New York State Defenders Association

Public Defense Backup Center
REPORT

Volume XXI Number 4 August–October 2006

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Peekskill Wrongful Conviction Case Illustrates Many Issues

Jeffrey Deskovic, imprisoned in 1991 after being convicted of raping and killing Peekskill classmate Angela Correa at age 16, was freed this September after a DNA match linked another prisoner to the crime. Deskovic had persevered in efforts to prove his innocence, contacting the Backup Center and others for assistance. Primary among those others who helped Deskovic was an artist and anti-death penalty activist from Maine, Claudia Whitman, who researched his case and urged Deskovic to again contact the Innocence Project, which had rejected his case years before. This time, the Innocence Project agreed to represent him.

Westchester County District Attorney Janet DiFiore was approached and quickly had DNA evidence from the case compared with the national DNA databank, which did not exist the first time Deskovic sought help from the Innocence Project in 1994. The resulting match led to a confession by the other prisoner, and Deskovic was released. (www.lohud.com, 9/20/06; http://kennebecjournal.mainetoday.com, 9/22/06.)

The case at least briefly became a political issue in the Attorney General race, raising questions about, among other things, candidates' support for the death penalty. (*See eg* www.newsday.com, 9/21/06.) With New York's death penalty statute currently unenforceable, opponents of execution point to cases like Deskovic's to illustrate why death should never again be available as a punishment. For updates on capital punishment issues in New York and around the nation, see the Death Penalty (Capital Punishment) page of the Hot Topics area of the NYSDA website (www.nysda.org).

Like other wrongful conviction cases, the Deskovic matter highlights truths that defense attorneys often struggle to prove, including that police may extract false confessions and that law enforcement/prosecutorial "tunnel vision" may wrongly prevent full investigation of a case once a particular individual has become the prime suspect. The case also reminds defense lawyers that client claims of innocence in the face of evidence stacked against them should not be disregarded, but should be carefully and fully investigated. Check the Innocence/Wrongful Convictions page of the Hot Topics area of the NYSDA website for details on this and other wrongful conviction cases.

One specific issue that Deskovic himself has noted publicly since his release is the difficult situation created for wrongly-convicted prisoners by certain Department of Correctional Services policies. Prisoners are barred from sex offender treatment programs, useful and sometimes necessary for prisoners seeking to be seriously considered for parole release, if the prisoners continue to deny their crime. While willing to take the treatment program as a positive measure in his record, Deskovic could not bring himself to admit actions he had not committed: "'I don't think it would have been healthy for me mentally, and I would have been somewhat sickened to do that,'" Deskovic had told the Parole Board in 2005. (www.lohud.com, 10/16/06.)

INSIDE AT CENTER INSERT:

Table of Lesser Included Offenses, 16th Revision

Courtesy of the *NY Defender Digest*

(Available in Printed Copies Only, Not on the Web)

Sex Offenders Remain Political Targets

As past issues of the *REPORT* have noted, increasingly restrictive laws, harsh punishments, and restrictions on individuals convicted of sex offenses have proven popular with elected

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officials across New York and the nation. As the 2006 Legislative Review (beginning p. 15) shows, this year saw the enactment of several state sex offense provisions. The most recent is a redrafting of the incest statute, effective November 1, 2006, creating degrees that correspond to the most serious underlying criminal acts alleged.

Just after the prior issue of the *REPORT* was published, the 1st Department issued a decision in *State of New York ex rel Harkavy v Consilvio*, __ AD3d __, 819 NYS2d 499 (1st Dept 2006) (*Harkavy II*), applying *State of New York ex rel Harkavy v Consilvio* (29 AD3d 221 [1st Dept 2006]) (*Harkavy* I) and denying the request by eight civilly committed sex offenders for habeas relief. (Summary of decision p. 35.)

Nationwide, some states such as California are considering draconian limitations on where registered sex offenders can live and work despite growing evidence from states like Iowa that such provisions are counterproductive. (*See eg* www.latimes.com, 10/30/06; *see also* http://correctionssentencing.blogspot.com/2006/10/moral-panics-and-pretend-policy.html.)

Even celebration of certain holidays may be verboten for sex offenders. In New York, sex offenders under state parole supervision were being required to stay home on Halloween this year, from 3 p.m. or immediately following dismissal from work or other approved programs, until 6:00 the next morning. (timesunion.com, 10/26/06.)

The Backup Center monitors legal developments affecting representation of persons charged or convicted of sex offenses, and NYSDA participates in efforts to analyze sex offense developments and recommend appropriate resolution of issues that arise. Check the Meagan's Law page of the website, under Hot Topics, for updates on sex offense issues.

Public Defense Developments

Representation on Family Court Act Matters Mandated in Supreme Court

The Legislature has amended Judiciary Law 35 to required assignment of counsel in Supreme Court for adults in matters for which they would be eligible for representation in Family Court under the Family Court Act. Chapter Law 538 of the Laws of 2006 adds section eight to Judiciary Law 35, which was effective immediately upon the Governor's signature.

Issues that have arisen since passage of the bill include by what process lawyers are to be assigned, whether and how training is to be provided for lawyers taking on this new mandated representation, the scope of representation that will be provided, and whether the costs of representation are to be a county or state charge.

NYSDA sent a memorandum to the New York State Association of Counties setting out the position that the new legislation makes the costs of implementation a state charge. That memo was sent to Chief Defenders. Questions continue to arise as to the process by which payment is to be made and as to other aspects of implementation. The Backup Center is monitoring developments. Please let Staff Attorney Mardi Crawford know of questions that have arisen and how this new law is being put into effect in your county.

ABA: Excessive Caseloads Present Ethical Obligations

The American Bar Association has issued an ethical opinion entitled "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation." The summary of Formal Opinion 06-441, posted on the ABA website, reads:

> All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps

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Volume XXI Number 4 August–October 2006

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The *REPORT* is published ten times a year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone 518-465-3524; Fax 518-465-3249. Our Web address is http://www.nysda.org.

are feasible to ensure that she will be able to competently and diligently represent the defendant.

The ABA opinion is based on the ABA Model Rules of Professional Responsibility.

Among other authorities cited in the opinion is the American Counsel of Chief Defenders (a section of the National Legal Aid and Defender Association), Ethics Opinion 03-01 (2003). Links to both the ABA and ACCD opinions will be available on the Ethics page of the Hot Topics section of the NYSDA website.

That excessive public defense caseloads which prevent the provision of quality representation must be avoided is recognized in many standards, including NYSDA's *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004), *see* Standards III.E and IV.A, and the New York State Bar Association's *Standards for Providing Mandated Representation* (2005), *see* Standards G-1 through G-6. These standards can be found on the Defense Services page of NYSDA's website.

The ABA opinion is of special interest because it specifically addresses the obligation of individual lawyers, including those working in institutional defender offices, to take steps when excessive caseloads begin to interfere with the lawyers' ability to provide the quality of representation they are ethically bound to give.

Possession of Loaded Firearm Now C Felony

Legislation elevating the crime of criminal possession of a loaded firearm from a Class D to a Class C violent felony has been signed and became effective on Nov. 1, 2006. It had been hoped that technical objections to the bill, raised by prosecutors, would delay its enactment. The legislation repeals Penal Law 265.02 (4) and moves that provision into revised Penal Law 265.03. Criminal possession of a loaded firearm, *without the intent to use it unlawfully against another*, is made a Class C violent felony. The effect of the change is that a determinate sentence with a minimum of three and one-half years and a maximum of 15 years will be mandatory for a first offense. Even with a plea to the Class D violent felony of attempted criminal possession of a weapon in the second degree, a prison sentence can only be avoided if the court finds that, pursuant to Penal Law 70.02 (4) (b), an alternative sentence is consistent with public safety and not a deprecation of the seriousness of the crime and one or more of the following factors exist: mitigating circumstances bearing directly upon the how the crime was committed; the defendant did not act alone and the defendant's participation was relatively minor but not so minor as to constitute a defense to the prosecution; or possible deficiencies exist as to proof of the defendant's commission of an armed felony. The Governor's press release about this bill is online at http://www.ny.gov/governor/press/06/1031063.html. Attorneys who have questions about this new law can call Staff Attorney Al O'Connor at the Backup Center.

Al O'Connor presented NYSDA's Service of Justice Award to David A. Crow, Staff Attorney at The Legal Aid Society Criminal Appeals Bureau.

For other 2006 legislation see the Legislative Review appearing on p. 15.

County Public Defense Developments

Fulton Co Funds New Assistant PD Position

Fulton County's Board of Supervisors approved the hiring of a new full-time assistant public defender in the wake of an increase in Family Court cases. The vote came in the midst of a local controversy over whether the increase in assignments was linked to the county's failure to fund appeals of recent Appellate Division decisions critical of a Family Court judge's rulings (decisions noted in the last issue of the REPORT). (www.heraldleader.com, 7/11/06.)

Conflict Defender Offices Considered, Implemented

The Niagara County Legislature voted in August to hire five lawyers to handle conflicts cases, previously handled by assignment to private attorneys. The five attorneys will work part-time with no benefits for $40,000 annually. Robert M. Pusateri, Niagara County Assigned Counsel Plan Administrator, will administer the new conflict office. The Legislature rejected a pay cut for Pusateri, which had been suggested on the basis that the change would mean less work reviewing vouchers and because a

secretarial position for the Administrator was created at the same time; his pay was instead raised to $27,000. (*Buffalo News*, 8/2/06; *Tonawanda News*, 8/2/06.)

As the *REPORT* went to press, the Cortland County Legislature was headed toward a vote on creating a Conflict Attorney office to handle cases that the public Defender's Office cannot take. (*Cortland Standard*, 10/11/06.)

AC Plan for First Dept Seeks Administrator

With the retirement of George Golfinopolous, the Assigned Counsel Plan for the First Judicial Department (Bronx and New York counties) is seeking a new Administrator. (See job notice, p. 25.)

722-c Costs Accrue in High-Profile Case

Following the highly-publicized trial of Christopher Porco for an attack that left his father dead and mother gravely injured, Albany County has been ordered to pay for daily stenographic transcripts and fees for two expert witnesses. While fees for Porco's attorneys were privately paid in advance, he was at some point declared financially eligible for public payment of defense costs. The bills were to be charged against the budget of the Alternate Public Defender, and were expected to exceed $15,000. The expert witness fees were estimated at under $6,000, compared to about $20,000 for two DNA experts who testified for the prosecution.

The press account attempted to raise questions about the propriety of the county charge based on allegations that Porco had been seen "partying" and "dining extravagantly." Responding to a reporter's questions, the Albany County Comptroller said that absent a challenge by the County Attorney or District Attorney, the bills will be paid. (timesunion.com, 8/23/06.)

This serves as a reminder to attorneys that when clients' assets become depleted, resources needed for representation can and should be sought. (*See eg People v Smith*, 114 Misc2d 258.)

NYCLU OpEd Piece Supports Justice Reform

The Kaye Commission's June 2006 recommendation for a statewide, state funded public defense system overseen by an independent commission was recently discussed in an NYCLU opinion piece in an Albany newspaper. While focused on the *New York Times* series about local justice courts, the article also noted the Kaye Commission report:

> The recent investigation of town and village courts and the Kaye Commission report are just the latest reminders that there is a crisis in our justice system. Now we must solve that crisis.
>
> (*timesunion.com*, 10/29/06)

Authors of the article were Melanie Trimble, Executive Director of the Capital Region chapter of the New York Civil Liberties Union and Corey Stoughton, NYCLU Staff Attorney.

South Nyack Village Court Justice Dennis E.A. Lynch (Rockland County) expansively responded to the *Times* series. He noted in an opinion in a case captioned *People v Morrison* that his denial of an unopposed motion to dismiss a charge against a defendant accused of possessing a half-smoked marijuana cigarette illustrated the dedication of himself and fellow local magistrates who do their duty in the face of criticism and lack of funding. (www.law.com, 10/23/06.)

The *Times* series has also spurred the New York City Bar Association to announced formation of a Task Force on Town and Village Courts. (www.bizjournals.com, 10/27/06.) Publication of the series was noted in the Defense News section of the NYSDA website. Containing more news than can be included in the *REPORT* and posted without the delay inherent in production of a print publication, www.nysda.org is an important source of information on criminal defense and public defense services in criminal and family court.

Bulletin About '07 ILSF Distribution Now Available

The Office of the State Comptroller (OSC) has issued a bulletin about the upcoming March 31, 2007 Indigent Legal Services Fund (ILSF) distribution of monies to counties for public defense. It is designed to provide information to help estimate the ILSF distribution for each county next year. NYSDA distributed the bulletin to Chief Defenders in September. The bulletin should be posted soon on the OSC website, but only information regarding 2006 was available there at *REPORT* press time. http://nysosc3.osc.state.ny.us. Copies are available from the Backup Center.

Death Comes to Current, Former AC Administrators

Geoffrey Q. Ralls, who served as the administrator of the 1st Department Assigned Counsel Plan from 1985 to 1992, and, in that capacity founded the Office of the Appellate Defender, died in August at the age of 57. He was also law clerk to Supreme Court Justice Richard Lee Price and retired Appellate Division Justice John Carro. (www.law.com, 8/18/06.)

Andrew Scott Waterman, Administrator of the Cattaraugus County Assigned Counsel Plan, died on Oct. 29, 2006 following a brief illness. He was 53. (www.zwire.com [Olean *Times Herald*], 11/1/06.)

NYSDA extends its sympathies to the families and colleagues of both men.

39th Annual Meeting a Success

Held in Corning, NY, NYSDA's 39th Annual Meeting and Conference included two days of Continuing Legal Education, receptions at which public defense lawyers and others could mingle and share information, a Chief Defender Convening focused on public defense reform, NYSDA Board of Directors meetings, and an Awards Luncheon at which the outstanding work of several individuals was recognized.

Two new members were elected to the Board: Alba Susan Johnson, Executive Director of Prisoners' Legal Services of New York, Inc., and Richard W. Rich, Jr., Chemung County Public Advocate. (Seymour W. James, Jr., Attorney-in-Charge of Criminal Practice at The Legal Aid Society in New York City, was added as a member at the Board meeting in October.) The Board has also chosen the site for the 2007 Annual Meeting and Conference, which will be held in Saratoga Springs July 22-24 (see p. 26).

The Annual Meeting Awards Luncheon celebrated a number of esteemed persons. The Wilfred R. O'Connor Award, established by the NYSDA Board of Directors, was presented to Stephen J. Pittari, Executive Director of the Westchester County Legal Aid Society. The Kevin M. Andersen Memorial Award, established by the Genesee County Public Defender Office, was presented to Bridget L. Field, Assistant Genesee County Public Defender. NYSDA's Service of Justice Award was presented to David A. Crow, Staff Attorney at The Legal Aid Society Criminal Appeals Bureau, for his work in coordinating

Bridget L. Field, Assistant Genesee County Public Defender, received the 2006 Kevin M. Andersen Memorial Award.

pro bono representation. As noted in the May-June *REPORT,* the New York State Bar Association Denison Ray Indigent Criminal Defender Awards for 2006 were also presented at the NYSDA conference; recipients were Laurie Shanks and Mark J. Caruso.

Jacky Kirkpatrick Joins Backup Center Staff

NYSDA's Public Defense Backup Center welcomes Jacky Kirkpatrick as our Training Coordinator. Currently enrolled in a Master's program pursuing both Classic Literature and Sociology at SUNY Albany (where she received her Bachelor of Arts in English, with a minor in Women Studies), Jacky still finds time for helping others. Her volunteer work has given her opportunities to work with local nursing homes, the Salvation Army, and Planned Parenthood. She currently donates time and energy to coaching young women during their pregnancy and in labor and delivery. Before coming to NYSDA Jacky worked as an assistant in the Heart Institute at Albany Medical Center, and for four years managed an independent bookstore in Dutchess County. Her broad experience and generosity make her a welcome addition to the Backup Center staff.

Shahrul Ladue, upon whom trainers and attendees alike had come to rely, has left NYSDA for new horizons after completing his MBA. He received a special award at our Annual Meeting and Conference in recognition of his dedication and outstanding service in improving our training programs. We miss him and wish him health, happiness, and prosperity!

Backup Center Hosts Reentry Coordinator

NYSDA's Backup Center will host, for the next year, one of two Upstate Coordinators for Reentry.Net, a project of The Bronx Defenders. Reentry.Net is an internet-based support network and information clearinghouse

on reentry from jail and prison and the civil consequences of criminal proceedings. We welcome Grant Zanker and look forward to working with him.

The Center for Community Alternatives will host another coordinator, Ray Barnes, in their Syracuse office.

Gradess Testifies at Probation Task Force

Jonathan E. Gradess, NYSDA's Executive Director, testified on Oct. 19, 2006 before The Task Force on the Future of Probation, urging that probation services be returned to their roots—client service and creative advocacy with the goal of keeping clients away from further involvement in the criminal justice system. The testimony, "Returning Probation to its Roots," will be available on the NYSDA website.

Announced by Chief Judge Judith S. Kaye in this year's State of the Judiciary message (www.nycourts.gov), the Task Force was created to address the issue of strengthening probation in New York State. Hearings have been held in New York City, Syracuse, and Buffalo.

Prison and Parole Notes

High Court to Hear Prisoner Telephone Case

The Court of Appeals will review a lawsuit brought by the Center for Constitutional Rights and prisoners' advocates, including NYSDA, that seeks to prohibit the state and Verizon/MCI from charging exorbitant rates for prisoner calls, financing a 57.5% kickback to the state. (www.northcountrygazette.org, 7/13/06.) Oral argument in *Walton v New York State Department of Correctional Services* is scheduled for Jan. 9, 2007. For updated information, check the Prisoners Rights page under Hot Topics on the NYSDA website.

Parole Issues Percolate

Denying a motion for dismissal by state defendants, a federal judge ruled that a class action suit may proceed on behalf of prisoners who claim that they are denied parole on the basis of executive policy rather than statutory criteria. An "abrupt and steep decline" in parole release rate for A-1 violent felons, the court said, presents "at least circumstantial evidence" supporting the prisoners' claim. (www.nylj.com, 7/20/06.) The case is *Graziano v Pataki*, No. 06 Civ. 480 (CLB).

Traditionally reluctant to interfere with parole decisions, New York courts have begun to overturn some decisions, with new parole hearings ordered where judges found parole to have been unfairly denied. In one recent example, Bronx County Supreme Court Justice Billings ordered a new parole hearing for an inmate described as "indisputably the 'model prisoner' for whom the parole system is intended to work." Imprisoned for her 1981 drug-driven efforts to rob an elderly woman who died after being bound and gagged, Jean Coaxum was denied parole four times after expiration of her 15-year minimum sentence. Grounds for the most recent denial were only that her crime had been so heinous that release would deprecate its seriousness and undermine respect for the law. (law.com, 8/7/06, citing *Matter of Coaxum v. New York State Board of Parole*, No. 2470/2005 [SupCt Bronx Co, 7/26/06].) Coaxum was then denied parole for the fifth time because of the nature of her crime. Her attorney, Richard M. Greenberg of the Office of the Appellate Defender, is seeking to have the parole board held in contempt. (www.law.com, 10/2/06.)

The July *Coaxum* decision also discussed the issue of venue. The parole hearing and determination occurred in Westchester County. The prisoner had been tried and sentenced in Bronx, and she sought judicial review of the parole denial there. Change of venue was denied. However, other courts have found that venue does not lie in the county where the offense occurred, but only in Albany, where the Division of Parole is based, or in the county where the prisoner bringing the challenge is incarcerated (where the parole hearing generally takes place). Venue is important because prisoners originally sentenced in New York City view the judges there as more receptive to arguments that the current administration has subverted the parole process. (*NYLJ*, 10/30/06.) ⚖

Defense Practice Tips

Avoid Common "Missed Opportunities" in Local Criminal Courts (Part II)

By Eric H. Sills, Esq.*

Introduction to Part II

This is Part II of a two-part series setting forth various simple strategies to avoid missing critical opportunities in local criminal courts. Part I, which was published in the January-March 2006 issue of the *Report*, dealt with opportunities available in all types of local criminal court cases. Part II deals with commonly missed opportunities in DWI cases.

*[**Ed. Note:** While focused on DWI cases, Part II should be of interest to all defense lawyers, illustrating as it does the depth of preparation needed at the early stages of a case. Some of the tips given have applicability to cases other than DWI matters, either directly or by provoking thought about the breadth of practice possible in local criminal courts.*

Take Full Advantage of Your Client's Discovery Rights

The People's discovery response in a DWI case typically contains copies of (a) the charges, (b) the defendant's breath test result, (c) the breath test operational check list (if one exists), (d) the breath test operator's Department of Health permit, (e) a recent breath test instrument record of inspection / maintenance / calibration, (f) a certificate of analysis for the simulator solution, and (g) some recent weekly simulator test results (if such testing is done). The People generally summarily claim that any other documents either do not exist, are not discoverable, and / or constitute *Rosario* material that will be provided at the appropriate time.

However, case law makes clear that far more information is discoverable. For example, in *Matter of Constantine v Leto*,[1] the Appellate Division, 3rd Department (in a decision affirmed by the Court of Appeals for the reasons stated below), held that "records indicating that a machine was not operating properly are discoverable, as are the State Police rules and regulations and the checklist and calibration records."[2] Case law also makes clear that tests such as the HGN test and the Alco-Sensor test are "scientific" tests[3]—which brings them within the ambit of CPL 240.20(1)(c) and (k).

Radar and laser speed detection devices are also scientific tests.[4] The reason why maintenance, calibration and similar records pertaining to such devices are generally believed to be undiscoverable is that discovery pursuant to CPL 240.20 is not available where the only accusatory instruments in the case are simplified informations charging traffic infractions (*e.g.*, where the sole charge against the defendant is speeding).[5] By contrast, where the defendant is charged with speeding *and* is also charged with one or more misdemeanors (such as DWI), the defendant is entitled to full CPL 240.20 discovery with regard to any scientific device used to determine his or her alleged speed (including the operator's certification card).

It has further been held that all documentary evidence that the People intend to introduce to establish the foundation for the introduction of the defendant's chemical test result is discoverable,[6] as are documents containing the results of field sobriety tests,[7] and any videotape(s) pertaining to the stop, detention, arrest and / or breath test of the defendant.[8]

The defense is further entitled to discovery of *every* "written, recorded or oral statement of the defendant . . . made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him."[9] Despite the People's frequent claims to the contrary, such discovery is not limited to statements that the People intend to introduce as part of their direct case at trial.[10] In this regard, many police officer notes and reports in DWI cases contain statements of the defendant. Thus, those portions of the documents are discoverable—they are not merely *Rosario* material.[11]

In addition to material that is properly discoverable pursuant to a Demand to Produce, there are other frequently overlooked avenues of discovery in DWI cases. For example, defense counsel has the right to examine the breath test device used to test the defendant's breath,[12] and it is always a good idea to travel to the scene of the stop / arrest (to see if the lighting, condition of the roadway, pavement markings, traffic control devices, landmarks, etc. coincide with the officer's description thereof).

With regard to field sobriety tests, virtually every police officer in New York has been trained to administer the so-called Standardized Field Sobriety Tests ("SFSTs") using a training manual either provided by the National Highway Traffic Safety Administration ("NHTSA"), or directly derived from the NHTSA manual. In order to seriously practice DWI law, one must be intimately famil-

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iar with the contents of this manual. Although efforts to obtain the manual through discovery, through the FOIL, and/or by use of a subpoena have generally been unsuccessful,[13] you can purchase the various versions of the NHTSA manual directly from the NACDL.[14]

Finally, in response to a FOIL request, DCJS will provide you with certified copies of the recent maintenance/repair history of the breath test machine used to test your client, as well as the Service Authorization Form(s) filled out by the police department when sending the machine to DCJS for calibration and/or repair. These records sometimes indicate that the machine was not working as reliably as the People would have you believe.

Take Full Advantage of Your Client's Rosario *Rights*

As with discovery, far more *Rosario* material exists in a typical DWI case than is commonly believed. Aside from all of the usual documents, such as handwritten notes, DWI investigative notes, physical condition, arrest, accident and incident reports, etc., in most cases the police (a) make radio transmissions that are tape recorded and/or recorded in a radio log, (b) make mobile data transmissions from computers located in the police car, (c) make log and/or blotter entries at the police station, (d) fill out documents in response to inquiries from the People, and (e) otherwise generate any number of written documents in connection with the case—all of which constitute discoverable *Rosario* material.[15]

In addition, where a witness (such as a police officer) discusses the case with an ADA, and the ADA takes notes of the conversation in order to prepare for a pre-trial hearing and/or for trial, such notes constitute *Rosario* material *of the witness—not* of the ADA.[16] Where a timely request is made for *Rosario* material at a pre-trial hearing, the remedy for a *Rosario* violation is either a new or a "re-opened" hearing.[17]

Hearings, Hearings, Hearings

As is noted in Part I of this series, as a general rule the only thing better than one hearing in a local criminal court case is more than one hearing; as hearings provide the best opportunity for you to both (a) obtain information helpful to your client's case, and (b) expose weaknesses in the People's case. In this regard, there are many more pre-trial hearings potentially available in a DWI case than is commonly believed.

At the outset, if your client took (and "failed") the chemical test (and the Court seeks to suspend his or her driver's license pending prosecution), your client is entitled to a *Pringle* hearing.[18] By contrast, if your client refused to submit to the chemical test, he or she is entitled to a DMV chemical test refusal hearing.[19] If the People are seeking the civil forfeiture of your client's vehicle, he or she is entitled to a *Krimstock* (*a.k.a. Canavan*) hearing.[20]

Of course, your client is always entitled to a *Huntley* hearing[21] upon request,[22] and to a *Dunaway/Mapp* hearing[23] upon a proper factual predicate.[24] As it is more and more common for videotapes to exist in DWI cases, it is often necessary that a pre-trial hearing be held to determine both (a) the audibility of the tape, and (b) whether certain portions of the tape contain inadmissible material that needs to be redacted.

The People frequently argue that no other hearings exist[25]—as they are not expressly enumerated in CPL 710.20. However, the Courts of this State have judicially created, and/or expressly or implicitly recognized the right to, pre-trial suppression hearings addressing a variety of issues in DWI cases. For example, in checkpoint cases there is a *Scott* (*a.k.a. Edmond*) hearing.[26] In chemical test refusal cases, there is a *Boone* (*a.k.a. Cruz*) hearing.[27]

In both chemical test and chemical test refusal cases, suppression hearings often encompass the issue of whether the test result/test refusal was obtained in violation of the defendant's right to counsel.[28] In two-hour rule cases, there is a *Victory* hearing.[29]

In blood test cases, suppression hearings have been granted on a variety of issues, including whether the defendant's consent to the test was voluntary,[30] and whether the blood was withdrawn by an appropriate or properly supervised person.[31] In breath test cases, suppression hearings have been granted on a variety of issues, ranging from whether the machine was affected by radio frequency interference,[32] to whether the ampoules used in connection with a Breathalyzer test were reliable,[33] to whether the defendant was denied his statutory right to obtain an independent chemical test.[34]

Furthermore, where the defendant raises an issue of fact as to whether his or her chemical test was properly administered, Courts have ordered *Ayala* hearings.[35] Although the People often claim that there is no such thing as an *Ayala* hearing, their refusal to participate in such a hearing on this ground can lead to the suppression of the defendant's chemical test result.[36]

Keep Alco-Sensor Evidence Out of the Trial

An Alco-Sensor (*a.k.a.* a "PBT") is a portable breath screening test typically used by the police at the scene of a traffic stop to help establish probable cause to make a DWI arrest. Evidence concerning the administration of an Alco-Sensor test, as well as evidence of the actual Alco-Sensor test result, is clearly inadmissible at trial.[37]

Similarly, in perhaps the only published decision dealing directly with the issue of the admissibility of a defendant's refusal to submit to an Alco-Sensor test at trial, the Court held that an Alco-Sensor test refusal, like

an Alco-Sensor test result, is inadmissible at trial.[38]

In order to avoid any danger that the People will attempt to improperly bring Alco-Sensor evidence before the jury at trial, defense counsel should file a motion *in limine* to preclude the People from introducing any evidence with regard to the Alco-Sensor test.[39]

Understand the Licensing Consequences of a VTL 1192 Conviction

It is often overlooked that one of the primary consequences faced by the defendant in a DWI case is the loss of his or her driver's license. In this regard, many defense attorneys understand the criminal consequences of a VTL 1192 conviction, but are relatively unfamiliar with the licensing consequences thereof—particularly where the defendant (a) refused to submit to a chemical test, (b) is a multiple offender,[40] (c) is the holder of a commercial driver's license ("CDL"), (d) is under 21 years of age, and/or (e) has an out-of-state driver's license.

For example, many defense attorneys who handle DWI cases do not know:

- the difference between a driver's license *suspension* and a driver's license *revocation* (and/or why the distinction is important); or that
- the driver's license of an underage offender who is convicted of DWAI will be revoked for at least 1 year—not merely suspended for 90 days; or that
- an underage offender's driver's license will be revoked for at least 1 year for a chemical test refusal —not for 6 months; or that
- the commercial driving privileges of a CDL holder will be revoked for at least 1 year for a DWAI and/or for a chemical test refusal even if the person was driving a non-commercial vehicle at the time of the offense/refusal; or that
- a second conviction of DWAI within 5 years results in a license *revocation*, ineligibility for either the Drinking Driver Program ("DDP") or a conditional license, and the need for alcohol evaluation and/or treatment; or that
- a conditional license, a pre-conviction conditional license, and/or a hardship privilege cannot be used to operate a commercial motor vehicle; or that
- some people who are eligible for the DDP are not eligible for a conditional license; or
- the consequences of a conviction of a moving violation on a conditional license; or
- the effect of a VTL 1192 conviction and/or of a chemical test refusal revocation on an out-of-state driver's license; or that
- some people with out-of-state driver's licenses are eligible for the DDP and for a "conditional privilege" to drive in New York; or that
- two convictions of violating VTL 1192(3) or (4) involving "physical injury" will result in a *lifetime* driver's license revocation; or that
- where a Court fails to impose, or incorrectly imposes, a license suspension/revocation in a VTL 1192 case, DMV can and will impose the correct suspension/revocation; or that
- where a DWI defendant is sentenced to probation, DMV will *presume* that a condition of such probation is that the defendant is prohibited from operating a motor vehicle and/or from applying for a driver's license during the period of probation—*absent express language in the conditions of probation to the contrary*; or that
- the defendant does not get credit for "time served" for any time that his or her driver's license is suspended pending prosecution; or that
- multiple offenders are oftentimes subject to far longer periods of license revocation than a reading of the plain language of VTL 1193(2) appears to indicate; or
- the effect of DDP completion where the defendant is under 21, is the holder of a CDL, and/or is revoked for refusal to submit to a chemical test; or that
- significant changes to the laws affecting CDL holders went into effect on September 30th of last year; or that
- significant changes to the DWI laws are expected to go into effect on November 1st of this year[41]; etc.

Information on these (and similar) issues is generally easily found in the relevant statutes and DMV regulations, as well as by contacting the DMV Driver Improvement Bureau,[42] or by purchasing any of the widely available treatises on this topic.

It should not be forgotten that your client won't distinguish between a loss of license caused by a VTL 1192 conviction versus a loss of license caused by a plea to a different charge or charges.[43] Thus, for example, if you are able to negotiate what appears to be a favorable plea bargain to DWAI on behalf of your client, but the plea bargain also involves a plea to a speeding charge and/or to an AUO charge as well, such other conviction(s) may result in a separate and distinct license revocation (depending upon your client's driving record), and thus may make your client ineligible for a conditional license.

Accordingly, it is not sufficient to merely understand the licensing consequences set forth in VTL 1193 and 1194. You must also understand the licensing consequences set forth in VTL 510 and 318, as well as those set forth in the relevant DMV Rules and Regulations. In this regard, it is safe to say that in order to practice DWI law effectively you have to become an expert of sorts in Vehicle and Traffic Law generally. At a minimum, you must learn how to read a complicated DMV driving abstract, understand

how various VTL convictions interact with each other, and understand the eligibility requirements for the DDP and for a conditional license.

It is also vital that you become familiar with DMV's semi-secret "negative unit system,"[44] which can result in both (a) ineligibility for a conditional license despite the fact that your client appears to be eligible therefor, and (b) a dramatic increase in the minimum license revocation period faced by your client. Once you understand the negative unit system, you will not only be able to more effectively represent your DWI clients, but will also be able to more effectively represent your VTL clients as well.

Understand the Financial Consequences of a VTL 1192 Conviction

Many of the financial consequences of a VTL 1192 conviction are set by statute and cannot be avoided. For example, everyone who is found to have improperly refused to submit to a chemical test is subject to a civil penalty of at least $300. In addition, everyone who either (a) is convicted of a violation of any subdivision of VTL 1192, or (b) is found to have refused to submit to a chemical test in accordance with VTL 1194, must pay DMV a Driver Responsibility Assessment[45] of $250/year for 3 years.[46] If the person fails to pay the Driver Responsibility Assessment, DMV will suspend his or her driver's license (or privilege of obtaining a driver's license) until it has been paid in full.[47]

On the other hand, while it is generally assumed that a VTL 1192 conviction carries with it a mandatory fine and surcharge, this is not always the case. For example, if the defendant is sentenced to jail time in connection with a VTL 1192 conviction, a fine is *not* mandatory.[48] Thus, if your client (a) spent any amount of time in jail in connection with his or her DWI arrest (and is sentenced to time served), or (b) is sentenced to one day in jail (which will result in your client being released almost immediately), a fine need not be imposed. In addition, a defendant who cannot afford to pay a Court-imposed fine can apply to the Court for re-sentencing.[49]

A "mandatory" surcharge is also not always mandatory. For example, where the defendant has made restitution or reparation pursuant to PL 60.27, he or she is not subject to a VTL surcharge in connection with the same case.[50] Similarly, where the defendant is sentenced to a PL surcharge, he or she is not subject to a VTL surcharge in connection with the same case.[51]

In addition, with certain exceptions, there is a $100 "cap" on surcharges in VTL cases.[52] A person who overpays or erroneously pays a mandatory surcharge (or whose underlying conviction is reversed) is entitled to a refund.[53]

Finally, DWI-related fines and surcharges are routinely increased by the Legislature. In this regard, the Ex Post Facto Clause requires that the Court impose the fine/surcharge in effect on the date of the *charge—not* those in effect on the date of the defendant's *conviction*.[54]

Minimize Your Client's Loss of Driving Privileges

There are a number of simple things that you can do in a DWI case to maximize your effectiveness by minimizing your client's loss of driving privileges. The remainder of this article provides some examples of ways to minimize your client's loss of driving privileges.

Suspension at Arraignment in Chemical Test Refusal Case

At the arraignment in a chemical test refusal case, the Court is required to temporarily suspend the defendant's driver's license pending the outcome of a DMV chemical test refusal hearing.[55] Such suspension lasts for *the shorter of* 15 days or until the hearing.

Thus, if the DMV refusal hearing is not held within 15 days, the defendant's driving privileges are automatically reinstated pending the hearing.[56] Your client should be advised of this fact, as well as of the fact that he or she can go to DMV and obtain a duplicate driver's license on the 16th day after the suspension was imposed.

In addition, "[i]f [your client] appears for a first scheduled chemical test refusal hearing, and the arresting officer does not appear, the matter will be adjourned and any temporary suspension still in effect shall be terminated."[57] In this regard, most DMV ALJs have a form in their possession which officially "lifts" the temporary suspension. You should make sure to request the form on behalf of your client (and advise your client to bring it to the DMV counter and to obtain his or her driver's license back). If you don't, even though the ALJ reinstated your client's driving privileges,[58] the DMV computer will still indicate that your client's driver's license is suspended. As such, DMV won't issue your client a duplicate driver's license, and your client will likely be charged with AUO if he or she is stopped by the police during the remainder of the 15-day time period.

20-Day Orders

It is also important to obtain a so-called "20-Day Order" for your client whenever possible, as well as to understand how a 20-Day Order works, who is eligible for one, and how to best make use of it. A 20-Day Order makes the license suspension or revocation arising out of a conviction of DWAI, DWI or DWAI Drugs take effect 20 days after the date of sentencing.[59]

Many defense attorneys and Courts are under the misapprehension that a 20-Day Order is only available where the defendant is convicted of DWAI and his or her driver's license is *suspended*—and that it is not available

where the defendant is convicted of DWI or DWAI Drugs and his or her driver's license is *revoked*. This is incorrect. The only times that the defendant is ineligible for a 20-Day Order is where he or she either (a) was charged with, or convicted of, a violation of PL Article 120 or 125 arising out of the same incident, and / or (b) has been convicted of a violation of any subdivision of VTL 1192 within the previous 5 years.[60]

Defense counsel should advise an eligible client to sign up for the DDP and for a conditional license while the 20-Day Order is still valid; but to wait approximately 16-18 days following sentencing before doing so (unless DMV has notified the client in a more expeditious fashion that his or her VTL 1192 conviction has been processed). The reason is that if the client goes to DMV too soon (*i.e.*, before his or her VTL 1192 conviction has been entered into the DMV computer system), such trip will be a waste of time and will have to be repeated.

The client should also be advised that unless he or she obtains a conditional license, continuing to drive after the 20-Day Order has expired constitutes the crime of AUO 2nd.[61]

Cause Suspension/Revocation Periods to Overlap

A driver's license revocation resulting from a chemical test refusal is a "civil" or "administrative" penalty separate and distinct from a driver's license suspension / revocation resulting from a VTL 1192 conviction. As such, the suspension / revocation periods run separate and apart from each other to the extent that they do not overlap. In other words, to the extent that a VTL 1192 suspension / revocation and a chemical test refusal revocation overlap, DMV runs the suspension / revocation periods *concurrently*; but to the extent that they do not overlap, DMV runs the suspension / revocation periods *consecutively*.

If your client is not interested in contesting either the VTL 1192 charge or the chemical test refusal, you can minimize the amount of time that his or her driver's license will be suspended / revoked. In this regard, the best course of action is to (a) negotiate a plea bargain which will be entered at arraignment (or as soon thereafter as possible), (b) help your client execute the "Waiver of Hearing" form provided by the Court, and (c) mail the waiver form to DMV immediately.

If you don't do this, don't handle your client's refusal hearing, and don't advise your client how to waive the hearing, the following scenario can take place:

- 1st, if both the client and the officer fail to appear for the hearing (which is common), nothing will happen[62]; then
- 2nd, the hearing will ultimately be re-scheduled by DMV at least one month (and perhaps many months) later; then
- 3rd, if the client fails to appear for the re-scheduled hearing (which is common), he or she will lose by default (even if the officer fails to appear); and then
- 4th, by the time the client is notified by DMV of the refusal revocation, he or she will probably have already completed the DDP and received his or her full driver's license back—but is now subjected to a brand new license revocation.

Although DMV will re-issue your client a conditional license (if he or she had one to begin with and it was not revoked), your client may not understand this, and may believe that he or she has no driving privileges whatsoever for the entire length of the refusal revocation. Regardless, your client's effective period of license loss will have increased unnecessarily by at least a couple of months. In addition, your client will likely be confused, angry and bitter about the entire process.

Advise Your Client to Complete Alcohol Treatment Simultaneously With the DDP

Many DWI defendants will be required to obtain an alcohol evaluation and / or to complete alcohol treatment in order to re-obtain their full driving privileges.[63] In this regard, the DDP does not constitute "alcohol treatment." Nor does AA. Alcohol treatment is treatment obtained through a private treatment provider that is "recognized" by DMV. A treatment provider is recognized by DMV if it is qualified to issue your client a form DS-449 upon successful completion of treatment.

A person who has more than one VTL 1192 conviction within the past 10 years (and who is DDP eligible) will be required to obtain an alcohol evaluation and, if such evaluation recommends treatment, to complete treatment in order to obtain the "green card" required to complete the DDP and to obtain the return of his / her full driver's license.

Critically, the defendant does not have to wait for the DDP to advise him or her of the evaluation / treatment requirement in order to get started. In fact, the defendant can obtain the evaluation prior to entry into the DDP and, if treatment is required, can commence and / or complete treatment prior to completion of the DDP. In such a case, the defendant will generally be eligible for the restoration of full driving privileges as soon as he or she completes the DDP classes.

By contrast, where the defendant delays entry into treatment, and / or does not complete treatment prior to completion of the DDP, DMV will not restore his or her full driving privileges until such treatment is completed. By advising your clients of this simple procedure, you can minimize their time on a conditional license by several weeks (if not months).

The situation is far more urgent where your client's driver's license is revoked for a VTL 1192 conviction and he or she both (a) is not eligible for either the DDP or a conditional license, and (b) will be required to complete alcohol treatment in order to *ever* have his or her driver's license restored. An example of this situation is where your client has two VTL 1192 convictions within the past 5 years.

In such a situation, the Court imposes what is commonly understood to be a 6-month license revocation. However, the Court in actuality imposes a *lifetime* revocation with a minimum duration of 6 months.[64] If your client applies for license reinstatement after 6 months, but his or her application is incomplete, or the application fee is not paid, or any outstanding civil penalty is not paid, or your client has too many negative units on his or her driving record, or your client has not shown proof of alcohol evaluation and/or rehabilitation, etc.—the application will be denied.

In other words, there is no right to license reinstatement. Such reinstatement is in the discretion of DMV. However, DMV will almost always exercise its discretion in the motorist's favor if all bars to license reinstatement are removed. One of the bars to license reinstatement is the failure of a person who has more than one VTL 1192 conviction within the past 10 years to submit satisfactory proof of alcohol evaluation and/or rehabilitation (*i.e.*, treatment).

Thus, unless you advise a client who is in this situation that he or she will generally be required to complete alcohol treatment prior to applying for license reinstatement, your client is likely to wait 6 months, re-apply, and find out 45–60 days later that his/her application was denied for failure to submit satisfactory proof of rehabilitation. The client will then—8 months after his or her license was revoked—have to commence a treatment program that can last several months, re-apply, pay a new application fee, and wait 45–60 days for DMV to approve the application.

Simply stated, by failing to advise your client of the alcohol treatment requirement applicable to multiple offenders, a 6-month license revocation can easily double.

Take Advantage of the 45-Day Rule

Where a defendant's driver's license is revoked pursuant to VTL 1193(2)(b), or the defendant is subject to a condition of probation that he or she not operate a motor vehicle or apply for a driver's license during the period of probation, "application for a new license may be made within [45] days prior to the expiration of such minimum period of revocation or condition of probation, whichever expires last."[65] The reason for this rule is that it generally takes DMV at least a month to review a license application. Thus, unless the defendant is permitted to re-apply early, every revocation period would be unfairly extended.

In this regard, it is my understanding that the backlog at DMV is currently so great that, despite the 45-day rule, DMV will accept license re-applications up to 60 days prior to the expiration of the minimum revocation period.

Make Sure the Court Fills Out Relevant Paperwork Correctly

Local criminal courts often make clerical errors in filling out DWI-related paperwork. For example, where the defendant's driver's license is suspended pending prosecution, Courts routinely either (a) mistakenly check the box on the Order of Suspension Pending Prosecution form indicating that the suspension is being imposed pursuant to VTL 1193(2)(e)(*1*) rather than pursuant to VTL 1193(2)(e)(*7*), or (b) fail to check either box (in which case DMV defaults to a VTL 1193(2)(e)(1) suspension). This has the effect of causing DMV to incorrectly "code" the suspension in a manner which will preclude the defendant from being issued a pre-conviction conditional license even where he or she is in actuality eligible for such license.

Similarly, Courts sometimes issue VTL 1193(2)(e)(7) suspensions in DWAI cases, in DWAI Drugs cases, and in chemical test refusal cases—despite the fact that the statute is inapplicable to such cases. Furthermore, such suspensions are sometimes issued in blood test cases before the defendant's blood test result has been received from the lab—despite the fact that the Court of Appeals has made clear that "[t]he court may not order suspension of the license unless it has in its possession the results of the chemical test."[66]

Fortunately, while Courts frequently make these kinds of errors, they are generally quick to rectify them when defense counsel politely brings them to the Court's attention. Such errors are far easier to undo if they are caught before the relevant paperwork has been mailed to DMV and entered into its computer system. Thus, by taking a few moments outside of Court to scrutinize the paperwork provided to your client to make sure that it is filled out correctly, you will save yourself many hours of future frustration, and will save your clients many days or weeks of needless loss of license.

Conclusion

In sum, by following a few simple procedures, you can take advantage of these and other significant opportunities to maximize the effectiveness of your representation of your DWI clients in local criminal courts.⚖

Endnotes

[1] 157 AD2d 376, 557 NYS2d 611 (3d Dept 1990), *affd for the reasons stated in the opinion below*, 77 NY2d 975, 571 NYS2d 906 (1991).

[2] *Id* at __, 557 NYS2d at 613 (citations omitted). *See also People v Alvarez*, 70 NY2d 375, 380, 521 NYS2d 212, 214 (1987) ("defendant may not be denied discovery which prevents him from challenging the reliability and accuracy of the machine"). Of course, records indicating that a breath test device was not operating properly also constitute *Brady* material. *See Brady v Maryland*, 373 US 83, 83 SCt 1194 (1963).

[3] *See eg People v Gallup*, 302 AD2 681, __, 755 NYS2d 498, 501 (3d Dept 2003); *People v Vargulik*, 130 AD2d 530, 515 NYS2d 111 (2d Dept 1987).

[4] *See eg People v Knight*, 72 NY2d 481, 534 NYS2d 353 (1988) ("moving" radar); *People v Dusing*, 5 NY2d 126, 181 NYS2d 493 (1959) (radar); *People v Clemens*, 168 Misc2d 56, 642 NYS2d 760 (Chatham Justice Ct 1995) (laser); *People v Depass*, 165 Misc2d 217, 629 NYS2d 367 (Roslyn Harbor Justice Ct 1995) (laser).

[5] *See* CPL 240.20(1). *See also People v Malone*, 166 Misc2d 54, __, 631 NYS2d 223, 224 (Suffolk Co Dist Ct 1995); *People v Chess*, 149 Misc2d 430, __, 565 NYS2d 416, 418 (Kensington Justice Ct 1991); *People v McGettrick*, 139 Misc2d 403, __, 528 NYS2d 758, 759 (Hudson City Ct 1988); *People v Cohen*, 131 Misc2d 898, __, 502 NYS2d 123, 124 (Yonkers City Ct 1986).

[6] *See People v Amidon*, 102 Misc2d 850, __, 427 NYS2d 727, 728 (Geneva City Ct 1980).

[7] *See People v Lawrence*, 74 Misc2d 1019, __, 346 NYS2d 330, 333 (Suffolk Co Dist Ct 1973). *See also People v DiLorenzo*, 134 Misc2d 1000, __, 513 NYS2d 938, 940 (Nassau Co Ct 1987).

[8] *See People v Marr*, 177 AD2d 964, 577 NYS2d 1008 (4th Dept 1991); *People v Karns*, 130 Misc2d 247, 495 NYS2d 890 (Rochester City Ct 1985).

[9] CPL 240.20(1)(a). *See also People v Combest*, 4 NY3d 341, 347, 795 NYS2d 481, 485 (2005).

[10] *See eg People v Fields*, 258 AD2d 809, __, 687 NYS2d 184, 185-86 (3d Dept 1999); *People v Hall*, 181 AD2d 1008, 581 NYS2d 951 (4th Dept 1992).

[11] *See eg People v Lawrence*, 74 Misc2d at __, 346 NYS2d at 333.

[12] *See People v Alvarez*, 70 NY2d 375, 380, 521 NYS2d 212, 214 (1987); *People v Merrick*, 188 AD2d 764, __, 591 NYS2d 564, 566-67 (3d Dept 1992).

[13] *Matter of Sills v New York State Div. of State Police*, 248 AD2d 920, 669 NYS2d 990 (3d Dept 1998); *Matter of Constantine v Leto*, 157 AD2d 376, 557 NYS2d 611 (3d Dept 1990), *affd for the reasons stated in the opinion below* 77 NY2d 975, 571 NYS2d 906 (1991).

[14] To purchase the NHTSA manual(s) from the NACDL, go to www.nacdl.org/publications.

[15] *See* CPL 240.44(1); CPL 240.45(1)(a). *See also People v Rosario*, 9 NY2d 286, 213 NYS2d 448 (1961); *People v Malinsky*, 15 NY2d 86, 262 NYS2d 65 (1965).

[16] *See eg People v Washington*, 86 NY2d 189, 192, 630 NYS2d 693, 694 (1995); *People v Consolazio*, 40 NY2d 446, 453, 387 NYS2d 62, 65-66 (1976).

[17] *See eg People v Feerick*, 93 NY2d 433, 451, 692 NYS2d 638, 647 (1999); *People v Banch*, 80 NY2d 610, 618, 593 NYS2d 491, 496 (1992). *See also* CPL 240.75.

[18] *See Pringle v Wolfe*, 88 NY2d 426, 646 NYS2d 82 (1996).

[19] *See* VTL 1194(2)(c).

[20] *See Krimstock v Kelly*, 306 F3d 40 (2d Cir 2002); *County of Nassau v Canavan*, 1 NY3d 134, 770 NYS2d 277 (2003).

[21] *See People v Huntley*, 15 NY2d 72, 255 NYS2d 838 (1965).

[22] *See eg People v Weaver*, 49 NY2d 1012, 1013, 429 NYS2d 399, 399 (1980) (CPL 710.60(3)(b) "expressly provides that the absence of factual basis does not permit denial of a motion to suppress a statement claimed to have been involuntarily made to a law enforcement official. Thus, . . . there *must* be a hearing whenever defendant claims his statement was involuntary no matter what facts he puts forth in support of that claim").

[23] *See Dunaway v New York*, 442 US 200, 99 SCt 2248 (1979); *Mapp v Ohio*, 367 US 643, 81 SCt 1684 (1961).

[24] It is well settled that a hearing is *required* whenever "the papers submitted raise a factual dispute on a material point." *People v Gruden*, 42 NY2d 214, 215, 397 NYS2d 704, 705 (1977). *See also* CPL 710.60(3), (4); *People v Hightower*, 85 NY2d 988, 990, 629 NYS2d 164, 166 (1995); *People v Mendoza*, 82 NY2d 415, 426, 604 NYS2d 922, 926 (1993).

[25] Other than (a) *Sandoval/Ventimiglia* hearings, *see eg People v Sandoval*, 34 NY2d 371, 357 NYS2d 849 (1974); *People v Ventimiglia*, 52 NY2d 350, 438 NYS2d 261 (1981), and (b) *Wade* hearings, *see eg United States v Wade*, 388 US 218, 87 SCt 1926 (1967)—which are generally inapplicable to DWI cases handled in local criminal court.

[26] *See City of Indianapolis v Edmond*, 531 US 32, 121 SCt 447 (2000); *People v Scott*, 63 NY2d 518, 483 NYS2d 649 (1984).

[27] *See eg People v Boone*, 71 AD2d 859, 419 NYS2d 187 (2d Dept 1979); *People v Davis*, 8 Misc3d 158, 797 NYS2d 258 (Bronx Co Supreme Ct 2005); *People v Lynch*, 195 Misc2d 814, 762 NYS2d 474 (NY City Crim Ct 2003); *People v Burtula*, 192 Misc2d 597, 747 NYS2d 692 (Nassau Co Dist Ct 2002); *People v Dejac*, 187 Misc2d 287, 721 NYS2d 492 (Monroe Co Supreme Ct 2001); *People v McGorman*, 159 Misc2d 736, 606 NYS2d 566 (NY Co Supreme Ct 1993); *People v Martin*, 143 Misc2d 341, 540 NYS2d 412 (Newark Justice Ct 1989); *People v Delia*, 105 Misc2d 483, 432 NYS2d 321 (Onondaga Co Ct 1980); *People v Hougland*, 79 Misc2d 868, 361 NYS2d 827 (Suffolk Co Dist Ct 1974); *People v Cruz*, 134 Misc2d 115, 509 NYS2d 1002 (NY City Crim Ct 1986).

[28] *See eg People v Shaw*, 72 NY2d 1032, 534 NYS2d 929 (1988); *People v Gursey*, 22 NY2d 224, 292 NYS2d 416 (1968); *People v Dejac*, 187 Misc2d 287, 721 NYS2d 492 (Monroe Co Supreme Ct 2001); *People v Cole*, 178 Misc2d 166, 681 NYS2d 447 (Brighton Justice Ct 1998); *People v Anderson*, 150 Misc2d 339, 568 NYS2d 306 (Nassau Co Dist Ct 1991); *People v Martin*, 143 Misc2d 341, 540 NYS2d 412 (Newark Justice Ct 1989); *People v Iannopollo*, 131 Misc2d 15, 502 NYS2d 574 (Ontario Co Ct 1983); *People v Stone*, 128 Misc2d 1009, 491 NYS2d 921 (NY City Crim Ct 1985); *People v Rinaldi*, 107 Misc2d 916, 436 NYS2d 156 (Chili Justice Ct 1981).

[29] *See People v Victory*, 166 Misc2d 549, __, 631 NYS2d 805, 806 (NY City Crim Ct 1995) ("upon objection of the defense, the prosecution must establish, at a hearing by expert testimony, scientific evidence that a Blood Alcohol Content (BAC) test taken more than two hours after the arrest of the defendant is competent, reliable and probative of the fact that the defendant was impaired or intoxicated when he operated a motor vehicle before such results may be admitted as relevant evidence at the trial").

[30] *See eg People v Verdile*, 119 AD2d 891, __, 500 NYS2d 846, 848 (3d Dept 1986) ("To be admissible, the People were required to demonstrate that defendant consented to the taking of the blood sample utilized for the test").

[31] *See eg People v Moser*, 70 NY2d 476, 522 NYS2d 497 (1987); *People v Olmstead*, 233 AD2d 837, 649 NYS2d 624 (4th Dept 1996); *People v Gertz*, 189 Misc2d 315, 731 NYS2d 326 (App Term, 2d Dept 2001); *People v Ellis*, 190 Misc2d 98, 737 NYS2d 232 (Cattaraugus Co Ct 2001), *affd* 309 AD2d 1314, 765 NYS2d 313 (4th Dept 2003); *People v Pickard*, 180 Misc2d 942, 691 NYS2d 884 (Chautauqua Co Supreme Ct 1999). *See gen People v Moselle*, 57 NY2d 97, 104, 454 NYS2d 292, 294 (1982).

[32] *See eg People v Hochheimer*, 119 Misc2d 344, 463 NYS2d 704 (Monroe Co Supreme Ct 1983); *People v Tilley*, 120 Misc2d 1040, 466 NYS2d 983 (Erie Co Ct 1983).

[33] *See eg People v Krebs*, 195 AD2d 696, 600 NYS2d 317 (3d Dept 1993); *People v Nieves*, 143 Misc2d 734, 541 NYS2d 1008 (NY City Crim Ct 1989).

[34] *See eg People v Kirkland*, 157 Misc2d 38, 595 NYS2d 905 (Yates Co Ct 1993); *People v Cegelski*, 142 Misc2d 1023, 539 NYS2d 639 (Monroe Co Ct 1989); *People v Batista*, 128 Misc2d 1054, 491 NYS2d 966 (NY City Crim Ct 1985).

[35] *See People v Ayala*, 89 NY2d 874, 653 NYS2d 92 (1996).

[36] *See People v Hartley*, 188 Misc2d 70, 726 NYS2d 540 (Albany Co Ct 2001).

[37] *See People v Thomas*, 121 AD2d 73, __, 509 NYS2d 668, 671 (4th Dept 1986), *affd* 70 NY2d 823, 523 NYS2d 437 (1987). *See also People v MacDonald*, 227 AD2d 672, __, 641 NYS2d 749, 751 (3d Dept), *affd* 89 NY2d 908, 653 NYS2d 267 (1996); *People v Gray*, 190 Misc2d 40, __, 736 NYS2d 856, 860 (Kings Co Supreme Ct 2002); *People v Ottino*, 178 Misc2d 416, __, 679 NYS2d 271, 273 (Sullivan Co Ct 1998).

[38] *See People v Ottino*, 178 Misc2d at __, 679 NYS2d at 273. Although *People v MacDonald*, 89 NY2d 908, 653 NYS2d 267 (1996), appears at first glance to hold otherwise, *MacDonald* is distinguishable from *Ottino*. In *MacDonald*, the evidence at issue was not evidence of the defendant's refusal to submit to an Alco-Sensor test, but rather "testimony regarding defendant's [conduct in] attempt[ing] to avoid giving an adequate breath sample for alco-sensor testing." *Id* at 910, 653 NYS2d at 268. *See also People v MacDonald*, 227 AD2d 672, __, 641 NYS2d 749, 751 (3d Dept) ("the testimony introduced by the People regarding the test was to show defendant's consciousness of guilt in refusing to comply with the procedures and pretending to blow into the straw. Under these circumstances, we find the testimony regarding the attempt to give defendant the alco-sensor test permissible, particularly in light of the court's limiting instructions to the jury on this point"), *affd* 89 NY2d 908, 653 NYS2d 267 (1996).

[39] *See People v Gray*, 190 Misc2d at __, 736 NYS2d at 860.

[40] *Ie* the defendant either (a) has a prior VTL 1192 conviction or chemical test refusal revocation within the previous 5 years, or (b) has 2 such prior convictions and/or revocations within the previous 10 years.

[41] The proposed changes to the DWI laws are so significant and voluminous that they could easily be the subject of a Part III of this series.

[42] Whose phone number is (518)474-0774.

[43] Nor will your client be very forgiving if it turns out either (a) that the actual license revocation received is far longer than you had advised him or her that it would be, and/or (b) that he or she is ineligible for a conditional license despite your assurance to the contrary.

[44] *See* 15 NYCRR Part 136.

[45] VTL 1199(1).

[46] VTL 1199(2). If the person is both convicted of a violation of VTL 1192 *and* found to have refused to submit to a chemical test in accordance with VTL 1194 in connection with the same incident, only one Driver Responsibility Assessment will be imposed. VTL 1199(1).

[47] VTL 1199(4).

[48] *See eg People v Figueroa*, 17 AD3d 1130, 794 NYS2d 262 (4th Dept 2005); *People v Domin*, 284 AD2d 731, 726 NYS2d 503 (3d Dept 2001).

[49] *See* CPL 420.10(5). CPL 420.10(5) was formerly designated CPL 420.10(4). For an excellent discussion of the application of this statute, see *People v Goddard*, 108 Misc2d 742, 439 NYS2d 71 (NY City Crim Ct 1981). *See gen Bearden v Georgia*, 461 US 660, 103 SCt 2064 (1983). In *People v.Ingham*, 115 Misc2d 64, 453 NYS2d 325 (Rochester City Ct 1982), the Court held the mandatory fine excessive and thus unconstitutional as applied to an indigent defendant convicted of DWI in violation of VTL 1192(3).

[50] *See* VTL 1809(6).

[51] *See* VTL 1809(7).

[52] *See* VTL 1809(2).

[53] *See* VTL 1809(4); VTL 1809-a(3); PL 60.35(4).

[54] *See eg People v Figueroa*, 17 AD3d 1130, 794 NYS2d 262 (4th Dept 2005); *People v Reeves*, 6 AD3d 231, 774 NYS2d 326 (1st Dept 2004); *People v Moye*, 4 AD3d 488, 772 NYS2d 352 (2d Dept 2004); *People v Goldwire*, 301 AD2d 677, 752 NYS2d 906 (3d Dept 2003); *People v Catalano*, 179 AD2d 1051, 580 NYS2d 915 (4th Dept 1992).

[55] *See* VTL 1194(2)(b)(3). *See also* 15 NYCRR 139.3(a). This procedure apparently does not violate the Due Process Clause. *See Matter of Ventura*, 108 Misc2d 281, 437 NYS2d 538 (Monroe Co Supreme Ct 1981). *See gen Mackey v Montrym*, 443 US 1, 99 SCt 2612 (1979).

[56] *See* VTL 1194(2)(c).

[57] 15 NYCRR 127.9(c).

[58] This "suspension lift" only applies to the 15-day temporary suspension. It does not terminate or override any other suspension/revocation on your client's driving record.

[59] VTL 1193(2)(d)(2).

[60] *Id.*

[61] *See* VTL 511(2). AUO 1st if the person is impaired or intoxicated at the time. *See* VTL 511(3).

[62] In fact, the ALJ will not even know that a hearing had been scheduled.

[63] For purposes of this article, the phrase "alcohol evaluation" means an alcohol and/or drug evaluation, and the phrase "alcohol treatment" means alcohol and/or drug treatment.

[64] VTL 1193(2)(c) provides that where a driver's license is revoked pursuant to VTL 1193(2)(b), "no new license shall be issued after the expiration of the minimum period specified in such paragraph, except in the discretion of the commissioner."

[65] VTL 1193(2)(e)(6).

[66] *Pringle v Wolfe*, 88 NY2d 426, 432, 646 NYS2d 82, 85-86 (1996). *See also id* at 434, 646 NYS2d at 87.

2006 Legislative Review

By Al O'Connor*

New Crimes

➢**Chap. 765 L.2005 (Crimes Against Police Act). Effective: December 21, 2005.**

In December 2005, following several police shootings, the New York City tabloids goaded the Legislature back into session to pass the so-called "Hero's Law," aimed at violent crimes against police officers. At the same Extraordinary Session, the Legislature enacted new penalties for illegal possession and sale of firearms (see Guns / Firearms below).

Chapter 765 creates a new series of crimes relating to violent acts directed at police and peace officers. For the new crime of aggravated murder of a police or peace officer the sentence must be life imprisonment without parole. Convictions for attempted murder in the first degree where the intended victim was a police, peace or correction officer, and for attempted aggravated murder, the sentence range is life imprisonment with a minimum term ranging from 20 to 40 years.

Penal Law § 125.26 Aggravated murder

A person is guilty of aggravated murder when:

1. With intent to cause the death of another person, he or she causes the death of such person, or of a third person who was a person described in subparagraph (i), (ii) or (iii) of paragraph (a) of this subdivision engaged at the time of the killing in the course of performing his or her official duties; and

(a) Either:

(i) the intended victim was a police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known that the victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth; or

(iii) the intended victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one of this section, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, aggravated manslaughter in the first degree, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, aggravated manslaughter in the second degree, manslaughter in the second degree or any other crime except murder in the second degree.

(Class A-I felony with a mandatory sentence of life imprisonment without parole)

The bill also enacts the following new crimes:

Penal Law § 125.22 Aggravated manslaughter in the first degree

(Class B felony, punishable by determinate term of 10–30 years plus PRS)

Penal Law § 12521 Aggravated manslaughter in the second degree

(Class C felony, punishable by determinate term of 7–21 years plus PRS)

Penal Law § 125.11 Aggravated criminally negligent homicide

(Class C felony, punishable by determinate term of 3½–20 years plus PRS)

Penal Law § 120.18 Menacing a police or peace officer

(Class D felony, punishable by determinate term of 2–8 years plus PRS).

Chap. 765 also increases the minimum sentence for the Class B felony of aggravated assault upon a police office (Penal Law § 120.11) to a determinate term of 10–30 years, plus post-release supervision.

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➢**Chap. 738 (S.8445) (Unlawful fleeing a police officer). Effective: November 1, 2006.**

Creates the new crime of unlawful fleeing a police officer in a marked motor vehicle, a Class A misdemeanor, and higher grade offenses when serious physical injury (Class E felony) or death (Class D felony) results.

Penal Law § 270.25 Unlawful fleeing a police officer in a motor vehicle in the third degree.

A person is guilty of unlawful fleeing a police officer in a motor vehicle in the third degree when, knowing that he or she has been directed to stop his or her motor vehicle by a uniformed police officer or a marked police vehicle by the activation of either the lights or the lights and siren of such vehicle, he or she thereafter attempts to flee such officer or such vehicle by driving at speeds which equal or exceed twenty-five miles per hour above the speed limit or engaging in reckless driving as defined by section twelve hundred twelve of the vehicle and traffic law.

(Class A misdemeanor)

Penal Law § 270.30 Unlawful fleeing a police officer in a motor vehicle in the second degree.

A person is guilty of unlawful fleeing a police officer in a motor vehicle in the second degree when he or she commits the offense of unlawful fleeing a police officer in a motor vehicle in the third degree, as defined in section 270.25 of this article, and as a result of such conduct a police officer or a third person suffers serious physical injury.

(Class E felony)

Penal Law § 270.35 Unlawful fleeing a police officer in a motor vehicle in the first degree.

A person is guilty of unlawful fleeing a police officer in a motor vehicle in the first degree when he or she commits the offense of unlawful fleeing a police officer in a motor vehicle in the third degree, as defined in section 270.25 of this article, and as a result of such conduct a police officer or a third person is killed.

(Class D felony)

➢**Chap. 107 (A.8939-a) (Predatory Sexual Assault). Effective: June 23, 2006.**

Enacts new crimes relating to predatory sexual assault, Class A-II felonies carrying life sentences.

Penal Law § 130.95 Predatory Sexual Assault.

A person is guilty of predatory sexual assault when he or she commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, and when:

1. in the course of the commission of the crime or the immediate flight therefrom, he or she:

(a) causes serious physical injury to the victim of such crime; or

(b) uses or threatens the immediate use of a dangerous instrument; or

2. He or she has engaged in conduct constituting the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, against one or more additional persons; or

3. He or she has previously been subjected to a conviction for a felony defined in this article, incest as defined in section 255.25 of this chapter or use of a child in a sexual performance as defined in section 263.05 of this chapter.

(Class A-II felony)

Penal Law § 130.96 — Predatory Sexual Assault Against a Child

A person is guilty of predatory sexual assault against a child when, being eighteen years old or more, he or she commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, and the victim is less than thirteen years old.

(Class A-II felony)

Sentencing—First and second felony offenders: Indeterminate term with a minimum term of 10 – 25 years and a maximum of life imprisonment; Persistent violent felony offender: minimum term of 25 years to life. The bill also adds these new crimes to list of offenses requiring registration under Megan's Law (Correction Law § 168-a).

➢**Chap. 564 (A.2833) (Controlled Substances — Use of a Child). Effective: November 1, 2006.**

Enacts a new crime relating to use of a child to commit a controlled substance offense:

Penal Law § 220.28 Use of a Child to Commit a Controlled Substance Offense.

1. A person is guilty of use of a child to commit a controlled substance offense when, being eighteen years old or more, he or she commits a felony sale or felony attempted sale of a controlled substance in violation of this article and, as part of that criminal transaction, knowingly uses a child to effectuate such felony sale or felony attempted sale of such controlled substance.

2. For purposes of this section, "uses a child to effectuate the felony sale or felony attempted sale of such controlled substance" means conduct by which the actor:

(a) conceals such controlled substance on or about

the body or person of such child for the purpose of effectuating the criminal sale or attempted sale of such controlled substance to a third person; or

(b) directs, forces or otherwise requires such child to sell or attempt to sell or offer direct assistance to the defendant in selling or attempting to sell such controlled substance to a third person.

For purposes of this section, "child" means a person less than sixteen years of age.

(Class E felony)

➢ **Chap. 49 (A.7027) (Aggravated Harassment — Swastikas and Cross Burning). Effective: June 7, 2006.**

Adds new subdivisions to Penal Law § 240.31 relating to swastikas and cross burning:

§ 240.31 Aggravated harassment in the first degree.

A person is guilty of aggravated harassment in the first degree when with intent to harass, annoy, threaten or alarm another person, because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct, he or she:

3. etches, paints, draws upon or otherwise places a swastika, commonly exhibited as the emblem of nazi Germany, on any building or other real property, public or private, owned by any person, firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property; or

4. sets on fire a cross in public view.

(Class E felony

Sex Offenses and Offenders

➢**Chap. 3 (S.8441) (Statute of Limitations eliminated for certain sex crimes). Effective: June 23, 2006.**

Eliminates the statute of limitations for the following Class B felonies: rape in the first degree, criminal sexual act in the first degree; aggravated sexual abuse in the first degree; course of sexual conduct against a child in the first degree. The bill also extends the statute of limitations for a civil action concerning these crimes to five years, or five years from the termination of a criminal action concerning the same conduct.

The law applies prospectively to crimes committed on or after June 23, 2006, as well as retroactively where the former statute of limitations had not yet expired by June 23, 2006.

➢**Chap. 1 (S.6409) (Megan's Law — duration of registration periods extended). Effective: January 18, 2006.**

Chapter 1 extends the duration of registration requirements under the Sex Offender Registration Act to life for all offenders classified as Level 2 (with a right to petition for relief from registration requirements after 30 years), and to twenty years for those classified as Level 1. Regardless of risk level, those offenders who are designated sexual predators, sexually violent offenders, or predicate sex offenders must register for life with no right to petition for relief. The legislation also amends Correction Law § 168-o to limit the right to petition for downward modification of risk level to once every two years (from annually).

Federal district court judge Denny Chin ruled in April, 2006 that this legislation violated the consent decree in *Doe v. Pataki*, 3 F.Supp.2d 456 (S.D.N.Y. 1998), with respect to class members who were classified as Level 1 and 2 offenders and were originally governed by a 10 year registration requirement. 427 F.Supp.2d 398 (S.D.N.Y. 2006). Judge Chin's order has been stayed and the matter is currently on appeal to the Second Circuit.

➢**Chap. 106 (A.8370) (Megan's Law — expansion of public notification). Effective: June 23, 2006.**

This law expands the public notification provisions of Megan's Law by requiring DCJS to post the names, approximate addresses, photographs and other information concerning Level 2 sex offenders on the internet. The law also authorizes law enforcement agencies to release the names, approximate addresses, photographs and other information concerning Level 1 sex offenders to "entities with vulnerable populations related to the offense committed," which may further disseminate such information at their discretion.

➢**Chap. 320 (S6277-b) (Incest — three degrees corresponding to seriousness of underlying criminal acts). Effective: November 1, 2006.**

In response to a false, tabloid-fueled campaign asserting that prosecutors in New York charge familial sex abuse as the Class E felony of incest instead of indicting offenders on more serious rape and criminal sexual act charges, the Legislature has redrafted the incest statute into three degrees, which correspond to the most serious underlying criminal acts alleged.

Penal law § 255.25 Incest in the third degree.

A person is guilty of incest in the third degree when he or she marries or engages in sexual intercourse, oral sexual conduct or anal sexual conduct with a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or the half

blood, uncle, aunt, nephew or niece.

(Class E felony)

Penal Law § 255.26 Incest in the second degree.

A person is guilty of incest in the second degree when he or she commits the crime of rape in the second degree, as defined in section 130.30 of this part, or criminal sexual act in the second degree, as defined in section 130.45 of this part, against a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece.

(Class D felony)

Penal Law § 255.27 Incest in the first degree.

A person is guilty of incest in the first degree when he or she commits the crime of rape in the first degree, as defined in subdivision three or four of section 130.35 of this part, or criminal sexual act in the first degree, as defined in subdivision three or four of section 130.50 of this part, against a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or half blood, uncle, aunt, nephew or niece.

(Class B felony)

➢**Chap. 96 (S.7277) (Sex offenders — Board of Parole notification to local social services districts). Effective: June 7, 2006**

Requires the Board of Parole to notify the local social services district upon the release from prison of a Level 2 or 3 sex offender when it appears the inmate is "likely to seek access to local social services for homeless persons." (Amends Executive Law § 259-c). Previously, the Department of Correctional Services was required to perform this function.

➢**Chap. 91 (S.6934) (Megan's Law – DNA databank compelling prostitution added). Effective: June 7, 2006 – Megan's Law amendment applies retroactively to defendants who have not completed sentence by effective date.**

Adds compelling prostitution (Penal Law § 230.33) to the list of crimes covered by the Sex Offender Registration and DNA databank laws.

Penal Law

➢**Chap. 98 (S.7588) (Purposes of Penal Law) – Effective: June 7, 2006.**

Adds reentry and reintegration to the expressed purposes of the Penal Law.

Penal Law § 1.05

The general purposes of the provisions of this chapter are:

(6) To insure public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, *the promotion of their successful and productive reentry and reintegration into society*, and their confinement when required in the interests of public protection.

➢**Chap. 13 (A.9835) (Riot in the first degree – prison incidents). Effective: March 21, 2006.**

In 2005, the Legislature expanded the crime of rioting in the first degree to conduct occurring within state correctional facilities (Penal Law § 240.06). This bill extends the statute to local correctional facilities:

Penal Law § 240.06 (2)

A person is guilty of riot in the first degree when he:

(2) while in a correctional facility or local correctional facility, as those terms are defined in subdivisions four and sixteen, respectively, of section two of the correction law, simultaneously with ten or more other persons, engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing alarm within such correctional facility and in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs.

➢**Chap. 682 (S.6997-a) (Music/Video Piracy – threshold for felony reduced). Effective: November 1, 2006.**

Reduces the threshold for felony-level music and video piracy (Penal Law § 275.40 — failure to disclose the origin of a recording in the first degree) from one thousand to one hundred unauthorized recordings. The bill also elevates the crime of failure to disclose the origin of a recording in the second degree to the first degree offense when the defendant has a previous conviction for the same crime within the previous five years.

➢**Chap. 110 (S.7008) (Reckless assault of a child — shaken baby syndrome). Effective: November 1, 2006.**

Enacts a new assault crime involving reckless assault by a person at least 18 years old on a child less than five years old by shaking or causing blunt trauma to the head.

Penal Law § 120.02 reckless assault of a child.

A person is guilty of reckless assault of a child when, being eighteen years of age or more, such person recklessly causes serious physical injury to the brain of a child less than five years old by shaking the child, or by slamming or throwing the child so as to impact the child's head on a hard surface or object.

2. For purposes of subdivision one of this section, the following shall constitute "serious physical injury":

a. "serious physical injury" as defined in subdivision

ten of section 10.00 of this chapter; or

b. extreme rotational cranial acceleration and deceleration and one or more of the following: (i) subdural hemorrhaging; (ii) intracranial hemorrhaging; or (iii) retinal hemorrhaging.

(Class D violent felony)

➢**Chap. 349 (S.7054) (Criminal contempt in the first degree — aggravated criminal contempt added as predicate offense). Effective: November 1, 2006.**

Adds aggravated criminal contempt (Penal Law § 215.52) to the list of predicate offenses that can support a prosecution for criminal contempt in the first degree pursuant to Penal Law § 215.51 (c).

➢**Chap. 350 (S.7055) (Aggravated criminal contempt – previous convictions). Effective: November 1, 2006.**

Adds two new subdivisions to Penal Law § 215.52 to elevate the crime of criminal contempt in the first degree (Class E felony) to aggravated criminal contempt (Class D felony) when the defendant has prior criminal contempt convictions:

Penal Law § 215.52 Aggravated criminal contempt.

A person is guilty of aggravated criminal contempt when:

2. he or she commits the crime of criminal contempt in the first degree as defined in subdivision (b) or (d) of section 215.51 of this article and has been previously convicted of the crime of aggravated criminal contempt; or

3. he or she commits the crime of criminal contempt in the first degree, as defined in paragraph (i), (ii), (iii), (v) or (vi) of subdivision (b) or subdivision (c) of section 215.51 of this article, and has been previously convicted of the crime of criminal contempt in the first degree, as defined in such subdivision (b), (c) or (d) of section 215.51 of this article, within the preceding five years.

➢**Chap. 436 (S.8431) (Sale of a controlled substance on or near school grounds). Effective: September 1, 2006.**

Amends Penal Law § 220.34 to add school buses to the locations covered by the law prohibiting sale of a controlled substance on or near school grounds.

Criminal Procedure Law

➢**Chap. 215 (A.9907-a) (Increased duration of orders of protection). Effective: August 25, 2006.**

Amends CPL §§530.12 and 530.13 to increase the maximum duration of an order of protection in felony cases to eight years (up from five) from the date of conviction or from the date of expiration of the maximum term of an indeterminate or determinate sentence of imprisonment, whichever is longer. For Class A misdemeanors, the maximum period has been increased to five years (up from three), and in all other cases the maximum period has been increased to two years (up from one).

➢**Chap. 253 (A.10767-a) (Orders of Protection — companion animals). Effective: July 26, 2006.**

Amends the Family Court Act and the Criminal Procedure Law to authorize a court to issue an order of protection concerning "companion animals." The court may order a defendant to "refrain from intentionally injuring or killing, without justification, any companion animal [the defendant or respondent] knows to be owned, possessed, leased, kept or held by [the victim or petitioner] or a minor child residing in the household.

➢**Chap. 695 (S.7408) (Jury Selection — challenges for cause). Effective: November 1, 2006.**

Amends CPL § 360.25 (1)(e) to provide that a prospective juror may be challenged for cause when he or she "served on a trial jury in a prior civil or criminal action involving the same *incident* charged . . ." The section currently refers to "the same *conduct* charged," and the amendment is intended to clarify that prospective jurors are not subject to for-cause challenge because of prior jury service involving the same type of crime as the one alleged. The new language conforms to CPL § 270.20 (1)(e). *See People v. Petikas*, 10 Misc.3d 915 (Dist. Ct. Nassau Co. 2005).

➢**Chap. 470 (S.6385) (Audio-Visual court appearances). Effective: August 16, 2006.**

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

➢**Chap. 532 (S.7987) (Audio-Visual court appearances). Effective: August 16, 2006.**

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

DNA Databank

➢**Chap. 2 (S.8446) (Expanded DNA databank offenses). Effective: June 23, 2006, applies to offenses committed on or after such date, and to crimes committed prior thereto where the sentence was not completed by June 23, 2006.**

Expands the list of DNA databank offenses [Executive Law § 995 (7)] to include all felonies defined in the Penal Law and the following misdemeanors:

Assault in the third degree
Attempted aggravated assault upon a person less than eleven years old
Attempted menacing in the in the first degree

Menacing in the second degree
Menacing in the third degree
Reckless endangerment in the second degree
Stalking in the fourth degree
Stalking in the third degree
Attempted stalking in the second degree
Forcible touching
Sexual abuse in the third degree
Unlawful imprisonment in the second degree
Attempted unlawful imprisonment in the first degree
Criminal trespass in the second degree
Possession of burglar's tools
Petit larceny
Endangering the welfare of a child
Endangering the welfare of an incompetent or physically disabled person

Guns/Firearms

➢**Chap. 742 (S.8467) (Criminal possession of a loaded firearm elevated to Class C violent felony). Effective: November 1, 2006.**

NOTE: Prosecutors have raised technical objections to this bill. It will likely be amended later this year. Unfortunately, the final version will probably continue to define illegal possession of a loaded firearm as a Class C felony.

This bill elevates the crime of criminal possession of a loaded firearm, without the intent to use it unlawfully against another, from a Class D to a Class C violent felony. It repeals Penal Law § 265.02 (4) and inserts the provision in Penal Law § 265.03, which is revised as follows:

Penal Law § 265.03 Criminal possession of a weapon in the second degree.

A person is guilty of criminal possession of a weapon in the second degree when:

(1) with intent to use the same unlawfully against another, such person:

possesses a machine-gun;

possesses a disguised gun; or

(2) such person possesses five or more firearms; or

(3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this section if such possession takes place in such person's home or place of business.

The effect of this upgrade is that a determinate sentence with a minimum of 3½ years and a maximum of 15 years will be mandatory for a first offense. Even with a plea to the Class D violent felony of attempted criminal possession of a weapon in the second degree, a prison sentence can only be avoided if the court finds, pursuant to Penal Law § 70.02 (4) (b), that an alternative sentence is "consistent with the public safety and does not deprecate the seriousness of the crime and one or more of the following factors exist: i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor was to constitute a defense to the prosecution; or iii) possible deficiencies in proof of the defendant's commission of an armed felony."

➢**Chap. 764, L.2005 (Criminal sale/possession of a weapon). Effective: December 21, 2005.**

Redefines the crime of criminal possession of a weapon in the third degree (Penal Law § 265.02 (5) — Class D felony) as possession of 3 or 4 firearms (from 20 or more). Defines the crime of criminal possession of a weapon in the second degree (new subdivision 2 of Penal Law § 265.03 — Class C felony) as possession of 5 or more firearms, and defines the crime of criminal possession of a weapon in the first degree (Penal Law § 265.04 (1) — Class B felony) as possession of 10 or more firearms.

Chapter 764 also redefines the crime of criminal sale of a firearm in the first and second degrees (Penal Law §§ 265.13, 265.12) as unlawful sale of ten or more firearms (1st degree) or five or more firearms (2nd degree) in a period of not less than one year.

➢**Chap. 199 (A.9272) (Firearms prohibited on school buses). Effective: November 1, 2006.**

Amends Penal Law § 265.01 to prohibit possession of a rifle, shotgun or firearm on school buses.

➢**Chap. 281 (A.11864) (Possession of guns at pistol ranges — minimum age requirement). Effective: July 26, 2006.**

Amends Penal Law § 265.20 (7)(e) to legalize the possession of a pistol or revolver by a person fourteen years of age (down from eighteen) at a pistol range under certain conditions.

Vehicle and Traffic Law and Driving (or Boating) While Intoxicated

➢**Chap. 732 (S.8232) (DWI — new offenses, increased penalties, new conditions). Effective: November 1, 2006.**

This bill enacts numerous changes to driving while intoxicated laws and related Penal Law statutes:

It enacts a new crime, aggravated driving while intoxicated, defined as a blood alcohol reading of .18% or higher (VTL § 1992-a), a misdemeanor punishable by up to one-year imprisonment, and enhanced fine of $1000–

$2500. The bill restricts plea bargaining below the level of driving while intoxicated in these cases, unless the district attorney determines the charge is "not warranted" and the court "sets forth upon the record the basis for a [lesser] disposition." In any event, plea dispositions must include mandated completion of a drinking driver program, unless the defendant completed the program prior to sentencing as a condition of the plea. Sentences of probation for aggravated driving while intoxicated must include installation and maintenance of an ignition interlock system during the period of probation. The mandatory license revocation period pursuant to VTL § 1993 (2) for convictions of aggravated driving while intoxicated is one year; 18 months when the defendant has a prior conviction for an offense defined in VTL § 1192 (2) (2-a) (3) or (4) within the preceding 10 years.

Aggravated driving while intoxicated involving the operation of a taxicab or livery car carrying passengers, or certain non-commercial and commercial trucks, shall be a Class E felony, punishable by up to 4 years imprisonment and a fine of $1000–$5000. Cases involving operation of a school bus carrying a passenger, or a truck carrying hazardous material, shall be a Class D felony, punishable by up to 7 years imprisonment and fine of $2000–$10,000.

The bill also enacts a new crime driving while ability impaired by the combined influence of drugs and alcohol, VTL § 1192 (4-a), a misdemeanor punishable by up to one year imprisonment and a fine of $500–$1,000; higher penalties apply to operation of special vehicles.

The bill also requires that a defendant charged with driving while intoxicated, or impaired by drugs, or drugs and alcohol, attend and complete a drinking driver program as a condition of a plea of guilty to driving while impaired, unless the defendant has already done so as a condition of the plea, or "for other good cause shown":

VTL § 1192 (10)

In any case wherein the charge laid before the court alleges a violation of subdivision two, three, four or four-a of this section, no plea of guilty to subdivision one of this section shall be accepted by the court unless such plea includes as a condition thereof the requirement that the defendant attend and complete the alcohol and drug rehabilitation program established pursuant to section eleven hundred ninety-six of this article, including any assessment and treatment required thereby; provided, however, that such requirement may be waived by the court upon application of the district attorney or the defendant demonstrating that the defendant, as a condition of the plea, has been required to enter into and complete an alcohol or drug treatment program prescribed pursuant to an alcohol or substance abuse screening or assessment conducted pursuant to section eleven hundred ninety-eight-a of this article or for other good cause shown. The provisions of this subparagraph shall apply, notwithstanding any bars to participation in the alcohol and drug rehabilitation program set forth in section eleven hundred ninety-six of this article; provided, however, that nothing in this paragraph shall authorize the issuance of a conditional license unless otherwise authorized by law.

The bill requires alcohol dependency screening for all first offenders with a blood alcohol level of less than .15%, and requires an alcohol dependency assessment when it is 1) indicated by screening; 2) the defendant is a repeat offender; or 3) the blood alcohol level is alleged to be .15% or higher.

The bill also increases the license revocation period for refusal to submit to a chemical test to one year (up from 6 months), 18 months for repeat offenders and operators of commercial vehicles. And it provides for permanent revocation when the defendant has 1) three of more convictions under section 1192 (at least one of which is a crime) or three or more test refusals or any combination thereof within a four year period, or 2) four or more convictions, refusals or combinations thereof within an eight year period. A waiver of permanent revocation is available after five years in certain circumstances.

Penal Law Amendments:

Amends Penal Law § 125.13 (Vehicular manslaughter in the first degree) by adding new subdivisions:

A person is guilty of manslaughter in the first degree when he or she commits the crime of vehicular manslaughter in the second degree, and either:

1. commits the crime while operating a motor vehicle while such person has .18 grams or more by weight of alcohol in such person's blood as shown by chemical analysis of such person's blood, breath, urine, or saliva made pursuant to the provisions of section eleven hundred ninety-four of the vehicle and traffic law;

3. causes the death of more than one other person

4. has previously been convicted of violating any provision of this article or article one hundred twenty-five of this title involving the operation of a motor vehicle, or was convicted in any other state or jurisdiction of an offense involving the operation of a motor vehicle which, if committed in this state, would constitute a violation of this article or article one hundred twenty-five of this title; or

[*Note the following subdivision is inconsistent with Chap. 245 see below*]

(5)(a) has previously been convicted two or more times within the preceding five years of a violation of the provisions of section eleven hundred ninety-two of the vehicle and traffic law for which a sentence of imprison-

ment is authorized and at least one such violation resulted in a conviction for a misdemeanor or felony, or (b) has been convicted three or more times within the preceding ten years of a violation of the provisions of section eleven hundred ninety-two of the vehicle and traffic law for which a sentence of imprisonment is authorized and at least one such violation resulted in a conviction of a misdemeanor or felony; provided that, for the purposes of this subdivision, a conviction in any other state or jurisdiction for an offense which, if committed in this state, would constitute a violation of section eleven hundred ninety-two of the vehicle and traffic law, shall be treated as a violation of such law.

➢**Chap. 245 (A.10619-b) (Vehicular Assault; Vehicular Manslaughter — offense upgrade). Effective: November 1, 2006**

This legislation adds a new subdivision to Penal Law § 125.13 to elevate vehicular manslaughter in the second degree to the first degree offense when the defendant "has previously been convicted of violating any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law within the preceding ten years." As noted above, Chapter 732 amends the same statute and inconsistently elevates the offense level when the defendant has been convicted two or more times within the preceding five years, or three or more times within the preceding ten years.

Chapter 245 also elevates the crime of vehicular assault in the second degree to the first degree offense when the defendant has a prior VTL § 1192 conviction within the preceding ten years.

➢**Chap. 571 (A.4914-b) (Vehicle and Traffic Law — right of way violations). Effective: November 1, 2006.**

Amends VTL § 510 to require a mandatory license suspension for right of way violations (VTL Article 26) that result in serious physical injury (45 day suspension) or death (75 day suspension), and provides for mandatory license revocation for a subsequent right of way violation committed within 18 months. The bill also amends Penal Law § 65.10 to authorize courts to order defendants convicted of right of way violations involving serious physical injury or death to participate in a motor vehicle accident prevention course as a term and condition of probation or conditional discharge.

➢**Chap. 231 (A.10369-a) (DWI — Out-of-state convictions). Effective: November 1, 2006 and shall apply to convictions "occurring" on or after such date.**

VTL § 1192 (8) specifies that an out-of-state conviction for any level drunk driving offense shall be considered a prior conviction for driving while ability impaired for purposes of determining penalties, provided the conduct would have constituted driving while impaired in New York State. This bill provides that an out-of-state offense shall be deemed to be a prior felony, misdemeanor, or violation depending on its classification had the underlying conduct occurred in New York.

➢**Chap. 151 (S.7154-b) (Boating while intoxicated — increased penalties). Effective: August 6, 2006.**

Amends the Navigation Law to increase penalties for boating while impaired and intoxicated:

Boating while impaired: 15 days and fine of $300–$500 (up from $250–$300); second offense within 5 years — up to 30 days and fine of $500–$750 (down from $500–$1500); third offense within 10 years elevated to a misdemeanor punishable by up to 6 months and fine of $500–$1500.

Boating while intoxicated First offense: imprisonment for up to one year (from 90 days), fine of $500–$1000 (up from $50–$500); second offense within 10 years elevated to a Class E felony punishable by up to 4 years imprisonment and fine of $1000–$5000; third conviction within 10 years elevated to a Class D felony punishable by up to 7 years imprisonment and fine of $2000–$10,000.

➢**Chap. 618 (A.10891) (DWI — Blood samples — Authorized Personnel). Effective: August 16, 2006.**

Amends Public Health Law § 3703 to authorize registered physician assistants and certified nurse practitioners to supervise and direct the withdrawal of blood to determine alcohol or drug content pursuant to VTL § 1194 (4).

Collateral Consequences/Employment Discrimination/Rehabilitation

VETOED (S.7728-a) (Employment Discrimination — Inquiries about youthful offender adjudications and sealed violations prohibited).

Amends Executive Law § 296 (16) to render it an "unlawful discriminatory practice" for an employer to inquire about youthful offender adjudications, traffic infractions, or a violations sealed pursuant to CPL § 160.55, or to take adverse action against an individual because of them.

It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in sub-

division two of section 160.50 of the criminal procedure law, *or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a traffic infraction or violation sealed pursuant to section 160.55 of the criminal procedure law* in connection with the licensing, employment or providing of credit or insurance to such individual; provided, however, that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law.

VETOED (S.7730-a) (Employment Discrimination).

Correction Law Article 23-a prohibits discrimination in certain employment and licensing decisions involving persons with criminal convictions, unless there is a direct relationship between the offense and the specific license or employment sought. This bill extends the qualified protections of Article 23-a to persons who are already employed or licensed and prohibits unwarranted adverse action because of previous criminal convictions.

VETOED (A.6719) (Employment — barbering license).

Amends General Business Law §§ 434 and 438 to provide that in determining good moral character for purposes of issuing a barbering license the secretary of state "shall not automatically disqualify an applicant on the basis of a criminal conviction."

➢**Chap. 720 (S.8021) (Access to reports concerning applications for certificates of relief from civil liabilities). Effective: June 7, 2006 (as amendment to Chap. 98).**

This bill amends Correction Law § 702 (6) to provide applicants for a certificate of relief from civil disabilities access to evaluative reports by probation offices in connection with requests for the certificate (as opposed to mere "examination" rights to such reports).

Miscellaneous

VETOED (S.8368) (Early Conditional Parole for Deportation Purposes Only available for determinate sentence for drug offense).

Following enactment of the 2004 Drug Law Reform Act, the Board of Parole announced that it would not consider inmates serving determinate sentences for drug offenses eligible for early parole release for deportation purposes only [Executive Law § 259-i (d)(i)]. This bill makes clear that such inmates are eligible for early conditional release notwithstanding service of a determinate term of imprisonment.

VETOED (A.3926) (SHU confinement barred for mentally ill inmates).

This bill bars the Department of Correctional Services from placing inmates with serious mental disorders in Special Housing Units for disciplinary confinement. Instead such inmates shall be placed in residential treatment units jointly operated by DOCS and the Office of Mental Health. Inmates covered by the ban include those with DSM Axis I diagnoses of 1. a) schizophrenia and other psychotic disorders, b) major depressive disorders, c) bipolar disorders, and d) cognitive disorders, specifically delirium, dementia and amnesiac disorder, as well as 2) inmates diagnosed with brain injury, 3) those determined to be at risk of suicide, and 4) "inmates who have otherwise substantially deteriorated mentally or emotionally while confined in isolation where [transfer to a residential treatment unit] is deemed to be clinically appropriate by a mental health clinician." The bill gives oversight authority to the New York State Commission on Quality of Care for the Mentally Disabled to enforce compliance with its terms.

VETOED (A.10085) (Collection of parole supervision fees).

Amends Executive Law § 259-a to provide that parole supervision fees shall not be collected by parole officers but shall be payable at a central location.

VETOED (A.10113-a) (Illegal hunting — increased fines and penalties).

Amends Environmental Conservation Law § 71-0921 to increase fines and penalties for illegal taking of big game, or illegal spotlighting of big game or deer: first offense — up to 1 year imprisonment and a fine of $500 - $3000 (up from $250–$2000), subsequent offenses fine of $1000–$5000. In addition, the bill provides for new mandatory firearm license suspensions: first offense — 2 years; subsequent offense — 5 years.

➢**Chap. 647 (S. 1626-a) (Notification to child protective services of certain convictions). Effective: October 12, 2006.**

Requires district attorneys to notify local child protective services agencies of convictions for crime defined in Penal Law Articles 125, 130, 260 or 263 involving a victim under the age of 18 by a person legally responsible for such child.

➢**Chap. 346 (s.6957) (Unlawful dissection, body stealing, grave robbing, sale and purchase of human organs — Offense level upgrades). Effective: November 1, 2006.**

Elevates the crime of unlawful dissection of the body of a human being (Public Health Law § 4210-a) from an unclassified misdemeanor to a Class E felony; elevates the

crimes of body stealing (Public Health Law § 4216) and grave robbing ("opening graves" — Public Health Law § 4218) from unclassified felonies to Class D felonies; elevates the crime of unlawful sale or purchase of human organs (Public Health Law § 4307) from an unclassified misdemeanor to a Class E felony.

➢**Chap. 538 (S.8096) (Right to Assigned Counsel – Supreme Court in Family Court matter). Effective: August 16, 2006.**

Adds a new subdivision 8 to Judiciary Law § 35 to provide a right to assigned counsel in Supreme Court in a "matter which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto pursuant to law, and under circumstances whereby, if such proceedings were pending in family court would be required by section two hundred sixty-two of the family court act to appoint court."

Freedom of Information Law

➢**Chap. 492 (S.7011-a) (FOIL — attorney's fees). Effective: August 16, 2006.**

The Public Officers Law authorizes attorney's fees in FOIL litigation only when the requested documents are of significant interest to the general public. This law changes the standard and allows attorney fees in Article 78 proceedings when the requestor substantially prevails and the agency "had no reasonable basis for denying access," or "failed to respond to a request or appeal within the statutory time."

VETOED (A.8007) (FOIL – electronic data).

Adds a new subdivision 9 to Public Officers Law § 89 to provide:

"When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access."

➢**Chap. 182(A.7933-b) (FOIL — electronic requests and responses). Effective: October 24, 2006.**

Amends the Freedom of Information Law (Public Officers Law § 89) to require the Committee on Open Government to "develop a form, which shall be made available on the internet, that may be used by the public to request a record." The bill also requires agencies within the means to do so to accept e-mail requests for records.

Sunset Clause Extended

➢**Chap. 145 (A.10139)** — Vehicle and Traffic Law — payment of fees and other charges by credit card — extended to July 7, 2010.

➢**Chap. 34 (A. 10339)** — Extends the sunset provision of CPL Article 182, which authorizes an experimental program of audio-visual arraignments and court appearances via two-way closed-circuit television in certain counties, to September 1, 2009.

Peace or Police Officer Status

Peace Officers

➢**Chap. 584 (A.7678)** — employees of the Town of Yorktown serving as court attendants at Town of Yorktown court facilities

➢**Chap. 581 (A.6715-b)** — certain employees of the department of public safety of the town of Rye

➢**Chap. 467 (S.6319)** — member of the Erie County Medical Center security force

➢**Chap. 438 (S.8436)** — employees of the village of Lake George acting as peace officers pursuant to local law

VETOED (A.8858-a) — civil deputies employed by the Onondaga County sheriff's department

VETOED (S.1479-a) — employees appointed by the sheriff of Lewis County, when acting pursuant to their special duties serving as recreational patrol officers

➢**Chap. 653 (S4301-a)** — employees of the Lewis County sheriff's department serving as uniformed security officers at Lewis County Court facilities

➢**Chap. 482 (S.6675)** — employees of the town of Riverhead serving as court officers at town of Riverhead court facilities

➢ **Chap. 501 (S.7356)** — employees of the town court of the town of Southold serving as uniformed court officers

Police Officers

➢**Chap. 693 (S.7346)** – supervisor of forest ranger services; assistant supervisor of forest ranger services; forest ranger 3, forest ranger 2; forest ranger 1 employed by the state department of environmental conservation or sworn officer of the division of forest protection and fire management in the department of environmental conservation responsible for wild land search and rescue, wild land fire management in the state as prescribed in subdivision eighteen of section 9-0105 and title eleven of article nine of the environmental conservation law, exercising care, custody and control of state lands administered by the department of environmental conservation. Effective: Upon Governor's signature. ⚖

Job Opportunities

The Appellate Division, 2nd Dept, is seeking an attorney to serve as **Administrator of the Assigned Counsel Plan for the 2nd and 11th Judicial Districts**, which serves the courts in Kings, Queens, and Richmond counties. Successful candidate will function as administrative authority for trial and appellate panel attorneys assigned by courts to represent defendants unable to afford counsel in criminal proceedings. Administrator is appointed by the presiding Justice and is a NY City employee. Required: admission to NYS bar, minimum 5 yrs criminal justice experience, NY City resident (within 90 days of appointment). Responsibilities include: implement and coordinate process for appointing and reappointing attorneys to panels; review performance evaluations; investigate complaints; assign attorneys to ensure court coverage; coordinate and sponsor CLE seminars and training; and provide oversight of investigators and social service providers. Salary: $90K & benefits. EOE. Send cover letter and résumé by Nov. 15, 2006, to Matthew Kieman, Esq., 45 Monroe Place, Brooklyn NY 11201 or email to mkieman@courts.state.ny.us.

The Center for Community Alternatives, in Syracuse NY, seeks to fill a one year post-graduate **Justice Strategies Fellowship.** This fellowship is designed to help develop new leadership among law school graduates of color seeking a career in the field of criminal justice who have a commitment to reintegrative justice and promoting rational, effective, and humane policies for crime and justice based upon principles of fairness and equality. It will provide fellows with an opportunity to engage in a wide variety of activities which advance reintegrative justice including research and policy development, providing legal assistance related to reentry and reintegration issues, and developing and facilitating training for lawyers, judges, community based organizations and individuals. The fellow will also serve as associate counsel for the agency. Experience and Qualifications: JD, excellent verbal/written communication skills, analytical and research skills, commitment to and experience in working with adults and youth with diverse cultural backgrounds who are involved, or at risk of involvement, with the criminal/juvenile justice system, HIV/AIDS, or substance abuse. Salary: $34,000.00 plus up to $4,000.00 for student loan repayment or to cover other approved expenses and $1,000.00 for professional development. CCA is an Equal Opportunity Employer, women and persons of color are encouraged to apply. For more info see website www.communityalternatives.org. Send cover letter & résumé indicating position applying for to: Center for Community Alternatives, 115 East Jefferson Street, Syracuse NY 13202. Fax to (315)471-4924. Email (in word format) to jobs@communityalternatives.org. No phone calls please. Only candidates selected for interviews will be contacted.

Job Listings are also available at
www.nysda.org
Job Opportunities
(under NYSDA Resources)
Find: Notices Received After REPORT deadline
Links to More Detailed Information

Bedford Stuyvesant Community Legal Services seeks a **Project Director** to lead its neighborhood law office in the Bedford-Stuyvesant community of Brooklyn NY through a period of re-development and growth. Currently a separately incorporated 501(c)(3) under the organizational umbrella of Legal Services for New York City (LSNY), BSCLS serves individuals and families who are among the most vulnerable populations in New York City. Areas of practice include homelessness prevention, public assistance (*eg,* food stamps, Medicaid/Medicare, and Social Security), consumer, unemployment insurance benefits law, family law and tax. Applicants should be skilled leaders who are experienced, energetic, and passionate about providing cutting edge legal work to protect the rights and meet the civil legal needs of low-income people from this community. Inclusive management style and a desire to work collaboratively sought. For more info on responsibilities and qualifications, see www.lsny.org. Competitive public interest salary commensurate with experience and provides excellent fringe benefits. BSCLS is an equal opportunity employer. People of color, women, people with disabilities, gay, lesbian, bisexual and transgender people are welcome and encouraged to apply. Email a cover letter and résumé to bslsjobposting@bsls.org. Please type Project Director Search on the subject line.

The Public Defender's Office of Cattaraugus County is accepting applications for an **Assistant Public Defender**. Office has five full-time attorneys in a client-centered practice. Candidates must be law school graduates and members in good standing of the NY State bar, with strong commitment to undertake cases before Cattaraugus County Family Court and various local criminal courts, including night courts. Successful candidate should demonstrate unwavering commitment to the representation of individuals who are unable to retain private counsel and possess requisite research and writing skills. Ability to work collaboratively with other lawyers and staff necessary. Starting salary $40,000+; may be negotiable with experience. Great government benefits. EOE. Send cover letter expressing interest with application (from http://www.cattco.org/human_resources/hr_info.asp?Parent=9500) and/or résumé to: Mark S. Williams, Esq., Cattaraugus County Public Defender, 175 North Union Street, Olean NY 14760. Tel (716) 373-0004; Fax (716) 373-3462; Email: mswilliams@cattco.org.

Hiscock Legal Aid Society, Syracuse, seeks **staff attorney** to represent indigent persons in **parole revocation cases**. High volume caseload; extensive jail visits. Demonstrated commitment to serving the indigent and ability to work with incarcerated persons required. Admission to New York Bar required. Salary: 36,000+ benefits. EOE. Persons of Color & Bilingual persons encouraged to apply. Applicant should send cover letter and résumé, including three references to: Executive Attorney, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse, NY 13202.⚖

Conferences & Seminars

Sponsor: New York State Bar Association
Theme: Handling DWI Cases in New York State
Date: November 30, 2006
Place: Albany, NY
Contact: NYSBA CLE: tel (518)463-3200; fax (518) 487-5517; website www.nysba.org

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Sponsor: Social Research Conference Series
Theme: Punishment: The US Record
Dates: November 30–December 1, 2006
Place: New York City
Contact: Social Research Conference Office: tel (212)229-5776 x3121; fax (212)229-5476; email socres@newschool.edu; website www.socres.org

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Last Chance Ethics Seminar
Date: December 2, 2006
Place: New York City
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

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Sponsor: National Association of Criminal Defense Lawyers
Theme: Advanced Criminal Law Seminar
Dates: January 21–26, 2007
Place: Aspen, CO
Contact: NACDL: Gerald Lippert, tel (202) 872-8600 x 236; email gerald@nacdl.org; website www.nacdl.org

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Sponsor: National Association of Criminal Defense Lawyers
Theme: The Latest and Greatest in Defense Strategies
Dates: February 21–24, 2007
Place: San Diego, CA
Contact: NACDL: Gerald Lippert, tel (202) 872-8600 x 236; email gerald@nacdl.org; website www.nacdl.org

Visit the Training page at www.nysda.org often!

Information about CLE events may reach the *REPORT* too late for publication; not all regional training events are listed here.

Sponsor: New York State Defenders Association
Theme: 40th Annual Meeting & Conference
Dates: July 22–24, 2007
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; email jkirkpatrick@nysda.org; website www.nysda.org ⚖

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July 22–24, 2007
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for
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or
(518) 584-3000
or fax
(518) 584-1354

Attorneys and NYSDA's Client Advisory Board gathered at a reception at the 2005 Conference in Saratoga.

Book Review

Active Liberty: Interpreting Our Democratic Constitution

By Stephen Breyer

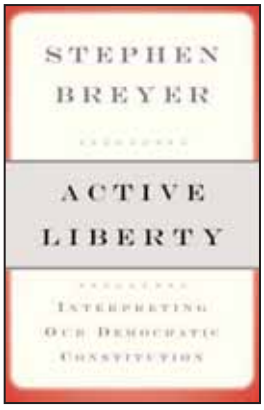
Knopf, 2005;161 pp.

By Barbara Demille*

Related ideals, the sharing of political authority, a free people delegating that authority to a democratically elected government, participation by those people moved the Framers. And they wrote a constitution that embodied those ideals. We judges cannot insist that Americans participate in that government. But we can make clear our Constitution depends upon it.

—Stephen Breyer, *Active Liberty*

The term democracy, in our present time, has been misapplied to such a degree that it has become what the Victorians termed "cant": a word laden with the implicit values of a prevailing culture, favoring a particular social or political agenda. A word, in short, having lost its original impetus and vitality, now used most frequently in political and religious exhortations and government propaganda. Justice Breyer, in his brief book, taken from the Tanner Lectures on Human Values he presented at Harvard University in 2004, makes a vigorous effort to return the word to the meaning and use most valued by our Founding Fathers.



Breyer's basic premise is that our Constitution is a document designated to establish a rule of law able to move with flexibility, reflecting and changing with the political and social intent of the people it serves. Equally as important, it was crafted in such a manner as to protect the necessary rights of the individual against that collective will wherever the individual's will and actions did no harm to others.

At the outset, Justice Breyer defines his terms. "Active liberty" refers to a sense of the word prevalent in the 18th century Enlightenment thought. Quoting Benjamin Constant, an 18th century political philosopher, "'active liberty'" is "'[a] sharing of sovereign authority [which] enlarged the citizen's minds, enabled their thoughts, and established among them a kind of intellectual equality which forms the glory and power of a people.'" Against this tradition, Breyer juxtaposes "modern liberty," again quoting and paraphrasing Constant, as "'that liberty, civil liberty,' freedom from government, [which] consisted of the individual's freedom to pursue his own interests and desires free of improper government interference."

It is this interplay between these two forces that similarly occupied John Stuart Mill in his 1849 monograph *On Liberty*. Both Breyer and Mill are in agreement that, quoting Mill:

> Human nature is not a machine to be built after a model and set to do exactly the work prescribed for it, but a tree which requires to grow and develop . . . according to the tendency of the universal forces which make it a living thing.

And consequently, for both Mill and Breyer, a government, and its constitution, must incorporate flexibility, to reflect and change with the growth and progression of that "living thing." Breyer would specifically add that our American Constitution was designed by our Founding Fathers to particularly further those principles.

Mill and Breyer diverge in their emphasis on this necessary growth. Mill places the force of his argument upon the necessity of not unduly obstructing the creativity and subsequent development of the individual and that individual's need to be free of unnecessary political and social pressures, while Breyer devotes the main of his argument to the need to protect "active liberty"—that will of the people as manifested in the legislation of their elected representatives. In that light, he stresses a mandate to judges, when interpreting those laws so formed, to ever respect the people's intent.

Breyer's stress upon the democratic principles he believes were those foremost in the minds of the Framers of our Constitution is an argument against a tendency of some present-day judges who, when interpreting the constitutionality of a law, are interested solely in "original intent"—the seeking to determine the exact purpose, as originally intended at its creation, of any given law and the consequent adherence to that past intention in spite of any alterations in current circumstances or beliefs. For Breyer is certain that our Framers were intelligent enough to know they could not, in the 18th century, lay down law for all time no more than they were capable of predicting the future. According to Breyer:

> The Constitution is not a document designed to solve the problems of a community at any level–local, state, or national. Rather it is a document that trusts people to solve these problems themselves. And it creates a framework for a government that will help them do so.

Breyer follows his basic argument with six sections in which he applies these principles to current legislative

(continued on page 31)

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

Immigration Practice Tips

By Alina Das, Manny Vargas, and Marianne Yang of NYSDA's Immigrant Defense Project (IDP)*

NY Court of Appeals Holds that State Criminal Appeal May Be Dismissed upon Defendant's Deportation

On Sept. 19, 2006, the Court of Appeals ruled that a state criminal appeal seeking a new trial may be dismissed upon a defendant's deportation because the defendant was no longer in the jurisdiction of the Court. *People v Diaz*, ___ NY3d ___, 2006 NY LEXIS 2620, 2006 WL 2672189 (No. 881, 9/19/06). The Court dismissed the defendant's appeal without prejudice, noting that he could make a motion to reinstate the appeal if he ever returned to the Court's jurisdiction. The Court explained that deportation did not mandate dismissal, but observed that it could exercise its discretion in dismissing the appeal, akin to a mootness analysis. The Court concluded: "Analyzing the relevant factors, we determine that it would be inappropriate under the circumstances of this case to retain this appeal." It did not discuss further the "relevant factors" or the specific "circumstances of this case," beyond having noted the absence of the defendant due to his deportation.

Prior to this decision, the Court of Appeals had dismissed criminal appeals where the defendant had absconded or voluntarily agreed to deportation. Although the Court acknowledged that the defendant in *Diaz* was deported involuntarily, the Court reasoned that the defendant is "nevertheless unavailable to obey the mandate of this Court."

Judge R.S. Smith wrote a dissent observing that the "mandate of this Court" must refer to the possible grant of a new trial, since the affirmance of the conviction would not alter the deportation. While acknowledging that a deported defendant might not be able to participate in a new trial, Judge Smith disagreed with the majority's conclusion that the defendant would necessarily be prevented from participating: "Defendant has asked us for a new trial, and has not by any voluntary act made a retrial difficult or impossible. He is entitled to have us assume, absent contrary evidence, that he in fact wants a retrial, and will cooperate in any way necessary if his conviction is reversed and the People seek to retry him. While it would be perfectly reasonable to inquire into the facts—to ask defense counsel, for example, to communicate with defendant and to get his assurance that he is not abandoning his appeal and will cooperate with any necessary future proceedings—I think it inappropriate to presume with no proof that a litigant, simply because he is a deportee, is contemptuous of or indifferent to the Court's processes."

Practice Tips: It is unclear how broadly courts will apply *Diaz*, so there may be room to argue that your client's appeal should be heard despite deportation because of the specific circumstances of the case. If you are representing a noncitizen defendant in a criminal appeal where only new trial issues are raised, you should be prepared to argue why the court should hear the appeal in the event that the defendant is deported. This may include providing an affidavit or other statement from the defendant indicating that the defendant is not abandoning the appeal in the event of deportation and will cooperate with any future proceedings. As an example of how defendants will cooperate with any future proceedings, you should argue that they may seek permission to return temporarily to the US to participate in a new trial in the event that one is granted. Specifically, they may apply for a waiver of inadmissibility though a temporary nonimmigrant visa under INA § 212(d)(3), a discretionary waiver broadly applicable to criminal grounds of inadmissibility, including controlled substance offenses. *See US v Hamdi*, 432 F3d 115, 118-19 (2d Cir. 2005) (explaining how individuals may apply for a discretionary grant of a nonimmigrant visa waiver after deportation). Because the Court in *Diaz* made clear that it was dismissing the defendant's appeal as a matter of discretion, you may be able to convince a court to exercise its discretion to continue to consider an appeal despite deportation in a different case.

If your client's criminal appeal involves other issues along with new trial issues, you can also argue that deportation will not interfere with the issuance of the court's mandate on those other issues, particularly if a possible outcome is the outright reversal of the conviction or some other change that may have a direct immigration effect. *See Hamdi*, 432 F3d at 121 (concluding that the defendant's sentencing appeal was not mooted by his deportation because the outcome of the appeal would impact his chance to reenter the US through the discretionary grant of a nonimmigrant visa waiver); *see also State v Ortiz*, 774 P2d 1229 (Wash. 1989) (en banc) (permitting deported defendant to pursue appeal). There are some cases in New York State in which courts have considered a deported defendant's criminal appeal on some issues (contact the Immigrant Defense Project for more information). In any event, be sure to request that any dismissal entered by the court be granted "without prejudice," to preserve your client's ability to raise the appeal at a later date.

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* *The IDP provides training and legal support to defense attorneys, other immigrant advocates, and immigrants themselves in defending against the immigration consequences of criminal dispositions. For backup assistance on individual cases, call the IDP at (718) 858-9658 ext. 201. We return messages. IDP is located at 25 Chapel Street, Box 703, Brooklyn, NY 11201.*

US Supreme Court Hears Oral Argument on Whether a State Drug Possession Offense Constitutes a "Drug Trafficking" "Aggravated Felony" and IDP Prepares Interim Practice Advisories

On Oct. 3, 2006, the Supreme Court heard oral argument in *Lopez v Gonzales* (No. 05-547) (immigration case) and its companion case *Toledo-Flores v US* (No. 05-7664) (federal criminal sentencing case). These cases challenge the government's application of the "drug trafficking" aggravated felony ground to state felony drug possession offenses. *Lopez* raises the issue in the context of the immigration aggravated felony bar for relief from deportation. The *Toledo-Flores* case raises the issue in the context of the criminal sentence enhancement for the federal crime of illegal entry into the US following a prior conviction of an aggravated felony.

These cases are significant for noncitizen defendants accused of New York State drug offenses. While conviction of virtually any New York drug offense makes your noncitizen client subject to *possible* removal, conviction of a New York drug-related offense deemed an "aggravated felony" almost certainly subjects your client to *mandatory* deportation. That is, your client—even one who has a green card—will be ordered removed without any consideration of favorable factors, such as legal residence of long duration, extensive family ties, evidence of rehabilitation, etc.

The federal government currently usually argues that the only New York State drug offense that is not an aggravated felony is a first-time misdemeanor possession offense. If the challenge to the federal government's position in *Lopez* and *Toledo-Flores* is successful, however, a first-time felony possession offense also will not be deemed an aggravated felony. Conversely, if the challenge is unsuccessful, a first-time felony possession offense will definitely be deemed an aggravated felony.

Practice Tips: How the Supreme Court will rule in *Lopez* and *Toledo-Flores* remains unclear. Thus, depending on how the Supreme Court rules, your client who pleads guilty today to a first-time New York State felony drug possession offense may or may not become subject to mandatory deportation, and you should advise your client accordingly about the current uncertainty in the law. If it is important to your client to avoid mandatory deportation, consider postponing a plea until the Supreme Court decides *Lopez* and *Toledo-Flores*. If this is not possible, your client may wish to include a statement in the plea allocution that the plea is based on current case law. This would leave open the possibility of a later motion to withdraw the plea should the Supreme Court's decision overrule the current case law on which the plea was based.

For detailed up-to-date practice tips on representing immigrant defendants charged with state drug offenses pending the Supreme Court's decision in *Lopez* and *Toledo-Flores*, see **Practice Advisory: Criminal Defense of Immigrants in State Drug Cases** (10/20/06).

For practice tips on representing immigrants in immigration proceedings in cases where the federal government is alleging that the immigrant is subject to aggravated felony mandatory deportation based on a past drug possession conviction, see **Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases** (10/10/06).

For practice tips on representing immigrant defendants in federal criminal proceedings in illegal entry/reentry cases where the federal government is alleging that the immigrant is subject to an aggravated felony sentence enhancement based on a past drug possession conviction, see **Practice Advisory: Defense of Immigrants Facing Illegal Entry/Reentry Sentence Enhancements for Prior Drug Possession Convictions** (10/10/06).

These advisories are posted on the IDP's website at www.nysda.org/idp/webPages/LvGPressroom.htm. For the latest information regarding the Supreme Court cases and other legal developments, contact IDP's Benita Jain at (718) 858-9658 ext. 231 or Manny Vargas at (718) 858-9658 ext. 208.

2nd Circuit Rules New York Youthful Offender (YO) Adjudication May Be Considered as a Negative Discretionary Factor in an Immigration Application for Adjustment of Status

In *Wallace v Gonzales*, 463 F3d 135 (2nd Cir. 2006), the 2nd Circuit held that immigration authorities may properly consider the facts underlying an immigrant's adjudication as a "youthful offender" (YO) under New York law when deciding whether to grant his application for adjustment of status to become a lawful permanent resident.

A Trinidadian national, Wallace had come to the US on a non-immigrant visa and stayed beyond the period authorized. In removal proceedings, the immigration judge found Wallace statutorily eligible for adjustment of status based on his US citizen stepfather's having filed a petition on his behalf. The judge then granted Wallace adjustment of status as a matter of discretion, despite Wallace's prior adjudication as a youthful offender for New York first-degree robbery, for which Wallace received a sentence of 1-1/3 to 4 years imprisonment. The Board of Immigration Appeals reversed, concluding that Wallace's equities—such as US family ties—could not outweigh his YO and other criminal history (arrests for marijuana possession and turnstile-jumping), "which indicate[d] a propensity to violate the law" and that "he is not

desirable as an alien resident in the United States . . . ."

The 2nd Circuit dismissed Wallace's petition for review of the Board's decision. Noting that adjustment of status is "a matter of grace, not of right" and that "the evaluation of such applications is left to the discretion of the Attorney General," the *Wallace* panel held that the BIA's rejection of his adjustment of status application after weighing his YO as a considerable negative factor was a discretionary determination over which they lacked jurisdiction to review.[1]

Practice Tips: *Wallace* leaves undisturbed *Matter of Devison-Charles*,[2] the precedent *en banc* decision of the Board of Immigration Appeals that held that YO adjudications under Article 720 of the New York Criminal Procedure Law are *not* convictions for immigration purposes. Criminal defense counsel are advised, therefore, that a YO adjudication still will not be the basis for deporting a lawful permanent resident (green-card holder), nor should it be the basis of denying a noncitizen's application for lawful admission to the US or for adjustment of status, *as a matter of law. Wallace* nevertheless reminds criminal defense counsel that YOs may be used to deny a noncitizen's application for adjustment of status to the US *as a matter of discretion*, if the facts underlying the YO and other negative factors outweigh positive considerations. Defense counsel should advise their noncitizen clients accordingly when they are considering pleading to an offense with the understanding of a YO adjudication. When possible defense counsel should also strive for YO dispositions for lesser, non-violent offenses as opposed to higher-level or violent ones, seek shorter sentences, and strive to create a record in the criminal proceedings that would highlight factors sympathetic to the client.

New Soros Fellow Joins IDP to Launch Project on Alternatives to Incarceration and Deportation for Noncitizen Defendants

This fall, Alina Das joined IDP as its new Soros Justice Advocacy Fellow. Her work at IDP is focused on developing alternatives to incarceration and deportation for immigrants facing criminal charges and convictions. Many alternative sentencing programs and problem-solving courts (including drug courts, domestic violence courts, and community courts) provide citizen defendants with opportunities for rehabilitation and reintegration, but leave noncitizen defendants at risk of deportation. This risk exists because these programs often require a guilty plea or other admission as part of a defendant's participation; an eventual vacatur or expungement generally does not remove the deportation consequences. Alina is therefore working with immigrants, reentry service providers, attorneys, and courts to examine how noncitizen defendants can participate successfully in problem-solving courts and alternative sentencing programs without the risk of deportation. Alina is also developing materials and trainings for individuals working in reentry and reintegration services to promote awareness of the deportation consequences of alternative sentencing dispositions.

Criminal defense attorneys and others working with noncitizen defendants who may be participating in problem-solving courts and other alternative sentencing programs are encouraged to contact Alina at (718) 858-9586 ext. 203 to discuss those cases and how to craft dispositions that will not lead to deportation. Alina is also interested in hearing about cases in which noncitizens may be facing removal due to participation in an alternative sentencing program or problem-solving court disposition.

IDP to Publish Fourth Edition of Immigrant Defense Manual

This fall, the IDP will publish an updated and supplemented 2006 4th Edition of its manual entitled *Representing Noncitizen Criminal Defendants in New York*. The 4th Edition includes many new and / or improved features, including the following:

- **Updating of entire manual** to incorporate the many significant case law and practice developments since publication of the 2003 3rd Edition, including the 2004 US Supreme Court *Leocal v Ashcroft* decision on the breadth of the "crime of violence" aggravated felony deportation category, and other federal court and agency decisions potentially altering the immigration implications of conviction of the following New York State offenses:
  - —DWI offenses
  - —offenses involving reckless or negligent conduct
  - —drug offenses
  - —theft and burglary offenses
  - —fraud and deceit offenses
  - —sex abuse offenses involving minors
  - —certain attempt or conspiracy offenses
- **Supplementing of manual** to include new sections on how to analyze the immigration implications of the following:
  - —convictions of broadly defined New York State offenses that cover both deportable and non-deportable conduct
  - —convictions of New York State accessory and preparatory offenses

[1] In general, 8 USC 1252(a)(2)(B) bars federal court review of discretionary denials of various forms of relief from removal, including adjustment of status to lawful permanent resident.

[2] 22 I&N Dec. 1362 (BIA 2000, INS motion for reconsideration denied 2001).

—conviction appeals
—post-conviction vacaturs and resentencing

- **Updated and expanded Quick Reference Chart for New York State Offenses, including a new feature—quick reference practice tips** for criminal and immigration practitioners on how to avoid adverse immigration consequences for noncitizen clients.
- **Over 200 pages of additional updated charts and outlines** on criminal/immigration issues to assist criminal and immigration practitioners in effective representation of noncitizen clients.
- **Updating and improvement of one-page Immigration Consequences of Criminal Convictions Checklist binder insert for quick-reference courtroom use, with new back page summarizing Suggested Approaches for Representing a Noncitizen in a Criminal Case**.

To order a copy of the 4th Edition, visit the IDP website at www.immigrantdefenseproject.org, or call NYSDA at 518-465-3524. ⚖

Pro Bono Counsel Needed for Death Row Prisoners

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

Book Review

(continued from page 27)

issues: Speech, Federalism, Privacy, Affirmative Action, Statutory Interpretation, and Administrative Law. In each, using specific cases, he illustrates an application of "active liberty," while also allowing for the necessity of "modern liberty"—that crucial protection of individual rights from undue government interference.

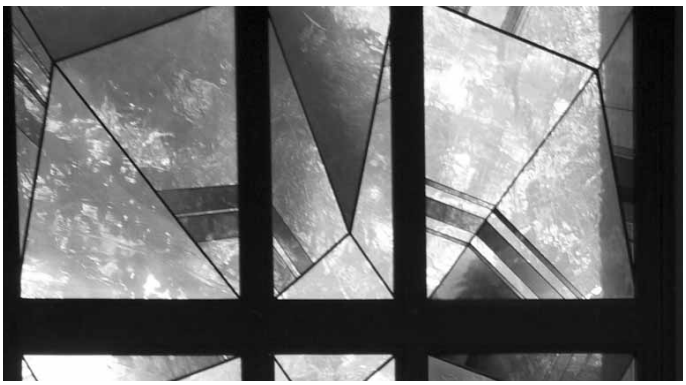
This is a welcome book, its premises much in need of reiteration in our time, wherein we labor under increasing "moral" pressure from a minority of religious fundamentalists and an increasing justification for political and civil stricture from those preoccupied with our War on Terror. As J.S. Mill worried about overwhelming social and cultural pressures in the Victorian Age, so is Breyer concerned about our present tendency to silence protest and censor information in the name of collective security.

Mill, arguing over 150 years ago, would agree with the importance of Breyer's concern. In Mill's words:

> A State which dwarfs its men in order that they be more docile instruments . . . even for beneficial purpose–will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything will in the end avail it nothing for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.

According to J. S. Mill and Justice Breyer, we need government as guidance and protection for ourselves and from each other.

However, the best government is that which arises out of the prolonged thought and discussion, the clumsy experiment, and the good will of those governed rather than the rigid dictates of an inflexible system of law. A government is only as strong as the enlightened, active will of the individuals composing it. It is the task of judges, according to Justice Breyer, to determine and preserve the vitality of that will. For a strong law and a strong people will thrive through an organic, intrinsic process of growth and change, through "active liberty." ⚖



The following is a synopsis of recent case law of interest to the public defense community. The index headings appearing before each case are from the Association's Subject Matter Index. These case briefings are not exhaustive, nor are they designed to replace a careful reading of the full opinion.

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

New York State Court of Appeals

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

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

People v Diaz, No. 881, 9/19/2006

The defendant's first-degree gang assault conviction was affirmed in the Appellate Division despite his claim that the trial proceeding violated due process. After leave to appeal was granted, the prosecution moved to dismiss because the defendant had been involuntarily deported. Defense counsel sought to continue the appeal.

Holding: The appeal is dismissed without prejudice due to the defendant's involuntary deportation. *See People v Del Rio*, 14 NY2d 165. Although the defendant did not voluntarily abscond, he is outside the court's mandate. In a sense, it was as if the appeal became moot. *See People v Smith*, 44 NY2d 613. However, the defendant can move to reinstate the appeal should he return. *See People v Sullivan*, 28 NY2d 992. Appeal dismissed without prejudice.

Dissent: [Smith, J] Once leave to appeal had been granted, the defendant had a right to have his appeal decided unless he voluntarily absconded. It cannot be assumed that he would not cooperate in future proceedings, such as a new trial. Since his departure was involuntary and no evidence suggested that he abandoned the appeal, the case should be heard.

Juries and Jury Trials (Competence) (Deliberation) **JRY; 225(15) (25)**

People v Pizarro, No. 112, 9/21/2006

Holding: The defendant moved for a mistrial based on information from the jury foreperson that a juror had hidden personal knowledge about the case in voir dire and later shared it with the other jurors in deliberations. A hearing was held to investigate the allegations. Under oath the juror denied having outside knowledge of the case, which was confirmed by the other jurors. All the jurors asserted that they would decide the case impartially. The court denied a mistrial. The Appellate Division found that the record supported a finding that the juror did not have extrinsic knowledge of the case and did not contaminate other jurors with outside information. The trial court's credibility findings were entitled to great deference, and supported by the record. Order affirmed.

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

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

People v Bautista, No. 135, 9/21/2006

Holding: An appeal from an order denying resentencing under the Drug Law Reform Act (DLRA), L 2005, ch 643, § 1, can be brought as of right to the Appellate Division, but the Court of Appeals has no authority to hear the case as of right or by permission. The high court's jurisdiction is bounded by statutory limits. *See People v De Jesus*, 54 NY2d 447, 449. An appeal to the Court of Appeals by permission is authorized by CPL 450.90 (1) only from an "adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court pursuant to section 450.10, 450.15, or 450.20." Chapter 643 of the Laws of 2005 stated that "[a]n appeal may be taken as of right in accordance with applicable provisions of the criminal procedure law: (a) from an order denying resentencing . . ." However, the legislature did not incorporate CPL 450.90 into the DLRA nor amend CPL 450.10 or CPL 450.15 to include appeals from denials of resentencing orders. Appeal dismissed.

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

Juveniles (Delinquency —– Procedural Law) (Probation) **JUV; 230(20) (115)**

In the Matter of Markim Q., No. 108, 9/21/2006

The respondent, a juvenile, was charged with assault and menacing. He admitted attempted assault, and Family Court adjudicated him a juvenile delinquent sentencing him to one year of probation. Later the Probation Department filed a petition claiming that the respondent violated the conditions of his sentence by failing to attend school regularly. Attached to the violation of probation (VOP) petition was a computer printout of an attendance report. No objections were made to the VOP petition or attendance report. Finding the respondent in violation of probation, the Family Court ordered him placed with the Office of Children and Family Services for up to twelve months. On appeal, the respondent challenged the VOP petition as jurisdictionally defective under Family Court Act 360.2 because it did not contain non-hearsay allegations of his failure to attend school and the attendance report was not supported by testimony from a witness with personal knowledge. The Appellate Division found the petition to be facially insufficient.

NY Court of Appeals *continued*

Holding: A defect in a violation of probation petition in a juvenile delinquency proceeding was not a non-waivable jurisdictional defect, and must be preserved for appeal. Only if the original petition was not supported by sworn, non-hearsay allegations could a jurisdictional challenge have been raised. *See Matter of Michael M.*, 3 NY3d 441. The original petition was a necessary foundation for the delinquency proceeding and the court's jurisdiction. The probation hearing was part of the earlier proceeding based on a sufficient instrument. *See* Family Court Act 360.1 (1). The VOP petition did not lay the foundation for the court's power to hear the case. And since a VOP petition could be cured by amendment, it was incumbent on the respondent to preserve the error. *See Matter of Vincent B.*, 239 AD2d 925. It was not an error that could be raised for the first time on appeal. Order reversed.

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

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

People v Utsey, No. 113, 9/21/2006

The Drug Law Reform Act (DLRA) (L 2004, ch 738) created a determinate sentencing scheme and reduced mandatory minimum prison sentences for nonviolent felony drug offenders. Defendants Utsey, Nelson, and Smith were convicted of drug felonies before enactment of the DLRA. Only Utsey had been sentenced under the old law; the other dispositions were pending when the new law went into effect. The *Nelson* court did not apply the DLRA to his sentence, but the court in Smith's case did. The Appellate Division reversed *Smith* and affirmed the other cases finding none of the defendants were eligible for DLRA sentencing.

Holding: The legislature did not intend to give retroactive effect to the ameliorative sentencing provisions of the DRLA. *See People v Festo*, 60 NY2d 809, *affg* 96 AD2d 765. The amelioration doctrine stated that a statutory amendment reducing punishment for a crime was applied to all cases decided after the effective date except when the Legislature expressed a contrary intent. *See People v Behlog*, 74 NY2d 237, 240. The Legislature intended that the particular sentence reduction provisions of the DLRA "shall take effect on the thirtieth day after it shall have become a law, and such provisions . . . shall apply to crimes committed on or after the effective date thereof" (L 2004, ch 738, § 41 [d-1]). The intent was to negate the amelioration doctrine and apply the law prospectively. Order affirmed.

Harmless and Reversible Error (Harmless Error) **HRE; 183.5(10)**

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

Prior Convictions (General) **PRC; 295(7)**

People v Grant, No. 120, 10/17/2006

The defendant was charged with first-degree criminal contempt for violating an order of protection. In its *Sandoval* ruling, the court allowed evidence of the defendant's six prior criminal-contempt convictions to be used for impeachment. Because of the ruling, the defendant did not to take the stand. His conviction was affirmed. The appellate court found the *Sandoval* ruling to be harmless error.

Holding: The *Sandoval* ruling was subject to harmless error analysis, as prior cases have implied. *See People v Williams*, 56 NY2d 236 (Sandoval error not harmless); *People v Shields*, 46 NY2d 764 (Sandoval error harmless). The defendant failed to raise a violation of his constitutional right to testify before the trial court. Therefore, the issue must be viewed under the nonconstitutional harmless error standard. *See People v Kello*, 96 NY2d 740, 743-744. A *Sandoval* ruling can impact a defendant's decision to testify and potentially allow prejudicial evidence to get to the jury. *People v Sandoval*, 34 NY2d 371, 376. The absence of this defendant's testimony did not deprive the jury of significant material evidence, nor would it have led to an acquittal. *See People v Grant*, 45 NY2d 366, 378. The terms of the order of protection were not in question, and the ex-wife and two of their teenage children testified that the defendant came to their home three times and harassed them. The defendant did not proffer any defense to these actions. The error was harmless as the proof of guilt was overwhelming and there was no significant probability that the jury would have acquitted had the error not occurred. *See People v Crimmins*, 36 NY2d 230, 241-242. Judgment affirmed.

Dissent: [Smith, RS, J] An error that prevents a defendant from testifying should not be considered harmless. It was not up to the court to determine whether the defendant's testimony might have been fruitful, nor to demand a proffer of his defense. He had the right to present his defense and let the jury decide. *See Holmes v South Carolina*, 126 SCt 1727 (2006).

Forfeiture (General) **FFT; 174(10)**

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

In the Matter of Schwartz v Morgenthau, No. 119, 10/17/2006

The petitioner pled guilty to insider trading in federal court, and was sentenced to prison time and supervised release. The condition of his release included an order to

NY Court of Appeals *continued*

pay $786,402 in restitution. Soon after, he pled guilty in state court to a scheme to defraud, and was sentenced to a concurrent prison sentence, with the requirement that he pay $750,000 in restitution and $250,000 in lieu of forfeiture. The $250,000 was to be distributed according to CPLR 1349. Three years later, he owed the federal government over $250,000 in restitution and asked the NY District Attorney (DA) to confirm that his $250,000 state forfeiture payment would be applied to the federal restitution. *See* CPLR 1349(2)(c). The DA's office, which had given $80,000 to the state substance abuse service fund and retained the rest, refused to use any of the forfeiture funds to satisfy the federal restitution. The petitioner filed an art 78 to compel the DA to apply the monies to the federal debt. The lower court found that the DA violated CPLR 1349(2)(c) and ordered payment. The decision was reversed for lack timeliness and standing.

Holding: The petitioner, a criminal defendant, did not have standing to assert the rights of victims in his federal case regarding the disbursement of forfeiture funds from a state conviction under CPLR 1349. The forfeiture statute was intended to take the profit out of crime (*see* Governor's Mem approving L 1984, ch 669, Bill Jacket at 7) and encourage district attorneys to pursue forfeiture. *See* Governor's Program Bill Mem, L 1990, ch 655. Applying the state forfeiture money to pay the defendant's federal restitution did not fall within the zone of interests contemplated by the forfeiture statute. *See Matter of District Attorney of Suffolk County*, 58 NY2d 436, 442. Moreover, CPLR 1349(2)(c) imposed an obligation on the defendant to exhaust his resources, which had not been done, before forfeited moneys could be used to pay off his federal debt. It was risky for the DA to give forfeited funds to low priority goals before determining if sufficient money remained to pay the federal victims. Judgment affirmed.

First Department

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

Trespass (Elements) (Instructions) — **TSP; 374(10) (20)**

People v White, 31 AD3d 273, 818 NYS2d 81 (1st Dept, 2006)

Holding: The court erred in declining to instruct the jury on second-degree criminal trespass (Penal Law 140.15) as a lesser included offense of first-degree criminal trespass (Penal Law 140.17[2]). The defendant testified that he had not known his son had a weapon until it was displayed. The jury could have found based on that testimony that the defendant was unaware of the weapon and was not liable for possession it. While the jury did have the option of convicting the defendant under 140.17(2) by finding that he possessed (constructively or acting in concert with his son) the weapon and ammunition that his son had, it could reasonably have found the defendant had committed only the lesser offense. An instruction on that lesser charge should have been given. *See* CPL 300.50(2); *People v Devonish*, 6 NY3d 727. As the defendant was acquitted of the original charge contained in the indictment, he can only be reprosecuted under a new accusatory instrument containing the lesser included charge. *See* 2 Newman, New York Appellate Practice 13.09(1), at 13-168. Judgment reversed, indictment dismissed with leave to represent at noted. (Supreme Ct, New York Co [Berkman, J])

Homicide (Murder [Definition] [Degrees and Lesser Offenses] [Evidence] [Intent]) — **HMC; 185(40[d] [g] [j] [p])**

People v Dudley, 31 AD3d 264, 819 NYS2d 237 (1st Dept, 2006)

Holding: The decedent resisted a robbery attempt and was killed by a single stab wound inflicted by the defendant, who was charged with intentional murder (Penal Law 125.25[1]) and depraved indifference murder (Penal Law 125.25[2]) but not with felony murder under Penal Law 126.25(3). He was convicted of depraved indifference murder. This one-on-one stabbing was unmarked by "uncommon brutality" (*see People v Payne*, 3 NY3d 266, 271) or other hallmarks of wanton recklessness that would meet the statutory requirement of "'circumstances evincing a depraved indifference to human life." *See* Penal Law 125.25(2).The evidence was legally insufficient and against the weight of the evidence for depraved indifference murder. *See People v Suarez*, 6 NY3d 202. The evidence would support second-degree manslaughter, a lesser charged requested at trial, and the conviction is reduced accordingly. *See eg People v Lawhorn*, 21 AD3d 1289. The other issues raised are without merit. Judgment modified, charge reduced, remanded for resentencing. (Supreme Ct, Bronx Co [Seewald, J])

Counsel (General) (Standby and Substitute Counsel) — **COU; 95(22.5) (39)**

People v Bryan, 31 AD3d 295, 818 NYS2d 217 (1st Dept, 2006)

Holding: The court erred by denying the defendant's request for substitution of counsel without any inquiry and without providing the defendant an opportunity to state the basis of his complaint. The court instead turned the discussion to whether the defendant wanted to pro-

First Department *continued*

ceed pro se. "While applications which appear to be delaying tactics may be reviewed skeptically, and may well be justifiably denied, especially on the eve of trial [*People v Medina*, 44 NY2d 199, 207-208. . . [1978]), the defendant must be at least given an opportunity to state the basis for his application (*see People v Sides*, 75 NY2d 822, 824. . .)." Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [Stone, J])

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

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

State of New York ex rel Harkavy v Consilvio, __ AD3d __, 819 NYS2d 499 (1st Dept 2006)

Eight former state prisoners who had completed their sentences for sexually violent offenses were transferred by the Department of Corrections (DOCS) to the custody of the Office of Mental Health and the Kirby Forensic Psychiatric Center. In a habeas petition (*Harkavy II*), they challenged their confinement on several grounds: DOCS failed to follow the procedures under Correction Law 402; the medical certifications for their detention did not meet the requirements of Mental Hygiene Law (MHL) 9.27(a); and the civil transfer process violated substantive and procedural due process and equal protection under *Vitek v Jones* (445 US 480 [1980]). The trial court granted habeas relief (CPLR art 70) to the extent of ordering immediate hearings for each petitioner or their release.

Holding: Identical issues were raised on behalf of 12 individuals in *State of New York ex rel Harkavy v Consilvio* (29 AD3d 221 [1st Dept 2006]) (*Harkavy I*). That decision, entered after the judgment here, controls. Article nine of the MHL, not the Correction Law, applied to persons not prisoners at the time of commitment. The state acted properly in seeking civil commitment. MHL procedures did not violate due process or equal protection, again because the former prisoners were not in prison at the time. And it was error for the former prisoners to seek habeas relief under CPLR art 70; they were required to rely on MHL 33.15. Judgment reversed and petition dismissed. (Supreme Ct, New York Co [Silbermann, J])

Ethics (Defense) **ETH; 150(5)**

Matter of Perez-Olivo, __AD3d__, 820 NYS2d 14 (1st Dept 2006)

Holding: The respondent attorney was charged with disciplinary violations based on his mishandling of criminal cases, conversion of client funds and other matters. He was hired to represent one criminal defendant convicted after trial and facing deportation as well as incarceration, to appear at the sentencing hearing, seek a new trial, and appeal. His application for adjournment of sentencing and for a new trial was perfunctory, he failed to perfect the appeal, and convinced his client to withdraw her already-dismissed appeal as meritless. She was ultimately deported. The referee found the respondent in violation of ethical obligations because he intentionally prejudiced his client's case, failed to refund the unearned portion of the retainer, neglected a legal matter, and overall poorly represented his client. In other cases, the respondent converted money that had been provided for bail and improperly accounted for monies accepted for fee retainers. *See Matter of Mitnick*, 248 AD 198. In spite of the respondent's 25 years of experience, he engaged in conduct adversely reflecting upon his fitness as a lawyer, in violation of DR 1-102 (A) (7). Recommendation confirmed, respondent disbarred.

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

Perjury (Evidence) **PER; 280(15)**

People v Monaco, __AD3d__, 820 NYS2d 35 (1st Dept 2006)

The defendant filed a small claims suit against two tenants for unauthorized alterations to the apartment they rented from him. The tenants were represented by a former Bronx County Assistant District Attorney. After the civil case concluded, a perjury complaint was filed against the defendant based on his testimony that: "All the tile in the kitchen walls had to be removed."

Holding: The evidence was insufficient to prove the defendant willfully and knowingly gave false testimony. *See* Penal Law 210.15; *People v Hattemer*, 4 AD2d 775, 776 *affd* 4 NY2d 835. No evidence received during the civil trial refuted the legitimacy of the contractor's charge of $ 500 for replacing a nonconforming electrical supply and restoration of the wall surface resulting from the tenants' actions. The number of tiles replaced was not material to the small claims courts decision. *See People v Tyler*, 62 AD2d 136, 145, *affd* 46 NY2d 251. The reference to tile, which could be interpreted as singular or plural, by the defendant was not false. It was based on the itemized bill, "removal wall tiles, skim & restore wall surface," not the defendant's subjective impression, and was a fair interpretation of the documentary evidence. Even if the evidence was sufficient to sustain the conviction, judgment as to willfulness was still against the weight of the evidence. Judgment reversed, indictment dismissed. (Supreme Ct, Bronx Co [Mogulescu, J])

Sentencing (General) (Resentencing) **SEN; 345(37) (70.5)**

People v Arana, 32 AD3d 305, 820 NYS2d 251 (1st Dept 2006)

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Holding: The court did not exercise its sentencing discretion under chapter 738 of the Laws of 2004, the "Drug Law Reform Act" (DLRA). *See People v Cronin*, 60 NY2d 430, 433. The defendant was eligible to apply for resentencing; the new law permits even those with violent felony histories to apply. *See* Penal Law 70.71. The court was required to grant the application (to the extent of specifying what the new determinate sentence would be) "unless substantial justice dictates that the application should be denied" (DLRA § 23). In denying the defendant's application, the court took note of his criminal history, the amount of drugs involved, but not his prison record, which is permitted by the DLRA. It appeared that the trial court was under the misimpression that it lacked the authority to resentence the defendant. Judgment reversed and remanded for reconsideration. (Supreme Ct, New York Co [McLaughlin, J])

Jurisdiction (General) **JSD; 227(3)**

Venue (Determination of) (General) **VEN; 380(10) (20)**

People v Zimmerman, 32 AD3d 345, 820 NYS2d 266 (1st Dept 2006)

Holding: The defendant was indicted for perjury based on statements made under oath in Ohio as part of a New York Attorney General investigation into allegations of alleged violations of anti-trust law. The grand jury instructions included a reading of the statutory provisions governing "'particular effect' jurisdiction" under Criminal Procedure Law 20.20(2) (b), 20.10(4), and 20.40(2) (c). Dismissal of the indictment for lack of venue in New York County was proper. Assuming the defendant did commit perjury, New York County would only have jurisdiction if the statements he made in Ohio had or were likely to have, a materially harmful impact on the governmental processes or community welfare of New York County or a political subdivision or part of it, or result in the defrauding of persons there. The evidence did not establish that the defendant, at the time he made the allegedly false statements, knew of the facts relied on for the claim here. At most, it was shown that he "knew his conduct would have a deleterious effect on the governmental or judicial processes of the State of New York, but not on any particular county." *See Matter of Taub v Altman*, 3 NY3d 30. There should be a statute directing a prosecutor to an appropriate county where the State has jurisdiction but no particular county has venue. The Legislature is invited to fill this gap. Order affirmed. (Supreme Ct, New York Co [Yates, J])

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

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

People v Bayard, 32 AD3d 328, 819 NYS2d 754 (1st Dept 2006)

Holding: The complainant, while in an elevator with the defendant and others, was placed in a chokehold from behind and lost consciousness. When he recovered, he was alone and no longer had his cell phone or cash. He had not seen the face of his assailant, but said only the defendant had been wearing a grey sweatshirt, which the assailant wore. The prosecution theorized that the defendant had committed second-degree robbery, aided by another actually present. *See* Penal Law 160.10(1). The defendant's request for an instruction on third-degree robbery (*see* Penal Law 160.05) was improperly denied. "None of the evidence reasonably eliminates the possibility that defendant acted alone." The conviction of fourth-degree grand larceny is not affected. Judgment modified, matter remanded for new trial on count one, and otherwise affirmed. (Supreme Ct, New York Co [Goodman, J])

Dissent: [McGuire, J] This appeal should be held in abeyance and the matter should be remanded for determination of appropriate remedy. The parties did not brief whether a new trial should be ordered on the robbery count or whether that conviction should be reduced to the lesser offense. The issue of remedy is not addressed in the statute. *See* Criminal Procedure Law 470.20. It is an issue of considerable significance.

The court properly denied a *Payton* hearing where no property had been recovered and the prosecution said the defendant's statement would not be elicited unless the defendant testified.

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

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

People v Picard, 32 AD3d 317, 819 NYS2d 760 (1st Dept 2006)

Holding: The defendants, Picard and Williams, were convicted of murder. At trial, a detective testified that a witness, who could not be located for trial, had said the witness brought a gun to Williams after Williams phoned him on the night in question and that Picard had been in the car. Williams objected that this testimony deprived him of his right to confront the witness, and Picard objected that the statement had not been against the witness's penal interest. The prosecution concedes that introducing the witness's statement violated the confrontation protections of the constitution. *See US* Const 6th, 14th Amends; NY Const, art I, §6; *Crawford v Washington*, 541 US 36 (2004). The prosecution's case was heavily dependent on largely uncorroborated accomplice testimony that was consistent with the statement by the absent witness. The prosecutor argued that the statement was "'strong evi-

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dence'" against the defendants. The jury asked that the testimony be read back. Admission of the statement was not harmless error. *See People v Hardy*, 4 NY3d 192, 198-199. While defendant Picard did not preserve the confrontation issue, both defendants argued there was insufficient corroboration of the accomplice testimony to sustain their convictions. No nonaccomplice testimony connected defendant Picard with the crime. He is entitled to dismissal. His plea in connection with a prior incident was induced by the promise of a sentence concurrent to the sentence here and must be vacated. Judgments reversed, new trial ordered for Williams, murder indictment dismissed as to Picard, weapons charge remanded for further proceedings. (Supreme Ct, New York Co [Wittner, J])

Accomplices (Accessories) **ACC; 10(5)**

Venue (General) **VEN; 380(20)**

People v Marasa, 32 AD3d 369, 820 NYS2d 273 (1st Dept 2006)

Holding: New York County was the wrong venue for one falsifying business records count. *See People v Schwartz*, 21 AD3d 304, 306. The transcript pages cited by the prosecution do not support their claim that the defendant made telephone calls and sent faxes to a New York City attorney who drafted the consulting contract in question. Further, neither the indictment nor the prosecution's presentation at trial gave the defendant warning that he was charged with accessorial liability based on the attorney's conduct. The prosecution has conceded that venue did not lie as to another count. Those counts may still be used a "pattern acts," and in any event, other pattern acts remain. *See* Penal Law 460.40(2); *People v Ciauri*, 166 Misc2d 615, 619 *affd* 266 AD2d 164 *affd* 96 NY2d 136. Other issues are without merit. Judgment modified, two counts falsifying business records vacated and dismissed, otherwise affirmed. (Supreme Ct, New York Co [Fried, J])

Third Department

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

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

People v Vanhoesen 31 AD3d 805; 819 NYS2d 319 (3rd Dept 2006)

Holding: A police-supervised confidential informant arranged a drug buy. The defendant arrived at the designated location in a vehicle matching the description given. The police approached, and he backed down an alley, hitting a police car, and sped away, dropping crack cocaine out the window. This provided probable cause. An audiotape of the phone calls arranging the buy should not have been admitted. Foundational elements for recorded conversations include both authenticity and identity of the speakers. *See People v Ely*, 68 NY2d 520, 528. No circumstances were shown to prove that the defendant was the speaker. The informant did not testify, the officer listening in could not identify the speaker, and there was no testimony indicating the defendant was known as "Homie," the name used for the person the informant called. Admission of the tape invited speculation that the speaker was the defendant. Further reversible error occurred during a detective's testimony. Telling the jury that the informant had provided a pager number he said belonged to a "supplier" was hearsay and implied that the defendant was regularly involved in drug trafficking with a propensity to commit the charged offenses. Testimony about drug-related meanings of certain terms and actions was allowed without sufficient showing of the detective's specialized knowledge. *See People v Bethea*, 261 AD2d 629, 630-631. The defendant may have been entitled to a missing witness charge for failure to call the informant; the prosecution may seek to show that the informant is not under their control. *See People v Smith*, 225 AD2d 1030, 1031. Judgment reversed, remitted for new trial. (County Ct, Albany Co [Breslin, J])

Search and Seizure (Arrest/ Scene of the Crime Searches) (General) **SEA; 335(10) (42)**

People v McCullough, 31 AD3d 812, 818 NYS2d 328 (3rd Dept 2006)

Holding: The absentee landlord of an apartment building known to be a drug location gave police a key to the front door and permission to enter common areas to remove trespassers and try to limit criminal activity. When an officer who had just checked the premises saw the defendant coming from the back yard toward the officer near a police car in the front, the defendant ran. The officer knew the defendant, having arrested him for trespass and drug possession at the site several times previously, and ordered him to stop. The defendant did not and the officer gave chase. He saw the defendant throw a plastic bag in a pond and make sweeping motions on the ground. After arresting the defendant for trespass, the officer found cocaine in two plastic bags from the pond and on the ground. The court erred in denying suppression. There was no specific conduct observed justifying reasonable suspicion that a crime had been, was being, or would be committed (*see People v Holmes*, 81 NY2d 1056, 1057-1058) as is required to justify pursuit. *See eg People v Matienzo*, 81 NY2d 778. No context indicia other than location accompanied the defendant's flight. The pursuit, and the arrest for trespass that occurred during the pursuit,

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were unlawful. Throwing away the cocaine was a spontaneous reaction to the pursuit, not an independent act attenuated from police conduct and involving a calculated risk. Judgment reversed, indictment dismissed. (County Ct, Sullivan Co [LaBuda, J])

Counsel (Attachment) (Right to Counsel) **COU; 95(9) (30)**

Grand Jury (General) (Procedure) **GRJ; 180(3) (5)**

Matter of Trudeau v Cantwell, 31 AD3d 844, 817 NYS2d 760 (3rd Dept 2006)

The indictment charging the petitioner with sex offenses was dismissed without prejudice. The prosecution said they would resubmit, and told the petitioner to provide notice if he intended to testify at the grand jury, which he did provide. The prosecution notified the petitioner's previously-assigned attorney of the date of the grand jury. At the grand jury, the petitioner told the prosecutor that he wanted to talk to counsel before executing the waiver of immunity. The prosecutor contacted previously-assigned counsel by phone; the lawyer told the petitioner that he no longer represented him and could not advise him. After the prosecutor said the petitioner could not testify without signing the waiver, the petitioner signed in the absence of counsel and was reindicted. He unsuccessfully moved to dismiss the indictment because he had received transactional immunity when he appeared uncounseled before the grand jury. He then brought an article 78 proceeding.

Holding: Where the indelible right to counsel has attached, a purported waiver of immunity without the advice of counsel is ineffective. *See People v Chapman*, 69 NY2d 497. The respondents argue that the right to counsel derived from a previously-filed felony complaint and indictment expired with the dismissal of that indictment. The Criminal Procedure Law provides that dismissal without prejudice constitutes an order holding the defendant for the grand jury. *See* CPL 210.45(9). The *Chapman* rule that a person accused of a serious crime must be afforded legal advice when it is most critically needed applies here. Petition granted, respondents prohibited from proceeding under the indictment. (County Ct, Clinton Co).

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

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

People v Hofelich, 31 AD3d 882, 819 NYS2d 159 (3rd Dept 2006)

Holding: The defendant was charged with third-degree drug possession. He was convicted by jury. His motion to set aside the verdict was denied. The court erred in denying suppression of the evidence retrieved during a police search of the defendant's vehicle. Evidence admitted the first day of the suppression hearing showed that police received two anonymous tips that the defendant was going to travel to New York City, accompanied by a Korean woman, to buy drugs, and would then return. Investigators went in an unmarked car to an Interstate exit where they saw a vehicle with license plates matching the tipster's description, and observed three traffic violations. The investigators called for a patrol vehicle but the car stopped before backup arrived. The investigators approached. On the second day of the hearing, evidence was received as to the defendant being placed in the police vehicle, perhaps receiving his *Miranda* rights, using his cell phone to call his lawyer who told police the defendant did not consent to a search of his care, and making a statement. The court's decision denying suppression relied on facts for which there is no record support, as the prosecution concedes. The evidence at the suppression hearing, which is the only evidence that can be considered on this issue, did not support the court's findings of fact and conclusions of law. The defendant's other contentions need not be addressed. Issues raised as to a separate finding that he violated probation lack merit. Judgment as to probation violation affirmed, judgment as to drug charges reversed and indictment dismissed. (County Ct, Schenectady Co [Eidens, J])

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

People v Pham, 31 AD3d 962, 818 NYS2d 674 (3rd Dept 2006)

Holding: Five years after a shooting, the defendant and two others were charged with attempted first-degree robbery, attempted first-degree coercion, and first-degree assault. A mistrial was declared due to the prosecutor's *Brady* violation. A codefendant was acquitted (the other was said not to have been found) but the defendant was convicted. The evidence was legally sufficient, though a different verdict would not have been unreasonable; the verdict was not against the weight of the evidence. While no testimony connected the defendant to the planning, the defendant's statements of not being in the area near the time of the incident were contradicted by evidence of police contact. Further, his DNA was found on a ski mask left in the car abandoned nearby after the shooting (though several persons' DNA was found, and the time that the DNA was deposited could not be determined).

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There was evidence supporting a finding that the complainant suffered serious physical injury as required for first-degree assault. Excluding the reputation evidence that the defendant sought to introduce was not error; it was removed in time from the charged incident. Unique and narrow circumstances do warrant a reduction in the defendant's sentence in the interest of justice. *See People v Wilt*, 18 AD3d 971, 973 *lv den* 5 NY3d 771. He lived a productive and apparently respectable life since shortly after the incident, which occurred when he was 18, and he has no prior record. "His family history of overcoming barriers is compelling." The complainant's injury was less grave than often occurs in such cases. One juror submitted an affidavit urging leniency. Judgment modified, sentence for assault reduced to seven to 14 years, and as modified, affirmed. (County Ct, Broome Co [Smith, J])

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

People v Rowland, 31 AD3d 978, 818 NYS2d 668 (3rd Dept 2006)

After several days of jury trial, the defendant entered an *Alford* plea to criminally negligent homicide and third-degree weapons possession. Sentences imposed were to run concurrently with previously imposed sentences for probation violation and possession of stolen property. The latter conviction was later reversed, and the defendant pled to a reduced charge and was sentenced to a year, which he had already served. His motion under CPL 440.10 to vacate the instant convictions was denied.

Holding: The instant plea was not "'inextricably intertwined'" with the prior convictions. *See People v Schaaff*, 77 AD2d 607, 608. The general rule that reversal of a guilty plea is required when the plea bargain includes a sentence to run concurrently with another that is later reversed (*see People v Pichardo*, 1 NY3d 126) is not applicable here. The previous convictions were not charged nor resolved contemporaneously with the current plea, and "the promise of concurrent time did not amount to an understanding that, by virtue of the plea, defendant would avoid additional prison time." The reason given by the defendant for this plea was that there might be enough evidence to convict him and he did not want to risk a more severe sentence following trial. There "is no reason to permit defendant to profit from the reversal of a conviction on an unrelated charge (*see People v Lowrence*, 41 NY2d 303, 304. . ." Judgment and order affirmed. (County Ct, Saratoga Co [Scarano, Jr., J])

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

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

People v McBean, 32 AD3d 549, 819 NYS2d 368 (3rd Dept 2006)

The defendant was charged with drug possession and sale relating to three transactions in December 2001 and January 2002. After two mistrials, he was convicted of selling drugs, and his 440 motion to vacate was denied.

Holding: The defendant's hearsay objection to testimony by an undercover officer about statements made by the other person involved in the transactions adequately preserved the issue of whether *Crawford v Washington* (541 US 36 [2004]), decided after this trial, applied. *See People v Milazo*, 18 AD3d 1968, 1070 n. The informant was not aware of the undercover's status. The statements "lacked the formality of testimony and were not made in anticipation of prosecution" and were not barred by *Crawford*.

The prosecution's failure to disclose a police report of an officer's arrest in early January of the defendant's cousin driving the same car that the defendant was seen driving at the time of the charged incidents was not reversible error. While the prosecution must disclose any recorded statement in its control relating to the subject matter of a witness's testimony (*see* CPL 240.45[1][a]) any error here was harmless. Review of the report and the officer's testimony at the defendant's trial reveals no meaningful inconsistencies and in fact confirms the officer's ability to tell the defendant and his cousin apart. The report was not exculpatory or material; no *Brady* violation occurred. *See People v Shcherenkov*, 21 AD3d 651, 652. The alleged newly discovered evidence was no more than impeachment or cumulative of testimony already given. Judgment affirmed. (County Ct, Tompkins Co [Sherman, J])

Prior Convictions (Evidence) (General) (Instructions) **PRC; 295(5) (7) (10)**

People v Hunter, 32 AD3d 611, 819 NYS2d 620 (3rd Dept 2006)

Evidence at the defendant's trial for second-degree burglary showed that the complainant's daughter saw through a window that a man on his hands and knees had his head in a broken window of their home. After watching him apparently pulling at window screens, the complainant stepped into the yard and asked what he was doing. He cursed and ran away. The incident was reported and the complainant identified the defendant first from a photo array and later at a lineup.

Holding: The defendant's 1997 burglary conviction should not have been admitted. It was not needed to establish intent to commit a crime on the complainant's premises. A prior conviction may be used to show intent when a defendant's actions are equivocal, and would not be criminal absent guilty knowledge. *See People v Alvino*, 71 NY2d 233, 242-243. This exception to the *Molineux* rule

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does not apply where intent may be easily inferred from the alleged actions themselves. *See People v Vargas*, 88 NY2d 856, 858. The defendant here did not contest the intent element, and the jury could easily find an intention to commit a crime based on his observed actions. *See eg People v Rivera*, 301 AD2d 787, 789 *lv den* 99 NY2d 631. The potential prejudice of the prior conviction far outweighed its probative value. The court failed to adequately convey to the jury that the prior could not be considered as propensity or predisposition to commit the crime. *See* CJI2d *Molineux*. The error was not harmless. *See People v Simmons*, 29 AD3d 1219. The photo array was not shown to be unduly suggestive. Judgment reversed, remitted for new trial. (County Ct, Warren Co [Austin, J])

Admissions (Interrogation) (*Miranda* Advice) (Spontaneous Declaration) — **ADM; 15(22) (25) (37)**

Confessions (Advice of Rights) (Counsel) (Notice of Use at Trial) — **CNF; 70(10) (23) (46)**

People v Wilhelm, No. 15092, 2006 NY Slip Op 6296, 3rd Dept 8/24/2006)

The defendant, who had a history of mental illness, was charged with murder. She admitted responsibility to police when they first arrived and said that her son's death was a "mercy killing." After being Mirandized, she again stated that she killed her son. She later made statements to Child Protective Services (CPS) caseworkers that after trying to drown her son the first time, she pulled him out and resuscitated him because she knew that what she was doing was wrong. She said she had brought the children into her relationship with her husband and that she needed to fix the situation "by taking care of it, meaning drowning the kids." No CPL 710.30 notice of intent to use the CPS caseworkers' statements was given.

Holding: The defendant's right to counsel indelibly attached before she spoke with the CPS caseworkers. *See People v West*, 81 NY2d 370, 373-374. The defendant's admissions to them were obtained in violation of the right to counsel and should be precluded under CPL 710.30 and suppressed as involuntary within the meaning of CPL 60.45 (2) (b) (ii). The caseworkers were members of a county-wide, multidisciplinary team whose goal was to aid the prosecution of criminal cases; they worked closely with the police and prosecutors in this case. Their conduct went hand-in-hand with law enforcement and constituted state action. *See People v Ray*, 65 NY2d 282, 286. It was immaterial that CPS considered their investigation separate or reported to the prosecutor according to statutory requirements. The statements undermined the defendant's psychiatric defense of insanity, since they showed that she had some capacity to appreciate the wrongfulness of her conduct. *See* Penal Law 40.15; *People v Kohl*, 72 NY2d 191, 193-195; admission was not harmless. Judgment reversed, remanded for new trial. (County Ct, Rensselaer Co [McGrath, J])

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

Confessions (Advice of Rights) (Huntley Hearing) (Interrogation) (*Miranda* Advice) — **CFN; 70(10) (33) (42) (45)**

People v Durrin, 32 AD3d 665, 820 NYS2d 363 (3rd Dept 2006)

The defendant was charged with rape and endangering the welfare of a child. After a *Huntley* hearing, the defendant's initial oral statement to police was ruled admissible as spontaneous. His later oral statements were held inadmissible for failure to provide *Miranda* warnings, but the written admission and written apology to the complainant and her family tat followed were ruled admissible.

Holding: The defendant failed to argue that all statements were suppressible as a continuous chain of questioning, leaving the issue unpreserved. *See People v Caballero*, 23 AD3d 1031, 1032 *lv den* 6 NY3d 846. The case relied almost entirely on the seven-year-old complainant's credibility; the jury convicted the defendant of only two of three counts. The challenged statements partially support the complainant's allegations; the evidence was not overwhelming without them. It is proper to exercise interest of jurisdiction to review admission of the statements. *See People v Seaman*, 239 AD2d 681, 683 *app dismd* 91 NY2d 954. The defendant's written statement and apology followed an earlier oral statement made in violation of *Miranda*, and there was no pronounced break in questioning; the statements were part of a single continuous chain of events. *See People v Chapple*, 38 NY2d 112, 115. The written statements acknowledged the defendant's access to and sexual contact with the complainant during the pertinent time frame, prejudicing the defendant's case and depriving him of a fair trial. Judgment reversed, matter remanded for a new trial. (County Ct, Fulton Co [Giardino, J])

Evidence (Hearsay) (Other Crimes) (Uncharged Crimes) — **EVI; 155(75) (95) (132)**

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

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

Third Department *continued*

People v Wlasiuk, 32 AD3d 674, 821 NYS2d 285 (3rd Dept 2006)

Holding: The defendant was charged with killing his wife and staging a car accident to cover it up. The cumulative effect of trial errors deprived him of a fair trial. The prosecution offered two dozen witnesses to testify about prior bad acts, incidents of domestic violence. Admissibility of *Molineux* evidence (*People v Molineux*, 168 NY 264) is a matter of law, not discretion (*See People v Alvino*, 71 NY2d 233, 242) and has to be determined on case-by-case basis. Admission in other cases of prior domestic violence evidence does not alone provide a basis for its admission in all later cases. Here, the court permitted the evidence (and instructed the jury to use it concerning motive or intent) without considering the materiality and the cumulative nature of the evidence, and there was no prejudice versus probity analysis. Evidence of an accused's prior abusive conduct against a decedent can overwhelm proof of the actual crime. *See People v Lewis*, 69 NY2d 321, 325.

It was also error to admit hearsay evidence from the decedent's diaries and letters, many of which were years old and others undated. *See People v Steiner*, 30 NY2d 762, 763. A State Police report about a submerged motor vehicle accident study was admitted without proper foundation, and was essentially treated as a definitive authority conflicting with the defendant's story. Finally, there were many instances of prosecutorial misconduct: expressing personal opinion on the merits, disparaging the defendant, characterizing defense witnesses' testimony as lies, and maligning defense counsel. *See People v Russell*, 307 AD2d 385, 386-387. Judgment reversed, remanded for new trial. (County Ct, Chenango Co [Sullivan, J])

Fourth Department

Homicide (Murder [Degrees and Lesser Offenses] [Evidence]) — **HMC; 185(40[g] [j])**

People v Packer, 31 AD3d 1169, 817 NYS2d 829 (4th Dept 2006)

Holding: The defendant was convicted of second-degree murder (Penal Law 125.25 [2]) for shooting his friend at a party. He testified that he had no memory of the event, and had been drinking while on painkillers. There was no rational view of the evidence that the defendant acted with depraved indifference in this one-on-one shooting. *See People v Lawhorn*, 21 AD3d 1289, 1290. While it might have been reckless, it was not depraved. *See People v McPherson*, 6 NY3d 202, 216. Judgment modified, second-degree murder reduced to second-degree manslaughter (Penal Law 125.15 [1]), remanded for resentencing. (County Ct, Wayne Co [Kehoe, J])

Evidence (Character and Reputation) (Uncharged Crimes) — **EVI; 155(20) (132)**

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

People v Carter, 31 AD3d 1167, 818 NYS2d 380 (4th Dept 2006)

Holding: The court's exclusion of testimony concerning the reputation of the complainant at the defendant's trial for sodomy and related charges was error. Defense counsel had laid an appropriate foundation and agreed to limit direct examination to the general reputation of the complainant in the community for truth and veracity. *See People v Hanley*, 5 NY3d 108, 112. Also, the prior bad act testimony went to only propensity and so was inadmissible. *See People v Peters*, 187 AD2d 883, 884. This testimony came within no *Molineux* exception and its prejudicial effect outweighed any probative value. The evidence showed that the sexual encounter between the witness and defendant was consensual.

The prosecutor's misleading and inflammatory statements in argument tended to prejudice the jury. *See People v Halm*, 81 NY2d 819, 821. The search warrant was overbroad, allowing evidence to be collected that was not specifically connected to the alleged crimes. *See People v Couser*, 303 AD2d 981. Judgment reversed, remanded for new trial on counts two through six. (County Ct, Ontario Co [Reed, J])

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

People v Taylor, 31 AD3d 1141, 817 NYS2d 816 (4th Dept 2006)

Holding: Police lacked reasonable suspicion to stop the vehicle in which the defendant was a passenger, and evidence of the gun found on his person should have been suppressed. The police received a radio report that two male blacks had committed an armed robbery and were driving a "light blue Ford Contour." More than two hours later, they saw a light blue Mercury Mystique and stopped it. The purpose of the stop was to "identify the occupants of the vehicle," whose race was unknown, and to "ask them if they had possibly known anything" about the robbery. Once stopped, the defendant fled and dropped a gun. He was convicted of third-degree weapons possession. The police lacked sufficient facts to reasonably believe that the robbery suspects were driving the car. *See gen People v Spencer*, 84 NY2d 749, 752-755. The

Fourth Department *continued*

gun must be suppressed. *See People v Nicodemus*, 247 AD2d 833, 835-836. Judgment reversed, suppression granted, matter remanded. (Supreme Ct, Monroe Co [Egan, J])

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

People v Solomon, 31 AD3d 1178, 817 NYS2d 819 (4th Dept 2006)

Holding: A caller told 911 that the defendant refused to leave the caller's home. The defendant was arrested for harassment, a violation, after he had already gone out the door. However, the police did not witness the defendant in the caller's home, and therefore did not have reasonable cause to believe an offense was committed in their presence. *See* CPL 140.10 [1] [a]; *People v Van Buren*, 4 NY3d 640, 646-647. Drugs found on the defendant's person, upon which the instant fourth-degree possession charge was based, must be suppressed. Judgment reversed, suppression granted, matter remitted. (Supreme Ct, Monroe Co [Mark, J])

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

Homicide (Negligent Homicide) **HMC; 185(45)**

People v Simmons, 31 AD3d 1143, 817 NYS2d 817 (4th Dept 2006)

Holding: The unpreserved issue of sufficiency of the evidence is reviewed in the interest of justice. *See* CPL 470.15(6)(a). The evidence was insufficient to support the defendant's conviction of criminally negligent homicide under Penal Law 125.10. The evidence showed that the defendant was driving just over 30 mph in a work zone, posted speed 15 mph. He was unable stop before hitting a woman and her infant who were in the intersection. The road recently had been resurfaced, resulting in oil and loose gravel. As a result, the defendant skidded through the intersection and killed the child. While the defendant's conduct may wall have constituted civil negligence, the facts were insufficient to establish "'a gross deviation from the standard of care that a reasonable person would observe' under the circumstances" as required by Penal Law 15.05 [4]. *See People v Boutin*, 75 NY2d 692, 695-698. Judgment modified and remanded. (Supreme Ct, Monroe Co [Mark, J])

Dissent: [Martoche, J] It was not appropriate to exercise interest of justice jurisdiction, and in any event there was sufficient evidence to sustain the conviction.

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

Witnesses (Confrontation of Witnesses) (Direct Examination) **WIT; 390(7) (15)**

People v McFarley, 31 AD3d 1166, 818 NYS2d 379 (4th Dept 2006)

Holding: The defendant was charged with rape five months after the event, and he claimed that the complainant and her mother wanted to sue him for money. The court improperly restricted defense counsel's cross-examination of a prosecution witness concerning the motive of the complainant and her mother to bring the allegations against the defendant and precluded defense witness evidence concerning the motive. Whether through the 14th Amendment Due Process Clause or the Compulsory Process or Confrontation clauses of the 6th Amendment, the federal constitution ensures defendants "'a meaningful opportunity to present a complete defense.'" *See Crane v Kentucky*, 476 US 683, 690 (1986).The proffered defense evidence would have shown that the complainant had seen a movie about making false rape allegations and said she would like to try that, and that the mother had a profit motive. Extrinsic evidence of fabrication was relevant; its preclusion was not harmless error. *See People v Hudy*, 73 NY2d 40, 56. Judgment reversed and remanded. (County Ct, Monroe Co [Bellini, J])

Accusatory Instruments (Variance of Proof) **ACI; 11(20)**

Evidence (General) (Sufficiency) **EVI; 155(60) (130)**

People v Comfort, 31 AD3d 1110, 817 NYS2d 811 (4th Dept 2006)

Holding: At trial, the prosecution presented evidence of more than one sexual act between the defendant and the complainant occurring during the time specified in one count of the indictment. This could have allowed the jury to convict on an unindicted rape, amounting to usurpation by the prosecutor of the grand jury's exclusive power to determine a charge. *See People v McNab*, 167 AD2d 858, 858. The same analysis applies to the evidence produced on another count in the multi-count indictment.

The evidence only supported conviction for one of two counts of third-degree rape, since the interrupted sex act was part of continuous conduct constituting one rape. *See People v Watkins*, 300 AD2d 1070, 1071 *lv den* 99 NY2d 659. Judgment modified, three counts of third-degree rape reversed, those counts dismissed, and otherwise affirmed. (County Ct, Monroe Co [Keenan, J])

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

Fourth Department *continued*

[Investigative Searches])

People v Ortiz, 31 AD3d 1112, 817 NYS2d 804 (4th Dept 2006)

Holding: Police stopped the defendant's vehicle because they believed, based on an informant's taped telephone calls, that the defendant was going to bring drugs to the informant. No drugs were found on the defendant or in his car. He was asked to sit in the patrol car and was accusatorily questioned about the drugs. He consented to a search of his home and later admitted he sold drugs. After the roadside stopped turned up empty, the police had no basis to arrest the defendant. His statements and the drugs recovered from his home should have been suppressed. *See People v Williams*, 191 AD2d 989, 990 *lv den* 82 NY2d 729. The prosecution argues that the defendant was arrested only after the drugs were found and he had signed a statement. Police are not at liberty to arrest and hold a suspect while searching for evidence to justify their actions. Judgment reversed, matter remanded. (County Ct, Livingston Co [Alonzo, Jr., J])

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

People v Price, 31 AD3d 1114, 817 NYS2d 802 (4th Dept 2006)

Holding: The defendant requested a redetermination of his level three risk assessment under the Sex Offender Registration Act (Correction Law 168 *et seq.*) pursuant to *Doe v Pataki* (427 FSupp2d 398 [2006]) after his release from incarceration following a violation of probation for this offense. The defendant was again found to be a level three risk. At the hearing, the prosecution submitted a new version of the Risk Assessment Instrument (RAI) with a rating of 110, a level three presumptive risk. However, there was a 15 point assessment error. The crime upon which the prosecution based that point score was not a prior crime. Subtracting those 15 points yields a presumptive risk level classification of two. The court could properly consider evidence of the crime in question as a basis for an upward risk level determination, but did not indicate whether or not it did so. The judge accepted the prosecution's assessment without an independent inquiry. There must be a redetermination based on the hearing record, setting forth the court's findings of fact and conclusions of law. *See People v Cruz*, 28 AD3d 819. Judgment reversed, matter remanded. (Supreme Ct, Erie Co [Forma, J])

Search and Seizure (Arrest/ Scene of the Crime **SEA; 335(10[g(i)])**

Searches [Probable Cause (Furtive Conduct)])

People v Lobley, 31 AD3d 1161, 817 NYS2d 825 (4th Dept 2006)

Holding: At a *Mapp* hearing regarding suppression of a gun recovered after a chase, there was evidence that the police arrived at a location regarding which a complaint had been made about a group of men loitering and trespassing, and involvement with narcotics. The police saw the defendant near a group of men. One officer knew the defendant lived somewhere else, and suspected the defendant may have been trespassing. When the officer asked the defendant to stop, the defendant ran into a nearby residence. A woman answered the police knock on the door, and the defendant was seen standing nearby with a gun. The defendant ran from the house and threw away the gun. The police had reason to question the defendant initially, but not to chase after him. *See People v Moore*, 6 NY3d 496, 498. Flight alone, or with questionable circumstances, was insufficient to establish reasonable suspicion for the police to pursue the defendant. *See People v Holmes*, 81 NY2d 1056, 1057-1058. The defendant had the right to be let alone. Even a trespass, a violation, would not have justified a forcible stop. *See People v De Bour*, 40 NY2d 210, 223. Judgment reversed, suppression granted, indictment dismissed, and matter remanded. (Supreme Ct, Erie Co (Tills, J)]

Extradition (General) **EXT; 160 (24)**

People v Kopp, __AD3d__, 817 NYS2d 806 (4th Dept 2006)

The defendant was convicted after a nonjury trial on stipulated facts of second-degree murder. *See* Penal Law 125.25 [1]. A longtime abortion opponent, the defendant shot a doctor who worked at an abortion clinic. Afterwards the defendant fled the country and eluded capture for two years. Upon his extradition on the original charge, a new count of depraved indifference murder in the second degree (Penal Law 125.25 [2]) was added. At trial the defendant claimed justification based on protection of the unborn, and that his intent was only to wound the doctor. He was found guilty of intentional murder.

Holding: Assuming arguendo that the defendant has standing to raise the specialty clause of the Extradition Treaty between the US and France, his contention that the superseding indictment adding the charge of depraved indifference murder violated the specialty clause fails. *See US v Masefield*, No. 02 Cr. 441 (LAP), 2005 WL 236443, *2 n 1, 2005 US Dist LEXIS 1570, *6 n 1 (SDNY 2005). The specialty clause only applied to new, separate offenses, not related charges based upon the same set of facts. *See US v Nosov*, 153 FSupp 2d 477, 480 (SDNY 2001). Judgment affirmed. (Supreme Ct, Erie Co [D'Amico, J]) ⚖

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