



Public Defense Backup Center
REPORT

Volume XXII Number 1

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Defender News

Error in New Aggravated DWI Legislation Corrected

A one-word error in 2006 legislation intended to crack down on drivers with high concentrations of alcohol in their blood rendered the law unenforceable. Instead of specifying a percentage of blood alcohol, the bill (Laws 2006, ch 732, summarized in the *REPORT*, Vol XXI, No. 4, Aug-Oct 2006 [Legislative Review]) set the threshold for new penalties at 0.18 grams, which is below the amount that can occur naturally. (www.theithacajournal.com, 11/21/2006.) The Legislature amended the law in a bill (A.12120) signed and made effective on Dec. 15, 2006, changing "grams" to "of one per centum" (Laws 2006, ch 746).

A.12120 also reconciled inconsistencies in two bills enacted last year pertaining to elevation of vehicular assault and vehicular manslaughter crimes (see 2006 Legislative Review at 21-22). The new law specifies that vehicular assault and vehicular manslaughter in the second degree are elevated to first degree offenses when the defendant has previously been convicted of any VTL section 1192 offense within the preceding ten years.

Challenges Being Made to Breath Tests

As the importance of blood alcohol levels increases in New York and elsewhere, challenges to measurement of those levels have also risen. For example, Massachusetts attorneys handling alcohol-related traffic cases say that a 2003 law making failure of an alcohol breath test a "per se" crime has not led to more pleas or convictions. Rather, they have been able to more often convince courts to exclude breath test results. The bases for challenge may

include the prosecution's failure to present expert testimony as to the validity of test results or its inability to show that a machine complies with relevant regulations. (www.masslaw.com, 1/22/07.)

Meanwhile, a special master in New Jersey, appointed to make a recommendation to that state's Supreme Court about the reliability of results from the Alcotest 7110 machine that has replaced old Breathalyzers in most counties, has found the reliability of the new machines questionable because overestimation of the blood alcohol level by the machine is possible, though not probable. The master said that fact-finders should pay close attention "to the clinical findings and observations of the suspect at the time of apprehension" to avoid the possibility that a machine reading could lead to conviction "where the clinical data in the field sobriety test might otherwise strongly suggest innocence." The state's high court will hold a hearing before ruling. Meanwhile, defense attorneys noted that among the problems with the new machine is that the manufacturer, Draeger Safety Diagnostics Inc., refused to provide relevant computer information for experts to assess, citing the "proprietary" nature of the source code. (www.nytimes.com, 2/14/07.)

Going Forward, Guided by Gideon

On Mar. 18, 1963, the US Supreme Court recognized that the right to counsel for persons accused of crime is fundamental and essential to a fair trial. Without "the guiding hand of counsel at every step," the Court observed, an accused may be wrongly prosecuted and convicted. *Gideon v Wainwright*, 372 US 335, 345 (1963). Forty-four years later, from New York to New Orleans, the promise of the *Gideon* decision remains too often unfulfilled.

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Gideon Day Renewed

For over a decade, the anniversary of the *Gideon* decision has been the occasion for public defense lawyers and others in New York State to express their concern that *Gideon's* "guiding hand" remains out of reach for many.

In 2006, Gideon Day passed largely unobserved in New York. Attention was drawn instead to the announcement in June of an eagerly-awaited report calling for an independent public defense commission as part of a statewide system. The report, and a companion study of New York State's public defense system, was issued by the commission appointed by Chief Judge Judith Kaye in 2004 to study public defense issues.

As this issue of the *REPORT* went to press, the Chief Judge reaffirmed that the Kaye Commission report guides the judicial branch in working with the Governor's office, county governments, and public defense providers to achieve consensus on a framework for a new defense system in New York State. Judge Kaye noted that the Judiciary "is absolutely committed to serving as the catalyst for reform." (www.nycourts.gov/admin/stateofjudiciary/soj2007.pdf.)

Earlier in February, the New York State Defenders Justice Fund issued a "Save the Date" announcement that Gideon Day will be marked on Tuesday, Mar. 6, 2007, by defender colleagues and friends traveling to Albany to talk with elected officials about public defense reform. The announcement notes that consensus exists in the defense community—reform is required to ensure that every defendant has capable counsel. Enforceable standards and increased state funding are imperative. Agreement on these basics allows the defense community to be united for change even while debating the specific form such change will take.

Previously filed legislation called for a statewide independent public defense commission. The Kaye Commission, the New York State Association of Criminal Defense Lawyers, and NYSDA recommend incorporating an independent commission into a broad new statewide structure. The Chief Defenders of New York State continued at the last Chief Defender Convening on Feb. 2, 2007, to draft their version of such a plan.

While differing on the exact steps needed for reform, those concerned about justice agree that *Gideon* must be observed in practice year-round, in courts and public defense offices across the state, not just in anniversary observances once a year.

Building a New System After Katrina

"A year and a half after Katrina flooded New Orleans, the city's legal system continues to limp along with understaffed courts, a poorly funded public defense system and temporary prison accommodations." Despite this depressing overview, *National Law Journal* staff writer

Vesna Jaksic reported recently that some public defense advocates believe that a miracle will arise from Hurricane Katrina's destruction of what was already a barely-functioning system. Only since Katrina revealed the system's deep flaws have public defenders had at least some semblance of vertical representation (with lawyers assigned to clients, not courtrooms), a computerized organizational system, and offices across from the courthouse. (www.law.com, 2/6/07.)

Whether these and more reforms, funded at least in part by post-Katrina federal aid, can survive in the long term remains to be seen. Previously funded by traffic tickets and other fines—money that dried up in the wake of Katrina—the New Orleans public defense system desperately needs a steady revenue stream to continue to build a system that truly implements *Gideon*. New York State, having begun its own defense revenue stream (the Indigent Legal Services Fund), likewise needs to increase funding to ensure reform.

Reform Efforts Continue Across the Land

Public defense reform movements can be found not just in New York and New Orleans, but across the country. After the American Civil Liberties Union brought a lawsuit challenging the constitutionality of Montana's defense system, the state's Attorney General went to the Legislature and garnered a major expansion, with funding for more lawyers and better computers and offices. However, the 2007 funding falls \$3 million short of original targets, raising concerns about whether reform there will hold. In Mississippi, sweeping reforms passed in 1998

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Observing Gideon Day—Past and Present

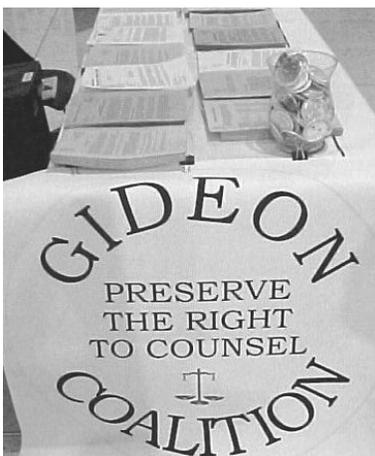
Observance of “Gideon Day” has taken many forms. Display of artwork and even theatrical performances in the Concourse at the Empire State Plaza in Albany have heralded *Gideon’s* promise and illustrated how the promise has been broken. A variety of written materials, from opinion pieces printed in local newspapers to fliers handed out in Albany, have trumpeted the importance of *Gideon*. And visitors to the offices of elected officials have repeatedly stressed the need for the State to live up to its responsibility under *Gideon* to timely provide effective counsel for all eligible clients. Over the years, advocacy has focused on specific budget items, seeking restoration or increase of funding for defense programs. More recently, systemic reform has become the theme.

In 2007, Gideon Day participants need not call for full inclusion of NYSDA in the budget. Funding at the level of the recent past has been included. However, funding for other important defense programs, including Indigent Parolee Program, Neighborhood Defender Service of Harlem, and Prisoners’ Legal Services of New York, Inc., was not included and should be restored, indeed increased, to meet the needs of the clients served by these programs and diminish the burden of public defense costs on localities.

On Gideon Day 2001, a transformational mural by Ellen McPherson, “The Tree of Justice,” graphically depicted the plight of clients in a public defense system in crisis and presented a vision of the future where justice will flourish.



Detailed fact sheets about New York public defense issues and the need for adequate funding were often prepared as handouts for Gideon Day, as shown in this photo from 2000.



The Gideon Players, a theatrical troupe formed for the occasion, entertained passers-by in the Legislative Office Building in 2003 with performances illustrating the problems attorneys and clients face when public defense services are underfunded and do not meet professional standards. The Players were Terry Rabine, Lawanda Horton, Leigh Strimbeck, and Tomas Bell.



Press conferences held on Gideon Day through the years have helped educate the media and the public about the need for public defense reform. Among those appearing at the 2000 press conference were Stephen J. Pittari, NYSDA Board Member; Tom Terrizzi, then-Executive Director of Prisoners’ Legal Services of New York, Kathryn Kase, then-President of the New York State Association of Criminal Defense Lawyers, and Susan Hendricks, then-Deputy Attorney in Charge, Criminal Defense Division, NYC Legal Aid Society.

(continued from page 2)

were later repealed because funding was never provided. (www.governing.com [*Governing Magazine*], 1/07.)

More generally, public defense issues remain a topic of interest nationally. The American Bar Association recently held the Third Annual Summit on Indigent Defense Improvement: A National Forum for Bar and Indigent Defense Leaders on Feb. 9, 2007 in Miami FL. Reports on post-Katrina developments in New Orleans and other national developments, as well as a session on using the ABA's 2006 ethics opinion on excessive caseload to stimulate reform topped the agenda. [For more on the ethical opinion, see the *REPORT*, Vol XXI, No 4, Aug-Oct 2006.] NYSDA's Executive Director was among those attending the recent summit.

In Michigan, a lawsuit filed in late February attacks that state's failure to fulfill its constitutional obligation to provide adequate public defense services. The suit seeks to force the state to provide representation consistent with national standards and constitutional obligations; it does not seek monetary damages. Brought by the Michigan Coalition for Justice, a diverse group of organizations and individuals committed to reform of Michigan's public defense system, the lawsuit focuses on three counties—but the problems described are statewide, as an ACLU press release describes. Coalition members include the ACLU, the ACLU of Michigan, the Brennan Center for Justice, the law firm of Cravath, Swaine & Moore, and the National Association of Criminal Defense Lawyers. (www.aclu.org/crimjustice/indigent/28617prs20070222.html.)

For information on other public defense developments, check the Public Defense and Funding pages of the Hot Topics section on the NYSDA website, www.nysda.org.

Victories in Prison Phone Rate Battle

In a long-standing scheme that amounts to a burdensome, back door tax on collect calls by prisoners, the Department of Correctional Services receives a kickback from the high rates paid for prisoners' collect calls. Newly sworn-in Governor Elliot Spitzer has committed to instead using money from the State's General Fund to pay for prison services that had been used as the excuse for a surcharge on prisoner calls. The change will be effective when the current contract expires at the end of March. The Governor made his announcement the day before the Court of Appeals heard argument in a lawsuit seeking to end the scheme. (www.auburnpub.com, 1/9/07; www.newsday.com, 1/9/07, 1/15/07; www.timesunion.com, 2/21/07.)

Over a month after the Governor's announcement, the Court of Appeals found that four of the constitutional claims pressed in the suit were timely made and must be

considered. Albany Supreme Court Justice George Ceresia had found the claims time barred, and the 3rd Department had affirmed the dismissal. (www.law.com, 2/21/07.) NYSDA is one of the plaintiffs in the case, which was argued in the Court of Appeals by Rachel Meeropol of the Center for Constitutional Rights. A summary of the decision, *Walton v NYS Dept. of Correctional Services* (No. 12 [2/20/07]) appears at p 19.

These victories result from persistent activism by families of prisoners and the support of many advocates, and may have a wide-ranging effect. After Spitzer's announcement, the *Detroit Free Press* noted that "A few states, including New York and Washington, are backing off policies to virtually extort exorbitant phone fees from the families of prisoners," and added, "Michigan ought to follow suit." (www.freep.com, 2/5/07.)

Appointment Procedures Announced for Representation Under Chap 538

Administrative judges around the state received a memorandum from the Office of Court Administration (OCA) in late January on implementing Subdivision 8 of Section 35 of the Judiciary Law, added by Laws of 2006, Chapter 538. (Passage of Chapter 538 was announced in the Aug-Oct issue of the *REPORT*.) The memo, from First Deputy Chief Administrative Judge Ann Pfau, clarifies that the state will bear the cost of representing eligible adults in Supreme Court on matters for which counsel has long been provided in Family Court. (Family Court representation remains a county charge.)

Some revision of the memo is expected to be announced; it currently calls for assignments in these matters to "be made from the Family Court 18-B plan through the county Assigned Counsel Plan Administrator." It adds that Supreme Court judges presiding over these matters will need in each case "to approve a voucher for payment of the appropriate attorney's fees." A more detailed outline of procedures, attached to the memo, noted among other things the specific types of representation for which State payment is available.

NYSDA's Board of Directors discussed Chapter 538 at its October 2006 meeting, noting that it creates many problems while providing an important right to counsel. The Board concluded that the best solution was to try and facilitate representation by civil legal services providers in the cases arising under this legislative reform.

The Backup Center, which has advised public defense programs about issues in implementing Chapter 538 since its passage, forwarded a copy of Judge Pfau's memo to all Chief Defenders. Those who attended the Chief Defender Convening on Feb. 2, 2007 in Albany were asked to summarize any problems or developments regarding Chapter 538. Most knew of no appointments made under the new law, with a few assignments having been received or

rumored just recently. Public defense programs or attorneys providing representation mandated by Chapter 538 are encouraged to let the Backup Center know of any new or remaining issues in the wake of the OCA memo. Contact Staff Attorney Mardi Crawford.

Staff Changes at IDP, Backup Center

Macri Now Heads IDP

Joanne Macri became the Director of NYSDA's Immigrant Defense Project (IDP) as of Mar. 1, 2007. Before joining IDP, Macri was of counsel to the Law Offices of Mark T. Kenmore in Buffalo, where she was a trial attorney specializing in the litigation of federal and state criminal/immigration matters and in the negotiation of release for US immigration detainees subject to long term confinement. She was also an adjunct professor at the State of New York University at Buffalo Law School. Earlier in her career, Macri was the managing attorney for the Immigration Department of the International Institute, representing detained noncitizens in criminal/immigration matters, and was the managing attorney of the Buffalo office of Prisoners' Legal Services of New York. She has demonstrated a long-time commitment to bettering conditions for detained persons by, in addition to the work she has chosen throughout her career, her active membership in the American Immigration Lawyer's Association and the New York State Coalition for Women Prisoners' Subcommittee on Conditions of Confinement, prior service on NYSDA's Board of Directors, and volunteer work with the Canadian Red Cross, monitoring conditions of confinement of immigrant detainees in Ontario, Canada.

NYSDA welcomes Joanne, and thanks departing Director Marianne Yang for her dedicated work. We wish Marianne the very best in her new endeavors.

NYSDA Hires Projects Coordinator

Phyllis Alberici has joined NYSDA as Projects Coordinator. She was formerly the training coordinator for the Vermont Department of Public Safety Emergency Management Division. Phyllis will be working directly with Managing Attorney Charlie O'Brien on a variety of projects, including the Public Defense Case Management System.

Email and Blogs and Wikis, Oh My!

Do the various forms of electronic communication and research now lurking along the information highway have you as skittish as the characters traveling on the Yellow Brick Road to see the *Wizard of Oz* (lions and tigers and bears, oh my!)? NYSDA can help you tame those lurking creatures, or at least tame your fears. From articles in the *REPORT* to resources on our website, we provide

knowledge about uses, misuses, and abuses of electronic information.

Email Blues and Don'ts

The usefulness of email, to everyone and to attorneys and clients, is by now well-established. But dangers—primarily lack of confidentiality—can lie in wait. Electronic discovery is a hot issue in civil law, and government access to email in criminal investigations may raise both civil liberties and procedural issues.

The federal government, in pursuing mail and wire fraud charges against Steven Warshak for allegedly false product claims, got a court order to access his email. He sought to block access, arguing that a search warrant, which requires a higher burden of proof, should have been required. The government analogized email to postcards that can be read without opening. (Not that sealed "snail" mail is necessarily safe; a media furor erupted in early January over the government's power to open "snail mail" after President Bush was said to have laid claim, in a Dec. 20, 2006 signing statement involving a postal reform bill, to the power to open mail without a warrant under emergency conditions. [see eg www.dailynew.com, 1/4/07.] The EFF (Electronic Frontier Foundation), the ACLU of Ohio, and the Center for Democracy and Technology filed a brief in the 6th Circuit siding with Warshak. (arstechnica.com, 12/27/06; www.eff.org/news/archives/2006_11.php, 11/27/06.) The brief is available at http://eff.org/legal/cases/warshak_v_usa/warshak_amicus.pdf.

Closer to home, in a lawsuit over strip searches in Erie County, the 2nd Circuit has vacated an order compelling production of emails and other documents claimed to be protected under attorney-client privilege. The emails, between an assistant county attorney and county officials, were sent for the main purpose of obtaining or giving legal advice. The federal court held that where the "predominant purpose" of the communications was legal advice, the privilege protected them, even though they also included discussions about political and policy matters.

The matter has been remanded for a determination of whether distributing the emails within the Sheriff's Department amounted to a waiver of the privilege. (findlaw.com; www.law.com, 1/5/07). *Pritchard v County of Erie (In re County of Erie)*, 473 F3d 413 (2nd Cir 2007).

Even if you are not the target of an investigation or a litigant, some claim your email may still wind up being scrutinized. Reports of a discussion at a symposium at Stanford University's law school in January indicate that if an Internet service provider cannot, because of technical constraints, isolate a person or IP address specified in a court order, federal authorities resort to "full-pipe surveillance," which may yield information about the communications of others. (news.com, 1/31/07.) A Justice

Department spokesperson denied the allegations after they were published. (news.com, 1/3/07.)

Blogs Collected, Debated

Back in 2004, the NYSDA website posted information about an article entitled “Legal and Appellate Weblogs: What They Are, Why You Should Read Them, and Why You Should Consider Starting Your Own,” published in the *Journal of Appellate Practice and Process* (US) (Spring 2003). It was an introduction to legal web logs. To say that legal blogs have grown in number since then would be an understatement.

If you didn’t already know that “web logs are becoming the must-read news sources in many areas of law,” now you do. And it should come as no surprise that NYSDA’s Director of Legal Information Services, Ken Strutin, who made that statement, has put together a “collection of web logs that provide news and analysis of current developments in criminal justice” to help you find those you can use. In an article for Law Library Resource Xchange, Strutin provided descriptions of and links to selected criminal justice blogs, from ones providing general criminal law news and commentary to highly specialized topic blogs including many on sentencing, different types of evidence, and capital defense. The article is posted at www.llrx.com and there is a link to it on the NYSDA website (www.nysda.org).

Not every blog can be trusted, of course. Information posted on a law blog should be verified before it is cited or relied upon. But blogs may do more than provide factual or analytical information. They may provide a point of view, or seek to sway their visitors, and that raises issues beyond the accuracy of the information posted.

One California prosecutor has begun blogging with the avowed purpose of exposing the “false claims, distortions and shoddy journalism” of the local newspaper in regard to criminal cases. Another posted graphic details about a rape case when trying to challenge news coverage of it; the conviction in the case was later reversed, and the defendant, who secured a plea to a lesser charge, has retained a libel attorney. The ethical ramifications of such blogs have not yet been determined, but many questions about their propriety are being raised, according to one account. (www.sfgate.com, 2/25/07.)

In New York, the passage of new professional ethics rules with regard to advertising has raised the question of whether law blogs are covered by the rules. One blogger has concluded that it is not a problem, but invited comment. (nylawblog.typepad.com/suigeneris/2007/01/are_blogs_adver.html.)

What in the World is a Wiki?

Even as many lawyers begin to cautiously explore single-author or institution-based web logs, where there

seems to be someone responsible for the content, along come wikis. Wikis are collaborative websites that allow users—in some instances only authorized users, in others anyone who gets on the Internet—to change the content of web pages and to view a history of changes that have been made. The most familiar wiki is Wikipedia, the online encyclopedia that (almost) anyone can edit. www.wikipedia.org. The history department at Middlebury College recently banned Wikipedia as a citation in student papers after one too many errors were found. (www.nytimes.com, 2/21/07.) Yet, in the past year, Wikipedia was “cited four times as often as the Encyclopedia Britannica in judicial opinions,” according to one article, “and the number is rapidly growing.” (www.washingtonpost.com, 2/23/07.)

To date, the number of law-related wikis on the Internet is small, according to an article entitled “Wikis for the Legal Profession,” by Dennis Kennedy and Tom Mighell, in *Law Practice Today*, the ABA’s Law Practice Management Section’s magazine, a link to which was recently posted on the News Resources/New Publication page of NYSDA’s website. But that does not mean wikis are useless for lawyers. Internally, they may be used in offices to create and edit publications, or to collaboratively document and work on a specific case. (www.abanet.org/lpm/lpt/articles/slc02071.shtml.)

So, watch the NYSDA website and the *REPORT* for updates on the growing wiki phenomenon and other legal/technology topics. And let us know if you find uses for wiki software; as there is no wikinysda, you’ll have to send the information to the *REPORT* editor the old-fashioned way—via email. ☺

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Grief and Laughter for Michele

[Ed. note: The following excerpts from a eulogy for Michele Maxian provide not only solace for those who love and have lost her, but inspiration for those who aspire to be great public defense lawyers and all those who believe in compassion and civil rights. It seemed fitting to include the remarks in this issue of the REPORT in observance of the anniversary of *Gideon v. Wainwright*—Michele offered a “guiding hand” to so many. The eulogy, a collaborative recollection by many of Michele’s friends following her death in December 2006, was written and delivered by Laura Johnson.]

... Yesterday, Susan and Tony and Bob and Bill and Tom and I sat down together and talked about Michele. Michele as a lawyer, Michele as a colleague, Michele as a friend. As in any gathering where Michele was present ... there were stories told, and by the end, there was laughter.

Michele would have wanted it that way. While I will speak in a moment about just what an extraordinary lawyer Michele was, I think for all of us who had the privilege of working with her every day, she was first and foremost a person who infused even the most serious work and the longest hours with a special kind of lightness. Michele was playful; she had an incredible gift for fun. She could make you laugh at yourself, and laugh over the latest awful decision. That is not to say that she did not take her battles on behalf of her clients seriously, but she always gave warmth and humor to the office. ...

... Michele was a consummate story-teller. Not only in relaxed moments at the office, but in her work itself. One of Michele’s many strengths as a lawyer was her ability to see and tell the very human story behind the big legal battle. ...

When I looked Michele up on Westlaw, I wasn’t surprised to find 90 plus published decisions, seven pages worth, where she appeared in every state and federal court in New York as counsel. Scores of them are significant constitutional or criminal law cases. Like *People v. Bright*, in which Michele successfully mounted a constitutional challenge to a statute criminalizing loitering in a transportation facility. No doubt it was a matter of legal principle for her, but it would have been characteristic of Michele to believe that we should all welcome a daily commute that let us interact with the poor, the homeless and those living in a different reality, just as she rejoiced in the infinite variety of humanity whose paths crossed hers.

But Michele’s best-known case is probably *People ex rel Maxian o/b/o Roundtree v. Brown*, which everyone else calls *People ex rel Maxian* and Michele always insisted on calling *Roundtree* for her lead client. ... [T]he *Roundtree* case established that people arrested in New York can’t be kept in jail for more than 24 hours without being brought to court, where they can talk to a lawyer and have a judge review the case and a chance to be released. Before Michele won the case, people sometimes spent up to four or five days isolated in police lock-ups and jails, under grim conditions—bringing those jail conditions under control was another of Michele’s successful lawsuits—while their friends and family wondered where they were, while they worried about their children, while they sometimes lost their jobs.

* * *

If you ever read the Appellate Division decision in *Roundtree*, what shines through in the midst of the long legal discussion are the tiny stories, especially Sei Boo, the unlicensed umbrella vendor, arrested on the street and locked up for 95 hours before he got to a courtroom. Those bare facts, which are all the appellate court mentions, in their simplicity virtually com-

pel the reader to imagine the whole narrative - the immigrant street vendor, alone, frightened and uncomprehending as his hours and days in the holding cell go by. Michele and Susan made sure those facts became a part of the case. ...

... In the months and years that followed the *Roundtree* decision, Michele put in hundreds more hours trying to make sure that the decision was obeyed, mostly between 5 p.m. and midnight, in courtrooms and courthouse cells, making the rounds interviewing prisoners, talking to police officers and court officers, negotiating with City officials and arguing writs. I think in a way, the defendants she represented were so close to her heart that it mostly never even occurred to her that was onerous. ...

Michele spent her entire legal career at the Legal Aid Society, starting out in the former Youth Part, where she may have honed her strong empathy for the histories behind the crimes her clients were charged with ... Though Michele was not always happy with Legal Aid, as is bound to happen in any long relationship, she loved it. From the outpouring after she became so ill, Legal Aid, it is clear, loved Michele too. ...

There are hundreds of stories that could be told about the lengths to which Michele, who was a defense lawyer down to her toes, would go for her clients, but here, I must conclude that her relationship with them is best expressed in a letter written to her by her [very last] client, who had been serving hundreds of days in punitive segregation for having some contraband tobacco until Michele won a writ of habeas corpus for him in the Rikers Island courthouse—a disgraceful black hole in the City’s legal system that few lawyers even know and where fewer ever venture. Michele by then was too sick to read the letter herself, though the author did not know that when he wrote [to let her know that he was no longer in CPSU, thanks to her, and concluding:]

... Any way I wish you the best in all that you do, it was a pleasure meeting you and I wish I could get to know you better as a person. Because as a lawyer you’re the greatest I think that’s something you need to know. Thanks a lot, I admire you.

The only part he got wrong was in thinking there was a difference between Michele the lawyer and Michele the person. ... Getting to know Michele was a revelation. I would have assumed that anyone who worked so hard had little else going on. In fact, Michele had energy to spare and an immense life that included a passion for reading and travel, a talent for athletic competition and a large and devoted circle of friends almost none of whom, amazingly enough, are lawyers. And Marianne. Michele may have sometimes spent so many hours at work that they had little time for more than morning greetings, but Marianne was never second to anything so far as Michele was concerned. ... [T]hough I confess I still do not know how it was done, I believe that each part of Michele’s crowded life somehow made the others more rich and complete.

Michele had her weaknesses. Her office was a mess, she was unbelievably absent-minded, she lost things, sometimes important things, her writing could often use editing, she could be cranky or impulsive or distracted, her creativity at times took her in wrong directions, and her fervent focus on helping lawyers help defendants to the exclusion of all else was not always seen as an asset when she was a manager or administrator. She sometimes took on so much she was unable to cope, and her pride stopped her from asking for help when she really needed it. For all her gifts, she was absolutely human. And that was the great gift she gave us all. She wasn’t a paragon of some impossible-to-attain perfection. Instead, she was the kind of lawyer and, more important the kind of person, we can each actually aim to be and showed us a kind of life we may actually hope to lead. She was so very alive that it will be a long time before I can completely take in that she is gone, and I know that like every one of you, I will always miss her. ❧

Job Opportunities

The Hiscock Legal Aid Society, Syracuse NY, seeks a **part-time attorney** to represent financially eligible persons in criminal and family court appeals. Excellent research and writing skills required. Admission to New York State Bar preferred. Salary: \$18,000+ benefits. EOE; Persons of Color and Bilingual Persons encouraged to apply. Applicants should send cover letter and résumé, including three references to Executive Attorney, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse NY 13202.

The Franklin County Public Defender's Office in Malone NY has an immediate opening for an entry level **Assistant Public Defender**. The position is in a busy office providing criminal defense services to those unable to afford counsel as well as Family Court representation in cases requiring assigned counsel. The Assistant will be expected to handle Family Court appearances and misdemeanor cases in local criminal court. Salary negotiable in the +/- \$35,000 range depending on experience and qualifications. Recent law school graduates strongly encouraged to apply. Send résumé and cover letter, including salary history to the Franklin County Personnel Office, 355 West Main Street, Suite 428, Malone NY 12953.

The Orange County Legal Aid Society seeks a **Staff Attorney: Criminal/Family law**, for potential 2007 vacancy. NY bar admission, related job or clinic experience required. Salary: \$45-55,000, DOE + excellent benefits. Send résumé to Legal Aid Society of Orange County, Inc., PO Box 328, Goshen NY 10924, or fax to (845)294-2638.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) seeks an **attorney** with at least 5 years of litigation experience to join its Criminal Justice Project. Responsibilities will be to challenge through litigation, public education and policy initiatives, racial bias in the criminal defense system and, in particular, the devastating impact of the "War on Drugs" on the African-American community. The nation's first Legal Defense Fund, LDF is a non-profit

law firm committed to civil rights. LDF seeks an attorney to bring impact litigation challenges focusing on "Drug War" issues (in the form of both direct representation and *amicus* briefs) and to promote policy reform and public education through public speaking, legal training, preparation of reports, etc. The attorney will also work with the members of the Criminal Justice Project on other focus areas. The ideal candidate will have at least 5 years of relevant litigation experience; a demonstrated commitment to criminal justice; outstanding research and writing skills; the ability to work collaboratively; a strong initiative; and the capacity for creative and independent thinking.

seminars, moot courts, research materials, legal publications, and other legal resources. Salary commensurate with qualifications and experience; includes benefits. Required: significant experience in criminal litigation, including recent experience in capital defense; demonstrable commitment to representing financially eligible persons; excellent research, writing, and communication skills; computer proficiency; ability to work in a team environment, set priorities and meet critical deadlines. Applicants must be licensed attorneys and if not licensed in Arizona, willing to sit for the Arizona Bar examination. Submit a cover letter and résumé with references. Email to Jennifer Bedier at azcaprep@hotmail.com or mail to: Arizona Capital Representation Project, 133 E. Speedway Blvd. #1, Tucson AZ 85705. For more info, contact Jennifer at azcaprep@hotmail.com or (520)229-8550.

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EOE. LDF seeks to fill this position immediately. Send a cover letter, résumé, writing sample and list of references to: Christina Swarns, Director, Criminal Justice Project, NAACP Legal Defense & Educational Fund, Inc., 99 Hudson Street, 16th Floor, New York NY 10013; fax (212)219-2052; email jobs@naacpldf.org. No calls please.

The Arizona Capital Representation Project (Project) seeks a full-time **Staff Attorney**. The position, based in Tucson, Arizona, is open until filled. Project is the only non-profit death penalty resource center in Arizona which both consults on capital cases at all stages of legal proceedings and directly represents financially eligible death-sentenced inmates in state and federal court. The Project also offers legal resources such as training seminars, sample pleadings, research materials, and moot courts. Current staffing includes one full-time attorney, two part-time attorneys, and support staff. The Staff Attorney will directly represent death-eligible criminal defendants; consult on capital cases at all procedural stages; and assist with preparation and/or presentation of training

The Sylvia Rivera Law Project (SRLP) seeks a **Staff Attorney**. SRLP works to guarantee that all people are free to self-determine their gender identity and expression, regardless of income or race, and without facing harassment, discrimination, or violence. SRLP is a collective organization founded on the understanding that gender self-determination is inextricably intertwined with racial, social and economic justice. The staff attorney will work on direct services, impact litigation, public education, policy work, and community organizing support to advance the rights of low-income transgender, intersex, and gender nonconforming people of color. The staff attorney will focus on the areas of discrimination in sex-segregated facilities (such as foster care group homes and homeless shelters), Medicaid coverage, name and gender changes on identity documents, and immigration. People of color, trans people, women, people with intersex conditions, people who have lived in poverty, people with disabilities, immigrants, and lesbian, gay, bisexual, and queer people strongly encouraged to apply. Send a cover letter, résumé, and writing sample to Staff Attorney Hiring Committee, Sylvia Rivera Law Project, 322 8th Ave, 3rd Floor, New York NY 10001. ☺

CONFERENCES & SEMINARS

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Criminal Law Update
Date: March 24, 2007
Place: New Hartford, CT
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: **New York State Defenders Association**
Theme: **Twenty-First Annual Metropolitan New York Trainer**
Date: **April 7, 2007**
Place: **New York City**
Contact: **NYSDA: tel (518)465-3524; fax (518)465-3249; email jkirkpatrick@nysda.org; website www.nysda.org**

Sponsor: Department of Public Advocacy (Kentucky)
Theme: Death Penalty Institute
Dates: April 16-20, 2007
Place: Louisville, KY
Contact: DPA: tel (502) 564-8006 ext. 236; fax (502)564-7890; email Lisa.Blevins@ky.gov; website http://dpa.ky.gov

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: DNA Update
Date: April 20, 2007
Place: New York City
Contact: NYSACDL: tel (212)532-4434; fax. (212)532-4668; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Syracuse Trainer – Part I
Date: April 28, 2007
Place: Syracuse, NY
Contact: NYSACDL: tel (212)532-4434; fax. (212)532-4668; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross To Kill
Date: May 5, 2007
Place: Binghamton, NY
Contact: NYSACDL: tel (212)532-4434; fax. (212)532-4668; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: **New York State Defenders Association and Federal Public Defender Office for the Districts of Northern New York and Vermont**
Theme: **Federal Criminal Defense Practice Update**
Date: **May 10, 2007**
Place: **Syracuse, NY**
Contact: **NYSDA: tel (518)465-3524; fax (518)465-3249;**

email jkirkpatrick@nysda.org; website www.nysda.org

Sponsor: National Defender Training Project
Theme: 2007 Public Defender Trial Advocacy Program
Dates: June 1-6, 2007
Place: Dayton, OH
Contact: Ira Mickenberg: (518)583-6730; email imickenberg@nycap.rr.com

Sponsor: Trial Lawyers College
Theme: Death Penalty Seminar
Dates: June 9-16, 2007
Place: Dubois, WY
Contact: tel (800)688-1611 or (760)322-3783; fax (760)322-3714; website www.triallawyerscollege.com

Sponsor: **New York State Defenders Association**
Theme: **Defender Institute Basic Trial Skills Program**
Dates: **June 10-16, 2007**
Place: **Troy, NY**
Contact: **NYSDA: tel (518)465-3524; fax (518)465-3249; email jkirkpatrick@nysda.org; website www.nysda.org**

Sponsor: National Institute for Trial Advocacy
Theme: The Habeas Institute: Federal Post-Conviction Skills Seminars
Dates: June 14-17, 2007
Place: Atlanta, GA
Contact: NITA: (800)225-6482; website www.nita.org

Sponsor: National Criminal Defense College
Theme: Trial Practice Institute
Dates: June 17-30, 2007
July 15-28, 2007
Place: Macon, GA
Contact: tel (478)746-4151; fax (478)743-0160; website www.ncdc.net

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Theme: **40th Annual Meeting & Conference**
Dates: **July 22-24, 2007**
Place: **Saratoga Springs, NY**
Contact: **NYSDA: tel (518)465-3524; fax (518)465-3249; email jkirkpatrick@nysda.org; website www.nysda.org** ☺

Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse

By Steve Bogira

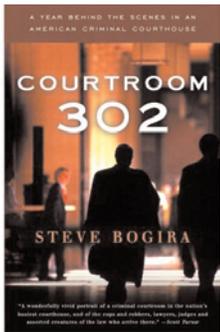
Knopf, 2005. 404 pages

by Barbara DeMille*

The Cook County Courthouse—the biggest and busiest felony courthouse in the nation—sits in a Mexican neighborhood on Chicago’s southwest side. It’s a boxy limestone structure, seven stories high and seven decades old, with Doric columns, Latin phrases carved into the limestone, and eight sculpted figures above the columns, representing law, justice, liberty, truth, might, love, wisdom, and peace. None of them is visible from the back of a police wagon.

— Prologue, *Courtroom 302*

Steve Bogira’s account of his 1998 year spent observing and interviewing the people who work in and pass through the Cook County Courthouse is a microcosm of our American justice system. Given the myriad pleas encouraged and the “dispos” accrued in short order, the lack of time which an overworked public defender may pay to an individual client, and the most discouraging, humiliating conditions in the holding pens and jails in the complex immediately behind the courthouse, you might name it a Wal-Mart of justice.



Concentrating his attention and extensive research upon Courtroom 302, the particular demesne of Judge Daniel Locallo, Bogira presents a detailed view of one courtroom as representative—with minor variations—of our congested, over-burdened justice system itself. It’s an absorbing account; indeed, with its cast of characters ranging from the circuit judge down to the most dis-

couraged drug user, arrested for the fourth or fifth time for possession with intent to sell. The story reads with the page-turning qualities of a Dickens novel.

In the vein of an epic novel, Bogira introduces the main characters—Judge Locallo, public defenders Amy Campanelli and Diana Bidawid, Illinois state prosecutor Paul Alesia, deputies Gil Guerrero and Laura Rhodes—and the secondary characters—the court reporter, the court clerk, the numerous defendants, relatives, and observers

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

crammed into either the holding pen or the gallery. Among these is Larry Bates, heroin user; Leslie McGee, seventeen year old, mentally unstable, accused murderess; Leroy Orange, death row inmate, convicted by his confession, which he claims was extracted under torture, now asking for a new sentencing hearing; and Frank Caruso Jr., accused of the savage beating of a thirteen year old black youth who dared venture into his neighborhood.

It will be the Caruso trial, which will mainly occupy the last third of the book, which will be the most contentious and threatening. The Caruso family will prove to have political influence, and, infuriated by the guilty verdict and subsequent prison sentence, will exert this influence in an attempt to defeat Judge Locallo in his bid for another six year term. In between the development of this drama, however flow numerous persons, none of them influential, none of them well-known or supported by a formidable, contentious, extended family. Most of them will plead guilty. Some of them will receive more justice than others. All of them will suffer the necessary crowding, quick dispensation, and grim realities of an overworked court and court building.

Bogira’s strength in relating this panoramic and detailed look into an unexceptional instance of our justice system in action is in his consistently objective reportorial skills: presenting enough background concerning these souls to establish them as individuals. For a brief space, these are not numbers processing through an indifferent bureaucracy; they are people, caught in circumstances most often of their own making but people who suffer nonetheless. And those in the courtroom responsible for administering, or defending against, the law’s dicta, are human as well. Judge Locallo, for instance, is no saint nor is he a sinner. He is an essentially good man, a fair judge, nearly overwhelmed by the amount of cases for which he is expected to dispense justice.

One cannot help but compare Bogira’s portrayal of this human procession with that of David Feige’s experiences in the South Bronx courthouse—from which he wrote *Indefensible: One Lawyer’s Journey into the Inferno of American Justice* [reviewed in the *REPORT*, Vol XXI No 3, June-July 2006]. Feige, in a *Washington Post* review of the Bogira book, gives a good account of it, as he should. Having reviewed both books, I would add Bogira earns by far the best marks. With his long experience as a reporter for the *Chicago Reader*, an alternative Chicago paper, he is able to distance himself from the narrative while skillfully arranging his observations to his desired effect.

There is no doubt, when Bogira is finished, about the dirt, the smells, the tedium, the short attention paid to any understanding of the underlying causes of the crimes committed, or the good, if imperfect, intent of the judge, the prosecutors, the public defenders, and deputies.

(continued on page 14)

Preliminary Assessment of *Cunningham v California's Impact on Persistent Felony Offender (PFO) Provisions*

by Andrew C. Fine*

Many thought that the New York Court of Appeals' decision in *People v Rivera* (5 NY3d 61) [2005]), sounded the death knell for challenges to New York's persistent-felony-offender (PFO) provisions (PL 70.10, CPL 400.20) on the ground that they violate defendants' constitutional rights to a jury trial and due process within the meaning of the *Apprendi* line of cases.¹ State high-court decisions construing state statutes are generally regarded as binding for purposes of evaluating the constitutionality of such provisions, and *Rivera* purported to interpret PFO to permit sentencing judges to impose PFO sentences "based solely on whether [defendants] had two prior felony convictions." *Rivera*, 5 NY3d at 67. This construction sufficed to salvage the statute's constitutionality, since the mandate of the *Apprendi* line of cases—that any fact necessary to the imposition of an increased maximum sentence must be submitted to a jury and found beyond a reasonable doubt—is subject to an exception for "the fact of a prior conviction." *Apprendi*, 530 US at 490. The court acknowledged that "if we . . . construe[] the statutes to require the court to find additional facts about the defendant before imposing a recidivism sentence, the statutes would violate *Apprendi*." 5 NY3d at 67.

Though *Rivera's* "interpretation" of PFO certainly presents a major obstacle to future challengers, it is not an insuperable one, as I'll explain shortly. The Supreme Court's recent decision in *Cunningham v California* (___ US ___, 127 S Ct 856 [2007]), striking California's sentencing scheme as violative of the *Apprendi* line, provides additional support for such a challenge. The rationale of the California Supreme Court in attempting to circumvent the scheme's obvious incompatibility with *Apprendi/Blakely* closely resembles that engaged in by the New York Court of Appeals in *Rivera*, and the Supreme Court squarely rejected it. See *post* at 13. If your client's direct appellate process has concluded, there is considerable question about whether, under the Antiterrorism and Effective Death Penalty Act, you can rely on *Cunningham* at all in a federal habeas petition. See *Brown v Greiner*, 409 F3d 523 (2d Cir 2005) (petitioners could not rely on *Ring v Arizona*, or *Blakely v Washington*, since those cases had not been decided until after their state convictions had become final); *Brown v Miller*, 451 F3d 54 (2d Cir 2006) (post-*Ring* but pre-*Blakely* petitioner could not rely on *Blakely*).² But if

you're still in the state appellate process, at least at the leave-application stage, you should argue that the rationale of *Cunningham* fatally undermines *Rivera*.³

Of course, CPL 400.20, on its face, requires sentencing judges to make factual determinations well beyond a defendant's recidivism. The court must also determine that "the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest." CPL 400.20(1). And to justify that determination, the court is further required to "make such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is authorized." CPL 400.20(9). These findings may be based on "any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence," and must be determined by "a preponderance of the evidence." CPL 400.20(5). The court is also obligated to "set forth in the record" its reasons for imposing the dramatic enhancement. PL 70.10(2). Although the court may terminate a PFO hearing "without making any finding," it "may not" sentence a defendant under these provisions "unless [it] . . . makes the necessary findings." CPL 400.20(10).

Notwithstanding its declaration that a sentencing judge need only find two prior felony convictions to justify the imposition of a PFO life sentence, the Court of Appeals in *Rivera* did not purport to abolish either the second-step determination mandated by CPL 400.20(1) ("nature and circumstances," etc.), or the procedural framework established by the remainder of the statute. It acknowledged that the court is "requir[ed] . . . to consider the specified factors and to articulate a reason for the chosen sentence," (5 NY3d at 69); that a defendant has the "statutory right to present evidence" relevant to the ultimate determination (*id.* at 68); and that the statute places on the prosecution "the burden to show that the defendant deserves the higher sentence." *Id.*⁴ However, it determined that "in practical terms," these "legislatively-prescribed procedural rules" "merely make[] explicit what sentencing courts have always done in deciding where, within a range, to impose a sentence." *Id.* at 69 and n. 7. Their purpose is to "allow[] more complete review by the Appellate Division in the interest of justice" (*id.* at 69), to determine whether the PFO sentence constitutes an abuse or improvident exercise of discretion.

The *Rivera* opinion manifests its mistaken understanding of the meaning of "fact findings," for *Apprendi/Blakely* purposes, by the example it gives of a circumstance in which a sentencing judge could impose a PFO sentence with "no further factual findings." This could be done, said the Court of Appeals, if the judge determined that the defendant "had an especially long and disturbing history of criminal convictions." 5 NY3d at 70-71. But a determination that a defendant has a "especially long and disturb-

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ing” history of recidivism is undoubtedly a fact finding that should be reserved for the jury under *Apprendi et al.*, since it involves an assessment that goes well beyond the mere existence of the convictions. And it is precisely such a fact finding that would be required to support the judge’s ultimate determination, under CPL 400.20(1), that a PFO sentence was warranted by the “nature and circumstances of [the defendant’s] criminal conduct.”

Rivera is pursuing his challenge to PFO in a Federal habeas proceeding, as is my client Charles Daniels, whose case was argued together with Rivera’s. See *People v Daniels*, 5 NY3d 738 (2005). There is a strong argument that Federal courts need not defer to the alleged “statutory interpretation” in *Rivera*, based on the principle outlined in *Wisconsin v Mitchell* (508 US 476, 483-484 [1993]) that a state court opinion is not binding if, “strictly speaking,” the court “did not construe the ... statute in the sense of defining the meaning of a particular statutory word or phrase,” but instead characterized the legislation’s “practical effect.” Habeas petitioners in *Rivera* and *Daniels* argue that the Court of Appeals’ opinion in *Rivera* explicitly recognized the mandatory nature of the procedural requirements set out in CPL 400.20, including the requirement of additional factual findings, but said that in “practical terms,” they were components of an exercise of discretion by trial judges, rather than legal requirements enforceable on appeal. But if the findings are indeed mandatory at the trial level, and they are factual in nature, they must be determined by a jury beyond a reasonable doubt under *Apprendi/Ring/Blakely*, and the scope of appellate review of such findings, as well as their “practical” significance, is irrelevant.

Cunningham v California provides support for this argument. The California Determinate Sentencing Law (DSL) prescribes “three precise terms of imprisonment” for an offense, a lower, middle, and upper term. *Cunningham*, 127 SCt at 861. The middle-term sentence (12 years for *Cunningham*’s offense) is mandated unless the court finds “circumstances in aggravation or mitigation” of the crime. *Id.* If the court finds “facts which justify the imposition of the upper prison term” (16 years here), it may, in the exercise of its discretion, impose the upper-term sentence. *Id.* at 862.⁵ Though some aggravating facts are listed in the legislation,⁶ the court may rely on unenumerated facts as well. All such “circumstances in aggravation” “shall be established by a preponderance of the evidence.” *Id.* These provisions are functionally identical to those struck by the Supreme Court in *Blakely*: under both schemes, the higher sentence may only be imposed based on judicial fact findings made under a preponderance standard, the increased sentence is discretionary, and the judge may rely on facts not enumerated in the legislation.

In upholding the DSL, the California Supreme Court “acknowledged that California’s system appears on surface inspection to be in tension with the rule of *Apprendi*.”

Cunningham, 127 SCt at 868; quoting from *People v Black*, 113 P3d 534, 543 (Cal 2005). However, it maintained that a critical portion of *Blakely* had been implicitly overruled or severely limited by *Booker*. The *Blakely* Court had specifically rejected the state’s claim that the *Apprendi* rule only applies to legislation mandating a sentence increase based on judicial fact findings, and did not encompass statutes that afford the sentencing judge the discretion to increase a defendant’s sentence, even if judicial fact findings are a necessary prerequisite to the exercise of discretion. In *Booker*, after a majority of the Court determined that the Federal Sentencing Guidelines violated *Apprendi/Blakely* because they required the imposition of a higher sentence than could otherwise have been imposed based on judicial fact findings, a different five-judge majority⁷ remedied the constitutional defect by requiring sentencing judges to consider the Guidelines when exercising their sentencing discretion, but not to follow them. The sentencing court, as well as reviewing courts, are ultimately required to evaluate all relevant sentencing factors, and impose a sentence that is “reasonable.” The California Supreme Court concluded from the remedy portion of *Booker* that *Blakely* no longer applied to any discretionary guidelines sentencing provisions, and that the only constitutional barrier to discretionary judicial fact findings as the basis for an increased sentence is the requirement that the sentence be reasonable. That is demonstrably incorrect, as the Supreme Court determined.

Under “remedial *Booker*,” if a judge discretionarily increases the defendant’s sentence based on a Guidelines aggravator, the sentence imposed will not fall outside the statutory range that is now controlling based on the jury’s verdict alone. See *Booker*, 543 US at 305 (Scalia, J., dissenting in part). Thus, the remedy imposed by *Booker* is compatible with *Apprendi/Blakely*. Before *Booker*, in contrast, a judge, upon determining the existence of an aggravator, was required under the Guidelines to impose a sentence greater than that which the jury’s verdict alone would have allowed. The *Cunningham* majority rejected the California Supreme Court’s (and dissenting Justice Alito’s) view that “remedial *Booker*” was inconsistent with *Blakely*, and that post-*Booker*, the “touchstone of Sixth Amendment analysis” was “reasonableness”: “[t]he reasonableness requirement *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedents, not as a substitute for those constraints. . . . *Booker*’s remedy for the Federal Guidelines . . . is not a recipe for rendering our Sixth Amendment case law toothless.” *Cunningham*, 127 SCt at 870 and n 15.

In attempting to fit DSL within its mistaken conception of *Blakely*, the California Supreme Court engaged in the same sort of analytical gymnastics as did the New York Court of Appeals in *Rivera*. Though it admitted that DSL required judicial fact findings before the heavier sentence could be imposed, “in ‘operation and effect,’” the

court said, “the DSL ‘simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge’s selection of an appropriate sentence within a statutorily prescribed sentencing range.’” *Cunningham*, 127 SCt at 868; quoting from *Black*, 113 P3d at 543. Further, said the California court, the scheme “afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury.” *Cunningham*, 127 SCt at 869, quoting from *Black*, 113 P3d at 544.

Eventually, it concluded that although the legislation requiring the imposition of the middle-term sentence unless an aggravating factor is found “is worded in mandatory language, the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*.” *Id.* (emphasis as written). The jury’s verdict, according to the California court, “authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. The judicial factfinding that occurs during that selection process is the same type of judicial factfinding that traditionally has been a part of the sentencing process.” *Id.* at 545.

Based on this language, the state argued to the US Supreme Court that the California Supreme Court had “construed” California law so as to comply with *Blakely* as supposedly modified by *Booker*, and that its “construction” was binding on the Supreme Court. The Supreme Court rejected this claim, stating that “[t]he *Black* court did not modify California law so as to align it with this Court’s Sixth Amendment precedent. Rather, it construed this Court’s decisions in an endeavor to render them consistent with California law.” *Cunningham*, 127 SCt at 871 n 16. It did not question the *Black* court’s characterizations of its statutory scheme, but ruled that they were constitutionally irrelevant:

We cautioned in *Blakely* . . . that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury’s verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

Cunningham, 127 SCt at 869.

A persuasive argument can be developed that the New York Court of Appeals’ reasoning in *Rivera* is defec-

tive for many of the same reasons that led the Supreme Court to overrule *Black* in *Cunningham*. First, like the California court in *Black* regarding DSL, the Court of Appeals recognized the mandatory nature of the procedural provisions set forth in the PFO scheme, specifically including the provision mandating that at a hearing, the prosecution is required to prove “matters pertaining to the defendant’s history and character and the nature and circumstances of his criminal conduct . . . by a preponderance of the evidence.” CPL 400.20 (5); see *Rivera*, 5 NY3d at 65 n 3. In *Cunningham*, the Supreme Court characterized California’s requirement that “circumstances in aggravation . . . shall be established by a preponderance of the evidence” as “a clear factfinding directive to which there is no exception.” *Cunningham*, 127 SCt at 863.

Second, similar to *Black*, the Court of Appeals attempted to recast the statutory requirement of judicial factfinding as a prerequisite to imposition of a PFO sentence as merely providing guideposts for the exercise of discretion by trial courts “in deciding where, within a range, to impose a sentence.” Cf *Black*, 113 P3d at 543 (DSL “simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge’s selection of an appropriate sentence within a statutorily prescribed sentencing range”). And although the *Black* opinion does not contain the sort of flat disclaimer of a fact finding requirement as does *Rivera*, it seemed to reformulate the statutory language by declaring that it was “comparable to *Booker*’s requirement that a federal judge’s sentencing decision not be unreasonable,” 113 P3d at 548, and it apparently considered the statute’s “operation and effect” to be at least as important as its language. *Id.* at 543. See *Rivera* (analyzing PFO “in practical terms”). The Supreme Court determined, however, that the statutory requirement of judicial fact finding trumped the state high court’s attempt to divine the legislation’s “operation and effect.”

Third, the *Rivera* court relied in part on the same mistaken understanding of “remedial *Booker*” as did the *Black* court, claiming mistakenly that the *Booker* Court had upheld the statutory “demand for sentencing courts to consider” factors such as the history and characteristics of the defendant, “which do not require any jury fact-finding.” 5 NY3d at 68. See discussion *ante* at 11.

Finally, though the *Rivera* court disclaimed reliance on this distinction, it noted that the determination required by PFO, unlike the provisions at issue in *Apprendi*, *Ring*, *Blakely*, and *Booker*, did not “relate to the crime for which the defendant was on trial,” but instead involved a “holistic” consideration of the defendant’s “entire circumstances and background,” including traits “unrelated to the crime of conviction.” 5 NY3d at 69 n 8. The *Cunningham* majority, however, expressly rejected Justice

Kennedy's proposed "distinction between facts concerning the offense, where *Apprendi* would apply, and facts concerning the offender, where it would not." 127 SCt at 869 n 4.

Based on *Cunningham*, the Supreme Court has already vacated a decision of the Hawaii Supreme Court upholding that state's "extended term sentencing scheme," which strikingly resembles New York's PFO provisions. *State v Mauoaotea*, 114 P3d 905 (Haw. 2005), vacated and remanded for reconsideration, ___ US ___, 2007 WL 505811 (decided 2/20/07). The Hawaii legislation at issue allows a judge to increase the sentence of a defendant convicted of two prior felonies based on fact findings related to, inter alia, the "nature and character of the offense and the history and characteristics of the defendant," in order to "protect the public from further crimes of the defendant." On the same date, the Supreme Court denied cert. to the state from a habeas corpus decision of the 9th Circuit that had held the Hawaii provisions to violate *Apprendi*. *Kaua v Frank*, 436 F3d 1057 (9th Cir. 2006), cert den, ___ US ___, 2007 WL 506822 (1/20/07).

For habeas purposes, *Cunningham* boosts the claim that the Court of Appeals' machinations in *Rivera* constituted an unreasonable application of *Apprendi et al.* Even at the state-court level, *Cunningham* should be used to advance challenges to the continuing legitimacy of *Rivera*. ☞

Endnotes

1. See *Apprendi v New Jersey*, 530 US 466 (2000); *Ring v Arizona*, 536 US 684 (2002); *Blakely v Washington*, 542 US 296 (2004); *United States v Booker*, 543 US 220 (2005).

2. In *Brown v Greiner* and *Brown v Miller*, the 2nd Circuit implicitly rejected petitioners' arguments that *Ring* and *Blakely* were retroactive, or, alternatively, that they were binding because they constituted direct applications of *Apprendi*. A pre-*Cunningham* petitioner could make these arguments regarding

Cunningham as well. In *Cunningham*, moreover, the argument that the Supreme Court merely applied *Blakely*, and did not create a new rule, would be a persuasive one.

3. In her dissent in *Rivera*, Chief Judge Kaye expressed the view that lower state courts are bound by a Federal constitutional ruling of the Court of Appeals, even in the event of an intervening relevant Supreme Court decision. 5 NY3d at 72 n 2. While this view of stare decisis is debatable, it may warrant a less than comprehensive approach to this issue in an Appellate Division brief. It also makes it virtually inconceivable that a CPL 440.10 motion could succeed on this ground, unless and until the Court of Appeals (or the United States Supreme Court) overrules *Rivera*.

4. When it first rejected an *Apprendi*-based challenge to these provisions, made prior to *Ring*, *Blakely*, and *Booker*, the Court of Appeals similarly recognized that under the statutory scheme, the trial court, after determining the defendant's prior convictions, "must consider" the "other enumerated factors" set forth by the Legislature before deciding "whether to actually issue an enhanced sentence," and that the underlying "[m]atters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct" are determined "based on the preponderance of the evidence." *People v Rosen*, 96 NY2d 329, 335 (2001).

5. The lesser-term sentence (here, 6 years) could be imposed only if the judge found at least one fact in mitigation.

6. These include the "fact that . . . the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness," and the "fact that . . . the defendant has engaged in violent conduct which indicates a serious danger to society." *Cunningham*, 127 SCt at 862 and n 7, n 8.

7. Justice Ginsburg joined Justice Stevens' opinion for the Court striking the mandatory Guidelines scheme to the extent that it required enhanced sentences based on judicial fact finding, but defected and joined the four original dissenters (Breyer, Rehnquist, O'Connor, and Kennedy) in their remedy analysis.

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Book Review (continued from page 10)

Bogira accomplishes this without dramatics, without insisting. From his careful observation and reporting these qualities are evident to an intelligent reader.

In the book's epilogue, wherein Bogira gives a short account of the subsequent lives of the principal and secondary players, it is Judge Locallo who's allowed the last word. Asked what has mattered to him in a long career as a county judge handling both civil and criminal cases, Locallo sums up the essence of his career. It was those obscure defendants who paraded past him in criminal court who were the most needful of his best efforts as a judge. For "liberty is more precious than money. A lot of people can get by without much money, but it's pretty tough to be in a cage." ☞

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

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

United States Supreme Court

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

United States v Resendiz-Ponce, 549 US ___, 127 Sct 782 (2007)

The respondent, a Mexican citizen, walked up to a port of entry and displayed a photo identification of his cousin to the border agent. The respondent told the agent that he was a legal resident traveling to Calexico, California. Since he did not resemble the photo, the respondent was arrested, and was convicted of illegally attempting to reenter the US after being deported. *See* 8 USC 1326(a). A motion to dismiss the indictment because it did not allege a specific overt act was denied. The case was reversed on appeal.

Holding: The respondent's indictment was not defective; it implicitly alleged that the respondent engaged in the necessary overt act by alleging that he "attempted" to enter the country. "Attempt" encompassed both the overt act and intent elements. An indictment alleging attempted reentry under 1326(a) need not specifically allege a particular overt act or any other part of the offense. *See Hamling v US* 418 US 87, 117 (1974). An indictment must contain the elements of the offense charged and fairly inform a defendant of the charge to be defended against; and it must enable the defendant, in the event of future prosecution for a similar offense, to plead an acquittal or conviction. The word "attempt," coupled with the specification of the time and place of the alleged reentry, satisfied both requirements. While specific overt acts tended to prove the charge, no single act was essential to the verdict. Judgment reversed and remanded.

Dissent: [Scalia, J] "Attempt" included intent and some action towards committing the crime; both elements had to be alleged in the indictment. *See US v Carll*, 105 US 611, 612 (1882). The majority's exception based on an understanding of the word "attempt" in common parlance was misleading. "If every word contained within the definition of each element of a crime were *itself* an element of the crime within the meaning of the indictment requirement, there would be no end to the prolixity of indictments."

Habeas Corpus (Federal)

HAB; 182.5(15)

Sentencing (Aggravated Penalties)

SEN; 345(5)

Burton v Stewart, 549 US ___, 127 Sct 793 (2007)

The petitioner was convicted of rape, robbery, and burglary by a Washington state court and sentenced in 1994 to 562 months in prison (consecutive terms). In 1996, based on the petitioner's request for resentencing, the court amended the terms to run concurrently with the longest period for the rape conviction, 562 months. Following appellate procedures, the trial court ordered in 1998 that the sentences run consecutively as originally determined, which was affirmed on appeal. While state review of the 1998 amended judgment proceeded, the petitioner sought a federal writ of habeas corpus, challenging the constitutionality of his three convictions from 1994 but raising no sentencing claim. The writ was denied. Three years later in 2002, after the state courts completed review of the sentencing case, the petitioner filed a second habeas petition challenging the 1998 sentence under *Apprendi v New Jersey* (530 US 466 [2000]). Denial of the petition was affirmed on appeal because *Blakely v Washington* (542 US 296 [2004]) is not retroactive.

Holding: The 2002 habeas petition was a successive filing. Since the petitioner did not obtain the court's permission to enter it, the District Court did not have jurisdiction to hear it. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner has to seek an order authorizing the district court to hear a successive habeas petition. 28 USC 2244(b)(1). When the petitioner filed the 2002 habeas petition, he was being held in custody under the 1998 amended judgment, which was the subject of the first habeas filed in 1998. The 1998 filing was a mixed petition, *ie*, the sentencing issue was not ripe for federal review. The petitioner could have withdrawn it until all the issues could have been raised (*see Slack v McDaniel*, 529 US 473, 485-486 [2000]), or proceeded with the exhausted claims and risked being barred from raising the rest. *See Rose v Lundy*, 455 US 509, 520-522 (1982). The purpose of the AEDPA was to avoid piecemeal litigation. *See Duncan v Walker*, 533 US 167, 180 (2001). The petitioner chose to take the risk of raising his unexhausted claim in a second habeas petition that was procedurally barred. Judgment vacated and remanded for dismissal of habeas petition.

Accomplices (Aiders and Abettors)

ACC; 10(10)

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

Gonzales v Duenas-Alvarez, 549 US ___, 127 Sct 815 (2007)

The respondent, a permanent resident alien, was convicted under Cal. Veh. Code Ann. 10851(a), which made the theft of a vehicle or joyriding a crime, and included accessories and accomplices. Removal proceedings were

US Supreme Court *continued*

instituted based on the claim that this conviction met the federal definition of a generic theft offense with a term of imprisonment of at least one year. 8 USC 1101(a)(43)(G); 1227(a)(2)(A). A Federal Immigration Judge and the Bureau of Immigration Appeals (BIA) agreed that the conviction justified removal. On appeal, the Circuit court remanded the matter for consideration under a decision issued while the appeal in this matter was pending.

Holding: Aiding and abetting falls within the generic definition of theft, which involves the “taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” *Penuliar v Gonzales*, 435 F3d 961, 969 (9th Cir 2006). Principals and aiders and abettors are generally treated the same by the states and federal government. See *Nye & Nissen v US*, 336 US 613, 618 (1949). Although California’s statute imposed liability on aiding and abetting for any crime that “naturally and probably” resulted from the intended crime (see *People v Durham*, 70 Cal. 2d 171, 181 [1969]), this did not take it out of the category of generic theft. The natural and probable consequences doctrine in some form is commonly applied in the states and federal system. California’s law did nothing “special” and did not criminalize conduct that most other states did not. The respondent failed to show that there was a “realistic probability,” not a theoretical possibility, that California’s law would apply to conduct outside the generic definition of theft. His claims that the statute applied to accessories after the fact and joyriding, both outside generic theft, were not considered. Judgment vacated and remanded.

Concurring in Part and Dissenting in Part: [Stevens, JJ] Interpretation of California law should have been left to the Circuit courts. See *Haring v Prosise*, 462 US 306, 314 (1983).

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

Prisoners (Access to Courts and Counsel) (General) PRS I; 300(2) (17)

Jones v Bock, 549 US __, 127 Sct 910 (2007)

Petitioner Lorenzo Jones, an inmate in the Michigan Department of Corrections (MDOC), was injured but compelled to work, aggravating his injuries. His grievances were denied. In federal court, he filed a medical neglect suit against two staff members, noticed in the internal proceedings, and Warden Bock, a deputy warden, a registered nurse, and a doctor. Jones named defendants not involved in the grievance process and did not attach copies of the grievance forms or describe the proceedings with specificity, and he did not exhaust the administrative

remedies; his complaint was dismissed, which was affirmed on appeal. Petitioner Timothy Williams, another inmate, suffered from a disabling, painful condition in his right arm. MDOC rejected the doctor’s surgery recommendation. Williams filed two grievances, one for denial of medical treatment, the other for refusing to place him in a single-occupancy handicapped cell. After all actions were denied, he filed a federal complaint against the former director of MDOC, the warden, deputy wardens, a corrections officer and the chief medical officer. As in Jones’ case, none of the respondents were named in the grievance process and the federal complaint was dismissed. Petitioner John Walton, a prisoner, received indefinite upper slot restriction after assaulting a guard. He filed a grievance claiming racial disparity in discipline. After the claims were denied, he filed a 1983 action based on race discrimination and named the former warden, deputy wardens, resident unit manager, and assistant. Only one of them was named in the grievance process, and the complaint was dismissed for failure to exhaust his remedies.

Holding: The Prison Litigation Reform Act (PLRA) required exhaustion of administrative remedies before a prisoner filed a 1983 suit. See 42 USC 1997e(a). The 6th Circuit mandated that exhaustion be pled with specificity and include documentation, that every person named in the suit had to be noticed through the grievance process, and total exhaustion of all claims. Federal Rule of Civil Procedure 8(a) required a “short and plain statement of the claim” in a complaint, while Rule 8(c) identified a nonexhaustive list of affirmative defenses that must be pled in response. And 42 USC 1983, the source of the cause of actions, did not require exhaustion. See *Patsy v Board of Regents of Fla.*, 457 US 496, 516 (1982). Since PLRA was silent on this point, the practice under the Federal Rules was to be followed. See *Leatherman v Tarrant County Narcotics Intelligence and Coordination Unit*, 507 US 163 (1993). Failure to exhaust was an affirmative defense under PLRA, and inmates were not required to specially plead or demonstrate exhaustion in their complaints. Exhaustion occurred when a prisoner completed the administrative review process in under the applicable procedural rules. The action was not per se inadequate because an individual later sued was not named in the grievances. The treatment of unexhausted claims should be handled on a case-by-case basis, and mixed complaints should not be dismissed out of hand. Judgments reversed and remanded.

Sentencing (Aggravated Penalties) SEN; 345(5)

Cunningham v California, 549 US __, 127 Sct 856 (2007)

The petitioner was convicted of a sex crime and faced one of three possible sentences under California’s Determinate Sentencing Law (DSL): 6, 12 or 16 years in

US Supreme Court *continued*

prison. See Cal. Penal Code Ann. §288.5(a) (West 1999). After a sentencing hearing, the court found that there were several aggravating factors outweighing the sole mitigator. The petitioner's sentence, the maximum 16 years, was affirmed. A recent California Supreme Court decision upheld the DSL against a 6th Amendment challenge.

Holding: Under the DSL, the court was normally to impose the middle level sentence but could depart from it in the presence of aggravators or mitigators, as outlined by the rules of the State's Judicial Council. See Penal Code 1170(b). A fact that was an element of the crime could not be used to impose the upper sentence. Rule 4.420(d). The rules made selection of a sentence a factfinding process, not one based on policy or subjective belief. Under the 6th Amendment, any fact (except a prior conviction) that exposes a defendant to a greater potential sentence has to be found by a jury, not a judge, and established beyond a reasonable doubt, not a preponderance of the evidence. *Apprendi v New Jersey*, 530 US 466 (2000). *Apprendi* has been applied to the death penalty (*Ring v Arizona*, 536 US 584, 602, 609 [2002]), to facts permitting a sentence in excess of the "standard range" under Washington's Sentencing Reform Act (*Blakely v Washington*, 542 US 296, 304-305 [2004]), and to facts triggering a sentence range elevation under the then-mandatory Federal Sentencing Guidelines. *US v Booker*, 543 US 220, 243-244 (2005). Applying the DSL, the sentencing judge relied on facts not found in the indictment or admitted by the petitioner to increase the sentence. Therefore, the DSL's middle sentence starting point ought to be the constitutional maximum limit. Judgment reversed and remanded.

Dissent: [Kennedy, J] The *Apprendi* line of cases is used too broadly. They should have applied to sentencing enhancements based on the nature of the offense, not the offender. California's system of guided discretion was constitutional.

Dissent: [Alito, J] Since the post-*Booker* federal sentencing scheme satisfied the 6th Amendment, California's DSL should be upheld as advisory. The 6th Amendment permitted a system of advisory guidelines with reasonableness review, which allowed judicial discretion and factfinding based on those guidelines.

New York State Court of Appeals

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

People v Kisoan, Nos. 15 and 16, 2/13/2007

Defendant Ganesh Kisoan was charged with sale and possession of cocaine. During deliberations the jury sent a

note to the court: "We took a vote. We are not unanimous. We are 10 guilty to 2 not guilty on all three counts. Furthermore, we believe that further deliberations will not change our decision." The judge only told the parties that the jury sent a note saying they were deadlocked. The court instructed the jury to continue deliberating. The next day, they found the defendant guilty. The conviction was reversed on appeal. Defendant Leon Martin was tried for murder and claimed self-defense. During deliberations the jury sent out a note, which, in part, requested, "definitions of 3 counts." It went unread due to a clerical error. They sent a second note, "Want a brief readback. First Count 3 points." The court reread the first count, intentional murder, and at a juror's request, the second count, depraved indifference murder. Later, the jury sent out a third note, "reread elements of 3rd ct." The judge reread the weapons charge, count three. The resulting convictions were reversed on appeal.

Holding: In both cases the judges acted on notes from the jury without giving notice to the prosecution and defense in the presence of the defendant. See CPL 310.30. The notes should have been marked as exhibits and read into the record with counsel present. The trial courts were obligated to give counsel meaningful notice of the contents of the notes and the chance to ask questions or make suggestions for responding, such as asking for an *Allen* charge. See *People v O'Rama*, 78 NY2d 270, 277. This fundamental failure of the court's responsibility, a mode of proceeding error, did not have to be preserved. *People v DeRosario*, 81 NY2d 801. Judgment affirmed.

Juveniles (Parental Rights) (Visitation) JUV; 230(90) (145)**In the Matter of Sheena D. v Darwin F., No. 10, 2/13/2007**

The Department of Social Services filed a Family Court Act (FCA) article 10 petition alleging that the respondent abused his 16-year-old sister-in-law and neglected his biological sons. After a fact-finding hearing, Family Court made a finding of abuse as to the sister-in-law and neglect as to the two boys. A disposition order, without an expiration date, gave custody of the children to the mother. An order of protection against the respondent father forbidding contact with the boys until their 18th birthdays—14 and 16 years later—was affirmed on appeal.

Holding: Under article 10, the Family Court did not have the power to issue an order of protection lasting until the children reached adulthood. See FCA 1056. The Legislature limited such orders in 1989 (after a court decision upholding a similar order in *In re Erin G.*, 139 AD2d 737) by limiting the terms of orders of protection to the term of dispositional orders in the same matter, to allow for periodic review. L 1989, ch 220, § 1. Some Family Courts continued the "until 18" orders, but as was recognized in *Matter of Gabriel A.* (5 Misc. 3d 479), *Erin G.* was

NY Court of Appeals *continued*

superseded by statute. The duration of most dispositional orders is one year. *See* FCA 1052 [a]. There is no statutory limit set for orders of protection in cases where custody is awarded unaccompanied by an order of supervision. *See* FCA 1052 [a][ii]; 1054. A literal reading of the statute would cut off the father’s presumptive rights to visitation without periodic review. *See* FCA 1052 [b][i]. Periodic review of orders of protection is required whether or not the underlying dispositional order contained an expiration date. Judgment modified, matter remitted.

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

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

People v Williams, No. 9, 2/15/2007

The defendant was tried for murder and related charges in connection with the decedent’s death during a robbery. The defendant’s convictions of felony murder and related offenses were affirmed.

Holding: The defendant claimed that he was denied a fair trial due to prosecutorial misconduct, *ie*, denigration of witnesses, disparagement of the proffered alibi, and misrepresentations to the jurors. Most of these errors were not preserved. The trial court upheld the majority of defense counsel’s objections, which did not include requests for mistrial or other relief. On its own the court admonished the jury that the lawyers’ statements were not evidence. There was no due process violation. Defense counsel was not ineffective. He made objections throughout the trial, conducted rigorous cross-examination, and moved for both a mistrial and a new trial on unrelated grounds. Although inconsistent, his defense was zealous. Judgment affirmed.

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

People v Tzitzikalakis, No. 2, 2/15/2007

The defendant, a contractor, did work for New York City and received payment of \$2,700,000. Later, it was discovered that he submitted false invoices for the subcontractors. He pled guilty to grand larceny and falsifying business records, and was sentenced to prison and ordered to pay restitution. At the restitution hearing, the sole witness was an investigator for the City, who determined the City’s losses by subtracting the actual costs from those listed in the subcontractors invoices. But she included the full amounts for invoices from two companies that did not exist at the time. The total loss was \$340,143. The court prevented inquiry by the defense into the fair market value of work done and materials provid-

ed with regard to those two invoices. It required the defendant to prove actual expenditures rather than fair market value of that work. The restitution was reversed on appeal.

Holding: The trial court improperly shifted the burden of proving the city’s out-of-pocket loss to defendant. *See* Penal Law 60.27; CPL 400.30. The court was required to consider the amount taken and the value of any benefit received by the City. *See Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421. At a restitution hearing, the prosecution had to show the amount taken less the benefit conferred. Since the sentencing court improperly shifted the burden of proving the benefit conferred to the defendant, a new hearing was required. The defendant should be permitted to introduce evidence to reduce the amount of the out-of-pocket loss. Changing the burden of proof for offsets must be left to the legislature. Judgment affirmed and new restitution hearing ordered.

Dissent: [Smith, J] The prosecution had the burden of production and persuasion at the restitution hearing as to out-of-pocket losses. But once the prosecution met its burden of proof on losses, the burden of production as for benefit conferred shifted to the party in the best position to know, the defense.

Identification (Eyewitnesses) **IDE; 190(10) (35)**
(Photographs)

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

People v Grajales, No. 14, 2/20/2007

Two men, one of whom was armed, robbed the complainant. Police showed him two photographic arrays, including a six-photograph array with the defendant’s picture. The complainant picked out the defendant as the armed robber. A week later, seeing the defendant on the street, the complainant contacted police. During the defendant’s arraignment, the prosecution served a CPL 710.30 notice for the street identification, but not the photo array. The defendant’s motion to preclude the identification based on the inadequate notice was denied. The conviction was affirmed.

Holding: The prosecution offered notice of the witness’s street point-out identification they intended to introduce at trial. Since the photographic array was not admissible (*see People v Cioffi*, 1 NY2d 70), they could not have intended to offer it at trial. The CPL 710.30(1)(b) notice was sufficient. However, the customary and better practice was to give the defendant notice of all prior police-arranged identifications. Judgment affirmed.

Dissent: [Ciparick, J] Failure to give the defendant CPL 710.30 notice of the photo array mandated preclusion of the identification testimony at trial. *See People v Lopez*, 84 NY2d 425, 428. This was not a situation where the defendant was known to the complainant, or one involv-

NY Court of Appeals *continued*

ing a confirmatory identification establishing a degree of reliability. *See People v Boyer*, 6 NY3d 427, 431. Limiting the statute's application strictly to evidence the prosecution intended to offer at trial is unreasonable. *See People v White*, 73 NY2d 468, 474 n 1. The risk of misidentification was too high in police arranged settings that might taint later identifications, whether admissible at trial or not. *See People v Rodriguez*, 79 NY2d 445, 448-449

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

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

**Walton v NYS Dept of Correctional Services,
No. 12, 2/20/2007**

The petitioners are individuals and organizations that receive collect calls from prisoners in the custody of the New York State Department of Correctional Services (DOCS). They filed a lawsuit to prevent DOCS from collecting a 57.5% commission on its 2001 contract with MCI Worldcom Communications, Inc. (MCI), damages and other relief. The petitioners claimed that DOCS, through the MCI agreement, infringed upon their rights to due process, freedom of speech and equal protection, imposed an unlawful tax and/or regulatory fee, violated General Business Law 340 and 349, and tortiously interfered with their rights to use other telephone service carriers offering lower rates. Dismissal of the claims for untimeliness and failure to state a cause of action was affirmed.

Holding: The petitioners' constitutional claims, which included alleged violations of taxation power, due process, equal protection, and free speech under the state Constitution, were timely. Since the petitioners challenged a quasi-legislative act by DOCS, an article 78 proceeding was appropriate. The four-month statute of limitations began to run when the action challenged became final and binding. *See CPLR 217 [1]*. Since the rate change needed to be approved by the Public Service Commission (PSC), the 2001 contract became ripe for judicial review only upon issuance of final PSC approval on Oct. 30, 2003. The petitioners' action started on Feb. 26, 2004, within the time limit. The other claims were properly dismissed. Judgment modified and remanded to determine whether the constitutional claims stated a cause of action.

Concurring: [Smith, J] It would not be reasonable to allow dismissal of the constitutional claims as untimely for failure to file within four months of the Comptroller approving the contract where the petitioners would have had little chance to learn about the DOCS-MCI contract rate amendments at that point.

Dissent: [Read, J] The article 78 claim expired in 2001 when the rates in the phone contract were set.

Evidence (Uncharged Crimes)

EVI; 155(132)

People v Jackson, No. 17, 2/22/2007

Holding: Admission of evidence of a prior uncharged sexual assault against someone other than the complainant coupled with an out-of-court statement of intent to do the same to the complainant was harmless error. The defendant's convictions of three statutory rapes based on the uncorroborated testimony of the 14-year-old complainant (*see People v Schulz*, 4 NY3d 521, 530) were affirmed. Trial evidence showed: the complainant made a prompt outcry the morning after the first rape; the defendant had a key to her home; and results of a medical examination indicated her condition was not inconsistent with a rape having occurred two weeks earlier. Inconsistencies in the complainant's testimony were explained by an expert in child psychology who stated that it was normal for an adolescent rape victim to remember the crime, but not the precise dates. Judgment affirmed.

Concurring: [Smith, J] Evidence of the uncharged rape was not admissible under *Molineux*. *See People v Hudy*, 73 NY2d 40, 55. Its admission was not harmless error. However, its admission was permissible to give meaning to the statement of intent against the complainant where the victim of the uncharged assault testified that the defendant said when he raped her that if she hadn't been there, he would have raped the complainant.

Dissent: [Pigott, J] Admission of the prior uncharged sexual assault showed a propensity to commit rape and was not harmless error. *See People v Vargas*, 88 NY2d 856, 858.

First Department

Evidence (Sufficiency)

EVI; 155(130)

**Reckless Endangerment
(Elements) (Evidence)**

RED; 326(10) (15)

**People v Brinson, __AD3d__, 827 NYS2d 51
(1st Dept 2007)**

Holding: The "[d]efendant's actions of leading the police on a brief high-speed chase, half of which occurred on an empty street, and then, upon encountering heavy traffic, trying to force his way through the traffic at a slow rate of speed, while beeping his horn and flashing his high beams, failed to evince a depraved indifference to human life, as required for a conviction of reckless endangerment in the first degree." *See Penal Law 120.25; People v Feingold*, 7 NY3d 288. The evidence does establish that the defendant acted recklessly and that his actions "'create[d] a substantial risk of serious physical injury' to other drivers" (*see Penal Law 120.20*). Judgment modified, first-degree reckless endangerment reduced to second-degree

First Department *continued*

reckless endangerment, sentence on that conviction reduced to one year, and otherwise affirmed. (Supreme Ct, Bronx Co [Barone, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Irizarry, __AD3d__, 827 NYS2d 152 (1st Dept 2007)

Holding: The defendant was adjudicated a level three sex offender under Correction Law art 6 C. The prosecution’s proof did not establish the risk factor of drug abuse by clear and convincing evidence, as is required. *See People v Collazo*, 7 AD3d 595. The only evidence of drug abuse was a 1997 conviction of seventh-degree possession of a controlled substance and a 1983 conviction of disorderly conduct, which arose from a misdemeanor drug arrest. Both convictions, one not even for a drug offense, were excessively remote under the circumstances. No other evidence such as a probation report or other documentation was offered to show that the defendant had a substance abuse problem. The assessment of 15 points for this risk factor was error. Order reversed, the defendant adjudicated a level two sex offender. (Supreme Ct, New York Co [Sussman, JJ])

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

Defenses (Duress) DEF; 105(25)

People v Quintana, No. 27, 1st Dept, 1/18/2007

Holding: The evidence presented to the grand jury permitted a reasonable inference that the defendant acted under duress. *See Penal Law 40.00; People v Speros*, 186 AD2d 434. The prosecution was required to charge the grand jurors on that defense. *See People v Goetz*, 68 NY2d 96, 115. The court correctly found that failure to so instruct impaired the integrity of the grand jury proceedings enough that the defendant may have been prejudiced. *See People v Valles*, 62 NY2d 36. Not only did the prosecutor fail to give an instruction on the defense, but in response to a grand juror’s question said that “affirmative defenses do not apply to the grand jury.” Duress, unlike the insanity defense, is the type of affirmative defense that would prevent an unfounded prosecution if accepted by the grand jury. *See People v Lancaster*, 69 NY2d 20, 26-28 *cert den* 480 US 922.

The court also properly found that the evidence in the grand jury was not legally sufficient to establish first-degree escape, where the only evidence as to the charge for which the defendant was being arrested was inadmissible hearsay from an officer with no personal knowledge of the element in question. *See Penal Law 205.15(2)*. Order

dismissing counts in the indictment affirmed. (Supreme Ct, New York Co [White, JJ])

Discrimination (Race) DCM; 110.5(50)

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

People v Perez, No. 9098, 1st Dept, 2/1/2007

Holding: At the end of the second round of jury selection, a codefendant’s attorney raised a *Batson* challenge as to a black male prospective juror. Counsel for the defendant immediately noted that the prosecutor had peremptorily excused three jurors in the first round, all of whom were black women, as well as a black male in the second round, completely excluding blacks from the panel. The court, stating that the challenge only went to the black male, said that it would ask for race-neutral explanations for the challenges of all African Americans in order to decide about the one. The court disagreed with the prosecutor’s assessment of one; the court found the juror had misunderstood a question, then given assurances that she had no opposition to a one-witness case. To the prosecutor’s claim that the male black juror had seemed quiet and therefore might be more easily convinced by the opinions of other jurors, the court said that the juror had been no more quiet than others not challenged. The prosecutor could not remember why he had challenged a juror who had been the victim of theft. The court found that the prosecutor offered a race-neutral basis for only one of the black jurors, who had previously been on a hung jury. The court seated the black male juror. Defense counsel asked that the two prospective jurors wrongly excused the day before also be located and seated, but the court refused. The claim as to all challenged black jurors was timely; a *Batson* claim can be raised at any time during jury selection. *See People v Butler*, 15 AD3d 415 *lv den* 4 NY3d 884. The defendant made his position known and objected to the court’s ruling. Some remedy should have been fashioned. *See People v Chin*, 3 AD3d 574 *lv den* 2 NY3d 761. Judgment reversed, new trial ordered. (Supreme Ct, New York Co [Goodman, JJ])

Second Department

Sex Offenses (Sentencing) SEX; 350(25)

People v Middleton, 33 AD3d 777, 822 NYS2d 453 (2nd Dept 2006)

Holding: The record of the defendant’s Sex Offender Registration Act hearing (*see* Correction Law article 6-C) indicates that the court had before it as many as three different risk assessment instruments. One, typewritten, was from the Board of Examiners of Sex Offenders. The others were handwritten and apparently from the prosecutor’s

Second Department *continued*

office. The transcript does not reveal which instrument the court considered in designating the defendant a level two sex offender. Nor is the record clear as to which factors the court considered. A new hearing must be held "at which the court shall clearly indicate on the record which risk assessment instrument it is relying on and which factors it considered in making its determination." Order reversed, matter remitted for a new hearing and determination. (Supreme Ct, Kings Co [Marrero, JJ])

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

Counsel (Anders Brief) COU; 95(7)

Matter of Angelique L. v Tracy L., 33 AD3d 799, 822 NYS2d 454 (2nd Dept 2006)

Holding: The defendant's appellate counsel filed an *Anders* brief (*Anders v California*, 386 US 738 [1967]) and seeks to be relieved as counsel. Independent review of the record indicates the existence of potentially nonfrivolous issues. These include "whether the evidence was sufficient to support a finding of neglect, and whether continued placement of the children was in their best interests . . ." Counsel relieved and directed to turn over all papers to new counsel, petitioner to furnish a copy of the transcript to new counsel, and briefing schedule set. (Family Ct, Suffolk Co [Sweeney, JJ])

Aliens (General) ALE; 21(30)

Family Court (General) FAM; 164(20)

Matter of Luis A.-S. 33 AD3d 793, 823 NYS2d 198 (2nd Dept 2006)

Holding: The petitioner is the uncle of the child in question, who entered the US illegally at age 17. The petitioner seeks appointment as the child's guardian on the grounds that the child's parents, in Guatemala, neglected, abandoned, and abused the child. The court improperly dismissed the petition on the ground that the child was in the country illegally and any remedy he has would lie in federal court. The child was domiciled in Orange County or had come there immediately before the application. See Family Court Act 661; SCPA 1702(1); *Matter of Kummer*, 93 AD2d 135, 167-169. The child's immigration status did not present an impediment to the court's jurisdiction. See 8 USC 1101(a)(27)(J)(i), (ii); 8 CFR 204.11(c)(1)-(6); *Gao v Jenifer*, 185 F3d 548, 554 (1999). This appeal was rendered academic when the child reached the age of 18 two days after the ruling, and there is now no basis upon which the requested relief can be granted. Appeal dismissed. (Family Ct, Orange Co [Bivona, JJ])

Sentencing (Concurrent/Consecutive) (General)

SEN; 345(10) (37)

People v Johnson, 33 AD3d 939, 826 NYS2d 295 (2nd Dept 2006)

After separate trials in each county for a series of robberies in Queens and Nassau counties, the defendant was convicted on multiple counts of second-degree robbery and (in Queens) other charges. He was sentenced in each court to consecutive prison terms on each count. Nassau County Court also ordered that the sentences it imposed were to run consecutively to those imposed in Queens.

Holding: Supreme Court, Queens County, erred in imposing consecutive sentences for second-degree assault and attempted first-degree escape. The assault count was for causing physical injury to a police officer intending to prevent the performance of the officer's lawful duty. Penal Law 120.05(3). The attempt to escape from custody and the intent to prevent performance of the officer's lawful duty were essentially the same act, each charge involving the same material element. See Penal Law 110.00, 205.15(2); 120.05(3); *People v Laureano*, 87 NY2d 640, 643. The sentences imposed were not excessive. Because the defendant was convicted of no greater than class C felonies, the aggregate maximum term of imprisonment in both the Queens and Nassau cases must be deemed to be 20 years. See Penal Law 70.30(1)(c)(i); *People v Moore*, 61 NY2d 575, 577-578. Judgment modified, sentences for second-degree assault and attempted first-degree escape to run concurrently, and as modified, affirmed. (Supreme Ct, Queens Co [Kron, JJ])

Counsel (Competence/Effective Assistance/Adequacy)

COU; 95(15)

Guilty Pleas (Vacatur)

GYP; 181(55)

People v Goldberg, 33 AD3d 1018, 823 NYS2d 492 (2nd Dept 2006)

After a mistrial due to a hung jury, the defendant was retried and convicted of multiple counts of robbery and assault and sentenced as a second felony offender to a term of 16 years for first-degree robbery, with lesser sentences for the other charges. His conviction was affirmed. He then moved to vacate the conviction based on ineffective assistance of trial counsel for failure to tell the defendant about a plea offer and for misinforming the defendant about his possible sentence exposure following trial. His motion was summarily denied as based solely on his self-serving affidavit. Reconsideration was granted after the prosecution discovered notes in their file indicating that an offer of seven years for a class C felony had been made, rejected "out of hand" by defense counsel, whereupon the offer was "gone." Upon reargument, the court

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again refused to vacate the conviction because the attorney had made a strategic decision.

Holding: It is undisputed that the prosecution made an offer involving a prison term of seven years. Questions of fact exist, based on the file notes and the defendant's statements, as to whether defense counsel conveyed the terms of the offer to the defendant and whether the defendant would have accepted it. *See People v Fernandez*, 5 NY3d 813. Order reversed, matter remitted for a hearing on the defendant's motion and a new determination. (Supreme Ct, Nassau Co [Ort, JJ])

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

People v Whaley, 33 AD3d 1028, 822 NYS2d 716 (2nd Dept 2006)

Holding: Appellate counsel moved to be relieved, filing an *Anders* (*Anders v California*, 386 US 738 [1967]) brief. Independent review of the record reveals potentially non-frivolous issues including whether or not the defendant was properly adjudicated a second felony offender. *See* CPL 400.21; *People v Horsley*, 251 AD2d 427. New counsel is assigned to whom current counsel is to turn over all papers and to whom the prosecution is to furnish a copy of the stenographic minutes, and a new briefing schedule is set. (County Ct, Suffolk Co [Ohlig, JJ])

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

Evidence (Other Crimes) EVI; 155(95)

People v Alford, 33 AD3d 1014, 824 NYS2d 323 (2nd Dept 2006)

Holding: While isolated errors by a defense attorney will not generally meet the test for constitutionally ineffective assistance of counsel, ineffectiveness under the state constitution does result from error so serious it deprives a defendant of a fair trial. *See People v Henry*, 95 NY2d 563, 565-566. Here, counsel failed to ask that portions of a lab report be redacted. The portions indicating that the defendant's DNA had been recovered from a complainant in a similar, unrelated rape case would have been inadmissible if challenged, as there was no independent basis for its admission. *See People v Foster*, 295 AD2d 110, 113. Given the defendant's admission that consensual sexual relations occurred between him and the complainant, making the sole contested issue one of consent, counsel's failure to seek redaction of evidence concerning a crime similar to the one charged constituted ineffective assistance. *See People v Lindo*, 167 AD2d 558,

559. Because the defendant was denied a fair trial, reversal is warranted. *See People v Turner*, 5 NY3d 476, 480-481. It was the jury that initially brought the prejudicial nature of the evidence to the court's attention; the curative instructions given did not obviate the prejudice. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Marrus, JJ])

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

Family Court (General) FAM; 164(20)

Matter of Samuel v Samuel, 33 AD3d 1010, 823 NYS2d 222 (2nd Dept 2006)

Holding: Family Court advised the mother in this visitation proceeding that she had a right to counsel. But the court failed to say that she had the right to counsel of her own choosing, an adjournment to confer with counsel, and to assignment of counsel if she could not afford to hire counsel. *See Matter of Wilson v Bennett*, 282 AD2d 933, 934. The mother never explicitly waived her right to counsel. *See Matter of Miranda v Vasquez*, 14 AD3d 566. Nothing in the record shows she knew of her rights to an adjournment or assignment of counsel. *Cf Matter of F. Children*, 199 AD2d 81. There was no "intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it" (*Werking v Amity Estates*, 2 NY2d 43, 52. . .). Further, Family Court Act 262(a) requires the court to advise parties of their rights before court proceeds. Order reversed, matter remitted for further proceedings. (Family Ct, Kings Co [Grosvenor, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Black, 33 AD3d 981, 823 NYS2d 485 (2nd Dept 2006)

Holding: Under the Sex Offender Registration Act (SORA) (Correction Law article 6-C), the Board of Examiners of Sex Offenders (Board) is to make a recommendation to the court regarding determination of an incarcerated offender's risk level classification at least 60 days before the offender's release. *See* Correction Law 168-l(6). For offenders who are not incarcerated, the prosecutor makes and provides a risk level determination. Certain due process rights apply to classification proceedings. *See Doe v Pataki*, 3 FSupp2d 456, 471-473 (SDNY 1998). The court here made clear that it intended to impose a one-year sentence. Under SORA, the defendant should have been sentenced. He should have later been notified of an opportunity to submit information to the Board, the Board should have made a recommendation, and no risk level determination made until 30 days before his release. *See* Correction Law 168-n(2), (3). Instead the court held a risk level hearing before sentencing, relying on a risk assessment instrument prepared by the prosecu-

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tor. The lack of an explicit objection at the hearing “does not, on this record, indicate that he knowingly and intelligently waived these statutory and due process rights or otherwise failed to preserve the issue for appellate review (see *People v Davila*, . . . [299 AD2d 573]).” The provision that a court may make a risk level determination notwithstanding failure by the Board to act (Correction Law 168-1[8]) is inapplicable where the Board was given no opportunity to make a recommendation. Order reversed, matter remitted for a new risk assessment hearing and determination preceded by a Board recommendation. (Supreme Ct, Kings Co [Sullivan, JJ])

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

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

People v Ziminski, 34 AD3d 507, 823 NYS2d 519 (2nd Dept 2006)

Holding: The evidence was insufficient to support the depraved indifference murder conviction. See Penal Law 125.25(2), *People v Suarez*, 6 NY3d 202, 212-214. The insufficiency stems not from the existence of “a ‘manifest intent to kill’” that contradicts a finding of depraved indifference and which would require dismissal of the count. Here there is a lack of proof of the depravity and indifference to human life required for murder. The evidence was sufficient to establish the lesser-included offense of second-degree manslaughter, which does not require depravity and indifference to human life. See *People v McMillon*, 31 AD3d 136 *lv den* 7 NY3d 815.

The court did not err by declining to sanction the prosecution for destruction of a tape recording of a phone conversation between a police officer and a transcriber. No bad faith or prejudice was shown. See *People v Lopez*, 292 AD2d 395, 396. The defendant’s other contentions also lack merit. Judgment modified, second-degree murder reduced to second-degree manslaughter, otherwise affirmed, and remitted for sentencing on the reduced count. (County Ct, Nassau Co [De Riggi, JJ])

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

Matter of Correnti v Suffolk County District Attorney’s Office, 34 AD3d 578, 824 NYS2d 382 (2nd Dept 2006)

The petitioner, a state prisoner, mailed papers seeking an article 78 order to show cause to overturn the respondent’s denial of his Freedom of Information Law request for a photograph introduced in his case at the grand jury. The papers were received by the court on Jan. 23, 2004

(and again on Mar. 19, 2004), and an index number was assigned on or about Jan. 30, 2004. The unsigned show cause order was filed with the Clerk on Oct. 25, 2004 and was signed by the Supreme Court judge on Nov. 8, 2004, authorizing service “by certified mailing return receipt requested . . . by November 30, 2004. The respondent argued that the petition should be dismissed as time barred and failure to effectuate service, the papers having been sent by regular mail.

Holding: Contrary to the court’s finding, the proceeding was timely commenced. The petition was timely “filed” as required by CPLR 304; the index number was assigned on or about Jan. 30, 2004. However, the petitioner’s failure to adhere to the directive in the order to show cause regarding the form of service warranted dismissal. Mode of service is jurisdictional in nature and must be followed literally. See *Matter of Bell v State University of New York at Stony Brook*, 185 AD2d 925. Pro se status did not entitle the petitioner to any greater rights with regard to service than any other litigant has nor to deprive the respondent of the rights any other respondent would have. See *Goldmark v Keystone & Grading Corp.*, 226 AD2d 143, 144. Judgment affirmed. (Supreme Ct, Suffolk Co [Pitts, JJ])

Assault (Defenses) (Evidence) (Instructions) (Lesser Included Offenses) **ASS; 45(20) (25) (45) (50)**

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

People v Palmer, 34 AD3d 701, 826 NYS2d 77 (2nd Dept 2006)

The jury acquitted the defendant of depraved indifference and intentional murder, attempted murder, and first-degree intentional assault. He was convicted of first-degree manslaughter and first-degree depraved indifference assault.

Holding: In addition to a generalized motion to dismiss, the defendant specifically asserted that depraved indifference murder had not been proven because an attack with a knife “is not a classical depraved indifference.” The court found that indiscriminate swinging of a knife, which the defendant claimed had been in self-defense, supported both intentional and depraved indifference murder. A separate, specific motion to dismiss the depraved indifference assault charge was not necessary given the court’s ruling as to the same element in the murder count. The record does not support the depraved-indifference assault conviction, but does “support the view that the defendant, in the heat of battle, recklessly inflicted physical injury upon the surviving complainant who did not even realize that he had been cut until some-time later (see Penal Law § 120.00[2]; *People v Swinton*, . . . [7 NY3d 776] . . .).”

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the prosecution had asserted that first-degree burglary was established because a named person was physically injured. By later seeking to charge that a different person was injured, the prosecution changed the theory of the case from that on which the defendant had been indicted. This is improper. *See People v Perez*, 83 NY2d 269, 274. That the defendant was charged elsewhere in the indictment with physically injuring the second-named person did not overcome the fact that as to the first-degree burglary charge, the theory was changed. The evidence did support the second-degree burglary count under Penal Law 140.25(2), which was charged in count two. The jury, though it did not reach that count, necessarily found all the elements of second-degree burglary (knowing entry or unlawful remaining in a dwelling with intent to commit a crime there) in convicting of first-degree burglary.

The defendant testified that he drove to the dwelling believing his daughter to be in danger, entered after being told she was inside and hearing a scream, and once inside was attacked by two of the people present. If the defendant had the intent to commit a crime when he entered the dwelling, he could not have entered on the basis of his belief that his daughter needed assistance. No justification charge was required on that count. Failure to give a justification instruction as to the assault charges requires a new trial on those counts. While defense counsel did not specify a particular Penal Law provision, the substance of the request was for a general charge under Penal Law 35.05. A reasonable view of the evidence would support a finding that the defendant's conduct was justified as to the assault counts. *See People v Petty*, 7 NY3d 277, 284. Judgment modified, first-degree burglary conviction reduced to second-degree, assault charges vacated, and remitted for resentencing and new trial respectively. (Supreme Ct, Queens Co [Cooperman, JJ])

Juries and Jury Trials (Challenges) **JRY; 225(10) (60)**
(Voir Dire)**People v Jerome, 34 AD3d 835, __NYS2d__**
(2nd Dept 2006)

Holding: The defense raised a *Batson v Kentucky* (478 US 79) objection to the prosecution's peremptory challenges of four black male venirepersons out of six. The court said that such challenge could succeed only if all black venirepersons, not just black males, were disproportionately challenged. Such ruling precluded full inquiry as to whether the *Batson* test should be applied. *See People v Garcia*, 217 AD2d 119, 122. The court here failed to allow the defense to set out grounds alleged to establish a prima facie case of purposeful exclusion. The defendant is entitled to an opportunity to make that

showing. *See People v Childress*, 81 NY2d 263, 266. Matter remitted for a hearing on the defendant's challenge and, if a prima facie showing is made, for a hearing and report on the prosecutor's exercise of challenges; appeal held in abeyance. (Supreme Ct, Queens Co [Buchter, JJ])

Sentencing (Second Felony Offender) **SEN; 345(72)****People v Fumai, 34 AD3d 831, __NYS2d__**
(2nd Dept 2006)

Holding: Contrary to the prosecution's contention, the defendant's challenge to being adjudicated a second felony offender, fully preserved (*see People v Samms*, 95 NY2d 52, 57), was not forfeited by the subsequent guilty plea. *See People v Thompson*, 60 NY2d 513, 520. Because not all acts covered by Connecticut General Statutes 21a-277(a) are felonies in New York, the prosecution had a duty to prove that the charges of which the defendant was actually convicted in the other state involved acts that would constitute a New York felony. *See People v Muniz*, 74 NY2d 464, 467-468. No evidence was presented to show which "narcotic substance" as defined in the Connecticut law the defendant was convicted of possessing, precluding a determination of whether the substance was one that also falls within the somewhat more restrictive definition of a "narcotic drug" under Penal Law 220.00(7) and Public Health Law 3306, schedules I(b), I(c), II(b), and II(c). Judgment modified, sentence vacated, matter remitted for resentencing as a first-time felony offender. (Supreme Court, Nassau Co [Donnino, JJ])

Homicide (Murder [Definition] **HMC; 185(40[d] [j])**
[Evidence])**People v Hawthorne, __AD3d__, 826 NYS2d 147**
(2nd Dept 2006)

The defendant's statement, admitted at trial, acknowledged that he had hit both the decedent and the surviving complainant with a hammer, but asserted that he had done so to ward off an attack by both when he refused to loan them money for more crack cocaine. The defendant was convicted of depraved indifference murder and other counts, but was acquitted of intentional murder.

Holding: No valid line of reasoning and permissible inference could support a rational finding that the killing was reckless rather than intentional. A minimum of 10 blows to the decedent's head with a hammer and an effort to strangle him "clearly demonstrated a 'manifest intent to kill.'" *See People v Payne*, 3 NY3d 266, 271. This evidence cannot be reconciled with the defendant's theory, which might otherwise suggest a conclusion that the killing was reckless. *See eg People v Gonzalez*, 1 NY3d 464. This case is therefore a "rare and exceptional" one in which a

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depraved indifference murder conviction must be overturned and dismissed, not reduced to second-degree manslaughter. *See People v McMillon*, 31 AD3d 136, 140 *lv den* 7 NY3d 815. Judgment modified, second-degree murder conviction vacated and dismissed, and as modified, affirmed. (Supreme Ct, Queens Co [Rios, JJ])

Double Jeopardy (Punishment) **DBJ; 125(30)**

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

People v Henriques, Nos. 2004-05968, 2005-01432, 2nd Dept, 12/5/2006

The defendant, convicted of depraved indifference murder for an act occurring when he was 16, received a sentence of 23 years to life in 1997. He also pled guilty to a drug related crime for which he received a concurrent three-year sentence. The murder conviction was reversed on appeal and on retrial the defendant was convicted of criminally negligent homicide and sentenced to probation.

Holding: The class E felony of criminally negligent homicide carries potential sentences of: a maximum four-year prison term (Penal Law 70.00[2]; 70.00[3]); five years probation with no prison term (Penal Law 65[3] [a] [i]); or five years probation with a concurrent period of incarceration of no more than six months. The defendant had served over six years in prison at the time of the second verdict. The court denied the defense motion to set aside the sentence as illegal, finding that because the primary purpose of probation is rehabilitation, not punishment, (*see People v Henriquez*, 7 Misc3d 453), no multiple punishment had been imposed. This ruling ignored “the nature of probation as an alternate criminal sanction,” rendering meaningless the constitutional protection prohibiting imposition of a second punishment after a defendant has completed an alternate punishment for the same offense. *See Ex Parte Lange*, 85 US 163, 176 (1874). While probation has a primarily rehabilitative purpose, it is a form of criminal sanction. *See Griffin v Wisconsin*, 483 US 868, 874 (1987). Where the defendant had completed more than the maximum prison term allowed for a class E felony, and had also served three years for the drug crime, the court had no power to impose any further sanction. *See US v Martin*, 363 F3d 25 (1st Cir 2004). No resentencing is required. *See People v Jackson*, 8 AD3d 678. Sentence vacated, the defendant sentenced to time served. (Supreme Ct, Kings Co [Demarest, JJ])

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

People v Liverpool, __AD3d__, 825 NYS2d 708 (2nd Dept 2006)

Holding: The cumulative effect of prosecution errors denied the defendant a fair trial in this single-eyewitness case. Among the errors during summation were: vouching for the main prosecution witness (*see People v Collins*, 12 AD3d 33); arguing the defendant’s general propensity to commit criminal acts (*see People v Sanders*, 303 AD2d 694); suggesting that the indictment was evidence of guilt (*see People v Jamal*, 307 AD2d 267); and making other “unduly prejudicial and inflammatory remarks (*see People v Robinson*, 260 AD2d 508).” Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Sullivan, JJ])

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

Matter of Powell v Blumenthal, __AD3d__, 827 NYS2d 187 (2nd Dept 2006)

Holding: The father, in seeking modification of an order of a Wyoming State court denying him visitation with his children, met his burden of showing a subsequent change in circumstances that warranted a hearing. *See Family Court Act 652(b)*. Upon his release from a federal penitentiary, he had been, in effect, paroled to Hawaii and is prohibited from leaving there until July 2007. The court improvidently exercised its discretion by granting the father unsupervised visitation with his children in the State of Hawaii. The totality of the circumstances (*see Eschbach v Eschbach*, 56 NY2d 167, 172), including the children’s ages, the father’s extensive criminal history including domestic violence against the mother, and travel costs and distance make unsupervised visitation in Hawaii not in the best interests of the children. *See eg Matter of Anaya v Hundly*, 12 AD3d 594, 595. He is initially awarded only supervised day visitation in New York State, beginning during the children’s’ summer recess. The court did not, upon a balancing of the competing interests, improvidently exercise its discretion by prohibiting the father from discussing “any issues pertaining to his religion or philosophy with the subject children,” a restriction supported by the Law Guardian. *Compare Stephanie L. v Benjamin L.*, 158 Misc2d 665, 667. The court properly directed therapeutic visitation. Order modified, and as modified, affirmed. (Family Ct, Nassau Co [Phillips, Ct Atty Ref])

Counsel (Conflict of Interest) **COU; 95(10) (15) (39)**
(Competence/Effective Assistance/Adequacy)
(Standby and Substitute Counsel)

People v Armstead, __AD3d__, 826 NYS2d 408 (2nd Dept 2006)

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Holding: The defendant's agreement with the prosecutor's office to provide assistance in a pending murder case was not mentioned at the proceedings in which the defendant pled guilty to second-degree robbery and petit larceny. At sentencing, the defendant having been indicted for a subsequent crime, the prosecution asserted that the defendant had breached the agreement, which provisions that he would be subject to an enhanced sentence if he failed to cooperate or committed further crimes. Defense counsel sought to be relieved in the matter, saying that the defendant planned to file charges against counsel and claimed that he had been coerced into agreeing to the plea provisions. The court refused to relieve counsel, who then conceded on the record that the defendant and others signed the agreement in counsel's presence and that counsel was present in the grand jury issuing the subsequent indictment. The defendant denied entering into the agreement providing for an enhanced sentence and denied committing a subsequent crime. The issues as to the knowing, voluntary, and intelligent nature of the defendant's plea, the validity of the cooperation agreement, and whether it was breached, were not addressed or resolved by the court. *See People v Fiumefreddo*, 82 NY2d 536. Defense counsel's taking of a position contrary to the defendant's at sentencing, essentially becoming a witness against the defendant, adversely affected the defendant's right to counsel. *See eg People v Bryant*, 22 AD3d 676. Matter remitted, appellate counsel to represent the defendant at a hearing, appeal held in abeyance. (Supreme Ct, Queens Co [Chin-Brandt, JJ])

Probation and Conditional Discharge (Revocation) **PRO; 305(30)****People v Horvath, __AD3d__, 825 NYS2d 757 (2nd Dept 2006)**

Sentenced in Kings County in 1995 to five years probation, the defendant stopped reporting to her probation officer and paying restitution in 1998; the next May she was arrested in Connecticut on charges there. In October 1999, a declaration of delinquency was filed and a bench warrant issued. That warrant had not been executed when the defendant was arrested in New York County on other charges in 2000. Convicted of those, she was sentenced in September 2000 to three to six years. The presentence report noted she was on probation. She was taken to state prison ten days later and was not produced in Kings County until May 2002, where she argued that the court lacked jurisdiction to adjudicate the declaration of delinquency due to the failure to produce her promptly. Her probation was revoked and a sentence of one to three years, consecutive to the term she was serving, was

imposed.

Holding: The defendant's claim is preserved. She was not promptly brought before the court as CPL 410.30 and 410.70 require. No part of the delay between the beginning of the 2000 sentence and her production in 2002 was due to the defendant. Probation offered no explanation for its failure to locate her earlier. The delay may have prevented any opportunity for the defendant to negotiate a more favorable deal encompassing both proceedings. While no one factor is usually necessary or sufficient to warrant relief for delay, any reading of *People v Douglas* (254 AD2d 300 *aff'd* 94 NY2d 807) suggesting that relief cannot be granted absent a showing of demonstrable prejudice is not to be followed. Requiring reasonable efforts to promptly resolve the filing of a declaration of delinquency, which in effect extends the original sentence (*see* Penal Law 65.15[2]; *People v Douglas*, 94 NY2d 807, 808), is consistent with notions of fundamental fairness. The court lost jurisdiction to adjudicate the violation of probation. Amended judgment reversed, sentence vacated. (Supreme Ct, Kings Co [Dowling, JJ])

Sentencing (Fines)**SEN; 345(36)****People v Sudbrink, __AD3d__, 825 NYS2d 762 (2nd Dept 2006)**

Holding: The defendant pled guilty to second-degree aggravated unlicensed operation of a motor vehicle and operating a vehicle while under the influence of drugs. He was fined \$1,000 for the operating a vehicle under the influence of drugs charge, a class D felony. As the prosecution concedes, imposition of the \$1,000 fine was error. Fines ranging from \$2,000 to \$10,000 are authorized by Vehicle and Traffic Law 1193(1)(c)(ii). If the court chose to impose a fine, which is optional, it was required to impose one of at least \$2,000. *See People v Smith*, 309 AD2d 1282. The part of the defendant's motion under CPL 440.20 that sought to vacate the \$1,000 should have been granted.

The \$500 fine imposed for second-degree aggravated unlicensed operation comported with Vehicle and Traffic Law 511(2), providing for "a fine of not less than" \$500. The defendant, although claiming he was not told of the possibility of a fine, does not want to withdraw his plea. There is no basis on which to vacate or modify that sentence. Order modified, portion of sentence imposing a \$1,000 fine vacated, and as modified, affirmed. (County Ct, Nassau Co [La Pera, JJ])

Sex Offenses (Sentencing)**SEX; 350(25)****People v Costello, __AD3d__, 826 NYS2d 429 (2nd Dept 2006)**

Holding: The defendant was designated a risk level two offender under Correction Law article 6-C. The pros-

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ecution had submitted a risk assessment instrument that included 20 points for “continuing course of sexual misconduct” with the complainant. To establish a continuing course of sexual misconduct requires: 1) two or more sexual contacts separated by at least 24 hours, at least one of the contacts involving “sexual intercourse, deviate sexual intercourse, or aggravated sexual abuse;” or 2) three or more sexual contacts over at least a two-week period. Sex Offender Registration Act Risk Assessment Guidelines and Commentary, November 1997 at 11. The complainant was an undercover detective using a fictitious screen name to pose as a 14-year-old boy; the only contact with the defendant was via the Internet. There was no sexual contact. *See* Penal Law 130.00(3). So, there could not be a continuing course of sexual conduct as contemplated by the guidelines. Without the 20 points assessed for this category, the defendant’s total risk factor score is 70, a presumptive level one risk level. The court’s determination did not contain findings of fact or conclusions of law (*see* Corrections Law 168-n[3]), providing no way to determine whether the court reached the prosecution’s contention that an upward departure was warranted. The prosecution failed to offer competent evidence supporting the existence of aggravating factors not otherwise taken into account. A written notice signed by the prosecutor and facts stated orally at the hearing, all without supporting evidence, were all that was presented. However, the defendant failed to object to the sufficiency of the proofs so as to provide the prosecution an opportunity to correct the deficiency. Judgment reversed, matter remitted for a new hearing. (Supreme Ct, Queens Co [Chin-Brandt, JJ])

Contempt (General) CNT; 85(8)

Juveniles (Support Proceedings) JUV; 230(135)

Matter of Orange County Commissioner of Social Services o/b/o Fraser v Green, __AD3d__, 826 NYS2d 692 (2nd Dept 2006)

Holding: An order of disposition found the appellant father to have willfully violated an order of support and committed him to jail for 45 days or until he purged himself of contempt by paying arrears of \$43,311.82, the commitment to issue if any payment required under a support order dated Aug. 30, 2004 was made more than 10 days late. Failure to pay ordered support is prima facie evidence of a willful violation of the order; the party failing to pay has the burden “to come forward with competent, credible evidence” of inability to pay. *See Matter of Greene v Holmes*, 31 AD3d 760, 762. The father offered documentary evidence supporting his claim that his failure to pay was due to a levy placed on his account by the New Jersey authorities as a result of a collection proceeding com-

menced there by the children’s mother. The mother provided no evidence to controvert the father’s evidence, saying conclusorily that the father had transferred his assets to his sister to avoid creditors. The court based its finding of willful nonpayment on that statement and its own conclusion that the father should have borrowed money from his sister. The evidence does not support a finding of willfulness. Portions of order appealed from reversed, contempt portion of the proceeding dismissed. (Family Ct, Orange Co [Klein, JJ])

Juveniles (Custody)

JUV; 230(10)

Matter of Silverman v Wagschal, __AD3d__, 827 NYS2d 229 (2nd Dept 2006)

Holding: In 2003, the petitioner mother consented to the grant of custody of her children to the respondents. Her subsequent petition for modification was summarily denied, with prejudice, on the grounds that, among other things, she had failed to comply with certain directives in the 2003 order. Because the mother consented to custody being awarded to the respondents, no determination was made in 2003 as to whether extraordinary circumstances existed that would overcome the superior right of a parent over a nonparent to custody of a child. The court erred by dismissing the modification petition without holding a hearing to determine whether extraordinary circumstances exist. *See Matter of Vincent A.B. v Karen T.*, 30 AD3d 1100 *lv den* 7 NY3d 711. If extraordinary circumstances are established, the court must determine the best interests of the children. *See Matter of Wilson v Smith*, 24 AD3d 562, 563. Order reversed, petition reinstated, matter remitted. (Family Ct, Rockland Co [Christopher, JJ])

Misconduct (Prosecution)

MIS; 250(15)

People v Anderson, No. 2005-07926, 2nd Dept, 12/26/2006

Holding: At trial, the prosecutor referred to uncharged crimes in which the defendant had participated, improperly said that the defendant made a statement to the police without requesting an attorney “because ‘he knew he was guilty,’” sought to inflame the jury by making characterizations of the defendant’s behavior that were unsupported by the record, and engaged in other misconduct. Despite defense counsel’s failure to object, the unpreserved issue is reviewed in the interest of justice. *See CPL 470.15(6)(a)*. The evidence of guilt was less than overwhelming; the misconduct cannot be considered harmless. *See eg People v Maldonado*, 97 NY2d 522. It was sufficiently egregious to have deprived the defendant of a fair trial under CPL 470.15(6)(a). Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Brennan, JJ])

Second Department *continued***Juries and Jury Trials (Waiver)****JRY; 225(65)****People v Nicholson, No. 2004-09502, 2nd Dept,
12/26/2006**

Holding: At the defendant's trial for first-degree and second-degree robbery, the jury requested exhibits, read back of testimony, and further instructions before saying they were deadlocked. Some jurors needed to leave at 4:00 and might have scheduling conflicts if the case went into the next week. They were directed to continue. Shortly before 4:00 they indicated they had reached a verdict. The court offered the defendant a choice: accept the pending verdict or a court determination of guilt of third-degree robbery with a promise of a one-year sentence. Saying, "I hate to say this is a game show," the court noted that it was almost 4:00 and added "the options are yours." The defendant accepted the court's finding and was questioned about whether he had had enough time. After a brief additional pause, he was told that if the court learned the jury verdict was "not guilty" the court would still impose the one-year sentence. The defendant waived the jury and a mistrial was declared. The defendant failed to preserve review of the jury waiver; it is reached in the interests of justice. *See* CPL 470.15(6). Waiver of jury trial, governed by CPL 320.10, allows waiver "any time before trial." Court decisions have allowed waivers at early stages of a trial, where the waivers were knowing, voluntary, and intelligent. *See eg People v Williams*, 289 AD2d 48. This cannot be extended to waivers at such a late stage of proceedings; the circumstances here were coercive in nature. *See People v Davidson*, 136 AD2d 66, 69. No authority exists for the court to prematurely determine guilt and sentence as a condition of waiver. The defendant's invalid waiver cannot be deemed consent to the mistrial. He did not seek to have the jury trial terminated. Retrial would violate the prohibition against double jeopardy. *See* US Const 5th Amend; NY Const art I, section 6. Judgment reversed, indictment dismissed. (Supreme Ct, Kings Co [Goldberg, JJ])

Sentencing (Resentencing)**SEN; 345(70.5)****People v Parris, No. 2006-03132, 2nd Dept, 12/26/2006**

Holding: The defendant sought a resentencing under Chapter 643 of the Laws of 2005, which allows inmates convicted of class A-II drug felonies to seek resentencing if they meet certain conditions. They must be "more than twelve months from being an eligible inmate," meaning eligible for release on parole or who will become eligible for parole or conditional release within two years. *See* Correction Law 851(2). While Chapter 643 is "not a model of clarity" (*People v Bautista*, 25 AD3d 230)," the import of

its language is that inmates already eligible for release, or who will be eligible in a year or less, may not seek resentencing. While the defendant and the prosecution disagree on his parole eligibility date, both dates are less than three years from the date he filed for resentencing. The court properly found he is not entitled to seek that relief. Order affirmed. (County Ct, Orange Co [Berry, JJ])

**Parole (Board/Division of Parole)
(General)****PRL; 276(3) (10)****Venue (Change of Venue) (General)****VEN; 380(5) (20)****Matter of Vigilante v Dennison, __AD3d__,
827 NYS2d 285 (2nd Dept 2006)**

Holding: The respondent, a state prisoner, was denied parole release, and brought an article 78 proceeding in Kings County, where he had been sentenced, seeking review of the affirmance of that determination. The appellant, Chairman of the Division of Parole, cross moved to change the venue to Albany County, where the appellant has his principle office or, alternatively, Sullivan County, where the respondent is incarcerated.

The cross-motion should have been granted. The contention that Kings County was a proper venue because the crime and sentence there were "material events" that led to the challenged parole ruling (*see* CPLR 506[b]), is rejected. The challenged parole denial was affirmed on administrative appeal in Albany County, where the respondent's principal office is located. Order reversed, cross motion granted, clerk of Supreme Court, Kings County, to deliver all papers and certified copies to the clerk of the Supreme Court, Albany County. (Supreme Ct, Kings Co [Knipel, JJ])

**Homicide (Murder [Degrees
and Lesser Offenses]
[Evidence])****HMC; 185(40[g] [j])****People v Boyce, No. 2004-02140, 2nd Dept, 1/26/2007**

After the decedent's stabbed, beaten, strangled, and smothered body was found, the police located the defendant coming out of his apartment; the child he had fathered with the decedent was inside. The defendant drank acid at the apartment and was taken first to the local precinct, then to the hospital, giving a statement in each location. He admitted fighting with the decedent and putting his hands on her throat after she grabbed his testicles, but denied having a knife and said the decedent was speaking when he left. He was indicted for intentional and depraved indifference murder, and was acquitted of intentional murder but convicted of the depraved indifference count.

Holding: Viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), the evi-

Second Department *continued*

dence was legally insufficient to establish depraved indifference murder. *See People v Feingold*, 7 NY3d 288. That the acts committed against the decedent were “voluntary” under Penal Law 15.00(2) did not mean they must have been done with the conscious objective or intent to kill. *See People v Rodriguez*, 33 AD3d 730, 731; Penal Law 15.05(1). The jurors concluded that the defendant caused the decedent’s death but did not do so intentionally. A valid line of reasoning or permissible inference from the evidence could allow a reasonable jury to conclude that the defendant acted recklessly, as the jury implicitly did. The evidence failed to establish the depravity and indifference to human life required for depraved indifference murder. It is sufficient to support the implicit finding of recklessness, and therefore a finding of the lesser-included offense of second-degree manslaughter. *See People v Magliato*, 110 AD2d 266 *affd* 68 NY2d 24. Judgment modified, murder reduced to second-degree manslaughter, and remitted for sentencing. (Supreme Ct, Kings Co [D’Emic, JJ])

Assault (Evidence) (Instructions)	ASS; 45(25) (45)
Instructions to Jury (General) (Theories of Prosecution and/or Defense)	ISJ; 205(35) (50)

People v Martin, __AD3d__, 826 NYS2d 747 (2nd Dept 2006)

Holding: The defendant, exiting her apartment building as police prepared to execute a search warrant, was arrested. She allegedly bit an officer as she was being handcuffed and claimed to be infected with AIDS; she was charged with second-degree assault under Penal Law 120.05(3). The defense presented no witnesses at trial. During a pre-charge conference, the prosecutor asked that the jury be told no issue existed as to whether the police were performing a lawful duty at the time of the incident; defense counsel argued that the lawful duty element was a jury question. The court disallowed any defense argument to the jury as to lawful duty, and instructed the jury that there was no issue that police were performing such. As there is no record support for the prosecution’s contention that the defense conceded the lawful duty element, it was reversible error to remove such element from the jury’s consideration. *See People v Milhouse*, 246 AD2d 119, 123. Judgment reversed, new trial ordered. (Supreme Ct, Kings, Co [Marrus, JJ])

Assault (Evidence)	ASS; 45(25)
Evidence (Sufficiency)	EVI; 155(130)

People v Richmond, __AD3d__, 826 NYS2d 748 (2nd Dept 2006)

Holding: The defendant bit the complainant on the arm. The complainant took a course of antibiotics, but aside from tenderness and swelling, experienced no bleeding or symptoms that required pain medication or missing of work. There was not sufficient evidence to show “impairment of physical condition,” which is how “physical injury” is defined. *See Penal Law 10.00(9)*. Nor was there evidence from which it could be inferred that the complainant suffered substantial pain. *See People v Pierrot*, 31 AD3d 582.

The issue as to the sufficiency of evidence supporting the conviction for resisting arrest was not preserved. Judgment modified, second-degree assault county vacated and dismissed. (Supreme Ct, Queens Co [Cooperman, JJ])

Third Department

Counsel (Competence/Effective Assistance/Adequacy) (Conflict of Interest) (Standby and Substitute Counsel) **COU; 95(15) (10) (39)**

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

People v Williams, No. 15383, 3rd Dept, 12/28/2006

Holding: After he pled guilty to attempted first-degree promoting prison contraband, but before sentencing, the defendant moved to withdraw his plea. He said his attorney had incorrectly told him that the complainant’s taped statement contained no exculpatory evidence. The defendant sought the appointment of substitute counsel as to the motion because the claim of ineffective assistance of counsel presented a conflict of interest. The court, relying on the long procedural history of the defendant’s case, the “active and detailed role” that counsel had played in a difficult matter, and the defendant’s acknowledgement at the time of the plea that he had not been coerced, denied the motion. There was no exploration of whether exculpatory evidence existed and whether counsel misinformed the defendant about the complainant’s statement. The concrete, sworn allegations by the defendant, together with corroborating evidence in the record that a taped statement by the complainant did exist and was reviewed by counsel, warranted a hearing. *See People v Ferreras*, 70 NY2d 630, 631. The court failed to address the issue of a conflict of interest, which is clear on the record. The defendant showed good cause for substitution of counsel. If his allegations are substantiated, withdrawal would be warranted. While the application pursuant to CPL 440.10 is premature, it was considered on the merits below and is reviewed as if made pursuant to CPL 220.20(3). The sentence must be vacated to allow reconsideration of the withdrawal motion. Judgment

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modified, sentence vacated, new counsel appointed, and matter remitted for a new hearing. (County Ct, Chemung Co [Buckley, JJ])

Narcotics (Penalties) **NAR; 265(55)**

Parole (General) **PRL; 276(10)**

**Matter of Ciccarelli v New York State Division of Parole,
No. 500347, 3rd Dept, 12/28/2007**

The petitioner sought in a CPLR article 78 proceeding to overturn a denial of his request for termination of his parole. The petition was dismissed.

Holding: Released on parole in 1993 after receiving a sentence of four years to life on each of two class A felony drug counts, the petitioner served over five consecutive years on parole without incident. Then, in 1999 his parole was revoked and he was reincarcerated. He was again released, then re-incarcerated after six months; this occurred again after one year. In April 2005 he asked that his sentence be terminated under a 2004 amendment to the drug laws, mandating termination of sentence for someone who has completed three years of unrevoked parole. *See* Executive Law 259-j (3-a). The court correctly denied the request. The statutory text requiring “three years of unrevoked parole” does not contemplate a period of parole served which was ultimately revoked.” Neither the statute’s language nor its history suggests that it should apply to parole periods that, while over three years in length, ended in violation and reincarceration. The Legislature’s specification of an effective date showed that it intended the provision to apply only to “persons who had or would thereafter accrue a period of unrevoked parole on or after” that date. *See People v Walker*, 26 AD3d 676, 677. Judgment affirmed. (Supreme Ct, Albany Co [Teresi, JJ])

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

**People v Degiorgio, __AD3d__, 827 NYS2d 342
(3rd Dept 2007)**

Holding: The evidence was legally sufficient to support the conviction of aggravated cruelty to animals. *See* Agriculture and Markets law 353-a (1). The law criminalizes intentional killing of or causing serious physical injury to a companion animal “with aggravated cruelty.” Acts intended to cause extreme physical pain or done in an “especially depraved or sadistic manner” are included in “aggravated cruelty.” Passage of the law was based in part on the “recognized relationship between violence against animals and subsequent violence against people (*see* Assembly Mem, 1999 McKinney’s Session Laws of

NY, at 1585).” Although the individual acts of the defendant might not establish aggravated cruelty, they satisfied the requisite elements when considered cumulatively. While wearing boots, the defendant kicked an 18-pound, 12-year-old Dachshund, picked it up by the neck and shook it, banged its head against a door, and threw it down stairs onto a cement basement floor.

The series of early-morning messages left for the complainant—the defendant’s girlfriend and owner of the dog—after she had reported the dog incident to the police were legally sufficient to establish intimidating a witness. In the context of the recently-made charges and upcoming proceedings, the profanity-laced calls, in which the underlying offense was repeatedly mentioned and numerous vile actions against the complainant were threatened, could be interpreted as an effort to intimidate her into not testifying or cooperating further with authorities. *See People v Buchanon*, 176 AD2d 1001, 1002. Judgment affirmed. (County Ct, Sullivan Co [Labuda, JJ])

Defenses (Agency) **DEF; 105(0)**

Sentencing (Excessiveness) **SEN 345(33)**

**People v Nealon, __AD3d__, 827 NYS2d 359
(3rd Dept 2007)**

Holding: The second felony offender sentence of 10 to 20 years in prison is unduly harsh and excessive. The defendant suffers from physical disabilities, a seizure disorder, mitigating psychological disorders, and substance abuse. He has an extensive but nonviolent, criminal history. The interests of justice would be best served by a sentence of six to 12 years. *See People v Pham*, 31 AD3d 962, 967.

The jury properly rejected the agency defense. There was evidence that the defendant approached and told the female seller he had a sale for her. The testimony of the undercover detective and of the confidential informant was persuasive and consistent with regard to the defendant approaching them without having any prior relationship, readily agreeing to provide them drugs, directing them to “his girl,” and taking the buy money. The defendant did take a piece of the crack cocaine for himself before delivering it, and unsuccessfully sought from the buyers an additional piece. A different verdict could have been returned, but the jury’s decision to credit the prosecution’s witnesses and inferences was supported by credible evidence.

The defendant’s further contentions, that the court’s *Molineux* ruling deprived the defendant of a fair trial and that the prosecution’s reason for delaying the trial was deliberate misrepresentation, are rejected. Judgment modified, sentence reduced, and otherwise affirmed. (County Ct, Rensselaer Co [Czajka, JJ])

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Appeal (Record) APP; 25(80)

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

People v Faulkner, __AD3d__, 826 NYS2d 850 (3rd Dept 2007)

Holding: The court erred by denying the defendant’s challenge to a juror who said he had been on a previous jury that convicted two Cancer family members. The defendant and the jointly-tried co-defendant are both members of the Cancer family, although their surnames are different, and a separately-tried co-defendant is named Cancer. While the limited transcription of voir dire is unclear as to whether the jury was initially told of the defendant’s familial relationship, the prosecutor clearly elicited evidence during trial that the defendant is also known as “Maleek Cancer.” The judge acknowledged that the challenged juror had said his prior jury service “‘might affect him,’” but the record does not reveal whether the court probed further, as is required, to elicit unequivocal assurance that the juror could be fair and impartial. See *People v Johnson*, 94 NY2d 600, 616. Verbatim transcription of voir dire may be waived, but reversal is mandated when the defendant is prejudiced by the absence of a full stenographic record. See *People v Harrison*, 85 794, 796. The defendant peremptorily challenged the juror in question, and exhausted all peremptory challenges, as did his co-defendant. See CPL 270.20(2). Judgment reversed, remitted for new trial. (County Ct, Albany Co [Breslin, JJ])

Guilty Pleas (Errors Waived By) (General [Including Procedure and Sufficiency of Colloquy]) GYP; 181(15) (25)

People v Pagan, No. 16425, 3rd Dept, 1/25/2007

Holding: After being found in possession of a cellular phone, the defendant, a prisoner, was charged with first-degree promoting prison contraband. Without waiving his right to appeal, he pled guilty to attempted first-degree promoting prison contraband. He did not move to withdraw his plea or vacate the judgment. Where the court accepted the plea in the face of an allocution that cast significant doubt on the defendant’s guilt and the voluntariness of the plea, the narrow preservation exception applies. See *People v Lopez*, 71 NY2d 662, 666. Defense counsel told the court that the defendant would admit having a cell phone but not that he possessed a “dangerous instrument.” First-degree promoting prison contraband requires that the contraband in question be capable of use that may endanger the safety or security of the facil-

ity or any person in it. Penal Law 205.00(4), 205.25(2). Items such as weapons may be inherently dangerous. See *People v Rosario*, 262 AD2d 802, 803 *lv den* 93 NY2d 1026. But the element of dangerousness is not inherent where the danger posed is not apparent without more. See *People v Salters*, 30 AD3d 903, 904. The defendant’s refusal to acknowledge that the item he possessed was dangerous negated a requisite element. Absent any evidence giving rise to an inference of dangerousness, any showing that the defendant’s misapprehension about the charges was corrected, and any support for finding that the defendant’s plea was a voluntary and rational choice, his plea must be vacated. Judgment reversed, plea vacated, matter remitted. (County Ct, Saratoga Co [Scarano, Jr., JJ])

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

People v Stewart, No. 16127, 3rd Dept, 1/25/2007

Holding: In 1997 the defendant’s 1995 conviction for depraved indifference murder was affirmed and leave to appeal to the Court of Appeals was denied. The defendant had admitted that he repeatedly hit his foster father in the head with a fireplace poker so the father would not come toward the defendant. Following the decisions in *People v Payne* (3 NY3d 266) and its progeny, the defendant sought to vacate his conviction. Because the issue of legal sufficiency of evidence was decided against him in his original appeal, relief cannot be granted on that ground unless there has been a retroactive change in the law since 1997. See CPL 440.10(2) (a); 440.20(2). While the Court of Appeals has now expressly overruled *People v Register* (60 NY2d 270), relied upon in affirming the defendant’s conviction in 1997 and in denying his 440 motion below, reversal is not required. “The defendant’s arguments implicate two separate elements of depraved indifference murder—recklessness and depraved indifference to human life.” The law on recklessness remains unchanged. It is not permissible to convict of depraved indifference murder on evidence that indicates a killing by the defendant was done with the conscious objective to kill. See *Policano v Herbert*, 7 NY3d 588, 600. What has changed relates to what circumstances evince a depraved indifference to human life “and the instances in which the ‘circumstantial proof’ may permit a ‘reasonable fact-finder [to] infer’” depraved indifference. See *People v Feingold*, 7 NY3d 288, 297. Under *Register*, recklessness was the only mens rea required; now depraved indifference to human life is also defined as a culpable mental state. It is now clear that a one-on-one knifing, shooting, or similar killing can almost never qualify as one done with depraved indifference. See *Policano v Herbert*, 7 NY3d 588, 601. The defendant’s claim turns mainly on the assertion that recklessness was not shown, that he was guilty of no crime if not an intentional one. See *People v Gonzalez*, 160 AD2d 502,

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504. This was precisely what he raised in his initial appeal. To the extent that the defendant raises the sufficiency of evidence of depraved indifference, the affirmance of his conviction could not stand if current law applied. The recent case law does not apply retroactively, as noted in *Policano*. Order affirmed (County Ct, Schenectady Co [Drago, JJ])

Fourth Department

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

People v Hunter, No. KA 04-01898, 4th Dept, 12/22/2006

Holding: The defendant asserted at sentencing that counsel had induced his guilty plea by telling him that a suppression hearing could be held after the plea. Questioned by the court, the lawyer denied it. The court should have appointed different counsel before ruling on the defendant's motion. *See People v Chrysler*, 233 AD2d 928. While the lawyer was under no obligation to support the pro se motion, by becoming a witness against the defendant he deprived the defendant of effective assistance of counsel. *See People v Lewis*, 286 AD2d 934, 935. Appeal held, matter remitted for a de novo determination of the motion after assignment of counsel. (Supreme Ct, Erie Co [Forma, JJ])

Search and Seizure (Consent [Evidence and Burden of Proof]) **SEA; 335(20[k])**

People v Hall, No. KA 06-01884, 4th Dept, 12/22/2006

Holding: The prosecution appealed the suppression of evidence seized from the defendant's car and statements made to police. The record shows that the prosecutor failed to meet the heavy burden of showing that the defendant consented to the search (*see People v Gonzalez*, 39 NY2d 122, 128) and that the search did not exceed the scope of any consent given. Where the substance of the communication between the defendant and the officers who stopped his vehicle was not proven, the court could not determine what a reasonable person would have understood from the conversation. *See People v Gomez*, 5 NY3d 415, 419. Even if either of the versions presented at the hearing are accepted, all that was established was that the defendant was asked if police could check the vehicle or look in it, which would not amount to consent to search it. *See People v Love*, 273 AD2d 842. The gun found in the trunk, the defendant's subsequent statements, and evidence seized from the vehicle thereafter were properly suppressed. *See gen Wong Sun v US*, 371 US 471, 487-488

(1963). The alternative theory that the police had probable cause to search was not advanced below. Order affirmed, indictment dismissed. (County Ct, Erie Co [D'Amico, JJ])

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

People v Harris, __AD3d __, 825 NYS2d 876 (4th Dept 2006)

Holding: Failure to disclose to the defense exculpatory material obtained by a prosecution investigator requires reversal. The information affected the credibility of a key witness, making it *Brady* material (*see Brady v Maryland*, 373 US 83 [1963]). The defense made a specific request for such material. There being a "reasonable possibility" that disclosure of the material would have led to a different result, reversal is required. *See People v Bond*, 95 NY2d 840, 843. Judgment reversed, new trial ordered. (Supreme Ct, Monroe Co [Sirkin, AJ])

Juries and Jury Trials (Discharge (Voir Dire)) **JRY; 225(30) (60)**

People v Habte, __AD3d __, 825 NYS2d 626 (4th Dept 2006)

Holding: In response to a prosecution question, a potential juror said that he could not convict based on the testimony of just one witness, even a credible one, because "We're supposed to take everything into consideration." The court dismissed him because the statement showed the juror was unable to be fair and impartial. While the court had broad discretion to control and restrict voir dire questioning (*see People v Boulware*, 29 NY2d 135, 140 *rearg den* 29 NY2d 670, 749 *cert den* 405 US 995), defense counsel must be afforded an opportunity to question potential jurors about relevant matters. *See People v Jean*, 75 NY2d 744, 745. The potential juror's response here did not prove he was unable to be fair and impartial, and the defense should have been allowed to question him. Judgment reversed, new trial granted. (Supreme Ct, Monroe Co [Egan, JJ])

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

Matter of Erie County Department of Social Services v Mamie W.-K., No. CAF 05-01467, 4th Dept, 12/22/2006

Holding: The petitioner presented clear and convincing evidence that the respondent is presently and for the foreseeable future unable to provide proper and adequate care for her children due to mental illness. *See Social Services Law* 384-b(4)(c). Psychological harm may result from an abrupt and complete severing of parent/child

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bonds, especially when the children involved are older and have strong emotional attachments to the parent. See *Matter of Gregory B.*, 74 NY2d 77, 90. Where parental rights are terminated under Social Services Law 384-b(4)(c) and (d), Family Court may when deemed appropriate use its discretion to determine “whether some form of posttermination contact with the biological parent is in the best interests of the child.” Cf *Matter of Labron P.*, 23 AD3d 943, 945. To the extent that prior decisions have held otherwise (see *Matter of Kenneth D.*, 32 AD3d 1237 and *Matter of Livingston County Dept. of Social Servs. v Tracy T.*, 16 AD3d 1133), those decisions should no longer be followed. In determining the children’s best interests here, factors the court may consider include the children’s ages, the bond between the children and the respondent, and the likelihood they will be adopted. Order modified, matter remitted for a hearing. (Family Ct, Erie Co [Carter, JJ])

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

Identification (Wade Hearing) **IDE; 190(57)**

**People v Terborg, __AD3d __, 825 NYS2d 897
(4th Dept 2006)**

Holding: The defendant was convicted of fourth-degree possession of stolen property, fourth-degree criminal mischief, and third-degree unauthorized use of a vehicle. The verdict as to criminal mischief was against the weight of the evidence as to intent. While the defendant may have acted recklessly with respect to the damage to the complainant’s car, “the evidence weighs heavily in favor of a finding that defendant did not specifically intend to damage the car (see *People v Ruiz*, 159 AD2d 656, 657, *lv denied* 76 NY2d 742. . .).”

The defendant’s request for a *Wade* hearing should have been granted. The “initial police viewing . . . was fleeting, unreliable and susceptible of misidentification.” *People v Boyer*, 6 NY3d 427, 429. “[I]t is not clear that the identification could not be mistaken’ as a matter of law.” See *People v Pittman*, 31 AD3d 469, 470. If the identification process was tainted by police suggestiveness, the defendant is entitled to a new trial on the relevant counts. Judgment modified, criminal mischief conviction reversed and dismissed, matter remitted for further proceedings. (County Ct, Monroe Co [Keenan, JJ])

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

**Matter of Jeffrey T. v Julie B., No. CAF 06-00167,
4th Dept, 12/22/2006**

Holding: The Family Court modified a prior visitation order and provided that during any time that the petitioner father was incarcerated, visitation would occur at the child’s request. This was error. See *Matter of Iadicicco v Iadicicco*, 270 AD2d 721, 722. The court must determine whether visitation during incarceration is in the child’s best interests and if it is, fashion an appropriate schedule. See *gen Matter of Crowell v Livziey*, 20 Ad3d 923, 923-924. The remaining contentions are not preserved or need not be addressed. Order modified, second paragraph vacated, matter remitted for a new hearing. (Family Ct, Monroe Co [Rivoli, JJ])

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

**People v Perkins, __AD3d __, 826 NYS2d 875
(4th Dept 2006)**

Holding: The Board of Examiners of Sex Offenders recommended, after assessing the defendant as a level two risk under the Sex Offender Registration Act (Correction Law 168 *et seq*), an upward departure to a level three, based in part on the defendant’s mental health history of depression and drug and alcohol dependency. The court’s determination setting the defendant’s risk level at three on that basis was error because the defendant’s substance abuse was already taken into account in the risk assessment instrument. See *People v Mount*, 17 AD3d 714, 715. The record is devoid of evidence that the “defendant’s mental health history is ‘causally related to any risk of reoffense’ (*People v Zehner*, 24 AD3d 826, 827.)” Order modified, defendant determined to be a risk level two. (Supreme Ct, Monroe Co [Geraci, Jr., AJ])

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

**People v Wilbert, No. KA 06-01940, 4th Dept,
12/22/2006**

Holding: The defendant sought a redetermination of his Sex Offender Registration Act (SORA) (Correction Law 168 *et seq*) risk level determination pursuant to the settlement in *Doe v Pataki* (439 FSupp2d 324 [SDNY 2006]). His risk level was determined to be level three. The record shows that the prosecution failed to establish a basis for 15 points assessed on the risk assessment instrument under the risk factor for drug or alcohol abuse. See *gen People v Price*, 31 AD3d 1114, 1115. The defendant became an Alcoholics Anonymous member upon release from prison and had remained alcohol-free for eight years. Cf *People v Villane*, 17 AD3d 336. Nor was there evidence to support assessment of 10 points for conduct while confined/supervised, where evidence of the defendant’s exemplary behavior on parole and thereafter was shown. The defen-

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defendant's involvement in physical altercations was shown to be defensive in nature. The points established under risk factor nine were duplicative of those assessed under risk factor eight. Order modified, defendant determined to be risk level two, and affirmed as modified. (County Ct, Wayne Co [Kehoe, JJ])

Search and Seizure (Warrantless Searches) SEA; 335(80)**People v Fravel, __AD3d __, 825 NYS2d 624 (4th Dept 2006)**

Holding: The defendant was convicted of forgery and other crimes. At a suppression hearing prior to trial, evidence was offered that at about 3:55 a.m., a 911 call was received that a car alarm was going off and that men next to a truck in a specified parking lot were arguing. Responding officers heard no alarm and saw no one near the specified vehicle. There was no testimony that officers who searched vehicles in the area saw signs of criminal activity; one officer saw a laptop computer, closed but with the power on, in the back of a pickup along with a spiral notebook, utility bill, and a cloth case. These were taken to the police station, where forged identification cards were found in the cloth case. An officer recognized the defendant from the photograph on the cards. Contrary to the prosecution's position, they did not meet their burden of showing that an emergency situation existed to justify a warrantless search to protect life or property. See *People v Mitchell*, 39 NY2d 173, 177 *cert den* 426 US 953. Judgment reversed, suppression granted, indictment dismissed, matter remitted. (Supreme Ct, Onondaga Co [Brunetti, AJ])

Sentencing (Appellate Review) SEN; 345(8) (37) (70) (General) (Pronouncement)**People v Dowdell, __AD3d __, 825 NYS2d 865 (4th Dept 2006)**

Holding: The defendant's challenges to his guilty plea were not preserved, did not survive his waiver of the right to appeal, or are without merit. His contention that the court failed to exercise its sentencing discretion did survive the waiver of appeal. See *People v Stith*, 30 AD3d 966, 966-967. It also has merit. The record shows that the defendant agreed to cooperate with the prosecutor's office in exchange for a recommendation of a sentence less than five to 15 years. The prosecutor made no such recommendation, and the court indicated it was bound to that sentence. That was error. See *People v Farrar*, 52 NY2d 302, 305. Judgment modified, sentence vacated, matter remitted for resentencing. (County Ct, Onondaga Co [Walsh, JJ])

Accusatory Instruments (General) ACI; 11(10) (15) (Sufficiency)**People v Goforth, No. KA 04-01776, 4th Dept, 1/10/2007**

Holding: The defendant pled guilty to third-degree weapon possession. Penal Law 265.02(4). Third-degree weapons possession is not a lesser included offense of second-degree weapons possession. See *People v Totten*, 161 AD2d 678. The superior court information (SCI) was jurisdictionally defective because the defendant had not been held for grand jury action on third-degree possession. See CPL 195.20; *People v Kohl*, 19 AD3d 1155. Because the SCI did not include the second-degree possession charge that was included in the felony complaint, the third-degree possession is not a joinable offense to the charge on which the defendant was held for the grand jury. The SCI was defective on this ground also.

Waiver of indictment procedures are set out in CPL 195.20. The *People v Johnson* (89 NY2d 905, 907-908) exception "'allowing pleas to crimes with common elements of fact and law. . . does not apply to waivers of indictment.'"

Judgment reversed, plea vacated, SCI dismissed, matter remitted. (County Ct, Erie Co [Troutman, JJ]) ⚖

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