



Public Defense Backup Center  
**REPORT**

Volume XXI Number 5

November-December 2006

A PUBLICATION OF THE DEFENDER INSTITUTE

## Defender News

### Developments Regarding Sex Offenders

At last some rationality has arisen as to ever-escalating efforts to isolate or incarcerate sex offenders forever with little or no regard for their individual crimes, characteristics, or rights. Near the end of 2006, the rush to civilly confine offenders after their criminal sentences expire has been checked, at least temporarily, in New York State. Nationally, criticism of broad restrictions on where persons previously convicted of sex offenses can live is beginning to receive attention. And while these policy battles continue, lawyers and clients face a multitude of legal, procedural, and technological issues in their cases.

### High Court Rules for Prisoners; Legislature Fails to Act

The Court of Appeals has ruled seven to zero that the State used improper procedures to involuntarily commit felony sex offenders near the end of their sentences. *State of New York ex rel. Harkavy v Consilio*, No. 140, 11/21/2006. (Case summarized on p. 19.) The *Harkavy* decision sparked renewed calls for legislative action on this issue. (See eg [www.thejournalnews.com](http://www.thejournalnews.com); [www.nysun.com](http://www.nysun.com), 11/22/06.) But mid-December found no action taken: "Gov. George Pataki called the state Legislature back into session yesterday [Dec. 13] to tackle the contentious issue of confining repeat sex offenders after they leave prison, but lawmakers left town without agreement." ([www.newsday.com](http://www.newsday.com), 12/14/06.) With media speculation rampant about pay raises for legislators or other bills being part of negotiations over the issue (see eg [www.timesunion.com](http://www.timesunion.com), 12/12/06), and sex offenders remaining the target of much political and tabloid pressure, this may be no more than a delay. But it is at least a delay, one that provides an opportunity for reason to overcome hype, and for New York to learn from the mistakes of other states.

Serious deliberation is needed before proceeding with a civil commitment statute; calls for caution come from many quarters. One recent example is a law review note that seeks to "explore the effect that past Supreme Court

decisions have had on contemporary treatment of sex offenders, specifically through a discussion of the recent events in New York State" and concludes that "states may want to carefully consider the path they choose when balancing the civil rights of sex offenders against the interests of public safety." Allison Morgan, "Note: Civil Confinement of Sex Offenders: New York's Attempt to Push the Envelope in the Name of Public Safety," 86 BU L Rev 1001 (2006).

NYSDA has previously noted problems with civil commitment warranting caution in adopting it. At our behest, Dennis Carroll, Assistant Supervisor, Sex Offender Commitment Division of the Washington Defender Association in Seattle testified at an Assembly hearing in 2005 about bad experiences in his state. We allied with others, among them NAMI-NY (National Alliance for the Mentally Ill of New York State), which opposes civil commitment on the grounds that (among others) it improperly burdens already overwhelmed mental health systems and improperly stigmatizes persons with mental illness. (*REPORT*, Vol XX, No 4, Aug-Oct 05.) And in a recent op-ed piece, Executive Director Jonathan E. Gradess, echoing the position of victims' advocates, the treatment community, and others, pointed out that "the threat of civil confinement may actually run the risk of causing victims not to report for fear of the lifetime civil commitment of [offending] family members" and that [s]exual abuse treatment professionals believe that the best way to treat sex offenders is to prevent such behavior, monitor them closely in the community and provide meaningful ongoing treatment." We will continue to educate and advocate on this issue.

On Dec. 11, 2006, the New York State Coalition Against Sexual Assault (NYSCASA), one of the organizations with which NYSDA has allied on this

### Contents

Defender News .....	1
Job Opportunities .....	6
Immigration Practice Tips .....	7
Conferences & Seminars .....	11
Book Review .....	12
Case Digest:	
US Supreme Court .....	14
NY Court of Appeals .....	15
First Department.....	22
Second Department.....	27
Third Department .....	35
Fourth Department .....	38

issue, held a press conference. The Executive Director, Anne Liske, noted the group's awareness of the challenge presented by the need to create sex offender management practices that remain victim-centered and "maximize public safety," and decried efforts to rush into legislation that would do neither. She cited other states' reconsideration of civil commitment, and called on New York's elected officials to draw upon the collected wisdom of this state's many knowledgeable and dedicated experts "to build effective, lasting solutions."

### **Restrictions on Released Sex Offenders Imposed, Debated**

Persons convicted of sex offenses who are released to supervision, and even those who are not on parole or post-release supervision, face a range of existing and proposed restrictions. This is not new, as readers of the *REPORT* know. However, there have been some new developments in New York and across the country.

The Suffolk County Legislature voted on Dec. 5, 2006 to restrict registered level 2 and 3 sex offenders from several types of locations where children might congregate, such as playgrounds, swimming pools, and video arcades. Press accounts indicate that constitutional and enforcement issues were raised, but the measure passed 17 to one. It is reportedly the second of its kind in New York, a similar law having passed in Seneca County. The County Executive was said to be considering a legal review of the legislation before signing it. ([www.newsday.com](http://www.newsday.com), 12/6/06.) (Enforcement of existing sex offender regulations has been problematic in Suffolk, where a proposal to allow the Sheriff's Department to conduct random checks on registered sex offenders because some believe the police are not doing so has been opposed by the police union. [[www.newsday.com](http://www.newsday.com), 11/29/06.]).

Meanwhile, in Iowa, law enforcement representatives have joined victim advocates in asking for changes in the state's sex-offender restrictions. In Iowa, persons convicted of sex crimes involving children are barred from living within 2,000 feet of a day-care center or school. As a result, such offenders are forced to relocate. Keeping track of offenders became more difficult as a result of the restriction, and police and victim advocates alike want it revised to bar offenders from being on school or day-care property. ([www.qctimes.com](http://www.qctimes.com) [*Quad-City Times*], 12/12/06.)

Nor are second thoughts about unrealistic restrictions limited to Iowa. The Kansas Department of Corrections has posted "Twenty Findings of Research on Residential Restrictions for Sex Offenders and the Iowa Experience with Similar Policies" on its website. [www.dc.state.ks.us](http://www.dc.state.ks.us). This document cites not only Iowa research but information from other states including Florida, Minnesota, and Colorado. Among the Colorado findings is number 20: "a tight web of supervision, treatment and surveillance may

be more important in maintaining community safety than where a sex offender resides." Meanwhile, in Georgia, opponents of a law restricting the residences of registered sex offenders—including not just sexual predators but persons convicted of having underage consensual sex in high school—are seeking its repeal. ([www.washingtonpost.com](http://www.washingtonpost.com), 11/22/06.) From California (*see eg* [www.dailynews.com](http://www.dailynews.com), 12/9/06) to New Hampshire (*see eg* [www.concordmonitor.com](http://www.concordmonitor.com), 11/23/06), rational citizens and officials are beginning to realize that extreme, poorly-drafted measures do more harm than good.

### **NY SORA Determinations Must Be by the Rules**

While debates rage about what restrictions to place on registered sex offenders, New York attorneys and their clients continue to confront issues about how "risk levels" under the Sex Offender Registration Act (SORA) are determined. A pair of 2nd Department cases issued in December should be of interest.

In one, the Court held that Supreme Court erred in conducting a risk level hearing before sentencing, using a risk level assessment instrument prepared by the District Attorney's office rather than the mandated Board of Examiners of Sex Offenders (Board) recommendation. These actions violated both SORA and due process guarantees. (*People v Black*, \_\_AD3d\_\_, 823 NYS2d 485).

In the other, "possibly three different risk assessment instruments were proffered to the Supreme Court for its consideration," including one from the Board of Examiners of Sex Offenders and two handwritten instruments that were apparently from the prosecutor's office. The court made no statement on the record as to which

#### **Public Defense Backup Center REPORT**

A PUBLICATION OF THE DEFENDER INSTITUTE

Volume XXI Number 5 November-December 2006

Managing Editor  
Editor  
Contributors

Charles F. O'Brien  
Mardi Crawford  
Stephanie Batcheller, Al O'Connor,  
Ken Strutin

The *REPORT* is published ten times a year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone 518-465-3524; Fax 518-465-3249. Our Web address is <http://www.nysda.org>. All rights reserved. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that its contents do not constitute the rendering of legal or other professional services. All submissions pertinent to public defense work in New York State and nationwide are welcome.

THE REPORT IS PRINTED ON RECYCLED PAPER

instrument(s) it relied upon, nor did the court make clear which factors it considered in determining the defendant's risk level. The matter was remitted for a new hearing. (*People v Middleton*, \_\_AD3d\_\_, 822 NYS2d 453.) Summaries of both decisions will appear in a future issue of the *REPORT*.

### ***DOCS Improperly Delaying Treatment for Sex Offenders, Delaying Release***

Prisoners who are required to complete mandatory sex offender treatment as a criterion of release must be placed in such eight-month programs at least eight months before their "earliest release date." However, the Department of Correctional Services (DOCS) and Parole officials have been using the conditional release date (twice the minimum sentence) rather than the minimum sentence as the "earliest release date." A DOCS memo proffered to Supreme Court Justice Alice Schlesinger on behalf of a prisoner denied parole justified the practice on the ground that sex offenders are statistically unlikely to be released after completing their minimum sentence. The judge ruled in early December that the memo "gave credence" to Jerrold Schwartz's claim that denial of his release had been predetermined. However, his release is stayed pending other proceedings. (*Schwartz v Dennison*, No. 115789/05 (Supreme Ct, Manhattan Co), [www.law.com](http://www.law.com), 12/5/06.)

### ***Laptop Lie Detector Leads to Parolee's Arrest***

Among new technological devices being used to reincarcerate sex offenders on parole supervision is a "laptop lie detector." Skin sensors placed on the parolee during an interview with a parole officer feed information to the officer's laptop computer, equipped with polygraph software. If a "blip" is registered while the parolee answers questions about locations and persons visited or encountered, or commission of any new crimes or parole violations, the parolee may be on the way back to prison. In a recently-reported example, a parolee who was questioned further after such a "blip" admitted having been in the presence of young boys. According to the article, he was accused of parole violation only after field officers followed up on his admission. ([www.newsday.com](http://www.newsday.com), 12/12/06.)

In May, mandatory polygraph testing as a condition of federal parole for a sex offender was ruled proper by a federal Court of Appeals. The 2nd Circuit decision noted that while polygraph evidence is not admissible in court, due in part to the possibility of prejudicing a jury, it could have value as a treatment tool. The Court held that "polygraph testing can, and in this case does, further sentencing goals without excessive deprivations of liberty." *US v Johnson*, 446 F3d 272, 278 (2006).

### ***Dealing with the Adam Walsh Act in Federal Cases***

Attorneys with clients charged in federal court have new problems as well. They must deal with the Adam Walsh Act. Materials for defense attorneys are available from the Federal Public Defender for the Northern District of New York that address matters such as Sex Offender Treatment/Management Programs, Sexually Dangerous Person Commitment, and the Act's bail provisions. Online at: [www.nynd-fpd.org/news.htm](http://www.nynd-fpd.org/news.htm). Another source of potential information is "Sex Crimes: A blog devoted to the criminal laws regulating and punishing sex offenders." [www.sexcrimes.typepad.com/sex\\_crimes](http://www.sexcrimes.typepad.com/sex_crimes).

### ***What if You Can't Even Review the Evidence?***

Representation of persons accused of sex offenses offers many challenges to lawyers. In addition to the harsh and constantly-changing consequences of a conviction, unique trial issues may also arise. As recently noted in the *National Law Journal*, prosecutors in the state of Washington are trying to bar defense lawyers from getting copies of child pornography; the alleged evidence could be looked at only in an evidence room, like drugs or a weapon. A federal statute allowing defense lawyers to review the evidence only at a courthouse or an FBI office is being challenged in Virginia. The National District Attorneys Association now recommends that copies not be made for defense counsel. ([www.law.com](http://www.law.com), 12/1/06.)

To keep up with such developments, check Practice Pointers under Defense News, as well as the Breaking News and Updates portion of the Home Page of NYSDA's website, regularly.

### ***Crawford Issues Still Percolate***

Lawyers are still raising, and courts are still deciding, issues with regard to what is, and what is not, "testimonial" hearsay evidence that violates the Confrontation Clause under *Crawford v Washington*, 541 US 36 (2004). Cases interpreting *Crawford* are frequently found in the case summaries in the *REPORT*, which are then put in our searchable Case Digest System.

In federal court, the 2nd Circuit recently held that autopsy reports are not testimonial. A key factor in the court's decision was that the report was a business record even if the person making the record in the case at hand may have had a "practical expectation" that the report could be used in litigation. See, *US v Feliz*, Docket No. 02-1665-cr, (2nd Cir, 10/25/06). ([www.law.com](http://www.law.com), 10/31/06.)

In New York state court, earlier this year, the Appellate Term in the 2nd Department said that foundation documents certifying the reliability of a breath test instrument are not testimonial either. That decision, *People v Helen Lebrecht*, 13 Misc3d 45, decided on July 27,

2006 (NYLJ 10/6/06) has been cited in other states. See *People v Kim*, No. 2-05-1130 (AppCt Ill, 2nd Dist., 11/16/06); *State v Shisler*, 2006 Ohio 5265 (CtApps Ohio, 1st App Dist., Hamilton Co., 10/6/06.)

The US Supreme Court itself has another *Crawford* case pending before it. The issue to be decided has potentially far-reaching consequences; it concerns the admission of a non-testifying child complainant's statements to her mother and a police detective about an alleged sexual assault by the defendant. ([www.csmonitor.com](http://www.csmonitor.com), 11/01/06). Certiorari was granted in this 9th Circuit case on May 15, 2006. *Whorton v Bockting*, \_\_\_US\_\_\_, 126 SCt 2017, 164 LE2d 778 (2006).

The rapid developments in *Crawford* law make it a prime subject for "blawgs"—law blogs on the Internet. For example, see "The Confrontation Blog" at <http://confrontationright.blogspot.com/2006/11/pending-crawford-issues.html>. And this is another subject that may appear in Practice Pointers and in Breaking News and Updates on the NYSDA website.

### **NYSDA Fingerprint Resources Available**

Backup Center Staff Attorney Stephanie Batcheller attended a lunch meeting of the Monroe County Bar Association Criminal Justice Section in early November to introduce NYSDA's new CD-ROM containing resource material on challenging fingerprint evidence. The CD-ROM contains items such as "A Cautionary Note About Fingerprint Analysis and Reliance on Digital Technology" by Michael Cherry and Edward Imwinkelried, which was reprinted with permission in the June-July issue of the *REPORT* (having first appeared in *Judicature*, Vol 89, No 6 [May-June 2006]).

The materials were well received and lawyers attending the meeting exchanged ideas on how to incorporate fingerprint challenges into their defense practice. Attorneys with fingerprint cases are encouraged to contact the Backup Center.

### **Move Quickly to Investigate Money Order Cases**

Local authorities may bring felony charges against the victims of "419 Scheme" fraud involving US Postal Money Orders when federal authorities have declined to do so, according to Mark Cunningham, Investigator for the Cattaraugus County Public Defender Office. A "419 Scheme" is the much-ridiculed but often successful ploy to have a victim cash money orders because the con artist in a foreign location like Nigeria claims to be unable to do so. High-quality fake money orders are used; the victim cashes them, wires the cash as requested, and becomes an unwitting part of a fraudulent transaction.

As Editor of the National Defender Investigator Association's magazine, Cunningham recounted his experience. At the beginning of his investigation in one case, he contacted the local office of the US Postal Inspectors to see the money orders in question. He found that such money orders are typically sent to Washington, DC within two weeks, and the ones that he needed to see were being sent that day. An agent asked why he needed to see them when no charges had been filed; the agent was aghast when told that state felony forgery charges had been lodged, saying, "I told the police not to arrest her." The agent assisted the Public Defender Office in getting the charges dropped.

Two such cases have now come into the Cattaraugus Public Defender Office and both have been dismissed. With 419 schemes proliferating—the Postal Inspector that Cunningham spoke with has 30 to 40 on his desk at a given time—other state public defense offices may have a victim-turned-defendant as a client soon.

The first key to investigating such cases, Cunningham wrote, is to act quickly to examine the money orders so the opportunity to do so is not lost. The second key is to promptly interview the client to determine if email/online correspondence involved in the scheme has been saved or may still exist so that it can be subpoenaed while the host (such as AOL, hotmail, etc.) can still recreate/retrieve it. (*The Eagle's Eye*, Vol 10, Summer 2006.)

### **Defense Reform Remains News**

In the six months since the Kaye Commission (Commission on the Future of Indigent Defense) issued its recommendations for a statewide public defender system headed by an independent public defense commission, public defense reform has remained in the news. New York counties continue to struggle with how to provide mandated representation, too often looking at the bottom fiscal line than at the low quality of representation caused by underfunding and lack of accountability. Similar scenarios exist across the country. For more information on public defense developments, check our website, [www.nysda.org](http://www.nysda.org) (see Defense Services, and also the Public Defense page under Hot Topics).

### **Rockland County to Keep 18-B Panel, Keep Studying Change**

The Rockland County Legislature has rejected, for the coming fiscal year, a proposal to contract with the Legal Aid Society of Rockland County rather than paying for lawyers assigned through the Rockland Bar Association's Assigned Counsel Panel to represent persons eligible for mandated representation in county court and other courts. Proponents of the switch claimed it would save money. The Legislature will continue to study the issue.

An editorial in *The Journal News* noted that administrators of mandated representation programs have a two-fold goal: "Give quality legal representation to the poor in a cost-effective manner." The editorial went on to link the proposed change to the "goals of a recent report issued by The Spangenberg Group, 'The Status of Indigent Defense in New York'" The editorial noted that the Spangenberg Report, "cited in state Chief Justice Judith Kaye's call for dramatic reform in New York's court system, notes a need for greater accountability, uniform standards and quality representation for all defendants." (<http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20061208/OPINION/612080328/1015/OPINION01>, 12/8/06.)

Lawyers on the assigned counsel panel had opposed the switch. ([www.thejournalnews.com/apps/pbcs.dll/article?AID=/20061114/NEWS03/611140383/1019](http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20061114/NEWS03/611140383/1019), 11/14/06.)

### **Kaye Commission Reports Noted in Justice Court Reform Plan**

Chief Judge Judith S. Kaye announced issuance of an "Action Plan for the Justice Courts" on Nov. 21, 2006. She was asked at a press conference why changes in these local courts are needed. Kaye responded that before the *New York Times* articles on justice courts (the "Broken Bench" series by William Glaberson, see "Defense News" page of the NYSDA website) there had been the report of the Commission on the Future of Indigent Defense. A large part of that report, she noted, was about problems with the provision of representation in justice courts. There is a need to assure the right to counsel and equal representation in local courts, she said.

In the Action Plan itself, public defense is discussed in Subsection 5 of "Justice Court Operations and Administration." The Kaye Commission's recommendation for "wholesale reform" of public defense is acknowledged before the subsection focuses on court operational changes recommended by the Kaye Commission relating to justice courts. The Executive Summary of the Action Plan describes recommendations relating to public defense as follows:

OCA will require town and village justices to report compliance with legal mandates governing determinations of eligibility for public defense and assignment of counsel, and coordinate the terms of Justice Courts to avoid scheduling conflicts that unnecessarily burden already stretched county indigent defense resources.

The Action Plan is available online at <http://www.nycourts.gov/publications/pdfs/ActionPlan-JusticeCourts.pdf>.

### **Assembly Holds Hearings On Justice Courts**

Following on the heels of the above developments, the Assembly Judiciary and Codes Committees held a joint hearing in mid-December to examine whether legislation is needed to institute reforms that go beyond those in the Court's Action Plan. Those testifying included Chief Administrative Judge Jonathan Lippman, the President of the New York State District Attorneys Association, the President of the State Magistrates Association, and others. A press account of the hearing indicated that Assembly Member Joseph R. Lentol (D-Brooklyn), who chairs the Assembly's Codes Committee, expressed concern about "'a real lack of criminal justice training and expertise on our justice courts'" but had come to no conclusions as to whether local justices should be required to be lawyers. ([www.nytimes.com](http://www.nytimes.com), 12/14/06.)

### **Gradess, Chiefs Among Fordham Panel Members**

A news item on the Fordham Law School website reported in October on "The Crises in Indigent Criminal Defense: National and New York Perspectives and Recommendations for Change," a panel discussion sponsored by the school's Public Interest Resource Center, Stein Scholars Program, and Drug Policy Reform Project. The panel examined public defense issues from a national perspective and a New York one. Panel members include: Jonathan E. Gradess, NYSDA's Executive Director, Lisa Schreibersdorf, Executive Director of Brooklyn Defenders, and Seymour W. James, Jr., Attorney-in-Charge of the Criminal Defense Division of The Legal Aid Society. ([www.fordham.edu/campus\\_resources/public\\_affairs/inside\\_fordham/october\\_10\\_2006/news/panel\\_legal\\_services\\_24270.asp](http://www.fordham.edu/campus_resources/public_affairs/inside_fordham/october_10_2006/news/panel_legal_services_24270.asp).)

### **Jury Pool Issues Arise In NY, Elsewhere**

#### **City Court Can't Order Jury Commissioner to Limit Pool**

The Court of Appeals held on Nov. 16, 2006, that Syracuse City Court Judge Langston McKinney erred by ordering the commissioner of jurors to provide a new panel composed only of city dwellers. The challenge to the judge's ruling was initially brought in a Civil Procedure and Laws Article 78 proceeding seeking prohibition, which was granted in Supreme Court. The Appellate Division converted the matter to a declaratory judgment action, dismissing the individual criminal defendant as a party. The Court of Appeals affirmed, finding that Judiciary Law 500 cannot be used to require a commissioner of jurors to provide a panel of prospective jurors comprised solely of city residents. (The decision, *Matter of*

*Oglesby v McKinney*, No. 138 (Ct of Appeals, 11/16/ 2006) is summarized at p. 18.)

### **Racial Disparity in Juries Noted in Michigan**

Also in November, a Michigan defense lawyer challenged the jury-selection system for Wayne County, which includes Detroit and surrounding municipalities, saying jury panels contain too few African-Americans. A demographic study finished in August for Wayne Circuit Court showed that racial minorities are under-represented. This is apparently not contested—but the thorny issue of how to address the problem is. The Chief Judge of the county’s circuit court, who has denied that there was any intentional discrimination, refused to recuse herself from a hearing on the lawyer’s motion demanding a change in the system. Protracted appeals are expected to keep the criminal case in which the issue arose on hold. ([www.detnews.com](http://www.detnews.com), 11/3/06, 11/22/06.) A claim of racial disparity has also been raised in a case in Lansing, the state capital. ([www.lsj.com](http://www.lsj.com), 11/28/06.)

These claims arise at the same time that Michigan is dealing with the passage of Proposal 2, which bans race- and gender-based preferences in public education, employment and contracting. The law is being challenged in federal court. ([www.lsj.com](http://www.lsj.com), 11/24/06.)

### **Executions on Hold**

In California and Florida, executions have been halted due to concerns about lethal injection methods. A federal judge ruled that California’s current lethal injection procedure violates the constitutional ban on “cruel and unusual punishment” because it is possible condemned inmates experience excruciating pain. Missouri’s procedures, similar to California’s, were declared unconstitutional a month ago. And Florida’s governor has declared a moratorium for study of execution protocols after the autopsy of Angel Diaz revealed that a rare second dose of lethal chemicals had to be administered because the

*(continued on page 10)*

## **Job Opportunities**

St. Lawrence County seeks a **Public Defender**. The Public Defender administers and supervises the functions of the Public Defender’s Office, including providing representation to eligible defendants charged with crimes, supervising and managing both a professional legal staff and clerical support staff, coordinating with the Assigned Counsel Administrator, the Indigent Defense Coordinator, courts and other criminal justice agencies to ensure effective, efficient operation of the Indigent Defense Program. A significant portion of the work of the Office of the Public Defender is providing legal support to clients in Family Court. It also includes the initiation of proceedings as necessary, and appeals, if warranted. The work is performed under the guidelines provided by law, and under the supervision of the St. Lawrence County Administrator. Suggested Minimum Qualifications: Admitted to the New York State Bar AND six (6) years of paid experience practicing law, two of which must have been in criminal defense and/or Family Court or comparable experience. Administrative and supervisory experience definitely preferred. Salary commensurate with qualifications and experience. AA/EEO employer. Applications accepted until close of business Friday, 1/19/07. Please send applications to the St. Lawrence County Board of Legislator’s Office, 48 Court Street, Canton NY 13617.

Franklin County seeks a NYS Licensed Attorney to appoint as **Conflict Defender**. This office will handle conflict cases, both criminal and family law, in county court and/or town and village justice courts. Required: minimum of five (5) years appropriate experience. Salary negotiable to \$50,000 and full county benefits. EOE. Send résumé to Franklin County Personnel Officer, Donna M. Barnes, 355 West Main Street, Suite 428, Malone NY 12953. tel (518)481-1676; fax (518)483-2340; email [dbarnes@co.franklin.ny.us](mailto:dbarnes@co.franklin.ny.us) (with subject line stating Conflict Defender position). Last date to file résumé is 1/16/07.

The Correctional Association of New York, in New York City, is seeking a committed, dynamic individual to join our fund raising team as **Development/Communications Coordinator**. The Association is a unique, 162-year old nonprofit organization doing prison monitoring, research, public education, and policy advocacy on criminal justice issues in New York State. The Coordinator reports to the Director of Development and works closely with the Director and Associate Director of Development in all matters related to fundraising and communications. Responsibilities include: writing and designing a newsletter; overseeing the design and launch of a new website; developing an email communications

campaign; creating fundraising and public education materials; and assisting in mail campaigns. Needed: strong background in verbal and written communications and website management; enjoy being part of a team; able to work autonomously and proactively; committed to the ideals of the Association; ability to maintain a sense of humor and work well with diverse staff, board members and constituents; detail oriented, proactive and able to meet deadlines. Qualifications: B.A. degree or equivalent experience. Experience in fundraising, communications and/or public relations. Donor relations experience a plus. Minimum 2 years experience in media writing and editing, website maintenance, email list serve communications and Internet research. Strong database skills required. Full-time position available January 2007. Salary CWE. Excellent benefits. EOE. The Association encourages qualified candidates with diverse backgrounds to apply. Email résumés, with cover letters (required) to Susan Gabriel, Director of Development, [sgabriel@correctionalassociation.org](mailto:sgabriel@correctionalassociation.org). No phone calls. Website: [www.correctionalassociation.org](http://www.correctionalassociation.org).

**Additional job listings are also available at [www.nysda.org](http://www.nysda.org)**

# Immigration Practice Tips

## Criminal Defense of Immigrants in State Drug Cases—The Impact of *Lopez v Gonzales*

by Manuel D. Vargas and Marianne C. Yang\*

[Ed. note: This is a shortened version of the third in a series of practice advisories on the impact of the recent Supreme Court's decision in *Lopez v Gonzales*. It was written for use in any state and therefore is not as specific to New York cases as most *Immigration Practice Tips* that appear in the REPORT. For the full Dec. 14, 2006 advisory, including background on *Lopez*, go to IDP's website at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

The decision in *Lopez v Gonzales* (No. 05-547) (Dec. 5, 2006) answers an important question for criminal lawyers representing immigrants: What state drug offenses are “aggravated felonies” and thereby trigger mandatory deportation without the possibility of a waiver?

### What the Supreme Court Decided in *Lopez*

The Supreme Court held in *Lopez* that the federal government may not apply the aggravated felony label to state felony drug possession offenses that would be misdemeanors under federal law. This means that **state first-time drug simple possession offenses (i.e. those without an ‘intent to sell’ element)**—except for possession of more than five grams of crack cocaine and possession of flunitrazepam—are **NOT aggravated felonies**, even if classified as a felony by the state. Thus, while noncitizen clients convicted of such offenses will generally still face regular drug offense deportability or inadmissibility, some may be eligible to seek discretionary relief from removal in later immigration proceedings, e.g., cancellation of removal, asylum or naturalization.

### What *Lopez* Means for State Criminal Defense Practice

We distill the import of *Lopez* for state criminal defenders into the following four general principles:

\* *Marianne C. Yang* is Director of the NYSDA Immigrant Defense Project (IDP); *Manuel D. Vargas* is Senior Counsel. IDP acknowledges the helpful input by Dan Kesselbrenner of the National Immigration Project and Nancy Morawetz of the NYU School of Law.

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 IDP at (718) 858-9658 ext. 201. We return messages. IDP is located at 25 Chapel Street, Box 703, Brooklyn, NY 11201.

1. Conviction of, or mere guilty plea to, virtually any drug offense still generally triggers deportability and/or inadmissibility, even if later vacated or expunged based on rehabilitation or participation in drug treatment. In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver. If your noncitizen client is convicted of virtually any drug offense relating to a “controlled substance” as defined in section 102 of the Controlled Substances Act (referencing federal controlled substance schedules published at 21 USC 812), he or she will become removable despite the Supreme Court decision in *Lopez*. Your client’s conviction will trigger regular controlled substance offense deportability for lawfully admitted immigrants,<sup>1</sup> or inadmissibility for others who now or in the future may be seeking lawful admission.<sup>2</sup> The only exception is for deportability purposes and applies only to lawfully admitted immigrants convicted of a single offense involving possession for one’s own use of thirty grams or less of marijuana.<sup>3</sup>

Even a drug conviction later expunged via a rehabilitative statute—or a mere guilty plea to a drug offense later vacated, e.g., due to successful completion of a drug treatment program—may be sufficient for your client to be deemed convicted for immigration purposes and rendered removable (unless the disposition involves a first-time possession offense and the removal case later arises in the 9th Circuit).<sup>4</sup> Moreover, if your client is a lawful permanent resident immigrant (“green card” holder) who was admitted to the United States (US) less than seven years before the alleged commission of the drug offense, conviction or plea to a drug offense may trigger *mandatory deportation*.<sup>5</sup> And, if your client is a noncitizen who does not have lawful permanent resident status, trial conviction or plea to virtually any drug offense will trigger *inadmissibility without a waiver* if the client is now applying, or in the future plans to apply, for permanent resident status.<sup>6</sup>

2. *Lopez*, however, dictates that most first-time drug possession convictions that have no ‘intent to sell’ element will no longer trigger the more certain *mandatory deportation consequences attached to the “aggravated felony” label*. Your client convicted of such a first-time possession offense—even if deemed a felony under state law—will no longer be deemed convicted of an aggravated felony. The only exceptions would be, as noted above, if your client was convicted of crack cocaine or flunitrazepam offenses that would be felonies under federal law.<sup>7</sup>

This is important: If your client is convicted of a first-time drug possession offense, he or she may avoid the statutory aggravated felony bars for eligibility for removal relief such as cancellation of removal for certain lawful permanent residents,<sup>8</sup> asylum,<sup>9</sup> withholding of removal,<sup>10</sup> and termination of removal proceedings in

order to pursue naturalization.<sup>11</sup> Whether your client may be able to obtain such relief will depend on whether he or she is otherwise eligible and the strength of the claim.

For example, if your client is a lawful permanent resident and is convicted of a drug offense that triggers removability but is not an aggravated felony, your client may later be eligible for the relief of cancellation of removal as long as s/he has resided continuously in the US for at least seven years prior to commission of the offense.<sup>12</sup> To be granted such relief, your client will have to show favorable factors such as family ties within the US, residency of long duration in the country, evidence of hardship to the individual and family if deportation were to occur, service in the armed forces, history of employment, existence of property or business ties, existence of value and service to the community, proof of genuine rehabilitation, and evidence attesting to good moral character.<sup>13</sup> It is estimated that about one-half of applicants whose applications for the similar “212(c) waiver” cancellation predecessor form of relief were decided between 1989 and 1995 were granted such relief.<sup>14</sup>

Finally, it should be noted that avoiding the aggravated felony label also avoids other negative immigration consequences under the immigration laws, such as the stiff sentence enhancements that exist for the federal crime of illegal reentry after deportation subsequent to an aggravated felony conviction.<sup>15</sup>

**3. Whether a conviction of a second possession offense may be deemed an aggravated felony remains uncertain, and may depend on the law of the federal court circuit in which your client’s removal case later arises.** The only drug offense plea that is currently safe from aggravated felony consequences is a first-time possession offense. If preceded by a prior drug conviction, even a misdemeanor possession offense might be deemed an aggravated felony. This is because the government may continue to argue, as it has in the past, that under the federal felony approach adopted by the Supreme Court in *Lopez*, a misdemeanor possession offense preceded by a prior drug conviction must be deemed an aggravated felony because of the authority under federal law to penalize a second or subsequent possession conviction as a felony.<sup>16</sup> Some federal circuits have adopted this position.<sup>17</sup>

However, other circuits have applied the federal felony approach to find that the later conviction does not correspond to a federal “recidivism possession” 21 USC 844(a) felony offense if the state conviction did not involve notice and proof of the prior conviction as required for a federal possession recidivism conviction under 21 USC 851.<sup>18</sup> In addition, even if a circuit has stated that a second or subsequent possession offense may be deemed an aggravated felony, it may not so find if the prior conviction was not yet final at the time of commission of the later

offense. This is because a second or subsequent state drug possession conviction is subject to an 844(a) recidivism sentence enhancement only if the prior conviction was final at the time of commission of the later offense.<sup>19</sup> It should be noted that the 9th Circuit has ruled that a second or subsequent state drug possession conviction should not be treated as punishable by more than one year’s imprisonment and therefore a “felony” punishable under the Controlled Substances Act by virtue of a recidivist sentence enhancement;<sup>20</sup> however, the *Lopez* decision contains language characterizing federal convictions of misdemeanor possession offenses with a recidivist enhancement to a potential sentence in excess of one year as “felonies” falling within the 18 USC 924(c)(2) “drug trafficking crime” definition. See *Lopez* at n.6.

**4. Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal “trafficking” offense continues to trigger aggravated felony mandatory deportation consequences.** Any state drug offense that corresponds to a federal felony drug offense listed at 18 USC 841 *et seq.*—generally true trafficking-type offenses such as drug distribution or intent to distribute offenses—is an aggravated felony. However, conviction of a state offense that covers conduct that may not be a federal felony (*e.g.*, possession, transfer of marijuana without remuneration, or maybe offer to sell—see practice tips below), as well as conduct that would be a federal felony, may not necessarily be deemed an aggravated felony unless the federal government is able to establish, through the state record of conviction, that your client was convicted of that portion of the statute relating to the covered conduct that would be a federal felony.

### PRACTICE TIPS

In light of *Lopez*, state criminal defense practitioners representing noncitizen clients facing state drug charges may wish to consider the following:

—**Avoid drug conviction or plea, if possible.** This includes a guilty plea to a drug offense combined with some penalty or restraint ordered by a court (*e.g.*, court-ordered commitment to a drug treatment program) since such a disposition may be deemed a conviction for immigration purposes even if the plea is later vacated. If possible, when there is a possibility of placement in a drug treatment or other alternative-to-incarceration program, try to negotiate a disposition that does not involve an up-front guilty plea to a drug offense.

—**If this is your client’s first drug offense charge, plead to possession rather than sale.** If your permanent resident client will plead guilty, you should negotiate a plea to a simple possession offense rather than a sale or possession with intent-to-sell or other trafficking-type offense in order to preserve the possibility of relief from

removal. Moreover, since the Court made clear that it did not matter what quantity of the controlled substance was possessed as long as the possession offense does not contain a distribution, intent to distribute, or other federal “trafficking” element, your client may in some states be able to offer a plea to a simple possession offense that is of a comparable or even higher level than the “trafficking” offense charged. Even if your client is not a permanent resident, avoiding the aggravated felony label may enable your client to apply for asylum if otherwise eligible or, if your client is deported, may avoid the stiff federal prior aggravated felony sentence enhancement if your client is convicted in the future of the crime of illegal reentry after deportation.

—If your client has a prior drug conviction(s), file an appeal of the prior conviction(s), or seek leave to appeal the prior conviction(s), if possible. *Lopez* leaves open the question of whether a second state drug possession conviction may be deemed an aggravated felony. However, a second state possession offense should not be deemed to correspond to a federal 21 USC 844(a) recidivism possession offense if the prior conviction was not final at the time of commission of the later offense. Thus, if your client is still within the time to file an appeal of the prior conviction as of right, you might advise your client to appeal the prior conviction. If the time for an appeal of right has passed but there is still time to seek discretionary leave to appeal the prior conviction, you might advise your client to seek such leave. See *Smith v Gonzales*, 468 F3d 272 (5th Cir. 2006) (later offense committed while individual still within the time to seek leave to appeal the prior conviction).

—If your client has a prior drug conviction(s), avoid plea to offense that involves charge and proof of the prior conviction(s). As discussed above, a second state drug possession conviction might be deemed not to correspond to a federal 21 USC 844(a) recidivism possession offense if the conviction does not include charging and proof of the prior drug conviction. Thus, if your state has separate offenses for those convicted of possession depending on whether the prosecution chooses to charge and prove a prior conviction of a drug offense, you should seek to avoid the offense involving proof of the prior conviction. Be aware, however, that this strategy may not work if your client’s later removal case falls within the jurisdiction of the 2nd Circuit (Connecticut, New York, Vermont) or the 5th Circuit (Canal Zone, Louisiana, Mississippi, Texas). See *US v Simpson*, 319 F3d 81 (2d Cir. 2002).

—If possible, plead to a preparatory or accessory-after-the-fact offense. For removal cases arising in the 9th Circuit, a state conviction of a free-standing preparatory or accessory offense such as solicitation, even if the underlying offense is a drug offense, should not be deemed an aggravated felony. See *Levy-Licea v INS*, 187 F3d 1147 (9th

Cir. 1999). Therefore, if your noncitizen client is charged with a drug offense, you might offer an alternate plea to such a preparatory or accessory offense. At present, this strategy may work only if your client’s later removal case falls within the jurisdiction of the 9th Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington); however, even for clients whose cases will probably not fall within 9th Circuit jurisdiction, such a disposition may offer your client an argument to avoid removal or mandatory removal.

—If your client will plead guilty to a state drug offense that covers conduct that would be an aggravated felony but also conduct that would not, keep out of the record of conviction any information that would help establish that the conduct is an aggravated felony. Under immigration case law, an offense that covers some conduct that is an aggravated felony and some that is not may not categorically be determined to be an aggravated felony. For example, the 3rd Circuit has found that a state marijuana “sale” offense that might cover transfer of a small amount of marijuana for no compensation should not categorically be considered a “drug trafficking crime” or an “illicit trafficking” aggravated felony since such a transfer would be treated as a misdemeanor under federal law. See 21 USC 841(b)(4) (“distributing a small amount of marijuana for no remuneration” treated as simple possession misdemeanor under 21 USC 844); *Wilson v Ashcroft*, 350 F3d 377 (3rd Cir. 2004). See also *US v Rivera-Sanchez*, 247 F3d 905 (9th Cir. 2001). However, be aware that the immigration authorities may look to the record of conviction to determine whether your client was convicted of that portion of the statute relating to conduct that would be an aggravated felony. Therefore you may help your noncitizen client avoid removal if you either make sure the record of conviction establishes conduct that would not be considered an aggravated felony, or keep out of the record of conviction any information that would help the federal government establish conduct that would be an aggravated felony.

—If your client will plead guilty to a state drug offense whose elements do not establish the controlled substance involved, keep out of the record of conviction any information that would help establish that the substance involved is one listed in the federal controlled substance schedules. The aggravated felony definition at INA 101(a)(43)(B) covers only drug offenses that relate to a substance included in the federal definition of “controlled substance” in section 102 of the Controlled Substances Act (referencing federal controlled substance schedules published at 21 USC 812). However, many states define “controlled substance” to include some substances that do not appear in the federal controlled substance schedules. Therefore, if you are able to avoid the record of conviction in your client’s state criminal case establishing the particular controlled substance involved,

this may offer your client an argument in later immigration proceedings that his or her particular offense is not necessarily an aggravated felony.

—If your client will plead guilty based on an understanding that the plea will not trigger removal, or at least mandatory removal, advise your client to allocate to his or her understanding. You might advise your client to include such a statement of his or her understanding in the plea allocution in order to provide some basis for a later withdrawal of the plea should this understanding be upset by later legal developments.

### Contact Us

For the latest legal developments or litigation support on any of the issues discussed in this advisory, contact IDP's Benita Jain at (718) 858-9658 ext. 231 or Manny Vargas at (718) 858-9658 ext. 208, or for support on issues involving drug possible alternative-to-incarceration (ATI) disposition cases, contact IDP's Alina Das at (718) 858-9658 ext. 203. They may also be contacted by email at [bjain@nysda.org](mailto:bjain@nysda.org), [mvargas@nysda.org](mailto:mvargas@nysda.org) and [adas@nysda.org](mailto:adas@nysda.org).

### Endnotes

1. See INA 237(a)(2)(B)(i), 8 USC 1227(a)(2)(B)(i).
2. See INA 212(a)(2)(A)(i)(II), 8 USC 1182(a)(2)(A)(i)(II).
3. See INA 237(a)(2)(B)(i), 8 USC 1227(a)(2)(B)(i).
4. See INA 101(a)(48)(A), 8 USC 1101(a)(48)(A) (guilty plea combined with some penalty or restraint ordered by a court sufficient to be deemed conviction for immigration purposes); see also *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute); but see *Lujan-Armendariz v INS*, 222 F3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act).
5. The relief of cancellation of removal for lawful permanent resident immigrants is barred not only if the individual is convicted of an aggravated felony, but also if the individual commits any drug offense before the person has continuously

### Defender News *(continued from page 6)*

needles were inserted all the way through his veins and into the flesh in his arms. ([www.nbc11.com](http://www.nbc11.com), 12/15/06, [www.nypost.com](http://www.nypost.com), 12/18/06.)

In New York, only one death penalty case remains in the system after a jury instruction provision in the capital punishment statute was found unconstitutional in 2004. John Taylor's case is pending in the Court of Appeals. Argument is expected to be scheduled in the spring. (Check the NYSDA website, [www.nysda.org](http://www.nysda.org), for a Court of Appeals update provided every two months by Robert Dean of the Center for Appellate Litigation.) Taylor's case will be decided by a court that will have experienced sub-

stantial turnover in its members since the ruling in *People v LaValle*, 3 NY3d 88. ([www.nysun.com](http://www.nysun.com), 11/17/06.)

6. The waiver of inadmissibility available for persons seeking lawful permanent resident status who have been convicted of, or who have admitted, crimes is not available for any drug offense other than a single offense of simple possession of 30 grams or less of marijuana. See INA 212(h), 8 USC 1182(h).

7. See 21 USC 844(a).
8. Barred by aggravated felony—see INA 240A(a)(3).
9. Barred by aggravated felony—see INA 208(b)(2)(B)(i).
10. Barred by aggravated felony or felonies for which the person has been sentenced to an aggregate term of imprisonment of at least 5 years—see INA 241(b)(3)(B).
11. Barred by post-November 29, 1990 aggravated felony—see INA 101(f).
12. See INA 240A(a) & (d), 8 USC 1229b(a) & (d).
13. See *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998).
14. See *INS v St. Cyr*, 533 US 289 at 296, n.5 (2001).
15. See INA 276(b)(2), 8 USC 1326(b)(2).

16. See 21 USC 844(a) (subjecting individuals convicted of possession of a controlled substance after a prior drug conviction has become final to a maximum sentence in excess of one year).

17. See *US v Sanchez-Villalobos*, 412 F3d 572 (5th Cir. 2005) (finding second misdemeanor possession offense constituted an aggravated felony); *US v Simpson*, 319 F3d 81 (2d Cir. 2002) (finding second misdemeanor possession offense to be an aggravated felony in illegal reentry sentencing context but declining to comment on whether such offense would be an aggravated felony in the immigration context).

18. See *Berhe v Gonzales*, 464 F3d 74 (1st Cir. 2006) ("Because Berhe's 1996 conviction is not a part of the record of the 2003 conviction, the government did not establish that Berhe was convicted of a hypothetical federal felony"); *Steele v Blackman*, 236 F3d 130 (3rd Cir. 2001).

19. See 21 USC 844(a) (providing for sentence enhancement based on a prior conviction only if the offense at issue is committed after such prior conviction "has become final"); see also *US v Palacios-Suarez*, 418 F3d 692 (6th Cir. 2005) (later offense committed while prior drug case still pending in criminal court); *Smith v Gonzales*, 468 F3d 272 (5th Cir. 2006) (later offense committed while individual still within time to seek leave to appeal prior conviction).

20. See *Oliveira-Ferreira v Ashcroft*, 382 F3d 1045 (9th Cir. 2004).

stantial turnover in its members since the ruling in *People v LaValle*, 3 NY3d 88. ([www.nysun.com](http://www.nysun.com), 11/17/06.)

### Sad News In the Defense Community

#### Maxian's Death a Loss for Many

Former NYSDA Board Member Michele Maxian, who spent her entire legal career at The Legal Aid Society of New York City, died Nov. 14, 2006 at the age of 55. Widely admired among defense lawyers, the client community,

*(continued on page 13)*

# CONFERENCES & SEMINARS

**Sponsor:** New York State Association of Criminal Defense Lawyers and Henry C. Lee Institute of Forensic Science

**Theme:** Law and Forensic Science

**Date:** January 27, 2007

**Place:** New York City

**Contact:** (212)532-4434; website [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** California Attorneys for Criminal Justice and California Public Defender Association

**Theme:** Capital Case Defense Seminar 2007

**Dates:** February 16-19, 2007

**Place:** Monterey, CA

**Contact:** tel (916)448-8868; fax (916)448-8965

**Sponsor:** National Association of Criminal Defense Lawyers

**Theme:** The Latest and Greatest in Defense Strategies

**Dates:** February 21-24, 2007

**Place:** San Diego, CA

**Contact:** NACDL: Gerald Lippert, tel (202)872-8600 x 236; email [gerald@nacdl.org](mailto:gerald@nacdl.org); website [www.nacdl.org](http://www.nacdl.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers

**Theme:** Annual Mid-Hudson Trainer

**Date:** March 9, 2007

**Place:** Poughkeepsie, NY

**Contact:** NYSACDL: tel (212)532-4434; fax (212)532-4468; email [nysacdl@aol.com](mailto:nysacdl@aol.com); website [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** National Legal Aid and Defender Association

**Theme:** Life in the Balance 2007

**Dates:** March 10-13, 2007

**Place:** Dallas, TX

**Contact:** tel (202)452-0620; fax (202)872-1031; email [info@nlada.org](mailto:info@nlada.org); website [www.nlada.org](http://www.nlada.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers

**Theme:** Federal Practice

**Date:** March 16, 2007

**Place:** New York City

**Contact:** NYSACDL: tel (212)532-4434; fax (212)532-4468; email [nysacdl@aol.com](mailto:nysacdl@aol.com); website [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers

**Theme:** Criminal Law Update

**Date:** March 24, 2007

**Place:** New Hartford, CT

**Contact:** NYSACDL: tel (212)532-4434; fax (212)532-4468; email [nysacdl@aol.com](mailto:nysacdl@aol.com); website [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** Department of Public Advocacy (Kentucky)

**Theme:** Death Penalty Institute

**Dates:** April 16-20, 2007

**Place:** Louisville, KY

**Contact:** DPA: tel (502) 564-8006 ext. 236; fax (502)564-7890; email [Lisa.Blevins@ky.gov](mailto:Lisa.Blevins@ky.gov); website <http://dpa.ky.gov>

**Sponsor:** Trial Lawyers College

**Theme:** Death Penalty Seminar

**Dates:** June 9-16, 2007

**Place:** Dubois, WY

**Contact:** tel (800)688-1611 or (760)322-3783; fax (760)322-3714; website [www.triallawyerscollege.com](http://www.triallawyerscollege.com)

**Sponsor:** National Criminal Defense College

**Theme:** Trial Practice Institute

**Dates:** June 17-30, 2007

July 15-28, 2007

**Place:** Macon, GA

**Contact:** tel (478)746-4151; fax (478)743-0160; website [www.ncdc.net](http://www.ncdc.net)

**Sponsor:** **New York State Defenders Association**

**Theme:** **40th Annual Meeting & Conference**

**Dates:** **July 22-24, 2007**

**Place:** **Saratoga Springs, NY**

**Contact:** **NYSDA: tel (518)465-3524; fax (518)465-3249; email [jkirkpatrick@nysda.org](mailto:jkirkpatrick@nysda.org); website [www.nysda.org](http://www.nysda.org)**

## ***Saratoga in '07!***

**Join Us July 22-24, 2007 at the Gideon Putnam Resort and Spa in beautiful Saratoga State Park, Saratoga Springs, NY for NYSDA's**  
**40th Annual Meeting and Conference**

*Hotel reservations may be made now:*  
Call (800) 732-1560 or (518) 584-3000  
or fax (518) 584-1354

## Book Review

### *The Dreams of Ada*

By Robert Mayer

(1987) (new afterword 2006)

Broadway Books, softcover, 494 pages

### *The Innocent Man*

By John Grisham

(2006)

Doubleday, 360 pages

by Mardi Crawford

The re-publication of Robert Mayer's book, *The Dreams of Ada*, could mistakenly be dismissed as no more than a marketing ploy. The cover bears a favorable blurb by well-known novelist John Grisham.

Grisham's recent nonfiction book, *The Innocent Man*, is not about the same murder case that Mayer thoroughly documented and deconstructed in 1987, but there is a connection. Grisham writes about another case in Ada, Oklahoma. Each case involves the death of a young woman, capital murder charges, questionable police and prosecution procedures, and many of the same criminal justice players whose actions lead to wrongful convictions. Grisham's research leads him to state in *The Innocent Man* his belief in the innocence of Tommy Ward and Karl Fontenot—the men about whom Mayer wrote and who remain in prison. The two men in Grisham's own book have been exonerated by DNA, evidence that is unavailable for Ward and Fontenot.

This reviewer began reading Mayer's book reluctantly. Like most readers of the *REPORT*, I already knew that police extract false confessions and secure improper convictions based on them. That law enforcement officials often treat unfairly the poor and members of the "running" underclass, as Mayer denominates the members of a community often described as troublemakers, neer-dowells, dopers, or just criminals, I take as a given. Numerous news accounts of recent exonerations caused by tactics and systemic problems that nevertheless persist prepared me to find *The Dreams of Ada* historically interesting at best, repetitious of all I already knew at worst.

The book opens with low-key, journalistic descriptions of Ada and the disappearance of Donna Denice Haraway from McAnally's convenience store during her evening shift. People key to the story are introduced as they go about their lives just before and after the disappearance, not always by their ultimate connections to the case. Mayer builds tension not by dramatic flourishes or

bombast, but by drawing the reader into the lives of Ada citizens, including the family of Tommy Ward. Once Ward, along with loner Karl Fontenot, becomes the focus of police and prosecution suspicion, all other suspects—and there are several—are ignored by the police, but not by Mayer.

Mayer does not overplay the "dreams" of the title. We learn that Ward's videotaped confession to Haraway's kidnapping, rape, and murder followed hours of questioning and began as his recounting of a dream. Occasionally Mayer refers to other dreams—other dreams that Ward had, dreams that his sister had, a few dreams of those prosecuting him—but the theme does not become a gimmick. The most memorable legal "dream" moment occurs in the 2006 afterword. A federal judge, in overturning the conviction of Ron Williamson (one of the defendants in the case portrayed in *The Innocent Man*), cites an earlier edition of *The Dreams of Ada* in a footnote, and, in Mayer's words, "questioned the multiple dream confessions leading to convictions in Ada."

"Dream confessions" may or may not join "Christian burial speech" (which also occurs in the case, though to little effect) in the argot of defense lawyers seeking to attack a client's confession. But Mayer's book offers all storytellers, including lawyers, a brilliant example of how to lead readers to a conclusion, not just tell them what to conclude. Among its gifts, *The Dreams of Ada* demonstrates the power of "humanizing" (a jargon word Mayer would not, I assume, ever use) someone accused of heinous acts.

It also demonstrates how concisely a point can be made. Mayer spent time in Ada during the trial. He describes in three short paragraphs a conversation with an Ada resident who, called for jury duty at the beginning of the trial, was not selected to serve but stayed to watch:

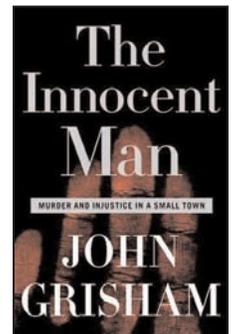
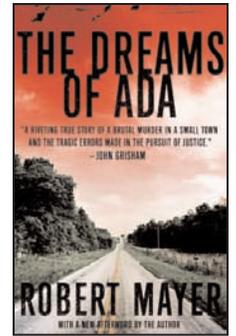
"You can get anyone to confess to anything," Andersen said. He puffed on his cigarette. "I know. I was in Vietnam. Everyone has a different pressure point. But if you want, you can get anyone to say anything."

His questioner hesitated, then asked, "Were you a prisoner of war in Vietnam?"

"No," Andersen said. He crushed out the cigarette. "I interrogated prisoners of war."

Mayer does not comment on the would-be juror's words, but rather leaves them echoing in the reader's mind.

Grisham, on the other hand, has trouble letting facts and circumstances speak for themselves. By page 164, the



\* Mardi Crawford is a Staff Attorney at the Backup Center and Editor of the *REPORT*.

reader knows that the police and prosecutor believed Ron Williamson to have been the lead participant in a vicious attack that left Debbie Carter dead, nude, in her own apartment, asphyxiated by either the bloody washcloth stuffed in her mouth or a belt around her neck. The reader also knows that Williamson has mental problems. His brief stint as a minor-league baseball player thought—by himself most of all—to be headed to the majors had ended. Thereafter, his increasing alcohol abuse, mood swings, and inability to cope with daily life had led his family to get him to see a mental health counselor, who diagnosed him as manic-depressive. Workers at the mental health clinic described him as “drooling” shortly before his arrest for murder—four years after Debbie Carter’s death and less than a month after publication of *The Dreams of Ada* made the local authorities look bad. Williamson’s lawyer had him evaluated, and received a report that concluded Williamson’s panic and confused thinking could be causing inappropriate behavior such as refusing to attend the preliminary hearing, a time “[w]hen most individuals would be demanding to hear information and opinions that would influence their future life or death.” Yet, “[t]he report was tucked away in [the lawyer’s] file and left there.”

In Mayer’s book, that last statement might have been left standing alone, leaving the reader to wonder why Williamson’s mental history was ignored, or to rant that there was no reason. If Mayer did, as Grisham does, go on to explain that requesting a competency hearing is routine and that the lawyer had done it before, it is likely he would stop there. But Grisham spells it out: “The case was begging for someone to raise the issue of competency.”

Other differences between Mayer’s approach and Grisham’s include the more thorough and thoughtful research and analysis reflected in Mayer’s book. Mayer learned about the Ward/Fontenot prosecution soon after their arrests in 1984, so he could be in Ada researching the story, in context, as it unfolded; his book did not appear until 1987. Grisham’s interest in the later Ada prosecution was sparked by Williamson’s 2004 obituary in *The New York Times*; the resulting book came out in 2006. That shorter time may account for minor problems. For instance, Grisham says that Ward and Fontenot said in their false confessions that a third man was involved in the killing and that he had tattoos covering both arms. It was soon obvious that the man was not there; he had a painfully broken arm at the time, which would have prevented his participation, and which meant his tattoos on that arm were covered by a cast. But Mayer had noted that Ward and Fontenot said the man lacked tattoos, a more blatant discrepancy between the confessions and the truth.

Grisham, to his credit, explains for lay readers a lot of applicable constitutional law and proper procedures violated in the prosecution of Williamson and his codefen-

dant, Dennis Fritz. Grisham specifically points out public defense underfunding and resulting deficiencies in representation. By writing a book about a second case of injustice in the same small town, bringing his prose and novelist’s fame to bear, he contributes to public awareness that such incidents are not random or accidental, but a result of how the system functions. And he rightly lauds *The Dreams of Ada*: “It’s a fascinating book, a wonderful reminder of how good true-crime writing can be.” ☪

---

## **Defender News** (continued from page 10)

and throughout the criminal justice system, Maxian’s skill and fervor benefited many beyond her Legal Aid clients and colleagues. Her well-known victory in *People ex rel. Maxian on behalf of Roundtree v Brown*, 77 NY2d 422 (1991), recognizing a criminal defendant’s right to be arraigned within 24 hours of arrest, improved how defendants are treated in the criminal justice system. Further, that case and other examples of Maxian’s work continue to inspire defense lawyers to challenge rather than acquiesce to “how it’s done” when clients are being harmed.

As a trainer and sounding board, as well as Board Member and participant in Chief Defender Convenings, Maxian assisted NYSDA in many ways. She presented at NYSDA conferences and seminars, encouraging attending lawyers to take on new or difficult issues and illustrating how to approach such issues with dedication and humor. Remembered as “one the most committed defenders I have ever known and one of the top legal minds in the defense community,” in the words of one NYSDA colleague, Maxian will be sorely missed.

As noted in her obituary in the *New York Law Journal*, formal recognitions of Maxian’s achievements included receipt of Legal Aid’s Orison S. Marden award (1991) and being named by the New York State Bar Association as outstanding public defense practitioner for 2004. ([www.law.com](http://www.law.com), 11/17/06.)

## **Monroe County Defense Attorney Jacobs Dies**

Another recent cancer death saddening the public defense community was that of Jeffrey Jacobs, a long-time member of the Monroe County Public Defender Office legal staff. On a memorial website, Judge Richard Wesley (now on the 2nd Circuit) recalled Jacobs from Wesley’s time as a state judge: “He always had an insightful or original view of his case. He was what is right about our profession.”

NYSDA joins the many others who mourn the untimely deaths of Michele and Jeff and in being grateful for what they gave us all. ☪

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

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

## United States Supreme Court

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

**Ayers v Belmontes, 549 US \_\_, 127 S Ct 469 (2006)**

The respondent was convicted of first-degree murder in California and sentenced to death. During the sentencing phase, the court instructed the jury to consider aggravating or mitigating factors; and a catchall factor (k), "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In his state and federal post-conviction motions, the respondent claimed that factor (k) prevented the jury from considering forward-looking mitigation evidence—that he likely would lead a constructive life if incarcerated. The sentence was reversed in federal habeas proceedings by the 9th Circuit Court of Appeals.

**Holding:** Factor (k) did not limit the jury's ability to consider mitigating evidence about the respondent's positive adjustment to prison life, religious conversion, and future contributions. The provision has been challenged before, first in *Boyd v California* (494 US 370, [1990] [pre-crime background and character]). In *Brown v Payton* (544 US 133, [2005]), the Court considered the mitigating effect of postcrime rehabilitation under factor (k). The Court concluded that the California Supreme Court reasonably applied *Boyd* in finding no 8th Amendment violation. The state court reasonably found that factor (k) did not prevent the jury from considering postcrime reform evidence. In this case, there was no reasonable probability that the jury failed to consider the respondent's forward-looking mitigation evidence. Factor (k) permitted the jury to evaluate any other circumstance that might excuse the crime and justify a penalty less than death. Thus, whether the evidence concerned precrime background and character or postcrime rehabilitation, the likelihood of future good conduct and remorse fell within the factor (k) instruction. Judgment reversed and remanded.

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

**Dissent:** [Stevens, J] Factor (k) unduly restricted the jury's ability to evaluate future mitigating evidence and prevented them from giving weight to evidence that did not extenuate the severity of the crime. See *Lockett v Ohio*, 438 US 586 (1978).

**Aliens (Deportation)**

**ALE; 21(10)**

**Lopez v Gonzales, No. 05-547, 12/5/2006, 549 US \_\_,**

The petitioner, a legal permanent resident, was convicted of a South Dakota felony, aiding and abetting another person's possession of cocaine. The Immigration and Naturalization Service (INS) started removal proceedings based on the petitioner's state conviction, on the grounds that it was a controlled substance violation (8 USC 1227[a][2][B][i]), and an aggravated felony. 8 USC 1227(a)(2)(A)(iii). An Immigration judge held that the drug conviction was an aggravated felony under federal Controlled Substances Act (CSA). Removal ordered, affirmed on appeal.

**Holding:** The state felony drug possession, which was a misdemeanor under the CSA, did not qualify as an aggravated felony under the INA. The petitioner's state crime was for helping someone else possess cocaine in South Dakota, and was treated the same as if he possessed it. SD Codified Laws 22-3-3. Under federal law, this type of drug possession was a misdemeanor. 21 USC 844(a). An aggravated felony required a conviction of "illicit trafficking in a controlled substance ... including," but not limited to, "a drug trafficking crime (as defined in section 924(c) of title 18)." 8 USC 1101(a)(43)(B). Trafficking meant some degree of commerce was involved, which did not apply to simple possession. See *Leocal v Ashcroft*, 543 US 1, 11 (2004). An aggravated felony had to be punishable as a federal felony under the CSA, and not state law. See 8 USC 1227(a)(2)(A)(iii); §1101(a)(43); *Russello v US*, 464 US 16, 23 (1983). Therefore, the state offense became a "felony punishable under the Controlled Substances Act" only if it proscribed conduct punishable as a felony under that federal law. Judgment reversed.

**Dissent:** [Thomas, J] A plain reading of the statute showed that the petitioner's state felony offense qualified as a drug trafficking crime because it was deemed a felony by the state and it was capable of punishment under the CSA.

**Due Process (Fair Trial)**

**DUP; 135(5)**

**Juries and Jury Trials (General)**

**JRY; 225(37)**

**Carey v Musladin, No. 05-785, 12/11/2006**

The respondent was convicted of first-degree murder, despite his claim of self-defense. Members of the decedent's family sat in the front row, some wearing buttons with a photo of the deceased. A defense objection was denied. The respondent's conviction was affirmed on appeal. Denial of federal habeas corpus relief was reversed on appeal.

**US Supreme Court** *continued*

**Holding:** The state court decision holding that buttons with the decedent’s image worn by family members during trial did not violate due process was not contrary to or an unreasonable application of clearly established federal law. 28 USC 2254(d)(1). “Clearly established Federal law” meant Supreme Court holdings, not dicta, at the time of the state court decision. *See Williams v Taylor*, 529 US 362 (2000). Government-sponsored courtroom practices have been examined. Compelling a defendant to wear identifiable prison clothing at his jury trial violated due process (*Estelle v Williams*, 425 US 501, 503-506 [1976]) but seating state troopers immediately behind a defendant at trial was not so inherently prejudicial that it denied him a fair trial. (*Holbrook v Flynn*, 475 US 560, 568 [1986]). The *Williams-Flynn* lines of cases established that some practices are so inherently prejudicial that they must be justified by an “essential state” policy or interest. The Supreme Court has not addressed spectator practices, and the decisions of lower courts have been mixed. Without Supreme Court precedent on spectator-conduct claims, the state court did not unreasonably apply clearly established federal law. Judgment vacated and matter remanded.

**Concurring:** [Stevens, J] “Clearly established Federal law” included dicta. The 1st Amendment did not protect spectators in a courtroom engaged in actual or symbolic speech about the trial.

**Concurring:** [Kennedy, J] A new rule is required to encourage courts to take preventive measures when spectators with buttons threatened to create an atmosphere of intimidation or coercion.

**Concurring:** [Souter, J] Clear precedent existed concerning threats to the fundamental fairness of a criminal trial posed by courtroom conditions. *Sheppard v Maxwell*, 384 US 333 (1966); *Estes v Texas*, 381 US 532 (1965). The judge had an obligation to control the courtroom behavior of visitors, whether government agents or private citizens.

**New York Court of Appeals**

**Double Jeopardy (Mistrial) DBJ; 125(20)**

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

**In the Matter of Gorghan v DeAngelis, No. 109, 10/19/2006**

The trial court ruled that evidence of the petitioner’s prior uncharged criminal and immoral acts were inadmissible at the petitioner’s trial for rape and related offenses. The prosecutor ignored this ruling, repeatedly referencing excluded evidence and asking the jury to draw conclusions with no basis in fact. The petitioner objected and moved for a mistrial after opening statements, during tes-

timony and after the prosecutor’s summation. All motions for mistrial were denied. The conviction was reversed on appeal. The petitioner’s subsequent motion to bar new trial on double jeopardy grounds was denied. An article 78 petition to prohibit a new trial was filed in the Appellate Division to prohibit the new trial was dismissed.

**Holding:** The remedy for persistent prosecutorial misconduct motivated by a desire to secure a conviction, rather than provoke a mistrial, is a new trial, not dismissal. A criminal defendant has a qualified right to have the jury render a verdict, *People v Adames* (83 NY2d 89, 92), which is derived from the general prohibition against Double Jeopardy. *See Oregon v Kennedy*, 456 US 667, 671 (1982). When a prosecutor engages in prejudicial misconduct deliberately to provoke a mistrial motion, a defendant’s right to proceed to verdict is frustrated and double jeopardy can bar retrial, even based on the defendant’s mistrial motion. *Davis v Brown*, 87 NY2d 626, 630. But where, as here, the prosecutor’s “deplorable” conduct was to convict the petitioner, and not cause a mistrial, a new trial is the proper remedy. Judgment affirmed.

**New York State Agencies (Health, Department of) NYA; 266.5(135)**

**People v Cuttita, No. 126, 10/24/2006**

The State Department of Health accused the defendant of operating adult care facilities without a license. The defendant claimed that they were boarding houses and not regulated adult residences. In addition to civil proceedings, the defendant was charged with a misdemeanor, knowingly operating an adult care facility without written approval in violation of Social Services Law 461-b (2) (c). The case was handled by a Special Assistant Attorney General affiliated with the Welfare Inspector General (WIG). The defendant’s motion to dismiss due to the WIG’s lack of jurisdiction was denied and his conviction was affirmed.

**Holding:** The WIG was not statutorily authorized to prosecute the defendant for the misdemeanor in question. Executive Law 74 (3) (d) limits the agency’s power to prosecute fraud and illegality committed internally within the Department of Health, Office of Children’s Services, local districts, or contractees. The defendant did not fall under any of the statutory categories. The WIG did not have the power to enforce licensing requirements of other agencies under the Social Services Law. The Special Assistant Attorney General did not have the authority to prosecute the case without a specific legislation mandate. *See Executive Law 63 (3); People v Gilmour*, 98 NY2d 126, 129-132. Since the WIG lacked the authority to prosecute licensing violations, it could not empower the Special Assistant Attorney General to do so. Order reversed, accusatory instrument dismissed.

**NY Court of Appeals** *continued*

<b>Courts (General)</b>	<b>CRT; 97(17)</b>
<b>Jurisdiction (General)</b>	<b>JSD; 227(3)</b>
<b>Motor Vehicles (General)</b>	<b>MVH; 260(17)</b>

**Matter of Dolce v Nassau County Traffic and Parking Violations Agency, No. 123, 10/24/2006**

The petitioner received a traffic ticket returnable in the Nassau County Traffic and Parking Violations Agency (TPVA). His motion to dismiss due to a lack of supporting deposition was denied. His article 78 petition to annul the judicial hearing officer’s determination, claiming that the TPVA lacked jurisdiction, was granted. The matter was referred to local village court, which found that the ticket was not properly filed with Nassau County District Court. Since the TPVA did not have concurrent jurisdiction, the court found it did not have power to hear the matter. This ruling was affirmed on appeal.

**Holding:** Nassau County TVPA is an adjunct of the Nassau County District Court and therefore had jurisdiction to hear traffic and parking violations without duplicative filings in District Court. General Municipal Law 370 [2] L 1990, ch 496. A lower court decision holding that the TPVA was not part of the District Court (*People v Jones*, 178 Misc 2d 681) was wrongly decided. The Administrative Judge of Nassau County, without consent of the parties, had the power to assign certain traffic and parking infractions to judicial hearing officers. CPL 350.20 [5]. Their actions were considered to have the same authority as the court. VTL 1690 [3]. Order reversed and remanded.

<b>Appeals and Writs (Preservation of Error for Review) (Scope and Extent of Review)</b>	<b>APP; 25(63) (90)</b>
--	-------------------------

**Instructions to Jury (Preliminary Instructions) ISJ; 205(48)**

**People v Harper, No. 187, 11/20/2006**

**Holding:** A challenge to the trial judge’s preliminary instructions to the jury outlining elements of each of the robbery counts was unpreserved due to the defendant’s failure to object. *People v Brown*, \_\_ NY3d \_\_ (11/20/06). Review of a mixed question of law and fact is limited here to “whether there is record support for the determinations of the courts below.” See *People v Hollman*, 79 NY2d 181, 193-194. There is record evidence to support the Appellate Division’s affirming the denial of a suppression motion without disturbing the trial court’s finding of abandonment. Order affirmed.

<b>Appeals and Writs (Preservation of Error for Review)</b>	<b>APP; 25(63)</b>
---	--------------------

<b>Counsel (Conflict of Interest) (Standby and Substitute Counsel)</b>	<b>COU; 95(10) (39)</b>
--	-------------------------

**People v Nelson, No. 188, 11/20/2006**

**Holding:** The trial court did not abuse its discretion by denying for lack of good cause the defendant’s motion to substitute counsel before jury selection. See *People v Linares*, 2 NY3d 507. While the defendant’s motion was denied without inquiry at first, later the court permitted the defendant to express his concerns. Also, the attorney’s statements in defense of his performance did not create a conflict of interest. See *People v Quintana*, 15 AD3d 299. The defendant failed to preserve the alleged error of the trial court in defining the elements of the crime during its preliminary instructions. *People v Brown*, \_\_ NY3d \_\_ (11/20/06). Judgment affirmed.

<b>Appeals and Writs (Preservation of Error for Review)</b>	<b>APP; 25(63)</b>
---	--------------------

**Instructions to Jury (Preliminary Instructions) ISJ; 205(48)**

**People v Brown, No. 155, 11/20/2006**

**Holding:** By instructing the jury during voir dire on the elements of the crime, the trial court did not commit a “mode of proceedings” error that went to the essential validity of the process and was so fundamental that the entire trial is irreparably tainted. See *People v Agramonte*, 87 NY2d 765, 770. Since the defendant failed to object at trial, his claim was unpreserved for our review. *People v Gray*, 86 NY2d 10. Judgment affirmed.

<b>Sentencing (Second Felony Offender)</b>	<b>SEN; 345(72)</b>
--	---------------------

**People v Cagle, No. 154, 11/20/2006**

The defendant was arrested on felony charges on Nov. 8, 2002. He pled guilty and was sentenced as a second felony offender based on a prior conviction dated Mar. 25, 1991, for which he had served a sentence until Feb. 23, 1993, when he was paroled. At the sentencing on the current charges, the defendant argued that more than 10 years had elapsed since his prior conviction where the underlying felony sentence had been changed to day-report status on Sept. 28, 1992. His argument was rejected. His sentence was affirmed.

**Holding:** A second felony offender sentence enhancement must be based on a predicate felony conviction less than ten years before the commission of the current offense, with exclusion for time spent incarcerated. Penal Law 70.06[1][b][v]. The day-reporting part of the defendant’s sentence fell within the definition of incarceration.

**NY Court of Appeals** *continued*

See Correction Law 851 [10]; 855 [5], [7]; 7 NYCRR 1926.2 [a] [4]. The purpose behind the second felony offender statute was to reduce punishment for prior felons who showed that they could live a law-abiding life in society for at least ten years; time spent in confinement did not count. *People v Walker*, 81 NY2d 661, 665. The defendant was not released until his parole date, Feb. 23, 1993. The predicate felony was with the 10-year limit. Order affirmed.

**Dissent:** [Smith, J] The defendant was not incarcerated in the plain meaning of that word during a day reporting program allowing him to live at home with his family. See 7 NYCRR 1925.2, 1927.4, 1901.1 [c] [2] [i] [a]. His situation was more like being on parole with opportunities to commit new crimes than being in prison.

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

**Assault (Instructions) (Lesser Included Offenses)** ASS; 45(45) (50)

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

**People v Carter, No. 156, 11/16/2006**

The defendant's first- and second- degree assault convictions were affirmed on appeal.

**Holding:** First-degree assault (Penal Law 120.05 [1]) requires proof beyond a reasonable doubt that the defendant recklessly engaged in conduct that created a grave risk of death to another person. Second-degree assault (Penal Law 120.10 [3]) requires proof that the defendant intended to cause serious physical injury to another person. The defendant did not object to the trial court's failure to charge these offenses in the alternative, nor did he attack the jury's verdict as repugnant. Since it was not a mode of proceedings error, an objection was needed to preserve it. See *People v Alfaro*, 66 NY2d 985. Defense counsel's failure preserve the issue was not ineffectiveness of counsel. Although an argument might have been raised (*People v Robinson*, 145 AD2d 184, *affd* 75 NY2d 879), in light of the holding in *People v Trappier* (87 NY2d 55), it was not so compelling that not making it rose to the level of ineffectiveness. See *People v Turner*, 5 NY3d 476. Order affirmed.

**Homicide (Manslaughter [Instructions])** HMC; 185(30[j])

**People v Bolling, No. 145, 11/16/2006**

**Holding:** The defendant was charged with second-degree manslaughter. Any error in the justification charge (see *People v McManus*, 67 NY2d 541) was harmless since

no reasonable view of the evidence supported it. See *People v Jones*, 3 NY3d 491, 496-497. While the evidence showed that the decedent threatened the defendant and a co-defendant with a gun, and had fired it into the air, it also revealed that after the decedent was disarmed and lying on the ground, he was shot and killed. Order affirmed.

**Homicide (Murder [Definition] HMC; 185(40[d] [m] [p]) [Instructions] [Intent])**

**Policano v Herbert, No. 161, 11/16/2006**

The defendant was indicted for intentional murder and depraved indifference murder and related weapons offenses. He raised an alibi defense at his trial for killing the decedent, who was shot to death about a week after alleged fights with the defendant. The autopsy report indicated that the decedent had been shot at close range twice in the head, once in the neck, probably while standing upright and turning, and once in the right thigh, likely when he was on the ground. A motion to dismiss the depraved indifference count was denied. The court instructed the jury to consider that count first, before deciding the intentional murder count. The conviction for depraved indifference murder was affirmed, but a federal habeas corpus petition was granted based on insufficiency of evidence after *People v Gonzalez* (1 NY3d 464) was decided on similar facts. Granting of the writ was initially affirmed, but a split decision denying en banc review resulted in three certified questions to the NY Court of Appeals.

**Holding:** Certified Question No. 1: Would the jury have been justified in finding the elements of depraved indifference murder satisfied beyond a reasonable doubt under the law as it existed on June 28, 2001, when the defendant's conviction became final? In *People v Register* (60 NY2d 270) the defendant, while intoxicated, shot several people in a bar. Charged with both depraved indifference and intentional murder, he was convicted of the former. Depraved mind murder was held to include a mental element ('recklessly') and a voluntary act ('engaging in conduct which creates a grave risk of death to another person') and to require the homicide to occur under circumstances evincing a depraved indifference to human life—an objective factual setting. Determination of intentional or reckless state of mind belonged to the jury and could be submitted in the alternative. See *People v Gallagher*, 69 NY2d 525, 530. Under *Register*, which governed at the time (it was not overruled until 2006, in *People v Feingold*, 7 NY3d 288), the jury could have found the defendant guilty of depraved indifference murder.

Certified Question No. 2: At the time the defendant's conviction became final, what were established elements of depraved indifference murder? At that time the prosecution was required to prove that the defendant 1) reck-

NY Court of Appeals *continued*

lessly engaged in conduct 2) which created a grave risk of death to another person 3) thereby causing the death of another person 4) under circumstances evincing a depraved indifference to human life.

Certified Question No. 3: Does the interpretation of Penal Law 125.25(1) and (2) set out in *Payne* and *Gonzalez* correctly state the elements of depraved indifference murder on the date the defendant’s conviction became final? Cases following *People v Sanchez* (98 NY2d 373) finding depraved indifference a culpable mental state did not apply retroactively. The purpose (*see People v Pepper*, 53 NY2d 213) behind the new interpretation was to eliminate confusion and curb the overcharging of depraved indifference and intentional murder.

**Dissent in part:** [Kaye, J] Intentional murder and depraved indifference murder are inconsistent crimes. *Gonzalez* and its progeny did not change the law. *Feingold* did, by changing an element of the offense to a culpable mental state, but it did not require retroactive application.

Juries and Jury Trials (General Selection) JRY; 225(37) (55)

**Matter of Oglesby v McKinney, No. 138, 11/16/2006**

Reginald Bradwell was charged with misdemeanors in the city of Syracuse. He moved to strike the jury panel because many panel members were not residents of the city. The motion was granted and a new panel composed only of city dwellers ordered. The District Attorney and Commissioner of Jurors filed an article 78 seeking prohibition of enforcement of the order, which was granted. On appeal, the decision was modified; the matter was converted to declaratory judgment stating that Judiciary Law 500 “does not mandate that a county commissioner of jurors provide a defendant in a criminal action in city court with a panel of prospective jurors comprised solely of residents of the city.”

**Holding:** Judiciary Law 500 did not require a county commissioner of jurors to provide a defendant in city court with prospective jurors comprised solely of city residents. The respondent trial judge had the authority to strike the panel, thus there was no justification for an art 78 based on prohibition. However, the alleged error of law in the use of that power was properly challenged through declaratory judgment. *See Matter of Morgenthau v Erlbaum*, 59 NY2d 143. The statute requires juries to be chosen from “a fair cross-section of the community in the county or other governmental subdivision wherein the court convenes . . .” (emphasis in opinion). There are exceptions to the county-wide jury selection practice for courts in rural communities (22 NYCRR 128.7[a]), but no exceptions have been

made for city courts since they were usually located near courts of countywide jurisdiction. Order affirmed.

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

**People v Moyett, No. 191, 11/21/2006**

**Holding:** During the plea colloquy the court advised the defendant that “by pleading guilty you give up your right to appeal the conviction.” There was no valid plea waiver. The court’s statement was misleading because it gave the impression that the right to appeal was automatically waived when entering a guilty plea. *See People v Billingslea*, 6 NY3d 248, 257. Without a written waiver or something in the record to show that the defendant understood the difference between his right to appeal and the trial rights abandoned through a guilty plea, there was no reason to believe that the defendant entered into a knowing, intelligent and voluntary waiver of his right to appeal. Order reversed, remanded for consideration of excessive sentencing issue

Evidence (Weight) EVI; 155(135)

**People v Vega, No. 189, 11/21/2006**

The defendant’s conviction of selling drugs, based on the testimony of several detectives who saw the transaction, was affirmed on appeal.

**Holding:** The Appellate Division applied the proper standard in finding that the verdict was not against the weight of the evidence despite its citation to *People v Gaimari* (176 NY 84, 94); that did not indicate that the court failed to apply the proper legal standard. *See People v Romero*, \_\_ NY3d \_\_, at 18-19. There was no reason to challenge the jury’s findings regarding credibility and resolution of inconsistencies in the detectives’ testimony. Judgment affirmed.

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

Evidence (Weight) EVI; 155(135)

**People v Lane, No. 153, 11/21/2006**

**Holding:** At the end of the prosecution’s case, the defendant moved for dismissal based on lack of a prima facie case, which was denied. But the defendant failed to renew the motion at the end of his case. Without an objection to the sufficiency of the trial evidence, there was no question of law reviewable by the Court of Appeals. *See People v Payne*, 3 NY3d 266, 273. The defendant also failed to raise constitutional objections to the court’s decision to preclude his testimony about refusing to cash additional checks requested by co-defendant. Without an objection,

**NY Court of Appeals** *continued*

the right to present a defense issue was not preserved. See *People v Lee*, 96 NY2d 157, 163. The court did not abuse its discretion as a matter of law by finding that the proposed testimony was irrelevant or inadmissible. The Appellate Division’s citation to *People v Gaimari* (176 NY 84) did not mean that it applied the wrong standard in deciding that the verdict was not against the weight of the evidence. See *People v Romero*, \_\_ NY3d \_\_, at 18-19. The citation to *People v Bleakley* (69 NY2d 490), which contains the current standard, supports that conclusion. That this was a bench trial was immaterial. Order affirmed.

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

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

**People v Romero, No. 151, 11/21/2006**

After three men allegedly intending to rob a drug dealer arrived at a location where the defendant, his three brothers, and a juvenile allegedly operated a drug ring, one man left the car. The other two were shot and killed. Nearly ten years passed before charges were brought against the defendant and other codefendants. The juvenile pled guilty to manslaughter. The four brothers went to trial; only the defendant was convicted. He had challenged the credibility of prosecution witnesses based on inconsistencies in their testimony and cooperation agreements. On appeal he claimed that the verdict was against the weight of the evidence, but his conviction was affirmed.

**Holding:** The Appellate Division did not err by citing to *People v Gaimari* (176 NY 84, 94), where it applied the correct standard for evaluating weight of the evidence arguments under *People v Bleakley* (69 NY2d 490). See CPL 470.15 [5], 470.20 [5], 470.30 [1]. Under the former Code of Criminal Procedure 528 a verdict was presumed correct and could be overturned only if the record revealed that the jury’s fact finding was incorrect. See *People v Driscoll*, 107 NY 414, 417. This was approach at the time when *Gaimari* was decided. *Gaimari* did not discuss the impact of jury deference on the Court of Appeals’ ability to review factual findings. In *People v Crum* (272 NY 348) a modified standard was adopted; a conviction would be upheld only if the court affirmatively reviewed the record and determined that the evidence supported the jury’s resolution of competing factual inferences. A last refinement was in *People v Bleakley* (69 NY2d 490), which held that courts must (1) determine whether, “based on all the credible evidence a different finding would not have been unreasonable”; and (2) if it would have been reasonable for the fact-finder to reach a different conclusion, “then the appellate court must, like the trier of fact below,

‘weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony.’” If such review leads the court to find that the trier of fact failed to give the evidence the weight it deserved, then the appellate court may set aside the verdict. Here, the Appellate Division reviewed the jury’s assessment of the witnesses’ credibility and resolution of conflicting evidence. The lower court found conflicting evidence, but the appeals court did not see any reason to disturb the jury’s findings, which were supported by the facts. The Appellate Division was not required to issue full written opinions in weight of evidence review matters. The better practice would be for the court to cite contemporary authority in its opinions. Order affirmed.

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

**Prisoners (Rights Generally)** PRS I; 300(25)

**State of New York ex rel. Harkavy v Consilvio, No. 140, 11/21/2006**

The petitioners, felony sex offenders, were near the end of their prison sentences when they were examined by two Office of Mental Health (OMH) physicians to determine whether they should be involuntarily committed to a psychiatric facility. All petitioners were found to suffer from mental illness, which untreated posed a high risk of reoffending. Prison superintendents sought involuntarily commitment under Mental Hygiene Law 9.27. When released from prison the petitioners were transported directly to a psychiatric center, where doctors ordered involuntary commitment. Mental Hygiene Legal Service filed a habeas corpus motion seeking the petitioners’ release, claiming that treatment of mentally ill prisoners was covered by Correction Law 402. The petition was granted and conditional release ordered unless an immediate retention hearing was held. That ruling was reversed on appeal.

**Holding:** In the absence of specific statutory authority governing the imminent release of felony offenders from prison to a psychiatric hospital and involuntary commitment, the procedures in Correction Law 402, rather than Mental Hygiene Law article 9, control. At the time of their commitment, the petitioners were still in prison; article 9 did not apply. Prisoners are entitled to the greater protections afforded by Correction Law 402, which requires: (1) prison superintendents to apply to a court for appointment of two examining physicians; (2) petition a court for commitment order, if a prisoner is found to be mentally ill and in need of treatment; (3) notice given to inmate or closest friend or relative and Mental Hygiene Legal Service; and (4) right to pre-transfer hearing before a judge. Under Mental Hygiene Law 9.27 commitment procedures did not require court-

**NY Court of Appeals** *continued*

appointed physicians, pre-transfer notice or hearing. Since all preliminary paperwork and examinations were done while the petitioners were in prison, the Corrections Law applied. Once the petitioners' sentences expired, the Mental Hygiene Law became applicable. Order reversed, remanded for retention hearings under Mental Hygiene Law.

**Concurring:** [Smith, J] Immediate action for the protection of society by civilly committing petitioners was not necessary, since they had been in prison for years preceding their release. *See Fhagen v Miller*, 29 NY2d 348. The petitioners were constitutionally entitled to a hearing before being committed to a psychiatric facility. Since Correction Law 402 provided a predeprivation hearing, it was the appropriate mechanism to protect their rights.

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

**People v Ross, No. 180, 12/14/2006**

The defendant, a state prisoner, pled guilty to attempted third-degree possession of a weapon to cover all charges related to a prison contraband case. During the plea proceeding, he agreed to be sentenced as a second felony offender. The prosecutor did not submit a predicate felony statement. The defendant waived receipt of the statement and did not challenge his predicate felonies. The court sentenced him as a second felony offender to a term of 1½-to-3 years.

**Holding:** A second felony offender sentence required the defendant to have a conviction for a predicate felony, Penal Law 70.06(1)(b)(I), within 10 years of the commission of the present offense, tolled for any periods of incarceration. *See* Penal Law 70.06 [iv], [v]. However, since the sentencing court possessed information that the defendant had been convicted of a known and identified felony within the time required by the statute, waiver of his rights to receive a predicate felony statement and to challenge its allegations was valid. *See* Criminal Procedure Law 400.21 [2], [3]. Order affirmed.

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

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

**People v Romero, No. 152, 12/19/2006**

**Holding:** Most of the improper remarks made by the prosecutor during summation were unreviewable because they went unchallenged at trial (*see People v Tardbania*, 72 NY2d 852, 853), were met with only unspecified, general objections (*see People v Harris*, 98 NY2d 452, 491 n 18), or were raised for the first time in a post-summations mistrial motion. *See People v LaValle*, 3 NY3d 88,

116. The only specific objection was made to a statement about defense counsel, which the trial judge did not find to be improper, and nonetheless gave a curative instruction on burden of proof as a safeguard. The court sustained an objection to the prosecutor's reference to a plea agreement reached in an unrelated, high-profile federal case. This sole reference, coupled with the entire summation and the curative charge, did not deprive the defendant of a fair trial. Order affirmed.

**Speech, Freedom Of (General) SFO; 353(10)**

**People v Barton, No. 176, 12/19/2006**

The defendant was ticketed for aggressive panhandling, violating section 44-4(H) of the City of Rochester's Municipal Code. Allegedly, he waded into traffic on a highway exit ramp, soliciting money from motorists. Dismissal of the accusatory instrument as overbroad in violation of Free Speech Clauses of Federal and NY Constitutions was reversed on appeal.

**Holding:** Panhandling is speech or expressive conduct safeguarded by the 1st Amendment and entitled to protection tantamount to that afforded to organized charities. *See Schaumburg v Citizens for a Better Environment*, 444 US 620 (1980). No Supreme Court precedent has squarely decided the issue of how it may be restricted; court cases are in conflict. *Compare Young v New York City Transit Authority*, 903 F2d 146, 154 (1990) (upholding panhandling ordinance) *with Loper v New York City Police Dept.*, 999 F2d 699, 704 (1993) (enjoining loitering for begging law). A law is overbroad if it prohibits a real and substantial amount of constitutionally protected conduct. *See Houston v Hill*, 482 US 451, 458. Content-neutral regulations of time, place, and manner of expression are enforceable if narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *See International Soc. for Krishna Consciousness of New Orleans, Inc. v City of Baton Rouge*, 876 F2d 494, 497 (1989). The purpose of this ordinance was to eliminate distractions for motorists and promote traffic safety and flow. It was not a blanket ban on solicitation, only requests for handouts in the street. It was content neutral and was narrowly tailored to its purpose. *See Ward v Rock Against Racism*, 491 US 781, 791. Judgment affirmed.

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

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

**People v Bradley, No. 181, 12/19/2006**

The defendant was convicted of assault and criminal contempt for attacking his girlfriend while an order of protection was in effect. A police officer testified that he responded to a 911 call and spoke with the complainant,

**NY Court of Appeals** *continued*

who was visibly shaken, had blood on her face and clothing, was bleeding profusely from one hand, and walked with a noticeable limp. He asked her what happened and she stated her boyfriend threw her through a glass door. The defendant was in the apartment at the time, and a glass door was broken. The officer’s version of the complainant’s statement was admitted as an excited utterance because the complainant was unavailable to testify. On appeal, the defendant’s claim that the complainant’s statement violated the Confrontation Clause failed.

**Holding:** Admission of a statement made out of court does not violate a defendant’s Confrontation Clause rights unless the out-of-court statement was “testimonial.” See US Const amend VI; NYS Const art I, sec 6; *Crawford v Washington*, 541 US 36 (2004); *Davis v Washington*, 126 S Ct 2266 (2006). Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there was no ongoing emergency, and the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution. The officer’s inquiry in this case was prompted by concerns for the complainant’s safety and well-being in an emergency situation. Nothing suggested that he was investigating past events, only evaluating the current crisis. The complainant’s statements were non-testimonial. Judgment affirmed.

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

**People v Gillian, No. 184, 12/21/2006**

The defendant was charged with felony drug sale and possession. His motion to discharge assigned counsel alleging a conflict of interest and “difference in strategy” was denied. At a pretrial hearing, his motion to dismiss his assigned counsel or proceed pro se, because his lawyer had done nothing for him, was denied; the defendant did not appear able to represent himself. Days later, the defendant renewed his motion. The prosecutor advised the court that counsel did have a conflict, and a new attorney was appointed. This lawyer was rejected because he represented a witness who testified against the defendant in an unrelated matter. Another attorney was assigned. The Appellate Division found that the trial court improperly denied the defendant’s timely and unequivocal request to proceed *pro se*, but determined he abandoned it by moving forward with his new attorney.

**Holding:** The defendant’s request to act pro se was not clear and unequivocal. See *People v Smith*, 92 NY2d 516, 520. The defendant raised the issue of pro se representation in the context of seeking assignment of new counsel; it was couched as a remedy if the trial court refused to replace the first attorney. The impetus behind the pro se request was to obtain new counsel, and his specific pro se application was abandoned at the time of the third appointment. Order affirmed.

**Concurring:** [Smith, JJ] The defendant’s request to act pro se was not equivocal, although made in the alternative. *Faretta v California*, 422 US 806. Only the appointment of new satisfactory counsel remedied the court’s error in denying the pro se request.

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

**People v Ozuna, No. 185, 12/21/2006**

The defendant was arrested for rape and while in jail allegedly telephoned the complainant in violation of an order of protection. In his pro se CPL 440.10 motion concerning the contempt charge (he was acquitted of rape), the defendant alleged that his attorney failed to investigate his claim that the complainant had requested the phone calls by contacting his father, and neglected to call his father as a witness at trial. The defendant’s conviction was affirmed.

**Holding:** The trial court misstated the standard for evaluating ineffectiveness of counsel claims. The judge denied the defendant’s motion because “[m]ovant’s argument fails to establish a thresh[old] issue of ineffective assistance. Ther[e] is no reasonable probability verdict would have been different, given the evidence here.” New York courts do not apply the “but for” or second prong of the *Strickland v Washington* (466 US 668 [1984]) test, but have adopted a rule more favorable to defendants. See *People v Turner*, 5 NY3d 476, 480. The prejudice component of *Strickland* focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case. See *People v Caban*, 5 NY3d 143, 156. However, the trial judge did not abuse his discretion in finding that the defendant failed to meet the threshold requirements. His post-conviction papers did not contain “sworn allegations substantiating or tending to substantiate all the essential facts.” See CPL 440.30[4][b]. And there was no affidavit from his father to show that he would have corroborated his son’s testimony, or explained his failure to do so. See *People v Ford*, 46 NY2d 1021. Order affirmed.

**First Department**

**Narcotics (Marijuana) (Possession) NAR; 265(40) (57)**

**People v Huertas, 32 AD3d 795, 821 NYS2d 205 (1st Dept 2006)**

**Holding:** The defendant was standing inside a garage entryway when police entered. He was arrested. Despite his admission that the garage was used to grow marijuana, and that the lights and other items found there were used for that purpose, the prosecution failed to connect him to the marijuana operation, which was located in two rooms. His mere knowledge that a controlled substance was present was legally insufficient to show that he exercised dominion and control over illegal items found in the building, which is required for constructive possession. See *People v Burns*, 17 AD3d 709, 711. His first-degree possession of marijuana cannot stand. Judgment reversed, indictment dismissed. (Supreme Ct, Bronx Co [Benitez, JJ])

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

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

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

**People v Black, \_\_AD3d\_\_, 821 NYS2d 593 (1st Dept 2006)**

An escalating disagreement resulted in one person’s death. The defendant was charged with second-degree murder, second- and third-degree possession of a weapon, attempted murder and assault, and first-degree reckless endangerment. The jury was charged on the defense of justification, but was told it did not apply to reckless endangerment. The defendant was convicted of only the counts not covered by the charge—reckless endangerment and third-degree weapons possession.

**Holding:** The prosecution’s contention that the charging error (see *People v Goetz*, 68 NY2d 96, 104 n 2) was harmless because justification should not have been given on any count is rejected. There was sufficient evidence to support the charge on reckless endangerment; the defendant testified that the decedent had “launched himself at defendant with a shard of glass” and others had shot at the defendant first. The jury could reasonably have concluded that the “defendant reasonably believed deadly physical force was necessary to defend against these attacks.” See *People v Arzu*, 7 AD3d 458, 459 *lv dsmd* 3 NY3d 670. The defendant had no duty to retreat in the face of non-deadly physical force, only when “deadly physical force was used or imminent.” See *Matter of Y.K.*, 87 NY2d 430, 434. While the defendant did leave his apartment to engage in a confrontation, there was evidence that he could not have retreated safely when deadly physical force was threatened or imminent.

At sentencing, the court improperly relied on the counts on which the defendant was acquitted. On these facts, *US v Watts* (519 US 148 [1977]) does not apply. Judgment reversed, remanded for new trial on reckless endangerment and for resentencing on the weapons charge. (Supreme Ct, Bronx Co [Webber, JJ])

**Juveniles (Delinquency)**

**JUV; 230(15)**

**Matter of Joel J., \_\_AD3d\_\_, 823 NYS2d 7 (1st Dept 2006)**

After a fact-finding determination that the appellant had committed an act that would constitute fifth-degree possession of marijuana if committed by an adult, the court placed him with the Office of Children and Family Services (OCFS) for 12 months.

**Holding:** The appellant was charged at age 13 after he was seen walking in a public place with his 16-year-old sister, who was smoking a “marijuana cigar” and passed it to the appellant, who put it in his mouth and reportedly appeared to inhale, then exhale, smoke. The record indicates that the appellant lived in a “chaotic home environment.” The incident presented “an ideal situation for referral to the Department of Probation for adjustment.” The appellant’s illegal activity was minor and non-violent, and in these circumstances victimless, posing no threat to community safety. It was his first arrest, following which he made significant progress: he appeared at each court session, was responsive to SCAN (Supportive Children’s Advocacy Network) services, and received negative results on three random drug tests. A child should not be marked as a juvenile delinquent based on shortcomings of the child’s family. *Matter of Deborah C.*, 261 AD2d 138-139. Placing the appellant with OCFS without any discussion of the crime, relying on the appellant’s family history and living situation, was not the least restrictive available alternative, required by statute. See Family Court Act 352.2(2)(a). Nor was it the appropriate disposition. Order reversed, finding of delinquency vacated, matter remanded for entry of adjournment in contemplation of dismissal. (Family Ct, Bronx Co [Cordova, JJ])

**Counsel (Conflict of Interest) COU; 9(10) (15) (30) (39) (Competence/Effective Assistance/Adequacy) (Right to Counsel) (Standby and Substitute Counsel)**

**People v Pina, No. 8256, 1st Dept, 10/10/2006**

About eight months after the defendant was charged with drug offenses, his retained attorney said that the defendant wanted to make a record of a request for court-appointed counsel, being unable to afford a lawyer to go to trial. The court declined. The plea proceeded, and the

**First Department** *continued*

defendant answered affirmatively questions including whether he understood that his current counsel would be his lawyer if the case went to trial. But then the defendant repeated concern that he could not afford trial counsel. The court did not ask for further clarification, telling the defendant that counsel had an obligation to represent him, had met that obligation, and had not acted in any way to indicate there was a problem. The case was adjourned for sentencing.

**Holding:** The court erred by summarily denying the motion to vacate the plea brought by a new lawyer before sentencing. The defendant’s affidavit indicated that he had stopped working at the bodega two months before his arrest there, was just filling in, knew nothing about drugs hidden under the floor in the back room, and had been told by the first lawyer before arraignment that the two men who ran the store had hired the lawyer. No conflict of interest was disclosed. Initial counsel allegedly said on the date of the plea that the two had stopped paying him, intimating that counsel wouldn’t do much at trial if he wasn’t paid. The defendant’s wife also submitted an affidavit about initial counsel. Their allegations, if true, would establish counsel’s failure to recognize a potential conflict of interest and act appropriately. *See People v Berroa*, 99 NY2d 134, 139. The allegations tended to show that the conflict did affect the lawyer’s representation. *See People v Longtin*, 92 NY2d 640, 644. While the defendant’s guilty plea contradicted his claim of innocence, parts of his allocution conflicted with the facts. The “risk that innocent persons will falsely implicate themselves is a real one.” So is “the risk that some attorneys will not act in the highest tradition of the bar ...” Appeal held in abeyance, remanded for a hearing on the defendant’s claim as to counsel’s conflict. (Supreme Ct, New York Co [Scherer, JJ])

**Instructions to Jury (General)** ISJ; 205(35) (50)  
**(Theories of Prosecution and/or Defense)**

**Robbery (Elements) (Evidence)** ROB; 330(15) (20)  
**People v Harrison, \_\_AD3d\_\_, 822 NYS2d 520**  
**(1st Dept 2006)**

The defendant was convicted of third-degree robbery for grabbing the complainant’s backpack, yelling that the complainant had stolen his backpack, eventually pointing a knife at the complainant and using the knife to try and cut the backpack’s straps. He made no effort to run when police arrived, and a friend of his testified that the pack in question resembled one the friend gave to the defendant a day earlier.

**Holding:** The court erred by answering “yes” to a jury note reading: “If a person attempts to forcibly regain

property that he or she truly believed is his or hers, does that make that person subject to the law of attempted robbery.” Under *People v Green* (5 NY3d 538), decided after this trial, the defendant was free to assert a good faith but mistaken claim of right to the pack that if believed would mean the prosecution had failed to prove he had the intent to take property from one with a superior right to possession. While *Green* made clear that defendants are not entitled to specific “claim of right” jury instructions, and some of the defendant’s actions belied a true belief that the pack was his, the court’s response to the jury question left the erroneous impression that the defendant’s belief as to true ownership was irrelevant, error which was not harmless. Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Zweibel, JJ])

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

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

**People v Ortiz, \_\_AD3d\_\_, 822 NYS2d 518**  
**(1st Dept 2006)**

**Holding:** The case against the defendant, charged with participating in a contract killing, turned on the credibility of the main witnesses, including a police detective and a former assistant district attorney (who had become a judge by the trial date). On cross-examination of the defendant, the prosecutor repeatedly characterized him as a liar and his defense as a lie, and, even after directed by the court to stop, asked the defendant why the two witnesses noted above would lie. The prosecutor pushed the defendant into accusing prosecution witnesses of lying, which the defendant had not done on direct. Cumulatively, this improper conduct prejudiced the defendant. *See eg People v Shanis*, 36 NY2d 697, 699. During summation, the prosecutor repeatedly vouched for the credibility of the same two key witnesses, referring approvingly to their status as law enforcement officials, especially “the Judge.” He expressly compared the credibility of the two witnesses with that of defendant purely on the basis of careers—long-time peace officer and prosecutor (now judge) versus long-time drug dealer. This was also an improper, prejudicial pattern of conduct. *See People v Collins*, 12 AD3d 33, 37. The court’s failure to instruct the jury as to the credibility of the judge’s testimony (after instructing on credibility in general and of a police officer) exacerbated the error. Even absent a request for such charge or objection to its absence, “the omission raises the possibility that the jury believed it had to accept a judge’s version of her interview ...” The evidence was not so overwhelming as to render the errors harmless. Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [Torres, JJ])

**First Department** *continued*

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

**Matter of Tristram K. v Jing K., No. 8670,  
1st Dept, 11/2/2006**

**Holding:** Family Court erred by permitting paternal relatives of the child to intervene. The relatives, with whom the child had been living without court consent, argued that Family Court Act 1035(f) permitted their intervention without the mother’s consent because the father, deceased, could not “appear” or consent. The child’s mother did appear and did not consent to the intervention. The statutory language is clear and the mother’s appearance and objection to intervention undisputed; the relatives may not intervene. *See Marylou L. v Tenecha L.*, 182 Misc2d 457, 459. The father’s death cannot be equated with a failure to appear. The statutory admonition that motions to intervene be “liberally granted” comes into play only after statutory criteria are met, which they are not here. The recent amendment of Family Court Act 1017 to expand the role of family members in article 10 proceedings did not impliedly repeal the parental consent requirement. Order reversed, motion denied, matter remanded. (Family Ct, New York Co [Schechter, JJ])

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

**Property Clerk of the Police Dept. of the City of New York v Harris, No. 8816, 1st Dept, 11/2/2006**

The respondent was arrested on drug charges and his vehicle seized by petitioners (the City). A vehicle retention hearing was held by an Office of Administrative Trials and Hearings (OATH) administrative law judge; the joint ownership of the vehicle by the respondent and his wife, who is also a respondent, was established. OATH directed release of the vehicle on the grounds that the City had not shown it could defeat an “innocent owner” defense by the respondent wife. *See Administrative Code of City of NY 14-140(e) (1)*; *see also Property Clerk v Pagano*, 170 AD2d 30, 34-35. The determination was upheld by Supreme Court in an article 78 proceeding.

**Holding:** The innocence of one co-owner does not end the City’s interest in the other co-owner’s share. Release of the vehicle pending a final determination would, as a practical matter, destroy the City’s ultimate right; retention of the vehicle by the City pending that determination does not put an innocent co-owner at risk of losing their interest because that co-owner would receive the appropriate share of forfeiture sale proceeds (minus administrative expenses). The City is entitled to protection of its potential right to forfeiture. *See County of Nassau v Canavan*, 1 NY3d 134, 144. While loss of the vehi-

cle may be a hardship, the result reached below would essentially rewrite the relevant legislation. Order reversed, determination annulled and vacated. (Supreme Ct, New York Co [Shulman, JJ])

**Counsel (Competence/Effective Assistance/Adequacy) (Standby and Substitute Counsel) COU; 95(15) (39)**

**People v Susankar, No. 8039, 1st Dept, 11/2/2006**

**Holding:** Substitute counsel represented the defendant at a post-verdict competency hearing to allow original counsel to testify, if necessary. After finding the defendant competent, the court proceeded with sentencing despite substitute counsel’s complaint that substitute counsel was not prepared to represent the defendant for sentencing. Substitute counsel indicated that original counsel would be available the next morning and that substitute counsel was not sufficiently familiar with the case and had not spoken to the defendant’s family. Original and substitute counsel should have made arrangements for one of them to be ready to proceed immediately to sentencing, but the implied single-day delay requested was unquestionably minimal and it is reasonable to conclude from the record that substitute counsel could not have effectively represented the defendant. *See People v Jones*, 15 AD3d 208. The court lacked reasonable grounds to deny the request. *See People v Stella*, 188 AD2d 318. Contrary to the dissent’s position, the issue was sufficiently preserved; the obvious intentions were clear and repeated pointless protests were not required. *See People v Mezon*, 80 NY2d 155, 160-161. Sentences vacated, remanded for resentencing. (Supreme Ct, New York Co [Yates, JJ])

**Dissent in Part, Concurrence in Part:** [McGuire, JJ] Substitute counsel did not ask for an adjournment. The protest, if construed as a request for a one-day adjournment, was untimely, coming after the prosecutor’s sentencing presentation. Granting relief encourages gamesmanship. *See People v Dekle*, 56 NY2d 835.

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

**Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and other Vehicles]) (Motions to Suppress) SEA; 335(10[a]) (45)**

**People v Long, No. 8827, 1st Dept, 11/14/2006**

**Holding:** The court did not err in summarily denying a motion to suppress on the grounds that the defendant “merely denied illegal activity and failed to address any of the allegations underlying her arrest.” Despite having

**First Department** *continued*

“ample access to relevant information” given the arrest write-up read in open court at arraignment, the prosecutor’s comments at that time, and the indictment and Voluntary Disclosure Form, the defendant set out only general denials failing to raise a factual dispute requiring a hearing. Her claims of innocent conduct in the vehicle that police stopped at the time of her arrest are unavailing. *See People v Jones*, 95 NY2d 721, 726. She gave no reason in a renewal motion for omitting the new allegations from the original motion to suppress. The trial testimony relied upon by the dissent has no retroactive application to pre-trial suppression motions. If considered, the evidence that the defendant and a codefendant sought to buy a camcorder with credit cards, but left the store after identification was requested, was sufficient to support a reasonable suspicion that criminal activity was at hand, justifying the subsequent police stop based on a call from the store. Judgment affirmed. (Supreme Ct, New York Co [Berkman, J at motions, Obus, J at renewal motions, trial, and sentence])

**Dissent:** [Catterson, JJ] There is no evidence supporting the stop of the defendant’s car. The defendant was entitled, at the least, to a suppression hearing.

**Contempt (General) (Procedure)** CNT; 85(8) (10)

**Juveniles (Parental Rights) (Visitation)** JUV; 230(90) (145)

**Matter of Roberto M. v Melanie D-B., No. 9135,  
1st Dept 11/14/2006**

**Holding:** In April 2005, a temporary order of protection was issued in this protracted and convoluted custody and visitation matter, to be in effect until June 23, 2005. Among its requirements was that the petitioner father not provide the paternal grandmother access to the child in question. On June 23, the court signed an order drafted by counsel that set out an expanded, unsupervised visitation schedule per an agreement of the parties. The order said nothing about barring contact with the paternal grandmother. Two months later the Law Guardian sought an order requiring supervision to be supervised because the petitioner had allowed contact with the paternal grandmother and told the child to lie about it. Although the Law Guardian did not seek to have the petitioner punished for contempt, the court advised that it would make a determination after hearing witnesses as to whether or not the petitioner had willfully violated a court order. At the next court date, the court determined without a hearing that the petitioner was in contempt, dismissed his visitation petition, and prohibited contact between the petitioner and his daughter. This was punishment for a claimed violation of a court order not committed in the court’s presence. *Cf* Judiciary Law 755. No statutorily

required notice was given, nor were other required procedures followed. *See* Judiciary Law 756. The lack of notice deprived the court of jurisdiction. *See Michael N.G. v Elsa R.*, 233 AD2d 264, 266. Orders reversed, petition reinstated, matter remanded for hearing and proceedings before a different judge. (Family Ct, Bronx Co [Martinez-Perez, JJ])

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

**Larceny (Elements) (Evidence) LAR; 236(17) (25) (40) (60)  
(Grand Larceny) (Lesser  
and Included Offenses)**

**People v Esquilin, No. 9252, 1st Dept, 11/16/2006**

**Holding:** The defendant’s conviction of third-degree grand larceny was based on legally sufficient evidence. His pattern of depositing empty envelopes at ATMs and making withdrawals before the envelopes could be examined supported an inference of larcenous intent. *See People v Grant*, 18 AD3d 235 *lv den* 5 NY3d 762. That intent was not negated by evidence that some money did keep flowing into his account. *See Matter of Reinaldo O.*, 250 AD2d 502, 503. The verdict was against the weight of the evidence as to the element that the stolen property exceed \$3,000 in value. The theft was of cash, not “an instrument constituting an evidence of debt.” *See* Penal Law 155.20(2) (a). The amount stolen was not the amount of the empty-envelope deposits; it was the amount of the defendant’s withdrawals offset by legitimate starting balances. During the period in question, that amount was \$1,967.60, which satisfies the amount required for fourth-degree grand larceny. *See* Penal Law 155.30(1). The particular circumstances do not require resentencing or a reduction of the two-to-four-year second felony offender sentence. Judgment modified, conviction reduced, and otherwise affirmed. (Supreme Ct, New York Co [Zweibel, JJ])

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

**Beverly B. v Rossannh B., No. 9298,  
1st Dept 11/16/2006**

**Holding:** The petitioner, a paternal grandmother, commenced a special proceeding under Domestic Relations Law 72 seeking visitation with her now-incarcerated son’s daughter. The child’s mother had relocated the child to the maternal grandparents’ in Florida. The referee “heard no formal testimony and received no documentary evidence.” The petitioner was repeatedly denied an opportunity to speak and was reprimanded for trying to present her position, while the attorney for the mother was allowed to make allegations without personal knowledge with regard to the petitioner’s residence and supervision of the child. While the court has discretion in determining whether a grandparent is to be allowed visitation and, if so, the extent of it, “such discretion cannot be exer-

**First Department** *continued*

cised until the court first apprises itself of the pertinent circumstances (*see Matter of Netfa P.*, 115 AD2d 390, 392 ...).” The court’s refusal to hear the petitioner was particularly egregious where the petitioner was appearing pro se. Order granting visitation once every three months, in Florida, for two hours in a public place, reversed, matter remanded for further proceedings before a different referee. (Family Ct, Bronx, Co [Cohen-Gallet, R])

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

**People v Gordon, No. 9573, 1st Dept, 11/16/2006**

**Holding:** The defendant’s conviction for first-degree assault is reduced to third-degree assault. The defendant and the complainant had an altercation after which the defendant drove his car toward the complainant, seriously injuring him. The defendant said he tried to get around the complainant and did not intend to hit him. The jury acquitted the defendant of attempted murder; his first-degree assault conviction was predicated on depraved indifference. *See* Penal Law 120.10(3). The evidence, viewed in a light most favorable to the prosecution, lacked proof of extreme brutality, risk to others, or other factor legally sufficient to support a finding that “the defendant acted with the culpable mental state of depraved indifference to human life.” *See People v Feingold*, 7 NY3d 233. The evidence does support a finding of recklessness, permitting a conviction of the lesser-included offense of third-degree reckless assault. *See* Penal Law 120.00(3); *People v Swinton*, 7 NY3d 776. Conviction of other offenses would also be supported by the evidence, but second-degree assault (Penal Law 120.05[4]) and second-degree vehicular assault (Penal Law 120.03[1]) are not proper lesser included offenses of depraved indifference assault under the impossibility test. *See People v Glover*, 57 NY2d 61, 64. Judgment modified, conviction reduced to third-degree assault, remanded for resentencing, and otherwise affirmed. (Supreme Ct, New York Co [Uviller, JJ])

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

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

**People v Cumberbatch, No. 8528, 1st Dept, 11/21/2006**

**Holding:** A defendant’s challenge to the voluntariness of a guilty plea based on alleged failure of the court to advise that the bargained-for sentence would include mandatory post-release supervision must be preserved for review. *See eg People v Alexander*, 21 AD3d 1223 *lv den* 5 NY3d 881. The Court of Appeals has defined post-release

supervision as a direct consequence of a plea, not a collateral one. *See People v Catu*, 4 NY3d 242; *People v Van Deusen*, 7 NY3d 744. In *People v Armstrong* (31 AD3d 291) and other cases this court has held failure to advise a defendant about post-release supervision to be so fundamental an error that preservation is not required. But there is no reason why ordinary rules of preservation should not apply. The defendant here could have raised the issue of post-release supervision at sentencing when he became aware that he would be subject to post-release supervision. He could have moved to vacate his conviction. He did not, denying the sentencing court the opportunity to fashion a remedy. “[I]t would be ill-advised to permit a defendant to raise an unpreserved claim of this type perhaps years after a criminal case has been concluded ...” Judgment affirmed. (Supreme Ct, New York Co [Goodman, JJ])

**Assault (Evidence) (General)** **ASS; 45(25) (27) (45)**  
**(Instructions)**

**People v McCallop, No. 9643, 1st Dept, 11/28/2006**

The defendant was convicted by a jury of second-degree assault (two counts), fourth-degree criminal mischief, fourth-degree possession of a weapon, fifth-degree possession of stolen property, and possession of burglar’s tools.

**Holding:** The assault found to be part of the commission or attempted commission of a felony (Penal Law 120.05[6]) was repugnant to the court’s charge where the defendant was acquitted of third-degree criminal mischief and attempted criminal mischief was not submitted or explained to the jury. *See People v Sanchez*, 128 AD2d 377. The defendant’s other issues are without merit. Judgment modified, second-degree assault under Penal Law 120.05(6) vacated and dismissed, and otherwise affirmed. (Supreme Ct, Bronx Co [Tallmer, JJ])

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

**People v Morales, No. 9672, 1st Dept, 11/30/2006**

**Holding:** The court’s finding that physical evidence recovered at the precinct from the defendant’s bag was seized incident to lawful arrest was not supported by the hearing evidence. The police lawfully arrested the defendant and inspected a bag in his vicinity, finding nothing. Hearing evidence suggested that the items found at the precinct were discovered during an inventory search, but the prosecutor did not argue that theory. *See People v Dodt*, 61 NY2d 408, 416. The prosecutor did not question the officer about inventory procedures. *See People v Galak*, 80 NY2d 715. The prosecutor even objected on relevance grounds when defense counsel sought to pursue the inventory search issue. Nor did the court mention an

**First Department** *continued*

inventory search. *Compare People v Velasquez*, 267 AD2d 64 *lv den* 94 NY2d 886. Denial of suppression was error, but harmless with respect to the sexual abuse and public lewdness convictions, both supported by overwhelming evidence, including the complainant's highly reliable testimony and corroboration by untainted evidence. There is a reasonable possibility that admission of the challenged knife contributed to the possession conviction. Judgment modified, motion to suppress granted, weapon possession conviction vacated, remanded for new trial on that count, and otherwise affirmed. (Supreme Ct, New York Co [Carro, JJ])

**Sentencing (Resentencing)** SEN; 345(70.5) (72)  
**(Second Felony Offender)**

**People v Medina, No. 9715, 1st Dept, 12/5/2006**

The defendant was convicted by a jury of selling drugs. Judgment was initially rendered Mar. 31, 2004, and amended by a second felony offender adjudication and sentencing on May 10, 2005. At the original sentencing proceeding, the prosecutor said it did not appear that the defendant was a predicate felon because of the passage of time since his prior conviction; no predicate felony statement was filed. The prosecutor was mistaken. There is no indication that the defendant defrauded the court as to his status. The prosecutor later realized the error, but filed only an order to produce the defendant, more than a year after the judgment. The supporting affirmation contained little information except an erroneous statement that the defendant was needed to dispose of a pending case. The prosecutor later filed a predicate felony statement and the court adjudicated the defendant a second felony offender, sentencing him accordingly.

**Holding:** A first felony offender sentence is invalid where the defendant is actually a second felony offender. *See People v Scarbrough*, 66 NY2d 673 *revg on dissenting op of Boomer, J*, 105 AD2d 1107. But a court's power to correct a substantively illegal sentence is purely statutory absent factors such as clerical error, inadvertence, or fraud. *See Matter of Campbell v Pesce*, 60 NY2d 165. Prosecutors may appeal sentences as illegal (CPL 450.20[4]) or move to set the sentence aside, within one year of the sentence. *See CPL 440.40[1]*. The filing here, even if treated as a 440.40 motion, was untimely. The court acted without authority. Judgment modified, original sentence reinstated, otherwise affirmed. (Supreme Ct, Bronx Co [Stadtmauer, JJ])

**Admissions (General)** ADM; 15(17) (22) (25)  
**(Interrogation) (Miranda Advice)**

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

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

**People v Kimes, No. 8251, 1st Dept, 12/7/2006**

The defendant was convicted by a jury of multiple counts of murder, robbery, burglary, and related charges relating to the high-profile disappearance of a woman whose property the defendant and codefendant had transferred to their control.

**Holding:** Under the emergency exception, the defendant's statements to a detective need not be suppressed even if she did ask for an attorney, where questioning was limited to the whereabouts of the missing woman. *See People v Krom*, 61 NY2d 187. Further, the safety exception of *New York v Quarles* (467 US 649 [1984]) applies to situations where a suspect has asked for counsel, and to the type of emergency that existed here. In any event, any error would be harmless given the independent testimonial, physical, and documentary circumstantial evidence here.

Hearsay statements made by the missing woman about her fear of and concerns about her tenant, the codefendant here, were properly admitted. They were not admitted for their truth but to show the woman's state of mind and future intent. *See People v James*, 93 NY2d 620. The statements made it unlikely that the missing woman had voluntarily transferred property to him and the defendant and were admissible pursuant to *Mutual Life Ins. Co. v Hillmon*, 145 US 285 (1892). No constitutional confrontation claim was asserted at trial and the issue is unpreserved. The other issues raised are without merit. Judgment affirmed. (Supreme Ct, New York Co [Altman, JJ])

**Second Department**

**Juveniles (Custody) (Permanent Neglect)** JUV; 230(10) (105)

**Matter of Anna Marie G. v Abduel G., 29 AD3d 992, 818 NYS2d 104 (2nd Dept 2006)**

**Holding:** The court erred in finding that the father permanently neglected the child in question. The petitioner failed to produce clear and convincing evidence of the father's failure to plan for the child for at least a year, as required. *See Social Services Law 384-b(7)(a), (3)(g)*. There was no evidence that two of the three elements of the service plan regarding the father had existed for at least a year. Nor did the petitioner sustain its burden of showing it had made the required diligent efforts to reunite the child with its father. The findings with respect to the mother support the findings as to her. The Law Guardian's brief sets out information about the child's current placement and her desire to reside with her father. Order modified, petition dismissed as to the father, provision transferring

**Second Department** *continued*

guardianship and custody for the purpose of adoption deleted, and matter remitted for new dispositional hearing. (Family Ct, Kings Co [Freeman, JJ])

<b>Auxiliary Services (Interpreters)</b>	<b>AUX; 54(30)</b>
<b>Counsel (Right to Counsel)</b>	<b>COU; 95(10)</b>
<b>Family Court (Violation of Family Court Orders)</b>	<b>FAM; 164(60)</b>

**Matter of Er-Mei Y. v Guo J.Y., 29 AD3d 1013, 816 NYS2d 539 (2nd Dept 2006)**

While the father was in court with counsel, the Administration for Children’s Services (ACS) filed a petition alleging he had violated an order of protection 18 days earlier by going to the foster home and threatening the child and, later, the foster father. Counsel’s request to confer with the father with an interpreter was denied. The father was remanded pursuant to Family Court Act 153. At a hearing two days later, a caseworker testified, over hearsay objections, about statements by the child, the child’s psychologist, and the foster father. The child testified briefly and nervously that her father had come to the foster home to “get ‘stuff.’”

**Holding:** Non-English speaking individuals threatened with incarceration are entitled, as a corollary of the constitutional right to counsel, to an interpreter. *See People v Ramos*, 26 NY2d 272, 274. There is a statutory right to counsel in proceedings alleging violation of a court order. Family Court Act 262(a)(vi). While the father had assigned counsel, he was denied an opportunity to confer with counsel through an interpreter, and was not advised of his rights to retain counsel and to an adjournment to confer with counsel. The hearing judge failed to assure that the father had been so advised. Deprivation of the right to counsel is fundamental error. *See Matter of Otto v Otto*, 26 AD3d 498. ACS failed to establish by a preponderance of the evidence that the father received notice of the order of protection’s terms. The court improperly relied on hearsay evidence. Order reversed, petition dismissed. (Family Ct, Queens Co [Richardson, JJ])

<b>Homicide (Manslaughter [Evidence]) (Murder [Degrees and Lesser Offenses] [Evidence])</b>	<b>HMC; 185(30[d]) (40[g] [j])</b>
---	------------------------------------

**People v McMillon, 31 AD3d 136, 816 NYS2d 167 (2nd Dept 2006)**

**Holding:** The Court of Appeals left open in *People v Suarez* (6 NY3d 202) the question of what relief is appropriate when evidence is found on appeal to be legally

insufficient to support a conviction of depraved indifference murder. Here, the defendant fired only once, from at least five feet away, and claimed that his intent was not to kill but only to frighten the decedent, with whom he had been fighting after the decedent waved a knife. This cannot be said to be one of the rare cases where reversal of a depraved indifference murder is required because a manifest intent to kill was established. *See People v Payne*, 3 NY3d 266, 271. But “the evidence did not establish the degree of depravity and indifference to human life required for depraved indifference murder.” One person’s attack on another almost never meets the requirements for this crime. “[T]he evidence was sufficient to establish the lesser-included offense (*See People v Magliato*, 110 AD2d 266, *aff’d* 68 NY2d 24. . .).” The conviction is reduced to second-degree manslaughter. *Cf People v Howe*, 49 AD2d 604, *People v Santucci*, 48 AD2d 909, *People v Klosis*, 48 AD2d 705. Judgment modified, and as modified, affirmed, remitted for resentencing. (Supreme Ct, Kings Co [Chambers, JJ])

<b>Juries and Jury Trials (Constitution—Right To)</b>	<b>JRY; 225(20)</b>
---	---------------------

<b>Sentencing (Appellate Review) (Excessiveness) (General)</b>	<b>SEN; 345(8) (33) (37)</b>
--	------------------------------

**People v Simmons, 29 AD3d 1024, 815 NYS2d 484 (2nd Dept 2006)**

**Holding:** The defendant, with no prior felony convictions or history of violent crime, declined a plea offer of a determinate term of eight years imprisonment. The more culpable co-defendant pled to first-degree robbery and first-degree burglary and received a determinate sentence of 15 years. After a jury trial, the defendant was sentenced to a determinate sentence of 25 years. He did not preserve for review the contention that he was improperly penalized for exercising his right to trial, failing to raise it at the time of sentencing. *See People v Hurley*, 75 NY2d 887. The issue is reached in the interest of justice. *See People v Clark*, 6 AD3d 1066. The circumstances do raise the inference that the defendant was improperly penalized for going to trial. *See People v Morton*, 288 AD2d 557 *cert den* 537 US 860. Judgment modified, sentence reduced to 15 years, and as modified, affirmed. (County Ct, Nassau Co [Cotter, JJ])

<b>Evidence (Hearsay)</b>	<b>EVI; 155(75)</b>
---------------------------	---------------------

<b>Juveniles (Permanent Neglect)</b>	<b>JUV; 230(105)</b>
--------------------------------------	----------------------

**Matter of Jonathan R. v Michael R., 30 AD3d 426, 817 NYS2d 335 (2nd Dept 2006)**

**Holding:** “The Family Court properly admitted the child’s case file into evidence as a business record (*see*

**Second Department** *continued*

CPLR 4518[a]; *Heft v Bellin*, 137 AD2d 406, 408. . .)“ The agency presented evidence that it “facilitated contact between the incarcerated father and the child’s foster parents, facilitated several visits between the father and the child, including one at an upstate correctional facility, and apprised the father of the child’s progress with information and photographs.” The father adduced no evidence of making any plan for the child future other than wanting to retain parental rights. The permanent neglect finding, and the finding that the best interests of the child would be served by terminating the father’s parental rights to free the child for adoption by the foster parents (see Family Court Act 631) were proper. Order affirmed. (Family Ct, Richmond Co [Porzio, JJ])

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

**Matter of Ice S. v. Silva S., 30 AD3d 428, 816 NYS2d 557 (2nd Dept 2006)**

**Holding:** Visitation with a parent is generally presumed to be in a child’s best interest. The parent’s incarceration does not, alone, make visitation inappropriate. See *Matter of Crowell v Livziey*, 20 AD3d 923. “Contrary to the Law Guardian’s contention, there is no evidence that supervised telephone contact between the incarcerated father and the subject children ‘would be inimical to the [children’s] welfare’ (*Matter of Anaya v Hundley*, 12 AD3d 594, 596. . .).” Most of the material cited came from a pending dispositional hearing or was dehors the record and could not be considered on appeal. See *gen Matter of GG*, 285 AD2d 678, 679. Order affirmed. (Family Ct, Queens Co [Richardson, JJ])

**Instructions to Jury (Preliminary Instructions) ISJ; 205(48)**

**People v Harper, 32 AD3d 16, 818 NYS2d 113 (2nd Dept 2006)**

**Holding:** The defendant asserted that under *People v Mollica* (267 AD2d 479), the court erred in explaining in preliminary jury instructions the elements of each of three robbery counts. The rule in *Mollica* is now rejected. It was an extension of the holding in *People v Townsend* (67 NY2d 815), which said it was reversible error to give juries written statements of the elements before opening statements. The Court of Appeals has never extended *Townsend* beyond the issue of written instructions, and no other intermediate appellate court has adhered to the *Mollica* rule. Meanwhile, research and innovation with regard to jury improvement has led to a favorable view of preliminary instructions as providing introduction and guidance. See American Bar Association, Principles for Juries and

Jury Trials, Commentary, at 33. Studies show that substantive preliminary instructions make it easier for juries to understand evidence as it is presented and to understand the burden of proof. See Final Report of the Committees of the Jury Trial Project of the New York State Unified Court System, at 31. Preliminary instructions in criminal cases still raise concern. Instructions given on elements without also instructing on the presumption of innocence, burden of proof, assessment of witness credibility, and the need to withhold any conclusion-making until the close of evidence would be problematic. See *People v Morris*, 162 Misc2d 742, 742. The preliminary instructions here were limited to distinguishing among the three counts, arising from a single incident, and were well within the court’s discretion. Judgment affirmed. (Supreme Ct, Kings Co [Rappaport, JJ])

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

**Matter of Miguel M.-R. B. v Monique B., 30 AD3d 514, 817 NYS2d 900 (2nd Dept 2006)**

**Holding:** In proceedings concerning termination of the mother’s parental rights based on her mental illness, her motion to vacate the order entered upon her default was denied. An *Anders* (*Anders v California*, 386 US 738 [1967]) brief was filed by assigned counsel representing the mother on appeal of the termination of her parental rights. “Based on the mother’s supplemental pro se brief, and our independent review of the record, we conclude that there are nonfrivolous issues including, but not necessarily limited to, whether the mother provided a reasonable excuse for her failure to appear at the combined fact-finding and dispositional hearing (see CPLR 5015[a][1]).” Motion to be relieved granted, new counsel assigned. (Family Ct, Queens Co [Richroath, JJ])

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

**People v Echevarria, 30 AD3d 537, 816 NYS2d 364 (2nd Dept 2006)**

**Holding:** Under the circumstances here, the Supreme Court improvidently exercised its discretion in discharging a sworn juror. See CPL 270.35. While scheduled for a future medical examination, the juror was not unavailable at the time he was discharged. Nor did this juror’s observance of the Jewish Sabbath render him unavailable for continued service. See *eg* CPL 270.35[1]; *People v Page*, 72 NY2d 69. While the juror was anxious, there was no indication that he could not be fair and impartial. See *People v Grace*, 243 AD2d 579. He stated during voir dire that he could be fair and impartial and was not “grossly unqualified.” Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Chambers, JJ])

**Second Department** *continued*

**Identification (Eyewitnesses) IDE; 190(10) (50) (57)**  
**(Suggestive Procedures)**  
**(Wade Hearing)**

**People v Mims, 30 AD3d 539, 817 NYS2d 356**  
**(2nd Dept 2006)**

At a *Wade* hearing (*US v Wade*, 388 US 218 [1967]), a complainant testified that while waiting outside the precinct to view a lineup he saw a man in handcuffs and wearing a white shirt being brought in by detectives. The complainant followed them in and told the desk officer that the man was the robber. The officer gave a disapproving expression. No other officers were informed. At the lineup, the complainant picked out the defendant, who was the only one wearing a white shirt. The motion to suppress identification was denied. At trial the complainant was unable to make an in-court identification.

**Holding:** The lineup was unduly suggestive where the witness had informed the police of the outside viewing, 30 minutes before the procedure, and the defendant was the only one wearing a white shirt. The defendant is entitled to a new trial on count one. *See People v Wilson*, 5 NY3d 778. The defendant's other issues are rejected. Judgment modified, remanded for independent source hearing and new trial. (Supreme Ct, Kings Co [Collini, JJ])

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

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

**People v Rosas, 30 AD3d 545, 818 NYS2d 126**  
**(2nd Dept 2006)**

The defendant was convicted by a jury of first degree-murder (two counts), second-degree murder (two counts), and second-degree criminal possession of a weapon. The court sentenced him to two consecutive terms of life imprisonment without parole on for first-degree murder, to run concurrently with two consecutive indeterminate terms of imprisonment of 25 years to life for second-degree murder, and an indeterminate term of imprisonment of 7½ to 15 years for weapons possession, to run concurrently with the sentences for first degree-murder.

**Holding:** The convictions and sentences for second-degree murder must be dismissed; those charges were inclusory concurrent counts of first-degree murder. *See People v Rodriguez*, 7 AD3d 545, 546 *affd* 6 NY3d 295. The shooting of a husband and wife at the same time, although alleged in two counts of the indictment, was part of the same criminal transaction; the defendant was charged with double murder under Penal Law 125.27(1)(a)(viii). Consecutive sentences of life imprison-

ment without parole for the two counts of first-degree murder violated Penal Law 70.25(1) and (2), and should run concurrently. The murder of the wife was a material element of the offense as to the husband and vice versa. *See People v Ramirez*, 89 NY2d 444, 451. Judgment modified, second-degree murder convictions vacated and dismissed, all sentences made concurrent, and as modified, affirmed. (Supreme Ct, Queens Co [Eng, JJ])

**Alibi (General) (Instructions) ALI; 20(22) (25)**

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

**People v Brown, 30 AD3d 609, 817 NYS2d 139**  
**(2nd Dept 2006)**

**Holding:** The court improperly rejected a request for an alibi charge where the defendant testified that he was elsewhere at the time of the attempted murder. *See People v Warren*, 76 NY2d 773, 775. And the court should have permitted the jury to consider as partial alibi testimony what the defendant's sister-in-law said concerning his whereabouts shortly before the event. *See People v Holt*, 67 NY2d 819, 821. Since evidence of the defendant's guilt was not overwhelming, the failure to give the requested alibi instruction was error requiring reversal. *See gen People v Watts*, 57 NY2d 299, 301.

Reversal would also have been required based on prosecutorial misconduct during the cross-examination of a defense witness and upon summation. The prosecutor, who suggested that defense counsel did not believe his own client, made public safety arguments, and implied that certain key evidence had been kept from the jury due to legal technicalities, presented himself as an unsworn witness; the errors cumulatively deprived the defendant of his right to a fair trial. *See People v Calabria*, 94 NY2d 519. Judgment reversed and remanded for new trial. (Supreme Ct, Queens Co [Katz, JJ])

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

**People v Flock, 30 AD3d 611, 817 NYS2d 369**  
**(2nd Dept 2006)**

The defendant pled guilty to third-degree possession of stolen property and sentenced to 3 to 6 years in prison.

**Holding:** The charge had been reduced by court order from third- to fifth-degree possession of stolen property due to legally insufficient evidence. *See CPL 210.20 (1-a)*. The prosecution neither filed a reduced indictment nor exercised any of their other options pursuant to CPL 210.20 (6) within 30 days following the entry of the order. The defendant then mistakenly pled guilty to the original charge, but the only count that remained viable after expiration of the 30-day stay was the reduced offense. *See People v Jackson*, 87 NY2d 782, 784. The prosecution conceded that the judgment should be modified to reflect the

**Second Department** *continued*

reduction. See *People v Ortiz*, 297 AD2d 758. Judgment modified, conviction reduced, sentenced reduced to a determinate term of one year. (Supreme Ct, Queens Co [Rotker, JJ])

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

**People v Garrison, Jr., 30 AD3d 612, 818 NYS2d 141 (2nd Dept 2006)**

**Holding:** The defendant was tried for attempted grand larceny and possession of a forged instrument. During jury selection, a prospective juror indicated that he might give more weight to a police officer’s testimony than to that of a civilian. Also, he had been the victim of an identity theft, a crime similar in nature to the one being tried, and stated he was “not sure” if he could judge the case fairly. The defendant’s challenge for cause was denied, and he was forced to use his last peremptory challenge. The prosecution conceded that the prospective juror’s answers revealed a state of mind likely to preclude him “from rendering an impartial verdict based upon the evidence adduced at the trial.” See CPL 270.20[1][b]; *People v Johnson*, 94 NY2d 600, 614. Judgment reversed and remanded for new trial. (County Ct, Nassau Co [Kase, JJ])

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

**People v Brazil, 31 AD3d 461, 819 NYS2d 274 (2nd Dept 2006)**

**Holding:** The defendant’s CPL 440.10 motion to vacate his conviction for murder and related offenses was denied by the court without a hearing. The defendant claimed that an uncorroborated anonymous tip did not supply reasonable suspicion for a stop-and-frisk within the meaning of *Terry v Ohio* (392 US 1 [1968]). The decision in *Florida v JL* (529 US 266, 275 [2000]) was issued while the defendant’s application for leave to appeal from the decision of Appellate Division, affirming his conviction, was still pending in the Court of Appeals. Therefore, *Florida v JL* was issued before the defendant’s conviction became final. See *Schriro v Summerlin*, 542 US 348, 350-351 (2004). The trial court erred in determining that *Florida v JL* could not “retroactively” be applied to the defendant’s motion.

The record of the original suppression hearing is insufficient to determine whether *Florida v JL* is applicable. The source of the information from an unidentified caller and the time at which the police learned of the complainant’s existence were not explored. The prosecution is

entitled to an opportunity to show that the police conduct was lawful. See *People v Crandall*, 69 NY2c 459, 464-465. A new suppression hearing was required to determine the source of the tip. Upon reargument, prior decision recalled, matter remitted for a hearing. (Supreme Ct, Kings Co [Feldman, JJ])

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

**People v Lisle-Cannon, 31 AD3d 467, 820 NYS2d 280 (2nd Dept 2006)**

The defendant pled guilty to attempted second-degree kidnapping. His actions were motivated by financial gain, not sex. Nonetheless, he was certified as a sex offender. Correction Law 168-a[1], [2][a][i], 168-d[1][a]. He was assigned a risk level of one under the Sex Offender Registration Act (SORA). His motion under CPL 440.20(1) to extinguish his obligation to register under SORA because the statute was unconstitutional as applied to him was denied.

**Holding:** A CPL 440.20(1) motion to set aside a sentence was not the correct method to challenge a SORA certification, since risk assessment was part of the conviction, not the sentence. See Correction Law 168-d[1][a], *People v Hernandez*, 93 NY2d 261; *People v Mitchell*, 300 AD2d 377, 378. However, the defendant is free to seek relief under CPL 440.10. Order affirmed. (Supreme Ct, Kings Co [Ambrosio, JJ])

**Identification (Eyewitnesses) (General) (In-court)** **IDE; 190(10) (17)**

**People v Pittman, 31 AD3d 469, 817 NYS2d 636 (2nd Dept 2006)**

**Holding:** Police chased the defendant’s car until he stopped. Then he fled leaving a female passenger behind. Later she identified the defendant as the driver. At the station, the detective who pursued the defendant’s car found his photographic identification card and determined that it was the defendant he saw fleeing the vehicle. Ten days later the defendant was arrested for resisting arrest and the detective confirmed his identification after viewing him in the jail cell. At a pretrial hearing, the court erroneously found the two identifications were confirmatory. The nature of the identifications by the passenger and the detective were not confirmatory. See *People v Boyer*, 6 NY3d 427. An independent source hearing was required regarding the in-court identification by the officer. Judgment reversed, hearing and trial ordered. [County Ct, Dutchess Co (Dolan, J)]

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

**Second Department** *continued*

**People v Abdullah, 31 AD3d 515, 818 NYS2d 267  
(2nd Dept 2006)**

In 1991, the defendant pled guilty to first-degree sexual abuse, based on an event occurring in 1988, and was sentenced to five years probation. During the term of his sentence the Sex Offender Registration Act (SORA) went into effect (1996). Correction Law article 6-C. He was administratively assigned a level three risk offender designation. At a redetermination hearing in 2004 (*see Doe v Pataki*, 3 FSupp2d 456), the defendant’s risk level was confirmed based on the Risk Assessment Instrument (RAI) point score.

**Holding:** A court is empowered to depart from a presumptive risk level based on the record. *See VanDover v Czajka*, 276 AD2d 945. The hearing court should have departed from the presumptive risk level. *See People v Collazo*, 7 AD3d 595. There was convincing evidence that the defendant has been rehabilitated and led an exemplary life for the last 17 years. This mitigating factor was not taken into account by the SORA Guidelines or RAI, or sufficiently considered by the court. Also, since the defendant had abstained from drug or alcohol use for over 15 years, the court incorrectly assessed him 15 points for that risk factor, raising his total to 125. *See People v Villane*, 17 AD3d 336. Judgment reversed, defendant reclassified as a level two sex offender. (Supreme Ct, Westchester Co [Bellantoni, JJ])

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

**People v Ruddy, 31 AD3d 517, 818 NYS2d 271  
(2nd Dept 2006)**

**Holding:** The court improperly assessed the defendant as a level two sex offender. Ten points were wrongly added under Risk Factor 15 (*see* Correction Law article 6-C, Sex Offender Registration Act) because his living situation was uncertain. The Guidelines and Commentary assess points if the living situation is “inappropriate,” such as a child molester living near an elementary school. *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* at 17 [1997 ed]. The defendant, at most, fluctuated between homelessness and living in a “sober house.” There was no clear and convincing evidence that this situation was improper. *See* Correction Law 168-n[3]; *People v Hampton*, 300 AD2d 641. Reducing the total score by ten points leaves a total 70, which warrants a reduction in risk level. Judgment reversed, defendant reclassified as a level one sex offender. [County Ct, Westchester Co (Alessandro, JJ)]

**Dissent:** [Rivera, JJ] Evidence at the hearing showed that defendant was homeless, itinerant, and the uncertainty of his situation gave him access to potential victims,

contrary to the purpose of the statute. *See People v Wroten*, 286 AD2d 189, 197, quoting L 1995, ch 192 § 1.

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

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

**People v Green, 31 AD3d 578, 818 NYS2d 262  
(2nd Dept 2006)**

**Holding:** The appellant, pro se, sought a writ of error coram nobis to vacate his sentence on the ground of ineffective assistance of appellate counsel. The issue of whether the sentencing court failed to properly determine the defendant’s status as a second violent felony offender was not adequately presented and supported on appeal. There was apparently conflicting documentation about a 1989 conviction; the court must determine whether that conviction was for a violent felony. On reargument, judgment modified, sentence vacated, remanded for resentencing [Supreme Ct, Queens Co]

**Robbery (Elements) (Evidence) ROB; 330(15) (20)**

**People v Pierrot, 31 AD3d 582, 817 NYS2d 524  
(2nd Dept 2006)**

**Holding:** The prosecution failed to present legally sufficient evidence of physical injury to sustain the defendant’s conviction of second-degree robbery. *See* Penal Law 160.10(2)(a). Physical injury had to be an “impairment of physical condition or substantial pain.” Penal Law 10.00(9). The evidence fell below the legal threshold necessary to send this question to the jury. *Matter of Philip A.*, 49 NY2d 198, 200. It was legally insufficient to show that the complainant sustained physical injury. *See People v Almonte*, 23 AD3d 392 *lv den* 6 NY3d 831. Judgment modified, second-degree robbery conviction dismissed, sentence thereon vacated. (Supreme Ct, Queens Co [Rosenzweig, JJ])

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

**People v Jones, 31 AD3d 666, 818 NYS2d 285  
(2nd Dept 2006)**

**Holding:** The prosecutor failed to correct false trial testimony by one of his witnesses, which he had a duty to do. *See People v Steadman*, 82 NY2d 1. A witness falsely testified that she had identified the defendant’s nephew in a lineup as one of two people who shot at a group that included the decedent. The prosecutor did not make any effort to correct this false statement. This was not harmless error and required a new trial. *See Napue v Illinois*, 360 US 264, 269-270 (1959). Additionally, the prosecutor

**Second Department** *continued*

improperly vouched for the credibility of an eyewitness, saying “she was ‘not making [testimony up] out of the blue,’” which should not be repeated at the new trial. *See People v Walters*, 251 AD2d 433. Judgment reversed, new trial ordered before a different justice. (Supreme Ct, Kings Co [Tomei, JJ])

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

**People v Vielman, 31 AD3d 674, 818 NYS2d 291 (2nd Dept 2006)**

**Holding:** The prosecutor made an improper closing argument that the defendant fabricated, after hearing other witnesses, his testimony related to the burglary count of the indictment, when in fact the defendant’s statements had been consistently exculpatory. The remarks were based on a false premise and intended to mislead the jury. *People v Rose*, 307 AD2d 270, 271, 761 NYS2d 686. Although the prosecution does not oppose reversal of the burglary offense, they contend that the error did not affect the bail-jumping count. However, there was a “reasonable possibility” that the misconduct influenced the jury’s verdict on that count in a meaningful way. *See People v Doshi*, 93 NY2d 499, 505, 693. The jury was required to assess the credibility of the defense as to that count as well. And the court instructed the jury that false evidence by a witness on one material fact allowed them to disregard their entire testimony. This unreserved error is reached in the interest of justice. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Demarest, JJ])

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

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

**People v Kozlow, 31 AD3d 788, 821 NYS2d 212 (2nd Dept 2006)**

**Holding:** The evidence was legally insufficient to support the defendant’s convictions of attempted first-degree disseminating indecent material to minors. *See Penal Law 110.00, 235.22*. The prosecution did not show “that the defendant’s internet communications with an undercover police officer whom he believed to be a minor ‘depict[ed]’ sexual conduct within the meaning of Penal Law § 235.22 (1), since they contained no visual, ‘sexual images’ *People v Foley*, 94 NY2d 668, 681 *cert denied* 531 US 875; *see Penal Law § 235.21[1], [1]*.” Judgment reversed, indictment dismissed. (County Ct, Westchester Co [Alessandro, JJ])

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

**Post-Judgment Relief (General)**

**PJR; 289(20)**

**People v Byrdsong, 33 AD3d 175, 820 NYS2d 296 (2nd Dept 2006)**

**Holding:** DNA testing under CPL 440.30(1-a) is not available to the defendant, who pled guilty. In 1981 the complainant was attacked by three men, raped and robbed. She identified the defendant from photographs and a lineup. A fingerprint recovered from the scene was not the defendant’s. The other two accomplices were never identified or apprehended. The defendant’s guilty plea to first-degree robbery to cover all charges was affirmed. In 2000, the defendant’s motion for DNA testing was denied because the statute contemplates a trial, making relief was unavailable to someone who pled guilty. The defendant filed a direct appeal. CPL 450.10(5). Before the enactment of CPL 440.30(1-a), a post-conviction application for DNA testing was treated as an application for discovery. CPL 440.10(1)(g); *People v Callace*, 151 Misc2d 464. This required a guilty verdict after trial. And CPL 440.30(1-a) tracked the language of CPL 440.10(1)(g) by imposing a requirement that there was a reasonable “probability” that “the verdict would have been more favorable to the defendant” had the DNA evidence been admitted at “the trial.” It was up to the legislature to amend the statute if it intended to allow defendants who plead guilty to seek relief through DNA testing. Judgment affirmed. (Supreme Ct, Queens Co [Goldstein, JJ])

**Speedy Trial (Prosecutor’s Readiness for Trial) (Statutory Limits) SPX; 355(32) (45)**

**People v Williams, 32 AD3d 403, 821 NYS2d 604 (2nd Dept 2006)**

**Holding:** The defendant was arrested on Sept. 18, 2000 on burglary and related charges. The grand jury indicted him on Oct. 25, 2000. The prosecution’s statement of readiness for trial, dated Oct. 26, 2000, was made prior to the filing of the indictment on Oct. 31, 2000, and 30 days before the defendant’s arraignment on Nov. 30, 2000. Thus, it was an illusory statement of readiness and inadequate to toll the time. *See People v England*, 84 NY2d 1. The court erroneously excluded the 30-day period from Oct. 31 to Nov. 30, 2000; correct calculation increases the 131 days to 161 days. It miscalculated the days between Oct. 25 and Oct. 31, 2000, requiring that an additional day be charged to the prosecution, increasing the total to 162 days. Nov. 8 to Nov. 13, 2001 was an adjournment at prosecution request and in the defendant’s absence, increasing the total to 167 days. *See People v Nielsen*, 306 AD2d 500, 501. A consent adjournment, a period of 15 days from Feb. 7 to Feb. 22, 2002, was improperly excluded; there was nothing in the record to show the defendant’s agreement, increasing the total to 182 days. *See People v Liotta*, 79

**Second Department** *continued*

NY2d 841, 843. However, post-readiness delay for the appointment of counsel should not have been attributed to the prosecution; the three-day period from April 23 to April 26, 2002 must be subtracted, leaving 179 days. See CPL 30.30[4][f]; *People v Correa*, 77 NY2d 930, 931. The prosecution did not exceed speedy trial limits; they were ready for trial within 181 days of the start of the criminal action. See CPL 30.30(1)(a); *People v Goss*, 87 NY2d 792. Judgment affirmed. (Supreme Ct, Queens Co [Rotker, JJ])

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

**Matter of Bascombe v Bascombe, 32 AD3d 470, 819 NYS2d 472 (2nd Dept 2006)**

**Holding:** Family Court found that the petitioner wife’s application for an order of protection against her husband was not supported by a preponderance of the evidence showing that a family offense had occurred. The Court erred in not giving collateral estoppel effect to the husband’s plea-based conviction for second-degree harassment arising from the same facts. See *Lili B. v Henry F.*, 235 AD2d 512. Order reversed, petition reinstated, matter remanded for a dispositional hearing and appropriate order of disposition. (Family Ct, Kings Co [Cammer, JHO])

**Identification (Eyewitnesses) IDE; 190(10) (40) (57)**  
**(Show-ups) (Wade Hearing)**

**People v Moses, 32 AD3d 866 (2nd Dept 2006)**

At a *Dunaway/Wade* hearing, only the arresting officer testified. After receiving a radio communication he came to the scene, spoke with the complainant, then heard by radio that a person had been stopped at a nearby intersection. The officer drove the complainant there; the defendant was leaning against an unmarked police car between two plainclothes police officers wearing “NYPD” jackets. The complainant identified him as the man who broke into her home. Neither of the plainclothes officers testified at the hearing, and suppression of the identification was denied. The complainant identified the defendant at trial and described her previous identifications.

**Holding:** The prosecution presented no evidence to show that the defendant was lawfully stopped and detained before the complainant identified him. See *People v Dodt*, 61 NY2d 408. The original radio communication about a robbery in progress, assuming the undercover officers heard it, was insufficient to provide a legal basis for stopping the defendant. See *People v King*, 274 AD2d 669. The arresting officer’s vague and equivocal hearsay testimony about a statement made by a plainclothes officer was also inadequate. Reargument granted, prior deci-

sion vacated, burglary and other counts reversed, matter remanded for an independent source hearing and new trial; bail jumping conviction affirmed. (Supreme Ct, Kings Co [Balter, JJ])

**Identification (Eyewitnesses) IDE;**  
**(Show-ups) (Wade Hearing)**

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

**In the Matter of Emmanuel O., 32 AD3d 948, 821 NYS2d 255 (2nd Dept 2006)**

Two plainclothes officers approached the appellant and his two friends in the vestibule of a residential building. One officer claimed that it was a high crime area and he learned from an anonymous source that there was party going on there. He asked the youths for identification; the appellant ran into the building. The police chased him. He dropped a firearm. When he was arrested they found drugs on him. He was charged with weapons and drug possession. A motion to suppress was denied.

**Holding:** The appellant’s opening the inner door of the vestibule and running inside the building were insufficient under the circumstances to support a finding of reasonable suspicion that he was engaged in criminal activity. See *People v Brogdon*, 8 AD3d 290. Therefore, the officer had no legal authority to order him to stop. Evidence recovered as a result of the chase should have been suppressed. Order reversed. (Family Ct, Kings Co [Weinstein, JJ])

**Dissent:** [Rivera, JJ] The appellant’s flight and the surrounding circumstances provided reasonable suspicion to justify police pursuit. See *People v Woods*, 98 NY2d 627, 628.

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

**People v Richards, 32 AD3d 545, 821 NYS2d 104 (2nd Dept 2006)**

The defendant was arrested after police responded to a call that he had robbed and assaulted his girlfriend. She said that he had weapons in his nearby car. The police searched it and found a firearm and a machete. The defendant was charged only with weapons possession. The trial court, rejecting the police testimony that the defendant consented to the search, suppressed the evidence. On reargument, it denied suppression.

**Holding:** The search of the car did not fall under the automobile exception to the warrant requirement. See *People v Blasich*, 73 NY2d 673, 678. The weapons were not in plain view, and the complainant did not indicate that

**Second Department** *continued*

any were used in the assault. The police did not have probable cause to believe that the car contained evidence related to the crimes of assault or robbery. See *People v Belton*, 55 NY2d 49, 55. Since the vehicle search was unrelated to the crime for which the defendant was being arrested, it had to meet the *Aguilar-Spinelli* test—reliability of the complainant and basis of her knowledge. See *Aguilar v Texas*, 378 US 108 (1964); *Spinelli v United States*, 393 US 410 (1969). While the complainant was an identified citizen and presumed reliable, there was no proof of the source of her knowledge. See *People v Parris*, 83 NY2d 342, 350. The evidence was properly suppressed in the first instance. Judgment reversed, indictment dismissed. (Supreme Ct, Kings Co [Dowling, JJ])

**Driving While Intoxicated (General)      DWI; 130(17)**

**People v Litto, \_\_AD3d\_\_, 822 NYS2d 130  
(2nd Dept 2006)**

The defendant allegedly inhaled a portion of the contents of a spray can of “Dust-Off,” veered into oncoming traffic and killed another motorist. He was charged with second-degree vehicular manslaughter (Penal Law 125.12) and driving while intoxicated (DWI). See Vehicle and Traffic Law 1192(3). The court dismissed the charges because the intent of the DWI law limits its application to intoxication caused by alcohol.

**Holding:** The legislative history, intent and structure of Vehicle and Traffic Law 1192(3) supported the conclusion that it was limited to alcohol related driving offenses. See *People v Grinberg*, 4 Misc3d 670, 676, quoting Letter of Senator Norman F. Lent, June 7, 1966, Bill Jacket, L 1966, ch 963. Vehicle and Traffic Law 1192(4) was enacted to preclude operation of a motor vehicle while under the influence of drugs or narcotics. Intoxication has been defined as a greater degree of impairment caused by voluntarily ingesting alcohol. See *People v Cruz*, 48 NY2d 419. Order affirmed. (Supreme Ct, Kings Co [Walsh, JJ])

**Dissent:** [Ritter, JJ] An “intoxicated condition” within the meaning of the statute embraced more than alcohol consumption. This phrase has never been explicitly defined by the legislature, and cases have applied it to drug induced states. See *People v Koch*, 250 AD 623, 624. There is a gap because not all non-alcohol intoxicating substances are listed in Public Health Law 3306 apropos Vehicle and Traffic Law 1192(4).

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

**People v Rodriguez, 2006 NY Slip Op 7385  
(2nd Dept 2006)**

The defendant, a prisoner at Sing Sing Correctional Facility, was the subject of repeated and unwanted sexual advances by the deceased, a fellow prisoner. When the deceased’s advances turned physical, the defendant pursued and attacked him with a knife. The defendant was indicted for intentional murder and depraved indifference murder. Evidence at trial showed that another inmate advised the defendant that the deceased only responded to the use of force, and the defendant told police that he had not intended to kill him. He was acquitted of intentional murder and convicted on the depraved indifference count.

**Holding:** Viewing the evidence in the light most favorable to the prosecution (*People v Contes*, 60 NY2d 620), the evidence was legally insufficient to establish the defendant’s guilt of depraved indifference murder. See *People v Suarez*, 6 NY3d 202. That the defendant stabbed the deceased three times showed a conscious effort to harm him, but not an intent to kill. See Penal Law 15.05(1); *People v McMillon*, 31 AD3d 136, 140, n1. A rational trier of fact could have concluded that the killing was reckless, but not depraved. Conviction for second-degree murder reduced to second-degree manslaughter. Judgment modified and remanded for resentencing. (County Ct, Westchester Co [Zambelli, JJ])

**Third Department**

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

**People v Muir, \_\_AD3d\_\_, 823 NYS2d 236  
(3rd Dept 2006)**

The defendant was indicted in April 2003 on charges arising from a November 2002 automobile accident involving alcohol. In September 2003, the court dismissed the second-degree vehicular assault charge upon the defendant’s motion that the count was duplicitous. The prosecution sought an adjournment and appealed that dismissal. When the appeal had not been perfected after two years, County Court dismissed the entire indictment on speedy trial grounds, which the prosecution also appealed.

**Holding:** The record belies the prosecution’s claim that the adjournment for appeal did not impact their readiness for trial. The request for adjournment was reasonable but the length of delay was not. The appeal was not perfected within the time limit set by appellate rules (see 22 NYCRR 800.14[b], [c]), and no reason has been offered for the two-year delay. Postreadiness delay attributable to the prosecution’s inaction and directly implicating their ability to go to trial can be charged to them. See *People v Rouse*, 4 AD3d 553, 556 *lv den* 2 NY3d 805. The appeal as to the initial dismissal of the assault count is academic in light of the dismissal of the indictment. Order

**Third Department** *continued*

of Dec. 22, 2005 affirmed, order of Sept. 24, 2003 dismissed. (County Ct, Broome Co [Smith, JJ])

**Defenses (Justification) DEF; 105(35)**

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

**People v Young, No. 15807, 3rd Dept, 10/26/2006**

The defendant was convicted of first-degree murder and related offenses. The decedent and others had been driving around looking for the defendant, allegedly to shoot him. When the group found the defendant, a gunfight erupted and the defendant shot the decedent.

**Holding:** The court erred in failing to instruct the jury on the defendant’s justification defense. The defendant argued that while there was evidence of a murder for hire conspiracy between the defendant and another, the decedent and his companions were the initial aggressors and the defendant acted justifiably in self-defense. The court told the jury to disregard the presence and conduct of the decedent’s cohorts in deciding whether the defendant reasonably believed that imminent deadly physical force was being or was about to be used against him. The objective element of the justification defense requires that the totality of the circumstances at the time of the defendant’s use of force be considered. *See People v Wesley*, 76 NY2d 555, 559. A jury should be instructed to consider not just a victim’s actions at the time but any evidence presented about prior acts of the victim known to the defendant, the physical characteristics of everyone involved, and the actions of any third-party aggressors acting in concert with the victim. *See Matter of Y.K.*, 87 NY2d 430, 434. The court here precluded the jury from considering all the circumstances surrounding the defendant from his point of view. The evidence was conflicting and not overwhelming, so the error was not harmless. Judgment modified, counts of first-degree murder, second-degree weapons possession, and second-degree conspiracy reversed and remanded for new trial, and as modified, affirmed. (County Ct, Schenectady Co [Eidens, JJ])

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

**People v Lindahl, No. 15962, 3rd Dept, 10/26/2006**

The initial indictment was dismissed with leave to re-present because the prosecution failed to properly serve notice of the defendant’s right to testify. *See Criminal Procedure Law 190.50(5)(a)*. The defendant specifically asked to be allowed to testify if the matter was re-presented, and listed his address on a supporting affidavit. Three days before the re-presentation, notice of the immi-

nent grand jury was faxed to the lawyer who had appeared at the motion. Counsel responded immediately by fax that he could not accept service as he no longer represented the defendant. No notice was given to the defendant at the address he had provided. After he was indicted, the defendant moved pro se for dismissal, which the court denied because the defendant had not filed an affidavit of service of his motion on the prosecution. He was then convicted.

**Holding:** The prosecution’s contention that at the time of re-presentation the defendant was “not arraigned ‘in a local criminal court upon a currently undisposed of felony complaint’” is rejected. Under the statute, either a written request to appear or being subject to a pending undisposed of felony charge secures the right to testify at a grand jury. The defendant had timely requested to appear, and the prosecutor was obligated to give notice of the proceedings and afford the opportunity to testify. *See Criminal Procedure Law 190.50(a),(b); People v Evans*, 79 NY2d 407, 413, 414. The defendant’s failure to file proof of service was not a sufficient basis for denial of the motion to dismiss, where the motion was timely filed and the prosecutor concedes timely receipt, especially where the defendant was proceeding pro se. *See People v Stevens*, 151 AD2d 704, 704. Judgment reversed, motion granted, indictment dismissed without prejudice to re-presentation. (County Ct, Warren Co [Hall Jr., JJ])

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

**Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15) (30)**  
**(Right to Counsel)**

**People v Robbins (I), No. 16208, 3rd Dept, 10/26/2006**

After advising the defendant of the rights he was waiving as part of the negotiated plea agreement, including the right to appeal, the court “delegated responsibility for conducting the plea allocution to defense counsel, informing defendant, without obtaining a waiver of the right to counsel, that counsel was ‘no longer representing you in the sense of protecting you.’” After counsel conducted the factual plea allocution, the court sentenced the defendant to eight years incarceration and five years postrelease supervision.

**Holding:** The practice of “delegating the duty to conduct the plea allocution” has long been criticized. *See People v Bonneau*, 142 AD2d 890, 890-891 *lv den* 73 NY2d 889. Here the court not only delegated the entire factual portion of allocution but indicated during a critical stage of the proceedings that counsel would (at the court’s urging) take a position adverse to the defendant. *See gen*

**Third Department** *continued*

*People v Settles*, 46 NY2d 154, 165-166. Denial of counsel implicates the voluntariness of the plea, so the issue is not precluded by the defendant's waiver of appeal. *See People v Wright*, 21 AD3d 583, 583-584. The issue may be reviewed even in the absence of objection. *See People v Dean*, 47 NY2d 967, 968. Judgment reversed, plea vacated, matter remitted. (County Ct, Tioga Co [Sguela, JJ])

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

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

**People v Robbins (II), No. 16392, 3rd Dept, 10/26/2006**

**Holding:** As the prosecution concedes, the defendant was entitled to be present at the *Sandoval* hearing and his attorney's purported waiver of that right was invalid. *See* Criminal Procedure Law 260.20; *People v Dokes*, 79 NY2d 656, 661-662. The contention that the error does not require reversal because the defendant's presence would have been superfluous given his criminal history and the issues to be resolved is rejected. The court ruled that the prosecution could question the defendant about an uncharged theft crime. The defendant apparently admitted that he sold stolen property to get money to pay the attorney of record but could no longer afford counsel, making several admissions in an effort to obtain leniency. These circumstances do not negate the possibility that the defendant might have contributed meaningfully to the *Sandoval* hearing, nor was the outcome wholly favorable to him. *See People v Favor*, 82 NY2d 254, 267. Judgment reversed, new trial ordered to be preceded by a new *Sandoval* hearing at which the defendant is present. (County Ct, Tioga Co [Sguela, JJ])

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

**People v Carman, No. 500528, 3rd Dept, 10/26/2006**

After the defendant pled guilty to first-degree sexual abuse and was sentenced to six months jail time and 10 years probation, the court classified him as a risk level II sex offender. *See* Sex Offender Registration Act, Correction Law art 6-c. The court rejected the prosecution's claim that the defendant's statements in the presentence investigation report warranted 10 additional risk assessment points for failure to accept responsibility for his actions. The prosecution appealed.

**Holding:** The defendant's denial that he engaged in sexual contact with the complainant, his claim that he pled guilty because he thought his juvenile record would lead to a conviction in this case, his assertion that the com-

plainant's accusation had been made to get attention, and his intimation that the complainant had actually been abused by someone else are clear and convincing evidence of failure to take personal responsibility for his abusive behavior. *See People v Chilson*, 286 AD2d 828 *lv den* 97 NY2d 655; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 16 (Nov. 1997). Order reversed, the defendant classified as a risk level III sex offender. (County Ct, Broome Co [Smith, JJ])

**Parole (Board/Division of Parole) (General)** PRL, 276(3) (10)

**Matter of Walker v Dennison, No. 500231, 3rd Dept, 11/16/2006**

For their respective unrelated convictions, each petitioner received an indeterminate sentence for a drug-related crime significantly higher than the concurrent indeterminate sentence for a non-drug-related offense. Each served more than the maximum term imposed for the non-drug-related crime, was released on parole for at least three years, and sought termination of their sentences under Executive Law 259-j(3-a). Termination was denied because the non-drug-related sentences had merged in the longer original terms of the drug-related sentences (Penal Law 70.30[1] [a]), so they were still subject to their non-drug-related sentences. Supreme Court granted termination when they brought a CPLR article 78 proceeding and the Division of Parole (Parole) appealed.

**Holding:** Parole's assertion that the petitioners remain subject to parole on their merged non-drug-related sentences is rejected. Interpretations of the provisions in question are matters of pure statutory analysis, and Parole's "interpretation is entitled to little deference because it has not been shown to depend upon any special agency expertise." *See Matter of KSLM-Columbus Apts. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312. The plain language of the Executive Law makes it applicable where, as here, someone "is serving an indeterminate sentence on a qualifying drug felony and has been on unrevoked parole for at least three years." Since each of the petitioner's longest unexpired term is for a drug-related sentence, termination of which is mandated by Executive Law 259-j(3-a), the non-drug-related sentence "is 'satisfied by discharge' of the drug-related sentence" under Penal Law 70.30(1) (a). Judgment affirmed. (Supreme Ct, Albany Co [Teresi, JJ])

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

**People v Thomas, No. 100125, 3rd Dept, 12/7/2006**

In September 2005, the defendant applied pursuant to the 2005 Drug Law Reform Act (DLRA) (L 2005, ch 643, §1) to be resentenced on a 1999 second-degree possession

**Third Department** *continued*

of drugs conviction for which he was serving a sentence of eight years to life. The application was granted and he was resentenced to a term of eight years plus postrelease supervision for five years. A stay was granted pending the prosecution's appeal.

**Holding:** The defendant was not eligible for resentencing. To be eligible, "a class-A-II felony drug offender must not be eligible for parole within three years (*see People v Bautista*, 26 AD3d 230 [2006] *appeal dismissed* 7 NY3d 838 [2006])." This criterion is derived from the DLRA requirement that qualified defendants be "more than 12 months from being an 'eligible inmate' as that term is defined in Correction Law § 851 (2)," which in turn requires for the purpose here that prisoners be eligible for parole or conditional release within two years. At the time of his application, the defendant was eligible for parole in February 2007, well beyond the three-year limit. Judgment reversed, application denied. (County Ct, Chemung Co [Buckley, JJ])

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

**People v Collins, No. 100266, 3rd Dept, 12/7/2006**

**Holding:** A police search on May 28, 2004 of the defendant's house disclosed drugs and other physical evidence. The search warrant had been issued based upon detective Jeff Roberts's application the day before. It included a description of the investigation and information obtained from three undisclosed confidential informants. One had indicated in late 2003 that the defendant sold drugs from the residence and had been in prison on drug charges; Roberts verified the latter information. Another informant had told a different detective that the defendant engaged in drug trafficking in a neighborhood where he owned a garage and had a "stash house" on the street for which the warrant was ultimately issued. The last informant told an officer that the defendant was selling drugs from his residence at the address for which the warrant was issued; the informant described the residence and drug operation in detail in a sworn statement. The information from the last two informants was provided in May 2005. Roberts found that the defendant was on parole, had prior arrests for selling drugs, and listed the address in question on his driver's license. The application was sufficient to demonstrate the reliability of at least one of the informant's knowledge. *See Spinelli v US*, 393 US 410 (1969); *People v Griminger*, 71 NY2d 635, 639. The third informant provided information that was against his penal interest. *See People v Walker*, 27 AD3d 899, 900 *lv den* 7 NY3d 764. It was thorough and specific

about drug activities at the place to be searched. The identification of the defendant was consistent with information from the other informants and the defendant's objective criminal history. Suppression was properly denied. Judgment affirmed. (Supreme Ct, Albany Co [Lamont, JJ])

**Sentencing (Enhancement)** **SEN; 345(32)**

**People v Conklin, Jr., No. 16409, 3rd Dept, 12/21/2006**

Following his guilty plea to attempted second-degree robbery, which was based on an agreement that he would be sentenced to a statutory minimum term of three years with five years postrelease supervision (*see* Penal Law 70.45[2]; 70.06[6][c]), the defendant was released pending sentencing. He was warned that if he did not appear for sentencing or was rearrested he would be sentenced to seven years. After failing to appear, he was arrested in another state and brought back. He explained that he did not appear because he had been trying to have a tattoo removed that would incite gang assault in prison. He was given two options: accept five years in prison or have a hearing on the reason for his flight. The court said that at the end of the hearing, the court might go back to the three years, and did not mention the seven-year sentence that had been threatened earlier. The defendant opted for a hearing, and the court, after rejecting his explanation, sentenced him to the maximum term of seven years plus five years postrelease supervision.

**Holding:** The defendant's failure to appear for sentencing terminated the court's duty to follow the plea agreement and made imposition of an enhanced sentence permissible. *See People v Davis*, 30 AD3d 893, 894 *lv den* 7 NY3d 847. However, the court's comments after defendant was brought in after absconding could have been interpreted to mean the defendant's choice at that time was between a five-year sentence and, if his hearing was successful, the original, lighter term. Judgment modified, sentence reduced to five years imprisonment plus five years postrelease supervision and as modified, affirmed. (County Ct, Broome Co [Smith, JJ])

**Fourth Department**

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

**People v Watson, 32 AD3d 1199, 821 NYS2d 328 (4th Dept 2006)**

**Holding:** County Court dismissed eight counts from a 12-count indictment against the defendant, a police officer. The prosecution appealed. The issue as to the dismissed fourth-degree stalking counts is whether there was prima facie evidence that the "defendant knew or reasonably should have known" that his undisputed conduct toward the complainants "was likely to cause rea-

**Fourth Department** *continued*

sonable fear of material harm" to their physical health or safety. See Penal Law 120.45(1). While the charged conduct, not the complainants' subjective fear, should be the focus, the actual perception of the complainants in this case should also be considered. The complainants on the dismissed counts testified that they were not afraid for their physical safety and had not expressly told the defendant to stay away or stop his conduct. Dismissal was proper.

The third-degree counts were also properly dismissed. Two complainants said they were not afraid the defendant would commit a sex offense against them, and a third said only that she "wondered" if he would. The prosecution's theory that the complainants were "thick-skinned" and their lack of fear unreasonable is rejected. The provision underlying those three counts requires intentional conduct likely to cause the person against whom it is directed to reasonably fear the commission of a sex offense. Penal Law 120.50(3). As those were properly dismissed, the remaining count alleging multiple crimes under Penal Law 120.50(1) was also correctly dismissed.

Dismissal of the official misconduct count was error. One complainant testified that the defendant followed her car in his police vehicle, pulled her over, and kissed her cheek. This constituted prima facie evidence of unauthorized exercise of an official function to obtain a benefit. See *gen People v Maloney*, 233 AD2d 681. Order modified, count 12 reinstated, and matter remitted. (County Ct, Chautauqua Co [Ward, Jr., JJ])

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

**People v Ciccarelli, 32 AD3d 1175, 822 NYS2d 186 (4th Dept 2006)**

**Holding:** The defendant's motion under Criminal Procedure Law 440.10 to vacate the judgment convicting him of second-degree sale of drugs and attempted first-degree sale of drugs was denied in part. At the time of his guilty plea, the court and the parties incorrectly believed that attempted first-degree sale was a class A-II rather than class A-I felony. See Penal Law 110.05(1). The court correctly found that the four-years-to-life sentence imposed on that count was therefore illegal. See Penal Law 70.00(3)(a)(i); *People v Gutierrez*, 169 AD2d 882. But vacating only that sentence and permitting the defendant to withdraw only his plea to that count was error. The proper remedy when a plea bargain includes an improper minimum sentence is to vacate the entire sentence and allow withdrawal of the entire plea. See *People v Martin*, 278 AD2d 743, 744. That some portions of the bargained-for sentence are legal is immaterial; See *People v Sheils*, 288

AD2d 504, 505 *lv den* 97 NY2d 733. Order modified, motion granted in its entirety, judgment vacated, and matter remitted. (Supreme Ct, Erie Co [Wolfgang, JJ])

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

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

**People v Brown, 32 AD3d 1222, 821 NYS2d 348 (4th Dept 2006)**

**Holding:** The defendant's contention that use of a firearms report at his probation violation hearing was precluded by *Crawford v Washington* (541 US 36 [2004]) is rejected. Probation revocation, while resulting in a loss of liberty, is not a criminal prosecution. See *gen Gagnon v Scarpelli*, 411 US 778, 782 (1973). The decision in *Crawford* preserved the "right to confront witnesses in the context of a criminal prosecution" and does not apply here. See *People v Dort*, 18 AD3d 23, 25 *lv den* 4 NY3d 885. In any event, any error was harmless. Judgment affirmed. (County Ct, Ontario Co [Doran, JJ])

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

**Misconduct (Juror) MIS; 250(12)**

**People v Saxton, 32 AD3d 1286, 821 NYS2d 353 (4th Dept 2006)**

**Holding:** The defendant's contentions with regard to the sufficiency of proof are not preserved or are incorrect. The certificate of conviction does contain a clerical error in that it incorrectly recites that the defendant was convicted of second-degree assault under Penal Law 120.05(1) and must be amended to reflect the conviction was under Penal Law 120.05(2). See *People v Lamphier*, 302 AD2d 864, 865 *lv den* 99 NY2d 656.

The court erred in summarily denying the defendant's Criminal Procedure Law 330.30(2) motion to set aside the verdict. The sworn allegations that the defendant learned post-verdict that a juror failed to disclose a past affair with a witness required a hearing on whether the alleged juror misconduct prejudiced a substantial right. See *People v Rodriguez*, 100 NY2d 30, 35. Case held, decision reserved, matter remitted for a hearing. (County Ct, Allegany Co [Euken, JJ])

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

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

**People v McClain, 32 AD3d 1261, 821 NYS2d 729 (4th Dept 2006)**

**Fourth Department** *continued*

**Holding:** The defendant correctly asserts in both appeals that the court erred in denying suppression of evidence (a gun, showup identification, and his statement) obtained as a result of an arrest unsupported by probable cause. The police acts of drawing guns, handcuffing and frisking the defendant, then transporting him, while handcuffed, to the robbery scene amounted to an arrest. *See People v Brnija*, 50 NY2d 366, 372. The prosecution does not assert that the police had probable cause. Judgments reversed, pleas vacated, suppression granted, and matter remitted. (County Ct, Monroe Co [Geraci, Jr., JJ])

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

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

**People v Phillips, 32 AD3d 1343, 821 NYS2d 352 (4th Dept 2006)**

**Holding:** The court erred in charging the jury that the defendant had a duty to retreat if he could safely do so. The unpreserved error is reviewed as a matter of discretion in the interest of justice. *See* Criminal Procedure Law 470.15(6)(a). The justification defense was a critical part of this trial. *See People v Feuer*, 11 AD3d 633, 634. Even viewed in its entirety, the court’s charge was not a correct statement of the law. Only when a defendant has used deadly force must the jury determine whether the defendant could have retreated with complete safety. *See* Penal Law 35.15(2)(a); *Matter of Y.K.*, 87 NY2d 430, 433. The defendant here was not alleged to have used deadly force. Reviewed in the light most favorable to the defendant, “the court’s charge left the jury with no choice but to reject the justification defense, inasmuch as the evidence established that defendant did not retreat although he could have done so with complete safety.” Judgment reversed, new trial granted. (County Ct, Monroe Co [Marks, JJ])

**Evidence (Business Records) (Hearsay) (Sufficiency) EVI; 155 (15) (75) (130)**

**Larceny (Welfare Fraud) LAR; 236(85)**

**People v Smith, 32 AD3d 1255, 821 NYS2d 540 (4th Dept 2006)**

**Holding:** The court erred in admitting payroll documents under the business records exception to the hearsay rule. There are three foundation requirements for admission of business records. CPLR 4518; *People v Cratsley*, 86 NY2d 81. The document here met neither the second requirement (the record must be made according to established procedures for the systematic making of such a record) nor the third (the record must have been made at

the time of the occurrence recorded or within a reasonable time thereafter to assure fairly accurate recollection and routine making of entries). Without the payroll documents, the evidence was insufficient to establish an amount paid to the defendant by private employers while receiving public assistance. Thus there was insufficient evidence of the amount of any improperly received benefits. *See People v Hunter*, 34 NY2d 432, 438-440. Sentences imposed on other counts are not affected by this ruling. Judgment modified, conviction of fourth-degree welfare fraud as a lesser-included offense of count one reversed, that count dismissed, sentence on that conviction vacated. (Supreme Ct, Monroe Co [Eagan, JJ])

**Sentencing (General) (Second Felony Offender) SEN; 345(37) (72)**

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

**People v Armbruster, 32 AD3d 1348, 823 NYS2d 322 (4th Dept 2006)**

The defendant pled guilty to attempted first-degree sexual assault and attempted second-degree course of sexual conduct against a child. The prosecution moved to set aside his sentence as a second felony offender because it was invalid, and filed a second child sexual assault felony offender statement. *See* Criminal Procedure Law 400.19. The defendant contended that the statement was untimely filed because it had not been filed before the plea.

**Holding:** The filing of a second child sexual assault felony offender statement is permissive, not mandatory. *See* Criminal Procedure Law 400.19(2), which says such statement “may be filed” any time before trial. The statute does not provide for when a statement may be filed in the event of a guilty plea. Such statement is timely in a guilty plea case “if it is filed within a sufficient time before the imposition of sentence to afford the defendant notice and an opportunity to be heard (*see generally* Preiser, Practice Commentaries, McKinney’s Cons Laws of NY, Book 11A; CPL 400.10, at 401-402).” Even if the statement is to be filed before entry of a guilty plea, the failure to so file here would be harmless. The court and parties contemplated that the defendant would be sentenced as a predicate offender within a range of imprisonment that is the range contained in Penal Law 70.07(4) (f). The defendant admitted his prior conviction and did not object to being sentenced as a predicate felon. The statutory purposes for filing of a predicate statement were satisfied; strict compliance is not required. *See People v Sampson*, 30 AD3d 623, 623-624. Resentence affirmed. (Supreme Ct, Erie Co [Burns, JJ])

**Fourth Department** *continued*

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

**Habeas Corpus (State)** HAB; 182.5(35)

**People ex rel Seals v New York State Department of Correctional Services, 32 AD3d 1262, 822 NYS2d 351 (4th Dept 2006)**

**Holding:** This appeal from a judgment in a habeas corpus proceeding is dismissed as moot because the petitioner has been released on parole. If the appeal was available for review, the judgment would be reversed. Supreme Court initially granted a writ. The respondent Department of Correctional Services (DOCS) moved for leave to reargue. Converting that motion to one for leave to renew, granting it, and vacating the prior judgment was error. Motions for leave to reargue or renew (CPLR 2221[a]) have no application to a judgment in a special proceeding. A habeas judgment is subject to appeal but the court had no authority to vacate the judgment and issue a contrary one.

In any event, the court would be found to have abused its discretion as DOCS did not comply with CPLR 2221(e). The facts offered on "renewal" existed when the matter was first before the court and no justification was given for "conceding 'facts' not claimed to be erroneous." Appeal dismissed. (Supreme Ct, Wyoming Co [Dadd, AJ])

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

**People v Gerecke, No. KA 05-01812, 4th Dept, 11/17/2006**

**Holding:** The evidence was legally insufficient to support the conviction of second-degree obstructing governmental administration as charged in the indictment and detailed in the bill of particulars. The defendant was charged with interfering with the arrest of her son at her home. However, the arresting officer testified that he never saw the son; the record shows the officer was arresting another person when the defendant was alleged to have interfered. *See gen People v Bleakley*, 69 NY2d 490, 495. The defendant's other contentions are either unpreserved or without merit. Judgment modified, second-degree obstructing governmental administration reversed, count three dismissed, and matter remitted. (County Ct, Cayuga Co [Fandrich, JJ])

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

**Forgery (Elements) (Evidence)** FOR; 175(10) (15)

**People v Carmack, No. KA 04-01787, 4th Dept, 11/17/2006**

**Holding:** The defendant was convicted of multiple counts of forgery, possession of forgery devices, and identity theft. He failed to preserve for review his contention that the evidence was legally insufficient as to the three counts of second-degree forgery and the count of possession of forgery devices. The sufficiency question is reviewed as a matter of discretion in the interest of justice. The e-mails which the defendant was shown to have sent from his computer, making it appear that they were sent from another's e-mail address, "do not constitute deeds, wills, codicils, contracts, assignments, commercial instruments or credit cards, nor do they 'evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status'" as required by Penal Law 170.10(1). Nor did the prosecution establish that the computer program used was a forgery device as set out in Penal Law 140.40(1). The prosecution expert testified that the program could be used for legitimate purposes, while the statute prohibits devices "'specifically designed for use in counterfeiting or otherwise forging written instruments.'" The defendant's other contentions are unpreserved and/or without merit. Judgment modified, second-degree forgery and possession of forgery devices convictions reversed, those counts dismissed, and as modified, affirmed. (County Ct, Erie Co [D'Amico, JJ])

**Bail and Recognizance (Forfeiture and Failure to Appear)** BAR; 55(25)

**People v Miller, No. CA 06-01105, 4th Dept, 11/17/2006**

**Holding:** The defendant, arrested in February 2001, was released after the appellant, International Fidelity Insurance Company, posted a \$100,000 bail bond. A bench warrant was issued and bail revoked when the defendant failed to appear on July 2, 2001, but no finding was made that his absence was unexcused and forfeiture of bail was not ordered. The prosecution moved on Aug. 3, 2001 for bail forfeiture pursuant to Criminal Procedure Law 540.10. The appellant received an adjournment in exchange for waiving any timeliness issue with regard to the motion. After the appellant notified the court on July 20, 2005 that the defendant could not be located, the court entered judgment against the appellant for \$100,000. The claim that the court erred in ordering forfeiture more than three years after issuance of the bench warrant is rejected given the earlier waiver, and in any event, lacks merit. The Criminal Procedure Law 540.10(2) mandate that enforcement of forfeiture be sought within 120 days after adjournment of the court at which forfeiture was directed does not apply until a defendant's absence is found unexcused and a determination is made on the record directing forfeiture of the bail bond. *See People v Nicholas*, 97 NY2d

**Fourth Department** *continued*

24, 25-26. No such finding or determination was made on July 2, 2001. Judgment affirmed. (Supreme Ct, Erie Co [Buscaglia, AJ])

**Appeals and Writs (Retroactivity)** APP; 25(87)

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

**People ex rel. Moxley v Zon, No. KAH 05-02023, 4th Dept, 11/17/2006**

**Holding:** The petitioner had been tried on second-degree murder charges and was acquitted of intentional murder but convicted of depraved indifference murder. His conviction was affirmed in 1997. *People v Moxley*, 236 AD2d 778 *lv den* 89 NY2d 1097. After several Court of Appeals decisions were issued regarding depraved indifference murder, the petitioner sought a writ of habeas corpus. He seeks a hearing on his new claim that he intended to kill the decedent and that his depraved indifference murder conviction must be reversed under *People v Suarez* (6 NY3d 202), *People v Payne* (3 NY3d 266 *rearg den* 3 NY3d 767), and *People v Gonzalez* (1 NY3d 464). The court properly denied the petition without a hearing. The defendant's conviction is final, and the cases upon which he relies would be applied retroactively only if allowing the conviction to stand would "amount to 'manifest injustice' (*People v Pepper*, 53 NY2d 213, 222, *cert denied* 454 US 967)." The petitioner's continued imprisonment cannot be said to amount to manifest injustice. Judgment affirmed. (Supreme Ct, Erie Co [Buscaglia, AJ])

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

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

**People v Wilmot, No. KA 05-00200, 4th Dept, 11/17/2006**

**Holding:** The court erred in denying the defendant's *Batson* objection to the prosecutor's peremptory challenge to a black prospective juror. The prosecutor's stated reason for excusing the prospective juror was the juror's age (19) and "lack of 'lifelong experience.'" The prospective juror's age bore no relationship to the facts of this case. See *People v Burroughs*, 295 AD2d 959 *lv den* 99 NY2d 534. The prosecutor failed to challenge a 22-year-old white prospective juror with a similar background. The prosecutor's explanation was pretextual. See *People v Smalls*, 249 AD2d 495, 495 *lv den* 92 NY2d 986. Judgment reversed, new trial ordered. (Supreme Ct, Erie Co [Wolfgang, JJ])

**Evidence (Sufficiency)**

EVI; 155(130)

**Larceny (Elements) (Evidence) (Grand Larceny)** LAR; 236(17) (25) (40)

**People v Avino, KA 03-01118, 4th Dept, 11/17/2006**

**Holding:** The defendant failed to preserve for review his contention that the evidence was legally insufficient to support his convictions on two counts of second-degree grand larceny. The issue is reviewed as a matter of discretion in the interest of justice. See Criminal Procedure Law 470.15(6) (a). At trial, the prosecutor relied on a theory that money was stolen by false pretenses, which requires a false representation of a past or existing fact, not a future intention. See Penal Law 155.05(2) (a); *People v Fangiullos*, 186 AD2d 1007, 1008. Count one alleged that the defendant stole money from a trust through a scheme with accomplices to obtain payment from the trust to pay for repairs to the beneficiary's home, repairs that they had no intention of making. The first check they received from the trust was issued on the basis of their proposals only; the second two checks were issued only after falsified inspection reports were submitted. While the latter two checks were obtained via a false representation (the falsified inspection reports), the first was obtained only by a false promise, not false pretenses. Each check was for \$24,649; without the first check, the other checks totaled less than the \$50,000 statutory threshold for second-degree grand larceny. See Penal Law 155.40(1). Count two alleged theft from the beneficiary of the trust. The only representations made to the beneficiary were false promises regarding future intentions. Judgment modified, conviction under count one reduced to third-degree grand larceny, conviction under count two reversed, remanded for sentencing. (Supreme Ct, Monroe Co [Sirkin, AJ])

**Identification (Eyewitnesses) (Photographs) (Wade Hearing)** IDE; 190(10) (35) (57)

**People v Williams, No. KA 04-02995, 4th Dept, 11/17/2006**

The defendant was convicted of several felonies including rape and drug possession.

**Holding:** The prosecutor disclosed to the defendant that the rape complainant had been shown a photo array at one point and did not identify the defendant. The court refused to grant a *Wade* hearing. At trial, the complainant testified that after she was shown a photo array a second time and did not identify the defendant, his photograph was pointed out to her. She identified the defendant at trial as her attacker. The defendant was entitled to a pre-trial opportunity to test the admissibility of the complainant's identification of him. See *gen People v Gee*, 99 NY2d 158, 161 *rearg den* 99 NY2d 652. The issue is reached in the interest of justice despite the defendant's failure to

**Fourth Department** *continued*

preserve the issue by requesting a hearing after the complainant's testimony about the second array, especially as the defendant had sought a hearing pretrial. The defendant is entitled to a hearing as to whether the detective's improper conduct affected the reliability of the complainant's identification testimony, rendering it inadmissible. *See People v Dodt*, 61 NY2d 408, 417.

The defendant failed to preserve a claim that the evidence adduced at trial was legally insufficient to support the conviction. The verdict was not against the weight of the evidence. Judgment reversed, matter remitted for a *Wade* hearing on the appropriate counts. (County Ct, Niagara Co [Sperrazza, JJ])

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

**People v Ponder, No. KA 04-01450, 4th Dept, 11/17/2006**

**Holding:** The defendant did not preserve for review the court's error in failing to conduct a sufficient inquiry as to the knowing and voluntary nature of the defendant's guilty plea, failing to move to withdraw the plea or to vacate the judgment. This is one of the rare cases in which preservation is not necessary because the fact allocution raises significant doubts about the defendant's guilt or calls the voluntariness of the plea into question. *See People v Lopez*, 71 NY2d 662, 666. In pleading to first-degree assault, the defendant said that the complainant, without provocation, hit the defendant's head with a bottle and put him in a choke hold. The defendant said he did not intend to shoot the complainant, but pulled out a gun and fired in self-defense. This colloquy negated the essential intent element (*see* Penal Law 120.10[1]) and raised the possibility that a justification defense existed. *See* Penal Law 35.15(2) (a). The court made further inquiry to ensure the knowingness and voluntariness of the plea, but only as to intent, with the defendant admitting he did mean to cause serious physical injury. There was no inquiry as to the potential justification defense. *Cf People v Greer*, 277 AD2d 1051 *lv den* 96 NY2d 829. Judgment reversed, plea vacated, matter remitted. (Supreme Ct, Monroe Co [Affronti, JJ])

**Admissions (Codefendants)** ADM; 15(5)

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

**People v Pichardo, No. KA 03-01819, 4th Dept, 11/17/2006**

**Holding:** The court failed to give the jury a limiting instruction as to a statement by a nontestifying codefendant. *See gen Bruton v US*, 391 US 123 (1968). Even if the statement was admissible, a proper limiting instruction is required if such a statement is to conform to the requirements of Confrontation Clause case law. *See Richardson v Marsh*, 481 US 200, 211 (1987); *People v Glisson*, 260 AD2d 245, 245-246 *lv den* 93 NY2d 924, 1002. The failure to give such an instruction was fundamental error warranting reversal even in the absence of a request for the instruction to be given. *See People Geoghegan*, 68 AD2d 279, 284 *affd* 51 NY2d 45. Judgment reversed, new trial ordered. (Supreme Ct, Monroe Co [Kehoe, AJ])

**Accusatory Instruments (General)** ACI; 11(10) (15)  
**(Sufficiency)**

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

**People v Bracewell, No. KA 05-00308, 4th Dept, 11/17/2006**

**Holding:** The defendant, convicted by a jury of 28 counts of first-degree sexual abuse (Penal Law 130.65[1]) and 30 counts of endangering the welfare of a child (Penal Law 260.10[1]) contends that the indictment was not legally sufficient, due in part to duplicitousness. The contention is unpreserved but reviewed as a matter of discretion in the interest of justice. *See People v Comfort*, 31 AD3d 1110, 1111-1112. Each of counts four through 29 alleged an act committed "'on or about one day during' a specified week from February through November 2002." Not duplicitous on their face, these counts became duplicitous due to trial evidence tending to show multiple criminal acts during each of the weeks specified. *See People v Dalton*, 27 AD3d 779, 780-781. The counts are also duplicitous in light of the grand jury evidence upon which they are based. *See People v Levandowski*, 8 AD3d 898, 899. There can be no certainty that the jury's verdict as to any one count was unanimous, and the duplicitousness defeats the indictment's functions of notice and assurance against double jeopardy. *See People v Keindl*, 68 NY2d 410, 418 *rearg den* 69 NY2d 823.

The defendant's cause challenge to a prospective juror whose ability to render a fair verdict appeared in doubt should have been granted where the juror never gave an unequivocal assurance that he could be fair and impartial and that his prior state of mind would not influence his decision. *See People v Bludson*, 97 NY2d 644, 646. Judgment reversed, courts four through 29 dismissed without prejudice to being re-presented, and a new trial granted on the rest. (County Ct, Yates Co [Falvey, JJ]) ⚖

# NYSDA MEMBERSHIP APPLICATION

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

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

Name \_\_\_\_\_ Firm/Office \_\_\_\_\_

Office Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_ Zip \_\_\_\_\_

Home Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_ Zip \_\_\_\_\_

County \_\_\_\_\_ Phone (Office) (\_\_\_\_) \_\_\_\_\_ (Fax) (\_\_\_\_) \_\_\_\_\_ (Home) (\_\_\_\_) \_\_\_\_\_

E-mail Address (Office) \_\_\_\_\_ E-mail Address (Home) \_\_\_\_\_

**At which address do you want to receive membership mail?**  Office  Home

Please indicate if you are:  Assigned Counsel  Public Defender  Private Attorney  
 Legal Aid Attorney  Law Student  Concerned Citizen

*Attorneys and law students please complete:* Law School \_\_\_\_\_ Degree \_\_\_\_\_

Year of graduation \_\_\_\_\_ Year admitted to practice \_\_\_\_\_ State(s) \_\_\_\_\_

I have also enclosed a tax-deductible contribution:  \$500  \$250  \$100  \$50  Other \$ \_\_\_\_\_

Checks are payable to **New York State Defenders Association, Inc.** Please mail coupon, dues, and contributions to: New York State Defenders Association, 194 Washington Ave., Suite 500, Albany, NY 12210-2314.

*To pay by credit card:*  Visa  MasterCard  Discover  American Express

Card Billing Address: \_\_\_\_\_

Credit Card Number: \_\_\_\_\_ Exp. Date: \_\_\_\_ / \_\_\_\_

Cardholder's Signature: \_\_\_\_\_

**NEW YORK STATE DEFENDERS ASSOCIATION**

194 Washington Ave., Suite 500, Albany, NY 12210-2314

Non-Profit Organization

U.S. Postage

**PAID**

Albany, NY

Permit No. 590