about how the violations can be remedied.

**Concurring:** [Thomas, J] Inconsistent prosecution theories have never been found to violate due process. Inconsistent theory claims are deterred by the requirements of adversarial trials and proof beyond a reasonable doubt, as inconsistencies will be noted by factfinders.

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

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

### Johnson v California, 545 US __, 125 SCt 2410, 162 LEd2d 129 (2005)

The petitioner, a black male, was convicted of murdering his white girlfriend's child. The prosecutor used 3 of 12 peremptory challenges to remove all black prospective jurors, leaving an all white jury. The petitioner objected claiming racial bias. The judge, without questioning the prosecutor, was satisfied that the challenges were race-neutral and that the defendant did not make out a *prima facie* case. An appellate reversal was overturned by the state supreme court and the conviction reinstated.

**Holding:** The question raised is whether *Batson v Kentucky* (476 US 79 [1986]) allows California to require at the beginning of the three-step *Batson* analysis that the objector show "'it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.'" A defendant satisfies the first *Batson* step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Requiring the petitioner to show that it was more likely than not that the challenge was improperly motivated with limited facts was too burdensome. The inferences raised by striking all three black jurors were sufficient to establish a *prima facie* case under *Batson*. Judgment reversed.

**Concurring:** [Breyer, J] *See* concurring opinion in *Miller-El v Dretke*, 125 SCt 2317 (2005).

**Dissent:** [Thomas, J] California's procedure was within its discretion to make rules of criminal procedure.

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

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

### Miller-el v Dretke, 545 US __, 125 SCt 2317, 162 LEd2d 196 (2005)

During jury selection in the respondent's capital murder trial, prosecutors used peremptory strikes against 10 qualified black venire members. The respondent objected, citing the prosecution's history of systemic exclusion of black members from criminal juries. The motion was denied. During his appeal, *Batson v Kentucky* (476 US 79 [1986]) was decided and changed the requirement from showing systemic discrimination to proving individual prosecutorial bias. On remand, the trial court accepted the prosecution's race-neutral reasons for the jury strikes, and the decision was affirmed. Denial of the respondent's federal *habeas* claim was affirmed.

**Holding:** Deciding that the respondent failed to show by clear and convincing evidence that the state court's finding of no discrimination was wrong was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 USC 2254(d)(2). Prosecutors used their peremptory strikes to exclude 91 percent of the eligible African-American venire members. The prosecution's bias was evidenced by shuffling of the venire panel, manipulative and disparate questioning, and a policy to exclude black venire members from juries. A comparative juror analysis showed that the prosecutor's reasons for eliminating black jurors were equally applicable to some of the white jurors. *See Reeves v Sanderson Plumbing Products, Inc.*, 530 US 133, 147 (2000). The prosecution's rationale for the strikes was not plausible. *See Miller-El v Cockrell*, 537 US 322, 339 (2003). Courts are not to supply or supplement race-neutral explanations not proffered by the prosecution. Evidence supporting the respondent's claims from the *voir dire* tran-

## US Supreme Court *continued*

scripts was fairly presented to the state courts. *See Picard* v *Connor*, 404 US 270, 275 (1971). Judgment reversed.

**Concurring:** [Breyer, J] Because of the practical difficulties and ineffectiveness at times of the *Batson* test, the peremptory challenge system needs to be reexamined.

**Dissenting:** [Thomas, J] Relying only on evidence presented in state court (and not evidence presented during the federal *habeas* proceeding), the respondent failed to make out a *prima facie* case.

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

**Dodd v United States, 545 US __, 125 SCt 2478 (2005)**

The petitioner's conviction on federal drug charges became final on August 6, 1997. On April 4, 2001 he filed a *pro se* motion under 28 USC 2255 to set aside his conviction for engaging in a continuing criminal enterprise based on *Richardson v US* (526 US 813 [1999]), requiring jury unanimity on all predicate offenses. His motion was dismissed as time barred, since *Richardson* had been decided more than a year before petitioner filed his motion. *See* 28 USC 2255, P6(3). On appeal, he claimed that the time did not start to run until April 19, 2002, when the 11th Circuit decided *Ross v US* (289 F3d 677 [11th Cir 2002]), holding that *Richardson* applied retroactively. The dismissal was affirmed.

**Holding:** The statute, 20 USC *2255* P6(3), sets only one date for statute of limitations purposes. That is the date on which the right asserted was initially recognized by the Supreme Court, not the date it was made retroactively applicable to cases on collateral review. A statute is assumed to mean what it says. *See Connecticut Nat. Bank v Germain,* 503 US 249, 253-254 (1992). It is for Congress to amend the statute if it believes that P6(3) unduly restricts federal prisoners' ability to file second or successive motions. Judgment affirmed.

**Dissent:** [Stevens, J] A natural reading of the statute would make it possible for the limitations period to expire before the cause of action accrued. Limiting the time period curtails the right of prisoners to file second or successive applications based on a retroactive rule.

**Dissent:** [Ginsburg, J] The statute is most sensibly read to start the time clock on the date a right is "made retroactively applicable to cases on collateral review."

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

**Sentencing (Mitigation)** **SEN; 345(50)**

**Rompilla v Beard, 545 US __, 125 SCt 2456 (2005)**

During the penalty phase of the petitioner's capital trial, the prosecution introduced evidence to support three aggravators: (1) felony murder; (2) murder by torture; and (3) the petitioner's violent criminal history. The mitigation evidence was brief testimony by family members asking for mercy and protesting the petitioner's innocence. Based on a finding that the aggravators outweighed the mitigating evidence, the petitioner was sentenced to death. Federal *habeas* relief granted after state court affirmances was reversed on appeal.

**Holding:** Defense counsel's ineffectiveness in not investigating a prior conviction file to counter aggravating evidence by the prosecution was prejudicial under an objective standard of reasonableness. *See Strickland v Washington,* 466 US 668 (1984). An examination of the file would have prepared trial counsel to respond to evidence of similar prior crimes used in support of aggravation. *See* 1 ABA Standards for Criminal Justice 4-4.1 (2d ed 1982 Supp). The prior conviction file would have led defense counsel to investigate school, medical, and prison records revealing evidence of a troubled childhood, mental illness and alcohol dependency. This evidence would have given trial counsel reason to reevaluate the information from the petitioner and family members. Judgment reversed.

**Concurring:** [O'Connor, J] Examining the prior conviction file was essential since it was central to the prosecution's aggravating evidence and necessary to counter evidence of prior similar crimes. Failure to obtain the file was the result of neglect, not a strategic choice.

**Dissent:** [Kennedy, J] A *per se* requirement to review all documents in the prior conviction file that the prosecution might rely on at trial exceeded requirements of 6th Amendment.

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

**Gonzalez v Crosby, No. 04-6432, 6/23/2005, 545 US ___**

The petitioner filed a federal *habeas* petition 15 years after his state sentence began. It was dismissed as time barred, more than one year after the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations took effect. A certificate of Appealability (COA) was denied. Based on *Artuz* v *Bennett* (531 US 4 [2000]), decided in the interim, the petitioner moved to amend the judgment under Federal Rule of Civil Procedure 60(b)(6) claiming the time bar rule was misapplied. After numerous filings, the Court of Appeals *en banc* determined that a postjudgment motion under Rule 60(b) other than one alleging fraud on the court is in essence a second or successive *habeas corpus* petition, which a state prisoner may not file without precertification by a court of appeals under 28 USC 2244(b).

**Holding:** A Rule 60(b) motion, in which no new claim was presented, was not a second or successive *habeas* petition (*see* 28 USC 2254) under AEDPA. *See* 28 USC 2244(b)(1)-(3). Misapplication of the federal statute limiting the time for filing a *habeas* petition was not a new

## US Supreme Court *continued*

claim. 28 USC 2244(d). Rule 60(b) was designed to protect parties from default judgments mistakenly entered against them. It has time limits and specific grounds, preventing circumvention of AEDPA's successive petition prohibition. The petitioner failed to show "extraordinary circumstances" under Rule 60(b)(6) to justify reopening the judgment. He did not appeal the court's decision to disallow time related to a state postconviction application, later reached by *Artuz*. Judgment affirmed.

**Concurring:** [Breyer, J] Definition of "claim" under the AEDPA, which determines whether a new *habeas* claim was being brought under Rule 60(b), was problematic.

**Dissent:** [Stevens, J] The district court should decide the merits of Rule 60(b) motion. A supervening change in AEDPA procedural law can be a kind of "extraordinary circumstance" to justify reopening the case, and it is for the lower court to decide. *Ackermann* v *US,* 340 US 193 (1950).

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

**Mayle v Felix, No. 04-563, 6/23/2005, 545 US ___**

Convicted in state court, the respondent filed a *pro se* federal *habeas* petition within the Antiterrorism and Effective Death Penalty Act (AEDPA) time limit. He claimed a Confrontation Clause violation based on admission of a videotaped statement from a prosecution witness. After the AEDPA time limit expired, and counsel was appointed, he filed an amended petition adding a new claim about a coerced confession in violation of the Fifth Amendment. Dismissal of the confrontation claim was affirmed, rejection of the 5th Amendment claim was reversed.

**Holding:** The amended *habeas* petition did not relate back to the original filing when it asserted a new ground for relief supported by facts that differed in time and type from the original pleading. Amendments made after statute of limitations expire relate back to the date of the original pleading if the amended pleadings "arise out of the conduct, transaction, or occurrence" set forth in the original. FRCP Rule 15(c)(2). The 5th Amendment self-incrimination claim concerned a pre-trial police interrogation, which differed from the original 6th Amendment Confrontation Clause challenge based on admission of a witness's testimony at trial. Judgment reversed and remanded.

**Dissent:** [Souter, J] Both claims fell under the same "transaction or occurrence," a trial ending in conviction resulting in a single ultimate injury of unlawful custody. Restrictive application of the FRCP Rule 15(c)(2) relation back provision discriminates against indigent defendants. Most original *habeas* petitions are filed *pro se* by inmates who cannot afford counsel. *Duncan* v *Walker,* 533 US 167, 191 (2001). Counsel, appointed only after the petition survives judicial review, are hamstrung when attempting to add new claims.

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

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

**Halbert v Michigan, No. 03-10198, 6/23/2005, 545 US ___**

The petitioner was convicted on a plea of *nolo contendere* and requested appointment of counsel to make a leave application to the Michigan Court of Appeals. Appeals from plea-based convictions are labeled discretionary. Denial of the request was affirmed; the state supreme court declined review.

**Holding:** The petitioner claims that review in the Michigan Court of Appeals is a first-tier appellate proceeding requiring appointment of counsel, and not a purely discretionary appeal that does not mandate assignment of counsel. Due Process and Equal Protection require appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier discretionary review in the Michigan Court of Appeals. *See Evitts* v *Lucey,* 469 US 387 (1985). When a state provides appellate review of criminal convictions, it is required to appoint counsel to represent indigent defendants on first-tier appeals as of right. *Douglas* v *California,* 372 US 353 (1963). However, no provision of counsel is required for discretionary appeals to a state's highest court or the US Supreme Court. *See Ross* v *Moffitt,* 417 US 600 (1974). It is proper to classify Michigan's discretionary appeal to the intermediate appellate court as a first-tier proceeding. This application for leave was the first review of the merits, and indigent defendants are not usually prepared to adequately represent themselves. A defendant who pleads guilty waives the appeal as of right, but is entitled to apply for leave to appeal. The Michigan Court of Appeals is an error-correction tribunal; unlike the state's highest court it is not limited to questions of significant public interest. The petitioner and a majority of indigent defendants who plead guilty are unprepared to pursue their own appeals due to limited education, learning disabilities, or mental impairments. Judgment vacated and remanded.

**Dissent:** [Thomas, J] Michigan's system was a constitutionally acceptable response to limited appellate resources. Even if there was a right to counsel, it was waived as part of the plea.

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

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

## US Supreme Court *continued*

**Town of Castle Rock v Gonzales, No. 04-278, 6/27/2005, 545 US ___**

The respondent obtained a restraining order against her husband. When she discovered that her three daughters were missing, she suspected her husband and repeatedly asked the police for assistance. They advised her to wait before taking action. Several hours later, the husband came to the police station, opened fire with a semiautomatic handgun, and was killed in the gun battle. The three girls were found in his vehicle, dead. The respondent filed a 1983 action against the town alleging a due process violation based on a pattern of non-enforcement of restraining orders. The dismissal for failure to state a claim was reversed on a procedural due process claim.

**Holding:** Colorado state law did not invest the respondent with a property interest in police enforcement of her restraining order under procedural due process. *Kentucky Dep't of Corrections v Thompson,* 490 US 454, 462-463 (1989). The language of the statute that police "shall use every reasonable means to enforce a restraining order" was discretionary, not mandatory. Colo. Rev Stat 18-6-803.5(3)(a), (b). The statements on the order itself did not elevate the legal standard to a mandate creating a property interest. Not all statutory mandates confer entitlements. *See Sandin v Conner,* 515 US 472 (1995). The right to an arrest warrant was an indirect benefit that did not trigger due process protections. *See O'Bannon v Town Court Nursing Center,* 447 US 773 (1980). Judgment reversed.

**Concurring:** [Souter, J] Due process did not recognize an entitlement in a state process, *eg*, arrest warrant to enforce a restraining order. *Board of Regents of State Colleges v Roth,* 408 US 564.

**Dissent:** [Stevens, J] Undue weight was placed on the discretionary nature of police enforcement statutes, with little attention given to "mandatory arrest" domestic violence statutes. The Colorado law was enacted to benefit a narrow class of persons protected by restraining orders. The respondent's interest in police enforcement in limited circumstances was a property interest.

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

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

**Bell v Thompson, No. 04-514, 6/27/2005, 545 US ___**

Denial of the respondent's state postconviction motion following his death sentence, raising ineffectiveness of counsel for failing to investigate mental illness as a mitigating factor, was affirmed. A federal *habeas* petition was denied. Pending appeal, the respondent moved to supplement the record in District Court with evidence from a new expert's evaluation of his mental condition, and asked to hold the appeal in abeyance. The motion was denied by both courts, the *habeas* appeal was denied on the merits, and the respondent's motion for rehearing denied. Issuance of the mandate was stayed pending a *certiorari* motion, which was denied, but the Court of Appeals extended the stay of mandate pending rehearing request. The Court of Appeals did not issue the mandate after rehearing was denied. State officials asked its highest court to set an execution date, believing that federal *habeas* proceedings were complete. Motions were filed in state and federal court challenging the respondent's competency to be executed. State courts found defendant competent, and a federal decision was pending, when—seven months after cert was denied—the Court of Appeals remanded the case to the district court for an evidentiary hearing on ineffective assistance of counsel. The court had incorporated the new expert's testimony in its evaluation.

**Holding:** The Court of Appeals abused its discretion by withholding the mandate following US Supreme Court denial of *certiorari*. FRAP 41. *Calderon v Thompson,* 523 US 538 (1998). Delay of more than five months impacted the criminal justice system by failing to provide notice of the court's intention to reconsider its opinion, and allowing the state to believe that the proceedings were finished. *Ballard v Comm'r.*, 544 US ___, ___ [Slip op at 17], 161 LEd2d 227, 125 SCt 1270. Judgment reversed.

**Dissent:** [Breyer, J] The Court of Appeals realized that the unadmitted expert's document was critical to the case, and revisited its original decision. It was not an abuse of discretion to change a decision that was believed to have been wrong. Impact on the justice system caused by delay was minimal.

## New York State Court of Appeals

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

**Trespass (Elements)** **TSP; 374(10)**

**People v Moore, No. 77, 6/7/2005**

The State University of New York at Buffalo sent "persona non grata" letters to the defendant on two occasions barring him from the campus. Almost two years later, he entered a public building there. City Court's grant of the defendant's motion to dismiss as jurisdictionally defective the information charging him with third-degree criminal trespass was affirmed.

**Holding:** The third-degree trespass information was deficient because it omitted any reference to the property being enclosed. *See People v Alejandro*, 70 NY2d 133, 136. Third-degree trespass is shown when one "knowingly enters or remains unlawfully in a building or upon real property (a) which is fenced or otherwise enclosed in a

## NY Court of Appeals *continued*

manner designed to exclude intruders." Penal Law 140.10 [a]. The statute was amended to specifically require enclosure, an aggravating element, to justify increasing the offense from a violation to a class B misdemeanor. L 1987, ch 192. The information and supporting deposition did not allege facts to show that the building was enclosed and so were facially insufficient. Order affirmed.

**Sentencing (Concurrent/Consecutive) SEN; 345(10) (80) (Weapons)**

**People v Hamilton, No. 85, 6/7/2005**

The defendant was tried for shooting and killing one man and seriously injuring another, allegedly because they had stolen a gun from the defendant. The judge sentenced him to consecutive sentences of 12 1/2 to 25 years for first-degree manslaughter and seven and a half to 15 for first-degree assault, to be concurrent with a sentence of two and one third to seven years for first-degree reckless endangerment. The defendant also received a sentence of seven and a half to 15 years for second-degree weapons possession to run consecutively to the manslaughter and assault sentences.

**Holding:** Since the weapons conviction for unlawfully using a gun was not separate and distinct from the crimes of manslaughter and assault, concurrent sentences were mandated. *See People v Ramírez*, 89 NY2d 444. The statute states that "[w]hen more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently." Penal Law 70.25 subdivision (2). One pistol was used to shoot both victims. The weapons charge overlapped the manslaughter and assault charges. No evidence showed that there was a separate intent to use the gun illegally. *See People v Parks*, 95 NY2d 811. Order modified and remanded for resentencing.

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

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

**People v Williams, No. 92, 6/9/2005**

The defendant was arrested for selling drugs to an undercover police officer who was part of a buy-and-bust operation that included a ghost observer and an arresting officer. Only two witnesses testified at trial, the arresting officer, who did not observe the transaction, and the undercover buyer. The latter claimed that the seller wore a distinctive blue and white flowered hat, which was not inventoried or present in the defendant's arrest photograph. No pre-recorded buy money or drug stash was recovered from the defendant. The defense request that the court not instruct the jury against speculating about missing evidence was granted. The court did charge the jury not to speculate about missing witnesses. The conviction was reversed.

**Holding:** Although a missing witness charge may not have been justified, the defendant was entitled to ask the jury to draw inferences from the absence of an available prosecution witness, the ghost, who had material, noncumulative information. *See People v Tankleff*, 84 NY2d 992, 994-995. The prosecution's case relied on an uncorroborated, single-witness identification. The court's instruction undermined the defense of insufficient evidence and misled the jury into believing that they could not draw any inferences from the absence of the ghost officer at trial. It was not harmless error. *See People v Kello*, 96 NY2d 740.

**Concurring:** [Smith, RS, J] The "do not speculate" instructions were valid. However, it was error for the court to *sua sponte* permit the undercover officer to testify anonymously. The prosecutor made no showing to justify it and the court acted without balancing the officer's interests in anonymity against defendant's right of cross-examination. *See People v Stanard*, 42 NY2d 74. Since the error was egregious, defense counsel's general objection was sufficient. *See People v Payne*, 3 NY3d 266, 273. Order affirmed.

**Sentencing (Aggravated Penalties) SEN; 345(5) (32) (58) (Enhancement) (Persistent Felony Offender)**

**People v Rivera, No. 86, 6/9/2005**

The defendant was convicted of second-degree unauthorized use of a vehicle, an E felony. The prosecution asked for a persistent felony offender sentence. The defendant's objection under *Apprendi v New Jersey* (530 US 466 [2000]) was overruled. The judge found the defendant to be a persistent felony offender. The sentence of 15 years to life was affirmed.

**Holding:** The sole determinant for persistent felony offender sentencing was that the defendant had at least prior two felony convictions *See* Penal Law 70.10; CPL 400.20. The request to overrule *People v Rosen* (96 NY2d 329, 335) is rejected. No additional factual findings were required. *See Almendarez-Torres v US*, 523 US 224, 226-27 (1998). Once persistent felony offender status was established, the court had the discretion to impose an indeterminate sentence based on the history and character of the defendant, nature and circumstances of the crime, and whether an extended prison term and lifetime supervision best served the public interest. Order affirmed.

**Dissent:** [Kaye, J] *Rosen* relied on *Walton v Arizona*

## NY Court of Appeals *continued*

(497 US 639, which has since been overruled by *Ring v Arizona* (536 US 584 [2002]), holding that all facts, other than prior convictions, which increase a sentence beyond the maximum must be found by a jury beyond a reasonable doubt. The statute requires additional factual findings beyond the threshold of two felony convictions, and is distinguishable from Penal Law 70.08.

**Dissent:** [Ciparick, J] *Rosen's* interpretation of the persistent felony offender statute as depending solely on the existence of two prior convictions, while disregarding the judicial fact finding element of the process, is inconsistent with the 6th Amendment and *Ring*, *Blakely v Washington*, 124 SCt 2531 (2004), and *US v Booker*, 125 SCt 738 (2005).

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

**Sentencing (Aggravated Penalties) (Enhancement) (Persistent Felony Offender)** **SEN; 345(5) (32) (58)**

**People v Daniels, Nos. 84; 87, 6/14/2005**

The defendants sought unsuccessfully to vacate their persistent felony offender sentences. Penal Law 70.10; CPL 400.20.

**Holding:** The defendants did not preserve their claims under *Apprendi v New Jersey* (530 US 466 [2000]). Even if an *Apprendi* violation was deemed a mode of proceedings error and reviewed unpreserved, *see People v Rosen* (96 NY2d 329, 335), the defendants would not have prevailed on the merits. *See People v Rivera*, __ NY3d __ (No. 86, 6/9/2005). Orders affirmed.

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

**Sentencing (Aggravated Penalties) (Enhancement) (Persistent Felony Offender)** **SEN; 345(5) (32) (58)**

**People v Giola, No. 145, 6/14/2005**

**Holding:** The question of whether the defendant could raise an *Apprendi v New Jersey* (530 US 466 [2000]) argument for the first time in a motion to set aside his sentence was moot since the persistent felony offender statute has been found constitutional. *People v Rivera*, __ NY3d __ (No. 86, 6/9/2005). Order affirmed.

**Conspiracy (Accomplice) (Evidence)** **CNS; 80(5) (20)**

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

**People v Caban, No. 98, 6/14/2005**

At the defendant's trial for conspiracy to commit murder, George Castro, a street-level drug dealer who worked for the defendant, testified that he heard the defendant say that a rival drug dealer "needed . . . to be killed," and offered to pay $5,000. Derrick Garcia responded, "I'll do it," and Pello Torres offered to provide a gun. Over two months later, Torres told Castro, "It's time." They went with Garcia to find the rival, whom Garcia shot. A jury convicted the defendant of conspiracy but not the substantive crimes. His conviction was affirmed.

**Holding:** The co-conspirators statements were nonhearsay evidence of conspiracy, but hearsay as to the substantive crimes. *See People v Tran*, 80 NY2d 170, 179. Conspiracy required an agreement to commit an underlying substantive crime coupled with an overt act committed by one of the conspirators in furtherance of the conspiracy. Penal Law 105.15, 105.20. Garcia's acceptance of the defendant's invitation to kill the rival for money and Torres's offer of the gun were evidence of the agreement. Since the statements were nonhearsay as to the conspiracy, it was unnecessary to establish a *prima facie* case. Torres's statement "It's time," was offered for its truth, and therefore was hearsay as to the conspiracy and substantive offenses. The prosecution established a *prima facie* case of conspiracy making it admissible under the co-conspirator's exception. *See People v Wolf*, 98 NY2d 105, 118. The trial court properly allowed the co-conspirator hearsay statements into evidence "subject to connection." *See People v McKane*, 143 NY 455, 473. Defense counsel was not ineffective, under either the federal or state constitutions, for failing to seek a jury charge that Castro was an accomplice as a matter of law, since it was a factual question unsupported by the evidence. *See* CPL 60.22 [2]; *People v Benevento*, 91 NY2d 708, 712. Order affirmed.

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

**Trial (Prejudicial Publicity)** **TRI; 375(40)**

**Courtroom Television Network v State of New York, No. 88, 6/16/2005**

Court TV filed a complaint against New York State and the New York County District Attorney seeking an injunction and a declaratory judgment that Civil Rights Law 52 was unconstitutional. Summary judgment granted to defendants was affirmed.

**Holding:** Civil Rights Law 52 banning audio-visual coverage of most courtroom proceedings did not violate the Federal or State Constitutions. Under the 1st Amendment and the New York constitution, the press had the same right of access to observe court proceedings as the public, but not a greater right. *Nixon v Warner Comm. Inc*, 435 US 589, 609 (1978); *United Press Assocs. V Valente*,

## NY Court of Appeals *continued*

308 NY 71, 84-85. Civil Rights Law 52 did not prohibit media access, it only limited the means. There was no federal or state constitutional right to televise a criminal trial. US Const Amend 1; NYS Const Article 1, section 8; *Chandler v Florida*, 449 US 560, 569 (1981); *Johnson Newspaper Corp v Melino*, 77 NY2d 1, 8. Moreover, broadcasting criminal court proceedings risked violating a defendant's right to a fair trial and due process. *Estes v Texas*, 381 US 532 (1965). Despite advances in technology making television equipment less obtrusive, the legislature has not changed its position on the cameras ban. Order affirmed.

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

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

**People v Lopez, No. 93, 6/16/2005**

The defendant was indicted for third-degree criminal sale of drugs, and for selling them in or near school grounds. Penal Law 220.44 (2) and 220.39 (1). He agreed to plead guilty as a second felony offender to selling drugs near a school for four and a half to nine years in prison but could withdraw his plea in favor of a misdemeanor and time served if he successfully completed an eighteen-month residential drug treatment program. During the allocution, the judge discovered that the defendant's name did not appear in the body of the indictment, only his co-defendant's name appeared alleging acting in concert with another. The defendant agreed that the indictment would be dismissed with leave to represent but he would enter a plea on the same terms to a superior court information (SCI). In the colloquy, the defendant waived his right to be prosecuted by indictment and entered his plea. The defendant failed to finish the drug treatment program and was sentenced to the agreed prison term. The case was affirmed on appeal.

**Holding:** The defendant's plea to an SCI was lawful since it was made after a defective indictment was dismissed, CPL 210.20 [1] [a], with leave to represent. CPL 195.10 (2) (b). Order affirmed

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

**People v Lopez, No. 170, 6/30/2005**

**Holding:** The defendant moved to suppress a written post-arrest statement describing events very close in time and place to one of the charged crimes. It stated in part that the defendant saw "one of the officers was with" one of the complainants, "I knew they were looking for us, so I ran;" and that the defendant threw away his gun before being apprehended. Suppression was denied without a hearing. This was justified based on the face of the pleadings, the context of the motion, and the defendant's access to information. *See People v Mendoza*, 82 NY2d 415, 426. The defendant's suppression motion was too conclusory to mandate a hearing. *See also People v Jones*, 95 NY2d 721, 728-729. Judgment affirmed.

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

**People v Johnson, No. 115, 6/30/2005**

The defendant was charged with one felony and six misdemeanor counts by felony complaint. The court granted, without explanation, the prosecutor's motion to dismiss the felony. The defendant's guilty plea to a misdemeanor was affirmed.

**Holding:** The defendant pled guilty to a misdemeanor offense that was originally charged, and not one that was reduced from a felony. Therefore, CPL 180.50, which "requires that before permitting reduction of a felony charge to a misdemeanor, the court conduct an inquiry to determine whether the available facts and evidence provide a basis for charging a nonfelony offense," did not apply. It was unnecessary for the trial court to find a basis for reduction when no reduction occurred. *People v Yolles*, 92 NY2d 960. Order affirmed.

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

**People v Hunter, No. 114, 6/30/2005**

The defendant was originally charged with two felony counts and one misdemeanor count by felony complaint. Several days later, the felony was reduced to a misdemeanor and additional misdemeanor counts added. No CPL 180.50 reduction inquiry was conducted. The defendant's guilty plea to a misdemeanor was affirmed.

**Holding:** Since the defendant pled guilty, he forfeited any objections to the trial court's failure to conduct a CPL 180.50 inquiry into the factual and evidentiary basis for reducing a felony to a misdemeanor. *People v Hansen*, 95 NY2d 227, 230. Order affirmed.

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

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

**People v Kelly, No. 111, 6/29/2005**

The defendant was charged with murder for stabbing his ex-girlfriend's father with a 12-inch long bayonet. The prosecution theory was that defendant attacked the decedent deliberately and without provocation. Defendant claimed self-defense saying the deceased took the bayonet from a sheath hanging on the defendant's belt. During deliberations the jury requested to see the bayonet and

## NY Court of Appeals *continued*

sheath. When the jurors asked to handle the weapon, the court officer refused due to safety concerns. However, he agreed to wear it in his waistband in the same manner as the defendant did, and draw the weapon from the sheath; he told them that it easily slid out. The court officer advised the judge about the demonstration. After conferring with defense counsel, the judge instructed the jury to disregard the demonstration. After a guilty verdict and sentencing, the defendant filed a CPL 440.10 motion based on the unauthorized demonstration. The defendant's conviction and denial of the 440 motion were affirmed.

**Holding:** The court officer's demonstration to the jury was not a mode of proceedings error, since the court did not delegate its authority or even become aware of the action until it was reported later. *See People v Ahmed*, 66 NY2d 307. A mode of proceeding error does not require preservation since it goes to the essential validity of the trial process. *See People v Agramonte*, 87 NY2d 765, 770. In other cases, an objection is required to preserve an error concerning a court's failure to adhere to a statutorily or constitutionally grounded procedural protection. *People v Hernandez*, 94 NY2d 552. The court officer's actions were ministerial and unauthorized by the court. *People v Bonaparte*, 78 NY2d 26. Once aware of the problem, the court addressed it by giving defense counsel a chance to be heard. However, no protest was made, counsel agreeing to the curative instruction. "In all, the impropriety was protestable but unprotested, curable and cured." Order affirmed.

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

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

**People v Hanley, No. 112, 6/29/2005**

The defendant was charged with robbery for allegedly holding up two bartenders. He tried to call a witness, a third bartender, to testify about their bad reputation in the community for truth and veracity. The request was denied, and the defendant convicted after trial. Judgment modified on appeal.

**Holding:** The defendant had the right to call a witness to testify about the bad reputation of the prosecution witnesses for truth and veracity in the community. *See People v Hinksman*, 192 NY 421, 432. Bad reputation evidence was admissible based on a proper foundation, ability to contradict testimony of a key witness, and limited to general reputation for truth and veracity in the community. *People v Pavao*, 59 NY2d 282, 290. Both prosecution witnesses admitted to drinking while at work, were uncertain that the defendant had a gun, and knew the defendant as a difficult customer who asked to borrow money. The use of a concealed firearm was essential to the robbery first-degree charge. Penal Law 160.15 [4]. The defense theory was that the witnesses manufactured the story about the gun to keep him away from the bar. A proper foundation was laid since the proffered testimony was limited to reputation evidence by someone who knew and worked with the witnesses. *See People v Bouton*, 50 NY2d 130, 139. The error of rejecting the offer without inquiry was compounded by the prosecution's closing, which exploited the ruling by saying there had been no showing that the witnesses lacked credibility. There was a significant probability that the jury would have acquitted the defendant if they found the witnesses had lied. Order reversed, new trial ordered.

**Confessions (Advice of Rights) (Interrogation) (*Miranda* Advice)** **CNF; 70(10) (42) (45)**

**People v Paulman, No. 99, 6/29/2005**

The defendant was accused by a mother of sexually abusing her four-year-old daughter. A state trooper spoke with the defendant at his apartment, where he admitted various acts with underage children. Later at the barracks, the defendant put his statements in writing. After another investigator read the defendant his *Miranda* rights the defendant orally repeated his earlier statement with additional details. He was again Mirandized, and signed a waiver. Finally, the investigator typed the defendant's answers in response to specific questions. The defendant was charged in 22 counts of sexual misconduct. Suppression of his statements was denied and his conviction affirmed.

**Holding:** The defendant conceded that first oral statement was admissible. The Appellate Division properly found that the handwritten pre-*Miranda* statement was inadmissible. The test for custody is whether a reasonable person innocent of any wrongdoing would have believed that he was not free to leave. *People v Harris*, 48 NY2d 208, 215. Interrogation occurred when the trooper gave the defendant a notepad, and told him to write down his "best recollection" of what happened. The trooper should have known that these actions were reasonably likely to elicit an incriminating response. *See People v Ferro*, 63 NY2d 316, 322. Giving *Miranda* warnings alone may not remove the taint of a prior, unwarned statement. NY Const article I, § 6; *People v Bethea*, 67 NY2d 364, 368. When an improper, unwarned statement is part of a "single continuous chain of events," it is uncertain that *Miranda* warnings are effective. *People v Chapple*, 38 NY2d 112, 114. Here, there was a sufficiently "definite, pronounced break in the interrogation" to dissipate the taint from the *Miranda* violation. There was a change in police personnel, change in location, a time break between statements, and significant differences in the methods of eliciting

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information. Admission of the handwritten statement was harmless error. Order affirmed.

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

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

**People v Hill, No. 123, 7/6/2005**

In response to the defendant's request to have alibi witnesses testify in the grand jury, the prosecutor asked the grand jurors whether they wanted to hear from a list of witnesses. No mention was made about the substance of their testimony. The grand jurors asked what kind of witnesses these were, and the prosecutor answered that he did not know. The grand jury voted not to hear them and returned a true bill for murder. Dismissal on the defendant's motion, with leave to re-present, was affirmed.

**Holding:** The prosecutor's inaccurate and misleading answers to grand jurors undermined the integrity of the proceeding, potentially prejudicing the defendant. *See* CPL 210.20 [1] [c]. At the pre-trial stage, it was not possible to determine whether the prejudice could have been cured by a trial or guilty plea. Order affirmed.

**Dissent:** [Smith, J] The prosecutor's good faith error not to inform the grand jury more fully about the witnesses did not impair the integrity of the proceedings. *See* CPL 190.50 (6), 210.35(5). The prosecutor's conduct made the grand jurors' job more difficult but not impossible. *See People v Darby*, 75 NY2d 449, 455.

**Identification (Eyewitnesses) (In-court) (Lineups)** **IDE; 190(10) (24) (30)**

**People v Wilson, No. 124, 7/6/2005**

An eyewitness identified the defendant in a pre-trial lineup after seeing a picture of him provided by the police. A motion to suppress the identification was denied. The court found the lineup identification untainted by the viewing of the defendant's photograph. On appeal, the lineup identification was found error, but the conviction affirmed on the grounds that the eyewitness had an independent source for his in-court identification.

**Holding:** The trial court never determined whether there was an independent source for the in-court identification; there was no basis for affirming a ruling that was never made. Although the Appellate Division had the power to make a *de novo* independent source determination based on the evidence from the suppression hearing (*see* CPL 470.15 [1]; *People v James*, 67 NY2d 662, 664), the record was insufficient. To avoid the risk of reversal and a new hearing, it is advisable for the prosecution to come forward with any independent source evidence at a *Wade* hearing and give the trial court the opportunity to rule in the alternative. *See People v Burts*, 78 NY2d 20, 25. Order reversed, new trial ordered, to be preceded by an independent source hearing.

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

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

**Matter of Katherine B. v Cataldo, No. 113, 7/6/2005**

Petitioners, four protestors, were convicted of obstructing governmental administration and disorderly conduct for blocking traffic on 5th Avenue in New York City. Sentencing in Criminal Court was postponed to allow the prosecution to produce updated rap sheets. Supreme Court granted a prosecution *ex parte* motion to unseal several sealed case records mentioned in a criminal history search to support their sentencing recommendation. The sealed cases were convictions for violations, adjournments in contemplation of dismissal, and procedural dismissals. At sentencing the prosecution cited 20 prior acts of civil disobedience, drawn from the unsealed records, and requested jail time. After Supreme Court rejected the petitioners' request to vacate the unsealing order, they filed an article 78 in the Appellate Division challenging the unsealing of the records and their use in sentencing. This challenge was rejected without prejudice to the same arguments being raised on direct appeal.

**Holding:** The article 78 proceeding is converted to a civil appeal, the proper mechanism for seeking review in these circumstances. The law enforcement exception to the sealing requirement did not encompass a request by the prosecutor to unseal records for sentence enhancement. The sealing requirement was intended to protect accused persons from the effects of unsuccessful prosecutions that ended in favor of the accused. CPL 160.50; *Matter of Harper v Angiolillo*, 89 NY2d 761. Among the six exceptions to the rule is one that allows a law enforcement agency to file an *ex parte* motion supporting disclosure for investigative purposes. CPL 160.50 [1][d][ii]. While certain law enforcement agencies may seek to unseal records for investigatory purposes, prosecutors may request to unseal records under this statute only when the accused has moved for an adjournment in contemplation of dismissal in a case involving marijuana charges below felony grade. CPL 160.50 (1)(d)(i). (The petitioners did not challenge unsealing of records pursuant to CPL 160.55.) Order reversed.

## First Department

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

**Matter of Letisha D., 14 AD3d 455, 788 NYS2d 374 (1st Dept 2005)**

## First Department *continued*

An oficer stopped the appellant, then 13 years old, in the bus terminal at about 2:15 pm. He called the phone number she provided but got no answer. He warned the appellant that lying constituted the offense of false personation. The appellant provided an incorrect work number for her mother and a number for a nonexistent aunt, and incorrectly stated that her father was deceased. Family Court accepted the appellant's admission to false personation, adjudicated her a delinquent, and placed her on probation for 12 months during which Probation was ordered to monitor the appellant's school attendance and performance and her compliance with family rules.

**Holding:** The disposition failed to take into account the best interests of the juvenile and the community's need for protection and so was not the "'least restrictive available alternative.'" *See* Family Court Act 352.2(2)(a); *Matter of Gomez*, 131 AD2d 399, 401. This was the appellant's first arrest. She has no history of being a "'person in need of supervision.'" The only school she missed, after her arrest, was two days for court appearances. Probation's investigation and report disclosed that the appellant did not go out after school hours, was under her mother's control and was respectful and cooperative. Family life is stable, and her family is supportive of the appellant's need to find tutoring. This first offense "was isolated, minor and victimless." Probation could have been ordered to monitor the appellant's activities under the terms and conditions of an adjournment in contemplation of dismissal (ACD) without "branding" the appellant a delinquent. *See Matter of Justin Charles H.*, 9 AD3d 316. An ACD can be entered only prior to a determination of delinquency and dispositional order. Order reversed, finding vacated, matter remanded for entry of ACD order. (Family Ct, New York Co [Sturm, J])

**Assault (Evidence) (Lesser Included Offenses)** **ASS; 45(25) (50)**

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

**People v Johnson, 14 AD3d 460, 788 NYS2d 379 (1st Dept 2005)**

After an earlier jury trial, the defendant objected that the verdict acquitting him of first-degree manslaughter and convicting him of first-degree gang assault (along with second-degree manslaughter) amounted to an irreconcilable inconsistency. *See People v Gallagher*, 69 NY2d 525, 529-530. Both first-degree manslaughter and first-degree gang assault require intent to cause serious physical injury. The court dismissed the count of gang assault without seeking the jury's resolution of the conflict. *See* CPL 310.50(2); *People v Robinson*, 45 NY2d 448, 452. After the conviction was reversed for other error, the defendant was tried and convicted of second-degree gang assault.

**Holding:** The prosecution asserts that the first trial did not constitute an acquittal of first-degree gang assault, allowing the retrial for second-degree gang assault, which requires only the intent to cause physical injury. This contention ignores the principle of collateral estoppel, subsumed in the prohibition of double jeopardy, to protect against serial prosecution under multiple theories for the same event. *See People v Goodman*, 69 NY2d 32, 38. The earlier prosecution terminated with a final and valid judgment following the prosecution's full and fair chance to litigate the defendant's intent. *Cf People v Berkowitz*, 50 NY2d 333, 347. The first acquittal of first-degree manslaughter negated the intent element of first-degree gang assault and was tantamount to an acquittal on that charge. Since no proof beyond that needed for the greater offense is required for second-degree gang assault, a subsequent trial on that offense was barred by double jeopardy. Judgment reversed. (Supreme Ct, Bronx Co [Massaro, J])

**Counsel (Conflict of Interest) (Standby and Substitute Counsel)** **COU; 95(10) (39)**

**People v Walton, 14 AD3d 419, 788 NYS2d 107 (1st Dept 2005)**

**Holding:** The defendant filed with the Departmental Disciplinary Committee and in federal court meritless complaints against assigned counsel. Any conflict created by these actions was of the defendant's own making. He was not entitled to circumvent the "good cause" requirement for substitution of counsel by creating an artificial conflict. *See People v Linares*, 2 NY3d 507, 512. The court had properly denied the defendant's request for new counsel after a sufficient inquiry that showed the defendant failed to establish good cause. *See People v Sides*, 75 NY2d 822. Unjustified hostility toward counsel and disagreements with counsel's tactics did not require substitution of counsel. *See People v Sawyer*, 57 NY2d 12, 19. "Counsel's brief defense of his own performance, made in response to an inquiry from the court, did not create a prejudicial conflict. Counsel's innocuous and generalized remark fell far short of providing damaging factual information (*compare People v Rozzell*, 20 NY2d 712 [1967]), and the court's familiarity with the proceedings permitted it to make an informed determination without having to rely on defense counsel's statements (*see People v Vasquez*, 287 AD2d 334 [2001 *lv denied* 97 NY2d 709 [2002])." Judgment affirmed. (Supreme Ct, New York Co [Berkman, J])

**Police (General)** **POL; 287(20)**

## First Department *continued*

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

**People v Barrett, 14 AD3d 369, 787 NYS2d 321 (1st Dept 2005)**

**Holding:** Suppression of evidence seized at the time of the defendant's arrest was properly denied. The hearing court was entitled to accept some portions of police testimony even though it discredited other portions; the portions that were accepted satisfied the prosecution's burden of coming forward with credible evidence. The car had darkly tinted windows and contained two drug suspects; that police approached it with drawn guns and pulled the occupants out was not use of an unreasonable degree of force. *See eg People v Finlayson,* 76 AD2d 670, 678-681 *lv den* 51 NY2d 1011 *cert den* 450 US 931. Judgment affirmed. (Supreme Ct, New York Co [Yates, J])

**Dissent:** [Catterson, J] The officers had reasonable suspicion to approach the car, but the level of intrusion of subsequent actions required nothing less than probable cause. After a police sergeant heard an individual say on a cell phone he wanted "ladies" and asked to meet on 6th Avenue, police followed the individual, heard him say "I see you now" and saw him enter the car in question, which the police followed. When the car stopped for a light, police approached (one with gun drawn and pointed at the driver), yelled at the occupants to open the doors, pulled them out and to the ground, observed drugs in the car, and arrested the occupants. The court discredited officers' testimony that they could see into the vehicle. While there was reasonable suspicion justifying a stop and frisk of the individual initially heard and followed by police, the further actions were not reasonable.

**Guilty Pleas (Errors Waived By) (General) (Withdrawal)** **GYP; 181(15) (25) (65)**

**People v Ford, 14 AD3d 347, 786 NYS2d 742 (1st Dept 2005)**

The defendant was convicted upon a guilty plea of attempted third-degree burglary and a one-year sentence was imposed to run consecutively with sentences imposed in another county.

**Holding:** The court, its clerk, and defense counsel made numerous misstatements in naming the charged offenses and the offense to which the defendant was pleading guilty. The errors were not corrected. The factual allocution regarding the illegality of the defendant's presence in a store was vague. This, combined with "the incorrect recital of the charge in his formal arraignment on the plea," made the defendant's guilty plea fatally defective. *See People v Lopez,* 71 NY2d 662, 666. Even if the defect did not rise to the *Lopez* level authorizing review of a guilty plea absent a motion to withdraw, the conviction would be reversed in the interest of justice. Judgment reversed, plea vacated, matter remanded. (Supreme Ct, New York Co [Ward, J])

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

**People v Feliciano, 14 AD3d 308, 787 NYS2d 281 (1st Dept 2005)**

**Holding:** The defendant, who suffers from health problems including HIV, asthma, depression, disorders related to withdrawal from opiates, and anxiety, pled guilty to third-degree possession of drugs. If the defendant completed a designated drug program she would be allowed to withdraw her plea and plead to a misdemeanor for which she would receive time served. Failure to complete the program would result in a prison term of four and a half to nine years. Seven months after entering the drug program, she was advised that the program could not give her the "'intense' medical supervision'" she needed and that "her 'extensive medical issues' would be better addressed at a hospital-based residential program," which the required program would find. As a result, the defendant left the required program and was involuntarily returned to court. Despite defense counsel's argument that there must be a showing that the defendant intentionally left the program and disobeyed the court, the court found that the defendant had not been relieved of her obligation to continue in the program. The defendant's request to withdraw her plea was denied and a request for a hearing was denied. Where a defendant's medical condition prevents completion of a program required as an alternative to prison, the defendant should be given an opportunity to finish a program that can manage the defendant's condition. *See People v Jimenez,* 307 AD2d 880. If such a program is unavailable, the defendant should be allowed to withdraw the plea. Judgment modified, sentence vacated, matter remanded for appropriate placement or plea withdrawal. (Supreme Ct, Bronx Co [Webber, J])

## Second Department

**Counsel (Right to Counsel) (Right to Self-Representation)** **COU; 95(30) (35)**

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

**Madhu S. v Taijwaite S., 14 AD3d 513, 788 NYS2d 171 (2nd Dept 2005)**

**Holding:** The father appealed two orders of the Family Court. Assigned counsel filed a brief and moved to be relieved pursuant to *Anders v California,* 386 US 738 (1967). The first order denied the father's petitions to

## Second Department *continued*

modify the awarding of his children to the mother. The second order prohibited him from filing further petitions regarding the mother and children without certification from his counsel. As to that order, "the Family Court improvidently exercised its discretion by prohibiting the father from filing any further applications … without certification from his counsel the … claims asserted therein were not frivolous as defined in 22 NYCRR 130-1.1(c)." This imposes "an unwarranted financial restriction on the father's access to the courts." The court should be able to assess the frivolousness of any proposed filings. First order affirmed and counsel relieved, second order modified to delete specified portions as and modified, affirmed and counsel's motion to be relieved as to appeal of this order denied. (Family Ct, Kings C [Freeman, J])

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

**Counsel (Waiver)** **COU; 95(40)**

**Matter of Miranda v Vasquez, 14 AD3d 566, 789 NYS2d 202 (2nd Dept 2005)**

**Holding:** The father appealed an order to pay child support and an order denying his objection to the child support order. The father's lawyer failed to appear; the "Hearing Examiner erred in failing to advise the father that he had 'an absolute right to be represented by counsel at the hearing at his own expense, and that he was entitled to an adjournment for the purpose of retaining the services of an attorney.'" *Herbert v Herbert*, 149 AD2d 949, 949-950. The "[e]xaminer further erred in proceeding with the hearing without an explicit waiver of the right to counsel from the father." *See Alexander v Maharaj*, 299 AD2d 354. The first order is dismissed and the second order is reversed and the matter remitted for a new hearing and determination. (Family Ct, Kings Co [LeFreniere, SM])

**Motions (New Trial)** **MOT; 255(25)**

**Discovery (*Brady* Material and Exculpatory Information) (Prior Statements of Witness)** **DSC; 110(7) (26)**

**People v Mitchell, 14 AD3d 579, 789 NYS2d 185 (2nd Dept 2005)**

The initial police reports that the prosecutor turned over to the defense "described a very different person than the defendant"—a 30-year-old Hispanic male compared to a 44-year-old Black male—and were relied on heavily by the defense. After the first witness testified, the prosecutor gave additional police reports containing descriptions of the perpetrator that were much closer to the defendant's description.

**Holding:** The prosecution "must turn over to the defense any prior statements by a witness which relates to the subject matter of that witness's testimony for use on cross-examination." *See* CPL 240.45[1][a]; *People v Rosario*, 9 NY2d 286 *cert den* 368 US 866. "The material must be provided at a time when it can be useful to the defense." *See People v Goins*, 73 NY2d 989, 991. The court's remedial action did not obviate the prejudice here. *See People v Thompson*, 71 NY2d 918, 919-20. "When the late disclosure of *Rosario* material results in substantial prejudice to the defendant, a new trial is required." *See People v Smith*, 190 AD2d 700, 701. Judgment reversed and a new trial ordered. (Supreme Ct, Queens Co [Buchter, J])

**Judges (General)** **JGS; 215(9)**

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

**People v Chatman, 14 AD3d 620, 789 NYS2d 208 (2nd Dept 2005)**

**Holding:** "The course of conduct of the trial judge was such that he assumed the appearance of an advocate at the trial by his extensive examination of certain witnesses (*see People v Arnold*, 98 NY2d 63, 67-68 …). 'While a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on "the function or appearance of an advocate"' (*People v Zamorano*, 301 AD2d 544, 546, quoting (*People v Arnold*, *supra* at 67 …)." "'In last analysis [the trial judge] should be guided by the principle that his [or her] function is to protect the record, not to make it' (*People v Yut Wai Tom*, 53 NY2d 44, 58)." Although no objection was raised, the issue is reached in the "interest of justice jurisdiction since the trial judge's excessive intrusion deprived the defendant of his right to a fair trial (*see People v Zamorano*, *supra* at 547)." Here, the judge improperly elicited evidence that the defendant failed to mention his alibi when arrested and refused to answer questions. *See People v Larson,* 145 976, 977. Combined with the judge's extensive questioning of the defense alibi witnesses created an appearance of advocacy by the court. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Blumenfeld, J])

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

**People v Harris, 14 AD3d 622, 789 NYS2d 210 (2nd Dept 2005)**

Two jurors were challenged by the defense for cause when each made a statement during *voir dire* that cast doubt upon their ability to render a fair verdict.

**Holding:** Under CPL 270.20(1)(b), a party may challenge prospective jurors for cause if they have a state of

## Second Department *continued*

mind likely to preclude them from rendering an impartial verdict based upon the evidence at the trial. Following such challenges, jurors who have revealed doubt, due to prior knowledge or opinion, about having the ability to serve impartially must be excused unless they can state unequivocally that they can be fair. *See People v Kenner*, 8 AD3d 296, 297. Any doubt about a prospective juror's impartiality should cause courts to err on the side of excusing a juror, which at worst means that one impartial juror will have replaced another. The only direct evidence in this statutory rape case was the testimony of the complainant. A prospective juror said during *voir dire* that "a child who testified would have '[n]othing to gain by fabricating.' " Another prospective juror did not provide unequivocal assurance that she could render a verdict solely on the basis of evidence at trial. The defendant exhausted his peremptory challenges, preserving the error. The court also erred by letting the prosecution show the defendant had been arrested for selling drugs and by refusing to let the defense question a police witness on re-cross-examination about the complainant refusing to submit to medical examination. Judgment reversed, new trial ordered. (County Ct, Westchester Co [Walker, J])

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

**Forgery (Checks) (Elements) (Evidence) (Possession of a Forged Instrument)** **FOR; 175(5) (10) (15) (30)**

**People v Friedman, 14 AD3d 713, 789 NYS2d 250 (2nd Dept 2005)**

**Holding:** The defendant was convicted of several offenses, including second-degree forgery with respect to two checks and second-degree possession of a forged instrument based on 1) payment to a company against funds in the defendant's father's bank account via telephone, and 2) a power of attorney which the defendant forged and gave to another for purposes of cashing the two checks. Viewed in the light most favorable to the prosecution, the evidence as to the two checks was "legally insufficient to establish the defendant's guilt beyond a reasonable doubt." A necessary element of forgery is that the defendant signed another's name without that other's authorization. Penal Law 170.00(4); *see People v Levitan*, 49 NY2d 87, 91. The prosecution failed to submit proof that the defendant forged the checks, showing only that he signed his uncle's name to a power of attorney without authorization; testimony showed that the checks were issued directly to someone else who signed and endorsed them. As to the verbally-authorized payment made on the telephone, the prosecution failed to prove "that the defended possessed 'a written instrument which has been falsely made, completed or altered' (Penal Law § 170.00[7]; *see also* Penal Law § 170.25)." This unpreserved error is reviewed as a matter of discretion in the interest of justice. The conviction for possession of the power of attorney must also be vacated since the defendant was convicted of forging the same item. An individual may not be convicted of both forgery and criminal possession of a forged instrument with respect to the same forged instrument. *People v Ramos*, 259 AD2d 505. Judgment affirmed as modified. (Supreme Ct, Queens Co [Rosengarten, J])

**Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles] [Probable Cause Searches]) (Automobiles and Other Vehicles [Probable Cause Searches])** **SEA; 335(10[a][g]) (15[g])**

**People v Romeo, 15 AD3d 420, 789 NYS2d 537 (2nd Dept 2005)**

**Holding:** The defendant committed a traffic infraction, which justified the police stop of his car. *See People v Robinson*, 97 NY2d 341, 351-53. Police actions in placing the defendant in custody were justified by his failure to produce a driver's license and the subsequent discovery of marijuana on his person. However, these circumstances did not provide probable cause for the search of a closed duffel bag in the car's trunk, "particularly after a search of the vehicle's passenger compartment, conducted with the defendant's consent, revealed nothing (*see People v Torres*, 74 NY2d 224…)." There is no evidence that the consent given by the defendant to search the passenger area extended to the trunk or duffel bag in the trunk. *See People v Bryant*, 245 AD2d 1010, 1013. The evidence found as a result of the improper search must be suppressed, the conviction resting upon that evidence reversed, and the indictment on that count dismissed. Judgment affirmed as modified. (County Ct, Rockland Co [Resnik, J])

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

**Juveniles (Parental Rights)** **JUV; 230(90)**

**In re Jordan Amir B., 15 AD3d 477, 790 NYS2d 507 (2nd Dept 2005)**

**Holding:** The court correctly revoked the suspended judgments based on evidence that the mother violated the conditions thereof. *See Matter of Michael C.*, 4 AD3d 423. However, "the Family Court improvidently exercised its discretion in entering dispositional orders terminating the mother's parental rights without conducting any inquiry into the children's best interests (*cf. Matter of Caitlin H.*, 287 AD2d 715; *Matter of Shavira P.*, 283 AD2d 1027)."

## Second Department *continued*

Where a court presided over prior proceedings, acquainting the court with the parties, it may enforce a suspended judgment without a separate dispositional hearing if the record shows that the best interest of the child was considered. *Cf Matter of Ulawrence J.*, 10 AD3d 658. While these children had been in placement for a substantial period and the mother had violated the judgments, the children's best interests still must be considered. *See Matter of Queen Taisa Synethia G.*, 308 AD2d 584. Neither the court nor the children's Law Guardian provided evidence of the children's current circumstances and relationship with their mother, or of the effect termination of the mother's parental rights and potential adoption would have on the children. The children's therapist recommended encouraging continued connections between the children and the mother, which the court recognized only by continuing visitation "at least prior to any adoption." There was no evidence that the 15-year-old had consented to adoption. *See* Domestic Relations Law 111(1)(a). There being an inadequate record on which to judge the children's best interests, dispositional hearings are required. Judgment reversed and matter remitted. (Family Ct, Westchester Co [Duffy, J])

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

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

**Matter of Tolbert v Scott, 15 AD3d 493, 790 NYS2d 495 (2nd Dept 2005)**

**Holding:** Grandparents who can show the existence of extraordinary circumstances may seek custody of their grandchildren under a 2003 amendment to Domestic Relations Law 72. "'[A]n extended disruption of custody,'" which constitutes an "'extraordinary circumstance,'" is defined as "'a prolonged separation of the respondent parent and the child for at least 24 continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents.'" Domestic Relations Law 72[2][b]. The statutory amendments, remedial in nature, occurred while this matter was pending and were properly applied retroactively. However, an evidentiary hearing was required to determine if extraordinary circumstances exist and the facts supporting a finding of extraordinary circumstances must be stated. *See Matter of McArdle v McArdle*, 1 AD3d 822, 823. On remand, the grandmother bears the burden. *See Matter of Linda J. v Nakisha P.*, 10 AD3d 287. "Extraordinary circumstances" may be found in situations not expressly defined in Domestic Relations Law 72, such as where a parent is mentally or physically unfit to maintain custody, there has been a protracted separation of the parent and child, or "the attachment of the child to the custodian is so strong that separation threatens destruction of the child." *Matter of Bennett v Jeffreys*, 40 NY2d 543,550-551. This record is too conclusory and underdeveloped to allow a determination. Judgment reversed and matter remitted. (Family Ct, Queens Co [Ebrahimoff, J])

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

**People v Dewall, 15 AD3d 498, 790 NYS2d 182 (2nd Dept 2005)**

**Holding:** The defendant asserts that because the complainant was not present when the defendant allegedly violated the order of protection by going to her home, there was insufficient evidence to support a conviction of first-degree criminal contempt. *See* Penal Law 215.51(c). This unpreserved claim is reviewed as a matter of discretion in the interest of justice. The language of the statute clearly indicates the Legislature's intent to limit the law's scope and reach. *See People v White*, 188 Misc2d 394, 398-399. To interpret the words "'to stay away from the person or persons on whose behalf the order was issued'" (emphasis omitted) to encompass violation of any provision in an order of protection would render those words meaningless and superfluous. The invitation to create criminal liability where none is set out is declined. The evidence is legally insufficient for first-degree criminal contempt but is enough to support the conviction of second-degree criminal contempt. *See* Penal Law 215.50(3). The sentence is reduced accordingly. *See* CPL 470.15(2); *People v Jackman*, 8 AD2d 678. Judgment affirmed as modified. (Supreme Ct, Queens Co [McDonald, J])

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

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

**People v White, 16 AD3d 440, 790 NYS2d 544 (2nd Dept 2005)**

**Holding:** The defendant testified that she and the decedent, her boyfriend, who was much larger and heavier than she, were in the front seat of his car. He was choking and punching her when the gun discharged, killing him. This provided a reasonable basis for submitting the defense of justification for the jury's consideration. *See People v Magliato*, 68 NY2d 24. Judgment modified, second-degree murder conviction vacated, matter remitted for new trial. (Supreme Ct, Kings Co [D'Emic, J])

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

**Juveniles (Parental Rights)** **JUV; 230(90)**

## Second Department *continued*

**In re Katlynn G., 16 AD3d 504, 791 NYS2d 167 (2nd Dept 2005)**

The mother appealed a finding that she permanently neglected her child and the resulting termination of her parental rights.

**Holding:** Where it is established that a parent actively participated in abuse, failure to acknowledge that participation may be grounds for terminating parental rights. *See Matter of Travis Lee G.*, 169 AD2d 769, 770. The mother here admitted that the child had been injured while in the mother's "'care and custody,'" and that "'the child was an abused child.'" *See* Family Court Act 1046[a][ii]). However, she has maintained that she neither saw the abuse occur or know how the injuries were caused. Treatment programs may mandate that passive abusers acknowledge that they were in some way responsible for abuse children endured while in their care. *Matter of Jesus II.*, 249 AD2d 846, 847. As an admission to active participation in abuse is sought, a new fact-finding hearing is required to determine if the mother participated in or witnessed the abuse so that her insistence that she did not know how it occurred could be found an abdication of parental responsibility. Order of disposition reversed, fact-finding order vacated, and remitted. (Family Ct, Suffolk Co [Lehman, J])

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

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

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

**People v Evans, 16 AD3d 517, 792 NYS2d 112 (2nd Dept 2005)**

**Holding:** It was error to admit as a prior consistent statement a lengthy written statement by a witness whose testimony was attacked as recent fabrication where "the prior statement was not made at a time when [the witness] had no motive to lie (*see People v McLean*, 69 NY2d 426, 429 . . ." The prior statement contained numerous inconsistencies; "it was error to permit the prosecutors to impeach their own witness." *See Becker v Koch*, 104 NY 394, 401. Also rejected are the contradictory grounds offered on appeal for permitting the statement, ie that the defendant opened the door by establishing on cross-examination of the witness that she had made an earlier statement inconsistent with her statement to other officers and her trial testimony. The defense had carefully avoided any questions aimed at the substance of the statement. The error does not require reversal, as there is no reasonable probability that the defendant would have been acquitted absent the error. *See People v Seit*, 86 NY2d 92, 97, as the other evidence of the defendant's culpability was overwhelming. Judgment affirmed. (Supreme Ct, Kings Co [Knipel, J])

**Juries and Jury Trials (Challenges) (Competence) (Discharge) (Qualifications)** **JRY; 225(10) (15) (30) (50)**

**Trial (Mistrial)** **TRI; 375(30)**

**People v Simpkins, 16 AD3d 601, 792 NYS2d 170 (2nd Dept 2005)**

**Holding:** The court should have dismissed as grossly unqualified a juror who was repeatedly observed sleeping during trial. *See People v Rogers*, 266 AD2d 481, 482. Another juror reported after both sides rested that the juror had only been kept awake by efforts of other jurors. When questioned by the court, the juror alleged to have been sleeping said he had closed his eyes but was aware of the proceedings. The court observed the juror sleeping during much of the read-back of testimony and reviewing of a videotape in evidence. Other jurors said that they had to continually nudge the juror to wake him. Where discharge of the juror would have made continuation of the trial impossible, a mistrial should have been declared. *See* CPL 270.35, 280.10. Judgment reversed, new trial ordered. (County Ct, Nassau Co [Carter, J])

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

**Records (General)** **REC; 327(25)**

**People v Hussari, 17 AD3d 483, 794 NYS2d 64 (2nd Dept 2005)**

**Holding:** The "report" of the Supreme Court as to the defendant's competence, made after this appeal was held in abeyance and the matter remitted, is rejected. Once the court found that reconstruction of the record was not possible, only that finding should have been reported. "When 'a record cannot be reconstructed because of the lapse of time, the unavailability of the participants in the proceeding or some similar circumstance, there must be a reversal' (*People v Smith*, 248 AD2d 568, quoting *People v Harrison*, 85 NY2d 794, 796)." "[T]here were no contemporaneous psychiatric reports of the defendant's mental condition at the time of trial to determine his competency to stand trial." Reconstruction of the defendant's mental capacity to stand trial is not possible here, requiring reversal. *See People v Peterson*, 40 NY2d 1014. Judgment reversed, new trial ordered. (Supreme Ct, King Co [D'Emic, J])

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

## Second Department *continued*

**People v Warcha, 17 AD3d 491, 792 NYS2d 627 (2nd Dept 2005)**

After 10 months of representation using Spanish interpreters, defense counsel learned that his client's language was Quiche, a Guatemalan dialect. The client spoke "limited" Spanish. Two Spanish interpreters opined that the defendant could understand Spanish if spoken slowly, though his ability to express himself in that language was limited. A recess was ordered to find a Quiche interpreter but one could not be found despite diligent efforts. The court found that the defendant's understanding was not so limited as to nullify the proceedings, and allowed trial to proceed.

**Holding:** "'For the constitutional right to be present during a trial to be meaningful, a defendant has the right to have the testimony interpreted to him in a language which he understands so he may meaningfully participate in his own defense' (*People v Perez*, 198 AD2d 446, 447…). 'Only when it becomes acutely obvious that the defendant is exhibiting an inability to understand the trial proceedings or to communicate with his counsel due to a language barrier should the court take affirmative steps to determine the need of an interpreter' (*People v Ramos*, 26 NY2d 272, 275)." The determination of whether an interpreter is necessary is best left to the "sound discretion of the trial court, which is in the best position to make the fact-intensive inquires necessary to determine whether" an interpreter is needed to uphold the defendant's constitutional rights. *See People v Navarro*, 134 AD2d 460. There was evidence that the defendant had been speaking Spanish with coworkers for two years, had been taught in Guatemalan schools in both Spanish and Quiche, communicated with counsel via a Spanish interpreter for several months, and at the time of his arrest made statements in English. Judgment affirmed. (Supreme Ct, Queens Co [Hollie, J])

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

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

**People v Jeffrey, __ AD3d __, 795 NYS2d 703 (2nd Dept 2005)**

**Holding:** The court erred in denying a motion to suppress the defendant's pre-*Miranda* statement since there was insufficient evident to indicate the police officer's queries were` due to concern for the safety of fellow officers or the general public. *See People v Solano*, 148 AD2d 761. Additionally the court erred in failing to suppress the pistol found in the car as a result of the defendant's statement. There is no evidence to support the claim that the pistol would have inevitably been discovered. Inventory searches must be conducted pursuant to established procedures clearly limiting individual officers' conduct, assuring that the searches are consistently and reasonably carried out. *See People v Galak*, 80 NY2d 715, 719. There was no testimony here about the officer's "knowledge of the general objectives of an inventory search" nor evidence establishing the existence of a department policy regulating such searches. *See People v Russell*, 13 AD3d 655, 657. Judgment reversed, suppression granted, matter remitted. (Supreme Ct, Kings Co [Carroll, J])

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**Sex Offenses (General) (Sentencing)** **SEX; 350(4) (25)**

**People v Hawkins, __ AD3d __, 795 NYS2d 332 (2nd Dept 2005)**

**Holding:** The prosecution "failed to establish by clear and convincing evidence that the defendant used 'forcible compulsion' as that term is defined in Penal Law §130.00(8) in the commission of the attempted rape of the complainant (*see Doe v. Pataki*, 3 F Supp 2d 456, 472; Correction Law §168-n[3]). Accordingly, the 10-point assessment under Risk Factor 1 for 'used forcible compulsion' must be deducted bringing the defendant's total risk factor score to 105, which falls within level two," not three. *See People v Collazo*, 7 AD3d 595. Order reversed, the defendant reclassified as a level two sex offender. (Supreme Ct, Kings Co [Barros, J])

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**Sentencing (Persistent Violent Felony Offender)** **SEN; 345(59)**

**People v Lawrence, 17 AD3d 697, 794 NYS2d 118 (2nd Dept 2005)**

**Holding:** The motion to suppress evidence was correctly denied since the initial encounter was lawful and the intrusion in to the vehicle "was reasonably limited in scope and intensity." *See People v Hollman*, 79 NY2d 181. The accomplice's testimony was legally sufficient to establish guilt; it was sufficiently corroborated by independent evidence linking the defendant to the crime. *See* CPL 60.22[1]; *People v Breland*, 83 NY2d 286. Resolution of witness credibility is primarily for the jury (*People v Gaimari*, 176 NY 84, 94) and jury determinations should be accorded weight on appeal. *See People v Garafolo*, 44 AD2d 86, 88. The defendant's claim of prejudice from the jury instructions was not preserved since he did not object or request supplemental instructions. *See* CPL 470.05[2]; *People v Mack*, 115 AD2d 790, 791. However, it was error "to sentence the defendant as a persistent violent felony offender based on his Federal conviction of possession of a firearm under 18 USC § 922(g)(1)." Federal law does not require as an element that the firearm be loaded unlike the equiva-

## Second Department *continued*

lent New York crime. Penal Law 265.02(4). Under Penal Law 265.01(1), possession of an unloaded gun is a misdemeanor. Judgment affirmed in part, vacated in part and remitted. (County Ct, Suffolk Co)

## Third Department

**Grand Jury (General)** **GRJ; 180(3)**

**Larceny (Grand Larceny)** **LAR; 236(40)**

**People v Serkiz, 17 AD3d 28, 790 NYS2d 296 (3rd Dept 2005)**

The defendant was indicted for third-degree grand larceny for using 32 surplus sick days as an employee of the Town of Union while working for the Town of Chenango on the same days. The defendant moved to dismiss the indictment for want of legally sufficient evidence, a defective grand jury proceeding, and in the interest of justice. County Court dismissed the indictment on the latter two grounds.

**Holding:** The grand jury evidence was legally sufficient to sustain the indictment. A grand jury indictment can only be dismissed as defective if the integrity of the grand jury proceeding is impaired and prejudice to the defendant may result. *See* CPL 210.35(5); *People v Spencer*, 289 AD2d 877, 877-78 *lv den* 98 NY2d 655. Such a dismissal is limited to "those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the [g]rand [j]ury." *See People v Huston*, 88 NY2d 400, 409. County Court erred by finding that the integrity of the proceedings here were impaired by a failure to present evidence in mitigation or defense, in the form of testimony that employees often did, under an unwritten policy, take sick days accumulated in excess of the maximum allowable even if not sick. The witness who had said this in arbitration had been recalled to the grand jury and said that he never discussed such a scheme with the defendant or told the defendant this was permissible. In any event, the prosecutor has largely unfettered discretion in presenting a case and need not present mitigation. *See People v Lancaster*, 69 NY2d 20, 25-26. There has been no showing of "a particularized need or gross and prejudicial irregularity in proceedings." *People v Lewis*, 98 AD2d 853, 854. Nor are there extraordinary or compelling circumstances that would support a dismissal in the interest of justice. *See* CPL 210.40. The court's finding that the defendant's conduct was less serious than other forms of third-degree grand larceny is unsupportable. There was no showing that other employees who "burned up" sick time then worked for another, receiving double compensation. Order reversed, indictment reinstated. (County Ct, Broome Co [Smith, J])

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

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

**Re La Rocca v Goord, 15 AD3d 809, 790 NYS2d 265 (3rd Dept 2005)**

The defendant was denied merit time eligibility in prison because his disciplinary record included 213 days of keeplock confinement. He appealed the decision by the Commissioner of Correctional Services upholding the denial.

**Holding:** Directive 4790 provides clear language that inmates with disciplinary sanctions totaling 60 or more days in the special housing unit or keeplock are ineligible for merit time. *See* 7 NYCRR 280.2 [b] [3]. Since the defendant's disciplinary record included more than 60 days of keeplock time, there was no abuse of discretion in withholding the defendant's merit time. *See Matter of Scarola v Goord*, 266 AD2d 598 *lv den* 94 NY2d 760. The defendants other claims are without merit. Judgment affirmed. (Supreme Ct, Ulster Co [Bradley, J])

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

**Civil Rights (General)** **CVR; 67.5(10)**

**Trial (Prejudicial Publicity)** **TRI; 375(40)**

**Heckstall v McGrath, 15 AD3d 824, 790 NYS2d 566 (3rd Dept 2005)**

The petitioner claims that the defendant exceeded his authority by narrowly interpreting Civil Rights Law 52 as prohibiting audiovisual coverage only during the testimony of subpoenaed witnesses. The Article 78 proceeding was initiated to prohibit the respondent from permitting audiovisual coverage of court proceedings in the petitioner's action.

**Holding:** Civil Rights Law 52 forbids "audiovisual coverage of all 'proceedings' in which the testimony of subpoenaed witnesses 'is or may be taken'" (emphasis removed). Allowing audiovisual coverage negatively impacts the "overall fairness of petitioner's trial in a manner which will evade effective appellate review and in a manner which is expressly prohibited by the Legislature." The remedy of prohibiting audiovisual coverage is appropriate here; by narrowly interpreting the statute to allow what the Legislature expressly prohibited the respondent acted in excess of his authority and adversely affected the petitioner's fundamental right to a fair trial. *See Matter of Santiago v Bristol*, 273 AD2d 813, 814. The cure for this harm may not be adequately addressed on direct appeal. *See Matter of Rush v Mordue*, 68 NY2d 348, 354. Petition for prohibition is granted. (County Ct, Rensselaer Co [McGrath, J])

## Third Department *continued*

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

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

**People v Ryan, 17 AD3d 1, 790 NYS2d 723 (3rd Dept 2005)**

The defendant and two others were charged with multiple offenses following a robbery. The defendant was convicted following a jury trial at which the statements of his non-testifying co-defendants were admitted into evidence on redirect examination.

**Holding:** The constitution prohibits use of an out-of-court statement against a defendant if the statement is testimonial, the declarant is unavailable at trial, there was no opportunity for the defendant to cross-examine the declarant, and "the statement is offered for the truth of the matter asserted therein." *See* US Const 6th Amend; *Crawford v Washington*, 541 US 36 (2004). *Crawford* established a new rule for conducting all prosecutions and applies to this case, which was pending when *Crawford* was decided. Testimonial statements may be offered for purposes other than establishing the truth of what is asserted. *See People v Newland*, 6 AD3d 330, 331 *lv den* NY3d 679. However, the prosecution's claim that the evidence here was introduced on redirect to "elaborate on matters incompletely or misleadingly touched upon by the defendant" is without merit. The defendant only asked the witness about whether the codefendants had made statements about the use of a gun during the robbery. This did not open the door to other aspects of the codefendants' statements such as their accounts of the defendant's role in the offense. The prosecutor's use of the statements in summation made clear they were presented for the truth of what was said. The error damaged the defense by "buttressing the reliability of the defendant's own confession" while also providing additional proof of guilt. Judgment reversed, matter is remitted for a new trial. (County Ct, Ulster Co [Bruhn, J])

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

**Juries and Jury Trial (Challenges) (Qualifications) (Selection)** **JRY; 225(10) (50) (55)**

**People v Russell, 6 AD3d 776, 791 NYS2d 198 (3rd Dept 2005)**

The defendant was convicted of murder and weapons possession. He claimed the court erred in denying a challenge for cause for a prospective juror after the juror indicated that the juror's impartiality might be affected if the defendant exercised his right not to testify.

**Holding:** The juror's response was sufficient to cast serious doubt on the juror's ability to render a fair trial, as there was no unequivocal assurance by the juror of an ability to render an impartial verdict. The court erred in not excusing the juror for cause. *See People v Johnson*, 94 NY2d 600, 614-615. The prosecution's claim that the defense exercise of its only remaining peremptory challenge was a mere tactical move to preserve the error for appeal lacks merit; an improper denial of a challenge for cause is not subject to harmless error analysis. *See eg People v Hausman*, 285 AD2d 352 *lv den* 97 NY2d 656. As a new trial is required, other errors are addressed to guide the court. Proof of the defendant's prior assaultive conduct was material as to motive and *modus operandi*, but should have been limited to behavior as to one person and the decedent's effort to act as a mediator between that person and the decedent. The jury should be instructed on the purpose and use of such evidence. The charges of intentional and depraved mind murder must be submitted to the jury in the alternative. *See People v Gallagher,* 69 NY2d 525, 530. Judgment reversed, matter remitted for a new trial. (County Ct, Warren Co [Austin, J])

**Driving While Intoxicated (Chemical Test [Blood or Urine])** **DWI; 130(5)**

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

**State v Miller, 17 AD3d 708, 793 NYS2d 231 (3rd Dept 2005)**

After being arrested for driving while intoxicated, the defendant was taken to a hospital "where he consented to the withdrawal of blood for a chemical test to determine his blood alcohol level." Following a suppression hearing at which the court excluded evidence on the manner in which the defendant's blood was withdrawn, the defendant was convicted on several counts including second-degree vehicular manslaughter.

**Holding:** The record contains no evidence about the qualifications of the "nurse" who had withdrawn the defendant's blood, so the manner in which blood was drawn could not be evaluated for its conformity to Vehicle and Traffic Law 1194 (4) (a) (1). Such conformity is required even if the defendant has consented to the withdrawal of blood. *See People v Reynolds*, 307 AD2d 391 *lv den* 1 NY3d 578. Appeal held in abeyance, remitted for a new suppression hearing. (Supreme Ct, Albany Co [Lamont, J])

**Grand Jury (General)** **GRJ; 180(3)**

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

**Kidnapping (Elements) (Instructions)** **KID; 235(15) (20)**

**People v Gudz, __ AD3d __, 793 NYS2d 556 (3rd Dept 2005)**

The defendant was convicted of attempted kidnap-

## Third Department *continued*

ping. His defense was mistake of fact as to the identity of the complainant, whom he believed to be someone with whom he had arranged via the Internet to engage in sexual role-playing. The defendant was prevented from introducing hardcopies of instant message conversations he had with another person whom the defendant claimed was to be a willing party to the abduction.

**Holding:** Given the testimony of the defendant to the grand jury and the grand jury's finding of a *prima facie* case for attempted kidnapping (*see gen* CPL 190.65), there is no presentment error notwithstanding the court's preclusion of the defendant's documentary evidence offered as corroboration for his testimony. *Cf People v Kaba*, 177 AD2d 506, 508 *lv den* 79 NY2d 859. A "mistake of fact" defense is not applicable unless the factual mistake negatives the *mens rea* required for the commission of an offense. *See* Penal Law 15.20 [1] [a]. Because the court's trial jury instruction required that such a mistaken belief must also be reasonable under the circumstances, the instruction was in error. *See People v Grinage*, 269 AD2d 780, 780 *lv den* 95 NY2d 853. As *mens rea* was the dominant issue at trial, this error cannot be viewed as harmless beyond a reasonable doubt. The judgment below is reversed and the matter is remitted for a new trial. (County Ct, Columbia Co [Crzjka, J])

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

**Possession (General)** **POS; 288.3(10)**

**People v Burns, 17 AD3d 709, 792 NYS2d 700 (3rd Dept 2005)**

The defendant was convicted of criminal possession of marihuana after being arrested as a passenger in a vehicle in which marihuana was found in the locked trunk.

**Holding:** To establish constructive possession, the prosecution must present evidence that the defendant exercised 'dominion or control' over the property. *See* Penal Law 10.00 [8]; *People v Manini*, 79 NY2d 561, 573. The defendant's presence in the vehicle where drugs are found by itself is insufficient to establish a sufficient level of control. *See People v Headley*, 74 NY2d 858, 859. Lack of any direct evidence linking the defendant to the contraband in the trunk placed a "'heavy burden'" on the prosecution to establish this essential element. Without proof that the defendant had the "'ability and intent to exercise dominion or control over the contraband'" (*People v Wesley*, 73 NY2d 351, 361-362) constructive possession cannot be established. This is true even if the defendant knew of the presence of marihuana, as indicated by evidence that there was a strong smell of marihuana in the car and that the defendant was present during a discussion by others in the car that they were going to "'pick up something'" at the casino. The defendant had no key to the car, the drugs were not within the defendant's sight or reach, and nothing belonging to the defendant was shown to be present in the trunk. Judgment reversed, indictment dismissed. (County Ct, St Lawrence Co. [Nicandri, J])

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

**People v Mount, 17 AD3d 714, 792 NYS2d 697 (3rd Dept 2005)**

**Holding:** Pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C), the defendant was evaluated in anticipation of release from a 5-year prison sentence for first-degree sexual abuse and second-degree assault and presumptively classified as a level II sex offender. After a hearing, the court accepted the Board of Examiners of Sex Offenders recommendation that the classification be raised to risk level III. A departure from the presumptive guidelines is warranted when aggravating or mitigating factors exist "'of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines.'" *Matter of O'Brien v State of New York Div. Of Probation and Correctional Servs.*, 263 AD2d 804, 805-806 *lv den* 94 NY2d 758. Clear and convincing evidence is required for such a determination. *See* Correction Law 168-n(3); *People v Bottisti*, 285 AD2d 841, 841-842. Here, the defendant had been assessed the maximum number of points in the categories of prior conviction of sexual misconduct and alcohol and substance abuse. A departure was not warranted based on the same factors. *See People v Hoppe*, 12 AD2d 792, 793-794. Order reversed, the defendant classified as a risk level II sex offender. (County Ct, Saratoga Co [Scarano, Jr., J])

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

**People v Hill, 17 AD3d 715, 792 NYS2d 695 (3rd Dept 2005)**

Prior to the defendant's anticipated release from prison on charges of sexual contact with a minor child, a risk assessment instrument was prepared pursuant to the Sex Offender Registration Act, classifying the defendant as a risk level II violent sex offender. The prosecution objected to this classification, requesting a level III classification based on information that two other children had also been abused. The matter was adjourned, over objection, for reconsideration by the Board of Examiners of Sex Offenders. At a second hearing, the prosecution again objected to the Board's classification, asking for a level III based on a statement by the complainant that the abuse began when she was four years old. The matter was again adjourned over objection. The Board issued a new recommendation classifying the defendant as a level III violent sex offender because the complainant was under 11,

## Third Department *continued*

apparently on the basis of factual assertions in the case summary. The court then adopted that recommendation.

**Holding:** Where the accuracy of the case summary is conceded, it may provide sufficient evidence to support a classification. *See People v Dorato*, 291 AD2d 580, 581. The defendant here disputed the central allegation regarding the complainant's age. The complainant's written statement was never offered and was not included in the record on appeal. Further, the court failed to issue an order setting out its determinations, "'and the findings of fact and conclusions of law on which the determinations are based.'" Correction Law 168-n(3). Order reversed, matter remitted. (Count Ct, St Lawrence Co [Nicandri, J])

**Driving While Intoxicated (Chemical Test [Blood or Urine]) (Evidence)** **DWI; 130(5) (15)**

**People v Griesbeck, 17 AD3d 717, 793 NYS2d 227 (3rd Dept 2005)**

**Holding:** The defendant was convicted of driving while intoxicated. Vehicle and Traffic Law (VTL) 1192(2) and (3), 1193(1) (c). At trial, the prosecution failed to show that the defendant's blood sample was taken in compliance with the statute. *See* VTL 1194(4)(a)(1)(ii). No evidence was presented that the medical technologist who performed the blood draw was authorized to do so by a physician. *See People v Moser*, 70 NY2d 476. The test results were therefore improperly admitted. *See People v Olmstead,* 233 AD2d 837. The court properly granted the motion to set aside the jury verdict. The court should not have set aside the count of common-law driving while intoxicated (*see* VTL 1192[3]). A new trial on that count is warranted, however, because the court instructed the jury that they could consider the blood tests results as to that count. The error in admitting the blood test results cannot be said to be harmless. Order modified, count one reinstated, matter remitted for new trial on that count, and as modified, affirmed. (County Ct, Sullivan Co [La Buda, J])

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

**Matter of McPherson v Goord, 17 AD3d 750, 793 NYS2d 230 (3rd 2005)**

**Holding:** The petitioner "appeared before the Time Allowance Committee for consideration of the amount of good behavior allowance which would be granted toward the reduction of his sentence." *See* 7 NYCRR 261.3. The Committee withheld all the petitioner's good time, which was affirmed on administrative appeal. The "petitioner's refusal to participate in a recommended treatment program provides a rational basis for withholding a good behavior allowance." *See Matter of Thomas v Time Allowance Comm. at Arthur Kill Correctional Facility*, 4 AD3d 637. While the petitioner's institutional record and prior criminal record contain no evidence of drug abuse, he asked the complainants in the instant case "where he could buy some 'smoke' " just before the offense. The presentence report indicates he admitted using marijuana. Judgment affirmed. (Supreme Ct, Albany Co [Teresi, J])

## Fourth Department

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

**People v Knightner, 11 AD3d 1002, 782 NYS2d 333 (4th Dept 2004)**

The defendant was convicted of several offenses, including third-degree sale and possession of drugs and fifth-degree possession of drugs.

**Holding:** The only evidence that the defendant sold drugs was the testimony of the buyer, an accomplice as a matter of law. *See People v Artis*, 182 AD2d 1011, 1013. There was no corroborative evidence of the buyer's testimony that the defendant was allowed to use the buyer's truck in exchange for drugs. Corroboration of accomplice testimony is required by law (*see* CPL 60.22(1); *People v Arnott,* 143 AD2d 761, 763), and must be independent of the accomplice's testimony. *See People v Steinberg*, 79 NY2d 673, 683. There was not sufficient evidence to support the possession counts. The defendant's mere presence in an area where drugs were found was not enough to show that he exercised the dominion and control required to establish constructive possession. *See People v Scott,* 206 AD2d 392, 393-394. Judgment modified, counts five, six and seven reversed and dismissed. (Supreme Ct, Erie Co [Wolfgang, J])

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

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

**People v Howard, 12 AD3d 1127, 785 NYS2d 632 (4th Dept 2004)**

**Holding:** County court erred by denying without a hearing the defendant's CPL 440.10(1)(h) motion to vacate the judgment. The defendant's supporting affidavit asserted that prior counsel had failed to inform the defendant of a plea offer and to advise him whether or not to accept that offer, and that the defendant would have accepted the offer had it been communicated to him. This sworn statement supports the claim that he was denied effective assistance of counsel. *See People v Sherk*, 269 AD2d 755 *lv den* 95 NY2d 804. The factual issue raised requires a hearing. The office stamp on a letter from the prosecutor to the defendant's prior counsel setting out the

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offer does not establish that a copy was mailed to the defendant. Prior counsel's affidavit does not justify denial of a hearing. Even if an affidavit could constitute conclusive documentary evidence, the statements in prior counsel's affidavit do not conclusively establish that the defendant received the offer nor refute the allegation that he did not advise the defendant about what to do. Amended order reversed, matter remitted. (County Ct, Cayuga Co [Fandrich, J])

**Family Court (Violation of Family Court Orders)** **FAM; 164(60)**

**Matter of Jefferson County Department of Social Services o/b/o Helen L.H. v Mark L.O., 12 AD3d 1037, 785 NYS2d 216 (4th Dept 2004)**

**Holding:** Family Court granted the part of the respondent's motion seeking to vacate an order finding the respondent in violation of an order of protection and sentencing him to a period of 102 days of incarceration, which the respondent had already served. The respondent "is not aggrieved by Family Court's denial of that part of his motion seeking to vacate the first ordering paragraphs of the order of commitment and amended order of commitment (*see generally* CPLR 5511; *Town of Massena v Niagara Mohawk Power Corp,* 45 NY2d 482, 488…)," which "were implicitly vacated upon vacatur of the underlying order finding him in violation of the order of protection." Appeal dismissed. (Family Ct, Jefferson Co [Schwerzmann, A.J.])

**Sentencing (Restitution)** **SEN; 345(71)**

**People v Therrien, 12 AD3d 1045, 784 NYS2d 771 (4th Dept 2004)**

**Holding:** Although the defendant failed to object to the imposition of restitution at the time of sentencing (*see People v Delair*, 6 AD3d 1152), the claim that such imposition was improper is reviewed in the interest of justice. "[B]ecause restitution was not part of the plea agreement, the court should have afforded defendant the opportunity to withdraw his plea before ordering him to pay restitution (*see Delair,* 6 AD3d at 1152…)." Also reviewed despite a failure to preserve is the claim that the court erred in relying solely upon the presentence report when determining the amount to be paid. *See People v White*, 266 AD2d 831, 832. Failure to conduct a restitution hearing was error. *See People v Hendrix,* 2 AD3d 1479. Judgment modified, sentence vacated, matter remitted. (County Ct, Jefferson Co [Martusewicz, J])

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

**Matter of Green v Bellini, 12 AD3d 1148, 784 NYS2d 813 (4th Dept 2004)**

The Monroe County District Attorney brought an original CPLR article 78 proceeding seeking prohibition against an Acting Supreme Court Justice who, while sitting as a local criminal court, dismissed pursuant to CPL 180.70 (4) a felony complaint due to the prosecution's failure to go forward at a preliminary hearing. The prosecutor asserted that the action was without or in excess of the judge's jurisdiction.

**Holding:** The petition must be dismissed for failure to join the criminal defendant as a respondent, "as both a necessary party to the proceeding and the real party in interest therein (*see Matter of Brown v Braun*, 240 AD2d 663, 664…; *see generally* CPLR 3211 [a] [10]; 1001 [b])." The criminal defendant is an individual in whose favor the respondent allegedly acted. *See* CPLR 7802 (c). Statutory law contemplates the naming of a criminal defendant in article 78 proceedings under the present circumstances. *See* CPLR 7804(i). While, technically, no matter was pending against the criminal defendant at the time this proceeding was instituted, the object is to reinstate the action against him. He is "a person 'who might be inequitably affected by a judgment in the [proceeding]' (CPLR 1001 [a]; *see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 819, *cert denied* __ US __, 125 S Ct 570)." Petition dismissed.

**Forgery (Possession of a Forged Instrument)** **FOR; 175(30)**

**People v Cunningham, Sr., 12 AD3d 1131, 785 NYS2d 244 (4th Dept 2004)**

**Holding:** A year before trial the prosecutor sought to have defense counsel disqualified. The court made adequate inquiry concerning conflicts (*see People v Gomberg*, 38 NY2d 307, 314) and properly found that the defendant knew of the potential risks and chose to continue with counsel. The court did not abuse its discretion by denying the defendant's motion for an adjournment on the eve of trial for the purpose of obtaining new counsel.

Those parts of the judgment convicting the defendant of 19 counts of second-degree possession of a forged instrument must be reversed because they are included offenses of the 19 counts of second-degree forgery. Judgment modified and as modified, affirmed. (County Ct, Oneida Co [Daley, J])

**Courts (General)** **CRT; 97(17)**

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

## Fourth Department *continued*

**People v Van Dyne, 12 AD3d 120, 784 NYS2d 795 (4th Dept 2004)**

Charged with a murder that occurred during a robbery, the defendant appeared in County Court on Jan. 19, 1999 to enter a guilty plea. A four-page plea agreement including a waiver of the right to appeal with respect to all constitutional grounds. After a long colloquy but before entry of the plea, the prosecutor gave the court a letter stating that the notice of intent to seek the death penalty was withdrawn, conditioned on the defendant's plea to first-degree murder according to all the terms in the plea agreement. After the court "'accepted'" the written withdrawal, the defendant pled guilty.

**Holding:** The defendant claims on appeal that the death notice was not validly withdrawn before he entered his plea, as required by *Matter of Hynes v Tomei* (92 NY2d 613 *cert den* 527 US 1015). The *Hynes* claim survives the defendant's waiver of the right to appeal. The issue raised (that guilty pleas entered under a New York death notice are invalidly coerced because under the statute only persons who exercise their right to trial can be put to death) implicates "'the very power of the court' (*People v Callahan*, 80 NY2d 273, 281) and involve matters of 'societal concern' with 'implications for the integrity of our criminal judicial system.'" Despite the defendant's failure to preserve the claims by seeking to withdraw his plea or vacate the judgment, the issues are reviewed in the interest of justice. Where the defendant's plea was a condition precedent to withdrawing the notice of intent, the defendant was faced with the unconstitutional choice condemned in *Hynes*. Further, the prosecution did not comply with the filing requirements for attempting to withdraw the notice. *See* CPL 250.40 (4). The letter was not "filed" where it was given to the judge, not to the County Clerk, the proper official with whom to file Count Court documents. *See* County Law 525. Judgement reversed, plea vacated, matter remitted. (County Ct, Monroe Co [Marks, J])

**Juveniles (Delinquency–Procedural Law) JUV; 230(20)**

**Matter of Gerald R.M., 12 AD3d 1192, 785 NYS2d 256 (4th Dept 2004)**

**Holding:** The respondent-appellant claims that the petition alleging him to be a juvenile delinquent did not comply with Family Court Act 311.2(3) and that such failure is a non-waivable jurisdictional defect. Cases interpreting *People v Alejandro* (70 NY2d 133, 138) "held that, where a juvenile delinquency petition fails to contain non-hearsay allegations sufficient to support each element of the crime charged, 'an omission of this nature in a criminal information renders the accusatory instrument jurisdictionally defective' (*Matter of David T.*, 75 NY2d 927, 928…)." But in *People v Casey* (95 NY2d 354, 362), the court said that *Alejandro* had dealt only with the "'total absence' of evidence supporting an element of the crime charged and not the existence of hearsay information supporting that charge." *Casey* held that violation of CPL 100.40 (1) (c) is not jurisdictional and is therefore waivable. *Casey* tacitly overruled juvenile delinquency cases such as *David T.* The respondent-appellant's failure to preserve the issue regarding the lack of non-hearsay allegations precludes review. Other issues raised are without merit. Order affirmed. (Family Ct, Seneca Co [Falvey, J])

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

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

**People v Couser, 12 AD3d 1040, 785 NYS2d 212 (4th Dept 2004)**

**Holding:** The defendant's convictions of first-degree murder, second-degree intentional murder, and attempted second-degree intentional murder are not supported by legally sufficient evidence. While the defendant was incarcerated, he conspired with others to have the complainant in his case killed. The co-conspirators did not find the complainant, but killed and wounded members of the complainant's family. There is no evidence that the defendant shared a community of purpose to kill anyone other than the complainant in his case. *See People v Monaco*, 14 NY2d 43, 45. The defendant's convictions of second-degree conspiracy (Penal Law 105.15) and second-degree felony murder (Penal Law 125.25 [3]) are supported by the evidence, the necessary intent being inferable from the intent to commit the burglary. *See People v Gladman*, 41 NY2d 123, 125. The contention that one cannot be convicted of felony murder based on the predicate felony of burglary when the intent at the time of entry was to commit murder is rejected. *See People v Miller*, 32 NY2d 157, 161. Judgment modified, and as modified, affirmed. (County Ct, Onondaga Co [Fahey, J])

**Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) GYP; 181(25)**

**People v Speed, 13 AD3d 1083, 786 NYS2d 874 (4th Dept 2004)**

**Holding:** The defendant's statements during the factual colloquy during his guilty plea negated, as to the burglary charge, the element of unlawful entry. *See People v Lopez*, 71 NY2d 662, 666. The court's further inquiry to ensure the knowingness and voluntariness of the plea did not clarify that the defendant unlawfully entered the complainant's apartment. Penal Law 140.25. Where the court's inquiry did not rectify the negation of a necessary ele-

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ment, the claim falls within the "'rare case' exception to the preservation rule (*Lopez*, 71 NY2d at 666)." The plea agreement disposed of a three-count indictment including a plea to the lesser-included offense of attempted first-degree rape. On remittal, the court should entertain a prosecution motion to vacate the plea in its entirety should the prosecutor be so disposed. *See People v Irwin*, 166 AD2d 924, 925. Judgment modified, plea of guilty to second-degree burglary vacated, and as modified, affirmed; matter remitted. (Supreme Ct, Erie Co [Forma, J])

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

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

**People v Afrika, 13 AD3d 1218, 787 NYS2d 774 (4th Dept 2004)**

**Holding:** The prosecution's contention that under CPL 240.40(2) (b) (v) they could obtain a sample of the defendant's blood without a showing probable cause is rejected. The statute is subject to constitutional requirements. *See Matter of Abe A.*, 56 NY2d 288, 291, 295-296. Probable cause existed where the State Police Forensic Investigation Center, having entered into a database the DNA profile of the defendant (created from a blood sample obtained as a result of the defendant's conviction in an unrelated matter) notified the prosecution by letter that the defendant's profile matched that of a sample taken from the complainant in this case. Probable cause was also established by a comparison done by a forensic serologist of semen samples from the complainant in this case and the complainant in another case. The serologist concluded that the donor in the other case could not be excluded as the donor in this case, and that the probability of an unrelated African-American having the same profile in both cases was about one in 5,920. The prosecutor stated that the complainant in the other case, identified by name, told him that the defendant was the perpetrator. The court properly relied on this information. *See People v Martinez*, 298 AD2d 897, 898 *lv den* 98 NY2d 769 *cert den* 538 US 963 *reh den* 539 US 911. That a grand jury had no-billed the other case did not make use of the evidence in this case a violation of CPL 160.50, and any such violation would not warrant suppression of the evidence. The defendant's many other contentions are without merit. Judgment affirmed. (Supreme Ct, Monroe Co [Fisher, J])

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

**People v McMorris, 13 AD3d 1084, 786 NYS2d 768 (4th Dept 2004)**

**Holding:** The prosecution concedes that when setting the duration of the order of protection as part of the defendant's sentence for first-degree assault, the court did not take into account jail time credit. *See* CPL 530.13(4)(ii); *People v Grice*, 300 AD2d 1005 *lv den* 99 NY2d 654. This issue was not preserved but is reviewed in the interest of justice. Judgment modified, matter remitted for determination of jail time credit and to specify an expiration date for the order of protection that is three years from the date the maximum sentence expires. (County Ct, Monroe Co [Geraci, Jr., J])

**Appeals and Writs (Judgments and Orders Appealable) (Preservaton of Error for Review)** **APP; 25(45) (63)**

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

**People v Ricks, 13 AD3d 1073, 786 NYS2d 875 (4th Dept 2004)**

**Holding:** The record does not establish that the defendant's waiver of the right to appeal was knowing, voluntary, and intelligent. The court asked him no more than, "'[d]o you understand that?' after the district attorney completed his recitation of the entire plea agreement." *See People v Harris*, 4 AD3d 767, 767. The defendant did not preserve for review the claim that the order of protection is overbroad and exceeds the statutory limit of CPL 530.13(4). *See People v Grice*, 300 AD2d 1005 *lv den* 99 NY2d 654. That unpreserved claim is reviewed as a matter of discretion in the interest of justice. *See* CPL 470.15(6)(a); *cf People v Nieves*, 2 NY3d 310, 317. The order of protection exceeded the statutory limit. Judgment modified, matter remitted for determination of jail time credit and to specify an expiration date for the order of protection that is three years from the date the maximum sentence expires. (County Ct, Orleans Co [Punch, J])

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

**Evidence (Common Plan or Scheme) (Other Crimes)** **EVI; 155(30) (95)**

**People v Austin, 13 AD3d 1196, 786 NYS2d 882 (4th Dept 2004)**

**Holding:** The unavailability at trial of the complainant, murdered two days after testifying at the grand jury, was not attributed to the defendant. *See People v Geraci*, 85 NY2d 359, 368-369. Admission of the complainant's grand jury testimony was error. *See* CPL 670.10(1). The error was harmless, where the testimony admitted was limited to the complainant's identification of photographs she took of her home, reflecting the home's condition after the offense. A police officer testi-

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fied that the photographs accurately represented the scene at the time the officer responded. Admission at trial of the complainant's testimony from the preliminary hearing was not error as the defendant's opportunity to cross-examine was unrestricted. *See People v Simmons*, 36 NY2d 126, 131. The court erred in admitting a prior uncharged crime (a burglary of the complainant's home weeks before the instant offense). Where there was no evidence that the defendant had committed the earlier crimes, regardless of the complainant's belief, the evidence as to the prior crime was not relevant. *See People v Crawford*, 4 AD3d 748 *lv den* 2 NY3d 797. The error was harmless. The court properly admitted evidence that weeks before this offense the complainant had found the defendant hiding in her garage and that he then tried to grab her. While the complainant had identified the defendant at the preliminary examination, so that the evidence should not have been admitted on the issue of identity, it was admissible as evidence of a common scheme or plan. *See People v Leeson*, 299 AD2d 919, 920 *lv den* 99 NY2d 560. Judgment affirmed. (County Ct, Erie Co [D'Amico, J])

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

**People v McCants, 15 AD3d 892, 788 NYS2d 892 (4th Dept 2005)**

**Holding:** As the prosecution correctly concedes, the defendant's sentence to a term of two and one half to five years, to be served under parole supervision at the Willard Drug Treatment Campus, was improper. At the time of sentencing, the defendant was subject to an undischarged term of imprisonment. *See* CPL 410.91 (2); *cf People v Carlton*, 2 AD3d 1353, 1354 *lv den* 1 NY3d 625. Thus the court erred in denying the defendant's CPL 440.20 motion to set aside his sentence on the ground that it was illegal. The procedural bar set forth in CPL 440.10 (3) (c) applies only to motions made pursuant to section 440.10; the instant motion was made pursuant to section 440.20. Order reversed, motion granted, sentence set aside, and matter remitted for resentencing "'in accordance with the law.'" *See* CPL 440.20 [4]; *cf People v Boyd*, 298 AD2d 300 *lv denied* 99 NY2d 612. (County Ct, Monroe Co [Marks, J])

**Sentencing (Delay)** **SEN; 345(25)**

**People v Reyes, 15 AD3d 868, 789 NYS2d 588 (4th Dept 2005)**

**Holding:** The court lost jurisdiction to impose sentence due to a seven-year delay between entry of the plea and sentencing. *See* CPL 380.30(1); *People v Drake*, 61 NY2d 359, 367. The defendant did abscond after the plea, and thus is "'primarily responsible'" for the delay until the prosecution learned of his incarceration in Pennsylvania. *See People v Pierre-Paul*, 289 AD2d 262, 262 *lv den* 97 NY2d 732. Once the prosecution knew of that incarceration, the delay is not excusable in the absence of diligent effort to secure the defendant's presence. *See People v Turner*, 222 AD2d 206, 206-207 *lv den* 88 NY2d 855. There is no evidence that the prosecution sought the defendant's presence, and in fact he made application and appeared in court three years before he was actually sentenced. The prosecution opposed his sentencing, and only sought it after his Pennsylvania sentence was complete. The delay was unreasonable and the court lacked jurisdiction to impose sentence. *See gen People v Monaghan*, 34 AD2d 815. Judgment reversed, indictment dismissed. (Supreme Ct, Monroe Co [Egan, J])

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

**People v Adams, 15 AD3d 987, 789 NYSd 580 (4th Dept 2005)**

**Holding:** The defendant's guilty plea to second-degree murder for actions taken when he was 13 years old must be vacated because it was not entered knowingly, voluntarily, and intelligently. His statements to police and in the plea colloquy indicated that his father, whom he had shot and killed, had abused the defendant, the defendant's brothers, and the defendant's mother. The record does not reveal whether the defendant was aware of, and waived, the possible defense of extreme emotional disturbance raised by his statements. *Cf People v Peralta,* 231 AD2d 958 *lv den* 90 NY2d 909. The court failed to conduct further inquiry to ensure that the defendant knew of such potential defense and had decided to plead despite it. This result in Appeal No. 1, from the judgment of conviction for murder and first-degree reckless endangerment, makes moot Appeal No. 2, in which the defendant contends that the court erred in denying his CPL 440 motion in its entirety. Judgment modified, murder conviction reversed, plea vacated, matter remitted. (County Ct, Orleans Co [Punch, J])

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

**Juveniles (Visitation)** **JUV; 230(145)**

**Matter of Livingston County Department of Social Services, o/b/o Jamie T. v Tracy T., 16 AD3d 1133,792 NYS2d 273 (4th Dept 2005)**

**Holding:** Once Family Court terminated the respondent's parental rights on the ground of permanent neglect, there was no authority for the court to issue an order permitting supervised visitation between the respondent and her two children. "Visitation is authorized only where

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parental rights are surrendered voluntarily. . .” *See* Social Services Law 383-c (2) and 383-c [3] [b]; *Matter of April S.*, 307 AD2d 204 *lv den* 1 NY3d 504. Order reversed, visitation provisions vacated. (Family Ct, Livingston Co [Cicoria, AJ]).

**Evidence (Sufficiency) (Weight)** **EVI; 155(130) (135)**

**Sex Offenses (General)** **SEX; 350(4)**

**People v Smith, 16 AD3d 1033, 790 NYS2d 805 (4th Dept 2005)**

**Holding:** The defendant’s claims that the non-jury verdict is against the weight of the evidence and that the evidence is legally insufficient are rejected. The evidence showed that after the defendant, the complainant, and two other spent the afternoon together, during which time they drank alcohol and smoked marijuana, the complainant awoke on her couch. She testified that when she awoke, the defendant was on top of her and that she pretended to be asleep throughout a sex act. The defendant testified that he had entered the complainant’s apartment because he saw her on the couch with a cigarette and feared for her safety, and that the sexual contact between them was consensual. The evidence was sufficient for the jury to find that the defendant had “‘sexual intercourse with another person . . . who is incapable of consent by reason of being physically helpless’ (Penal Law § 130.35 [2]).” The verdict was not against the weight of the evidence. Judgment affirmed. (County Ct, Chautauqua Co [Ward Jr., J])

**Dissent:** [Green, JP] Unlike the sleeping victims in the cases relied upon by the majority (*eg People v Krzykowski*, 293 AD2d 877 *lv den* 100 NY2d 643), the complainant here “did not make an immediate outcry, fight off, or otherwise rebuff the alleged attacker.” She “deferred reporting the alleged attack until she spoke with her friend the following day.” And she “testified that, during the purported rape, she could have communicated her unwillingness to engage in sexual intercourse but elected not to do so.” Her testimony undercut “the credibility of her allegation that the sexual act was nonconsensual as the result of her physical incapacity.” Additionally, the prosecution did not establish that the defendant’s waiver of a jury trial met legal requirements.

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

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

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

**People v Sampel, 16 AD3d 1023, 791 NYS2d 745 (4th Dept 2005)**

**Holding:** The complainant, former girlfriend of the defendant, said that the defendant raised a hammer over his head, threatening to kill her. The defendant was convicted of second-degree menacing and violating an order of protection. The court erred by refusing to allow the defense to call a witness to impeach the complainant with a prior statement. The witness would have testified that the complainant had told her that the complainant sought the defendant’s arrest so the complainant could get the defendant’s vehicle. The complainant had denied on cross-examination that she had said that. The defendant was denied his right to confront the witness against him when he was denied “the opportunity to contradict answers given by a witness to show bias, interest or hostility in this case.” *People v Vigliotti*, 203 AD2d 898, 899. Judgment reversed, new trial ordered. (County Ct, Monroe Co [Schwartz, AJ])

**Concurrence:** [Hurlbutt, J] Defense counsel was allowed to cross-examine the complainant about the prior statement; the defendant’s confrontation right was not implicated by exclusion of the proffered testimony. The alleged statement was hearsay that should have been admitted as impeachment with a prior inconsistent statement.

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

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

**People v Rogers, 16 AD3d 1101, 790 NYS2d 914 (4th Dept 2005)**

**Holding:** The defendant’s convictions of second-degree murder and first-degree robbery rested entirely upon circumstantial evidence. “[T]he court should have instructed the jury on the moral certainty standard of proof (*see People v Mickewitz*, 236 AD2d 793 *lv denied* 90 NY2d 861.” Judgment reversed, new trial ordered. (County Ct, Niagara Co [Broderick, Sr., J])

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

**People v Rudolph, 16 AD3d 1151, 791 NYS2d 253 (4th Dept 2005)**

**Holding:** The defendant was convicted after a bench trial of multiple offenses including two counts of first-degree attempted murder and second-degree criminal possession of a weapon. Penal Law 265.03 (2). When an officer tried to handcuff the defendant, the defendant pulled a loaded semiautomatic handgun from his jacket and fired it close to the officer’s head. Another officer intervened and struggled for control of the gun, which the defendant pointed at the officer’s face and held against

## Fourth Department *continued*

the officer's chest. The defendant's contentions on appeal lack merit, except that the court erred in imposing a consecutive sentence for second-degree criminal possession of a weapon. The defendant did possess the gun illegally, but there is no evidence of an intent to use it unlawfully against another person until he took it out and fired it toward the officer. *See People v Holland*, 13 AD3d 1101. The charges of attempted murder and criminal possession of a weapon were committed through a single act, requiring imposition of concurrent sentences. *See* Penal Law 70.25 [2]; *People v Laureano*, 87 NY2d 640, 643. Judgment modified, sentence imposed on count four to run concurrently with the sentence imposed on count one. (County Ct, Oneida Co [Donalty, J]) ⚖

# *Defender News* *(cont'd. from page 3)*

County Public Defender Office testified in the *habeas* proceedings that he had written to Fulton County Family Court less than a week after the default was entered, asking that the court produce Ms. Constantino on the matter and assign her counsel.

A copy of the opinion is available from the Backup Center. The county has authorized funds for outside counsel to appeal the decision. (*Daily Gazette* (local edition) 7/13/05.)

## *Defender Institute BTSP Keeps Getting Better*

The Defender Institute Basic Trial Skills Program (BTSP) 2005 fostered a high level of enthusiasm among participants, coaches, and NYSDA staff. (See *From My Vantage Point*, pp. 5, 7). Exceptional attorneys and communications experts serve as coaches at this client-centered, award-winning program, helping public defense lawyers new to trial work hone their craft. In addition to pointers and practice in traditional skills such as cross-examination and summation, participants learned how focusing on their clients' circumstances in preparation of cases improves not only attorney-client relations but also case outcomes.

While planning for the week-long BTSP consumed much staff time and energy in the weeks leading up to June 19-25, it was not the only NYSDA CLE program offered recently. A day-long regional trainer, "Advocacy: Defense Strategies, Tactics and the Law," was presented in Albany on June 3rd, and the Association co-sponsored with The Ontario County Defenders Association an hour-long CLE program entitled "Sentencing Advocacy: Meeting the Challenge of the Pre-sentence Report," in Canandaigua, NY at the end of June.

## *NYSBA to Receive Award for Standards*

The New York State Bar Association (NYSBA) has been selected to receive the 2005 Harrison Tweed Award at the American Bar Association's Annual Meeting on August 5, 2005. The award recognizes local and state bar associations for developing or significantly expanding projects or programs to increase the access of poor people to civil legal services and criminal defense services. Award recipients are selected by the American Bar Association Standing Committee on Legal Aid and Indigent Defendants and the National Legal Aid and Defender Association.

NYSBA is being recognized for the work of its Special Committee to Ensure Quality of Mandated Representation chaired by Buffalo lawyer Vincent E. Doyle, III (Connors & Vilardo). The Committee drafted the "Standards for Providing Mandated Representation," adopted by the NYSBA House of Delegates on April 2, 2005 as announced in the last issue of the *REPORT*. Congratulations!

The State Bar standards can be found on the Web on their web site, www.nysba.org. ⚖

**BTSP participants and coaches had an opportunity to relax and converse at the Thursday barbeque, a small break in the intense week of client-centered trial skills training.**

# NYSDA Membership Application

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

Enclosed are my membership dues: ☐ $75 Attorney ☐ $15 Law/Other Student/Inmate ☐ $40 All Others

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