New York State Defenders Association

Public Defense Backup Center
REPORT

Volume XXI Number 1 January–March 2006

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Defender News

2nd Circuit: File Requested Notice of Appeal Even if Plea Waived Appeal

A federal Court of Appeals panel in the 2nd Circuit has held that failing to file a requested notice of appeal constitutes ineffective assistance of counsel even if the client's plea agreement included a waiver of appeal. The defendant relied on *Roe v Flores-Ortega* (528 US 470 [2000]), which held that failure to file a requested notice is per se ineffective assistance. The panel found that an attorney's good-faith belief that the resulting appeal would be frivolous did not override the duty to file the notice. (*NYLJ*, p.1, 3/28/06.) As the *REPORT* went to press, the decision in *Campusano v US* (04-513-pr) was scheduled to be published in the *New York Law Journal* on Friday, Mar. 31, 2006.

Search and Seizure Protection Enforced High and Low

The US Supreme Court has held that a co-tenant inviting police to conduct a search of a shared residence had no recognized authority in law or social practice to prevail over a present and objecting co-tenant. In a five to three decision, the court upheld a Georgia Supreme Court ruling that evidence found after police entered a residence over the objection of the resident husband should have been suppressed despite the permission granted to police by the resident (and codefendant) wife. *Georgia v Randolph* (No. 04-1067, 3/22/2006.) Decided just as the *REPORT* went to press, the case will be summarized in a future issue.

Meanwhile, on a local level, a Rockland County Court judge recently suppressed drugs found in a car after a valid stop for a defective license plate. Rather than giving the driver a ticket and letting him go on his way, the officer ordered him out of the car and patted him down, discovering the drugs. This constituted an "excessive detention." (*People v Anderson*, County Ct, Rockland Co, *NYLJ* 3/6/06.)

Inside: Defender Institute Basic Trial Skills Program Application

Post-Sentencing Burdens on Defendants Increase

To properly advise clients about potential consequences of criminal charges requires knowing and informing those clients of much more than just the length of any potential incarceration following conviction. (*See e.g.* NYSDA's *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004), Standard VIII.A.7 and New York State Bar Association, *Standards for Providing Mandated Representation* (2005), Standard I-7.e.) Several recent developments described below may affect what your current clients need to know about possible consequences of pending convictions (as well as what other clients/former clients are now facing).

Parole Implements DNA "Discretionary" Special Condition of Release

The DNA databank provisions of 9 NYCRR 6192.1 have been amended to include collection of DNA from individuals under the jurisdiction of the Division of Parole. This follows the Governor's announcement late last year of plans to expand collection of DNA samples for inclusion in the state's DNA databank (*Backup Center REPORT*, Nov-Dec 2005). According to an operations plan and procedure memo effective Jan. 3, 2006, Parole "will identify all 'discretionary DNA offenders' for whom

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a DNA sample could, appropriately, be required as a condition of release," focusing "on offenders not identified as 'designated offender[s]'" under Executive Law 995(7). The memo notes that imposing a special condition mandating that DNA be provided is within the Division's discretion, and adds that there must be a documented "reasonable and rational basis to support its imposition." Offenders who may be affected include those granted discretionary release by the Board of Parole and those released on presumptive release, conditional release, or post-release supervision. The special condition may be imposed by the Board or a Field Parole officer. Detailed procedures are set forth in the memo.

Attorneys who need further information may contact the Backup Center.

SIC Report Favors Expansion of DNA Database

Meanwhile, a new report by New York's State Commission of Investigations (SIC) recommends expanding the group of persons subject to having their DNA samples included in the state database. Everyone convicted of a felony or misdemeanor should be required to provide a sample, according to the report, which also recommends actions to extend or abolish statutes of limitation for sex cases. The report's recommendations largely mirror the 2006 legislative agenda of Governor George E. Pataki and Criminal Justice Commissioner Chauncey G. Parker, according to one news account. (*NYLJ* online, 3/21/06.)

The report, issued after a five-month investigation including public hearings, does acknowledge privacy and other concerns. One troubling issue discussed is law enforcement interest in expanding the information garnered from an individual's DNA sample to include genetic disease information, because health care institutions could then provide information to help narrow the pool of suspects for a particular case. The report offers few rejoinders or solutions to the concerns it documents, other than to suggest increased penalties for unauthorized disclosure of DNA information and increased penalties for tampering with DNA evidence.

Statutory protections of government-collected information can, of course, be removed by new legislatures and new executives, as happened with the use of Social Security numbers, strictly limited when established in 1935 and gradually expanded. See, Computer Professionals for Social Responsibility, "History and Significance of the Social Security Number." (www.cpsr.org/prevsite/cpsr/privacy/ssn/SSN-History.html.)

The full SIC report can be viewed on the SIC website, under publications: www.sic.state.ny.us.

Disabilities Act Applies to DA's ATI Program

Community service requirements imposed on two individuals must be vacated if the Brooklyn District Attorney's Office fails to provide "reasonable accommodations" for their disabilities, a Criminal Court judge has ruled. Both defendants suffer from arthritis, and one has a gunshot injury as well. Both failed to complete community service requirements. Judge John H. Wilson found there was "no doubt" that the Americans with Disabilities Act (42 USC 12201 et seq.) applies to the King's County District Attorney's Office and its Alternative Sentencing Program. (*People v Brathwaite and Pearson* (Kings Co Crim Ct, *NYLJ* 3/1/06.)

Batterer Programs, Domestic Violence Judicial Monitoring Found Ineffective

The Center for Court Innovation recently issued a report entitled "*Testing the Effectiveness of Batterer Programs and Judicial Monitoring,*" (2005). It describes a study that compared the recidivism rates of 420 convicted offenders in the Bronx Misdemeanor Domestic Violence Court who were randomly assigned either to attend or not to attend a batterer program. It also examined the extent to which judicial monitoring by the court deters recidivism. The study found that both batterer programs and judicial monitoring did *not* produce a reduction in re-arrests. A copy of the report is available from the Center for Court Innovation web page: http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=474.

Denial of CASAT Continues Despite Reform

The Department of Correctional Services (DOCS) claims to have the authority to deny prisoners Comprehensive Alcohol and Substance Abuse Treatment (CASAT) ordered by courts under the Drug Law Reform Act of 2004 (*see* Penal Law 60.04[6]5). On Mar. 24, 2006,

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Westchester County Supreme Court Justice Loehr issued a decision refuting DOCS's position. The court had ordered enrollment of a defendant in the CASAT program when he had satisfied the statutory eligibility requirements. Finding the defendant ineligible for CASAT under DOCS regulations, DOCS refused to move him into the program. Judge Loehr found that while the reform statute recognizes DOCS administrative regulations governing completion, discipline, and removal from a program, it recognizes only statutory, not administrative, eligibility requirements. To accept DOCS' position, the court found, "would be to return the ultimate decision making concerning CASAT enrollment to DOCS thereby effectively repealing Penal Law §60.04(6)." (*Matter of Bailey v Joy*, Westchester Co Sup Ct, *NYLJ* 3/24/06.)

Some courts have rejected the reasoning of *Bailey v Joy* and similar cases. In *Hines v Goord* (Index # 2006-0273, 3/16/06), an Onondaga County Supreme Court judge upheld DOCS' refusal to enroll a defendant in CASAT despite a sentencing court's order. Presumably, the Court of Appeals will eventually settle this matter. Meanwhile, lawyers and clients need to be aware of this issue and its possible effect on a given sentence when deciding how best to proceed.

Budget Proposals Would Increase Financial Burden

The 2006 New York State Executive Budget contains proposals that would yet again increase financial penalties on people reintegrating into the community from the criminal justice system, according to the Center for Community Alternatives. Among proposed fees: probation fees to be paid by everyone on probation; electronic monitoring and drug testing fees for those who must submit to such scrutiny; increased bail fees; and others (online at www.communityalternatives.org). Budget bills had not been passed as the *REPORT* went to press.

Public Defense Reform Looms As Problems Recur

Recognition that public defense in New York State is in crisis continues to grow. The Chief Judge, the State Bar Association's House of Delegates, and editorial boards have all weighed in on aspects of the problem this year. Meanwhile, Governor Pataki—one last time—zero-funded several defense programs in the budget proposed in January.

Kaye Puts Spotlight on Public Defense Reform

Chief Judge Judith Kaye announced at the NYS Bar Association annual meeting in January that the commission she formed in 2004 would soon recommend a statewide public defense system. Her statement that the Commission on the Future of Indigent Defense "has voted unanimously to recommend a . . . single, statewide, state-funded system for the delivery of indigent defense services" was included in a *New York Law Journal* front page story. Immediately after the Chief Judge's remarks, the State Bar House of Delegates unanimously voted to support state oversight of public defense and to hold a bar summit once the Kaye Commission issues its final report. (*NYLJ*, 1/30/06, pp 1 and 8.) In her State of the Judiciary address in early February, Judge Kaye reiterated support for a statewide, publicly funded system of indigent defense services. (www.timesunion.com, 2/7/06.) Her address and the interim Commission report are available on the Unified Court System website: www.nycourts.gov.

Gideon Day Postponed Until Report Released

Gideon Day, the annual commemoration of the US Supreme Court's right-to-counsel decision in *Gideon v Wainwright*, was slated for Tuesday, April 11 this year but has been postponed until further announcement in the hope of coordinating it with Judge Kaye's formal release of the final report of the Kaye Commission. Those who had marked their calendars for April 11 should watch for an announcement of the new date.

Governor Fails to Fill Task Force Seats

Shortly before the Chief Judge appeared at the State Bar, the deadline passed for a legislatively-mandated report on the effectiveness of the assigned counsel fee increase passed in 2003. The Governor's failure to fill his four (of seven) positions on the task force created by the fee-increase legislation to issue such a report sparked interest and rebuke in the public press. (*See*, Albany *Times Union*, "Phantom task force never met," "Capitol Confidential" column, 1/17/06, p A3 and editorial, "A New York disgrace," 1/24/06, p. A8.)

Consistent with his failure to appoint members to a panel intended to examine problems in public defense, the Governor also failed to include NYSDA, the Indigent Parolee Representation Program, Prisoners' Legal Services, and Neighborhood Defender Service of Harlem in his 2006 budget. The Backup Center kept Chief Defenders informed about public defense budgetary developments as the end of the fiscal year approached.

Civil Commitment, Other Sex Offender Issues Remain News

Past issues of the *REPORT* have detailed continuing local and state legislative efforts to increase penalties and supervision of individuals convicted of sex offenses. NYSDA continues to collect and analyze information on

issues such as increased registration requirements, restrictions on locations where persons convicted of sex offenses can live, work, and be present, and creation of civil commitment to keep designated sex offenders locked away (for ostensible treatment) after they have served their sentences (see p. 14). For more information, visit the NYSDA website and go to the "Megan's Law" page under "Hot Topics," then scroll down to the "Developments in NY Sex Offender Laws." (www.nysda.org).

The Center for Community Alternatives has produced a timely document entitled "Responding to Sexual Offenses: Research, Reason and Public Safety," by Kostas A. Katsavdakis, Marsha Weissman, and Alan Rosenthal. Calling for an evidence-based approach to determining how best to address the serious issue of sex offending, the paper notes that "[t]here are law enforcement and mental health professionals who raise concerns about the overreaching of" new and proposed sex offense statutes. Analyzing the problem in a way that will allow the making of effective public policy requires analysis of three key functions — risk assessment, classification, and treatment. Heavily documented, this paper is an antidote to the sound-bites that constitute too much of current discourse on the issue. The paper is available on the CCA website: www.communityalternatives.org.

Metropolitan Trainer: False Confession Expert and More!

This year's NY Metropolitan Trainer at NYU featured expert Saul Kassin and defense lawyer Paul Casteleiro presenting "Coerced Confessions: Lessons from People v. Kogut" and Ed Nowak's ever-popular "Recent Developments in Criminal Law and Procedure," along with Jodie English on closing argument, Thomas Klein and John Schoeffel on defeating challenges to defense questions and defense evidence, and Randy Hertz on *Huntley* hearings and *Crawford v Washington*. Close to 400 lawyers packed the auditorium for this event. Materials from the trainer are available for $30.

Left: Attorney Jodie English at the 20th Annual NY Metropolitan Trainer. Right: Coerced Confession Expert Saul Kassin. (Photo by Mitchell R. Miller, © 2006, used with permission**)**

NYSDA continues to provide relevant, affordable CLE. Upcoming trainings include the Defender Institute Basic Trial Skills Program (see application at the centerfold) and the 39th Annual Meeting and Conference in Corning (see p. 6). Also check the training page on the website for regional trainers and information (www.nysda.org).

Award Nominations Sought

Nominations are now sought for two awards to be presented at NYSDA's 39th Annual Meeting and Conference in Corning, NY. (See p. 6 for conference information.)

Kevin M. Andersen Memorial Award

Kevin M. Andersen was a lifelong public defender. Those who worked with him knew him to have the ability to be angered to his core by injustice, the will to fight ferociously for his client, and the compassion to grant the client the dignity each deserved as a human being despite whatever human frailties they might present. Following his death in 2004, the Genesee County Public Defenders Office created the Kevin M. Andersen Memorial Award to remember and honor his dedication to public defense work. This award is presented to an attorney who has been in practice less than fifteen years, practices in the area of indigent defense, and exemplifies the sense of justice, determination, and compassion that were Kevin's hallmarks. Nominations with supporting materials should be forwarded to the Genesee County Public Defenders Office, One West Main Street, Batavia NY 14020.

Wilfred R. O'Connor Award

Wilfred R. O'Connor was a founding member and long-time President of the New York State Defenders Association. He served as a legal aid lawyer in Brooklyn and Queens, as director of the Queens Legal Aid office, as a member of Legal Aid's Attica Defense Team, as director of the Prison Legal Assistants Program, and as president of NYSDA from 1978 to 1989. He went on to complete his career as a judge in New York City. His beliefs were clear: every defendant, regardless of race, color, creed or economic status, deserves a day in court and zealous client centered representation. The NYSDA Board of Directors created the Wilfred R. O'Connor Award to remember Bill and honor his sustained commitment to the client-centered representation of the poor. This award will be presented to an attorney who has been in practice fifteen or more years, practices in the area of public defense, and exemplifies the client-centered sense of justice, persistence, and compassion that characterized Bill's life. Nominations with supporting materials should be forwarded to the New York State Defenders Association, 194 Washington Avenue, Suite 500, Albany NY 12210-2314.

NYSDA Receives NYS Bar Foundation Grant

The New York State Bar Foundation has approved a $10,000 grant to NYSDA to use toward the Backup Center's Social Science Research Unit. This critical unit was a major casualty of the 2001 state budget cuts. The grant has allowed the Backup Center to hire Criminal Justice PhD candidate (University at Albany) Andrew Davies as an intern. We appreciate the Bar Foundation's support.

NLADA has New Defender Director

The National Legal Aid and Defender Association in Washington, DC will welcome Richard Goemann as Director, Defender Legal Services, on May 1, 2006. He will move to NLADA from his current position as Assistant Federal Public Defender for the Office of the Federal Public Defender office in Richmond, VA. His state public defense experience includes being the Executive and Deputy Director of the Virginia Indigent Defense Commission and, before that, serving as a Chief Public Defender in Fairfax County, VA. Among NLADA's efforts on behalf of public defense is their ongoing support for federal legislation that would extend to public defenders and prosecutors the same program of student loan repayment assistance as is already available to federal government attorneys and congressional staff. For information on current bills (HR 198 and S 2039) and other NLADA news, visit the Defender Resources page on their website: www.nlada.org.

New Edition of Slanguage Published

The third edition of *Criminal Law Slanguage of New York*, by Glenn Edward Murray and Gary Muldoon, has been published by LexisNexis. (www.lexis.com.) Excerpts taken from prior editions of the book (which defines common [and not-so-common] words, acronyms, and phrases used in criminal cases) have been included in past issues of the *REPORT*. The third edition includes more than 100 new expressions, including "melioration doctrine," "claim-of-right defense," "exhaustion requirement," "HIPAA," "Kathy's Law," "Stone v Powell doctrine," and the "Flip Wilson defense." ⚖

Job Opportunities

Prisoners' Legal Services of New York seeks a **Managing Attorney** for the Buffalo, NY Office. PLS is a statewide program providing civil legal services to people incarcerated in New York State prisons. PLS handles cases involving mental health and medical care, prison disciplinary matters, excessive use of force, conditions of confinement, sentence calculation, and jail time credit. The Managing Attorney will supervise all Staff Attorneys, Legal Assistants, Secretaries, and Interns in the Buffalo office, and report to the Executive Director. He/she will establish the effectiveness of the office and collaborate with other PLS staff throughout the state. Required: commitment to providing legal services to the disadvantaged, admission to practice in NYS, and minimum of five years experience in civil legal services, civil rights, poverty law, or federal litigation. Previous supervisory experience preferred; Spanish fluency highly desirable. Salary: competitive, with outstanding benefit package including free health, dental, long term disability, and life insurance, as well as generous leave policies. PLS seeks to be a well-balanced, diverse organization. People of color, women, and people with disabilities encouraged to apply. Send cover letter, resume, writing sample, and at least three references by mail, fax or email to: Susan Johnson, Human Resources Manager, Prisoners' Legal Services of New York, 114 Prospect Street, Ithaca, NY 14850. tel (607)273-2283; fax (607)272-9122; email sjohnson@plsny.org (Word or WP format).

The Orange County Legal Aid Society seeks a **staff attorney** to work in the areas of criminal and family law. NY bar admission, related work or clinic experience required. Salary $44-55,000, good benefits. Send cover letter and resume to: Legal Aid Society of Orange County, Inc., PO 328, Goshen NY 10924. Fax (845)294-2638. ⚖

Conferences & Seminars

Sponsor: Duquesne University School of Law, Cyril H. Wecht Institute of Forensic Science and Law, and The Justice Project
Theme: 6th Annual Forensic Science and Law Conference Justice for All
Dates: April 20-22, 2006
Place: Pittsburgh, PA
Contact: tel (412)396-1330; email justiceforall@duq.edu

Sponsor: National Defender Investigator Association
Theme: 2006 National Conference & Seminar
Dates: April 26-28, 2006
Place: San Francisco, CA
Contact: NDIA: tel (203)281-6342; fax (203)248-8932; email ndia@cox.net; website www.ndia.net

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Syracuse Trainer
Date: April 29, 2006
Place: Syracuse, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; website www.nysacdl.org

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Sponsor: Louisiana Association of Criminal Defense Lawyers
Theme: 16th Annual Law and All That Jazz
Dates: April 27-29, 2006
Place: New Orleans, LA
Contact: LACDL: tel (225)767-7640; fax (225)767-7648; website www.lacdl.org

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Sponsor: National Association of Criminal Defense Lawyers
Theme: The Perfect Jury: Selecting, Connecting & Winning Them Over
Dates: May 3-6, 2006
Place: Philadelphia, PA
Contact: NACDL, Viviana Sejas: tel (202)872-8600 xtn 232: fax (202)872-8690; website www.nacdl.org

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Sponsor: New York State Bar Association
Theme: DWI on Trial—The Big Apple VI Seminar
Dates: May 4-5, 2006
Place: New York City
Contact: NYSBA: tel (212) 563-1800; website www.nysba.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Criminal Law Update
Date: May 5, 2006
Place: Nyack, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; website www.nysacdl.org

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Sponsor: Trial Lawyers College
Theme: Death Penalty Seminar
Dates: May 8-14, 2006
Place: Dubois, WY
Contact: TLC: tel (800)688-1611; fax (760)322-3714; website www.triallawyerscollege.com

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross to Kill
Dates: May 19-20, 2006
Place: New York City
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; website www.nysacdl.org

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Sponsor: National Defender Training Project
Theme: 2006 Public Defender and Assigned Counsel Trial Advocacy Program
Dates: June 2-7, 2006
Place: Dayton, OH
Contact: Ira Mickenberg: tel (518)583-6730; email iramick@worldnet.att.net

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Sponsor: National Criminal Defense College
Theme: Trial Practice Institutes 2006
Dates: June 11-24, 2006
July 16-29, 2006
Place: Macon, GA
Contact: NCDC: tel (478)746-4151; fax (478)743-0160; website www.ncdc.net

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Sponsor: Public Defender Service for the District of Columbia, National Association of Criminal Defense Lawyers, National Legal Aid and Defender Association, and The Innocence Project
Theme: Litigating Eyewitness Identification Cases
Dates: June 16-17, 2006
Place: Washington, DC
Contact: email rschmechel@pdsdc.org; website www.pdsdc.org

Sponsor: NEW YORK STATE DEFENDERS ASSOCIATION
Theme: Defender Institute Basic Trial Skills Program
Dates: June 19-24, 2006
Place: Troy, NY
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; website www.nysda.org

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Sponsor: NEW YORK STATE DEFENDERS ASSOCIATION
Theme: 39th Annual Meeting and Conference
Dates: July 23-25, 2006
Place: Corning, NY
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; website www.nysda.org

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Immigration Practice Tips

By Benita Jain of NYSDA's Immigrant Defense Project (IDP*)

Senate Considers Legislation Severely Impacting the Rights of Undocumented Immigrants and Immigrants with Criminal Dispositions

As noted in the last issue of *REPORT*, the US House of Representatives has passed HR 4437, a bill laden with harsh enforcement provisions that restrict the rights of immigrants and expand the criminal dispositions that would make immigrants deportable, unable to obtain lawful permanent residency, or ineligible for citizenship. (*REPORT*, Nov.–Dec. 2005, pp. 7–8).

As the *REPORT* goes to press, the US Senate is poised to vote on one or more immigration bills containing many of the provisions of HR 4437. One bill expected to be approved by the Senate Judiciary Committee and to reach the floor of the Senate during the last week of March is the "Comprehensive Immigration Reform Act of 2006," proposed by Judiciary Committee Chairman Arlen Specter (the "Chairman's Mark"). Currently, the Chairman's Mark includes the following provisions that are particularly relevant for immigrants in the criminal justice system:

- **Would impose harsh criminal penalties on immigrants living in the US without proper documentation or in violation of immigration laws.**

Those affected would include undocumented immigrants and lawfully-present immigrants who may be in technical violation of immigration laws (for example, because they did not file a change of address form with the federal government within 10 days of moving). The bill also increases the maximum penalties for this new federal offense and for the offenses of illegal entry and reentry into the US. Terms would be: 1) 10 years if the offense occurred after 3 misdemeanor or one felony conviction(s); 2) 15 years if the offense occurred after one felony conviction for which the person received a prison sentence of 30 months; or 3) 20 years if the offense occurred after a conviction for a felony for which the person received a prison sentence of 60 months.

- **Would greatly expand the scope of federal document-related offenses for which an immigrant may be convicted, denied lawful permanent residency (even without a conviction), or deported.**
- **Would further expand the already-discredited "aggravated felony" category, which leads to mandatory detention and deportation, to include the following offenses:**
  - —Minor accessory roles in the criminal conduct of others, including soliciting and aiding and abetting;
  - —Misdemeanor drunk driving offenses;
  - —New federal offense of being present in the US in technical violation of immigration laws;
  - —New federal offense for assisting an undocumented immigrant to reside in the US; and
  - —Expanded federal document-related offenses.

In addition, the bill allows an immigration judge to look behind the record of conviction to determine the age of the victim, when considering whether an immigrant has been convicted of a "sexual abuse of a minor" aggravated felony.

- **Would bar US citizens and lawful permanent residents from petitioning to bring their relatives to the US if that US citizen or lawful permanent resident has been convicted of murder, rape, or sexual abuse of a minor**
- **Would severely expand the scope of immigration detention, including:**
  - —Giving the government the authority to indefinitely detain immigrants who have been ordered removed, but whose removal it cannot execute;
  - —Giving local law enforcement the authority to issue detainers to hold an immigrant after completion of a prison sentence and the authority to hold certain immigrants for 14 days after the completion of a prison sentence;
  - —Requiring that the Department of Homeland Security (DHS) detain certain immigrants who fail to file a change of address form with DHS and creating a presumption of flight risk for undocumented immigrants and lawfully-present immigrants who failed to file such form on more than one occasion.

Criminal defense attorneys who are representing immigrant defendants should be aware that any bill that is passed by the Senate and finally adopted may include some or all of these provisions (among others), and **may contain language to apply these provisions retroactively to convictions predating adoption.** Due to these and other potential changes in immigration law, defense practitioners and others may wish to advise their clients of the pending legislation's effects should it pass. In addition, practitioners may wish to counsel defendants to make statements on the record during any plea allocutions that the plea is based on the defendant's current understanding of immigration law. This may provide a basis for the defendant to later move to withdraw or vacate the plea should new immigration legislation change the consequences of that plea.

For more information on pending legislation, contact the Immigrant Defense Project at (718) 858-9658 ext. 201. ⚖

** 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.*

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

By Eric H. Sills, Esq.*

Introduction

Since criminal cases in local criminal courts involve relatively minor offenses (*i.e.*, misdemeanors, violations and traffic infractions), and since the defendant rarely faces the realistic possibility of substantial jail time, it is easy to lose sight of the fact that local criminal court defendants possess almost all of the same procedural and Constitutional rights as defendants charged with felonies.[1]

In addition, local criminal court convictions, even seemingly minor ones, can have a significant adverse impact on your client's current job, future career opportunities, driving privileges, etc. Some can even be used as predicates for charging future offenses as felonies. Accordingly, it is critical that, as a defense attorney practicing in local criminal courts, you do not unintentionally fail to assert, and hence waive, rights of your clients that can aid in achieving more favorable resolutions of their local criminal court cases.

This two-part series sets forth various simple strategies to avoid missing critical opportunities in local criminal courts. The first part deals with opportunities available in all types of local criminal court cases. The second part, which will appear in a future issue of the *REPORT*, deals with commonly missed opportunities in DWI cases.

Scrutinize the Accusatory Instruments

As a general rule, "[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution."[2] One of the most fruitful avenues of attack in a local criminal court case—and yet one of the most commonly overlooked—is a challenge to the sufficiency of the accusatory instruments.[3]

Most local criminal court accusatory instruments are drafted by the police, and are not reviewed by an ADA prior to filing. As a result, such accusatory instruments routinely:

(a) Fail to allege one or more elements of the offense[4];

(b) Fail to negate an exception contained in the statute[5];

(c) Do not satisfy Criminal Procedure Law (CPL) 100.40 (particularly CPL 100.40(1)(c))[6];

(d) Do not satisfy CPL 100.50(3) and 170.65[7i];

(e) Do not satisfy CPL 100.30[8];

(f) Do not satisfy CPL 60.50[9];

(g) Contain incorrect / conflicting times / dates[10];

(h) Are unsigned; and / or

(i) Otherwise contain material defects or violate pleading requirements.

Many defense attorneys view such defects with a "who cares" attitude; feel that raising them makes the attorney look "nitpicky"; or feel that the issue is not important because any dismissal for facial insufficiency is without prejudice. I strongly disagree.

First of all, the judge should (and is constitutionally required to) care whether an accusatory instrument is valid and sufficient (and, when a legitimate defect is brought to their attention, most judges *do* care). In addition, pointing out material defects in an accusatory instrument makes you look diligent and competent—not "nitpicky." Furthermore, in my experience, when local criminal court accusatory instruments are dismissed for facial insufficiency, the charges are almost never re-filed. Regardless, since the prosecution cannot be ready for trial in the absence of a valid accusatory instrument,[11] re-filing may be an exercise in futility if the prosecution's CPL 30.30 time has expired.

An additional benefit of closely scrutinizing the accusatory instruments (and all other paperwork filled out by the police) is that you will almost always find inconsistencies that can be used to impeach the police officer(s) on cross-examination.

Take Advantage of Procedural "Glitches"

There are two notable procedural "glitches" that can result in the dismissal of local criminal court accusatory instruments. First, where your client is issued a Uniform Traffic Ticket (UTT) or an appearance ticket and appears on the return date thereof only to find that the court is not in session, (a) jurisdiction over your client is not acquired, (b) there can be no proper adjournment, and thus (c) the charge should be dismissed (albeit without prejudice).[12] In this regard, if the court is not in session on the return date of an appearance ticket, your client cannot be arraigned. As a result, the court can neither exercise control over your client's person with respect to the accusatory instru-

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ment, nor set the course of further proceedings in the action.[13]

Second, CPL 150.50(1) requires that "[a] police officer or other public servant who has issued and served an appearance ticket must, at or before the time such appearance ticket is returnable, file or cause to be filed with the local criminal court in which it is returnable a local criminal court accusatory instrument charging the person named in such appearance ticket with the offense specified therein." Where the prosecution fails to comply with CPL 150.50(1), and the accusatory instrument is not filed prior to the return date of the UTT/appearance ticket, many local criminal courts will dismiss the charges (albeit without prejudice).

The rationale is similar to that used where the court is not in session on the return date of a UTT/appearance ticket (*i.e.*, in the absence of a timely filed accusatory instrument, the appearance ticket is rendered a nullity, and the court can neither (a) arraign your client (which is required for the court to acquire *in personam* jurisdiction over him or her), nor (b) grant an adjournment or compel your client's future appearance in court.[14]

File a Demand to Produce

A Demand to Produce (DTP) must generally be filed within 30 days of arraignment.[15] If it appears that your client's case will not be resolved during that time period, a DTP should be filed in order to preserve your client's discovery rights. In this regard, a DTP is typically boilerplate in nature. Thus, once you have drafted a DTP that you are satisfied with, it only takes a couple of minutes to protect each new client's discovery rights.

In theory, your DTP can be as simple as a letter to the ADA requesting the disclosure of all property discoverable pursuant to CPL Article 240. A slightly more detailed DTP would request the disclosure of all property discoverable pursuant to CPL 240.20(1)(a)–(k), and would quote the statutory language.

While such a DTP might be considered competent, it would not adequately protect your client's rights. The reasons for this are twofold. First, an ADA might not be aware that a particular item exists, and/or that it is discoverable, without being placed on specific notice that the item is sought. For example, a general request, pursuant to CPL 240.20(1)(d), for "any photograph or drawing relating to the criminal action," is likely to trigger the response "None known to exist." By contrast, a specific request for a copy of the defendant's arrest photograph (*i.e.*, mug shot)—which request cites *People v Shcherenkov*,[16] will almost certainly lead to disclosure thereof.

Second, where the prosecution fails to disclose exculpatory material, the Court of Appeals has established a significantly lower standard for reversal on appeal where the undisclosed material was sought by the defendant in a specific, as opposed to a general, discovery request.[17] Accordingly, your DTP should be as specific as possible.

Your DTP should also request that the prosecution preserve all *Rosario*[18] and discoverable material. It is well settled that in addition to the duty to *produce Rosario* and discoverable material, the prosecution has an affirmative duty to *preserve* such material as well.[19] Nonetheless, police agencies often engage in the so-called "routine destruction" of *Rosario* material—particularly 911 and other police tape recordings. Although such a practice would seem to be inexcusable and unacceptable, the courts have been forced to "excuse" such behavior, largely due to the sheer prevalence of the problem.

However, where *Rosario* or discoverable material is destroyed despite a timely and specific request by the defense that it be preserved, the degree of prosecutorial fault is significantly greater—and it is generally an abuse of discretion for the court to fail to impose a sanction therefor on the prosecution.[20]

Accordingly, your DTP should expressly request that the prosecution take appropriate action, make appropriate requests and inquiries, etc. to ascertain the location of, and to ensure the preservation of, any *Rosario* material and other discoverable material. In addition, the DTP should list, in as much detail as possible, specific documents, notes, tape recordings, etc. that you believe may exist.[21]

Finally, your DTP should request that discovery pursuant to CPL 240.43 and 240.44 be disclosed to the defendant at the appropriate times. Discovery pursuant to CPL 240.43 and 240.44 is only available to the defendant upon request. Absent a timely request therefor, you will be found to have waived your client's right to such discovery.

However, if such request is included in your DTP, you will have preserved the issue early on in the case — and will be protected in the event that you subsequently forget to reiterate the request orally. In addition, a written request for such information in a DTP is likely to be more specific, and will provide the prosecution with more time to locate the requested information.

Request Copies of the Accusatory Instruments

CPL 170.10(2) provides that, at arraignment on a local criminal court accusatory instrument, the court "must furnish [the defendant] with a copy of the accusatory instrument." In this regard, it is noteworthy that a UTT is not the same thing as, and is not identical to, a simplified traffic information:

> [T]he accusatory instrument is prepared at the same time as the ticket by filling out different parts of a carbonized multi-part form. One part is served upon the person summoned to appear (*e.g.*, the operator of the vehicle) and another part will be filed with a local criminal court. The part

served upon the motorist is an appearance ticket and the part filed with the court is an accusatory instrument; to wit, a simplified information (see CPL § 100.25 and Practice Commentary thereon).[22]

Request a Copy of Your Client's Rap Sheet

CPL Article 160 provides that, upon the taking of a defendant's fingerprints:

(a) The police must forward 2 copies thereof to the Division of Criminal Justice Services (DCJS);

(b) DCJS must thereafter search its records for information concerning the defendant's prior record, if any, and transmit a report thereof (*i.e.*, a "rap sheet") to the forwarding police officer or agency;

(c) The recipient police officer or agency must thereafter transmit the defendant's rap sheet to both the district attorney and the court; and

(d) The court must thereafter furnish a copy of the defendant's rap sheet to defense counsel.[23]

Most local criminal courts are unaware of this requirement, and/or will not automatically provide you with a copy of your client's rap sheet absent a formal request therefor.

Request a Copy of the Court's File

"[T]he court files are public records accessible to the defense."[24] In addition, to the extent that the court's file contains documents such as arrest or incident reports—or other documents or information commonly provided to local criminal courts by the police or the prosecution—such documents/information constitute *ex parte* communications (which must be disclosed to all parties to the action).[25]

View Any Videotape Pertinent to the Case

If there is a videotape pertinent to the case, you should probably view it prior to accepting any plea bargain offer (unless either (a) you are certain that, regardless of what transpired on the tape, the prosecution's offer will not improve, or (b) you have reason to believe that if the prosecution viewed the tape its offer might get worse). In this regard, aside from the fact that the videotape might prove exculpatory, there are sometimes problems with the video and/or the audio portion of the tape that may be to your client's advantage.

Attach Copies of Important Cases to Your Motion Papers

Most local criminal courts do not have law libraries. As a result, case citations in your motion papers cannot be readily verified by the judge. The judge is thus left to speculate as to whether the cases that you cite actually support the propositions for which you have cited them. This problem is compounded by the fact that the ADA has cited cases—some of which are likely to be the exact same cases that you have cited—which he or she claims stand for precisely the opposite positions. In such a situation, the judge must literally guess which of you is right.

On the other hand, if you attach copies of the important cases to your motion papers, the judge can easily see that yours are the meritorious positions—and will rule accordingly.

Hearings, Hearings, Hearings

As a general rule, the only thing better than one hearing in a local criminal court case is more than one hearing. Hearings provide the best opportunity for you to both (a) obtain information helpful to your client's case, and (b) expose weaknesses in the prosecution's case. In addition, the prosecution and the police generally do not prepare thoroughly for the hearing—which gives you a golden opportunity to "lock in" weak testimony that can critically damage the prosecution's case, and/or be used to your advantage during cross-examination at trial. In this regard, unless the hearing is adequately tape recorded, it is imperative that a stenographer be present (as most local criminal courts are not "courts of record").

Two of the most under-utilized hearings available to defense counsel in local criminal court cases are preliminary hearings (in felony cases), and *Dunaway* (*i.e.*, probable cause) hearings.[26] All too often, defense attorneys waive their clients' right to a preliminary hearing without obtaining any meaningful benefit in return, and/or when there is little or no chance that the client will be able to make bail. In so doing, you may be waiving your client's single best opportunity for meaningful discovery in the case:

> In a very real sense, as scholars and practitioners agree, since the prosecutor must present proof of every element of the crime claimed to have been committed, no matter how skeletally, the preliminary hearing conceptually and pragmatically may serve as a virtual minitrial of the prima facie case. In its presentation, the identity of witnesses, to greater or lesser degree, testimonial details and exhibits, perforce will be disclosed. Especially because discovery and deposition, by and large, are not available in criminal cases, this may not only be an unexampled, but a vital opportunity to obtain the equivalent. It has even been suggested that "in practice [it] may provide the defense with the most valuable discovery technique available to him."
>
> Since the hearing provides an occasion for appraising witnesses and others who are likely to participate in the ultimate trial, at least as often as not attentive and sensitive counsel gain knowledge and insight that will be of invaluable assistance in the preparation and presentation of the

client's defense. Moreover, judicious exercise may be made of the power of subpoena, which, in the discretion of the court, is available at a preliminary hearing. Its use to call to the stand witnesses whom the People have not elected to summon may present the only way in which a recalcitrant though material witness can be interrogated. This may turn out to be a fortunate perpetuation of critical testimony of witnesses who later may not be available for trial. Most important, early resort to that time-tested tool for testing truth, cross-examination, in the end may make the difference between conviction and exoneration.[27]

In non-felony cases, probable cause (PC) hearings are grossly under-utilized. In this regard, never assume that probable cause existed for your client's arrest. You will be amazed at how often a case that looks "open-and-shut" on paper completely falls apart when live witness testimony is presented (and subjected to cross-examination). The prosecution understands how critical a PC hearing is to your case—which is why it will often expend far more time and effort opposing a request for a PC hearing than it would take to simply have the hearing.

Where your omnibus motion requests both a *Huntley* hearing and a PC hearing, but only the *Huntley* hearing is granted,[28] the scope of the hearing nonetheless encompasses the issue of probable cause. In this regard, the Court of Appeals has made clear that:

> Clearly, statements obtained by exploitation of unlawful police conduct or detention must be suppressed, for their use in evidence under such circumstance violates the Fourth Amendment (*Dunaway v. New York*, ___ U.S. ___, 99 S. Ct. 2248, 60 L.Ed.2d 824). It is therefore "incumbent upon the suppression court to permit an inquiry into the propriety of the police conduct." *Unless the People establish that the police had probable cause to arrest or detain a suspect, and unless the defendant is accorded an opportunity to delve fully into the circumstances attendant upon his arrest or detention, his motion to suppress should be granted.*[29]

In *Misuis*, the Court of Appeals reversed the Appellate Division, vacated the defendant's guilty plea, and remitted the case for a PC hearing where:

> At the hearing on defendant's motion to suppress [various] admissions, his counsel repeatedly attempted to interrogate the two officers in an effort to discover whether the police had probable cause to make the arrest. His avowed intention was to show that the detention was unlawful and thus any statements made as a result of the claimed unlawful arrest and detention tainted any admissions. However, at the insistent urging of the prosecutor the court refused to permit that inquiry and permitted only questions concerning the voluntariness of the statements themselves.[30]

Two other under-appreciated hearings in local criminal court cases are so-called *Scott*[31] (*i.e.*, checkpoint) hearings, and *Mapp*[32] hearings addressing the validity of an inventory search. The law pertaining to the administration of both checkpoints and inventory searches is strikingly similar. In a nutshell, in both situations the police are required to follow particularized guidelines with "listed criteria," which afford little discretion to officers in the field.[33]

Never assume either (a) that a checkpoint and/or an inventory search complied with these requirements, or (b) that the prosecution will satisfy its burden of presenting sufficient evidence at a pre-trial hearing that such requirements were satisfied. Simply stated, a tremendous opportunity exists in checkpoint cases to get *all* of the evidence against your client suppressed as the fruit of an invalid stop—yet the issue of the validity of checkpoint stops appears to be rarely litigated.

Another critical opportunity provided by pre-trial hearings is your client's right to *Rosario* material at such hearings.[34] Since pre-trial discovery pursuant to CPL 240.44 is only available upon request, however, failure to make such a request will result in a waiver of this valuable right.

Confirm That Your Client's Records Were Sealed

When criminal charges against a defendant are terminated in his or her favor by either dismissal or a reduction to a non-criminal offense (other than DWAI in violation of Vehicle and Traffic Law 1192(1), or loitering in violation of Penal Law 240.35(3) or 240.37(2)),[35] CPL 160.50 and 160.55 generally require that various records pertaining to the case be sealed, and that the defendant's fingerprints and mug shot be returned or destroyed. In this regard, unless the court reports to DCJS that the records in an eligible case should *not* be sealed, DCJS should automatically seal the appropriate records.[36]

Critically, when this is done properly, the record of the defendant's arrest will no longer appear on his or her rap sheet. Nonetheless, I routinely receive copies of my clients' rap sheets that reflect charges that should have been sealed, but weren't. There are a number of reasons why this can happen. Courts sometimes fail to properly report case dispositions to DCJS; DCJS sometimes does not receive a properly reported case disposition; DCJS sometimes does not properly process the disposition; etc. In addition, court clerks sometimes improperly "code" the paperwork sent to DCJS in a manner which indicates that the judge expressly directed that the defendant's records *not* be sealed (which local criminal court judges rarely do).

Regardless of how the error was made, the result is the same—if your client is re-arrested and fingerprinted, the court and the ADA will become aware of a prior charge or charges that they probably would not have oth-

erwise been aware of. You can't "unring the bell"—and your plea bargaining position may be irreparably damaged.

Accordingly, it is critical that when you resolve a case for a client in a manner in which the charges are sealable, you confirm that the charges were actually properly sealed. This can generally be done with a simple form letter to DCJS containing the name of the court, your client's name and date of birth, the date of the arrest, and a description of the criminal charges for which your client was arrested. Enclose a self-addressed, stamped envelope. If DCJS responds that the charges were *not* sealed, you may be required to obtain a formal Sealing Order from the court.

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 clients in local criminal courts. ⚖

Endnotes

[1] *See eg*, UJCA 2001(2) ("Unless otherwise specifically prescribed, the practice and procedure in the court shall be governed by the criminal procedure law"); VTL 155 (in most local criminal courts, traffic infractions "shall be deemed misdemeanors and all provisions of law relating to misdemeanors except as provided in [VTL 1805] and except as herein otherwise expressly provided shall apply except that no jury trial shall be allowed for traffic infractions"). *See gen, Berkemer v McCarty*, 468 US 420, 434, 104 SCt 3138, 3147 (1984) ("We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested*") (emphasis added) (footnote omitted).

[2] *People v Harper*, 37 NY2d 96, 99, 371 NYS2d 467, 469 (1975). *See also People v Alejandro*, 70 NY2d 133, 135, 517 NYS2d 927, 928 (1987); *People v Hall*, 48 NY2d 927, 927, 425 NYS2d 56, 57 (1979); *People v Case*, 42 NY2d 98, 99, 396 NYS2d 841, 842 (1977).

[3] It is important to note that certain defects in local criminal court accusatory instruments can be waived if you do not file a timely and proper motion to dismiss. *See eg, People v Casey*, 95 NY2d 354, 717 NYS2d 88 (2000); *People v Dean*, 74 NY2d 643, 542 NYS2d 512 (1989); *People v Key*, 45 NY2d 111, 408 NYS2d 16 (1978).

[4] *See, eg, People v Alejandro*, 70 NY2d 133, 517 NYS2d 927 (1987); *People v McNamara*, 78 NY2d 626, 578 NYS2d 476 (1991); *People v Tarka*, 75 NY2d 996, 557 NYS2d 266 (1990); *People v Dumas*, 68 NY2d 729, 506 NYS2d 319 (1986); *Matter of Jahron S.*, 79 NY2d 632, 584 NYS2d 748 (1992); *Matter of Rodney J.*, 83 NY2d 503, 611 NYS2d 485 (1994); *People v Hall*, 48 NY2d 927, 425 NYS2d 56 (1979); *People v Case*, 42 NY2d 98, 396 NYS2d 841 (1977); *People v Key*, 45 NY2d 111, 408 NYS2d 16 (1978).

[5] *See eg, People v Kohut*, 30 NY2d 183, 331 NYS2d 416 (1972); *People v Hogabone*, 278 AD2d 525, 716 NYS2d 836 (3d Dept 2000); *People v Bingham*, 263 AD2d 611, 692 NYS2d 823 (3d Dept 1999); *People v Krathaus*, 181 Misc2d 378, 693 NYS2d 872 (Cattaraugus Co Ct 1999); *People v Deming*, 80 Misc2d 53, 362 NYS2d 804 (Albany Co Ct 1974); *People v Dailey*, 69 Misc2d 691, 330 NYS2d 899 (Saratoga Co Ct 1972); *People v Bailey*, 60 Misc2d 283, 302 NYS2d 874 (Fulton Co Ct 1969).

[6] *See eg, People v Casey*, 95 NY2d 354, 717 NYS2d 88 (2000); *People v Nuccio*, 78 NY2d 102, 571 NYS2d 693 (1991); *People v Alejandro*, 70 NY2d 133, 517 NYS2d 927 (1987); *Matter of Jahron S.*, 79 NY2d 632, 584 NYS2d 748 (1992); *Matter of Rodney J.*, 83 NY2d 503, 611 NYS2d 485 (1994).

[7] *See eg, People v Keizer*, 100 NY2d 114, 760 NYS2d 720 (2003); *People v Casey*, 95 NY2d 354, 717 NYS2d 88 (2000); *People v Alejandro*, 70 NY2d 133, 517 NYS2d 927 (1987); *People v Weinberg*, 34 NY2d 429, 358 NYS2d 357 (1974).

[8] *See eg, Matter of Shirley v Schulman*, 78 NY2d 915, 573 NYS2d 456 (1991); *People v Gabbay*, 175 Misc2d 421, 670 NYS2d 962 (Sup Ct App T 2d Dept 1997).

[9] *See eg, People v Kaminiski*, 143 Misc2d 1089, 542 NYS2d 923 (NYC Crim Ct 1989); *People v Pappas*, 163 Misc2d 1029, 623 NYS2d 83 (NYC Crim Ct 1994); *People v Mauro*, 147 Misc2d 381, 555 NYS2d 533 (NYC Crim Ct 1990); *People v Alvarez*, 141 Misc2d 686, 534 NYS2d 90 (NYC Crim Ct 1988). *Cf People v Heller*, 180 Misc2d 160, 689 NYS2d 327 (NYC Crim Ct 1998); *People v McKinney*, 145 Misc2d 460, 546 NYS2d 927 (NYC Crim Ct 1989).

[10] *See eg, People v Baron*, 107 Misc2d 59, 438 NYS2d 425 (App Term, 9th & 10th Jud Dist 1980).

[11] *See eg, People v Wilson*, 86 NY2d 753, 754-55, 631 NYS2d 127, 127 (1995); *People v Cortes*, 80 NY2d 201, 211, 590 NYS2d 9, 15 (1992); *People v Colon*, 110 Misc2d 917, 920-921, 443 NYS2d 305, 307 (NYC Crim Ct 1981) ("it is obvious that the People cannot be ready for trial within 90 days or 60 days of commencement of the actions if they have not converted the complaints to jurisdictionally sufficient informations within those periods"), *revd*, 112 Misc2d 790, 450 NYS2d 136 (App Term, 1st Dept 1982), *revd for the reasons stated in the opinion of Judge Atlas at Crim Ct*, 59 NY2d 921, 466 NYS2d 319 (1983); *People v Caussade*, 162 AD2d 4, 8, 560 NYS2d 648, 650 (2d Dept 1990) ("present readiness for trial is established when the People [*inter alia*] have a valid accusatory instrument upon which the defendant may be brought to trial").

[12] *See Matter of Shapiro v MacAffer*, 99 Misc2d 694, 416 NYS2d 955 (Albany Co Sup Ct 1979); *Matter of Abbott v Rose*, 40 Misc2d 64, 242 NYS2d 773 (Monroe Co Sup Ct 1963).

[13] *See* CPL 1.20(9). *See also People v Mitchell*, 235 AD2d 834, 835-836, 652 NYS2d 827, 828 (3d Dept 1997) ("Absent arraignment, County Court never acquired the requisite control of defendant's person with respect to the accusatory instrument . . . , and was therefore precluded from 'setting the course of further proceedings in the action' (CPL 1.20[9])").

[14] *See eg, People v Consolidated Edison Co*, 161 Misc2d 9007, 615 NYS2d 978 (NYC Crim Ct 1994); *People v Consolidated Edison Co*, 159 Misc2d 354, 604 NYS2d 482 (NYC Crim Ct 1993).

[15] CPL 240.80(1).

[16] 21 AD3d 651, 799 NYS2d 663 (3d Dept 2005), as well as *People v Dudley*, 268 AD2d 442, 703 NYS2d 489 (2d Dept 2000), *People v Halikias*, 106 AD2d 811, 484 NYS2d 182 (3d Dept 1984), and *People v Cobb*, 104 AD2d 656, 480 NYS2d 33 (2d Dept 1984).

[17] *See People v Vilardi*, 76 NY2d 67, 556 NYS2d 518 (1990).

[18] *See People v Rosario*, 9 NY2d 286, 213 NYS2d 448 (1961). *See also*

People v Malinsky, 15 NY2d 86, 262 NYS2d 65 (1965).

[19] *See eg*, *People v Joseph*, 86 NY2d 565, 570-71, 635 NYS2d 123, 126 (1995); *People v Wallace*, 76 NY2d 953, 955, 563 NYS2d 722, 723 (1990); *People v Martinez*, 71 NY2d 937, 940, 528 NYS2d 813, 815 (1988); *People v Kelly*, 62 NY2d 516, 520, 478 NYS2d 834, 836 (1984).

[20] *See eg*, *People v Wallace*, 76 NY2d 953, 563 NYS2d 722 (1990); *People v Martinez*, 71 NY2d 937, 528 NYS2d 813 (1988); *People v Jackson*, 271 AD2d 455, 707 NYS2d 128 (2d Dept 2000); *People v Burch*, 247 AD2d 546, 669 NYS2d 299 (2d Dept 1998); *People v Huynh*, 232 AD2d 655, 649 NYS2d 160 (2d Dept 1996); *People v Parker*, 157 AD2d 519, 549 NYS2d 710 (1st Dept 1990); *People v Nesbitt*, 230 AD2d 755, 646 NYS2d 522 (2d Dept 1996).

[21] *See gen People v Vilardi*, 76 NY2d 67, 74, 556 NYS2d 518, 521 (1990) ("This court has . . . found the prosecution's failure to turn over specifically requested evidence to be 'seldom, if ever, excusable' and to verge on prosecutorial misconduct").

[22] Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 150.10, at 564.

[23] *See* CPL 160.10, 160.20, 160.30 & 160.40. *See also Matter of Legal Aid Soc'y of Suffolk County v Mallon*, 47 AD2d 646, 364 NYS2d 17 (2d Dept 1975); *People v Morrison*, 148 Misc2d 61, 559 NYS2d 1013 (NYC Crim Ct 1990).

[24] *People v Zavulunov*, 165 Misc2d 205, 208, 629 NYS2d 934, 937 (NYC Crim Ct 1995). *See also People v Covington*, 191 AD2d 285, 595 NYS2d 32 (1st Dept 1993); *People v Bonet*, 176 AD2d 641, 575 NYS2d 294 (1st Dept 1991); *People v O'Brien*, 193 Misc2d 500, 750 NYS2d 737 (Richmond Co Sup Ct 2002).

[25] *See* Code of Judicial Conduct Canon 3(B)(6) (22 NYCRR 100.3(B)(6)). *See also* Code of Professional Responsibility DR 7-110(b)(2) (22 NYCRR 1200.41(b)(2)).

[26] *See Dunaway v New York*, 442 US 200, 99 SCt 2248 (1979).

[27] *People v Hodge*, 53 NY2d 313, 318-19, 441 NYS2d 231, 234 (1981) (citations and quotation omitted).

[28] 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." *People v Weaver*, 49 NY2d 1012, 1013, 429 NYS2d 399, 399 (1980).

[29] *People v Misuis*, 47 NY2d 979, 981, 419 NYS2d 961, 962-63 (1979) (emphasis added) (quoting *People v Wise*, 46 NY2d 321, 329, 413 NYS2d 334, 339 (1978)) (footnote omitted). *See also People v Sanchez*, 236 AD2d 243, 653 NYS2d 563 (1st Dept 1997); *People v Chaney*, 253 AD2d 562, 686 NYS2d 871 (3d Dept 1998).

[30] 47 NY2d at 980, 419 NYS2d at 962. *See also People v Whitaker*, 79 AD2d 668, ___, 433 NYS2d 849, 850 (2d Dept 1980) ("It is well-settled that on a motion to suppress a defendant's postarrest statements, the suppression court is required to permit the defendant to 'delve fully into the circumstances attendant upon his arrest'") (quoting *Misuis*); *People v Roberts*, 81 AD2d 674, 441 NYS2d 408 (2d Dept 1981); *People v King*, 79 AD2d 1033, 437 NYS2d 931 (2d Dept 1981); *People v Specks*, 77 AD2d 669, 430 NYS2d 157 (2d Dept 1980). *See gen People v Gonzalez*, 71 AD2d 775, ___, 419 NYS2d 322, 323-24 (3d Dept 1979).

[31] *See People v Scott*, 63 NY2d 518, 483 NYS2d 649 (1984).

[32] *See Mapp v Ohio*, 367 US 643, 81 SCt 1684 (1961).

[33] *See eg*, *People v Johnson*, 1 NY3d 252, 771 NYS2d 64 (2003); *People v Robinson*, 97 NY2d 341, 741 NYS2d 147 (2001); *Matter of Muhammad F.*, 94 NY2d 136, 700 NYS2d 77 (1999); *People v Galak*, 80 NY2d 715, 594 NYS2d 689 (1993); *People v Scott*, 63 NY2d 518, 483 NYS2d 649 (1984). *See also City of Indianapolis v Edmond*, 531 US 32, 121 SCt 447 (2000); *People v Jackson*, 99 NY2d 125, 752 NYS2d 271 (2002).

[34] *See eg*, CPL 240.44; *People v Feerick*, 93 NY2d 433, 692 NYS2d 638 (1999); *People v Banch*, 80 NY2d 610, 593 NYS2d 491 (1992); *People v Malinsky*, 15 NY2d 86, 262 NYS2d 65 (1965).

[35] *See* CPL 160.55(1).

[36] *See* CPL 160.50(2); 160.55(2).

ERROR in *JLM!*

If you Use or Refer Others to

A Jailhouse Lawyer's Manual,

Chapter 23

PLEASE NOTE:

The initial version of **Vol. I of the 6th Edition of the JLM incorrectly** said prisoners could avoid post-release supervision by serving their full prison sentence.

> ***Everyone** serving a determinate sentence for a crime committed on or after Sept. 1, 1998 **must** complete post-release supervision.*

If your copy of Vol. I has more than 2 paragraphs under subhead 4 on page 634, ignore the 3rd and 4th paragraphs.

The version now appearing on the Columbia Human Rights Law Review website www.columbia.edu/ cu/ hrlr/JLMOnline.html has been corrected.

Conferences & Seminars *(continued from page 6)*

Sponsor:	New York State Association of Criminal Defense Lawyers
Theme:	Criminal Law Update
Date:	September 9, 2006
Place:	Ithaca, NY
Contact:	NYSACDL: tel (212)532-4434; fax (212)532-4468; website www.nysacdl.org
Sponsor:	National Child Abuse Defense and Resource Center
Theme:	Child Abuse Allegations: Science vs. Junk Science in the Courtroom
Dates:	September 28-30, 2006
Place:	Las Vegas, NV
Contact:	tel (419)865-0513; fax (419)865-0526; website www.falseallegation.org ⚖

From My Vantage Point

On Sex Offender Hysteria

by Jonathan E. Gradess*

Politics, Not Policy-Making, is Driving Civil Commitment

In the last year the Legislature passed a bill that forbids certain sex offenders from being present within 1000 feet of a school. The effect of this bill is to make thousands of men pariahs in their own communities. It will force them into the gray outskirts of metropolitan areas where, further marginalized, they will be forced underground, unable to travel freely. Then, but a few months ago, yielding to the political attractiveness of the idea, the Legislature made all level 2 and 3 sex offenders register for life on the Sex Offender Registry. We can tell the politicians are polling on this issue because they are not looking for strategies that make sense or are effective and reformative. Sex offenders are the new lepers; the Legislature is dithering over civil commitment in the same way Hawaii dithered over making Molokai a prison for lepers 150 years ago.

Sexual abuse treatment providers, advocates opposing sexual assault, mental health providers, the families of the mentally ill, families of sex offenders, and the legal and civil liberties communities all believe civil commitment of dangerous sex offenders is a misguided policy. Why then have both houses of the State Legislature passed competing draconian civil commitment bills? Answer: November 7, 2006—Election Day. It is election-year *polling* on the electoral problem of sex offenders, not *policy making* about the problem of sex offenders, driving this ill-founded idea in Albany.

Civil Commitment Erodes Rather Than Promotes Safety

Sexual abuse treatment professionals believe that the best way to treat sex offenders is to prevent their behavior, closely monitor them in the community, and provide meaningful, ongoing treatment. Up against this common sense proposition are the politicians. They like to say sex offenders have high recidivism rates, can't be treated, and must be locked up to protect the public. The truth is the majority of sex offenses involve people who know or are related to each other and the offenders are never even arrested. Many sex offenses occur between family members; in such cases the threat of civil commitment may actually run the risk of causing victims not to report crimes for fear of the lifetime civil commitment of those family members.

Proposals Based on Myths, Overreaching, and Fiscal Irresponsibility

It is a myth that sex offenders cannot be rehabilitated. Sex offenders represent a wide range of behaviors, many of which are successfully treated. Contrary to popular mythology, the re-offense rates for sex offenders are substantially lower than the rates for many other offenders, lower than that of persons convicted of robbery, burglary, car theft, and weapons offenses, and among the lowest recidivism rates of criminal offenders generally. Success has been demonstrated with intensive community treatment in those states that have a multidisciplinary, aggressive system of monitoring, supervision and treatment.

BREAKING NEWS

As this edition of the *REPORT* was going to press, the Appellate Division, 1st Department upheld the Governor's authority to use existing provisions of the Mental Hygiene Law to civilly commit sex offenders scheduled to be released from prison. In *People ex rel Harkavy v Consilvio* (3/30/06), the Court held such inmates can be civilly committed on the certification of two physicians employed by the Department of Correctional Services, and the concurrence of a third employed by the Department of Health. This decision, while certainly not the final word in this legal controversy, eliminates any need for the Legislature to pass specialized sex offender civil commitment legislation this session. It offers lawmakers breathing room to now study the issue. Hopefully, they will reject the wasteful and unproven strategy of civil commitment, and embrace more comprehensive and cost-effective initiatives to reduce sexual assault crime.

The majority of American states—68 percent—do not have civil commitment laws. Yet touting the "national move toward these laws" (i.e., a minority of 16 states, 2 of which are retreating from the idea already), New York's Governor and Legislature have proposed the broadest and most expensive civil commitment law in the country. The Assembly and Senate bills are both so broad they encompass statutory rape, youthful sexual experimentation, and behaviors that are not likely to be repeated. Unless these bills are more carefully limited, they potentially threaten the lifetime incarceration of thousands of people.

The incarceration of sex offenders in a specialized facility, where treatment, according to the Governor, will cost $200,000 per year per offender, is a waste of money. People who have sexually offended should be monitored and treated along a continuum of care that includes treatment in the community, treatment in prison, and

(continued on page 39)

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Book Review

Public Defenders: Pragmatic and Political Motivations to Represent the Indigent

By Michael Scott Weiss

New York: LFB Scholarly Publishing, 2005;
304 pages. ISBN 1-59332-068-X. $70.00.

By Wendy Pogorzelski*

Introduction

Michael Scott Weiss's study sets out to understand what motivates public defenders to represent the indigent. His research uses interviews to capture the perspectives of 48 public defenders in three defender offices (one in a "small town," with part-time defenders; one each in a "mid-sized city" and a "large city," both with full-time defenders). Previous social science and legal literature has addressed public defender motivations tangentially but not as a topic in its own right. Weiss, a J.D. and Ph.D. in criminal justice, sets out to systematically study what motivates public defenders to do their work. The guiding question he posed to those interviewed was: If someone must be a public defender, why must that someone be you?

A logical place to begin such a study is with a definition of motivation—an elusive concept as Weiss acknowledges. The problem with attempts to study or measure individual motivation is that people are often inconsistent in how their personalities, attitudes, and beliefs directly affect their behavior. But researchers are a notoriously stubborn bunch so we keep at it—and there is much work to be done. What follows is a review of Weiss's contribution to this effort.

Defender Motivation Framed Within the Context of Motivations for Criminal Behavior

While there is a voluminous literature on motivations and work generally and on motivations of cause lawyers and public sector employees specifically (see Katzell & Thompson, 1990; Perry & Wise, 1990; Sarat & Scheingold, 1998; Wright, 2001), Weiss frames motivation in the context of what motivates people to engage in criminal behavior. The choice of linking public defenders to criminal behavior in the introduction of the key research concept is puzzling. Weiss attempts to bridge this disconnect via analogy. Criminologists study the causes of crime at the individual level but have been haunted by a fundamental cause: motivation. Weiss posits that perhaps the challenge of studying the policies and practices of the criminal justice system could be ameliorated by conducting research on the practitioner level rather than the institutional level, hence his study of public defender motivations. But Weiss does not elucidate how motivation is conceptualized and the argument is so abbreviated that the reader is left asking what one (motivations for engaging in criminal behavior) has to do with the other (motivations for being a public defender).

Weiss discusses public defender motivations across two categories: pragmatic and political motivations. Pragmatic motivations are "personally rewarding" to defenders, are "inward looking" and include opportunities for trial work, variety in the kind of cases handled, autonomy in how cases are handled, camaraderie, and an appreciation of the down time for family and personal activities not usually afforded those trying to make partner or maintain a private practice (Weiss terms this benefit lifestyle) (p. 8). Political motivations are "distinctively ideological," encompass "cynical perspectives about the social structure in general and the criminal justice system in particular" (p. 8) and include: legal and constitutional motivations; altruistic motivations such as helping people, giving back to society, and direct interaction with people in need; and finally, critical motivations.

"Critical" Motivations are the Focus

Critical motivations comprise the bulk of the book (chapters 8–11). The first critical motivation defined by Weiss is the anti-establishment motivation. Defenders are described as possessing a

> . . . generalized rebelliousness against the status quo. It is quite unrelated to any explicit or carefully formulated belief about social injustice and can be most accurately conceived of as a broad dissent against what is accepted by mainstream society as decent, moral, proper or upright. . . . These defenders, in fact, *enjoy* challenging the "Establishment," *take pleasure* in violating what is sacrosanct, and *relish* their role as what Babcock [1984:314] calls "lawyer-outlaws" (p. 146, italics in original).

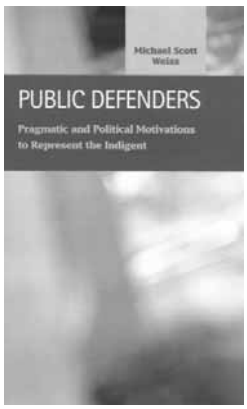
The other critical motivations are defined as "anti-police" "anti-prosecutor," "anti-judge" and "anti-corrections" motivations. In this section Weiss includes quips like "I hate prosecutors!" and "I don't like police officers" from several defenders. There is no indication that these defenders express such direct opinions of the judiciary, but many, we are told, have a "less than enthusiastic perception" of judges (p. 264). The impression that public defenders are obsessively negative, lump all police officers and prosecutors together, and think judges are inequitable is easy to form given the tone and structure of the book.

This notion falls apart, however, upon examining these defenders' numerous explanations of why they are so skeptical (Weiss uses the term cynical). Explanations include police officers embellishing cases, prosecutors

*__Wendy Pogorzelski, Ph.D.,__ *is a post-doctoral fellow at the Center for Mental Health Services & Criminal Justice Research, Rutgers University.*

overcharging, and politically ambitious judges being more concerned with appearing tough on crime than with being fair. The anti-corrections motivation rests squarely on the ineffectiveness of incarceration as a response to criminal behavior. All of the public defenders interviewed are resolute in their doubt that "anyone sent to jail or prison will undergo any sort of positive personal transformation" (p. 267).

The public defenders Weiss interviewed certainly hold strong and critical sentiments toward those who deliberately engage in the miscarriage of justice. They also readily acknowledge that the problem lies with some and not all police officers, prosecutors, and judges. These defenders express an understanding that everyone working in the criminal justice system has a challenging job and that each part of the system has its function—without which justice would be deficient. The discussion of public defenders having anti-establishment, anti-prosecutor, anti-police, anti-judge, and anti-corrections motivations (chapters 8–11) is important in as much as it reflects these public defenders' reality in the justice system, though such findings are not unfamiliar. There is, however, a great deal of depth and texture in the findings that the analysis fails to explore.



"Justice and Fairness" Motivations, Complexity, Lost in Polemic

"Justice and fairness" motivations may be a more apt description than "critical" motivations. Here the general consensus of the public defenders interviewed can be summarized as follows: public defenders understand the professional obligations and responsibilities of prosecutors, the police, and judges, and the role of corrections. Further, they certainly understand that individuals cannot harm others without consequence. Most if not all readily acknowledge they would rather live in a world with law and order than without. However, they believe that the process of implementing law and order and subsequently responding to violations must be done fairly, uniformly, and according to the rule of law. What motivates these public defenders then is the affront felt when this does not occur—and most would agree such injustices are systemic. What comes through in these interviews is a commitment to justice, due process, and utilizing legal skills on behalf of the socially disadvantaged.

The defenders interviewed offer a complex view of their work, the criminal justice system, and its various components. Conventional wisdom, stereotypes, and previous social science research hold that public defenders are either rebel outlaws or double agents. In other words, they are either fighting to bring down The Man or working for him. This dichotomous perception has its roots in political rhetoric and has been sustained by the shift toward a punitive response to deviant and criminal behavior; it seems to have stalled social science research on public defense.

Public defense has not waited for policy makers or researchers to catch up (or catch on) and has developed as a professional public sector institution that is integral to the implementation of justice and the criminal justice system. In the face of this development, continued focus on outdated polemic hinders an investigation of the professionalization of the courts and public defenders.

Further Research Needed

We may learn more by studying public defense/defenders in the context of other kinds of lawyers and professionals who work for social justice than by revisiting the perception of public defenders as renegades against the status quo and via comparison with prosecutors. Future research that seeks to distinguish the subtleties of why one is a public defender rather than a housing, immigration, or civil rights litigator would advance our understanding of both public defenders and cause lawyering. (There is a body of literature resistant to defining criminal defense lawyers as cause lawyers, see Etienne, 2005).

Another important line of inquiry would examine public defenders in the context of public servants. Research on public defenders' job satisfaction, goal commitment, and work context as public sector professionals would advance our understanding of practices and performance in the public sector. Pulling in other disciplinary lenses to examine the work of public defenders would allow us to see the connections between public defenders, lawyers, and public service professionals as well as provide meaningful guidance at the policy level. ⚖

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Court of Appeals Update

Significant Criminal Cases Pending in the New York Court of Appeals, 03/15/2006

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

(Expanded version available on NYSDA website, Courts NY Hot Topic page, www.nysda.org *and Center for Appellate Litigation,* www.appellate-litigation.org.*)*

CASES AWAITING DECISION

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

People v Najib Bosier — Whether the trial court properly denied the defendant's motion to introduce prior grand jury testimony of the complainant to impeach the complainant's subsequent grand jury testimony on ground that the defendant procured the complainant's unavailability as a witness through threats.

People v Mikel Wardlaw — Whether the court's erroneous granting of the defendant's application to go *pro se* at a pretrial suppression hearing absolutely requires the appellate court to remit for a *de novo* suppression hearing, or whether the appellate court can instead simply affirm the judgment if it believes that any error in admitting the evidence at trial would be harmless beyond a reasonable doubt.

People v Baumann & Sons Buses, Inc. — In an anti-noise prosecution, where the defendant was accused of creating unreasonable noise by the idling of bus engines (Islip Town Code §35-3[D]), whether the accusatory instrument was insufficient for failing to allege the public nature of the nuisance. [*Ed. note:* decided 3/26/06.]

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

People v Matthew Smith — (1) Whether the defendant knowingly and voluntarily waived his right to a jury trial. (2) The sufficiency of the evidence.

People v Stephen Pacer — (1) Whether it was a *Crawford* violation to admit an affidavit of a Department of Motor Vehicles employee to prove the revocation of the defendant's license. (2) Whether the court erred in refusing to charge unlicensed operation of a motor vehicle as a lesser included offense of aggravated unlicensed operation in the first degree.

CASES SCHEDULED FOR ARGUMENT

People v Ronald Williams — Whether, after learning of a *Brady* violation, the trial court properly precluded the defendant from introducing evidence that a police detective had given false testimony in an unrelated drug case.

People v Mark Conway — Whether the court improperly allowed the prosecution to put on expert testimony on "police procedures" to evaluate the defendant-officer's actions in pursuing suspect-victim; Appellate Division held testimony was not beyond the ken of the fact-finder and constituted an opinion on the ultimate issue in the case.

People v Thomas Burton — Whether the factual allegations about "standing" in the defendant's moving papers were sufficient to require a hearing under CPL 710.60(1). Specifically, whether the defendant has to admit personal possession to establish standing or whether, instead, he can rely on sworn police allegations.

People v Terence Wells — (1) Whether single count that the defendant attempted to kill unnamed police officer was rendered impermissibly duplicitous by the trial evidence, which suggested two potential victims. (2) The defense unsuccessful motion to strike the newly-seated jury venire after juror attested in open court to the honesty of a police witness acquaintance.

People v Paris Drake — (1) Whether the court's charge on expert identification testimony undermined the value of that testimony. (2) Whether the court erred in refusing to examine the prosecution witness's psychiatric records *in camera* and in limiting cross-examination of that witness. (3) The court's refusal to allow the defense to recall a prosecution witness for impeachment purposes.

People v Rudolph Young — (1) Whether there was independent source for the complainant's in-court identification of the defendant, after the line-up was found to be suggestive. (2) The admissibility of expert testimony on the issue of identification.

People v Mednan Redzeposki — Whether the trial court made a sufficient inquiry into the circumstances of the defendant's absence from the courtroom before proceeding with the verdict rendition. Although trial counsel represented that the defendant had taken ill and gone to the hospital, the court rejected that explanation merely because it had fleetingly seen the defendant in the hallway prior to the verdict.

People v Shawn Kennedy — (1) Whether military offenses can be felonies for the purposes of "other jurisdiction" SORA determinations pursuant to Correction Law 168-a(2)(d). (2) Whether court-martial conviction for "indecent assault" is properly considered a felony rather than a misdemeanor.

People v Rolando Leon — Whether the trial court abused its discretion as a matter of law by refusing to submit to the jury, as a non-inclusory concurrent count of second-degree weapon possession, third-degree weapon possession.

People v Edwin Santana — Whether the inapplicability of the "labor dispute" exception in PL 215.50(3) (criminal contempt) must be pleaded and proved or is, rather, a "proviso" for the defendant to raise as a defense. (2) The sufficiency of the evidence of "physical injury" in an assault prosecution.

People v Jose Diaz — Whether the admission of the nontestifying complainant's statement ("That's them!") as an excited utterance violated *Crawford v Washington*, where the statement was a nontestimonial "visceral response" to the presence of the attackers rather than the product of structured police questioning.

People v Norman Bradley — Whether the non-testifying assault complainant's on-the-scene statement to responding police officers that her boyfriend (the defendant) "threw her through a glass door" was admissible as an "excited utterance" notwithstanding *Crawford v Washington* (541 US 36). The Appellate Division ruled that the statement was not "testimonial," and therefore was admissible, as it was made in response to police "preliminary investigation" (ie, "what happened?") and not "structured interrogation."

CASES WAITING TO BE SCHEDULED

People v Gina Mancini — Sufficiency of evidence of depraved indifference murder (*People* v *Payne*).

People v *Tyrone Atkinson* — Sufficiency of evidence of depraved indifference murder, where the deceased was shot once in the neck. (*People* v *Payne*).

People v Juan Serrano — Whether, during jury selection, CPL 270.15(1), requiring questioning of prospective jurors "in the box," was violated when the court ordered simultaneous questioning of 44 prospective jurors.

People v *Jamal Petty* — Whether, where the defense was justification, (1) the court properly excluded evidence of prior threats made by the complainant against the defendant, and (2) the court properly charged the jury regarding the relevance of the prior threat evidence to the determination of who was the initial aggressor.

People v Michael Nelson — Whether the Drug Law Reform Act, and its amelioration doctrine, apply to the sentencing of a defendant for a drug felony committed before the effective date of the Act, even though the defendant was sentenced after the effective date. The First Department held that they do not, ruling that the Legislature so specified.

People v Corey Smith — Whether the Drug Law Reform Act, and its amelioration doctrine, apply to the sentencing of a defendant for a drug felony committed before the effective date of the Act, even though the defendant was sentenced after the effective date. The First Department held that they do not, ruling that the Legislature so specified.

NEW LEAVE GRANTS

People v Thomas Utsey — Whether the Drug Law Reform Act, and its amelioration doctrine, apply to the sentencing of a defendant before the effective date of the statute, while the case is on direct appeal.

People v Ubaldo Romero — Whether the Appellate Division erroneously applied legal-sufficiency analysis to a weight-of-the-evidence claim in citing *People v Gaimari*, 176 NY 84 (1903), a case superceded by *People v Bleakley*, 69 NY2d 490 (1987).

People v Charlie Vega — Whether the Appellate Division erroneously applied legal-sufficiency analysis to a weight-of-the-evidence claim in citing *People v Gaimari*, 176 NY 84 (1903), a case superceded by *People v Bleakley*, 69 NY2d 490 (1987).

People v Joseph Swinton — Whether the evidence of depravity and recklessness was sufficient in light of the recent *Suarez* decision. The defendant and his co-defendant wife, well-intentioned but misguided, fed their 16-month-old daughter a strict vegetarian diet.

People v Larry Feingold — Sufficiency of evidence of depraved indifference where the defendant attempting suicide caused a gas explosion in an occupied apartment building.

People v Tammi Van Deusen — Whether the sentencing court erred in denying the defendant's plea withdrawal motion. The defendant had been promised a determinate sentence of not less than 5 years nor more than 15 years if she pleaded guilty; the plea court did not advise the defendant of post-release supervision. The court sentenced the defendant to 8 years. The Appellate Division refused to vacate the plea because the 8 years, added to 5 years of post-release supervision, did not exceed 15 years.

*People v Jose Cosme Pizarro** — Whether a deliberating juror must be discharged as grossly unqualified under CPL 270.35(1) when, in response to inquiry by the court, the juror falsely denies having attempted to inject matters outside the evidence into deliberations, thus vitiating the reliability of any assurance by the juror that he will deliberate solely on the evidence during the remainder of the deliberations.

*People v Patricio Bautista** — Whether the 2005 DLRA for Class A-II narcotics felons allows resentencing for inmates less than 3 years from parole eligibility; *ie*, the definition of an inmate "who is more than twelve months from being an eligible inmate as that term is defined in subdivision 2 of Section 851 of the Correction Law."

People v Carlos Ramos — The validity of the waiver of the right to appeal where the court told the defendant, "By entering this plea of guilty you're giving up any and all rights to appeal this conviction and sentence."

(continued on page 39)

* See summary on p. 28.

** See summary on p. 31.

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

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

United States Supreme Court

Death Penalty (Penalty Phase) (Special Circumstances) **DEP; 100(120) (145)**

Brown v Sanders, 546 US __, 126 SCt 884, 163 LEd2d 723 (2006)

The respondent and a confederate entered a home. Both people there were tied up and struck with blunt objects; one died. A California jury found four "special circumstances" qualifying the respondent for the death penalty for that killing: that the murder had been committed during the course of a (1) robbery, (2) burglary, and (3) witness killing, and (4) was heinous, atrocious, or cruel. The state supreme court invalidated two of the special circumstances (burglary and cruelty), but upheld the death sentence. Denial of federal habeas corpus relief was reversed on appeal following an analysis finding California a "weighing" state as to its penalty phase procedures.

Holding: The death sentence was not unconstitutional since the information presented to the jury to establish the two invalid special circumstances also supported independent sentencing factors. "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (Footnote omitted, emphasis in original.) California requires a finding of at least one special circumstance for death eligibility. When the jury finds a special circumstance, it must "take into account" a separate list of sentencing factors describing aspects of the defendant and the crime, including circumstances of the crime. The facts underlying the invalid factors were properly considered by the jury under the "circumstances of the crime" sentencing factor. *See Zant v Stephens*, 462 US 862, 871-872 (1983). Judgment reversed.

Dissent: [Stevens J] In a nonweighing state, an aggravating circumstance is considered for death eligibility but in a weighing state, it is used to impose a death sentence. *See Clemons v Mississippi*, 494 US 738, 745 (1990). The issue on appeal was limited to determination of whether California was a weighing state—it was.

Dissent: [Breyer, J] The jury's consideration of an invalid aggravator was subject to a harmless error analysis, regardless of the form a state's death penalty law takes. The weighing / nonweighing distinction was unnecessary.

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

Prisons (Civil Liabilities) (Conditions) (Health Conditions) **PRS II; 300.5(3) (6) (25)**

United States v Georgia, 546 US __, 126 SCt 877, 163 LEd2d 650 (2006)

The petitioner, a paraplegic inmate in the Georgia prison system, filed grievances and then a federal complaint under 42 USC 1983 and Title II of the Americans with Disabilities Act (*see* 42 USC 12131 *et seq*) challenging the conditions of his confinement and seeking an injunction and damages. Among his claims were: 24-hour lockdown in a cell too small to turn his wheelchair; no means to use the toilet and shower without assistance; denial of physical therapy and medical treatment; and no access to prison programs. His complaint was dismissed as to the 1983 claims, and summary judgment was granted to the state defendants on the Title II claims based on sovereign immunity. On appeal, the judgment was reversed in part (because the petitioner had stated some sufficient 8th Amendment claims under 1983), remanded to allow amendment of the complaint to eliminate frivolous portions, and affirmed as to the ruling that the Title II claims for money damages against the state were barred by sovereign immunity.

Holding: Title II validly abrogates state sovereign immunity for violation of rights under the 14th amendment. *See* 42 USC 12132; *Board of Trustees of Univ. of Ala. v Garrett*, 531 US 356, 363-364 (2001). The petitioner alleged sufficient grounds to show 8th Amendment violations in the refusal of prison officials to accommodate disability-related needs for such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs. Congress had the power to abrogate state sovereign immunity to enforce the 8th Amendment through the due process clause of the 14th Amendment, section 5. *See Tennessee v Lane*, 541 US 509, 543, n. 4 (2004). This includes the power to authorize private suits against the state for damages under Title II. It was unclear which acts are claimed to support the Title II claims. The District Court must evaluate the amended complaint to determine what allegations support which type of claim. Judgment reversed.

Concurring: [Stevens, J] A constellation of rights is applicable in prisons. The 11th Circuit erred in identifying only an 8th Amendment right when performing the first step of the "congruence and proportionality" inquiry of *City of Boerne* v *Flores*, 521 US 507 (1997).

US Supreme Court *continued*

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

Evans v Chavis 546 US __, 126 SCt 846, 163 LEd2d 684 (2006)

Denial of the respondent's state habeas corpus petition was affirmed on appeal on Sept. 29, 1994. On Nov. 5, 1997, the respondent filed a petition for review in the California Supreme Court, which was denied on April 29, 1998. After a second round of state habeas petitions, the respondent filed a federal habeas petition on Aug. 30, 2000. The 9th Circuit found that the respondent's state collateral review application was pending during the three year period (1994-1997), tolling the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations.

Holding: Without a clear statement from the California Supreme Court on the timeliness of a filing under the state's indeterminate rule, the Circuit Court must make an independent determination of reasonableness based on state law. Only a timely appeal of collateral proceedings tolls the AEDPA. *See* 28 USC 2244(d)(2); *Carey v Saffold*, 536 US 214 (2002). The respondent had one year to file from the effective date of the AEDPA, April 24, 1996. He filed four years and 128 days after that date. He claimed that the delay was due to limited access to the law library that made him unable to file sooner, but for at least six months he did have access. Nothing in California law justified a finding that a six-month delay was reasonable. A state supreme court denial on the merits is not automatically a finding that the pleadings denied were filed timely. Here, the state supreme court did not even use the phrase "on the merits," making it more likely that the delay was not found to be reasonable. Judgment reversed.

Concurring: [Stevens, J] This Court should direct the 9th Circuit to follow the presumptions outlined in *Saffold*, not make ad hoc determinations of timeliness, and should adopt the 9th Circuit's presumption that a state supreme court ruling on the merits is a finding the that filing itself was timely, so long as the filing was not delayed more than six months.

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

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

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

Rice v Collins, 546 US __, 126 SCt 969, 163 LEd2d 824 (2006)

The respondent objected at his trial on drug charges that the prosecutor excused one of the jurors because she was African-American. The prosecutor said that the juror was excused because she rolled her eyes in response to a question from the court; was young and might be tolerant of a drug crime; and was single and lacked ties to the community. The prosecutor also made some reference to the juror's gender. The trial court accepted the prosecutor's explanation of youth, and to some extent demeanor, to uphold use of the peremptory challenge. The respondent's conviction was affirmed. Denial of federal habeas corpus was reversed by the 9th Circuit.

Holding: *Batson* (*v Kentucky*, 476 US 79) requires a three tiered analysis: (1) whether a defendant made a prima facie showing that the prosecutor made a race-based peremptory challenge: (2) if so, whether the prosecutor gave a race-neutral explanation; and (3) if so, whether the defendant met the burden of proving purposeful discrimination. California courts have not always properly implemented *Batson* and its state counterpart. *See Johnson v California*, 545 US ___, 125 SCt 2410 (2005). Here, the finding that the prosecution's peremptory challenge was not race-based was not an unreasonable application of federal law. Under the Antiterrorism and Effective Death Penalty Act, a federal habeas court can only reverse if it finds the state court's conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 USC 2254(d)(2). The trial judge's credibility finding was not unreasonable in light of the evidence. The prosecutor's claim about the juror's youth and lack of community ties could reasonably have been viewed as race-neutral reasons. Although reasonable minds might differ over the credibility of the prosecution's justifications, there was no basis on which to supersede the trial court's decision, which was not contrary to clearly established federal law. Judgment reversed.

Concurring: [Breyer, J] Traditional methods of judicial review cannot assure a lack of racial discrimination. No trial judge can know with certainty or confidence that a prosecutor's peremptory challenge was free of racial prejudicial or other unconstitutional motives. *See Miller-El v Dretke*, 545 US ___, 125 SCt 2317, 2325 (2005) (Breyer, concurring). The *Batson* test and the peremptory challenge system need to be reconsidered.

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

Oregon v Guzek, __ US __, 126 SCt 1226, 163 LEd2d 1112 (2006)

The respondent and two others burglarized a home. Evidence showed that the respondent killed the woman occupant and an associate killed the man. The associates portrayed the respondent, who presented an alibi defense, as the ringleader. The jury sentenced him to death. After several appeals in which the conviction was affirmed but the sentencing found faulty, the state court ruled that the respondent had a federal constitutional right to introduce

US Supreme Court *continued*

his mother's live alibi testimony, in addition to her transcript from trial, at the sentencing phase.

Holding: The 8th and 14th Amendments did not require that the respondent be allowed to introduce new evidence of innocence at the sentencing phase. The respondent had the right to introduce mitigating sentence-related evidence, but not exculpating testimony that called the conviction into question. *See Franklin v Lynaugh*, 487 US 164 (1988). The state court misapplied *Green v Georgia* (442 US 95 [1979]) in finding such a right existed. The state had the power to set reasonable limits on evidence introduced in a death penalty sentencing proceeding. *See Boyde* v *California*, 494 US 370 (1990). Sentencing is generally concerned with the circumstances of the criminal act, not its occurrence. Commission of the crime, having been litigated at trial, becomes collateral at sentencing and collateral attacks are discouraged. State law allowed the respondent to introduce evidence of innocence from his trial, and the respondent has no claim that the requested alibi testimony was unavailable at the time of trial. The state court did not address the question of whether the alibi evidence in question can be used to impeach the testimony of his associates that is to be offered, and are free to decide now. Judgment vacated and remanded.

Concurring: [Scalia, J] This Court should reject 8th Amendment residual-doubt claims across the board; the state rule allowing evidence of innocence from trial is superfluous.

New York State Court of Appeals

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

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

People v Echevarria, No. 182, 2005 NY Slip Op 09812, 12/22/2005

The defendant had been charged with the stabbing deaths of two people. He was indicted on four counts, two for first-degree murder and two for second-degree murder. At trial, the court instructed the jury to consider all the counts, but in no particular order. While deliberating, the jury advised the court that they reached a verdict on two counts, without revealing which ones. During consultation with the attorneys, defense counsel supported a partial verdict; the judge accepted the jury's finding of guilt on second-degree murder and ordered them to continue deliberating. The next day, they rendered a guilty verdict on first-degree murder. The convictions were affirmed.

Holding: Defense counsel's failure to object to the partial verdict, ask for a lesser-included instruction, or seek a mistrial forfeited claims of error in the jury's decision making. The court did not instruct the jury on lesser-included offenses and the requirement of unanimous acquittal on the top counts before reaching the lesser offenses. *See* CPL 300.40 (3)(b); *People v Boettcher*, 69 NY2d 174. Defense counsel did not object to this omission and argued in favor of accepting the partial verdict without knowing the results. *See People v Fuller*, 96 NY2d 881. There was no objection to continued jury deliberations after the partial verdict. The defendant's lawyer made a strategic decision to forgo a mistrial. *See People v Ferguson*, 67 NY2d 383. Judgment affirmed.

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

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

People v Corby, No. 164, 2005 NY Slip Op 09809, 12/22/2005

The defendant, who paid to use the apartment of one Burnett for a drug transaction and moved in along with another, went with Burnett and retrieved drugs from the room of a dealer, the decedent. They returned to Burnett's apartment where the decedent was waiting. Sometime after the defendant and others went into a back room, Burnett saw that the decedent had been killed. Burnett helped the defendant and others dispose of the body. When questioned by police, Burnett denied any knowledge of the murder. Two years later, the defendant suggested to DEA agents that Burnett was involved in the killing. Confronted with the accusation, Burnett identified the defendant and the others as the killers. At trial, the judge prohibited the defendant from cross-examining Burnett about Burnett's reason for implicating the defendant two years later. The defendant's murder and robbery convictions were affirmed.

Holding: The trial court did not abuse its discretion by limiting the defendant's cross-examination of the prosecution witness about the reason for the delay in identifying the defendant. *See People v Coleman*, 56 NY2d 269, 273. The defendant was allowed to question Burnett about her motive to lie and harbor hostility based on other facts, such as her role in disposing of the body, her fear that the defendant might harm her, and the theft of his money while he was in prison. *See People v Chin*, 67 NY2d 22, 29. The defense questioned Burnett about past crimes and knowledge of the drug trade as well. Also, independent evidence connected the defendant to the decedent. The prohibited line of inquiry would have been cumulative and of little probative value, and would have caused unneeded speculation by the jury. Judgment affirmed.

Dissent: [Smith, GB, J] Burnett was the only one to place the defendant at the scene and link him to the crimes. Evidence that Burnett named the defendant as the

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murderer only after he implicated her was critical to evaluating her motive to fabricate. The judge's ruling violated the Confrontation Clause and right to present a defense. *See People v Hudy*, 73 NY2d 40, 57.

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

People v Suarez, Nos. 178 and 179, 12/22/2005

Defendant Suarez was indicted for intentional murder, depraved indifference murder, and intentional manslaughter for allegedly stabbing his girlfriend three times and fleeing the scene without calling for help. At trial, he testified that he did not intend to kill the decedent, who attacked him with a knife after he slapped her during an argument. Acquitted of intentional homicide, Defendant Suarez was convicted of depraved indifference murder, which was affirmed. Defendant McPherson got into an argument with her former boyfriend. During the fight, he raised his hand as if to hit her, and she pulled out a knife and stabbed him in the chest, called 911, and left just before the ambulance arrived. At a bench trial for depraved indifference murder and first-degree manslaughter, she testified to having been the victim of domestic violence and acting in self-defense. Her depraved indifference murder conviction was affirmed.

Holding: These homicides did not meet the statutory criteria for depraved indifference murder: circumstances that evince a depraved indifference to human life; recklessness; and grave risk of death to another. *See* Penal Law 125.25 (2). Use of a weapon is not depraved difference murder where there is an intent to kill. *See People v Payne*, 3 NY3d 266, 271. Whether an accused called for help or not does not alone change the nature of the homicide. Depraved indifference murder rarely applies to one-on-one killings. There are only a few single-victim circumstances that qualify, such as abandoning a helpless and vulnerable victim under conditions where death is likely (*see People v Kibbe*, 35 NY2d 407) and torturing or prolonging the suffering of a vulnerable victim leading to death. *See People v Poplis*, 30 NY2d 85. "The proliferation of the use of depraved indifference murder as a fallback theory under which to charge intentional killers reflects a fundamental misunderstanding of the depraved indifference murder statute." Judgments reversed and remanded to Appellate Division to determine appropriate remedies.

Concurring: [Smith, GB, J] *People v Register*, 60 NY2d 270 and *People v Sanchez*, 98 NY2d 373 should be overruled since their definitions of depraved indifference are too broad.

Concurring: [Read, J] Overuse of depraved indifference charges in homicide cases raised an important public policy issue for the legislature.

Concurring in McPherson, Dissenting in Suarez: [Graffeo, J] Depraved indifference defines the factual setting in which the risk-creating actions occurred. *See People v Register*, 60 NY2d 270, 276. Narrowing this definition is inconsistent with the statutory language and legislative intent. *See* Penal Law 125.25 (2). As there is now virtually no "category of reckless homicide that is comparable in grade and penalty to intentional murder," the Legislature should address the resulting gap in the homicide scheme created by this narrowing of the A felony of depraved indifference homicide, leaving the C felony of second-degree (reckless) manslaughter.

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

People v Bongarzone-Suarrcy, No. 15, 2006 NY Slip Op 1044, 2/9/2006

The defendant was convicted for the 1990 contract killing of her husband. A suicide note from a former lover in 1998 claimed that the defendant had admitted to the killing. Under police questioning, the defendant admitted making the statement only as a scare tactic, and denied its truthfulness—which was confirmed by a polygraph. The defendant's attorney had called the police during the polygraph to stop the questioning, but the defendant voluntarily continued. In 2001, she went to the police barracks and confessed to paying her brother to kill her husband. Her suppression motion based on a violation of her right to counsel was denied.

Holding: Although the defendant's right to counsel may have attached during the 1998 police interrogation, it did not apply to the 2001 questioning. None of the detectives in the 2001 encounter participated in the 1998 interrogation. After the first session in 1998, no charges were brought and the attorney's role came to an end. In the regular course of business, the police destroyed the file from the 1998 session. Since no files alerted the police about the past involvement of an attorney, any right to counsel from the 1998 interview did not prevent the defendant from waiving counsel and speaking to police in 2001. *See People v Carranza*, 3 NY3d 729, 730. Judgment affirmed.

Insanity (Civil Commitment) (Post-commitment Actions) **ISY; 200(3) (45)**

In the Matter of Jamie R. v Consilvio, No. 12, 2006 NY Slip Op 1042, 2/9/2006

The petitioner pled not guilty by reason of mental disease or defect and became an insanity acquittee. At his commitment hearing, the court found that he had a mental illness and placed him a nonsecure facility. During several discharges, he exhibited abusive and disruptive behavior, including assaulting another patient. He was

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arrested several times for misdemeanor offenses. An application by the Commissioner of the Office of Mental Health (OMH) to have the petitioner reclassified as a dangerously mentally ill patient and placed in a secure facility was granted by Supreme Court. The petitioner did not appeal, but petitioned for jury rehearing and review. *See* CPL 330.20(16) and Mental Hygiene Law 9.35. The fury found that the petitioner, while suffering from mental illness requiring inpatient treatment, was not a danger to himself or others. The judge adopted the jury's finding and ordered the petitioner's transfer to a nonsecure facility. The Appellate Division reversed.

Holding: An OMH transfer decision moving an insanity acquittee from a nonsecure to a secure facility could only be challenged by direct appeal, and not through review and rehearing. An insanity acquittee had two routes to challenge placement orders: a permissive appeal under CPL 330.20(21) or a rehearing and review under CPL 330.20(16). The mental condition and placement of the acquittee can be designated by one of three tracks: (1) dangerous mental disorder—secure facilities; (2) mentally ill—nonsecure facilities; or (3) not dangerous or mentally ill—released from OMH custody. *See Matter of Norman D*, 3 NY3d 150, 153 n 1. Tracks two and three are controlled by CPL 330.20 and Mental Hygiene Law 9.35. Review and rehearing apply only to commitment, recommitment, and retention orders. CPL 330.20[16]. An order transferring a patient from a nonsecure to a secure facility can only be challenged through appeal. *See Mental Hygiene Legal Services o/b/o Aliza K. v Ford*, 92 NY2d 500, 508. Judgment affirmed.

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

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

People v Burns, No. 21, 2006 NY Slip Op 1109, 2/14/2006

The defendant was tried for involvement in a shootout that resulted in another's death. Among his different accounts of what happened, the defendant claimed that a gang of Hispanic men shot him and the decedent. The trial court rejected the defendant's request to introduce the signed statement of a declarant about seeing five Hispanic men in the area at the time of the shooting, receiving some heroin from them to leave the area, hearing shots, and seeing the men drive away.

Holding: The only portion of the declarant's hearsay statement that would have been admissible as a statement against penal interest concerned possession of heroin, which was not relevant to the case. *See People v Geoghegan*, 51 NY2d 45, 49. The remainder of the statement implicating others in the shooting did not fall within this hearsay exception. Precluding the statement did not violate the defendant's constitutional right to present a defense. After his efforts to introduce the statement through the police officer that took it was rejected because it would have created double hearsay, the defendant did not accept the court's offer to subpoena the declarant to testify. *See Delaware v Van Arsdall*, 475 US 673, 679 (1986). Further, the statement lacked any indicia of reliability. *See People v Robinson*, 89 NY2d 648, 650. Judgment affirmed.

Speedy Trial (Cause for Delay) (Consent to Delay) (Waiver) **SPX; 355(12) (15) (50)**

People v Waldron, No. 22, 2006 NY Slip Op 1110, 2/14/2006

The defendant was arrested on Jan. 23, 2000 for a sex crime. A competency exam was ordered on February 1 and the report filed on February 24. Assigned counsel was replaced by a retained attorney on March 20. The prosecutor indicated that if the complainants had to testify in the grand jury, the plea offer would be a minimum of 20 years. The defendant's counsel initiated a strategy of delay to soften that position. On July 11, counsel sent a letter to the prosecutor requesting a disposition date of September 15 and waiving speedy trial. After negotiations from July to November, the prosecutor reduced the offer to 8 years. On November 30, the defendant filed a pro se motion firing his attorney and a speedy trial motion to dismiss based on his 317 days in custody. The defendant was indicted on December 14 and arraigned on December 20, when the prosecutor announced readiness for trial. At the speedy trial hearing, the defendant denied knowledge of his attorney's delay tactics. Dismissal was denied and the defendant was convicted after a trial.

Holding: Defense counsel explicitly waived the defendant's speedy trial rights on July 11 for ongoing plea negotiations. *See* CPL 30.30(1)(a). The 24 days for the competency exam were excludable. *See* CPL 30.30(4)(a). While counsel's letter was not clear, the record supported the conclusion that from July 11 to November 30 speedy trial was waived for plea negotiations and that the defendant knew of and consented to the delay tactics. There was no statutory requirement that a contemporaneous consent-to-delay letter be filed. Prosecutors are advised to obtain unambiguous written waivers in similar situations. There was no violation of the defendant's constitutional right to a speedy trial. *See People v Taranovich*, 37 NY2d 442. Judgment affirmed.

Evidence (Business Records) (Sufficiency) **EVI; 155(15) (130)**

People v Bloomfield, No. 13, 2006 NY Slip Op 1108, 2/14/2006

NY Court of Appeals *continued*

In a securities fraud scheme, members of Westfield Partners posed as foreign citizens to buy US stocks at discounted prices. As part of the plan, the defendant worked with a London solicitor who obtained letters of ownership from a foreign diplomat. Eventually, charges of first-degree falsifying business records (Penal Law 175.10) and conspiracy were brought based on the letters. The court rejected the defendant's argument that the letters were not business records since they were held at the office of a lawyer representing the enterprise rather than at the enterprise's business offices. The convictions were reversed on appeal.

Holding: Location of the incriminating letters in counsel's office rather than the company's headquarters was only one factor in determining whether they were business records under Penal Law 175.00. The prosecution presented legally sufficient evidence to show that the letters fit within the definition of business records: "'any writing or article . . . maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.'" Penal Law 175.00 (2). The statute, which makes no reference to the location of records, is unambiguous; courts must give effect to its plain meaning. *See Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of the Town of Huntington*, 97 NY2d 86, 91. Documents created for the purpose of deceiving outside third parties can still qualify as business records. There was evidence that the defendant's company focused on transaction records, and their lawyers kept the ownership documents and participated in the management of this enterprise. Judgment reversed, remanded to Appellate Division for consideration of the facts.

Homicide (Felony Murder) (Murder [Degrees and Lesser Offenses]) **HMC; 185(20) (40[g])**

Lesser and Included Offenses (Definition) **LOF; 240(5)**

People v Miller, Nos. 131 and 132, 2006 NY Slip Op 1194, 2/16/2006

Defendant Rodriguez was convicted of first-degree murder (Penal Law 125.27 [1] [a] [vii] [intentional felony murder]), two counts of second-degree murder (Penal Law 125.25 [1] and [3] [intentional murder and felony murder, respectively]) and other offenses. He had broken into the decedent's apartment and stabbed her multiple times. On appeal the court dismissed the second-degree murder charges as inclusory concurrent counts.

Defendant Miller was convicted of first-degree murder (Penal Law 125.27 [1] [a] [vii], two counts of second-degree murder (Penal Law 125.25 [1] and [3]) and other charges. The decedent had died in the course of a robbery. Defendant Miller's convictions were affirmed.

Holding: The prosecution claimed that first-degree murder was not a greater offense than second-degree murder in either case, so the second-degree counts should not be dismissed based on conviction of the first-degree charges. Under CPL 300.40 (3) (b), when inclusory concurrent counts exist, a guilt finding on the greatest count is deemed a dismissal (but not an acquittal) as to every lesser count submitted. While first- and second-degree murder are both A-1 felonies, they "are unequivocally of different degrees and carry considerably different sentences." The prosecution, noting that the felonies predicating intentional felony murder under the first-degree statute are not identical to those underlying ordinary felony murder in the second-degree provisions, submits that the second-degree charges are not lesser-includeds because of the "impossibility" doctrine of CPL 1.20 (37). The predicate of flight after attempting to commit second-degree murder, found in the intentional felony murder statute, is not contained in the standard felony murder statute, making it theoretically possible to commit the higher crime without at the same time committing the lesser. The prosecution's conclusion does not follow where the higher crime can be committed in alternative ways through different conduct. The impossibility doctrine speaks not to all variations of the greater offense detailed in a Penal Law section with numerous subdivisions, but only to the subdivision relevant to a particular indictment. *See People v Green* 56 NY2d 427, 430-431. In *People v Glover* (57 NY2d 61), "we held that 'impossibility' refers not only to the facts of the case but to whether it is, in theory, impossible to commit the greater crime without by the same *conduct* committing the lesser . . ." (emphasis in opinion). While cases under *Glover* that found down-charges should not have been submitted are reaffirmed, the "greater-lesser relationship between intentional felony murder based on burglary or robbery and standard felony murder based on burglary or robbery" compels a holding here that felony murder is a lesser-included crime under intentional felony murder. Judgment affirmed in Rodriguez and murder second-degree counts dismissed in Miller.

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

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

People v Lopez, Nos. 23, 24, and 25, 2006 NY Slip Op 1195, 2/16/2006

During his guilty plea, Defendant Lopez waived his right to appeal, orally and in writing. He then appealed, arguing for a sentence reduction in the interest of justice. His sentence was affirmed.

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Defendant Billingslea acknowledged at her guilty plea the court's statement that she would be giving up her right to appeal by pleading guilty. Her appeal on excessive sentence grounds in the interest of justice was denied.

At Defendant Nicholson's plea colloquy, the judge warned him that he would be giving up his right to appeal, which was reiterated again before sentencing. His excessive sentence appeal was denied.

Holding: A defendant's valid waiver of the right to appeal includes giving up the right to invoke the Appellate Division's interest of justice jurisdiction to reduce the sentence. *See People v Seaberg*, 74 NY2d 1, 10. While the Appellate Division's interest of justice jurisdiction can only be changed by constitutional amendment, defendants have the power to give up that option in the plea bargain process. A valid waiver must be executed knowingly, intelligently and voluntarily, and the court is required to make sure that the defendant is aware of the right being relinquished. *See People v Calvi*, 89 NY2d 868, 871. The trial court must be sure that the defendant understands that a waiver of the right to appeal is distinct from the other rights forfeited by operation of law in the process of pleading guilty. The colloquy in Billingslea fell short, and left that defendant confused. Her one-word response was insufficient to confirm her understanding. The distinction was made clearer in the Lopez and Nicholson cases. The better practice is to clearly state, preferably in writing, that the right to appeal survives the guilty plea, unless it is waived. Judgments in Lopez and Nicholson affirmed, judgment in Billingslea reversed and remanded.

Concurring: [Smith, GB, J] Prosecutors and defendants cannot agree to divest the Appellate Division of its interest of justice jurisdiction, which is constitutionally based. NY Const article VI, § 4(k).

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

Homicide (Causation) (Manslaughter [Evidence]) **HMC; 185(10) (30[d])**

People v DaCosta, No. 26, 2006 NY Slip Op 1196, 2/16/2006

A bench warrant was issued for the defendant, who was on bail from a felony probation violation charge in Maryland. A bail bondsman traced the defendant, and the defendant was found on a bus that had been stopped by the police based on the bondsman's tip. When the defendant fled, the police chased him toward a major highway. After crossing three lanes of traffic, the defendant climbed over a metal fence. The fence gave way when an officer attempted to follow, and the officer landed on a car, was thrown to the ground, and later died from his injuries. The defendant's motion to dismiss the indictment for second-degree manslaughter due to insufficient evidence of causation was denied. His reckless manslaughter conviction was affirmed.

Holding: The defendant's unlawful flight set in motion and legally caused the officer's death. *See People v Matos*, 83 NY2d 509. The defendant's actions were the direct cause of the officer's death because it was foreseeable that someone might get hit by a car while in hot pursuit across a major highway. *See People v Kern*, 75 NY2d 638. Judgment affirmed.

Search and Seizure (Arrest/ Scene of the Crime Searches) (Stop and Frisk) (Weapons-Frisk) **SEA; 335(10) 75) (85)**

People v Moore, No. 3, 2006 NY Slip Op 1249, 2/21/2006

Two police officers responded to a radio call based on an anonymous tip concerning a dispute involving a young man with a gun. He was described as male, black, about 18 years old, wearing a gray jacket and red hat. One minute later, the police arrived but did not find any activity, only defendant who was a male, black, and wearing a different color jacket. As they approached, he started to walk away. Instantly, the police drew their guns and yelled "police, don't move." The defendant stopped a short distance later, discovering his path was blocked. Following a police command to put up his hands, the defendant made a movement toward his waistband. During a patdown, one officer felt a hard object in the left jacket pocket and recovered a gun. The defendant's suppression motion was denied, and his conviction was affirmed.

Holding: The anonymous phone tip only authorized the police to conduct a common law inquiry. Upon their arrival, they did not possess reasonable suspicion to justify pulling their weapons and ordering the defendant to stop. His motioning toward his waistband did not justify a forcible stop. *See People v De Bour*, 40 NY2d 210, 215. The *De Bour* test for street encounters has four levels: (1) information request based on an objective, credible reason, not necessarily indicative of criminality; (2) common-law right of inquiry supported by a founded suspicion that criminal activity is afoot; (3) stop and frisk requiring a reasonable suspicion of involvement in a felony or misdemeanor; and (4) arrest based on probable cause. When the police chose to pull their guns and order the defendant to stop, in lieu of questioning, their actions constituted a seizure requiring reasonable suspicion. *See People v Chestnut*, 51 NY2d 14. An anonymous tip does not justify a seizure, except where it contains predictive information about criminal conduct that could be tested. *See Florida v JL*, 529 US 266 (2000). There was no dispute or evidence of a gun when the police arrived. Absent reasonable suspi-

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cion, the defendant was free to walk away when the police approached. *See People v May*, 81 NY2d 725, 728. Judgment reversed.

Dissent: [Smith, RS, J] When the police receive an anonymous tip and observe avoidance of contact, these occurrences together support reasonable suspicion for temporary detention.

First Department

Federal Law (General) **FDL; 166(20)**

Juveniles (Adoption) **JUV; 230(5)**

Baby Boy C. v Tohono O'odham Nation, No. 6451, 805 NYS2d 313 (1st Dept 2005)

A mother who is one-half Native American and registered as a member of an Indian tribe and a Caucasian father had a child in California and signed consent in Arizona to adoption of the child by the petitioners, certified in New York as qualified adoptive parents. An Arizona court approved the consent and terminated parental rights. The petitioners brought the child to New York and began adoption proceedings. The federally recognized Indian tribe sought to intervene under the Indian Child Welfare Act of 1978 (25 USC 1901 *et seq*). Family Court denied intervention, invoking "the judicially-created 'existing Indian family' exception (EIF)" to the Act.

Holding: The EIF avoids the application of the Act upon determination that a child is not part of an "Indian family," and has been found to be necessary to uphold the Act's constitutionality where a child and family "lack significant ties to an Indian tribe or culture." This is a matter of first impression in New York appellate courts. The EIF exception "directly conflicts with the express language and purpose of" the Act and the rationale of *Mississippi Band of Choctaw Indians v Holyfield* (490 US 30 [1989]). While the Act does not expressly authorize tribal intervention in adoptions as a matter of right, it does not prohibit intervention under applicable state law (here, CPLR 1013). The tribe has a "significant interest" in having the proceeding conducted in accordance with the Act. Order reversed, matter remanded for further proceedings. (Family Court, New York Co [Bednar, J])

Counsel (Right to Counsel) **COU; 92(30)**

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

Matter of Leroy C., Jr., v Hanna N., 24 AD3d 143, 805 NYS2d 61 (1st Dept 2005)

Holding: The decision to terminate the respondent-appellant's parental rights is supported by the record. Counsel for the respondent-appellant failed to object to two instances in which the court took testimony in counsel's absence. No actual prejudice resulting from counsel's absence or failure to object is shown. The record shows that the respondent-appellant received a fair hearing and was meaningfully represented. While the question of whether the respondent-appellant was deprived of the right to counsel is unpreserved (*see People v Seiler*, 139 AD2d 832, 834), "we strongly disapprove of the practice of receiving evidence in the absence of counsel." Orders affirmed. (Family Ct, New York Co [Larabee, J])

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

Matter of Amsterdam, No. M-2389 (1st Dept 12/15/2005)

Holding: The respondent pled guilty to conspiracy to defraud under a count that alleged she had submitted false and fraudulent applications to be assigned as counsel under the federal Criminal Justice Act. The respondent admitted receiving $10,000 to assist another attorney in the defendant's case, lied when she told the court she was appearing pro bono, and knew that the other attorney sought to have her appointed. The respondent's actions in concert with the other attorney would constitute the New York felony of offering a false instrument for filing. Penal Law 175.35. In any event, the respondent has resigned. Respondent's name stricken from the roll of attorneys.

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

Matte of Martin R.G. v Ofelia G.O., 24 AD3d 305, 809 NYS2d 1 (1st Dept 2005)

Holding: Custody awards are to be based on the best interests of the child. A hearing is generally required before a temporary change of custody can be awarded in a non-emergency matter. *See Matter of Jones v Scaldini*, 23 AD2d 422. A non-custodial parent has the significant burden of showing that the child's best interests, in the totality of circumstances, warrant modification of an order. *See Friederwitzer v Friederwitzer*, 55 NY2d 89. Here, the mother, who had sole custody with no visitation provisions, did not violate any court order by moving 90 miles to New Jersey, The record contains no basis for the temporary transfer of custody to the father without a hearing; Family Court's displeasure about the move did not justify the order, and several facts bearing on the child's best interest were in dispute, requiring a hearing. Order reversed, custody to remain with the mother pending a hearing. (Family Ct, Bronx Co [Dawson, J])

First Department *continued*

Burglary (Defenses) (Elements) **BUR; 65(5) (15)**

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

People v Madera, 24 AD3d 278, 808 NYS2d 181 (1st Dept 2005)

The defendant was arrested after forcing his way into a stranger's apartment. Defense counsel filed a notice of intent to present psychiatric evidence to negate the element of intent for the burglary charge. Counsel had trouble getting the defendant's psychiatric records; the court refused to sign "so-ordered" subpoenas. Counsel filed an amended notice specifying a diagnosis of drug-induced psychotic disorder with delusions; the court ruled that psychiatric evidence would not be relevant until evidence was offered to show the defendant thought he was acting to avoid a pursuer. After an offer of proof, the court found psychiatric evidence not needed because "the average juror is familiar with even the more extreme consequences of drug or withdrawal induced delusions," citing movies like "*Reefer Madness.*" Despite further defense efforts, the court maintained its position.

Holding: Absent expert testimony on drug-induced delusions, the jury was likely to conclude that no reasonable person would believe they were in danger under the circumstances shown. Leading up to the incident, the defendant, after using cocaine and drinking beer, heard a noise and saw a bullet hole in the glass door of a building lobby. Believing that someone was after him, he fled to the home of a friend, who found him "kind of paranoid" and "crazy" and asked him to leave. When the defendant refused, the friend threatened to show him a gun, then, although the defendant appeared very frightened, physically ejected him. The defendant finally forced his way into the apartment in question after hearing someone on the stairs. Judgment reversed, new trial ordered before a different judge. (Supreme Ct, New York Co [Berkman, J])

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

People v Breaux, 24 AD3d 261, 808 NYS2d 177 (1st Dept 2005)

Defense counsel at sentencing objected to the presentence report, which contained notations on pages three and four (entitled "Social History Summary") that the defendant had not been produced by the Department of Correction for an interview on either of two scheduled dates. Counsel asserted that the defendant had been produced but not interviewed, and asked for an adjournment for the defendant to be interviewed by the Probation Department, which was denied. The court did offer the defendant a chance to supplement or refute ay information in the report at sentencing.

Holding: A presentence report may be the most important document at sentencing and also in the correctional setting afterward. *See People v Hicks*, 98 NY2d 185, 189. Due to deficiencies in the presentence report here, the "judge lacked sufficient information bearing upon the propriety of the sentence to be imposed." The defendant affirmatively asked for a Probation interview, and counsel argued that "the intimidating nature of speaking in court was not an adequate substitute" for the requested interview. In these unique circumstances, there must be a resentencing based on a presentence report that meets the statutory requirements. *See* CPL 390.30. Judgment modified, sentence vacated, remanded for resentencing. (Supreme Ct, New York Co [Grella, J])

Accusatory Instruments (Amendment) (General) **ACI; 11(5) (10)**

People v Rivera, 24 AD3d 367, 806 NYS2d 537 (1st Dept 2005)

The defendant waived indictment in 1997 and pled guilty to attempted fifth-degree sale of drugs and was adjudicated a second felony offender. The undated waiver form signed by counsel, the defendant, and the prosecutor said that a superior court information (SCI) was to be filed charging "the offenses named in this waiver." The correspondingly numbered SCI charged attempted fifth-degree drug sale. In 1998 after the defendant was found eligible for the Drug Treatment Alternative to Prison (DTAP) program, the prosecutor said that the agreement was that the defendant would have to replead to third-degree attempted sale before DTAP was made available. Defense counsel and the defendant agreed, the court said the waiver was still in effect, and the defendant entered a new plea citing the same SCI number. After several unsuccessful efforts to complete drug treatment programs, the defendant was sentenced in 2003 to five to 10 years pursuant to the last of several DTAP agreements.

Holding: The grand jury guarantee of NY Const Art 1, Sec 6 is not a mere personal privilege but a jurisdictional, public fundamental right. *See People v Boston*, 75 NY2d 585, 587. Indictment can be waived only by fulfilling explicit prerequisites, including execution of a document that includes, among other things, the name of the offense. *See* CPL 195.20. No amendment can cure a failure to charge or state an offense. CPL 200.70(1)(A). The charge of attempted third-degree sale was not part of the original SCI. Notwithstanding any understanding of the parties that the fifth-degree attempted sale plea was only provisional, withdrawal of the initial plea restored the charge in the "single document" constituted by the initial written waiver as to the first SCI. The parties could not agree to amend the initial SCI or replace it without first dismissing

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in and obtaining a new waiver. Judgment reversed, matter remanded for further proceedings on the original SCI. (Supreme Ct, New York Co [Cataldo, J at plea; Ward, J at sentence])

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

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

People v Bracey, 24 AD3d 363, 807 NYS2d 34 (1st Dept 2005)

Holding: No mention was made of postrelease supervision at the defendant's plea proceeding, and no allocution of the defendant about the constitutional rights he was waiving appears on the record. The defendant's claim that the court's failure to advise him about mandatory postrelease supervision mandates reversal (*see People v Catu*, 4 NY3d 242) is unpreserved. However, the error is so fundamental as to require reversal. (Supreme Ct, Bronx Co [Stadtmauer, J])

Dissent: [McGuire, J] The defendant in *Catu* raised the issue of failure to advise about postrelease supervision in a CPL 440.10 motion. Here, the defendant did not do so, though he submitted a pro se motion to vacate his plea. He should not be able to raise his claim now, years later, when the prosecution's ability to proceed against the defendant may have been compromised.

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

Witnesses (Confrontation of Witnesses) (Cross-Examination) (Direct Examination) **WIT; 390(7) (11) (15)**

Matter of Kendall J., 24 AD3d 357, 807 NYS2d 330 (1st Dept 2005)

The respondent was adjudicated a juvenile delinquent for acts that by an adult would constitute first-degree sexual abuse.

Holding: Weeks after the complainant was at her grandmother's, the complainant told her mother that the respondent had committed certain acts. The complainant was interviewed by police, then taken to a hospital where she told a Dr. Daniel a story that differed markedly from her later testimony. The respondent's attorney elicited from Dr. Daniel that the complainant had said the respondent had put Vaseline on his finger and tried to touch the complainant but had not actually done so. The prosecutor moved to strike, claiming the statement was about a different incident. Even if there was ambiguity about whether the complainant's story to Dr. Daniel related to the same time period, that would affect the weight, not admissibility, of the testimony. It was indefensible for the court to essentially rule as a matter of law that the complainant's statement was about a different incident; on the record it is not reasonable to think it was. The court erred in precluding testimony about comments made by the complainant's mother during Dr. Daniel's interview, offered not for their truth but for their effect on the complainant and raising the possibility that the mother was coaching her. The errors were not harmless, there being no medical corroboration of the allegations and others in the house having observed nothing. Order reversed, remanded for new fact-finding hearing. (Family Ct, New York Co [Larabee, J])

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

Witnesses (Child) **WIT; 390(3)**

Matter of Arnaldo R., 24 AD3d 326, 807 NYS2d 327 (1st Dept 2005)

Holding: The seven-year-old complainant testified that the appellant came into the bedroom where she was watching a DVD, closed the door, pulled his zipper down and "did fresh," penetrating her vaginally and anally with his penis. She said it hurt a lot, but she did not cry out, never saw blood, and stayed to watch the DVD when he left. Her account was confusing at best, not accounting for articles of clothing. Whether she had the capacity to understand and appreciate the nature of an oath is a close question. *See* CPL 60.20(2). There was no corroboration in the medical records. *See Matter of Fatima M.*, 16 AD3d 263, 272. The complainant's godfather was in the apartment at the time and gave a straightforward account; his exculpatory testimony was not implausible. The fact-finding determination that the appellant committed acts that would constitute first-degree sexual assault is against the weight of the evidence. Order reversed, petition dismissed. (Family Ct, Bronx Co [Lynch, J])

Dissent: [Buckley, PJ] The testimony of a child witness alone can establish sexual abuse. *See People v Carroll*, 95 NY2d 375, 383. The complainant's testimony was sufficiently clear and consistent to support the finding. *Fatima* can be distinguished.

Juries and Jury Trials (Alternate Jurors) (Challenges) (Competence) (Deliberation) (Qualifications) **JRY; 225(5) (10) (15) (25) 50)**

People v Pizarro, 24 AD3d 309, 806 NYS2d 506 (1st Dept 2005)

Holding: The defendant's mistrial motion on the basis of a grossly unqualified juror was properly denied. "The court conducted a 'probing and tactful inquiry' of each juror, including the allegedly offending juror, in the

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presence of counsel and defendant (*see People v Buford*, 69 NY2d 290, 299 [1987]. . . CPL 270.35." The foreperson told the court on the second day of deliberations that one juror kept trying to bring up outside information but that the foreperson had cut the juror off. The foreperson suspected the juror had tried to talk to others in the bathroom. The juror denied, under court questioning, any misconduct. Some others said the juror had said he "'knew something'" but had been stopped by the foreperson. The court found that there was a "vague 'perception'" among a majority of jurors that the one juror had tried to offer information, and a few thought he "'did get something out'" but some of their statements made no sense. The court's credibility findings are entitled to great deference and its determination that only a misunderstanding had occurred are supported by the record. Judgment affirmed. (Supreme Ct, Bronx Co [Donnino, J at hearing; Marcus, J, at trial and sentence])

Concurrence: [McGuire, J] The only reasonable conclusion that can be drawn from the record is that the juror at least attempted to inform other jurors about personal knowledge about the separately-tried codefendant, and falsely and repeatedly denied to the court that he had done so. There would have been no question of the defendant's rights being violated if the court could have allowed the other 11 jurors to deliberate without him or the defendant had consented to substitution of an alternate instead of barring it under CPL 270.35.

Freedom of Information (General) FOI; 177(17)

Matter of Taylor v New York City Police Dept. FOIL Unit, __AD3d__, 806 NYS2d 586 (1st Dept 2006)

The court dismissed a petition for material under the Freedom of Information Law (FOIL).

Holding: Several of the petitioner's requests were rendered moot by the respondents' production, as part of their motion to dismiss the instant proceeding, of records responsive to those requests and certification that they had conducted a diligent search for records they could not locate. *See Matter of Robles v Borakove*, 6 AD3d 216. The petitioner argues as to his Nov. 2, 2003 request that because the respondents did not respond to it until Dec. 12, 2003 (after the statutory five-day deadline had expired, *see* Public Officers Law 89[3]), he could properly institute this proceeding on Jan. 7, 2004 without first taking an administrative appeal. That argument is rejected. *Cf Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 145. Judgment affirmed. (Supreme Ct, New York Co [Schlesinger,])

Evidence (Hearsay) EVI; 155(75)

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

People v Lopez, __AD3d__, 808 NYS2d 648 (1st Dept 2006)

Holding: The defendant objected to introduction of evidence of a nontestifying codefendant's custodial written and stenographic statements, which the court admitted as declarations against penal interest, and an audio taped police-arranged conversation between the defendant and the nontestifying codefendant. The defendant's objected hearsay objection did not preserve a Confrontation Clause claim. *See People v Kello*, 96 NY2d 740, 743-744. While the trial predated the decision of in *Crawford v Washington* (541 US 36 [2004]), the defendant was obligated to make a proper constitutional claim, as opposed to a claim grounded in state evidentiary law. If the claim as to the written and stenographic statements were reviewed, the conceded *Crawford* error would be found harmless. Admission of the conversation between the defendant and his codefendant was not error, constitutional or otherwise. *See US v Hendricks*, 395 F3d 173, 184 (3d Cir 2005). "The codefendant's portion of the conversation was not admitted for its truth, but to provide the context for the statements on the tape made by defendant." Judgment affirmed. (Supreme Ct, Bronx Co [Barone, J])

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

Speedy Trial (Cause for Delay) (Prosecutor's Readiness for Trial) SPX; 355(12) (32)

People v Salgado, __AD3d__, 808 NYS2d 54 (1st Dept 2006)

Holding: The prosecution appeals from a dismissal on speedy trial grounds pursuant to CPL 30.30. They assert that CPL 470.15 limits review to the part of the motion court's calculations that held particular time periods to be chargeable to the prosecution and bars consideration of other aspects of the determination. The prosecution relies on language in *People v Goodfriend* (64 NY2d 695), which applied CPL 470.15(1) to limit review in a prosecution appeal to issues decided adversely to them. That language was not intended to apply in a CPL 30.30 case, where the issue is "whether the total number of days chargeable to the People exceeds the permissible number." *See eg People v Cortes*, 80 NY2d 201. Here, the motion court incorrectly excluded a 46-day adjournment from December to February. The relevant December minutes do not support the prosecution's assertion that there were outstanding discovery issues then, and the assistant prosecutor standing in for the assigned trial assistant indicated that the trial assistant would not be available until at

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least mid-January. The alleged unavailability of jurors during the holiday period cannot justify the whole 46-day delay. Closer monitoring of time might have avoided the need for dismissal. Courts and prosecutors should ensure that the basis for adjournments, and whether or not the time is chargeable to the prosecution, is clearly stated on the record. Order affirmed. (Supreme Ct, Bronx Co [Webber, J])

Sentencing (Restitution) SEN; 345(71)

People v Tzitzikalakis, __AD3d__, 807 NYS2d 360 (1st Dept 2006)

The defendant pled guilty to grand larceny and falsifying business records for submitting false, inflated invoices to the City. His sentence included payment of $340,143 in restitution. At the restitution hearing, an investigator described how she calculated the amount of overpayment. The defense asked whether the work and materials in the invoices had actually been provided. The court stopped counsel, saying the issue was filing of false instruments, not whether work was done. The court also precluded questioning about the fair market value of labor and materials invoiced, saying without proper invoices the City would not have paid regardless. The court ultimately allowed evidence of actual expenditures by the defendant to offset against what he received, but the court refused to put the burden on the prosecution to show by how much the defendant had fallen short.

Holding: Under Penal Law 60.27, restitution may not be greater that what will compensate a victim for out-of-pocket losses. *See People v Fuller*, 57 NY2d 152, 158 n 6. When the amount is disputed, it is the prosecution's burden to prove by a preponderance of the evidence facts supporting the restitution requested. *See People v Horne*, 97 NY2d 404, 410-411. It was error under CPL 400.30(4) to place on the defendant the burden of proving the actual value of work and materials provided; the Legislature should examine this part of the statute for possible amendment. The court also erred by precluding fair market value evidence. In restitution hearings, relevant evidence is admissible unless privileged. Judgment amended, remanded for new restitution hearing. (Supreme Ct, New York Co [Goodman, J])

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

Sentencing (Persistent Felony Offender) SEN; 345(58)

Matter of Johnson v Price, No. 7222, 006 NY Slip Op 700 (1st Dept 2006)

Defendant Ortiz opposed the prosecution's application to sentence him as a persistent felony offender (PFO) by challenging the constitutionality of the PFO statute (Penal Law 70.10[2]; CPL 400.20[5]) under the line of US Supreme Court cases beginning with *Apprendi v New Jersey* (530 US 466, 490 [2000]). The respondent judge rejected the challenge citing *People v Rivera* (5 NY3d 61 *cert den* __US__, 126 SCt 569) and its antecedent. As a "prophylactic against any further refinement of *Rivera*" the judge ruled that once prior convictions were established beyond a reasonable doubt, other evidence as to the defendant's history and character had to meet the same standard, despite the statutory directive that a preponderance of the evidence test be used. The District Attorney brought an Article 78 to prohibit imposition of that higher standard.

Holding: While the challenged ruling is erroneous, such an error of law is not a basis for invoking the extraordinary writ. *See Matter of State of New York v King*, 36 NY2d 59, 62. The court here had authority under the Criminal Procedure Law to perform each act here challenged: to hold the FPO hearing, to admit and weigh evidence, and to determine whether, in its discretion, to sentence the defendant as a PFO and if so, decide what the sentence should be within the statutory range. Application denied, petition dismissed.

Juveniles (Delinquency—Procedural Law) JUV; 230(20)

Matter of Julius P., __AD3d__, 809 NYS2d 27 (1st Dept 2006)

Holding: One day before expiration of the 60-day period for commencing a fact-finding hearing in this delinquency matter (*see* Family Court Act 340.1.[2]), the presentment agency requested (another) adjournment because its police witnesses were unavailable. The court erred by finding good cause and granting the adjournment. The absence of both police witnesses on the first scheduled hearing date was not explained. Bare excuses that one officer was on "'special assignment'" and the other had a regular day off were insufficient to further adjourn the matter, beyond the 60-day limit. *See Matter of Darius P.*, 269 AD2d 140. Nothing in the record explains why one officer learned of the adjourned date only belatedly and whether either could have appeared later in the day to meet the statutory deadline for commencing the hearing. The court did not ask questions to clarify the vague reasons given. Good cause cannot be found on this record. Order reversed, petition dismissed. (Family Ct, Bronx Co [Martinez-Perez, J])

Defenses (Justification) DEF; 105(37)

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

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People v Douglas, __AD3d__, 809 NYS2d 36 (1st Dept 2006)

Holding: The court erred by precluding evidence bearing on the reasonableness of the defendant's belief that the complainant in his attempted murder and assault trial had been about to use imminent deadly physical force against him. *See* Penal Law 35.15(2)(a). The defendant sought to show that the day before he shot the complainant, the defendant had been kidnapped and robbed at gunpoint by members of the gang to which the complainant belonged and had later received a phone call threatening him. This proof was disallowed, as was testimony by the defendant and another that the complainant had committed prior violent acts. The defendant had a constitutional right to "a meaningful opportunity to present a complete defense (*Crane v Kentucky*, 476 US 683, 689 [1986] . . .)" (interior quote marks omitted). An armed attack and subsequent threat by persons closely associated with the complainant less than a day before the incident was highly relevant to the reasonableness of the defendant's claim, as part of a justification defense, that he believed he was in danger. *See People v Goetz*, 68 NY2d 96, 114. The complainant's two prior violent acts were sufficiently related in time and quality to the incident in issue to also warrant admission. Further error occurred when the defendant was barred from a robing room conference about what testimony he would be allowed to give. *See* CPL 260.20. These errors do not require reversal of the weapons counts. Judgment modified. (Supreme Ct, Bronx Co [Bamberger, J])

Trespass (Evidence) TSP; 374(15)

Matter of Gregory W., __AD3d__, 809 NYS2d 50 (1st Dept 2006)

Holding: The appellant was charged with acts that would constitute third-degree criminal trespass if committed by an adult. There was no evidence presented at the disposition hearing showing that the appellant entered the building in question via an entrance at which notice was posted that would have given him the required notice that his entry was unlawful. Nor was there any evidence that he refused to leave after being asked to by a person with authority. *See Matter of James C.*, 23 AD3d 262. The police testimony upon which the appellant was adjudicated a juvenile delinquent was insufficient to prove beyond a reasonable doubt that he entered or remained in a public housing building unlawfully. *See* Penal Law 140.10(e), 140.10(f). Order reversed, petition dismissed. (Family Ct, Bronx Co [Lynch, J])

Narcotics (Sentencing) NAR; 265(60)

People v Bautista, __AD3d__, 809 NYS2d 62 (1st Dept 2006)

Holding: The 2005 Drug Law Reform Act (L 2005, ch 643, Sec 1) provides that a defendant who was sentenced to an indeterminate term under prior law for a class A-II felony drug offense may apply to be resentenced in accordance with Penal Law 70.71 if the defendant meets certain criteria. One criterion is that the defendant is more than twelve months from being an eligible inmate under Correction Law 851(2). An "eligible inmate" is defined an incarcerated person "'who is eligible for release on parole or who will become eligible for release on parole or conditional release with two years. . . .'" Read together, the statutes require that an A-II offender "may not be eligible for parole with three years" in order to qualify for resentencing. The statute is not unconstitutional; the different treatment of different groups of prisoners is rationally related to achieving the valid state objective of ameliorating the situation of A-II offenders facing the longest time. *See eg Hodel v Indiana*, 452 US 314, 331-332 (1981). The court correctly refused to grant resentencing to the defendant, who is eligible for parole in March 2008. Order affirmed. (Supreme Ct, New York Co [Scherer, J])

Juveniles (Custody) (Parental Rights) JUV; 230(10) (90)

Matter of Jacqueline Sharon L. v Pamela G., No. 7543, 2006 NY Slip Op 1253 (1st Dept 2006)

Just before New York neglect proceedings were initiated against the appellant mother in 2001, she took her children to North Carolina, where they began living with maternal relatives. Following a finding of neglect, custody was awarded to the maternal grandmother subject to North Carolina approval. While the children thrived under the grandmother's care, North Carolina refused to approve her as a foster parent due to advanced age. The children were then placed on consent directly with the grandmother. In 2002 approval was sought for the maternal aunt to be backup or primary caretaker; the appellant mother opposed, and placement remained with the grandmother. In 2003 the "permanency goal" was changed from reunification with the appellant mother to placement with the aunt. A combined custody, extension of placement, and permanency hearing, was held and adjourned, with the appellant mother opposing the suggested placement of custody with either the aunt or grandmother. In July 2003, permanent custody was awarded to the aunt. No finding was made as to "extraordinary circumstances" warranting State intervention in the parental custody of the appellant mother's children.

Holding: The appellant mother correctly asserts that a proper evidentiary hearing was not held on extraordi-

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nary circumstances. *See Matter of Tristram K.*, __AD3d__, 84 NYS2d 83. The determination of neglect was insufficient ground on which to deny custody. Order reversed, remanded for a full evidentiary hearing. (Family Ct, New York Co [Schechter, J])

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

People v Rosario, No. 6663, 2006 NY Slip Op 1365 (1st Dept 2006)

The defendant was sentenced to consecutive terms of 12½ to 25 years and two and a half to five years respectively for first-degree manslaughter and third-degree criminal possession of a weapon.

Holding: Notwithstanding the defendant's plea of guilty, he may advance on appeal the contention that his consecutive sentences should be concurrent and are therefore illegal. Sentences imposed for offenses meeting the criteria of Penal Law 70.25(2) must be concurrent. Consecutive sentences have been upheld for two or more offenses that include third-degree weapon possession when the possession and use were "'separate and successive acts.'" *See eg People v Baro*, 236 AD2d 307 *lv den* 89 NY2d 1032. Here, the defendant confronted the decedent twice, then walked to a nearby location where a friend gave him a gun, returned to where the decedent stood, shot him, and was not found in possession of the gun when apprehended very soon thereafter. *Compare People v Simpson*, 209 AD2d 281. There is no allegation that the weapon charge referred to a different gun or event. *See People v Hamilton*, 4 NY3d 654,658. Judgment modified, sentences directed to run consecutively. (Supreme Ct, Bronx Co [Globerman, J])

Second Department

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

People v Atkinson, 21 AD3d 145, 799 NYS2d 125 (2nd Dept 2005)

The defendant bought marijuana from the decedent using counterfeit money. When the fraud was discovered the decedent demanded either the money or the drugs. The defendant entered the decedent's store and confronted him. Associates of both were present. The defendant, saying he had heard the decedent planned to kill him, pulled out a gun, shot the decedent in the neck, and left the store. The defendant was acquitted of intentional murder and convicted of depraved indifference murder.

Holding: Evidence at trial, viewed in a light most favorable to the prosecution (s*ee People v Contes,* 60 NY2d 620), was sufficient to prove the recklessness element of depraved indifference murder. A rational jury could have found beyond a reasonable doubt that while the defendant had no intent to kill, shooting the decedent in the neck and walking away created a substantial and unjustifiable risk that the decedent would die, and that the defendant, aware of that risk, consciously disregarded it, deviating grossly from the standard of conduct that a reasonable person would observe in that situation. The evidence was not insufficient. *See People v Sanchez*, 98 NY2d 373. A single homicidal act against one person can under some circumstances constitute both a reckless and an intentional crime, where the intent is one other than to kill. The evidence in this case supported a *mens rea* other than an intent to kill, which was tacitly conceded by the defendant's request for a manslaughter second-degree charge. Reversal is not required by *People v Payne*, 3 NY3d 266. Judgment affirmed. (Supreme Ct, Queens Co [Rosenzweig, J])

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

People v Elpenord, 24 AD3d 465, 806 NYS2d 675 (2nd Dept 2005)

Police responded to a radio call about shots being fired and a car speeding away. Later, seeing the defendant's car speed through a traffic sign, they stopped him. He produced a learner's permit, but no registration card or proof of insurance. He said he had permission from the car's owner, his mother, to drive it. The car was impounded. During an inventory search the police found a handgun and the defendant's valid interim driver's license in a bag in the trunk. The defendant admitted buying the gun. The inventory was not completed, and later the police confirmed that the defendant had his mother's permission to use her car. The defendant was convicted of weapons possession.

Holding: Police failure to abide by their rules for an inventory search requires suppression of the gun and the defendant's statement. The prosecution did not meet its burden of showing the police conduct was valid. *See People v Thomas*, 291 AD2d 462, 463. Testimony showed that the inventory search was not conducted according to police procedures, as is required. *See People v Galak,* 80 NY2d 715, 718. Nor did the search satisfy any of the goals of an inventory search, which are: (1) protect the owner's property while in police custody, (2) insure police against claims of lost or stolen property, and (3) guard police against hidden dangers. *See Colorado v Bertine*, 479 US 367, 372 (1987). This search was a pretext to find evidence related to the shooting. *See People v Johnson*, 1 NY3d 252, 257. There was no probable cause; the radio call did not contain a description of a perpetrator or a vehicle, and the

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police failed to run a license check when they stopped the defendant. Judgment vacated and indictment dismissed. (County Ct, Nassau Co [Calabrese, J])

Juries and Jury Trials (Alternate Jurors) (Discharge) **JRY; 225(5) (30)**

People v Whitley, 24 AD3d 473, 806 NYS2d 222 (2nd Dept 2005)

Holding: The court did not obtain the defendant's written and signed consent to replace a regular juror with an alternate juror after the jury began its deliberations in his robbery trial. *See* CPL 270.35[1]; *People v Page*, 88 NY2d 1, 3. Oral consent is insufficient, "consent had to be in writing, in open court, and made by the defendant personally" in front of the judge. Judgment reversed and new trial ordered. (Supreme Ct, Suffolk Co [Copertino, J])

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

People v McGraw, 24 AD3d 525, 808 NYS2d 276 (2nd Dept 2005)

The defendant had been convicted of first-degree sexual assault and burglary in Connecticut, been released from prison and completed probation. He then moved to New York. The Board of Examiners of Sex Offenders found him to be a level two sex offender based on a 90 point assessment, including 20 points attributed to assaulting a stranger. *See* Correction Law art. 6-C; Sex Offender Registration Act Guidelines Risk Factor 7. Confirmed at classification hearing.

Holding: The prosecution failed to prove by clear and convincing evidence, as required, that the defendant and the complanant were strangers. *See People v Smith*, 5 AD3d 752. The Board's case summary and the probation report showed that the complainant knew the defendant—her family provided him with furniture when he moved in and he was a good friend of her nephew; she was able to identify the defendant by name to the police. Without the 20 points for assaulting a stranger, the defendant's new score is 70 points, placing him in the range of a level one offender. Judgment reversed and defendant reclassified as a level one sex offender. (County Ct, Westchester Co [Walker, J])

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

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

People v Sanford, 24 AD3d 572, 808 NYS2d 274 (2nd Dept 2005)

The defendant was charged with the death of her 87-year-old mother, who was found dead at the bottom of a flight of stairs. The indictment for manslaughter and related charges was dismissed as legally insufficient.

Holding: Evidence before the grand jury was legally sufficient to establish the offenses charged. *See* CPL 210.20[1][b]; *People v Jennings*, 69 NY2d 103. After initially denying knowledge, the defendant later admitted that the fall happened during a confrontation between the defendant and her mother. The defendant, a geriatric nurse, said she tried to help her mother, but was rebuffed and left. Returning several hours later, the defendant found her mother was still downstairs, tried CPR, and called 911. She said that her mother had been in the beginning stages of Alzheimer's disease, had a heart condition, a hip injury which caused her to limp, and arthritis. The defendant claimed the bruising was due to blood thinners, then admitted that her mother stopped taking them four years before. The defendant's admissions about her involvement in her mother's fall, knowledge of her mother's age and health, the seriousness of the fall proved by the autopsy (which showed bruising all over the body), and the defendant's five hour delay in providing help or calling for aid despite her medical background, if unexplained and uncontradicted at trial, would support a jury verdict that the defendant recklessly or with criminal negligence caused the death of or injuries to her mother, or recklessly created a substantial risk of serious injury. *See People v Galatro*, 84 NY2d 160. Judgment reversed and indictment reinstated. (Supreme Ct, Kings Co [D'Emic, J])

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

People v Noll, 24 AD3d 688, 808 NYS2d 381 (2nd Dept 2005)

The defendant, on trial for robbery and related charges, conceded committing the acts, but raised an insanity defense. *See* Penal Law 40.15. He had made several admissions to the police. His former attorney sought a suppression hearing. *See People v Huntley*, 15 NY2d 72. Replacement counsel, who had been assigned more than a year before trial, waited until the prosecutor referred to those admissions in her opening statement to seek suppression. He claimed that this was the first he knew of the confession.

Holding: Defense counsel's failure to timely move for suppression of the statements was not a strategic decision but the result of inadequate preparation. *See People v Rivera*, 71 NY2d 705, 708-709. A lawyer who properly prepared a case should be aware that the client had made statements to the police. Nothing in the record showed a legitimate explanation for counsel's inaction with regard to the statement. Under all the circumstances of the case, the defendant did not receive meaningful representation. *See People v Baldi*, 54 NY2d 137. Judgment reversed,

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Huntley hearing ordered. (County Ct, Suffolk Co [Weber, J])

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

People v Brooksvasquez, 24 AD3d 644, 808 NYS2d 378 (2nd Dept 2005)

Holding: The defendant, facing risk level classification under the Sex Offender Registration Act (Correction Law art. 6-C), was entitled to due process, including 20 days notice of the hearing date, the purpose of the hearing, and the risk level recommended by the Board of Examiners of Sex Offenders and reasons 20 days before the proceeding. *See* Correction Law 168-n(3); *Doe v Pataki*, 3 FSupp2d 456, 471 (SDNY 1998). These requirements were not met, violating the defendant's due process rights. *See People v Brooks*, 308 AD2d 99, 103. Judgment reversed and new hearing ordered. (County Ct, Suffolk Co [Weber, J])

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

People v Cioffi, 24 AD3d 793, 809 NYS2d 92 (2nd Dept 2005)

Holding: Admission of the plea allocutions of 15 codefendants during the defendant's trial for conspiracy and falsifying business records violated his right to confront the witnesses against him. *See Crawford v Washington*, 541 US 36 (2004); *People v Douglas*, 4 NY3d 777, 779. The prosecution made repeated use of the allocutions in summation, and admitted that they were a key element of their case. Admission of these statements was not harmless beyond a reasonable doubt. *See People v Woods*, 9 AD3d 293, 295. The evidence against the defendant was not so overwhelming as to preclude the reasonable possibility that the error influenced the jury. *People v Ryan*, 17 AD3d 1, 6. Although the issue was unpreserved (*see People v Bones*, 17 AD3d 689), it is reached in the interest of justice. *See* CPL 470.15[6][a]. Judgment reversed and new trial ordered. (Supreme Ct, Kings Co [Tomei, J])

Third Department

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

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

People v Hastings, 24 AD3d 954, 805 NYS2d 702 (3rd Dept 2005)

The defendant pled guilty to criminal possession of a controlled substance and was promised a sentence of six months in jail and five years of probation. She waived her right to appeal and was advised that the commitment would not be honored if she committed another crime before sentencing.

Holding: After the defendant testified at her boyfriend's trial on drug charges that the defendant was the one who sold drugs to the undercover police officer, the prosecution asked that her sentence be increased to 2 to 6 years in prison. The trial court found that the defendant had not fulfilled her plea agreement, and imposed the enhanced sentence.

Inculpating her boyfriend at his trial was not a condition of the defendant's plea agreement, nor included in the *Parker* warnings about refraining from committing new offenses before sentencing. There was no basis for finding a breach of the plea agreement. *See People v Caldwell*, 308 AD2d 658, 659. The defendant's waiver of appeal did not prevent her from raising this claim, since the promised sentence was not imposed and contingencies of the plea bargain were not clearly spelled out. *See People v Haslow*, 20 AD3d 680, 680-681 *lv den* 5 NY3d 828. Although the defendant failed to preserve the error by moving to withdraw her plea (*see People v Haynes*, 14 AD3d 789, 790 *lv den* 4 NY3d 831), the issue is reached in the interests of justice. *See* CPL 470.15[6]. The defendant's release from prison did not make the issue moot, as she was on parole. *See People v Stewart*, 185 AD2d 381, 382 *lv den* 80 NY2d 977. Judgment modified, remanded for resentencing. (County Ct, Clinton Co [McGill, J])

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

People v Hasenflue, 24 AD3d 1017, 806 NYS2d 766 (3rd Dept 2005)

The defendant was arraigned in a town court for assaulting a police officer and other offenses. The town court ordered a competency examination. *See* CPL art. 730. The exam was not completed because the defendant refused to participate, and he was indicted. At his trial in county court, he acted pro se with stand-by counsel. Convicted on three counts, he was sentenced as a second felony offender to an aggregate prison term of 10 years.

Holding: Once the competency exam process had begun in the justice court, it was incumbent on the county court to see that it was completed after jurisdiction was transferred. *See People v Decker*, 134 AD2d 726, 728. Since the trial proceeded without the results of the exam, the defendant was deprived of his right to a full and fair determination of his mental capacity to stand trial. *See People v Armlin*, 37 NY2d 167, 172. The county court's

Third Department *continued*

searching inquiry about the defendant's ability to represent himself and the defendant's conduct throughout the trial did not obviate the need to comply with the requirements of CPL 730. Those requirements may be met by a reconstruction hearing. *See People v Hudson*, 19 NY2d 137 *cert den* 398 US 944 (1970). Decision withheld, remanded for reconstruction hearing. (County Ct, Ulster Co [Ulster, J])

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

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

People v Douglas, 24 AD3d 1019, 806 NYS2d 764 (3rd Dept 2005)

The defendant was charged with second-degree burglary for allegedly entering his former girlfriend's apartment in violation of an order of protection and striking her in the face. An agreement was reached where the defendant would be tried on stipulated facts, convicted of third-degree burglary, and sentenced to two to four years in prison. The stipulation stated "[t]hat it is agreed between the People and the defendant that on the 28th day of March, 2003, the defendant knowingly entered or remained unlawfully in a building, located at 370 West Water Street, to commit a crime therein." No other facts or witnesses were introduced. At sentencing, the defendant claimed he was a guest in the apartment and denied hitting his girlfriend. The court imposed the promised sentence.

Holding: To satisfy Penal Law 140.20, there must be a showing that the defendant, at the time he unlawfully entered or remained after authorization to be present terminated, had the intent to commit a crime. *See People v Gaines*, 74 NY2d 358, 363. The stipulation of facts does not contain evidence of, or a basis to infer, such intent. "More fundamentally," the stipulation contains neither adequate assurances of the defendant's guilt or proof that his admissions were intelligently made, as is required for a guilty plea. *See People v Lopez*, 71 NY2d 662, 666. Preservation of the issue was unnecessary, since it concerned a fundamental, nonwaivable defect in the mode of procedure. *See People v Patterson*, 39 NY2d 288, 295-296 *affd* 432 US 197. With no witnesses appearing and being sworn, there was no prosecution, so jeopardy did not attach. *See* CPL 40.30[1]; *People v Gingello*, 84 Misc2d 63, 65. Judgment reversed and remanded. (County Ct, Chemung Co [Buckley, J])

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

People v Sleasman, 24 AD3d 1041, 805 NYS2d 736 (3rd Dept 2005)

The defendant and the complainant, now his wife, both had histories of alcohol abuse and fighting. On this occasion, after another drunken encounter, they awoke to discover that the complainant had been stabbed in the neck. The defendant called an ambulance, and the complainant was treated at the hospital and kept overnight. The defendant was convicted of first-degree depraved indifference assault.

Holding: The weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495) did not support the serious physical injury element of first-degree assault. *See* Penal Law 120.10[3]. The complainant was conscious and communicating when the ambulance arrived; and although the injury was originally viewed as life threatening, tests confirmed that it cut a neck muscle without damaging the airways or major blood vessels. The evidence in the record did not support a substantial risk of death. *See eg People v Horton*, 9 AD3d 503, 504-505 *lv den* 3 NY3d 707. However, there was sufficient proof of third-degree reckless assault. *See* Penal Law 120.00[2]. Judgment modified and remanded for resentencing. (Supreme Ct, Albany Co [Lamont, J])

Robbery (Degrees and Lesser Offenses) (Elements) (Evidence) **ROB; 330(10) (15) (20)**

People v Dobbs, 24 AD3d 1043, 805 NYS2d 734 (3rd Dept 2005)

The defendant was charged with third-degree robbery based on evidence that he stole a purse from a 79-year-old woman. Pursuant to a stipulation, the court inspected the grand jury minutes. The court reduced the charge to petit larceny due to the lack of evidence of forcible taking. The prosecution appealed.

Holding: No evidence was presented to the grand jury that the complainant was threatened, pushed, shoved, or injured when the defendant took her purse. Nor was there any proof that the defendant threatened to use physical force or exerted such force upon the complainant in removing her purse. Forcible taking is an essential element of third-degree robbery. *See* Penal Law 160.05. Lacking sufficient evidence, the trial court properly reduced the charge (*see People v Middleton*, 212 AD2d 809) to petit larceny. *See* Penal Law 160.00. Judgment affirmed. (County Ct, St. Lawrence Co [Richards, J])

Double Jeopardy (General) **DBJ; 125(7)**

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

Matter of Gorghan v DeAngelis, __AD3d__, 808 NYS2d 787 (3rd Dept 2006)

In 2001, the petitioner was convicted of rape and related charges. The conviction was overturned due to pervasive prosecutorial misconduct. The petitioner's motion to prohibit retrial on double jeopardy groups was

Third Department *continued*

denied. He brought an Article 78 proceeding (writ of prohibition) in the Appellate Division to prevent retrial by the County Court.

Holding: The petitioner's double jeopardy claim was not raised on his direct appeal, but only mentioned in a conclusory manner. Therefore, review is not barred by res judicata or collateral estoppel. Double jeopardy may bar retrial when prosecutorial misconduct has been so egregious or provocative that the judicial process has broken down. *See Matter of Potenza v Kane*, 79 AD2d 467, 475 *lv den 53* NY2d 606; *People v Adames*, 83 NY2d 89, 90-91. This record did not support a finding that the integrity of the judicial process had been impaired. Petition dismissed.

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

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

People v Cross, __AD3d__, 807 NYS2d 711 (3rd Dept 2006)

The defendant and two codefendants were in one codefendant's apartment when the police executed a search warrant, finding found crack cocaine on the codefendants and drugs and a scale in a box in the bedroom. In the defendant's pockets they found buy money from a prior drug sale by a codefendant to a confidential informant. The codefendants plea bargained and testified against the defendant, who was convicted of third- and fourth-degree possession of drugs based on constructive possession.

Holding: The trial court violated the defendant's right to a fair trial by withholding its *Sandoval* decision (*People v Sandoval*, 34 NY2d 371) until after the close of the prosecution's case. The defendant was entitled to a pretrial ruling on the admissibility of his criminal history to allow him to make an informed decision about whether to testify. *See People v Bennett*, 79 NY2d 464, 468. The defendant made a pretrial motion, but by the time the trial court issued its decision, the defense had already made an opening statement and cross-examined the prosecution's witnesses. The defendant had committed to a defense strategy that called for his testimony, but when the *Sandoval* ruling was made, he felt compelled not to testify. The defendant's choice of trial strategies might have been different but for the error. *Compare People v Young*, 271 AD2d 751, 751-752 *lv den* 95 NY2d 859. The accomplice testimony by the codefendants was amply corroborated. *See* CPL 60.22[1]; *People v Breland*, 83 NY2d 286, 293. Judgment reversed, new trial ordered. (County Ct, Greene Co [Lalor, J])

Parole (Release [General]) **PRL; 276(35[d])**

Prout v Dennison, __AD2d__, 809 NYS2d 261 (3rd Dept 2006)

The petitioner pled guilty to second-degree murder for a double homicide that occurred when he was 18, and was sentenced to 15 years to life in prison. After 25 years of incarceration, he made his sixth appearance before the Parole Board, which denied his request for release, and ordered him held for another two years. The Board specifically concluded that "discretionary release is contrary to the best interest of the community" and "is not appropriate, as this deprived [sic] indifference to life is not consistent with community standards and interests, and release would not serve society." The court granted the petitioner's article 78 application based on the Parole Board's failure to follow statutory standards. Respondent appealed.

Holding: The Parole Board was required by Executive Law 259-i(2)(c)(A) to consider if there was "a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law." (emphasis omitted). The record here shows that the Board did not fully consider the statutory factors or provide any explanations. *See* Executive Law 259-i[1][a]; [2][c][A]; *Matter of Farid v Travis*, 17 AD3d 754, 754-755 *app dsm'd* 5 NY3d 782. While not all factors must be given equal weight or articulated (*Matter of Zhang v Travis*, 10 AD3d 828, 829) the statutory requirements must be met. The Board's terse decision lacks any analysis of criteria, preventing the court from giving meaning to its language. Judgment affirmed and remanded for new hearing. (Supreme Ct, Albany Co [Lamont, J])

Dissent: [Carpinello, J] The reviewing court can look to the entire hearing transcript, and not limit itself to the Board's decision in assessing its conclusion.

Fourth Department

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

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

Fitzpatrick v Rosenthal, No. CA 05-01698 (4th Dept 2/3/06)

Felony complaints proffered at arraignment in local criminal court averred conduct constituting the crimes charged and recited that the sources of the affirmant's information were "eyewitness accounts," but no witness statements or police reports were attached. The judge refused to consider evidentiary material presented ex parte by the prosecution and dismissed the complaints for facial insufficiency. The prosecutor brought a CPLR Article 78 proceeding to prohibit the judge from: questioning the facts contained in sworn felony complaints

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during CPL 140.45 review; dismissing complaints without determining that a sufficient complaint could be drafted by examining evidence made available including in camera review of confidential police reports; requiring amendment of complaints to avoid their dismissal; and making public or providing to the defense any confidential information submitted for in camera review. The prosecutor also sought declaratory judgment imposing the strictures of the requested prohibition relief on the judge in question and all other judges of preliminary jurisdiction. Supreme Court found the dismissed complaints facially sufficient.

Holding: This is properly a declaratory judgment action, as a writ of prohibition does not lie in the circumstances presented. The court erred by granting declaratory relief purporting to affect the underlying criminal action. The court also erred in finding the complaints facially sufficient. Where a felony complaint is based on hearsay, probable or reasonable cause cannot be established without a showing that the informant had some basis for the knowledge transmitted and was reliable. *See People v Bigelow*, 66 NY2d 417, 423. The felony complaints here do not meet this test. The assertion that the judge must consider evidence outside the complaint lacks merit. Judgment is granted in favor of the defendant judge as follows: "[A] local criminal court is not required to consider evidentiary material submitted ex parte by the People for in camera review in determining the facial sufficiency of a felony complaint pursuant to CPL 140.45." Judgment reversed, complaint dismissed, and judgment granted as noted. (Supreme Ct, Onondaga Co [Greenwood, J])

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

People v Trotter, No. KA 04-00230 (4th Dept 2/3/2006)

The court suppressed drugs discovered in the defendant's vehicle at a traffic checkpoint. When the defendant reached for his license, an officer looking into the vehicle saw a baggie containing what looked like cocaine in an open compartment in the door.

Holding: A checkpoint program contravenes the 4th Amendment when its primary purpose is to uncover evidence of ordinary criminal wrongdoing. *See City of Indianapolis v Edmond*, 531 US 32, 42 (2000). That the dozen or more officers participating in the checkpoint stopped every passing vehicle to check all windshield stickers, registrations, and drivers' licenses did not make it a legitimate seizure. While the checkpoint procedure alone would present no constitutional infirmity, it did not exist in isolation. The Court of Appeals has said that *Edmond* requires looking closely at the nature of the public interests a seizure regime principally serves. *People v Jackson*, 99 NY2d 125, 131. Evidence supported the court's finding that the checkpoint here was "no more than a 'key programmatic tool'" in an effort to "'control crime by heightened police presence.'" The checkpoint "was conducted as an integral component of the 'Rochester Initiative,' a law enforcement tactical unit" that used traffic checkpoints within a target area as a strategy to deter violent crimes and drug trafficking. During the two-month Initiative period, all 46 checkpoints conducted were at night in the target area, staffed by personnel for the three law enforcement agencies participating in the Initiative. Order affirmed, indictment dismissed. (Supreme Ct, Monroe Co [Affronti, J])

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

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

People v Jackson, Jr., No. KA 04-01786 (4th Dept 2/3/2006)

Holding: The defendant's contentions as to the court's failing to advise him that he would be subject to postrelease supervision and registration under the Sex Offender Registration Act (*see* Correction Law 168 *et seq; People v Ginter*, 23 AD3d 1064) are not preserved for review. Review as a matter of discretion in the interest of justice is declined. *See* CPL 470.15(6)(a). The defendant's claim that the waiver of the right to a jury trial was not knowing, intelligent, and voluntary is also unpreserved, and lacks merit. Judgment affirmed. (County Ct, Steuben Co [Bradstreet, J])

Trial (Joinder/Severance of Counts and/or Parties) **TRI; 375(20)**

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

People v Kyser, No. KA 04-02747 (4th Dept 2/3/2006)

Holding: The court erred by refusing to sever the defendant's trial from that of his co-defendant. Grounds for severance included that the co-defendant's statement would implicate the defendant, who would be unable to confront and cross-examine the co-defendant. The defendant was denied his right to confront this witness against him. *See Bruton v US*, 391 US 123 (1968); *People v Camarre*, 171 AD2d 1002, 1003 *lv den* 78 NY2d 953. Severance was also required because the defendant and co-defendant each asserted that the other possessed the drugs found in the vehicle. *See People v Mahbaubian*, 74 NY2d 174, 184. The defendant failed to preserve his claim of a violation of the federal holding in *Crawford v Washington* (541 US 36 [2004]). The issue is reached in the interest of justice. The

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out-of-court statement of the co-defendant, which implicated the defendant, was testimonial in nature and was offered for the truth of the facts in the statement; its admission violated the Confrontation Clause. *Cf People v Lewis*, 11 AD3d 954, 955 *lv den* 3 NY3d 758. Judgment reversed, severance granted, new trial ordered. (Supreme Ct, Erie Co [Tills, AJ])

Juveniles (Youthful Offender) **JUV; 230(150)**

People v William S., No. KA 04-02978 (4th Dept 2/3/2006)

Holding: The defendant, convicted of second-degree assault (Penal Law 120.05[1]), should have been granted youthful offender status. He was 16 years old at the time of the offense and had no prior record. The record indicates that racial name-calling by the complainants precipitated the assault and that the defendant's older sisters were the primary perpetrators. Despite a difficult upbringing, the defendant appears to have the potential to lead a law-abiding life. Adjudicating him a youthful offender is deemed appropriate in the interest of justice. *See* CPL 470.15 (3) (c); *People v Noel*, 106 AD2d 854. Judgment modified. (Supreme Ct, Erie Co [Wolfgang, J])

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

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

People v Martin III, No. KA 05-00252 (4th Dept 2/3/2006)

The defendant's conviction was affirmed on direct appeal. His motion for a writ of coram nobis was granted based on the potential merit of his contention that he was denied effective assistance of appellate counsel where counsel failed to argue in the appeal that the defendant was improperly denied the opportunity to review notes from the jury or to have input into the court's response to those notes.

Holding: Reversal is required based on the court's failure to read into the record two jury notes. The first asked for definitions of three counts in the indictment and the other for "'First Count 3 points.'" *See People v O'Rama*, 78 NY2d 270, 277-278. The court failed to respond to the first note. *See People v Butler*, 192 AD2d 1126, 1127-1128. The court's effort to "interpret and paraphrase" the second note did not substitute for the required notice to defense counsel of the note's actual specific content. Defense counsel was prevented from participating meaningfully in this critical state; the errors were not subject to preservation rules. *See People v Kisoon*, 23 AD3d 18, 23. They were "'inherently prejudicial'" and effectively deprived the defendant of an opportunity to evaluate the inquires and propose responses. Harmless error analysis does not apply. As to a third jury note, the record lacks an affirmative notation that the defendant was absent during the court's response. The defendant has not presented substantial evidence to rebut the presumption of regularity. *See People v Afrika*, 13 AD3d 1218, 1222-1223. Judgment reversed, new trial granted on the first and third counts. (Supreme Ct, Erie Co [Wolfgang, J])

Concurrence: [Scudder and Kehoe, JJ] As to the first note, the "errors were cured by the jury's two subsequent notes and the on-the-record request for that same information and by the court's prompt and 'meaningful' responses to those subsequent requests."

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

Motor Vehicles (General) **MVH; 260(17)**

People v Shank, No. KA 05-01694 (4th Dept 2/3/2006)

Holding: The defendant's contention that the evidence was legally insufficient to support his driving while intoxicated conviction is unpreserved and without merit. That the officer did not see anything improper in how the defendant was operating the vehicle before he was stopped and failed a field sobriety test did not preclude the trier of fact from finding that the defendant's consumption of alcohol had rendered him incapable of employing the necessary physical and mental abilities needed to drive. The conviction of operation of a motor vehicle on the highway while drinking (Vehicle and Traffic Law 1227[1]) is not supported by sufficient evidence. *See gen People v Bleakley*, 69 NY2d 490, 495. The officer testified that he saw an empty beer bottle in the defendant's vehicle; no evidence was offered that the bottle contained alcohol or that the defendant had been drinking from the bottle "while in the vehicle 'located upon {a} public highway{ }'" [empty brackets in original]. Judgment modified, count four dismissed. (County Ct, Erie Co [DiTullio, J])

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

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

People v Carlton, No. KA 04-01737 (4th Dept 2/3/2006)

Holding: The court did not err in summarily denying suppression of items described in a search warrant for, and seized from, the defendant's house. Facial sufficiency of a warrant is an issue of law that does not require a hearing, but rather may properly be determined by review of the affidavits alone to determine whether probable cause

Fourth Department *continued*

was established. *People v Dunn*, 155 AD2d 75, 80 *affd* 77 NY2d 19 *cert den* 501 US 1219. Summary denial of suppression of a pistol and bullets not described in the warrant or warrant application, and of items described in or seized pursuant to a warrant to search the defendant's work locker, was improper. A hearing is required to decide the "disputed issue of whether the pistol and bullets were seized in plain view as part of the lawful search" of the defendant's home and upon his admission that the gun was unregistered. *See gen Horton v California*, 496 US 128, 136-137 (1990). The application for the warrant to search the defendant's work locker failed to establish probable cause, necessitating a hearing on the issue of whether the defendant consented to that search. At the hearing, the prosecution bears the burden of establishing voluntary consent. *See gen Bumper v North Carolina*, 391 US 543, 548-549 (1968). Judgment reversed, plea vacated, matter remitted for hearing. (County Ct, Ontario Co [Reed, J])

Accusatory Instruments (General) ACI; 11(10)

People v Waid, No. KA 04-03067 (4th Dept 2/3/2006)

Holding: The defendant's contention that his waiver of indictment was jurisdictionally defective did not require preservation for review, but lacks merit. After the defendant was indicted for several offenses relating to a single transaction, the prosecution filed a felony complaint charging those offenses and a new first-degree sexual abuse charge. Having waived a preliminary hearing and been held for action of the grand jury, the defendant then waived indictment and consented to prosecution by superior court information (SCI) on all charges in the complaint. The waiver of indictment and SCI with respect to the sexual abuse charge (to which the defendant eventually pled guilty) was not jurisdictionally defective. *See People v D'Amico*, 76 NY2d 877, 879. The statutory prerequisites for waiver were met. *See* CPL 195.10(1)(a). County Court's failure to sign an order approving the waiver of indictment was a mere ministerial error not requiring reversal. *See gen People v McKenzie*, 221 AD2d 743, 744. Where the record shows the court was satisfied that the waiver was sufficient and all statutory requirements were met, the court had no discretion to withhold approval of the waiver. *See* Preiser Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 195.30. Judgment affirmed. (County Ct, Niagara Co [Broderick, Sr., J]) ⚖

From My Vantage Point *(continued from page 14)*

treatment on parole in the community. Sex offender experts say that the group most talked about—"dangerous sexual predators"—is the least amenable to treatment. Yet in the six Conference Committee hearings held so far to "resolve differences between the Assembly and Senate bills," the proponents of lifetime commitment for "dangerous sexual predators" will have none of this truth. Each house outdoes itself urging how little their members know about treating sex offenders and how much each should be willing to spend on this rogue idea, how critical this bill is, and how important—in an election year—public safety is to each of them.

With only eight months left to election, both houses would do well to recognize that even people who want civil commitment and the enhanced treatment of sex offenders find these bills conceptually defective. While the Assembly bill moves toward treatment goals, neither bill assures professionalism in treatment decisions. In the Governor's bill the decision to seek commitment is left exclusively in the hands of law enforcement, while in the Assembly bill law enforcement can override the medical decision recommending against civil commitment. Why the Legislature fears leaving the decision in the hands of professionals can be explained by the power of the tabloids and the banner they carry for this unwise legislation. Far broader than their rhetoric, these bills which pretend to cover only a "small handful of dangerous offenders" actually cover every felony sex offense in the Penal Law.

Even if the bill worked right it would be wrong. Isolating a small handful of generally untreatable people in an expensive facility where they will be held for life on the theory they must be treated skews precious, limited resources that should otherwise be available for treatment of a broader category of sex offenders.

Coalition Calls for Careful Evaluation

Civil commitment is a very bad, wasteful, reactionary idea. That is why a coalition consisting of NYSDA, the New York Civil Liberties Union, the New York State Alliance of Sex Offender Service Providers, the New York State Coalition Against Sexual Assault, the Mental Health Association in New York State, the New York Association of Psychiatric Rehabilitation Services, Prison Families of New York, Inc., Prisoners' Legal Services of New York, The Innocence Project, and the New York State Association of Criminal Defense Lawyers has called upon the Legislature to slow down, resist politics, and critically evaluate civil commitment. ⚖

Court of Appeals Update *(continued from p. 18)*

CAPITAL APPEALS PENDING

People v John Taylor — Appeal as of right directly to Court of Appeals from Queens County conviction for capital offense. The defendant was convicted in the "Wendy's" slayings. Appellant's brief due June 2006. Issues to be determined. ⚖

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