NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXII Number 4 August-September 2007

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

New York's Persistent Felony Offender Law Held Invalid

For the second time this year a federal district court judge has rejected the NY Court of Appeals' rationale in *People v Rivera*, 5 NY3d 61 (2005) and held that New York's Persistent Felony Offender laws violate the 6th Amendment right to a jury trial (www.law.com, 8/29/07). In *Washington v Poole*, 06 Civ 2415 (SDNY 8/27/07), Judge Koeltl granted Washington's habeas corpus petition, finding that "[b]ecause New York's persistent felony offender law requires the finding of aggravating facts, other than the finding of two predicate felonies, by the judge rather than the jury, the law is contrary to federal law clearly established in the holding of *Blakely* [*v Washington*, 542 US 296 (2004)]." Earlier this year, in *Portalatin v Graham*, 478 F Supp 2d 385 (EDNY 2007), Judge Gleeson granted Portalatin's habeas petition for similar reasons. In *Morris v Artus*, 06 Civ 4095 (SDNY 7/25/07), however, Judge Sweet disagreed with the rationale in *Portalatin* and denied the habeas petition. The 2nd Circuit is expected to hear all three cases, along with *Phillips v Artus*, which is already pending in the 2nd Circuit. For more information about challenging the PFO statutes, see Andrew C. Fine's article, "Preliminary Assessment of *Cunningham v California's* Impact on Persistent Felony Offender (PFO) Provisions," in the Jan–Feb 2007 issue of the *REPORT* (available at www. nysda.org).

INSIDE AT CENTER INSERT:

Table of Lesser Included Offenses, 17th Revision

Courtesy of the *NY Defender Digest*
(Available in Printed Copies Only, Not on the Web)

First Sex Offender Management and Treatment Act Cases

The first two civil confinement cases under the Sex Offender Management and Treatment Act (SOMTA), *State of New York v Junco* (Sup Ct, Washington Co 8/10/07) and *State of New York v Eaton* (Sup Ct, Greene Co 8/15/07), illustrate the value of challenging commitment recommendations. (www.timesunion.com, 8/16/07). In *Junco*, the jury concluded that the respondent did not suffer from a "mental abnormality" that predisposes him to commit sex offenses. As Junco reached the end of his 15-year sentence for attempted first-degree rape and second-degree assault, an Office of Mental Health case review committee recommended that the Attorney General file a civil commitment petition against him. Junco objected to the committee's findings, prompting the jury trial. In *Eaton*, however, the respondent did not object to the state's application for civil confinement and the court ordered Eaton to be civilly confined in the St. Lawrence Psychiatric Center. For more info about what defense attorneys representing persons accused of sex offenses should know about SOMTA, see Al O'Connor's article, "Actuarial Justice—Representing Sex Offenders Facing Lifetime Civil Confinement" (http://www. nysda. org/Hot_Topics/Megan_s_Law/07_ActuarialJustice2007-04-26.pdf). Pattern Jury instructions for SOMTA cases are available at http://www.nycourts.gov/judges/MHLArt10.pdf.

Failure to Register or Verify as a Sex Offender Now a Class E Felony

On August 17, 2007, failure to register or verify as a sex offender (first offense) became a Class E felony (Corr Law 168-t), up from a Class A

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misdemeanor. For more info, see Al O'Connor's 2007 Legislative Review (p. 6).

New Offenses Added to Penal Law

Chapter 74 (eff 11/1/07) adds several sex trafficking and labor trafficking offenses to Penal Law articles 135 and 230, and Chapter 345 (eff 11/1/07) adds the offenses of aggravated vehicular homicide (PL 125.14) and aggravated vehicular assault (PL 120.04-a). For more info about these and other legislative changes, see Al O'Connor's 2007 Legislative Review.

College Cost Reduction Act Passes, Awaits President's Signature

Congress has passed the College Cost Reduction and Access Act (CCRA Act) (H.R. 2669), which President Bush is expected to sign. The Act will allow public defenders and others to make loan repayments at a reduced rate and receive loan forgiveness. The text of the Act is available at www.thomas.gov. For detailed information about the CCRA Act, see Philip G. Schrag's article, "Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations" (available at www.ssrn.com).

NYSDA's Expert Witness Database At Your Fingertips

NYSDA's expert witness database is now available on the web at http://www.nysda.org/ExpWeb/. Users can search for experts by area of expertise, name, and/or keyword. Members of the public defense community are still welcome to contact the Backup Center for expert witness referrals, CVs of experts, and assistance with specific expert witness issues. As always, you must verify the credentials of any expert witness you want to hire. If you know of experts that we should consider adding to the database, please contact the Backup Center at (518) 465-3524 or complete the online contact form at www.nysda.org (Contact Us).

Web Access to All New York Rules and Regulations Coming

All state agency rules and regulations (unofficial version) will be freely available as of 1/1/08 on the Department of State's website (www.dos.state.ny.us), as required by L 2007, Chapter 407 (Executive Law 106-a). Currently, many agency rules and regulations are not freely available, including those of the Department of Correctional Services and the Department of Motor Vehicles.

Panel Report in Peekskill Wrongful Conviction Case and Federal Suit

In July, at the request of Westchester County DA Janet DiFiore, a four-member panel issued a report on the wrongful conviction of Jeffrey Deskovic. (www.thejournalnews.com, 7/3/07; www.silive.com, 8/5/07). The report (available at http://www. westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf), details numerous and significant errors committed by the police, the prosecution, defense counsel, and the court, all of which led to his wrongful conviction. The report includes the following panel recommendations for how to avoid future wrongful convictions: (1) give all defendants the right to request that unidentified DNA profiles found during the criminal investigation be run through DNA banks to identify other possible perpetrators, except where the prosecution can show that the request is frivolous and without merit; (2) videotape interrogations in violent felony cases; (3) establish a Commission of Inquiry to review wrongful conviction cases and make recommendations on how to prevent future wrongful convictions; and (4) standardize New York rules regarding evidence collection and storage.

Since the report's release, Deskovic has filed a federal lawsuit against Westchester and Putnam counties, the city of Peekskill, several city and county employees, and two state correctional officers, alleging that the defendants violated his civil rights. Deskovic also plans to file a lawsuit against New York State in the Court of Claims. (www.thejournalnews.com, 9/19/07). For more info about Jeffrey Deskovic's case, see the August-October 2006 issue of the *REPORT*, available at www.nysda.org.

Public Defense Backup Center REPORT
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THE REPORT IS PRINTED ON RECYCLED PAPER

OCA Eliminates Violations from Criminal History Reports

In late July 2007, the Office of Court Administration (OCA) began eliminating information about dispositions of violations from publicly available criminal history reports. Additionally, the reports, which are available from OCA for $52.00, no longer contain information about cases in which the original top charge was a violation. In mid-July, OCA reached a settlement in *Alexander v NYS Office of Court Administration*, No. 104929/07 (Sup Ct, New York Co), in which the plaintiff alleged that he was denied employment because his OCA criminal history report stated that he had pleaded guilty to a violation a year ago. (www.law.com, 9/10/07).

Commission on Judicial Conduct Members Object to Agreed Statement

In a recent case before the State Commission on Judicial Conduct, attorney member Richard D. Emery wrote a lengthy dissent criticizing the Agreed Statement entered into by the Commission's Administrator and the respondent village justice, Noreen Valcich. (www.law.com, 9/6/07). Judge Valcich was accused of presiding over a case despite her relationship with the defendant, having ex parte communications with the defendant, and granting an adjournment in contemplation of dismissal without notice to or consent of the District Attorney. The Commission decided to censure Valcich. In his dissent, Emery noted that the Agreed Statement failed to include critical information, including whether the judge's actions resulted from ignorance of the law or from deliberate disregard of the law. He stated that had the Commission been provided with more facts about the case, it might have removed Judge Valcich instead of censuring her. Attorney member Stephen R. Coffey also objected to the Statement. Commission decisions, including the *Valcich* decision, can be found at http://www.scjc.state.ny.us/.

Gradess Testifies Before Commission on Sentencing Reform

On July 18, Jonathan E. Gradess, NYSDA's Executive Director, testified before the State Commission on Sentencing Reform. Urging the assembled commissioners to view their work as first and foremost about people, Jonathan called on the panel to create a new system in which sanctions are purposeful and sentences imposed are the least restrictive alternative. Reflecting upon the historic decade-long efforts of the Temporary State Commission on Revision of the Penal Law and Criminal Procedure Law, he described the rich environment that had once been available to judges to allow for individualized sentencing determinations. His testimony emphasized that the new system being envisioned must be forward-looking and ensure that both victims and offenders are made whole in a robust environment that returns the defense to its primary role as advocates for the individual liberty interests of their clients. The Commission is expected to release a first draft of its recommendations on October 1. (www.law.com, 7/31/07).

NYSDA's 40th Annual Meeting and Conference: Reform, CLE, and Celebration

On July 22, NYSDA's Board of Directors approved a Resolution supporting the recommendations of the Kaye Commission and legislation to implement those recommendations. The Resolution is available at http://www.nysda.org/html/about_nysda.html. This action followed a focused discussion at the Chief Defender Convening about pending legislation (Public Defense Act) that would implement the Kaye Commission's recommendations. The bills, S.4311-A and A.9087-A, are available at http://public.leginfo.state.ny.us/menuf.cgi. The Chiefs agreed that their drafting committee should analyze the bills and recommend any necessary changes.

As always, the two-day conference provided the majority of the CLE (non-transitional) required for the year and focused on issues relevant to defense attorneys. In addition to Ed Nowak's annual update on NY criminal law and procedure and Kent Moston's Supreme Court update, the conference featured presentations on false confessions (Deja Vishny), ethics and expert witnesses (Vince Aprile), subpoena practice (Barry Fisher), preserving the record for appeal (Lynn Fahey), effective closing arguments (Jed Stone), legislative updates (Al O'Connor), immigrant defense updates (Joanne Macri), and representing sex offenders (Alan Rosenthal, Al O'Connor, and Kostas Katsavdakis).

The Annual Meeting Awards Banquet celebrated the work of several members of the defense community. Joyce Kendrick, staff attorney with Brooklyn Defender Services, received the Kevin M. Andersen Memorial Award, which is given to an attorney in practice for less than 15 years who works in the area of public defense and exemplifies the sense of justice, determination, and compassion that were Kevin's hallmarks. The Wilfred R. O'Connor Award was presented to Raymond A. Kelly, Jr., a longtime NYSDA member, Basic Trial Skills Program faculty member, and public defense attorney. Echoing the reform activities earlier in the conference, Vincent E. Doyle III received NYSDA's Service of Justice Award for his work as Chair of the NYSBA Special Committee to Ensure Quality of Mandated Representation. Sol Wachtler, former Chief Judge of the New York Court of Appeals, delivered the keynote address at this celebratory dinner.

(continued on page 17)

Conferences & Seminars

Sponsor: New York City Bar Association
Theme: ABCs of Federal Criminal Practice
Dates: October 10 & 17, 2007
Place: New York City Bar Assoc., NYC
Contact: NYCBAR: tel (212) 382-6663; fax (212) 869-4451; website www.nycbar.org

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Sponsor: New York County Lawyers Association
Theme: 29th Annual Criminal Trial Advocacy Institute
Dates: October 11 & 12, 2007
Place: New York County Lawyers' Association, NYC
Contact: NYCLA: tel (212) 267-6646 x215; fax (212) 267-1745; website www.nycla.org

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross to Kill
Date: October 12, 2007
Place: St. Francis College, Brooklyn, NY
Contact: NYSACDL: tel (212) 532-4434; fax (212) 532-4468; email nysacdl@aol.com; website www.nysacdl.org

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Civil Commitment of Sex Offenders
Date: October 19, 2007
Place: Marriott Renaissance, Syracuse, NY
Contact: NYSACDL: tel (212) 532-4434; fax (212) 532-4468; email nysacdl@aol.com; website www.nysacdl.org

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Sponsor: New York City Bar Association
Theme: Between A Rock & A Hard Place: Successful Advocacy In The Face Of Parallel Investigations
Date: October 25, 2007
Place: New York City Bar Assoc., NYC
Contact: NYCBAR: tel (212) 382-6663; fax (212) 869-4451; website www.nycbar.org

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Sponsor: Appellate Division, Fourth Judicial Department and New York State Defenders Association
Theme: Assigned Counsel Criminal Appeals
Date: October 27, 2007
Place: Monroe County Bar Association Center, Rochester, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email jkirkpatrick@nysda.org; website www.nysda.org

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Nyack Trainer
Date: November 2, 2007
Place: Best Western on Hudson, Nyack, NY
Contact: NYSACDL: tel (212) 532-4434; fax (212) 532-4468; email nysacdl@aol.com; website www.nysacdl.org

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Sponsor: ABA Criminal Justice Section
Theme: Ethics and Professionalism in Plea Negotiations
Date: November 2, 2007
Place: George Washington University, Washington, DC
Contact: ABA: tel (202) 662-1519; fax (202) 662-1501; website www.abanet.org/crimjust/home.html

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Sponsor: New York State Defenders Association
Theme: Criminal Defense Update
Date: November 3, 2007
Place: Rochester Institute of Technology, Rochester, NY
Contact: NYSDA: tel (518)465-3524; fax (518) 465-3249; email jkirkpatrick@nysda.org; website www.nysda.org

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Sponsor: New York State Defenders Association, Office of the Federal Public Defender, and Federal Bar Association
Theme: Federal Criminal Defense Practice Update
Date: November 6, 2007
Place: Albany, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email jkirkpatrick@nysda.org; website www.nysda.org

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Criminal Trial Practice
Date: November 16, 2007
Place: New York City
Contact: NYSACDL: tel (212) 532-4434; fax (212) 532-4468; email nysacdl@aol.com; website www.nysacdl.org

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Sponsor: Appellate Division, Fourth Judicial Department and New York State Defenders Association
Theme: Assigned Counsel Family Court Appeals
Date: November 17, 2007
Place: Monroe County Bar Association Center, Rochester, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email jkirkpatrick@nysda.org; website www.nysda.org

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Sponsor: New York City Bar Association
Theme: Performances from "Oscar" Winning Litigators: Ethical Conundrums in Criminal Cases
Date: November 27, 2007
Place: New York City Bar Assoc., NYC
Contact: NYCBAR: tel (212) 382-6663; fax (212) 869-4451; website www.nycbar.org

Sponsor:	New York State Association of Criminal Defense Lawyers
Theme:	Last Chance Ethics
Date:	December 1, 2007
Place:	New York City
Contact:	NYSACDL: tel (212) 532-4434; fax (212) 532-4468; email nysacdl@aol.com; website www.nysacdl.org

Sponsor:	National Association of Criminal Defense Lawyers
Theme:	28th Annual Advanced Criminal Law Seminar
Dates:	January 20-25, 2008
Place:	St. Regis Aspen Resort, Aspen, CO
Contact:	NACDL: tel (202) 872-8600; fax (202) 872-8690; email gerald@nacdl.org; website www.nacdl.org

Sponsor:	**New York State Defenders Association**
Theme:	**41st Annual Meeting & Conference**
Dates:	**July 20-22, 2008**
Place:	**Saratoga Springs, NY**
Contact:	**NYSDA: tel (518) 465-3524; fax (518) 465-3249; email jkirkpatrick@nysda.org; website www.nysda.org** ⚖

Job Opportunities

The Franklin County Public Defender's Office seeks a **Public Defender** to fill an unexpired term (approx. 28 months). The attorney selected will lead and administer the Franklin County Public Defender office and staff, as well as maintain a significant caseload. Applicants must be admitted to the New York State bar. The successful candidate must reside in Franklin County within 60 days of appointment. Salary CWE/qualifications. Send cover letter and resumé to: Franklin County Personnel Office, 355 West Main Street, Suite 428, Malone, NY 12953 or email to: dbarnes@co.franklin.ny.us (subject line: Public Defender position).

The Sentencing Project, based in Washington, D.C., seeks a **Research Analyst** to join a program team engaged in analysis and public education in the areas of sentencing policy, incarceration, racial justice, and the collateral consequences of incarceration. The Research Analyst will help to shape the organization's research agenda, and will be responsible for producing briefing sheets, policy reports, journal articles, and op-ed commentary, preparing summaries and commentary for the website, communicating findings to the media and the public, and keeping abreast of policy and program developments in the field. Skills and experience sought include: graduate degree with a minimum of five years relevant experience in research and public policy; strong writing and editing skills; good working knowledge of the criminal justice system; strong quantitative skills and ability to analyze government and academic data and reports; ability to communicate research findings and policy implications to a broad audience; and demonstrated commitment to reform and racial justice. The Sentencing Project is an equal opportunity and affirmative action employer. More info: http://www.sentencingproject.org/. Application deadline: 10/19/2007. To apply, send cover letter, resumé, and writing sample to Nia Lizanna, Operations Manager, The Sentencing Project, 514 Tenth Street, NW, Suite 1000, Washington, DC 20004 or email to: nlizanna@sentencingproject.org. No calls please.

The State of Louisiana Public Defender Board is seeking applications for five positions. Applicants for **State Public Defender** must be licensed to practice law in the US, have at least seven years of experience as a criminal defense attorney, and be licensed to practice law in Louisiana within one year of employment with the Board. Applicants for the **Deputy Public Defender—Director of Training** position must be licensed to practice law in the US, have at least five years experience as a criminal defense attorney, and be licensed to practice law in Louisiana within one year of employment. Applicants for **Deputy Public Defender—Director of Juvenile Defender Services** must be licensed to practice law in the United States, have at least five years experience in the defense of juveniles in delinquency proceedings, and be licensed to practice law in Louisiana within one year of employment. Applicants for **Trial-Level Compliance Officer** must have expertise in matters of performance evaluation development and implementation, be licensed to practice law in the US with at least three years of experience as a criminal defense attorney, or a master's degree in public administration from an accredited school or university and, if licensed as an attorney in a state other than Louisiana, become licensed in Louisiana within one year of employment. Applicants for **Juvenile Justice Compliance Officer** must have expertise in matters of performance evaluation and implementation and be an attorney licensed to practice law in the US with at least three years of experience in the defense of juveniles in delinquency proceedings, or a master's in public administration from an accredited school or university and, if licensed as an attorney in a state other than Louisiana, become licensed in Louisiana within one year of employment.

Full job descriptions available at: http://www.lidab.com/LPDB%20job%20info.htm. For all positions send cover letter, resume, and three references to: Jerri G. Smitko, Chair, Louisiana Public Defender Board, 1010 Common Street, Suite 2710, New Orleans, LA 70112. ⚖

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2007 Legislative Review

By Al O'Connor*

[***Ed. Note:*** *The REPORT annually presents Staff Attorney Al O'Connor's review of relevant New York State legislation. The first item, Civil Commitment of Sex Offenders, was discussed in the last two issues of the REPORT.*]

Sex Offenses/Offenders

➢ **Chap. 7 (S.3318) (Sex Offender Management and Treatment Act). Effective: April 13, 2007.**

See "Actuarial Justice—Representing Sex Offenders Facing Lifetime Civil Confinement" http://www.nysda.org/Hot_Topics/Megan_s_Law/07_ActuarialJustice2007-04-26.pdf

➢ **Chap. 373 (S.6277) (Offense Upgrade—Failure to register as a sex offender). Effective: August 17, 2007.**

Elevates the crime of failure to register or verify as a sex offender (first offense) from a Class A misdemeanor to a Class E felony. Because the crime is defined in the Correction Law (§ 168-t) and not the Penal Law, the second felony offender law does not apply. Subsequent offenses remain a Class D felony.

➢ **Chap. 8 (S.748) (Disseminating indecent material to minors—written descriptions of indecent material). Effective: March 19, 2007.**

Amends Penal Law § 235.22 (1) to specifically include written descriptions of indecent material as a type of communication covered by the statute:

Disseminating indecent material to minors in the first degree:

Knowing the character and content of the communication which, in whole or in part, depicts *or describes, either in words or images*, actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor . . .

The legislation was proposed in response to the Appellate Division decision in *People v. Kozlow*, 31 AD3d 788 (2d Dept 2006), which held the unamended statute did not cover written descriptions and vacated the defendant's conviction. The amendment proved unnecessary because the Court of Appeals reversed and reinstated the conviction in April 2007.

➢ **Chap. 335 (S.5012-a) (Sex Offenses—Prisoners legally incapable of consent to sexual conduct—volunteers and other direct service providers in correctional facilities). Effective: November 1, 2007.**

Penal Law § 130.05 (3)(e) deems persons confined to correctional facilities incapable of consent to sexual contact with correctional personnel and certain other professional employees. This bill adds volunteers and others providing direct services to inmates to the list of persons who face criminal charges for otherwise "consensual" sexual contact with prisoners. The new prohibition extends to:

> (iv) A person, including a volunteer, providing direct services to inmates in the state correctional facility in which the victim is confined at the time of the offense pursuant to a contractual arrangement with the state department of correctional services or, in the case of a volunteer, a written agreement with such department, provided that the person received written notice concerning the provisions this paragraph.

➢ **VETOED (S.5526-a) (Notice to DCJS regarding homeless sex offenders).**

Requires local social service commissioners to give notice to DCJS whenever a sex offender subject to the SORA is placed in temporary housing. (Amends Social Services Law § 136, Correction Law § 168-f).

Criminal Procedure Law

➢ **Chap. 571 (S.6357) (Compelled pre-trial HIV testing of defendants in certain sex offense prosecutions). Effective: November 1, 2007.**

This legislation authorizes a court to issue a pre-trial order compelling a defendant charged with a sex offense that includes sexual intercourse, or oral or anal sexual conduct as an element to submit to HIV testing. The victim must submit a written application for such testing within six months of the date of the crime and file it prior to, or within 48 hours (subject to a good cause extension), of the filing of the indictment or superior court information. A court is authorized to grant the application when HIV testing of the defendant "would provide medical [or psychological] benefit to the victim." The legislation also authorizes follow-up testing of the defendant if the court finds re-testing "medically appropriate" within timeframes to be issued by the commissioner of health.

The results of such testing "shall not be disclosed to the court," and shall be limited to the victim and, upon request, the defendant. Redisclosure shall be permitted only to the "victim's immediate family, guardian, physicians, attorneys, medical or mental health providers and to his or her past and future contacts to whom there was or is a reasonable risk of HIV transmission and shall not

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be permitted to any other person or the court." [New section—CPL § 210.16]

➢ **Chap. 29 (A.2407) (Audio-Visual court appearances). Effective: May 14, 2007.**

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

➢ **Chap. 137 (A.8193) (Family Offenses—temporary order of protection in connection with remand order). Effective: July 3, 2007.**

Amends CPL §§ 530.12 and 530.13 to authorize a criminal court to issue a temporary order of protection in conjunction with the issuance of a securing order.

➢ **Chap. 541 (S.4542-a) (Family Court/Criminal Court concurrent jurisdiction—criminal mischief). Effective: November 13, 2007.**

Amends Family Court Act § 812 and CPL § 530.11 to add criminal mischief to the list of offenses for which Family Court and the criminal courts may exercise concurrent jurisdiction over offenses between members of the same family or household.

➢ **Chap. 548 (S.5049) (Vulnerable Witnesses—Two-way closed-circuit televised testimony). Effective: August 15, 2007.**

This legislation slightly alters the standard governing "vulnerable child witnesses" eligible to give testimony via two-way closed-circuit television pursuant to CPL Article 65. As originally enacted and upheld by the Court of Appeals [*People v. Cintron*, 75 N.Y.2d 249 (1990)], CPL § 65.10 (1) required a determination that "it is likely, *as a result of extraordinary circumstances*, that such child witness will suffer *severe* mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of [such technology] will *help prevent*, or diminish the likelihood or extent of, such harm." The amendment, which according to the bill memo is intended to "liberalize" the statute, strikes the phrases "as a result of extraordinary circumstance" and "help prevent," and replaces "severe" with the word "serious."

➢ **Chap. 377 (S.6352) (Administrative probation violation warrants—Pilot project). Effective: July 18, 2007—scheduled to sunset March 31, 2010.**

This legislation directs the director of the Division of Probation and Correctional Alternatives to establish a pilot project in four counties outside the city of New York concerning administrative probation violation warrants, which will authorize detention of alleged violators for up to 48 hours whenever the sentencing court is unavailable. The pilot project will be limited to so-called "high risk" probationers, ones convicted of sex offenses [Correction Law § 168-a (2), (3)] or "family offenses" [CPL § 530.11].

Penal Law

➢ **Chap. 74 (S.5902) (Sex Trafficking/Labor Trafficking). Effective: November 1, 2007.**

This legislation enacts crimes relating to "sex trafficking" and "labor trafficking" offenses. Although intended to apply to defendants who exploit vulnerable persons through the business of "human trafficking" for sexual or labor servitude, the statutes are broadly worded and subject to abuse. For example, a person is guilty of sex trafficking (Class B felony) if he advances or profits from prostitution by giving a narcotic drug to a prostitute with the intent to impair her judgment, or inducing a person to engage in prostitution by making a material false statement. These definitions could be inappropriately applied to ordinary "pimps" who share drugs with a prostitute or who make false claims. The legislation also elevates the crime of patronizing a prostitute from a Class B to a Class A misdemeanor, and expands the crime of promoting prostitution in the third degree (Class D felony) to include travel-related services for the purpose of patronizing a prostitute, even if prostitution is legal in the traveler's destination. It also enacts a new Article 10-D to the Social Services Law pertaining to services for victims of "human trafficking" offenses (including assistance with immigration matters).

Penal Law § 230.25 Promoting Prostitution in the third degree.

1. Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes, *or a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a prostitute, including to a foreign jurisdiction and regardless of the legality of prostitution in said foreign jurisdiction.*

Class D felony.

Penal Law § 230.34 Sex trafficking.

A person is guilty of sex trafficking if he or she intentionally advances or profits from prostitution by:

1. unlawfully providing to a person who is patronized, with intent to impair said person's judgment: (a) a narcotic drug or a narcotic preparation; (b) concentrated cannabis as defined in paragraph (a) of subdivision four of section thirty-three hundred two of the public health law; (c) methadone; or (d) gamma-

hydroxybutyrate (GHB) or flunitrazepan, also known as Rohypnol;

2. making material false statements, misstatements, or omissions to induce or maintain the person being patronized to engage in or continue to engage in prostitution activity;

3. withholding, destroying, or confiscating any actual or purported passport, immigration document, or any other actual or purported government identification document of another person with intent to impair said person's freedom of movement; provided, however, that this subdivision shall not apply to an attempt to correct a social security administration record or immigration agency record in accordance with any local, state, or federal agency requirement, where such attempt is not made for the purpose of any express or implied threat;

4. requiring that prostitution be performed to retire, repay, or service a real or purported debt;

5. using force or engaging in any scheme, plan or pattern to compel or induce the person being patronized to engage in or continue to engage in prostitution activity by means of instilling a fear in the person being patronized that, if the demand is not complied with, the actor or another will do one or more of the following:

   (a) cause physical injury, serious physical injury, or death to a person; or

   (b) cause damage to property, other than the property of the actor; or

   (c) engage in other conduct constituting a felony or unlawful imprisonment in the second degree in violation of section 135.05 of this chapter; or

   (d) accuse some person of a crime or cause criminal charges or deportation proceedings to be instituted against some person; provided however, that it shall be an affirmative defense to this subdivision that the defendant reasonably believed the threatened charge to be true and that his or her sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge; or

   (e) expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

   (f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

   (g) use or abuse his or her position as a public servant by performing some act within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

   (h) perform any other act which would not in itself materially benefit the actor but which is calculated to harm the person who is patronized materially with respect to his or her health, safety, or immigration status.

Class B felony.

Penal Law § 230.36 Sex trafficking; accomplice.
In a prosecution for sex trafficking, a person from whose prostitution activity another person is alleged to have advanced or attempted to advance or profited or attempted to profit shall not be deemed to be an accomplice.

Penal Law § 135.35 Labor trafficking.
A person is guilty of labor trafficking if he or she compels or induces another to engage in labor or recruits, entices, harbors, or transports such other person by means of intentionally:

1. unlawfully providing a controlled substance to such person with intent to impair said person's judgment;

2. requiring that the labor be performed to retire, repay, or service a real or purported debt that the actor has caused by a systematic ongoing course of conduct with intent to defraud such person;

3. withholding, destroying, or confiscating any actual or purported passport, immigration document, or any other actual or purported government identification document, of another person with intent to impair said person's freedom of movement; provided, however, that this subdivision shall not apply to an attempt to correct a social security administration record or immigration agency record in accordance with any local, state, or federal agency requirement, where such attempt is not made for the purpose of any express or implied threat;

4. using force or engaging in any scheme, plan or pattern to compel or induce such person to engage in or continue to engage in labor activity by means of instilling a fear in such person that, if the demand is not complied with, the actor or another will do one or more of the following:

   (a) cause physical injury, serious physical injury, or death to a person; or

(b) cause damage to property, other than the property of the actor; or

(c) engage in other conduct constituting a felony or unlawful imprisonment in the second degree in violation of section 135.05 of this chapter; or

(d) accuse some person of a crime or cause criminal charges or deportation proceedings to be instituted against such person; provided, however, that it shall be an affirmative defense to this subdivision that the defendant reasonably believed the threatened charge to be true and that his or her sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge; or

(e) expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(g) use or abuse his or her position as a public servant by performing some act within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

Class D felony.

Penal Law § 135.36 Labor trafficking; accomplice.
In a prosecution for labor trafficking, a person who has been compelled or induced or recruited, enticed, harbored or transported to engage in labor shall not be deemed to be an accomplice.

Patronizing a Prostitute—Amendments
Penal Law § 230.03—REPEALED.

Penal Law § 230.04 Patronizing a prostitute in the third degree.
A person is guilty of patronizing a prostitute in the third degree when [~~, being over twenty-one years of age,~~] he **or she** patronizes a prostitute [~~and the person patronized is less than seventeen years of age~~].

Class A misdemeanor.

Penal Law § 230.07 Patronizing a prostitute; defense.
In any prosecution for patronizing a prostitute in the first [~~,~~] or second [~~or third~~] degrees, it is a defense that the defendant did not have reasonable grounds to believe that the person was less than the age specified.

➢ **Chap. 582 (A.5036) (New offenses relating to "service animals"). Effective: November 1, 2007.**
Establishes new crimes relating to the harming of guide dogs and other "service animals." The Governor's approval message notes flaws in the statute relating to a defendant's intent and knowledge, and urges the Legislature to amend the statutes. (New Penal Law Article 242).

Penal Law § 242.05 Interference, harassment or intimidation of a service animal.
A person is guilty of interference, harassment or intimidation of a service animal when he or she commits an act with intent to and which does make it impractical, dangerous or impossible for a service animal to perform its assigned responsibilities of assisting a person with a disability.

Class B misdemeanor.

Penal Law § 242.10 Harming a service animal in the second degree.
A person is guilty of harming a service animal in the second degree when, with the intent to do so, he or she causes physical injury, or causes such injury that results in the death, of a service animal.

Class A misdemeanor.

Penal Law § 242.15 Harming a service animal in the first degree.
A person is guilty of harming a service animal in the first degree when, he or she commits the crime of harming a service animal in the second degree, and has been convicted of harming a service animal in the first or second degree within the prior five years.

Class E felony.

➢ **Chap. 570 (S.6241) (Eavesdropping warrants—Designated offenses). Effective: November 1, 2007.**
Adds Penal Law § 275.40 (Failure to disclose the origin of a recording in the first degree) to the list of offenses that can be the subject of an eavesdropping warrant pursuant to CPL § 700.05.

➢ **Chap. 519 (S.1869) (Restitution—Placing a false bomb or hazardous substance). Effective: August 15, 2007.**
Adds Placing a False Bomb or Hazardous Substance (Penal Law §§ 240.62, 240.63) to the list of offenses that can support a restitution award to a school, municipality, fire department, ambulance company, or emergency service provider pursuant to Penal Law § 60.27.

➢ **Chap. 291 (S.2589) (Unlawful surveillance—cell phones). Effective: November 1, 2007.**
Adds cell phones to the definition of "imaging device"

for purposes of unlawful surveillance offenses (Penal Law § 250.40).

➢ **Chap. 310 (S.3844-a) (Non-support of a child in the first degree—predicate offense). Effective: November 1, 2007.**

Technical amendment to non-support of a child in the first degree (Penal Law § 260.06), which specifies that a prior conviction for either the second degree or *first degree offense* within the preceding five years upgrades the crime to a Class E felony.

➢ **Chap. 353 (S.5791-a) (Cemetery Desecration—Theft of Property). Effective: July 18, 2007.**

Amends laws relating to cemetery desecration in order to criminalize theft of property from a cemetery plot, a misdemeanor offense (Penal Law § 145.22), and a Class E felony when the value of the property exceeds $250 (Penal Law § 145.23).

➢ **Chap. 376 (S.6332) (Aggravated Cemetery Desecration). Effective: November 11, 2007.**

Establishes two new felonies relating to cemetery desecration—aggravated cemetery desecration in the first and second degrees.

Penal Law § 145.26 Aggravated cemetery desecration in the second degree.

A person is guilty of aggravated cemetery desecration in the second degree when, having no right to do so nor any reasonable ground to believe that he or she has such right, he or she opens a casket, crypt, or similar vessel containing a human body or human remains which has been buried or otherwise interred in a cemetery and unlawfully removes therefrom a body, bodily part, any human remains or any object contained in such casket, crypt or similar vessel for the purpose of obtaining
unlawful possession of such body, bodily part, human remains or object for such person or a third person.

Class E felony.

Aggravated cemetery desecration in the first degree (Penal Law § 145.27) applies when a person commits the second degree offense and has been previously convicted within the past five years of a cemetery desecration offense.

Class D felony.

➢ **Chap. 568 (S.6230) (Enterprise corruption—trademark counterfeiting). Effective: November 1, 2007.**

Adds Trademark Counterfeiting in the first and second degrees (Penal Law §§ 165.72, 165.73) to the list of crimes that may form the basis of an enterprise corruption prosecution (Penal Law § 460.10).

➢ **Chap. 191 (S.3886) (Intrastate probation transfers). Effective: September 1, 2007.**

This bill streamlines the procedure for intrastate transfers of probation. It provides for non-discretionary transfers when the defendant resides in another jurisdiction within New York State at the time of sentence. In all other situations, the bill provides sentencing courts with discretionary authority to transfer probation to another jurisdiction. The bill eliminates statutory authority for bifurcated transfers—where a sentencing court could formally retain authority to resentence the defendant in the event of a violation. From now on, an appropriate court within the transfer jurisdiction will assume complete authority over the probationer, including resentencing authority (Amends CPL § 410.80).

DWI and Related Offenses

➢ **Chap. 345 (S.5517-a) (New Crimes—Aggravated vehicular homicide/Aggravated vehicular assault). Effective: November 1, 2007.**

This legislation, spurred on by a high profile drunk driving murder case on Long Island, creates two new crimes, aggravated vehicular homicide (Penal Law § 125.14), a Class B felony, and aggravated vehicular assault (Penal Law § 120.04-a), a Class C felony. The crimes are defined by coupling the element of reckless driving with the underlying offenses of vehicular manslaughter (or assault) with enumerated aggravating circumstances (i.e., BAC level of .18 or higher, suspended license, prior convictions within the preceding 10 years, death or injury to more than one person). The legislation also includes numerous conforming amendments, adding these two new crimes to various provisions of the Vehicle and Traffic Law.

Penal Law § 125.14 Aggravated vehicular homicide

A person is guilty of aggravated vehicular homicide when he or she engages in reckless driving as defined by section twelve hundred twelve of the vehicle and traffic law, and commits the crime of vehicular manslaughter in the second degree as defined in section 125.12 of this article, and either:

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

(2) commits such crimes while knowing or having reason to know that:

(a) his or her license or his or her privilege of operating a motor vehicle in another state or his or

her privilege of obtaining a license to operate a motor vehicle in another state is suspended or revoked and such suspension or revocation is based upon a conviction in such other state for an offense which would, if committed in this state, constitute a violation of any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law; or (b) his or her license or his or her privilege of operating a motor vehicle in this state or his or her privilege of obtaining a license issued by the commissioner of motor vehicles is suspended or revoked and such suspension or revocation is based upon either a refusal to submit to a chemical test pursuant to section eleven hundred ninety-four of the vehicle and traffic law or following a conviction for a violation of any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law;

(3) has previously been convicted of violating any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law within the preceding ten years, provided that, for the purposes of this subdivision, a conviction in any other state or jurisdiction for an offense which, if committed in this state, would constitute a violation of section eleven hundred ninety-two of the vehicle and traffic law, shall be treated as a violation of such law;

(4) causes the death of more than one other person;

(5) causes the death of one person and the serious physical injury of at least one other person; or

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

If it is established that the person operating such motor vehicle caused such death or deaths while unlawfully intoxicated or impaired by the use of alcohol or a drug, or by the combined influence of drugs or of alcohol and any drug or drugs, then there shall be a rebuttable presumption that, as a result of such intoxication or impairment by the use of alcohol or a drug, or by the combined influence of drugs or of alcohol and any drug or drugs, such person operated the motor vehicle in a manner that caused such death or deaths, as required by this section and section 125.12 of this article.

Class B felony.

Penal Law § 120.04-a Aggravated vehicular assault.

A person is guilty of aggravated vehicular assault when he or she engages in reckless driving as defined by section twelve hundred twelve of the vehicle and traffic law, and commits the crime of vehicular assault in the second degree as defined in section 120.03 of this article, and either:

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

commits such crimes while knowing or having reason to know that:

(a) his or her license or his or her privilege of operating a motor vehicle in another state or his or her privilege of obtaining a license to operate a motor vehicle in another state is suspended or revoked and such suspension or revocation is based upon a conviction in such other state for an offense, which would, if committed in this state, constitute a violation of any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law; or

(b) his or her license or his or her privilege of operating a motor vehicle in this state or his or her privilege of obtaining a license issued by the commissioner of motor vehicles is suspended or revoked and such suspension or revocation is based upon either a refusal to submit to a chemical test pursuant to section eleven hundred ninety-four of the vehicle and traffic law or following a conviction for a violation of any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law;

(3) has previously been convicted of violating any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law within the preceding ten years, provided that, for the purposes of this subdivision, a conviction in any other state or jurisdiction for an offense, which, if committed in this state, would constitute a violation of section eleven hundred ninety-two of the vehicle and traffic law, shall be treated as a violation of such law;

(4) causes serious physical injury to more than one other person; or

(5) has previously been convicted of violating any provision of this article or article one hundred twenty-five of this title involving the operation of a motor vehicle, or was convicted in any other state or juris-

diction of an offense involving the operation of a motor vehicle which, if committed in this state, would constitute a violation of this article or article one hundred twenty-five of this title.

If it is established that the person operating such motor vehicle caused such serious physical injury or injuries while unlawfully intoxicated or impaired by the use of alcohol or a drug, or by the combined influence of drugs or of alcohol and any drug or drugs, then there shall be a rebuttable presumption that, as a result of such intoxication or impairment by the use of alcohol or a drug, or by the combined influence of drugs or of alcohol and any drug or drugs, such person operated the motor vehicle in a manner that caused such serious physical injury or injuries, as required by this section and section 120.03 of this article.

Class C felony.

➢ **Chap. 311 (S.3950) (Snowmobiling while intoxicated—prohibited areas). Effective: November 1, 2007.**

The Parks, Recreation and Historic Preservation Law § 25.24 prohibits snowmobiling while intoxicated on streets, highways and public trails and lands. This legislation extends the area covered by the section to "bodies of water, or private property of another."

➢ **Chap. 669 (S.5780-a) (Ignition interlock program). Effective: October 27, 2007.**

Amends Penal Law § 65.10 (k)(1) to require that an ignition interlock device required as a condition of sentence be installed in any vehicle owned or operated by the defendant. (Formerly, the device was required in any vehicle owned or operated on *a regular basis* by the defendant.)

Non-Penal Law Offenses

➢ **Chap. 61 (A.7526) (Ticket scalping—maximum resale price repealed). Effective: May 31, 2007. [See also Chap. 374 (S.6321)—chapter amendments]**

Amends the Arts and Cultural Affairs Law Article 25 to eliminate all restrictions on the maximum resale price of tickets. The law retains no scalping buffer zones for unlicensed and licensed ticket dealers of 1500 feet for venues with a capacity in excess of 5000 persons, and 500 feet for venues with a capacity of 5000 or fewer persons. However, it adds a new section that criminalizes the selling, or offering of tickets anywhere on the street in any city or in the County of Nassau.

Arts & Cultural Affairs Law § 25.05 Ticket speculators.
Any person who:

1. Conducts on or in any street in a city or in the county of Nassau the business of selling or offering for sale any ticket of admission or any other evidence of the right of entry to any performance or exhibition in or about the premises of any theatre or concert hall, place of public amusement, circus or common show; or
2. Solicits on or in any street in a city or in the county of Nassau by words, signs, circulars or other means any person to purchase any such ticket or other evidence of the right of entry; or
3. In or from any building, store, shop, booth, yard, garden or in or from any opening, window, door, hallway, corridor or in or from any place of ingress or egress to or from any building, place of business, store, shop, booth, yard or garden in a city or in the county of Nassau indicates, holds out or offers for sale to any person or persons on or in the street by word of mouth, crying, calling, shouting or other means that such ticket or other evidence of the right of entry may be purchased in such building, store, shop, booth, yard, garden or any other place; or
4. In or from any such place or places in a city or in the county of Nassau solicits by word of mouth, crying, calling, shouting or other means any person on or in the street to purchase any such ticket or other evidence of the right of entry, is guilty of a misdemeanor.

Unclassified misdemeanor.

➢ **Chap. 418 (S.53) (Littering—increased fines). Effective: November 1, 2007.**

Amends VTL § 1220 (c) to increase fines for littering on highways—first offense: up to $350 fine and/or 10 hours community service (from $250 and 8 hours); second and subsequent offenses: up to $700 fine and/or 15 hours community service (from $500 and 8 hours).

➢ **VETOED (A.735) (Illegal Hunting—increase fines and penalties).**

Amends Environmental Conservation Law § 71-0921 to increase fines and penalties for illegal taking of big game, or illegal spotlighting of big game or deer: first offense—up to 1 year imprisonment and a fine of $500—$3000 (up from $250—$2000), subsequent offenses fine of $1000—$5000. In addition, the bill provides for new mandatory firearm license suspensions: first offense—2 years; subsequent offense—5 years. (Governor Pataki vetoed this bill in 2006.)

Prisons/Prisoners

➢ **Chap. 239 (A.3286) (Early conditional parole for deportation purposes only available on determinate sentences for drug offenses). Effective: July 18, 2007.**

Following enactment of the 2004 Drug Law Reform Act, the Board of Parole announced that it would not consider inmates serving determinate sentences for drug offenses for early parole release for deportation purposes only [Executive Law § 259-i (d)(i)]. This bill makes clear that such inmates are eligible for early conditional release notwithstanding service of a determinate term of imprisonment. (This bill was vetoed by Governor Pataki in 2006.)

➢ **Chap. 240 (A.3397-b) (Telephone service—state correctional facilities). Effective: April 1, 2008.**

Requires the Department of Correctional Services to make available a collect call system or prepaid telephone system with emphasis on "the lowest possible cost to the telephone user." The bill also provides that DOCS "shall not accept or receive revenue in excess of its reasonable operating cost for establishing and administering such telephone system services." (Correction Law § 623.)

➢ **Chap. 355 (S.5875-a) (Medicaid eligibility following release from prison or jail). Effective: April 1, 2008.**

This legislation amends Social Services Law § 366 in order to facilitate a person's immediate resumption of Medicaid coverage following release from prison or jail. In lieu of dropping inmates from the Medicaid rolls after commitment to a prison or jail, this legislation suspends coverage by providing that Medicaid recipients shall remain technically eligible following commitment to a state or local correctional facility, "except that no medical assistance shall be furnished . . . for any care, services, or supplies provided during such time as the person is an inmate." However, the legislation does provide that "nothing herein shall be deemed as preventing the provision of medical assistance for inpatient hospital services furnished to an inmate at a hospital outside of the premises of such correctional facility, to the extent that federal financial participation is available for the costs of such services."

➢ **Chap. 336 (S.5143) (Seneca County correctional facility—Persons held for arraignment). Effective: July 18, 2007.**

Amends Correction Law §§ 500-a and 500-c to authorize use of the Seneca County Correctional Facility for detention of persons under arrest and being held for arraignment in the county.

Collateral Consequences

➢ **Chap. 639 (S.3092) (Employment discrimination—inquiries about youthful offender adjudications and sealed violations prohibited). Effective: November 1, 2007.**

Amends Executive Law § 296 (16) to make it an "unlawful discriminatory practice" for an employer to inquire about youthful offender adjudications or violations sealed pursuant to CPL § 160.55, or to take adverse action against an individual because of such matters. (Governor Pataki vetoed a similar bill in 2006.)

➢ **Chap. 284 (S.1602-a) (Employment discrimination—current employees). Effective: July 18, 2007.**

Correction Law Article 23-a prohibits discrimination in certain employment and licensing decisions involving persons with criminal convictions, unless there is a direct relationship between the offense and the specific license or employment sought. This bill extends the qualified protections of Article 23-a to persons who are already employed or licensed and prohibits unwarranted adverse action because of previous criminal convictions. The bill provides that it shall not "affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment made by a prospective employee or previously made by a current employee." (A similar bill was vetoed by Governor Pataki in 2006.)

➢ **Chap. 235 (A.463) (Certificate of relief from civil disabilities/good conduct inapplicable to certain firearms ownership). Effective: October 16, 2007.**

Amends Penal Law § 265.20 (5) to provide that a certificate of good conduct shall not authorize a person convicted of a Class A-I felony or a violent felony to possess a rifle or shotgun. Amends Correction Law § 701 (2) to provide that a certificate of relief from civil disabilities shall not provide relief from automatic forfeiture of a firearm permit issued pursuant to Penal Law § 400.00 when a person was convicted of a Class A-I felony or a violent felony, and amends Correction Law § 703-a (2) to provide a firearms permit disability for a person convicted of such offenses.

➢ **VETOED (S.820) (Employment—barbering license).**

Amends General Business Law §§ 434 and 438 to provide that in determining good moral character for purposes of issuing a barbering license the secretary of state "shall not automatically disqualify an applicant on the basis of a criminal conviction." (A similar bill was vetoed by Governor Pataki in 2006.)

Courts

➢ **Chap. 205 (S.4212) (Increased penalty for disobeying judicial subpoena). Effective: January 1, 2008.**

Amends CPLR § 2308 to raise the maximum penalty for failure to obey a judicial subpoena from $50 to $150.

➢ **Chap. 321 (S.4257) (Reassignment of judges to town and village courts). Effective: July 18, 2007.**

Amends the Uniform Justice Court Act and Judiciary Law to give the Chief Administrative Judge authority to temporarily assign a town or village justice, or city court judge, to a town or village court within the county of such judge's residence, or any adjoining one. The legislation is part of OCA's Town and Village Court Action Plan.

➢ **Chap. 638 (S.2709) (Justice courts—felony convictions). Effective: August 28, 2007.**

Bars felons from holding the office of town or village justice. (Amends Town Law § 31, Village Law § 3-301)

➢ **Chap. 40 (A.7373) (Habeas Corpus—Family Court matters). Effective: May 29, 2007.**

Amends CPLR § 7009 to provide that the Attorney General shall represent the court in all habeas corpus proceedings arising out of Family Court matters (in lieu of the New York City Corporation Counsel and county attorneys).

➢ **Chap. 210 (S.4631) (Court of Claims—Priority to certain claims of unjust conviction and imprisonment). Effective: July 3, 2007.**

Amends Court of Claims Act § 8-b to give docket priority to claims of unjust conviction and imprisonment that are based on claims of innocence supported by DNA evidence. (Known as "Anthony's Law"—after Anthony Capozzi, a Buffalo man who served over 20 years in prison for rape before he was exonerated by DNA in 2007.)

Miscellaneous

➢ **VETOED (S.3445) (Authorizes state troopers to plea bargain traffic tickets).**

Countermands the State Police regulation that prohibits troopers from plea bargaining traffic tickets.

Executive Law § 231—Prosecution of certain violations of the vehicle and traffic law.

The division of state police shall make no rule or regulation nor shall otherwise limit a member of the state police's ability to modify or recommend the modification of a charge before a court relating to a petty violation of the vehicle and traffic law. In addition, a member who has issued a citation or uniform traffic ticket (hereafter referred to as the "issuing member") to a person for committing a petty violation of the vehicle and traffic law shall be authorized to appear before the court if authorized by the local district attorney where such violation is returnable on behalf of the people of the state of New York, at a date designated by the court, and recommend to the court the modification of the original charge or charges.

This section is not intended to affect any plea bargain limitations otherwise provided for in this chapter or other law of this state, including, but not limited to, those limitations set forth for the alleged commission of a violation of article thirty-one of the vehicle and traffic law.

➢ **Chap. 346 (S.5541-a) (Identity theft crimes—police reports). Effective: July 18, 2007.**

Authorizes an identity theft victim to file a complaint in a county "[1] in which any part of the offense took place regardless of whether the defendant was actually present in such county, or [2] in the county in which the person who suffered financial loss resided at the time of the commission of the offense, or [3] in the county where the person whose personal identification information was used in the commission of the offense resided a the time of the commission of the offense. " The bill also provides such victims a right to a free copy of the police report. (Amends Executive Law § 646, CPL § 20.40 [4][l]).

Peace/Police Officer Bills

Note: Governor Spitzer has expressed disapproval of piecemeal legislation designating certain employees as peace officers on an ad hoc basis, and has called for comprehensive legislation on the subject. Therefore, he vetoed all but one of the following "peace officer" bills:

A.6065—(Vetoed)—Uniformed members of the fire marshall's office in the Village of Southampton

S.916—(Vetoed)—Dog control officers in the city of Syracuse

S.4323—(Vetoed)—Security officers for the Town Court of Alden

Chap. 550 (S.5159)—Adds United States Department of Interior park rangers to the list of Federal law enforcement officers included in CPL § 2.15

S.5805—(Vetoed)—Dog control officers of the city of Utica

S.6195—(Vetoed)—Uniform members of the bureau of fire prevention of the Town of Islip

S.6204—(Vetoed)—Persons employed by Paul Smith's College as members of the campus safety department

S.6263—(Vetoed)—Employees of the Village of Lake George serving as peace officers pursuant to local law ⚖

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Board of Immigration Appeals Holds that a Conviction under the First Subsection of the New York Misdemeanor Assault Statute Is a Conviction of a Crime Involving Moral Turpitude

On July 25, 2007, the Board of Immigration Appeals held that the New York offense of misdemeanor assault is a crime involving moral turpitude triggering deportability and other adverse immigration consequences. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007).

The Board began its analysis by noting that the Immigration and Nationality Act does not define the term "crime involving moral turpitude." However, it stated that the Board has held that the term "encompasses conduct that shocks the public conscience as being 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" *Id.* at 240 (quoting *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999)).

After commenting that crimes committed intentionally or knowingly have historically been found to involve moral turpitude, and that crimes committed recklessly "may" also be so found, the Board reviewed its case law on assault offenses, which the Board has said may or may not involve moral turpitude.

After reviewing its case law, the Board stated:

> The reasoning from these decisions reflects that at least in the context of assault crimes, a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm. This body of law, then, deems intent to be a crucial element in determining whether a crime involves moral turpitude.
>
> *Id.* at 242.

The Board then applied its case law to the assault conviction at issue in *Matter of Solon*, a 2002 conviction under Penal Law 120.00(1). Section 120.00(1) provides that "[a] person is guilty of assault in the third degree when: 1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person." The Board found that an offense under this subsection of the New York misdemeanor assault statute requires both specific intent to cause physical injury and actual physical injury. It thus distinguished a 120.00(1) offense that requires specific intent to cause physical injury from general intent simple assault offenses, which are not considered to involve moral turpitude. It also found that a section 120.00(1) offense requires more than a mere offensive touching since "physical injury," as set forth in Penal Law 10.00(9), states that the physical injury required must involve "impairment of physical condition or substantial pain," as opposed to mere "pain."

The Board concluded:

> In summary, as we understand New York law, a conviction for assault in the third degree under section 120.00(1) of the New York Penal Law requires, at a minimum, (1) that the offender acts with the conscious objective to cause another person impairment of physical condition or substantial pain of a kind meaningfully greater than mere offensive touching, and (2) that such impairment of physical condition or substantial pain actually results. Thus, a conviction under this statute requires, at a minimum, intentionally injurious conduct that reflects a level of depravity or immorality appreciably greater than that associated with the crime at issue in *Matter of Sanudo*, [23 I&N Dec. 968], 971-72 (stating that the minimal conduct necessary for a battery conviction under section 242 of the California Penal Code was in the nature of a simple battery). Accordingly, we conclude that a conviction under section 120.00(1) of the New York Penal Law is a conviction for a crime involving moral turpitude.
>
> *Matter of Solon*, 24 I&N Dec. at 245.

Practice Tip

Conviction of a crime involving moral turpitude (CIMT) may trigger deportability, inadmissibility, or ineligibility for citizenship. *See* Chapter 3, *Representing Immigrant Defendants in New York*. As the Board of Immigration Appeals makes clear in *Matter of Solon*, federal immigration authorities will deem a conviction under subsection 1 of Penal Law 120.00 a CIMT and thus, such a conviction may trigger these adverse consequences.

Nevertheless, *Matter of Solon* provides further support for the conclusion that convictions under subsections 2 and 3 of Penal Law 120.00 will not be deemed CIMTs. For example, the Board cited its prior decision in *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996), which held that if an

**The IDP provides training and legal support to defense attorneys, other immigrant advocates, and immigrants themselves in defending against the immigration consequences of criminal dispositions. For backup assistance on individual cases, call the IDP at (212) 725-6422. We return messages. IDP is located at 3 West 29th Street, Suite 803, New York, NY 10001.*

assault offense requires only reckless conduct, it must require a showing of "serious bodily injury" in order to be considered to involve moral turpitude. *See Matter of Solon*, 24 I&N Dec. at 242. Therefore, a conviction under Penal Law 120.00(2) should not be considered a CIMT. It also suggests that there may be alternative Penal Law dispositions covering lesser conduct that will not be deemed CIMTs. For example, the Board noted that Penal Law 120.15 (menacing in the third degree) continues to "prohibit some of the lesser conduct traditionally encompassed within common-law assault," which has not been considered to be a CIMT. *Id.* at 244 n.5.

Thus, a New York defense practitioner should try to negotiate a plea to a subsection of the misdemeanor assault statute or a lesser or alternative offense that would not necessarily be considered a CIMT. Where a criminal statute, such as Penal Law 120.00, is divisible or ambiguous as to whether the offense involves moral turpitude, the Board will look beyond the statute only to the record of conviction in order to determine whether the offense is a CIMT. The record of conviction includes the charge, indictment, plea, judgment or verdict, sentence, and transcript from criminal court proceedings. If you can keep out of the record of conviction information that establishes that your client was convicted of the portion of the statute that covers conduct that involves moral turpitude (*i.e.*, subsection 1), you may help your noncitizen client avoid removal or other negative immigration consequences. *See* Section 4.3 (Immigration Consequences Of Dispositions Involving Broadly Defined State Offenses—Categorical Approach And Divisibility Analysis), in *Representing Immigrant Defendants in New York.*

In a Recent Unpublished Decision, the Board of Immigration Appeals Considers Whether a New York State 2nd Degree Harassment Conviction May Constitute a Charge of Deportability as a "Crime of Domestic Violence"

In a recent unpublished, non-precedential decision, the Board of Immigration Appeals considered whether an individual convicted of harassment in the second degree under Penal Law 240.26 would be deportable as an immigrant convicted of a "crime of domestic violence" under the Immigration and Nationality Act 237(a)(2)(E)(i), 8 U.S.C. 1227(a)(2)(E)(i). *See In re Lee*, A 47926006 (BIA June 11, 2007). In *Lee*, the Board concluded that Penal Law 240.26 is a "divisible" statute for deportability purposes, meaning that it encompasses some offenses that would be considered a "crime of domestic violence" and some that would not. The Board did not specify which sections of Penal Law 240.26 would constitute a "crime of domestic violence." However, applying a categorical approach and examining the respondent's record of conviction, the Board explained that it could not determine the threshold question of which parts of the statute were implicated by the respondent's conviction, and thus it could not conclude that the respondent's offense involved a "crime of domestic violence." Therefore, the Board held that the respondent was not deportable on the basis of having been convicted of a "crime of domestic violence."

Practice Tip

Although this is an unpublished decision, *In re Lee* indicates that a Penal Law 240.26 conviction may be considered a "crime of domestic violence," which is a ground of deportation for lawfully admitted immigrants such as lawful permanent residents. Also note that the conviction may be considered a "crime involving moral turpitude." Less risky options for these clients include an adjournment in contemplation of dismissal or a disorderly conduct conviction under Penal Law 240.20, neither of which would provide grounds for removal. However, if the client has to plead to harassment in the second degree, defense attorneys should try to keep any detail out of the record of conviction that would establish to which subsection of the harassment statute the client's conviction pertains.

New York State Legislature Passes and Governor Spitzer Signs Legislation that Authorizes Early Release for Deportation for Noncitizen Inmates Sentenced or Resentenced to Definite Terms of Imprisonment

On July 18, 2007, New York State Governor Elliot Spitzer signed S.6228/A.3286 (Chapter 239), a technical fix bill that amends the New York Executive Law to clarify that the Board of Parole may grant discretionary early release to non-citizen inmates for purposes of turning them over to federal immigration authorities for deportation *even if the inmate was sentenced to a determinate sentence*.

Specifically, Chapter 239 amends section 259-i of the Executive Law to provide that, in addition to its authority to grant parole from an indeterminate sentence, the Board of Parole may grant release for deportation from a determine sentence to a noncitizen who is not otherwise ineligible under existing law (*i.e.*, convicted of a violent offense). Early release remains conditioned on the prior issuance of a final deportation order and assurances from federal immigration authorities that deportation will occur promptly.

Enactment of this bill was necessary to preserve the Parole Board's authority to release noncitizen drug offenders for deportation after the 2004 and 2005 Drug Law Reform Acts amended state law to require that drug offenders be sentenced to determinate terms of imprisonment. Also, some drug offenders who were convicted before the enactment of the Drug Law Reform Acts had been resentenced to a determinate term or are eligible to be resentenced to a determinate term. Prior to this bill,

Executive Law 259-i appeared to authorize early release for deportation only for noncitizen offenders sentenced to indeterminate sentences and eligible for parole. This created a hurdle for many noncitizens otherwise eligible for early release for deportation, especially since the overwhelming majority of noncitizen inmates granted early release purposes have been drug offenders.

The new legislation restores the possibility of early release for drug offenders sentenced to determinate terms. As the bill sponsor's memo states: "When sentences for drug offenders were changed from indeterminate to determinate terms, the legislature did not intend to render such offenders ineligible for early release for deportation only. . . . . Therefore, this bill clarifies the existing law and allows inmates serving a determinate sentence who are not otherwise ineligible to be considered for parole for deportation purposes."

NYSDA Publishes and Begins Distribution of Updated and Supplemented Fourth Edition of IDP Immigrant Defense Manual

NYSDA has published and begun distribution of an updated and supplemented Fourth Edition of *Representing Immigrant Defendants in New York* (formerly *Representing Noncitizen Criminal Defendants in New York State*). The Fourth Edition includes many new and/or improved features, including the following:

- **Entire manual updated** to incorporate the many significant case law and practice developments since publication of the Third Edition, including the 2006 US Supreme Court decision in *Lopez v. Gonzales* on the breadth of the "drug trafficking crime" aggravated felony deportation category and the 2004 US Supreme Court *Leocal v. Ashcroft* decision on the breadth of the "crime of violence" aggravated felony deportation category, and other federal court and agency decisions potentially altering the immigration implications of conviction of the following NYS offenses:
  - —drug possession offenses
  - —DWI offenses
  - —offenses involving reckless or negligent conduct generally
  - —theft and burglary offenses
  - —fraud and deceit offenses
  - —sex abuse offenses involving minors
  - —certain attempt or conspiracy offenses
- **Manual supplemented** to include new sections on analyzing immigration implications of the following:
  - —convictions of broadly defined New York State offenses that cover deportable and non-deportable conduct
  - —convictions of NYS accessory and preparatory offenses
  - —conviction appeals
  - —post-conviction vacaturs and resentencing
- **Updated and expanded Quick Reference Chart for NYS Offenses, including quick reference practice tips** for criminal and immigration practitioners on avoiding adverse immigration consequences for noncitizen clients.
- **Over 200 pages of additional updated charts and outlines** on criminal/immigration issues to assist criminal and immigration practitioners in effective representation of noncitizen clients.
- **Updated and improved one-page Immigration Consequences of Criminal Convictions Checklist** binder insert for quick-reference courtroom use with new back page summarizing Suggested Approaches for Representing a Noncitizen in a Criminal Case.

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

Defender News *(continued from page 3)*

Save the Date—NYSDA's 41st Annual Meeting at the Spa Again

NYSDA's 41st Annual Meeting and Conference will take place on July 20-22, 2008 at the Gideon Putnam Resort in Saratoga Springs, NY. Hotel reservations can be made by calling 1-800-732-1560 or 518-584-3000 or faxing 518-584-1354.

NYSDA Welcomes Susan Bryant

In July 2007, Susan Bryant joined the NYSDA Backup Center as a staff attorney. Susan has a J.D. from St. John's University School of Law and a Masters of Science in Information Science from the University at Albany. Susan has been a law clerk for the Chief Judge of the U.S. District Court, District of Connecticut, an Honors Program trial attorney with the US Department of Justice's Civil Division, and an elder law attorney in private practice in Albany. We are delighted to have her on staff.

Editorial Staff Change

Mardi Crawford, editor of the *REPORT* for more than ten years, will be working much of the time as the Communications Officer for the New York Justice Fund, while remaining an active member of the NYSDA staff. As a result, Mardi has handed over her editorial position to Susan Bryant, NYSDA's new staff attorney.

(continued on page 47)

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.

NY Court of Appeals

Identification (General) **IDE; 190(17)**

Juries and Jury Trials (Challenges) (Selection) **JRY; 225(10) (55)**

People v Rivera, No. 161, 9/11/2007

Holding: Trial court decision denying defendant's for-cause challenge to prospective juror was not error as a matter of law. *People v Arnold*, 96 NY2d 358, 362-363. Failure to provide notice under CPL 710.30(1)(b) of intent to introduce the police officer's identification testimony was harmless in light of overwhelming evidence of guilt. *People v Grant*, 7 NY3d 421, 424. Constitutional challenge to persistent violent felony offender statute (Penal Law 70.08) was unpreserved. Order affirmed.

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

People v Collier, No. 163, 9/18/2007

Holding: Based on the court's recent precedent in *People v Louree*, 8 NY3d 541, 545-546, ("where a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion"), defendant's plea is vacated and case remitted to County Court. Order reversed and remanded.

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

People v Salaam, No. 164, 9/18/2007

Holding: Based on the court's recent precedent in *People v Louree*, 8 NY3d 541, 545-546, ("where a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion"), defendant's plea is vacated and case remitted to County Court. Order reversed and remanded.

First Department

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

People v Osorio, 39 AD3d 400, 835 NYS2d 82 (1st Dept 2007)

Holding: In an earlier appeal, this court reversed the lower court's granting of the defendant's first speedy trial motion. Fourteen days after the prosecution learned of the reversal, they declared their readiness for trial. The lower court correctly held that this pretrial readiness delay was excludable as the prosecution must be given a reasonable amount of time to prepare for trial and contact witnesses. The readiness declaration was not ineffective because, although it was not sent to the defendant's trial attorney, it was sent to an attorney who had previously appeared for the defendant, both attorneys worked at the same public defender office, and there was no evidence of bad faith on the part of the prosecution. *See People v Vaughan*, 36 AD3d 434. The prosecution had no obligation to inform the defendant that the indictment was reinstated after the appeal or to get the case back on the court calendar. *See People v Carter*, 91 NY2d 795. The defendant was on constructive notice of the reinstatement based upon the mailing of the appellate order to his appellate counsel, the notification provided by the supreme court clerk to his trial counsel, and the prosecution's readiness declaration. The prosecution is not responsible for defense counsel's failure to communicate with the defendant, who was not incarcerated. Judgment affirmed. (Supreme Ct, Bronx Co [Price, J (second speedy trial motion); Massaro, J (third speedy trial motion, trial, and sentence)])

Juries and Jury Trials (Challenges) (Selection) **JRY; 225(10) (55)**

People v O'Toole, 39 AD3d 419, 835 NYS2d 97 (1st Dept 2007)

Holding: The court erred by denying the defendant's challenge of a juror for cause and defense counsel's request to ask the juror additional questions about her ability to set aside her bias. *See People v Johnson*, 94 NY2d 600. During jury selection, a prospective juror indicated that twenty years ago her apartment had been broken into and she was assaulted. When defense counsel asked the juror whether her experience may cause her to consider a complainant's testimony to be credible, the juror responded that "she could not 'be certain until [she heard] the testimony.'" The juror also indicated that she could not guarantee that her experience would not affect her deliberations. Judgment reversed and matter remanded for new trial. (Supreme Ct, New York Co [Cataldo, J])

First Department *continued*

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

Counsel (Conflict of Interest) (Competence/Effective Assistance/Adequacy) **COU; 95(10) (15)**

People v McGraw, 40 AD3d 302, 836 NYS2d 35 (1st Dept 2007)

Holding: The court admitted rebuttal testimony of the defendant's former counsel regarding pre-indictment statements made by the attorney to the prosecution regarding the defendant's whereabouts at the time of the offense. The attorney had stated that the defendant was at work in Manhattan and the defendant later said he was in Philadelphia. The defendant was not entitled to the special protections against impeachment that apply when a defendant withdraws a mandated alibi notice. His statement was not the equivalent of an alibi notice since counsel did not provide the statement in the form mandated by CPL 250.20. *See People v Rodriguez*, 3 NY3d 462, 467. The court properly admitted the rebuttal testimony because "[a] statement made by an agent of a party, acting within the scope of his authority, is admissible as an admission against the party (*see People v Rivera*, 58 AD2d 147 [1977], *affd* 45 NY2d 147 [1978])."

The defendant received effective assistance of counsel. The former attorney was not ineffective when he asked to be relieved since he expected to be called as a prosecution witness. By changing his alibi, the defendant actually created the conflict of interest. "[I]t would have been futile for the attorney to argue that his statements about defendant's whereabouts could not be used to impeach defendant's new alibi." Judgment affirmed. (Supreme Ct, New York Co [Carruthers, J])

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

Juveniles (Delinquency) **JUV; 230(15)**

In re Niazia F., 40 AD3d 292, 836 NYS2d 30 (1st Dept 2007)

Holding: The petition was facially insufficient as there was no allegation of circumstances under which the appellant, who was adjudicated a juvenile delinquent for the unlawful possession of weapons by someone under 16, possessed or used unmodified kitchen knives in a way that the knives could be considered dangerous within the meaning of Penal Law 265.05. *See Matter of Jamie D.*, 59 NY2d 589. Order of disposition reversed. (Family Ct, Bronx Co [Cordova, J])

Evidence (Sufficiency) (Weight) **EVI; 155(130) (135)**

Juveniles (Delinquency) **JUV; 230(15)**

In re Niazia F., 40 AD3d 292, 836 NYS2d 31 (1st Dept 2007)

The appellant was adjudicated a juvenile delinquent for committing acts that would constitute the crime of third-degree robbery and other offenses. He approached an acquaintance and told him he had "five seconds" or he would get punched in the mouth. The acquaintance walked away and at some point he took out his cell phone. The appellant followed the acquaintance and struck him and then the two started to hit each other. During the altercation, the acquaintance's cell phone fell to the ground. After the fight ended, the appellant took the cell phone.

Holding: The court's finding on the robbery charge was based on legally insufficient evidence and was against the weight of the evidence. Although the appellant took the cell phone, the evidence did not show that he used force when taking or retaining it or that he intended to dislodge the phone in order to acquire it. Instead, the evidence showed that the taking was an afterthought after the altercation ended, which does not constitute robbery. *See People v Lopez*, 58 AD2d 516. Order of disposition modified. (Family Ct, Bronx Co [Gribetz, J])

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

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

People v Watkins, 40 AD3d 290, 837 NYS2d 7 (1st Dept 2007)

Holding: The prosecution met its obligation to provide the defendant with a reasonable and meaningful opportunity to testify before the grand jury. Defense counsel's actions, including her failure to return the prosecutor's messages, failure to contact the prosecutor after confirming the defendant wanted to testify, and waiting to call the prosecutor's office until she knew that the prosecutor had left her office to go to the grand jury, constituted deliberately dilatory and evasive conduct that was an attempt to use the prosecution's CPL 190.50 obligations for gamesmanship. The court strongly disapproved of defense counsel's conduct, but held that it did not warrant a new trial. *See People v Crisp*, 246 AD2d 84 *lv dsmsd* 93 NY2d 898.

The police had reasonable suspicion to stop the defendant as the defendant was the only one present in the sealed-off area of the burglary, he attempted to walk away from an officer, and he was wearing a raincoat over a red apron in warm sunny weather and the perpetrator had been described as wearing a red jacket, which suggested an attempt to conceal his red clothing. *See People v Daniels*, 304 AD2d 478 *lv den* 100 NY2d 593. Even assuming that his initial arrest was unlawful, since the prosecution did

First Department *continued*

not introduce suppressible evidence at trial, there was no basis for reversal. The officer's testimony about what he saw the defendant wearing immediately before the arrest was not suppressible. *See People v Mackey*, 5 AD3d 136, 138 *lv den* 3 NY3d 643. Although the defendant's later arrest yielded various fruits, they were not fruits of the initial stop. The defendant's cell phone that was left at the scene of one of the burglaries was the principal element of probable cause for his arrest, which was unrelated to the initial stop. Judgment affirmed. (Supreme Ct, New York Co [Scherer, J (CPL 190.50 dismissal motion); Atlas, J (suppression hearing); McLaughlin, J (trial and sentence)])

Perjury (Evidence) (General) **PER; 280(15) (17)**

People v Ortiz, 40 AD3d 374, 836 NYS2d 73 (1st Dept 2007)

Holding: During his grand jury testimony, the defendant admitted that he was the person arrested in the case, but he gave false testimony about his name and apartment number. The evidence was insufficient to support the defendant's conviction for first-degree perjury because his false testimony was not material to the grand jury's investigation. *See* Penal Law 210.15. The conviction must be reduced to third-degree perjury because materiality is not an element of that offense. *See* Penal Law 210.05. Judgment modified, sentences reduced, otherwise affirmed. (Supreme Ct, New York Co [White, J])

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

People v Rivera, 42 AD3d 160, 836 NYS2d 148 (1st Dept 2007)

The defendant was arrested for drug possession and possession with intent to sell. After recognizing the car the defendant was driving from a prior surveillance operation, undercover officers watched the defendant park the car and saw an unidentified woman get in. They observed her exchange money with the defendant for "a small object." After the woman left the car, an officer arrested the defendant and searched the vehicle, finding cash, a notebook, a cellular phone, and illicit drugs.

Holding: The court erred in denying the defendant's CPL 710.20 motion for the suppression of all physical evidence and his alternative request for a suppression hearing. "[The] defendant's denial that he was participating in a drug transaction, which alleged event was the only basis for the probable cause to arrest and search him and the car he was sitting in at the time, was clearly sufficient to warrant a hearing on his motion." There is no statutory or case law requirement that the defendant deny the specific facts of the transaction. When probable cause is generated by a drug transaction, the defendant's denial of participation in the transaction is sufficiently factual to warrant a hearing. *People v Mendoza*, 82 NY2d 415, 428-29. Appeal held in abeyance and matter remanded for hearing on suppression motion. (Supreme Ct, New York Co [Berkman, J])

Dissent: [Sullivan, J] "A hearing is not required unless the defendant's papers 'raise a factual dispute on a material point which must be resolved before the court can decide the legal issue' (*People v Gruden*, 42 NY2d 214, 215 [1977] . . .)." The defendant's allegations were factually insufficient to warrant a hearing since he failed to refute the facts made available to him in the complaint, voluntary disclosure form, and factual write-up and read aloud at his arraignment.

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

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

People v Ortega, 40 AD3d 394, 836 NYS2d 144 (1st Dept 2007)

Holding: The court correctly denied the defendant's CPL 440.10 motion to vacate the judgment. The prosecution did not violate their obligations under *Brady v Maryland* (373 US 83 [1972]) by failing to disclose evidence that the police officers who testified at his suppression hearing had made false statements in other cases. The prosecution did not have substantiated evidence of the officers' misconduct before the defendant's guilty plea. Regardless, the court's denial of the suppression motion was proper where the evidence established a lawful traffic stop followed by plain view observation of drugs and where there was no justification for disturbing the court's credibility determinations. The defendant cannot rely on CPL 440.10(g) since he was not convicted after trial and he cannot assert a claim of newly discovered evidence using the writ of error coram nobis. The question of the prosecution's ethical duty with regard to post-conviction discovery of evidence tending to exonerate a defendant is not presented, only the "prosecution's post-conviction acquisition of impeachment material, relating to a Fourth Amendment issue, where a defendant chose not to litigate his guilt . . . ." Judgment and order affirmed. (Supreme Ct, New York Co [Altman, J (trial); McLaughlin, J (440.10 motion)])

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

Juveniles (Delinquency) **JUV; 230(15)**

In re Tyrone P., 42 AD3d 170, 837 NYS2d 49 (1st Dept 2007)

Holding: The appellant was adjudicated a juvenile delinquent for charges that would constitute second-

First Department *continued*

degree robbery, third-degree attempted assault, and third-degree menacing solely based on the testimony of two witnesses who perceived the appellant to be with a group who assaulted and procured an iPod from the complainant's person. The witnesses did not actually see the appellant with the group before or while the attack was in progress. They merely testified to him being near "all" of the people perceived to be part of the group took part in the assault. The witness' testimony cannot sustain that the appellant committed these acts, even when viewed in the light most favorable to the presentment agency. "[T]he inferential thread connecting the appellant to the attack is too weak to support a finding that guilt for any of the wrongful acts charged has been proved beyond a reasonable doubt." All that was established was his presence near the complainant when the group of attackers dispersed. This decision is consistent with other recent Appellate Division decisions reversing delinquency adjudications based upon "'mere presence in the vicinity of the crime' (*Matter of Tyquan N.*, 25 AD3d 502, 503 [2006] . . . ; *see also Matter of Derrick McM.*, 23 AD3d 474, 475 [2005] . . . ; *Matter of Lamar McL.*, 19 AD3d 234, 234-235 [2005] . . .)." Order of disposition reversed and petition dismissed. (Family Ct, New York Co [Larabee, J])

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

Evidence (Sufficiency) (Weight) **EVI; 155(130) (135)**

People v Conway, 40 AD3d 455, 839 NYS2d 1 (1st Dept 2007)

The defendant police officer was charged with third-degree assault for shooting the complainant who he believed to be an escaping suspect. The defendant asserted that the complainant tried to grab his extended firearm during the pursuit, but the complainant and other witnesses claimed that the complainant tried to spin away from the defendant's car or alleviate the defendant's grasp on him. The Court of Appeals remitted the matter to the Appellate Division for "consideration of the facts."

Holding: The defendant's actions did not reach the level of criminal negligence. It was uncontradicted that the stop was proper and the defendant acted within the bounds of the law when he chased an escaping suspect. Further, the essential facts of the case as stated by the defendant were not disputed, except by the complainant. Judgment reversed and indictment dismissed. (Supreme Ct, Bronx Co [Webber, J])

Dissent: [Williams, J] The defendant's conduct, including driving on the sidewalk in the wrong direction on the roadway and attempting to grab the complainant from his moving car with his left hand while steering with his right hand and holding a finger on his firearm's trigger, satisfied the mens rea for criminal negligence. The defendant's claim that the complainant tried to reach for the firearm is not credible based upon the testimony of disinterested witnesses and the complainant.

Counsel (Choice of Counsel) **COU; 95(9.5)**

Identification (Show-ups) (Suggestive Procedures) **IDE; 190(40) (50)**

People v Wilburn, 40 AD3d 508, 837 NYS2d 71 (1st Dept 2007)

Holding: The court correctly denied the defendant's motion to suppress the identification testimony. Two witnesses identified the defendant during a showup that took place "as part of an unbroken chain of fast-paced events (*see People v Duuvon*, 77 NY2d 541, 544-545) . . . ." While the witnesses were viewing the defendant, he was standing with a codefendant and plainclothes officers and he "may" have been handcuffed. However, these facts do not make the showup process unduly suggestive. *See eg People v Moore*, 264 AD2d 693 *lv den* 94 NY2d 826. Although there were two witnesses at the showup, the process "was 'tolerable in the interest of prompt identification' (*People v Love*, 57 NY2d 1023, 1024 [1982]), and there is no reason to believe that one witness influenced the other's identification." The court conducted a more than sufficient inquiry into the defendant's dissatisfaction with retained counsel, and the defendant never asked to obtain a different attorney. Judgment affirmed. (Supreme Ct, New York Co [Solomon, J (hearing); Richter, J (trial and sentence)])

Guilty Pleas (Withdrawal) **GYP; 181(65)**

People v. Bobo, 41 AD3d 129, 836 NYS2d 604 (1st Dept 2007)

Holding: The defendant entered a guilty plea on the mistaken belief that that the Division of Parole had the discretion to run his undischarged sentence concurrently with the negotiated sentence in the current case. In fact, the two sentences must run consecutively. *See People v Smith*, 279 AD2d 487. Because the defendant did not possess all of the information needed to make an informed choice among different courses of action, his plea was not knowingly entered and is invalid. *See People v Van Deusen*, 7 NY3d 744. Judgment reversed, guilty plea vacated, and remanded for further proceedings. (Supreme Ct, New York Co [Hayes, J])

Guilty Pleas (Withdrawal) **GYP; 181(65)**

People v Diaz, 41 AD3d 159, 837 NYS2d 121 (1st Dept 2007)

First Department *continued*

Holding: The defendant entered a guilty plea based upon a promise that his sentence would run concurrent to a sentence that he was to receive for another conviction. Because the other conviction was reversed on appeal, the defendant must be allowed to withdraw his guilty plea. *See People v Rowland*, 8 NY3d 342. Judgment reversed, plea vacated, and remanded for further proceedings. (Supreme Ct, New York Co [Cataldo, J])

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

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

People v Daugherty, 41 AD3d 219, 836 NYS2d 413 (1st Dept 2007)

Holding: Defense counsel sought to be relieved as counsel and submitted a brief pursuant to *People v Saunders*, 52 AD2d 833. The brief failed to mention the summary denial of the defendant's suppression motion. Counsel must investigate the issue and "file a supplemental brief addressing whether the denial of the motion presents any nonfrivolous issues that should be considered on appeal (*see People v Diaz*, 127 AD2d 511, 512 [1987])." Appeal held in abeyance pending receipt of supplemental appellant's brief. (Supreme Ct, New York Co [Berkman, J])

Sentencing (Fines) (Restitution) **SEN; 345(36) (71)**

Trial (Venue) **TRI; 375(65)**

People v Pena, 41 AD3d 250, 838 NYS2d 533 (1st Dept 2007)

Holding: The venue for the defendant's trial was proper because, although the defendant's offenses occurred in Manhattan, the element of forcible compulsion began in Bronx County when the complainants were not allowed to leave their car. *See People v O'Connor*, 21 AD3d 1364, 1365 *lv den* 6 NY3d 757. The defendant joined crimes already in progress and intentionally assisted in completing the offenses, making him criminally liable for acts that others had already committed in furtherance of the crime. *See People v Lopez*, 6 AD3d 252 *lv den* 3 NY3d 643. "[T]here is no reason to use a different rule for venue purposes (*see* CPL 20.40 [incorporating Penal Law §20.00 standard])."

The court erred in imposing a fine of over $25,000 against the defendant and basing the amount of restitution on an estimate of the complainant's medical expenses. Pursuant to Penal Law 80.00(1)(a), the maximum amount that the defendant can be fined for each of his convictions is $5,000. The restitution award must be based upon the complainant's actual medical expenses and a hearing is required to determine that amount. *See* Penal Law 60.27(5)(b). Judgment modified, reducing fines, vacating restitution order, remanding for new restitution hearing, and otherwise affirmed. (Supreme Ct, Bronx Co [Stackhouse, J])

Assault (Evidence) (Serious Physical Injury) **ASS; 45(25) (60)**

Trial (Summations) **TRI; 375(55)**

People v Wade, 41 AD3d 288, 839 NYS2d 724 (1st Dept 2007)

Holding: The prosecutor's statement during summation that "'the question here is which version is more credible and who's telling the truth'" did not mislead the jury about the burden of proof since the prosecutor also reminded the jury that the prosecution must prove the defendant's guilt beyond a reasonable doubt. Also, the prosecutor did not misstate the evidence during his summation.

The evidence was sufficient to support a finding of physical injury because the complainant police officer's sprained wrist caused him "substantial pain." *See eg Matter of Ismaila M.*, 34 AD3d 373, 374 *lv den* 8 NY3d 808. The officer's pain amounted to "substantial pain" because he "was treated at a hospital . . . , needed pain medication, and missed several days of work . . . ." Judgment affirmed. (Supreme Ct, New York Co [Zweibel, J])

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

Juveniles (Custody) (Jurisdiction) **JUV; 230(10) (70)**

In re Blerim M. v Racquel M., 41 AD3d 306, 839 NYS2d 57 (1st Dept 2007)

The petitioner sought modification of an Albany County Family Court order that awarded the parties joint custody of their four children after the respondent mother failed to comply with some of the provisions of the order. The respondent was living in North Carolina and began home schooling the children without the petitioner's consent and refused to provide the petitioner with information about the children's living situation. A North Carolina court had declined jurisdiction over the matter and the Albany County family court directed petitioner to file the petition in Bronx County, his county of residence. After numerous adjournments, the court found that it had continuing exclusive jurisdiction, but declined to exercise jurisdiction in favor of North Carolina.

Holding: Before declining to exercise continuing exclusive jurisdiction, the court must consider all the factors set forth in Domestic Relations Law 76-f(2) and allow the parties to submit information about those factors. *Matter of Greenidge v Greenidge*, 16 AD3d 583. The court's

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failure to consider the law guardian's submission deprived the children of their right to participate in the case. *Matter of White v White*, 267 AD2d 888, 890. The evidence showed that the children maintained significant connections with New York, including residing with the petitioner over Easter vacation and during the summer, and that substantial evidence existed in New York. Order reversed and remanded for further proceedings before a different judge because of the unusual circumstances of the case. (Family Ct, Bronx Co [Cordova, J])

Double Jeopardy (Jury Trials) (Lesser Included and Related Offenses) **DBJ; 125(10) (15)**

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

People v Hernandez, 41 AD3d 358, 838 NYS2d 554 (1st Dept 2007)

Holding: The evidence at trial was insufficient to support the defendant's conviction for depraved indifference murder. Although the defendant failed to preserve the issue, it is considered in the interests of justice. The defendant confessed to confronting the decedent with a gun to rob him, struggling with him, during which time the gun discharged repeatedly, and seeing the codefendant take his chain. While this evidence could support a finding that the defendant intentionally shot the decedent while robbing him or accidentally shot him during a struggle, it did not support the depraved indifference conviction. *See* Penal Law 125.25(2); *People v Suarez*, 6 NY3d 202. The jury was instructed to consider three theories of murder, intentional, depraved indifference, and felony, in the alternative and in order. The jury stopped deliberating after finding the defendant guilty of depraved indifference murder and did not consider the felony murder and other counts. The defendant can be retried for counts that the jury did not consider without violating double jeopardy. *See People v Jackson*, 20 NY2d 440, 448-49 *cert den* 391 US 928. Since the first-degree manslaughter count was a separate count in the indictment, the defendant can be retried on that count under Criminal Procedure Law 40.30(3). *See People v Suarez*, 40 AD3d 143. Judgment reversed, conviction vacated, and remanded for new trial. (Supreme Ct, Bronx Co [Stadtmauer, J])

Dissent in part: [Tom, J] The defendant cannot be retried for first-degree manslaughter as it would violate his constitutional protection against double jeopardy because the manslaughter charge is a lesser included offense of intentional second-degree murder. *See People v Biggs*, 1 NY3d 225, 230. The defendant can be retried for felony murder since it is not the same offense as intentional murder. *See eg People v Daniels*, 35 AD3d 756; *People v Wade*, 146 AD2d 589, 590 *lv den* 73 NY2d 1023.

Search and Seizure (Standing To Move to Suppress) **SEA; 335(70)**

People v Johnson, 42 AD3d 341, 839 NYS2d 741 (1st Dept 2007)

Holding: The court erred in summarily denying the defendant's motion to suppress the gun allegedly found on him during a pat down search after concluding that the defendant lacked standing. To meet his burden of proving that he has standing to challenge the admissibility of the gun, the defendant can rely on the prosecution's proof. *See People v Ramirez-Partoreal*, 88 NY2d 99, 108. Although the defendant denied possessing the gun, the arresting officers' testimony that the gun was seized from the defendant's person was sufficient to meet the pleading requirements of CPL 710.60. *See People v Burton*, 6 NY3d 584, 589. Appeal held in abeyance, matter remitted to Supreme Court for *Mapp/Dunaway* hearing. (Supreme Ct, New York Co [Solomon, J (suppression motion); Grella, J (trial and sentence)])

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

Trial (Summations) **TRI; 375(55)**

People v Sutton, __ AD3d __, 839 NYS2d 746 (1st Dept 2007)

The police saw defendant Sutton approach co-defendant Simmons and conduct a transaction. Later, drugs were recovered. After being charged with a misdemeanor, Simmons was assigned an attorney who was not on the 18-b felony panel. Prior to the prosecution's presentation of the charges to a grand jury, Simmons' attorney provided only oral notice that Simmons planned to testify before the grand jury and Simmons did not appear. Because the grand jury indictment included a felony count, a new attorney was appointed to represent Simmons. The new attorney moved to dismiss the indictment arguing that the defendant was denied the opportunity to appear before the grand jury.

Holding: The court correctly denied defendant Simmons' motion to dismiss the indictment. "An indigent defendant does not have the right to specify the qualifications of his or her court-appointed lawyer (*People v Batts*, 186 AD2d 208, 209 [1992])." There is no evidence that the attorney was unable to effectively represent him and Simmons failed to present evidence that he was prejudiced by his attorney's failure to secure his appearance before the grand jury. *See People v Alicea*, 229 AD2d 80 *lv den* 90 NY2d 890. The court correctly found that the

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defendants were not deprived of a fair trial because the prosecution's statements during summation were not "vouching" or an expression of personal opinions and "constituted fair comment on the evidence and reasonable inferences that could be drawn therefrom, made in response to defense arguments." Judgments affirmed. (Supreme Ct, New York Co [Wiley, J (trial and sentence); Berkman, J (Simmons, dismissal motion)])

Dissent: [Catterson, J] Because there was no contact between Simmons and his first attorney between his misdemeanor arraignment and the indictment, he was effectively without counsel and his motion to dismiss the indictment should have been granted.

Juveniles (Delinquency) **JUV; 230(15)**

Larceny (Elements) (Intent) (Petty Larceny) **LAR; 236(17) (55) (65)**

In re Carlique P., 42 AD3d 367, 839 NYS2d 750 (1st Dept 2007)

The defendant and a group of his friends got into an altercation with the complainant and another boy. During the fight one of the defendant's friends pulled off the complainant's jacket causing him and his jacket to fall to the ground. The complainant's friend helped him up and the two walked away and got on a bus. The defendant picked up the jacket and immediately handed it to another boy.

Holding: The presentment agency failed to prove beyond a reasonable doubt that the defendant had larcenous intent, a necessary element of petit larceny. The evidence did not show that the defendant's purpose during the fight was to steal the jacket, nor did it show that at the moment he picked up the jacket, the defendant "intended to deprive the complainant of his jacket and appropriate it for himself or another (*see* Penal Law § 155.00[3], [4])." The presentment agency also failed to prove beyond a reasonable doubt that the defendant "knowingly possessed stolen property and that he intended to benefit himself or another with the property or impede its recovery by the owner (*see* Penal Law § 165.40)." The evidence was insufficient to show that based upon his momentary possession of the jacket, the defendant knew that the jacket was stolen. Order of disposition reversed and petition dismissed. (Family Ct, Bronx Co [Cordova, J])

Dissent: [Tom, J] Larcenous intent is determined by looking at the defendant's actions and the totality of the surrounding circumstances. Viewing the defendant's conduct in a light most favorable to the presentment agency, a rational person could conclude that the defendant had the requisite intent to commit the offense at the moment he took the jacket. Further, the trier of fact could reasonably infer that the defendant intended to deprive the complainant of his jacket when he picked up the jacket and gave it to his friend.

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) (Vacatur) **GYP; 181(25) (55)**

Identification (Show-ups) (Suggestive Procedures) **IDE; 190(40) (50)**

People v Colon, 42 AD3d 411, 840 NYS2d 579 (1st Dept 2007)

Holding: Although the defendant failed to preserve the issue of the voluntariness of his plea, it is reviewed in the interest of justice. "[T]he allocution as to the waiver of defendant's constitutional rights was nonexistent" since the court failed to notify the defendant that by pleading guilty he was waiving his right to a jury trial, his right of confrontation, and his right against self-incrimination. Since the defendant's guilty plea was invalid, his appeal waiver was also invalid.

A few hours after the crime, the complainants were at a hospital emergency room when a police officer asked them to "stand by the door and 'look over toward where EMS park their trucks and to identify the person that was standing on the outside of the car.'" At that time, the defendant was standing near a police car and another officer. The complainants' identification of the defendant at the hospital must be suppressed because the officer essentially identified the defendant as one of the perpetrators and the show-up was not close in time or in place to the crime. Also, the fact that the two complainants viewed the defendant together increased the likelihood of an unreliable identification. *See People v Adams*, 53 NY2d 241, 248-49. Judgment reversed, plea vacated, out-of-court identification suppressed, and remanded for further proceedings pending an independent source proceeding. (Supreme Ct, Bronx Co [Stadtmauer, J])

Admissions (Voluntariness) **ADM; 15(35)**

In re Cy R., No. 570, 1st Dept, 8/2/2007

The complainant (the defendant's cousin and a retired detective) searched for the defendant after weapons and ammunition were stolen from his apartment. A police sergeant drove the complainant around the area to help him find the defendant. When they found him, the complainant threw him up against a fence, threatened him with bodily harm, and demanded to know where the guns were located. After the defendant eventually admitted that he had hidden the weapons, the sergeant took him into custody and placed him in his car without administering *Miranda* warnings. The complainant continued to berate the defendant, who finally agreed to bring them to the hiding place.

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Holding: The court properly denied the defendant's motion to suppress his statements because the statements were voluntarily made. "A statement is voluntary even in the face of duress if the 'defendant's will has [not] been overborne and his capacity for self-determination critically impaired' (*Culombe v Connecticut*, 367 US 568, 602 [1961] . . .)." The evidence shows that defendant was not intimidated into making an inculpatory statement as the complainant's threats were more akin to hyperbole, not true violent threats. After the arrest, the complainant's demands did not instill a fear in the defendant that induced or compelled him to admit that he knew where the guns were hidden. The sergeant's failure to administer *Miranda* warnings did not require suppression of the guns or the defendant's statements because the public safety exemption applied; the officer was focused on finding the guns, one of which was loaded. Order affirmed. (Family Ct, Bronx Co [Cordova, J])

Dissent: [Andrias, J] The defendant's admission must be suppressed because, as the sergeant admitted, the defendant was not free to leave and the complainant held the defendant and threatened him with serious bodily injury. The discovery of the weapons and his statements about the location of the guns must be suppressed as they were fruits of his unlawful arrest.

Juries and Jury Trials (Challenges) (Selection) **JRY; 225(10) (55)**

People v Luciano, __ AD3d __, 840 NYS2d 589 (1st Dept 2007)

Holding: The court found that the defendant's challenge of two female jurors constituted a *Batson* violation, *Batson v Kentucky*, 476 US 79 (1986). The court then seated the two jurors and refused to return the two peremptory challenges to the defendant. The court erred by denying the defendant's right to use the two peremptory challenges. Criminal Procedure Law 270.25 requires that each party be allowed the full number of peremptory challenges. Judgment reversed and remand for a new trial. (Supreme Ct, Bronx Co [Sonberg, J])

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

People v Taylor, 42 AD3d 13, 835 NYS2d 241 (2nd Dept 2007)

The defendant was convicted of first-degree kidnapping for an incident involving a minor. The lower court held that the defendant's due process rights would be violated by requiring him to be subject to the provisions of the Sex Offender Registration Act because the incident involved no sexual misconduct.

Holding: Because no fundamental right was implicated, the issue is whether the legislature had a rational basis for requiring defendants to register under SORA for crimes that did not include a sexual component. A rational basis for the law exists because "the legislature could reasonably have concluded that kidnappers should be required to register . . ." as that offense involves "either the restraint or abduction of the victim . . . [which] is a frequent precursor to a sex offense . . . ." Since federal law requires that states enact sex offender registration programs that include kidnapping as a registerable offense, *see* 42 USC 14071[g][2][a], "the Legislature could rationally have determined that it would be in the public interest to establish a registration program in compliance with federal law and, on that basis, have also concluded rationally that requiring the registration of convicted kidnappers furthers the legitimate purposes of the statute, even in the absence of a sexual component to the kidnapping." Since the Legislature has a rational basis for including kidnapping as a registerable offense, the court is "not at liberty to depart from that determination (*see People v Robinson*, 95 NY2d 179, 183)." Order reversed, motion denied, matter remitted for a new risk level assessment hearing. (County Ct, Westchester Co [Bellantoni, J])

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

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

Matter of Bey v Perez, 39 AD3d 631, 833 NYS2d 613 (2nd Dept 2007)

The appellant mother had custody of the parties' child and the respondent father had visitation. Later the respondent filed a petition alleging that the appellant had fled to Puerto Rico with the child and denied him visitation. The appellant's attorney, appearing on her behalf, stated that the appellant had gone to Puerto Rico due to domestic violence and threats by the respondent, and advised the court that his client opposed the petition "but had been unable to either timely answer or appear due to severe financial constraints and the limitations of technology in the area where she was living." The lower court found the appellant in default and issued two orders transferring custody to the respondent and suspending his child support obligation pending the appellant's return to New York. The appellant mother moved to vacate the orders, which the court denied.

Holding: The appellant had not defaulted on the petition. *See* CPLR 321; *Matter of Kindra B.*, 296 AD2d 456. Even if the appellant had defaulted, she presented a reasonable excuse for the default and a meritorious defense in support of her motion to vacate. *See* Domestic Relations

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Law 75[2], 240[1]; *Matter of Wissink v Wissink*, 301 AD2d 36. Therefore, the court "improvidently exercised its discretion in denying the mother's motion to vacate the orders entered on her default." Order reversed, motions to vacate granted, and matter remitted for further proceedings before a different justice. (Supreme Ct, Queens Co [Morgenstern, J])

Juveniles (Support Proceedings) **JUV; 230(135)**

Matter of Katz v Pecora, 39 AD3d 646, 835 NYS2d 252 (2nd Dept 2007)

The petitioner, the child's paternal aunt, commenced this proceeding under the Uniform Interstate Family Support Act (UIFSA) to establish a support order against the child's mother. The petitioner obtained custody of the child after the child's father was incarcerated and the child did not want to live with his mother. During that custody proceeding, the petitioner did not request child support. However, the mother voluntarily paid the petitioner $400 per month. The court dismissed the petition and awarded the mother $3,000 in attorney's fees.

Holding: The court correctly dismissed the petition because it did not have the authority to grant a new support order when another child support order already existed. *See* Family Court Act 580-401; *cf Matter of Lorenzana v Arafiles*, 297 AD2d 679, 680. The court erred in granting attorney's fees to the respondent as the UIFSA does not authorize such an award. *See* Family Court Act 580-313(b). New York law does not authorize the award of attorney's fees for a party who defends against a support petition. *See* Family Court Act 438(a). Order modified, attorney's fee award reversed, and order otherwise affirmed. (Family Ct, Nassau Co [Eisman, J])

Counsel (General) **COU; 95(22.5)**

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

Judges (Disqualification) **JGS; 215(8)**

Matter of Khan v Dolly, 39 AD3d 649, 833 NYS2d 608 (2nd Dept 2007)

Holding: In a custody hearing, the court did not err in admitting into evidence forensic evaluation reports prepared by the court's expert witness in prior custody and visitation proceedings between the parties. The court used the reports solely for the purpose of assessing the expert's credibility, not for the truth of the matters asserted therein; therefore, the reports were not inadmissible hearsay. The court did not err in exercising its discretion to deny the mother's counsel's request to withdraw. Although counsel was resigning from the 18-b panel and was moving his office "out of the jurisdiction," the court denied the request because the attorney had represented the mother during the almost five months of custody proceedings and had been her counsel on and off since 2001. Also, the court did not have to grant the withdrawal motion or recuse himself because the attorney's federal lawsuit against the judge was unrelated to the instant case. Since Judiciary Law 14 did not require recusal, the judge had discretion to determine whether recusal or a mistrial was necessary and that decision "will not be lightly overturned (*see People v Moreno*, 70 NY2d 403, 405-406 . . .)." The judge's decision not to recuse himself or declare a mistrial was proper given that he did not have personal interest in the outcome of the custody case and he was informed of the commencement of the federal suit on the last hearing date of the proceeding. Order affirmed. (Family Ct, Queens Co [DePhillips, J])

Juveniles (Hearings) (Parental Rights) (Permanent Neglect) **JUV; 230(60) (90) (105)**

Matter of Ryan L., 39 AD3d 652, 835 NYS2d 250 (2nd Dept 2007)

After fact-finding and dispositional hearings, the court found that the mother permanently neglected her children and terminated her parental rights and transferred custody and guardianship of the children to the Department of Social Services.

Holding: The mother had consented to the admission into evidence of the caseworker's file based upon representations that the caseworker would be testifying at the hearing and that the mother would have the opportunity to cross-examine her. The court erred in failing to allow the mother to withdraw her consent once it became clear that the caseworker would not be testifying. *Cf Matter of Leon R.R.,* 48 NY2d 117, 123-124. Order reversed and remitted for a new fact-finding hearing and, if necessary, a new dispositional hearing. (Family Ct, Orange Co [Klein J])

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

People v Colon, 39 AD3d 661, 833 NYS2d 605 (2nd Dept 2007)

In a felony complaint, the defendant was charged with a first-degree criminal sexual act in violation of Penal Law 130.50(4) for acts that took place in November 2004. The defendant later pleaded guilty to a superior court information that charged him with first-degree sexual conduct against a child in violation of Penal Law 130.75(1)(b) for acts committed between September 2002 and September 2004.

Holding: The superior court information did not set forth the offense on which the "'defendant [had been]

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held for action of a grand jury . . . ,'" as required by CPL 195.20, nor did the information set forth a lesser included offense thereof. *Cf People v Menchetti*, 76 NY2d 473, 475. The superior court information upon which the defendant's plea was based was jurisdictionally defective because it "did not 'include at least one offense that was contained in the felony complaint' (*People v Zanghi*, 79 NY2d 815, 818)." The defendant did not waive his right to appellate review of the defect, even though he failed to timely object in the county court, pleaded guilty, and waived his right to appeal. *See People v June*, 30 AD3d 1016. Judgment reversed, plea vacated, information dismissed, and matter remitted for further proceedings on the felony complaint. (County Ct, Westchester Co [Loehr, J])

Accomplices (Corroboration) (Witnesses) **ACC; 10(20) (35)**

People v Gomez, 39 AD3d 668, 833 NYS2d 601 (2nd Dept 2007)

The defendant was convicted of first-degree criminal possession of a forged instrument for purchasing a cell phone at a retail store using counterfeit money. At trial, two of his alleged accomplices testified against the defendant in exchange for reduced exposure to criminal liability.

Holding: The prosecution failed to present sufficient corroborating evidence that connected the defendant to the offense, as required by Criminal Procedure Law 60.22. The accomplices testified that the defendant gave them counterfeit money that he printed and instructed them to use the money to purchase cell phones for him in exchange for drugs. On the date of the incident, however, while one of the accomplices used counterfeit money to purchase a cell phone, the defendant purchased a cell phone using genuine currency. This evidence was not "additional, independent evidence tending to connect the defendant to the crime charged." *People v Robinson*, 297 AD2d 296. Further, because of the deal between the accomplices and the prosecution, "their testimony is subject to particular scrutiny (*see People v Daniels*, 37 NY2d 624 . . .)." Judgment reversed, indictment dismissed, and matter remitted to the County Court for the purposes of entering an order in its discretion pursuant to CPL 160.50. (County Ct, Suffolk Co [Weber, J])

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

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

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

People v Kowalewski, 39 AD3d 770, 835 NYS2d 291 (2nd Dept 2007)

Holding: The court did not err in admitting into evidence the recording of the defendant's 911 call, which he made immediately after the incident, because the recording was evidence of his consciousness of guilt that outweighed any alleged prejudice to the defendant. *See People v. Yazum*, 13 NY2d 302. Further, there was no reversible error resulting from the prosecution's cross-examination of the defendant about the recording because the court sustained objections to the questions and promptly instructed the jury to disregard the questions. *See People v Gibbs*, 59 NY2d 930, 932.

The court did not err in denying the defendant's request for a jury charge on the mistake of fact defense because the theory was adequately covered by the instructions given on the elements of manslaughter and weapons possession. *See People v Williams*, 81 NY2d 303, 316-17.

The court erred in ordering the defendant to serve consecutive sentences as Penal Law 70.25(2) mandates that the defendant serve concurrent sentences. *See People v Hamilton*, 4 NY3d 654, 658. Judgment modified, and affirmed as modified. (Supreme Ct, Kings Co [Dowling, J])

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

Jurisdiction (Subject Matter) **JSD; 227(10)**

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

Matter of Ruiz v Goord, 39 AD3d 866, 832 NYS2d 822 (2nd Dept 2007)

The petitioner commenced an Article 78 proceeding against respondent Glenn Goord seeking an order compelling elimination of the five-year term of post-release supervision from his sentence and against respondent Randall Eng, Supreme Court Justice, seeking an order prohibiting resentencing.

Holding: The court lacks subject matter jurisdiction over the proceeding. *See* CPLR 506(b), 7804(b); *Matter of Nolan v Lungen*, 61 NY2d 789, 790. The portion of the petition seeking prohibition against Judge Eng cannot proceed. It is purely hypothetical since Judge Eng has not indicated any intent to resentence the defendant. *See* CPLR 7803(2). The court cannot preside over the matter brought against Glenn Goord as such a proceeding must be brought against the respondent in Supreme Court. *See* CPLR 506. Respondents' motion granted, petitioner's cross-motion denied, and proceeding dismissed.

Juveniles (Custody) (Paternity) **JUV; 230(10) (100)**

Erlec v Johnson, 40 AD3d 633, 835 NYS2d 375 (2nd Dept 2007)

The petitioner putative father commenced separate

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paternity and custody proceedings against the respondent mother. The respondent moved out of state with the child before the petitioner could serve her with an ex parte order barring her from taking the child out of the state. The court dismissed the paternity case based upon the petitioner's failure to properly serve the child's mother. Then the court dismissed the custody proceeding, finding that the petitioner lacked standing since he "'never had [his] paternity declared by the court in New York.'"

Holding: The court erred in dismissing the custody petition. Dismissal of the paternity petition did not constitute a finding that the petitioner is not the child's father. Several documents support the petitioner's paternity claim, such as the formal acknowledgement of paternity that he signed three days after the child was born and the respondent's affidavit and verified petition filed in Illinois acknowledging that the petitioner is the child's father and seeking child support from him. The existence of the petitioner's acknowledgement, if proven, would give him standing in the custody proceeding pending a paternity determination. *See* Family Court Act 516-a(a). Order reversed, petition reinstated, and matter remitted for further proceedings. (Family Ct, Queens Co [McGrady, R])

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

Trial (Verdicts) **TRI; 375(70)**

Matter of Phillips II v Wieboldt, 40 AD3d 650, 835 NYS2d 417 (2nd Dept 2007)

After a nonjury trial, the respondent town court justice found the defendant guilty of driving while intoxicated, but after reweighing the evidence a few minutes later, found the defendant not guilty of that offense and guilty of the lesser-included offense of driving while ability impaired. The petitioner district attorney commenced an Article 78 proceeding seeking to prohibit the justice from enforcing the judgment and compel the justice to enter a judgment convicting the defendant of driving while intoxicated.

Holding: The court erred in denying the petition. The respondent exceeded the scope of his authority by convicting the defendant of driving while ability impaired after he had already convicted him of driving while intoxicated. Absent a clerical or ministerial error, the respondent did not have the inherent power or statutory authority to change his factual determination after he rendered the original guilty verdict. *See People v Carter*, 63 NY2d 530, 533. Judgment reversed, petition granted, respondent prohibited from enforcing his judgment, and respondent directed to vacate his judgment and enter a judgment convicting the defendant of driving while intoxicated. (Supreme Ct, Orange Co [Horowitz, J])

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

People v Bennett, 40 AD3d 653, 837 NYS2d 655 (2nd Dept 2007)

The defendant was convicted of second-degree murder. There were no eyewitnesses, but prior to his death the decedent allegedly told police that the defendant shot him. Before trial the defendant requested a police report about an unnamed witness the police interviewed. The prosecutor refused to produce the report because the witness was not going to testify. In her opening statement, defense counsel, relying on that assertion, attacked the prosecutor's reliance on police testimony to implicate the defendant and his decision not to call the other witnesses. After his other witnesses testified, the prosecutor called the previously unnamed witness and gave the defense the requested report. The witness testified that the decedent implicated the defendant before the police arrived. During the prosecutor's summation, he told the jury: "And you remember that [the defense counsel] told you in her opening that the People will not produce any civilian witness in this case. We did."

Holding: The prosecutor deprived the defendant of his right to a fair trial by undermining the defense theory and ambushing the defense by denying his plan to call the witness and later calling the witness, withholding *Rosario* material, and capitalizing on those unfair tactics in summation. "Because the instances of prosecutorial misconduct were flagrant and the evidence of guilt was not overwhelming, . . ." reversal is required. *See People v Calabria*, 94 NY2d 519, 522. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Cooperman, J])

Ethics (General) **ETH; 150(7)**

Misconduct (Defense) (General) **MIS; 250(5) (7)**

Matter of Brown, 42 AD3d 70, 833 NYS2d 911 (2nd Dept 2007)

Holding: The attorney was charged with numerous counts of misconduct, including neglecting criminal cases that he was retained to handle by not making court appearances, failing to communicate with clients, failing to return unearned fees and pay judicial sanctions, and failing to re-register with the Office of Court Administration. After the Grievance Committee moved for an order suspending him from the practice of law pending a determination on the misconduct charges pursuant to 22 NYCRR 691.4(l)(1)(i), the attorney tendered his resignation. Resignation is accepted, attorney disbarred.

Search and Seizure (Arrest/ Scene of the Crime Searches) (Motions to Suppress [CPL Article 710]) **SEA; 335(10) (45)**

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People v Hernandez, 40 AD3d 777, 836 NYS2d 219 (2nd Dept 2007)

The complainant identified the defendant as the person who stole his cell phone. A police officer spoke to the defendant's parole officer and then went to the parole office when the defendant was expected to be there. When the officer arrived, the defendant was handcuffed and sitting in a chair and his backpack was on a table. The officer searched the backpack and found a cell phone. At the suppression hearing regarding the phone, the officer testified that the backpack was "on the desk in front of [the defendant]," but did not testify as to why he searched the bag.

Holding: The court erred in denying the defendant's motion to suppress as the prosecution failed to meet its initial burden of establishing the reasonableness of the officer's conduct. For the warrantless search of the defendant's effects that are within his immediate control or "grabbable area" during the arrest to have been reasonable, there must have been exigent circumstances. "[T]wo circumstances that may be considered exigent [are]: the safety of the police and the public, and the need to prevent evidence from being destroyed or concealed ([*People v Gokey*, 60 NY2d 309, 312] . . .)." The prosecution failed to show that either circumstance existed. The hearing testimony does not allow the court to determine whether the bag was within the defendant's immediate control or "grabbable area." Judgment reversed, motion to suppress granted, and new trial ordered. (Supreme Ct, Queens Co [Kron, J (trial); Grosso, J (omnibus motion)])

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

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

Steinhauser v Haas, 40 AD3d 863, 837 NYS2d 660 (2nd Dept 2007)

Holding: The court erred in denying the petitioner maternal grandmother's petition for visitation with her grandchildren based on animosity between the her and the children's father. The grandmother had automatic standing to seek visitation based upon the death of the children's mother. *See* Domestic Relations Law 72(1). Since the grandmother had standing, the court must determine whether visitation is in the best interests of the grandchildren. *See Matter of E.S. v P.D.*, 8 NY3d 150, 157. While the court has discretion in making such a determination, the court's finding "'lack[ed] a sound and substantial basis in the record' (*Matter of Thomas v Thomas*, [35 AD3d 868, 869] . . .)." In general, animosity between a grandparent and a parent is not sufficient to deny a grandparent's petition for visitation. The existence of a meaningful relationship between the petitioner grandparent and the grandchildren is critical and the evidence showed that such a relationship existed in this case. Order reversed, petition granted, and matter remitted to set up a schedule of supervised visitation. (Family Ct, Suffolk Co [Kelly, J])

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

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

Matter of Sullivan v Sullivan, 40 AD3d 865, 836 NYS2d 259 (2nd Dept 2007)

The petitioner father sought increased visitation with his daughter and the respondent mother cross-petitioned to enjoin the petitioner from filing further custody modification petitions without leave of court and for counsel fees.

Holding: The court erred in granting the father's petition for increased visitation as the modification was not in the child's best interests. *See Messinger v Messinger*, 16 AD3d 562, 563. The evidence showed that the child's school issues were not attributable to poor parenting by the respondent and that the respondent took appropriate steps to deal with the problems. Additionally, the child and her law guardian opposed the change in visitation and the record showed that the child derived stability from living with her mother, brother, and grandmother at the home she has lived in since infancy. The court also erred in denying the mother's cross-petition for counsel fees as authorized by Domestic Relations Law 273(b). However, the court properly denied the mother's request for an order enjoining the father from filing further petitions to modify custody without leave of court. Since the petitioner's current and prior petitions raised legitimate concerns about the child's welfare, such an order would not be appropriate. Order modified, matter remitted. (Family Ct, Suffolk Co [Blass, Ct Atty Ref])

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

People v Feola, 40 AD3d 874, 836 NYS2d 270 (2nd Dept 2007)

The defendant police officer and the codefendant officer Hepp [*see People v Hepp*, 40 AD3d 880, 836 NYS2d 268 (2nd Dept 2007)] were convicted of making a punishable false written statement in connection with an incident between the officers and a civilian. An Assistant District Attorney prepared two corroborating affidavits for the officer defendants to sign, which he faxed to the police precinct with a cover sheet addressed to co-defendant Hepp. The signed affidavits were returned to the ADA via facsimile with defendant Feola's name on the cover sheet. After the charges against the civilian were dropped, the defendants were charged with making punishable false

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statements based on the affidavits.

Holding: The judgment against Feola was not supported by legally sufficient evidence. The issue is "whether the evidence before the jury, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620) could lead a rational trier of fact to conclude that the elements of the crime had been proven beyond a reasonable doubt (s*ee People v Rossey*, 89 NY2d 970, 971-972 . . .)." The prosecution's evidence consisted of the ADA's testimony regarding the sending and receiving of the facsimiles and his conversation with Feola. However, the ADA did not know whether the affidavits bore the signatures of the defendants and there was no direct evidence to support that allegation. Judgment reversed, indictment dismissed, and matter remitted for further proceedings. (Supreme Ct, Kings Co [Collini, J])

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

People v Hepp, 40 AD3d 880, 836 NYS2d 268 (2nd Dept 2007)

The defendant police officer and the codefendant officer Feola [*see People v Feola*, 40 AD3d 874, 836 NYS2d 270 (2nd Dept 2007)] were convicted of making a punishable false written statement in connection with an incident between the officers and a civilian. An Assistant District Attorney prepared two corroborating affidavits for the officer defendants to sign, which he faxed to the police precinct with a cover sheet addressed to defendant Hepp. The signed affidavits were returned to the ADA via facsimile with defendant Feola's name on the cover sheet. After the charges against the civilian were dropped, the defendants were charged with making punishable false statements based on the affidavits.

Holding: The court properly granted the defendant's motion to set aside the jury verdict as the evidence was insufficient to support the verdict. The issue is "whether the evidence before the jury, viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), could lead a rational trier of fact to conclude that the elements of the crime have been proven beyond a reasonable doubt (*see People v Rossey*, 89 NY2d 970, 971-972 . . .)." The prosecution's evidence consisted of the ADA's testimony regarding the sending and receiving of the facsimiles and his conversation with Feola. However, the ADA did not know whether the affidavits bore the signatures of the defendants and there was no direct evidence to support that allegation. Order affirmed. (Supreme Ct, Kings Co [Collini, J])

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

Trial (Verdicts [Motions to Set Aside (CPL § 330.30 Motions)]) **TRI; 375(70[a])**

People v Gruttadauria, 40 AD3d 879, 836 NYS2d 272 (2nd Dept 2007)

Prior to sentencing, the defendant filed a pro se motion to set aside the verdict pursuant to CPL 330.30 arguing that he received ineffective assistance of counsel. In opposition to the motion, defense counsel filed an affidavit detailing how his actions on the record and outside the record constituted effective assistance. In denying the defendant's motion, the court referred to the record and the defense attorney's explanations.

Holding: "The defense counsel, by taking a position adverse to his client, deprived the defendant of effective assistance of counsel with respect to the motion to set aside the verdict pursuant to CPL 330.30 (*see People v Coleman*, 294 AD2d 843)." Matter remitted for new determination of the defendant's motion, defendant's appellate counsel to represent him on the motion, and appeal held in abeyance. (County Ct, Suffolk Co [Hinrichs, J])

Appeals and Writs (Briefs) (Counsel) **APP; 25(15) (30)**

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

People v Shemack, 40 AD3d 890, 834 NYS2d 488 (2nd Dept 2007)

Holding: The defendant's appellate counsel filed an *Anders* brief (*Anders v California*, 386 US 738) and requested to be relieved as counsel. An independent review of the record and the defendant's pro se brief reveals potentially nonfrivolous issues, including the effectiveness of the defendant's waiver of his right to appeal and the denial of his pretrial suppression motion. *See People v Moyett*, 7 NY3d 892. Counsel relieved and directed to turn over all papers to new counsel, prosecution to provide counsel with a certified transcript of the proceedings, and briefing schedule set. (County Ct, Nassau Co [Carter, J])

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

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

Juveniles (Parental Rights) (Permanent Neglect) **JUV; 230(90) (105)**

Matter of Dustin H. v Raymond H., 40 AD3d 995, 837 NYS2d 190 (2nd Dept 2007)

Holding: The best interests of the child are furthered by timely termination of parental rights proceedings, which "avoid[s] unnecessarily depriving children of the

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benefits of positive and nurturing family relationships . . . (*see* Social Services Law 384-b[1][a]-[b])." Here, more than five years after the petition was filed and after it took four years to complete the fact-finding hearing, the court found that the child's mother had permanently neglected and abandoned her children and terminated her parental rights. The court erred in admitting into evidence, under the business records exception, a caseworker's testimony about entries in progress notes made by someone else without evidence that the entries were contemporaneously made. *See* CPLR 4518(a). "The uneven application of the Family Court's evidentiary rulings, together with the inordinate amount of time it took to complete the fact-finding and dispositional hearings, contravened 'fundamental fairness' in the conduct of the proceedings (*see Matter of Leon RR*, 48 NY2d 117) and warrants reversal (*see Matter of Christina C.*, 185 AD2d 843 . . .)." Orders reversed and matter remitted for new hearings before a different judge. (Family Ct, Queens Co [Bogacz, J])

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

People v Milton, 40 AD3d 1125, 837 NYS2d 279 (2nd Dept 2007)

After the prosecutor presented evidence of a drug sale to a grand jury, the grand jury said it had voted a "No True Bill." After a prosecutor questioned them and they deliberated further, they reported that "No Action" had been taken. The prosecution then submitted the evidence of the sale along with evidence of another offense to a second grand jury, which indicted the defendant for both offenses.

Holding: The court correctly dismissed the counts that related to the drug sale offense because the prosecution failed to obtain judicial approval before resubmitting the matter to the second grand jury. The prosecutor's actions in withdrawing the case from the first grand jury before it took any action on the case are equivalent to a dismissal under Criminal Procedure Law 190.60(4) and therefore court approval is required before the prosecution resubmits the case to a new grand jury. *See People v Hemstreet*, 234 AD2d 609, 610. Prior court approval is required so that prosecutors do not withdraw matters from one grand jury to present to another grand jury that may be more likely to return indictments. *See People v Aarons*, 2 NY3d 54, 552. Order affirmed. (Supreme Ct, Kings Co [Parker, J])

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

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

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

People v Perez, 40 AD3d 1131, 837 NYS2d 275 (2nd Dept 2007)

Holding: The court committed reversible error by reversing its pretrial *Sandoval* ruling (*People v Sandoval*, 34 NY2d 317) in the middle of trial and permitting the prosecution to cross-examine the defendant about his immigration status. *See People v Duggins*, 1 AD3d 450, 450-51 *affd* 3 NY3d 522. Whether or not he had already taken the stand, the defendant was prejudiced by the court's decision. The defendant had not opened the door to the issue of his immigration status and because there was less than overwhelming evidence of the defendant's guilt, the error harmed the defendant. *See People v Crimmins*, 36 NY2d 230, 241-42. The court deprived the defendant of his constitutional right to present a defense by preventing the defendant from either recalling a detective as a witness or having police reports admitted into evidence since the defendant's offer of proof demonstrated that the testimony would impeach the detective's credibility on a material issue in the case. *Cf People v Carroll*, 95 NY2d 375, 386. Judgment reversed and new trial ordered. (Supreme Ct, Kings Co [Brennan, J])

Juveniles (Neglect) (Removal) **JUV; 230(80) (120)**

Matter of Nurayah J., 41 AD3d 477, 839 NYS2d 97 (2nd Dept 2007)

The respondent mother, a foster child, was sixteen years of age when she gave birth to the subject child. After the mother consented to temporary removal of the child pursuant to Family Court Act 1021, the Department of Social Services filed a neglect petition against her.

Holding: The court properly dismissed the petition, but relied on incorrect grounds for the dismissal. Contrary to the court's findings, when the Department of Social Services petitions on behalf of a child of a foster child, its responsibilities under the Family Court Act and the Social Services Law remain the same. *See Matter of Ta Fon Edward J.B.*, 6 AD3d 611. The Department failed to present a prima facie case of neglect. The court correctly denied the Department's motion to conform the pleadings to the proof, including presenting evidence of the respondent's post-petition conduct, because it would have unduly prejudiced the respondent. *Cf Matter of LeVonn G.*, 20 AD3d 530. Finally, the court correctly held that the child was destitute, pursuant to Social Services Law 371(3), as the evidence demonstrated that the respondent mother could not properly provide the child with food, clothing, or shelter. Order affirmed. (Family Ct, Suffolk Co [Sweeney, J])

Motor Vehicles (Driver's License) **MVH; 260(5)**

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

People v Wolters, 41 AD3d 518, 838 NYS2d 117 (2nd Dept 2007)

Holding: The court erred in admitting into evidence the affidavit of a Department of Motor Vehicles official who did not testify during the trial. *See Crawford v Washington*, 541 US 36; *People v Pacer*, 6 NY3d 504. Without the affidavit, the evidence against the defendant was not legally sufficient to support the defendant's conviction for first-degree aggravated unlicensed operation of a motor vehicle. *See People v Perkins*, 189 AD2d 830. Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [Kohm, J])

Search and Seizure (Plain View Doctrine) (Warrantless Searches [Plain-view Objects]) **SEA; 335(53) (80[k])**

People v Dobson, 41 AD3d 496, 838 NYS2d 128 (2nd Dept 2007)

After stopping a car for making an illegal U-turn, the police noticed the defendant passenger put something down the back of his pants. During the pat-down search of the defendant, the officer saw a piece of plastic sticking out from the waistband of his pants. The officer, believing that the bag contained drugs, seized it; later testing showed that the bag contained crack cocaine.

Holding: The court correctly granted the defendant's motion to suppress physical evidence seized during the pat-down search. Although the stop and pat-down search were proper, the officer did not have the authority to seize the bag as the crack cocaine itself was not in plain view. Under the plain view doctrine, in order to seize an object without a warrant, the evidence must show that "the plastic bag, by its very nature, could not support any reasonable expectation of privacy because its content could be inferred from its outward appearance, or if the distinctive configuration of the bag proclaimed its contents (*see People v Bell*, [9 AD3d 492] . . .)." The officer's testimony at the suppression hearing that "based on her academy training as to the 'identification of narcotics and the packaging,' and her experience from prior arrests that 'drugs are packaged in [ ] plastic bags, in that kind of form, that way,' she believed that the bag would contain narcotics . . . " did not satisfy either of those factors. Order affirmed. (Supreme Ct, Queens Co [Grosso, J])

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

Forgery (Elements) (Possession of a Forged Instrument) **FOR; 175(10) (30)**

People v Cruz, 41 AD3d 493, 837 NYS2d 308 (2nd Dept 2007)

Holding: The evidence was legally insufficient to support a conviction of second-degree criminal possession of a forged instrument. The evidence demonstrated that the defendant gave an undercover police officer the name of a person who could help the officer purchase a Social Security card. However, the evidence did not show that the defendant "'solicited, requested, commanded or intentionally aided the principal' (Penal Law § 20), in the subsequent creation and possession of the forged Social Security card or in its sale to the undercover police officer." Similar to the rationale for why a person who gives general information about where to purchase drugs cannot be guilty of drug sales as an accomplice, the defendant cannot be guilty of criminal possession of a forged instrument under an accomplice theory. *See People v Bello*, 92 NY2d 523, 527. Judgment reversed, indictment dismissed, and remitted for purpose of entering an order in its discretion pursuant to CPL 160.50. (Supreme Ct, Queens Co [Spires, J])

Juveniles (Parental Rights) (Removal) **JUV; 230(90) (120)**

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

Matter of Shonica Ahaila S., 41 AD3d 606, 840 NYS2d 78 (2nd Dept 2007)

Holding: The court erred in terminating the mother's parental rights based upon the mother's inability to provide proper and adequate care for her children by reason of mental illness. By allowing a psychology expert to testify about the mother's illness even though the expert had not examined the mother, the court failed to comply with the requirements of Social Services Law 384-b(6)(e), which requires that the court order and take the testimony of a qualified psychologist or psychiatrist who has examined the parent. Orders reversed and matter remitted for a new hearing. (Family Ct, Kings Co [Danoff, J])

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

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

People v Warren, 41 AD3d 745, 838 NYS2d 617 (2nd Dept 2007)

Holding: The defendant pleaded guilty to second-degree criminal possession of a controlled substance, a class A-II felony, for conduct that occurred in 2002. The court sentenced the defendant pursuant to the Drug Law Reform Act (L 2004, ch 738) to a determinate term of 10 years imprisonment. The court erred in applying the provisions of the Drug Law Reform Act as that law, which took effect on January 13, 2005, can only be applied

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prospectively. The defendant's sentence is invalid as a matter of law because the defendant's crime was committed prior to the effective date of the statute. A post-Drug Law Reform Act statute (L 2005, ch 643) that allows for the retroactive application of the Act to class A-II felonies does not apply to this case because the court did not sentence the defendant "to an indeterminate term of imprisonment pursuant to the law in effect prior to the effective date of the provision (*see* L 2005, ch 643)." After he is resentenced under the prior law, upon notice to the District Attorney, the defendant may apply to the original sentencing court to be resentenced pursuant to L 2005, ch 643. Sentence reversed and matter remitted for resentencing. (Supreme Ct, Kings Co [Gerges, J])

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

People v Oleman, 41 AD3d 738, 836 NYS2d 881 (2nd Dept 2007)

Holding: The court properly accepted a partial verdict where the jury deliberated for approximately seven hours over a period of two days and one of the jurors had a medical problem. *See People v Brown*, 1 AD3d 147. "Neither CPL 310.70 nor any other provision of law precludes a trial court's inquiry into whether the jury, after a substantial period of deliberation, has agreed upon a verdict as to any of the counts submitted, and in then accepting a partial verdict (*see People v Spears*, [276 AD2d 725] . . .)." Judgment affirmed. (Supreme Ct, Richmond Co [Rooney, J])

Witnesses (Cross Examination) (Experts) WIT; 390(11) (20)

People v Rose, 41 AD3d 742, 840 NYS2d 363 (2nd Dept 2007)

Holding: The court did not err in exercising its discretion by precluding the defendant from cross-examining the medical examiner, the prosecution's expert witness, using statements from several forensic science journals. Although the expert had accepted the journal articles as authoritative, the defendant failed to demonstrate that the articles contradicted the expert's direct testimony. *See Watkins v Labiak*, 6 AD3d 426, 426-27. The other issues raised also lack merit. Judgment affirmed. (County Ct, Suffolk Co [Weber, J])

Appeals and Writs (Briefs) (Counsel) APP; 25(15) (30)

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

People v Jones, 41 AD3d 863, 837 NYS2d 587 (2nd Dept 2007)

Holding: The defendant's appellate counsel filed an *Anders* brief (*Anders v California*, 386 US 738) and requested to be relieved as counsel. An independent review of the record reveals potentially nonfrivolous issues, including issues regarding the defendant's sentencing and the lack of mention of the required period of post-release supervision. *See People v Stokes*, 95 NY2d 633, 638. Motion granted, counsel relieved and directed to turn over all papers to new counsel, prosecution to provide counsel with a certified transcript of the proceedings, and briefing schedule set. (County Ct, Westchester Co [Zambelli, J])

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

Discovery (Matters Discoverable) (Right to Discovery) DSC; 110(20) (33)

Matter of Phillips II v Ramsey, 42 AD3d 456, 839 NYS2d 223 (2nd Dept 2007)

Holding: The court erred in denying the Article 78 petition to prohibit a City Court Judge from enforcing his order directing a state trooper to produce his own copy of a police training manual at a pretrial hearing in a criminal case. A petition seeking to prohibit the enforcement of a disclosure order is appropriate where the court has exceeded its authority by ordering the prosecution to disclose material that it is not statutorily required to disclose. *See Matter of Pirro v LaCava*, 230 AD2d 909. While Criminal Procedure Law 240.20(1)(k) requires that the prosecution, in a Vehicle and Traffic Law case, disclose "any written report or document concerning . . . a physical examination made by a public servant engaged in law enforcement activity, there is no statutory right entitling a defendant to compel a trooper of the State Police to turn over his personal copy of a police training manual (*see People v Bagley*, 279 AD2d 426 . . .)." Because the state trooper is not a party to the criminal case, the court cannot order the trooper to produce his copy of the manual without a properly issued subpoena based on defense counsel's request pursuant to Criminal Procedure Law 610.20(3). Judgment reversed, petition granted, and enforcement of disclosure order prohibited. (Supreme Ct, Orange Co [Slobod, J])

Misconduct (Judicial) MIS; 250(10)

Sentencing (Resentencing) SEN; 345(70.5)

People v Zuniga, 42 AD3d 474, 838 NYS2d 445 (2nd Dept 2007)

Holding: After the defendant rejected a plea offer, the court improperly stated its intent to impose consecutive terms of imprisonment if the jury convicted the defendant of all the charges against him. "'There is not and cannot be any fair system of justice which would permit the

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Presiding Judge or Justice to predetermine the discretionary sentence that would be imposed if an accused person exercises his right to trial and is found guilty' (*People v James*, 70 AD2d 706)." Judgment modified, sentences vacated, and remanded for resentencing before a different judge. (County Ct, Nassau Co [Carter, J])

Sentencing (Excessiveness) (Resentencing) **SEN; 345(33) (70.5)**

People v Castaneda, 42 AD3d 504, 838 NYS2d 788 (2nd Dept 2007)

Holding: The court sentenced the defendant to concurrent determinate terms of seven years for second-degree assault and one year for fourth-degree criminal possession of a weapon. In sentencing the defendant to seven years on the assault charge, the court incorrectly stated that the defendant, a noncitizen, was illegally in the United States. Considering all the circumstances, the sentence is excessive. *See People v Suitte*, 90 AD2d 80. Sentence for second-degree assault reduced to a determinate term of four years and sentence affirmed as modified. (County Ct, Orange Co [DeRosa, J])

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

Freedom of Information (General) **FOI; 177(20)**

Matter of Lockwood v Suffolk County Police Department, 42 AD3d 538, 839 NYS2d 808 (2nd Dept 2007)

Holding: The petitioner filed an Article 78 petition seeking an order compelling the respondent Suffolk County Police Department to provide him with a copy of the Department's operating manual for the Intoxilyzer Model 5000 alcohol detection machine under the Freedom of Information Law (Public Officers Law article 6). The court correctly granted the Article 78 petition in part, by ordering the respondent to make the manual available for inspection at a mutually convenient time, but denying the petitioner's request for a copy of the manual. The manufacturer of the machine, not the respondent, owned the copyright to the manual. By ordering inspection, but not copying of the manual, the court correctly balanced the petitioner's rights under the Freedom of Information Law and the respondent's obligations to the manufacturer. *See County of Suffolk v First American Real Estate Solutions*, 261 F3d 179, 195. Judgment affirmed. (Supreme Ct, Suffolk Co [Werner, J])

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

Matter of Pettiford-Brown v Brown, 42 AD3d 541, 840 NYS2d 118 (2nd Dept 2007)

Holding: Upon the petition of the child's mother for full custody and limitation of the father's visitation, the court suspended the father's visitation rights without conducting a full evidentiary hearing to determine the best interests of the child. The court can elect not to hold a full hearing if it "possesses adequate relevant information to make an informed determination of the child's best interest (*see Hom v Zullo*, 6 AD3d 536)." Because the court did not possess adequate relevant information, the court erred in not conducting a full hearing. *See gen Janousek v Janousek*, 108 AD2d 782. Order reversed and matter remitted for an evidentiary hearing on custody before a different judge. (Family Ct, Westchester Co [Klein, J])

Juveniles (Support Proceedings) **JUV; 230(135)**

Matter of Strella v Ferro, 42 AD3d 544, __ NYS2d __ (2nd Dept 2007)

Holding: The court erred in modifying the Support Magistrate's child support order by reducing the amount the father must pay from $300 per week to $440 per month. The Support Magistrate is in the best position to make credibility determinations, and those determinations must be given great deference. *See Matter of Musarra v Musarra*, 28 AD3d 668, 669. The Support Magistrate properly found that, based upon the father's education, real estate license, and prior earnings, and upon expert witness testimony about his earning ability, the father had the ability to earn significantly more income. *See Chi-Yuan Hwang v Hwang*, 308 AD2d 560, 561. A court "'may impute income [to a parent] based upon the party's past income or demonstrated earning potential' (*Matter of Westernberger v Westernberger*, 23 AD3d 571 . . .)." Although the father had just started a new job that paid approximately $2,000 per month, the father's prior earnings showed his ability to earn more than four times that amount. The evidence and the father's admissions demonstrated that "he had not been 'extensively' looking for work before the mother commenced this proceeding for an upward modification of child support." Amended order reversed and respondent's objections to the Support Magistrate's order denied. (Family Ct, Orange Co [Bivona, J])

Search and Seizure (Motions to Suppress [CPL Article 710]) (Standing to Move to Suppress) **SEA; 335(45) (70)**

People v Samuel, 42 AD3d 551, 839 NYS2d 806 (2nd Dept 2007)

Holding: The court erred in denying the defendant's

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motion to suppress physical evidence without a hearing "on the ground that the defendant could not demonstrate a legitimate expectation of privacy in the gun, which he claimed was not his, and which was recovered in a public place." The defendant may rely on the testimony of the prosecution's witnesses, including statements by law enforcement officials, to satisfy his burden of proving that he has standing. *See People v Burton*, 6 NY3d 584, 588-89; *People v Whitfield*, 81 NY2d 904, 906. In the grand jury, one of the arresting officers testified that as he approached the defendant on a street, he saw the defendant throw away the gun he had in his pocket. This was sufficient to require the court to hold a requested suppression hearing. Appeal held in abeyance, matter remitted for a hearing on defendant's motion to suppress physical evidence. (Supreme Ct, Kings Co [Collini, J])

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

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

Matter of Meadowcroft v Woods, 42 AD3d 572, 840 NYS2d 141 (2nd Dept 2007)

Holding: The court erred in ordering the children's mother to move the children to a location within 35 miles of her former residence. The court lacked jurisdiction to order the mother to relocate the children, as there was no petition alleging violation of an existing custody or visitation order or a petition for modification of such an order pending before the court. *See Matter of Harriet v Alex LL.*, 292 AD2d 92. Order reversed. (Family Ct, Richmond Co [Cohen-Gallet, Ct. Atty. Ref.])

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

People v Banks, 42 AD3d 574, 840 NYS2d 137 (2nd Dept 2007)

Holding: The court erred in dismissing the second-degree kidnapping and second-degree murder counts in the indictment as the evidence was legally sufficient to support those counts. In reviewing a motion to dismiss an indictment for legally insufficient evidence, the court must determine whether there is "'competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof' (CPL 70.10[1]. . .)." Proof beyond a reasonable doubt is not required. *See People v Bello*, 92 NY2d 523, 526. The evidence presented to the grand jury, namely that the defendants ordered the complainant to walk out of a bar at gunpoint and one of the defendants hit him with the gun, is prima facie evidence of kidnapping, including the element of abduction. *See* Penal Law 135.00(1), (2), 135.20. Further, it was improper to dismiss the kidnapping charge based upon the defendants' contention that the charge is barred by the "merger doctrine;" that issue should only be considered after a trial. *See People v Morales*, 148 AD2d 325, 326. There is legally sufficient evidence to support the felony murder charge based upon the reinstated kidnapping charge. *See* Penal Law 125.25(3). The evidence presented to the grand jury included allegations that while the defendants were fleeing the scene, they fired their guns in the direction of a bystander who was shot and killed. *See People v Slaughter*, 78 NY2d 485, 490-91. Orders reversed, counts three and four of the indictment reinstated, and matter remitted for further proceedings. (Supreme Ct, Queens Co [Eng, J])

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

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

People v Rojas, __ AD3d __, 840 NYS2d 152 (2nd Dept 2007)

Holding: Prior to sentencing, defense counsel asked the court to order a compentency examination of the defendant pursuant to Criminal Procedure Law article 730 because he was unable to communicate with his client. The court mistakenly concluded that article 730 does not apply at sentencing. Since the court cannot sentence an incompetent defendant, the court must make a discretionary determination as to whether the defendant may be an incapacitated person before imposing a sentence. *See* CPL 730.30(1); *People v Bangert*, 22 NY2d 799, 800. Judgment modified, sentence vacated, and matter remitted for resentencing. (Supreme Ct, Queens Co [Wong, J])

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

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

People v Fricchione, __ AD3d __, 840 NYS2d 422 (2nd Dept 2007)

Holding: Nineteen months after he was sentenced to a term of imprisonment for several violations of Agriculture and Markets Law and the 2nd Department affirmed his order of conviction, the court ordered the defendant to pay restitution to the Warwick Valley Humane Society. The defendant seeks to appeal the restitution order. Because Criminal Procedure Law 450.10 does not include the type of order from which the defendant appeals, there is no jurisdiction to hear the appeal. However, the defendant may "seek[] relief by proper procedural means." Appeal dismissed. (County Ct, Orange Co [DeRosa, J])

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Assault (Evidence) (Serious Physical Injury) **ASS; 45(25) (60)**

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

People v Krotoszynski, __ AD3d __, 840 NYS2d 627 (2nd Dept 2007)

Holding: The decedent died of blunt head trauma. The evidence was legally insufficient to support the defendant's conviction for criminally negligent homicide as the prosecution failed "to establish that any of the defendant's actions, such as striking the decedent with his hands, was an actual contributory cause of the decedent's death thereby giving rise to criminal liability therefor (*see Matter of Anthony M.*, [63 NY2d 270]. . .)." Other theories, *eg* that the defendant swung the decedent around causing his head to strike the stair, were purely speculative. The prosecution also failed to show that it was reasonably forseeable that dragging the decedent into the hallway and onto a hard floor would cause the decedent's death, making that behavior "'a sufficiently direct cause'" of death. *People v Matos*, 83 NY2d 509. The evidence was legally sufficient to support the defendant's conviction for second-degree assault against his girlfriend. The jury could have found that striking his girlfriend with a remote control showed he intended to cause serious physical injury. *See People v Davis*, 300 AD2d 78. The evidence was legally sufficient to show that his girlfriend suffered substantial pain; she had a cut on her ear and bruising on her face that lasted for at least three days and she experienced pain for two weeks. *See* Penal Law 10.00(9), 120.05(2). Judgment modified, conviction of criminally negligent homicide vacated and that count dismissed, and judgment otherwise affirmed. (Supreme Ct, Queens Co [Braun, J])

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

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

Matter of Unique R., No. 2006-06510, 2nd Dept, 8/14/2007

Holding: The father appealed from an order denying his application to have his child returned to him, denying the mother's application for custody, and continuing the child's temporary removal from the father's care. The father cannot appeal from the portion of the order that denied the mother's custody petition as he was not aggrieved by that determination. *See* CPLR 5511. The appeal from the portion of the order that continued the temporary removal is moot as it was superseded by an order paroling the child to the father. *See Matter of Desiree C.*, 7 AD3d 522, 523. The father's appellate counsel filed an *Anders* brief (*Anders v California*, 386 US 738) and requested to be relieved as counsel. An independent review of the record reveals no nonfrivolous issues that can be raised on appeal. Order affirmed insofar as reviewed and counsel's request to be relieved granted. (Family Ct, Kings Co [Hall, J])

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

Instructions to Jury (Intoxication) (Theories of Prosecution and/or Defense) **ISJ; 205(40) (50)**

People v Smith, No. 2005-02254, 2nd Dept, 8/21/2007

Holding: The court erred in denying the defendant's request for an intoxication jury charge. The evidence at trial included the decedent's mother testimony that she saw the defendant drinking on the day of the murder, a witness's testimony that after the stabbing, the defendant appeared to be "'under the influence of some kind of alcohol,'" another witness's testimony that he saw the defendant sharing a bottle of alcohol with another, and drinking a cup of alcohol, but did not know how much the defendant drank, and a detective's testimony that he smelled alcohol on the defendant. A reasonable person could entertain a doubt as to intent on this basis. *See People v Perry*, 61 NY2d 849, 850. Judgment reversed and matter remitted for new trial. (Supreme Ct, Suffolk Co [Mullen, J])

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

Matter of Jamison v Chase, No. 2006-03407, 2nd Dept, 8/21/2007

Holding: The court erred in granting the paternal grandmother's petition for custody and denying the mother's petition for custody. A parent has a superior right to custody unless a nonparent "establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or similar extraordinary circumstances (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 . . .)." The appellate division's "'authority in custody matters is as broad as that of the trial court' (*Matter of Rosiana C. v Pierre S.*, 191 AD2d 432, 433 . . .)." The paternal grandmother failed to establish extraordinary circumstances justifying a best interests determination and the denial of the mother's custody petition. *Cf Matter of Jacqueline Sharon L. v Pamela G.*, 26 AD3d 250. Order reversed, grandmother's petition denied, mother's petition granted, and matter remitted for a hearing to determine paternal grandmother's visitation rights. (Family Ct, Kings Co [Silber, J])

Juveniles (Paternity) (Visitation) **JUV; 230(100) (145)**

Second Department *continued*

Matter of Perez v Munoz, No. 2006-09545, 2nd Dept, 8/21/2007

Holding: The court properly denied the father's petition to modify a prior visitation order by directing a social worker to transport the children to the prison where he is incarcerated for visitation. The court had no authority to direct a social worker to transport the children to the prison as the father had not named a specific social worker in the petition and a social worker had not been summoned before the court. *See Matter of Jillana C.*, 309 AD2d 1170, 1171. The court correctly denied the father's request for paternity as that request must be made in a separate Family Court Act article 5 proceeding where no order of support has been brought against him. *See* Family Court Act 418. Order affirmed insofar as appealed from. (Family Ct, Kings Co [Hepner, J])

Third Department

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

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

People v Terrell, 41 AD3d 1044, 839 NYS2d 812 (3rd Dept 2007)

The defendant pleaded guilty to one count of first-degree assault in exchange for a 19 year determinate prison sentence and waived his right to appeal. The plea agreement required the defendant to cooperate with the probation department's preparation of a presentence report and answer the department's questions in conformity with what he told the court during the plea allocation. The court told the defendant that if he did not comply with the plea agreement, he would be sentenced to 21½ years. The court found that, by telling the probation officer a different story about how the assault occurred, the defendant violated the terms of the plea agreement and sentenced him to the enhanced term.

Holding: The defendant failed to preserve for review the issue of the voluntariness of his plea as he did not more to withdraw his plea or vacate his judgment of conviction. *See People v Perez*, 35 AD3d 1030, 1031. If reviewed, it would be found without merit. The conditions agreed upon by the defendant as part of the plea agreement are enforceable as they do not violate statutory provisions or public policy. *See People v Avery*, 85 NY2d 503, 507. The defendant's waiver of his right to appeal prevented him from arguing that his enhanced sentence was harsh and excessive since he knew what his maximum sentence would be if he failed to comply with the plea agreement. *See People v Schryver*, 306 AD2d 626 *lv den* 100 NY2d 598. Judgment affirmed. (County Ct, Albany Co [Herrick, J])

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

People v Dominie, 42 AD3d 589, 838 NYS2d 730 (3rd Dept 2007)

The court adjudicated the defendant a level two sex offender pursuant to the Sex Offender Registration Act based upon his third-degree rape conviction. The defendant, a twenty-three year old audiologically and visually handicapped male, met a sixteen year old female on the Internet. She visited the defendant at his home while his mother was there; the defendant and the complainant went to his room to watch a movie and they had sex. The complainant later claimed the sex was not consensual. The defendant objected to the court's SORA assessment of ten points for forcible compulsion, as well as the assessment of points in two other categories of the risk assessment.

Holding: The court erred in assessing points for forcible compulsion as the prosecution failed to present clear and convincing evidence of forcible compulsion. *See People v Gonzalez*, 28 AD3d 1073, 1074. Three problems were: (1) the complainant gave "markedly differing accounts of the incident in her grand jury testimony, her impact statement and her statements to the police"; (2) the defendant consistently denied using that he used force; and (3) the prosecutor admitted on the record that he could not prove forcible compulsion at trial. Order reversed and matter remanded for further proceedings consistent with this order. (County Ct, St. Lawrence Co [Richards, J])

Dissent: [Cardona, J] The court did not abuse its discretion in assessing points for forcible compulsion based upon the complainant's grand jury testimony, as inconsistencies and additional allegations in her other statements did not undermine the reliability of the testimony and all of her statements indicated that the defendant used force. The prosecutor's statement is not dispositive because the prosecutor's inability to prove forcible compulsion beyond a reasonable doubt does not mean that there was not clear and convincing evidence of such compulsion.

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

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

Matter of Pfrang v Charland, 42 AD3d 611, 840 NYS2d 444 (3rd Dept 2007)

Holding: The court erred in granting the petitioner maternal grandmother's petition for visitation with the respondent mother's children as the court failed to advise the respondent of her right to be represented by counsel and her right to have counsel assigned if she could not

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afford an attorney and required the respondent to represent herself at the visitation hearing. The respondent had retained counsel, but later informed the court that she could not afford the attorney. Also, the respondent's retained counsel had requested permission to withdraw, which the court denied, and her counsel did not appear at the visitation hearing after calling the court to indicate that he was too sick to proceed. As the right to counsel is a fundamental right and the requirements of Family Court Act 262 were not followed, the respondent did not need to show that she was prejudiced by ineffective assistance of counsel. *See Matter of Wilson v Bennett*, 282 AD2d 933, 934-35. Order reversed and matter remitted for further proceedings. (Family Ct, Madison Co [McDermott, J])

Lesser and Included Offenses (General) (Instructions) **LOF; 240(7) (10)**

People v Hernandez, 42 AD3d 657, 839 NYS2d 592 (3rd Dept 2007)

Holding: The defendant was convicted of first-degree promoting prison contraband for possession of marijuana that was found in his prison cell. The court erred in denying the defendant's request that the jury be charged with the lesser included offense of second-degree promoting prison contraband. It is not appropriate for the court to give a lesser offense instruction where proof of the defendant's guilt for both offenses depends upon the testimony of one witness and the jury cannot reasonably differentiate between different portions of that testimony. The distinction between the two offenses at issue is that the greater offense requires that the defendant knowingly and unlawfully possess dangerous contraband, not just contraband. To establish that marijuana is dangerous contraband, the prosecution must present specific evidence of the danger to the safety and security at the facility. *See People v Salters*, 30 AD3d 903, 904. Two correctional officers testified regarding the possession of contraband and the dangerousness of the contraband. The officers' testimony can be separated, as the contraband testimony was based upon the facility's rule book and the dangerousness testimony was subjective, speculative, and relied on generalities. Because "there was a reasonable basis for the jury to differentiate between that portion of the testimony establishing that marihuana is contraband and that segment that was addressed to dangerousness, . . . a rational factfinder could have concluded on this record that defendant committed the lesser offense but not the greater if the lesser included charge had been given . . . ." Judgment reversed and remitted for a new trial. (County Ct, Clinton Co [Ryan, J])

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

Robbery (Elements) (Instructions) **ROB; 330(15) (25)**

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

People v Knowles, 42 AD3d 662, 839 NYS2d 324 (3rd Dept 2007)

Holding: The defendant was convicted of second-degree murder, first-degree robbery, and other offenses. The court committed reversible error when it instructed the jury that, for purposes of the robbery charge, the decedent was the owner of the property at issue because the instruction "relieved the prosecution of proving that element of the crime as a matter of fact (*see People v Hogue*, 139 AD2d 835, 836 [1998])."

During his opening statement and in his closing argument, the prosecutor referred to the defendant's invocation of his right to counsel and his decision to remain silent and he also elicited testimony about the matter during the direct case. By failing to admonish the jury that "it could not draw any inferences against the defendant for exercising those rights," the court committed reversible error. Although the defendant's attorney failed to preserve the issue, the court reviewed the matter in the interest of justice. Judgment reversed and remitted for a new trial. (County Ct, Schenectady Co [Hoye, J])

Juries and Jury Trials (Alternate Jurors) (Constitution-right to) (Discharge) **JRY; 225(5) (20) (30)**

People v Garbutt, 42 AD3d 665, 839 NYS2d 833 (3rd Dept 2007)

After about one and a half hours of deliberations, one of the twelve jurors started experiencing immense pain. After meeting with the juror, the court asked the defendant and his counsel whether the defendant agreed to the release of the juror. Defense counsel orally agreed to the juror's release and the court replaced the juror with one of the two alternates. The jury convicted the defendant of assault on a police officer.

Holding: Although the defendant failed to preserve the issue, it is reviewed because "the error 'impact[s] on the constitutional guarantee of [a] trial by jury, [which] implicates the organization of the court or the mode of proceedings prescribed by law' (*People v Ahmed*, [66 NY2d 307,] 310 . . .)." The court erred by failing to get the defendant's written consent to the substitution. Once deliberations have started, the court must obtain the defendant's written consent before substituting an alternate juror for a regular juror and the defendant must sign the consent in the court's presence. *See* CPL 270.35(1); *People v Ortiz*, 92 NY2d 955, 957. By failing to strictly comply with these requirements, the court violated the defendant's constitu-

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tional right to a trial by 12 jurors. *See* NY Const, art 1, § 2; *People v Page*, 88 NY2d 1, 10. Judgment reversed and remitted for new trial. (County Ct, Sullivan Co [LaBuda, J])

Larceny (Elements) (Instructions) **LAR; 236(17) (50)**

People v Vandermuelen, 42 AD3d 667, 839 NYS2d 835 (3rd Dept 2007)

Holding: Husband and wife defendants were convicted of second-degree grand larceny for stealing more than $50,000 from joint bank accounts that the wife had with her grandmother. The court erred in rejecting the defendant wife's argument that she could not be convicted of larceny for using the funds in the joint bank account since she was a joint owner. *See People v Antilla*, 77 NY2d 853, 855. The court also erred in denying the defendants' motion to set aside the verdict because it incorrectly found that the prosecution's theory of the case was larceny by false promise in creating the accounts, not in taking the money from the accounts, and that the evidence supported this theory. The prosecutor's bill of particulars and opening statement referred to the defendant's acquisition of a power of attorney from the complainant and the theft of money from the complainant's bank accounts. However, the prosecutor did not introduce evidence regarding use of the power of attorney to obtain the money. On appeal, the prosecution denied that their theory of the case was larceny by false promise and argued that it had two theories: simple larceny and larceny by false pretenses. These theories were not supported by the trial evidence as the complainant testified about the defendant's promises about how she would use the accounts in the future and not about "a false representation or statement of a prior or existing fact upon which [the complainant] relied in creating the joint accounts. . . ." Further, based on the prosecution's pleadings and statements at trial, the defendants did not have reason to believe that their theory was larceny by false promise. Even if this was the prosecution's theory, the evidence does not support the theory as an inference of criminal intent cannot be drawn solely from the defendant's failure to perform her promise. *See* Penal Law 155.05(2)(d); *People v Kramer*, 92 NY2d 529, 542. Judgment against Theresa Vandermuelen modified; judgment against Wayne Vandermuelen reversed and indictment dismissed. (County Ct, Sullivan Co [LaBuda, J])

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

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

People v Ramirez, 42 AD3d 671, 839 NYS2d 327 (3rd Dept 2007)

Holding: The defendant pleaded guilty to second-degree burglary based upon his entry into a residence and taking of compact discs and jewelry. The defendant's waiver of his right to appeal was valid because, although the court failed to adequately separate that right from the rights that are automatically forfeited by a guilty plea during the plea colloquy, the defendant signed a detailed written waiver in which he acknowledged that he had been fully informed of his right to appeal and the consequences of waiving that right. *See People v Ramos*, 7 NY3d 737, 738. While the defendant did not preserve the issue of whether his plea was knowingly and voluntarily entered, it is reviewable because the defendant's statement of the facts underlying the crime during the plea colloquy cast doubt on his guilt and the voluntariness of the plea. *See People v Lopez*, 71 NY2d 662, 666. The defendant's statements about having permission to enter the residence and get the items that he took "effectively negated his admission to the elements of knowingly entering unlawfully and intent to commit a crime therein at the time of entry, . . ." which triggered the court's duty to ask further questions to ensure that the defendant's plea was knowing and voluntary. The inquiry did not resolve the doubt about the defendant's guilt or show that the defendant's misunderstanding about the charges was corrected or explained. *See People v Ocasio*, 265 AD2d 675, 677-78. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, Sullivan Co [LaBuda, J])

Admissions (General) **ADM; 15(17)**

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

People v Willette, 42 AD3d 674, 839 NYS2d 597 (3rd Dept 2007)

A state trooper stopped the defendant's car after noticing that the car's license plate was not illuminated. The defendant admitted that he was violating the conditions of his restricted-use license. After he wrote up tickets for the violations and checked the defendant's license and registration, the trooper returned to the defendant's car and asked the defendant to step out so that he could perform an inventory search of the car and his canine partner could perform a walk-around. The defendant then told the trooper that there were nine pounds of marijuana in the trunk of the car. The statement was confirmed after the canine placed an alert on the trunk and then alerted on a hockey bag that contained ziplock bags full of marijuana.

Holding: The court erred in suppressing the defendant's statements and the marijuana. The trooper had the

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authority to impound the defendant's car after he determined that the defendant could not lawfully continue to drive it. *See People v Figueroa*, 6 AD3d 720, 722 *lv dsmsd* 3 NY3d 640. The defendant's Fourth Amendment rights were not violated because the trooper properly told the defendant about the inventory search after he decided to impound the car and the search was not extended by the canine sniff. *See Illinois v Caballes*, 543 US 405, 410. The defendant had a reduced expectation of privacy because he was violating his license restrictions, which created the possibility of an impoundment and inventory search, which can include examination of closed containers in the car. *See People v Gonzalez*, 62 NY2d 386, 390. The defendant's admissions were lawfully obtained because he was not in custody and he made the statements after being informed about the impound inventory procedure. Judgment reversed, motion denied, and matter remitted for further proceedings. (County Ct, Essex Co [Meyer, J])

Juveniles (Neglect) **JUV; 230(80)**

Matter of John O. v Sharon Q., 42 AD3d 687, 839 NYS2d 605 (3rd Dept 2007)

Holding: The court erred in finding that the petitioner established that the respondent mother neglected her children. To establish that a child has been neglected by a preponderance of the evidence, "the child's physical, mental or emotional condition must be shown to have been impaired or be in imminent danger of becoming impaired (*see* Family Court Act § 1012[f][i])." *See Nicholson v Scoppetta*, 3 NY3d 357. The mother's actions, including hitting her fourteen year old daughter with a candle and causing a slight bruise on her daughter's thumb, calling her daughter a vulgar name, and leaving her daughter at home overnight with her fifteen year old brother in the home and her grandmother at home in an upstairs apartment, did not amount to neglect. Because the petitioner failed to present testimony or a psychological evaluation "linking the clear inadequacies of respondent's parenting to [her daughter]'s disciplinary issues both at home and at school, we cannot conclude that [her daughter]'s defiant and confrontational behaviors are 'clearly attributable' to respondent's failures (Family Court Act § 1012[h])." Order reversed and petitions dismissed. (Supreme Ct, Rensselaer Co [Stein, J])

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

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

Matter of Scala v Tefft, 42 AD3d 689, 840 NYS2d 193 (3rd Dept 2007)

Holding: The court erred in continuing a custody hearing after the petitioner mother stated at least two times that she wanted an attorney to be assigned to represent her. Once the petitioner indicated that she wanted an attorney, the court was required to adjourn the proceedings to allow her to obtain and confer with an attorney. *See* Family Court Act 262(a); *Matter of Williams v Bentley*, 26 AD3d 441, 441-42. The court also erred in transferring jurisdiction over custody matters to North Carolina without allowing the parties to submit information about which state is the appropriate forum and without considering all of the factors set forth in Domestic Relations Law 76-f(2)(a) - (h). *See Matter of Rey v Spinetta*, 8 AD3d 393, 394. Order reversed and matter remitted for further proceedings. (Family Ct, Chenango Co [Sullivan, J])

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

Juveniles (Neglect) **JUV; 230(80)**

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

Matter of Ian H., 42 AD3d 701, 840 NYS2d 202 (3rd Dept 2007)

The petitioner commenced a neglect proceeding against the respondent father after he was accused of sexually abusing two children who attended his wife's day care center. Later a third child alleged that the respondent had abused her.

Holding: The court properly admitted into evidence the out-of-court statements of two of the children who the respondent allegedly abused. Pursuant to Family Court Act 1046(a)(iv), the out-of-court statements do not need to be made by the children named in the petition in order to be admissible. *See eg Matter of Alan YY. v Laura ZZ.*, 209 AD2d 902, 902-04 *lv den* 85 NY2d 806. The children's statements were adequately corroborated as the statements "cross-corroborated each other," one of the children made her initial statement about the abuse spontaneously and her demeanor during her interview indicated that the statement was reliable, and the defendant admitted to touching the vaginal area of two of the children "under the guise of checking them for wetness." Further, the "Family Court was permitted to 'draw a strong inference against' respondent in light of his election not to testify (*see Matter of Kayla F. [Michael F.]*, [39 AD3d 983,] 985)." The court correctly denied the respondent's request to call one of the children as a witness since the court made the discretionary determination after balancing the respondent's rights against the child's mental and emotional well-being. *See Matter of Robert U. [Frederick V.]*, 283 AD 2d 689, 690-91. Finally, the court did not err in finding derivative neglect of the respondent's children as his actions showed that he had impaired level of judgment that created a risk of harm to his children. *See Matter of Sheena D.*

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[Darwin F.], 27 AD3d 1128, 1128 *mod* 8 NY3d 715, 716. Order affirmed. (Family Ct, Tioga Co [Sgueglia, J])

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

Juveniles (Hearings) (Neglect) (Parental Rights) **JUV; 230(60) (80) (90)**

Matter of Damion D., 42 AD3d 715, 839 NYS2d 852 (3rd Dept 2007)

Holding: The court erred in granting the petitioner's oral motion to terminate its duty to make reasonable efforts to reunite one of the respondent's children with her. Family Court Act 1039-b(a) requires that the motion be made in writing and that the respondent be given adequate notice of the motion. Despite the respondent's failure to object to the oral motion or request an evidentiary hearing, based upon the circumstances of the case, the issue is reviewed. "Although the statute does not specifically direct that an evidentiary hearing be held, we conclude that the constitutional due process rights of respondent require such a hearing when genuine issues of fact are created by the answering papers (*see generally Matter of Marino S. [Raquel T.]*, 100 NY2d 361, 371 [2003], *cert denied* 540 US 1059 [2003])." Order reversed and motion denied. (Family Ct, Columbia Co [Nichols, J])

Plea Bargaining (General) **PLE; 284(10)**

Sentencing (Alternatives to Incarceration) (Presentence Investigation and Report) **SEN; 350(7) (65)**

People v Emerson, 42 AD3d 751, 840 NYS2d 635 (3rd Dept 2007)

The defendant pleaded guilty to first-degree aggravated unlicensed operation of a motor vehicle and driving while intoxicated. As part of the plea, the court agreed to give the defendant the opportunity to participate in a drug court treatment program so that his unlicensed operation offense could be reduced to a misdemeanor. The court instructed the defendant to cooperate with the presentence investigation, but did not impose additional conditions on his presentence release. During the investigation, the defendant admitted to using marijuana and alcohol three weeks before the sentencing. Based on the defendant's admissions, the court refused to allow the defendant to participate in the treatment program and sentenced him to concurrent terms of 15 to 45 months in prison for the unlicensed operation offense and one year in jail for driving while intoxicated.

Holding: The court erred in refusing to allow the defendant to participate in the treatment program or withdraw his guilty plea. The court agreed to the terms of the plea bargain, which did not include the restrictions imposed by it at the time of sentencing. Therefore, the court cannot enforce those restrictions without allowing the defendant to withdraw his plea. *See People v Kinch*, 15 AD3d 780, 781. Judgment reversed and matter remitted for further proceedings (County Ct, St. Lawrence Co [Richard, J])

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

People v Johnson, 42 AD3d 753, 839 NYS2d 346 (3rd Dept 2007)

After the prosecutors issued a pretrial notice stating that they were ready for trial, the defendant "filed an omnibus motion seeking, among other things, inspection and review of the grand jury minutes and/or dismissal of the indictment based on insufficiency of the evidence and the grand jury instructions." The prosecution ordered the grand jury minutes and indicated that they would forward the minutes to the court upon receipt. The prosecution received the minutes approximately one month later, but did not send the minutes to the court for over four months.

Holding: The court properly granted the defendant's motion to dismiss the indictment on speedy trial grounds. In determining whether the prosecution is chargeable with the 137 days of postreadiness delay, the court must look at "'whether the [prosecution] ha[s] done all that is required of them to bring the case to a point where it may be tried' (*People v England*, 84 NY2d 1, 4 [1994] . . .)." The prosecution can be charged with the delay since their inaction caused the delay and they have no excuse for waiting to forward the grand jury minutes. *See People v Dearstyne*, 215 AD2d 864, 866. Because the court was unable to decide the motion to dismiss without the grand jury minutes, the prosecution's actions "create[d] a direct impediment to the commencement of the trial . . . . " Order affirmed. (County Ct, Broome Co [Smith, J])

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

Matter of Carter v Dennison, 42 AD3d 779, 838 NYS2d 794 (3rd Dept 2007)

Holding: The Board of Parole erred in failing to review and consider the sentencing judge's recommendations, if any, as part of its consideration of the petitioner's request for parole release. *See Matter of Lovell v New York State Div. of Parole*, 40 AD3d 1166, 1167. Judgment reversed and matter remitted to the Board of Parole to obtain the sentencing minutes and sentencing court's recommendations and conduct a de novo hearing. (Supreme Ct, Albany Co [Lynch, J])

Third Department *continued*

Evidence (Privileges) **EVI; 155(115)**

Search and Seizure (Electronic Searches) **SEA; 335(30)**

People v Powers, 42 AD3d 816, 839 NYS2d 865 (3rd Dept 2007)

The defendant was convicted of second-degree sodomy for engaging in oral sex with the 14-year-old daughter of his girlfriend. The defendant later married his girlfriend. During a telephone conversation with his wife, which the police recorded, the defendant admitted to the alleged sexual contact. The court admitted into evidence the recording of the telephone conversation over the defendant's objection that the communication was protected by the marital privilege set forth in CPLR 4502(b) and CPL 60.10.

Holding: The marital privilege does not apply "where the communication arises out of the abuse of a spouse's child upon the theory that 'the wrong to the child is equally a wrong to the . . . spouse and that the performance of the injury is equally as destructive of the marriage.' *(People v Allman*, 41 AD2d 325, 328 [1973] . . .)." The court did not err in admitting the recorded telephone conversation into evidence as the recording did not amount to the crime of eavesdropping because it was obtained with the consent of either the caller or receiver of the communication. *See* Penal Law 250.00 (1), (2), (6); *People v Hills*, 176 AD2d 375. Judgment affirmed. (County Ct, St. Lawrence Co [Richards, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause]) (Private Persons) (Warrentless Searches) **SEA; 335(10[g]) (60) (80)**

People v Ruppert, 42 AD3d 817, 839 NYS2d 866 (3rd Dept 2007)

At a music festival, private security guards searched the defendant's backpack and found blue pills and glass vials with amber liquid. The security guards escorted the defendant out of the festival and brought him to a state trooper who was posted outside the festival gates and told the trooper what they had found. The trooper searched the defendant and his backpack and found additional drugs and paraphernalia. Thereafter, the trooper arrested the defendant. After the court denied his motion to suppress the physical evidence, the defendant pleaded guilty to several drug-related offenses.

Holding: The court did not err in denying the defendant's motion to suppress. The security guards did not conduct an illegal search as they were not performing a public function that amounted to state action. There was no evidence of a connection between the security guards and the police, such as police supervision of the guards or that the security guards were acting on behalf of the police. *See People v Ray*, 65 NY2d 282, 286. The guards cannot be considered agents of the state police merely because they turned over the drugs to the trooper. *See People v Alder*, 50 NY2d 730, 737 *cert den* 449 US 1014. Because the trooper had probable cause to arrest the defendant based upon the drugs found by the security guards, the trooper had the authority to conduct a warrantless search of the defendant and his backpack incident to the lawful arrest. *See People v Perel*, 34 NY2d 462, 467. Judgment affirmed. (County Ct, Tompkins Co [Sherman, J])

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

People v George, __ AD3d __, 840 NYS2d 662 (3rd Dept 2007)

The defendant was convicted of depraved indifference murder six months prior to the change in the definition of depraved indifference murder set forth in *People v Hafeez*, 100 NY2d 253.

Holding: The new definition of depraved indifference murder should be applied to this appeal since the defendant's conviction is not final. This conclusion is supported by recent decisions issued by the Court of Appeals and the other three Appellate Divisions. *See People v Swinton*, 7 NY3d 776; *People v Mancini*, 7 NY3d 767; *People v Atkinson*, 7 NY3d 765. The decedent was killed by a bullet from a gun that discharged during an altercation involving three people. Evidence conflicted as to how the shot occurred. While the prosecution presented legally sufficient evidence that "the defendant acted recklessly by engaging in conduct creating a grave risk of death to another," the evidence does not support the conclusion that the defendant acted with depraved indifference, even though the defendant delayed and interfered with emergency services for the decedent. Judgment modified, sentence vacated, and matter remitted for resentencing on the lesser included offense of second-degree manslaughter. (County Ct, Schoharie Co [Bartlett III, J])

Concurrence in Part, Dissent in Part: [Carpinello, J] The new definition of depraved indifference murder should not be applied retroactively to cases on direct appeal. All three factors that must be considered in making a retroactivity decision weigh against retroactivity here. The new definition was meant to apply prospectively, prosecutors have relied on the old definition in making charging decisions, and the administration of justice would be affected because of the large number of cases currently on appeal.

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Evidence (Photographs and Photography) (Prejudicial) — **EVI; 155 (100) (106)**

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

People v Ford, __ AD3d __, 840 NYS2d 668 (3rd Dept 2007)

Holding: There was legally sufficient evidence to support the depraved indifference murder conviction under Penal Law §125.25(4), which applies where the defendant is eighteen years of age or older and the decedent is less than eleven years old. The defendant told police that, after he could not get his girlfriend's 18-month old child to stop crying, he punched the child in the abdomen two or three times. The child began to choke and vomit and later died. The defendant's admissions and the medical examiner's testimony that the decedent died of blunt force trauma to the abdomen established that the defendant "recklessly engaged in conduct which created a grave risk of serious of physical injury to the [decedent] (*see People v Scott*, 288 AD2d 846 [2001], *lv denied* 97 NY2d 761 [2002])." Additionally, the jury could rationally conclude that punching a vulnerable child out of frustration and failure to call for medical assistance immediately after the child began to vomit and choke showed a callousness and indifference that "proved that defendant acted '[u]nder circumstances evincing a depraved indifference to human life' (Penal Law 125.25(4); *see People v Maddox*, [31 AD3d 970,] 971[, *lv denied* 7 NY3d 868])." The court properly admitted photographs of the decedent's lacerated liver during the prosecution's case since they were used to support a disputed or material issue. Although the defendant's expert testified that he agreed with the medical examiner about the cause of death, because the expert did not prepare a written report, the prosecution did not know what medical issues may be disputed. Since the prosecution had to be able to prove their case, the photographs were admissible and the court properly "instructed the jury to avoid making emotional judgments based on the photographs (*see People v Alvarez*, [38 AD3d 930,] 932 . . .)." Judgment affirmed. (County Ct, Albany Co [Breslin, J])

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

Equal Protection (Discriminatory Enforcement) (Suspect Classification) — **EQP; 140(5) (20)**

Brown v State of New York, No. 501702, 3rd Dept, 8/23/2007

In a class action suit, the plaintiffs alleged constitutional torts, including violations of the equal protection and search and seizure clauses of the New York Constitution, based upon the State Police's investigation of an attack on a woman in Oneonta.

Holding: The court correctly dismissed the plaintiffs' equal protection claims, with the exception of plaintiff Champen's claim. The strict scrutiny test does not apply to the equal protection claims because the evidence did not support a conclusion that the State Police adopted a policy that classified persons on the basis of race during the investigation. *See Hayden v County of Nassau*, 180 F3d 42, 48 (2d Cir 1999). Instead, the police based their investigation on the complainant's description of her attacker, which is a legitimate, race-neutral policy. The court correctly found in Champen's favor on her equal protection claim, however, since her race was "'the only physical characteristic that clearly connected her to the description of the assailant' ([*Brown v State of New York*,] 12 Misc 3d 633, 647, 814 N.Y.S.2d 492 [2006] . . .)."

The court granted Champen's and Brown's constitutional tort claims as both were subject to unreasonable search and seizure and correctly dismissed remaining plaintiffs' constitutional tort claims as the plaintiffs failed to provide specific information about their police encounters. *See People v Bora*, 83 NY2d 531, 535-36. Finally, the plaintiffs' negligent training and supervision claim was properly dismissed because the plaintiffs failed to produce evidence of negligent training during the trial. The state police could not be held liable for the actions of non-state officers since those officers were not acting as "special employees" of the defendant during the investigation. *See Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557. Judgment affirmed. (Court of Claims [McNamara, J])

Fourth Department

Instructions to Jury (Circumstantial Evidence) — **ISJ; 205(32)**

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

People v Burnett, 41 AD3d 1201, 838 NYS2d 290 (4th Dept 2007)

Holding: The evidence against the defendant was entirely circumstantial and the charge "failed to convey to the jury in substance that 'it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence' (*People v Isidore*, 158 AD2d 933, 933-934, *quoting People v Sanchez*, 61 NY2d 1022, 1024)." Since the proof of guilt was not overwhelming, the court committed prejudicial error by giving an inadequate jury charge. A new trial is required notwithstanding the defense failure to

Fourth Department *continued*

request an adequate charge or to except to the charge given. On remand the defendant may seek to reopen the suppression hearing based on the inconsistencies between the arresting officer's testimony at the hearing and at trial. *See* CPL 710.40(4); *People v Velez*, 39 AD3d 38. Judgment reversed, remanded for new trial. (County Ct, Onondaga Co [Walsh, J])

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

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

People v Weatherley, 41 AD3d 1238, 837 NYS2d 461 (4th Dept 2007)

The court adjudicated the defendant a level three risk under the Sex Offender Registration Act, Correction Law Article 168.

Holding: The defendant was entitled to a downward departure from a level three to a level two risk based on the following special circumstances: the defendant was 24 years of age when he engaged in sexual activity with a 15 year old female who admitted that she had willingly engaged in the activity; there was no evidence of forcible compulsion; it was the defendant's first sex offense; and the defendant had been receiving sex offender counseling at the time of the hearing. "We therefore substitute our own discretion 'even in the absence of an abuse [of discretion]' (*Matter of Von Bulow*, 63 NY2d 221, 224 . . .)." Order modified and otherwise affirmed. (County Ct, Jefferson Co [Martusewicz, J])

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

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

People v Williams, 41 AD3d 1252, 838 NYS2d 319 (4th Dept 2007)

The defendant was convicted of second-degree robbery for forcibly stealing a motor vehicle in violation of Penal Law 160.10(3).

Holding: Although the defendant failed to preserve for review the issue of the sufficiency of the evidence supporting his robbery conviction, the issue is reviewed in the interest of justice. *See* CPL 470.15(6)(a). When viewed in light most favorable to the prosecution, the evidence does not support the conclusion that the defendant committed larceny, a necessary element of the robbery charge. "[T]here is no valid line of reasoning or permissible inferences to support a conclusion that defendant intended 'to exert permanent or virtually permanent control over the [motor vehicle], or to cause permanent or virtually permanent loss to the owner of the possession and use [of the motor vehicle]' ([*People v] Jennings*, 69 NY2d [103,] 118)."

The defendant "had no absolute right to testify before the grand jury while proceedings concerning his competency were in progress." *See* CPL 730.40(3). Judgment modified, second-degree robbery conviction reversed, and remitted for further proceedings. (Supreme Ct, Erie Co [Wolfgang, J])

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

People v Smothers, 41 AD3d 1271, 838 NYS2d 314 (4th Dept 2007)

Holding: The evidence was insufficient to support the depraved indifference murder conviction as the defendant did not possess the requisite mental culpability for that offense. *See People v Gonzalez*, 1 NY3d 464, 467-68. The defendant ran after two girls with a kitchen knife after the girls had vandalized her car. After hearing someone yell out that she should watch her back, the defendant quickly turned around and stabbed the decedent, who had not participated in the vandalism. However, the evidence was legally sufficient to support a finding of second-degree manslaughter as the defendant recklessly caused the death of the decedent. *See People v DeCapua*, 37 AD3d 1189, 1190. Judgment modified by reducing conviction to second-degree manslaughter and matter remitted for sentencing. (County Ct, Erie Co [Drury, J])

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

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

Matter of Mark C. v Patricia B., 41 AD3d 1317, 837 NYS2d 473 (4th Dept 2007)

Holding: The incarcerated father's petition seeking visitation was dismissed based on the law of the case doctrine. A prior dismissal order had been issued on the same grounds based on dismissal of an earlier petition by a Judicial Hearing Officer (JHO).The court erred in dismissing the visitation petition based upon the doctrine of law of the case. The prior orders relied upon by the court did not determine the petitions on their merits. *See Cohen v Ho*, 38 AD3d 705, 706. The court also erred in deeming the petitioner's release from prison a condition precedent to filing a visitation petition. Visitation with a noncustodial parent is presumed to be in the child's best interests; that the petitioning parent is incarcerated does not in itself alter that presumption. *See Matter of Crowell v Livziey*, 20 AD3d 923. Judgment reversed, petition reinstated, remitted for hearing on the petition. (Family Ct, Oswego Co [Roman, J])

Fourth Department *continued*

Appeals and Writs (Briefs) (Counsel) **APP; 25(15) (30)**

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

People v Ammons, 41 AD3d 1325, 836 NYS2d 447 (4th Dept 2007)

Holding: The defendant's assigned appellate counsel filed a brief pursuant to *People v Crawford* (71 AD2d 38) and asked to be relieved as counsel. A review of the record reveals a question as to whether the defendant received an illegal sentence since he was sentenced as a second felony offender and the sentence included less than five years of post-release supervision. Motion denied. (County Ct, Monroe Co [Schwartz, JA])

Appeals and Writs (Briefs) (Counsel) **APP; 25(15) (30)**

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

People v Comfort, 41 AD3d 1326, 836 NYS2d 451 (4th Dept 2007)

Holding: The defendant's appellate counsel filed a brief pursuant to *People v Crawford* (71 AD2d 38) and asked to be relieved as counsel. A review of the record reveals an issue as to whether the court abused its discretion in denying the defendant's application for resentencing under the Drug Reform Act (L 2004, ch 738, § 23). Motion granted and new counsel to be assigned to brief this issue and any other issues that counsel may find. (County Ct, Steuben Co [Latham, J])

Appeals and Writs (Briefs) (Counsel) **APP; 25(15) (30)**

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

People v Guthrie, 41 AD3d 1327, 836 NYS2d 449 (4th Dept 2007)

Holding: The defendant appealed from his plea-based convictions of second-degree criminal sexual act, second-degree unlawfully dealing with a child, and endangering the welfare of a child. Appellate counsel filed a brief pursuant to *People v Crawford* (71 AD2d 38) and asked to be relieved as counsel. A review of the record reveals an issue of whether the court abused its discretion in denying the defendant's motion to withdraw his guilty plea prior to sentencing. Motion granted and new counsel to be assigned to brief this issue and any other issues that counsel may find. (County Ct, Ontario Co [Doran, J])

Appeals and Writs (Briefs) (Counsel) **APP; 25(15) (30)**

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

People v Ortiz, 41 AD3d 1328, 836 NYS2d 448 (4th Dept 2007)

Holding: The defendant's appellate counsel filed a brief pursuant to *People v Crawford* (71 AD2d 38) and asked to be relieved as counsel. A review of the record reveals an issue of whether the defendant received an illegal sentence when he was sentenced as a second felony offender to an indeterminate term of incarceration for second-degree assault, a class D violent felony. Motion granted and new counsel to be assigned to brief this issue and any other issues that counsel may find. (County Ct, Ontario Co [Harvey, J])

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

Prisoners (Crimes) **PRS I; 300(10)**

People v Finley, 42 AD3d 917, 839 NYS2d 393 (4th Dept 2007)

The defendant was charged with first-degree promoting prison contraband and unlawful possession of marijuana for possessing marijuana in a correctional facility. After a correction officer asked the defendant for identification, the defendant took his identification out of his sweatshirt and a wad of toilet paper fell out of his pocket. The officer looked inside the paper and found three cigarettes, one of which tested positive for marijuana. The defendant told the guard "[g]ive me a break, I'm leaving in a couple of days." At trial the defendant argued that the marijuana was not dangerous contraband and therefore he could not be guilty of promoting prison contraband.

Holding: Defense counsel was not ineffective for failing to move to suppress the defendant's statements to the officer since those statements did not relate to the defense's theory of the case. *See People v Reynoso*, 262 AD2d 102 *lv den* 93 NY2d 1025. In order to establish that the marijuana is dangerous contraband, "'[s]pecific [evidence was] needed regarding how the particular marijuana that was possessed by each defendant endangered the safety of the facility.' ([*People v Stanley*, 19 AD3d 1152, 1153 *lv den* 5 NY3d 856] . . .)." In this case, the defendant's possession of the marijuana endangered the safety of the facility because (1) the defendant's actions created an increased risk that another inmate would grab the marijuana and the correction officer would have to run after the other inmate; (2) the correction officer had to turn away from the defendant to pick up the paper, which increased the risk that the officer would be injured; and (3) by having to focus on the defendant, the officer could not supervise the rest of the inmates in the cell block. Judgment affirmed. (County Ct, Orleans Co [Punch, J])

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

Fourth Department *continued*

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

People v Casper, 42 AD3d 887, 839 NYS2d 397 (4th Dept 2007)

The defendant was convicted of depraved indifference murder for causing his wife's death by causing or allowing the van in which she was a passenger to fall off a cliff.

Holding: The evidence is legally insufficient to support the depraved indifference conviction. Although the defendant acted recklessly, his actions do not rise to the level of depraved indifference. *See People v Payne*, 3 NY3d 266, 271 *rearg den* 3 NY3d 767. The evidence is sufficient to support a conviction of second-degree manslaughter. *See People v Packer*, 31 AD3d 1169, 1170 *lv den* 7 NY3d 869. The court's decision to admit into evidence a note written by the decedent under the state of mind exception to the hearsay rule was not erroneous because: (1) "[t]he note was relevant to defendant's motive to harm the victim . . ."; (2) the evidence was sufficient to demonstrate that the defendant had read the note because the note was addressed to the defendant and was found torn up in the defendant's garbage can four days after the decedent's death; (3) it was clear that the decedent wrote the note; and (4) the note mentioned the decedent's "apparent sadness 'this morning' about a 'dream' of defendant that, according to other evidence in the case, had occurred two to three weeks prior to the homicide." Judgment modified, conviction reduced to second-degree manslaughter, sentence vacated, remitted for sentencing on the new conviction. (County Ct, Ontario Co [Harvey, J])

Guilty Pleas (Withdrawal) GYP; 181(65)

Sentencing (Restitution) SEN; 345(71)

People v Ponder, 42 AD3d 880, 838 NYS2d 767 (4th Dept 2007)

The defendant pled guilty to first-degree robbery and two counts of second-degree robbery. He moved to suppress the show-up identification arguing that there were no exigent circumstances for the show-up and that the identification procedure was unduly suggestive.

Holding: Exigent circumstances are needed for a civilian show-up identification only when the identification takes place at a police station or it is not held in geographic and temporal proximity to the crime. *See People v Brisco*, 99 NY2d 596, 597. The court correctly denied the defendant's motion to suppress because the identification took place within 25 to 30 minutes after the robbery and was within a few blocks from the crime scene. The identification was not unduly suggestive because although the defendant was in handcuffs, the witnesses could not see the handcuffs and the defendant's presence next to a police officer, by itself, does not make the identification unduly suggestive. *See People v Horne*, 2 AD3d 1399, 1401 *lv den* 1 NY3d 629. Although the defendant failed to preserve the issue of whether he should have been allowed to withdraw his guilty plea, the issue is considered in the interest of justice. The court erred in failing to allow the defendant to withdraw his guilty plea prior to ordering him to pay restitution because the plea agreement did not include a restitution provision. The defendant's agreement at his sentencing to pay restitution does not matter since the court did not give the defendant any other options. *See People v Branch-El*, 12 AD3d 785, 786 *lv den* 4 NY3d 761. Judgment modified, sentence vacated, and remitted for further proceedings. (County Ct, Monroe Co [Keenan, J])

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

People v Minter, 42 AD3d 914, 838 NYS2d 764 (4th Dept 2007)

Holding: The court erred in denying the defendant's CPL 440.10 motion to vacate the judgment convicting him on his guilty plea. During the plea, the court failed to advise the defendant that his sentence would include a mandatory period of post-release supervision. Therefore, the defendant's plea was not knowing, voluntary, and intelligent. *See People v Catu*, 4 NY3d 242, 245. Order reversed, 440.10 motion granted, conviction vacated, and remitted for further proceedings on the indictment. (County Ct, Monroe Co [Connell, J])

Trial (Verdicts [Inconsistent Verdicts]) TRI; 375(70[b])

People v Extale, 42 AD3d 897, 839 NYS2d 402 (4th Dept 2007)

The defendant was found guilty of first-degree assault and first-degree vehicular assault and other crimes for striking a police officer with his vehicle.

Holding: Although the defendant failed to preserve the issue of whether the verdict was inconsistent, the issue is reviewed in the interest of justice. CPL 470.15(6)(a). The jury verdict was inconsistent because the mental states required for the two assault counts are inconsistent. *See People v Gallagher*, 69 NY2d 525, 531. The court should have submitted the two assault counts to the jury in the alternative and instructed the jury that it could find the defendant guilty of only one of the two counts. Judgment modified, conviction on the assault and vehicular assault counts reversed, and new trial ordered on counts one and two of the indictment. (County Ct, Monroe Co [Keenan, J])

Fourth Department *continued*

Appeals and Writs (Record) **APP; 25(80)**

Juries and Jury Trials (Deliberation) (General) **JRY; 225(25) (37)**

People v Cruz, 42 AD3d 901, 839 NYS2d 653 (4th Dept 2007)

The defendant argues that the court erred by improperly responding to a jury note that requested an exhibit.

Holding: The record indicates that the jury sent a note to the court during deliberations, but it is silent as to what the court did in response to the note. A court must respond to jury requests, after notice to the prosecution and defense, in open court and in the presence of the defendant. CPL 310.30. A decision on the appeal is reserved and the matter is remitted for a reconstruction hearing on the issue of whether there was a jury note and, if so, what actions the court took after receiving the note. (Supreme Ct, Monroe Co [Sirkin, JA])

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

Juveniles (Paternity) (Support Proceedings) **JUV; 230(100) (135)**

Matter of Troy D.B. v Jefferson County Department of Social Services o/b/o Jaime L.M., 42 AD3d 964, 839 NYS2d 877(4th Dept 2007)

In a 1994 filiation order, the petitioner was determined to be the father of the respondent's child and was ordered to pay child support. In 2005, after a DNA test excluded him as the father, the petitioner commenced a proceeding seeking an order determining that he is not the child's biological father and suspending his support obligation. The court granted the petition after the respondent defaulted.

Holding: The court, in its discretion, can vacate an order if it finds that the movant had a reasonable excuse for the default and a meritorious defense. CPLR 5015(a)(1). In child support cases, this rule should not be applied as rigorously as in other civil actions. *See Matter of Patricia J. v Lionel S.*, 203 AD2d 979. The court correctly found that the respondent had a reasonable excuse for the default, but erred in denying the respondent's motion to reopen the proceedings. The respondent had a meritorious defense because the court failed to appoint a law guardian for the child and did not conduct the necessary best interests hearing before reaching a decision on the petition. A law guardian must be appointed in cases where an order could potentially prejudice the child's interests and a best interests hearing must be held before vacating a filiation order. *See Matter of Darlene L.-B. v Claudio B.*, 27 AD3d 564. Order reversed, motion to reopen granted, and remitted for further proceedings. (Family Ct, Jefferson Co [Hunt, J])

Guilty Plea (Withdrawal) **GYP; 181(65)**

Sentencing (Credit for Time Served) **SEN; 345(15)**

People v Fomby, 42 AD3d 894, 839 NYS2d 901 (4th Dept 2007)

Holding: Although the defendant failed to preserve the issues of withdrawal of his guilty plea and the duration of the orders of protection, the court reviewed the issues in the interest of justice. CPL 470.15(6)(a). The court erred in failing to allow the defendant to withdraw his guilty plea after the court did not impose the sentence promised in the plea agreement. *See People v Mariani*, 6 AD3d 1206 *lv den* 3 NY3d 643. The court also erred in failing to take into account the defendant's jail time credit in setting the duration of the orders of protection. *See People v Dixon*, 38 AD3d 1242. Judgment modified, matter remitted to the Supreme Court to impose the promised sentence or allow the defendant to withdraw his plea and amend the orders of protection by taking into consideration the jail time credit to which the defendant was entitled. (Supreme Ct, Erie Co [Tills, JA]) ⚖

Defender News *(continued from page 17)*

IDP Recent Developments

IDP's New Director Plans Defender Outreach

Joanne Macri, IDP's new director, comes to the Project with a commitment to continue IDP's initiative of assisting defense attorneys across New York State in representing immigrant defendants. In support of this initiative, over the next several months IDP expects to reach out to defender offices throughout New York to develop a strategy to improve immigration resources and in-house expertise in defender organizations. Defender offices interested in discussing immigration issues are encouraged to contact Joanne at (212) 725-6421.

IDP's New Location

IDP recently relocated to a new office location in midtown Manhattan. In July, the Project moved to 3 W. 29th St., Suite 803, New York, NY, 10001. IDP has also changed its hotline number to (212) 725-6422. Although the move caused some temporary phone glitches, the hotline is now running smoothly. The Project's website (www.immigrantdefenseproject.org) and fax number (800-391-5713) remain the same. IDP would like to thank the Center for Community Alternatives for the office space they provided to the Project during the past two years. ⚖

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