



Public Defense Backup Center
REPORT

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Defender News

Sex Offender Management and Treatment Act Is Law

In March, Governor Eliot Spitzer signed legislation providing for civil commitment of sex offenders in New York. The Sex Offender Management and Treatment Act, codified as Mental Hygiene Law Article 10, fundamentally alters what it will take to effectively represent clients in the wide range of cases it covers. The law passed despite some brave public opposition, exemplified by *Newsday's* editorial decrying of a law that says, "You do the time if we think you might one day do the crime" (www.newsday.com, 3/2/07) and the *Albany Times Union's* call for measures that would increase safety, measures that would be "preferable to punishing people for crimes they might commit." (www.timesunion.com, 3/6/07.)

NYSDA Provides Information

NYSDA quickly began training lawyers about the new law. An analysis of the new law and what it means for criminal defense, entitled "Actuarial Justice—Representing Sex Offenders Facing Lifetime Civil Confinement," is posted on the Megan's Law page in the Hot Topics area of NYSDA's web site, under Key Documents. Senior Staff Attorney Al O'Connor, who wrote the article, joined Richard Hamill of Forensic Mental Health Associates to present a session on the new law at this year's Metropolitan Trainer on April 7th (see p. 8).

In "Actuarial Justice," O'Connor notes that potential lifetime civil confinement will be the "elephant in the room" in all plea negotiations where serious sex offenses have been charged. Defense attorneys must know the procedures that clients will face at the end of their prison sentences, advise clients about the practical consequences of this new legislation, and, when possible, help clients minimize their vulnerability.

O'Connor summarizes the Act as follows:

The Act authorizes lifetime confinement of "mentally abnormal" dangerous sex offenders following completion of their penal sentences. It provides two stages of administrative review by

mental health personnel prior to an inmate's discretionary referral to the Attorney General for prosecution in a civil jury trial. The State must prove to a jury's satisfaction by clear and convincing evidence the respondent-inmate has a mental abnormality that predisposes him to commit sex offenses, and that he has serious difficulty controlling his behavior. If the jury so finds, the judge alone will determine whether the respondent is "likely" to reoffend, a finding that will result in the respondent's indefinite commitment to a secure treatment facility for care and treatment. If the court finds the respondent is not likely to reoffend, he will be ordered to submit to strict and intensive civil parole supervision, potentially for life. The Act also establishes the new category of "sexually motivated crimes," expands determinate sentencing, reclassifies certain offenses as violent felonies, and greatly increases the period of post-release supervision for felony sex offenses.

Topic headings in "Actuarial Justice" give an indication of the complexity of this new legislation and its impact on representation of persons charged with sex offenses. Besides areas that are at least familiar to criminal defense lawyers (*e.g.*, New Periods of Post Release Supervision—Sex Offenses, Crimes Covered by the Act, Prospective and Retroactive Applications, Juvenile Offenders, Mental Disease or Defect—Not Competent to Stand Trial [§ 10.03 (g)]), the new legislation entails new or less-frequently encountered concepts, such as actuarial instruments.

Attorneys representing accused or convicted sex offenders have already been required to deal with one (very bad) actuarial risk assessment instrument, that used by the Board of Examiners of Sex Offenders in recommending risk levels

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under the Sex Offender Registration Act. But as O'Connor notes, that instrument will surely not be used in this new context, as it "has never been validated, is widely discredited in the field, and would never hold up to serious scrutiny in the context of a civil commitment proceeding." Defense lawyers will, if they were not previously familiar with them, need to understand the workings of other instruments such as the STATIC-99.

Other information about the new legislation that defense lawyers will need to learn and understand includes:

- which clients, in what situations, are vulnerable?
- what, if anything, can attorneys and clients do to minimize clients' vulnerability at each stage of their case?
- what individuals and entities will be involved in the proceedings surrounding civil confinement, what are their roles, and what do their roles mean for clients?
- what does "civil confinement" actually entail?

All this and much more is set out in "Actuarial Justice," which is "must" reading for all attorneys who represent persons accused of sex offenses in trial courts even if they are never called upon to handle the civil commitment proceedings for clients when Mental Hygiene Legal Services, the designated provider of representation at that stage, cannot.

MHLS Challenges New Provisions

A month after Spitzer signed the bill, Mental Hygiene Legal Services brought suit in federal court seeking a declaratory judgment that several aspects of the new law are unconstitutional. Among the claims filed is one stating that the act violates the Due Process Clause (US Const, Amend XIV) because section 10.06(f), providing for deprivations of liberty under a "securing petition," "provides inadequate procedural safeguards to protect against an erroneous deprivation of liberty pursuant to" such petitions.

Some claims relate to the new law's provisions regarding defendants who have been found incompetent under Criminal Procedure Law 730, including both due process and equal protection claims. An equal protection claim is also alleged as to the different standards applied to persons convicted of non-sex crimes before the effective date of the act and those convicted after.

Actual Effects Remain to Be Seen

What "treatment" confined offenders receive remains a major question. Some proponents of the new legislation like Westchester County District Attorney Janet DiFiori claim that, "Proper treatment can help to break the cycle of recidivism and better serve society's interest in enhanced and sustained public safety." (www.thejournalnews.com,

3/21/07.) But a report on a Florida facility for the treatment of sex offenders indicates that even those running the facility were unsure about the facility's function:

"What is this place? Is it a prison? Is it a mental health center? A residential treatment facility where people are clients? What is it? We ask that question sometimes too. We really don't have a lot of guidance around what it is the state wants the facility to be . . ." (www.nytimes.com, 3/5/07.)

Vargas to Receive Wasserman Award

NYSDA and its Immigrant Defense Project (IDP) congratulate Manuel D. Vargas on being the 2007 recipient of the American Immigration Lawyers Association (AILA) Jack Wasserman Memorial Award. This national award was established by the AILA in 1980 to recognize attorneys who demonstrate an excellence in litigation in the field of Immigration Law.

The founding Director of IDP, Manny continues his work there as Senior Counsel. Manny's longstanding skill and commitment to seeking immigration reform was instrumental in the positive decision issued by the US Supreme Court in *Lopez v Gonzalez* (__US__, 127 S Ct 625 [2006]). The *Lopez* Court held that the government has been misapplying immigration law by subjecting lawful permanent resident immigrants to automatic deportation for drug possession offenses. This will have a dramatic impact on thousands of lawful permanent residents who were wrongly facing automatic deportation (*see* Immigration Practice Tips in the Nov-Dec issue of the *REPORT*).

In addition to his work in *Lopez*, Manny is the author of the well-known immigration manual, *Representing Immigrant Defendants in New York*, now available in its 4th Edition. Through litigation, counseling, training, and writing, Manny has helped thousands of immigrants and their

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families, lawyers representing immigrants, and the cause of justice. He richly deserves the Jack Wasserman Award.

For more information about the IDP and NYSDA, including information on ordering the 4th edition of Manny's manual, visit www.nysda.org and www.immigrantdefenseproject.org.

Rejecting Expert Testimony on Eyewitness ID Found Error

The Court of Appeals has reversed a conviction due to the trial court's refusal to admit expert testimony concerning eyewitness identification. The ruling is the latest in a series of 21st century decisions on the subject.

In 2001, the Court held in *People v Lee* (96 NY2d 157) that admission of expert testimony on eyewitness identification is in the trial court's sound discretion; no abuse of discretion was found in that case. In 2006, the Court again declined to reverse a conviction on this issue. It noted that courts must consider whether jurors would benefit from specialized expert knowledge beyond their common experiences, the importance of identification evidence in the case, and the amount of corroborating evidence. *People v Young*, 7 NY3d 40.

In the current case, *Lee* and *Young* were distinguished on the facts. No corroborating evidence supported the eyewitness identification of the defendant in *People v LeGrand*, __NY3d__ (No. 39 [3/27/07]). The case was reversed. A summary of the decision appears on p. 20.

One commentator quickly questioned how the *LeGrand* corroboration factor "squares with" *Holmes v South Carolina*, 547 US 319, ___, 126 SCt 1727, 1735 (2006). (indignantindigent.blogspot.com 4/2/07.) *Holmes* says, in language that seems equally appropriate to the issue in *LeGrand*, "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." The *Holmes* Court found that precluding evidence of a third party's possible guilt of the offense charged if the evidence against the defendant was strong "violates a criminal defendant's right to have 'a meaningful opportunity to present a complete defense.'"

On the issue of expert testimony about eyewitness identification, *LeGrand* brings the entire Court of Appeals to Chief Judge Judith S. Kaye's dissenting position as an associate judge 17 years ago, in *People v Mooney* (76 NY2d 827, 829-830). She noted then that increasingly, scientific evidence indicated that expert testimony on eyewitness identification was "sufficiently reliable to be admitted." (NYLJ, www.law.com, 3/28/07.)

"Weapons Focus"

The Court said in *LeGrand* that while the expert testimony could have been admitted without a hearing, based

on the *Frye* rulings (*Frye v US*, 293 F 1013 [CADC 1923]) of other courts, the trial judge had a right to conduct a hearing to assess whether there was a proper foundation "for the reception of the evidence at trial." Reviewing the *Frye* hearing in *LeGrand*, the Court found that the general acceptance prong of the test for admission of scientific evidence was satisfied as to three of four factors studied with regard to the reliability of eyewitness identifications: correlation between confidence and accuracy of identification; effect of post-event information on accuracy of identification; and confidence malleability.

But the court found that evidence as to the fourth factor said to influence memory, the effect of "weapon focus," was properly excluded. The Court's ruling on this point was discussed at some length on the Eyewitness Identification Reform Blog, which focuses on the law and policies addressing eyewitness IDs. Weapons focus is "the phenomenon in which the presence of a weapon during the commission of a crime negatively affects the eyewitness's ability to later identify the perpetrator." According to a blog entry, 87% of recently-surveyed experts believe the research on weapon focus is now sufficiently reliable to allow its use in court. The entry concludes that the *LeGrand* ruling "can only reasonably be read to mean that the trial court there had not erred in excluding testimony because the defense had failed to demonstrate consensus on that record" (emphasis in original). (<http://eyeid.blogspot.com>, 3/30/07.)

A later entry on the same blog discusses a joint DOJ/FBI publication, *Violent Encounters: A Study of Felonious Assaults on Our Nation's Law Enforcement Officers*, see www.ncjrs.gov/App/QA/Detail.aspx?Id=1076&context=9 (Aug. 2006). The report is said to include a chapter on weapons focus, as well as chapters on other factors affecting memory. The blog entry concludes: "This publication is a substantial concession from the law enforcement community that the psychological phenomena that prosecutors routinely dismiss as academic curiosities have real world application, as defense attorneys have known and argued for years." (<http://eyeid.blogspot.com>, 4/25/07.)

Erroneous Eyewitness ID Leads to Wrongful Conviction

The Eyewitness Identification Reform Blog also reported on a recent exoneration case in Missouri in which DNA had proven yet another eyewitness identification wrong. The case was unusual because the crime of conviction was robbery, in which DNA evidence is rarely available. Statistically calculating "that over 17 people per year are wrongfully convicted of robbery, or over 300 since 1989," while "only 6 of the exonerees between 1989 and 2003 were convicted of robbery," the blog entry calls for fixing the policies, procedures, and laws governing eyewitness evidence in criminal trials, to "stop wrongful

convictions *before* they happen.” (<http://eyeid.blogspot.com>, 4/2/07.)

Erroneous identifications harm the innocent persons imprisoned, but ultimately harm crime victims and the community at large as well. Exonerated defendants trying to save others from this horror have more than once joined with victims trying to prevent future misidentifications. Members of the family of Debra Sue Carter, along with Dennis Fritz, one of the men whose wrongful conviction for Carter’s murder was chronicled by John Grisham in *The Innocent Man* (reviewed in the *Backup Center REPORT*, Nov-Dec 2006), are pushing for creation of a commission to look at the issue. (www.tuttleimes.com [Tuttle OK], 4/5/07.)

Reform Efforts Grow

Commentators, citizens, and state officials nationwide are addressing the need to increase the reliability of eyewitness identification evidence. Stanley Z. Fisher, a Professor at Boston University School of Law, has written “Eyewitness Identification Reform in Massachusetts,” Working Paper No. 07-07 (available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978477). According to the abstract, Fisher “examines obstacles to the spread of reform practices statewide, including: 1) the decentralized system of law enforcement, which allows each police department discretion to choose its methods of criminal investigation; and 2) the failure of police training authorities to enforce statewide training according to a uniform curriculum.” His article also “describes a pilot study to learn how police in two ‘reform’ counties have implemented reforms in photo array procedures.”

North Carolina is among the states with pending legislation that would prescribe identification procedures intended to reduce misidentifications. Changes in ID procedures were recommended in 2003 by a state judicial commission looking at ways to reduce wrongful convictions. (www.charlotte.com, 4/25/07.)

A recent *National Law Journal* article set out other past and present—successful and still pending—lineup reform efforts in several states. Among them were West Virginia, Maryland, Georgia, Wisconsin, New Jersey, New Mexico, and Illinois. (*NLJ*, www.law.com, 4/9/07.)

Also in Illinois, the National Association of Criminal Defense Lawyers has brought suit seeking from the Illinois State Police and other agencies the underlying data for a controversial 2006 report claiming to cast doubt on the efficacy of the sequential double-blind identification procedure touted by many experts as necessary reform. (*The Champion*, www.nacdl.org, March 2007.) Meanwhile, reports on the exoneration in North Carolina of the Duke lacrosse team in a highly-publicized rape accusation included references to an extremely suggestive photographic lineup and need for reform. (E.g., *NLJ*,

www.law.com, 2/19/07, article by Bennett Gershman and Joel Cohen.)

In another broad look at the issue of eyewitness identification reform, The Justice Project in Washington DC recently released a report entitled *Eyewitness Identification: A Policy Review*. It includes suggestions for keeping down the cost of lineup reform. Noting the personnel costs associated with using an additional officer to administer the double-blind viewing that most experts call for, it suggests that digital photos can be presented randomly by a computer, or printed photographs can be placed in plain folders, shuffled, and presented to the witness in such a way that the attending officer cannot see the photos being reviewed. And, the report notes, “When weighed against the tremendous costs to the taxpayer in terms of lawsuits and compensation to the wrongfully convicted, as well as the very real costs in terms of human lives, the minimal procedural costs associated with these procedures are negligible.” (www.thejusticeproject.org.)

(Recommending nonsuggestive procedures in a given case, or challenging procedures after the fact, is of course not possible if counsel is unaware of the procedures. The Court of Appeals has held that where the prosecution does not intend to offer evidence of a certain identification procedure at trial, failure to provide CPL 710.30 notice of that procedure did not require reversal, even though testimony of a subsequent procedure—for which notice was given—was offered. *People v Grajales*, No. 14 (2/20/07) [a summary of the opinion appeared in the last *REPORT*].)

Addressing the problem from another angle, the New Jersey Supreme Court has directed trial courts to give further jury instructions in eyewitness identification cases. The court directed that existing instructions on factors affecting eyewitness reliability be preceded by the following:

Although nothing may appear more convincing than a witness’s categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, although made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification.

—*State v Romero*, No. A-109-05 (5/21/07).

Further eyewitness identification developments, from California to Texas and including New York, are reported on the Eyewitness Identification Reform Blog noted above. Eyewitness Evidence is also a Hot Topic on the NYSDA website. Attorneys can check there for new developments (www.nysda.org) or contact the Backup Center.

Race Issues Confront Clients, Lawyers, Throughout the System

Misidentification resulting in wrongful conviction, discussed above, sometimes has a racial component, such

as the phenomenon called “own-race bias” or the “cross-racial effect.” That issue has long been noted on the NYSDA website. See e.g. an item noting the New Jersey Supreme Court decision in *State v Cromedy* (158 NJ 112 [1999]) [requested cross-racial instruction should be given where identification is a critical issue and an eyewitness’s cross-racial identification is not corroborated] in the archives of the Race and Law Hot Topics page. (The New Jersey case noted above, *State v Romero*, while requiring general cautionary eyewitness instructions, rejected a defense request for cautionary instructions in a cross-ethnic, rather than cross-race, case, saying there was a lack of evidence on cross-ethnic identifications.)

Innocence Project Notes Racial Component of Wrongful Convictions

The effects of race on identification, and in the criminal justice system generally, have recently received renewed attention. Barry Scheck of The Innocence Project said on National Public Radio that being an African-American man charged with sexual assault of a white woman is one of the most dangerous places in the American legal system. (www.npr.org/, 4/24/07.) Innocence Project co-founder Peter Neufeld similarly told the *Chicago Tribune* that the Project’s nearly two decades of work shows huge racial disparities, with blacks much more likely to be wrongly convicted. (www.chicagotribune.com, 4/23/07.)

The occasion for the remarks was the 200th exoneration of a wrongly convicted person through the use of DNA testing. The Innocence Project’s press release noted that while only about 12% of sexual assaults are cross racial, “two-thirds of all black men exonerated through DNA evidence were wrongfully convicted of raping white people.” (www.innocenceproject.org, 4/23/07.) The issue has been placed in the public eye repeatedly, from the NPR segment to a column entitled “Injustice Heaped On Black Men,” by Stan Simpson, in the *Hartford Courant* (courant.com, 4/7/07) and another in *Newsday*, where columnist Les Payne recounted personal experience with misidentification: “two well-meaning, disinterested white citizens, with roots in the community, gazed at a photo of me and concluded separately and respectively that it was Al Sharpton and Jesse Jackson.” (www.newsday.com, 4/29/07.)

Racial bias and systemic racial disparities in the justice system are not limited to identification issues. Clients of color, and their lawyers, may confront race issues—overt or hidden—in any or all aspects of their cases, in any jurisdiction.

Being Stopped While Black or Brown

A new twist on the “driving while black (or brown)” effect emerged from one recent federal study. Black,

Hispanic and white drivers were found to be equally likely to be stopped by police, but blacks and Hispanics were much more likely to be searched and arrested. They were also more likely to be subjected to force or the threat of force. (www.washingtonpost.com, 4/29/07.) A Department of Justice (DOJ) press release about the report noted that the racial disparities shown “do not necessarily demonstrate that police treat people differently based on race or other demographic characteristics,” because the “study did not take into account other factors that might explain these disparities.” (www.ojp.usdoj.gov/bjs/pub/press/cpp05pr.htm.) The report is available on the DOJ website (under the Bureau of Justice Statistics) at www.ojp.usdoj.gov/bjs/pub/pdf/cpp05.pdf.

Systemic Racism Studied from Subconscious to the World Stage

The abstract of one new study says the authors argue that “judges and jurors unknowingly propagate racism through their legal decisions because they misremember case facts in implicitly biased ways.” To test their theory, bridging implicit social cognition, memory studies, and legal decision-making, the researchers had participants read two short stories resembling legal cases—one about a fight and one about an employment termination—with the race of the characters changing in different versions. When later asked to recall facts of the stories, people systematically misremembered relevant facts in racially biased ways. The abstract, with a link for downloading the article (entitled “Forgotten Racial Equality: Implicit Bias, Decision-Making and Misremembering”) can be found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975793.

In April, the Brennan Center for Justice at New York University School of Law released *New Guidelines for Prosecutors*, a publication designed to promote equal justice, improve public safety and increase confidence in the criminal justice system. The protocols set forth in the document were developed with the assistance of and signed onto by 13 former US Attorneys. It is available online at <http://brennancenter.org>.

NYSDA Executive Director Jonathan E. Gradess participated in a conference on May 17th in Washington DC, sponsored by The Sentencing Project and others, on the topic of racial discrimination in the US criminal justice system as it relates to the UN Convention for the Elimination of All Forms of Racial Discrimination.

Summit Speakers Seek Defense Independence

Independence of the public defense function was the common theme sounded by speakers at the New York State Bar Association on March 26th. The NYSBA Summit

on the Future of Indigent Defense provided a forum for discussing the report issued last June by a commission on public defense created by Chief Judge Judith S. Kaye.

Former State Senator John R. Dunne led with a summary of the Kaye Commission's findings and recommendations with the need for independence. Norman Reimer, Executive Director of the National Association of Criminal Defense Lawyers and past President of the New York County Lawyers Association, lauded independence as the solution to localities "playing off" components of the current "Balkanized" system at budget time. Seymour W. James, Jr., Attorney-in-Charge, The Legal Aid Society, Criminal Defense Division, noted that the lack of independence and absence of standards affects public defense providers across the state, as funders engage in a "race to the bottom" by looking only at cost per case.

The emphasis on independence headlined the *New York Law Journal's* coverage of the event. The article recognized that the experts assembled for the Summit "insisted that a proposed indigent defense commission could not function effectively if it is not insulated from fiscal and partisan politics." (www.law.com/jsp/nylj, 3/27/07.)

How to achieve independence engaged the attention of speakers and audience members alike. The potential makeup of a statewide commission to oversee public defense received much comment. Robert Spangenberg, whose nationally-known organization conducted a study for the Kaye Commission, advocated including members from a wide range of groups with interests in public defense. Several speakers, including NYSDA's Executive Director, Jonathan E. Gradess, emphasized the necessity of wide consensus in support of the Kaye Commission's recommendations.

As to concrete steps toward creating an independent public defense system, Lisa Schreibersdorf, speaking both as President-Elect of the New York State Association of Criminal Defense Lawyers and head of Brooklyn Defender Services, noted NYSACDL's work in drafting a proposed public defense reform bill and the work of the Chief Defenders of New York in evaluating and suggesting changes to that draft. Robert Lonski, Assigned Counsel Administrator of Erie County, urged taking on the hard work involved in honing the details with confidence that a reformed system with the strength of diverse elements will emerge. Michael Breslin, Albany County Executive, speaking last, urged initial focus on standards and an independent commission.

Participants were welcomed to the Summit by NYSBA President Mark H. Alcott, and heard introductory remarks by Chief Judge Kaye. Vincent Doyle III, Chair of the Special Committee on Special Committee to Ensure Quality of Mandated Representation adjourned the event.

Sentencing Commission Members Appointed

In March, Governor Eliot Spitzer created an 11-member State Commission on Sentencing Reform, by Executive Order, to thoroughly review the State's sentencing structure and practices. Heads of designated agencies who will serve are: Commissioner of the Division of Criminal Justice Services Denise O'Donnell (who will serve as chair), Commissioner of the Department of Correctional Services Brian Fischer, Chair of the Board of Parole Robert Dennison, and Chair of the Crime Victims Board Joan A. Cusack.

Four of the additional members are to be appointed on the recommendation of the legislative leaders (Speaker of the Assembly, Temporary President of the Senate, Minority Leader of the Assembly, and Minority Leader of the Senate, one each). The other three members, appointed by the Governor, are to include a judge or former judge with substantial experience presiding over courts of criminal jurisdiction, a member of the bar with significant prosecution experience, and a member of the bar with significant experience representing defendants in criminal actions. Five members of the Sentencing Commission were announced on April 20, 2007:

- Anthony Bergamo (Vice Chairman of MB Real Estate; CEO of Niagara Falls Redevelopment LLC; Managing Director of the Milstein Hotel Group; and Special Counsel to the New Jersey State Association of Chiefs of Police, Passaic County Sheriff's Office, New Jersey State PBA Local 123, and the New York Organization of Narcotics Enforcers)
- Michael C. Green (Monroe County District Attorney; previously First Deputy District Attorney and other titles in the office)
- Michael P. McDermott (Of Counsel to O'Connell and Aronowitz [Albany]; former Chief Assistant District Attorney [Albany and Rensselaer counties], and Senior Associate and ultimately Partner at Bouck, Holloway, Kiernan and Casey [Albany])
- Juanita Bing Newton (Administrative Judge of the Criminal Court of the City of New York since 2003 and New York State Deputy Chief Administrative Judge for Justice Initiatives since 1999; former Executive Director and General Counsel of the New York State Sentencing Guidelines Committee)
- Cyrus Vance, Jr. (a principal at the law firm of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.; previously co-founder of McNaul Ebel Helgren & Vance [Seattle, WA], adjunct professor at Seattle University School of Law teaching trial advocacy, member of the Washington State Sentencing Guidelines Commission, Special Assistant Attorney General, and Assistant District Attorney with the Manhattan District Attorney's Office.)

The announcement of the appointments did not indicate which appointments were made/recommended by which officials. (Executive Order 10 (3/5/07); Press Release at www.ny.gov/governor/press/0420073.html.)

DNA Developments To Watch

As the *REPORT* went to press, the Legislature was actively considering DNA legislation with far-reaching implications not only for civil liberties but for post-conviction procedures. The Senate had passed S05848. Bill information is available on the web at <http://assembly.state.ny.us/leg/>.

With the prospect of exonerations based on finding the “real” perpetrator among the increased samples, the defense community may be tempted not to examine this or other DNA developments critically. But DNA testing is no more free of human error than any other procedure. As one editorial noted, “Should the DNA tests be mistaken in one half of 1 percent of the cases, that will translate into thousands of people wrongly identified as suspects.” (www.recordonline.com [*Times Herold-Record* (Middletown), 5/22/07.] In just one recent example, there have been 24 known DNA-contamination incidents at the Tucson (AZ) Police Department lab in the last seven years; defense lawyers in a current case say information about the contamination incidents was withheld from them. (www.nacdl.org, 5/16/07).

Meanwhile, the 2nd Circuit has ordered a district court to consider a prisoner’s 42 USC 1983 claim involving his assertion of a post-conviction constitutional right of access to DNA testing. *McKithen v Brown*, 481 F.3d 89 (CA2 2007).

In other DNA news, the Backup Center received word that some prosecutors have been systematically notifying people with old felony convictions that recent legislation requires individuals convicted of certain misdemeanors and felonies to submit a buccal swab or risk arrest and a court order to comply. The letters are reportedly going to some individuals not required by any law in effect to give a DNA sample.

The legality of collecting DNA from individuals whose convictions are not among those listed in Executive Law 995 has been challenged. A Kings County Supreme Court Justice rejected the challenge by Laurene Gallo. At issue was DNA sought as a condition of parole where the underlying crime was not a felony designated in the Executive Law.

On Dec. 5, 2005, Governor Pataki issued Executive Order No. 143 (9 NYCRR 5.143), providing for inclusion in the state DNA databank of DNA samples collected from individuals convicted of a crime if the DNA samples were collected: pursuant to a plea agreement; as a condition of participation in enumerated Department of Correctional Services programs; as a condition of release on parole, post-release supervision, or other enumerated

forms of release; or as a condition of probation or interim probation. The Division of Criminal Justice Services adopted the Executive Order by amending sections 6192.1, 6192.3 and 6192.4 of Title 9 NYCRR.

Gallo’s multiple challenges to collection of her DNA were rejected. *Gallo v Pataki*, 15691/06 (Sup Ct, Kings Co 3/19/07), NYLJ 4/9/07.

NYSDA’s Strutin Notes Trojan Horse Defense

In an article published in the *New York Law Journal* on May 8th, NYSDA’s Director of Information Services, Ken Strutin, reminds lawyers representing clients accused of offenses based on internet use that what is on the client’s computer may not have been put there by the client. In “Malware and the Trojan Horse Defense,” Strutin notes that individuals may “be made to look guilty or mistaken for the real culprit in cyberspace” by the surreptitious downloading of incriminating evidence onto their computer. When “done by self-effacing software that leaves no trace,” such illicit use may be hard to prove—but it is harder to prove if no one even tries. While a newly published manual by the US Department of Justice “cautions law enforcement not to assume that everything in a defendant’s computer was put there intentionally,” defendants and counsel cannot assume that their local police or prosecutor read the manual. From the downloading of pornography to the cyberstalking of a complainant—whenever computer evidence forms a part of the prosecution’s case, defense counsel should consider getting expert assistance as counsel researches and analyzes how to confront that evidence. (www.law.com, 5/8/07.)

Other Computer Issues

Other computer/Internet issues may arise in a criminal matter. Due in part to a request for assistance received at the Backup Center, NYSDA now has information on how to subpoena information from MySpace, where complaining witnesses, their friends, or others may have posted information that would be of interest to the defense. Even checking public forums such as YouTube may reveal helpful facts or impeaching information.

As a final note, attorneys and their offices may also need to consider legal and other issues when upgrading equipment. Good impulses and intentions may conflict with one another or with legal duties. Donating equipment to non-profits or others, or even attempting to recycle hardware components, can present pitfalls. One nearly-comprehensive look at disposal issues is an online article entitled, “Where Computers Go When They Die.” http://online.wsj.com/public/article_print/SB117624986698065712.html. Missing from this cache of information is the question of whether a particular recycling effort ensures that toxic materials in the hardware are disposed of safely. (See e.g., <http://www.computertakeback.com/>.)

Other Recent Developments of Note

Lippman Heads 1st Dept, Pfau Heads OCA

Chief Administrative Judge Jonathan has been appointed presiding justice of the Appellate Division, First Department. (www.law.com, 5/24/07.) Ann T. Pfau, currently First Deputy Chief Administrative Judge, has been named to succeed Lippman (www.law.com, 5/30/07.)

Commission on Future of Courts Unveils Web Site

The Special Commission on the Future of the New York State Courts, appointed by Chief Judge Judith S. Kaye last year, now has a website. The purpose of the site is to “serve as a resource for persons and organizations interested in improving the quality of justice throughout New York State.” <http://www.nycourtreform.org>.

Death Penalty, Cameras in Court, Other Issues Continue

No issue of the *REPORT* can cover the multitude of existing and potential issues of importance to its readers. Efforts to reinstate the death penalty in New York following the deaths of law enforcement officers, yet another strong push to bring cameras into New York courtrooms, and many other topics worthy of attention are updated on our website: www.nysda.org.

What constitute best practices and dangers in death penalty cases can inform practice in other cases as well. Therefore, the *REPORT* (and Case Digest System) continue to offer summaries of all US Supreme Court criminal cases, including those concerning penalty-phase phase issues in death penalty cases (see pp. 16, 18–19). For the same reasons, attorneys are urged not to skip the New York Capital Defense page in the Defense News area, or the Death Penalty (Capital Punishment) page of the Hot Topics area on the website.

State Bar Presents 1st Outstanding Achievement Award to Bronx Defenders

The New York State Bar Association has selected The Bronx Defenders as the recipient of the inaugural Award for Outstanding Achievements in Promoting Standards of Excellence in Mandated Representation. The Award recognizes attorneys, groups of attorneys, or organizations for consistent adherence to the highest professional standards, innovative efforts to improve overall quality of mandated representation, and/or promoting governmental steps to ensure the provision of high quality defense to financially eligible clients. Presentation of the Award was to be made during a day-long CLE training session on public defense topics sponsored by the State Bar’s Special

Committee to Ensure Quality of Mandated Representation, which developed the Award.

The Bronx Defenders addresses client needs and concerns through client-centered advocacy using innovative programs and a multidisciplinary staff. Their Civil Action Project, which integrates civil representation into the office’s criminal defense practice, seeks to avoid the severe civil “collateral” consequences that may result from criminal proceedings and can prevent clients from moving forward. The Family Defense Project provides holistic representation to parents facing neglect or abuse allegations in Family Court. Congratulations to NYSDA Board Member Robin Steinberg, who heads The Bronx Defenders, and to the entire staff!

NY Metropolitan Trainer Comes of Age

The annual New York Metropolitan Trainer on April 7, 2007 included no ceremony to mark its 21st year, but did provide the relevant and affordable CLE training that is its hallmark—and the hallmark of NYSDA training in general. High points included Ed Nowak’s “Recent Developments in Criminal Law and Procedure,” which has become de rigeur, and the very timely (see p. 1) “‘Actuarial Justice’—Representing Sex Offenders Facing Lifetime Civil Confinement,” with Dr. Richard Hamill and NYSDA’s Al O’Connor. The always-vital MCLE ethics credit was provided by Michael Ross on “Ethics and Criminal Practice.” Rounding out the program were Lynne Fahey, discussing preservation of error and Tom Klein, who deftly covered a major trial issue: “The Right to Impeach: Overcoming Judicial Protection of Prosecution Witnesses.” For those who were unable to attend, the materials are available from the Backup Center for \$25. ☞



During the 2006 NYSDA Annual Meeting and Conference in Corning, NY, a Chief Defender Convening drew program heads from across the state. Pictured (from left): Jerome K. Frost, Rensselaer County Public Defender; Allegheny County Public Defender Beth Farwell; Genesee County Public Defender Gary A. Horton; and Schuylker County Public Defender Connie Fern Miller.

CONFERENCES & SEMINARS

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

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

Sponsor: Northwestern University School of Law
Theme: 50th Annual Short Course for Defense Attorneys in Criminal Cases
Dates: July 23–26, 2007
Place: Chicago, IL
Contact: website www.law.northwestern.edu/shortcoursedef/

Sponsor: Santa Clara University School of Law
Theme: Bryan R. Shechmeister Death Penalty College
Dates: August 4–9, 2007
Place: Santa Clara, CA
Contact: Ellen Kreitzberg: (408)554-4724; email ekreitzberg@scu.edu

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Appellate Practice
Date: September 7, 2007
Place: Brooklyn, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Weapons for the Firefight
Date: October 13, 2007
Place: Brooklyn, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Criminal Law Update
Date: October 14, 2007
Place: Syracuse, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

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Job Opportunities

The Public Defender's Office of Cattaraugus County seeks an **Assistant Public Defender**. Candidates must be law school graduates and members in good standing of the NY State bar, with commitment to undertake cases before Cattaraugus County Family Court. Some night court work may also be required. Strong research and writing skills and a commitment to the representation of individuals who are financially unable to retain counsel required. Ability to work collaboratively with other lawyers and staff necessary. Starting salary \$40,500 for recent law school grad, up to \$55,000 with experience. Great government benefits. EOE. Send cover letter expressing interest

with application and/or résumé to: Mark S. Williams, Esq., Cattaraugus County Public Defender, 175 North Union Street—Blue Bird Square, Olean NY 14760; tel (716)373-0004; fax (716)373-3462.

The Monroe County Public Defender's office has openings for **staff attorneys**. The positions are 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. Newly hired attorneys will be expected to handle misdemeanor cases in the local courts within Monroe County. Applicants with significant expe-

rience in representing clients charged with misdemeanors will also be considered for positions in the felony, appeals, or family court sections of the office. To be considered, candidates must be awaiting admission or admitted to the New York State bar, and **MUST** be admitted to be eligible for appointment. Salary commensurate with experience and qualifications; excellent benefits package including health insurance and membership in the NYS Retirement System. Submit a cover letter enclosing the following: (1) a Certificate of Good Standing from the Appellate Division of admission, or a statement from the

(continued on page 15)

Post-Release Supervision and *Earley v Murray*

By Elon Harpaz*

Penal Law 70.45 and the *Earley Decision*

In September 1998, the New York legislature brought post-release supervision (PRS) into existence, enacting Penal Law 70.45. The statute gave the impression that PRS was automatically included in every determinate sentence, making a pronouncement by the sentencing judge unnecessary. As a result, for the next several years, many judges neither imposed PRS at sentencing, nor advised defendants of it while accepting guilty pleas. Instead, the Department of Correctional Services (DOCS) added PRS to the sentence. In March 2005, the New York Court of Appeals held, in *People v Catu*, 4 NY3d 242 (2005), that a court's failure to advise of PRS renders the plea involuntary because PRS is a direct consequence of the conviction. The prospect of hundreds of defendants withdrawing their pleas suddenly loomed.

On June 9, 2006, the United States Court of Appeals for the Second Circuit went one step further. In *Earley v Murray*, 451 F3d 71 (2d Cir), rehearing den, 462 F3d 147 (2006), the 2nd Circuit held that, because PRS is not merely a direct consequence of a conviction, but an actual part of the sentence, it must be judicially imposed to satisfy due process under the federal constitution. Relying on the Supreme Court's decision in *Hill v US ex rel. Wampler*, 298 US 460 (1936), the 2nd Circuit made clear that the only sentence known to the law is the one pronounced by the judge and that any administrative alteration to that sentence is a nullity. Upon a petition for rehearing, the court refused to budge, notwithstanding the specter of nullification of PRS for thousands of defendants invoked by the Kings County District Attorney's Office, and the retooled argument that PRS is imposed, not administratively, but by operation of Penal Law 70.45 as an automatic consequence of a determinate sentence. As to the latter argument, the 2nd Circuit declared in no uncertain terms that any statute purporting to impose sentence by operation of law, without need for judicial pronouncement, would itself be unconstitutional.

The Reaction of New York Appellate Courts

While the systemic chaos predicted in the rehearing petition has yet to materialize, the reaction of New York

appellate courts to *Earley* has produced more than its share of legal chaos. And, until the Court of Appeals sorts it all out, litigating an *Earley* claim will require attorneys to make difficult choices and to navigate a series of legal minefields.

The 1st Department

The 1st Department was the first appellate court to address *Earley*. Reviewing direct appeals in *People v Sparber*, 34 AD3d 265 (1st Dept 11/09/06) and *People v Lingle*, 34 AD3d 287 (1st Dept 11/14/06), the Court distinguished *Earley* on its facts, drawing a line at the sentencing commitment sheet. The court held that, where the judge fails to impose PRS at sentencing, any potential constitutional problem is obviated when the court clerk, acting as agent of the judge, records PRS on the commitment sheet, thereby satisfying *Wampler's* requirement that sentence "be entered upon the records of the court." There is serious doubt, though, whether *Sparber* and *Lingle* are truly consistent with *Wampler*, since the Supreme Court in *Wampler* struck down a sentence that had been recorded on the commitment sheet by a court clerk after the judge had failed to pronounce it at sentencing. The 1st Department left for another day how it would rule on facts indistinguishable from *Earley*.

Seemingly presented with just such an opportunity in *People v Hill*, 830 NYS2d 33 (1st Dept 1/30/07), the 1st Department instead found another distinction. In *Hill*, the judge originally sentenced the defendant to a 15-year determinate term; no period of PRS was pronounced in court or recorded on the commitment sheet. Relying on *Catu*, the defendant moved to vacate his plea pursuant to CPL 440.10, but the court instead resentenced him to 12½ years, plus 2½ years of PRS. By a 3-2 vote, the 1st Department upheld the remedy because the defendant was given a better deal than the original offer.

Before reaching that conclusion, however, the court had to determine that resentencing was permissible at all, since a lawfully imposed sentence may not be altered. In finding the original sentence of 15 years illegal, the appellate court relied on the defendant's status as a first-time felony offender. Because Penal Law 70.45(2), which was in effect through 2004, gave judges discretion as to how long a period of PRS to impose on first offenders, the court, mindful of *Earley*, held that the statute did not automatically mandate the maximum permissible period when the judge failed to exercise discretion. Since the 15-year determinate sentence for defendant Hill accordingly did not include PRS by operation of law, and since PRS was required, the sentence imposed was unlawful and therefore subject to correction pursuant to the judge's inherent powers. The 1st Department specifically declined to decide, however, whether automatic imposition of the mandatory 5-year period of PRS for predicate offenders would violate due process.

* *Elon Harpaz* is a Staff Attorney at The Legal Aid Society in New York City. He thanks his colleague, Kerry Elgarten, for invaluable assistance in the preparation of this article. Both attorneys split their time between the Society's Criminal Appeals Bureau and its Parole Revocation Defense Unit.

The 2nd Department

The 2nd Department reached that question in a series of decisions issued in February. In *People v Smith*, 37 AD3d 499 (2d Dept 2/6/07), *People v Noble*, 37 AD3d 622 (2d Dept 2/13/07) and *People v Wilson*, 37 AD3d 855 (2d Dept 2/27/07), the court strongly endorsed *Earley v Murray*, holding that, where the sentencing minutes and the commitment sheet are silent as to PRS, “the sentence actually imposed by the court never included, and does not now include, any period of post-release supervision.” *Noble*, 37 AD3d at 622. Not only did the 2nd Department hold that administratively imposed PRS is a nullity, it signaled its apparent intention, in opposition to *Sparber* and *Lingle*, to reach the same holding even when PRS is recorded on the commitment sheet.

These 2nd Department decisions have created a procedural black hole. To hammer home its point that administratively imposed PRS is not part of a defendant’s sentence, the court dismissed the appeals in *Smith*, *Noble* and *Wilson*; since direct appeals and 440 motions can only challenge the actual sentence imposed by the court, they cannot be used to challenge the administrative imposition of PRS. Most tellingly, in *Wilson*, the 2nd Department dismissed an appeal from the denial of a CPL 440.10 motion, holding that the defendant got the exact sentence promised—one without post-release supervision—and thus had no basis to complain about the court’s failure to warn him about PRS. For the 2nd Department, then, far from creating a problem, *Earley* represents a solution to the potential undoing of numerous pleas in the aftermath of *Catu* based on the failure to warn of post-release supervision. But litigants in the 2nd Department are left in a state of uncertainty, possessed of a meritorious claim, with no clear way to obtain relief from a period of PRS that is not included in the sentencing minutes and the commitment sheet, *i.e.* PRS added by DOCS.

The 3rd Department

The 3rd Department has gone in the opposite direction—maybe. In *Garner v NYS Dept. of Correctional Services*, 831 NYS2d 923 (3d Dept 4/12/07), the court reaffirmed its holding in *Deal v Goord*, 8 AD3d 769 (3d Dept 2004) that prohibition does not lie in an Article 78 proceeding challenging administrative imposition of post-release supervision because PRS is automatically included in a defendant’s sentence by operation of law and DOCS has thus usurped no judicial function in imposing it. *Deal* was a pre-*Earley* statutory construction case that never considered whether a statute that makes it unnecessary for the judicial branch of government to impose sentence is unconstitutional. And, although *Garner* was only just decided, it is by no means clear that the 3rd Department considered the due process claim raised in *Earley*. The court’s decision does not hint at any such consideration,

making no mention of *Earley* or related cases. Furthermore, the Attorney General’s Office did not even cite *Earley* in its legal argument defending on appeal the trial court’s pre-*Earley* denial of the Article 78 petition. While it is thus unclear if the 3rd Department has rejected *Earley*, rest assured that attorneys for the State will be strongly advocating precisely such a reading of *Garner*.

The 4th Department

Finally, the 4th Department has yet to weigh in on *Earley*. However, pre-*Earley* decisions from that court uniformly held that post-release supervision is an automatic consequence of a determinate sentence and that a defendant is not entitled to excision of PRS based on the plea court’s failure to advise the defendant about it or the sentencing court’s failure to exercise discretion as to first-time offenders. Thus, until the 4th Department directly addresses *Earley*, it will be an uphill struggle to convince trial level courts in the 4th Department to grant relief on *Earley* claims.

The Reaction at the Trial Level

Not surprisingly, much of the post-*Earley* action in the New York courts has thus far taken place at the trial level. *Earley* claims have been raised via three distinct procedural vehicles: CPL 440 motions, Article 78 petitions, and Article 70 petitions for writs of habeas corpus. Habeas corpus has proven a straightforward and successful way to litigate an *Earley* claim, but its availability is limited to individuals incarcerated exclusively for violating the terms of their PRS. Most habeas claims have been filed in Bronx County on behalf of inmates awaiting final revocation hearings at Rikers Island. Three reported decisions have sustained writs: *People ex rel Johnson v Warden*, 15 Misc3d 1102A, 2007 WL 755412 (Sup Ct Bronx Co 3/12/07) (Adler, J) [not published in official reporter]; *People ex rel. White v Warden*, 15 Misc3d 360 (Sup Ct Bronx Co 1/26/07) (Marcus, J) and *People ex rel Lewis v Warden*, 14 Misc3d 468 (Sup Ct Bronx Co 11/24/06) (Cirigliano, J). In *Johnson* and *Lewis*, judges adopted the reasoning of *Earley* in its entirety, while in *White*, the court granted relief based on the inmate’s status as a first-time offender. In all three cases, the court ordered immediate release of the inmate and invalidated the period of PRS added by DOCS. The lone reported decision denying habeas relief, *People ex rel. Hernandez v Warden*, 14 Misc3d 1210A, 2006 WL 3843586 (Sup Ct Bronx Co 12/8/06) (Fisch, J) was issued prior to the 1st Department’s decision in *Hill* and would likely be decided differently now, given the petitioner’s status as a first-time offender. In addition, at least five other Bronx County judges have sustained writs of habeas corpus on *Earley* grounds in unpublished opinions.

Article 78 petitions can be filed by individuals still serving their determinate sentences, as well as by those already on PRS. Relief was granted in *Waters v Dennison*, 13 Misc3d 1105 (Sup Ct Bronx Co 2/23/07) (Cirigliano, J) and denied in *Quinones v State Dept. of Corrections*, 14 Misc3d 390 (Sup Ct Albany Co 11/16/06) (Ceresia, J). The court in *Waters* rejected the Attorney General's argument that the petition was untimely filed and expressed the view that the post-release supervision statute "usurp[s] the judiciary's authority which violates the separation of powers on one hand and clearly strips a defendant from his due process rights on the other." In *Quinones*, an Albany County judge found the 3rd Department's pre-*Earley* decision in *Deal v Goord* binding precedent compelling rejection of the *Earley* claim.

The most interesting results have come in response to CPL 440.20 motions, with judges devising creative ways to try to reconcile the statute with the dictates of *Earley* so as to ensure that defendants obtain no relief. Thus, in *People v Giles*, 13 Misc3d 1242A (Sup Ct Kings Co 12/1/06) (Goldberg, J), the court extended *Sparber* and *Lingle*'s holding, that due process is satisfied as long as PRS is contemporaneously recorded on the sentencing commitment sheet, by holding that amendment of the commitment sheet years later to include PRS is a ministerial act that brings the defendant's sentence into compliance with *Earley*. And, more recently, in *People v Edwards*, 2007 WL 96941, 2007 NY Misc LEXIS 15 (Sup Ct NY Co. 3/21/07) (Kahn, J), the court held, in the case of a predicate offender, that *Earley* would be satisfied by bringing the defendant before the court for "clarification" that his sentence included post-release supervision, then re-sentencing him to the same determinate term previously imposed, with the mandatory five years of PRS clearly stated for the record.

Trial-level judges have also struggled to define the scope of their inherent power to impose PRS once the illegally imposed period is vacated. Thus, in *People v Crawford*, 15 Misc3d 329 (Sup Ct Kings Co 3/5/07) (McKay, J) and *People v Ryan*, 13 Misc3d 451 (Sup Ct Queens Co 7/28/06) (Kron, J), courts held themselves without authority to impose the lawfully required period of PRS after vacating the unlawful period. In both cases, the judge had originally imposed an illegally low period of PRS; in *Crawford*, the court clerk recorded the correct period on the sentencing commitment sheet, while in *Ryan*, DOCS imposed the correct amount. In *People v Keile*, 824 NYS2d 757 (Sup Ct NY Co 9/5/06), the court questioned its inherent power to impose the mandated period, but did so anyway, while in *People v Rodriguez*, 2007 WL 967097, 2007 NY Misc LEXIS 1529 (Sup Ct Bronx Co 3/30/07) (Price, J), the court stated that it had the power to impose PRS after vacating the period administratively added by DOCS.

Tips for Litigating Earley Claims: by 440.20 or Article 78?

For most litigants seeking to raise an *Earley* claim, direct appellate review will no longer be available, since judges generally were imposing PRS by 2003. Therefore, the choice will usually come down to a CPL 440.20 motion or an Article 78 petition. In making that choice, a number of factors will need to be taken into account, by far the most important of which is the county of conviction. Because appellate precedents on this issue are so fractured, with each Department of the Appellate Division holding its own views, the governing law in the county of conviction is critical in deciding how to proceed.

In the 2nd Department

If the defendant was convicted in a county within the 2nd Department, dismissal of a 440.20 motion can be readily obtained on the ground that PRS is not part of the sentence. The question is whether such a "loss" can be parlayed into meaningful relief. At present, a number of litigants are awaiting an answer from DOCS on whether it will honor a decision, either from the 2nd Department or from a trial-level court, dismissing an *Earley* claim on the ground that the defendant's sentence does not include PRS. If DOCS deletes PRS in response to such decisions, filing a 440.20 motion would clearly be the way to proceed. However, if DOCS refuses, a 440.20 motion will be of no practical value, and the defendant will have no choice but to proceed by way of an Article 78 petition.

The outcome of such a petition will hinge at the trial level entirely on where venue lies. Litigants will file the Article 78 petition in the county of conviction, but the Attorney General will seek a change of venue to Albany County, on the ground that the "determination" being challenged took place there. *But see Matter of Browne v Board of Parole*, 10 NY2d 116 (1961). If venue is transferred to Albany, the petition will likely be denied on the authority of the 3rd Department precedents in *Garner* and *Deal*, while, if it remains in the county of conviction, it should be granted on the authority of the 2nd Department precedents in *Smith*, *Noble* and *Wilson*. In opposing a change of venue, it may be helpful to point out that the Attorney General's position on the merits, raised in dozens of cases thus far, is that post-release supervision is automatically included in the court's pronouncement of a determinate sentence. That being the case, venue is proper in the county of conviction, according to the Attorney General's own logic, because the key underlying material event took place there and a change of venue is thus unwarranted.

Bear in mind, though, that the outcome at the trial level is of little practical effect because the grant of an Article 78 petition is subject to an automatic stay pending appeal pursuant to CPLR 5519(a). Since the Attorney General's Office is vigorously litigating every single

Earley case, no relief will actually be afforded any litigant until he or she finally prevails on appeal. Petitioners can look forward to a prolonged period of state court litigation before taking their claim to federal court, assuming they ever need to go there. That means that serious thought needs to be given before filing an Article 78 petition on behalf of anyone already on post-release supervision, especially anyone who does not have a lot of time left to serve. In such cases, it may be better to wait to see if the individual is arrested for allegedly violating PRS. At that point, a writ of habeas corpus can be filed, which, if sustained, should fairly quickly result in liberty for the inmate and invalidation of PRS, since habeas corpus is a summary proceeding and is not subject to automatic stay pending appeal. Defendants not yet released to PRS are in a better position to endure the extensive delay in obtaining a final adjudication of their Article 78 claim.

In the 1st Department

If the county of conviction is Manhattan or the Bronx, the choice of a 440.20 motion versus an Article 78 petition looks very different. This is especially true if the defendant is a first-time offender convicted following a plea at which the defendant was not advised of PRS, and where PRS was not recorded on the commitment sheet. In that case, it may well be possible to use the filing of a 440.20 motion to play “Let’s make a deal.” First, pursuant to *People v Hill*, the claim of a first-time offender is meritorious. Second, assuming that the sentencing judge is inclined to impose PRS after vacating the administratively imposed period, he or she will have to offer the defendant plea withdrawal. That prospect will likely be unappealing to the prosecution, thereby giving the defendant some real leverage, since the prosecutor will not be sure that the defendant does not want to vacate the plea. Further, there will always be something to bargain about. The court will vacate the maximum period imposed by DOCS—3 years for a class D or E violent offense, or 5 years for a class B or C violent offense—and then have discretion to replace it with as little as 1½ years for class D and E offenders and 2½ years for class B and C offenders. And, if the defendant received more than the minimum determinate sentence, it may be possible to work out a deal that shortens the defendant’s prison time. The beauty of entering an agreement is that it will not be subject to appeal. Of course, before going that route, it will be important to consider whether any combination of the judge, the prosecutor, the heinousness of the crime, or the prison record of the defendant militates against obtaining a favorable result. An Article 78 proceeding is always available as an alternative, should the 440 route not look promising.

In the 3rd and 4th Departments

For defendants convicted in counties in the 3rd or 4th Departments, no relief can be expected at the trial level, and prospects do not look especially promising in the Appellate Division either. Court of Appeals review and/or the filing of a federal habeas corpus writ may be the best bets. With that in mind, it is preferable to file an Article 78 petition, rather than a CPL 440.20 motion. First, a denial of the former, unlike the latter, is appealable as of right to the Appellate Division, making the prospect of obtaining review in the Court of Appeals more likely. Second, the Article 78 route avoids the possibility that the sentencing judge could grant relief, and then impose the exact same period of PRS, as the judge did in *Keile*. In that situation, the federal issue would be gone and the only claim left would be that the court lacked the inherent power to impose PRS.

Tips for Litigating Earley Claims: Direct Appeal?

Where direct appellate review is still available in the 1st Department, it may make sense to raise an *Earley* claim for a predicate felon. While the 1st Department has laid the groundwork for rejecting the application of *Earley* to predicate offenders, the court may decide on balance to follow the 2nd Department’s approach. As for first offenders, it is true that they should have a winning claim on direct appeal in the 1st Department. Even so, negotiating a better deal for the defendant through a 440.20 motion would seem preferable to proceeding via direct appeal, especially where it appears possible to obtain a reduction in the defendant’s prison sentence.

The 2nd Department has all but invited the claim that, contrary to the 1st Department’s decisions in *Sparber* and *Lingle*, the court clerk’s recording of PRS on the sentencing commitment sheet is insufficient because federal due process can settle for no less than the judge pronouncing sentence on the defendant. Assuming the 2nd Department embraces that position, dismissal of the appeal would appear unwarranted, since a discrepancy between the sentence pronounced by the judge and that recorded on the commitment sheet is one that a direct appeal ought to resolve. That being the case, first offenders who have PRS recorded on the commitment sheet may well be able to seek the same negotiated deal through the filing of a 440.20 motion in 2nd Department counties as their counterparts who were convicted in Manhattan or the Bronx.

In the Fourth Department, every *Earley* claim is ripe for direct appellate review. The same should be seen as true in the 3rd Department until that court specifically addresses *Earley*.

(continued on page 43)

From My Vantage Point

By Jonathan E. Gradess*

Toward Independence

I'm writing this over a month before the 4th of July. If technology and fate allow, it will be available on the web in a few days. If you read it only after it has been through the long process of printing, labeling, and mailing the *REPORT*, Independence Day celebrations will be imminent. That will be appropriate, as the topic of this column is independence of the defense function, without which many of the rights and liberties hailed every July 4th exist only in reproductions of the Bill of Rights. Perhaps the temporal difference between web delivery and mail delivery of my words is appropriate too, serving as a metaphor for the point between the past and the future at which public defense in New York State stands.

At the current moment we are between a past with compromised defense delivery mechanisms and a future with a whole new system. And the moment is telling us much about what we are afraid of and what independence really means.

Independent Thought Comes First

Amitai Etzioni, the famed writer on social change, reminds us that there is always some lag associated with the process of social change, a differential rate of acceptance by people and institutions regarding the unfolding future. This is particularly present when the change is bringing new forms of freedom. And—to borrow a page from a friend's professor—people with much to conserve sometimes become the most conservative in times of change.

That is part of what the defender community in New York is experiencing. There lies before us a most promising adventure, not complicated or difficult to comprehend, but hard to believe in. It is risky newness, delightfully disruptive, and fundamentally challenging. It requires us to suspend some of our suspicion, some of our presupposition, and almost all of our skepticism.

I take at face value that everyone in public defense cares about improving the quality of representation in the system. But their caring is expressed through their capacity to believe whether or not we can win a new system, whether or not that system will reflect our shared or personal values, and indeed whether we will all be able, when the time is right, to measure up to the very values

we espouse. To them I would say: If you have faith that together we can build the system that should be—a system of realized values and meaningful service—you gain independence from your fear and your commit.

If your fear overwhelms your faith, you hold back.

In addition to those who have committed and those who are holding back, there is a small third group that may let self interest in the status quo govern their response, making them willing to manufacture legends about the past and misconceptions about the future. They may delay change, but they cannot successfully shroud the truth about a system that is simply not functioning. The past had led us to a system that is unconstitutional, morally impoverished and broken. We must think independently of those who proclaim otherwise.

Independence of The Defense Function

Independence from nay saying thought is important. So is the structural independence of the defense function, which I have written about before, which the speakers at the New York State Bar Association's summit on public defense emphasized (see pp. 5–6), and which is a prominent feature of the "must have" list developed by the Chief Defenders of New York State and recently adopted by the NYSDA Board of Directors (see sidebar, next page).

At the core of the concept of independence of defense is the critically important requirement of insulation—insulation of the defense function from the executive and judicial branches functioning in their administrative capacities, insulation from the judiciary functioning day to day in the courtroom and insulation from the vicissitudes of politics, peer pressure, supervisory overreaching, and bean-counting. The fears of those most interested in reform are fears that thorough insulation and independence cannot be achieved within a house built by state government.

But if such independence ever existed in the delivery of defense services at the local level, it long ago disappeared. Across the state, public defense programs are instructed or feel compelled to cut local costs by forgoing investigators and other necessary support services, by providing horizontal representation that harms clients but provides more efficient courtroom "coverage," and even by not representing everyone who is entitled to counsel.

A statewide system will no doubt also face political efforts to curtail its budget and its services. But a standards-driven, unified system will be better equipped to confront those efforts than are current splintered, isolated programs.

In 2007, let us move toward independence, day by day. ♪

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

Defender System “Must Haves”

[Following the final report of the Kaye Commission, in discussions about how a new statewide system could and should be implemented, the Chief Defenders of New York drafted a list of “must have” ingredients. The NYSDA Board of Directors adopted this list on April 27, 2007, in Albany, NY.]

1. Statewide Defense Commission
2. Appointment process and structure that ensures political independence of the PD Commission and the entire statewide public defense system
3. Power of the Commission to bring lawsuits to enforce overall quality and adequate funding of the system and to insure the political independence of the Public Defender system
4. Strong, detailed, specific standards, such as those promulgated by the New York State Bar

Association or the Standards adopted by the New York State Defenders Association on July 25, 2004 and also including specific caseload limits

5. Family Court representation included
6. Independence in the conflict system
7. Independence in the appellate system
8. Adequate and full State funding, with no reduction in existing level of funding for any county and/or region
9. Fair and consistent level of quality throughout the state
10. Legitimate and fair opportunity for existing programs to contract with or become part of the state system if they are in substantial compliance with the standards
11. Local offices in each county, staffed by attorneys, so as to ensure ready access to attorneys on the parts of all clients, including those in rural upstate areas

12. Regional and local heads of offices must have significant independence in the operation of the local office. In addition, there must be a system to require input from the local chiefs regarding state-wide policy issues.

13. Requirement that State Defender/Commission regularly review local offices for compliance with standards and method to enforce compliance
14. All employees who become part of a new system, either by becoming state employees or through contracting with the Commission, to be held harmless regarding salary, retirement and other benefits
15. Adequate and ongoing training for all levels of staff
16. Adequate support services, including, but not limited to, investigators, experts and social workers.
17. Salary and benefit parity with DAs and ADAs

Job Opportunities *(continued from page 9)*

candidate indicating they passed the NYS bar examination, where they took the exam, and the department in which they are awaiting admission; (2) a writing sample; (3) 3 references with addresses and telephone numbers; and (4) a complete resume listing all educational institutions, and all employment with addresses and telephone numbers. All candidates are subject to a background check. Interviews will not be scheduled until all required documents have been submitted and screened. EOE. Mail to: Edward J. Nowak, Monroe County Public Defender, Executive Office Building, 10 North Fitzhugh Street, Rochester NY 14614.

The Assigned Counsel Program in Erie County is hiring a full time **Family Court attorney trainer**. The primary responsibility will be to train attorneys representing persons entitled to public representation in Family Court matters. It will entail significant hands-on work with less experienced attorneys and intensive mentoring on selected cases. The trainer will assist

the Administrator with CLE programs & other aspects of the program as directed. Occasional litigation in Family Court may be required. Significant trial experience in all areas of Family Court is also required, including Article 10 cases. Good communication/teaching skills are essential. Demonstrated commitment to providing legal service to the poor is also required. Salary: \$75,000 plus benefits. Send resumes to Robert D. Lonski, Administrator, Assigned Counsel Program, 670 Statler Towers, Buffalo NY 14202; fax (716)856-0424; email rlonski@assigned.org. No phone calls.

The Hiscock Legal Aid Society, in Syracuse, seeks an **Attorney** to represent adults in Family Court matters, including Abuse/Neglect, Custody/Visitation and Support Violation cases. High volume caseload. Demonstrated commitment to public interest law and to serving the indigent required. Family Court experience preferred. Admission to New York Bar required. Salary: \$36,000 + DOE. Gener-

ous benefits. EOE; persons of color & 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.

Applications are currently being accepted by the federal court in the **Southern District of New York for the Criminal Justice Act (CJA) Panel** from which attorneys are appointed to provide legal representation to financially eligible defendants. The court seeks to increase the diversity of the attorney applicant pool and expand the pool of qualified applicants to assure the highest standard of representation. Qualified women and minority lawyers are encouraged to apply. Application forms are available on the court's website at www.nysd.uscourts.gov. Completed applications should be sent to Leonard F. Joy, Esq., 52 Duane Street, 10th Floor, New York NY 10007. **Application deadline is 6/29/07.** ♪

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

Habeas Corpus (Federal)

HAB; 182.5(15)

Lawrence v Florida, 549 US __, 127 Sct 1079 (2007)

The petitioner was convicted of murder and sentenced to death by a Florida court. The conviction and sentence were affirmed, and certiorari was denied by the US Supreme Court on Jan. 20, 1998. On Jan. 19, 1999, 364 days later, the petitioner filed for state post-conviction relief. Denial was affirmed by the state supreme court on Nov. 18, 2002. Certiorari to the US Supreme Court was denied on Mar. 24, 2003. A federal habeas corpus action filed while the last certiorari application was pending, 113 days after the state supreme court denied review, was dismissed as untimely. The denial was affirmed.

Holding: The one-year statute of limitations for seeking federal habeas corpus relief from a state court judgment under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was not tolled during pendency of a certiorari petition for review of the denial of state post-conviction relief. Therefore, the petitioner had only one day to file his federal habeas petition after the state supreme court denied review of state post-conviction application. The tolling provision, 28 USC 2244(d)(2), applies to state court review to enable exhaustion of state remedies. See *Carey v Saffold*, 536 US 214, 220. Petitioning for cert is not required to exhaust state remedies. Not did equitable tolling apply; the petitioner waited nearly three months to file his federal habeas and no extraordinary circumstance stood in the way. Judgment affirmed.

Dissent: [Ginsburg, JJ] Petitioning for US Supreme Court review of a state court's denial of postconviction relief was not a federal application, but involved review of a state court application, and should toll the AEDPA time limit. See *Clay v US*, 537 US 522, 527-529. Otherwise, petitioners must make anticipatory filings in federal court at the same time they seek cert to avoid being time-barred.

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

Wallace v Kato, 549 US __, 127 Sct 1091 (2007)

The petitioner's murder conviction was reversed because his arrest on Jan. 20, 1994, leading to his confession, was without probable cause. Eventually the case was

dropped. On Apr. 2, 2003, the petitioner filed a 1983 action (42 USC 1983) against the city and the police seeking damages. Summary judgment granted to the respondents was affirmed.

Holding: The applicable statute of limitations for 1983 actions is found by reference to the relevant state's statute of limitations for tort cases; Illinois's is two years. See *Owens v Okure*, 488 US 235, 249-250 (1989). However, federal law determines the accrual date of the action. See *Bay Area Laundry and Dry Cleaning Pension Trust Fund v Ferbar Corp. of Cal.*, 522 US 192, 201 (1997). A claim accrued here at the time of the petitioner's unlawful arrest; the time for filing a claim for false imprisonment began to run when the alleged false imprisonment ended, *ie* the end of the time the petitioner was held without legal process, not when he was physically released. Since more than two years elapsed between the time he was bound over for trial and the filing of this suit – without counting the time tolled due to his being underage – the action was time barred. Accrual of the claim could not be delayed awaiting an anticipated improper conviction; that would be an unwarranted extension of *Heck v Humphrey* (512 US 477 [1994]). Judgment affirmed.

Concurring: [Stevens, JJ] Once the 4th Amendment violation was completed, the action accrued. It could have been stayed pending the outcome of the criminal action. See *Quackenbush v Allstate Ins. Co.*, 517 US 706, 730 (1996). A state habeas remedy might have been available.

Dissent: [Breyer, JJ] Equitable tolling would have been the better resolution instead of compelling the petitioner to file his 1983 action at the same time he was defending a murder charge. See *Miller v Runyon*, 77 F3d 189, 191 (CA 7 1996).

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

Whorton v Bockting, 549 US __, 127 S. Ct. 1173 (2007)

The respondent was convicted of sexually assaulting a six-year old. At trial, over the respondent's Confrontation Clause objection, the trial judge found the complainant was too distressed to testify and permitted the complainant's mother and a detective to testify as to her out-of-court statements. The conviction and life sentence were affirmed in state court in 1993; the confrontation clause issue was reviewed under *Ohio v Roberts*, 448 US 56 (1980). The respondent's federal habeas petition was denied since the state court decision was not contrary to nor involved an unreasonable application of, clearly established Federal law. See 28 USC 2254(d). The 9th Circuit reversed the habeas denial, applying *Crawford v Washington*, 541 US 36 (2004) retroactively.

Holding: A new rule announced by the Supreme Court is applicable only to cases still on direct review. *Griffith v Kentucky*, 479 US 314 (1987). A new rule applies retroactively in a collateral proceeding only if it is sub-

US Supreme Court *continued*

stantive or is a watershed ruling implicating the fundamental fairness and accuracy of the proceeding. *Saffle v Parks*, 494 US 484, 495 (1990). The respondent's conviction became final on direct appeal before *Crawford* was decided; *Crawford* announced a new rule not dictated by prior precedent. The rule announced was procedural, not substantive. And it was not a watershed ruling—it was not necessary to prevent an impermissibly large risk of inaccurate conviction or alter the understanding of bedrock procedural elements essential to the fairness of a proceeding. See *Schriro v Summerlin*, 542 US 348, 352 (2004). *Crawford* overruled *Roberts* because it was inconsistent with the original understanding of the meaning of the Confrontation Clause. It is “unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials.” *Crawford* does not apply retroactively to cases on collateral review. Judgment reversed.

Sentencing (Enhancement)

SEN; 345(32)

James v United States, 550 US __, 127 Sct 1586 (2007)

The petitioner pled guilty to firearms possession under 18 USC 922(g)(1) and admitted three prior felony convictions. At sentencing he asserted that his Florida conviction was not a “violent felony” under the Armed Career Criminal Act (ACCA), 18 USC 924(e), which requires a 15 year mandatory sentence. His argument was rejected; his sentence was affirmed.

Holding: Florida's definition of attempted burglary fell within the residual section of the ACCA. A “violent felony” includes crimes such as burglary (*Taylor v United States*, 495 US 575, 598 [1990]), certain named offenses, or “an offense that otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 USC 924(2)(B)(ii). A plain reading of the ACCA did not preclude attempt offenses. Examining only the fact of conviction and Florida's definition of the crime, attempted burglary qualified as a violent felony. See *Shepard v US*, 544 US 13, 17 (2005). The risk of harm from the possibility of a face-to-face confrontation between the burglar and a third party appearing while the crime was in progress is sufficient. Judgment affirmed.

Dissent: [Scalia, JJ] The majority interpretation of the residual provision will result in crime-by-crime analysis in the lower courts. A residual offense must present that same level of risk as the least risky enumerated offense, which was burglary; attempted burglary fell short of that mark.

Dissent: [Thomas, JJ] The district court finding of fact that a state felony was a “violent felony” for sentencing under ACCA violated *Apprendi v New Jersey*, 530 US 466 (2000).

Civil Rights Actions (USC 1983 Actions)

CRA; 68(45)

Scott v Harris, 550 US __, 127 Sct 1769 (2007)

State police clocked the respondent's car at 73 mph in a 55 mph zone on a two-lane road. When they tried to pull him over, he sped away. The petitioner, a deputy, became involved in the chase and struck the respondent's bumper from the rear to stop him. The respondent lost control and crashed, rendering him quadriplegic. He filed a 42 USC 1983 action against the petitioner for using excessive force. The district court's rejection of the petitioner's summary judgment motion was affirmed.

Holding: The threshold question in determining qualified immunity requires viewing the evidence in a light most favorable to the injured party to see if those facts showed that the officer violated a constitutional right. *Saucier v Katz*, 533 US 194, 201 (2001). This usually means adopting the plaintiff's version of the facts. However, “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” A videotape of the chase contradicted the respondent's version of the facts, adopted by the Circuit court. The respondent careened down a narrow two-lane road, late at night, running red lights, and endangering bystanders and police. Since no reasonable jury could have accepted the respondent's version of events contrasted with the video, there was no genuine issue of material fact. See *Anderson v Liberty Lobby, Inc*, 477 US 242, 247-248 (1986). The petitioner did not violate the 4th Amendment. While ramming the respondent's car with his bumper was a seizure, it was objectively reasonable to eliminate the risk posed by his reckless driving, although it put him at risk of serious injury. Judgment reversed.

Concurring: [Ginsburg, JJ] This fact intensive analysis under the 4th Amendment does not create a per se rule. There was no need to reach the qualified immunity question, since the officer's actions were constitutional.

Concurring: [Breyer, JJ] The videotape persuasively showed that no reasonable jury would have found that the petitioner violated the constitution in stopping the respondent. Requiring that lower courts must decide the constitutional question before reaching qualified immunity should be overruled.

Dissent: [Stevens, JJ] De novo review of the videotape of the chase ignored the well-settled practice of relying on the findings of fact made by the trial and circuit courts. The appropriateness of deadly force under the 4th Amendment was a jury question.

Appeals and Writs (Preservation of Error for Review)

APP; 25(63)

US Supreme Court *continued*

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

Smith v Texas, 550 US __, 167 LEd2d 632 (2007)

The petitioner was sentenced to death for murder by a Texas jury. He challenged his sentencing proceeding, which occurred between the decisions in *Penry v Lynaugh*, 492 US 302 (1989) (*Penry I*), and *Penry v Johnson*, 532 US 782 (2001) (*Penry II*), dealing with special-issue questions submitted to capital juries in Texas to guide their penalty phase determinations. The infirmity identified in *Penry I* was that special-issue question instructions did not allow proper consideration of mitigating evidence. Trying to obviate the problem, Texas courts then instructed juries that, if they found that death should not be imposed but believed that the special issues had been satisfied, they ought to falsely answer “no” to one of the questions. *Penry II* found this nullification procedure insufficient. The petitioner raised a special issues claim and eventually, in *Smith v Texas*, 543 US 37 (2004) (*Smith I*), a *Penry I* error and an inadequate nullification charge under *Penry II* were found. On remand, relief was denied since the petitioner had not preserved the *Penry II* claim and the pretrial *Penry I* claim required the petitioner to show egregious harm.

Holding: Requiring the petitioner to show egregious harm to establish a constitutional error in the mitigation instructions was based on a misinterpretation of federal law. See *Ake v Oklahoma*, 470 US 68, 75 (1985). *Smith I* held that the special-issues instructions were not constitutional and the nullification charge did not fix the problem. The petitioner objected to the special-issues charge before trial and continued to raise the claim throughout post-conviction litigation. The state court should have applied the lower harmless error standard. The petitioner met his burden of showing a reasonable likelihood that the jury believed that it was not allowed to consider mitigating evidence. See *Johnson v Texas*, 509 US 350, 367 (1993). Judgment reversed and remanded.

Concurring: [Souter, J] Whether harmless error review is appropriate in a *Penry I* claim had yet to be addressed.

Dissent: [Alito, J] Failure to object to the text of sentencing instructions, or suggest modifications, and instead argue that they were unconstitutional under *Penry I*, failed to preserve the question. Application of the higher egregious harm standard, without objection, was an adequate and independent state ground for the lower court’s decision.

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

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

Abdul-Kabir v Quarterman, 550 US __, 127 Sct 1654 (2007)

At the petitioner’s capital sentencing hearing, the Texas court gave two special-issue instructions on deliberateness and future dangerousness, and made no reference to mitigating evidence. The petitioner presented evidence concerning childhood abandonment and neglect, and expert testimony about his lack of impulse control and lifelong depression. This evidence could have helped lessen moral culpability. The court rejected the petitioner’s proposed instructions asking the jury to consider evidence in mitigation in rejecting the special issues. The death sentence was affirmed and collateral relief denied, most recently under the 5th Circuit’s formulation of *Penry v Lynaugh*, 492 US 302 (1989) (*Penry I*). After the 5th Circuit test was found invalid under *Tennard v Dretke*, 542 US 274, 284 (2004) this case was remanded; habeas relief was again denied.

Holding: Even before *Penry I*, precedent required sentencing juries to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty, notwithstanding the severity of crime or future dangerousness. See *Woodson v North Carolina*, 428 US 280 (1976); *Proffitt v Florida*, 428 US 242 (1976); and *Jurek v Texas*, 428 US 262 (1976). “[W]hen the jury is not permitted to give meaningful effect or a ‘reasoned moral response’ to a defendant’s mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed.” Judgment reversed and remanded.

Dissent: [Roberts, J] *Penry I* has been narrowed by later cases. When the state court considered the standard for mitigation instructions, the law was not “clearly established.” Supreme Court precedent on this subject has been shifting and relying too heavily on case-specific fact patterns. *Yarborough v Alvarado*, 541 US 652, 664 (2004).

Dissent: [Scalia, J] Limiting a jury’s discretion to consider all mitigating evidence did not violate the 8th Amendment. See *Ayers v Belmontes*, 549 US __, 127 Sct 469, 480 (2006). The state court decisions were not unreasonable application of federal law.

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

Brewer v Quarterman, 550 US __, 127 Sct 1706 (2007)

At sentencing for felony murder committed during a robbery, the petitioner introduced evidence of treatment for depression, obsession with his co-defendant, who dominated and manipulated him, and an abusive father. Counsel made a strategic decision to offer no expert psychological or psychiatric testimony. The trial court rejected the petitioner’s additional mitigating jury instructions and charged the jury to decide whether the petitioner’s

US Supreme Court *continued*

actions were deliberate and the probability of future dangerousness. The prosecution underscored that the petitioner's violent upbringing supported finding future dangerousness and downplayed its value in mitigation. After the death sentence was affirmed on appeal and state post-conviction denied, federal habeas relief was conditionally granted based on *Tennard v Dretke*, 542 US 274 (2004) but was reversed on appeal.

Holding: The special issues instructions did not appropriately address the importance of mitigating evidence nor give the jury an opportunity to adequately consider it. *Penry v Lynaugh*, 492 US 302 (1989) (*Penry I*). The evidence offered by the petitioner was a "two-edged sword" that could have been applied to both future dangerousness and mitigation. The court's failure to charge the jury to consider it as mitigating evidence was "contrary to" and "involved an unreasonable application of, clearly established" federal law as set out by the Supreme Court. See 28 USC 2254(d). Judgment reversed.

Dissent: [Roberts, J] *Penry I* has been narrowed by later cases. When the state court considered the proper standard for mitigation instructions, the law was not "clearly established." Supreme Court precedent on this subject has been shifting and relying too heavily on case-specific fact patterns. *Yarborough v Alvarado*, 541 US 652, 664 (2004).

Dissent: [Scalia, J] Limiting a jury's discretion to consider all mitigating evidence did not violate the 8th Amendment. The state decisions were not unreasonable application of federal law.

Death Penalty (Penalty Phase) **DEP; 100(120)****Schriro v Landrigan, No. 05-1575, 5/14/2007, 550 US __**

At the respondent's sentencing hearing for his felony murder conviction, defense counsel attempted to present mitigation testimony from the respondent's ex-wife and birth mother, but the respondent refused to allow it. The respondent interrupted defense counsel's efforts to summarize the proposed testimony and undermined his arguments. The respondent made no statements in mitigation, and invited the court to bring on the death penalty. After his death sentence was affirmed, he argued in postconviction that defense counsel did not explore additional grounds for arguing mitigation, such as interviewing his father and investigating the biological aspects of his violent behavior, and prenatal drug and alcohol abuse by his mother. Relief was denied based on the respondent's refusal to allow counsel to present mitigating evidence. The district court in which the respondent filed a federal habeas petition found upon an expanded record that there

was no colorable claim of ineffectiveness of counsel; the en banc Court of Appeals reversed.

Holding: The district court did not abuse its discretion in refusing to grant an evidentiary hearing, since it found no colorable claim for ineffective assistance of counsel. Evidentiary hearings are discretionary under the Antiterrorism and Effective Death Penalty Act of 1996 and earlier case law. Before granting a hearing, the district court had to decide whether the respondent could have proven facts that if true would have entitled him to relief. See *Mayes v Gibson*, 210 F3d 1284, 1287 (CA 10 2000). Since the record refuted the respondent's claims, it was within the court's discretion to deny an evidentiary hearing. The lack of mitigation being at the respondent's clear directive, there was no prejudice under *Strickland v Washington*, 466 US 668 (1984). The respondent's mitigation evidence was weak at best, and his later claims were duplicative of information that could have been presented at sentencing. Judgment reversed and remanded.

Dissent: [Stevens, J] Important mitigating evidence was not disclosed, or discovered till much later, because defense counsel failed to conduct a constitutionally adequate investigation. See *Wiggins v Smith*, 539 US 510 (2003). Failure to uncover neuropsychological evidence infected the respondent's choices.

Civil Rights Actions (USC 1983 Actions) **CRA; 68(45)****Los Angeles County v Rettele, No. 06-605, 5/21/2007**

Executing a valid warrant to search for three African-American suspects, one possibly armed, police entered the target home unaware that the suspects had moved out three months earlier. With guns drawn, the police ordered the first person they encountered to lie face down on the floor and the two others out of bed without their clothes; the latter had to wait for several minutes before being allowed to dress. All occupants of the home were white. Realizing their mistake, the officers apologized and left. The respondents/residents brought a 42 USC 1983 action alleging that the search was conducted in an unreasonable manner under the 4th Amendment. Summary judgment granted to petitioners/police was reversed on appeal.

Holding: Police acting in a reasonable manner and detaining suspects for safety reasons while executing a valid warrant for contraband did not violate the 4th Amendment. See *Michigan v Summers*, 452 US 692 (1981). The officers took reasonable steps to secure the premises, assure their safety and avoid destruction of evidence. See *Graham v Connor*, 490 US 386, 397 (1989). Discovery of Caucasians in the house did not eliminate the possibility that the African-American suspects were somewhere else or lived there. In carrying out a lawful search, it was reasonable for the police, for safety reasons, to order the suspects out of bed, where weapons might have been hidden—especially since they were looking for an armed sus-

US Supreme Court *continued*

pect. See *United States v Enslin*, 327 F. 3d 788, 791 (CA9 2003). The detention was not overly long, less than 15 minutes, and the respondents were allowed to dress after about two minutes. The qualified immunity question need not be reached. See *Saucier v Katz*, 533 US 194, 201 (2001). Judgment reversed and remanded.

Concurring: [Stevens, J] Where the unconstitutionality of the officers' conduct was not clearly established (see *Franklin v Foxworth*, 31 F3d 873 (CA 9 1994), the petitioners were entitled to qualified immunity and there was no need to reach the constitutional issue. See *County of Sacramento v Lewis*, 523 US 833, 859 (1998).

New York State Court of Appeals

Auxiliary Services (Interpreters) AUX; 54(30)

People v Melendez, No. 28, 3/22/2007

The defendant's court-appointed interpreter was ordered by the trial judge to interpret for the entire courtroom.

Holding: The defendant's constitutional challenges – violation of his right to counsel, his right to be present and to participate in his own defense – were unpreserved. The issues relating to the accuracy of the translation of the complainant's testimony and faulty instructions to the grand jury were without merit. Order affirmed.

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

People v Dallas, No. 30, 3/22/2007

Holding: The trial court's decision that the search of the defendant's apartment was justified under the emergency doctrine was supported by the record. The lower courts determined that the three requisite factors had been met, based on evidence in the record. Those factors are: (1) reasonable grounds to believe that there is an emergency at hand and an immediate need for police assistance for the protection of life or property; (2) search not primarily motivated by intent to arrest and seize evidence; and (3) some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. *People v Mitchell*, 39 NY2d 173, 177-178. Resolution of the emergency doctrine issue was a mixed question of law and fact. *People v Molnar*, 98 NY2d 328, 335. No further review was warranted. The question of whether the *Mitchell* holding should be modified in light of the Supreme Court's decision in *Brigham City v Stuart* (___ US ___, 126 SCt 1943 [2006]) was not reached. Order affirmed.

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause (Observations and State of Mind)]) (Warrantless Searches) SEA; 335(10[g(iv)]) (80)

People v Gomcin, No. 6, 3/27/2007

In a New York City social club, the defendant had asked an undercover officer if she "wanted to take a hit of cocaine." The officer's purpose in the club was to conduct a buy and bust operation. She radioed another detective about the defendant's statement. A backup team later searched all patrons leaving the club; the defendant was found to have a packet of cocaine and a gun. At the *Mapp* hearing in his prosecution for possession of the drugs and weapon, only the detective who received the radio call testified. The court held that the evidence was legally insufficient to establish probable cause. Grant of the motion to suppress was affirmed.

Holding: The defendant's statement asking if the female officer wanted a hit of cocaine was merely an inquiry into her "wishes and desires." The motion court made a reasonable inference in coming to that conclusion, since no context to the conversation was provided. The existence of probable cause was a mixed question of law and fact. The lower court's decision that this statement alone did not support the inference that defendant possessed cocaine had sufficient support in the record. Order affirmed.

Identification (Expert Testimony) IDE; 190(5)

People v LeGrand, No. 39, 3/27/2007

The decedent cab driver was stabbed in front of four witnesses in 1991. Together they worked on a composite sketch. In 1998, the defendant was arrested on a burglary charge, and, based on the sketch, on the open homicide. Police found all four witnesses, and a new one. One witness picked the defendant from a photo array and lineup, two did not identify him from the photos. One found the picture resemblance close, if not exact, and another found it similar. The defendant's murder case hinged solely on the seven-year-old identifications. The first trial ended in a hung jury. The defendant's effort to introduce expert testimony on eyewitness identification at the second trial was denied. His conviction was affirmed.

Holding: Expert evidence concerning the reliability of eyewitness identification has earned acceptance within the scientific community. See *People v Mooney*, 76 NY2d 827, 829-830 [Kaye, J., dissenting]. In *People v Lee* (96 NY2d 157), it was held that trial courts must exercise sound discretion in determining whether to admit such expert testimony. The court must consider whether the jurors would benefit from specialized expert knowledge beyond their

NYS Court of Appeals *continued*

common experiences, the importance of identification evidence in the case, and the amount of corroborating evidence. *People v Young*, 7 NY3d 40. Here, the trial court recognized the importance and relevance of the expert evidence. Unlike *Lee* and *Young*, this case turned mainly on the accuracy of the witnesses' identification—there was no corroborating evidence. Although the general acceptance prong of the *Frye* test was satisfied, the trial court had a right to conduct a hearing to assess whether there was a proper foundation "for the reception of the evidence at trial." See *People v Wesley*, 83 NY2d 417, 429. Still, the expert testimony could have been admitted without a hearing based on the rulings of other courts. The defendant met his burden at the *Frye* hearing on three of four factors influencing reliability of eyewitness identifications: (1) correlation between confidence and accuracy of identification, (2) effect of post-event information on accuracy of identification, and (3) confidence malleability. Expert testimony on these factors should have been admitted. Evidence as to the fourth factor, the effect of weapon focus on memory, was properly excluded because there was insufficient evidence to confirm that the principles regarding it, as set forth by the expert, are generally accepted by the relevant scientific community. Order reversed and remanded for new trial.

Appeals and Writs (Arguments of Counsel) (Counsel) **APP; 25(5) (30)**

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

People v Ramchair, 8 NY3d 313 (2007)

The complainant cabdriver picked the defendant out of a lineup at which defense counsel was present. During the defendant's third trial (following two mistrials), a detective testified that the attorney made no objections during the lineup, which would have been accommodated or at least noted. Defense counsel's objection was overruled, and his request to testify in rebuttal was denied. When the detective finished, defense counsel moved for a mistrial claiming the testimony left the impression that he approved of the line-up procedure. Denial of the mistrial motion was not challenged on appeal; issues of double jeopardy and denial of the right to present a defense regarding trial attorney's request to testify about the lineup were rejected. After leave to appeal was denied, a federal habeas court rejected the points the points raised, but suggested appellate counsel was ineffective for not raising the mistrial issue. The petition was held in abeyance pending exhaustion of state remedies. The Appellate Division denied the defendant's coram nobis petition.

Holding: The defendant's constitutional right to

effective assistance of counsel (*People v Turner*, 5 NY3d 476) required "meaningful representation." See *People v Baldi*, 54 NY2d 137. Effective appellate counsel was not required to argue every potentially meritorious point, having discretion about which issues to choose and how to present them. Appellate counsel's second issue, right to present a defense, raised facts underlying the mistrial application. There is no US Supreme Court or Court of Appeals authority on this point, and only two Appellate Division cases suggested that such evidence is sometimes admissible. See *People v Foulks*, 143 AD2d 1038; *People v Valentine*, 271 AD2d 245. It was reasonable for appellate counsel to conclude that the right to present a defense argument stood a better chance than the mistrial issue. The record revealed a legal basis for this strategic choice. Order affirmed.

Guilty Pleas (General)**GYP; 181(25)****People v Rowland, 8 NY3d 342 (2007)**

While facing a murder charge, the defendant had been sentenced in unrelated matters to 1 to 3 years for a probation violation and 2 to 4 years for possession of stolen property, to be served consecutively. Eventually, the defendant entered an *Alford* plea to criminally negligent homicide and a weapons charge; he was sentenced 2 to 4 years on each charge to be served consecutively to each other (total 4 to 8 years) and concurrently with the previously imposed sentences (total 3 to 7 years). The next year, his stolen property possession conviction was reversed, resulting in a new plea bargain of one year. The defendant then moved to vacate the homicide conviction claiming that he would not have entered a plea except for the 2 to 4 year sentence on the stolen property charge and the expectation that it would run concurrent with the old sentence. Denial of the motion was affirmed.

Holding: The defendant was entitled to withdraw his guilty plea where the plea had been induced by a promise that the prison sentence would be concurrent with a pre-existing sentence; where the previous conviction had been overturned, the promise could not be kept. See *People v Pichardo* 1 NY3d 126. In *Pichardo*, the defendant received a short sentence on a drug charge to run concurrently with an existing 20-year term for murder. When that old conviction was overturned, the court's promise of a sentence that would not add jail time could not be kept. This rule applied to cases where the new sentence is longer than the previous one. In both cases, the gravamen of the plea bargain was no additional jail time or some benefit promised to the defendant to induce a plea. It is recommended that at the plea the parties put on the record the effect on the sentence should a previous conviction be vacated. Order reversed, matter remitted.

Dissent: [Graffeo, JJ] The defendant agreed to a concurrent new term longer than the one he was serving; the

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incentives described in *Pichardo* were absent. The record showed defendant would have accepted the homicide plea to avoid the risks of trial and a lengthy sentence, regardless of the previous sentence.

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

Confessions (Evidence) (General) CNF; 70(30) (32)

People v Havrish, No. 31, 4/3/2007

The defendant faced multiple felony charges related to a domestic violence complaint. The court issued an order of protection requiring him to surrender his firearms. To the police he admitted owning a handgun, but claimed his ex-wife had it. She told the authorities that it was in the defendant's home, and mentioned, with uncertainty, that he did not have a license. The defendant later called police and said he found the pistol. He did not have a license and was arrested for criminal possession of a weapon. His motion to suppress the gun based on a violation of his privilege against self-incrimination was granted, and the case dismissed. The Appellate Division reversed and reinstated the charge.

Holding: The 5th Amendment prohibits compelled testimonial self-incrimination. *Schmerber v California*, 384 US 757, 761 (1966). The privilege has two elements: compulsion and testimonial evidence. Compulsion was established by the order of protection, which mandated that the defendant turn over any guns he owned or face criminal contempt charges. Resulting physical evidence, such as a gun, was not protected. However, the act of producing the gun was communicative and privileged. *See US v Doe*, 465 US 605, 613 (1984). The defendant told police that he had a gun, which they did not know for certain and did not discover on their own. Finding the gun was not a "foregone conclusion." *See Fisher v US*, 425 US 391, 411 (1976). The act of production was incriminating, the commission of a crime in police presence. No independent basis for finding the gun was shown. Whether the defendant should have invoked the privilege before surrendering his weapon and the applicability of the regulatory scheme exception were not considered. Order reversed, suppression granted, information dismissed.

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

Sex Offenses (Sentencing) SEX; 350(25)

People v Dean, No. 35, 4/3/2007

The defendant was indicted on seven counts for various sex related crimes involving possession of porno-

graphic digital images and videos "during the month of July, 2004." While these charges were pending, another seven-count indictment was issued for similar crimes. The defendant pled guilty to three counts of the first indictment in satisfaction of both. His conviction and sentence of three consecutive one-to-three year terms were affirmed.

Holding: Neither the indictment nor the allocation provided sufficient facts to show that the defendant had taken possession of each of the digital images at a separate time. *See People v Laureano*, 87 NY2d 640, 644. Consecutive sentences require a finding that the acts were separate and distinct. *See Penal Law 70.25: People v Ramirez*, 89 NY2d 444, 451. Without a date and time in the indictment or the allocation for each of the allegedly separate acts of downloading the digital images, the court did not have the power to impose consecutive sentences. Order modified and affirmed.

Sex Offenses (General)

SEX; 350(4)

People v Kozlow, No. 49, 4/26/2007

The defendant was charged with attempted first-degree dissemination of indecent material to minors under former Penal Law 235.22 (L 1996, ch 600). Sending messages via the Internet to someone he believed to be 14 years old, but who was actually an undercover police officer, the defendant described sexual acts they might do and arranged a meeting. Police arrested the defendant at the rendezvous point. His motion to dismiss because the emails and instant messages did not contain pictures (*ie*, depictions) as required by the statute was denied. His conviction was reversed.

Holding: The term "depict" includes descriptions of sexual images. The former statute, Penal Law 235.22, which has been amended to read depicts "or describes, either in words or images," had two requirements: communication with a minor depicting sexual imagery; and luring a minor to engage in sexual conduct. "Depict" has the ordinary meaning of representing or portraying in words. The legislative history supported the conclusion that the law was aimed at curbing primarily textual communication to minors of a sexual nature. *See People v Shack*, 86 NY2d 529, 538. An enticement to meet could not be conveyed by pictures alone, hence construing "depicts" too narrowly would thwart the law's purpose. *See People v Foley*, 94 NY2d 668. Order reversed, matter remanded.

Dissent: [Smith, J] "Depict" means to represent by a picture and the legislature consciously used depict rather than describe in former Penal Law Art 235. Interpretation of the statute after its enactment underscored the accepted meaning of depict, *ie*, images and not words.

NYS Court of Appeals *continued***Instructions to Jury (Theories of Prosecution and/or Defense)** ISJ; 205(50)**Sex Offenses (Sodomy)** SEX; 350(30)**People v Newton, No. 53, 5/1/2007**

While on probation for assault, the defendant was charged with first- and third-degree sodomy. He claimed the charged behavior was consensual, and that he had been drinking at the time. At trial, his attorney asked for an intoxication charge. The court only gave the charge as to first-degree sodomy and refused to apply it to the other charge, since it did not have an intent element. The jury acquitted defendant of first-degree sodomy and convicted him on the third-degree count. The conviction was affirmed.

Holding: Third-degree sodomy focused on the “lack of consent” from the complainant. Penal Law 130.40(3). Under the Sexual Assault Reform Act, the court must look at how a “reasonable person” would have interpreted the circumstances and complainant’s expressions concerning lack of consent. Penal Law 130.05(2)(d). The reasonable person standard focuses on whether the complainant’s actions or words clearly expressed lack of consent, regardless of a defendant’s subjective views. Since the defendant’s subjective mental state was not at issue for third-degree sodomy, the intoxication defense did not apply. Order affirmed.

Assault (Evidence) ASS; 45(25)**Burglary (Elements) (Evidence)** BUR; 65(15) (20)**People v Chiddick, No. 56, 5/1/2007**

The complainant confronted the defendant during a burglary and grabbed him. In breaking away, the defendant bit the complainant’s left ring finger, cracking the nail and causing bleeding. The complainant was taken to a hospital and given a tetanus shot and bandaged. At trial, he described the injury as causing moderate pain. A jury convicted the defendant of second-degree burglary and second-degree assault. On appeal, he contended that the physical injury threshold required for both offenses was not met. His conviction was affirmed.

Holding: Physical injury means “impairment of physical condition or substantial pain.” Penal Law 10.00(9). While substantial pain must be more than slight or trivial, it need not be severe or intense. The complainant described the pain as being between a little and a lot, not trivial; he did receive medical treatment. Legislative history indicates that motive can be a factor. Unlike a person whose aim is to show hostility and not inflict pain, the

defendant’s goal was to make the complainant release him, *ie*, inflict as much pain as possible. “[I]t seems unlikely that anything less than substantial pain would have caused Gentles, evidently a tenacious man, to release his hold.” Order affirmed.

Juries and Jury Trials (Challenges) (Competence) (Discharge) (Qualifications) JRY; 225(10) (15) (30) (50)**People v Dukes, No. 63, 5/1/2007**

After the complainant testified, juror number three told the court that she and the complainant may have worked in the same nursing home, and that the juror thought the complainant may have been fired for an incident involving a gun. The juror had not know the complainant very well, was not involved in the firing, and said that she was 100 percent sure that she could remain impartial and not be affected by this information. The court granted the prosecution’s motion to remove the juror as grossly unqualified. The defendant’s conviction was affirmed.

Holding: County court improperly dismissed a sworn juror over the defendant’s objection. The Criminal Procedure Law required the court to carefully consider the juror’s answers about her ability to be impartial and to put its ruling and reasons on the record. CPL 270.35(1). The judge failed to show that he was convinced of the juror’s inability to be impartial. His comment that at worst he was replacing one qualified juror with another underscored the inadequacy of his reasoning. Order reversed and new trial ordered.

Motions (Suppression) MOT; 255(40)**People v Bryant, No. 50, 5/3/2007**

The defendant was indicted for second-degree murder. The prosecution served its voluntary disclosure form (VDF) disclosing that a witness had picked out the defendant’s photo shortly after the event. The defendant moved to suppress all the evidence, claiming he had been arrested without probable cause. He denied being either the principal or accomplice in the crime. The unknown witness who picked out his photograph was not revealed nor the source of that person’s information verified. Denial of the defendant’s *Mapp/Dunaway* motion was affirmed.

Holding: Criminal Procedure Law 710.60(1) requires factual allegations in a suppression motion to be judged by the content of the pleadings, the context of the motion, and a defendant’s access to information. *People v Mendoza*, 82 NY2d 415, 422. The defendant claimed he was arrested at his apartment building, not near the crime scene; the VDF noted the arrest occurred seven hours after the incident, after an identification was made and the defendant

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had given a statement. If he was arrested before going to the police station, probable cause would depend on the witness's identification. Where there was little information in the indictment or VDF about the defendant's role in the crime, he had few options but to deny his participation. See *People v Hightower*, 85 NY2d 988, 990. Only the prosecution knew the factual predicate for the arrest. It was disingenuous for the prosecution to withhold the identity of and basis for the identifying witness's knowledge, required under *Aguilar/Spinelli*, and at the same time attack the defendant's motion as insufficient. The defendant's lack of access to complete information prevented him from making specific factual allegations and created factual disputes mandating a hearing. Order reversed, matter remanded.

Guilty Pleas (General) GYP; 181(25)

Robbery (Elements) ROB; 330(15)

People v Castillo, No. 65, 5/3/2007

The defendant was charged with first-degree drug possession and two counts of first-degree robbery under Penal Law 160.15(4), which includes forcible stealing and displaying a firearm. Under a plea agreement, he pled guilty to the drug count and to first-degree robbery under Penal Law 160.15(2), which was not charged in the indictment. That subsection's language required possession of a "deadly weapon" during the robbery. The allocution did not cover the displaying a firearm element of subsection four. The plea was vacated on appeal as jurisdictionally defective.

Holding: Criminal Procedure Law 220.10(4) restricts pleading in a multi-count indictment to one or more of the offenses charged or a lesser-included offense. A plea to a different crime of equal or higher grade is prohibited. *People v Johnson*, 89 NY2d 905, 907. Since the defendant pled guilty to a first-degree robbery charge different from, although at the same level as, the one in the indictment, the plea was jurisdictionally defective. See *People v Keizer*, 100 NY2d 114, 119. Both subsections required forcible stealing, but differed concerning the weapons element. Order affirmed.

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

People v Person, No. 66, 5/8/2007

The defendant was charged with a robbery, carried out by two accomplices, that resulted in the decedent's

death. The accomplices made initial videotaped statements admitting their guilt but exonerating the defendant. After entering plea agreements with the prosecution, they testified at trial that the defendant had planned the robbery. Defense counsel cross-examined them using transcripts of their videotapes; they admitted making prior inconsistent statements. The court denied counsel's motion to introduce the videotapes into evidence.

Holding: At trial the defendant sought to introduce the videotapes to prove the content of the witnesses' prior inconsistent statements. On appeal, he argued that the videos were essential for the jury to evaluate the accomplices' credibility. This was not preserved. "We therefore have no occasion to consider whether the preclusion of this evidence constituted an abuse of discretion as a matter of law." Order affirmed.

Homicide (Murder [Sentence]) HMC; 185(40[v])

People v Rosas, No. 59, 5/8/2007

The defendant was charged with a double-homicide for shooting his ex-girlfriend and her husband as they slept. At trial he was convicted of two counts of first-degree murder. Penal Law 125.27. Although the court instructed the jury that the prosecution had to prove the defendant intended to kill each primary victim, and intended to kill or seriously injure the other, the defendant was sentenced to consecutive life terms on both counts. The appellate court found that, since the homicides occurred during a single act, the sentences should run concurrently.

Holding: The double homicide was part of a single act and each count was a material element of the other warranting a concurrent sentence. See Penal Law 70.25(1) and (2); *People v Laureano*, 87 NY2d 640. The "single act" required under the sentencing law is equivalent to the actus reus for the crime. The statutory definition of first-degree murder determined how the sentences ought to run. Under Penal Law 125.27(1)(a)(viii), the actus reus was that the defendant intended to kill one person and cause the death of the other. The same acts constituted both crimes, so the actus reus was the intentional murder of the same two people. Despite the fact that each count had different, yet complementary, primary victims and aggravators, it was all part of the same homicide. The acts were not independent of each other. Order affirmed.

Dissent: [Grafteo, J] Since the prosecution was required to prove two homicidal acts against two individuals, they deserved separate consideration for sentencing. By excluding consecutive sentencing for first-degree multiple murders, courts will be compelled to choose life without parole to avoid sentences of 25 years to life, when otherwise a sentence of 40 or 50 years to life might have been available.

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Juries and Jury Trials (Waiver) **JRY; 225(65)**

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

**People v Gajadhar, __AD3d__, 828 NYS2d 346
(1st Dept 2007)**

Holding: After jury deliberations began, a juror became ill, requiring extended hospitalization. The defendant requested that deliberations continue with the remaining 11 jurors, and executed a written waiver of the state constitutional right to a jury to that extent. *See Const, art I, § 2; see also CPL 270.05.* On appeal from felony murder and first-degree attempted robbery convictions, the defendant asserted that under *Cancemi v People* (18 NY 128) he could not consent to a jury of less than 12. The reasoning of *Cancemi* was rejected in *Patton v US* (281 US 276, 287 [1930] *abrogated other grnds Williams v Florida*, 399 US 78 [1970]). The defendant has not shown that New York law precludes a jury of less than 12 members in a criminal trial. Case law predating the Code of Criminal Procedure has been implicitly overruled. *See People v Page*, 88 NY2d 1, 8-9. The written waiver here complies with constitutional requirements.

The evidence was sufficient to support a finding of an intent to steal. Testimony indicated that the defendant had previously gone to the decedent's office seeking payment of an alleged debt and on the day in question had told an accomplice known to be armed to "take care of them" after the decedent refused to acknowledge the debt. While the assailants could have intended only to injure or kill those on the premises, a reasonable jury could infer that the purpose was to obtain money for the alleged debt by force or threat of force. *See People v Bracey*, 41 NY2d 296, 301. That the decedent told a 911 operator no robbery was in progress is not dispositive of whether the acts constituted the crime of attempted robbery. The remaining issues were unpreserved or lack merit. Judgment affirmed. (Supreme Ct, New York Co [Obus, JJ])

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

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

**People v Soriano, 36 AD3d 527, 828 NYS2d 369
(1st Dept 2007)**

Holding: Where the defense of justification was raised, the prosecution had the burden of proving that the defendant subjectively knew retreat would provide safety for him and the person he was allegedly trying to protect. *See Penal Law 35.15(2)(a); Criminal Jury Instruction 2nd, Justification: Use of Deadly Physical Force in Defense of a Person.* In charging the jury, the court initially said that justification would not apply if a defendant used deadly

force knowing that he could retreat with complete safety; the court then restated the standard, saying the prosecution had to show that the defendant "could have retreated with complete safety to himself and to" the person he sought to help. [Emphasis in decision.] This left out the essential element of knowledge. *See People v Lopez*, 87 AD2d 578, 579. The jury may have erroneously believed that the defense of justification was defeated if the prosecution proved no more than that it would have been possible for the defendant to have avoided the use of physical force by retreating. The charge as a whole cannot be said to have adequately conveyed the correct standard. *Cf People v Adams*, 69 NY2d 805, 806. The unpreserved error is reached and relief granted in the interest of justice. *See CPL 470.15(3)(c), (6) (a).*

Rebuttal testimony that the defendant's statement to police a day after the incident contained assertions that he had been at his girlfriend's apartment when the stabbing occurred had nothing to do with the prosecution's case in chief, and was relevant as opposing what the defendant sought to prove in his case and as impeachment of the defendant's witnesses. The evidence was properly admitted. *See People v Harris*, 57 NY2d 335, 345 *cert den* 60 US 1047. Judgment reversed, remanded for new trial. (Supreme Ct, Bronx Co [Clancy, JJ])

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

People v Hill, __AD3d__, 830 NYS2d 33 (1st Dept 2007)

The defendant pled guilty to first-degree rape in full satisfaction of a 32-count indictment. He was told that the sentence would be a 15-year prison term, which was imposed in May 2002. In March 2004 the defendant moved to vacate his conviction, saying he had not been informed of a five-year period of post-release supervision. After a hearing, the motion was denied but the defendant's sentence was modified to a prison term of 12½ years plus two and a half years of post-release supervision.

Holding: *People v Catu* (4 NY3d 242) does not require vacatur of every plea taken without advice about post-release supervision regardless of resulting prejudice or even benefit to the defendant. The modified sentence put the defendant in a better position than a 15-year term with no post-release supervision. The defendant's claim that he would rather serve 15 years in prison than any period of post-release supervision is "disingenuous at best." He could choose not to request conditional release under the modified sentence. *See Penal Law 70.40(1)(b).* Had the court modified the sentence to a lesser sentence, the prosecution could have had the plea vacated. *See People v Farrar*, 52 NY2d 302, 307-308. The defendant argues that he would have had the right to vacatur in that instance as well, but the outcome of a request for vacatur cannot depend on the extent of a windfall benefit. Upholding the modification furthers the strong interest in finality. To

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allow a *Catu* claim to be made at any time would permit defendants to wait for strategic advantage before seeking to vacate their pleas. Further, *Catu* claims that do not implicate substantial rights may be deemed technical, warranting no relief. *See* CPL 470.05(1). The modification is permissible under CPL 430.10; the original sentence was illegal because it omitted the required post-release supervision. Even if a 5-year post-release supervision period was added by operation of law, the court would have the inherent authority to remedy its mistake of not specifying what period it intended. Because the lawful modification could rectify the court’s error, this case is distinguishable from *Catu* and *People v Van Deusen*, 7 NY3d 744. Judgment affirmed. (Supreme Ct, New York Co [Allen, JJ])

Dissent: [Marlow, JJ] The plea must be vacated under *Van Deusen*.

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

People v Latham, 36 AD3d 553, 829 NYS2d 456 (1st Dept 2007)

After pleading guilty to the top count of a multicount indictment in exchange for a promised sentence of two to four years for third-degree robbery, the defendant sought to withdraw his plea. The motion was discussed in open court on the date of sentencing. The defendant said he felt he had been pressured into taking the plea, but denied that he was seeking a better deal. The judge reminded the defendant that the defendant had said under oath at the time of the plea that he had not been threatened or forced in any way. The judge then said, “Were you lying to me under oath at that time.” Counsel advised the defendant not to respond to the question in that form, and asked the court to rule on the defendant’s motion. The court, after repeating that the defendant had said under oath “that he did it and that he wasn’t under any force or threat . . . ,” effectively denied the motion, sentencing the defendant in accordance with the plea.

Holding: A limited interrogation by the court will often suffice for establishing a basis for deciding a motion to withdraw a plea. *See People v Tinsley*, 35 NY2d 926, 927. Instead of conducting a limited inquiry into the basis for the defendant’s motion, the court presented—perhaps inadvertently—a Hobson’s choice. The defendant could abandon his motion or admit perjury. This matter is distinguishable from *People v Vanluovender* (35 AD3d 238). Here the court denied the defendant the opportunity to present his contentions, as required by *Tinsley*. The prosecution’s contention, first made on appeal, that the defendant is a career criminal knowledgeable about the plea process, cannot alone justify summary denial of the defendant’s motion. Appeal held in abeyance, matter remand-

ed for further proceedings as to whether the defendant should be allowed to withdraw his plea. (Supreme Ct, New York Co [FitzGerald, JJ])

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

Motions (Suppression) MOT; 255(40)

People v Johnson, 37 AD3d 363, 830 NYS2d 546 (1st Dept 2007)

Holding: The defendant was denied effective assistance of counsel at a hearing where his attorney’s remarks at the end of proofs reflected counsel’s unwillingness to ask the court to suppress the evidence. The lawyer said, in part, that “I don’t believe I have sustained, frankly, my burden to show the unlawful and unconstitutionality of the search.” Severable colorable arguments were available to counsel, yet he conceded all points raised. The defendant has met the burden of showing the absence of strategic or other explanations for counsel’s actions (*see People v Taylor*, 1 NY3d 174, 176); no legitimate strategy or tactic supporting the concessions are discernable. Error of counsel must be sufficient to have compromised the defendant’s right to a fair trial in order to warrant relief. *See People v Caban*, 5 NY3d 143, 152. Here, the complainant was the only witness to the charged robbery, making the gun found in the defendant’s home and the complainant’s identification of the defendant the core of the case. Matter remanded for a de novo *Mapp/Dunaway/Wade/Huntley* hearing. (Supreme Ct, Bronx Co [Cirigliano, JJ])

Juries and Jury Trials JRY; 225(10) (15) (50) (60) (Challenges) (Competence) (Qualifications) (Voir Dire)

People v Ortiz, 37 AD3d 361, 831 NYS2d 50 (1st Dept 2007)

Holding: A prospective juror, whose sister was a lawyer in the prosecutor’s office and who was best friends in high school with a police chief’s daughter, said she would have a difficult time not lumping multiple charged incidents together. She also said she “might tend toward police officers” in assessing the evidence. She responded affirmatively to counsel’s inquiry about whether she would do her best to follow instructions to treat an officer the same as anyone else, and to the court’s questions as to whether she would use her “best effort to evaluate” the case. A defense request to excuse the juror for cause was denied because of her indication that she would use her best efforts. A second prospective juror expressed reservations about being able to assess the three separate charged incidents separately. The defense also sought to have her excused for cause. At the end of voir dire, the court said, “What I’m gathering [is] the people think it’s complicat-

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ed, but they will use their best efforts.” The defense excused both prospective jurors, exercising its last challenges for the second one, who never unequivocally expressed an ability to evaluate the defendant’s guilt as to the various charges. The “collective assessment of an entire panel is not equivalent to the personal, unequivocal assurance the court is required to elicit from the individual prospective juror (see [People v] *Arnold*, 96 NY2d [358] at 363-364).” Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Cataldo, JJ])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause]) (Consent [Coercion and Other Illegal Conduct]) (Detention)

People v Padilla, 37 AD3d 357, 830 NYS2d 541 (1st Dept 2007)

The prosecution appealed suppression of evidence and the defendant’s statements.

Holding: The defendant was seen driving a car described earlier by a woman at a community meeting in relation to suspicious activity, and was seen entering and soon leaving a “Safe Halls” building (for which management have signed affidavits authorizing arrest of anyone entering without legitimate reason). This justified a level one, “‘objective and credible reason’ to ask the defendant general questions about where he had come from (see *People v Hollman*, 79 NY2d 181, 184. . .).” Temporary detention of the defendant and taking him to the Safe Halls building was justified by his lying about where he had just been, then saying he had been visiting a family in a specific apartment there, and dropping keys. When the apartment occupants denied knowing the defendant, probable cause for a trespass arrest arguably existed; continued detention to determine whether he had a valid reason for being in the building was appropriate. See *People v Williams*, 16 AD3d 151 *lv den* 5 NY3d 771. An overwhelming smell of marijuana in the third-floor hall, the matching of a key that defendant had dropped with the lock on the door of a different apartment, and the defendant’s consent to use the key led to discovery of a marijuana growth factory. The defendant’s acts were not spontaneous reactions to an illegal seizure but a calculated effort to disassociate himself from the building. His statements were spontaneously made in an effort to maintain innocence. Order reversed, suppression denied, matter remanded. (Supreme Ct, Bronx Co [Price, JJ])

Prisoners (Temporary Release Programs) PRS I; 300(35)

Matter of Marciano v Goord, __AD3d__, 830 NYS2d 552 (1st Dept 2007)

Holding: The court below annulled a Department of Correctional Services (DOCS) determination. Contrary to the court’s finding, substantial evidence existed to justify DOCS’s discontinuation of the petitioner’s participation in a temporary release program (TRP). His wife filed a complaint that he had threatened to kill her, and he admitted that their relationship was hostile and they had argued on the day of the alleged threat. Evidence suggesting that the wife’s complaint was fabricated did not render the supporting evidence less substantial. See *Matter of Miller v DeBuono*, 90 NY2d 783, 793. The determination must be annulled, however, because the petitioner was not given notice of the final TRP hearing, contrary to 7 NYCRR 1904.2(h). His signed waiver of 24-hour notice expressly related to an earlier meeting at which his TRP participation was suspended pending investigation. Further, he was not allowed to present witnesses and was not told of his right to do so. The petitioner had a liberty interest in continuing in the TRP; he was entitled to some due process before that was discontinued. See *Kim v Hurston*, 182 F3d 113, 117 (2d Cir 1999). The petitioner’s merit time and parole release date were automatically rescinded by the determination to discontinue his TRP participation. Annulment of the determination for procedural reasons does not automatically restore these items. Given the substantial evidence supporting the determination, a new hearing should be held in which the petitioner is afforded the procedural rights accorded by DOCS regulations. See *Matter of Dawson v Coughlin*, 178 AD2d 946. If he prevails at that hearing he must be restored to the TRP and a new parole hearing date set. Judgment modified, new hearing ordered. (Supreme Ct, New York Co [York, JJ])

Narcotics (Penalties) NAR; 265(55)

Sentencing (Concurrent/Consecutive) (General) SEN; 345(10) (37)

People ex rel Ordonez v Warden, __AD3d__, 830 NYS2d 153 (1st Dept 2007)

Holding: The petitioner was sentenced to an aggregate term of six years to life for his 1986 conviction of second-degree sale of drugs (a Class A-II felony) and his 1981 second-degree robbery conviction. He was entitled to the benefits of Executive Law 259-j(3-a), which requires that an indeterminate sentence for a class A felony defined in Penal Law article 220 be terminated after three years of unrevoked parole. The statute does not state or imply that it applies only where there is no concurrent, non-drug-related sentence. See *Matter of Walker v Dennison*, __AD3d__, 824 NYS2d 464, 465. When the petitioner’s sentence for the A-II felony is terminated, only the rob-

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bery sentence, which he has served, remains. Order granting habeas corpus affirmed. (Supreme Ct, Bronx Co [Tallmer, JJ])

Juveniles (Neglect) JUV; 230(80)

Matter of Terrence P. v Melinda C., __AD3d__, 831 NYS2d 384 (1st Dept 2007)

The Administration for Children’s Services (ACS) alleged that the respondent mother neglected 10-year-old Devonte, who had Attention Deficit Hyperactivity Disorder (ADHD) and was acting out in school. The petition alleged that the respondent failed to obtain a prescription for recommended medication and repeatedly missed scheduled counseling appointments. A caseworker testified that it had been hard to schedule the appointments because of the respondent’s work (the caseworker said she could not fault the respondent for not missing work). The respondent did take a day off to bring Devonte to the psychiatric evaluation resulting in the ADHD diagnosis. The respondent was “ambivalent” about the recommendation that Devonte take Adderall, fearing its effect on Devonte’s chronic asthma and heart murmur; she asked to wait to speak to Devonte’s pediatrician. The agency did not provide a requested referral for a second opinion from a non-agency psychiatrist. The caseworker said that the respondent’s attendance at counseling sessions did not improve after changes to accommodate her schedule, though some cancellations were initiated by the agency. A second caseworker advised the respondent that she had a right not to administer the medication but had to keep the appointments. Subsequently, the respondent was found not in compliance. The petition was then filed; ACS also alleged derivative neglect of the respondent’s other children, who had been described as well cared for.

Holding: The petitioner did not establish by a preponderance of the evidence that Devonte was neglected or the other children derivatively neglected. The respondent’s concerns about medication side effects were reasonable. She did not refuse counseling, and was not told that failure to meet appointments could lead to a neglect finding. Orders reversed, determination set aside. (Family Ct, Bronx Co [Gribetz, JJ])

Juveniles (General) (Visitation) JUV; 230(55) (145)

Yolanda R. v Eugene I.G., __AD3d__, 831 NYS2d 387 (1st Dept 2007)

Holding: The mother petitioned for judicial approval of her relocation with the children to Georgia, and for modification of a prior order granting the father visitation rights. After a hearing held over the course of five months,

the court dismissed the petition with prejudice. The deference generally accorded a fact-finder is not warranted here. It is hard to ignore undisputed and well-documented facts in the record. The mother had been the children’s primary care giver, receiving little assistance from the father since he left her and the children in 1997. He never sought custody and failed to avail himself of proffered opportunities for increased visitation. He did not seek return of the children from Atlanta for over 17 months, and did so only after the mother filed for approval of the relocation. The undisputed occurrence of violent incidents at the apartment building from which the mother and children moved, and assaults on the children at school, were summarily rejected as a basis for the mother’s belief that remaining put the children at risk. The court ignored the evidence of substantial financial and emotional assistance available from the mother’s family in the Atlanta area. *See Heisler v Heisler*, 30 AD3d 321. The court seemed to focus on ancillary issues providing little help in evaluating whether the move would likely serve the children’s interests, and rejected or failed to seek essential evidence. The court refused a proffer of part of a school transcript offered as to the children’s progress in special education programs in Atlanta, and did not order psychological evaluations of the children. The court ignored the Law Guardian’s strong support for the mother’s petition. Order reversed, matter remanded for a de novo hearing before a new judge. (Family Ct, Bronx Co [Shelton, JJ])

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

People v Danielson, No. 8812, 1st Dept, 3/27/2007

The defendant was convicted of depraved indifference murder.

Holding: The defendant failed to preserve his claim regarding legal sufficiency of the evidence. “[W]here a defendant’s argument for appellate reversal rests on the unseemly assertion that he is entitled to relief because he intentionally murdered the victim, rather than having recklessly caused his death, no plausible argument can be made that review of defendant’s claim is in the interests of justice.” The defendant’s weight of the evidence arguments regarding prosecution witnesses’ testimony were appropriate but unpersuasive. The assertions do not overcome the deference customarily shown to jury credibility determinations. *See People v Hernandez*, 291 AD2d 263 *lv den* 98 NY2d 697. The dissent raises a different analysis, addressing nothing in the defendant’s brief and focusing on whether the proof satisfied the elements of recklessness and depraved indifference and whether evidence of intentional conduct negated either of those elements. That analysis, despite a disclaimer, reflects depraved indifference murder interpretations that post-date the defendant’s trial. Element-based weight challenges should not

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be allowed to eliminate the requirement that sufficiency claims be preserved. Judgment affirmed. (Supreme Ct, Bronx, Co [Moore, JJ])

Dissent: [Mazzarelli, JP] The weight of the evidence should be reviewed in light of the elements of the crime as charged. The majority ignores that, at the time of this trial, depraved indifference murder required recklessness and a showing that the circumstances, objectively viewed, demonstrated depraved indifference to human life. *See People v Register*, 60 NY2d 270 *cert den* 466 US 952. This conviction is against the weight of the evidence, which showed no recklessness, only calculated murder. Double jeopardy would not bar a retrial on the intentional manslaughter and second-degree possession of a weapon counts.

Double Jeopardy (Collateral Estoppel) (Jury Trials) (Lesser Included and Related Offenses) DBJ; 125(3) (7) (10) (15)

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

People v Suarez, No. 5014, 1st Dept, 3/27/2007

Holding: The Court of Appeals reversed the defendant's conviction of depraved indifference murder. The jury had acquitted him of intentional murder. The issue here is whether double jeopardy principles bar retrial of the defendant for the charge of first-degree intentional manslaughter, which had been submitted to but not considered by the jury. The Court of Appeals reversed because the depraved indifference murder charge was submitted to the jury in the absence of legally sufficient evidence to support it. *See* CPL 300.40. When considering inconsistent counts, a jury can convict of only one. Further, a jury must consider the charges in decreasing order of culpability and consider lesser charges only after acquitting on the greater charges. *See People v Johnson*, 87 NY2d 357. The jury here, having been correctly instructed as to the order of deliberation, could not consider the lesser charge of first-degree intentional manslaughter unless it acquitted on both murder counts. Without the trial court's improper submission of the depraved indifference count, the jury could have considered intentional manslaughter once it acquitted of intentional murder. Where a lesser offense was properly submitted but not considered due to trial error, so that no verdict on that charge is ever reached, jeopardy as to that charge has not terminated. *See People v Charles*, 78 NY2d 1044. The case relied upon by the dissent, *People v Biggs*, (1 NY3d 225) is distinguishable. Under the dissent's view, a jury could never consider a lesser included offense in the alternative,

which is contrary to settled law. *See People v Wilson*, 109 NY 345. The decision in *People v Johnson* (14 AD3d 460) was incorrectly decided. The assertion that retrial is warranted only as to offenses affected by the error leading to reversal is not supported by CPL 40.20(3) or *People v Goodman* (69 NY2d 32), which deals with collateral estoppel. Estoppel requires "a final and valid judgment," which does not exist here because the judgment was reversed, and a "full and fair" opportunity to litigate the issue in question. The prosecution never had such opportunity to litigate whether the defendant had the intent to cause the decedent serious physical injury. Judgment reversed, murder conviction dismissed, matter remanded for trial on first-degree manslaughter. (Supreme Ct, Bronx Co [Silverman, JJ])

Dissent: [Tom, JP] The indictment should be dismissed.

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

People v Patterson, No. 9464, 1st Dept, 3/27/2007

Holding: The defendant failed to preserve a claim of legal insufficiency of the evidence supporting his conviction of depraved indifference murder, and it is not reviewed. In any event, the defendant's own trial testimony that he fired while looking away from the decedent supported the requisite elements. *See* Penal Law 125.25(2); *People v Atkinson*, 7 NY3d 765. The conviction comports with the weight of the evidence, for reasons more fully discussed in *People v Danielson*, __AD3d__, decided herewith. Judgment affirmed. (Supreme Ct, Bronx Co [Boyle, JJ])

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

People v Pasley, No. 9318, 1st Dept, 3/27/2007

Holding: The defendant failed to preserve a claim of legal insufficiency of the evidence supporting his conviction of depraved indifference murder, and it is not reviewed. The lack of preservation, without more, does not establish the ineffectiveness of trial counsel. We reject the contention that an unpreserved legal sufficiency claim may be successfully presented as a weight-of-the-evidence claim, as more fully discussed in *People v Danielson*, __AD3d__, decided herewith. The conviction comports with the weight of the evidence presented in light of the court's instructions, to which the defendant did not object. In any event, the jury was entitled, if it chose, to accept the portion of the defendant's testimony that he slashed at the decedent and others for the purpose of intimidating them rather than with intent to kill. Judgment affirmed. (Supreme Ct, New York Co [Sudolnik, JJ])

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Concurrence: [Mazzarelli, JP] The required weight of the evidence review should not be summarily dismissed by deeming it a disguised claim of legal insufficiency. It must be clear that a defendant has received the scrutiny on appeal mandated by the Criminal Procedure Law. *See People v Romero*, 7 NY3d 633. The facts here, reviewed in light of the charge given, were sufficient to support the conviction.

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

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

People v Jean-Baptiste, No. 8977, 1st Dept, 3/27/2007

Holding: The defendant did not object to jury instructions given on the elements of depraved indifference murder. He did argue in a motion to dismiss at the end of the prosecution’s case that the evidence did not show the required “‘callous disregard’ or ‘wanton indifference to human life.’” While the motion to dismiss “was not overly expansive,” taken as a whole it was adequate to preserve the claim. *Cf People v Cona*, 49 NY2d 26, 33, n2. The evidence was legally sufficient. The defendant’s statements varied. His admitted actions—whether he fired into a crowd without conscious intent to kill or seriously injure anyone, or shot the decedent only to cause serious physical injury while creating a grave risk of death—were so wanton and deficient in regard for life as to support the conviction of depraved indifference murder. He brought a gun to a street brawl, and knowingly used hollow point ammunition, which causes maximum injury.

The court properly refused to suppress the defendant’s statements. An attorney from the defendant’s union did call the precinct and inquire about the defendant, but did not claim to represent the defendant or request questioning cease. The defendant acknowledged that the attorney was with his union but did not ask to contact him or claim the attorney represented him. The remaining issues raised were unpreserved or lack merit. Judgment affirmed. (Supreme Ct, New York Co [Bradley, JJ])

Concurrence: [McGuire, J] The defendant’s motion to dismiss was not sufficient to preserve any claim of legal insufficiency, much less challenges based on *People v Payne*, 3 NY3d 266. “[T]he majority never identifies the ostensibly preserved issue.”

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

People v McNeil, No. 9216, 1st Dept, 4/3/2007

Holding: As the prosecution concedes, the court reversibly erred by deviating from the order of jury selection prescribed in CPL 270.15(2) and allowing the prosecution to withdraw two peremptory challenges. *See People v McQuade*, 110 NY 284. No prospective jurors remained at the end of the second round of voir dire, and 11 jurors and two alternates had been selected. The judge said “‘I don’t think it’s necessary to call in for another panel when you had all these people to choose from’ and asked the parties to agree on two of the already struck veniremembers.” The defense objected, and used its remaining two peremptory challenges to strike the reinstated panelists. The court then reluctantly called another panel, denying defense requests for an additional two peremptory challenges to restore the status quo and for the prosecution to be limited to three – the number they had before the two challenges were “‘withdrawn.’”

A citizen-informant’s showup identification of the defendant was properly found to be unduly suggestive where the witness had been told by police that “‘they had gotten the person’ and ‘needed to make sure’ it was the person he had seen.” The court erred in finding an independent source for the witness’s identification based on an inference that the witness must have seen the robber’s face despite the witness’s testimony that he didn’t pay attention to the face, only seeing the side of the perpetrator’s head. Remaining issues lack merit or need not be addressed. Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Uviller, JJ])

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

Matter of Phillips v Dennison, No. 772, 1st Dept, 4/12/2007

Holding: The petitioner, a former police officer serving 25 years to life for two murders and an attempted murder committed in 1968, appeared before the Parole Board in September 2005 for his fourth parole hearing. The denial of parole after his third appearance had been successfully challenged but was reinstated in the Appellate Division. The current written denial of parole noted the petitioner’s extensive positive programming and excellent disciplinary record but found release “‘would deprecate the seriousness of your criminal acts and undermine respect for the law.’” The Chair had asked rhetorically during the personal interview, “‘How many years is enough for taking two lives and trying to kill a third?’” The Individual Assignment System court annulled the denial of parole when the petitioner brought a CPLR Article 78 petition, concluding that the Board had not given fair consideration to the factors mandated in Executive Law 259-i(2)(c)(A) and had based its decision solely on the seriousness of the crime. The court erred. The weight each statutory factor receives is within the Board’s discretion. The Board is not required to expressly

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discuss every factor. See *Matter of Walker v Travis*, 252 AD2d 360, 362. The petitioner's implication that his crimes were no more heinous than any murder is rejected; they were committed in cold blood as part of ongoing extortion efforts, through the use and perversion of his position as a police officer. He did not admit the exact nature of his acts without prompting, continuing to deprecate their seriousness. Finally, venue for this proceeding was properly placed in the county where the hearing was held and the decision made, or where the Board's principal office is located, not where the conviction and sentence were imposed. Judgment reversed, determination reinstated. (Supreme Ct, New York Co [Friedman, JJ])

Appeals and Writs (General) APP; 25(35)]

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

Matter of Ramirez v Dennison, No. 746N, 1st Dept, 4/12/2007

Holding: The petitioner sought to challenge denial of his parole application, bringing a CPLR article 78 proceeding in Bronx Supreme Court. The court denied the respondent's motion to change venue either to Orange County, where the parole determination was rendered, or to Albany County, where the respondent's principal office is located. "Inasmuch as the challenged determination was affirmed on administrative appeal in Albany County . . . Albany County and not the Bronx, is a proper venue for the proceedings . . ." Order reversed, motion to transfer to Albany County granted. (Supreme Ct, Bronx Co [Stinson, JJ])

Lesser and Included Offenses (General) LOF; 240(7)

Sex Offenses (Sexual Abuse) SEX; 350(27)

People v Berlin, No. 502, 1st Dept, 4/19/2007

Holding: The defendant waived any privilege that existed as to statements he made to a therapist regarding an act of sexual abuse of a child; the defendant gave police the same information, in more detail. Even if the therapist should not have been allowed to testify about the statements, the error was harmless. The court did not err in precluding testimony that the defendant told the therapist he had been "revulsed" by the presence of the child. The defense sought to have the full statement admitted under the rule of completeness. See *People v Dlugash*, 41 NY2d 725, 736. If error occurred, it was harmless. The defendant's admissions as to the circumstances are difficult to reconcile with the defense theory that the touching was not for the purpose of sexual gratification. Any "revulsion" apparently came about after the touching and there-

fore was unlikely to affect the jury's finding as to the purpose of the touching.

The defendant asked the court to submit to the jury a dismissed count of endangering the welfare of a child (Penal Law 260.10[1]) as a lesser included offense of sexual abuse. It is not possible to subject someone under 11 years old to a touching of the sexual or intimate parts for the purpose of gratifying sexual desire (Penal Law 130.00[3], 130.65[3]) without knowingly acting in a manner likely to be injurious to the child's welfare, but such touching could be committed without the requisite mens rea for endangering, *ie* knowledge or awareness that the conduct may likely result in harm. See *People v Johnson*, 95 NY2d 368, 372. Endangering was not a lesser included offense of sexual abuse. Judgment affirmed. (Supreme Ct, New York Co [Wetzel, JJ])

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

People v Lambert, 36 AD3d 939, 827 NYS2d 667 (2nd Dept 2007)

Holding: As the prosecution correctly concedes, the court erred by permitting the prosecution, over objection, to exercise a peremptory challenge to an unsworn prospective juror after the defense had exercised its peremptory challenges. See CPL 270.15(2); *People v Williams*, 26 NY2d 62. That the prosecution make such challenges first, and "'never be permitted to go back and challenge a juror accepted by the defense' (*People v Alston*, 88 NY2d 519, 529)" is the "'one persistently protected and enunciated rule of jury selection.'" Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Mangano, JJ])

Narcotics (Penalties) NAR; 265(55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Sanders, 36 AD3d 944, 829 NYS2d 187 (2nd Dept 2007)

Holding: The 2005 Drug Law Reform Act (DLRA 2005) retroactively extended revised sentencing provisions of the 2004 DLRA to qualified prisoners convicted of Class A-II felonies. The prosecution asserted that a reference in the DLRA 2005 to the "'eligibility requirements' of Correction Law § 803(1)(d)" precluded a prisoner from seeking resentencing under the DLRA if the prisoner's merit time allowance had been withheld. That contention is rejected. See *People v Quinones*, 11 Misc3d 582, 595-596. To adopt it would be to vest the authority for resentencing in the Department of Correctional Services rather than in the sentencing court. The defendant here was statutorily eligible to earn merit time allowance, and met the other requirements of section 1 of the DLRA 2005. The court

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properly exercised its discretion in denying the application given the defendant's prior criminal history dating back to 1988, his lack of remorse at the hearing, and his disciplinary ticket for a Tier III infraction. Order affirmed. (County Ct, Suffolk Co [Gazzillo, JJ])

Family Court (General) FAM; 164(20)

Matter of Janyce B. v Luisa W., 37 AD3d 459, 831 NYS2d 189 (2nd Dept 2007)

Holding: The court attorney referee exceeded the court's Family Court Act 255 authority by ordering the county Department of Social Services to notify the respondent's employer of the results of the respondent's drug test. *See Matter of Lorie C.*, 49 NY2d 161. Order reversed. (Family Ct, Suffolk Co [Green, Ct Atty Ref])

Trial (Public Trial) TRI; 375(50)

People v Baldomero, 37 AD3d 482, 829 NYS2d 207 (2nd Dept 2007)

Holding: Closure of the courtroom during the testimony of an undercover police officer was not justified by the officer's unparticularized testimony. He indicated that he no longer operated in the specific area where the alleged sale occurred, but planned to go back there undercover at some unspecified future time, and would be going back to the larger "'Brooklyn North' area in the 'near future.'" This fell short of the demanding first prong of the *Waller (Waller v Georgia)*, 467 US 39, 48 [1984] test. *See People v Ramos*, 90 NY2d 490, 506 *cert den* 522 US 1002. No "lost subjects" or open cases from the area of the defendant's arrest or the courthouse precinct were noted, nor was there any indication "that the officer was involved in any long-term undercover operation involving unapprehended subjects" there, or that threats had been made against him or his family. The harmless error rule does not apply to unjustified courtroom closures during trial. *See People v Jones*, 47 NY2d 409, 415 *cert den* 444 US 946. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Gary, JJ])

Motions (Suppression) MOT; 255(40)

Subpoenas and Subpoenas Duces Tecum (General) SUB; 365(7)

People v Velez, __AD3d__, 829 NYS2d 209 (2nd Dept 2007)

At a pre-trial suppression hearing, testimony indicated that the defendant had been sitting on the sidewalk during a show-up and was only handcuffed and searched

after being identified. At trial, defense counsel noted immediately that two witnesses' descriptions of the show-up conflicted with the hearing testimony given by others. The court denied a defense motion to re-open the suppression hearing.

Holding: The testimony of the trial witnesses was more than a matter of mere credibility. It went to the heart of the denial of suppression on the grounds that seizure followed the arrest of the defendant based on probable cause established by the show-up identification. While the defendant could be presumed to know that police put him on the ground, handcuffed him, and searched him (*see People v Meachem*, 288 AD2d 162), the further inference cannot be made that he knew whether this conduct preceded or followed a signal that he had been identified. *Cf People v Mixon*, 292 AD2d 177. There was no lack of defense diligence where an investigator had been unable to locate one trial witness and the other had declined to speak with him. Defendants do not have an absolute right to subpoena witness to suppression hearings (*see People v Chipp*, 75 NY2d 327, 337-338 *cert den* 498 US 833) and cannot be penalized for not doing what the law would not have allowed. The defendant carried the burden to proffer new facts that could not have been discovered with reasonable diligence before the hearing and are pertinent to the suppression ruling. *See People v Figliolo*, 207 AD2d 679, 681-682. Matter remitted for de novo suppression hearing before a different judge, appeal held in abeyance. (County Ct, Westchester Co [Adler, JJ])

[Ed. Note: The following opinion, and several other recent 2nd Department cases on Post-Release Supervision, are discussed in the Defense Practice Tips beginning on p. 10.]

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

Sentencing (Appellate Review) (Pronouncement) SEN; 345(8) (70)

People v Smith, 37 AD3d 499, 829 NYS2d 226 (2nd Dept 2007)

Holding: Neither the sentencing minutes nor the order of commitment mention any period of post-release supervision. The sentence appealed from, a determinate prison term of eight years, therefore does not include any post-release supervision. *See Hill v US ex rel Wampler*, 298 US 460 (1936); *Earley v Murray*, 451 F3d 71 (CAC2 2006) *rehear den* 462 F3d 147; *but see People v Sparber*, 34 AD3d 265. The defendant raised no challenge to the sentence actually imposed. Appeal dismissed. (Supreme Ct, Queens Co [Blackburne, JJ])

Second Department *continued***Prisoners (Disciplinary Infractions and/or Proceedings)** PRS I; 300(13)**Matter of Adamson v Barto, 37 AD3d 597, 829 NYS2d 696 (2nd Dept 2007)**

A prisoner brought a CPLR article 78 proceeding to review the superintendent's determination affirming a hearing officer's determination that the prisoner had violated Prison Disciplinary Rules 113.23 (7 NYCRR 270.2(B)(14)(xiii)) and 116.10 (7 NYCRR 270.2(B)(17)(i)).

Holding: The prison disciplinary charge relating to contraband was established by substantial evidence at the Tier II hearing, including the Inmate Misbehavior Report and the prisoner's admission that the number of cassettes he possessed far exceeded the number allowed. The charge of theft of state property was not supported. There was insufficient evidence at the hearing that the prisoner lacked authorization to take certain items from the mess hall, had not purchased other items from the commissary, or lacked authorization to possess the remaining items. *See Matter of Rand v Herbert*, 219 AD2d 878. Petition granted to the extent of annulling the determination as to Rule 116.10, that finding vacated, all references thereto to be expunged from the petitioner's institutional record; otherwise confirmed, remitted for imposition of penalty on the remaining charge.

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)**People v Green, 37 AD3d 615; 828 NYS2d 816 (2nd Dept 2007)**

The prosecution appealed from an order vacating the defendant's convictions of second-degree murder and first-degree robbery.

Holding: The defendant established that trial counsel failed to interview or even contact potential exculpatory witnesses, including an eyewitness. The defense was misidentification. There was no reasonable strategic reason for the failure. *See People v Fogle*, 10 AD3d 618, 619. The court properly granted that branch of the defendant's CPL 440.10 motion that was to vacate the judgment of conviction because the defendant did not receive effective assistance of counsel. Order affirmed. (Supreme Ct, Kings Co [Pesce, JJ])

Narcotics (General) (Penalties) NAR; 265(27) (55)**Sentencing (Excessiveness) (Resentencing)** SEN; 345(33) (70.5)**People v Guzman, 37 AD3d 615, 829 NYS2d 703 (2nd Dept 2008)**

Holding: The defendant pled guilty to second-degree sale and possession of drugs, and received the bargained-for consecutive sentences of three years to life and seven years to life. He moved for resentencing under the 2005 extension of the Drug Law Reform Act (L 2005, ch 643 § 1). The court determined that the defendant met the eligibility requirements for resentencing. Having considered "facts and circumstances relevant to the imposition of a new sentence, including the defendant's institutional disciplinary record as well as his expression of remorse," the court offered to replace the life-imprisonment portions of the sentence with a five-year period of post-release supervision on each conviction. The defendant's attorney, after consultation with the defendant, accepted the offer on the defendant's behalf. While a defendant may appeal as excessive terms imposed at resentencing under the Drug Law Reform Act, the express acceptance of the offer left no basis for such claim. *See People v Domin*, 13 AD3d 391. Resentence affirmed. (County Ct, Suffolk Co [Gazzillo, JJ])

Homicide (Murder [Definition] [Evidence] [Intent]) HMC; 185 (40[d] [j] [p])**People v Fields, 37 AD3d 733, 830 NYS2d 317 (2nd Dept 2007)**

Holding: The defendant was charged with both intentional and depraved indifference murder. His unreserved contention that there was insufficient evidence to support the conviction of depraved indifference murder is reviewed in the interest of justice. *See CPL 470.15(3)(c), (6)(a)*. Without a gun, the defendant accompanied a woman named Sandra, who had been arguing with the defendant's girlfriend, to the building where the decedent and the defendant's girlfriend lived. The decedent and a companion came outside to talk to Sandra. The defendant, who did not speak to the decedent, at some point took a gun from Sandra and put in his waistband. He remained outside while the other three went into the building lobby. Testimony established that someone outside the interior door of the lobby, which had a translucent curtained window, could see only shadows of people moving in the lobby and could not identify their faces. The defendant fired thru the curtained window, killing the decedent. The circumstances weigh against a finding that the defendant arrived at the building with intent to kill the decedent or that the shooting was intentional murder. *Cf People v Payne*, 3 NY3d 266. The jury could have rationally concluded the defendant did not intend to kill the decedent, and did acquit on that charge. The same facts constituted reckless conduct evincing a depraved indifference to human life, placing this in the "narrow category of cases"

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where this charge applies. *See People v Campbell*, 33 AD3d 716, 717.

The defendant’s contention that a lineup identification should be suppressed is rejected. Judgment affirmed. (Supreme Ct, Kings Co [Reichbach, JJ])

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

People v Daniel, 37 AD3d 731, 830 NYS2d 319 (2nd Dept 2007)

Holding: The trial court instructed the jury as to first-degree manslaughter as a lesser-included offense of intentional murder, but erred by refusing to also charge on second-degree manslaughter. *See People v Green*, 56 NY2d 427, 433. Viewed in the light most favorable to the prosecution, the evidence would support the conclusion that the defendant acted recklessly, not intentionally. *See People v Hartman*, 4 AD3d 22. The contention that the defendant’s statement should have been suppressed is rejected. Judgment modified, first-degree manslaughter conviction vacated without prejudice to the prosecution re-presenting an appropriate charge to another grand jury, and otherwise affirmed. (Supreme Ct, Nassau Co [Honorof, JJ])

Juveniles (General) (Visitation) **JUV; 230(55) (145)**

Matter of Vazquez v Kaufmann, 37 AD3d 728, 830 NYS2d 576 (2nd Dept 2007)

Holding: The Family Court erred by, in effect, dismissing the petition of the grandmother seeking visitation with her biological granddaughter for failure to join the child’s father, a necessary party. The court “should have attempted to have the father summoned and given him the opportunity to participate in the proceeding (*see Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. and Appeals*, 5 NY3d 452, 457-461).” Further, there was no hearing as to the petitioner’s standing to seek visitation. No testimony was taken as to the petitioner’s contacts with the child; the only sworn statements before the court were those in the petition. The petitioner grandmother’s allegations were sufficient to raise a factual question on her contacts and whether visitation would be in the best interests of the child, and there were no answering papers. The other petitioner was properly found to lack standing. Appeal dismissed, order modified, application to dismiss the proceeding as to the petitioner grandmother denied, and matter remitted for further proceedings. (Family Ct, Westchester Co [Klein, JJ])

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

People v Fuller, 37 AD3d 689, 828 NYS2d 909 (2nd Dept 2007)

Holding: The prosecution failed to show by clear and convincing evidence any aggravating factor of a kind or degree not adequately taken into account by the sex offender guidelines. *See People v Ruddy*, 31 AD3d 517 *lv den* 7 NY3d 714. The court erred by designating the defendant a risk level three sex offender, an upward departure from the defendant’s presumptive risk as a level two offender. *See Correction Law 168-a(1)*. Order reversed, the defendant reclassified as a level two sex offender. (County Ct, Westchester Co [Bellantoni, JJ])

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

People v Chen, 37 AD3d 845, 829 NYS2d 916 (2nd Dept 2007)

Holding: Assigned appellate counsel sought to be relieved in this appeal from a second-degree murder conviction and sentence, filing an *Anders* brief (*Anders v California*, 386 US 738 [1967]). Independent review of the record reveals potentially nonfrivolous issues with respect to the defendant’s resentencing. These include but are not limited to a claim that the sentence is harsh or excessive and that the defendant was deprived of an opportunity to make a personal statement at resentencing. *See CPL 380.50(1)*. Motion granted, counsel relieved, new counsel appointed. (County Ct, Westchester Co [Zambelli, JJ])

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

Subpoenas and Subpoenas Duces Tecum (General) **SUB; 365(7)**

People v John, __AD3d__, 832 NYS2d 238 (2nd Dept 2007)

Holding: At a suppression hearing, an officer testified that he found the ski mask allegedly worn by the defendant during the charged attempted gunpoint robbery only after the defendant had been arrested following identification by the complainant. At trial, the complainant said the officer showed her the mask before any identification occurred. Defense counsel sought to reopen the suppression hearing. The trial court directed that application be made to the hearing court, which declined to reopen the hearing because it was now a trial issue. The trial court erred by then finding that the denial was “law of the case” by a judge of equal jurisdiction, binding on the trial court. A trial court may in its discretion reopen a hearing conducted by another judge. *See People v Figliolo*, 207 AD2d 679, 681. The law of the case did not apply; the hearing court did not rule on the merits of the application to reopen. *See People v Bilsky*, 95 NY2d 172, 175. The defendant met the burden of proffering new facts that could not

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have been discovered with reasonable diligence before the suppression ruling and that were pertinent to the suppression issue. *See People v Velez*, __AD3d__, 829 NYS2d 209. Matter remitted for a de novo suppression hearing, appeal held in abeyance. (Supreme Ct, Queens Co [Buchter, JJ])

Admissions (Spontaneous Declaration) ADM; 15(37)

Motions (Suppression) MOT; 255(40)

People v Robinson, No. 2005-11981, 2nd Dept, 3/6/2007

Holding: The court properly found that the defendant was entitled to suppression of his inculpatory statement because it was not genuinely spontaneous but was prompted by the officer's inquiry, the functional equivalent of a custodial interrogation. *See People v Facciolo*, 288 AD2d 392. The prosecution correctly contends on appeal that suppression of the physical evidence should have been denied. The stop was justified by the officer's observation that the car's driver was not wearing a seat belt. *See Vehicle and Traffic Law 1229-c(3); Whren v US*, 517 US 806, 810-814 (1996). Order modified, provision denying suppression of physical evidence substituted for provision granting that suppression, and otherwise affirmed. (County Ct, Suffolk Co [Gazzillo, JJ])

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

Matter of Costantino v Goord, __AD3d__, 831 NYS2d 538 (2nd Dept 2007)

Holding: The petitioner, a prisoner, brought an article 78 proceeding seeking review of four disciplinary determinations. The charge that he violated Rule 116.12 (7 NYCRR 270.2(B)(17)(iii)) forbidding a prisoner to "alter, forge, or counterfeit any document" was not supported by the evidence. The petitioner created a personalized grievance form because grievance forms were in short supply. The word "alter" in the Rule carries the same intent to defraud or deceive as the companion words. The Hearing Officer recognized that the petitioner lacked the required intent; the petitioner created the forms "solely for [his] use in submitting grievances." The facts as to another charge were that that the petitioner, after complying with the officer's order to move his tray, paused with a quizzical look when asked what the problem was with the tray, and the officer walked away. This does not support a finding that the petitioner harassed (7 NYCRR 270.2(B)(8)(i)) or obstructed or interfered with (7 NYCRR 270.2(B)(8)(ii)) a correction officer. As to the other charges, "the misbehavior reports, the hearing testimony, together with the

circumstantial evidence and reasonable inferences to be drawn therefrom, provided substantial evidence to support the determinations . . ." *See Matter of Kalwasinski v Goord*, 25 AD3d 1050. Other issues have been rendered academic or lack merit. Petition granted, two determinations annulled, determinations otherwise affirmed.

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

People v Lampon, __AD3d__, 832 NYS2d 252 (2nd Dept 2007)

Holding: Charged with both intentional and depraved indifference murder for shooting the decedent, the defendant moved at the end of the prosecution's case and at the close of all evidence for dismissal of the depraved indifference count. He argued that the conduct shown was not consistent with "recklessness," but failed to specifically argue that it was not consistent with "depraved indifference." The jury's verdict finding of depraved indifference was effectively a rejection of the contention that the evidence was not consistent with a reckless state of mind. Evidence of the defendant's intoxication could be found to negate an intent to kill (*see Penal Law 15.25; People v Gonzalez*, 6 AD3d 457) without negating a reckless state of mind. *See People v Johnson*, 277 AD2d 702, 704. In that context, the failure to mention "depraved indifference" in the motion to dismiss left unpreserved the challenge made on appeal. *See CPL 470.05(2); People v Parker*, 7 NY3d 907. The remaining defense contentions are rejected. Judgment affirmed. (Supreme Ct, Kings Co [Gary, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Cruz, __AD3d__, 830 NYS2d 910 (2nd Dept 2007)

The defendant was designated a level three sex offender under the Sex Offender Registration Act (SORA) based on a presumptive override for a prior felony sex crime.

Holding: The court erred by considering the defendant's prior youthful offender adjudication as a prior felony conviction for presumptive override purposes. A youthful offender adjudication is not considered a conviction. *See Criminal Procedure Law 720.35(1)*. Upon such adjudication, the defendant's conviction was deemed vacated. The youthful offender finding that replaced the conviction may not be used to support a presumptive override in establishing his SORA risk level. However, the facts that led to the youthful offender adjudication could appropriately be considered in assessing his likelihood of reoffending and the danger he may pose to public safety. *See Risk Assessment Guidelines and Commentary at 6-7*. Risk points may be allocated in the criminal history category on the basis of those facts. *See People v Arnold*, 35

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AD3d 827. Because the court failed to properly consider those facts, there must be a new hearing. The court also failed to render an order setting forth its determinations, findings of fact, and conclusions of law. *See* Correction Law 168-n(3). Order reversed, matter remitted for new hearing and determination in accordance with this decision. (Supreme Ct, Kings Co [Marrero, JJ])

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

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

**Matter of Brown v Wood, No. 2005-11031,
2nd Dept, 3/20/2007**

Holding: The court erred by failing to properly advise the petitioner father that he had a right to counsel, including the right to assigned counsel if he could not afford to retain counsel, and to an adjournment to confer with counsel. *See Matter of Wilson v Bennett*, 282 AD2d 933, 934. Reversal is required for deprivation of the right to counsel in a custody or visitation proceeding without regard to the merits of the unrepresented party’s legal position. *See Matter of Knight v Griffith*, 13 AD3d 449. The petitioner, who sought custody or unsupervised visitation, was within the enumerated subdivisions of Family Court Act 262. Order reversed, matter remitted for further proceedings, child to remain with the mother pending a new determination of the father’s petition. (Family Ct, Richmond Co [Porzio, JJ])

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

**Matter of Richmond v Perez, Nos. 2005-09621,
2005-09625, 2nd Dept, 3/20/2007**

In May, the appellant father’s lawyer agreed to a “mini-hearing” to determine child custody. The parents were to testify in narrative form, to be followed by questions from the court and law guardian, but without cross examination. In August, counsel sought to be relieved because the father was not cooperating with him. The court asked the lawyer if he could continue for the remainder of the August proceedings and, without waiting for the lawyer’s response, repeated the procedure that would be used at the mini-hearing. There was no objection. The court then said it was relieving the father’s lawyer. On September 6, the court denied the father’s pro se motion to set aside consent to the mini-hearing. After the mini-hearing on September 15, the court awarded custody to the mother and scheduled a psychiatric evaluation for the father. The notice of appeal as of right is treated as an application for leave to appeal, which is granted.

Holding: A party in a custody dispute may waive

objection to irregular proceedings. (*See Kuleszo v Kuleszo*, 59 AD2d 1059, 1060.) Here, it is unclear whether the father was represented on August 11 when the court described the mini-hearing procedure. The father and his lawyer may each have expected the other to object. Failing to object in such confusing circumstances cannot be held to be an intelligent waiver of rights. *Cf Matter of Goldman v Goldman*, 201 AD2d 860, 861. The court also erred in making the determination as to custody before the psychiatric evaluation of the father which the court had requested. *See Matter of Tyrone W. v Dawn M.P.*, 27 AD3d 1147, 1148. Orders reversed, motion to set aside consent to mini-hearing granted, matter remitted. (Family Ct, Dutchess Co [Forman, JJ])

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

**Matter of Scott v Jackson, No. 2006-06215,
2nd Dept, 3/20/2007.**

Holding: At issue is the Family Court’s jurisdiction in these visitation proceedings, which began on Oct. 15, 2005, under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (*see* Domestic Relations Law 75-a *et seq*). Neither a temporary order of protection issued in Family Court on Feb. 13, 2002, nor a permanent order of protection issued in a criminal action by Supreme Court on June 17, 2003, constituted an initial custody determination that would give New York “exclusive, continuing jurisdiction” *See* Domestic Relations Law 76-a. Dismissal for lack of jurisdiction was appropriate. Order affirmed.

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

**People v Murdaugh, No. 2004-10162, 2nd Dept,
3/27/2007**

Holding: The unpreserved defense challenge to the adjudication of the defendant as a persistent felony offender is reached as a matter of discretion in the interest of justice. The court failed to comply with the requirements of Penal Law 70.10(2). A two-pronged analysis is required. *See People v Gaines*, 136 AD2d 731, 733. After determining that the defendant had previously been convicted of at least two felonies and been sentenced to incarceration of more than a year on each, the court noted that it had reviewed the presentence report and conferred with the lawyers in the case. This was insufficient to comply with the requirement that the court “set forth, on the record, the reasons why it was ‘of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate[d] that extended incarceration and life-time supervision [would] best serve the public interest’ (Penal Law § 70.10[2]” The court’s conclusory statement was insufficient. *See People v Garcia*, 267 AD2d 247, 248. The failure to give reasons on the record makes review impossible.

Second Department *continued*

It was further error to impose a period of post-release supervision on the indeterminate sentence. *See People v Rowlett*, 29 AD3d 922, 923. Sentence vacated, matter remitted for resentencing. (County Ct, Nassau Co [Honorof, JJ])

Counsel (Anders Brief)

COU; 95(7)

People v Nash, __AD3d__, 831 NYS2d 326 (2nd Dept 2007)

Holding: Assigned counsel filed an *Anders* brief (*Anders v California*, 386 US 738 [1967]), seeking to be relieved in this appeal from a judgment entered after a guilty plea convicting the defendant of failing to register or verify his status as a sex offender. In the brief, counsel discussed at length why specific issues that the defendant asked counsel to raise lack merit. "By presenting the appeal in this fashion, counsel denied the defendant the effective assistance of counsel (*see People v Vasquez*, 70 NY2d 1). Counsel disparaged the claims that his client wanted and addressed and 'for all practical purposes, precluded his client from presenting them effectively in a pro se brief' . . ." Counsel relieved, new counsel assigned, briefing schedule set, and consideration of appeal deferred until further briefs filed. (County Ct, Suffolk Co [Mullen, JJ])

Sex Offenses (Sentencing)

SEX; 350(25)

People v Burgos, No. 2006-04255, 2nd Dept, 4/3/2007

Holding: The court departed upward from the defendant's presumptive risk level under the Sex Offender Registration Act, designating the defendant a risk level III. The departure was not supported by clear and convincing evidence of an aggravating factor that was not adequately taken into account by the assessment instrument. *See People v Perkins*, 35 AD3d 1167. The court relied on an in camera review of medical records that included diagnoses of schizophrenia and a personality disorder. These records, and the evidence submitted at the hearing, failed to show that the defendant's disorders "'[are] causally related to any risk of reoffense' (*People v Zehner*, 24 AD3d 826; *see* Correction Law § 168-1[5][a][i]. . ." Order reversed, the defendant reclassified as a level two sex offender. (Supreme Ct, Westchester Co [Adler, JJ])

Evidence (Sufficiency)

EVI; 155(130)

Weapons (Evidence) (Firearms) (Possession) WEA; 385(20) (21) (30)**People v Lewis, No. 2003-08683, 2nd Dept, 4/3/2007**

The defendant was indicted after an incident in which, while riding in a car, he discharged what looked

like a gun in the direction of a group of people. He had recently been involved in an altercation with one member of the group. Shell cases were recovered at the scene and from the defendant's car. Forensic testing showed that all the shells had been fired from the same source. Following a non-jury trial, the defendant's motion to dismiss for facial insufficiency was denied. The court acquitted the defendant of reckless endangerment and second-degree weapons possession, but convicted him of third-degree possession of a weapon. Following a post-verdict motion, the court modified its verdict to fourth-degree weapons possession as a lesser included offense. The court reasoned that "there had been no testimony 'that the ammunition fired from the weapon was live,' pursuant to *People v Shaffer* (66 NY2d 663)."

Holding: Under the fourth-degree possession of a weapon statute (Penal Law 265.01[1]), the weapon in question must be "operable"—"capable of discharging live ammunition (*see People v Longshore*, 86 NY2d 851, 852 . . .)." There was no evidence that the recovered shell casings fired live rounds; no bullets, bullet fragments, or evidence of same were recovered, nor was any weapon found. The indictment should have been dismissed.

Third Department**Narcotics (Penalties)**

NAR; 265(55)

Sentencing (Excessiveness)

SEN; 345(33)

People v Guzman, 37 AD3d 615, 829 NYS2d 703 (3rd Dept 2007)

Holding: After pleading guilty to second-degree sale and second-degree possession of drugs, the defendant was sentenced according to the plea bargain to three years to life, and seven years to life, to run consecutively. The defendant moved for resentencing under the 2005 extension of the Drug Law Reform Act (DLRA2). *See* Laws 2005, chap 643 § 1. The court found the defendant eligible for resentencing. Based on its consideration of the facts and circumstances relevant to a new sentence, the court offered to vacate the portions of each sentence imposing life imprisonment and substitute five years of post-release supervision on each conviction. The defendant consulted with counsel, "who, not only declined to withdraw his application, but explicitly accepted the court's resentencing offer on the defendant's behalf." The DLRA2 permits appeal of a resentencing as excessive, even if an opportunity to withdraw the resentencing application has been declined. Where the defendant expressly accepted the resentencing offer, "he has no basis to complain that the resentencing was excessive (*see People v Domin*, 13 AD3d 391 . . .)." Resentence affirmed. (County Ct, Suffolk Co [Gazzillo, JJ])

Third Department *continued*

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

People v Johnson, 37 AD3d 363, 830 NYS2d 546 (3rd Dept 2007)

Holding: Following testimony at the suppression hearing, in response to the court’s inviting argument, the defendant’s attorney noted that the prosecution had gone forward and that the defense had the duty to sustain the illegality of the search. The attorney indicated, “I don’t believe in doing vain things and trying to ask a Judge to do something that I would not do,” and added, “I don’t believe I have sustained, frankly, my burden to show the unlawful [sic] and unconstitutionality of the search.” After going on in the same vain and saying, “I really can’t argue,” counsel asked the court to rule on the evidence presented. The prosecutor declined to respond. The transcript of the hearing reveals several colorable arguments that defense counsel could have made, and no legitimate strategy or tactic to support simply conceding. The complainant was the only witness to the charged offense, making suppression of a gun recovered in the apartment, along with the complainant’s identification of the defendant, key. A new hearing is required. *See People v Vega*, 276 AD2d 414. Appeal held in abeyance, matter remanded for a de novo suppression hearing. (Supreme Ct, Bronx Co [Cirigliano, JJ])

Counsel (General) (Standby and Substitute Counsel) **COU; 95(22.5) (39)**

People v Mack, No. 15641, 3rd Dept, 4/5/2007

Indicted for multiple offenses, the defendant pled guilty to murder and robbery, with no sentencing promises, after jury selection. The presentence report indicated he was being treated for mental illness. A competency examination was ordered. Two of three examiners found him incompetent. Before a competency hearing was ordered, he sought to substitute for the public defender a lawyer who apparently agreed to appear pro bono. The lawyer filed a notice of appearance and was present at subsequent proceedings, but was not substituted as counsel of record until the court ruled after a hearing that the defendant was competent. A motion to withdraw the plea was denied. Concurrent prison terms, including 25 years to life for felony murder, were imposed.

Holding: Defendants who can afford to hire counsel or find counsel willing to appear pro bono have the right to choose who will represent them. *See US v Gonzalez-Lopez*, 548 US ___, 126 SCt 2557, 2561, 2565-2566 (2006). Deprivation of this right is not subject to harmless error analysis. Here, no concern was raised about substitute counsel’s qualifications, willingness to proceed, or ability

to provide conflict-free representation. *See Wheat v US*, 486 US 153 (1998). There was no indication the request was a delaying tactic. That the defendant’s competency had been questioned did not justify denying the defendant his choice of counsel; he was presumed competent. *See People v Gelikkaya*, 84 NY2d 456, 459. Allowing requested counsel to act in a limited role akin to standby counsel was not sufficient. The defendant must be restored to his status as of his post-plea request for substitution of counsel. Judgment modified, matter remitted. (County Ct, Schuyler Co [Argetsinger, JJ]).

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

People v Cruz, No. 501473, 3rd Dept, 4/19/2007

The Court dismissed the petitioner’s CPLR article 78 petition seeking review of a denial of parole release.

Holding: At age 17, with no prior criminal record, the petitioner retrieved a gun from a car trunk during a group altercation in 1991, and fired. Unaware until the next day that his shot had struck someone, he then turned himself in and pled guilty to first-degree manslaughter and third-degree possession of a weapon, for which he was sentenced to consecutive prison terms of eight to 24 years and two to six years. He was denied release again at his third appearance before the Parole Board despite exemplary academic and institutional achievements. He has always admitted his guilt and continues to express remorse for his conduct. A police officer and several relatives have offered to assist him to reenter general society upon his release from prison, and his wife visits him twice a week. “Yet, given the standard of review available to us, we cannot find that the Board’s decision exhibits ‘irrationality bordering on impropriety’” *See Matter of Silmon v Travis*, 95 NY2d 470, 476. The Board considered the appropriate factors, including seriousness of the initial crime, prison record, program accomplishments, and postrelease plans. *See Executive Law 259-I; Matter of Mojica v Travis*, 34 AD3d 1155, 1156. “[W]e are constrained to affirm (*see Matter of Bonilla v New York State Bd. of Parole*, 32 AD3d 1070, 1071 . . .).” Judgment affirmed. (Supreme Ct, Albany Co [Bradley, JJ])

Due Process (Vagueness) **DUP; 135(35)**

People v Jenner, No. 16200, 3rd Dept, 4/26/2007

The defendant, entering the apartment he shared with his girlfriend, heard a Department of Social Services (DSS) caseworker reiterating DSS’s position disallowing unsupervised contact between the girlfriend’s child and the defendant without proof that an approved treatment program had been completed. The defendant yelled and cursed, said that he would solve the problem, go to the DSS office, get a gun, and “take care of” the primary caseworker and her supervisor. After mentioning Columbine,

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he added, "I've got nothing to lose." The caseworker to whom the remarks were directed told the primary caseworker, who notified police. The defendant later told an investigator that he was upset with DSS and would carry through his intentions. Indicted on two counts of making a terroristic threat, (Penal Law 490.20[1]), he was acquitted as to his conversation with the investigator, but convicted as to his comments to the caseworker.

Holding: The defendant did not preserve a claim that the statute is unconstitutional as applied. If reviewed, the strong presumption that the legislation is valid would not be overcome. Regardless of whether the conduct was what the Legislature had in mind, the statute's plain words clearly inform the public and law enforcement officials of what conduct is forbidden. The evidence sufficiently established that the defendant threatened to kill DSS workers, intending to intimidate or coerce them to influence a DSS policy and causing reasonable fear that his threat would be carried out. Lack of intent or ability to commit the threatened act, and communication of the threats to a person other than the objects of the threat are not defenses.

The court did not err in denying dismissal in the interest of justice. The defendant was not deprived of a fair trial due to the order that he be restrained. Counsel provided meaningful representation. The sentence of 15 years to life and lifetime supervision was not harsh or excessive. Judgment affirmed. (County Ct, Madison Co [McDermott, JJ])

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

Driving While Intoxicated (Evidence) (General) **DWI; 130(15) (17)**

People v Crandall, No. 100027, 3rd Dept, 4/26/2007

The defendant was indicted on two misdemeanor counts of driving while intoxicated after being found asleep in his car with the keys in the ignition and, upon being awakened, slurring his speech and being seen to have watery, bloodshot eyes. He appealed from a conviction based on a negotiated plea of guilty to reckless driving.

Holding: The statute governing guilty pleas allows a defendant to plead to a lesser included offense of any of the charged offenses. See CPL 220.10(4). The defendant correctly notes that the plea here was not to a lesser included offense as defined by the relevant statute. See CPL 1.20(37). The error is not jurisdictional. See *People v Keizer*, 100 NY2d 114, 118. This plea-based conviction would only be set aside on jurisdictional grounds if the offense pled to was "'not transactionally related to the offense specified in the accusatory instrument' (Preiser, 2003 Supp Practice Commentaries, McKinney's Cons Law

of NY, Book 11A, CPL 220.20, 2007 Supp Pamph, at 70)." Further, Vehicle and Traffic Law 1192(10)(a) expressly provides for pleas other than to Vehicle and Traffic Law 1192(2), (3), (4), or (4-a) "where, as here, the prosecutor has determined that the charges laid are not warranted and the basis for the proposed disposition has been set forth on the record." Judgment affirmed. (County Ct, Hamilton Co [Feldstein, JJ])

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

Sentencing (General) (Pronouncement) (Resentencing) **SEN; 345(37) (70) (70.5)**

People v Clark, No. 156668, 3rd Dept, 4/26/2007

Holding: The defendant and the prosecutor agreed to a joint recommendation that the defendant be sentenced to eight years of incarceration following his guilty plea. He pled to second-degree and third-degree possession of a weapon, fourth-degree possession of stolen property (two counts) and resisting arrest (two counts). During allocution, the defendant said he had pointed his weapon in the air trying to scare away pursuing police. The court sentenced him to twelve years, taking into account that the defendant had pointed a loaded weapon at an officer. The court had no obligation to accept the agreed-upon recommendation. See *People v Mills*, 17 AD3d 712, 713 *lv den* 5 NY3d 766. However, the defendant had disavowed at his plea the conduct attributed to him by a police officer. Resentencing is required. Judgment modified, sentence vacated and remitted for resentencing, and as modified, affirmed. (County Ct, Columbia Co [Czajka, JJ])

Fourth Department

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

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

People v Davis, 37 AD3d 1179, 829 NYS2d 791 (4th Dept 2007)

Holding: The court directed that the determinate sentence imposed here run concurrently with a previously-imposed indeterminate felony sentence. The court erred in imposing a concurrent sentence without stating on the record the facts and circumstances warranting it. Where the defendant committed the current offense while free on bail or recognizance awaiting disposition of the prior matter, a consecutive sentence was required absent certain mitigating factors. See Penal Law 70.25(2-b); *People v Garcia*, 84 NY2d 336. While the issue was not raised here or below, such an illegal sentence cannot stand. See *People v Price*, 140 AD2d 927, 928.

Fourth Department *continued*

The defendant failed to preserve his contentions that during his guilty plea colloquy he raised possible justification and intoxication defenses requiring the court to have conducted a sufficient further inquiry to ensure the plea was properly taken. *See People v Lopez*, 71 NY2d 662, 665. Judgment modified, sentence vacated, and remitted for resentencing. (County Ct, Orleans Co [Punch, JJ])

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

People v Agha, 37 AD3d 1202, 829 NYS2d 302 (4th Dept 2007)

Evidence obtained through pen registers on the defendant's phone lines helped establish the probable cause relied on for approval of eavesdropping warrants. The suppression court found that the prosecution had failed to establish, when seeking the warrant for the pen registers, the necessary reasonable suspicion that the defendant was part of a conspiracy to commit first-degree trademark counterfeiting. The court said the prosecution had to show that the value of the allegedly "pirated" DVDs exceeded \$100,000 as the statute requires. *See* CPL 705.10; Penal Law 165.73. The court also noted that the prosecution had failed to show that normal investigative procedures had been unsuccessful or reasonably appeared unlikely to succeed. As a result, evidence was suppressed.

Holding: The suppression court's hypertechnical review failed to pay proper respect to the decisions of the issuing courts. *See People v Tambe*, 71 NY2d 492, 501. A review of all the facts and circumstances was required. Not all investigative techniques, or a particular investigative technique, must be tried before electronic surveillance is sought. *See People v Fonville*, 247 AD2d 115, 119. The warrants were sought after months of extensive investigation. Order reversed, motions for suppression denied, matter remitted. (County Ct, Erie Co [Drury, JJ])

Juveniles (Abuse) JUV; 230(3)

Witnesses (Child) WIT; 390(3)

Matter of Kalifa K., 37 AD3d 1180, 829 NYS2d 794 (4th Dept 2007)

Holding: No corroborating evidence, as required by Family Court Act 1046(a)(vi), was offered to support the child's out-of-court statements alleging that the respondent sexually abused his daughter. None of the witnesses established expertise in child sexual abuse, or child abuse, or compared the complainant child's behaviors to behaviors or symptoms common to abuse victims. Such expertise and comparison is needed for validation testimony to

serve as corroboration. *See Matter of Nicole V.*, 71 NY2d 112, 120-121. Repetitive statements by the child did not constitute sufficient corroboration. *See Matter of Francis Charles W.*, 71 NY2d 112, 124 *rearg den* 71 NY2d 890. Order adjudging child to be abused, and other children derivatively abused, reversed, petition dismissed, order of protection vacated. (Family Ct, Erie Co [Maxwell, JJ])

Guilty Pleas (General) GYP; 181(25)

Sex Offenses (Sentencing) SEX; 350(25)

People v Smith, 37 AD3d 1141, 829 NYS2d 3 (4th Dept 2007)

Holding: The defendant's contention that he should have been permitted to withdraw his guilty plea to first-degree sodomy and multiple other offenses related to a home invasion is rejected. While the defendant "was not advised that he would be required to register as a sex offender, such registration is a collateral consequence of the plea and thus the failure" did not undermine the voluntariness of his plea. *See People v Dorsey*, 28 AD3d 351 *lv den* 7 NY3d 755. The other contentions regarding the plea also lack merit. To the extent that the defendant's claim of ineffective assistance of counsel survived the plea and valid waiver of appeal (*see People v Burke*, 256 AD2d 1244 *lv den* 93 NY2d 851), meaningful representation is found. *See gen People v Ford*, 86 NY2d 397, 404. Judgment affirmed. (Supreme Ct, Erie Co [Buscaglia, AJ])

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

People v de Capua, 37 AD3d 1189, 829 NYS2d 799 (4th Dept 2007)

Holding: A jury convicted the defendant of depraved indifference murder pursuant to Penal Law 125.25(2). The unpreserved issue of whether there was legally sufficient evidence to support the conviction is reviewed in the interest of justice. Evidence showed that the defendant had a gun when he confronted the decedent in a tavern about the decedent's alleged conduct toward the tavern-owner's girlfriend. The decedent and the defendant scuffled. A struggle over the gun ensued, and it went off when the two fell to the ground, fatally wounding the decedent. No valid line of reasoning based on these facts could support the conclusion that the defendant possessed the requisite mental culpability for depraved indifference. *See People v Gonzalez*, 1 NY3d 464, 467-468. The evidence presented is sufficient to establish beyond a reasonable doubt that the defendant recklessly caused the decedent's death, fulfilling the requirements for the lesser included offense of second-degree manslaughter. *See* Penal Law 125.15(1); *People McMillon*, 31 AD3d 136, 142 *lv den* 7 NY3d 815. Judgment modified, conviction reduced, sentence vacated, and remitted for sentencing. (County Ct, Monroe Co [Keenan, JJ])

Fourth Department *continued***Accusatory Instruments (General)** **ACI; 11(10)****People v Black, 38 AD3d 1283, 832 NYS2d 375**
(4th Dept 2007)

A jury convicted the defendant of first-degree rape and first-degree criminal sexual act.

Holding: The defendant's unpreserved contention that the judgment must be modified is reviewed in the interest of justice. The first count of the indictment charged that the defendant, by forcible compulsion, engaged in sexual intercourse with the complainant on or about April 5th. The complainant testified at trial about two separate acts of intercourse separated by a brief period of time. This did not constitute part of continuous conduct culminating in a single rape. *See People v Grant*, 108 AD2d 823, 823. The jury may have convicted the defendant of an unindicted rape. *See People v Comfort*, 31 AD3d 1110, 1111 *lv den* 7 NY3d 847. The defendant's other contentions are unpreserved or are without merit, including his claim that the court erred by failing to notify the defense of a jury note asking to review medical records where the parties had earlier agreed to allow jury examination of such records. No request for substantive information implicating the defendant's right to notice was involved. *See People v Damiano*, 87 NY2d 477, 487. Judgment modified, first-degree rape reversed and dismissed without prejudice to the prosecution's right to represent any appropriate charges under that count to another grand jury. (County Ct, Erie Co [DiTullio, JJ])

Robbery (Degrees and Lesser Offenses) (Elements) (Evidence) **ROB; 330(10) (15) (20)****People v Lunetta, 38 AD3d 1303, 832 NYS2d 358**
(4th Dept 2007)

Holding: The defendant correctly asserts that the evidence of physical injury is legally insufficient to support his conviction for second-degree robbery. *See* Penal Law 160.10(2)(a). The complainant said that during the robbery she sustained bruising on her arm that lasted about a week, swelling of two fingers that hurt for "a couple of weeks" during which time she couldn't move them, and a bump on her head that ached for about a week. She had received no medical treatment. When asked if she had been able to pursue her normal activities in the days after the robbery, she said "not with my left hand, it was swollen." These descriptions did not establish impairment or substantial pain as required under Penal Law 10.00(9). The complainant did not specify a manner in which her activities were curtailed. *See People v Windbush*, 163 AD2d 591, 592-593 *lv den* 76 NY2d 945. Neither did

she testify about the degree of her pain. *See Matter of Philip A.*, 49 NY2d 198, 200. The other issues raised are unpreserved or lack merit. Judgment modified, second-degree robbery reduced to third-degree robbery, sentence on that count vacated and remitted for sentencing, and otherwise affirmed. (Supreme Ct, Erie Co [Buscaglia, AJ])

Identification (Eyewitnesses) (General) **IDE; 190(10) (17)****Misconduct (Prosecution)** **MIS; 250(15)****People v Mc Cullough, 38 AD3d 1203, 832 NYS2d 366**
(4th Dept 2007)

A jury convicted the defendant of first-degree robbery, second-degree assault, and third-degree grand larceny.

Holding: The defendant's unpreserved contention that the prosecutor improperly bolstered the identifications of the defendant by two witnesses is reviewed in the interest of justice. At trial, two eyewitnesses identified the defendant as the perpetrator, and testified that they had identified him in lineups. The prosecutor then elicited a police investigator's testimony that the two eyewitnesses had identified the defendant after viewing two lineups. The prosecution correctly concedes this was improper bolstering. *See People v Holt*, 67 NY2d 819, 821. The identification of the robber was the only contested issue, and the evidence of identification was not overwhelming. The defendant may move to suppress the identifications before retrial. Other contentions are without merit or moot. Judgment reversed, new trial granted. (County Ct, Monroe Co [Marks, JJ])

Prisoners (Disciplinary Infractions and/or Proceedings) **PRS I; 300(13)****Matter of Loret v Goord, 38 AD3d 1267, 832 NYS2d 717**
(4th Dept 2007)

Holding: The petitioner, a prisoner, was found to have violated various prison rules. The misbehavior report, which alleged that he had, among other things, conspired to possess alcohol and drugs and engaged in abuse of inmate telephone privileges, was issued 21 months after the alleged behavior. Prisoner misbehavior is to be reported in writing "as soon as practicable." 7 NYCRR 251-3.1(a). Major events did occur during the 21-month delay, including the petitioner being charged and convicted of a previously unsolved murder. There was still an unexplained seven-month delay between the separate conviction and the misbehavior report. The petitioner also contended that his rights were violated when he was not given an opportunity to view photographs of the charged contraband and package nor to listen to an audiotape of his phone conversations. The respondent concedes that the determination should be annulled but argues

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there should be a new hearing. The long, unexplained delay requires annulment without remittal for a new hearing. *See Di Rose v New York State Dept. of Correctional Servs.*, 276 AD2d 842, 823 app dsmd 96 NY2d 850. Determination annulled, petition granted, all references to the charges to be expunged from the petitioner’s institutional record. (Transferred from Supreme Ct, Wyoming Co [Dadd, AJ])

Defenses (Entrapment) DEF; 105(30)

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

People v May, 38 AD3d 1245, 831 NYS2d 797 (4th Dept 2007)

Holding: A jury convicted the defendant of first-degree promoting prison contraband and third-degree possession of a weapon. The court erred in denying a defense request to charge the affirmative defense of entrapment. *See* Penal Law 40.05. A correction officer testified that he agreed to get the defendant a television in exchange for information about weapons in the facility, and that the officer suggestion the defendant turn over a weapon “as a show of good faith.” Once the defendant did so, the officer said this was a “beginning” and that he wanted more information, and arranged for the defendant to get his television the next day. Soon thereafter, a search of the defendant’s cell revealed the three homemade weapons charged herein. The evidence reasonably and sufficiently supports the inference that the defendant was actively induced or encouraged by an official to commit the charged offense and that a substantial risk was created by the inducement or encouragement of the offense being committed by someone not otherwise disposed to do so. *See People v Delaney*, 309 AD2d 968, 970. The request for an entrapment charge should have been granted. Judgment reversed, new trial granted. (County Ct, Wyoming Co [Dadd, JJ])

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

People v Garrison, KA 03-00617, 4th Dept, 4/20/2007

Holding: The defendant’s unpreserved claim that his conviction of depraved indifference murder must be set aside as unsupported by legally sufficient evidence is considered in the interest of justice. The evidence established that the defendant used a weapon “with a ‘manifest intent to kill’” the decedent. This negated the essential elements of recklessness and depraved indifference. *See People v Payne*, 3 NY3d 266, 271 rearg den 3 NY3d 767. As to other issues: the evidence was legally sufficient as to the defendant’s identity as one of the shooters; allowing the com-

plainant’s out-of-court statements in as excited utterances was not error; and the defendant received meaningful representation. The certificate of conviction incorrectly indicates that the defendant was convicted of attempted second-degree murder (Penal Law 110.00 and 125.25[2]), and should be amended to reflect a conviction under Penal Law 110.00 and 125.25[1]. Judgment modified, conviction of second-degree murder reversed, and as modified, affirmed. (Supreme Ct, Monroe Co [Affronti, JJ])

Dissent in part: [Smith and Lunn, JJ] There is no reason to review the unpreserved claim as to depraved indifference murder. Evidence showed that, as a group was leaving a building through a foyer, the defendant nudged the decedent, who smiled; the defendant then raised a gun, which discharged. A valid line of reasoning and inference could lead to the conclusion that this spontaneous action, in the absence of any known motive and under all the circumstances, was reckless rather than intentional.

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

Parole (Revocation Hearings [General]) PRL; 276(45[d])

Matter of Peek v Dennison, No. TP 06-03498, 4th Dept, 4/20/2007

Holding: The petitioner claimed that he was denied a preliminary hearing as to a revocation of parole proceeding. Where he had been convicted by guilty plea of a new crime, he was not entitled to a preliminary hearing. *See* Executive Law 259-i(3)(c)(i). He should have raised at the first appearance for the final revocation hearing the claim that he became eligible for a preliminary hearing after withdrawing his plea to the new offense. The hearing officer would have had the opportunity to effectively address the matter. *See* CPL 470.05(2). The issue is therefore unpreserved, and the petitioner has also failed to exhaust administrative remedies. *See gen Matter of Shapard v Zon*, 30 AD3d 1098. The determination that he violated parole is supported by substantial evidence. His inculpatory statements were admissible as party admissions. *See People v Thomas*, 300 AD2d 1034, 1035 lv den 99 NY2d 633. Determination confirmed. (Transferred from Supreme Ct, Monroe Co [Galloway, JJ])

Judges (Disqualification) (General) JGS; 215(8) (9)

People v Thomas, No. KA 04-01132, 4th Dept, 4/20/2007

The defendant pled guilty to first-degree and third-degree possession of drugs and other related charges.

Holding: The defendant was arrested following the execution of a search warrant. It then came to light that the judge who issued the warrant had, when serving as an assistant public defender, represented the defendant in a

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prior matter in which he had pled guilty to a lesser charge. That conviction was included in the search warrant application as part of the basis for probable cause. The judge was not required to recuse herself as a result of the prior representation. *See gen People v Marrero*, 30 AD3d 637. The judge signed an affirmation stating that in her 10 years as an assistant public defender, she had represented thousands of defendants and had no independent recollection of the defendant. Recusal is required when a judge's impartiality might reasonably be questioned, including when the judge *knows* that the judge served as a lawyer in the matter in controversy. *See* 22 NYCRR 100.3(E)(1)(b)(i). It is uncontroverted that the judge here did not know of the prior representation when issuing the warrant. Nor was recusal required by Judiciary Law 14. The contention that he should have been allowed to withdraw the plea because he had only a short time in which to make his decision is rejected. Judgment affirmed. (Supreme Ct, Monroe Co [Affronti, JJ])

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

People v Jones, No. KA 06-03349, 4th Dept, 4/20/2007

Holding: Evidence at the suppression hearing showed that police stopped the defendant's vehicle based on his violation of a noise ordinance. The area in which the stop occurred was the source of many complaints about drug activity. After two officers approached the defendant's car, sought and obtained his license, registration, and insurance information, they returned to their car. They saw the defendant open the center console, as he admitted in hearing testimony. Believing he had either retrieved or concealed a weapon or contraband, they ordered him out of his car, patted him down, and retrieved "a large wad of money in small denominations consistent with street level sales of cocaine." The defendant became nervous. The offices found nothing in the front passenger seat area but retrieved a digital scale with white residue from the rear passenger area. In the driver's area they found small pieces of white residue resembling crumbs of crack cocaine. Based on these discoveries, the police search the vehicle and found cocaine in the trunk. The suppression court erred in determining that the police were justified in search the "'grabbable area'" of the car. The search should have ended when no weapon or contraband was found in the front passenger area and console. As to the alternative ground of consent to search, the suppression court did not resolve it. Decision reserved, matter remitted for findings of fact on that issue based on the evidence presented at the suppression hearing. (County Ct, Onondaga Co [Fahey, JJ]) ⚖

Defense Practice Tips

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Going to Federal Court

Finally, a word of caution about going to federal court after exhausting state court remedies. The petitioner in *Earley* did not win his claim outright. Rather, the 2nd Circuit remanded to the District Court for a hearing on whether the petition was timely filed. The Antiterrorism and Effective Death Penalty Act (AEDPA) established draconian time limits on state prisoners seeking federal relief. Under AEDPA, a federal habeas claim must be filed within one year after the defendant learns that PRS has been imposed, not counting time spent exhausting state remedies. Thus, any defendant who has served more than one year of post-release supervision or learned more than a year earlier that DOCS had added a PRS period before filing an *Earley* claim in the state courts would be barred from going to federal court. As for defendants who are still in prison, it will depend on when DOCS notified the defendant that it had added PRS to the sentence. In many cases, that may not occur until the defendant is actually released from prison and handed a sheet containing the conditions of release. Those defendants should be able to seek relief in federal court if they lose in state court.

More Than a Technicality

It might appear at first blush that an *Earley* claim is the ultimate in legal technicalities. The defendant is asserting that he should not have to serve a period of post-release supervision that the law requires him to serve just because it was imposed by the wrong entity. However, viewed from a judge's perspective, the issue may not appear so technical after all. At its core, *Earley* stands for the proposition that administrative agencies and statutes in our society do not impose sentence on defendants, judges do. Litigants would do well, somewhere in their papers, to try to tap into the gut sense that administrative imposition of post-release supervision usurps the judge's authority over sentencing.

The state of the law with respect to *Earley* is evolving rapidly. Each month, new decisions are issued, at the appellate or trial level, that impact on how to litigate an *Earley* claim. Indeed, it would not be surprising if some of the information contained in this article is outdated by the time of publication. Review by the Court of Appeals is sorely needed to bring order to what can best be described as an appellate free-for-all. Until then, if ever an issue required lawyers to stay on top of the very latest developments in the law, this is the one. ⚖

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