



Public Defense Backup Center
REPORT

Volume XXI Number 3

June-July 2006

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Roberts Court Mixed on International Law Effects

At the close of its first term with John Roberts Jr. as Chief Justice, the US Supreme Court issued two major opinions addressing the effect of international law on domestic cases of interest to the defense community.

In late June the Court issued a decision written by Roberts addressing the effect in domestic criminal cases of Article 36(1) (b) of the Vienna Convention on Consular Relations. The Article says, among other things, that foreign nationals must be told they have a right to contact their consulate when detained in the US. The Court held that even if Article 36 creates a judicially enforceable right, suppression of statements made during detention is not an appropriate remedy for a violation of the Article's requirements. While the language of Roberts' opinion was respectful of the Vienna Convention, four justices dissented from what they termed an unprecedented repudiation of a valid treaty. (NYLJ online, 6/29/06, reporting on *Sanchez-Llamas v Oregon*, Nos. 04-10566 and 05-51, 6/28/06 [a summary of the case appears at p. 24, along with summaries of other end-of-term cases].)

The next day, the last day of the term, five members of the Court held that the military commissions established to try detainees held in Guantánamo Bay, Cuba, violate both US law and the Geneva Conventions. Strong dissents were read from the bench by Justices Thomas and Scalia after the majority's decision was summarized. Chief Justice Roberts did not participate, having been part of the DC Circuit Court of Appeals panel that heard the matter. (NYLJ online, 6/29/06, 6/30/06, reporting on *Hamdan v Rumsfeld*, No. 05-184 (6/29/06) [a summary of the case will appear in a future issue of the REPORT].)

Kaye Commission Calls for New, Statewide Public Defense System

Two years ago, Chief Judge Judith Kaye appointed a blue-ribbon commission to look into New York State's

provision of mandated legal services to poor people in criminal matters. On June 28, 2006, she announced the commission's findings and recommendations at a press conference at the Court of Appeals.

The Commission's report was supported by an extensive, statewide study of public defense services conducted by The Spangenberg Group (TSG). The Commission referred repeatedly to the TSG report, and urged "all who are concerned with this crisis" to examine it closely.

Findings: The System Fails to Protect Defendants' Rights

The Commission's findings will come as no surprise to public defense lawyers, clients, and anyone else who has observed how Article 18-B of the County Law, which delegates to counties the State's duty to provide mandated representation, works—or doesn't work:

New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused.

—"Final Report to the Chief Judge of the State of New York," Commission on the Future of Indigent Defense Services, June 18, 2006, p. 15. www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf

That overarching conclusion is followed by more detailed findings that need not be recounted here. The REPORT has noted repeatedly New York State's lack of and need for enforceable standards, lack of sufficient funding and resulting high caseloads, insufficient resources, and many other deficiencies.

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Recommendations: Establish a Statewide Defense System Overseen by an Independent Commission

Nor will the basic recommendations surprise those who attended or read about the four hearings the Commission held, noted the Commission's interim report (www.nycourts.gov/reports/futureofindigentdefense.pdf), or heard or read Chief Judge Kaye's State of the Judiciary Address and remarks to the New York State Bar Association in February, all reported in past issues of the *REPORT*. The recommendations, in sum, are that:

The delivery of indigent defense services in New York State should be restructured to insure accountability, enforceability of standards, and quality representation. To this end there should be established a statewide defender office consisting of an Indigent Defense Commission, a Chief Defender and Regional and Local Defender Offices, a Deputy Defender for Appeals, and a Deputy Defender for Conflict Defense.

—*Id.*, p. 28.

Details about the proposed Indigent Defense Commission, the other components of the system, the "expeditious phase-in schedule," etc. follow the initial recommendation.

Addendum: The Court System Should Take Steps Now

What may surprise readers of the Kaye Commission's final report is the suggestion of proposed interim measures, contained in an Addendum. These are proposals that the Commission believes the Unified Court System could implement immediately to ameliorate specific problems found to affect public representation. Not intended to undercut the necessity for the broad reforms advocated by the Commission, the suggestions in the Addendum are aimed at such long-standing issues as:

- denial or unavailability of expert/investigative services;
- insufficient CLE training specific to criminal law available to public defense lawyers;
- insufficient judicial knowledge about public defense issues, particularly in town and village courts;
- unrepresented defendants languishing in jail on excessive bail;
- lack in many counties of current, written plans for providing public defense;
- lack of adequate attorney/client contact;
- lack of public defense data generally;
- lack of verbatim records of town and village court proceedings;
- scheduling problems related to uncoordinated local court times; and

- unavailability of certified interpreters for non-English-speaking defendants.

The mechanisms proposed for addressing the problems include amendments to or additional enforcement mechanisms for various court rules (Rules of the Chief Administrator, Joint Rules of the Appellate Divisions, Rules of the Chief Judge, Uniform Rules for the Trial Courts, and Uniform Rules for Courts Exercising Criminal Jurisdiction).

Other proposals call for the Administrative Judge of the New York City Criminal Courts to expand the list of plea-by-mail offenses to reduce caseload, and for the Legislature to expand the availability of such measure outside the City; for expansion of videoconferencing to allow attorneys to interview incarcerated clients from court facilities; for use of Court and DCJS resources to improve data collection; and for creation of an office within OCA to facilitate implementation of the Commission's recommendations.

Read and Use the Reports

Defenders and all who have an interest in public defense reform can find both the Kaye Commission's Final Report and the supporting report by TSG on the Unified Court System website: www.nycourts.gov/ip/indigentdefense-commission/index.shtml. The 164-page report (plus appendices) by TSG makes a good judicial educational tool. Local court justices who see their own actions and inactions reflected in the critical mirror of Chapter 8 (Town and Village Courts) may become more concerned with applying the law governing the right to counsel rather than guarding against depleting the county coffers. Counties specifically named in the Spangenberg Report will have difficulty denying that a problem

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exists. District Attorneys who complain about increases in a defender's funding and minimize the depth of their own resources can be confronted with the Kaye Commission's finding that "There is a significant state-wide disparity between the resources available to public defenders and those enjoyed by prosecutors." (Kaye Commission Final Report, p. 23.)

Creative use of the two reports for both systemic change and individual advocacy should be virtually unlimited. One Chief Defender who read both reports as soon as they were available turned to the Spangenberg report only a week or two later as a starting point for analyzing the case of a client who had been jailed for non-payment of a surcharge. See Spangenberg Report, §§ 3.2.2, 7.8, 8.3.2, and Appendix M.

The reports may be especially effective in calling media attention to public defense problems. Local public defense programs can emphasize the portions of the reports most relevant to their situation. For example, Steven Banks, Attorney-in-Chief of The Legal Aid Society in New York City said, "We certainly welcome the chief judge's focus on adequate resources and appropriate case-load standards." (www.citylimits.org, week of 7/10/06.)

The Backup Center welcomes information on how local media treated release of the reports, what press releases defenders or others have issued, and any follow-up. The Albany paper, for example, ran a Sunday editorial decrying the state of public defense as described by the Kaye Commission. (*Times Union*, 7/9/06.) The Lower Hudson's *Journal News* described the Commission's findings and recommendations, lauded the suggestion that immediate steps be taken toward improvement, and called on state political leaders to provide needed longer-term solutions. (www.thejournalnews.com, 7/2/06.)

Please call us also with questions and your suggestions about how to use these reports to best advantage immediately and in the planning of long-needed, now-occurring public defense reform in New York State.

Dollard Honored for PDCMS Work

Darlene Dollard, Project Manager for NYSDA's Public Defense Case Management System (PDCMS), recently received state-wide recognition for her work. The Center for Digital Government, which annually recognizes stellar work by IT professionals in New York state and local government organizations, presented Dollard with a Best of New York 2006 Leadership Award for Demonstrated Excellence in IT Operations, Support and Service.

Carmen Lonardo, Confidential Assistant to the Public Defender, at the Monroe County Public Defender Office, nominated Dollard. He noted that her "technical expertise, thorough knowledge of the criminal justice system and innovative approach has enabled her to meet the unique needs of public defender offices in all regions of



Darlene Dollard received a Center for Digital Government award on June 22, 2006 for her work as Project Manager for NYSDA's Public Defense Case Management System.

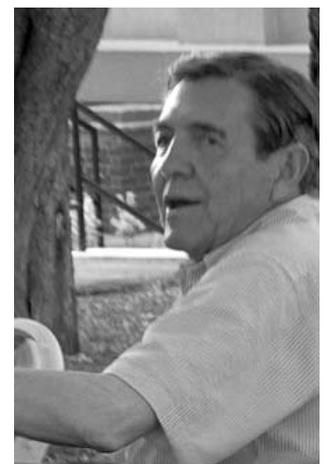
New York State." Dollard "always exceeds the minimal requirements of the maintenance and support services outlined in our contract," he added. Across the state, public defenders and their staffs no doubt echo Lonardo's words of appreciation.

With PDCMS, busy public defenders can efficiently perform management tasks such as conflict checking and generating reports that they otherwise would struggle to complete in a timely, effective way. Twenty-six offices in 22 counties have contracted with NYSDA for PDCMS software and support services, keeping Darlene and the Backup Center busy.

Congratulations, Darlene, on this well-deserved honor!

Client-Centered Basic Trial Skills Imparted at Defender Institute

The annual Basic Trial Skills Program offered by NYSDA's Defender Institute recently gave 55 lawyers from around the state the tools and skills to provide high-quality, client-centered representation to their public defense clients. On the Rensselaer Polytechnic Institute campus in Troy, NY from June 18 to 24, 2006, coaches from around the country worked with the participants in small-group exercises and large-group presentations. Lawyers and communications experts provided participants with



Jamie Kunz, in private practice in Illinois and a long-time public defender, was among the coaches at the Basic Trial Skills Program.

suggestions and feedback on their effectiveness in interviews, courtroom examinations, voir dire, and remarks to the jury.

Ethics Training Mandated for Judicial Candidates

An amendment to Rule 100.5 of the Chief Administrator's Rules Governing Judicial Conduct requires that candidates for judicial office other than those seeking election as town and village justices must complete mandatory judicial ethics training. The required training must be completed within 30 days after receiving the judicial nomination or 90 days before receiving the nomination. 22 NYCRR 100.5(A)(4)(f).

The Judicial Campaign Ethics Center is developing and implementing the training program. Live programs at the Judicial Institute in White Plains will occur on July 28, 2006, with simulcasts throughout the state. Options will be available for those unable to attend on these dates. Candidates seeking more information can contact the Center by calling (888)600-5232, by e-mailing ctjced@courts.state.ny.us, and checking the website at www.nycourts.gov/ip/jcec/.

Death Penalty Sought for Sex Offenses Against Children

As part of the nationwide trend to increase penalties for sex offenders, and in the face of declining use of the death penalty, several states have passed laws making some individuals convicted of sex offenses against children eligible for execution. The latest state is Oklahoma, joining South Carolina, Florida, Louisiana, and Montana. (www.nytimes.com, 6/10/06; www.deathpenaltyinfo.org.) For other national death penalty developments, check Hot Topics on the NYSDA website.

In New York, slightly less drastic proposals for increasing sex offender penalties continue to arise, with some being enacted.

Information about many offenders who must meet the requirements of the Sex Offender Registration Act is being made more readily accessible. The names of Level II offenders will now appear on the Internet (*NYLJ* online, 7/10/06), while additional information about Level I offenders, including photographs, may be disclosed to entities with vulnerable populations. (S. 8457, A.8370.)

Civil commitment of some sex offenders after completion of their sentence, also proposed, has not been enacted. The Chief Defenders of New York State have joined many other groups in opposing civil commitment. In a resolution dated June 5, 2006, the Chiefs noted that civil commitment is unproven to reduce sex offenses, would require a great expenditure of scarce funds, and, as currently proposed, is too broad as to the offenders targeted, lacks proper standards for determining who should be committed, and fails to effectively address right to counsel implications. The resolution is available online at www.empirenewswire.com/release/downloads/defend.pdf.

For other news about sex offender laws, see the Megan's Law Hot Topics page on the NYSDA website.

Client Released for Attorney's Failure to Notify Him of Plea Offer

A federal magistrate in the Western District of New York has ordered the release of state prisoner Andrew J. Hoffman, serving a 25-year-to-life term for murder, because Hoffman's trial counsel never presented Hoffman with the prosecutor's plea offer of 2¹/₃ to 7 years. At the time, Hoffman had been indicted on charges that included second-degree manslaughter for a 1994 high-speed chase in which two people were killed and two others injured. Counsel, who has acknowledged not telling his client of the offer, which he says was never formally presented to him, succeeded in getting the initial indictment dismissed. However, the case was re-presented. Hoffman was indicted on and convicted of murder. His conviction was not overturned, but his sentence was reduced to the maximum term in the unrelayed offer. (*NYLJ* online, 7/13/06.) ☞



Participants at the Basic Trial Skills Program in a discussion circle.

Defense Practice Tips

A Cautionary Note About Fingerprint Analysis and Reliance on Digital Technology*

by Michael Cherry and Edward Imwinkelried**

Today the public is acutely aware of the importance of forensic science. Our morning papers regularly carry stories about the role of DNA evidence in both convicting the guilty and exonerating the wrongfully convicted. At night, the popular CSI television programs dramatize the role that forensic experts play in criminal investigations.

Although DNA evidence now attracts the greatest attention, for decades fingerprint analysis was the gold standard in forensic analysis. In fingerprint analysis, an examiner compares two images or representations of the friction ridge patterns on fingers. In the past, in criminal cases, one of the two images, often referred to as the “rolled” image, was typically produced when a person was arrested. As part of the booking process, the police rolled the arrestee’s fingertips in ink and then impressed them on a card. The card was subsequently stored in libraries of such cards maintained by local, state, and national government agencies. The data on the cards was classified on the basis of the type of ridge pattern.

The other image, usually termed the “latent,” is typically produced at a crime scene. If the police suspect that a criminal might have left a fingerprint impression on a particular surface, such as a glass tabletop, they can use techniques such as the application of special powders to visualize the image. When they find an image, they photograph it for comparison with the images in the library of fingerprint cards.

Again, in the old days, the police used conventional analog cameras and traditional chemical film to take the photographs. If those administering the library could classify the type of skin pattern displayed on the latent, they searched the library for cards of inked images with similar patterns. An examiner then compared the image of the latent to the fingerprint cards with the most similar patterns. Based on that comparison, the examiner might attribute the latent image and the image on a card to the same person. The fingerprint examiner frequently testified about the comparison at trial.

*Reprinted with permission from *Judicature*, Vol. 89, No. 6 (May-June 2006).

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Thus, in the days of yore, living, breathing fingerprint examiners compared the images. Several aspects of that paradigm inspired confidence. To begin with, a human being made a meticulous comparison of the inked and latent impressions. Moreover, that person was working with the best possible images. Admittedly, no image perfectly captures a person’s fingerprint pattern, but some are more complete and therefore more reliable than others. For the most part, today, that paradigm is passe. We will not and should not return to the days of yore; but, as we shall see, we need to be far more aware of the pitfalls lurking in the new paradigm.

Computerized Fingerprint Analysis

To understand the profound differences between the old paradigm and the new reality, we must focus on two questions: who and what. Who conducts the analysis, and what is being analyzed?

Who conducts the analysis—a human being or a computer? During any given year today, government and business must conduct a huge number of fingerprint comparisons. Unfortunately, there are not enough examiners to conduct or verify even 10 percent of the fingerprint analyses that must be completed annually. Assume hypothetically that you have 1,000 experienced, certified examiners who do nothing but fingerprint analysis. If those examiners conduct 20 comparisons a day for 365 days, they will complete only 7,300,000 analyses per year. That number pales in comparison with the number of analyses that must be conducted.

One government agency alone, Homeland Security’s US-Visit, has conducted fingerprint searches for over 40 million individuals since March 2005. US-Visit conducts these searches in order to determine (1) whether the arrivee on American soil is the same person who earlier cleared the overseas departure customs and (2) whether that person is on the Watch List.

However, US-Visit is only part of the story. The FBI’s Integrated Automated Fingerprint Information System (IAFIS) is another important piece of the picture. On a daily basis, approximately 130,000 employment background and criminal checks are completed by using IAFIS and its regional Automated Fingerprint Identification System (AFIS) counterparts.¹ During the course of a year, those checks could total over 40 million comparisons. Given the limited number of examiners in the United States, computers have to be routinely used to conduct the comparisons and determine whether two images should be attributed to the same person.

The FBI’s IAFIS computerized fingerprint matcher was originally developed by Lockheed Corporation in the 1990s. In addition, many firms offer combination fingerprint scanning and enhancement systems that are the building blocks of our local and regional AFIS systems.

The U.S. Department of Commerce National Institute of Standards and Technology (NIST) is and has been the primary source for DOJ and Homeland's large scale testing of fingerprint matchers. NIST tests these proprietary matchers for speed and accuracy. The tests have shown instances where the matchers find more minutia matches than a human examiner could. NIST is currently contemplating testing the use of fingerprint matchers with latent fingerprints.

“. . . we need to be far more aware of the pitfalls lurking in the new paradigm.”

It is conceivable that NIST latent fingerprint testing could reveal that some of the popular matchers that are capable of matching single and multiple fingerprints lack the appropriate algorithms to accurately match latent (partial) fingerprints. This would present a problem, since fingerprint experts have been using the untested matchers with latent fingerprints to provide them with suspects.

To be sure, in civil settings a computerized match frequently enjoys a major advantage over the analysis in a criminal case. In many criminal cases, the comparison is often between a solitary latent image and a ten-print card. In contrast, in civil cases the comparison is frequently made between two ten-print cards, decreasing the probability of a misidentification. However, even in a given civil case that advantage could be absent. The question thus arises in both civil and criminal cases: In general, does the cost/benefit analysis favor computerizing fingerprint analysis?

A major benefit of computerization is efficiency. Computerization enables the examiner to perform identification tasks that were virtually impossible under the old paradigm. For example, as previously stated, FBI certified matchers can often find more matches than human examiners.

But there is a price, and here is an example. In a recent interview, Thomas Bush III, the Assistant Director of Criminal Justice Information Services at the FBI, conceded that the FBI's system had missed a fingerprint attribution for Jeremy B. Jones on three occasions. Jones was a serial killer who was repeatedly released from custody. Even though the IAFIS library had included images of Jones' fingerprint patterns, the computer system failed to "match" those images to the new images produced each time Jones was re-arrested.

While acknowledging the repeated failures in the Jones case, Mr. Bush noted that “. . . Integrated Automated Fingerprint Information System [is] more than 98 percent

accurate and a vast improvement over manually matching fingerprint cards, a process that used to take 15 to 25 days.”² Although the time saving is desirable and the 98 percent figure is impressive if it is true, even the 2 percent error figure is distressing. If a computerized system is involved in 40 million comparisons a year, a “mere” 2 percent error rate converts into 800,000 erroneous conclusions.

It is no surprise that there is a 2 percent error rate. No system, including human comparison, is foolproof, but IAFIS takes shortcuts in order to effect the time saving. For example, even when all 10 fingers of a suspect are available, in the early prescreening step IAFIS analyzes only the index fingers. If the prescreening yields a very low score, a non-match decision is made without analyzing the images of the other fingers.³ As a result, the system can fail to identify the person who is the source of the fingerprint patterns that produced the latent image. The Jeremy Jones debacle may have been caused by this deficiency in the process.

What is analyzed? The who question is only part of the problem; another key question is what is analyzed. Again, in the days of yore fingerprint examiners worked with the best possible images, such as the original inked exemplars and the original film photographs of the latent crime scene impressions. Today the original inked exemplars are digital, and the latent crime scene impressions could also be digital. The latent crime scene impressions

“Who conducts the analysis, and what is being analyzed?”

have to be digitized to produce suspects. Once digitized, fingerprints are run through IAFIS or a regional Automated Fingerprint Information System (AFIS).

The law enforcement community is making extensive use of digitized technology in its fingerprint systems. In many cases, if the police succeed in visualizing a latent print at the crime scene, they use a digital camera to preserve the image. And we must never assume that once a person is taken into custody a traditional inked exemplar will be taken. In almost all cases, rather than preparing and preserving an old-fashioned inked fingerprint card, the police now employ digital scanners. The suspect places his or her fingers directly on the instrument's screen, and the instrument scans the fingers to produce a digital image that can be printed out later. In subsequent litigation, an inked fingerprint card will be unavailable because one was never created.

Litigants are not the only persons who might mistakenly assume that they are dealing with the best possible images of the fingerprint patterns. If an image has been

digitized, it can of course be printed out. Even a fingerprint examiner might conduct an analysis without realizing that he or she was working with a digital image. It is almost impossible to differentiate between traditional inked fingerprint cards and cards produced by the best available printers.⁴

Limitations

Simply stated, the reality is that digital evidence is the new paradigm. But what difference does it make? Although digital photography is in widespread use, it has its limitations. Digitized images are incomplete. Digitized fingerprint impressions included in databases are represented by only 500 by 500 pixels per inch out of a minimum 6,000 by 6,000 pixels.⁵ In contrast, conventional 35 mm black and white forensic film employs at least 6,000 pixels per inch (ppi).

“Digitized images are incomplete.”

Digital printers and screen displays use interpolation⁶ techniques to approximate the appearance of images with 6,000 by 6,000 pixels. Interpolation is unnecessary when a computer is comparing two images; a computer does not need to “view” an image in order to compare it. In contrast, a human examiner does have to view images to compare them, and that almost always results in interpolated views. Computer experts realize that the final product of digital photography is not a complete, detailed reproduction of a 6,000 by 6,000 image; rather, it is an approximation—nothing less but nothing more.

It is true that database fingerprints of 500 x 500 ppi are thought by some to contain sufficient information to identify each row and valley of a full fingerprint. However, images of latent fingerprints are frequently captured with more detail such as 1,000 x 1,000. Often latent fingerprints of 1,000 x 1000 are matched against AFIS exemplar fingerprints that are 500 x 500. The detail missing from the 500 x 500 image might be the very detail that establishes that there is no match between the two images. In short, the incomplete detail introduces a possibility of error.

The concern is especially acute when the image is of a narrow finger. The NIST test entitled *Pact2002.pdf*, using 500 ppi, shows that wider fingers tend to yield more accurate readings than narrower ones.⁷ Wider fingers touch more of the available sensors and leave more data or dots in a 500 ppi image.

To appreciate the significance of the number of dots, consider employing dots to represent numbers. Suppose

that we want to represent two numbers, one and seven. If we use only three dots to represent the numbers, the representative images will be ambiguous; it will be difficult to distinguish between the two numbers. Similarly, when we use only 500 dots rather than 6,000 to represent a fingerprint pattern, there can be ambiguity since 6,000 dots are needed to depict a continuous line. By reducing detail, digital systems increase the likelihood that the database will include “matching” images for two or more different individuals.

The Mayfield Incident

After the March 2004 terrorist attack on Madrid commuter trains, partial latent prints were discovered and lifted from plastic bags that had contained detonator caps. Spanish law enforcement authorities sent digital images of the latents to the FBI for analysis. According to the FBI statement issued on May 24, 2004, the submitted images were searched through IAFIS. FBI examiners initially concluded that the latents belonged to Brandon Mayfield. However, Mayfield was finally released after Spanish officials conceded that the fingerprints on a bag left near the Madrid bombing site were not his. The FBI later acknowledged its mistake and at first explained that, in part, the misidentification was caused by reliance on “an image of substandard quality,” that is, the digital image.⁸

The later Stacey report stated that the quality of the digital image did not contribute to the misattribution.⁹ The panel concluded that the primary causes of the misidentification were the extreme pressure of such a high-profile case and the subtle bias created by the realization that other examiners had already found a match.

Ken Moses, a respected fingerprint expert, and several highly regarded FBI examiners acknowledged their error in misidentifying Brandon Mayfield as the Madrid Bomber. A computer imaging expert might consider a different type of explanation: important details can be lost or distorted when the wrong settings, components, or combinations of both are used to display images. Proper alignment is a complex topic. One example is the number of times in a second that the computer screen is illuminated. The higher the setting the better the image.¹⁰ Inferior displays are a second example. Better quality displays are sharper and more accurate as the phosphor dots or LCD cells of the same color are closer together rather than farther apart.¹¹

“Chain of Custody”

The use of digital technology in fingerprint analysis is the microcosm. However, there are broader concerns about reliance on such technology. When we use our personal digital cameras, the technology seems simple in the extreme. However, as in many forensic contexts, computerized analysis of digital fingerprint images to identify a culprit is a multi-step process, and there is a possibility of

error at every step. For instance, there are potential weaknesses at the following, major steps.

Initially scanning the image into the system. The original latent or exemplar fingerprint image must first be scanned into the computer. This raises an input problem. Even the best modern scanners are not accurate enough to perfectly represent the images they are tasked to scan. (If they were, we all could have Rembrandts in our living rooms.) In roughly 90 percent of the country, LiveScan scanners have replaced inked-paper based fingerprint images. Often there are two available settings on LiveScan: 500 dots per inch (dpi) and 1,000 dpi. If the operator chooses the first setting, the scanned images can omit a critical detail.

Image clean-up (enhancement). Even in this early stage of the conversion process, it is not uncommon to have a computer operator “clean up” the scanned image. The operator may exercise subjective judgment in deciding to delete certain pixels. If there is a later enhancement, the image has been altered not once, but twice.

Indexing the stored image. Before the image is stored, in many cases it must be linked (indexed) to a specific person. Some banking and manufacturing systems automate this step by the use of magnetic ink (MICR) or bar codes, but others do not. Many public sector systems still rely on fallible human beings to perform the indexing. In an Oregon case, authorities had assigned the same electronic fingerprint number to a killer and Miguel Espinoza, a law-abiding, successful restaurateur in Medford. As a result of the error, Mr. Espinoza’s liquor license was revoked; and his business was virtually destroyed.

Storing the scanned image. The indexed, scanned image must be stored for subsequent retrieval. The image might be stored on a standard hard drive. However, computer hard drives are vulnerable to hacking, substituting incorrect information for the correct data. Given the potentially dire consequences of hacking, each data center should be prepared to detect the creation of erroneous information and restore the correct information. However, even some of the largest private companies do not yet have that technical capability. Similarly, many criminal justice data centers currently lack that capability.

Retrieving the stored image. Once stored, images can be retrieved or printed. However, do not assume that the printout is identical to the original image. Most printers operate on a “best fit” principle. They sometimes distort the printout of the image in order to avoid black margins on the printout.

Digital “Enhancement”

As the preceding discussion indicates, when a film image undergoes the process of conversion into a digital one, the process may result in alteration of the image. Some of those changes are inadvertent. However, there is

also the possibility of deliberate manipulation of the image. Digital enhancement amounts to deliberate manipulation. Image enhancement technology was developed during the late 1960s and early 1970s for NASA. Due to the weight and power limitations of spacecraft, it was impractical for NASA to use state-of-the-art cameras on spacecraft. The cameras used produced somewhat degraded photographs.

“. . . a “mere” 2 percent error rate converts into 800,000 erroneous conclusions.”

One type of image enhancement reverses the degradation. Initially, researchers studied the degradation properties of the use of a particular type of photographic equipment to capture a certain type of image: When this type of camera is used to photograph distant objects, what type of degradation can be anticipated? Next, the researchers designed computer software to compensate for the specific type of foreseeable degradation. The software improves the sharpness and image contrast of the photograph by eliminating background patterns and colors.

Before the image on a normal 35 mm photograph can be enhanced, the photographic image must be digitized. Digital images are composed of millions of tiny dots, referred to as “pixels.” Based on degradation models developed in research, computer software manipulates the pixels to filter out graininess and improve brightness and contrast. Although image enhancement technology was developed for the space program, the technology now has a wide variety of applications. The technology has been applied in numerous areas, including medicine, physics, meteorology, resource exploration, factory automation, and robotics control. For instance, forensic scientists utilize the technology to enhance photographs of finger and palm prints.

In order to “enhance” the image, the computer uses mathematical transforms, that is, formulae which dictate the alteration of the image. The accuracy of the enhancement depends on the validity of these formulae. If the formula is “junk science,” the “enhanced” image will be distorted. A purportedly enhanced image should not be accepted at face value. Rather, the decision maker should demand a showing of the validity of the mathematical transforms programmed into the enhancement software. Unfortunately, if the transforms introduce distortions into the image, the distortions can be terribly difficult to detect. A 500 x 500 fingerprint image consists of 25,000 discrete points. Imagine how difficult it would be to detect that the enhancement program has altered 7 of the 25,000 points.

Conclusion

The focus of this article has been the extensive reliance on computerization and digital technology in fingerprint analysis. Two caveats are necessary. First, we are not proposing that we return to the days of yore. Again, there are significant advantages to computerization.

Secondly, this article is not intended to suggest that all questions about the reliability of a fingerprint analysis evaporate when a live fingerprint examiner conducts an analysis of traditional film images of fingerprint impressions. Some critics have sharply criticized fingerprint analysis on the ground that there are no objective criteria for determining whether two fingerprint impressions "match."¹² In his initial decision in *United States v Llera Plaza*,¹³ Judge Milton Pollak took that criticism so seriously that he ruled that fingerprint examiners may not opine on the ultimate question of whether both impressions can be attributed to the same person; the experts would be confined to noting points of similarity between the two images. Admittedly, in his later decision, Judge Pollak did an about face; but even in his second opinion he indicated that fingerprint analysis does not qualify as full-fledged science.¹⁴

"Digital enhancement amounts to deliberate manipulation."

The point of this article is that a further set of troublesome problems is triggered when a live examiner relies on a less detailed digital image that may also be interpolated instead of a traditional analog photograph. Until recently, society, including the public sector, has readily accepted computerized fingerprint analysis, including reliance on digitized images of fingerprint patterns. This article has demonstrated that greater skepticism is warranted. The bottom-line is that digital images are simple, incomplete approximations of the images they attempt to capture.

There are hopeful signs that government agencies and courts are beginning to take a more critical attitude toward this technology. To its credit, US-Visit is leading the way. US-Visit is now using two exemplar fingerprints as well as a photograph to verify the identity of arrivees in the United States; and in close cases, it is having human examiners check the identification. In the near future, the agency may further upgrade its system to require a match of all 10 fingerprint patterns. For their part, some courts are demanding more persuasive showings of the reliability of digital evidence. Perhaps coincidentally, in May 2004—the very same month as the Mayfield incident—the Connecticut Supreme Court announced that in the future

Connecticut courts would insist on a more extensive evidentiary foundation as a condition for accepting digital images.¹⁵ ☞

Endnotes

- ¹ NISTIR 7242 Summary of April 2005 ANSI/NIST Fingerprint Standard Update Workshop.
- ² Shaila Dewan, "F.B.I. Apologizes for Failing to Identify Murder Suspect," *New York Times*, May 5, 2005. www.nytimes.com/2005/05/05/national/05suspect.html?pagew.
- ³ www.mitretrek.org/publications/biometrics/NIST-IQS.pdf.
- ⁴ <http://www.fbi.gov/hq/cjisd/iafis/cert.htm>.
- ⁵ 35 mm forensic film uses approximately 9600 dots per inch to represent a straight line.
- ⁶ www.cambridgeincolour.com/tutorials/image-interpolation.htm.
- ⁷ NISTAPP_Nov02.pdf pages 11, 12.
- ⁸ Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* §16-4, at 238 (Supp. 2005) (quoting the May 24, 2004 FBI statement).
- ⁹ Robert B. Stacey, "Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case," 54 *J. Forensic Identification* 706 (2004).
- ¹⁰ http://en.wikipedia.org/wiki/Refresh_rate.
- ¹¹ http://en.wikipedia.org/wiki/Dot_pitch.
- ¹² Robert Epstein, "Fingerprints Meet Daubert: The Myth of Fingerprint 'Science' Is Revealed," 75 *S Cal L Rev* 605 (2002).
- ¹³ 179 F.Supp.2d 492 (E.D.Pa. 2002).
- ¹⁴ 188 F.Supp. 549 (E.D.Pa. 2002).
- ¹⁵ *State v Swinton*, 268 Conn. 781, 847 A.2d 921 (2004); Reni Gertner, "Computer-Enhanced Evidence Requires Detailed Foundation," *Lawyers Weekly USA*, June 7, 2004, at 1, 16.

**Coming Soon:
"Avoid Common
'Missed Opportunities'
in Local Criminal
Courts (Part II)"**

Eric Sills' article in our Defense Practice Tips department in the January-March issue of the *REPORT* received a favorable response ("interesting and enlightening," "keep up the good articles"). Watch for Part II, dealing with DWI matters in local criminal courts, coming soon.

From My Vantage Point

The Reports Are In, It Is Now Time For Action

By Jonathan E. Gradess*

Judge Kaye Makes Historic Call

The Chief Judge, of her own accord, without a compelling lawsuit or other external compulsion, has called for a major overhaul of the public defense system. This happened in the Court of Appeals on June 28, 2006. Though predicted and expected for the last several months, it was nonetheless historic.

In releasing the report of her Commission on the Future of Indigent Defense Services and the Final Report of The Spangenberg Group on the Status of Indigent Defense Services in New York State (<http://www.courts.state.ny.us/whatsnew>), Judge Kaye called upon all of us. We must come together, to break the stranglehold that fiscal limitation, systemic design flaws, historical accident, and human disregard have placed about the necks of our clients and their defense.

Both the Commission report and the supporting report of The Spangenberg Group call for performance standards and oversight. Both demand independence for the defense function. Each reports the need to end county financing and to finance the system from the State's General Fund. In calling for the establishment of a state public defense system headed by a chief defender and supported by regional defenders, and retaining the best offices and personnel from our current system, the Kaye Commission and our Chief Judge have invited us to participate as a community in bringing about needed social change.

This opportunity is unique for us and we must not squander it.

Work to Shape Much-Needed Change

We can worry with some political and criminal justice officials who will resist reform efforts for fear of losing local patronage positions and the control of "their" way of doing things, or we can stand with the client community demanding justice and zealous representation. We can sit silently, waiting to pounce on a weakness, a flaw, or an oddity in the evolving model of a new system, or we can roll up our sleeves and participate in building the future. We can fear the unknown and belittle a dream of success, or we can cast aside prejudice and self interest and together build the best state public defense system in America.

Change does not happen by itself; we choose change. And real change is always a little scary. The choice lies

in our hearts and in what we know about the actual nature of our practices. Ask the question, "Do I represent my clients—all my clients—the way I should?" The honest answer to this question will lead you where we need to go.

There will be new voices in opposition now that our long awaited call for reform has been enunciated at the highest level of public judicial authority. Social change is like that. When you reach critical mass with an idea—when you feel an idea's time come—new opposition that has been steeling itself for a fight emerges.

As defenders, our job is clear. We must bring into being a new creation. We must be ready to openly and happily answer every question that emerges. We must call upon naysayers and supporters alike to justify their positions. We must do so in a spirit of collegial and social dialogue. And we must do so knowing that we are on the verge of transforming a decrepit, deficient, underfunded, politicized monstrosity into something real, lasting and effective—a well structured and resourced system of which lawyers and their clients, as well as politicians and their constituents, can be proud. ☺

Pro Bono Counsel Needed for Death Row Prisoners

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

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

Court of Appeals Update

Significant Criminal Cases Pending in the New York Court of Appeals, 7/15/2006

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 SCHEDULED FOR ARGUMENT

People v Jose Cosme Pizarro — Whether a deliberating juror must be discharged as grossly unqualified under CPL §270.35(1) when 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 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 1st Dept held that they do not, ruling that the Legislature so specified.

People v Corey Smith — Same as *Michael Nelson*, above.

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 Egbert Grant — Whether a trial court’s erroneous *Sandoval* ruling, which kept the defendant off the stand, can be harmless error.

People v Frank Cuttita — Whether the Attorney General had the authority to prosecute the defendant for knowingly operating an adult care facility without proper written approval (Social Services Law §461-b[2][c]).

People v Brandon J. Bolling — (1) Whether the defendant is entitled to a jury instruction that if jurors find the defendant not guilty of the top charge by reason of justification, they are precluded from considering any lesser offense to which the defense is applicable. (The 1st and 2nd Dept. have so held, but the 4th deems it sufficient if the court merely charges correctly on justification.) (2) Whether the defendant was entitled to a hearing on his claim that the prosecutor arrested a potential defense witness on an unrelated charge to prevent her from testifying for the defendant.

People v Ganesh Kisoorn — Whether the trial court error of summarizing the deliberating jury’s note, rather than

reading it verbatim into the record (hiding that the jury was split 10 to 2 for conviction), before delivering an *Allen* charge, is subject to the usual rules of preservation (*People v O’Rama*, 78 NY2d 270).

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 superseded by *People v Bleakley*, 69 NY2d 490 (1987). (Leave also granted to codefendant, Robert Romero, and in unrelated case, *People v Bobby Lane*, with same issue.)

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 superseded by *People v Bleakley*, 69 NY2d 490 (1987).

People v Sterling A. Cagle — Whether the 10-year time limit for treating a prior felony conviction as a predicate felony for purposes of sentencing the defendant as a second felony offender was tolled during the time the defendant was in a day-reporting work release program. Penal Law §70.06(1)(b)(v) provides for tolling during “any period of time during which the person was incarcerated.”

People v Alan Brown — (1) Whether the trial court erred in its preliminary instructions, before opening statements, defining the elements of the crime charged. (2) Whether the court abused its discretion by modifying its *Sandoval* ruling.

People v Natsu Carter — (1) The failure to charge depraved-indifference first-degree assault and intentional second-degree assault in the alternative. (2) Whether trial counsel was ineffective for failing to object to the above error. (3) The sufficiency of evidence of depraved-indifference assault. (4) Whether the verdict was repugnant.

CASES WAITING TO BE SCHEDULED

People v Jose Diaz — Whether the admission of the nontestifying victim’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 victim’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” as it was made in response to police “preliminary investigation” (*ie*, “what happened?”) and not “structured interrogation.”

People v Ezekiel Ross — Whether, where the defendant admitted being a second felony offender and declined to challenge being a predicate offender, the predicate sentence was illegal since the prosecution did not file a pred-

icate statement and did not indicate a specific felony as the basis for a second-felony-offender adjudication.

People v Davor Gomcin — Whether the defendant's alleged question in a social club to an undercover officer, asking "if she wanted to take a hit of cocaine," was a mere inquiry into the officer's "wishes and desires" that did not provide probable cause to arrest.

NEW LEAVE GRANTS

People v Michael Barton — Constitutionality of city ordinance prohibiting panhandling through solicitation of motorists. County Court determined that ordinance did not violate 1st Amendment and was not overbroad.

People v Terrien Williams — (1) Ineffective assistance of trial counsel; (2) prosecutorial misconduct on cross-examination and in summation.

People v Beato Ozuna — Whether and under what circumstances can a trial court, consistent with CPL §440.10(2), deny an ineffective assistance of trial counsel claim on the ground that it can be raised on direct appeal?

People v Cornell Louree — Whether a claim under *People v Catu* (4 NY3d 242), that the plea was involuntary because was not advised of post-release supervision, needs to be preserved for appellate review by either a motion to withdraw the plea or a CPL §440.10 motion.

People v Rene Lisojo — (1) Whether the trial court erred in refusing to charge reckless manslaughter as a lesser-included offense to depraved indifference murder; whether there was no reasonable view of the evidence that the defendant's conduct was merely "reckless" as opposed to reckless and depraved. (2) Whether the court properly submitted depraved indifference murder to the jury, since the crime was clearly intentional (*People v Payne*).

People v Nico LeGrand — Whether expert identification testimony needs to meet the *Frye* test in order to be admissible.

People v Dennis Gillian — Whether the defendant, whose timely and unequivocal request to proceed pro se was improperly denied, subsequently abandoned that request by successfully asking, in the alternative, for reassignment of counsel.

People v Joseph Grajales — (a) Whether the prosecution is required under CPL §710.30 to give notice of a photo ID, and (b) whether, if so, the notice of a subsequent police-arranged corporeal ID puts the defense on notice, thus placing the burden on it to inquire if there was a previous photo ID.

CAPITAL APPEAL 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. ⚖

Job Opportunities

Job Listings Also Available

at

www.nysda.org

Job Opportunities

(under NYSDA Resources)

Find: Notices Received After REPORT deadline
Links to More Detailed Information

The Public Defense Services Commission (PDSC) is recruiting a **Director of the Office of Public Defense Services (OPDS)** in Salem, Oregon. The Director serves as the Chief Executive and Financial Officer of the statewide public defense program and is directly responsible and accountable to the PDSC. Required: Bachelors degree (advanced degree such as JD preferred); experience in the provision or administration of public defense services or other government-mandated services, government finance, public or business administration, or legislative or judicial service. Desired: strong communication and leadership skills; knowledge and understanding of the statewide and local criminal, juvenile, civil commitment, and other civil justice systems within which public defense services are mandated; ability to identify, analyze and effect changes in a complex system; ability to administer a program limited by significant constraints. Salary to be negotiated, range up to up to \$111,192. EO/AA, committed to a diverse work force. For more information see www.ojd.state.or.us/osca/opds/. Application deadline 8/15/06. To apply send resume, cover letter or memorandum describing how you meet the requirements and desired attributes, and contact information for 3 references to: Barnes H. Ellis, Chair, Public Defense Services Commission, c/o Aldrich Kilbride & Tatone LLC, PO Box 7469, Salem OR 97303, or email to resumes@aktcpa.com.

The Capital Appeals Project (CAP), located in New Orleans, Louisiana, has immediate openings for two **attorneys**. CAP is a non-profit law office established to provide representation to all indigent defendants sentenced to death in Louisiana. In addition to direct representation, staff members also resource ongoing capital trials, provide training and consultation for capital defense attorneys, engage in public outreach and education on issues relating to capital punishment, and advocate for continued improvement in the criminal justice system.

Senior Position for experienced capital defender (appellate experience a plus). Position considered full-time and permanent. Required: member of the Louisiana bar or willing to sit for it. Salary highly competitive, CWE; health insurance and typical benefits.

Junior Position is a one-year (with a possible second year agreement) contract with less experienced attorneys wanting to work, under supervision, in the area of capital appeals in Louisiana. Membership in the Louisiana Bar encouraged. Salary competitive; health insurance and typical benefits provided. Application deadline 8/7/06; may be extended for Senior Position until filled. Send cover letter, resume, and writing sample to: Jelpi P. Picou, Jr., Capital Appeals Project, 636 Baronne Street, New Orleans, LA 70113 or email to: jelpip@thejusticecenter.org. ⚖

CONFERENCES & SEMINARS

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; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: National Child Abuse Defense and Resource Center
Theme: 13th Annual Conference — Child Abuse Allegations: Science vs. Junk Science in the Courtroom
Dates: September 28-30, 2006
Place: Las Vegas, NV
Contact: NCADRC: tel (419)865-0513; fax (419)865-0526; email ncadrc@aol.com; website www.falseallegation.org

Sponsors: National Association of Criminal Defense Lawyers, Southern Center for Human Rights, and Nevada Attorneys for Criminal Justice
Theme: Making the Case for Life IX
Dates: September 29-October 1, 2006
Place: Las Vegas, NV
Contact: Colin Garrett: tel (404)688-1202; email cgarrett@schr.org; website www.nacdl.org

Sponsor: Carroll Consulting and Training
Theme: Investigative Training: Eyewitness Evidence and Death Investigation
Dates: October 5-6, 2006 [Note Corrected Date]
Place: Syracuse, NY
Contact: Sgt. Paul Carroll (ret.): tel (352)563-5701; fax (325)563-0436; email sgtpcret@aol.com; website www.paulbcarroll.com

Sponsor: National Association of Criminal Defense Lawyers
Theme: 10th Annual DUI Seminar: DWI Means Defend With Ingenuity — Making Over Your DUI Practice
Dates: October 12-14, 2006
Place: Las Vegas, NV
Contact: Gerald Lippert: tel (202)872-8600 xtn 236; fax (202)872-8690; email gerald@nacdl.org; website www.nacdl.org

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

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

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Syracuse Trainer — Part II
Date: October 14, 2006
Place: Syracuse, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Weapons for the Firefight
Date: October 20, 2006
Place: New York City
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: "Defending Crimes of Violence-Science and Technology" and "Improving Your Appellate Advocacy" (2 tracks)
Dates: October 25-28, 2006
Place: Boston, MA
Contact: Gerald Lippert: tel (202)872-8600 xtn 236; fax (202)872-8690; email gerald@nacdl.org; website www.nacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Mid-Hudson Trainer
Date: November 17, 2006
Place: Poughkeepsie, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org



Jed Stone shared his knowledge and experience with Basic Trial Skills Program participants.

Indefensible: One Lawyer's Journey into the Inferno of American Justice

By David Feige

Little Brown, 2006; 276 pages.

By Barbara Demille*

With its colorful cast of desperate characters, its ominous setting in the shadowy, crumbling South Bronx; its hectic pace, as its author races from one courtroom to another, wherein wait his frightened, exasperated clients, David Feige has written a fascinating book. The troubled people, often unduly hassled and always suffering under twin burdens of poverty and ignorance, this setting is as dramatic as any weekly TV series of crime and retribution. Courtrooms seethe with unwashed humanity; the streets outside seethe with man committing one outrage after another against his fellow man, as Feige rides his metaphorical white horse among them, dispensing quick, and often less than adequate, legal succor to as many as he can.

Early on in his career as a public defense lawyer, he is warned by a veteran lawyer in his office: “. . . you gotta lawyer for *you*. . . . You gotta know deep down that this is the most righteous work there is, that even though we lose and lose and we get creamed everyday, even though we watch them take our clients and haul them off to jail, you have to wake up the next morning and fight your heart out. . . . Not because you're looking for appreciation . . . but because at the end of the day, no matter what anyone says, you know that what you're doing is right.” And David Feige *does* proceed, through 276 pages, to demonstrate he's right.

The clients he describes, past and present—during the book's framework of a public defender's typical day in the office and at court—are lamentable in both their limited circumstances and their poverty of knowledge. But Feige is there, standing beside them, as they face State retribution. Occasionally he succeeds in helping them, as in the instance early in his career when he is able to get the woman he represents, who has stabbed her husband to death after serial beatings, released on her own recognition and ultimately acquitted. Most often he can do no more than get them the best plea.

Of course, it is unavoidable in a first person narration to hear a constant “I.” What troubles, within Feige's rapid pace, as he leads us up and down the stairs and into the crowded elevators of Criminal Court, is his more or less constant presentation of himself as warrior in a battle for justice for his clients to the exclusion of most everyone

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

else. There *are* exceptions: Robin, his boss and the founder of Bronx Defenders, the agency from which he is operating as his narrative begins; Paula, the above mentioned seasoned veteran in the never-ending fight; a few judges and assistant district attorneys for whom he has respect.

Most judges, however, are excoriated most unmercifully, their idiosyncrasies and lack of decency, their love of the power granted them by the bench laid out in particular detail. As Feige points out in his introduction, he has used actual names of all but his clients, whose privacy he does protect. This no doubt will be controversial, particularly in the courtrooms of the South Bronx.

Feige, summing up towards the end, gives his reasons for continuing with grueling demands: “It is because success is so often elusive that the essential challenge in much

of public defender work is finding lasting satisfaction amid constant failure. . . . ‘You gotta lawyer for *you*’ means that the narcissistic pleasure of giving doesn't invalidate the gift.” There is both narcissism and selfless dedication permeating this tale of the hordes of humanity that frequent the Criminal Court in the South Bronx on any given day it is in session. Indeed the particulars of so many tales of misfortune and missteps are gripping. But I did not feel Feige knew his clients beyond a necessarily cursory glance. Perhaps this is inevitable: so many, so little time. (As Chief Judge Judith Kaye noted in her State of the Judiciary Address this year, referring to information collected by the Commission on the Future of Indigent Defense, “Virtually all institutional defenders described excessive caseloads and a lack of resources like investigators and interpreters.”) But Feige has used these stories, and the people who own them, to his advantage. And any one of these, their life explored in depth, with less authorial interposition, is the material of a Dostoevsky, a Dickens novel.

This is an absorbing book: one reads it practically non-stop for its details, its cliff-hanging pace. This is a daring book, as Feige strips the character of several harried judges bare for the world to see. This is a young man's book. Feige insists too much. It would seem, by the end, that it is he, single-handed who “wake[s] up each morning and fights [his] heart out.” Perhaps this is as it must be: one needs ego as well as compassion to devote oneself daily to such a cause.

The layman will read this book for its revelations of a world far from his own. The judges described as callous and incompetent will most likely read it and object. I remain indecisive: torn between Feige's self-sacrifice and self-promotion. This book's true merits will be measured by those with day to day experience in what seems to be Feige's brave but losing cause. ♪



Immigration Practice Tips

By Manny Vargas
of NYSDA's Immigrant Defense Project (IDP)*

US Supreme Court Grants Cert on Whether a State Drug Possession Offense Constitutes a "Drug Trafficking" "Aggravated Felony"

On April 3, 2006, the Supreme Court granted certiorari in *Lopez v Gonzales* (Docket No. 05-547) and *Toledo-Flores v US* (Docket No. 05-7664). These cases raise the important issue of whether a state felony offense of simple possession of a controlled substance is a "drug trafficking" "aggravated felony" for federal immigration and sentencing purposes when such offense would be deemed a misdemeanor under federal law. The IDP, along with the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the National Association of Federal Defenders, the Capital Area Immigrant Rights Coalition, and the Immigrant Legal Resource Center, had in January prepared and submitted an amici curiae brief in support of cert in the *Lopez* case, which raises the issue in the immigration deportation context. The *Toledo-Flores* case raises the issue in the context of the criminal sentence enhancement for the federal crime of illegal entry into the US following a prior conviction of an aggravated felony.

Background on the Question Presented

The question of what drug offenses may be deemed aggravated felonies—which generally triggers mandatory detention and deportation under federal immigration law and a stiff sentence enhancement in the federal sentencing context—has been confused under case law of the Board of Immigration Appeals (BIA) as well as the case law of the federal courts, including the US Court of Appeals for the 2nd Circuit, which has jurisdiction over removal cases heard in New York. The immigration statute defines "aggravated felony" (AF) to include "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." See INA 101(a)(43)(B). In the past, the BIA has interpreted 101(a)(43)(B) to hold that a state drug offense qualifies as an AF only if either (1) it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined, or (2) regardless of state classification as a felony or mis-

demeanor, it is analogous to a felony under the federal Controlled Substances Act. *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), reaffirmed by *Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999). In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including offenses involving possession with intent to distribute), but simple possession drug offenses are generally potentially punishable as felonies only when the defendant has a prior final drug conviction. See 21 USC 801 et seq., and especially 21 USC 844 (Penalties for simple possession). In 1996, the Second Circuit deferred to this former BIA interpretation in *Matter of L-G-*. See *Aguirre v INS*, 79 F.3d 315 (2d Cir. 1996).

In 2002, however, the BIA modified its position. In *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the BIA indicated that a state simple possession drug offense would now be deemed an AF if it is classified as a felony under state law even if it would not be classified as a felony under federal law, unless the case arises in a federal court circuit with a contrary rule. Nevertheless, in cases arising in the 2nd Circuit, some Immigration Judges appear to continue to follow the 1996 2nd Circuit decision in *Aguirre* and only deem state simple possession offenses to be AFs if they would be treated as felonies under federal law even if they are felonies under state law. However, other Immigration Judges follow the separate line of 2nd Circuit cases that hold that, at least for federal sentencing purposes, the term "aggravated felony" includes state felony drug possession offenses. See, eg, *US v Pornes-Garcia*, 171 F3d 142 (2d Cir.), cert den 528 US 880 (1999). There has been similar confusion or conflict in the case law elsewhere. Compare *Gerbier v Holmes*, 280 F3d 297 (3d Cir. 2002), *US v Palacios-Suarez*, 418 F3d 692 (6th Cir. 2005), *Gonzales-Gomez v Achim*, 441 F3d 532 (7th Cir. 2006), and *Cazarez-Gutierrez v Ashcroft*, 382 F3d 905 (9th Cir. 2004), with the lower court decision in *Lopez v Gonzales*, 413 F3d 934 (8th Cir. 2005) and several federal criminal sentencing cases such as *US v Toledo-Flores*, 149 FedAppx 241 (5th Cir. 2005).

The stakes are high. Immigrants deemed to have an aggravated felony conviction are not only deportable but also ineligible for waivers of removal, such as cancellation of removal for long-term permanent residents and asylum for those with a well-founded fear of persecution in their countries of removal, and thereby face virtual mandatory deportation. In addition, in the federal criminal system, a prior aggravated felony conviction subjects a person convicted for illegal reentry after deportation to a sentence enhancement of up to 20 years in prison. As the government has been aggressively seeking an expansion of the types of drug offenses that may be deemed a "drug trafficking" aggravated felony to include many simple possession offenses, these cases may present an opportunity to scale back this expansion in both the immigration and sentencing contexts. If these challenges are success-

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

ful, some New York immigrants who plead guilty to simple possession offenses, even if a felony, will be able to avoid deportation without the possibility of a waiver and be able to avoid stiff sentence enhancements after conviction for illegal reentry into the US.

What Has Been Happening Since the Cert Grant

The IDP, in collaboration with the National Immigration Project, has worked with counsel for the petitioners in *Lopez* and *Toledo-Flores* to develop legal arguments and to recruit the submission of a variety of amicus briefs in support of the petitioners, including briefs filed by the IDP with other criminal and immigration legal organizations, by immigrant community groups, by the American Bar Association, by Human Rights First, by the Center for Court Innovation and the New York Association of Drug Court Professionals, and by former federal immigration service general counsels. We hope to have these briefs posted shortly on the IDP website at www.immigrantdefenseproject.org. Argument before the Court is expected in October, with a decision not expected until several months later.

Practice Tips: If you are representing a noncitizen charged with a drug possession offense, be aware that whether conviction of that offense may be deemed a “drug trafficking” “aggravated felony” for immigration purposes is currently uncertain, even if the offense is a misdemeanor under state law. (This is because the federal government may argue that a misdemeanor possession offense preceded by a prior drug conviction is an aggravated felony because there is authority under federal law to penalize a second possession offense as a felony.) You should advise your client of this uncertainty so that he or she may consider this when deciding whether or not to plead guilty. Defense counsel may contact the IDP to learn of any new legal developments that relate to the particular possession offense at issue in a case. Finally, if your client decides to plead guilty based on any understanding that current law would or might not deem such conviction to trigger mandatory deportation, it might be advisable to include a statement of such understanding in the plea allocution in order to give your client the possibility of later withdrawal of the plea should this understanding be upset by later legal developments, such as an unfavorable result in the cases before the Supreme Court.

If you are representing a noncitizen convicted of a drug possession offense in immigration proceedings, and are litigating the issue of whether the offense is a drug trafficking aggravated felony and anticipate a possible negative result, consider asking the judge/court to hold the case in abeyance until the Supreme Court decides these cases. This may slow the litigation and keep a person in the US in the event that a favorable Supreme Court decision holds that such an offense is not an aggravated felony.

Finally, if you or someone you know (client, family member, friend) is facing or has faced deportation, denial of asylum or withholding of removal, or denial of naturalization because of a government claim that a simple possession drug offense is an aggravated felony, please contact us. We may be able to provide information about these and other legal challenges or how to get involved in advocacy on this issue. Call Benita Jain at (718) 858-9658 ext. 231 or Manny Vargas at (718) 858-9658 ext. 208 at the IDP, or Dan Kesselbrenner at the National Immigration Project at (617) 227-9727.

2nd Circuit Finds NY First-Degree Manslaughter is a Crime of Violence

On May 8, 2006, the 2nd Circuit ruled that first-degree New York manslaughter is a “crime of violence” aggravated felony for immigration purposes. In *Vargas-Sarmiento v US Department of Justice*, 448 F3d 159 (2d Cir. 2006), the 2nd Circuit held that this offense (Penal Law 125.20) is divisible into crimes that are categorically grounds for removal—in this case, “crime of violence” aggravated felony—and others that may not be. The Court then found that the only possible subsections under which the petitioner in this case could have been convicted based on its review of the record of conviction—subsection (1) (“With intent to cause serious physical injury to another person, he causes the death of such person or of a third person”) or (2) (“With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance”)—were crimes that categorically, by their nature, are crimes of violence under the referenced definition in 18 USC 16(b) (“offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”). Focusing on the specific intent requirement for conviction of these offenses to distinguish these offenses from the New York second-degree manslaughter offense found not to be a “crime of violence” aggravated felony in *Jobson v Ashcroft*, 326 F3d 367 (2d Cir. 2003), the Court stated: “[F]irst-degree manslaughter cannot be committed through mere reckless passivity or omission, circumstances identified in *Jobson* as presenting no risk of the intentional use of force . . . when [the perpetrator’s] intent is to take a life, or at least to inflict serious physical injury—action likely to meet vigorous resistance from a victim—we can confidently conclude that inherent in the nature of the crimes is a substantial risk that the perpetrator may intentionally use physical force to achieve his criminal objective.”

Although the petitioner in this case had presented hypothetical examples of cases—wife poisoning food to be eaten by husband, or wearing down the brake pads of

a car to be driven by her husband—where the petitioner argued an individual could commit the crime of first-degree manslaughter without any risk of the intentional use of physical force, the Court found that these hypotheticals did not change its conclusion. First, the Court stated: “Where a person’s specific intent is to kill another human being or, at least, to cause him serious physical injury, there is necessarily a significant risk inherent in the nature of the crime that, if the perpetrator cannot initially achieve his objective without physical force, he may ultimately resort to force to do so.” Second, the Court found that, even in these hypotheticals, the perpetrators have, in fact, intentionally used physical force. For example, with respect to the poisoning hypothetical, the Court stated that, “when the perpetrator poisons food that she intends her spouse to eat, she engages in no mere passive act or reckless omission. Rather she intentionally avails herself of the physical force exerted by poison on a human body deliberately to kill her husband.”

Practice Tips: On a narrow level, this case shows the potential importance of trying to negotiate a plea to second-degree manslaughter when you are representing a noncitizen client charged with first-degree manslaughter who is willing to plead. On a broader level, however, this case confirms that, whenever you have a noncitizen client charged with a specific intent injury offense, you may be able to help such a client avoid mandatory detention and deportation upon later immigration proceedings if you negotiate a plea instead to an offense that does not categorically require a specific intent showing (or, in the alternative, if you negotiate a sentence that does not involve imprisonment of one year or more, the threshold for a crime of violence to be deemed an aggravated felony). And, finally, even more generally, this case is a reminder that, whenever you represent a noncitizen charged with a

criminal offense that includes some conduct that may be deemed to fall within a ground of deportation and other conduct that does not, counsel might be able to help a client avoid deportation by being vigilant about what to keep out of a noncitizen’s “record of conviction,” which includes: certificate of disposition; charging document; plea agreement and plea colloquy transcript; verdict or judgment of conviction; and record of sentence.

IDP Launches New Website

This spring, the IDP has launched its new website at www.immigrantdefenseproject.org. Defense lawyers and others representing or counseling immigrants in criminal or immigration proceedings may find useful the following resources posted on this website:

- Resources for effective representation of immigrants in criminal proceedings, including one-page Immigration Consequences of Criminal Convictions Checklist, Quick Reference Chart for New York State Offenses, and Crim/Imm Practice Tips.
- Resources for effective representation or advocacy on behalf of immigrants in immigration proceedings or at risk of detention and removal due to contact with the criminal justice system, including Removal Defense Checklist in Criminal Charge Cases, and Deportation 101: Detention, Deportation, and the Criminal Justice System training curriculum for advocates.
- Additional Know Your Rights materials for immigrants themselves, including Immigration Detention and Removal: A Guide for Detainees and Their Families (prepared by the Legal Aid Society of New York), Pro Se Advisory: Appealing Removal Orders in Federal Court, and Citizenship Alert for Lawful Permanent Residents with Criminal Records. ♪



Lean on Me has become the BTSP Karaoke “Theme Song.”

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

Search and Seizure (Entries and Trespasses [Knock and Notice Entries] (Warrantless Searches) SEA; 335(35[a]) (80)

Brigham City v Stuart, __US__, 126 S Ct 1943, 164 LEd2d 650 (2006)

In response to a call about a loud party, police arrived, heard shouting, entered the driveway, and saw two juveniles drinking beer in the backyard. Going into the yard, they saw through windows and a door a fight in the kitchen—four adults trying to restrain a juvenile, who then broke free and struck one of them. The others continued to struggle with the juvenile. At this point, the police announced themselves, without being heard, and entered the home. The adults were charged with intoxication, contributing to the delinquency of a minor, and disorderly conduct. Their suppression motion based on the officers' warrantless entry into the home was granted, and affirmed on appeal.

Holding: Police had an objectively reasonable basis to enter the respondent's home to provide aid and to restore order under the circumstances. See *Scott v US*, 436 US 128, 138 (1978). Law enforcement officers had the right to enter a home without a warrant to provide emergency assistance to an injured occupant or to protect that person from imminent injury. See *Mincey v Arizona*, 437 US 385, 392 (1978). The officers' subjective motivation—to arrest respondents, gather evidence, or assist the injured and prevent additional violence—was irrelevant. See *Bond v US*, 529 US 334, 338, n. 2 (2000). Police announcing their presence was equivalent to a knock on the door justifying entry, since the respondents did not hear them over the din from outside. Judgment reversed.

Concurring: [Stevens, J] The state supreme court did not explicitly rely on the Utah Constitution, which may provide broader protections than the 4th Amendment. They were free to afford respondents greater rights than the federal constitution allowed. There was no reason to grant certiorari in a case where the federal principles were well settled.

Misconduct (Prosecution) MIS; 250(15)

Speech, Freedom of (General) SFO; 353(10)

Garcetti v Ceballos, __US__, 126 S Ct 1951, 164 LEd2d 689 (2006)

The respondent, a deputy district attorney, investigated and found serious misrepresentations in a search warrant affidavit. He reported his findings to his superiors, the petitioners, and recommended dismissing the case. After a heated meeting, his position was rejected, and the case went forward. The respondent claimed that his office retaliated against him through job reassignment, transfer to a new court, and denial of promotion. He filed a 42 USC 1983 action asserting that the petitioners violated the 1st and 14th Amendments. Summary judgment was granted to the petitioners but reversed on appeal.

Holding: Public employees do not have the right to constitutionalize all employment grievances regarding speech restrictions based on their job. See *Connick v Myers*, 461 US 138, 143 (1983). Under the right of free speech, they do have the right to speak as citizens addressing matters of public concern. See *Pickering v Board of Educ.*, 391 US 563, 568 (1968). When matters of public concern are involved, it is up to the employer to show adequate justification to treat the employee differently from the general public. The 1st Amendment "does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." The respondent's statements were made in the course of his official duties, and not as a private citizen. Judgment reversed.

Dissent: [Stevens, J] Employee-speech made through official channels could still be protected by the 1st Amendment. See *Givhan v Western Line Consol. School Dist.*, 439 US 410, 414 (1979).

Dissent: [Souter, J] Public employees enjoy free speech protection on matters regarding official wrongdoing and threats to public welfare, unless it impedes government operations.

Dissent: [Breyer, J] When a public employee in his official capacity spoke on a matter of public concern, and relied on an augmented need such as the obligations under *Brady v Maryland*, 373 US 83 (1963), his statements deserved special protection.

Speedy Trial (Consent to Delay) (Due Process) (Statutory Limits) (Waiver) SPX; 355(15) (25) (45) (50)

Zedner v United States, __US__, 126 S Ct. 1976, 164 LEd2d 749 (2006)

On April 4, 1996, the petitioner was indicted on federal fraud and counterfeiting charges. Seven months later, after several adjournments, the judge responded to a request for an "ends-of-justice" continuance by asking for a prospective "waiver for all time." The petitioner signed

US Supreme Court *continued*

a “Waiver of Speedy Trial Rights.” He requested another postponement from Jan. 31, 1997 until May 5 for investigation. Relying on the waiver, the court made no findings of fact supporting the adjournment. Due to various proceedings and competency challenges, the case was delayed four years. On Mar. 7, 2001, the petitioner’s motion to dismiss on speedy trial grounds was denied. The trial began on April 7, 2003. The conviction was affirmed on appeal.

Holding: A defendant in a federal criminal prosecution cannot prospectively waive statutory speedy trial rights. The Speedy Trial Act requires a trial to start within 70 days of an indictment. 18 USC 3161(c)(1). Time may be excluded for designated reasons. 18 USC 3161(h). The ends-of-justice continuance permits excludable delays if the court considers statutory factors and makes an on-the-record assessment of the needs of justice weighed against the defendant’s right to a speedy trial. The statute’s lack of any provision for excluding delays based on a waiver was intentional, since the Act lays out specific factors for the court to consider in deciding when to exclude the time. 18 USC 3161(h)(8)(B)(iv). The public interest is not served by permitting a defendant to opt out of the Act without any inquiry. The petitioner was not estopped from challenging the waiver, since prospective waivers are inconsistent with the Act. The failure of the judge to make findings of fact to support the ends-of-justice continuance was not harmless error in view of the rights protected by the Act. The 91-day continuance granted on Jan. 31, 1997 was not excluded from the time calculation. Judgment reversed and remanded for dismissal (with or without prejudice).

Concurring: [Scalia, J] The language of the Speedy Trial Act was clear, making references to legislative history unnecessary.

Death Penalty (General) **DEP; 100(80)**

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

House v Bell, __US__, 126 Sct 2064, 165 LE2d 1 (2006)

The petitioner was tried for a 1985 murder. The evidence showed bloodstains consistent with the decedent’s type on the defendant’s pants, and traces of semen consistent with his on her nightgown and panties. His conviction and death sentence were affirmed on appeal. His state post-conviction motions were denied. In his federal habeas action, he raised an actual innocence claim and presented evidence to contradict the blood and semen results and implicate another viable suspect. Denial of relief was affirmed.

Holding: Resurrecting procedurally defaulted constitutional state claims based on innocence requires new evi-

dence showing that “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Schlup v Delo*, 513 US 298, 327 (1995). New reliable evidence, *eg*, exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, is required. DNA testing showed that the semen on the decedent’s gown belonged to her husband. The bloodstains on the petitioner’s pants came from spilled samples taken at the autopsy, not from the decedent when she was alive. And there was evidence that the decedent’s husband had motive and opportunity to commit the crime. This evidence met the requirements for federal review of the actual-innocence claim. Certiorari was denied on the question of the petitioner’s freestanding innocence claim, so it was not reached. *See Herrera v Collins*, 506 US 390, 417. Judgment reversed.

Concurring in Part and Dissenting in Part: [Roberts, J] The petitioner failed to meet the actual innocence standard. The reliability of much of the new evidence was called into question. The state showed that the decedent’s blood was found on the petitioner’s pants before the spillage of the autopsy samples. The evidence implicating the decedent’s husband was hotly contested. Deference should have been paid to the district court’s reliability findings. It was more likely than not that a reasonable juror would have voted to convict.

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

Death Penalty (Cruelty) **DEP; 100(40)**

Hill v McDonough, __US__, 126 Sct 2096, 165 LE2d 44 (2006)

The petitioner was convicted of murder and sentenced to death in Florida, where lethal injection became the main mode of execution. No procedures or methods for such executions were set out in the statute or by regulation. When his death warrant was signed, the petitioner requested information about the procedure, which was denied. Denial of his state postconviction motion challenging lethal injection on 8th Amendment grounds was affirmed on appeal. Days before his execution date, he filed a 42 USC 1983 complaint seeking an injunction claiming that the three-dose method could inflict severe pain if done improperly. The action was treated as a habeas corpus motion (28 USC 2254) and dismissed as a successive petition. Dismissal was affirmed.

Holding: Since the petitioner’s complaint only challenged the method of execution and not the sentence, it was properly brought as a 1983 action. *See Nelson v Campbell*, 541 US 637 (2004). Judgment reversed and remanded.

US Supreme Court *continued*

Search and Seizure (Entries and Trespasses [Knock and Notice Entries]) SEA; 335(35[a])

Hudson v Michigan, __US__, 126 Sct 2159, 165 LEd2d 56 (2006)

Police executed a search warrant for the petitioner’s apartment, to look for drugs and firearms, by announcing their presence and waiting three to five seconds before opening the door. Suppression was granted but reversed on appeal. Conviction was affirmed.

Holding: The exclusionary rule did not apply to the knock-and-announce violation. The method of entry was not a but-for cause of the seizure of evidence. Further, imposing the remedy of suppression for a violation of knock-and-announce requirements would have too great a social cost in view of the alternative relief available from civil lawsuits. *See Segura v United States*, 468 US 796 (1984); *New York v Harris*, 495 US 14 (1990); and *US v Ramirez*, 523 US 65 (1998). Judgment affirmed.

Concurring in Part: [Kennedy, JJ] Any link between violation of the knock-and-announce requirement and the later search was too attenuated to justify suppression.

Dissent: [Breyer, JJ] The knock-and-announce rule is firmly embedded in the 4th Amendment. *See Wilson v Arkansas*, 514 US 927, 931-932 (1995). Without suppression there is no incentive to comply with the Constitution’s knock-and-announce requirement or to deter misconduct. *See Elkins v US*, 364 US 206, 217 (1960). The method of entry is part of the reasonableness inquiry. *See Sabbath v US*, 391 US 585 (1968). Civil remedies are insufficient deterrence in this context. *See Dickerson v US*, 530 US 428, 441-442 (2000). Eviscerating the knock-and-announce rule will bring high social costs by severely loosening the requirements for intruding on privacy.

Appeals and Writs (Scope and Extent of Review) APP; 25(90)

Discovery (Brady Material and Exculpatory Information) DSC; 110(7)

Youngblood v Virginia, __US__, 126 Sct 2188, 165 LEd2d 269 (2006)

The petitioner was convicted of sexual assault based on the testimony of three complainants. After sentencing, the petitioner moved to set aside the verdict based on the discovery of an exculpatory note written by two of the complainant supporting his consensual-sex defense. Allegedly during the investigation, the note had been shown to a state trooper who refused to accept it and recommended that it be destroyed. The motion to vacate was

denied on the ground that the note was impeachment material and not exculpatory. That denial was affirmed.

Holding: *Brady* requirements (*Brady v Maryland*, 373 US 83 [1963]) apply to impeachment as well as exculpatory material (*see US v Bagley*, 473 US 667, 676 [1985]) and extend to evidence known only to the police. *See Kyles v. Whitley*, 514 US 419, 438 [1995]). Exculpatory evidence becomes material when there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Strickler v Greene*, 527 US 263, 280 (1999). The petitioner successfully raised a federal constitutional *Brady* claim in state court. The full views of the state supreme court on the issue are needed before the merits are reached here. Judgment vacated and matter remanded.

Dissent: [Scalia, JJ] Decision to grant, vacate, and remand based on suspicion of error was an abuse of the power to revise and correct. *See Lawrence v Chater*, 516 US 163 (1996).

Dissent: [Kennedy, JJ] There has been no new development warranting the exercise of the grant, vacate, and remand power.

Search and Seizure (Parolees and Probationers) SEA; 335(50)

Samson v California, __US__, 126 Sct 2193, 165 LEd2d 250 (2006)

A police officer, knowing that the petitioner was a California state parolee and believing there was a warrant for him, stopped the petitioner on the street. In response to questioning, the petitioner denied there was a warrant, which was confirmed by radio dispatch. Nonetheless, the officer searched the petitioner based solely on his status as a parolee, Cal Penal Code Ann 3067(a), and found methamphetamine. The petitioner’s conviction of drug possession and prison sentence were affirmed.

Holding: The 4th Amendment did not prohibit a police officer from conducting a suspicionless search of a parolee. The reasonableness of a search depends on a balancing of an invasion of privacy against legitimate governmental interests. In *US v Knights* (534 US 112), the Court upheld the reasonableness of a search of a probationer’s apartment, since he was suspected of being involved in several arsons. His status as a probationer meant he had a reduced expectation of privacy based on the terms of his punishment. *Cf Hudson v Palmer*, 468 US 517 (1984). Such searches serve legitimate governmental interests: integrating probationers back into the community and combating recidivism. *Knight* relied on the probation search condition and the officer’s reasonable suspicion. The petitioner’s parole search condition subjected him to possible searches “at any time,” making him aware of his diminished privacy. Government’s interest in reducing recidivism, bolstered by statistical evidence, and help-

US Supreme Court *continued*

ing the petitioner's adjustment into society justified the reduction in privacy. Judgment affirmed.

Dissent: [Stevens, JJ] Parolees and probationers have lowered expectations of privacy supporting a warrantless search when it is based on reasonable suspicion of wrongdoing. *Griffin v Wisconsin*, 483 US 868, 876-877 (1987). A suspicionless search, without special needs, was unjustifiable, since releasees have greater privacy expectations than inmates. *Morrissey v Brewer*, 408 US 471, 482 (1972).

Evidence (Hearsay)

EVI; 155(75)

Witnesses (Confrontation of Witnesses)

WIT; 390(7)

Davis v Washington, __US__, 126 Sct 2266, 165 LEd2d 224 (2006)

At petitioner Davis' trial, evidence was admitted of a 911 phone conversation between his girlfriend and the operator about a domestic disturbance. The operator elicited information about the petitioner's identity, the reason for his being present, and the background for the assault. His conviction was affirmed. In petitioner Hammon's case, police responded to a report of a domestic disturbance at his home and spoke with his wife. She stated that he broke glass, hit her, and knocked her down. At trial, only the police officer testified about the wife's statement and authenticated an affidavit she wrote. Petitioner Hammon's conviction was affirmed. In both cases, defense counsel challenged admission of the complainants' statements on confrontation clause grounds.

Holding: Statements in response to police questioning are nontestimonial when made under circumstances objectively indicating an ongoing emergency. They are testimonial when the circumstances objectively indicate no ongoing emergency exists, and the primary focus is to establish or prove past events for prosecution. *Crawford v Washington* (541 US 36, 53-54 [2004]), held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." The purpose of the 911 operator's interrogation in *Davis* was to gather information in response to an ongoing emergency, with the goal of resolving the current situation, not gathering evidence about past crimes for prosecution. See *Lilly v Virginia*, 527 US 116, 137 (1999). Once the emergency passed, the questioning could have elicited testimonial statements, which should have been redacted in limine. See *New York v Quarles*, 467 US 649, 658-659 (1984). This appeal concerns the early portion of the 911 call, which was nontestimonial. The statements in *Hammon* were testimonial. The police interrogated the complainant about the petitioner's past criminal conduct when no signs of an

emergency existed. The interrogation was held in a separate room, away from the petitioner, to gather information for an investigation, resulting in a statement that would be a clear substitute for live witness testimony. Unless there was sufficient evidence of wrongdoing by the petitioner in preventing the complainant from testifying, the statements should have been excluded. Judgment in *Davis* affirmed; Judgment in *Hammon* reversed and remanded.

Concurring in Part and Dissenting in Part: [Thomas, JJ] A primary purpose test for assessing the testimonial nature of hearsay statements is unpredictable. Statements in both cases were not part of a formalized dialogue or sufficiently formal to be considered testimony.

Evidence (Burden of Proof)

EVI; 155(10)

Dixon v US, No. 05-7053, 6/22/2006

At the petitioner's trial for purchasing firearms while under indictment, she claimed that her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns. The judge instructed the jury that the petitioner had the burden of proving duress by a preponderance of the evidence. The petitioner objected, contending that it was the prosecution's burden of disproving duress beyond a reasonable doubt. Her conviction was affirmed.

Holding: Whether or not the petitioner acted freely, she knew that she was making false statements and knew that she was breaking the law by buying a firearm. The prosecution established the knowing and willing elements of the crimes. The duress defense did not negate the required mens rea or disprove any element of the statutory offense; it would only excuse behavior. See *US v Bailey*, 444 US 394, 409-410 (1980). The decision in *Davis v US* (160 US 469 [1895]), placing the burden of proving sanity (an element of murder) on the prosecution and legislatively overruled in 1984, does not justify shifting the burden of proof for duress to the prosecution. Judgment affirmed.

Concurring: [Kennedy, JJ] Congress was silent on the duress defense when it enacted the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197. Nothing in the legislative history suggested that it intended to change the traditional principles for allocating the burden of proof.

Concurring: [Alito, JJ] Burden of persuasion on the defense of duress does not vary from one federal criminal statute to another. Congress left the defense of duress where it was at common law and made no effort to change it in the course of creating new federal crimes.

Concurring: [Breyer, JJ] The petitioner had the burden of production on duress, but the Constitution requires that the prosecution bear the burden of persuasion. When Congress was silent, it was up to the courts to develop rules for burdens of proof for affirmative defenses. The prosecution had the ultimate responsibility for disproving duress.

US Supreme Court *continued*

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

Woodford v Ngo, No. 05-416, 6/22/2006

The respondent, serving a life sentence in a California prison, was put into administrative segregation for allegedly engaging in “inappropriate activity” in the prison chapel. After two months he was returned to general population but excluded from special programs. Six months later, he filed a grievance challenging the exclusion. It was denied as untimely (more than 15 days after the action) and an appeal was denied. Later, the respondent filed a 1983 action against petitioners, prison officials. Their motion to dismiss for failure to exhaust administrative remedies was granted, then reversed on appeal.

Holding: The respondent’s untimely filing of a grievance did not satisfy the exhaustion requirements of the Prison Litigation Reform Act, 42 USC 1997e(a) (PLRA). *See Booth v Churner*, 532 US 731, 739 (2001). Proper exhaustion of an administrative remedy, as defined by administrative law, means complying with agency filing deadlines. The PLRA gives prisoners an incentive to make use of the grievance process and allows correctional facilities to fix their mistakes. Exhaustion requirements reduce the number of unnecessary inmate lawsuits in the courts. Judgment reversed and remanded.

Concurring: [Breyer, JJ] Exhaustion requirement was not absolute and lower court should consider any challenges based on traditional exceptions implicitly incorporated into the statute.

Dissent: [Stevens, JJ] PRLA did not empower state prison officials to curtail prisoners’ constitutionally protected access to the federal courts by imposing a stringent, 15 day filing period. The exhaustion requirement of the Act did not distinguish between administrative remedies denied on the merits or for procedural reasons. And there was no precedent for imposing a procedural default sanction.

Sentencing (Aggravated Penalties) SEN; 345(5)

Washington v Recuenco, No. 05-83, 6/26/2006

The respondent was convicted of assault with a deadly weapon, a gun. The jury found that he committed the act with a deadly weapon, but the verdict form did not say it was a firearm. At sentencing, the court imposed a 3-year enhancement because the respondent used a firearm. His conviction was reversed on the grounds that the sentence maximum exceeded facts established by the jury’s verdict, in violation of *Blakely v Washington*, 542 US 296 (2004). The state Supreme Court found such error to be structural, not subject to harmless error analysis.

Holding: Failure to prove a sentencing factor beyond a reasonable doubt, like the failure to submit an element of the crime to a jury, was not a structural error making the trial fundamentally unfair. *See Neder v US*, 527 US 1, 8 (1999). Therefore, harmless-error analysis applied. Judgment reversed.

Concurring: [Kennedy, JJ] Holdings in *Apprendi v New Jersey* (530 US 466 [2000]) and *Blakely* were not reconsidered, and application of harmless standard was correct.

Dissent: [Stevens, JJ] The error was structural since it denied the respondent notice of the charges he was defending against.

Dissent: [Ginsburg, JJ] The jury was charged on and rendered a verdict of guilty on assault with a deadly weapon, not a firearm. The state appellate court was correct in ordering a resentencing based on weapons conviction, since the uncharged firearm element should not have been a sentencing factor.

Counsel (General) (Right to Counsel) COU; 95(22.5) (30)

United States v Gonzalez-Lopez, No. 05-352, 6/26/2006

The respondent, facing federal drug distribution charges in Missouri, was represented by a local attorney, John Fahle, hired by his family. He also retained a California attorney, Joseph Low. Low was allowed to appear provisionally at a pretrial hearing, but still had to file a motion for admission pro hac vice. During the hearing, permission was revoked because Low violated the magistrate’s ruling limiting cross to one counsel. Later, the respondent advised Fahle that he wanted Low to be his only counsel. Low’s pro hac vice application was denied because he contacted a party already represented by counsel in another case. Fahle asked to withdraw from the case and moved for sanctions against Low because he contacted the respondent when he was already represented. Fahle’s motion to withdraw and for sanctions was granted. The respondent hired a new local attorney with whom Low was not allowed to speak during trial. The respondent’s conviction was vacated on appeal.

Holding: The 6th Amendment right to counsel of choice required that the accused be defended by the attorney he believed to be best. *See Strickland v Washington*, 466 US 668, 684-685 (1984). The issue is the respondent’s right to counsel of choice, not whether the trial overall was fair in due process terms; no showing of prejudice or ineffectiveness beyond the court’s error was needed. Deprivation of counsel of choice was a structural error, and impacted the result, and thus is not subject to harmless error analysis. *See Arizona v Fulminante*, 499 US 279 (1991). Such right to counsel of choice does not extend to appointed attorneys, and a defendant cannot demand that a court admit non-bar members or accept a waiver of conflict-free representation. Judgment affirmed.

US Supreme Court *continued*

Dissent: [Alito, J] Automatic reversal was not required. Defendants should be required to make at least some showing that the trial court's erroneous ruling adversely affected the quality of assistance that the defendant received. The respondent was only entitled to the assistance that his counsel of choice would have provided, and not the specific attorney. He would have to show that his second-choice counsel was ineffective or that there was some prejudice; or at least it should be subject to harmless error review.

Death Penalty (Penalty Phase) DEP; 100(120)
Kansas v Marsh, No. 04-1170, 6/26/2006

The respondent was convicted of premeditated murder for killing a mother and leaving her daughter to burn to death. The jury found beyond a reasonable doubt three aggravating circumstances that were not outweighed by any mitigating circumstances and sentenced the respondent to death. On appeal, he challenged Kan Stat Ann 21-4624(e) that mandated a death sentence when the aggravating and mitigating factors were equal, creating an unconstitutional presumption in favor of death. His capital murder conviction was reversed on appeal, the statute declared unconstitutional.

Holding: The statute did not prevent the jury from considering mitigating evidence and did not automatically impose death sentences for particular crimes. *See Furman v Georgia*, 408 US 238 (1972). A state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances. *See Walton v Arizona*, 497 US 639 (1990), overruled on other grounds, *Ring v Arizona*, 536 US 584 (2002). The Kansas statute placed the burden squarely on the prosecution to prove beyond a reasonable doubt that aggravators were not outweighed by mitigators, including when those factors were in equipoise. *See Franklin v Lynaugh*, 487 US 164, 179 (1988). Therefore, it was constitutional. Judgment reversed.

Concurring: [Scalia, J] The Kansas statute is supported by capital jurisprudence overall. No 8th Amendment claim that sentencer's discretion had been unlawfully restricted would survive review.

Dissent: [Stevens, J] *Walton* was not controlling since it did not address the equipoise issue. Certiorari was improperly granted, since the petition claimed that the state court had granted more rights than those recognized by the federal constitution.

Dissent: [Souter, J] The state court correctly found the statute imposed a death sentence when there was a tie between aggravating and mitigating circumstances. In view of the risks that innocent defendants have been

wrongly convicted, an equipoise capital sentencing system was unconstitutional.

Prisoners (Conditions of Confinement) (Rights Generally)

PRS I; 300(5) (25)

Prisons (Conditions)

PRS II; 300.5(6)

Beard v Banks, No. 04-1739, 6/28/2006

The respondents were inmates housed in Pennsylvania's Long Term Segregation Unit (LTSU), which is designed for the system's "most incorrigible, recalcitrant inmates." It is the highest of three levels of punitive housing beginning with Restricted Housing Unit (RHU), followed by Special Management Unit (SMU). LTSU level 2 inmates had no access to newspapers, magazines, or personal photographs. At level LTSU level 1, a prisoner can receive one newspaper and five magazines. The respondents filed a USC 1983 action challenging the restriction as violating the 1st Amendment. A motion for summary judgment by the petitioners, prison officials, was granted but reversed on appeal.

Holding: Prison administrators were entitled to deference in deciding how to regulate prison life (*See Overton v Bazzetta*, 539 US 126 [2003]), provided the regulations were 'reasonably related' to legitimate penological interests. *See Turner v Safley*, 482 US 78 (1987). The petitioners' justifications for the challenged regulations included: motivating difficult prisoners to improve their behavior; minimizing property in their cells; and maximizing safety by reducing risk of fires. The first justification was sufficient to sustain the policy, and based on the absence of disputed facts, the petitioners' summary judgment motion should prevail. Access to reading material was the last privilege that could be denied and withholding such materials was a reasonable incentive to change behavior. Accommodating the respondent's 1st Amendment rights would have undermined the policy. Judgment reversed.

Concurring: [Thomas, J] The constitution does not define incarceration and states are free to define punishment (and levels of imprisonment) consistent with the 8th Amendment. Since the respondents did not raise an 8th Amendment claim, the only issue was whether his sentence deprived him of the rights asserted.

Dissent: [Stevens, J] Prisoners retain 1st Amendment rights (*see O'Lone v Estate of Shabazz*, 482 US 342, 348 [1987]), which were violated by the state's LTSU level 2 limited access policy. The prime reason for the policy was a deprivation theory of rehabilitation. Where such deprivation had a tenuous logical connection to rehabilitation, it could not be considered reasonable as a matter of law. Moreover, Pennsylvania was in the minority view on the use of such a policy among prisons nationwide. Due to the severe conditions in LTSU level 2, inmates have suffi-

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cient reason to reform their conduct without denying access to reading materials.

Dissent: [Ginsburg, JJ] The petitioners failed to show that they were entitled to judgment as a matter of law. *See* Fed. Rule Civ Proc. 56(c); *Anderson v Liberty Lobby, Inc.*, 477 US 242, 249-255 (1986). A full trial was necessary to determine whether the petitioners’ avowed purpose of rehabilitation was reasonably supported by the deprivation.

Admissions (General) (Interrogation) (Voluntariness)	ADM; 15(17) (22) (35)
Confessions (Advice of Rights) (General) (Interrogation) (Voluntariness)	CNF; 70(10) (32) (42) (50)
Evidence (Exclusionary Rule)	EVI; 155(53)
Motions (Suppression)	MOT; 255(40)

Sanchez-Llamas v Oregon, No. 04-10566, 6/28/2006

Petitioner Sanchez-Llamas, a Mexican national, was charged with attempted murder. He was given his *Miranda* warnings but the police did not inform him of his rights under Article 36 of the Vienna Convention on Consular Relations. He sought to suppress his incriminating statements based on the violation of the Vienna Convention. Suppression was denied and his conviction affirmed. Petitioner Bustillo, a Honduran national, was charged with murder. Police did not advise him of his right to have the Honduran Consulate informed of his arrest. After his conviction was affirmed, he claimed in a state post-conviction motion that he would have contacted the consulate had he known his rights. The consulate indicated it would have helped petitioner Bustillo locate an alternate suspect who had left the country. Petitioner Bustillo claimed that his attorney was ineffective for not advising him of his consular rights. His habeas motion was dismissed as procedurally barred, because the issue had not been raised at trial or on appeal, and appeal was denied.

Holding: Assuming without deciding that the Vienna Convention grants individuals enforceable rights, foreign nationals facing criminal charges in US courts are not entitled to suppression for violation of the Convention, and their claims can be procedurally defaulted under state law. The Convention did not provide specific remedies for violations of Article 36; this was left to the individual country as a matter of domestic law. Automatic exclusion was an American invention, which has been universally rejected by other countries. Since the treaty omitted this remedy, which is not recognized by the other signatories,

there is no basis in US law for suppressing evidence obtained in violation of its provisions. Article 36 has no connection to searches, interrogations or any facet of criminal investigation. Other remedies exist, including a general challenge to voluntariness of a confession at trial and seeking help through diplomatic channels. Article 36 violations are subject to the same procedural default rules as other federal claims. *See Breard v Greene*, 523 US 371 (1998). Judgments affirmed.

Concurring: [Ginsburg, JJ] Article 36 does grant rights in judicial proceedings; there is no basis for departing from our suppression and procedural default rules in these cases.

Dissent: [Breyer, JJ] Foreign nationals were entitled to raise claims that the police violated Article 36. State procedural default rules should sometimes give way to the Vienna Convention’s requirement that domestic law give full effect to the notification rule. There should be no categorical proscription against applying the exclusionary rule in appropriate cases. *See Head Money Cases*, 112 US 580, 598-599 (1884).

Insanity (Defense of) (Evidence) (Instructions) (M’Naughton Rule)	ISY; 200(10) (25) (30) (40)
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Clark v Arizona, No. 05-5966, 6/29/2006

Charged with the murder of an Arizona police officer, the petitioner raised a psychiatric defense—paranoid schizophrenia at the time of the incident negating specific intent or knowledge that the decedent was a police officer. Mental illness was raised in an affirmative defense of insanity and to rebut evidence of mens rea. The trial court refused to allow the petitioner to use evidence related to insanity to challenge mens rea. His conviction was affirmed.

Holding: Arizona’s insanity statute dropped the first part of the McNaughton test: (1) cognitive incapacity: whether defendant suffered from a “defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing” or (2) moral incapacity: “if he did know it, that he did not know he was doing what was wrong.” The petitioner claimed that relying solely on the moral incapacity test violated due process. In light of the different approaches the states have taken to defining the insanity defense, due process did not require a single formulation. The petitioner had the option of producing evidence of cognitive incapacity to prove moral incapacity, which was recognized by the statute. Arizona’s rule that psychiatric evidence could only be considered in relation to an insanity defense and not to negate specific intent did not violate due process either. *See State v Mott*, 187 Ariz. 536, 931 P. 2d 1046. The petitioner had the right to introduce observational evidence about his condition, but the *Mott* exclusion applied to mental-disease and capacity

US Supreme Court *continued*

evidence that depended on expert opinions. The state had the power to balance the burden of proof and limit the application of mental disease and capacity evidence when used as a defense. Judgment affirmed.

Dissent: [Kennedy, J] The *Mott* rule is unworkable. It is unclear whether the petitioner was improperly denied the opportunity to present observational evidence about his mental state. The trial court's blanket rejection of any evidence, medical or observational, outside the scope of the insanity defense was overreaching. Some expert testimony should have been allowed even under the observational standard. The petitioner's mental illness defense addressed facts as much as judgment. Excluding evidence on factual issues that might have disproved an element of the offense violated the Confrontation Clause. *See Delaware v Van Arsdall*, 475 US 673 (1986).

Concurring in Part and Dissenting in Part: [Breyer, J] The state was properly concerned that jurors might be confused about the application of different kinds of evidence concerning insanity and specific intent. Arizona should clarify the distinction and role of factual evidence, medical testimony, and expert opinion on insanity.

New York State Court of Appeals

Discovery (Brady Material and Exculpatory Information) **DSC; 110(7)**

People v Williams, No. 51, 5/11/2006

The defendant moved to suppress physical evidence in this drug case. The sole prosecution hearing witness was Detective Gordon, who testified that he watched an intermediary give buy money to the defendant. Suppression was denied. At trial, the prosecution did not call Gordon; the defense did. The prosecution then revealed, *ex parte*, that Gordon was under investigation for perjury in an unrelated drug case (he was eventually tried and acquitted). A defense motion to reverse the suppression ruling or grant a *de novo* hearing was denied. At a limited reopened hearing the court received Gordon's former testimony and his 5th Amendment stipulation about the perjury case, and allowed both parties to call witnesses. The prosecution called another officer. Suppression was denied. The resulting conviction was affirmed.

Holding: The court did not abuse its discretion by ordering limited reopening of the suppression hearing to remedy a *Brady* (see *Brady v Maryland* (373 US 83 [1963]) violation. *See People v Jenkins*, 98 NY2d 280, 281. The prosecution violated *Brady* by not revealing the perjury investigation against their sole witness. *See People v Geaslen*, 54 NY2d 510, 516. However, the conduct was not shown to

be willful, and the record showed probable cause for the arrest and supported Gordon's recitation of the facts. Allowing another officer to testify at the reopened hearing increased the likelihood of a correct decision. The crux of the problem was flaw in the proceedings, not insufficiency of evidence. *See People v Bryant*, 37 NY2d 208. Judgment affirmed.

Dissent: [Smith, GB, J] Failure to disclose the perjury investigation required suppression. *Brady* evidence went to the defense theory that the police set the defendant up. *See People v Savvides*, 1 NY2d 554, 557-558. Even the trial court had difficulty accepting Gordon's version of the money exchange; at trial he claimed only to have seen them touch hands. Failure to reveal the *Brady* material justified suppression. *See People v Havelka*, 45 NY2d 636, 643-644.

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

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

People v Wells, No. 59, 5/11/2006

The defendant and an accomplice shot two people during a robbery. As they ran out of the store, the defendants were spotted by two detectives. The defendant fired at them twice. At trial, he moved to dismiss the attempted first-degree murder of a police officer count as duplicitous because the evidence did not specify the intended victim. His convictions of murder and attempted second-degree murder, a lesser-included offense, were affirmed.

Holding: The prosecution was not required to prove which of the two detectives was the intended victim to support the charge of attempted first-degree murder. *See People v Cabassa*, 79 NY2d 722, 728. First-degree murder required proof that defendant knew the intended victim was a police officer (see Penal Law 125.27 [1] [a] [i]); second degree murder only required the victim to be another person. Penal Law 125.25 [1]. Identity of the specific intended victim was not an element. *See People v Fernandez*, 88 NY2d 777. The attempted murder count was not duplicitous, since it did not charge more than one offense. *See CPL 200.30 [1]; People v Keindl*, 68 NY2d 410, 417-418.

The prosecution's reasons for excluding a female African-American panelist were not pretextual. *See Batson v Kentucky*, 476 US 79 (1986). The juror's demeanor, fondness for detective stories, and difficult personality, were race-neutral reasons. An entire panel of potential jurors did not have to be dismissed because one of them stated he was friends with a detective in the case and believed he was an honest guy. That panelist was excused, the remainder questioned about the influence of the remark and instructed to be impartial. The statement did not create a

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likelihood of substantial prejudice, as it was unrelated to the defendant’s guilt or reputation. Order affirmed.

Concurring: [Smith, GB, J] The defendant’s *Batson* challenged failed because he did not object to the prosecutor’s ambiguous comments about the panelist. Still, the prosecutor’s claim that the panelist’s personality reminded her of a former judge was unclear and not race-neutral, warranting a *voir dire*.

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

People v Redzeposki, No. 74, 6/6/2006

Holding: A trial cannot proceed in absentia unless the court has made an inquiry and recited on the record the facts and reasons for concluding that the defendant has deliberately not returned to court. *See People v Brooks*, 75 NY2d 898, 899. The record showed that the trial court’s inquiry was proper and the judge reasonably determined, based on the judge’s observations and defense counsel’s explanation, that the defendant deliberately left the courthouse before the verdict. Order reversed and case remitted to the Appellate Division for consideration of the facts.

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

People v Kennedy, No. 79, 6/6/2006

The defendant was court-martialed for “indecent assault.” 10 USC 934. He was sentenced to a bad conduct discharge and reduction in pay grade, but no fine or term of imprisonment. The Appellate Division affirmed the New York decision requiring his registration as a sex offender.

Holding: Someone convicted of a felony in another jurisdiction which required sex offender registration must register as a sex offender in New York. *See* Correction Law 168-a (2) (d) (ii). The underlying conduct for the defendant’s conviction was unclear; it might have been a lesser-included offense under the military crime of rape (10 USC 920) or ordinary assault (10 USC 928). The elements of indecent assault include: (1) assaulting a person not the spouse of the accused; (2) acts were done with the intent to gratify the lust or sexual desires of the accused; and (3) conduct of the accused prejudiced the good order and discipline of the armed forces. *See US v Watson*, 31 MJ 49, 53. While indecent assault may be construed as a federal felony carrying a maximum penalty of five years in prison (18 USC 3559 [a] [4]), the registration requirement was not established. No evidence presented at the hearing showed that sex offenders were required to register with the Navy, notify them of their movements, or that the Navy maintained a registry. New York’s registration law might not

apply to any military convictions; however, the prosecution could have attempted to show under § 168a (d)(2)(i) that the conviction had all the elements provided in the enumerated New York statutes. Order reversed.

Concurring: [Grafano, JJ] Federal law required the states to implement procedures to accept registration from persons sentenced by court material. *See* 42 USC 14071 (b) (7). However, Correction Law 168-a (2) (d) (ii) was not amended to cover military sex offenses. The legislature should address this problem.

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

Weapons (Evidence) (Possession) **WEA; 385(20) (30)**

People v Leon, No. 77, 6/8/2006

The decedent, an alleged drug dealer, went to the defendant’s apartment, threatened him, and displayed a gun. The defendant’s girlfriend later confronted the decedent, and the defendant overheard their argument. He took his gun from his bedroom, approached the two outside his apartment, and shot the decedent. At trial, he claimed that the decedent was holding a gun and about to shoot him. A jury acquitted the defendant of murder based on self-defense, and convicted him of second-degree possession of a weapon, which was affirmed. The court had rejected a defense request to charge second-degree and third-degree weapons possession alternatively.

Holding: Third-degree weapons possession is not a lesser included of second-degree. Second-degree weapons possession required proof that the defendant possessed a loaded firearm “with intent to use the same unlawfully against another.” *See* Penal Law 265.03 (2). Third-degree possession only required that he unlawfully possessed a loaded firearm anywhere except in his home or place of business. *See* Penal Law 265.02 (4). While both offenses were listed in the indictment, they were non-inclusory concurrent counts. *See* CPL 300.30 (3), (4). A defendant could be found guilty of committing the greater offense without committing the lesser one. Since third-degree weapons possession was not a lesser included offense, the trial court was not required to charge the jury, even if the evidence supported it. *See* CPL 300.40 (3), (4). The statutes intimate that a discretionary decision about submitting a non-inclusory concurrent count is reviewable. *See* CPL 300.40 (3) (a). A discretionary decision favorable to the prosecution is, contrary to their position, reviewable. *See* CPL 300.40 (6). Overall, the trial court did not abuse its discretion in refusing to submit the lesser charge. Order affirmed.

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

People v Serrano, No. 85, 6/8/2006

NY Court of Appeals *continued*

During jury selection at the defendant's trial for criminal sale of a controlled substance, the court called 44 individuals for simultaneous questioning, placing 12 in the jury box and the others in four front rows of the courtroom. Defense counsel objected claiming that he could not do an effective voir dire, especially since many potential jurors were sitting behind the defense table. His objection was overruled and the defendant's conviction affirmed.

Holding: The trial court did not abuse its discretion in calling more panelists than could be seated in the jury box. The legislature envisioned no upper limit on calling jurors for voir dire, and left it to the judge's discretion how best to do it. *See* CPL 270.15(1) (a). The defendant failed to show that he could not conduct a voir dire using the expanded procedure, or had any difficulties communicating with the panelists. Without evidence of prejudice, there was no abuse of discretion. Order affirmed.

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

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

People v Ramos, No. 133 SSM17, 6/13/2006

The defendant signed a written waiver that described his right to appeal, explained the appellate process, and confirmed that defense counsel had fully advised him of the right to take an appeal. The written waiver overcame any ambiguity in the sentencing court's colloquy. *See People v Billingslea*, 6 NY3d 248, 257. Based on this record, the defendant knowingly, intelligently, and voluntarily waived his right to appeal. Order affirmed.

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

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

People v Van Deusen, No. 100, 6/29/2006

The defendant was indicted for several violent felonies based on a home invasion in which the decedent was killed by a shotgun blast. The defendant pled guilty to first-degree robbery, in exchange for a determinate sentence of not less than five or more than 15 years in prison. Before sentencing, she moved to withdraw her plea because the court did not inform her that she faced mandatory postrelease supervision. The motion was denied and she was sentenced to eight years imprisonment plus five years of postrelease supervision. The conviction was affirmed.

Holding: The defendant's decision to plead guilty was not knowing, voluntary, and intelligent because the court did not inform her of a direct consequence of her plea, postrelease supervision. *See People v Catu*, 4 NY3d 242. That her promised sentence, with postrelease supervision, was still less than the maximum potential prison term was irrelevant. The court did not provide her with sufficient information before she decided whether to plead guilty. Judgment reversed, plea vacated, and case remanded.

Contempt (Elements) (General) **CNT; 85(7) (8)**

People v Santana, No. 81, 6/29/2006

An order of protection was issued in favor of the defendant's roommate when the defendant was charged with assaulting him. After violating a second order of protection, the defendant was charged with second-degree criminal contempt. At trial he was convicted of assault and contempt. On appeal, the defendant claimed that the contempt charge was jurisdictionally defective since it failed to allege that the violation did not arise from a labor dispute, a statutory exception. Conviction affirmed on appeal.

Holding: The labor dispute exception to the contempt statute was an option for the defense to raise, but not a requirement for the prosecution to plead. The statute states that a person is guilty of contempt: "when a person engages in '[i]ntentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law.'" *See* Penal Law 215.50 [3]. An exception to a crime must be pled along with the other elements unless it was found outside the Penal Law. *See People v Kohut*, 30 NY2d 183, 187. Since the contempt statute exception refers to the definition of "labor disputes" in the Judiciary Law, it was not intended to be a pleading element. *See People v Romano*, 188 Misc2d 368, 370-374. If it had been raised as a defense, the prosecutor would have been obligated to prove beyond a reasonable doubt that it did not apply. Judgment affirmed.

Civil Practice (General) **CVP; 67.3(10)**

Long v State of New York, No. 90, 7/5/2006

In 1995, the claimant had been convicted of rape and robbery. Based on the prosecutor's postconviction investigation, the trial court vacated the conviction. In 2002, the court issued a clarifying decision that the basis for vacating the judgment was newly discovered evidence (*see* CPL 440.10 [1] [g]), and the dismissal was in the interests of justice. *See* CPL 210.40. Also in 2002, the claimant sued the state for unjust conviction and imprisonment. *See* Court of

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Claims Act 8-b. Dismissal of the complaint as time-barred and for insufficient verification was affirmed because the judgment was not vacated and indictment dismissed on CPL 440 grounds.

Holding: When a judgment is vacated and an accusatory instrument is dismissed, the proviso of Court of Claims Act 8-b (3) (b) (ii) appears to require that both the vacatur of the judgment and dismissal of the accusatory instrument be premised on one of the grounds in CPL 440.10 (1). However, this is unworkable. See *Ivey v State of New York*, 80 NY2d 474. The requirements of CPL 440.10 (1) apply solely to the vacatur of judgment. Dismissal of indictments occurs under a separate provision, CPL 440.10 (4). The statutory criteria were met when the claimant established that the judgment of conviction was vacated under one of the specified grounds in Court of Claims Act 8-b (3) (b) (ii), regardless of the basis for the dismissal of the accusatory instrument. The trial court’s decision was based on newly discovered evidence, under CPL 440.10 (1) (g), which is referred to in the Court of Claims Act.

As to the alternate bases for affirming dismissal of the complaint here, the claim was timely filed within the two year time limit. However, the complaint was not properly verified by claimant. Court of Claims Act 8-b (4). Judgment affirmed.

Defenses (Justification) DEF, 105(37)

Homicide (Murder [Defenses] [Instructions]) HMC; 185(40[a] [m])

People v Petty, No. 95, 7/5/2006

The defendant was charged with murder. Evidence showed that the defendant shot the decedent in the back of the neck from a short distance. The defendant claimed self-defense based on previous threats and violence by the decedent and his friends. The defendant believed that when the decedent reached for his waist he was going to draw a weapon and kill him. Defense witnesses stated that the decedent had tried to have the defendant shot and that the decedent and his friends had attacked the defendant in the past. The court refused to charge the jury that threats were relevant to whether the decedent was the initial aggressor. The defendant was acquitted of murder. His conviction of manslaughter was affirmed.

Holding: The trial court erred by failing to charge the jury that evidence of the decedent’s threats should have been considered in determining the initial aggressor. See *People v Miller*, 39 NY2d 543, 548. The jury was required to make that determination first. If the defendant was not the initial aggressor, the jury had to decide, whether his actions in self-defense were reasonable. See Penal Law

35.15(1)(b); *People v Goetz*, 68 NY2d 96, 106. Threats made by the decedent, even if the defendant was not aware of them, were relevant to the question of initial aggression. See *Stokes v People*, 53 NY 164. However, the prosecution here disproved the justification defense. The decedent made no threats or menacing gestures before the shooting, and tried to run away. The defendant was the initial aggressor, and his use of deadly physical force was unreasonable since no evidence show that the decedent was going to kill him. Based on the overwhelming evidence of guilt, the court’s error in the jury charge was harmless. See *People v Crimmins*, 36 NY2d 230, 242. Judgment affirmed.

Reckless Endangerment (Elements) (Evidence) RED; 326(10)(15)

People v Feingold, No. 96, 7/5/2006

The defendant attempted suicide by sealing his apartment and allowing it to fill with gas from the oven. After he fell asleep a spark ignited the gas and caused serious damage to the surrounding apartments; no one died. At the bench trial, the judge found that the defendant did not possess the mens rea for depraved indifference, but convicted him of first-degree reckless endangerment, relying on *People v Register* (60 NY2d 270). The conviction was affirmed.

Holding: Depraved indifference is a mens rea element of the reckless endangerment statute. See Penal Law 120.25. In *Register* and *People v Sanchez* (98 NY2d 373), recklessness was found to be the only mens rea element of the depraved indifference murder statute, and depraved indifference found to describe the circumstances. However, recent developments show that depraved indifference to human life is a culpable mental state. Depraved indifference homicide occurs without a specific homicidal intent (see *People v Payne*, 3 NY3d 266) and rarely involves a single victim. See *People v Suarez*, 6 NY3d 202. Since *Register* and *Sanchez* are now overruled, and the trial court clearly would have acquitted defendant but for *Register*, the conviction cannot stand Judgment modified, conviction reduced to second-degree reckless endangerment.

Dissent: [Ciparick, J] The evidence was sufficient to support the conviction. The focus was on the risk created by the defendant’s conduct, not the result or injuries. *People v Chrysler*, 85 NY2d 413, 415.

Dissent: [Kaye, J] *Register* need not be overruled. No restrictions had been imposed on those situations where more than person was put at risk of harm, *ie*, quintessential depraved indifference as set out in *Payne*. Whether the defendant neglected to think about the safety of his neighbors, or disregarded it, he acted with depraved indifference to human life.

Dissent: [Grafano, J] Changing the meaning of “depraved indifference” from an objective factual assessment into a subjective mens rea requirement was un-

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ported by the language of the reckless endangerment statute or previous case law.

Homicide (Murder [Definition] HMC; 185(40[d] [j] [m]) [Evidence] [Instructions])

People v Atkinson, No. 97, 7/5/2006

The defendant was convicted of depraved indifference murder (Penal Law 125.25 [2]), based on a shooting where the decedent moved into gun fire that was only meant to scare him.

Holding: The defendant's actions did not constitute depraved indifference but were reckless. He did not forfeit his challenge by requesting that the jury be charged on the lesser-included offense of second-degree manslaughter under Penal Law 125.15 (1), requiring only recklessness. "Depraved indifference" was an additional statutory element of depraved indifference murder, beyond recklessness and risk. *See People v Suarez*, 6 NY3d 202, 214-215. The question of whether the defendant forfeited his present claim that the evidence was consistent only with intentional murder by asking for the lesser-included charge of manslaughter is not reached. Judgment modified, conviction-reduced to second-degree manslaughter.

Homicide (Murder [Definition] HMC; 185(40[d] [j] [m]) [Evidence] [Instructions])

People v Mancini, No. 98, 7/5/2006

Holding: The defendant did not commit depraved indifference murder (Penal Law 125.25 [2]), by leaving the decedent to die. *See People v Suarez*, 6 NY3d 202, 212-214. The defendant's conduct after the initial injury was irrelevant, unless elements of depraved indifference were established. Order modified, conviction reduced to second-degree manslaughter under Penal Law 125.15 (1).

Dissent: [Graffeo, J] Evidence that the defendant struck a severe blow to the decedent's head, causing profuse bleeding and unconsciousness, and locked the doors and left him alone, was sufficient to establish depraved indifference. She rendered the decedent helpless and likely to die, and impeded efforts for help to arrive. *See People v Mills*, 1 NY3d 269.

Assault (Evidence) (General) ASS; 45(25) (27) (50) (Lesser Included Offenses)

People v Swinton, Nos. 159 & 158, 7/6/2006

Holding: Viewed in the light most favorable to the prosecution, the evidence shows that the defendants acted recklessly but not with depraved indifference. *See People v*

Feingold, No. 96, 7/5/06. The convictions for first-degree assault must be reduced to third-degree assault. Order modified.

First Department

Criminal Mischief (Evidence) CMM; 99(15)

Evidence (Sufficiency) EVI; 155(130)

Matter of Andrew R., __AD3d__, 815 NYS2d 33 (1st Dept 2006)

Holding: Police responding to a burglary-in-progress call regarding a day care center found a window gate "bent up" and a window open. A young person seen inside disregarded a police order to halt and went into an internal office with the window of its door broken. The appellant was seen coming out from under a desk in that office. The center's director noticed afterward that CD players and tape recorders were missing.

The evidence was legally sufficient to support a finding that the appellant committed acts that would constitute third-degree burglary. However, there was no evidence that the appellant or the person with him had the missing property, leading to the inference that someone else had taken it. The more reasonable inference was that whoever stole the property damaged the window gate and window, so the finding that the appellant committed acts that would constitute fourth-degree criminal mischief was against the weight of the evidence. The "voluntary disclosure form" prepared by the presentment agency was not admitted at the fact-finding hearing, and there is no theory under which the statement by the other person with the appellant at the center would have been admissible against the appellant if offered. No new dispositional hearing is required. Order modified, criminal mischief charge dismissed, and otherwise affirmed. (Family Ct, Bronx Co [Lynch, JJ])

Dissent in part: [Catterson, J] The other individual admitted he and the appellant "were told to go in and take stuff for a man." It is reasonable to infer that the appellant worked in concert with that person, who escaped with the stolen property.

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

Identification (In-court) (Wade Hearing) IDE; 190(24) (57)

People v Anderson, __AD3d__, 813 NYS2d 725 (1st Dept 2006)

Holding: After a hearing court granted the defense motion to suppress physical evidence and a confirmatory identification of the defendant by an undercover officer,

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the prosecution did not seek an independent source hearing. Defense counsel announced at trial before a different justice that the only defense to be offered was agency, thereby conceding the identification of his client, but then objected when the officer made an in-court identification of the defendant. Counsel's only response to the court's request for a basis for the objection was, "Okay." When the court, having offered to consider a mistrial and an independent source hearing before a new trial was held, urged counsel to withdraw the request for a mistrial, counsel did so. "Counsel should have pressed, rather than withdrawn, the mistrial motion, which would have provided an opportunity to litigate the independent source issue and obtain a ruling prior to formulating a trial strategy (see *People v Burts*, 78 NY2d 20, 23-24 [1991])." Defense counsel's "confused and contradictory steps" compromised his client's right to a fair trial and the effective assistance of counsel. See *Strickland v Washington*, 466 US 668 (1984). Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Uviller, JJ])

Criminal Facilitation (Evidence) CRF; 98.3(15)

Evidence (Sufficiency) EVI; 155(130)

Matter of Luis O., __AD3d__, 815 NYS2d 57 (1st Dept (2006))

Holding: The only witness at the appellant's fact-finding determination was an undercover officer who said that he saw the appellant with his cousin, who responded affirmatively when the officer asked if he had any "Manteqa," a street name for heroin. Another man approached, asked the cousin if he had "good stuff," and said he had to go to an ATM for money. The cousin told the appellant to watch that man and be sure he didn't call the police. The officer did not see the appellant when he purchased drugs from the cousin, nor see the other man purchase drugs. The 14-year-old appellant, a special education student, testified that he had left school early with permission because he had been hit by another student and was upset. He met his cousin after getting off the subway, and was almost immediately told to follow a man, which he did. The cousin and others had run away when a car circled them, and the appellant was arrested. The evidence was insufficient to support a finding that the appellant committed acts constituting fourth-degree criminal facilitation. See *People v Bleakley*, 69 NY2d 490, 495. There was no evidence that the cousin sold drugs to the other man, and the evidence was insufficient to show that the appellant facilitated the sale by the cousin to the officer. Order reversed, petition dismissed. (Family Court, New York Co [Larabee, JJ])

Admissions (Evidence)

ADM; 15(15)

Evidence (Uncharged Crimes)

EVI; 155(132)

People v Jackson, __AD3d__, 814 NYS2d 627 (1st Dept 2006)

Holding: At the defendant's trial for rape of a 15-year-old, a babysitter was allowed to testify about a prior uncharged offense. She said that the defendant had raped her and said that the 15-year-old was lucky the babysitter was at the home or "it would be her." That was a statement of general intent, including future intent. The court correctly found this statement "key" to the prosecution and properly admitted it as circumstantial evidence that the defendant intended to take a certain action and did so. See *Stokes v People*, 53 NY 164, 174-175. The statement was also "background evidence" that could "complete the narrative" and rebut the defense suggestion that the 15-year-old made up the charges. The statement was also admissible as the defendant's admission. He did not preserve a federal constitutional claim. The court acted to minimize prejudice, limiting the prosecution's questioning of the babysitter and giving a cautionary instruction. This case is distinguishable from *People v Resik* (3 NY3d 385). As the case predates Penal Law 60.35, fees imposed thereunder were unlawful. Judgment modified, and as modified, affirmed. (Supreme Ct, Bronx Co [Moore, JJ])

Concurrence: [McGuire, JJ] The statement to the babysitter was an admission, so its acceptance as evidence does not depend on the *Hillmon* doctrine. See *Mutual Life Ins. Co. v Hillmon*, 145 US 285 (1892). The court did not err in admitting it.

Dissent: The prosecution asserted on appeal, contrary to the trial court's basis for admitting the statement, that the chief purpose of introducing the statement was to show state of mind under *Hillmon*, which is completely misread.

Misconduct (Prosecution)

MIS; 250(15)

Witnesses (General)

WIT; 390(22)

People v Harte, __AD3d__, 815 NYS2d 93 (1st Dept 2006)

Holding: The court erred by allowing four employees to testify about their conclusions, based on watching a poor-quality videotape, that the defendant committed the charged arson. The videotape was the only evidence, and none of the employees witnessed the actual incident. Their opinions were inadmissible. See *People v Hackett*, 228 AD2d 377, 378 *lv den* 88 NY2d 986. The error was compounded by the prosecution's repeated remarks in summation noting that the employees had identified the defendant as the person in the videotape. The prosecutor also improperly asked the jury to "wonder why [defen-

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dant] chose not to testify.” This error is of constitutional dimension. See *People v LaDolce*, 196 AD2d 49, 54. It shifted the burden to the defendant. See *People v Jamal*, 307 AD2d 267, 268. Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Adlerberg, JHO])

Evidence (Weight) EVI; 155(135)**People v Bloomfield, __AD3d__, 815 NYS2d 572 (1st Dept 2006)**

Holding: The Court of Appeals remitted this case for a determination of factual questions after finding that under the circumstances of this matter, fraudulent letters kept in the files of an enterprise’s legal counsel were business records. See *People v Bloomfield*, 6 NY3d 165. The evidence against the codefendant supported his convictions for fifth-degree conspiracy and first-degree falsifying business records. However, defendant Bloomfield’s conviction was against the weight of the evidence. Letters were created that falsely represented an unemployed former Liberian diplomat, who signed the letters, as “beneficial owner” of companies owned by US citizens. The purpose of manufacturing the letters was to mislead the Securities and Exchange Commission (SEC). While “defendant Bloomfield was instrumental in arranging for the Liberian diplomat to sign the letters,” there is no evidence that he knew the letters were designed to mislead the SEC. The prosecution’s money laundering expert admitted that nominees can be used in legal ways. The content of the letter would not necessarily lead to the conclusion that a crime was being committed. The falsifying business records statute, Penal Law 175.10, requires an intent to defraud, *ie* “an intent to commit another crime or aid or conceal the commission thereof.” Judgment as to codefendant affirmed, judgment as to defendant Bloomfield reversed and indictment dismissed. (Supreme Ct, New York Co [Visitacion-Lewis, J at hearing, Fried, J at trial])

Judges (Powers) JGS; 215(10)**Misconduct (Judicial) MIS; 250(10)****People v Melendez, __AD3d__, 815 NYS2d 551 (1st Dept 2006)**

The prosecution offered witnesses to testify about observing the defendant during a drug sale and thereafter. When a police officer named Keane testified about rooftop surveillance, the judge interrupted the prosecution’s examination many times to ask multiple questions about exactly where on the roof the witness was and what he did and saw. Other witnesses were also questioned by

the court. A defense motion for a mistrial based on, among other grounds, the court’s interference, was denied.

Holding: A court is not relegated to a mere observer or referee and may act to encourage clarity in the development of proof. See *People v Moulton*, 43 NY2d 944, 945. A court may question witnesses to clarify evidence, expedite the trial, and develop factual information if necessary. See *People v Yut Wai Tom*, 53 NY2d 44, 55-57. But a court should not make the record rather than protect it, act so as to become the jury’s focus, or take on the appearance of an advocate. See *People v Arnold*, 98 NY2d 63, 67. The court’s extensive level of interference did not deprive the defendant of a fair trial. This judge’s “overly intrusive” questioning and “undue interference in the orderly presentation of proof,” here and in other cases, “seemingly stems from an inability to accept the possibility that there is more than one way, her way, to examine a witness.” While not reversible in the absence of prejudice, “such injudicious conduct should not go unaddressed. The trial judge would do well to heed our criticism.” Judgment affirmed. (Supreme Ct, New York Co [Silverman, JJ])

Guilty Pleas (General) GYP; 181(25)**Robbery (Degrees and Lesser Offenses) ROB; 330(10) (15) (Elements)****People v Castillo, __AD3d__, 816 NYS2d 66 (1st Dept 2006)**

Holding: The defendant pled guilty to first-degree drug possession and first-degree robbery. Because he was indicted for the robbery under Penal Law 160.15(4), but pled guilty under Penal Law 160.15(2), which was not charged in the indictment and was not a lesser included offense for plea purposes (see CPL 220.20), the plea must be vacated as jurisdictionally defective under *People v Martinez* (285 AD2d 387). The issue merits review by the Court of Appeals. The rationale of *People v Johnson* (89 NY2d 905), as set out in *People v Keitzer* (100 NY2d 114) was that a prosecutor should not “attempt to avoid the protections of article 1, § 6 by soliciting a plea to alleged criminal activity that has *no common element (in law or fact)* to the crimes alleged in the indictment or felony complaint” [emphasis in opinion]. Here, the robbery offense charged had common elements with the robbery offense to which the defendant pled guilty. Concluding that the plea was “jurisdictionally defective is at odds with the rationale of *People v Ford* (62 NY2d 275 [1984]) and with the” legislative directive that appellate courts determine appeals without regard to technicalities that do not affect substantial rights. See CPL 470.05(1). Judgment modified, robbery conviction vacated, and otherwise affirmed. (Supreme Ct, New York Co [McLaughlin, JJ])

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

People v Dingle, No. 7047, 1st Dept, 6/6/2006

Holding: The defendant was convicted of depraved indifference murder. His contention that the evidence supports a finding of intent, not depraved indifference, is rejected. Rather, relief is warranted because the evidence was insufficient to establish the element of depraved indifference. *See People v Suarez*, 6 NY3d 202, 208-215. Once the jury convicted the defendant of depraved indifference murder, it necessarily acquitted him of any intentional behavior. *See People v Gonzalez*, 1 NY3d 464, 468. The evidence is entirely sufficient to support the lesser included offense of second-degree manslaughter. There were no third-party eyewitnesses. The physical evidence did not establish a mens rea. The defendant’s statement was the only eyewitness account. He denied any intent to harm his roommate, the decedent, and admitted to being drunk and under the influence of cocaine during the drunken brawl, saying that everything had gone “blank” and “crazy.” The evidence supported a finding that the defendant acted recklessly regarding the decedent, but not a finding of depraved indifference. *See People v Magliato*, 110 AD2d 266 *affd on other grnds* 68 NY2d 24. As between the lesser offenses of first- and second-degree manslaughter, reduction to the latter is proper because the jury’s verdict included a finding of recklessness. The remaining issues lack merit. Judgment modified, murder conviction reduced to second-degree manslaughter, and remanded for resentencing. (Supreme Ct, Bronx Co [Webber, J at hearing, Straus, J at trial and sentence])

Evidence (Sufficiency) EVI; 155(130)

Robbery (Evidence) ROB; 330(20)

Matter of Ashley M., No. 8435, 1st Dept, 6/8/2006

The appellant was convicted of several acts which if committed by an adult would constitute crimes, including third-degree robbery, fourth-degree grand larceny, and fifth-degree possession of stolen property. The complainant was a police officer who, with other police and school safety officers were maintaining crowd control during a protest at the High School of Art & Design. The appellant and the complainant became involved in a verbal exchange that escalated into a physical altercation. At some point the appellant grabbed the complainant’s badge, which ripped off and flew into the crowd. The appellant also grabbed another officer’s badge, which did not rip completely off. The complainant was on sick leave for two weeks as a result of minor injuries suffered during

the altercation. The appellant claimed self defense.

Holding: While the evidence was sufficient to sustain assault, obstruction of governmental administration, and criminal mischief charges, the theft and stolen property charges must fall. There was insufficient evidence that the appellant intended to dispose of the badges so as to render it unlikely the officers would recover them. *See Penal Law 155.05(1), 155.00(3); Matter of Shawn V.*, 4 AD3d 369, 370. Order modified, and as modified, affirmed. (Family Ct, New York Co [Bednar, JJ])

Appeals and Writs (Judgments and Orders Appealable) (Record) APP; 25(45) (80)

Forfeiture (General) FFT: 174(10)

People v Abruzzese, No. 8770, 1st Dept, 5/13/2006

Holding: The defendant pled guilty to robbery. The purported appeal from an agreement to forfeit, as a condition of the plea, money recovered at his arrest is dismissed because the agreement was not a part of the judgment of conviction. *Compare People v Stevens*, 91 NY2d 270 *with People v Hernandez*, 93 NY2d 261, 266-271. When a forfeiture agreement is part of a plea bargain, the property to be forfeited must be described, with its value, at the time of the plea. *See CPL 220.50(6)*. The statute does not require or provide for making a forfeiture determination part of the conviction or sentence. Here the forfeiture was not ordered by the court and was not part of the sentence, but was a settlement of a potential, separate civil proceeding. Even if the claim was not dismissed on this ground, the defendant waived his right to appeal. His claim is essentially that the forfeiture aspect of his sentence was procedurally defective and harsh and excessive, which claims are waivable. *See People v Samms*, 95 NY2d 52, 56-58. The challenge to the forfeiture as an excessive fine is unreserved. The only issue of merit in this appeal is the wrongful imposition of the DNA databank fee where the crime predated the effective date of the legislation providing for such fee. Judgment modified, and as modified, affirmed. ((Supreme Ct, Bronx Co [Stadtmauer, JJ])

Misconduct (Prosecution) MIS; 250(15)

People v Coppola, No. 8351, 6/13/2006

The defendant was convicted of robbery and burglary. The prosecutor theorized that the appellant’s former drug-dealing partnership with the complainant’s boyfriend provided the motive for the defendant’s taking of the complainant’s property. The defense maintained that the complainant had given the defendant permission to take and sell the property, then falsely accused him of theft because her share of the proceeds was low. At a pre-trial hearing, no link was established between the taking

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and the alleged prior partnership. The court excluded any evidence that the defendant was a drug dealer, and any reference to drugs. The prosecutor agreed not to show that the defendant was arrested at a meeting with his parole officer. At trial, a prosecution witness volunteered the information about the defendant's parole officer, and the prosecutor elicited testimony that a key defense witness obtained crack cocaine from the defendant. Upon objection, the court admonished the jury to disregard the testimony but denied dismissal, a mistrial, striking of the complainant's rebuttal testimony, and a motion to set aside the verdict.

Holding: The prosecutor should have asked before introducing excluded evidence, to avoid possible prejudice. *See People v Ventimiglia*, 52 NY2d 350, 362. Even if the officer's volunteering of the defendant's parole status reflected no prosecutorial misconduct, the prosecutor's subsequent conduct was inexcusable. Given the prejudice from the improper conduct and the parole testimony, "we are not willing to consider whether, or the extent to which, the court's limiting instructions dissipated the prejudice." Judgment reversed, remanded new trial. (Supreme Ct, Bronx Co [Silverman, JJ])

Evidence (Sufficiency) **EVI; 155(130)****Re David H., No. 6981, 1st Dept, 6/22/2006**

Holding: The evidence was legally insufficient to establish that the appellant possessed the air pistol, which is a requisite for conviction of violating section 10-131(b)(1) of the Administrative Code of the City of New York. The evidence established only that the appellant was seen by a teacher "flipping the top of his pants out a little" so that another student could not look in, while in a closet area. The teacher could not see what, if anything, the appellant had there. A school safety agent saw (the record does not indicate how much later) the appellant in an adjoining classroom near some lockers. When the safety agent opened a locker that was "kind of cracked open," he found the air pistol at issue in this case. The appellant was not seen putting anything into the locker, and there was no evidence that the opened locker was assigned to the appellant. This showed only the appellant's proximity to, not possession of, the air pistol. Judgment reversed, petition dismissed. (Family Court, New York Co [Bednar, JJ])

Instructions to Jury (General) **ISJ; 205(35)****Juries and Jury Trials (Deliberation)** **JRY; 225(25)****People v Nelson, No 7769, 1st Dept, 6/29/2006**

Holding: Telling jurors that they were to return and continue deliberating the next morning, and that they should be prepared to be sequestered overnight if they did not reach a verdict by the end of the day, was impermissibly coercive in this case, prejudicing the defendant's right to a fair trial. *See People v Huarotte*, 134 AD2d 166, 171. The jury had already deliberated the drug charges against the defendant for more than two days, unsequestered and had received an appropriate *Allen* charge after advising the court at the end of each day that it was deadlocked. Judgment reversed, remanded for new trial. (Supreme Ct, Bronx Co [Massaro, JJ])

Second Department**Identification (Suggestive Procedures) (Wade Hearing)** **IDE; 190(50) (57)****People v Cherry, 26 AD3d 342, 812 NYS2d 550 (2nd Dept 2006)**

Holding: A defendant's right to examine an identifying witness at a *Wade* hearing (*see US v Wade*, 388 US 218 [1967]) is not absolute, but is triggered when substantial constitutional issues regarding the identification procedure are raised on the hearing record, the prosecution's evidence is "notably incomplete," or the defendant's need for the testimony is otherwise established. *See People v Santiago*, 265 AD2d 351, 352. Here, a detective testified that at a pretrial lineup two other detectives identified the defendant as present when the shooting occurred, and that the defendant's picture had been disseminated to local police stations and newspapers. The defense was not allowed to ask the identifying witnesses if they had seen the defendant's picture before identifying him. This left open the possibility that their identification of him was based on the picture. *See People v Chipp*, 75 NY2d 327, 337 *cert den* 498 US 833. The defendant acted timely and in good faith to call the witnesses, and the request to question them should have been granted. *See People v Spears*, 64 NY2d 698, 700. Appeal held in abeyance, matter remitted for de novo suppression hearing. (Supreme Ct, Kings Co [Gerges, JJ])

Juveniles (Parental Rights) (Permanent Neglect) **JUV; 230(90) (105)****Matter of Antonio I., 26 AD3d 331, 809 NYS2d 170 (2nd Dept 2006)**

Holding: The subject child was placed in the temporary custody of the Department of Social Services after being hospitalized with skull fractures. Termination of the father's parental rights was proper, where the father visited the child only once in the year preceding the petition and did not complete most programs ordered by the

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court. The mother, however, was present at all but one scheduled visit, and completed all court-ordered programs as well as others (including two parenting skills classes and drug counseling), and maintained regular contact with caseworkers, never missing a case review. She saw a psychiatrist weekly, maintained employment, and got on a subsidized housing waiting list. While she did not admit that the child was injured as a result of a specific domestic violence incident, she did acknowledge the problem and take steps to correct it by going to domestic violence prevention counseling. *See Matter of Nathaniel T.*, 67 NY2d 838, 840. The agency did not show by clear and convincing evidence that she had failed to plan for the child's future. *See Matter of Lisa Ann U.*, 52 NY2d 1055. Order modified, finding of permanent neglect by the mother deleted, petition dismissed as to mother and otherwise affirmed. (Family Ct, Suffolk Co [Lehman, JJ])

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

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

People v Robinson, 26 AD3d 395, 811 NYS2d 83 (2nd Dept 2006)

Holding: The court failed to give a curative instruction to avoid prejudice from a witness's testimony that the defendant had spent time in jail. *See People v Cruz*, 72 AD2d 748, 748-749. There was a reasonable view of the evidence supporting a conclusion that the defendant recklessly threw the rock that hit the complainant through a glass door rather than throwing it with the intention to strike her. The court's refusal to charge third-degree assault was error. *See Matter of Shaniqua W.* 262 AD2d 496. These errors were preserved for review, contrary to the prosecution's assertion. Evidence of the defendant's guilt was not so overwhelming that the errors can be found harmless. The court correctly denied the motion to suppress the defendant's statements. Judgment reversed, new trial ordered. (Supreme Ct, Suffolk Co [Mullen, JJ])

Misconduct (Prosecution) MIS; 250(15)

People v Brown, 26 AD3d 392, 812 NYS2d 561 (2nd Dept 2006)

Holding: Improper comments made by the prosecutor during summation were not properly preserved for appellate review but are considered as a matter of discretion in the interest of justice. *See CPL 470.15(6)(a)*. The prosecutor repeatedly called the defendant's testimony "a

'story' and a 'load of garbage,' suggested that the defendant had lied under oath, and said the defendant had lots of time to tailor his testimony to prosecution proofs. *See People v Pagan*, 2 AD3d 879. The prosecutor also repeatedly vouched for her witnesses, saying they were "credible and accurate," that they had "told you the truth" and "told you exactly how it happened." *See People v Blowe*, 130 AD2d 668, 671. She also appealed to the jurors' sympathy, saying, "God forbid you had a gun pointed at your side." *See People v Walters*, 251 AD2d 433. Cumulative, these errors deprived the defendant of a fair trial. The lineup held in the absence of a lawyer did not violate the defendant's right to counsel. *See People v Hawkins*, 55 NY2d 474 *cert den* 459 US 846. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Barbaro, JJ])

Narcotics (Penalties) NAR; 265(55)

Sentencing (General) SEN; 345(37)

People v Torres, 26 AD3d 398, 809 NYS2d 187 (2nd Dept 2006)

Holding: The defendant pled guilty to the class C felony of attempted third-degree sale of drugs in full satisfaction of superior court information charging four separate class B felony drug offenses. He admitted selling a quantity of cocaine, was adjudged a second felony offender, and was promised the minimum permissible sentence of three to six years in prison. When he appeared for sentencing on Jan. 26, 2005, he claimed that he was entitled to the benefit of the Drug Law Reform Act (L 2004, ch 738), effective Jan. 13, 2005, which reduced the minimum sentence for class C drug felonies to a determinate two-year term. *See Penal Law 70.70(3)(b)(ii)*. The court rejected the claim and imposed the bargained-for sentence. The Legislature specified in the Drug Law Reform Act that its ameliorative provisions shall apply to crimes committed on or after its effective date. *See L 2004, ch 738, sec. 41(d-1)*. This indicates an intent for the Act not to apply to crimes before that date, so that *People v Behlog* (74 NY2d 237, 240) does not apply. *See eg People v Goode*, 25 AD3d 723. The challenge to the sentence as excessive was foreclosed by the defendant's waiver of appeal. Sentence affirmed. (County Ct, Nassau Co [Brown, JJ])

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

Juveniles (Custody) (Parental Rights) (Visitation) JUV; 230(10) (90) (145)

Matter of Williams v Bentley, 26 AD3d 441, 809 NYS2d 205 (2nd Dept 2006)

Holding: "The Family Court improperly conducted a custody hearing in the absence of the mother's counsel and awarded custody to the father, stating that it intend-

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ed to avoid delaying the hearing and disposition of the custody matter. The mother repeatedly told the Family Court that she would not proceed in the absence of her lawyer and that she would wait for her lawyer." Forcing the mother to proceed without counsel put the court's interest in avoiding delay above the litigants' interests and violated the mother's right to have counsel. *See Matter of Moloney v Moloney*, 19 AD3d 496. Depriving a party of the fundamental right to counsel in a custody or visitation proceeding violates due process, requiring reversal without reference to the merits of the unrepresented litigant's position. Order reversed, matter remitted. (Family Ct, Suffolk Co [Lehman, JJ])

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

People v Clymer, 26 AD3d 443, 809 NYS2d 207
(2nd Dept 2006)

Holding: The defendant was convicted of multiple counts of felony and misdemeanor animal fighting (*see* Agriculture and Markets Law 351[3]), overdriving, torturing, and injuring animals and failure to provide proper sustenance (*see* Agriculture and Markets Law 353), and criminal possession of a hypodermic. The claim that the two counts of possessing a hypodermic were multiplicitous was not preserved for review. *See People v Cruz*, 96 NY2d 857, 858. Imposing consecutive sentences for the two counts was a provident exercise of discretion as the counts charged separate acts occurring weeks apart at different locations. The sentences did not violate Penal Law 70.25(3) as the acts of possessing a hypodermic did not encompass the same incident or transaction. Judgment affirmed. (County Ct, Westchester Co [Lange, JJ])

Evidence (Sufficiency) EVI; 155(130)

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

People v Carratu, 26 AD3d 514, 811 NYS2d 92
(2nd Dept 2006)

Holding: The evidence was insufficient to convict the defendant of 54 counts of second-degree criminal possession of a forged instrument. The "cable 'cube' devices" (cubes) in question were incomplete. Without additional programming, they could not communicate with a cable converter box to authorize it to unscramble unpaid-for television. "A 'forged instrument'" must be "a complete written instrument" or an incomplete one that "purports to be an authentic creation of its ostensible maker . . . but

is not" Penal Law 170.00(4). The incomplete cubes could not purport to be "authentic Cablevision command-issuing device[s], since the cubes could not issue any such commands to a cable converter box. . ." *Cf People v Roman*, 8 Misc3d 1026[A]. Only the functioning cube found connected to the defendant's television allowing him to receive un-paid for programming fell within the definition of a forged instrument. *See* Penal Law 170.25. The defendant's sales of cubes to a Cablevision investigator and police investigation provided probable cause to arrest the defendant, justifying a search of his car and the search of his home pursuant to a search warrant. *See People v Cassella*, 143 AD2d 192, 194. Judgment modified, counts one through 54 vacated and dismissed, and otherwise affirmed.

Juries and Jury Trials (Challenges) JRY; 225(10)

People v Nieves, 26 AD3d 519, 809 NYS2d 586
(2nd Dept 2006)

Holding: The defendant's arrest was based on probable cause, and the showup procedure was permissible. However, the court erred in permitting "the prosecutor to belatedly exercise a peremptory challenge to a still unsworn prospective juror (*see* CPL 270.15[2]; *People v Williams*, 26 NY2d 62. . .)." That the prosecution, which must make peremptory challenges first, must not be permitted to go back and challenge a juror accepted by the defendant is "the one persistently protected and enunciated rule of jury selection." *See People v Alston*, 88 NY2d 519, 529. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Partnow, JJ])

Juveniles (Support Proceedings) JUV; 230(135)

Matter of Gabriel v Cooper, 26 AD3d 493,
810 NYS2d 222 (2nd Dept 2006)

Holding: Family Court denied the father's motion to vacate an order entered on default denying a motion to vacate an order of support, and denied his petition for a downward modification. "As noted by the Family Court, orders entered upon default are disfavored in child support cases (*see Matter of Pinto v Putnam County Support Collection Unit*, 295 A.D.2d 350. . .)." The father established a reasonable excuse for his failure to appear when the case was called. Further, evidence of his income of about \$3,000 annually established a meritorious defense. Questions of undisclosed income and imputation of income should be explored and a new determination as to support made at a hearing upon remittitur. The father shall pay \$50 biweekly pending the new determination. Order reversed, matter remitted. (Family Ct, Kings Co [Silber, JJ])

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

Family Court (General) FAM; 164(20)

Matter of Otto v Otto, 26 AD3d 498, 810 NYS2d 214 (2nd Dept 2006)

Holding: In a family offense proceeding, a hearing on a petition for a temporary order of protection proceeded with the appellant representing himself. The court told the appellant of his right to counsel and to an adjournment to secure counsel. However, the court did not tell the appellant he had a right to assigned counsel if he could not afford a lawyer, and there was no inquiry into his financial capability to hire one. *See* Family Court Act 262(a)(ii). The record shows that the appellant “was unaware a hearing was taking place, indicated his desire to retain counsel and to adjourn the matter, noted his confusion during the proceedings on numerous occasions, and could not understand the nature of cross examination or the admission of evidence.” There was no showing that he had “sufficient awareness of the relevant circumstances and probable consequences” of waiving counsel to validly do so. *See Matter of Lawrence S.*, 29 NY2d 206, 208. Order of protection reversed, matter remitted for a new hearing before a different judge at which the appellant appears with counsel or submits an adequate waiver. (Family Ct, Suffolk Co [MacKenzie, JJ])

Conspiracy (Evidence) CNS; 80(20)

Narcotics (Evidence) (General) (Sale) NAR; 265(20) (27) (59)

People v Dathan, 27 AD3d 575, 812 NYS2d 119 (2nd Dept 2006)

Holding: The jury instructions and prosecution theory at trial allowed the jury to convict the defendant of second-degree conspiracy “based on an aggregate weight of one-half ounce or more of a combination of alleged sales of cocaine weighing less than one-half ounce taking place over several months.” These independent sales did not constitute “a continuous offense establishing a class A felony (*See People v Okafore*, 72 NY2d 81, 86. . .).” Further, it is unclear whether the conviction was based on one of two class A felony sales charged or on the aggregate weight of some combination of lesser sales. The conspiracy count was duplicitous as submitted. *See* CPL 200.30, *People v Keindl*, 68 NY2d 410, 417-418. Judgment modified, second-degree conspiracy count vacated and dismissed with leave to resubmit appropriate charges arising from the conduct to another grand jury, and as modified, affirmed. (Supreme Ct, Kings Co [Tomei, JJ])

Assault (Attempt) (Evidence) ASS; 45(5) (25)

Attempt (General) ATT; 50(7)

People v Carmona, 27 AD3d 574, 811 NYS2d 431 (2nd Dept 2006)

Holding: As the prosecution concedes, an “attempt to assault a police officer is a legal impossibility (*see* Penal Law §§ 110.00, 120.08; *People v Campbell*, 72 NY2d 602, 607 . . .).” The evidence offered was legally sufficient to establish guilt of disorderly conduct beyond a reasonable doubt. *See* Penal Law 240.20(1), (3). Judgment modified, convictions of attempted assault on a police officer vacated and counts dismissed, and as modified, affirmed. (County Ct, Orange Co [Berry, JJ])

Parole (Release [Consideration for [Includes Guidelines)]) PRL; 276(35[b])

Matter of McLaurin v NYS Board of Parole, 27 AD3d 565, 812 NYS2d 122 (2nd Dept 2006)

Supreme Court directed that a de novo parole hearing be held.

Holding: Statements in the petitioner’s resentencing minutes constituted a sentencing recommendation by the judge which the Parole Board was required to obtain and consider before deciding whether to release the petitioner. Despite a statutory requirement that a certified copy of the sentencing minutes be provided to the person in charge of the institution holding a state prisoner (*see* CPL 380.70), the resentencing minutes were not available to the Board before the petitioner’s second parole hearing. While the interposing of yet another Board hearing would normally render the instant appeal academic (*see Matter of Rivera v Travis*, 8 AD3d 716), it is clear that the Board does not yet have the resentencing minutes and did not consider them at the third and latest hearing. The substantial issue presented is thus likely to recur, warranting its review. *See Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715. Judgment affirmed, Division of Parole ordered to obtain the resentencing minutes and with 30 days thereafter conduct a de novo parole hearing. (Supreme Ct, Orange Co [Rosenwasser, JJ])

Guilty Pleas (General) (Reinstatement) (Vacatur) (Withdrawal) GYP; 181(25) (40) (55) (65)

People v Rodriguez, 27 AD3d 585, 811 NYS2d 752 (2nd Dept 2006)

The defendant pled guilty to one count of attempted second-degree burglary in 1999, premised on a sentence of 12 years to life in prison as a persistent violent felony offender. In 2000, the court determined that the defendant

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should not be found to be a persistent violent felony offender. See CPL 400.20. The prosecution was permitted to withdraw consent and the 1999 plea was vacated. See CPL 220.10(4); *People v Farrar*, 52 NY2d 302, 307-308. After pleading to two counts of second-degree burglary the defendant was sentenced as a second felony offender to concurrent prison terms of six to 12 years. That sentence then being found illegal; the court, with the defendant's consent, vacated the sentence and imposed concurrent determinate seven-year terms. On the prosecutor's appeal, the sentence was overturned; the earlier determination that the defendant could not be sentenced as a persistent violent felony offender due to alleged unconstitutionality of a prior conviction was held incorrect. The matter was remitted to determine whether the defendant should be adjudicated a persistent violent felony offender. Supreme Court denied the defense motion to dismiss the indictment. The 1999 plea was reinstated and the defendant was sentenced as a persistent violent felony offender to 12 years to life.

Holding: Contrary to the defendant's position, the court properly vacated the 1999 plea when the prosecution withdrew its consent; jeopardy did not attach. The court lacked the power to vacate the 2000 plea and reinstate the 1999 plea without the defendant's consent where the action was not taken to cure error in the 2000 proceedings. See *Matter of Campbell v Pesce*, 60 NY2d 165. The 2000 plea should be reinstated and the defendant sentenced as a persistent violent felony offender. Because the 2000 plea was conditioned upon the 7-year concurrent sentences, the defendant must be given an opportunity to withdraw the plea. See *People v Hollis*, 309 AD2d 764. Judgment reversed, matter remitted. (Supreme Ct, Suffolk Co [Mullen, JJ])

Juveniles (Neglect)**JUV; 230(80)****Matter of Imani B., 27 AD3d 645, 811 NYS2d 447 (2nd Dept 2006)**

Holding: The appellant father was found to have neglected his child. Nearly the only evidence was the mother's out-of-court statements about a domestic dispute. Absent any showing that these statements came within an exception to the hearsay rule, they were not admissible against the appellant. See *Morrissey v City of New York*, 221 AD2d 607. The Law Guardian's theory that the statements were admissible as excited utterances was not advanced below when the appellant could have countered the argument and the court would have been able to make factual determinations relevant to admissibility. See *People v Nieves*, 67 NY2d 125, 135. The remaining evidence showed, at most, that the parents "had engaged in loud

verbal disputes in front of their four-month-old child." This was insufficient to show that the father's failure to exercise appropriate care resulted in an immediate danger that the child's condition would be impaired. See *Nicholson v Scopetta*, 3 NY3d 357, 368. Order reversed, petition dismissed. (Family Ct, Suffolk Co [MacKenzie, JJ])

Juveniles (Support Proceedings)**JUV; 230(135)****Matter of Lerner v Relkin, 27 AD3d 745, 813 NYS2d 726 (2nd Dept 2006)**

The mother claimed that the appellant father failed to pay his share of educational, camp, and medical expenses, willfully violating a court order. Because the appellant failed to provide financial documents to the court and the mother when ordered to do so, the Support Magistrate precluded him from offering evidence as to payments made. He was found to be in willful violation; arrears were established at \$50,760, and a money judgment in that amount was awarded to the mother along with counsel fees. Family Court confirmed the determination even though it noted that the appellant had apparently paid nearly \$34,000 but failed to present evidence to show it.

Holding: Family Court providently exercised its discretion by effectively addressing the appellant's timely specific written objections. See Family Court Act 439(e). While the appellant's admission that he did not timely pay and failure to show inability to pay support the finding of willfulness and award of counsel fees (see Family Court Act 437, 438[b], 454[3][a], 455[5]), the mother was not entitled to a money judgment without showing she had paid the outstanding sums. See *Boris v Boris*, 272 AD2d 284, 285. She admitted that the appellant had paid, though late, a substantial portion of the alleged arrears. The drastic nature of preclusion, the lack of prejudice to the mother, lack of evidence of bad faith regarding the disclosure order, and significant prejudice to the appellant warrant allowing him to present evidence of his actual payments. See *Incorporated Vil. of Rockville Ctr. v Speigel, Peter & Liu, Architects*, 295 AD2d 479, 480. Order modified, matter remitted for a hearing

Assault (Evidence) (Serious Physical Injury)**ASS; 45(25) (60)****Evidence (Sufficiency)****EVI; 155(130)****Matter of Anisha McG., 27 AD3d 749, 810 NYS2d 918 (2nd Dept 2006)**

Holding: The presentment agency's evidence established only that the complainant suffered a cut above the eye and a cut on the ear. This did not establish a serious physical injury. See *People v Snipes*, 112 AD2d 810, 812. Therefore it did not support a finding that the appellant committed acts that would constitute second-degree

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assault charged as a hate crime. *See* Penal Law 485.05 and 120.05(1). The evidence was also insufficient as to the charge of second-degree menacing (Penal Law 120.14[1]) where there was no showing that the complainant “had a well-founded fear of physical injury (*see Matter of Wanji W.*, 205 A2d 690, 691. . .).” Order modified, provisions adjudicating the appellant a juvenile delinquent as to the above charges deleted, and those counts dismissed, and otherwise affirmed. (Family Ct, Kings Co [McLeod, JJ])

Juveniles (Jurisdiction) (Support Proceedings) JUV; 230(70) (135)

Matter of Catalano v Catalano, 27 AD3d 734, 812 NYS2d 616 (2nd Dept 2006)

Holding: After the parties’ 1990 divorce, the mother moved with the children to New Jersey. The respondent father, who moved to Florida, was ordered by the Rockland County Family Court to pay child support. After the older son moved to Florida to live with the respondent, a 2004 New Jersey Court order was issued terminating the New York support order with regard to that child, effective in 2002. The court below found that under the Uniform Interstate Family Support Act, New York lost continuing exclusive jurisdiction over enforcement of the prior New York order as of 2002. “However, this state may enforce the order that was modified by another state’s tribunal, as to amount accruing before the out-of-state modification (*see* Family Ct Act § 580-205[c][1]).” The court erred by dismissing the violation petition insofar as it sought arrears accruing before the date of the New Jersey modification. Order modified, and as modified, affirmed. (Family Ct, Rockland Co [Warren, JJ])

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

Sentencing (General) SEN; 345(37)

People v Weekes, 28 AD3d 499, 813 NYS2d 188 (2nd Dept 2006)

Holding: The defendant’s guilty plea was not knowing, voluntary, and intelligent because he was not told that mandatory post-release supervision would be a mandatory part of whatever sentence he received. The addition of post-release supervision made it impossible for him to receive a prison term at the low end of the range specified in the plea bargain. That he was “not ultimately sentenced at the low end of the range is irrelevant; he did not know the true range of his sentencing exposure when he pleaded guilty.” He must be given the opportu-

nity to withdraw the plea; if he does not, the court may impose any lawful sentence within the range originally agreed to. *Cf* *People v Ingoglia*, 305 AD2d 1002, 1002. To the extent this decision is inconsistent with the Third Department case of *People v Van Deusen* (19 AD3d 747 *lv gntd* 6 NY3d 781) that decision is not followed. A defendant has a statutory right to be present at sentencing and resentencing. *See* CPL 380.40(1). Order reversed motion to vacate granted, matter remitted. (County Ct, Orange Co [Berry, JJ])

Family Court (General) FAM; 164(20)

Juveniles (Custody) (Visitation) JUV; 230(10) (145)

Matter of Grassi v Grassi, 28 AD3d 482, 812 NYS2d 638 (2nd Dept 2006)

Holding: The mother did not make an evidentiary showing that warranted a hearing on child custody and visitation; the court had sufficient information to render an informed custody and visitation determination consistent with the best interests of the child. *See Matter of Williams v O’Toole*, 4 AD3d 371. Discontinuing the mother’s supervised visitation and holding no hearing was a provident exercise of the court’s discretion. Family Court improperly barred the mother from petitioning for visitation without first meeting a set of criteria including maintaining sobriety for a significant time, going to regular therapy sessions, undergoing a complete psychiatric evaluation, and complying with any regime of medication prescribed. Counseling and treatment may be appropriate components of a custody or visitation order. *See Matter of Irwin v Schmidt*, 236 A2d 401. However, a court has no authority to condition future custody or visitation applications on therapy. *See Pudalov v Pudalov*, 308 AD2d 524. Order modified, provision barring future petitions until specific conditions are met deleted, and as modified, affirmed. (Family Ct, Nassau Co [Eisman, JJ])

Evidence (Business Records) (Hearsay) EVI; 155(15) (75)

Statute of Limitation (Tolling of) SOL; 360(20)

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

People v Grogan, No. 2004-02382, 2nd Dept, 4/11/06

Holding: In 2002, the defendant was indicted for a 1994 rape, after the DNA profile created from evidence in a rape kit was found to match the defendant’s profile in the Combined DNA Index System (CODIS). The prosecution was not barred by the five-year statute of limitation because the defendant’s whereabouts had been continuously unknown and unascertainable until the CODIS match. *See People v Seda*, 93 NY2d 307, 312. The court “properly admitted, as business records, the DNA reports

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produced from the rape kit." Neither the director of the laboratory nor the criminalist from the medical examiner's office who testified performed the DNA testing, but "their testimony revealed their familiarity with the business practices and procedures of their respective offices," properly laying the foundation for admission of the records. *See People v Cratsley*, 86 NY2d 81, 89. There was no violation of the defendant's right to confront the witnesses against him (*see Crawford v Washington*, 541 US 36, 56 [2004]) because business records are not testimonial. *Cf People v Pacer*, __NY3d__ (3/28/06). The contention that the DNA test performed after the defendant's indictment was prepared in anticipation of litigation and so was not a business record is rejected. Prosecutors have no authority to dictate medical examiner practices, and medical examiners lack authority to gather evidence for prosecution purposes. *See People v Washington*, 86 NY2d 189, 193. The defendant had an opportunity to cross examine the criminalist "as to the preparation, authenticity, and methodology of the testing and the result (*see People v Atkins*, 273 AD2d 11, 12 . . .)." Judgment affirmed. (Supreme Ct, Kings Co [Tomei, JJ])

Identification (Show-ups) **IDE; 190(40) (57)**
(Wade Hearing)

People v Moses, No. 2004-04253, 2nd Dept, 4/11/2006

Holding: The prosecution failed at the suppression hearing to meet its initial burden of going forward with evidence showing "the legality of the police conduct in the first instance." *See People v Berrios*, 28 NY2d 361, 367. The arresting officer testified that after receiving a radio call of a robbery in progress he responded, spoke with the complainant, then received by radio information that a person had been stopped at a nearby intersection. The officer drove the complainant there, where the defendant was observed leaning against an unmarked car between two officers with "NYCP" jackets. The complainant said the defendant had broken into her house. He was arrested. The other two officers did not testify at the hearing. The original radio call, by itself, was insufficient to have provided a legal basis for the two officers to stop the defendant. *See People v King*, 274 AD2d 669. The "vague and equivocal hearsay testimony of the arresting officer concerning a statement made by one of the plainclothes officers was inadequate to demonstrate that the defendant's presence at the scene was lawfully obtained." Judgment reversed, new trial ordered, to be preceded by a hearing to determine if the complainant had an independent source for an in-court identification of the defendant. (Supreme Ct, Kings Co [Balter, JJ])

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

Evidence (General) (Relevancy) **EVI; 155(60) (125)**

People v Ocampo, No. 2003-09358, 2nd Dept, 4/18/2006

Holding: The defendant was convicted of sexual offenses based on a sexual encounter with an 18-year-old noncitizen. Defense counsel sought to question the complainant about an alleged statement to the defendant that the complainant needed money to pay the people who brought him to the US and wanted to have sex in exchange for pay. The court prohibited the questioning, saying counsel could ask the defendant directly. When the defendant sought to testify about the statement, the court ruled it inadmissible hearsay and noted that the defense had the opportunity to question the complainant. The excluded evidence "went directly to the credibility of the complainant and the defense (*see People v Ashner*, 190 AD2d 238, 247-248)." The jury was entitled to hear the defense theory. *See Davis v Alaska*, 415 US 308, 317 (1974). A court's discretion in evidentiary rulings is circumscribed by the defendant's right to present a defense and by the rules of evidence. *See People v Carroll*, 95 NY2d 375, 385. The error in precluding the evidence was not harmless, as the prosecution's case would have been weakened, perhaps greatly, if the defendant could have convinced the jury that the complainant needed money badly and would do anything for it. Judgment reversed, new trial ordered. (County Ct, Suffolk Co [Ohlig, JJ])

Parole (Release [Consideration for (Includes Guidelines)]) **PRL; 276(35[b])**

Matter of Lu Po-Yen v Dennison, No. 2005-04371, 2nd Dept, 4/25/2006

Holding: Supreme Court correctly granted the respondent's petition and annulled the Parole Board's denial of his release on parole. There was no basis in the record for considering conduct of which the respondent was not convicted. The record was not sufficiently detailed to allow intelligent judicial review of the basis for the denial. *See Matter of Wan Zhang v Travis*, 10 AD3d 828, 829. The respondent satisfied his burden of demonstrating entitlement to the relief he requested. *See Matter of McLain v New York State Div. of Parole*, 204 AD2d 456. Judgment affirmed. (Supreme Ct, Orange Co [Slobod, JJ])

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

Search and Seizure (General) **SEA; 335(42)**

Matter of Valdes v DeRosa, __AD3d__, 814 NYS2d 234 (2nd Dept 2006)

Holding: The petitioner, under investigation for a

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suspected homicide, sought to prohibit enforcement of an order obtained by the prosecutor directing the petitioner to provide buccal swab samples for DNA comparison with two human hairs recovered as part of the investigation. The prosecutor’s motion did not indicate that the hairs had been tested to determine whether they belonged to the decedent or someone else. The affirmation did not disclose the source of the information that the hairs had been found on the decedent’s shirt. The prosecutor thus filed to demonstrate as required “that there was a clear indication that relevant material evidence will be found from the requested samples (see *Matter of William D. v Rohl* [148 AD2d 706]. . .).” Relief in the nature of prohibition is properly availed by a suspect seeking review of an order to provide a bodily sample. See *Matter of Abe A.*, 56 NY2d 288, 296 fn. 3. Petition granted, the respondents prohibited from enforcing the order. (County Ct, Orange Co [DeRosa, JJ])

Identification (Eyewitnesses) IDE; 190(10)

Misconduct (Prosecution) MIS; 250(15)

People v Clark, 2002-09673, 2nd Dept, 4/25/2006

Holding: After the complainant identified the defendant at trial as the person who robbed her, a detective testified. He responded affirmatively on direct examination when asked if he had conducted further investigation after meeting with the complainant. When he said, “I investigated—I let her look at a couple of —” the court interrupted with the caution, “[c]areful.” Over objection, the prosecutor was allowed to ask the detective whether, following his investigation with the complainant, he had ascertained the address of the robber. The detective said he did. He was then permitted to say that he had put the defendant in a lineup viewed by the complainant and then arrested the defendant. “Taken together, under the unique circumstances of this one-witness identification case, this testimony impermissibly bolstered the complainant’s prior testimony by providing official confirmation of her prior in-court identification of the defendant (see *People v Samuels*, 22 AD3d 507, 508 . . .).” The error was not harmless. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Brennan, JJ])

Trial (Public Trial) TRI; 375(50)

People v Watson, __AD3d__, 813 NYS2d 546 (2nd Dept 2006)

Holding: The court may have properly excluded the general public from the courtroom during the testimony of an undercover officer. See *People v Ramos*, 90 NY2d 490,

498 *cert den* 522 US 1002. There was no showing at the *Hinton* hearing (see *People v Hinton*, 31 NY2d 71 *cert den* 410 US 911) that the defendant’s family or defense counsel’s supervisor posed a threat to the officer. See *People v Garcia*, 95 NY2d 946, 947; *People v Hines*, 225 AD2d 706. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Balter, JJ])

Counsel (Anders Brief)

COU; 95(7)

People v Rush, No 2003-05072, 2nd Dept, 5/2/2006

Holding: The defendant appealed after a jury convicted him of multiple counts including first-degree burglary and first-degree robbery, Assigned counsel filed an *Anders* brief (*Anders v California*, 386 US 738 [1967]). Independent judicial review discloses potentially nonfrivolous issues including whether admission of an out-of-court statement violated *Crawford v Washington* (541 US 36) and whether the record discloses an articulated reasonable basis for physically restraining the defendant in front of the jury. See *People v Goldstein*, 6 NY3d 119 (*cert requested*). Counsel relieved, new counsel assigned. (County Ct, Nassau Co [Brown, JJ])

Family Court (General)

FAM; 164(20)

Juveniles (Adoption) (Custody) JUV; 230(5) (10) (50) (90) (Foster Care) (Parental Rights)

Matter of Melinda D., No. 2004-09642, 2nd Dept, 5/9/2006

A child placed in the custody of the Administration for Children’s Services (ACS) in 2002 as a result of neglect allegations against her mother was placed with an agency that in turn placed her with a non-kinship foster mother. A neglect judgment against the mother was suspended for a year under Family Court Act 1053. In early 2004 ACS changed its permanency plan from “return to parent” to “adoption”; the foster mother said she wanted to adopt the child and to relocate to Florida at the end of the school year. In April 2004 ACS filed a petition to terminate the mother’s parental rights. In June, Family Court approved the change to the permanency plan. The mother then executed, without the advice of counsel, written consent for the child to go with the foster mother to Florida until the end of July. After the child was in Florida, ACS initiated a placement application under the Interstate Compact on the Placement of Children (ICPC). See Social Services Law 374-a. The child and foster mother did not return to New York. The mother’s visitation was suspended at ACS request, but ACS was directed to arrange and pay for a one-week visit by the mother to Florida, which occurred in August. After receiving no response to a September request to have the child returned to New York, the moth-

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er petitioned for a writ of habeas corpus, which was denied. Florida then refused to approve the ICPC placement.

Holding: Ordinarily, this appeal would be dismissed as academic based on the mother's execution, on the day of oral argument of this appeal, of documents surrendering her parental rights in favor of adoption by the foster mother subject to visitation and communication. However, issues of noncompliance with Social Services Law 374-a have been increasing, and often evade appellate review. Habeas corpus is available as a remedy to determine child custody; noncustodial parents have standing to commence such proceedings. The purpose of the ICPC was thwarted by the events that unfolded here. But for the mother's later judicial surrender, relief would have been granted on appeal. Well intentioned efforts to match children and appropriate foster care must still comply with the mandates of 374-a. Order reversed, petition and motion dismissed as academic. (Family Ct, Kings Co [Hamill, JJ])

Juveniles (Support Proceedings)

JUV; 230(135)

**Matter of Terjesen v Terjesen, No. 2005-05194,
2nd Dept, 5/9/2006**

Holding: Family Court properly sustained the mother's objections to a Support Magistrate's order granting the father's petition for a downward modification of child support. While child support established by a stipulation of settlement incorporated but not merged into a divorce judgment may be modified, a showing of an unreasonable and unexpected change of circumstance is required. The father here failed to show that the changed circumstances were not of his own making or that he had "used his best efforts to obtain employment commensurate with his qualifications and experience" [internal quotation marks omitted]. See *Matter of Heyward v Goldman*, 23 AD3d 468, 469. The court properly rendered a decision without the aid of a hearing transcript, where it reviewed the Support Magistrate's findings of fact summarizing the hearing testimony. See *Matter of Cook v Bornhorst*, 230 AD2d 934. "[T]he order on appeal contains a scrivener's error," stating that the Support Magistrate's order directs payment of \$2,447.08 per week rather than the ordered amount of \$247.08. Order modified to \$247.08 per week and as modified, affirmed.

Admissions (Miranda Advice)

ADM; 15(25)

People v Celleri, No. 2002-10691, 2nd Dept, 5/9/2006

Holding: The defendant was convicted of multiple counts relating to the rape of the complainant, who rent-

ed an apartment from him. The police were summoned to a neighbor's apartment, where the complainant had gone after the reported assault. The responding officers conducted a preliminary investigation, handcuffed the defendant, and took him to the precinct. He made several statements during a conversation with a detective lasting over 20 minutes before *Miranda* warnings were given (see *Miranda v Arizona*, 384 US 436 [1966]), which the court later suppressed. After warnings were given, he made more inculpatory statements, which the court improperly found to have been voluntary and admissible. The initial questioning began at about 11:00 a.m., and the warnings were given at 11:45. Given the relatively short time between the *Miranda* violation and the additional admissions, which resulted from questioning by the same detective at the same location, there was not a "definite, pronounced break" that returned the defendant to the status of one not under the influence of improper questioning. See *People v Paulman*, 5 NY3d 122. However, admission of the statements was harmless given the overwhelming evidence of guilt, including DNA material matching the complainant's found on the defendant's underwear. Judgment affirmed. (Supreme Ct, Suffolk Co [Mullen, JJ])

Sex Offenses (Sentencing)

SEX; 350(25)

People v Perser, No. 2005-04107, 2nd Dept, 5/16/2006

Holding: The settlement in *Doe v Pataki* (3 FSupp2d 456) did not bar the court from assessing the defendant five points in the "release environment" category. That stipulation prohibits points from being assessed in this category against defendants who completed parole or probation before redetermination of their risk level under Correction Law 168-n(3). The record shows that the defendant's parole was revoked before completed. Points were properly assessed for drug or alcohol abuse based on admissions in the presentence report. See *People v Davis*, 26 AD3d 264. The grand jury minutes supported points assessed for sexual contact under clothing. Order affirmed. (County Ct, Westchester Co [Bellantoni, JJ])

Juveniles (Custody)

JUV; 230(10)

**Matter of Grigoli v Grigoli, No. 2005-06281,
2nd Dept, 5/16/2006**

Holding: The court, without a hearing, issued an order effectively granting the father's application for temporary custody. Considering the totality of the circumstances, the order was not supported by a substantial basis. The custodial agreement set out in the divorce settlement could be considered but is not dispositive as to what is currently in the best interest of the child. See *Friedwitzer v Friedwitzer* 55 NY2d 89, 95. The subject child, 14 years old, has repeatedly expressed a desire to contin-

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ue living with the mother. A psychologist found the child quite depressed and that denigrating remarks made to her by the father contributed to “her ‘overwhelming sadness.’” It is in the best interest of the child to remain in the temporary custody of the mother pending a full hearing at which the child’s well-being can be more fully explored. The mother is not to move the child’s residence more than 60 radial miles from Manhattan without the father’s prior written consent. Order reversed. (Family Ct, Richmond Co [McElrath, JJ])

Speedy Trial (Sentencing) SPX; 355(40)

People v Davis, No. 2003-05044, 2nd Dept, 5/16/2006

After pleading guilty to fourth-degree drug sale in Kings County, the defendant was released to participate in an employment program, with sentencing scheduled for Mar. 19, 1986. In February, he was extradited to Connecticut. On Mar. 5, 1986 the Kings County matter was advanced due to his failure to attend the program. A bench warrant issued on Mar. 7, 1986. In April, the Warrant Division learned of the defendant’s incarceration in Connecticut under an alias, and notified the District Attorney’s office. The defendant’s earliest Connecticut release date was 1988. The prosecution claims a detainer warrant was lodged on May 15, 1986, but the record shows no more than a warrant officer’s handwritten note that he had been so advised. For 15 years, the prosecution made no further effort to secure the defendant’s presence in Kings County. He was incarcerated a number of times in Connecticut under the same alias. On Oct. 8, 2002, Connecticut notified the prosecutor that the defendant was about to be released. The defendant was released to New York City police on Jan. 10, 2003. His motion to dismiss under CPL 380.30 was denied.

Holding: While the prosecution has no duty under 380.30 to make efforts to catch an absconder (*see People v Borgwin*, 23 AD3d 491), the defendant did not abscond. The failure to seek extradition upon the defendant’s initial Connecticut release was unreasonable. His alias was known to the prosecution from 1986, and there was no showing that the prosecution made efforts to locate him that were thwarted by his use of that name. The 17-year delay operated to divest the court of sentencing jurisdiction. *See People v Drake*, 61 NY2d 359, 366-367. Judgment reversed, motion granted, indictment dismissed. (Supreme Ct, Kings Co [Kreindler, JJ])

Counsel (Right to Counsel) (Waiver) COU; 95(30) (40)
Juveniles (Hearings) (Parental Rights) JUV; 230(60) (90)

Matter of Evan F., Nos. 2005-03174, 2005-08541, 2nd Dept, 5/23/2006

The appellant was found to have neglected his son and to have violated the order of disposition. A six-month jail sentence was suspended on the condition that he strictly comply with the disposition order.

Holding: The appellant was denied his right to counsel at the fact-finding hearing on the neglect petition. He was advised at his initial appearance of his right to counsel, and sought an adjournment to “evaluate” the situation. Three days before the scheduled hearing, he faxed the court a request for an adjournment to obtain counsel, saying he could not pay an attorney then but would be able to do so in a week. The request was denied. At the hearing, the appellant said he would proceed without an attorney as he had been unable to obtain counsel. This record lacks the requisite showing that the appellant had “sufficient awareness of the relevant circumstances and probable consequences of the waiver” of counsel. *See Matter of Lawrence S.*, 29 NY2d 206. The court asked only if the appellant was ready to proceed, not if he wanted to proceed without counsel, which his request for an adjournment indicated he did not want to do. “By failing to either adjourn the hearing so that the appellant could retain counsel or to inquire into the appellant’s eligibility for assigned counsel, the Family Court deprived him of his right to counsel, necessitating a new hearing. Orders reversed, violation petition dismissed, matter remanded for new fact-finding hearing and determination on the neglect petition and disposition. (Family Ct, Orange Co [Bivona, JJ])

Motions (Suppression) MOT; 255(40)

Search and Seizure (Arrest/ Scene of the Crime Searches) SEA; 335(10) (45)
(Motions to Suppress)

People v Clark, No. 2002-09629, 2nd Dept, 5/23/2006

Holding: The defendant, charged with burglary, did not seek a pretrial *Dunaway* hearing (*see Dunaway v New York*, 442 US 200 [1979]). At trial, the officer who had first encountered the defendant before his arrest and who had not testified at the *Mapp/Huntley* hearing (*Mapp v Ohio*, 367 US 643 [1961]; *People v Huntley*, 15 NY2d 72) testified that the defendant had not been free to leave when the officer took the pawn tickets from him. Trial counsel, who had not represented the defendant at the *Mapp/Huntley* hearing, sought to suppress the pawn tickets and fruits thereof, including a statement by the defendant. The court denied suppression, on the merits, without a hearing. While the court had the power to entertain and rule on the mid-trial suppression application (*see CPL 255.20[3]*), the evidence adduced at trial did not focus on the *Dunaway* issue. Appeal held in abeyance, matter remitted for a sup-

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pression hearing and report thereof. (Supreme Ct, Suffolk Co [Mullen, JJ])

Guilty Pleas (Vacatur) GYP; 181(55)

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

People v Rowlett, No. 2005-05917, 2nd Dept, 5/23/2006

Holding: The defendant was convicted of third-degree robbery, a nonviolent class D felony. He was sentenced as a second felony offender to a determinate prison term of seven years plus five years post-release supervision. As the prosecution concedes, the sentence was illegal for the conviction. *See* Penal Law 160.05, 70.02(1)(c), 70.06(2); *People v McKay*, 10 AD3d 734. The maximum incarceration that may be imposed is an indeterminate term of three and one-half to seven years. Post-release supervision is only authorized for determinate sentences. *See* Penal Law 70.06(3)(d), (4)(b), 70.45. The remedy requested by the prosecution, vacating the defendant's plea, is beyond an appellate court's authority where, as here, the defendant objects. *See Matter of Kisloff v Covington*, 60 NY2d 165, 169. Judgment modified, sentence vacated, and sentence of three and one-half to seven years substituted. (County Ct, Suffolk Co [Gazzillo, JJ])

Third Department

Evidence (Uncharged Crimes) EVI; 155(132)

People v Simmons, No. 15720, 3rd Dept, 5/25/2006

The defendant was convicted of multiple offenses including first-degree robbery as a result of the assault and robbery of the complainant by five people including the defendant.

Holding: The court improperly admitted evidence of the defendant's involvement in an assault a day before the incident underlying the defendant's current charges. The prosecution proffered the earlier assault by the defendant and another in his apartment as evidence of a common scheme or plan. *See People v Molineux*, 168 NY 264. The prosecution claimed that both involved multiple people, use of weapons, and occurred in public places. Mere similarity between the crimes is not enough. Nothing on these records suggests that the two crimes were so unique that proof of one tended to establish the other, leading one to conclude they were perpetrated by the same person. The evidence was not so overwhelming that the error can be found harmless. Judgment reversed, new trial ordered. (County Ct, Cortland Co [Campbell, JJ])

Sentencing (General (Modification) (Resentencing)) SEN; 345(37) (55) (70.5)

People v Dibble, No. 16003, 3rd Dept, 5/25/2006

Holding: The defendant violated the terms of probation that had been imposed as part of a split sentence of five years probation and six months in jail for third-degree rape. The court advised him of various sentencing options when he admitted the violation, but did not commit to a particular sentence. Probation was revoked and a prison sentence of one and a half to three years was imposed. The clerk later corrected the certificate of conviction to show a sentence of one to three years. The defendant was not a second felony offender, so the one and one third to three year sentence was illegal. The clerk lacked authority to correct it. Judgment modified, sentence vacated, matter remitted for resentencing and as modified, affirmed.

Narcotics (General) (Penalties) NAR; 265(27) (55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Valencia, No. 16268, 3rd Dept, 6/1/2006

Holding: The defendant, originally sentenced to consecutive prison terms of 25 years to life for first-degree drug sale and 8½ to 25 years for second-degree conspiracy, was resentenced following the Rockefeller Drug Law Reform Act of 2004 (L 2004, ch 738). A determinate sentence of 10 years plus five years post-release supervision was imposed on the drug count, to run consecutively to the already-imposed conspiracy sentence. On the initial appeal, the defendant's aggregate sentence was found severe but not excessive. The new sentence is close to the minimum authorized. (*See* Penal Law 70.71[2][b][1]). This reflects the court's consideration of the defendant's favorable prison record, as the initial sentence imposed was the maximum available. The defendant bore more culpability than his co-defendant, whose sentences, otherwise identical, run concurrently. (*See People v Grajales*, 294 AD2d 657, 659 *lv den* 98 NY2d 697. Judgment affirmed. (County Ct, Sullivan Co [LaBuda, JJ])

Guilty Pleas (General) GYP; 181(25)

Sentencing (Enhancement) SEN; 345(32)

People v Marrero, No. 16344, 3rd Dept, 6/1/2006

Holding: The defendant was fully apprised of his rights, which he understood and waived before admitting his guilt. Where there were no statutory grounds requiring the judge's disqualification (*see* Judiciary Law 14), the judge was the sole arbiter of whether or not to recuse himself. While the judge represented the defendant in a 1994 criminal matter, the record shows the judge did not recall

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his prior interaction with the defendant. *See People v Wallis*, 24 AD3d 1029, 1031. There was no demonstration of any bias. The court did not impose the enhanced sentence of 10 years to life rather than the negotiated sentence of seven and one-half to life as retribution for the defendant's application to withdraw his plea.

The court did err in straying from the negotiated sentence. Nothing in the record indicates that the bargain was premised on the defendant's concession to being a second felony offender, so there is no basis to find the defendant breached a condition of the plea, warranting sentence enhancement. *See People v Hastings*, 24 AD3d 954, 955-956. Judgment modified, sentence vacated, matter remitted for resentencing in accordance with the plea agreement. (County Ct, Sullivan Co [LaBuda, J])

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

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

People v Dukes, No. 15892, 3rd Dept, 6/8/2006

Holding: The part of the verdict convicting the defendant of attempted first-degree assault and second-degree reckless endangerment must be reversed as repugnant. First-degree assault required the jury to find that when the defendant shot at the complainant, he did so with intent to cause serious physical injury. But reckless endangerment required a finding that he recklessly engaged in conduct creating a substantial risk of serious physical injury. The behavior underlying both counts involved the defendant firing a gun in the direction of the complainant, which he could not have done both recklessly and with the intent to seriously injure. The jury's finding is inherently inconsistent. *Cf People v Gregory*, 290 AD2d 810, 810-811 *in den* 98 NY2d 675.

The evidence was not legally insufficient or and the verdict was not against the weight of the evidence. The court did not err in finding one sitting juror grossly unqualified. The admission of hearsay as "prompt outcry" was error in this non-sex case, but the hearsay was admissible as "excited utterance" or "spontaneous declaration." Letting the jury know the defendant was a parolee was necessary to complete the narrative where he was apprehended by his parole officer and asked about violating his curfew. The ineffective assistance of counsel claim regarding failure to challenge two prospective jurors is rejected. Judgment modified, remitted for new trial on two counts, and as modified, affirmed. (County Ct, Schenectady Co [Eidens, J])

Appeals and Writs (Remittiturs) **APP; 25(85)**

Insanity (Defense of)

ISY; 200(10)

People v Rodriguez, No. 16333, 3rd Dept, 6/8/2006

Decision was withheld on the defendant's appeal and the matter remitted for a psychological evaluation; County Court had erred in denying the defendant an adjournment to explore a mental disease or defect defense. The examination revealed that the defendant "may not have appreciated the nature and consequences of his actions." The convictions were reversed and a new trial ordered. Delays attributable to assigned counsel led to counsel's removal over the defendant's objection. After consulting with former and new counsel, the defendant decided not to pursue the psychological defense. The former convictions were then reinstated on the prosecution's motion.

Holding: Appellate reversal was not expressly conditioned on presentation of a psychological defense; the court lacked power to reinstate the convictions, ignoring the remittitur. *See CPL 470.45; Matter of Trager v Kampe*, 16 AD3d 426, 427-428. While proper procedure would have been a motion for reconsideration in the appellate court, the prosecution's motion below is treated as such. The "remittal was implicitly conditioned upon presentation of a defense that has now been unequivocally abandoned." There will be no new trial, making moot the further contention that the court erred in replacing trial counsel. *See People v Wolfe*, 288 AD2d 500, 501. Prior order vacated, judgment affirmed. (County Ct, Greene Co [Pulver, Jr., J])

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

Homicide (Manslaughter (Evidence) (Instructions) (Vehicular)) **HMC; 185(30[d]) [j] [v])**

People v Smith, No. 16385, 3rd Dept, 6/8/2006

The defendant's convictions of second-degree manslaughter, vehicular manslaughter, and leaving the scene of an accident without reporting were affirmed on appeal. A subsequent motion for a writ of coram nobis based on appellate counsel's failure to assert ineffective assistance of trial counsel as to one issue was granted and the appeal reinstated.

Holding: The parties agree that the jury instructions were incorrect in that the jury was not told to consider the manslaughter counts in the alternative. It is impossible to find that the defendant simultaneously acted negligently and recklessly. *See CPL 300.40(5); People v Spurling*, 199 AD2d 624, 625. Trial counsel did not request an alternative charge on both counts. At issue is whether such failure, alone, constituted ineffective assistance. It did. Had the jury been charged in the alternative, it would not have convicted the defendant of two crimes with contradictory

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mental states. This is a “‘clear-cut and completely dispositive’ issue which resulted in a conviction which would not have occurred but for counsel’s error (*People v Turner*, 5 NY3d 476, 481 . . .).” A new trial is warranted. *See People v Flores*, 84 NY2d 184, 188. Judgment reversed, new trial ordered. (County Ct, Albany Co [Breslin, JJ])

Assault (Attempt) (Evidence) **ASS; 45(5) (25)**

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

People v Gray, No. 15862, 3rd Dept, 6/15/2006

The defendant shot several times at his ex-girlfriend’s car, left a phone message threatening to kill everyone at her house, and began driving that way. Blocked by a car stuck in snow, he eventually fired his shotgun at a person at that scene, resulting in injury. He then went on to and shot several times at his ex-girlfriend’s house. Tried on consolidated indictments, he was acquitted of attempted second-degree murder, but convicted of first-degree assault, reckless endangerment, and two counts of criminal mischief.

Holding: The evidence was legally insufficient to support first-degree assault. The shotgun fired at the complainant from about 20 feet away contained turkey shot. The complainant bled from wounds caused by pellets in his arm, shoulder, and chest, but no pellet entered his chest cavity, none were surgically removed, he was released from the hospital in under 12 hours, and the scars were similar to small pimples. Numbness and restricted use of his arm resolved in a few months and he missed no more than 10 days of work. This was not serious physical injury under the statute. *See Penal Law 120.10(1); eg People v Sleasman*, 24 AD3d 1041, 1042-1043. The evidence did show that the defendant intended to cause serious physical injury and that his conduct tended to effect first-degree assault. *See Penal Law 110.00, 120.10(1); People v Stoby*, 4 AD3d 766, 766-767 *lv den* 2 NY3d 807. Judgment modified, first-degree assault reduced to attempted first-degree assault, sentence on that count vacated, and remitted for resentencing. (County Ct, Schenectady Co [Giardino, JJ])

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

Prisoners (Disciplinary Infractions and/or Proceedings) **PRS I; 300(13)**

People v Salters, No. 16081, 3rd Dept, 6/29/2006

Holding: A monitored phone conversation between the defendant and his girlfriend led to the girlfriend being intercepted as she tried to bring just under 10 grams of marijuana into the prison. The defendant was convicted of attempted first-degree promoting prison contraband

and conspiracy. He asserts the quantity of marijuana involved was not shown to be “dangerous contraband,” an element of first-degree promoting prison contraband. *See Penal Law 205.25(2), 205.00(4)*. The small amount of marijuana here, he claims, was not intrinsically dangerous and did not compromise the security of the facility. *See eg Levanthal, CTJNY 2:1, Promoting—Nature and Definition of Offense*. No legislative history or Court of Appeals precedent exists to guide determination of when prison contraband is “dangerous.” Drugs “‘can result in disruptive and dangerous behavior among’” prisoners, supporting a first-degree promoting prison contraband conviction. *See People v McCrea*, 297 AD2d 878 *lv den* 1 NY3d 576. But a small quantity of marijuana must be shown by “‘competent and specific proof’” to pose a danger. *See People v Brown*, 2 AD3d 1216, 1217-1218. Here, an Investigator from the Department of Correctional Services Inspector General’s narcotics unit testified that the specific facility had “‘a lot of drug activity’” that had caused fights and disobedience, and that the quantity of marijuana was enough to sell or distribute, creating a danger. This evidence was sufficient. *See People v Bleakley*, 69 NY2d 490, 495. Judgment affirmed. (Supreme Ct, Franklin Co [Main, Jr., JJ])

Search and Seizure (Stop and Frisk Searches) **SEA; 335(75)**

People v Rosa, No. 16082, 3rd Dept, 6/29/2006

Having been questioned once by State Police regarding child sexual abuse, the defendant was sought for further questioning. A police investigator pulled an unmarked car near the defendant and asked him to stop, which he did. Two marked cruisers and two other police investigators arrived quickly. The defendant agreed to speak with them again and was accompanied by police on his errand. Before being taken to police barracks for questioning, he voluntarily turned over a dagger in his possession, and during a pat-down reached in his pants pocket for additional objects, revealing a gun. His motion to suppress the gun was denied.

Holding: A reasonable person in these circumstances would have believed that a significant limitation had been placed on his or her freedom. *See People v Bora*, 83 NY2d 531, 535. The defendant’s detention was not justified on this record. The two police witnesses at the suppression hearing testified to no “‘single ‘specific and articulable fact’” warranting a seizure. There was no mention of what facts led police to suspect the defendant, and no arrest warrant had been issued. In the absence of reasonable suspicion, the pat-down was not a corollary to a proper stop, nor did the investigator have any reason to believe the defendant was armed. The plain view doctrine does not defeat suppression where the detention was unjustified on the record. The defendant’s plea to a charge unrelated

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to the gun was induced by a promise of concurrent sentences. Judgment reversed, matter remitted. (County Ct, Ulster Co [Bruhn, JJ])

Dissent: [Mugglin, JJ] The mere presence of five officers did not require a finding of forcible detention on these facts. The record reflected reasonable suspicion.

Fourth Department

Evidence (Hearsay) (Sufficiency) EVI; 155(75) (130)

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

People v Williams, No. KA 03-01237, 4th Dept, 6/9/2006

Holding: The defendant’s contention that his persistent violent felony offender determination was based on impermissible hearsay is rejected. The affidavit of the Criminal History Bureau’s Director, referring to four fingerprint cards obtained in connection to this felony and three earlier ones, which the affidavit said had been compared by staff and found to be from the same individual (see CPL 60.60[2]), was not admissible. It could not be used, even at a sentencing proceeding, because it was not based on the director’s personal knowledge. Further, the affidavit was testimonial in nature and inadmissible under *Crawford v Washington*, 541 US 36 (2004). But the prosecution also provided certificates of conviction for 1980 and 1995 felonies, which certified that a Michael C. Williams had been convicted of two prior felonies. Under CPL 60.60(1), certificates issued by courts certifying judgment of conviction constitute presumptive evidence of the facts stated therein. Also offered was a second felony offender information dated 1995; under CPL 400.15(8), a finding that a person is a second felony offender is binding in future proceedings. Based on this, the prosecution met its burden of showing the defendant had been convicted of at least two predicate felonies. The defendant’s other contentions are without merit. Judgment affirmed. (Supreme Ct, Monroe Co [Fisher, JJ])

Sentencing (General) (Hearing) SEN; 345(37) (42)

People v Stith, No. KA 04-01279, 4th Dept, 6/9/2006

Holding: The defendant’s contention that the court abdicated its sentencing authority to the prosecutor survived the defendant’s waiver of appeal at his guilty plea. See *People v Seaberg*, 74 NY2d 1, 9. At his plea, the defendant agreed to cooperate with the prosecution and the prosecutor agreed not to recommend a sentence higher than eight years to life. The court said it would consider a lesser sentence upon the prosecutor’s recommendation.

The prosecutor did not recommend a lesser sentence, and the court told the defendant it was bound to impose the eight-to-life sentence agreed upon, thereby failing to carefully consider all facts available. See *People v Farrer*, 52 NY2d 302, 305. Judgment modified, sentence vacated, remanded for resentencing. (County Ct, Onondaga Co [Walsh, JJ])

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

Sex Offenses (Sentencing) SEX; 350(25)

People v Gaffney, No. KA 04-02067, 4th Dept, 6/9/2006

Holding: The court did not err by sentencing the defendant to consecutive sentences for sexual abuse and sodomy. The complainant testified that the defendant forced her to touch his penis and then forced his penis into her mouth; these were separate and distinct acts, warranting consecutive sentences. See *People v Ramirez*, 89 NY2d 444, 451. The other issues raised by the defendant are also without merit. There is no indication in the complainant’s psychiatric history that a psychiatric condition impaired her capacity to perceive and recall events. See *People v Middlebrooks*, 300 AD2d 1142, 1143 *lv den* 99 NY2d 630. Counsel was not ineffective, pursuing a discernible trial theory that the defendant’s prior convictions by guilty plea demonstrated that he was willing to plead guilty when he was guilty and that the family of the complainant had a motive to lie where one of the defendant’s prior offenses involved another family member. While counsel’s cross-examination of the complainant was not aggressive, it was effective, especially given her young age and emotional state, revealing many inconsistencies. Judgment affirmed. (County Ct, Onondaga Co [Aloi, JJ])

Alibi (Definition) ALI; 20(10)

Defenses (General) (Notice of Defense) DEF; 105(31) (43.5)

People v Collins, No. KA 05-01851, 4th Dept, 6/9/2006

Holding: The court erred by refusing to allow the defendant to present evidence that when the shooting occurred on the sidewalk of a bar/restaurant, he was inside. See *gen* CPL 250.20(3); *People v Walker*, __AD3d__ (4/28/06). The prosecutor had responded to the defense discovery demand for the “exact location” of the crime by saying, “in the vicinity of” a specific address. The proposed defense testimony was not in the nature of alibi as being inside rather than outside the address would still be “in the vicinity.” Therefore, no alibi notice was required. Had notice been required, the court still failed to engage in the required balancing of the defendant’s fundamental right to offer a witness’s favorable testimony (see US Const, Amend VI) against the fair and efficient adminis-

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tration of justice. See *Taylor v Illinois*, 484 US 400, 414-415 (1988) *reh den* 485 US 983. The error cannot be deemed harmless beyond a reasonable doubt. Judgment reversed, new trial granted on counts two and three. (County Ct, Erie Co [DiTullio, JJ])

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

Witnesses (Expert) **WIT; 390(20)**

**People v Sommerville, No. KA 04-01995,
4th Dept, 6/9/2006**

Holding: The court erred by allowing child protective services workers to give opinion testimony about the demeanor of the complainants and the defendant during pretrial interviews. See *People v Ciaccio*, 47 NY2d 431, 439. The error was harmless given that the complainants and the defendant all testified at trial, giving the jury an opportunity to make its own assessment of demeanor and veracity. The defendant's other issues are rejected. Judgment affirmed. (County Ct, Erie Co [D'Amico, JJ])

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

Sentencing (General) **SEN; 345(37) (70)**
(Pronouncement)

People v Simpson, No. KA 00-00280, 4th Dept, 6/9/2006

Holding: The defendant's plea was not knowingly and voluntarily entered where the court failed to tell him about the mandatory postrelease supervision period and did not impose such required supervision period. Cf *People v Vance*, 27 AD3d 1015. To the extent that prior decisions require preservation of this issue (see eg *People v Pan Zhi Feng*, 15 AD3d 862 *lv den* 5 NY3d 809, 812) such decisions are no longer to be followed. Judgment reversed, plea vacated, matter remanded. (County Ct, Cattaraugus Co [Himelein, JJ]) δ



Left: Merble Reagon (right), BTSP Coach and NYSDA Board Member, with Felice Conte, BTSP participant. **Top:** Peter McShane (left), BTSP Coach and NYSDA Board Member, with David Saldarelli, BTSP participant. **Bottom:** Our thanks to the RPI Conference Staff for their assistance in making the BTSP program another success this year.

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