



Public Defense Backup Center  
**REPORT**

Volume XX Number 2

March–May 2005

A PUBLICATION OF THE DEFENDER INSTITUTE

**Defender News**

**Annual Meetings: Saratoga Now, Corning Later**

On April 22nd, the NYSDA board chose the location for the 2006 annual meeting, which will be held in Corning NY, dates to be announced.

This year’s event is already scheduled—the **38th Annual Meeting and Conference will be held at the Gideon Putnam Resort and Spa in Saratoga Springs NY on July 24–26, 2005**. Room rate for the Gideon Putnam Hotel this year is \$135/night, single or double; these rates are available for some rooms for the night of Tuesday, July 26 as well. Register early if you want to stay that extra night! Hotel reservations can be made directly. Call 1(800)732-1560 or (518)584-3000; fax (518) 584-1354.

**Restrictions and Rhetoric Intensify Around Sex Offenders**

Binghamton’s City Council recently passed an ordinance restricting the movement of persons convicted of sex crimes, barring them from being within a quarter-mile radius of schools, day-care centers, playgrounds, and parks. (*Press & Sun-Bulletin* online, 5/5/05.) (For an illustration of the limited areas in which sex offenders can legally be present in downtown Binghamton under the new ordinance, see [www.pressconnects.com/charts/sex-offendermap.pdf](http://www.pressconnects.com/charts/sex-offendermap.pdf).) The legality of the Binghamton ordinance is questionable, something its proponents admit. The issue is likely to wind up in City Court, which itself is within a zone from which offenders are barred. (*Press & Sun-Bulletin* online, 5/25/05.)

Similar local legislation has been introduced in Staten Island (*Staten Island Advance* online, 5/25/05), and is being considered elsewhere. An Albany County legislator, for example, is planning to introduce a ban on sex offenders “living within a mile of schools, bus stops, day care facilities or playgrounds.” (*Times Union* online, 5/10/05.) Clinton County legislators would like to see more restrictions on convicted offenders there, but believe that they cannot act; the County Attorney has said they do not have

the power to pre-empt state law. They plan instead to “pressure the state to make changes.” (*Press Republican* online, 5/26/05.)

Besides banishing persons convicted of sex offenses from specified areas, those who believe that current restrictions are not enough have proposed tracking them with global positioning technology, increasing use of web sites about offenders, etc. (*Eg NY Times* online 4/22/05, 5/17/05; *Poughkeepsie Journal* online, 4/25/05). Several proposals would increase the availability of information about offenders. For instance, Monroe County is considering the possibility of making available to individuals “the same access to information about Level 2 sex offenders as they now have to information about sex offenders in the Level 3 category.” (*Democrat and Chronicle* online, 5/24/05.)

**Rockefeller Reform Results Limited**

In the last issue of the *REPORT* we noted that the 2004 amendments to the draconian Rockefeller Drug Laws (RDL) were only a beginning, not the completion, of needed reform. That is being borne out as the legislation’s effect—and lack of effect—is realized. A recent news item recognized that “the failure of the new law to address all but the stiffest of drug penalties is hurting even those few the limited measure was designed to assist.” (*Times Union* online, 5/20/05.) The article went on: “Of the 446 Class A-1 offenders in the prison system when [Gov.] Pataki signed the new law, 66 have been resentenced, but only 21 were released as of April 30, according to the state Department of Corrections.”

Whether or not the amended sentencing provisions apply in cases already pending when the law came into effect remains an issue. In March, Justice Renee A. White ruled that if convicted, a defendant

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charged with possessing drugs before the law was amended would be subject to the sentence structure in place at the time of the offenses. *People v Devon McFarlane*, No. 5171/04 (Supreme Ct, New York Co, 3/31/05). That decision is apparently consistent with most trial court rulings; the issue has not yet been decided on appeal. (NYLJ online, 4/21/05.) However, Justice Richard Lee Price has found the new sentencing scheme should apply to cases pending at the time of the amendments. *People v Mario Armond*, No. 579-02 (Supreme Ct, Bronx Co, 4/15/05).

To help its members quickly determine the actual length of determinate sentences after applying merit and good time, NYSDA distributed sentence reference cards created by Backup Center staff attorney Al O'Connor. The card supplies the calculations for the 6/7th conditional release date (applicable to all determinate sentences), and the 5/7th merit release eligibility date (drug offenders only), for determinate sentences between 1 and 25 years. For all determinate sentences, post-release supervision terms between 1 and 5 years must also be imposed. See Penal Law 70.45.

For more on the RDL, check the Hot Topics page of the NYSDA web site, [www.nysda.org](http://www.nysda.org).

### **State Legislature to Consider Civil Commitment**

The state Senate is considering legislation that incorporates several of the above ideas and others, plus providing for civil commitment of persons found to be "sexually violent predators" after their prison terms have expired. (*Newsday* online, 5/3/05; *Times Union* online, 5/4/05.) Among those supporting this drastic measure are Senate Majority Leader Joseph Bruno and Westchester County District Attorney Jeanine Pirro, who notes that 17 other states have similar laws, several of which have been upheld by the US Supreme Court. (*Times Union* online, 5/12/05; see also *Press & Sun-Bulletin* online, 5/20/05; and see *eg Kansas v Crane*, 534 US 407 [2002].) For more information on civil commitment and other issues relating to sex offenses, see the Megan's Law Hot Topics page of the NYSDA web site.

### **Other Developments Relating to Sex Crimes and Offenders**

A bill introduced in the Assembly would do away with the statute of limitations for rape, set up a \$150 million trust fund to guarantee proper testing and preservation of DNA, training of clinical staff, and DNA testing equipment. A bill ending the statute of limitations for rape has already passed the state Senate. (*Press & Sun-Bulletin* online, 5/12/05.)

The statute prohibiting forcible touching of the sexual or other intimate parts of another, Penal Law 130.52, does

not encompass "mere touching, however unwanted," Judge Richard M. Weinberg has ruled. *People v Mohammed Nuruzzaman*, No. 2004CN010052 (Criminal Ct, New York Co, 5/13/05). A retail store employee's actions in twice patting a customer's buttocks was not tantamount to the behavior such as "squeezing, grabbing or pinching" covered by the statutory language, the decision says.

Medicaid coverage of erectile-dysfunction drug prescriptions for persons convicted of sex offenses became a target of headlines and politicians' sound bites in late May after Comptroller Alan Hevesi's office reported such payment. ([http://news.yahoo.com/s/ap/20050523/ap\\_on\\_re\\_us/sex\\_offenders\\_viagra](http://news.yahoo.com/s/ap/20050523/ap_on_re_us/sex_offenders_viagra).) The Governor has issued a temporary ban on all public funding of erectile dysfunction drugs until he proposes legislation to allow the state to cross-reference sex offender lists with taxpayer-funded health databases. (*NY Newsday* online, 5/26/05.)

## **NYSDA Files Amicus Briefs**

### **Cameras in Court**

Oral arguments about New York's ban on cameras in the courtroom, held in the Court of Appeals on April 27, 2005, spurred a rash of publicity and comment on the issue. Concerns about cameras mentioned as the argument approached included the possibility that cameras' presence would affect witness testimony and attorney or judge performance, distract jurors and other participants, and prejudice cases when only "sound bites" aired. (*Poughkeepsie Journal* online, 4/23/05.) One report of the argument itself noted: "If yesterday's colloquy, and lower court rulings, are any indication, Mr. Boies [lawyer for Court TV] may be fighting an uphill battle" in his efforts

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to overturn the ban on cameras found in section 52 of the Civil Rights Law. (NYLJ online, 4/28/05.) NYSDA, which has opposed cameras in courts for years, was among the groups, which also included the New York State Association of Criminal Defense Lawyers, that filed *amici* briefs in the case. For more information and updates, see the Cameras in the Courts Hot Topic page of the web site.

### **Amici File in Suppression Case**

Buffalo attorney Mark Mahoney authored an *amici* brief filed on behalf of NYSDA and the New York Association of Criminal Defense Lawyers in the Court of Appeals in *People v Jason Williams*, No. 81 (5/10/05). See case summary p. 21. The defendant, while not on Housing Authority property, had been stopped by Housing Authority police allegedly for traffic violations. He was eventually charged with possession of drugs as well as failure to wear a seatbelt and obstructed vision. The prosecution appealed the trial court's suppression of evidence and dismissal of the indictment. On appeal, the prosecution raised for the first time an additional argument challenging the application of the exclusionary rule where the illegality of the arrest was based on the officers being outside their jurisdiction. The suppression and dismissal were affirmed by the Court of Appeals based on the police, acting outside their jurisdiction, having not made a lawful "citizen's arrest." The court declined to address the belatedly-raised effort to limit the exclusionary rule.

### **NY Public Defense News: Funding, Hearings, and Standards**

Public defense programs have been seeking the advice of the Backup Center on ways to use funds received from the Mar. 31, 2004 distribution of funds by the state from the Indigent Legal Services Fund created in the 2003 legislation increasing assigned counsel fees. The distributed funds must be used to "supplement and not supplant any local funds which such county or city would otherwise have had to expend for the provision of counsel and expert, investigative and other services" under County Law Article 18-B; they must be used to "improve the quality of services provided."

Meanwhile, the New York State Commission on the Future of Indigent Defense Services held its fourth and final hearing about public defense in New York State. Members of the Commission heard from several public defense attorneys and members of the client community. Others who spoke included Jack Carter, Director of the Law Guardian Program of the Third Department, who felt that state funding of defense services is "inevitable," Melanie Trimble, Executive Director for the Capital Region Chapter of the New York Civil Liberties Union, which has been investigating public defense in Albany and Schenectady Counties, and Paul Toomey, supervising

counsel of the city, town and village courts resource center of the Office of Court Administration, who noted that a new court rule had been implemented in March 2005 to help ensure that defendants in local courts received the right to counsel, too often denied or ignored to protect county funds. See p. 4.

### **Statewide Commission and CDO Cited as Solutions**

Michael Whiteman of Whiteman, Osterman and Hanna, speaking for the Committee for an Independent Public Defense Commission, discussed the need for statewide standards and oversight. This theme, that accountability is a statewide need requiring a statewide solution, has been, while not unanimously sounded, a common topic in the testimony at all four hearings.

Albany defense lawyer Terence L. Kindlon, of Kindlon & Shanks, suggested on the last day of hearings that a logical place to begin needed reform of New York's indigent defense system was to use an existing statewide resource, the Capital Defender Office (CDO). The CDO's future is currently in question given the 2004 Court of Appeals ruling that effectively bars enforcement of New York's existing death penalty law and the Assembly Codes Committee vote on April 12 defeating efforts to "repair" the statute. (NYLJ online, 5/13/05.)

A transcript of the Commission on the Future of Indigent Defense Services' Albany hearing, and the one held in Rochester on March 11, will join the transcripts of New York City and Ithaca hearings on the web site: [www.courts.state.ny.us/ip/indigentdefense-commission/index.shtml](http://www.courts.state.ny.us/ip/indigentdefense-commission/index.shtml).

### **State Bar Adopts Standards for Mandated Representation**

The New York State Bar Association (NYSBA) House of Delegates approved on April 2nd a set of "Standards for Providing Mandated Representation." The lead standard (Section A) calls for the function of mandated representation to be independent—free from "political influence or any influences other than the interests of the client." The standards address, among other things, the need for: early entry of counsel; training of attorneys representing eligible clients; caseloads that are not excessive; support services and resources; quality assurance; and parity of compensation between attorneys providing mandated representation and the government attorneys opposing them.

Other issues addressed include qualifications of counsel and eligibility of clients. The latter section includes a requirement that "Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified."

Section I contains performance standards, from general standards applicable to all types of representation

(such as the requirement that an attorney must “communicate with his or her client on a regular basis during the course of the representation, preferably in a private face-to-face discussion”) to standards specific to one type of matter (criminal, juvenile delinquency, abuse and neglect, and appeals).

Because these standards were promulgated by an influential general bar association, they provide public defense attorneys and programs, clients, and others—including the Commission on the Future of Indigent Defense Services discussed above—with a powerful tool for evaluating public defense and advocating for its improvement. NYSDA, one of several groups that provided comments on the proposed standards prior to their adoption, hopes that the new standards, along with the standards adopted by the NYSDA Board and the Chief Defenders of New York last year, will help support much needed public defense reform.

The State Bar standards can be accessed from the Public Defense Hot Topics page on the NYSDA web site (where the NYSDA standards can also be found), or directly at [http://www.nysba.org/Content/ContentGroups/Reports3/Standards\\_Final.pdf](http://www.nysba.org/Content/ContentGroups/Reports3/Standards_Final.pdf).

### ***New Rule Issued on Notice and Provision of Counsel in Town and Village Court***

A new section, 200.25, relating to provision of counsel, has been added to subpart C of the Uniform Rules for Courts Exercising Criminal Jurisdiction, Rules Applicable to Local Criminal Courts. When a defendant is brought before such courts for arraignment on an accusatory instrument, “counsel for the defendant shall be given an opportunity to be heard before the court issues a securing order fixing bail or committing the defendant to the custody of the sheriff.” The major provisions of the new rule are set out below.

If the defendant has appeared without counsel, the court must permit the defendant to make free phone calls “for the purposes of obtaining counsel and informing a relative or friend that he or she has been charged with an offense.” The court must make an initial determination of the defendant’s eligibility for assigned counsel, and assign counsel to an eligible defendant in accordance with County Law 722, before issuing a securing order fixing bail or committing the defendant to the sheriff. These provisions do not apply to defendants who can and do post bail with the court.

When assigned counsel is not present in court, a securing order may be issued. In such instance, the court must “provide the defendant, in writing, with the name, business address and telephone number of such assigned counsel . . . [or public defense program].” The court must, upon issuing a securing order in the absence of counsel, notify the appropriate public defense chief and local pretrial serv-

ices agency or unit, by phone and in writing or by fax, of the assignment or, if not practicable, within 24 hours, and, in extraordinary circumstances, no later than 48 hours.

Where the defendant appears able to retain counsel, the court shall provide, when available, the phone number of a particular attorney named by the defendant. When the defendant does not name a particular attorney, or that attorney is not present, the court may issue a securing order in the absence of counsel and notify the pretrial services agency or unit of the defendant’s appearance in court and initial determination that the defendant is able to obtain counsel.

Nothing in the new rule precludes the court from terminating assignment of counsel under County Law 722-d(c), releasing the defendant on recognizance under CPL 170.70, 180.80, or other provision, releasing the defendant on bail or on recognizance pursuant to CPL 30.30(2), or entertaining an application for bail under CPL 510.20.

For the full language of the new rule, contact the Backup Center.

### ***NYSDA Provides CLE Variety***

NYSDA has presented a variety of training events in the first five months of 2005. Some focused on specific issues or themes. These included “Deportation 101,” co-sponsored with Families for Freedom and the NYU Immigrant Rights Clinic, presented in New York City on two dates in February, “Rockefeller Drug Reform,” presented in Rochester in March, the “2nd Annual Bridges and Barriers Forensic Conference: Integrating Community Mental Health and the Criminal Justice System,” co-sponsored with Albany County Forensic Task Force and others, presented in Albany in March, and “Federal Criminal Defense Update 2005,” co-sponsored with the Office of the Federal Public Defender for the Northern District of New York and Vermont and the Federal Bar Association, held in Syracuse in April.

Broader training events included the “19th Annual Metropolitan New York Trainer,” drawing an audience of over 200 to NYU in March, and “Criminal Defense Tactics and Techniques VII,” held in Rochester at the end of April and attended by nearly 100 people. Materials from these two trainings are available from the Backup Center, at a cost of \$30 each.

As the *REPORT* went to press, preparations were well underway for additional trainings, including this year’s Defender Institute Basic Trial Skills Program. An intense, award-winning, client-centered, week-long training, BTSP is designed to help attorneys with little or no trial experience become skilled in jury persuasion, confident of their abilities to conduct jury trials, sensitive to the conditions of their client’s lives, and ready to provide caring, humane, and effective representation.

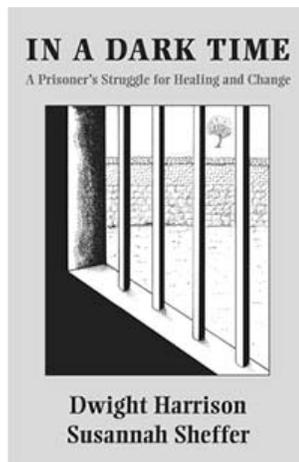
*(continued on page 35)*

## Book Review

### In a Dark Time: A Prisoner's Struggle for Healing and Change

By Dwight Harrison and Susannah Sheffer  
Stone Lion Press, 2005; 200 pages

Dwight Harrison's account of his childhood, the broken family, the parents' alcoholism, his father's gambling, the rejected child with an intense craving for love, is nothing new. The story has been told, over and over again—which subtracts not one iota from its bleak cruelty. There is the rejected child; there are the parents, unwilling or incapable of answering his needs. There is the boy, raped at eleven by a man offering him a ride home, a boy now twelve shooting heroin for the first time, selling drugs for a substitute parent-dealer, soon selling sex to older men.



Then there is a teenager learning to make Ecstasy, selling Ecstasy, breaking and entering, robbing, finding the support he craves in the company of thieves. Very soon he is twenty-one, the instigator not the follower, staging an amateurish armed robbery of an antique dealer reputed to keep \$300,000 in the house. Eventually Harrison is caught and sentenced to 28–30 years in prison. Especially for those who work in the legal and corrections fields, it's a familiar story.

The turning point in Harrison's story, the place where he veers from convicted felon assigned to segregation for his quick temper and defiant attitude, the point at which he veers toward an eventual life beyond prison, holding a job, keeping out of trouble, goes to the credit of another convicted felon. Bobby, eighteen years into a life sentence without parole, believed in choice. Even in prison where the "cops" make sure you know they own you, that they can do just about anything with you they choose, you are a person with free will. You decide how you are going to live your life.

Bobby tells Harrison he should take the GED exam, and after the usual denials and excuses, which Bobby waves off, Harrison listens:

He [Bobby] took the truth and held you right up to it, squirming and trying to look away, and he kept holding you there . . . until . . . you realized you could stand to look. And then the looking showed you something you'd never seen before. Excuses didn't work. Everything you tried to hide from yourself you couldn't hide from Bobby.

After taking the GED and scoring high, Harrison begins to take himself more seriously: college classes, plans for a life on the outside, hopes of a relationship with a woman. None of this of course happens in a smooth sequence. He is still involved in fights—nearly dying in a federal prison to which he'd been transferred—cursing the cops, doing and selling drugs however he could get them. Nevertheless, no matter that the path toward a more stable life has its windings and detours, eventually he is released, finds supportive friends and a job as a counselor at a school for extremely troubled kids.

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**"Fellow inmates are the most supportive and influential in Harrison's growth, much more than the limited attentions of the psychologists and counselors he sees."**

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In this account of a man's growth from small time crook, drug user and dealer, two points particularly stand out. Fellow inmates are the most supportive and influential in Harrison's growth, much more than the limited attentions of the psychologists and counselors he sees. It is Bobby, and Danny whom Harrison taught to read, and Lenny who took Harrison into the woodshop he ran, who give Harrison a sense of himself beyond the clever hustler, the bully, the tough. And it is the college credits he earns while in prison, supported by Pell grants, that make this realization possible.

Shortly before Harrison's release date those Pell grants are cancelled on the premise that it is wrong to "coddle" convicted felons while many outside of prison can not afford college, although the 43 million dollar cut does not contribute toward helping the non-felons get to school. Harrison himself is two credits short of his degree when they are cancelled but is able to finish in Boston once he's released. And at this writing it's assumed he continues employed, drug-free, and respectful of the law. His is a heartening story. If its beginning is too familiar, its ending, unfortunately, is not.

This is a useful book, particularly for those working with young people and particularly those young people already involved and/or convicted of criminal activity and drug use, on their way, most likely some day, to a maximum security prison. The author pulls no punches; his story is intensely readable and concrete. There is some degree of moralizing, tending to go on a bit long, but essentially the moral is found in the story itself.

And unlike those unfortunates in Dickens's novels, thrown into bad company, whose innate goodness shines through, protecting them as an invisible coat of armor, Dwight Harrison fights his fight for his self-respect and integrity in a world seemingly unable or unwilling to recognize a worth in the individual in need of cultivation. Unlike *Oliver Twist*, saved by providence and the kindness of strangers, Harrison must save himself. A victory all the more lasting, all the more admirable. ♪

# CONFERENCES & SEMINARS

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

**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](http://sentencingproject.org/nasa/conference_annual.cfm)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Creative Solutions to Difficult Cases  
**Dates:** August 3-6, 2005  
**Place:** Portland, OR  
**Contact:** NACDL: tel (202)872-8600; fax (202) 872-8690; e-mail [assist@nacdl.org](mailto:assist@nacdl.org); web site [www.nacdl.org](http://www.nacdl.org)

**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:** NACDL: tel (202)872-8600; fax (202) 872-8690; e-mail [assist@nacdl.org](mailto:assist@nacdl.org); web site [www.nacdl.org](http://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](mailto:assist@nacdl.org); web site [www.nacdl.org](http://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](mailto:nysacdl@aol.com)

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

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

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Annual Mid-Hudson Trainer  
**Date:** November 18, 2005  
**Place:** Poughkeepsie, NY  
**Contact:** Patricia Marcus, (212)532-4434; e-mail [nysacdl@aol.com](mailto: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](mailto:info@nlada.org); web site [www.nlada.org](http://www.nlada.org)

## Saratoga One More Time!

Recent Annual Meetings at the Gideon Putnam Hotel & Conference Center in Saratoga Springs have been so successful,

**WE'RE GOING BACK—ONE MORE TIME\*  
July 24–26, 2005**

Reserve your room now!  
(\$135/night, single or double)

Fax reservations to the Gideon Putnam:  
Fax: (518) 584-1354

Room Reservation cut-off: June 23, 2005  
Call the Backup Center for post-cut-off information.



\* In 2006, join us in Corning, NY (see p. 1)

**Visit the Training page at  
[www.nysda.org](http://www.nysda.org) often!**

Information about CLE events may reach the  
**REPORT** too late for publication; regional  
training events may not be listed statewide.

# 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 Court of Appeals update is available on the NYSDA website, [www.nysda.org](http://www.nysda.org), on the Courts NY Hot Topic page, and on the Center for Appellate Litigation website, [www.appellate-litigation.org](http://www.appellate-litigation.org). The information printed here was current as of May 15, 2005; look for new information on the web every two months.]

### I. Cases Awaiting Decision

*People v Jerry W. Moore* — Whether an information charging third-degree trespass (PL 140.10[a]) is facially insufficient for failing to plead that the building was “fenced or otherwise enclosed in a manner designed to exclude intruders.”

*People v William Rivera* — (1) Whether the discretionary persistent felony offender statute violates *Apprendi*; ie, whether *People v Rosen*, 96 NY2d 329, is still good law in light of *Ring v Arizona*. (2) The *Sandoval* ruling.

*People v Charles Daniels* — Whether the discretionary persistent felony offender statute violates *Apprendi*, ie, whether *People v Rosen*, 96 NY2d 329, is still good law in light of *Ring v Arizona*.

*People v Byron Robinson* — (1) Whether the discretionary persistent felony offender statute violates *Apprendi*; ie, whether *People v Rosen*, 96 NY2d 329, is still good law in light of *Ring v Arizona*. (2) Whether the show-up ID was suggestive. (3) Whether certain suppression claims were preserved for appellate review.

*People v Oliver Giola West, Jr.* — Whether the discretionary persistent felony offender statute violates *Apprendi*, ie, whether *People v Rosen*, 96 NY2d 329, is still good law in light of *Ring v Arizona*.

*People v Abdel Hamilton* — Whether *Apprendi* principles apply to PL 70.25(2), which permits consecutive, rather than concurrent, sentences only upon a specific factual finding by the sentencing judge.

*People v Norris Williams* — Whether the trial court’s directive to the jury, in its final instructions, not to speculate on the absence of an uncalled police-officer-witness, unaccompanied by any comment clarifying that the jury could still give such weight as it chose to the People’s failure to call that witness, was error

*People v Neil Patterson, Jr.* — A challenge to the conviction of the defendant, a member of the Tuscarora Indian Nation, for not having an identifying tag on his ice fishing rig (6 NYCRR 10.4(7)) in violation of the 1794 Treaty of Canandaigua.

*People v Carlos Caban* — (1) The admissibility of the hearsay declarations of co-conspirators. (2) Whether the People established a prima facie case of the alleged conspiracy without regard to the hearsay statements of the co-conspirators.

*People v Raul Lopez* — The propriety of a guilty plea arising out of an indictment, which does not name the defendant (only the codefendant) in any of its counts.

### II. Cases Scheduled for Argument

*People v Kenneth Paulman* — Whether the admission of a confession into evidence in violation of *Missouri v Seibert*, 124 SCt 2601, was constitutional harmless error in light of the proper admission of other damaging confessions.

*People v Thomas Kelly* — Whether the trial court failed to exercise its core judicial responsibility to supervise juror deliberations when a court officer, after denying the deliberating jurors’ request to pull the bayonet from its sheath, demonstrated the bayonet’s draw and answered juror questions.

*People v Thomas Hanley* — (1) The trial court refusing to allow the defense to present a character witness as to the complainants’ bad reputation in the community for truthfulness and veracity. The majority held that no foundation had been laid; the dissent noted that the trial court (Edwin Torres, J.) cut off defense counsel as he was trying to make an offer of proof. (2) The denial of a for-cause challenge to a juror who could not guarantee impartiality.

*People v Benjamin Hunter* — Whether there is an effective conversion of the charges in a felony complaint to a misdemeanor, for the purposes of a guilty plea, where the court does not follow the procedure set forth in CPL 180.50; and whether the issue is waived by operation of the guilty plea.

*People v Garth M. Hill* — Whether the prosecutor’s inaccurate and misleading answer to the grand jury’s question regarding the nature of the defendant’s proposed witnesses undermined the integrity of the grand jury proceeding and required dismissal pursuant to CPL 210.35(5).

*People v Shamel Wilson* — Whether, in a one-eyewitness identification case, the erroneous admission into evidence of a suggestive lineup was harmless beyond a reasonable doubt. The Appellate Division held that it was harmless.

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

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

### III. Cases Waiting to be Scheduled

*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 non-waivable. (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”).

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

*People v Richard Miller* — (1) Whether second-degree murder under PL 125.25(1) and PL 125.25(3) are lesser-included offenses, and hence inclusory concurrent counts, of first-degree murder 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.

### IV. New Leave Grants

*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, ie, 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 US 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 indiffer-

ence" 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.

## V. Capital Appeals Pending

*People v Robert Shulman* —

**Suppression Issues:** (1) Whether there was probable cause for defendant's arrest. (2) The voluntariness of the confessions extracted from round-the-clock questioning. (3) The police failure to videotape the defendant's confession.

**Jury Selection Issues:** (4) The court's overriding defense counsel's strategic decision to forego a for-cause challenge to a prospective juror who believed the defendant was guilty but had favorable sentencing views. (5) A denial of a defense challenge for cause to a juror who had formed an opinion of defendant's guilt from the newspapers prior to trial. (6) A denied defense challenge for cause to a juror who believed that police witnesses were more likely to tell the truth than other witnesses. (7) The denial of a defense for-cause challenge to a prospective juror whose brother-in-law was a Suffolk County homicide prosecutor who had worked on the case with the lead trial prosecutor prior to defendant's arrest. (8) The denial of a defense for-cause challenge to a prospective juror who disobeyed a direct court order not to read about the case. (9) The denial of a defense for-cause challenge to a prospective juror who had written on his questionnaire that life without parole meant "three hots and a cot." (10) The denial of a defense for-cause challenge to a juror who believed that a death sentence would be more merciful than life without parole. (11) The denial of a defense for-cause challenge to a juror who indicated that he would always impose the death penalty under the facts of this case. (12) Where the voluntariness of defendant's confession was in dispute, the court's refusal to allow defense counsel to ask a prospective juror who was a police officer whether he had ever seen a colleague conduct an overly forceful interrogation.

**Guilt-Phase Issues:** (13) The court's refusal to *voir dire* the sitting jurors about a newspaper article connecting defendant to two additional murders. (14) Whether the "similar fashion" aggravating circumstance is unconstitutionally vague. (15) Whether the court's instructions on "similar fashion" invited the jurors to improperly conclude that "similar fashion" could be proven by acts committed after the murders. (16) Whether the court's decision not to submit two counts of second-degree depraved mind murder was an abuse of discretion. (17) The court's refusal to charge that delay in arraignment was a factor to consider in deciding the voluntariness of the confession.

**Penalty Phase Issues:** (18) Since defendant went to trial under a Hynes-violative statutory scheme (*Hynes v Tomei* was decided well after trial had begun), the death penalty must be stricken. (19) The standardless discretion granted to prosecutor's to seek the death penalty under CPL 250.40. (20) The prosecutor's issuance of a subpoena for defendant's records from his childhood psychiatrist, in violation of the physician-patient privilege, for the improper purpose of deciding whether to seek the death penalty. (21) Whether NY's statutorily mandated deadlock instruction is unconstitutionally coercive. (22) Defendant's competency to proceed at the penalty phase. (23) The court's denial of the defense motion for a new sentencing jury. (24) The court's refusal to discharge a juror who had heard about defendant's post-verdict suicide attempt. (25) The court's preclusion of mitigation testimony about defendant's prospective adjustment in prison were he sentenced to life without parole. (26) The court's refusal to put certain mitigating factors on the verdict sheet. (27) The prosecutor's misconduct throughout the guilt and penalty phases, including the summation comment: "I ask you to consider that even when Jesus Christ forgave the bad thief on the cross, he forgave him for his sins, but he didn't stop the execution." (28) Imbalanced and inaccurate penalty-phase instructions. (29) The death sentence was against the weight of the evidence. (30) Whether New York's death penalty statute violates the State Constitution. (31) Whether the legal injection procedures constitute cruel and unusual punishment.

*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 "Wendy's" slayings. ☞



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*Citations to the cases digested here can be obtained from the Backup Center as soon as they are published.*

## United States Supreme Court

**Double Jeopardy (Dismissal)** DBJ; 125(5) (10)  
**(Jury Trials)**

**Smith v Massachusetts, 543 US \_\_, 125 Sct 1129, 160 LEd2d 914 (2005)**

For his involvement in a shooting, the petitioner was tried in state court on armed assault with intent to murder; assault and battery by means of a dangerous weapon; and unlawful possession of a firearm. The only evidence concerning the firearm count was the complainant's testimony, which did not address the length of the weapon's barrel, an element of the possession count. The trial court granted the petitioner's motion to dismiss that count at the close of the prosecution's case, but did not inform the jury. The prosecution convinced the court to reverse its ruling before closing arguments. The petitioner was convicted on all three counts, tried and sentenced as a repeat offender on the firearm charge, and the matter was affirmed on appeal.

**Holding:** The prohibition against double jeopardy prohibits reconsideration of a mid-trial judicial acquittal just as it does reconsideration of a jury acquittal. See *Richardson v US*, 468 US 317, 325, n. 5 (1984). The trial court granted the petitioner an acquittal on the firearm charge; any more factfinding to determine guilt or innocence violated double jeopardy. See *Smalis v Pennsylvania*, 476 US 140, 145 (1986). At the time of the court's ruling, the prosecutor did not reserve reconsideration or seek a continuance to provide favorable authority, and when the sidebar conference about the ruling concluded, the prosecutor rested without any reservations. Treating the decision as tentative prejudiced the petitioner's trial strategy and defense theory. The petitioner presented his case for the defense in reliance on the finality of the acquittal. Judgment reversed.

**Dissenting:** [Ginsburg, J] Reliance on the finality of a midtrial acquittal depended on due process, not double jeopardy. This petitioner was not prejudiced by the court's error, which was not communicated to the jury and was reversed before closing arguments and the jury charge in an unbroken trial proceeding.

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

**Prisoners (Conditions of Confinement)**  
**(Rights Generally)** PRS I; 300(5) (25)

**Johnson v California, 543 US \_\_, 125 Sct 1141, 160 LEd2d 949 (2005)**

Respondent California Department of Corrections (CDC) had an unwritten policy racially segregating new and transferred male inmates in reception centers for up to 60 days for the purpose of preventing gang violence. The petitioner, an African-American inmate incarcerated since 1987, had always been assigned to share a cell with another African-American. He filed suit challenging the policy on equal protection grounds. A grant of summary judgment based on qualified immunity was affirmed on appeal under a deferential standard of review.

**Holding:** Racial classifications by government entities are subject to strict scrutiny. *Adarand Constructors, Inc. v Pena*, 515 US 200, 227 (1995). Segregation can stigmatize individuals and incite hostility. *Shaw v Reno*, 509 US 630, 643 (1993). Nearly all federal and state prisons operate without racial segregation policies. See eg 28 CFR 551.90. The appellate court erred by not applying strict scrutiny. The burden was on the CDC to show that the policy was narrowly tailored to serve a compelling state interest. See *Lee v Washington*, 390 US 333 (1968). Deferential review such as that applied in *Turner v Safley* (482 US 78 [1987]) has never been applied to racial classification. Judgment reversed and remanded for application of correct standard.

**Concurring:** [Ginsburg, J] Not all race classifications should be subject to strict scrutiny, but the CDC policy was not designed to correct inequities that might justify such classification.

**Dissent:** [Stevens, J] The CDC segregation policy was unjustified and violated equal protection under strict scrutiny or deferential review standards. Remand for a decision on qualified immunity is appropriate, but this court should find the policy unconstitutional.

**Dissent:** [Thomas, J] Deferential review is appropriate for prison policies; the CDC policy was reasonably related to legitimate penological interests, reducing gang violence.

**Death Penalty (Juveniles)** DEP; 100(100)

**Sentencing (Cruel and Unusual Punishment)** SEN; 345(20)

**Roper v Simmons, 543 US \_\_, 125 Sct 1183, 161 LEd2d 1 (2005)**

The respondent was tried for capital murder at age 18 for making and carrying out a plan at age 17 to kill the decedent. The court had instructed the jury that the respondent's age at the time of the offense was a mitigating factor. New counsel moved to set aside the judgment

US Supreme Court *continued*

by raising ineffectiveness of counsel and introduced evidence that the respondent was very immature, impulsive and credulous. Denial of the motion was affirmed. A new motion was filed after *Atkins v Virginia*, 536 US 304 (2002), which held that the 8th amendment prohibited execution of a mentally retarded person, and the respondent was resentenced to life in prison without parole.

**Holding:** Death is a disproportionate punishment for juvenile offenders under the age of 18 at the time of the offense. Executing offenders under the age of 16 was found to violate the 8th amendment in *Thompson v Oklahoma* (487 US 815 [1988]); at one time, the execution of juvenile offenders over 15 but under 18 did not offend contemporary standards of decency. *Stanford v Kentucky*, 492 US 361 (1989). Standards of decency evolved and changed the Court's view of executing the mentally retarded, and now juveniles. The evidence showed that 30 states reject the juvenile death penalty; and there is a consistency in the direction of change. Sufficient evidence proved that society views juveniles as less culpable than adults. Juveniles are not the worst offenders deserving of the death penalty: (1) they are immature and irresponsible, thus excluded from adult privileges; (2) they are more susceptible to negative influences and outside pressures; and (2) their character is not fully formed. Neither retribution nor deterrence justified the juvenile death penalty. Judgment affirmed.

**Concurring:** [Stevens, J] This reaffirms that the 8th Amendment is to be read in light of evolving standards of decency.

**Dissent:** [O'Connor, J] This ruling is not justified.

**Dissent:** [Scalia, J] "Allowing lower courts to reinterpret the Eighth Amendment whenever they decide enough time has passed for a new snapshot leaves this Court's decisions without any force—especially since the 'evolution' of our Eighth Amendment is no longer determined by objective criteria."

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**Civil Rights Actions (USC § 1983 Actions)** CRA; 68(45)

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

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

**Wilkinson v Dotson, 544 US \_\_, 125 Sct 1242, 161 LEd2d 253 (2005)**

Respondent Dotson was sentenced in 1981. His request for parole release was denied based on guidelines adopted in 1998. He claimed that application of those guidelines violated constitutional *ex post facto* and due process guarantees. He filed a federal complaint seeking to compel the prison authorities to apply the guidelines in

effect in 1981. Respondent Johnson began serving his sentence in 1992. His parole request was also rejected based on the 1998 guidelines. He raised the retroactivity problem and denial of due process due to the absence of board members from the hearing and denial of an opportunity to speak. Both respondents filed complaints under 42 USC 1983. The district court's rejection of the complaints because constitutional challenges to parole board procedures could only be heard in *habeas corpus* was reversed on appeal.

**Holding:** Prisoners are barred from using 1983 "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." See *eg, Preiser v Rodriguez*, 411 US 475, 489 (1973). The proper method for such claims is federal *habeas corpus* or appropriate state relief. The respondents sought an injunction for a new eligibility review (Dotson) and a new parole hearing (Johnson). The relief requested would not have necessarily resulted in immediate release from prison or a shortened sentence, and did not lie at the core of *habeas corpus*. See *Edwards v Balisok*, 520 US 641, 648 (1997). Judgment affirmed.

**Concurring:** [Scalia, J] The *habeas* remedy would have to be distorted to accommodate challenges to state parole panel procedures. *Cf Bell v Wolfish*, 441 US 520, 526, n. 6 (1979).

**Dissent:** [Kennedy, J] The respondents' complaints concerned duration of sentence, not conditions of confinement.

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**Sentencing (Aggravated Penalties)** SEN; 345(5) (32)  
**(Enhancement)**

**Shepard v United States, 544 US \_\_, 125 Sct 1254, 161 LEd2d 205 (2005)**

The petitioner pled guilty to a federal firearms charge. The prosecution wanted to enhance the sentence, based on predicate Massachusetts burglary offenses, under the Armed Career Criminal Act (ACCA). See 18 USC 924(e). The court did not consider an ACCA sentence because the charging documents for the proffered predicates set forth a definition of burglary encompassing nongeneric burglary of "building, ship, vessel or vehicle." After the matter was sent back to the trial court following appeal, the court again did not impose an ACCA sentence. The appellate court again reversed.

**Holding:** Classification of burglary as a violent felony under ACCA in plea proceedings can only be based on statutory elements, charging documents, jury instructions (see *Taylor v US*, 495 US 575 [1990]), plea agreements, plea proceeding transcripts, or a comparable judicial record, not police reports or complaint applications. Burglary, under the ACCA, means "generic burglary," *ie*, committed in a building or enclosed space. The complaints in the predicate cases were broader than generic burglary.

US Supreme Court *continued*

Reliance on police reports to show that buildings were involved would “ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State.” *Taylor* anticipated *Jones v US* (526 US 227, 243, n. 6 [1999]) and *Apprendi v New Jersey*, 530 US 466, 490 [2000]. Judgment reversed, case remanded.

**Concurring:** [Thomas, J] ACCA factfinding procedures defined in *Taylor* conflict with the *Apprendi* line of cases, and require reconsideration of the *Almendarez-Torres v US* (523 US 224 [1998]) exception to judicial factfinding concerning a defendant’s prior convictions. Examination of police and court documents to assess predicate convictions would lead to constitutional error.

**Dissent:** [O’Connor, J] Complaint application and police reports were appropriate, reliable, and necessary documents to clarify the classification of the petitioner’s predicate burglary offenses.

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

**Muehler v Mena, 544 US \_\_, 125 Sct 1465, 161 LEd2d 299 (2005)**

The petitioners, police officers, executed a search warrant for weapons and gang materials at a private residence. The respondent, a young woman who lived there, was handcuffed, along with three other occupants and held during the search. The petitioners asked the respondent about her immigration status. After being released without being charged, the respondent filed a 1983 action over the manner and length of her detention. A jury returned a verdict in her favor that was affirmed on appeal.

**Holding:** Restraining in handcuffs an occupant of a home for almost three hours and questioning her about her immigration status during execution of a search warrant were reasonable under the 4th Amendment. See *Michigan v Summers*, 452 US 692 (1981). While the handcuffs were an additional intrusion, see *Maryland v Wilson* (519 US 408, 413-414 [1997]), governmental interests in locating weapons and a wanted gang member and maintaining safety justified it. Police questioning about the respondent’s immigration status was not a seizure. See *Florida v Bostick*, 501 US 429, 434 (1991). Since the questioning did not prolong the detention, it did not require reasonable suspicion. *Illinois v Caballes*, 543 US \_\_, 160 LEd2d 842, 125 Sct 834 (2005). Judgment vacated and remanded.

**Concurring:** [Kennedy, J] Excessive force should not

be used on persons, especially those not under suspicion, unless objectively reasonable under the circumstances. *Graham v Connor*, 490 US 386 (1989). The two to three hours in handcuffs here skirted the limits of reasonableness. Since two officers were watching four detainees, it was objectively reasonable to handcuff them.

**Concurring:** [Stevens, J] The *Graham* objective reasonableness test is misapplied. No evidence showed that the respondent, a 5-foot-2-inch unarmed woman not part of a gang, was a threat to the officers’ safety. *Summers* did not give police *carte blanche* to keep in handcuffs individuals who posed no threat during a search. Excessive force and length of detention should be considered.

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

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

**Brown v Payton, 544 US \_\_, 125 Sct 1432, 161 LEd2d 334 (2005)**

During the penalty phase of the respondent’s capital murder trial, the defense presented evidence of postcrime behavior, *ie*, religious conversion. The respondent’s motion to modify a catchall jury instruction on mitigating circumstances to specifically include evidence of his character and background was denied. In closing arguments, the prosecutor told the jury repeatedly that the catchall instruction did not include postcrime evidence. The judge did not give a curative instruction that the prosecutor’s interpretation was wrong. The respondent’s death sentence was affirmed; federal *habeas corpus* was then granted and affirmed.

**Holding:** The state supreme court’s use of *Boyd v California* (494 US 370, 380 [1990]) to find that the catchall instruction given allowed consideration of postcrime conversion was not unreasonable. Nor was it unreasonable for the state court to find under *Boyd* that the prosecutor’s remarks did not prevent application of the instruction. “[F]or the jury to have believed it could not consider Payton’s mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all.” While the trial court “of course” should have “advised the jury that it could consider Payton’s evidence,” it was not unreasonable for the state court “to find that the jurors did not likely believe Payton’s mitigation evidence beyond their reach.” As the state court’s decision was not contrary to, or involve an unreasonable application of, clearly established Supreme Court precedent, under the Antiterrorism and Effective Death Penalty Act, federal *habeas* relief is not available. See 28 USC 2254(d)(1). Judgment reversed.

**Concurring:** [Scalia, J] Limiting a jury’s discretion to consider all mitigating evidence did not violate the 8th Amendment. See *Walton v Arizona*, 497 US 639, 673 (1990).

**Concurring:** [Breyer, J] Although the prosecutor’s

US Supreme Court *continued*

actions, the trial judge's inactions and the ambiguity of the instruction might have led a judge to conclude that the jury did not consider the postcrime evidence, the state court's decision was not contrary to, nor did it involve, "an unreasonable application of, clearly established Federal law."

**Dissent:** [Souter, J] The state supreme court applied settled law unreasonably when it did not find that the catchall instruction, combined with the prosecutor's and judge's actions, prevented the jury from considering post-crime mitigating evidence in violation of the 8th Amendment. *See Penry v Lynaugh*, 492 US 302 (1989) and *Skipper v South Carolina*, 476 US 1, 4-5 (1986).

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

**Statute of Limitations (Tolling of)** **SOL; 360(20)**

**Rhines v Weber**, 544 US \_\_, 125 Sct 1528,  
161 LE2d 440 (2005)

Convicted of murder and sentenced to death, the petitioner unsuccessfully sought state *habeas* relief, which was denied. Well before the Antiterrorism and Effective Death Penalty Act (AEDPA) one-year statute of limitations had run following that denial, the petitioner filed a federal *habeas corpus* motion containing 35 claims. The prosecution challenged 12 claims as unexhausted, and the court agreed as to eight. By then, the AEDPA time limit had expired, and the petitioner asked that the *habeas* petition be held in abeyance until he exhausted the remaining state claims. The court granted the stay. The State appealed, the stay was vacated, and the case remanded for a determination of whether the petition could proceed without the unexhausted claims.

**Holding:** The district court's stay-and-abeyance procedure for a mixed federal *habeas* petition was not categorically an abuse of discretion. Mixed petitions with exhausted and unexhausted claims must be dismissed without prejudice to allow state courts to decide those claims. *See Rose v Lundy*, 455 US 509 (1982). The AEDPA, enacted in 1996, preserved the total exhaustion requirement and imposed a one-year statute of limitations. *See* 28 USC 2244(d). The time can be tolled during the pendency of a state post-conviction review, but not by a federal filing. *See Duncan v Walker*, 533 US 167, 181-182 (2001). Dismissal of a mixed petition in federal court after the statute of limitations had run forecloses further review. The stay-and-abeyance is appropriate when there exists: good cause for failing to exhaust state claims; potentially meritorious issues; and no evidence of dilatoriness. These conditions override the AEDPA goals of finality and speedy resolution of federal petitions. If a stay here was not warranted, the court should permit the unexhausted

claims to be removed, and the petition to proceed without them. Judgment vacated and remanded.

**Concurring:** [Stevens, J] This court's "reference to 'good cause'" for failure to more promptly exhaust state remedies should not be read "to impose the sort of strict and inflexible requirement that would 'trap the unwary *pro se* prisoner.'" *Rose v Lundy*, 455 U.S. 509, 520...." *See also Slack v McDaniel*, 529 US 473, 487 (2000).

**Concurring:** [Souter, J] The good cause standard is too ambiguous for *pro se* petitioners. The appropriate standard is proof of "intentionally dilatory litigation tactics."

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**Federal Law (Procedure)**

**FDL; 166(30)**

**Post-Judgment Relief(General)**

**PJR; 289(20)**

**Johnson v United States**, 544 US \_\_, 125 Sct 1571,  
161 LE2d 542 (2005)

After pleading guilty to federal drug charges, the petitioner was given an enhanced sentence under the Armed Career Criminal Act (ACCA) (18 USC 924[e]) based on two state convictions. He challenged the enhanced sentencing on appeal because one of the predicates was not valid. The sentence was affirmed. Two days after the appellate decision, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) went into effect. One year and three days after the petitioner's conviction became final, he filed a motion for a 60-day extension of time to attack his federal sentence under 28 USC 2255. The motion was denied based on the AEDPA one-year deadline for challenging federal sentences. Later, the petitioner successfully challenged the predicate state conviction. He then renewed his federal motion based on new evidence, *ie* the vacatur. The denial of the motion as untimely was affirmed.

**Holding:** As applicable here, the one-year AEDPA time limit for challenging a federal sentence begins to run on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 USC 2255. Vacatur of a state conviction underlying an ACCA sentence is a "fact" for purposes of that provision. *See Custis v US*, 511 US 485 (1994). The vacatur must have been sought with due diligence, measured from the date of the federal judgment that relied upon the state predicate. If the petitioner had pursued vacatur with diligence after the date of judgment, the AEDPA time limit would have run from the date he received notice of the state court's decision. But he waited three years after judgment to file his predicate challenge. Judgment affirmed.

**Dissent:** [Kennedy, J] The due diligence requirement imposed here is improper for several reasons.

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**Federal Legislation (General)**

**FLG; 167(10)**

US Supreme Court *continued*

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

**Small v United States, 544 US \_\_, 125 SCt 1752, 161 LEd2d 651 (2005)**

The petitioner was convicted of arms smuggling by a Japanese court, and sentenced to five years in prison. Upon returning to the US, the petitioner purchased a gun from a store in Pennsylvania. He was charged with “unlawful gun possession” under 18 USC 922(g)(1). The petitioner pled guilty, reserving the right to challenge the foreign conviction as a basis for the charges, which were affirmed.

**Holding:** The statute makes it unlawful for a person “convicted in any court of, a crime punishable by imprisonment for a term exceeding one year” to possess a firearm. When Congress enacts legislation it is presumed to be limited to domestic applications. *See Foley Bros., Inc. v Filardo*, 336 US 281, 285 (1949). Foreign convictions are distinct since the justice systems of other countries may criminalize conduct that is lawful here, administer justice differently from the America system, or impose a heavier sentencing scheme. The statute did expressly include exceptions for certain offenses and enhanced penalties for others, but omitted any reference to foreign convictions. The legislative history was also silent on this point. The petitioner was not prohibited by this statute from possessing a firearm based on a conviction in a foreign court. Judgment reversed.

**Dissent:** [Thomas, JJ] The plain meaning of “any court” in statute should encompass foreign convictions.

**Federal Legislation (General)** **FLG; 167(10)**

**Pasquantino v United States, 544 US \_\_, 125 SCt 1766, 161 LEd2d 619 (2005)**

The petitioners ordered liquor from US distributors over the phone and smuggled it into Canada without paying excise taxes. Their wire fraud convictions were reversed on appeal based on the common law revenue rule proscribing US courts from enforcing foreign tax laws. On rehearing *en banc*, the convictions were affirmed.

**Holding:** A scheme to defraud a foreign government of tax revenue violated the federal wire fraud statute prohibiting use of interstate wires to effect “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” *See* 18 USC 1343. Canada’s right to uncollected excise taxes on liquor was an entitlement to collect money. *See McNally v US*, 483 US 350, 358 (1987). The petitioners’ concealment of liquor shipments into Canada was a scheme to defraud by representation (*see Durland v US*, 161 US 306, 313 [1896]) the Canadian government of

money in the form of uncollected taxes. The wire fraud statute did not derogate from the common law revenue rule. The prosecution was not a lawsuit to enforce a foreign tax obligation, but an action to punish domestic criminal conduct. Nor did it entail the interpretation of foreign tax policies. Since the scheme was completed in the US, the statute did not have extraterritorial impact. *See US v Pierce*, 224 F3d 158, 166 (CA 2 2000). Prosecuting a US citizen for smuggling cheap liquor into Canada may seem an odd use of federal resources but the broad language of the statute authorizes it and no canon of statutory construction justifies a narrower reading. Judgment affirmed.

**Dissent:** [Ginsburg, JJ] The wire fraud statute was improperly applied to evasion of foreign customs laws. Canada had no reciprocal law prohibiting smuggling, which would permit enforcement. *See* 18 USC 546. The statute did not specifically authorize enforcement of foreign laws. Also, the sentence was heavily weighted to punish petitioners for Canadian duties avoided rather than American wire fraud and was based on judicial factfinding that violated *US v Booker*, 125 SCt 738, 160 LEd2d 621 (2005).

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

**Statute of Limitations (Tolling of)** **SOL; 360(20)**

**Pace v DiGuglielmo, 544 US \_\_, 125 SCt 1807, 161 LEd2d 669 (2005)**

Convicted of murder in Pennsylvania in 1986, the petitioner sought no direct appeal, then filed a motion under the state post conviction act. In 1992, the state’s highest court denied the untimely petition for discretionary review. Again in 1996 the petitioner filed a state petition, which was dismissed under legislation that had replaced the earlier post conviction statute. Appeal was denied in 1998 after the state asserted that the petition was time barred under time limits in the new statute; the state high court denied review. In 1999, the petitioner sought federal *habeas corpus* relief. The district court tolled the time limit set by the Antiterrorism and Effective Death Penalty Act (AEDPA) (28 USC 2244[d][1]) for the time the 1996 state petition was pending. The appellate court reversed.

**Holding:** A state postconviction petition rejected as untimely was not “properly filed” as required by AEDPA. *See* 28 USC 2244(d)(2). Time limits on state postconviction petitions were “conditions to filing.” *See Artuz v Bennett*, 531 US 4, 8 (2000). This remained true despite the existence of exceptions to the timeliness requirement. *See Carey v Saffold*, 536 US 214 (2002). To avoid the situation where a state petition turned out to be improperly filed, a “protective” petition could be filed in federal court asking to stay and abey the proceedings until state remedies had been exhausted. *See Rhines v Weber* (125 SCt 1528 [2005]).

**US Supreme Court** *continued*

Confusion over timeliness of a state petition would be “good cause” for filing in federal court. The petitioner was not entitled to equitable tolling. The postconviction claims, illegal sentence and plea, were actionable in 1986, an ineffectiveness of counsel claim in 1991. However, the petitioner waited until 1996 to assert them showing a lack of diligence. *See Irwin v Department of Veterans Affairs*, 498 US 89, 96 (1990). Judgment affirmed.

**Dissent:** [Stevens, J] A postconviction petition reviewed and considered by state court, albeit untimely, was still properly filed under AEDPA’s tolling exception. A filing is proper when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. Thus, a petition can be properly filed although the claims might be time barred by state law.

**New York State Court of Appeals**

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

**People v Thomas**, 4 NY3d 143, 791 NYS2d 68 (2005)

The defendant, arrested for domestic violence and striking the arresting officers, was charged with third-degree assault on the woman at his home and resisting arrest. The complainant declined prosecution, and two new informations were substituted based on the defendant’s conduct towards the police. A superseding information contained an expanded factual account of the resisting arrest charge; a successive information charged a new offense, second-degree harassment. The original complaints were dismissed in favor of the new informations. Both informations were dismissed as defective because the harassment charge was not part of the original complaint and both charges relied on new facts unsupported by nonhearsay allegations. Appellate Term modified the ruling and reinstated the informations.

**Holding:** The prosecution can file new informations with additional charges or facts not found in original charging documents provided they are based on the same criminal transaction. The Criminal Procedure Law does not restrict a prosecutor’s information to the contents of a previously filed accusatory instrument. *See CPL 100.50(1)*. The prosecution was free to charge new crimes and allege new facts to support them. *See CPL 100.40 [1] [c]*. The information charging resisting arrest was not defective because it relied on the complainant’s hearsay statements. The statements were not offered to establish the truth of their content but to show reasonable cause for the defendant’s arrest. *People v Huertas*, 75 NY2d 487, 492. Order affirmed.

March–May 2005

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

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

**People v Pitts, Nos. 9; 10, 2/15/2005**

Defendant Pitts was convicted of rape. Five years after completing his direct appeals, he filed a *pro se* CPL 440.30 (1-a) motion seeking DNA testing of vaginal and oral swabs, the complainant’s underpants, fibers and any other material tested by the Monroe County Public Safety Laboratory. The motion was denied as untimely, because there was no showing that the items to be tested contained DNA, and because no forensic evidence had been introduced at trial and the court’s belief that no reasonable probability existed the verdict would have been more favorable to the defendant had DNA test results been introduced. The denial was affirmed on appeal.

Almost 10 years after defendant Barnwell’s direct appeal for his rape conviction, he filed a CPL 440.30 (1-a) motion for DNA testing on hairs, semen, and a cigarette butt. The motion was denied because, while DNA evidence might have changed the outcome of the one-witness identification case, a hearsay affidavit from the property clerk indicated that the rape kit had been destroyed. The denial was affirmed on appeal because the defendant failed to show that evidence to be tested still existed.

**Holding:** Post-conviction motions for forensic DNA testing can be brought at any time and defendants are not required to show that DNA evidence existed or was available for testing. The statute permits any defendant, regardless of the date of conviction, to seek post-conviction DNA testing, and requires prosecutors to advise defendants about the location and existence of evidence to be tested. Pitts’ motion was properly denied since no reasonable probability existed that he would have received a more favorable verdict had a DNA test been done. Barnwell’s motion was improperly denied. He had requested testing of specific evidence containing DNA, satisfying the reasonable probability requirement. Due diligence was not required. Judgment in Pitts affirmed; judgment in Barnwell reversed and remanded.

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

**Defense Systems (Assigned Counsel System) (Compensation Systems [Attorney Fees])** DFS; 104(5) (25[b])

**Levenson v Lippman, No. 1, 2/15/2005**

New York City assigned counsel lawyers in five separate cases submitted applications for compensation in excess of the statutory limit. The trial judges granted the increases, and in most instances ordered payment at a rate of \$75 per hour. The Director of the Assigned Counsel

**NY Court of Appeals** *continued*

Plan requested review of the awards by the administrative judge for New York City. All awards were reduced to then-current statutory rates. An action for declaratory judgment was filed challenging the constitutionality of Rule 127.2(b), under which the review was made. The rule was found valid and the reduction of the awards upheld. The ruling was reversed on appeal.

**Holding:** Amendment of 22 NYCRR 127.2(b) by the Chief Administrative Judge allowing administrative judges to review trial court orders increasing assigned counsel fee awards above statutory limits was constitutional. At the time the suit was filed, County Law 722-b provided compensation to assigned counsel at a rate of \$25 per hour for out-of-court work and \$40 per hour for in-court work. The maximum award was \$800 for misdemeanor cases and \$1,200 for felony cases and appeals. Excess compensation required a showing of “extraordinary circumstances.” The Chief Administrative Judge amended Rule 127.2 (b) to give administrative judges the power to review and reduce excess compensation awards. Trial court orders for excess compensation were administrative and not reviewable by an appellate court. *See Matter of Werfel v Agresta*, 36 NY2d 624; *Matter of Director of Assigned Counsel Plan of the City of New York [Bodek]*, 87 NY2d 191. Rule 127.2(b) did not expand or create new appellate authority, which had unsuccessfully been sought. Establishing this alternative form of review was within the administrative power of the courts. NY Constitution article VI, § 28(b); Judiciary Law 212; 22 NYCRR 80.1. Judgment reversed.

**Concurring:** [Rosenblatt, J] Rule 127.2(b) was amended after legislation to expand appellate jurisdiction to review excess payment vouchers was defeated. *See* 1995 NY Senate Bill S 4481.

**Evidence (Hearsay)**

**EVI; 155(75)**

**People v Douglas, 4 NY3d 777 (2005)**

The complainant telephoned 911 to report being robbed by four individuals. Then she canvassed the area with the police and picked out the defendant as one of the four. Before trial, a co-defendant pled guilty. The co-defendant was unavailable at trial and a redacted version of her plea allocution was introduced against the defendant.

**Holding:** Admission of a non-testifying co-defendant’s plea allocution against the defendant at trial violated his right to confrontation. The 6th Amendment required that the defendant have an opportunity for cross-examination of testimonial statements as a precondition to their admissibility. *See Crawford v Washington*, 541 US 36 (2004). The plea allocution here was a testimonial state-

ment not subject to cross-examination. However, its admission was harmless error. *See People v Eastman*, 85 NY2d 265, 276. Since the complainant provided detailed, corroborated testimony about the attack and identification of the defendant, there was no reasonable possibility that the error contributed to the defendant’s conviction. *See People v Crimmins*, 36 NY2d 230, 240-241. Order affirmed.

**Evidence (Hearsay)**

**EVI; 155(75)**

**People v Hardy, 4 NY3d 192, 791 NYS2d 513 (2005)**

The defendant was charged with robbery and attempted murder. He was apprehended after information from related investigations connected him to the crime. A person arrested for another crime testified that the defendant admitted shooting a woman for \$25. The defendant’s brother, who was also arrested, pled guilty. At trial, the complainant was unable to identify the defendant. Her account of the robbery matched the plea allocution of the defendant’s brother, a redacted version of which was read into evidence. The defendant’s conviction was affirmed.

**Holding:** Admission of a non-testifying co-defendant’s plea allocution against the defendant at trial violated the right to confrontation. The 6th Amendment required that the defendant have an opportunity for cross-examination of testimonial statements as a precondition to their admissibility. *Crawford v Washington*, 541 US 36 (2004). The co-defendant’s plea allocution was a testimonial statement, not subject to cross-examination. Under prior law such hearsay might have been admissible as a statement against penal interest, but under *Crawford* it violates the right to confrontation. *See People v Thomas*, 68 NY2d 194, 195. Its admission was not harmless error. The defendant’s alleged admission to the shooting was provided by an individual with a long criminal history. The complainant did not identify the defendant and her description of the attacker varied from the defendant’s actual appearance. The prosecutor relied heavily on the plea allocution to fill in gaps and create a cohesive picture. Read-back requests by the jury showed that they focused on these statements in reaching their verdict. *See People v Eastman*, 85 NY2d 265, 276. Order reversed.

**Guilty Pleas (Withdrawal)**

**GYP; 181(65)**

**People v Seeber, 4 NY3d 780 (2005)**

**Holding:** Denial of the defendant’s motion to withdraw her guilty plea to second-degree felony murder, made only after a jury acquitted her codefendant, was not an abuse of discretion. The defendant alleged nothing that would undermine her plea or show that it was not voluntary knowing and intelligent. *See People v Alexander*, 97

**NY Court of Appeals** *continued*

NY2d 482, 485. She negotiated a plea bargain, and entered her plea after the trial court administered detailed cautionary warnings and after extensive consultation with her counsel. She did not assert innocence or claim ineffectiveness of counsel. In her allocution she had acknowledged remaining unlawfully in the premises, which was an element of the underlying burglary, despite her later claim that this element was not sufficiently shown. Furthermore, this court has “never held that a plea is effective only if a defendant acknowledges committing every element of the pleaded-to offense.” See *People v Lopez*, 71 NY2d 662, 666. Order affirmed.

**Dissent:** [Smith, RS, JJ] The defendant’s plea allocution was not an admission of felony murder because she did not allocute to robbery or burglary, only stealing. See *People v Nixon*, 21 NY2d 338. Her admission of remaining unlawfully was in response to the prosecutor’s question, which called for a legal conclusion, and was unsupported by the facts. An *Alford* plea would be preferable to a hypertechnical admission to a non-existent crime.

**News Media (Shield Laws)** **NEW; 269(45)**

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

**People v Combest, No. 22, 2/22/2005**

The 17-year-old defendant was arrested for involvement in a shooting. His arrest and police interrogation were filmed by a film crew making a documentary for Court TV. Indicted for murder, the defendant subpoenaed the tapes that were not aired. The film company moved to quash. Without reviewing the tapes, the court ordered them to be given to the defense. The film company obtained a stay and a reversal on appeal. At trial, a hearing was held and the court granted the film company’s motion to quash the subpoena. The defendant’s manslaughter conviction was affirmed.

**Holding:** The defendant satisfied the requirements of Civil Rights Law 79-h (c), the Shield Law, and was entitled to disclosure of nonconfidential unpublished material obtained by the media related to his interrogation. See *O’Neill v Oakgrove Constr., Inc.*, 71 NY2d 521. The Shield Law protects journalists from revealing the content of unpublished news, unless the disclosure request makes a clear and specific showing that the news was: (i) highly material and relevant; (ii) critical or necessary to the party’s claim, defense or proof of a material issue; and (iii) not obtainable from any alternative source. The defendant’s statements to the police, and their voluntariness, were highly material and relevant; critical to his claim that he acted in self-defense; and the only recordings of his first interrogation. Since the Shield Law requirements

were met, the issues of “what standard is constitutionally required in order to overcome a criminal defendant’s substantial right to obtain relevant evidence” and “whether the indicia of state involvement in this case r[ose] to the level at which private conduct is transformed into state action” (see *People v Ray*, 65 NY2d 282, 286) need not be addressed. Order reversed, new trial ordered.

**Dissent in part:** [Smith, RS JJ] That the tapes were “critical or necessary” to the defense was insufficiently shown without *in camera* review.

[*Ed. Note:* See also the summary of *People v Combest*, No. 329, below.]

**Guilty Pleas (General) (Vacatur)** **GYP; 181(25) (55)**

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

**People v Catu, 4 NY3d 242, 792 NYS2d 887 (2005)**

The defendant pled guilty to two felonies and was sentenced to prison. Since he was a second felony offender, a mandatory period of postrelease supervision was added. The court had not advised him at his plea about the postrelease supervision. The court’s refusal to vacate the plea because the defendant did not show that he would not have pled guilty had he known of the postrelease supervision condition was affirmed.

**Holding:** Postrelease supervision, Penal Law 70.45 (1), was a direct consequence of the defendant’s conviction since it had a “definite, immediate and largely automatic effect on defendant’s punishment.” *People v Ford*, 86 NY2d 397. For the defendant’s plea to a determinate sentence to have been knowing, voluntary and intelligent, the court had to advise him about postrelease supervision. Order reversed, case remitted.

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

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

**People v Smith, No. 32, 3/24/2005**

The defendant moved under CPL 210.30 (1) to inspect the grand jury minutes and dismiss the indictment as based on legally insufficient evidence. See CPL 210.20(1)(b). The court found the evidence sufficient but discovered that the date of the offense in the indictment did not match the date in the grand jury minutes. The defendant renewed his motion to dismiss. The court conducted a hearing and determined that the minutes contained a typographical error. The defendant’s conviction following a jury trial was affirmed.

**Holding:** Since the court held a hearing to resolve the defendant’s CPL 210.30 motion to inspect and dismiss, and the evidence at trial was legally sufficient, it was not reviewable on appeal. CPL 210.30(6). Order affirmed.

**NY Court of Appeals** *continued*

**Discovery (Matters Discoverable) DSC; 110(20) (30[o])  
(Procedure [Review])**

**People v Yavru-Sakuk, No. 41, 3/29/2005**

The defendant, a dentist, was convicted of sexually abusing a patient. Before trial, the defendant requested the diary of the complainant’s mother, which included entries made after the offense. The prosecution provided two pages written in Turkish, which it claimed were the only relevant portions based on the mother’s representation—they did not translate it or review it themselves. The defense contended that it needed to see diary entries after the date of the alleged abuse because the mother and other family members continued to use the defendant’s professional services after that date. Appellate Term found that the defendant did not satisfy the statutory requirement for disclosure.

**Holding:** Finding that requested portions of the mother’s diary were not relevant, when the prosecution had not reviewed it, was error. The trial court should have conducted an *in camera* inspection to decide whether any other parts of the diary were relevant. *See People v Adger*, 75 NY2d 723. If relevant sections are found, then the court must determine whether there is “a reasonable possibility that the non-disclosure materially contributed to the result of the trial.” CPL 240.75. If so, that material must be disclosed to the defense and a new trial ordered. Order modified, matter remitted.

**Attorney/Client Relationship (Confidences) ACR; 51(10)  
Ethics (Defense) ETH; 150(5)**

**People v Andrades, No. 28, 3/29/2005**

After being arrested for murder and given his *Miranda* rights, the defendant confessed to police in written and videotaped statements. Before the *Huntley* hearing, defense counsel asked to be relieved citing an ethical conflict. The court denied the motion. After the prosecution completed its presentation, counsel renewed his request. He added that he had advised the defendant against testifying at the hearing, and that counsel was having an ethical problem and would asked his client to testify in the narrative. The defendant testified that he had no memory of the homicide and had only reiterated what the police told him another participant said about the crime. Defense counsel made no closing. The motion to suppress was denied, the defendant’s testimony being found not credible. His conviction after jury trial was affirmed.

**Holding:** Defense counsel did not violate the defendant’s right to a fair hearing by telling the judge who was

to preside at the hearing of an ethical dilemma, seeking to withdraw, and announcing that his client would testify in the narrative. A lawyer had a duty to the court not to participate in a client’s perjury. DR 7-102 (22 NYCRR 1200.33); *People v DePallo*, 96 NY2d 437; *Nix v Whiteside*, 475 US 157, 166 (1986). Where efforts to dissuade the client from committing perjury fail, and withdrawal is denied, it is the lawyer’s obligation to respect the defendant’s right to testify by offering evidence in the narrative. Counsel cannot use perjured testimony in closing arguments. DR 7-102[A][4]. Defense counsel’s disclosures here were within ethical bounds, since the defendant’s intent to give perjured testimony was not a protected confidence or secret. There being no violation of a professional duty, there was no ineffective assistance of counsel. *See People v Baldi*, 54 NY2d 137, 151-52. The colloquy between defense counsel and court about client’s testimony was procedural, and the defendant’s presence was not required. *See People v Keen*, 94 NY2d 533, 539. Order affirmed.

**Sentencing (Determinate Sentencing) SEN; 345(30) (37)  
(General)**

**People v McClemore, No. 46, 3/31/2005**

The defendant pled guilty to first-degree kidnapping and was sentenced to 15 years to life. The court issued an order of protection in favor of the person kidnapped, with an expiration date 100 years from the date of sentencing. The appellate court affirmed.

**Holding:** County court had the authority to calculate the maximum date of the order of protection, three years past the expiration of the defendant’s life sentence, by choosing a date 100 years from sentencing. The maximum length of an order of protection for a felony conviction “shall not exceed the greater of: (i) five years from the date of such conviction, or (ii) three years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed” CPL 530.13[4]. Setting an expiration date is important to give certainty and finality to defendants, complainants, witnesses, and law enforcement. *People v Nieves*, 2 NY3d 310, 317. Where the defendant’s maximum sentence was life, making it impossible to know the expiration date of the sentence, the county court’s approach satisfied the purpose of the statute although the result amounted to a lifetime order of protection. Order affirmed.

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

**People v Aiken, No. 31, 3/31/2005**

The defendant and the decedent were next-door neighbors sharing a common wall in an apartment building. Over the years, the decedent had stabbed the defen-

**NY Court of Appeals** *continued*

dant in the back and repeatedly threatened to shoot, stab, or otherwise injure him. In 1999, the defendant and the decedent started arguing through their common wall. The decedent's mother called the police. The defendant opened his door, holding a metal pipe with which he had banged on the wall earlier. In the hallway was the decedent, who again started arguing with him. The decedent reached into his pocket, came up to defendant's face, and said he "was going to kill" him. Fearing the decedent might stab him again, the defendant struck the decedent with the pipe, killing him. The defendant raised self-defense at trial, but the court denied his request to instruct the jury that standing near the threshold obviated the duty to retreat. Acquitted of murder, he was convicted of first-degree manslaughter, which was affirmed.

**Holding:** The defendant properly obtained a justification charge based on evidence of the decedent's threats and violent conduct as well as the defendant's subjective belief that the decedent was about to stab him again. The defendant was not entitled to an instruction that he had no duty to retreat. Permitted use of deadly force is statutorily limited to situations where a defendant could not safely retreat. *See* Penal Law 35.15. The defendant would have no duty to retreat in his own home when he was not the initial aggressor, but he stood in the doorway, and the decedent died outside the apartment without ever entering. *See People v Hernandez*, 98 NY2d 175, 182. The doorway was a hybrid private-public space without the same reasonable expectation of refuge as the home. *See People v Reynoso*, 2 NY3d 820. The defendant had an opportunity to close the door and retreat. Order affirmed.

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

**Traffic Infractions (General)** TFI; 372(15)

**People v Loren, No. 68, 4/28/2005**

A local volunteer fire department responded to an automobile accident on a public road. The Fire Chief ordered two firefighters, who were not designated peace officers under General Municipal Law 209-c, to close the road on one side and set up a roadblock. The defendant ignored the firefighters' order to stop at the roadblock, then swerved around them into the open lane. The firefighters flagged down the defendant, who refused to identify himself. Despite being told that they would call the State Police, the defendant drove off. Later, a State Police officer issued the defendant a ticket for violating Vehicle and Traffic Law 1102 for failing to comply with the lawful order of a police officer or "other person duly empowered to regulate traffic." The defendant unsuccessfully moved to dismiss the charge claiming volunteer firefighters had no authority to direct traffic. His conviction

was affirmed.

**Holding:** Statutory law (Vehicle and Traffic Law 1102) allowed the Fire Chief to authorize firefighters to direct traffic at the scene of an accident. The firefighters were acting under such authorized instructions from the Fire Chief, who had statutory authority to direct traffic at the scene of an accident, fire or other emergency. *See* Vehicle and Traffic Law 1602. This emergency rule power was delegable to other firefighters under supervision of the chief. *See* Village Law 10-1018. Order affirmed.

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

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

**People v Dunn, No. 69, 4/28/2005**

The defendant was convicted of second-degree murder. Her motion to set aside the verdict under CPL 330.30 was denied. However, relying on Judiciary Law 2-b (3), the court on its own overturned the verdict because of ineffectiveness of counsel. The prosecution's appeal was dismissed as unauthorized.

**Holding:** Under the Criminal Procedure Law, a prosecutor cannot file an appeal from the *sua sponte* order of a trial court setting aside a verdict pursuant to Judiciary Law 2-b (3). The right to appeal in a criminal proceeding is rooted in statute. *See People v Hernandez*, 98 NY2d 8, 10. Pursuant to CPL 450.20 (3) the prosecution can appeal where the verdict had been set aside based on CPL 330.30 or 370.10. Here there was no doubt that the court's ruling was based on the Judiciary Law, and outside the scope of a criminal appeal. The prosecution could have sought a writ of prohibition in a CPLR article 78 proceeding challenging the court's order as beyond its authority and asserting there was "no adequate remedy at law." *See Pirro v Angiolillo*, 89 NY2d 351. Order affirmed.

**Appeals and Writs (General)** APP; 25(35)

**News Media (Shield Laws)** NEW; 269(45)

**People v Combest, No. 329, 5/3/2005**

Hybrid Films, Inc. asked the Court of Appeals for permission to intervene in the appeal of a criminal action where it claimed to have a direct interest, interpretation of the journalist's privilege.

**Holding:** Hybrid Films, Inc., a nonparty, had no statutory right to intervene or join in a criminal case. However, they were free to seek leave to file an *amicus curiae* brief. Moreover, Hybrid's arguments concerning the journalist's privilege were raised by the prosecution, and all of its affidavits and memoranda of law submitted below were in the file before the Court of Appeals. Motion denied.

[Ed. Note: *See also* the summary of *People v Combest*, No. 22, above]

**NY Court of Appeals** *continued*

**Attorney/Client Relationship (Confidences)** ACR; 51(10)

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

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

**In the Matter of Nassau County Grand Jury Subpoena Duces Tecum, No. 60, 5/3/2005**

Investigating allegations of insurance fraud, the Attorney General issued a subpoena *duces tecum* asking the appellant law firm for financial records related to personal injury cases over a two and a half year period. Denial of a motion to quash the subpoena was affirmed.

**Holding:** Individual partners of a law firm cannot invoke the state or federal constitutional privilege against compelled self-incrimination in response to a grand jury subpoena *duces tecum*. The privilege is personal and not available to a business entity. *See US v White*, 322 US 694 (1944). A law firm partner is not protected under the federal 5th Amendment privilege, even if the requested documents incriminated that lawyer personally. *See US Const Amend V; Bellis v US*, 417 US 85, 88 (1974). New York’s privilege does not require a broader interpretation. *See NY Const Article I, § 6; People v PJ Video*, 68 NY2d 296. Under New York law, a corporation has no 5th Amendment privilege, and a partnership (collective entity) has no greater rights. *YMD, PC v Kuriansky*, 69 NY2d 232, 242. Under *Bellis*, the firm was not a family partnership or association or an independent entity apart from its individual members. Records were held in a representative capacity (*see Partnership Law 10[1]*) and the privilege does not protect documents required to be kept by law. The subpoena was not an unreasonable search and seizure, since it did not require probable cause and was presumed valid. *Matter of Grand Jury Subpoenas*, 72 NY2d 307, 315. Appellants failed to show the subpoena was irrelevant or overbroad. Nor was the information sought protected by the attorney-client privilege. *See CPLR 4503; Matter of Priest v Hennessy*, 51 NY2d 62. The firm was free to create a privilege log asserting privilege as to particular documents. *Matter of Subpoena Duces Tecum to Jane Doe, Esq.*, 99 NY2d 434. Judgment affirmed.

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

**In the Matter of Annette B., No. 67, 5/3/2005**

After Annette B. was born in 1991 in Suffolk County, Joseph B., her father, visited every weekend for several years. From 1996 to 2001 he was in prison and had no contact with his daughter. Her mother moved to Orange County without informing Joseph B. During an emer-

gency child neglect removal, Orange County Department of Social Services (DSS) proceeded without notifying Joseph B. At a later hearing, the mother surrendered her parental rights. No notice of this proceeding was sent to Joseph B. In 2001, DSS petitioned to terminate Joseph B’s parental rights, and sent a notice to him. He did not contact Annette at any time after the notice. At the family court hearing, he offered undocumented evidence of making three attempts to find her after 1996. The decision to terminate his parental rights was affirmed.

**Holding:** Evidence of abandonment was sufficient based on the father’s failure to maintain contact with his daughter. *See Social Services Law 384-b (4)(b)*. DSS proved by clear and convincing evidence that Joseph B. had not communicated with Annette B. in the six months before the petition was filed. *See Social Services Law 384-b (5)*. The family court was not required to credit his earlier attempts to find his daughter because his testimony was brief, vague, and uncorroborated. The finding that Joseph B could have been more persistent in his attempts to find his daughter was supported. He made no effort to contact Annette B in foster care even after he was notified of the termination petition, and “it was permissible for Family Court to infer that Joseph would not have done before the petition what he did not do afterwards.” The evidence was legally sufficient to justify termination. Order affirmed.

**Evidence (General) (Newly Discovered)** EVI; 155(60) (88)

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

**People v Schulz, No. 65, 5/5/2005**

At the defendant’s robbery trial, the complainant, a cashier, testified that the robber took money from the cash register, held her by the throat, and pulled out a knife; she did not identify the defendant. The business owner identified the defendant as the man he had met earlier and chased after the crime. The defendant’s proffer of a newspaper photograph of a person who had robbed businesses in the same area before and after this offense and who defendant argued was the robber was rejected. A motion to dismiss was denied, as was the defendant’s CPL 440 motion based on ineffectiveness of counsel, insufficient evidence, and newly discovered evidence. The conviction was affirmed.

**Holding:** Admission of third-party culpability evidence depends on a weighing of prejudice versus probity. *People v Primo*, 96 NY2d 351, 356-57. The court permitted the defendant to make a proffer of alternate perpetrator evidence, the photograph. The court held that there was no link between the photograph of the other robber and the crime at issue. *See Greenfield v People*, 85 NY 75, 89. Although the court allowed defense counsel to call the officers in the other case to testify about the photograph,

**NY Court of Appeals** *continued*

counsel chose not to do so, nor did he cross-examine the cashier about it. Evidence of the robbery based on the testimony of the owner was sufficient. *See* PL 160.15; *People v Arroyo*, 54 NY2d 567, 578. Despite conflicting identification at trial, the jury ultimately found the owner credible. *See People v Jackson*, 65 NY2d 265, 272. The decision not to call an alibi witness after the cashier failed to make a positive identification was not ineffective assistance of counsel. *See People v Hobot*, 84 NY2d 1021, 1022. Order affirmed.

**Dissenting:** [Rosenblatt, JJ] While the evidence was legally sufficient, exclusion of the other robber's photograph and the cashier's affidavit that she was 90% certain that the other robber did it merited a CPL 440 hearing. If the cashier would say after seeing the other individual in person that he, not the defendant, robbed her, "I should think that any right-minded prosecutor would want to know of it."

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**Discovery (Experts)** **DSC; 110(10)**

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

**People v Hill, No. 128, 5/10/2005**

**Holding:** The court's denial of a defense request for expert to conduct an examination in support of an insanity defense was not an abuse of discretion. *See* CPL 250.10[1][a]. The defendant waited until the start of jury selection to state his intention to pursue an insanity defense. His notice was untimely. *See* CPL 250.10(2); *People v Almonor*, 93 NY2d 571, 581. Order affirmed.

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

**People v Van Buren, No. 52, 5/10/2005**

New York City (NYC) Department of Environmental Protection (DEP) Water Supply Police issued speeding tickets to the defendants in Delaware County. They moved to dismiss, claiming that the DEP police acted outside their jurisdiction, the New York City watershed. Dismissal was granted and affirmed.

**Holding:** DEP police were authorized to enforce traffic laws within the NYC watershed. NYC had been empowered to create a police force to safeguard construction of the reservoirs. *See* L 1906, ch 314, § 6; NYC Administrative Code § 24-355. The DEP police served a dual purpose, protecting the reservoirs and watershed lands from pollution, and providing security for new facilities. *See* L 1937, ch 929, § 734 [1]-1.0. They were later added to the definition of police officers in the Criminal Procedure Law. CPL 1.20 (34). The defendants were stopped within the watershed patrol area. *See* Rules of

City of NY Dept of Envntl Protection [15 RCNY] § 18-16 [114]. The DEP officers had reasonable cause to issue speeding tickets. *See* CPL 140.10; VTL § 155. The law authorized them to make arrests to protect the water supply and those residing within the watershed. Protection of the water supply was a state interest exempt from the municipal home rule law. *See Matter of Town of Islip v Cuomo*, 64 NY2d 50, 57. Judgment reversed. Simplified traffic informations reinstated.

**Dissent:** [RS Smith, JJ] DEP police exceeded the authority of a 1906 statute that was limited to protecting the watershed during its construction. *See* NYC Administrative Code § 24-355.

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**Police (General)**

**POL; 287(20)****People v Williams, No. 81, 5/10/2005**

Peace officers employed by the Buffalo Municipal Housing Authority stopped the defendant's car because of a safety belt violation. During a conversation with the defendant, the officers observed a plastic bag under his tongue. When asked about it, the defendant fled and spat out the bag. The defendant was charged with drug possession and several traffic violations. The matter was dismissed based on the officers acting outside of their jurisdiction. Dismissal was affirmed.

**Holding:** The traffic stop and arrest of the defendant was invalid. Peace officers acting under color of law and with ensigns of office could not make a citizen's arrest. *See McKinley v Commonwealth*, 564 Pa 565, 583 n 18; *People v Lahr*, 147 Ill 2d 379, 383. Reasonable suspicion of criminal activity is required for a peace officer to arrest a suspect (*see* CPL 140.25 [1]), but a citizen's arrest is valid only where the arrestee had committed an offense. *See* CPL 140.30 [1]. The prosecution concedes these events occurred outside the housing officers geographical jurisdiction. *See* CPL 140.25 (3). Order affirmed.

**First Department**

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

**APP; 25(15) (45)****People v Anonymous, 12 AD3d 171, 786 NYS2d 134 (1st Dept 2004)**

**Holding:** Contrary to the prosecution's claim, there is not a sufficient basis in the record to support a conclusion that the defendant's waiver of the right to appeal was knowing, intelligent, or voluntary. *See People v Calvi*, 89 NY2d 868, 871. The defendant acknowledged and executed before the court a cooperation agreement containing such waiver, but there was no mention of it on the record. The court therefore did not make a determination appar-

**First Department** *continued*

ent on the record's face that the defendant understood the waiver terms. *See People v Callahan*, 80 NY2d 273, 280. The prosecution did not address three substantive issues raised by the defendant. As a review of the record shows those issues to be nonfrivolous, the prosecution is to submit a supplemental brief responding to those claims. *See* 22 NYCRR 600.16(b). Matter held in abeyance. (Supreme Ct, New York Co [Berkman, JJ])

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

**People v West**, 12 AD3d 152, 783 NYS2d 473  
(1st Dept 2004)

**Holding:** The court erred in finding the persistent felony offender statutory scheme unconstitutional. The facts upon which the sentencing court apparently based its determination were all permissible under *Apprendi v New Jersey* (530 US 466 [2000]) "in that they constituted facts found by the jury, defendant's prior convictions and matters of record." Therefore, whether *People v Rosen* (96 NY2d 329 *cert den* 534 US 899) conflicts with *Ring v Arizona* (536 US 584 [2002]) need not be decided. Order reversed, sentence reinstated. (Supreme Ct, New York Co [Bradley, JJ])

[Ed. Note: Appeal granted at *People v West*, 4 NY3d 749. For more Court of Appeals updates, see p. 7.]

**Guilty Pleas (General) GYP; 181(25)  
Lesser and Included Offenses (General) LOF; 240(7)**

**People v Javier**, 12 AD3d 192, 783 NYS2d 586  
(1st Dept 2004)

**Holding:** In the case for which relief is granted, the defendant pled guilty to first-degree assault. This offense was not charged in that indictment. It was not a lesser-included offense of any crime charged in the indictment (attempted second-degree murder, attempted first-degree assault, and second-degree assault). It did not otherwise constitute a permissible offense for purposes of a guilty plea. *See* CPL 220.10(4); *People v Johnson*, 89 NY2d 905. Judgment reversed, plea vacated, matter remanded. (Supreme Ct, Bronx Co [Stadtmauer, JJ])

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

**Sentencing (Second Felony Offender) SEN; 345(72)**  
**People v Terrerro**, 12 AD3d 262, 784 NYS2d 547  
(1st Dept 2004)

**Holding:** The defendant was convicted of attempted sale of drugs in 1996. While on probation for that offense, he pled guilty in the instant matter to fifth-degree possession of drugs and was sentenced as a second felony offender to a term of two to four years. Subsequently, the 1996 conviction was vacated because the indictment had charged only possession. In 2003 he pled guilty in that matter to attempted third-degree possession and was sentenced to one and a half to four and a half years. The contention that by virtue of the 2003 plea in the 1996 case, which post-dated the instant offense, that conviction could not serve as a predicate felony conviction in the instant matter. *See* Penal Law 70.06(1)(b)(ii); *People v Robles*, 251 AD2d 20, 21 *lv den* 92 NY2d 904. There is no question that at the time judgment was entered in the instant matter the defendant had been properly adjudicated a second felony offender. A challenge to that adjudication on the bases of post-judgment events should be made in a CPL article 440. Judgment affirmed without prejudice to a 440 motion. (Supreme Ct, New York Co [White, JJ])

**Guilty Pleas (General) GYP; 181(25)  
Sentencing (Enhancement) SEN; 345(32)**

**People v Santos**, 13 AD3d 258, 785 NYS2d 922  
(1st Dept 2004)

**Holding:** The record does not support a finding that the defendant violated a guilty plea condition requiring that he be truthful with the Department of Probation. Compare *People v Hicks*, 98 NY2d 185. The court improperly imposed an enhanced sentence. Reduction of the defendant's sentence to that originally bargained for is an appropriate remedy under the circumstances. Judgment modified, sentence of two and a half to four and a half years reduced to two to four years and otherwise affirmed. (Supreme Ct, Bronx Co [Sonberg, JJ])

**Burglary (Elements) (Instructions) BUR; 65(15) (25)  
Contempt (General) CNT; 85(8)**

**People v Lewis**, 13 AD3d 208, 786 NYS2d 494  
(1st Dept 2004)

The defendant was convicted after a jury trial of second-degree burglary and criminal contempt based on two incidents at the apartment of his former girlfriend.

**Holding:** The jury could reasonably infer that the defendant had knowingly entered the apartment unlawfully in order to commit a crime on the premises (*see* Penal Law 140.25[2]; *People v Polanco*, 279 AD2d 307 *lv den* 96 NY2d 833) based on evidence that the defendant entered the apartment in violation of an order of protection and threw the complainant's belongings out a window. The prosecution had no obligation to allege or prove a partic-

**First Department** *continued*

ular crime that the defendant intended. *See People v Mahboubian*, 74 NY2d 174, 193. The court properly instructed the jury that the complainant could not grant the defendant license to enter premises from which a court order excluded him. *See People v Scott*, 195 Misc2d 647, 651. Any error in a supplemental instruction formulated and requested by the defense in response to a jury note was not preserved. The defendant's testimony that he used physical force against the complainant because she pushed him was not sufficient to support a charge of justification. Judgment affirmed (Supreme Ct, New York Co [McLaughlin, JJ])

**Dissent:** [Tom, JJ] Where the complainant did not consent to the defendant's entry, it is not necessary to decide whether entry with the permission of a person in control of a dwelling but in violation of an order of protection constitutes unlawful entry for burglary. Nothing in the record refutes the defendant's contention that he intended to rest at the complainant's apartment; this contrasts to *Polanco*, where the court noted that the defendant intended to violate the order of protection beyond the forcible entry. Defense counsel here had clearly disagreed with the court's ruling on this point. The totality of the jury instructions wrongly allowed the jury to conclude that if the defendant entered the premises in violation of an order of protection, he had committed burglary.

**Discovery (Brady Material)**

DSC; 110(7)

**People v Gantt, 13 AD3d 204, 786 NYS2d 492  
(1st Dept 2004)**

**Holding:** There was a reasonable possibility that the prosecution's failure to disclose prior inconsistent testimony by their main witness contributed to the defendant's conviction. *See People v Vilardi*, 76 NY2d 67, 77. The witness, a career criminal, had waited six years to come forward, and had a motive to testify falsely. The undisclosed testimony did not pertain to the witness's background and general credibility, but called into doubt his specific claim that he was present at the incident. *Compare People v Sibadan*, 240 AD2d 30, 35 *lv den* 92 NY2d 861. This was not cumulative to impeachment material brought to the jury's attention by the defense. The other evidence against the defendant was far from overwhelming, where the decedent recanted statements identifying the defendant as not being based on personal knowledge. The defendant's 440.10 motion to vacate was properly granted. Order affirmed. (Supreme Ct, New York Co [Obus, JJ])

**Sentencing (General)**

SEN; 345(37)

**Matter of Velella v New York City Local Conditional  
Release Comm., 13 AD3d 201, 788 NYS2d 8  
(1st Dept 2004)**

**Holding:** The court properly denied CPLR article 78 challenges to determinations of the Conditional Release Commission advising the petitioners that their conditional releases were invalid and to determinations of the Department of Correction that the petitioners were to surrender themselves. The applications of three petitioners had been improperly considered before the statutorily required 30 days of incarceration. *See Correction Law 273(1)*. Two other petitioners had reapplied less than 60 days after their initial applications were submitted. *See Correction Law 273(6)*. An agency has the power to set aside a determination where there is a significant irregularity. *People ex rel Finnegan v McBride*, 226 NY 252, 259. The petitioners had no substantive due process right to the protection of illegal conditional release orders. There is no constitutional guarantee of a particular form of procedure. *See Kuriansky v Bed-Stuy Health Care Corp.*, 135 AD2d 160, 171 *affd* 73 NY2d 875. Appropriate process varies depending on the governmental function involved and the substantiality of individual interests affected. *See Matter of Pannell v Jones*, 36 NY2d 339, 342. Each petitioner had an adequate postdeprivation opportunity to be heard in these article 78 proceedings. Estoppel may not be invoked against an agency to prevent discharge of the agency's statutory duties, and no grounds for departing from that settled rule have been shown. Order and judgment affirmed. (Supreme Ct, New York Co [Wilkins, JJ])

**Parole (General) (Release  
[Consideration for (includes  
guidelines)])**

PRL; 276(10) (35[b])

**Records (Sealing)**

REC; 327(40)

**Matter of Palacio v Morgenthau, 13 AD3d 282,  
786 NYS2d 305 (1st Dept 2004)**

**Holding:** The respondent New York County District Attorney improperly disclosed the petitioner-inmate's previous arrests to the Division of Parole. The arrests had been sealed pursuant to CPL 160.50. While the statute is generally invoked to protect reputation and employment prospects, nothing in it prevents its application in this situation. *See Matter of Burr v Goord*, 283 AD2d 891. The petitioner is entitled to a new parole recommendation that does not refer to sealed arrests. The petitioner is not entitled to expungement of records or other relief. *See Matter of Brown v Hallman*, 278 AD2d 604 *lv den* 96 NY2d 709. Judgment modified, voiding and sealing of parole recommendation granted, revised recommendation to be submitted. (Supreme Ct, New York Co [Payne, JJ])

**First Department** *continued*

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

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

**People v Santiago, 13 AD3d 81, 785 NYS2d 449 (1st Dept 2004)**

**Holding:** The defendant was entitled to introduce a police report containing a prior inconsistent statement by a prosecution identification witness about the number of people who participated in the burglary. The statement concerned the manner in which the crime was committed. *See People v Schwartzman*, 24 NY2d 241, 246 *cert den* 396 US 846. Further, having allowed cross-examination of the detective as to the witness’s inconsistent statement about which person held a gun to her father’s head, the court should not have changed its ruling after the detective said the witness was translating for her father. The defendant should have been able to inquire further as to the circumstances of the inconsistent statement.

There is no requirement that independent evidence establish to the court’s satisfaction that a witness testified falsely before a requested *falsus in uno* jury charge can be given. Credibility is within the jury’s province. Where several witnesses, some of whom had known the defendant for 10 years, testified that he forcibly entered an apartment, held them at gunpoint, and searched for drug money, the errors were harmless. Judgment affirmed. (Supreme Ct, Bronx Co [Bamberger, JJ])

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

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

**People v Jacobs, 13 AD3d 98, 786 NYS2d 448 (1st Dept 2004)**

**Holding:** Where a duly licensed attorney acted as lead counsel, was present throughout the proceeding, and conducted most of the trial, the defendant received effective assistance of counsel even though a person who took part in the defense had not, unbeknownst to the defendant, lead counsel, the prosecutor, and the court, been admitted to practice law. There is no reason to extend the *per se* reversal rule to this situation. *See People v Leslie*, 232 AD2d 94 *lv den* 91 NY2d 875. The court’s acquittal of the defendant of most counts including robbery does not warrant reversal of the larceny conviction. The court could reasonably have credited the complainant’s testimony about larceny while rejected the testimony about an assault and threats accompanying the taking. The verdict could have been an effort to extend leniency. *See People v Rayam*, 94 NY2d 557, 561-563. A judge correctly recused himself, and his removal from the case did not prejudice

the defendant, who had no right to be tried by a particular judge. *People v Moreno*, 70 NY2d 403, 405-406. Judgment affirmed. (Supreme Ct, Bronx Co [Silverman, JJ])

**Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) (Stop and Frisk)** SEA; 335(15[k]) (75)

**People v Heapps, 13 AD3d 107, 787 NYS2d 4 (1st Dept 2004)**

**Holding:** The court properly granted the defendant’s motion to suppress the defendant’s statement and a gun ultimately recovered by police. The tip from an anonymous person from an unknown location that a man with a gun was in a specific vehicle, uncorroborated by any police observations suggesting criminality and lacking any other indicia of reliability, did not provide reasonable suspicion that the defendant had committed or was committing a crime. *See Florida v JL*, 529 US 266 (2000). Police observation of a bulge in the defendant’s waistband occurred only after the police stopped his car (which met the description received) and with guns drawn ordered him to shut off the motor and put his hands up, then tried to open the passenger door when the defendant failed to follow the orders. This conduct went beyond protective measures taken in the course of an inquiry. *See People v Ocasio*, 85 NY2d 982. Order affirmed. (Supreme Ct, Bronx Co [Sonberg, JJ])

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

**People v Norcott, 787 NYS2d 241 (1st Dept 2004)**

**Holding:** The motive of the prosecution’s main witness to lie was readily apparent to the jury; any error in precluding the defense from eliciting testimony to show that motive was harmless so the propriety of the challenged ruling need not be determined. The witness testified that the defendant had offered her money to allow him to use her apartment, then the defendant and another moved in. The witness assisted them in going to meet the decedent, saw them with the decedent at his hotel and in her apartment, observed them with apparent drugs just before she observed the decedent with a bleeding head wound, and helped remove the decedent’s body from her apartment. The witness said she did not report the death fearing harm to her or her family. She did not disclose anything relating to the homicide when police visited her apartment (where the defendant remained), and moved out of state, where she ultimately implicated the defendant. The court prohibited the defense from eliciting testimony that the witness made her statement only after being told that the defendant had accused her of complicity in the crime. Counsel argued the witness’s motive in

**First Department** *continued*

summation. A strong argument can be made that the ruling was correct. Evidence that the witness had been accused by the defendant of participating in the crime could have led the jury to speculate on the truth of that accusation, seriously prejudicing the prosecution's case. See *People v Scarola*, 71 NY2d 769, 777. Judgment affirmed. (Supreme Ct, New York Co [Snyder, JJ])

**Dissent:** [Andrias, JJ] The defendant was denied the constitutional right to confront his accuser and present a defense. See *People v Rios*, 223 AD2d 390, 391.

**Second Department**

**Speedy Trial (Statutory Limits)** **SPX; 355(45)**

**People v Hodges, 12 AD3d 527, 784 NYS2d 638**  
(2nd Dept 2004)

New York City sought to quash "so-ordered" subpoenas by the defendant for records relating to the charges against him. While denial of a CPLR 2304 proceeding to quash was pending, the City sought by CPLR article 78 to prohibit enforcement of the Supreme Court's order. That petition was granted by the Appellate Division, quashing the subpoenas. The defendant's subsequent motion for dismissal on statutory speedy trial grounds was granted.

**Holding:** The period in which proceedings concerning the subpoenas were being litigated should have been excluded for CPL 30.30 purposes. The defendant initiated those processes by serving the subpoenas. Other delay was also excludable. Amended order reversed, indictment reinstated, matter remitted. (Supreme Ct, Queens Co [Blackburne, JJ])

**Concurrence:** [Miller, JJ] The proceedings regarding quashing the subpoenas had no bearing at all on the prosecution's ability to proceed to trial. In *Matter of Brown v Grosso* (285 AD2d 642), civil proceedings concerning a defendant seeking discovery to which he was not entitled did not slow the progress of the criminal prosecution. The proceedings here were not analogous to an appeal that would have made it impossible for the prosecution to proceed. See *People v Bryant*, 153 AD2d 636, 639-640. Unlike *People v McCray* (238 AD2d 442), this action did go forward. The court's 30.30 dismissal was error because the prosecution was charged with other periods of excludable time. The following delays should have been excluded: extension of a delay beyond that actually requested by the prosecution, delay attributable to court unavailability, delay ordered by the court or unattributable to the prosecution, and delay requested by the defense.

**Discrimination (Gender)** **DCM; 110.5(30)**

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

**People v Patterson, 12 AD3d 694, 785 NYS2d 513**  
(2nd Dept 2004)

During *voir dire* in the defendant's trial for robbery, rape and related charges, the court denied his peremptory challenge to a juror based on employment status.

**Holding:** The defendant failed to show a relationship between the potential juror's employment status and the facts of the case. *People v Campos*, 290 AD2d 456, 457. The trial court found the defendant's explanation for his challenge a pretext for gender discrimination. *People v Payne*, 88 NY2d 172. The defendant's "constitutional challenge to his adjudication as a mandatory persistent violent felony offender is unpreserved for appellate review and, in any event, is without merit..." Judgment affirmed. (Supreme Ct, Queens Co [Katz, JJ])

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

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

**People v Samuels, 12 AD3d 695, 785 NYS2d 485**  
(2nd Dept 2004)

**Holding:** The defendant's pretrial motion to dismiss the indictment because the prosecutor did not charge the grand jury on the defense of justification should have been granted. The evidence viewed in a light most favorable to the defendant indicated that she was afraid of the complainant, who had previously abused her and had taken a cup of acid from a shelf after pushing her and grabbing her throat, that they struggled for the acid, and that there was no showing the defendant knew she could retreat upstairs from the complainant's front door. Failure to so instruct impaired the integrity of the grand jury. The defendant was convicted after a trial in which the jury was instructed on justification. The conviction did not preclude review of the issue. See *People v Huston*, 88 NY2d 400, 411. This case highlights an anomaly in statutory law. The legislature did not eliminate the need for reversal here as it acted to preclude review of dismissals for legal insufficiency at the grand jury following a trial. It is up to the governor and legislature to amend the Criminal Procedure Law. Judgment reversed, indictment dismissed, with leave to resubmit. (Supreme Ct, Kings Co [Leventhal, JJ])

**Dissent:** [Ritter, JP] There is no rational basis for requiring reversal based on improper grand jury instructions following a trial at which a properly-instructed jury voted to convict. Reversal is a waste of resources. Further, a justification charge to the grand jury was not required. The defendant's testimony was that the spilling of acid was accidental, not justifiable use of deadly physical force.

**Second Department** *continued*

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

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

**People v Smith, 13 AD3d 400, 785 NYS2d 539**  
(2nd Dept 2004)

**Holding:** Following assigned counsel’s request to be relieved, an independent review of the record showed “that a potentially nonfrivolous issue exists with respect to whether the court’s misstatement at the plea concerning the length of the minimum sentence to be imposed warrants any relief on appeal (*see People v Nicholas*, 8 AD3d 300 [2004], *lv denied* 3 NY3d 679 [2004])...” Counsel is relieved, new counsel is assigned. (Supreme Ct, Westchester Co [Rosato, JJ])

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

**Self-Incrimination (Conduct and Silence)** SLF; 340(5)

**People v Jones 13 AD3d 468, 787 NYS2d 344**  
(2nd Dept 2004)

**Holding:** “The County Court committed reversible error when it failed to instruct the jury, as requested by the defendant, to draw no inference from the defendant’s failure to testify (*see CPL 300.10[2]; People v Koberstein*, 66 NY2d 989...)” Judgment reversed, new trial ordered. (County Ct, Nassau Co [Samenga, JJ])

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

**Assault (Evidence)** ASS; 45(25)

**People v Baez, 13 AD3d 463, 785 NYS2d 749**  
(2nd Dept 2004)

**Holding:** The defendant was convicted of charges including second-degree assault. Viewed in the light most favorable to the prosecution, the evidence “was legally insufficient to establish that the complainant suffered either ‘substantial pain’ or ‘impairment of [his] physical condition’ as a result of the injury to his shoulder (*see Penal Law § 120.05 [2]; §10.00 [9]; Matter of Philip A.*, 49 NY2d 198, 200 [1908];.... The complainant cleaned and bandaged the injury himself and testified to only limited restrictions. No expert testimony was proffered as to either the extent of the injury or the duration of the limitation.” The evidence was sufficient to establish the lesser offense of attempted second-degree assault. *See CPL 470.15(2) (a); People v Lobo*, 6 AD3d 550. Judgment modified, count reduced, and as modified, affirmed. (Supreme Ct, Queens Co [Blumenfeld, JJ])

**Prisoners (Disciplinary Infractions and/or Proceedings)**

**PRS I; 300(13)**

**Matter of Ramirez v Schultz, 13 AD3d 457,**  
**787 NYS2d 57 (2nd Dept 2004)**

**Holding:** The petitioner, a state prisoner, was found guilty of violating disciplinary rules against destruction of state property (*see 7 NYCRR 270.2[B] [17] [i]*), interfering with an employee (*see 7 NYCRR 270.2 [B] [8] [i]*), and creating a disturbance (*see 7 NYCRR 270.2[B] [5] [iv]*). As a representative of an inmate committee, he attempted to negotiate with an official about an upcoming family-day picnic. Unable to obtain the terms the committee wanted, “he tore up a paper requisition form rescinding the committee’s voluntary monetary donation to the event” and, after placing the torn form in the trash, left the office. The respondent’s concession that the creating a disturbance charge was not established is well founded. Interference with an employee was not established either; “there was no physical contact between the petitioner and any employee ... nor did the petitioner engage in any improper behavior that caused the involved employee to respond in a manner that interfered with his duties (*cf. Matter of Goncalves v Donnelly*, 9 AD3d 721...)” In tearing up the form, the petitioner was acting on the authority of his committee to withdraw its voluntary donation toward the event; the form was of no further use. Tearing it up and disposing of it “is not equivalent to the destruction of valuable state property...” The respondent’s determination was arbitrary and capricious. Petition granted, determination annulled, penalties and surcharge vacated, and all references to the charges to be expunged from the petitioner’s institutional record.

**Parole (Release [General])**

**PRL; 276(35[d])**

**Matter of Marino v Travis, 13 AD3d 453,**  
**787 NYS2d 54 (2nd Dept 2004)**

**Holding:** Convicted in 1997 of grand larceny for stealing from clients, the petitioner, a disbarred attorney in his mid-80s, was sentenced to three to nine years. He received a certificate of earned eligibility (*see Correction Law 805*) in 2000 but was denied parole release. The Parole Board found that there was a reasonable probability that the petitioner “would not live and remain at liberty without violating the law” and that the petitioner’s release at that time would be “incompatible with the welfare and safety of the community.” A Supreme Court judgment finding the “Board’s determination to be irrational bordering on impropriety and remitting the matter” for a *de novo* hearing was affirmed. *See Matter of Marino v Travis*, 289 AD2d 493. On three subsequent appearances before the Board, the petitioner was denied release for the same reasons. He was finally released during the pendency of this appeal

**Second Department** *continued*

from another article 78 proceeding in his favor, but “substantial issues presented are likely to recur, constituting an exception to the mootness doctrine,” so the merits of this matter are reached. Following the judicial finding that the Board’s determination was “irrational bordering on impropriety,” the Board should not have then denied the petitioner’s release “based on the same reason without specifying new or additional relevant evidence in support of the determination. Rather, by the plain language and mandate of Correction Law § 805, the petitioner should have been released to parole.” Judgment affirmed. (Supreme Ct, Queens Co [Weiss, JJ])

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

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

**Matter of Knight v Griffith, 13 AD3d 449,  
787 NYS2d 53 (2nd Dept 2004)**

**Holding:** “The Family Court improperly proceeded without considering the incarcerated father’s written ‘motion for legal representation,’ thereby impairing the father’s ‘right to the assistance of counsel’ (Family Ct Act § 262 [a]; *see Matter of Ella B.*, 30 NY2d 352, 356-357 [1972]). The deprivation of a party’s fundamental right to counsel in a custody or visitation proceeding requires reversal, without regard to the merits of the unrepresented party’s position (*see Matter of Wilson v Bennett*, 282 AD2d 933, 934 [2001]...).”

The court improperly dismissed a petition by the paternal grandmother regarding visitation. The court relied on the fact that both parents were alive, failing to consider whether equitable circumstances gave the grandmother standing. *See Domestic Relations Law* 72. Orders reversed, remanded for assignment of counsel and further proceedings. (Family Ct, Kings Co [Wright, JJ])

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

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

**People v Russell, 13 AD3d 655, 788 NYS2d 139  
(2nd Dept 2004)**

**Holding:** The court should have granted the defense challenge for cause where the prospective juror had indicated she did not think she could be fair because of her feelings about illicit drugs. She did not on further inquiry provide unequivocal assurances that she could render a verdict solely on the evidence. *See People v Bludson*, 97 NY2d 644, 645.

The court also should have granted the defendant’s motion to suppress evidence found in his auto after his lawful arrest. The evidence adduced at the suppression hearing “was clearly insufficient to satisfy the prosecutor’s initial burden of establishing a valid inventory search. There was no testimony from the officer about his knowledge of the general objectives of an inventory search or to establish the existence of any departmental policy regarding inventory searches.” If such policy is assumed to exist, the prosecution still failed to produce evidence showing that the procedure was rationally designed to meet the objectives of inventory searches (as required by *People v Johnson*, 1 NY3d 252, 256) or that this search was conducted properly and in compliance with established procedures. *See People v Golak*, 80 NY2d 715, 719. (Supreme Ct, Queens Co [Flaherty, JJ])

**Assault (Evidence)** ASS; 45(25)

**Search and Seizure (Arrest [Scope])** SEA; 335(10[m])

**People v Manley, 13 AD3d 653, 789 NYS2d 502  
(2nd Dept 2004)**

**Holding:** The strip search of the defendant incident to his arrest for fifth-degree possession of marijuana (Penal Law 221.10[1]) was “an unjustified, warrantless search of unlimited scope.” Evidence at the suppression hearing did not justify the body cavity search based on police seeing the defendant remove a small bag of marijuana from his boot, and no exigent circumstances were shown. *See People v More*, 97 NY2d 209. The “evidence recovered from the defendant’s buttocks should have been suppressed.”

The prosecution failed to show as to the charge of second-degree assault that the alleged kicks by the defendant to the complainant’s arm and leg during the body cavity search led to physical injury. *See Penal Law* 10.00(9); *People v Briggs*, 220 AD2d 762, 763. Judgment modified, counts charging third- and fourth-degree possession of drugs and assault dismissed, and as modified affirmed. (Supreme Ct, Queens Co [Hanophy, JJ])

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

**People v Lindsey, 13 AD3d 651, 787 NYS2d 385  
(2nd Dept 2004)**

**Holding:** The court properly suppressed evidence and the defendant’s statements. There was no reasonable suspicion to justify the stop of the defendant’s car. After the defendant was identified as having committed a shooting, police took up surveillance at an apartment building where his girlfriend was believed to live. Based on information that the couple sometimes took their child to school, officers who had never met the defendant or his

**Second Department** *continued*

girlfriend followed women matching the general description of the girlfriend, ie a black female, taking a child to school. The third woman they followed got into a car with a short black male after leaving a child at school. After following the car for several blocks, police pulled it over. Only after pulling alongside the defendant were they able to identify him from a photograph. Stopping the vehicle before identifying the driver as the person sought was an unlawful seizure. See *People v Spencer*, 84 NY2d 749, 753 cert den 516 US 905. The defendant was seen removing his jacket, from which cocaine was then recovered. No showing was made that the police would have uncovered the same evidence through a separate line of investigation. See *People v Turriago*, 90 NY2d 77, 85. “Moreover, the drugs seized were ‘primary evidence,’ the very evidence obtained in the illegal search (*People v Stith*, 69 NY2d 313, 318-319...)” Order affirmed. (Supreme Ct, Kings Co [Tomei, JJ])

**Counsel (Advice of Right to Counsel) (Right to Counsel) (Waiver)** COU; 95(5) (30)

**People v James, 13 AD3d 649, 789 NYS2d 60 (2nd Dept 2004)**

**Holding:** Assigned counsel who represented the defendant at arraignment was later relieved when the defendant indicated he would retain counsel. No attorney was retained and the defendant proceeded *pro se* through pretrial proceedings and trial. Where the court never conducted an inquiry as to the defendant’s ability to afford counsel, twice refused to consider the defendant’s eligibility for assigned counsel, and did not tell the defendant of his right to assigned counsel, that right was violated. Error was compounded by the failure to warn the defendant of the dangers of proceeding *pro se*. See *People v Smith*, 92 NY2d 516, 520-521. The record shows that the defendant did not want to proceed without counsel. He did not forfeit his right to counsel by failing to secure an attorney in the 10 months before trial. The record suggests that he did not hire an attorney because he could not afford to, and because the court refused to consider whether he was entitled to assigned counsel, not because he sought to undermine, upset, or delay the case. See *People v McIntyre*, 36 NY2d 10, 18. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rosenzweig, JJ])

**Speedy Trial (Due Process)** SPX; 355(25)

**People v Allen, 13 AD3d 639, 789 NYS2d 56 (2nd Dept 2004)**

**Holding:** The court erred in denying the defendant’s motion to dismiss the indictment based on the excessive,

57-month pre-indictment delay between the alleged sale of drugs and arrest. The prosecution failed to demonstrate that the delay was justified. See *People v Lesiuk*, 81 NY2d 485, 490. The delay constituted a denial of due process requiring dismissal even in the absence of prejudice to the defendant, See *People v Singer*, 44 NY2d 241, 253-254. Judgment reversed, indictment dismissed. (Supreme Ct, Queens Co [Kohm, JJ])

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

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

**Matter of Larry O, 13 AD3d 633, 787 NYS2d 119 (2nd Dept 2004)**

**Holding:** The evidence did not establish that the father and mother of the child engaged in domestic violence in the child’s presence. They offered unrefuted testimony that, while they engaged in an altercation, the child was asleep in another room. “There was no proof of a pattern of domestic violence. An isolated instance of domestic violence outside the presence of the child is insufficient to establish neglect (see *Matter of Davin G.*, 11 AD3d 462 [2004]).” There was no specific testimony or finding about an allegation that the father left the child unattended after the mother left the premises, requiring further fact-finding and determination as to that branch of the petition. Disposition reversed, allegation regarding domestic violence dismissed, matter remitted as to failure to supervise. (Family Ct, Suffolk Co [Sweeney, JJ])

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

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

**Matter of Ingravera v Goss, 13 AD3d 627, 786 NYS2d 344 (2nd Dept 2004)**

**Holding:** “The Family Court erred in ignoring the appellant’s unequivocal request for the appointment of counsel, purportedly due to the difficulty of obtaining counsel.” An eligible appellant is entitled to assignment of counsel in a proceeding to determine paternity. See Family Court Act 262(a)(vii); *Matter of Cheryl B. v Alfred W.D.*, 99 Misc2d 1085. The determination made after a hearing at which a request for counsel was not honored must be vacated. See *Matter of DuBova v Lekumovich*, 302 AD2d 459. Order reversed, matter remitted for a hearing and new determination. (Family Ct, Kings Co [Wright, JJ])

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

**Matter of Scott D v NY City Department of Education, 13 AD3d 621, 786 NYS2d 343 (2nd Dept 2004)**

**Holding:** The court erred in denying the appellant’s motion to effectively vacate an order granting an *ex parte*

**Second Department** *continued*

application by the New York City Department of Education to unseal criminal records sealed pursuant to CPL 160.50. The unsealing order was issued in relation to a disciplinary proceeding by the Department against the appellant. The appellant filed a civil action against New York City and a police officer who had arrested him. The facts underlying the appellant's arrest are relevant in both matters. However, by invoking the privilege in the disciplinary matter, the appellant had not simultaneously sought to use it as a sword in that proceeding. The rationale for finding that he waived the statute's privilege by commencing a civil action which placed the subject matter of the sealed records in issue therefore does not apply. Cf *Kalogris v Roberts*, 185 AD2d 335. Order reversed, motion, in effect, to vacate the earlier order granted. (Supreme Ct, Kings Co [Hall, JJ])

**Third Department**

**Appeals and Writs (Briefs) (General)** APP; 25(15) (35)

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

**People v Hernandez, 12 AD3d 723, 783 NYS2d 481 (3rd Dept 2004)**

**Holding:** Appellate counsel asserted that no nonfrivolous issues exist. A review of the record, counsel's brief, and the defendant's *pro se* submission reveal issues of arguable merit, including whether the waiver of the right to appeal was knowingly, voluntarily and intelligently made and whether the defendant's right to a speedy trial was violated (*see gen People v Jordan*, 141 AD2d 886 *app dismd* 73 NY2d 849). Without a discussion of the merits of any potential issues, counsel's application to be relieved is granted, new counsel assigned. *See People v Stokes*, 95 NY2d 633. (County Ct, Albany Co [Breslin, JJ])

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

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

**People v Boyce, 12 AD3d 728, 783 NYS2d 722 (3rd Dept 2004)**

**Holding:** Where the court failed to advise the defendant at the time of his guilty plea to second-degree assault that he would be subject to a period of post-release supervision, the defendant is entitled to an opportunity to withdraw his plea. *See People v Munck*, 4 AD3d 677. However, the defendant did not seek to withdraw his plea. An automatic three-year period of supervised release was calculated in the absence of a specific period imposed by the judge. The defendant violated the conditions of supervision and the Parole Board ordered that he be incarcerated

for the entire term of his post-release supervision. The court erred by granting the defendant's subsequent CPL 440.20 motion to reduce post-release supervision to one and one-half years where there was no showing of an infirmity in the original sentence. Order reversed, three-year post-release supervision reinstated. (County Ct, Washington Co [Berke, JJ])

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

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

**People v Ortiz, 12 AD3d 779, 784 NYS2d 230 (3rd Dept 2004)**

**Holding:** The defendant was convicted of multiple counts including burglary and grand larceny. The prosecution consented to suppression of the defendant's statements made to federal agents after he had requested counsel but continued the interview without the presence and advice of counsel. No hearing was held. The defendant had requested suppression for any purpose. At trial, when the defendant sought to testify, the court ruled that the defendant could be impeached with the suppressed statements. Where the need for the defendant to pursue a hearing was obviated, the prosecution should not have been permitted to subsequently change course and use the "statements after the passage of time may have made evidence unavailable or witness's memories less reliable." *People v White*, 73 NY2d 468, 476 *cert den* 493 US 859. The record indicates that several witnesses testified that the defendant entered and remained unlawfully in the home in question, with intent to commit a crime therein, and evidence further established that he did not have permission to take the family's vehicle. The error was harmless. Judgment affirmed. (County Ct, Greene Co [Lalor, JJ])

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

**People v Hoppe, 12 AD3d 792, 784 NYS2d 220 (3rd Dept 2004)**

On initial appeal, the court's decision to follow the recommendation of the Board of Examiners of Sex Offenders and upwardly depart from the classification rendered pursuant to the Sex Offender Registration Act was reversed. After a new hearing, the court found the evidence presented by the prosecution was insufficient to support departure from the presumptive risk level category indicated by the risk assessment instrument. The defendant was classified as a risk level II sex offender and the prosecution appealed.

**Holding:** The court properly found that much of the information from the presentence report and the reports of the psychiatric social worker, psychiatrist and proba-

**Third Department** *continued*

tion officer, indicating that the defendant was abusive and/or violent towards family members, constituted unreliable hearsay. The defendant refuted information that he abused his sister or was violent towards other family members and did not, contrary to the prosecution's assertion, admit that he intended to rape the complainant. The facts and circumstances did not provide a substantial basis for a departure, as is required. *See People v Dorato*, 291 AD2d 580, 580-581. The level II classification stands. Order affirmed. (County Ct, Broome Co [Smith, JJ])

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

**Discovery (General) DSC; 110(12)**

**People v Whitmore, 12 AD3d 845, 785 NYS2d 140 (3rd Dept 2004)**

**Holding:** The defendant's statement to a Department of Social Services (DSS) child protective caseworker should have been excluded because the defendant did not receive notice that a statement made by him to a public servant would be offered at trial, as required by CPL 710.30(1)(a). Reference to the definition of "public servant" in Penal Law 10.00 (15) ("any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state") is instructive as to how the term should be defined for CPL purposes. It comports with a common sense understanding of the term, and seems to include a DSS caseworker. However, the error was harmless.

Taking of the statement did not implicate the right to counsel. DSS caseworkers are not generally considered agents of the police (a necessary factor for suppressing statements for right to counsel violations). *See People v Greene*, 306 AD2d 639, 641 *lv den* 100 NY2d 594. The caseworker here did coordinate with police as to the interview of the child complainant, but conducted the jailhouse interview of the defendant with no police involvement. There was no agency relationship with the police. Other issues raised lack merit. Judgment and order affirmed. (County Ct, Broome Co [Smith, JJ])

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

**People v Park, 12 AD3d 942, 785 NYS2d 180 (3rd Dept 2004)**

The complainant waited seven months to bring charges against the defendant for an April 2002 incident in which the defendant hit the complainant in the face with a glass at a bar. Charges were brought only after the complainant heard that the defendant had "attacked" someone else. At the time the instant matter went to trial,

charges were still pending as to that alleged later incident.

**Holding:** The court erred in allowing the prosecution to introduce the facts underlying the pending charges as necessary to complete the complainant's narrative and thus inextricably interwoven with the charges being tried. The defense did not question the delayed complaint. The later incident was not probative of intent or motive as to the charges here. *Cf People v Poquee*, 9 AD3d 781. Given the similar nature of the charges, the prejudicial value of the pending charges outweighed their probative worth. The denial of an intoxication defense instruction was not error. Judgment reversed, remitted for new trial. (Supreme Ct, Albany Co [Teresi, JJ])

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

**People v Grune, 12 AD3d 944, 785 NYS2d 178 (3rd Dept 2004)**

**Holding:** No foundation was laid for admission of the results of a blood alcohol test of blood drawn from the defendant at a hospital after the defendant could not be subjected to a breath test at the police station due to belching. The prosecutor "failed to elicit testimony from the witness who conducted the test as to whether the testing equipment was properly calibrated and whether the test was properly performed on the particular blood sample taken from defendant." The results should not have been admitted (*see People v Campbell*, 73 NY2d 481, 484. There being no other evidence of the defendant's blood alcohol, the error was not harmless as to the charge under Vehicle and Traffic Law § 1192 (2). It was harmless as to the charge under 1192 (3); other clear evidence of intoxication was adduced, including the arresting officer's testimony as to what he observed, the results of field sobriety tests and the defendant's admissions. *see People v Heidelmark*, 214 AD2d 767, 769 *lv den* 85 NY2d 973. Judgment modified, conviction of driving while intoxicated under count one reversed, and as modified, affirmed.

**Probation and Conditional Discharge (Conditions and Terms) PRO; 305(5)**

**People v Swenson, 12 AD3d 948, 785 NYS2d 175 (3rd Dept 2004)**

**Holding:** The defendant unpersuasively contends that a condition of probation precluding any contact with the inmate to whom she tried to smuggle drugs violates the constitutional guarantee of freedom of association. Courts have broad discretionary powers to set probation conditions deemed "reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him [or her] to do so" (Penal Law section 65.10[1]) and which are 'necessary or appropriate to ameliorate the conduct

**Third Department** *continued*

which gave rise to the offense' (Penal Law section 65.10[5])." The defendant's relationship with the prisoner in question marked the beginning of the defendant's criminal activity; the record shows that the defendant planned to continue the relationship in spite of that person's manipulation and negative influence. The no-contact condition was reasonably related to the defendant's rehabilitation in these circumstances. *See People v Page*, 266 AD2d 733, 735. Judgment affirmed. (County Ct, Franklin Co [Main, Jr., JJ])

**Juries and Jury Trials (Competence and Qualifications)** **JRY; 225(15) (50)****People v Walters, 12 AD3d 953, 785 NYS2d 192 (3rd Dept 2004)**

**Holding:** Due to the importance of a defendant's right to an impartial jury and the public's concomitant right to a jury that appears impartial (*see People v Hartson*, 160 AD2d 1046, 1048), the unpreserved claim that a juror was incompetent is reviewed in the interest of justice. *See* CPL 470.15(6)(a). The juror here was married to a first cousin of the prosecuting attorney. This falls within the statutory bar of six degrees of consanguinity or affinity in CPL 270.20(1)(c). *See Matter of von Knapitsch*, 296 AD2d 144, 148. The bar is automatic, regardless of a claim by the juror of impartiality. *See People v Provenzano*, 50 NY2d 420, 424. The defendant's right to a fair and impartial trial was impaired by the participation of this juror, disqualified as a matter of law from serving. Judgment reversed, matter remitted for new trial. (County Ct, Delaware Co [Becker, JJ])

**Appeals and Writs (Judgments and Orders Appealable)** **APP; 25(45) (63)**  
**(Preservation of Error for Review)****People v Coles, 13 AD3d 665, 786 NYS2d 595 (3rd Dept 2004)**

**Holding:** The defendant's waiver of appeal was involuntary and so was invalid. He exercised his right to plead to the entire indictment (*see* CPL 220.10[2]) without any promise about sentencing. Requiring him to waive his right to appeal was improper. On review, the defendant's criminal history, failure to take responsibility during the presentence interview for his actions, and the brutal nature of his actions show that his sentence was not unduly harsh or excessive. His other claims were unpreserved due to his failure to move to withdraw his plea or vacate the judgment. Judgment affirmed. (County Ct, Albany Co [Catena, JJ])

**Constitutional Law (New York State generally)** **CON; 82(25)****Speech, Freedom of (General)** **SFO; 353(10)****Trial (Verdicts [Repugnant Verdicts])** **TRI; 375(70)(c)****People v Brown, 13 AD3d 667, 786 NYS2d 592 (3rd Dept 2004)**

**Holding:** The second-degree stalking statute (Penal Law 120.50[3]) purports to punish conduct, not speech, likely to cause a complainant reasonable fear of physical injury or other specified harm. Threatening conduct causing fear of physical harm is not protected speech. *See* US Const, Amends 1, 14; NY Const article I, section 8; *US v Bowker*, 372 F3d 365, 378 (6th Cir 2004); *cf People v Shack*, 86 NY2d 529, 535-536. The defendant claims that the stalking conviction must be reversed because the predicate offense relied upon to enhance the charge was constitutionally infirm because the aggravated harassment statute (Penal Law 240.30[1]) has been held unconstitutional as applied to situations such as his. *See Vives v City of New York*, 305 FSupp2d 289, 301-302 (2003). However, while indictment for an enhanced offense provides an opportunity at arraignment to admit or deny the predicate offense (*see* CPL 200.60[1]-[3]), challenges to the constitutionality of the previous conviction must be by way of direct appeal or motion to vacate the judgment with regard to that previous conviction. *See People v Knack*, 128 AD2d 307 *aff'd* 72 NY2d 825. The verdicts convicting him of stalking while acquitting him of criminal contempt are not repugnant. This issue was not preserved, and if reviewed would not prevail. The elements of the two statutes are not identical; it is possible to commit the former and not the latter. Judgment affirmed. (County Ct, Rensselaer Co [McGrath, JJ])

**Sentencing (Excessiveness)** **SEN; 345(33) (65)**  
**(Presentence Investigation and Report)****People v Thomas, 2 AD3d 982, 768 NYS2d 519 (3rd Dept 2004)**

**Holding:** The defendant's guilty plea waived review of claims that the two-count drug indictment was defective because it was based on uncorroborated accomplice testimony and that counsel was ineffective for failing to challenge the indictment or make pretrial motions. He has not claimed that these alleged failures undermined the voluntariness of his pleas. *See People v Porter*, 300 AD2d 698, 699 *lv den* 100 NY2d 541. The defendant challenged portions of the presentence report and the court agreed not to consider those portions in determining sentence. The purpose of presentence investigations is to provide the court with the best available information on which to

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base an individualized sentence. *People v Perry*, 36 NY2d 114, 120. While the court opted not to use the challenged information, there is no basis for physical redaction of the report, requested by the defendant to avoid future prejudice in other discretionary determinations such as those regarding parole. The sentence was not so grossly disproportionate to the seriousness of the defendant's conduct as to render it unconstitutional. The argument that if the sentence were reduced the defendant could begin restitution payments earlier is not persuasive. Judgment affirmed. (County Ct, Chemung Co [Buckley, JJ])

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

**Witnesses (Cross Examination) WIT; 390(11) (12)**  
**(Defendant as Witness)**

**People v Allen, 13 AD3d 892, 787 NYS2d 417**  
**(3rd Dept 2004)**

**Holding:** Over objection, the prosecutor repeatedly referred in opening statement, in a manner designed to credit the complainant's expected trial testimony, to the complainant's disclosures two months after the fact regarding the charged sexual assault. Instead of delaying a ruling on the admissibility of the disclosures, the court should have taken an offer of proof or heard testimony and argument outside the jury's presence then. Defense counsel referred in opening statement to the delay. Unsurprisingly in light of the earlier ruling, the defense did not object to the complainant's testimony about the disclosures and the reasons for the delay. These actions did not waive the issue of or open the door to the corroborative testimony. *Cf People v Williams*, 75 NY2d 858. Testimony by the persons to whom the complainant's disclosures were made was erroneously admitted over objection as a "prompt outcry." The significant delay was not adequately explained. *See People v Shelton*, 1 NY3d 614, 615. While recent studies suggest that withholding complaint may not be unusual (*see People v McDaniel*, 87 NY2d 10, 16-17), the disclosures did not fall within the exception as established by law. The error was not harmless.

Cross examination of the defendant by way of relevant nonrhetorical questions as to why the complainant would fabricate the incident was not error. Comments in summation that the defendant had not demonstrated a credible motive for the complainant to bring false allegations improperly shifted the burden of proof. The prosecutor improperly asked the defendant about being asked to take a lie detector test and failing to testify to that on direct. Judgment reversed, remitted for new trial. (County Ct, Rensselaer Co [McGrath, JJ])

**Evidence (Uncharged Crimes)**

**EVI; 155(132)**

**Misconduct (Prosecution)**

**MIS; 250(15)**

**People v Gorghan, 13 AD3d 908, 787 NYS2d 178**  
**(3rd Dept 2004)**

**Holding:** Errors permeated the prosecutor's opening statement, presentation of proof, and summation. In opening, the prosecutor said that the defendant had forcibly put his hands on the complainant and possessed an unlicensed weapon on that day, although there was no allegation that the gun found during a search of the defendant's home was involved in the charged sex offenses or occurred on the same dates. The prosecutor also referred to expected testimony by the complainant's mother, despite having removed the mother from the witness list. The jury was improperly told that the defendant had originally been charged with incest, and about other bad acts, not brought up at the *Ventimiglia* hearing. A motion for mistrial after the opening was denied. Despite a court admonition that no evidence was to be elicited to bolster the complainant's testimony about uncharged acts, the prosecutor repeatedly did so. Restrictions placed by the court on testimony about the defendant's physical characteristics were disregarded. The reminder before summation to keep comments consistent with the court's *Ventimiglia* ruling were repeatedly ignored resulting in several sustained objections. Considerably more time was spent in opening, testimony of the complainant, and summation on uncharged crimes and bad acts than the charges being tried. The court's frequent curative instructions could not ensure that the harm by the repeated errors was eliminated. *See People v Levandowski*, 8 AD3d 898, 901. "A review of this record reveals a pervasive pattern by the prosecutor of pushing beyond accepted boundaries on key issues and in a fashion prejudicial to a fair trial."

At retrial, a new *Ventimiglia* hearing is necessary. While some evidence of prior sexual abuse may be admissible in cases of this nature, evidence of uncharged crimes and bad acts should be closely controlled so they do not again eclipse the reason for trial. *See People v Singh*, 186 AD2d 285, 287-288. If the misdemeanor weapons charge survives a speedy trial challenge, it must be severed. Judgment reversed, remitted for new trial. (County Ct, Rensselaer Co [McGrath, JJ])

**Juries and Jury Trials (Challenges)**

**JRY; 225(10)**

**People v Powell, 13 AD3d 975, 787 NYS2d 480**  
**(3rd Dept 2004)**

**Holding:** The prosecutor revealed after exercising all peremptory challenges that a prospective juror who was a criminal defense attorney represented the prosecutor's sister in a civil matter. The defense exercised five peremp-

**Third Department** *continued*

tory challenges, none against that juror. Before the jury was sworn, the prosecutor said that the prosecutor had thought the defense would challenge the juror in question for cause, that the juror had ongoing litigation with the prosecutor's office, and should be removed for cause. Over objection and after further questioning of the juror, the court granted the challenge for cause. This was improper. The law is clear that the prosecution may not exercise a peremptory challenge after the defense has done so. *See eg People v Williams*, 26 NY2d 62, 63; CPL 270.15(2). This prevents the prosecution for waiting to determine which jurors are satisfactory to the defense and excluding them for that reason. *See People v McQuade*, 110 NY 284, 294-295. There is no difference perceived as to the prosecution exercising a cause challenge after the defense challenges have ended. It was not until the prosecutor here discovered that the juror was acceptable to the defense that the challenge was brought. This was not a situation where a ground for cause was not known to the challenging party during voir dire, making a later challenge permissible. *See CPL 270.15(4)*. Judgment reversed, remitted for new trial. (County Ct, Columbia Co [Leaman, JJ])

**Double Jeopardy (Mistrial)****DBJ; 125(20)****People v Mergenthaler, 13 AD3d 984,  
787 NYS2d 486 (3rd Dept 2004)**

The defendant was charged with first-degree criminal contempt for violating an order of protection directing him to stay away from his wife after a new dispute revealed that he had resumed living with her (with her countenance). A jury was selected and sworn. The prosecution was unable to locate the defendant's wife to testify and, after some short continuances, the court declared a mistrial, to which the defense did not consent, having withdrawn an earlier motion for mistrial. A month later, the defendant's wife was found and held as a material witness. The defendant's motion to dismiss on double jeopardy grounds was denied. The defendant's wife invoked her 5th Amendment privilege, and her grand jury testimony was read. She was then granted immunity for cross examination and recanted much of her grand jury testimony. The defendant was nonetheless convicted.

**Holding:** While a mistrial granted without defense consent does not bar retrial if it was based on manifest necessity, such necessity with regard to a missing witness includes a showing that the witness's absence is due to threats by the defendant or someone acting for the defendant, or to an unforeseeable contingency not within the prosecution's control. There is no showing that the defendant was involved in his wife's unavailability, nor was

that unavailability unforeseeable where the wife had been reluctant to testify at the grand jury and attempted to minimize the defendant's behavior at that time. Judgment reversed, indictment dismissed. (County Ct, St. Lawrence Co [Nicandri, JJ])

**Evidence (Sufficiency)****EVI; 155(130)****Robbery (Evidence)****ROB; 330(20)****People v Mateo, 13 AD3d 987, 786 NYS2d 671  
(3rd Dept 2004)**

**Holding:** The complainant testified that he believed he was being robbed when the defendant tried to place him in a headlock and said "Don't move. You know what this is." His subjective belief that the purpose of the confrontation was to remove property was not supported by any statement or action indicating a larcenous intent or effort to remove property. The evidence was insufficient to support the conviction of attempted robbery. *See People v Bass*, 277 AD2d 488, 494-995 *lv den* 96 NY2d 780. There was sufficient circumstantial evidence to support the charge of criminal possession of a weapon. *See People v Marmulstein*, 6 AD3d 879, 880 *lv den* 3 NY3d 660. While the police did not see the defendant with a gun, one saw the defendant and another fleeing and found guns discarded on the path that each took. The gun found where defendant had gone matched a magazine found near where the complainant had allegedly pushed the defendant to the ground. The verdict was not against the weight of the evidence. Judgment modified, attempted robbery conviction reversed, and as modified, affirmed. (Supreme Ct, Albany Co [Lamont, JJ])

**Sentencing (Excessiveness)****SEN; 345(33)****Sex Offenses (Sentencing)****SEX; 350(25)****People v Nickel, 14 AD3d 869, 788 NYS2d 274  
(3rd Dept 2005)**

**Holding:** The defendant's consecutive sentences for first-degree sodomy, second-degree aggravated sexual abuse, first-degree sexual abuse, and endangering the welfare of a child totaled over 50 years. While the defendant's efforts to access particularly vulnerable children and the effect of his conduct upon the children justified a maximum sentence for the most serious offense against each child, the defendant had no criminal history. In the interest of justice, the multiple charges concerning one complainant should run concurrently to each other, but consecutively to the single charge concerning the other complainant. *Compare Poepl v Thornton*, 4 AD3d 561, 563-564 *lv den* 2 NY3d 808; *People v Hutzler*, 270 AD2d 934, 936. The defendant's other claims are rejected. Judgment modified and as modified, affirmed. (County Ct, Albany Co

**Third Department** *continued*

[Czajka, JJ]

**Concurrence in part, Dissent in part** [Peters, JP]  
There is no basis upon which to reduce the sentence. *See People v Serrano*, \_\_ AD3d \_\_ (decided herewith).

**Concurrence in part, Dissent in part** [Carpinello, JJ]  
Both the original sentence and the majority’s modification to an aggregate sentence of 32 years are harsh and excessive. *See eg People v Munroe*, 307 AD2d 588 *lv den* 100 NY2d 644. Concurrent sentences totaling 25 years would be sufficient.

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

**Trial (Presence of Defendant)** **TRI; 375(45)**

**People v Ha, 14 AD3d 877, 787 NYS2d 731**  
**(3rd Dept 2005)**

**Holding:** The defendant was represented by an attorney, provided with an interpreter, and told of his right to be present at sidebar conferences about potential jurors’ biases and hostilities. It appears that bench discussions about the potential bias of prospective jurors were held without the defendant’s presence. The record does not disclose whether all venire members questions were excused for cause or on peremptory challenge by the prosecutor. While the defendant should have had the opportunity to assess jurors’ facial expressions, demeanor, and other subliminal responses (*People v Antommarchi*, 80 NY2d 247, 250), reversal is not required if the defendant’s presence could not have afforded him meaningful opportunity to affect the outcome. *See People v Roman*, 88 NY2d 18, 26. Decision withheld, matter remitted for further proceedings. (County Ct, Broome Co [Mathews, JJ])

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

**Weapons (Possession)** **WEA; 385(30)**

**People v Rowland, 14 AD3d 886, 787 NYS2d 741**  
**(3rd Dept 2005)**

**Holding:** As to the charge of fourth-degree possession of stolen property, the court determined that “operability” was a necessary finding and instructed the jury by reading the definition of a rifle from Penal Law 265.00(11). The defense requested additional language that “the rifle need not be loaded, but it must be operable. To be operable, the rifle must be capable of discharging ammunition.” Counsel cited the pattern criminal jury instruction for PL 265.01(4), revised after *People v Longshore*, 86 NY2d 851. The court erroneously agreed with the prosecutor that the definition of “rifle” was sufficient to cover operability. The error was not harmless. Refusal to submit each

element of the crime for jury consideration requires reversal. *See People v Flynn*, 79 NY2d 879, 881-882. Judgment reversed, matter remitted for new trial. (County Ct, Saratoga Co [Scarano, Jr., JJ])

**Assault (Evidence)** **ASS;45(25)**

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

**People v Winchester, 14 AD3d 939, 790 NYS2d 238**  
**(3rd Dept 2005)**

**Holding:** The bite the defendant inflicted on the arresting officer’s arm caused a break in the skin, causing pain at the time for which he was given medication, and tenderness for a couple days. The officer could not recall for sure that he took the medication, and the record shows that he told doctors an hour after the incident that he had no pain. The defendant argues that this was not legally sufficient evidence of the “physical injury” required for second-degree assault. *See Penal Law 120.05(3)*. The evidence does fall short of the objective level of proof necessary to raise a question of fact for the jury. *See People v Colantonio*, 277 AD2d 498, 500 *lv den* 96 NY2d 781. It was sufficient to sustain the conviction of attempted second-degree assault. Judgment modified, conviction reduced, and as modified, affirmed. (Supreme Ct, Albany Co [Lamont, JJ])

**Dismissal (General)** **DSM; 113(17)**

**Motions (Adjournment)** **MOT; 255(3) (5) (17)**  
**(Continuance) (General)**

**People v Colon, 15 AD3d 777, 790 NYS2d 288**  
**(3rd Dept 2005)**

The defendant timely sought dismissal of the indictment, including a count charging second-degree possession of a weapon. County Court reviewed the grand jury minutes and denied the motion. It was revealed at trial that the ammunition found at the scene was not test-fired before the case went to the grand jury. The defendant renewed the motion to dismiss that count and also argued for dismissal on speedy trial grounds. Supreme Court transferred to County Court the motion regarding that court’s earlier ruling, retaining the CPL 30.30 motion. With motions pending, the case went to the jury and the defendant was convicted. Six weeks later County Court found that the failure to test the ammunition meant the prosecution had failed to prove at the grand jury the element of “loaded firearm” and dismissed count II. At sentencing, Supreme Court set aside count II based on the County Court order, but also determined that the failure to test-fire the ammunition until after indictment belied any claim that the prosecution was ready for trial. The prosecution appeals the dismissal.

**Third Department** *continued*

**Holding:** Motions should be determined in a timely manner; deciding pretrial motions at the same time as post-trial motions contravenes logic and CPL 255.20(3). It is also contrary to the public policy precluding dismissal of an indictment where trial evidence supports the charges. *See People v Grant*, 194 AD2d 348, 351 *lv den* 82 NY2d 754. *Grant* is not followed here. The speedy trial issue need not be addressed. Judgment and orders affirmed. (County Ct, Albany Co [Herrick, J], Supreme Ct, Albany Co [Lamont, JJ])

**Guilty Pleas (Withdrawal)****GYP; 181(65)****People v Kinch, 15 AD3d 780, 789 NYS2d 770 (3rd Dept 2005)**

After initial appellate counsel sought to withdraw, new counsel was appointed to pursue issues of “arguable merit,” including failure to warn the defendant about the consequences of violating conditions of release pending sentencing.

**Holding:** The defendant, on probation pending resolution of an unrelated matter, pled guilty to a reduced charge in exchange for receiving interim probation, which if successfully completed would result in youthful offender status and three years probation. Before sentencing in this matter, he was alleged to have engaged in incorrigible behavior including use of marijuana. His release was revoked and, without hearing proofs as to the allegations, the court sentenced him to 60 days in jail and probation with no youthful offender designation. No mention was made of abiding by existing probation conditions. It was error to impose a sentence differing from that agreed upon where the court had not specifically advised the defendant of conditions he must meet or what would happen if he did not do so. *See People v Santiago*, 288 AD2d 404. He was only told to cooperate “in preparation of a probation report, abide by a curfew, honor an order of protection,” and not use a restraining maneuver he had learned. Judgment reversed, remitted for imposition of agreed-upon sentence or to permit the defendant to withdraw his plea. (County Ct, St. Lawrence Co [Nicandri, JJ]) ⚖

 **Reasons to Join Us in July**

Below are some of the positive things said about NYSDA’s last two annual conferences, held at the Gideon Putnam Resort and Spa in Saratoga Springs. This year’s conference will once again be in Saratoga; for information, including hotel reservation information, see pp. 1 and 6.

**Defender News** (continued from page 4) —**Federal Court Questions State IAC Standard**

The theory of defense in Dwayne Henry’s trial for a 1995 robbery was that the complainant had misidentified Henry in a lineup after Henry was arrested on other charges. Henry’s trial attorney presented alibi evidence consisting of testimony that Henry was with his girlfriend on the night of the offense—which occurred in the early morning hours of the date in question, not that night. The Court of Appeals reversed the Appellate Division’s order of a new trial based on ineffective assistance of counsel (IAC). The state high court rejected the prosecution’s request to adopt the federal standard for IAC, adhering instead to the New York standard of “meaningful representation.” *See People v Henry*, 95 NY2d 563, 566. The state standard includes a requirement of prejudice “which focuses on the ‘fairness of the process as a whole rather than [any] particular impact on the outcome of the case . . .’” That the prosecution was able to discredit the alibi testimony elicited by counsel did not, the Court of Appeals found, “seriously compromise” Henry’s defense of misidentification. Counsel’s other actions had been competent and the representation provided was found to be meaningful.

The federal district court denied *habeas* relief on the grounds that the Court of Appeals decision was not an “unreasonable application” of *Strickland v Washington*, 466 US 668 (1984). On May 24, 2005, the 2nd Circuit Court of Appeals disagreed. A false alibi, which “is likely to be viewed by the jury as evincing consciousness of guilt,” could well have diminished the effectiveness of the misidentification theory, the court found. *Habeas* relief was granted.

Because the Court of Appeals decision was an objectively unreasonable application of *Strickland*, the 2nd Circuit did not decide whether the “meaningful representation” standard is contrary to the *Strickland* standard. The opinion by Judge Amalya Kearsse certainly leaves the possibility open. “[W]e find it difficult to view so much of the New York rule as holds that ‘whether defendant would have been acquitted of the charges but for counsel’s errors is . . . not dispositive’ . . . as not ‘contrary to’” *Strickland*’s prejudice standard. *Henry v Poole*, No. 03-2884 (CA 2, 5/24/05). ⚖

- *This may be the best conference you’ve done. Great location, excellent speakers, good facilities. (2004)*
- *Keep the program in Saratoga. This is a great venue. (2004)*
- *Excellent conference—great location—super topics covered—interesting and informative speakers. This is the best one yet! (2004)*
- *I enjoyed the conference, facilities, lectures and attendees. (2003)* ⚖

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