New York State Defenders Association

Public Defense Backup Center
REPORT

Volume XXII Number 5 October-December 2007

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

NLADA Study of Public Defense in NY Reveals Major Deficiencies, including Lack of Independence, Accountability, and Reasonable Caseloads

The National Legal Aid and Defender Association issued a report on Franklin County's public defense system and report cards on the systems in Cattaraugus, Niagara, Ontario, Schuyler, Tioga, and Washington counties. These counties were chosen as representative of upstate counties that were not reviewed for the 2006 Spangenberg Group's study for the Kaye Commission on the Future of Indigent Defense Services. The report cards, commissioned by NYSDA, are available at www.nysda.org. NLADA has also been studying the public defense systems in three other counties, and the report cards on those counties, as well as the final multi-county study, are expected to be released soon.

NLADA analyzed the county systems using the ABA's Ten Principles of a Public Defense Delivery System. Regarding the first principle, independence, except for Ontario County, which received a C+, the counties received grades of D, D–, or F.

As to accountability, each of the counties received an F, and with regard to reasonable workloads, the counties received grades of D– or F. With limited exceptions, the counties received failing or low grades for the other principles, including the prompt appointment of counsel, client confidentiality, continuous representation, resource parity, training, and minimum qualifications.

NLADA's findings echo those of the Kaye Commission: no matter how hard public defense attorneys work to represent their clients, without an independent system that is sufficiently funded and can enforce consistent standards throughout the state, New York's public defense system will never meet its constitutional and statutory mandates.

NYCLU Sues NYS Over Broken Public Defense System

On November 8, the New York Civil Liberties Union filed a civil rights class action lawsuit accusing New York State of failing to provide meaningful and effective legal representation to persons eligible for public defense counsel. The suit was filed in the New York State Supreme Court, Albany County. The proposed plaintiff class is comprised of all persons eligible for public defense representation with felony, misdemeanor, or lesser criminal charges pending in New York State courts in Onondaga, Ontario, Schuyler, Suffolk, and Washington counties. The suit seeks a preliminary and permanent injunction requiring the state to provide a public defense system that is consistent with the constitutions and laws of the United States and New York.

District Court Judge Strikes Portions of SOMTA, Upholds Others

In *Mental Hygiene Legal Services v Spitzer*, No. 07-Civ-2935 (SDNY 11/16/07), District Judge Gerald Lynch granted the plaintiffs' request for a temporary restraining order with regard to: (1) Mental Hygiene Law (MHL) 10.06(k), which requires respondents to be detained pending trial if the court concludes after a probable cause hearing that they may have a mental abnormality; and (2) MHL 10.07(d), which authorizes civil commitment for persons who were declared incompetent to stand trial after a showing of clear and convincing evidence of guilt of the underlying crime, not proof beyond a reasonable doubt. The court ruled that detention is not constitutionally authorized in the absence of a preliminary judicial determination of dangerousness.

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Judge Lynch denied the plaintiff's request for a preliminary injunction and denied the defendant's motion to dismiss with regard to the following statutory provisions: (1) MHL 10.06(f), which allows the Attorney General to issue a "securing petition" to detain individuals beyond the completion of their prison terms without notice or an opportunity for review (plaintiffs only made a facial challenge to this provision); (2) MHL 10.07(c), which provides that for respondents who were convicted of crimes that may subject them to SOMTA prior to the effective date of the statute, the determination of whether the crime was sexually motivated must be proven by clear and convincing evidence, not beyond a reasonable doubt; and (3) MHL 10.05(e), which authorizes psychiatric examinations prior to the filing of a petition and the attachment of the right to counsel.

The court dismissed the facial challenge to MHL 10.06(j)(iii), which bars respondents who are found incompetent to stand trial from contesting guilt at the probable cause hearing, concluding that "the probable cause established by an indictment is a sufficient showing of potential guilt to warrant pretrial detention where an individualized showing of mental abnormality and dangerousness have been made."

Second Circuit Rules on Constitutionality of Multiple SORA Failure to Report Charges

In *Willette v Fischer*, No. 06-1422-pr (2d Cir 10/29/07), the petitioner sought a writ of habeas corpus after he was convicted of four counts of first-degree filing a false instrument (Penal Law 175.35) and four counts of failing to inform the police of his new address (Corr Law 168-f(4)). As a level III sex offender, Willette was required to personally verify his address with the police every 90 days (Corr Law 168-f(3)) and register any address changes within 10 days of moving (Corr Law 168-f(4)). During a 15-month period, Willette lived with his girlfriend and her two minor children, but continued to register using his father's address. The Second Circuit concluded that Willette could not be guilty of four 168-f(4) violations as he only changed his address one time. The statutory language does not support the state's position that a defendant can be charged with a 168-f(4) violation for each day that the address is not reported. The district court affirmed Willette's filing a false instrument convictions, finding that such convictions did not require that the defendant have a legal duty to file the instruments, which Willette did not appeal. (www.law.com, 11/1/07.)

NYS Department of Health Issues Regulations Governing Pre-Conviction HIV Testing of Defendants

As of November 1, 2007, pursuant to CPL 210.16, courts must order a defendant who has been indicted for certain sex offenses to be tested for human immunodeficiency virus (HIV) if the complainant requests a test within six months of the date of the crimes charged and the court finds that the result would provide a medical or psychological benefit to the complainant. The test results are provided to the complainant and the defendant (upon request) and the results may be disclosed to the complainant's immediate family, guardian, physicians, attorneys, medical or mental health providers, and past and future contacts of the complainant to whom there was or is a reasonable risk of HIV transmission, but not the court or any other individuals.

The NYS Department of Health issued guidelines to assist courts in determining whether testing would provide a medical or psychological benefit to the complainant. The guidelines, which are available at http://www.hivguidelines.org/admin/files/other/hot%20topics/defendanttesting.pdf, provide that HIV testing of the defendant may be medically and psychologically beneficial from seven to thirty days from the time of exposure; after thirty days, testing may be psychologically beneficial, but not medically beneficial as it will not assist in determining whether to continue post-exposure prophylaxis. The guidelines set forth the specific tests that should be completed and the responsibilities of the county or state public health officials that conduct the tests.

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A fact sheet for judges is available at www.health.state.ny.us/diseases/aids/testing/defendant/judges_fact_sheet.htm

Maryland Judge Excludes Fingerprint Evidence

Baltimore County Circuit Judge Susan M. Souder recently held that the prosecution failed to present evidence that expert opinion testimony regarding the ACE-V method of latent fingerprint identification rests on a reliable factual foundation. *See State of Maryland v Rose*, No. K06-0545 (decision available at www.barlib.org/ Bryan RoseFingerprintMemDecision2.pdf; www.baltimoresun.com, 10/24/07.) The court noted that the long-standing use of fingerprint evidence in criminal cases does not prove that such evidence is reliable under *Frye*. The decision contains a lengthy review of the US Department of Justice Office of the Inspector General Oversight and Review Division's 2006 report regarding the FBI's handling of the Brandon Mayfield case (available at www.usdoj.gov/oig/special/s0601/PDF_ list.htm.)

NYSDA encourages defense attorneys to consider fingerprint evidence challenges. As noted in the Nov./Dec. 2006 issue of the *REPORT*, (http://www.nysda.org/06_NovDEC_2006REPORT.pdf), NYSDA has created a fingerprint evidence resource guide, which is available on CD-ROM from the Backup Center.

Court of Appeals Ends Death Penalty in New York; Capital Defenders Office to Close

The New York State Court of Appeals issued a decision in *People v Taylor*, No. 123 (10/23/07), in which the Court affirmed its 2004 decision in *People v LaValle* (3 NY3d 88) and concluded that the CPL 400.27 deadlock jury instruction violated the New York State Constitution and invalidated the entire death penalty statute. Judge Ciparik wrote the majority decision, in which Chief Judge Kaye and Judge Jones concurred. Judge Smith wrote a separate concurring opinion in which he agreed that stare decisis required the Court to follow *LaValle*. In her dissent, Judge Read concluded that the deadlock instruction given in *Taylor* was not coercive, stare decisis did not apply, and the deadlock instruction could be severed from the rest of the statute. Judges Graffeo and Piggot concurred in the dissent. The court's decision is available at http://www.nycourts.gov/ctapps/decisions/oct07/123opn07.pdf. Taylor has since been resentenced to life without parole. [A case summary appears at p. 8.]

As the *Taylor* decision ended the availability of the death penalty in New York State, the Capital Defenders Office has announced that it will close in the coming months. (www.law.com, 10/29/07.) From 1995, the year the death penalty returned to New York, until now, there have been 877 capital-eligible cases in New York. In 58 of those cases, prosecutors filed notices of intent to seek the death penalty. Kevin Doyle, Capital Defender, and the attorneys and staff of the office should be commended for their hard work and dedication to representing capital defendants.

EJusticeNY Criminal History Report Manual Available

The NYS Division of Criminal Justice Services (DCJS) recently released its manual to the eJusticeNY Integrated Justice Portal Criminal History Report. The manual provides details about the two types of rap sheets produced by DCJS: fingerprint response rap sheets and repository inquiry response rap sheets. While relying on the same information sources, the eJustice criminal history reports look different than the more familiar rap sheets. Information about eJusticeNY reports is available at http://www.criminaljustice.state.ny.us/ojis/ejusticeinfo.htm. Members of the public defense community who want more information can contact the Backup Center.

New York State to Litigate Parole Denial Class Action

In 2006, inmates filed a class action suit against Governor Pataki alleging that the Parole Board routinely denied parole to members of the class based solely on the severity of their crimes and not the other factors set forth in Executive Law 259-I. *Graziano v Pataki*, 7:06-cv-00480 (SDNY). In July 2006, District Judge Charles L. Brienant denied the state's motion to dismiss the suit. For the past several months the parties have engaged in settlement negotiations. Unfortunately, those negotiations have failed and the state has indicated that it will litigate the matter (www.law.com, 11/15/07.)

CASAT Outpatient Program Expanded to Work Release Inmates in Upstate New York

In a recent press release, the NYS Department of Correctional Services (DOCS) announced that eligible work release inmates in upstate NY who are in phase II of the Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program can receive outpatient substance abuse treatment. (www.docs.state.ny.us, 11/20/07.) In March, DOCS entered into a memorandum of understanding with the Office of Alcoholism and Substance Abuse Services that opened the door to this community-based treatment. Treatment will be available

for up to 170 inmates. The following organizations are expected to or are already providing treatment: Alcohol Drug Dependency Services, Inc./Family Addiction Outpatient Services (Buffalo Correctional Facility inmates-male); Twin County Recovery Services, Inc. and 820 River Street, Inc. (male and female Hudson area work release inmates); Genesee Council on Alcoholism and Substance Abuse, Inc. and Strong Recovery (Rochester Correctional Facility inmates-male and Albion Work Release Facility inmates-female); and Lexington Center for Recovery, Inc. (Fishkill Work Release Facility inmates-male).

Handbook for Family & Friends of DOCS Inmates Published

In August, the NYS Department of Correctional Services released an updated handbook for the friends and family of inmates housed in DOCS facilities. The handbook, available at http://www.docs.state.ny.us/FamilyGuide/FamilyHandbook.html, includes information about visiting, sending mail and calling inmates, dealing with emergencies and family deaths, and rules governing inmate monies, misconduct, grievances, health care, transfers and releases. The guide is also available in Spanish at http://www.docs.state.ny.us/FamilyGuide/FamilyHandbookSpanish.html.

Monroe Co Public Defender to Retire

Edward J. Nowak, Monroe County Public Defender for the last 30 years, has announced he will leave that position at the end of the year. Local recognition of Nowak's outstanding tenure was immediate. City Court Judge John R. Schwartz recalled that Nowak supported—even when it imperiled his job—a drug court program that he believed would help his clients. District Attorney Michael C. Green called Nowak "a consummate professional and a very bright attorney." (This could be considered an understatement in view of, among other things, Nowak's successful trip to the United States Supreme Court in *Dunaway v New York*, 442 US 200 [1979].) (www.democratandchronicle.com, 11/1/07.)

Praise also emanated from within Nowak's office. An item entitled "Ed Nowak—Appellate Superstar" appeared on http://indignantindigent.blogspot.com/ on November 10. While the blog carries the disclaimer that items appearing thereon "are not endorsed or in any way even remotely approved of by the Monroe County Public Defender's Office," it was clear that blogger Brian was not alone in appreciating Nowak's many contributions.

High regard for Nowak extends well beyond the borders of Monroe County. He is known across the state for his legal expertise, dedication to quality in all his work, and compassion for others. He has been President of NYSDA's Board of Directors since 1990, working countless hours on behalf of the Association, its members, and public defense lawyers and their clients across the state. He is a well-regarded lecturer, and has presented for NYSDA on countless occasions across the state. His "Recent Developments" sessions are perennial favorites. Attorneys looking toward future CLE trainings, and the criminal justice students at Rochester Institute of Technology where he is an adjunct professor, no doubt welcome his intention to continue his relationships with NYSDA and RIT.

We are happy for ourselves and for the public defense community as a whole that Ed will remain an integral part of NYSDA. We wish him all the best in his retirement as Public Defender and look forward to his invaluable assistance in pursuit of the Association's mission to improve the quality and scope of public defense representation in New York State.

Selection Process at Issue

Nowak's retirement means that Monroe County must, for the first time in three decades, select a new Public Defender. His appointment by the County Legislature followed a recommendation from an independent panel that examined candidates' credentials. That merit selection process was established after Monroe County's public defense system received a failing grade in an independent review of the public defender system. Before that, attorneys were usually political appointees. (www.democratandchronicle.com, 11/12/07.)

The local newspaper editorialized recently that employing an impartial commission to propose a new Public Defender had worked very well in 1977, and should be adopted again. "The legislature, which makes the appointment, should appoint a broad-based, diverse advisory commission of Bar members and civic leaders to consider candidates and make recommendations." (www.democratandchronicle.com, 11/8/07.) The same point was made in a guest essay by Thomas G. Smith, President of the Monroe County Bar Association. (www.democratandchronicle.com, 11/8/07.)

Issues concerning the independence of the defense function are not limited to Monroe County, but perennially arise across the state, as noted above.

Forensics News

Cross Contamination and Gunshot Residue

Steven Howard, a Michigan attorney and firearms expert, authored "Gunshot Residue and Cross Contamination: An Introductory Lesson," which appeared in the September/October 2007 issue of NACDL's publication, *The Champion*. The article, which is available at www.nacdl.org, provides some basic information on gunshot residue and the components of gunpowder, how

cross contamination can occur, and offers advice on how to question positive gunshot residue test results.

FBI Announces Plan to Review Bullet-Lead Analysis Testimony

After a joint investigation by the *Washington Post* and *60 Minutes*, the FBI and the Innocence Project will review bullet-lead testimony that its agents gave in hundreds of cases. (www.washingtonpost.com, 11/18/07; http://www.fbi.gov/pressrel/pressrel07/bulletlead111707.htm, 11/17/07.) In 2004, the National Academy of Sciences released a report criticizing the FBI's use of a particular type of statistical analysis to declare that bullets matched and in September 2005, the FBI announced that it would no longer conduct the analysis. (http://www.nysda.org/05_AugustOctoberReport.pdf). However, the FBI's 2005 letter minimized the significance of the National Academy of Sciences' conclusions.

Technology Updates

Technology has pervaded the lives of almost all New Yorkers, including the lives of public defense clients. Keeping abreast of new technologies and their uses in criminal cases is a necessity. In a recent New York Law Journal article, "Analyzing Instant Messaging as Evidence," Ken Strutin, NYSDA's Director of Legal Information Services, reviewed how instant messaging discussions and text messaging are being used in criminal proceedings. (www.law.com, 9/4/07.) As Strutin emphasized, access to this evidence, like other types of evidence, is guided by the Fourth Amendment.

Another major issue is whether the data is admissible evidence. Defense attorneys should carefully examine any data accessed by the police and being offered by the prosecution to determine whether it is authentic. A computer expert may be necessary to examine how, when and where the data was created and possible ways in which the data could have been corrupted. For more information on locating and assessing potential expert witnesses, see below.

Other technology-based evidence that is showing up in criminal and civil cases appears on social networking sites such as Facebook and MySpace. In the National Law Journal article, "Litigation clues are found on Facebook," Vesna Jaksic explains how attorneys are using these sites to investigate clients and cases. (www.law.com, 10/15/07.) As Jaksic notes, judges are beginning to rely on this evidence in making sentencing determinations. Defense attorneys and their investigators must be aware of whether their clients have a web presence, as the police, prosecutors, presentence investigators, and judges are using this information against them. As with all electronic evidence, this evidence can be incomplete or inaccurate, at the very least, and defense attorneys must be ready to attack it.

The National Institute of Justice just released a special report entitled "Investigative Uses of Technology: Devices, Tools, and Techniques," available at www.ojp.usdoj.gov/nij. The report includes information about investigative techniques, evidence preservation, practical examples, and legal considerations. Defense attorneys can use the report to learn about the techniques used by police and prosecutors to locate, gather, and analyze electronic data from devices including cell phones, voicemail systems, computers, cameras, GPS systems, and personal digital assistants (PDAs).

Expert Witness Resources Available on NYSDA's Website

NYSDA's expert witness database has been available on the web (http://www.nysda.org/ExpWeb/) for the past several months. The database includes experts in over 40 areas of expertise. NYSDA's expert witness page (http://www.nysda.org/html/experts.html) includes links to various free expert witness databases. The site also provides links to articles on locating and investigating the qualifications of experts, including two recent articles from the National Association of Criminal Defense Lawyers' publication *The Champion*, and The Virtual Chase. Attorneys who have had positive experiences with available experts not currently listed are encouraged to notify the Backup Center so the database can grow to the benefit of all.

Noteworthy NYS Lower Court Decisions

Speedy Trial "Exceptional Circumstances"—*People v Cozzani*, No. 02028/2007 (County Ct, Suffolk Co 10/29/07)

The defendant was charged with first-degree disseminating indecent material to a minor. He was arraigned on the felony complaint on March 11, 2006, but was not indicted until July 2007. The defendant filed a motion to dismiss, arguing that the delay between his arraignment and indictment violated his speedy trial rights. The prosecution responded that most of the post-arraignment delay was excusable based on "exceptional circumstances," namely that soon after the arraignment, the Second Department held that a defendant in a similar case could not be prosecuted for disseminating indecent material and the prosecution was waiting for the Court of Appeals to rule on the issue. In granting the defendant's motion to dismiss, the court concluded that the speedy trial statutory language does not provide for this type of delay to be considered an exceptional circumstance. "An exhaustive search of the decisional authority of this state has failed to reveal a single instance where a court has permitted a felony complaint pending before it to lie

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Conferences & Seminars

Sponsor: National Association of Criminal Defense Lawyers
Theme: 28th Annual Advanced Criminal Law Seminar
Dates: January 20–25, 2008
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x232; fax (202) 872-8690; email gerald@nacdl.org; website www.nacdl.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: New Solutions for Old Problems
Dates: February 20–23, 2008
Place: Tucson, AZ
Contact: NACDL: tel (202) 872-8600 x232; fax (202) 872-8690; email gerald@nacdl.org; website www.nacdl.org

Sponsor: New York State Defenders Association
Theme: 22nd Annual Metropolitan New York Trainer
Dates: March 1, 2008
Place: NYU Law School, New York City
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: National Legal Aid and Defender Association
Theme: Life in the Balance: Defending Death Penalty Cases
Dates: March 8–11, 2008
Place: New Orleans, LA
Contact: NLADA: tel (202) 452-0620 x207; fax (202) 872-1031; website www.nlada.org

Sponsor: Eyewitness Identification Reform Litigation Network
Theme: A New Legal Architecture: Litigating Eyewitness Identification Cases in the 21st Century
Dates: March 14–15, 2008
Place: NYU Law School, New York City
Contact: Zeke Edwards (Innocence Project): tel (212) 364-5349; email zedwards@innocenceproject.org; website www.nacdl.org/meetings

Sponsor: National Criminal Defense College
Theme: Trial Practice Institute
Dates: June 15–28, 2008
July 13–26, 2008
Place: Macon, GA
Contact: NCDC: tel (478) 746-4151; fax (478) 743-0160; email Rosie@ncdc.net; website www.ncdc.net

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

Sponsor: National Child Abuse Defense & Resource Center
Theme: Child Abuse Allegations: Separating Scientific Fact from Fiction
Dates: September 18–20, 2008
Place: Las Vegas, NV
Contact: NCADRC: tel (419) 865-0513; website www.falseallegation.org ⚖

Back to Saratoga Springs!

NYSDA's 41st Annual Meeting will be held at the Gideon Putnam Hotel in Saratoga Springs, NY

July 20-22, 2008

Hotel reservations can be made by phone:
1-800-732-1560 or 518-584-3000
or fax: **518-584-1354.**

Defender News *(continued from page 5)*

fallow so that a similar dispositive issue, presented in a different case, could run its appellate course."

Field Sobriety Tests—*People v Goldstein*, No. 06-070093 (Village Ct, Southampton Village, Suffolk Co 10/26/07)

The defendant was charged with driving while intoxicated, VTL 1192(3), and failure to keep right. He refused to submit to a breathalyzer test, but did submit to several field sobriety tests: horizontal gaze nystagmus; reciting the alphabet; one-leg stance; and walk and turn. The court noted that when the horizontal gaze nystagmus and walk and turn tests are both administered, the tests are 80 percent accurate, at most, in identifying individuals with a blood alcohol concentration of .10 percent or higher; the court found that this rate of error is unacceptable. Also, these tests speak to a blood alcohol concentration of .10 percent, not "intoxication," which was the issue here. "[C]onclusions based upon a defendant's performance of these tests should be objected to as inadmissible." After reviewing all of the evidence, including the testimony of the two officers who administered the tests, the court concluded that the prosecution failed to prove beyond a reasonable doubt that the defendant was intoxicated and found the defendant not guilty of driving while intoxicated.

See also People v McKown, 226 Ill 2d 245 (Illinois Supreme Ct 9/20/07) (concluding that the lower courts erred in taking judicial notice of the general acceptance of the horizontal gaze nystagmus test as an indicator of

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Job Opportunities

The Jefferson County Public Defender's Office is accepting applications for **Assistant Public Defender** positions. Assistant public defenders are responsible for the representation of indigent defendants in criminal, family, and village and town night courts. Applicants must be attorneys in good standing in the State of New York and/or awaiting admission to the bar and must be able to work collaboratively with clients, other lawyers, social workers, and local law enforcement officials. Salary: $47,822–$53,281 DOE, plus excellent fringe benefits including NYS retirement. EOE. To apply, send an application letter with résumé, Appellate Division certificate of good standing or a statement from the applicant indicating when, where, and the department in which the exam was taken, three letters of reference, and copy of valid driver's license to the Jefferson County Department of Human Resources, County Office Building, 175 Arsenal Street, Second Floor, Watertown, NY 13601.

The Virginia Capital Representation Resource Center (VCRRC) is accepting applications for **Staff Attorney** positions. VCRRC is a not-for-profit law firm that represents people sentenced to death in Virginia and provides assistance and educational resources and programs to appointed and pro bono counsel in capital cases. Direct representation is focused on post-conviction litigation in state and federal courts. VCRRC has cases throughout Virginia and travel is required. Candidates should have a strong work ethic and a professional history demonstrating a creative and energized approach to solving problems and producing results. Applicants with significant litigation experience and those with less experience but the ability to develop quickly will be considered. Recent capital experience in trial or post-conviction litigation a plus. Applicants must be admitted to the Virginia bar, eligible for admission, or willing to take the Virginia bar exam. Salary CWE. EOE. To apply, send a cover letter discussing special skills and talents and explaining interest in death penalty work, résumé, professional references, and a brief writing sample to Rob Lee at roblee@vcrrc.org.

The Federal Public Defender for the Eastern and Western Districts of Arkansas is accepting applications for the position of Assistant Defender at the Little Rock office to work on capital habeas cases. The Arkansas Capital Habeas Unit is currently authorized to have four assistant defenders, and there are four mitigation investigators, two paralegals, one legal secretary, and one clerical assistant in the unit. Arkansas has a death row population of thirty-eight. Applicants must be members in good standing of a state bar, must be eligible for admission to the Bar of the United States District Court for the Eastern and Western Districts of Arkansas and the Eighth Circuit Court of Appeals, and must have at least three years of experience in the defense of capital habeas cases. Salary CWE. EOE. Position open until filled. For more information, visit http://arfpd.com. To apply, send résumé, references, and a writing sample to jenniffer.horan@fd.org or mail to Federal Public Defender, 1401 W. Capitol Avenue, Suite 490, Little Rock, AR 72201.

The Orleans Public Defender is seeking applications for the following positions: **Staff Attorney, Conflict Attorney, Supervisory Attorney, and Contract Attorney.** Minimum requirements for all positions: (1) graduate of an ABA accredited law school; (2) demonstrated commitment to working with clients in poverty and from diverse cultural backgrounds; (3) demonstrated skill in legal research and writing; (4) knowledge and commitment to the national standards of criminal defense performance; and (5) proficiency with word processor and legal research software. **Staff Attorney** applicants must be members of the Louisiana bar or willing to take the February or July 2008 exam. **Conflict Attorney** applicants must be members of the Louisiana bar or willing to take the February 2008 exam. **Contract Attorney** applicants must be members of the Louisiana bar. **Supervisory Attorney** applicants must be members of the Louisiana bar or willing to take the exam at the first opportunity and have at least four years experience as a criminal defense attorney, demonstrated skill and experience in the delivery of criminal defense services at the trial level, demonstrated strengths in team work and the supervision and motivation of others, and demonstrated innovation and creativity in the provision of indigent defense services. Full job descriptions, application deadlines, and salary information available at http://www.orleanspublicdefenders.org. To apply send a cover letter, résumé, 5+ page writing sample, list of three references, and for staff attorney and conflict attorney applicants out of law school less than five years, a law school transcript, to Karen Hayes Green, Recruitment Coordinator, Orleans Public Defenders by email: kareng@orleanspublicdefenders.org, fax: (504)821-5285, or mail: 2601 Tulane Avenue, New Orleans, LA 70119.

Prisoners' Legal Services is accepting applications for a **Managing Attorney** (Buffalo office) and a **Staff Attorney** (Ithaca office). PLS is a statewide program providing civil legal services to people incarcerated in New York State prisons. We have regional offices in Albany, Buffalo, Ithaca and Plattsburgh. PLS handles cases involving mental health and medical care, prison disciplinary matters, excessive use of force, conditions of confinement, sentence calculation and jail time credit. PLS attorneys engage in administrative advocacy and representation in individual lawsuits and impact litigation. We provide high quality legal services and have been successful in establishing important rights for our clients. PLS offers a competitive salary in addition to an outstanding benefit package including free health, dental, long term disability, and life insurance, as well as generous leave policies. We seek to be a well-balanced, diverse organization. PLS is an equal opportunity employer. We encourage people of color, women, and people with disabilities to apply. We have a serious need for staff who are fluent in Spanish.

Applicants for the **Managing Attorney** position must be committed to providing legal services to the disadvantaged, must be admitted to practice in New York State and have a minimum of five (5) years of experience in the areas of civil legal

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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.

New York Court of Appeals

Arrest (Appearance Ticket) (General) ARR; 35(3) (12)

Juveniles (Delinquency) JUV; 230(15)

Search and Seizure (Warrantless Searches) SEA; 335(80)

In the Matter of Victor M., 9 NY3d 84 (2007)

Victor, a juvenile, was discovered by a police officer playing dice with several others. He was issued a summons, but since neither Victor nor his mother, who appeared later, had identification, he was arrested. The officer did not allow them to go home and get identification. During a stationhouse search, drugs were discovered. Victor's suppression motion was denied by the Family Court, and he was adjudicated a delinquent. The 1st Department affirmed on appeal.

Holding: A police officer cannot temporarily detain or arrest a juvenile for offenses that were only violations, and the resulting search was illegal. Victor's involvement as a player in the dice game was not a crime, since his actions did not "advance gambling activity." *See* Penal Law 225.05, 225.30. He was not trespassing, but there was basis to believe he violated the loitering statute's provision related to gambling activity. *See* Penal Law 240.35 [2]. However, loitering and simple trespass were violations, not crimes. A warrantless arrest of a juvenile was authorized only when an adult could have been arrested for a "crime." *See* Family Court Act 305.2 [2]. Victor was 15 and nothing suggested he looked like an adult at the time. The officer was not empowered to detain Victor based on reasonable suspicion, because that also required witnessing a crime, not a violation. *See* CPL 140.50 [1]. Lastly, a detention would have only permitted a frisk and not a full search. Taking a 15-year-old to the police station for a violation was not reasonable, when he could have been allowed to return to his apartment to get his identification. Judgment reversed, petition dismissed.

Death Penalty (Penalty Phase) (States [New York]) DEP; 100 (120) (155[gg])

Sentencing (Instructions to Jury) SEN; 345(45)

People v Taylor, No. 123, 10/23/2007

During the robbery of a Wendy's restaurant, the defendant, along with an accomplice, bound and gagged seven employees. According to one of the employees, the defendant shot two people and ordered his companion to kill the rest. After his arrest, the defendant claimed that it was his partner who had shot the decedents and survivors. During a videotaped statement to the police, he backtracked and took responsibility for shooting the first person. He was convicted of first-degree murder; the jury returned a death sentence. Before the sentencing jury had been selected, the defendant moved for an order declaring the deadlock jury instruction under CPL 400.27(10) unconstitutional and non-severable. The motion was denied. The court charged the jury that the defendant would not be eligible for parole until he served the minimum sentence—175 years in prison.

Holding: The trial court's attempt to minimize the effect of a defective deadlock jury instruction in a capital case did not overcome the holding of *People v LaValle* (3 NY3d 88 [2004]), which found the CPL 400.27 instruction violated the New York State Constitution, invalidating the entire statute. The deadlock provision was inherently coercive, since jurors would likely vote for a death sentence to avoid a standoff that would put the case in the judge's hands, opening the door to release on parole. The deadlock provision violated due process and the defendant's right to a fair trial because it might force jurors to give up their conscientious beliefs in order to reach a verdict. A verdict might be based on the fear of future dangerousness and the possibility that the defendant might be free some day. New York's Constitution provided more protection than the 8th Amendment, *Jones v United States* (527 US 373 [1999]), requiring a heightened standard of reliability. The provision could not be severed, since the jury was entitled to know the consequences of deadlock but ought not be coerced into making a choice. To craft a new instruction would usurp legislative prerogative. In view of the holding in *LaValle*, stare decisis controlled the outcome in this case. *See Semanchuck v Fifth Ave. & Thirty-Seventh St. Corp*, 290 NY 412, 420 (1943). Efforts to undermine *LaValle* by finding it limited to an "as applied" constitutional challenge misinterpret constitutional jurisprudence. Reworking the statute to allow the death penalty depending on a defendant's longevity and potential consecutive sentences would create an entirely new statute, one applicable to only a small subset of the original class of persons subject to it. Judgment vacated and remanded for resentencing.

Concurrence: [Smith, J] *LaValle* should not be overruled since the Court is reviewing the very same statute. That the *LaValle* decision was wrong does not justify casting aside stare decisis. It was up to the legislature to revisit this issue.

Dissent: [Read, J] The deadlock instruction in the defendant's case was non-coercive. While *LaValle* was precedent, its comments about the instruction's facial con-

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stitutionality were dicta. The issue presented by these instructions was not squarely confronted in *LaValle*. The deadlock provision was constitutionally severable.

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

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

People v Hill, No. 144, 11/15/2007

The defendant pleaded guilty to first-degree rape. He was sentenced to a determinate 15-year imprisonment term. While in prison, the defendant learned that there was an additional five-year term of post-release supervision, which was not mentioned during the plea or sentence. He moved to vacate his plea. His sentence was modified to a term of 12½ years in prison and two and one-half years of post-release supervision. The Appellate Division affirmed the judgment.

Holding: Post-release supervision following a determinate sentence was a direct consequence of pleading guilty. *See People v Catu*, 4 NY3d 242, 245. Without being informed of this additional punishment, the defendant's plea was not knowing, voluntary, and intelligent. *See People v Van Deusen*, 7 NY3d 744. The harmless error doctrine does not apply when determining the remedy for a *Catu* error. *See People v Coles*, 62 NY2d 908, 910. The issue was not whether the defendant received the benefit of the plea bargain, but the violation of his due process right to make an informed decision about pleading guilty. Order reversed, plea vacated, and matter remanded for further proceedings.

Dissent: (Pigott, J) Specific performance was a viable remedy for a *Catu* error. *See People v Selikoff*, 35 NY2d 227, 239. The trial court had authority to modify the sentence rather than vacate it.

Defenses (General) (Justification) **DEF; 105(31) (37)**

Evidence (Burden of Proof) (Sufficiency) **EVI; 155(10) (130)**

People v Olson, No. 134, 11/15/2007

After a bench trial, the defendant was convicted of first-degree assault and fourth-degree criminal possession of a weapon. The Appellate Division affirmed.

Holding: The Appellate Division correctly determined that the verdict was not against the weight of the evidence. The court conducted a factual review and concluded that the record supported the trial court's assessment of credibility and the evidence. The court's reference to *People v Gaimari*, 176 NY 84, which has been overruled, did not mean that it failed to apply the proper standard. *See People v Vega*, 7 NY3d 890, 891. The trial court did not improperly shift the burden of proving justification to the defendant. The court found evidence that the defendant committed assault and determined that his actions were not justified. The prosecution had disproved justification beyond a reasonable doubt. Order affirmed.

Confessions (Counsel) **CNF; 70(23)**

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

People v Porter, No. 136, 11/15/2007

Holding: There was no support in the record for the determination that the defendant's request for counsel was equivocal. Whether a request for counsel is equivocal is a mixed question of law and fact. The defendant stated: "I think I need an attorney," and the interviewing officer noted that he was "asking for an attorney." These two pieces of evidence, without any additional facts upon which a contrary inference could be drawn, demonstrated an unequivocal request for counsel. The defendant's confession should have been suppressed. Order reversed, suppression motion granted, and new trial ordered.

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

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

Property Clerk of the Police Department of the City of New York v Harris, No. 138, 11/19/2007

The respondent and her husband co-owned a car. A New York City police informant contacted the husband seeking a cocaine delivery at a certain location. The husband arrived and received money from the informant for drugs. The police arresting the husband found four bags of cocaine in the car, charged him with criminal sale and possession, and seized the car. The criminal charges were dismissed for failure to prosecute. The respondent and her husband appeared at a hearing to challenge forfeiture of the car. The City presented evidence of the recent sale and the husband's criminal record, including 12 arrests and two sentences for drug convictions. The respondent testified that she knew of her husband's past, made little use of the car, and was financially responsible for the car payments. The administrative judge ordered the car returned to the respondent as an innocent co-owner, concluding that there was no proof she knew her husband was going to use the car for drug sales. The City filed an Article 78 petition challenging the decision as arbitrary and capricious. The trial court upheld the administrative ruling. The Appellate Division reversed.

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Holding: The City has the right to seize a car suspected of being involved in a crime. Admin Code of the City of NY 14-140 [b]. Due process requires that innocent co-owners receive notice and the opportunity to be heard (*see Krimstock v Kelly*, 306 F3d 40); they have the burden of proving that their present possessory interest in the car outweighs the City's need to impound it to deter future criminal conduct and safeguard its right to future auction proceeds. *See County of Nassau v Canavan*, 1 NY3d 134. The City made a prima facie case by showing probable cause for the car's seizure, a likelihood of success in the forfeiture proceeding, and the necessity for continued impoundment. The respondent would have been entitled to release of the car if she demonstrated three things by a preponderance of the evidence: that she was a legal co-owner; was not a 'participant or accomplice' in the underlying offense and did not "'permit[]' or 'suffer'" the car to be used to commit or aid or further a crime; and that "continued deprivation would substantially interfere with . . . her ability to obtain critical life necessities. . . ." She proved the first two elements, but failed to show that she would suffer a substantial hardship due to continued impoundment. Order affirmed.

Concurrence: (Smith, J) The forfeiture provision of the NYC Code is constitutional as applied to an innocent co-owner. If the City can establish the likelihood that the car was used by an owner to commit a crime, due process does not require that the car be returned to an innocent co-owner. *See Bennis v Michigan*, 516 US 442.

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

Disorderly Conduct (General) **DSO; 115(10)**

People v Jones, No. 145, 11/20/2007

The defendant was charged with disorderly conduct, Penal Law 240.20(5), and resisting arrest for standing on a public sidewalk at 2:00 am with other people and "not moving." A few pedestrians were forced to go around him. An officer told him to move but the defendant refused, and then ran. The trial court denied the defendant's motion to dismiss and he pleaded guilty to disorderly conduct in satisfaction of all charges. The Appellate Division affirmed.

Holding: The information did not present a prima facie case of disorderly conduct. An information must contain nonhearsay allegations, which if true, establish every element of the offense and defendant's culpability. *See* CPL 100.40(1); 100.15(3). An information is jurisdictionally defective if it does not contain sufficient factual allegations. *See People v Alejandro*, 70 NY2d 133, 134-135. The information did not contain any allegations to show that defendant had the intent to "cause public inconvenience, annoyance or alarm." Penal Law 240.20(5); *see People v Carcel*, 3 NY2d 327, 331-332. Since the disorderly conduct charge failed, the arrest was not authorized, so there was no support for the resisting arrest charge. *See* Penal Law 205.30. Order reversed, conviction vacated, and information dismissed.

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

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

People v Greene, No. 139, 11/20/2007

The decedent was shot to death and, according to his aunt, the perpetrator had been slashed in the face. A detective learned from a hospital administrator that the defendant had been treated for such a wound on the night of the shooting and got his address. Using the police computer, the detective found a photo of the defendant from which a witness identified the defendant. The trial court denied the defendant's motion to suppress all evidence from the hospital's disclosure and he was convicted of second-degree manslaughter. The Appellate Division affirmed.

Holding: Even if the physician-patient privilege was violated, the suppression of the evidence found as a result was not required. *See* CPLR 4504. The privilege is a creature of statute with no constitutional right to privacy underpinning it (*see Klein v Prudential Ins. Co. of Am.*, 221 NY 449,453), and therefore, its violation did not warrant suppression. *See People v Patterson*, 78 NY2d 711, 716-717. The privilege regulated a private relationship, and suppressing the evidence would punish the State for the hospital's actions, which is unlikely to deter violations by doctors and hospitals. Order affirmed.

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

People v Rice, 44 AD3d 247, 841 NYS2d 72 (1st Dept 2007)

Holding: The court improperly granted the defendant's motion to suppress physical evidence discovered after police officers stopped the defendant's car. The officers lawfully stopped the car because the defendant failed to signal two lane changes in violation of Vehicle and Traffic Law 1163. Contrary to the lower court's conclusion, 1163 clearly requires that drivers use directional signals when changing lanes; the legislative history supports that conclusion. Order reversed, suppression motion denied,

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and matter remanded for further proceedings. (Supreme Ct, New York Co [Yates, J])

Concurrence: [McGuire, J] When interpreting a statute, courts should not rely on statements made by persons who are not part of the enactment process, as the majority did in citing the New York State Department of Motor Vehicles post-enactment memorandum.

Search and Seizure (Arrest/ Scene of the Crime Searches [Relevance] [Scope]) **SEA; 335(10[j] [m])**

People v Hendricks, 43 AD3d 361, 841 NYS2d 94 (1st Dept 2007)

Holding: The court incorrectly denied the defendant's motion to suppress cocaine found in a bag on him during a search incident to his arrest. While patroling a public housing unit, an officer suspected the defendant of trespassing because he appeared to be staying in the vestibule of a building despite posted signs prohibiting loitering and trespassing. The officer questioned the defendant about why he was in the building and arrested him for trespassing after the defendant could not identify the location of a resident he claimed to know. The officer searched the defendant and found a rolled up paper bag in his pocket, which the officer opened at the scene and found baggies of crack cocaine. At the suppression hearing, the officer testified that "he felt the situation was under control and did not believe defendant would flee" and that "he did not think that [the bag] contained a weapon." Although the officer had probable cause for the stop and arrest, he did not have a reasonable basis for believing the contents of the bag might pose a danger to officers or a legitimate concern for the preservation of possible evidence in the bag. *See People v Rosado*, 214 AD2d 375 [1995], *lv den* 86 NY2d 740 [1995]. The defendant's arrest and that the building was "drug-prone" do not provide a reasonable basis for believing "that a search of the bag was necessary to preserve evidence." Judgment reversed, motion to suppress granted, and indictment dismissed. (Supreme Ct, New York Co [Tejada, J (hearing); Wetzel, J (jury trial and sentence)])

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) (Withdrawal) **GYP; 181(25) (65)**

People v Baret, 43 AD3d 648, 841 NYS2d 97 (1st Dept 2007)

Holding: The court properly denied the defendant's motion to withdraw his guilty plea as he failed to show that the plea was involuntary. *See People v Cosey*, 286 AD2d 647 *lv den* 97 NY2d 655. The defendant pleaded guilty to third-degree criminal possession of a controlled substance pursuant to a "no-split" plea offer. In his supporting affidavit, the defendant stated that his codefendant "told him he 'better do the right thing and plead guilty' or [he] would 'make sure he did the right thing,' and that he would 'do what he had to do' if defendant did not plead guilty." The defendant's assertions, even if true, do not provide a factual basis for concluding that his plea was *actually* involuntary. A claimed vague threat is insufficient. A formal evidentiary hearing was not required since the defendant did not present "information as to, for instance, the codefendant's ability to carry out the veiled threat, or some other reason to justify a belief that the codefendant would have the capability, means and inclination to harm him . . . ." Judgment affirmed. (Supreme Ct, Bronx Co [Massaro, J (motions); Stackhouse, J (plea and motion to withdraw plea); Lorenzo, J (sentence)])

Dissent: [Marlow, J] The court should have held a hearing on the defendant's motion "given the combination of 1) the particularized allegations he made; 2) the circumstantial setting of his plea allocution; and 3) the specific type of plea offer at issue with its attendant concerns—all of which could have been routinely resolved in a relatively brief hearing."

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

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

People v Olivera, __ AD3d __, 842 NYS2d 390 (1st Dept 2007)

Holding: The court improperly denied the defendant's request for a lesser included offense charge of seventh-degree criminal possession of a controlled substance. An undercover officer testified that she had purchased heroin from the defendant and paid with prerecorded buy money. Despite the continuous surveillance of the defendant, the police did not recover the prerecorded money. None of the field team members testified that they heard the conversation between the undercover officer and the defendant, even though the officer was under radio surveillance. When the defendant was arrested, the police found five envelopes of heroin on the ground next to his foot that were stamped with the same word as was stamped on the envelopes that the undercover officer received. Based on this evidence, the jury could have reasonably concluded that the sale did not take place and such a modest amount of heroin alone would support a finding that it was possessed for the defendant's own consumption, not for sale. *Compare People v Rizzo*, 279 AD2d 314 *lv den* 96 NY2d 805. The requested lesser included offense charge "represented a reasonable view of the credible evidence presented at trial, and it should have been

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submitted [to the jury].” Judgment reversed and matter remanded for new trial. (Supreme Ct, New York Co [Zweibel, J])

Dissent: [Williams, J] The defendant was not entitled to a lesser included offense instruction; the evidence showed he intended to sell heroin rather than possessing it for personal use. *See People v Henry*, 272 AD2d 238 *lv den* 95 NY2d 890.

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

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

People v Shaw, 43 AD3d 685, 841 NYS2d 304 (1st Dept 2007)

Holding: The court erred in denying defense counsel’s request to inquire into a juror’s qualifications after that juror approached defense counsel and “made comments indicating a possible bias against the defense . . . .” *See* Criminal Procedure Law 270.35; *People v Buford*, 69 NY2d 290, 299. “Under the circumstances presented, that error is not subject to harmless error analysis (*see People v Dotson*, 248 AD2d 1004 [1998], *lv denied* 92 NY2d 851 [1998] . . .).” Judgment reversed and matter remanded for new trial. (Supreme Ct, New York Co [Wittner, J])

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

Juveniles (Abuse) (Custody) (Neglect) **JUV; 230(3) (10) (80)**

Matter of Tequan R. v Joyce McC., 43 AD3d 673, 841 NYS2d 535 (1st Dept 2007)

Holding: The court erred in finding that the respondent mother had derivatively neglected one of her children by missing appointments for services for her other children, maintaining a dirty home, failing to send one child to school and getting therapy for herself. This did not establish by a preponderance of the evidence that the child “was in imminent danger due to parental failure to exercise ‘a minimum degree of care’ (*see Nicholson [v Scoppetta]*, 3 NY3d [357] at 370).” The respondent mother’s conduct “‘was not so egregious as to support a conclusion that [she] lacked the requisite judgment to function as [an] adequate parent[].’ (*Matter of Summer Y.-T.*, 32 AD3d 212 [2006]).” Although the mother and her attorney were late to court on the day that the mother’s cross-examination was to continue, striking her direct testimony violated her due process rights. *See Matter of Hanson*, 51 AD2d 696. The court could have imposed a less-drastic, appropriate sanction. The court also erred by precluding the mother from testifying about domestic violence incidents involving the children’s father during the dispositional hearing. Orders reversed and vacated, matter remanded for new fact-finding and dispositional hearings before a different judge. (Family Ct, New York Co [Schechter, J])

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

Witnesses (Cross Examination) **WIT; 390(11)**

People v Thorpe, 43 AD3d 672, __ NYS2d __ (1st Dept 2007)

Holding: At the time of his arrest, the police searched the defendant and found 51 glassine envelopes of heroin and $196 in cash. The court improperly refused to allow the defendant to call a witness who was with him at the time of his arrest to testify regarding his actions prior to the arrest and the defendant’s heroin addiction. Precluding the proposed testimony denied the defendant “an opportunity to refute the charge that he intended to sell the heroin he possessed and ‘improperly impeded defendant’s ability “to present his own witnesses to establish a defense. . . .”’” *People v Gilmore*, 66 NY2d 863, 867 [1985]. The court erred in allowing the prosecution to argue during summation that the defendant “deals drugs” and that the money found on him was from prior drug sales and for use as change in future sales where the excluded witness’s testimony would have refuted the prosecution’s argument. The court erred by almost continuously interfering with defense counsel’s cross-examination of witnesses regarding the issue of the defendant’s intent to sell. *See People v Canto*, 31 AD3d 312 *lv den* 7 NY3d 900. While criminal trial dynamics “may result in some intervention by the trial judge in the examination of witnesses, the cumulative effect of the court’s extraordinary incessant interference in this case was to obstruct counsel’s effort to present a defense for his client. This is simply unacceptable.” Judgment reversed and matter remanded for new trial before a different justice. (Supreme Ct, New York Co [Silverman, J])

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

People v Alcequier, 43 AD3d 699, 841 NYS2d 550 (1st Dept 2007)

Holding: The defendant successfully moved for resentencing under the 2004 and 2005 Drug Law Reform Acts. At his original sentencing, the prosecution had declined to file a predicate felony statement regarding his prior felony drug conviction because it would not affect the aggregate sentence. However, at resentencing, the prosecution filed the statement. The court correctly resentenced the defendant as a second felony drug offender based upon his earlier conviction pursuant to Penal Law

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70.71(3)(b), which requires courts to give enhanced sentences to defendants who are second felony drug offenders. The failure to do so at the original sentencing was irrelevant. The request for resentencing placed the case in a procedural posture requiring the prosecution to file a predicate felony statement. *Compare People v Medina*, 35 AD3d 163 *lv den* 8 NY3d 925. No legal basis existed for sentencing the defendant as a first felony offender. Judgment of resentence affirmed. (Supreme Ct, New York Co [Allen, J])

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

People v Dawkins, 43 AD3d 705, 841 NYS2d 552 (1st Dept 2007)

The defendant was convicted of first-degree murder and sentenced to life without parole. Several years later, defense investigators obtained an affidavit from the sole identifying witness that stated that police questioning her about the crime said fingerprint evidence connected her to the crime and that she would be charged as an accessory if she did not cooperate.

Holding: The court correctly held that the defendant was not prejudiced by the prosecution's failure to disclose information regarding alleged police threats against the witness. Even assuming that the threats were made, that the prosecution had to disclose the information pursuant to *Brady v Maryland* (373 US 83 [1963]), and that knowledge of the threats could be imputed to the prosecution, there was not even a reasonable possibility that the failure to disclose the alleged threat contributed to the verdict. *See People v Vilardi*, 76 NY2d 67, 77. The witness's trial testimony was credible and the threat "would have simply explained the circumstances that led her to cooperate with the authorities, rather than furnishing a motive to incriminate anyone *falsely* . . . ." The court properly denied as speculative the defendant's claim that the prosecution extended leniency to the witness in an unrelated drug case in exchange for her testimony and that the failure to disclose the leniency violated *Brady*. Judgment affirmed. (Supreme Ct, Bronx Co [Donnino, J])

Narcotics (Sentencing) **NAR; 265(59.5)**

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

People v Anonymous, 43 AD3d 806, 842 NYS2d 433 (1st Dept 2007)

Holding: The court correctly denied the defendant's motion for resentencing under the Drug Law Reform Act. Although the defendant's first-degree conspiracy conviction related to class A drug felonies, the Drug Law Reform Act does not apply since that law only applies to persons convicted of Penal Law article 220 offenses. "If the Legislature had intended to include conspiracy to commit drug offenses, it could have inserted the necessary language, and its failure to do so is presumed to be intentional (*see People v Pinkoski*, 300 AD2d 834, 836-837 [2002], *lv denied* 99 NY2d 631 [2003]." Order affirmed. (Supreme Ct, New York Co [Straus, J])

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) (Withdrawal) **GYP; 181(25) (65)**

People v Aleman, 43 AD3d 756, 842 NYS2d 14 (1st Dept 2007)

Holding: The defendant's guilty plea was not knowing, intelligent, and voluntary. While the defendant did not move to withdraw his guilty plea, it is reviewed since "the recitation of facts elicited during the plea allocution 'clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea.' [*People v Lopez*, 71 NY2d 662, 666]." Despite the defendant's assertions of innocence and refusal to admit to key facts during his plea allocution, "the court relentlessly pursued its efforts to obtain a guilty plea . . . ." The court failed to conduct an inquiry regarding the defendant's statements "other than to reiterate the point that without an admission of guilt there could be no plea." The court erred by failing to sufficiently advise the defendant of the rights he was giving up by pleading guilty. *See People v Colon*, 42 AD3d 411. The plea having been improperly entered, the validity of the appeal waiver is academic. If the issue were reached, that waiver would be found defective as well, as no explanation was given regarding it. Judgment reversed, conviction vacated, and matter remanded for further proceedings. (Supreme Ct, Bronx Co [Stadtmauer, J])

Sentencing (Modification) (Pronouncement) **SEN; 345(55) (70)**

People v Williams, __ AD3d __, 843 NYS2d 561 (1st Dept 2007)

Holding: The court clerk did not have the authority to include a three-year term of post-release supervision on the defendant's commitment sheet, even though the court had previously promised the defendant a three-year term, because the court did not address or impose a term of post-release supervision at sentencing. Pursuant to Penal Law 70.45(1)(f), the court had discretion as to the amount of post-release supervision. "[I]mposition of a discretionary sentencing provision subsequent to the court's oral sentence is a defect that survives a waiver of the right

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to appeal (*compare People v Thomas*, 35 AD3d 192 [2006], *lv denied* 8 NY3d 850 [2007]).” Judgment modified by vacating term of post-release supervision and otherwise affirmed. (Supreme Ct, Bronx Co [Carter, J])

Competency to Stand Trial (General) CST; 69.4(10)

People v Rivers, No. 1636, 1st Dept, 10/9/2007

Holding: The court erred in failing to hold a competency hearing after the two examining psychiatrists concluded that the defendant was unfit to proceed to trial because of his mental illness. “While a finding of incompetency may be *confirmed* on consent without a hearing, the statute does not provide for *controverting* the psychiatrists’ finding in that manner (*see* CPL 730.30[3]; *see also* CPL 730.50[1]).” However, the defendant is not entitled to a new trial. Under the circumstances “it is constitutionally permissible to conduct a hearing for the purpose of reconstructing defendant’s competency at the time of the trial (*see People v Pena*, 251 AD2d [26,] 31 . . .).” Appeal held in abeyance and matter remanded for a hearing on incapacity before a justice other than one who may be able to testify about the defendant’s mental condition as reflected in behavior in court. (Supreme Ct, New York Co [Yates, J (CPL art 730 proceedings); Zweibel, J (jury trial and sentence)])

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

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

Matter of Neal v White, __ AD3d __, 843 NYS2d 265 (1st Dept 2007)

The petitioner was charged with assault and endangering the welfare of a child. The court issued a temporary order of protection ordering her to stay away from her children. The prosecution failed to indict within six months, but the case remained on the court calendar for another two weeks. During that time, the petitioner allegedly entered the apartment where her children were living and took them away. She was indicted for second-degree burglary, first-degree custodial interference, second-degree criminal contempt, and endangering the welfare of a child. She moved to dismiss the indictment arguing that because the prosecution failed to indict her on the original charges within the applicable speedy trial time limit, the temporary order of protection was stale. The trial court denied the motion.

Holding: A writ of prohibition is not warranted. The petitioner’s arguments can be reviewed on direct appeal. Even if the petitioner was correct, only a portion of the indictment would be subject to dismissal and this proceeding would be an inappropriate interruption of the criminal proceedings. *See Matter of Rush v Mordue*, 68 NY2d 348, 353. The writ is not warranted based upon a claim that the petitioner’s statutory and/or constitutional speedy trial rights were violated. Petition denied.

Dissent: [Catterson, J] The petition should be granted because the petitioner could not have violated the temporary order of protection since the court lacked jurisdiction over the petitioner and the temporary order was a nullity when the speedy trial time ran out.

Due Process (Fair Trial) DUP; 135(5)

People v DeJesus, __ AD3d __, 843 NYS2d 294 (1st Dept 2007)

Holding: The court violated the defendant’s due process right to a fair trial by denying his request to reopen his case and call a key witness. The defendant was arrested for selling cocaine to an undercover officer. When the defendant was searched, the police recovered a set of keys, one of which could open the padlock on a van that was in a parking lot near the arrest scene. A search of the van uncovered cocaine. Prior to summations, the defendant sought to reopen his case and call a witness, Simms, to testify that he also had keys to the van and entered the van on the day of the arrest. Simms previously refused to testify for fear of prosecution. Another witness had already testified for the defense regarding Simms’ access to the van. The court denied the request and assured the defendant that the prosecution would not contest the testimony about Simms. During her summation, however, the prosecutor argued that the defendant was the only person with keys to the van and challenged the testimony about Simms. A constructive possession conviction requires sufficient proof that a defendant exercised a sufficient level of control over the area in which the contraband was found. *See* Penal Law 10.00[8]. “[H]ad Simms testified and corroborated the challenged testimony of defense witness Paulino, it is unlikely that the People would have met their heavy burden of establishing constructive possession by defendant.” Judgment modified, first-degree criminal possession of a controlled substance conviction vacated, matter remanded for new trial on that count, and judgment otherwise affirmed. (Supreme Ct, Bronx Co [Davidowitz, J])

Alibi (General) ALI; 20(22)

People v Ashley, __ AD3d __, 843 NYS2d 506 (1st Dept 2007)

Holding: The court erred in precluding the defendant from calling a witness as a penalty for failing to serve an alibi notice. As conceded by the prosecution, the court abused its discretion in precluding the testimony instead

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of allowing the prosecution an adjournment under CPL 250.20(3). The defendant's actions were not willful. Nor did they prejudice the prosecution since the prosecution already knew of the witness's pedigree information and her grand jury and suppression hearing testimony. In this case, the court's error was not harmless. Judgment reversed and matter remanded for new trial. (Supreme Ct, New York Co [Tejada, J])

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

Matter of Alexander D. v Victoria D., No. 1534, 1st Dept, 11/1/2007

Holding: The court erred in concluding that the respondent parents medically and educationally neglected their children. The presentment agency failed to establish by a preponderance of the evidence that the respondents' autistic son was educationally neglected. The child's unexcused absences from school do not establish educational neglect where the preponderance of the evidence showed that the respondent mother was working to find an appropriate special education program for her child and there was no evidence that the child's absence adversely impacted his education. *See Matter of Giancarlo P.*, 306 AD2d 28. Nor did the agency establish by a preponderance of the evidence that the child was medically neglected. The evidence established that the respondent parents adequately treated the child's injuries from falling down stairs, which were minor, and that their actions "did not impair or threaten to impair [his] health (*cf. Matter of Faridah W.*, 180 AD2d 451 [1992], *lv denied* 80 NY2d 751 [1992])." Order reversed, findings of neglect vacated, and petitions dismissed. (Family Ct, New York Co [Schechter, J])

Concurrence: [McGuire, J] The evidence presented was legally insufficient to support findings of educational or medical neglect.

Second Department

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

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

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

People v Mercado, 43 AD3d 813, 840 NYS2d 873 (2nd Dept 2007)

Holding: The defendant's appellate counsel filed an *Anders* brief (*Anders v California*, 386 US 738 [1967]) and requested to be relieved as counsel. An independent review of the record reveals potentially nonfrivolous issues, including whether the prosecution met its initial burden of proving, by clear and convincing evidence, the facts to support the Sex Offender Registration Act determinations it sought, whether the court's findings of fact and conclusions of law were sufficient for appellate review, and whether the court properly assessed 30 points against the defendant for having committed an offense against a complainant under 11 years of age. *See* Correction Law 168-n[3]. Counsel relieved and directed to turn over all papers to new counsel, prosecution to provide counsel with a copy of the stenographic minutes, and briefing schedule set. (Supreme Ct, Kings Co [Mangano, Jr., J])

Counsel (Advice of Right to) (Right to Self-Representation) **COU; 95(5) (35)**

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

Matter of Jetter v Jetter, 43 AD3d 821, __ NYS2d __ (2nd Dept 2007)

Holding: The court erred in allowing the respondent to represent himself because it failed to advise him of the risks of self-representation. In a family offense proceeding, Family Court Act article 8, the parties have the right to counsel. *See* Family Court Act 262[a][ii]. A party may choose to waive the right to counsel, but only after a "searching inquiry." The court must determine whether the waiver is made knowingly, intelligently, and voluntarily. A waiver is not knowing, intelligent, and voluntary if the court fails to advise the party of the risks of self-representation. *See People v Arroyo*, 98 NY2d 101. (Family Ct, Kings Co [Silber, J])

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

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

People v Diaz, 43 AD3d 954, 842 NYS2d 458 (2nd Dept 2007)

Holding: The defendant's appellate counsel filed an *Anders* brief (*Anders v California*, 386 US 738 [1967]) and requested to be relieved as counsel. An independent review of the record reveals a potentially nonfrivolous issue regarding the excessiveness of the defendant's resentence. *See People v Chi Fong Chen*, 37 AD3d 845. Counsel relieved and directed to turn over all papers to new counsel, prosecution to provide counsel with a copy of the stenographic minutes, and briefing schedule set. (County Ct, Suffolk Co [Crecca, J])

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

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

Matter of Andrew B.-L., 43 AD3d 1046, __ NYS2d __ (2nd Dept 2007)

Holding: The court erred in conducting an in camera

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interview of the fourteen–year-old child alleged to have been neglected. The court failed to determine several key points. One was whether an in camera interview was necessary. *See Matter of Annemarie R.*, 37 AD3d 723. Another was whether the respondent's legal advisor should have been present. *See Matter of Christina F.*, 74 NY2d 532. A third was whether the child should have been interviewed without administering an oath. *See Matter of Rockland County Dept. of Social Servs. [Joseph Z.]*, 186 AD2d 136. Asking the child to swear in open court weeks later to the truth of what was said did not impress upon her the necessity of testifying truthfully. The court incorrectly relied on the statements made by the child during the improperly-conducted interview. The court erred in holding that the respondent derivatively neglected her two other children. "[T]here is no per se rule that a finding of neglect of one sibling requires a finding of derivative neglect with respect to the other siblings." The issue in a derivative neglect determination is whether the evidence as to one child "'indicates a fundamental defect in the parent's understanding of the duties of parenthood' (*Matter of Dutchess County Dept. of Social Servs. v Douglas E.*, 191 AD2d 694 . . .)." Order reversed, portion of petition alleging derivative neglect dismissed, and matter remitted for a new fact-finding hearing and disposition on the neglect allegations before a different judge. (Family Ct, Suffolk Co [Budd, J])

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

Matter of Isaiah A. C. v Faith T., 43 AD3d 1048, 842 NYS2d 69 (2nd Dept 2007)

In a paternity proceeding, the child's mother moved to dismiss the proceedings based upon equitable estoppel. The mother alleged that her boyfriend, who acknowledged paternity at the child's birth and whose name is on the birth certificate, is the child's father figure. After a hearing, the court ordered a blood genetic marker test, thereby denying the mother's motion.

Holding: The court erred in ordering the genetic marker test without holding further hearings on the best interests of the child. Family Court Act 418(a). In deciding whether to dismiss a paternity proceeding based on equitable estoppel, the focus is on the best interests of the child. *See Matter of Ruby M.M. v Moses K.*, 18 AD3d 471, 471-472. Normally such a determination should follow a hearing in which all the necessary parties are present, including an alleged father figure. *See Matter of Charles v Charles*, 296 AD2d 547, 550. The family court erred in not directing that reasonable efforts be made to subpoena the mother's boyfriend to testify and join him as a necessary party. The court should also determine whether the child, who is more than five years old, is sufficiently mature to be interviewed in camera. Order reversed and matter remitted for further hearing and new determination. (Family Ct, Nassau Co [McCormack, J])

Speedy Trial (Statutory Limits) **SPX; 355(45)**

Statute of Limitations (Computation of Period) (Tolling of) **SOL; 360(10) (20)**

People v Jordan, 43 AD3d 1048, 842 NYS2d 69 (2nd Dept 2007)

Holding: The court granted the defendant's motion to dismiss the indictment as time barred. The court properly held that the prosecution failed to commence the criminal proceeding within five years after the commission of the offense, as required by CPL 30.10(2)(b). *See People v Knobel*, 259 AD2d 499. The tolling provision set forth in CPL 30.10(4)(a)(ii) does not exclude the time period during which the police did not know that an offense was committed. "Had the Legislature intended a more expansive application of the tolling provision, it could have so provided, as it did in CPL 30.10(3)(a), (c)." Order affirmed. (Supreme Ct, Queens Co [Eng, J])

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

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

People v Pagan, 43 AD3d 1086, 843 NYS2d 101 (2nd Dept 2007)

Holding: The court erred in failing to inform the defendant during his plea allocutions that his sentences would include post-release supervision, even though the court did tell him of the post-release supervision at sentencing. *See People v Catu*, 4 NY3d 242, 245. Although he did not make a formal post-allocution motion to withdraw his guilty pleas, the defendant is not barred from challenging the sufficiency of his plea allocutions on direct appeal. *See People v Louree*, 8 NY3d 541. Judgments reversed, guilty pleas vacated, and matter remitted for further proceedings. (County Ct, Orange Co [De Rosa, J])

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

Matter of Robert G. v Peter I., 43 AD3d 1162, 843 NYS2d 139 (2nd Dept 2007)

Holding: The court correctly granted the maternal grandparents' petition for sole custody of the children, as that determination was in the children's best interests. The court erred in making a best interests determination without first determining whether extraordinary circumstances existed for awarding custody to a nonparent since

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the children's father was alive and available. *See Matter of Silverman v Wagschal*, 35 AD3d 747. However, a new hearing is not required because the record contains adequate evidence to show that extraordinary circumstances did exist (*see Matter of Vincent A.B. v Karen T.*, 30 AD3d 1100), including the father's failure to provide support for the children, his infrequent visits and contact with the children, and that in opposing the petition, he did not seek physical custody. *See Matter of Bevins v Witherbee*, 20 AD3d 718. The court properly concluded that joint custody was not appropriate because the father and the maternal grandparents did not communicate or cooperate in making decisions about the children. *See Matter of Fishburne v Teelucksingh*, 34 AD3d 804, 805. Order affirmed. (Family Ct, Dutchess Co [Foreman, J])

Juveniles (Abuse) (Neglect) **JUV; 230(3) (80)**

Matter of Karen Patricia G., __ AD3d __, 843 NYS2d 360 (2nd Dept 2007)

Holding: The court erred in dismissing the abuse and neglect petition against the respondent father. The court can make an abuse or neglect finding without the child's testimony at the hearing. *See* Family Court Act 1046[a][iv]. The child made statements regarding the abuse to a special victims unit detective who testified at the hearing, and those statements were corroborated by the findings of a child sexual abuse expert and the physical examination by a sexual abuse nurse examiner. The child's statements, the corroborating evidence, and the negative inference that can be drawn by the respondent's failure to testify, were sufficient to establish by a preponderance of the evidence that the respondent had abused and neglected the child. *See Matter of Christopher L.*, 19 AD3d 597. Order dismissing petition related to Karen Patricia G. reversed, petition reinstated, child found to be abused and neglected, and matter remitted for dispositional hearing; order dismissing derivative neglect petition related to Carlos Javier G. reversed, petition reinstated, and matter remitted for a further fact-finding hearing; order dismissing petition regarding Kevin M. affirmed. (Family Ct, Suffolk Co [Freundlich, J])

Narcotics (Drug Testing) (Evidence) **NAR; 265(13) (20)**

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

Matter of Mingo v Ercole, __ AD3d __, 843 NYS2d 644 (2nd Dept 2007)

Holding: The Commissioner of the New York State Department of Correctional Services erred in confirming the hearing officer's findings that the petitioner had violated disciplinary rules that prohibit smuggling and possession of a controlled substance. At the hearing, the hearing officer admitted the testimony of a corrections officer regarding the results of chemical tests on the substance seized from the petitioner. The hearing officer failed to require the witness to lay a foundation by testifying regarding the type of test performed and the testing procedures used. *See Matter of Lopez v Kramer*, 118 AD2d 572, 573. The hearing officer also erred in not calling the correction officer who did the testing as a witness. *See Matter of Giannattasio v Coombe*, 237 AD2d 287, 288. Article 78 petition granted, Commissioner's determination annulled, findings vacated, charges dismissed, penalties vacated, and Commissioner directed to expunge all references of the findings from petitioner's record.

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

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

Matter of Richmond v Perez, __ AD3d __, 843 NYS2d 355 (2nd Dept 2007)

Holding: The court erred in denying the respondent father's request for an adjournment of the proceedings so that he could confer with his attorney. The petitioner mother filed a petition alleging that the respondent violated an order of protection. At three court appearances, the respondent requested an attorney, but the court denied the requests because it had relieved other attorneys appointed to represent him in prior unrelated court proceedings. On the first day of the hearing on the petition, the respondent told the court that he had hired an attorney but the attorney could not appear in court that day, and asked for an adjournment. The court denied the request and required the respondent to proceed without counsel. The respondent had the right to assistance of counsel and to request an adjournment because his attorney was not available. *See* Family Court Act 262. Prior to the new hearing, the court shall determine whether the respondent has retained an attorney, and if not, whether he is eligible for assigned counsel. *See Matter of Evan F.*, 29 AD3d 905, 906-907. Order reversed and matter remitted for further proceedings. (Family Ct, Dutchess Co [Forman, J])

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

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

People v Kelemen, __ AD3d __, 841 NYS2d 895 (2nd Dept 2007)

Holding: The defendant sought to appeal his classification as a level III sex offender under the Sex Offender

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Registration Act (SORA). However, "[a] SORA determination is not part of a judgment upon a criminal conviction and may not be reviewed on appeal from a judgment on a criminal conviction (*see People v Kearns*, 95 NY2d 816, 817; *People v Stevens*, 91 NY2d 270, 277)." The defendant can appeal the SORA determination under the procedures set forth in Correction Law 168-n[3] and Civil Practice Law and Rules articles 55-57. Judgment affirmed. (County Ct, Suffolk Co [Kahn, J])

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

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

People v Vere, No. 2005-11707, 2nd Dept, 10/2/2007

Holding: The court did not err in failing to advise the defendant during the plea allocution that he would be required to register as a sex offender under the Sex Offender Registration Act (SORA). The certification that the court must issue at the time of sentencing, *ie*, that the defendant is a sex offender based on his conviction, is not part of the defendant's sentence. *See People v Hernandez*, 93 NY2d 261, 268. "Since the certification was a collateral consequence of his conviction, the absence of such a warning did not undermine the voluntariness of the defendant's plea (*see People v Dorsey*, 28 AD3d 351 . . .)." Judgment affirmed. (County Ct, Dutchess Co [Dolan, J])

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

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

People v Argueta, No. 2004-08826, 2nd Dept, 10/9/2007

Holding: The court properly denied the defendant's CPL 440.10 motion to vacate the judgment of conviction for fifth-degree criminal possession of a controlled substance after his guilty plea. The defendant was not denied effective assistance of counsel when his attorney advised him that deportation was a "possibility" if he pleaded guilty, but did not advise him that deportation was almost certain if he pleaded guilty. "[T]he immigration consequences of a plea of guilty are collateral, and defense counsel's failure to inform a defendant of the deportation consequences of a plea does not constitute ineffective assistance of counsel, but an attorney's affirmative misrepresentation on that subject may fall below an objective standard of reasonableness (*[People v McDonald*, 1 NY3d 109, 115] . . .)." Deportation does not become a direct consequence of a guilty plea solely because deportation will be automatic or almost automatic. *See People v Agero*, 234 AD2d 94. While mere cocaine possession is not an "aggravated felony" triggering deportation following the decision in *Lopez v Gonzales*, __ US__, 127 SCt 625 [2006]), it may be where, as here, the defendant had a prior conviction for a deportable offense. The defendant's attorney did not affirmatively misrepresent the deportation consequences of his guilty plea; the attorney told the defendant that if he pleaded guilty, he could be deported, and the defendant did not ask for more information about the likelihood of deportation. Thus, the defendant failed to demonstrate that he received ineffective assistance of counsel. Order affirmed. (County Ct, Nassau Co [La Pera, J])

Sentencing (Appellate Review) (Excessiveness) — **SEN; 345(8) (33)**

People v Hurd, No. 2006-01365, 2nd Dept, 10/9/2007

Holding: The defendant signed a form waiver of his right to appeal, Form CRO38 (06/92), which included the following statement: "'I have been advised of my right to take an appeal . . . and to submit a brief and/or argue before an appellate court on any issues relating to my conviction and sentence *other than that the sentence on a negotiated plea was harsh or excessive* (emphasis added).'" This statement is a misstatement of the law and is misleading. *See People v Pollenz*, 67 NY2d 264, 268-270. "To the extent that the aforementioned form is still being utilized, its use should be discontinued." Therefore, the defendant's waiver of his right to challenge the excessiveness of his sentence on appeal was invalid; however, upon review of the defendant's appeal, the defendant's sentence was not excessive. *See People v Suitte*, 90 AD2d 80. Sentence affirmed. (Supreme Ct, Kings Co [Reichbach, J])

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

Sentencing (Pronouncement) — **SEN; 345(70)**

People ex rel Gerard v Kralik, __ AD3d __, 843 NYS2d 398 (2nd Dept 2007)

The defendant was incarcerated after he allegedly violated the terms of the post-release supervision that were added to his sentence by the New York State Division of Parole.

Holding: The defendant had been sentenced to a determinate term of five years. A review of the sentencing minutes and the court's order of commitment show that the defendant's sentence did not include a term of post-release supervision. "Therefore, the sentence actually imposed by the court never included, and does not now include, any period of post-release supervision (*see People v Martinez*, 40 AD3d 1012 . . .)." Because the Division of Parole improperly added post-release supervision to the defendant's sentence, the defendant must be immediately released from incarceration based on a violation of that supervision. *Cf Earley v Murray*, 451 F3d 71 (CA 2 2006).

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

Matter of Rovenia G. M. v Lesley P. A., No. 2006-08357, 2nd Dept, 10/23/2007

After the child's mother died, the maternal grandmother petitioned for guardianship and the child's father petitioned for sole custody. The child had never lived with her father and was living with her grandmother since her mother's death.

Holding: The court erred in concluding that there were no extraordinary circumstances that would justify granting the grandmother's petition because the record did not contain adequate evidence to support such a conclusion. During the hearing on the petitions, "it became clear that there was a deep emotional bond between the child and her maternal grandmother and her brother [who lived with the grandmother]." Also, the court erred in failing to act on the law guardian's request for forensic evaluations of the child and father, which would have been highly probative on the issue of extraordinary circumstances as "[t]here were genuine factual issues concerning the father's fitness and the psychological impact of separating the child from her maternal grandmother and brother." Orders reversed and matter remitted for further proceedings before a different judge, including forensic examinations of the child and father. (Family Ct, Kings Co [Hepner, J])

Double Jeopardy (Lesser Included and Related Offenses) (Mistrial) **DBJ; 125(15) (20)**

Matter of Rivera v Firetog, No. 2007-02560, 2nd Dept, 10/23/2007

The court instructed the jury to reach the lesser included offenses of first- and second-degree manslaughter only if it acquitted the defendant of murder. During its deliberations, the jury asked for read backs and instructions on the manslaughter counts. The court denied defense counsel's requests for an inquiry as to whether the jury reached a partial verdict. The court declared a mistrial after receiving a note stating that the jury could not come to a unanimous decision. In an Article 78 proceeding, the petitioner seeks to prohibit retrial on the indictment on double jeopardy grounds.

Holding: While the court has discretion in declaring a mistrial, the court must consider appropriate alternatives and the record must show a sufficient basis for the decision. *See Matter of Rubenfeld v Appelman*, 230 AD2d 911, 912. The prosecution bears the burden of proving that a mistrial was manifestly necessary. S*ee People v Ramchair*, 308 AD2d 601, 602 *affd* 8 NY3d 313. Given evidence that the jury here reached a verdict on murder, and counsel's repeated requests for an inquiry as to a partial verdict, declaring a mistrial on that count without inquiring into taking a partial verdict was an improvident exercise of discretion. A mistrial was not manifestly necessary under all of the circumstances. *See Matter of Robles v Bamberger*, 219 AD2d 243, 247-248. Petition granted.

Dissent: [Dillon, J] The record does not indicate that the jury reached a verdict on the murder count where the jury's note indicated a disregard of the proper sequence of deliberation.

Evidence (Other Crimes) **EVI; 155(95)**

Sentencing (Persistent Felony Offender) (Resentencing) **SEN; 345(58) (70.5)**

People v Truesdale, No. 2005-06387, 2nd Dept, 10/23/2007

The defendant was convicted of fourth-degree grand larceny, fifth-degree criminal possession of stolen property, possession of burglar's tools, and jostling for taking $22 from the complainant's pocket and using a sweatshirt to cover his hand during the crime. The court adjudicated the defendant a persistent felony offender and sentenced him to 15 years to life on the larceny count.

Holding: The court correctly allowed the prosecution to introduce evidence of the defendant's prior arrest for pickpocketing, which involved the defendant's use of a sweatshirt to cover his hand. With limiting instructions, the evidence of the defendant's prior crime and his modus operandi was admissible to show the defendant's intent. *See People v Alvino*, 71 NY2d 233.

The court erred in adjudicating the defendant a persistent felony offender solely based on his record of misdemeanors and low-level felony offenses mainly involving pickpocketing. Based on the evidence adduced at the hearing, including the defendant's good character evidence, the court should have sentenced the defendant as a second felony offender. Judgment modified, persistent felony offender adjudication vacated, and larceny sentence reduced to two to four years. (Supreme Ct, Queens Co [Cooperman, J])

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

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

People v Ferguson, No. 2006-05377, 2nd Dept, 10/23/2007

Holding: The defendant's appellate counsel filed an *Anders* brief (*Anders v California*, 386 US 738 [1967]) and requested to be relieved as counsel. An independent review of the record reveals a potentially nonfrivolous issue regarding whether the court incorrectly granted the prosecution's oral request to amend the risk assessment

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instrument without proving prior written notice to the defense or adjourning the Sex Offender Registration Act hearing. *See* Corrections Law 168-n[3]; *People v Brooks*, 308 AD2d 99. Counsel relieved and directed to turn over all papers to new counsel, prosecution to provide counsel with a copy of the stenographic minutes, and briefing schedule set. (County Ct, Suffolk Co [Hinrichs, J])

Third Department

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

People v Freeman, 43 AD3d 1246, 842 NYS2d 609 (3rd Dept 2007)

Facts are set forth in the decision concerning prior appellate counsel's motion to withdraw. *People v Freeman*, 34 AD3d 1106.

Holding: The court erred in classifying the defendant as a Level III sex offender. The Board of Examiners of Sex Offenders did not complete the entire risk assessment instrument and presumptively classified the defendant as a level III offender based on an override factor, a prior conviction for a sex offense. The court failed to review all the evidence in making a final risk assessment determination and incorrectly concluded that the risk level was mandatory. The court also failed to issue an order that detailed the findings of fact and conclusions of law upon which it based its decision, as required by Correction Law 168-n(3). *See People v Sanchez*, 20 AD3d 693, 695. Order reversed and matter remitted for further proceedings. (County Ct, Chemung Co [Buckley, J])

Police (Peace Officer) **POL; 287(45)**

Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches]) **SEA; 335(15[p])**

People v Boyea, No. 100830, 3rd Dept, 10/18/2007

An anonymous motorist described to a border patrol agent a truck that had made a U-turn in the median before the checkpoint. Another agent saw a truck matching the description cross the center line and drive over the fog line. The agent pulled the truck over and smelled marijuana inside. The defendant admitted that he avoided the checkpoint and smoked marijuana. He eventually said there was marijuana in the truck and consented to a search.

Holding: The court erred in granting the defendant's motion to suppress physical evidence and his statement based on its incorrect conclusion that the agent did not have the authority to perform the search and arrest the defendant. Border patrol agents are accorded the powers of peace officers in New York (*see* CPL 2.15(7) and 2.20) including the "authority to enforce state law by making warrantless arrests for offenses committed in the agent's presence and carrying out warrantless searches when constitutionally permissible and effected pursuant to the agent's duties . . . ." Believing that the truck may have evaded the checkpoint, the agent properly stopped the defendant's car. *See People v Carrillo*, 257 AD2d 780, 781-782 *lv den* 93 NY2d 967. The agent had probable cause to perform a warrantless search once he smelled marijuana and the defendant admitted smoking marijuana. *See People v Pierre*, 8 AD3d 904, 905 *lv den* 3 NY3d 710. Order reversed, motion denied, and matter remitted for further proceedings. (County Ct, Essex Co [Meyer, J])

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

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

People v Charlotten, __ AD3d __, 843 NYS2d 697 (3rd Dept 2007)

Holding: In an earlier criminal proceeding, the defendant was charged with assaulting his former girlfriend. The court issued a temporary order of protection requiring the defendant to stay away from her. Prior to the expiration date of the temporary order, the defendant pleaded guilty, was sentenced, and was released as he had already served the full sentence. The court did not issue a permanent order of protection. Thereafter, but prior to the expiration date, the defendant allegedly violated the temporary order. He pleaded guilty to first-degree criminal contempt pursuant to a plea agreement that resolved an unrelated misdemeanor charge and a potential felony charge. The defendant correctly argued that the temporary order of protection was a nullity as of the date that the prior criminal proceeding ended. *See People v Bleau*, 276 AD2d 131. However, the court does not have jurisdiction to address that argument as the argument does not survive the defendant's guilty plea, *see People v Konieczny*, 2 NY3d 569, 577, and the defendant did not move to withdraw his plea. *See People v Sullivan*, 37 AD3d 974, 975 n *lv den* 8 NY3d 991. The court erred in failing to hold a hearing regarding the defendant's ineffective assistance of counsel claim. As the prosecution conceded, defense counsel mistakenly believed that the temporary order was valid, as did the court and the prosecution, apparently. "[T]he record does not show that defendant knowingly entered a plea in which he admitted violating a court order which was a nullity." Decision withheld and matter remitted for further proceedings. (County Ct, Albany Co [Herrick, J])

Counsel (Advice of Right to) **COU; 95(5)**

Third Department *continued*

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

People v Maraj, No. 100546, 3rd Dept, 10/18/2007

Holding: While a CPL 440 motion to vacate a plea does not substitute for direct appeal, it is appropriate here where the defendant was denied the right to counsel during his plea and after during the time for appeal. Although the defendant has served his jail term, his appeal is not moot. *See People v Bigtree*, 231 AD2d 802, 803 *lv den* 89 NY2d 919. The defendant applied for representation by the public defender, but his application was denied, possibly because his wife, who he was separated from, had modest assets. The defendant contacted two private attorneys, but could not afford the requested retainer. The presentence report indicated that the defendant had a middle school education, had limited prior dealings with the criminal justice system, and was described by his wife as "very naïve," which is supported by the defendant's comment to the presentence investigator that he was hoping that the judge would reduce his charge to a misdemeanor at sentencing. The court failed to clearly notify the defendant of his right to counsel and warn him of the risks in proceeding without an attorney. *Cf People v Providence*, 2 NY3d 579, 584. Further, the court failed to conduct a searching inquiry to determine that the defendant's waiver of his right to counsel was knowing, voluntary, and intelligent. *See People v Arroyo*, 98 NY2d 101, 103. It was not. Order reversed, motion granted, guilty plea vacated, and matter remitted for further proceedings. (County Ct, Franklin Co [Main Jr., J])

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

People v McGregor, __ AD3d __, 843 NYS2d 475 (3rd Dept 2007)

Holding: The court improperly allowed the defendant to waive his right to indictment without signing a written waiver in open court, as required by article I, section 6 of the New York Constitution. *See People v Donnelly*, 23 AD3d 921, 922. Therefore, the defendant's guilty plea to the superior court information must be vacated. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, St. Lawrence Co [Rogers, J])

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

People v Collazo, No. 15331, 3rd Dept, 11/1/2007

Holding: The court erred in sentencing the defendant to a 50-year aggregate prison sentence for second-degree attempted murder, second-degree kidnapping, two counts of first-degree robbery, second degree criminal possession of a weapon, and third-degree criminal possession of a weapon. The sentence was harsh and excessive in view of facts such as the circumstances of the offenses and the more lenient seven-year prison sentence given his cousin, the codefendant, who was the principal actor. *See People v Robinson*, 258 AD2d 817, 818 *lv den* 93 NY2d 978. The sentences imposed for the attempted murder, robbery, and kidnapping counts are reduced to concurrent sentences of 15 years. Judgment modified, sentences reduced, and otherwise affirmed. (County Ct, Rensselaer Co [Czajka, J])

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

Narcotics (General) **NAR; 265(27)**

People v Machuca, No. 100155, 3rd Dept, 11/15/2007

The defendant went to a correctional facility to visit an inmate and before she could put her belongings in a locker, an employee searched her bag and found a small amount of drugs. The defendant stated that the drugs were for her own use and that she was going to leave them in the locker. The defendant was convicted of first-degree promoting prison contraband and seventh-degree criminal possession of a controlled substance.

Holding: To establish that small amounts of drugs are dangerous within the meaning of Penal Law 205.00(4) and 205.25(1), there must be "proof of the danger posed to that particular correctional facility (*see People v Martinez*, 34 AD3d 859, 859-60 [2006]; *People v Salters*, 30 AD3d 903, 904 [2006], *lv granted* 9 NY3d 881 [2007]) . . . ." The testimony of a facility employee that drugs pose a danger in the facility by leading to gang violence that threatens the safety of employees and inmates was sufficient to establish that the drugs possessed by the defendant were dangerous contraband. *See People v Rivera*, 221 AD2d 380, 380 *lv den* 87 NY2d 977. The evidence was also sufficient to establish that the defendant knowingly and unlawfully introduced contraband into the facility. A sign posted outside the facility entrance stated that contraband was prohibited and the defendant admitted that she was aware of the prohibition and knew that drugs were considered to be contraband in a prison. Judgment affirmed. (County Ct, Clinton Co [Ryan, J])

Fourth Department

Sentencing (Presentence Investigation and Report) (Resentencing) **SEN; 345(65) (70.5)**

Fourth Department *continued*

People v Agha, 43 AD3d 1383, 843 NYS2d 887 (4th Dept 2007)

Holding: During sentencing, the court mentioned that the defendant's brother had been convicted of a similar crime and that in both incidents, his brother had come to his aid. The defendant objected to these statements, arguing that he was not charged in the prior case. "Although the court stated that it would not draw an adverse inference against the defendant based on the prior case, we conclude on the record before us that the court may in fact have relied upon information that was inaccurate in sentencing defendant (*see People v Gardner*, 28 AD3d 1221, 1223, *lv denied* 7 NY3d 812)." Judgment modified by vacating sentence, judgment otherwise affirmed, and matter remitted for resentencing. (County Ct, Erie Co [Drury, J])

Dissent: [Smith, J] The defendant did not object to the statements in the presentence report regarding his brother's assault case. The issue is unpreserved for appellate review. *See People v Sumpter*, 286 AD2d 450, 452 *lv den* 97 NY2d 658. Further, the record does not support the conclusion that the court relied on incorrect or inaccurate information when it sentenced the defendant.

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

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

People v Berry, 43 AD3d 1365, 842 NYS2d 822 (4th Dept 2007)

Holding: The court correctly denied the defendant's for cause challenge of a prospective juror who stated that she did not had a good understanding of the English language. The record established that the juror lived in the United States for almost 50 years and "her 'ability to communicate in the English language was sufficient' (*People v Chohan*, 254 AD2d 124, *lv denied* 92 NY2d 1030 . . .)." The defendant did not preserve for review the qualifications of another prospective juror because the defendant did not challenge that juror for cause. *See* CPL 470.05(2).

The court correctly denied the defendant's request to allow a witness to testify regarding sexual abuse of the complainant by another individual. At trial the defendant argued that the testimony "was relevant in establishing whether there was a reason for the delay of the victim in reporting defendant's abuse of her." This argument failed to show that the testimony was relevant to the issue of whether the defendant was the perpetrator. Judgment affirmed. (Supreme Ct, Monroe Co [Affronti, J])

Juveniles (Jurisdiction) (Parental Rights) **JUV; 230(70) (90)**

Matter of Bobbijean P., __ AD3d __, 842 NYS2d 826 (4th Dept 2007)

The petitioner county department of human services filed a neglect petition against the respondent after she tested positive for crack cocaine at the time of her daughter's birth. After she failed to appear for the neglect hearing, the court concluded that the respondent had neglected her daughter and as part of the dispositional plan, issued an "order that respondent 'shall not get pregnant again until and unless she has actually obtained custody and care of Bobbijean P. and every other child of hers who is in foster care and has not been adopted or institutionalized.'"

Holding: The court erred in denying the respondent's motion to vacate the order that prohibited her from becoming pregnant. The court incorrectly denied the motion based upon the respondent's failure to appear; the respondent could not have anticipated that the court would have issued such an order and the court should have given her an opportunity to be heard on the procreation condition. The court erred in denying the motion as the court had no authority to prohibit the respondent from procreating. The family court's authority is limited by statute, *see Matter of Martin v Martin* (127 AD2d 266, 269), and the conditions the court could impose in the neglect proceeding are set forth in the court's rules. *See* 22 NYCRR 205.83(a) and (b). These rules do not explicitly or impliedly authorize the court to prohibit procreation. "[T]he compelled use of birth control measures is not encompassed within the term 'medical treatment' under subdivision (a)(5), nor does a prohibition against reproduction address the goals of remedying the acts found to have caused the neglect or of safeguarding the well-being of the child within the meaning of section 205.83(b)(2) and (7) respectively." Order reversed, motion granted, and order prohibiting the respondent from procreating vacated. (Family Ct, Monroe Co [O'Connor, J])

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

People v Cole, 43 AD3d 1295, 842 NYS2d 636 (4th Dept 2007)

Holding: The court correctly reduced the count of first-degree promoting prison contraband to second-degree promoting prison contraband as "the evidence before the grand jury is legally insufficient to establish that the small quantity of marihuana possessed by defendant was dangerous contraband." The grand jury evidence did not specifically show that the marihuana possessed by the defendant was "'capable of such use as may endanger the safety or security of a detention facility

Fourth Department *continued*

or any person therein' . . . ." Penal Law 205.00(4); *see People v Stanley*, 19 AD3d 1152, 1153 *lv den* 5 NY3d 856. Order affirmed. (County Ct, Livingston Co [Cohen, J])

Accomplices (Corroboration) (Instructions) **ACC; 10(20) (25)**

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

People v Green, 43 AD3d 1279, 843 NYS2d 883 (4th Dept 2007)

The defendant was convicted of second-degree murder, second-degree attempted murder, and related charges. The defendant told the police that he and two others planned a robbery and during the attempted robbery, he killed a woman and injured his accomplice. After running away from the crime scene, the accomplice told his niece and a police officer that the defendant shot him.

Holding: The court correctly allowed the testimony of the niece and the police officer regarding the accomplice's statement that the defendant shot him. Although the accomplice did not testify at trial, the court properly admitted the testimony as the accomplice's statements fell within the excited utterance exception to the hearsay rule. *See People v McClary*, 21 AD3d 1427 *lv den* 5 NY3d 884. The accomplice's statements to the officer do not constitute testimony within the meaning of the Sixth Amendment's confrontation clause as the statements "were made during a police and medical emergency . . . ." *See People v Nieves-Andino*, 9 NY3d 12, 14-15. Although the accomplice's statement to his niece was testimonial, admitting the testimony was harmless error. The defendant failed to request a jury instruction on corroboration of the accomplice's declarations and the defendant's own statements to the police; thus the issue is not preserved for review. *See People v Scott*, 262 AD2d 1021 *lv den* 93 NY2d 1027. Further, the record reflects the requisite corroborative evidence that the crimes charged were committed. *See People v Chico*, 90 NY2d 585, 589-590. Judgment affirmed. (County Ct, Monroe Co [Marks, J])

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

People v Johnson, 43 AD3d 1453, 841 NYS2d 925 (4th Dept 2007)

Holding: The defendant moved for a writ of error coram nobis, arguing that his appellate counsel was ineffective for failing to argue that trial counsel was ineffective by failing to move to dismiss count one of the indictment on the basis of insufficient evidence. Review of the record indicates that issue may have merit. Motion for writ of error coram nobis granted, order vacated, appeal will be considered de novo.

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

People v Rodriguez, 43 AD3d 1317, 842 NYS2d 631 (4th Dept 2007)

Holding: The defendant was incorrectly convicted of depraved indifference murder. At trial he testified that he killed the decedent in self-defense. The trial evidence showed that the defendant stabbed the decedent a total of eight times; four of the wounds punctured the decedent's lungs and two hit the decedent's heart. The jury acquitted the defendant of second-degree intentional murder, but found him guilty of depraved indifference murder. "[T]here is no valid line of reasoning and permissible inferences that could have led the jury to conclude that his conduct was reckless rather than intentional, particularly in view of the number and severity of the wounds inflicted on the victim." *See People v Hawthorne*, 35 AD3d 499, 501-502 *lv den* 8 NY3d 946. Judgment reversed, depraved indifference count of indictment dismissed, and matter remitted for proceedings pursuant to CPL 470.45. (County Ct, Monroe Co [Keenan, J])

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

Matter of Steven M. v Meghan M., 43 AD3d 1349, 842 NYS2d 625 (4th Dept 2007)

Holding: The court erred in denying the petitioner's request for visitation with his child. The petitioner pleaded guilty to second-degree manslaughter for recklessly causing the death of the respondent's son and is currently incarcerated. The record does not contain information about the circumstances surrounding the son's death, which is relevant in determining whether the petitioner would pose a risk to his child and whether visitation would be proper. Also, the record does not contain evidence regarding the impact that visitation at a correctional facility would have on the child's psychological health. *See Matter of Crowell v Livziey*, 20 AD3d 923. The court incorrectly held that the respondent mother's financial situation was an independent basis for denying the petition. "It is well settled, however, that denial of visitation to an incarcerated parent should not be based solely on the cost and inconvenience to the custodial parent (*see Matter of Buffin v Mosley*, 263 AD2d 962 . . .)." Order reversed, petition reinstated, and matter remitted for a new hearing. (Family Ct, Seneca Co [Bender, J])

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

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

Fourth Department *continued*

Matter of Traneil B., 43 AD3d 1302, 842 NYS2d 807 (4th Dept 2007)

Holding: The court erred in restoring the juvenile delinquency case to the court calendar after the expiration date set forth in the order of adjournment in contemplation of dismissal. Pursuant to Family Court Act 315.3(1), because the court did not restore the case prior to the expiration date, the delinquency petition was "'deemed to have been dismissed by the court in furtherance of justice' . . . ." The court also could not extend the time period in the original order after that order expired. *See Matter of Cleveland R.*, 14 AD3d 568, 569. The petitioner's motion to restore the case to the calendar prior to the expiration date is irrelevant, as the court did not grant the motion until after the order expired. Order reversed and motion dismissed. (Family Ct, Erie Co [Dillon, J])

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

Sentencing (Excessiveness) (Modification) **SEN; 345(33) (55)**

People v Vasquez, 43 AD3d 1361, 842 NYS2d 629 (4th Dept 2007)

Holding: Because the defendant did not object to the court's final *Sandoval* decision, he failed to preserve for review the issue of whether the court erred in allowing the prosecution to cross-examine the defendant about a prior conviction. *See People v* Robles, 38 AD3d 1294, 1295 *lv* den 8 NY3d 990.

The court imposed an unduly harsh and severe sentence for the two counts of third-degree criminal possession of a controlled substance and third-degree criminal sale of a controlled substance. Because of the limited amount of cocaine possessed by the defendant and other circumstances, the sentences are reduced "as a matter of discretion in the interest of justice (*see* CPL 470.15[6][b])." Judgment modified, sentences reduced to indeterminate terms of 7½ to 15 years, and otherwise affirmed. (County Ct, Cayuga Co [Fandrich, J])

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

People v Adams, No. KA 06-00041, 4th Dept, 11/9/2007

The defendant was sentenced to consecutive terms of 2-1/3 to 7 years for third-degree burglary and 1-1/3 to 4 years for first-degree criminal contempt.

Holding: Although the certificate of conviction says the sentence imposed was for a second felony offender, the minutes show the court sentenced the defendant as a first felony offender. While the defendant did not raise the issue before the trial court or on appeal, because the sentence was illegal, it cannot stand. *See People v Davis*, 37 AD3d 1179, 1180 *lv den* 8 NY3d 983. Because the evidence demonstrated that the defendant was convicted of a felony offense within the ten years prior to committing the present felonies, the court must sentence the defendant as a second felony offender. *See* Penal Law 70.06(1)(b)(iv). The indeterminate sentences were also illegal because the minimum periods of imprisonment set by the court were not one half of the maximum periods imposed, as required by Penal Law 70.06(4)(b). *See gen People v Chappelle*, 282 AD2d 834. The court erred in changing the defendant's sentences from concurrent to consecutive terms after he refused to sign a no-contact order of protection. "That 'increase cannot be justified under sentencing procedures nor supported under the guise of punishment for contempt of court' (*People v Culpepper*, 33 NY2d 837, 838, *cert denied* 417 US 916)." Judgment modified, sentence vacated, matter remitted for resentencing before a different judge, and judgment otherwise affirmed. (County Ct, Erie Co [LoVallo, AJ])

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

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

People v Cieslewicz, No. KA 06-02293, 4th Dept, 11/9/2007

Holding: The superior court information charging the defendant with third-degree burglary was jurisdictionally defective. "Defendant was not held for action of a grand jury on that charge inasmuch as 'it was not an offense charged in the felony complaint or a lesser-included offense of an offense charged in the felony complaint' (*People v Edwards*, 39 AD3d 875, 876 . . .)." The defendant did not need to preserve the challenge to the superior court information and that challenge survived his guilty plea and would survive a valid waiver of the right to appeal. The defendant's waiver of his right to appeal was invalid because the court's statements during the plea colloquy may have led the defendant to erroneously believe that his guilty plea automatically extinguished his right to appeal. *See People v Moyett*, 7 NY3d 892, 893. Judgment modified, third-degree burglary conviction reversed, count two of superior court information dismissed, and judgment otherwise affirmed. (County Ct, Erie Co [D'Amico, J])

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

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

Fourth Department *continued*

People v Lard, No. KA 06-01200, 4th Dept, 11/9/2007

Holding: The court correctly denied the defendant's motion for vacatur of his conviction based on CPL 440.10(1)(h) because his attorney failed to file a timely notice of appeal. That statute applies to constitutional violations that occur in obtaining a judgment, not violations occurring after the judgment is entered, as is alleged here. *See* CPL 1.20(15). The appropriate remedy for the defendant's claim was a motion for an extension of time to file an appeal under CPL 460.30, but the time period for that motion has expired. The court erred in denying the defendant's CPL 440.10(1)(a) claim that the superior court information was jurisdictionally defective. The court denied that claim pursuant to CPL 440.10(2)(c), based on the defendant's unjustified failure to file a timely appeal on that issue. However, the defendant alleged that he instructed his attorney to file an appeal and that he did not learn that the attorney failed to file the appeal until after the appeal time expired. The record does not contain sufficient evidence to determine whether the defendant's failure to file a timely appeal the issue was justifiable. Order reversed and matter remitted for a hearing pursuant to CPL 440.30(5). (County Ct, Erie Co [DiTullio, J])

Driving While Intoxicated (Chemical Test [Blood or Urine]) **DWI; 130(5)**

Evidence (Prejudicial) **EVI; 155(106)**

People v Horsey, No. KA 04-02609, 4th Dept, 11/9/2007

Holding: The court correctly determined that the police efforts to contact the defendant's attorney at his request prior to asking him to consent to a chemical breath test were reasonable and sufficient. *See People v DePonceau*, 275 AD2d 994, 994 *lv den* 95 NY2d 962. If the police cannot reach the attorney requested promptly, then defendants may have to decide between taking the test and having their license revoked without the attorney's advice. The court properly allowed the prosecution to admit evidence regarding the defendant's behavior during the chemical breath test pursuant to *People v Molineux*, 168 NY2d 264. The evidence was admissible so that the test operator could complete his testimony regarding the preliminary steps taken to administer the test to the defendant, thereby laying a foundation for the test results. *See gen People v Tosca*, 98 NY2d 660. The evidence was also admissible as it provided circumstantial evidence of the defendant's intoxication. *See gen People v Neil*, 30 AD3d 901, 902 *lv den* 80 NY2d 836. Therefore, the probative value of the evidence outweighed the risk of undue prejudice to the defendant. *See People v Till*, 87 NY2d 835, 836-837. Judgment affirmed. (County Ct, Monroe Co [Marks, J])

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

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

People v Rivera, No. KA 04-01532, 4th Dept, 11/9/2007

In response to a question about whether any of the prospective jurors would have difficulty being fair and impartial, one juror stated that she probably would not be able to have an open mind. In response to a question from the judge, the juror said that she would have difficulty setting aside her feelings. Defense counsel then asked the juror several questions and reminded her that if the prosecution did not present evidence that the defendant committed the crime, the jury cannot find him guilty. The prosecution challenged the juror for cause, but defense counsel did not challenge the juror despite the court's explicit query to counsel about it.

Holding: The defendant was deprived of effective assistance of counsel based on defense counsel's failure to join in the prosecution's challenge of the prospective juror. "[T]he prospective juror 'cast serious doubt on [her] ability to render a fair verdict' (*People v Bludson*, 97 NY2d 644, 646), and she 'never "thereafter gave the requisite unequivocal assurances that [her] prior state of mind would not influence [her verdict] and that [she] could be fair and impartial"' (*People v Bracewell*, 34 AD3d 1197, 1199)." Any defense strategy that involved not challenging this juror "'fell short of an objective standard of reasonableness'" ([*People v*] *Turner*, 5 NY3d [476,] 485), and we thus conclude that defendant was denied a fair trial." Judgment reversed and new trial on counts one and two of the indictment granted. (County Ct, Monroe Co [Geraci, Jr., J])

Dissent: [Centra, J and Pine, J] Defense counsel's strategy decisions are matters outside the record and cannot be second-guessed in hindsight.

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

People v Stone, No. 04-02386, 4th Dept, 11/9/2007

The defendant was convicted of third-degree burglary and petit larceny.

Holding: The burglary verdict was not against the weight of the evidence. The evidence showed the following chain of events: the defendant was stopped by security when he attempted to leave a store with stolen merchandise; he was brought to the break room and asked to turn over the goods; when he refused and threatened to use force, store security called the police; and the defendant used force to escape with some of the stolen goods. Because the defendant used force while he was in possession of the stolen goods, the jury could infer that he used force to retain control of the goods and not to merely escape. *See People v Jones*, 4 AD3d 622, 623-624 *lv den* 2

Fourth Department *continued*

NY3d 801. Judgment affirmed. (County Ct, Monroe Co [Keenan, J])

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

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

People v Williams, No. KA 06-01218, 4th Dept, 11/9/2007

The defendant applied for resentencing on his second-degree criminal possession of a controlled substance conviction.

Holding: The court satisfied the hearing requirements of the 2005 Drug Law Reform Act (L 2005, ch 643, § 1) by allowing the defendant and his counsel to appear before the court and explain why resentencing was warranted. *See gen People v Figueroa*, 21 AD3d 337, 339 *lv den* 6 NY3d 753. The court erred by failing to set forth written findings of fact and the reasons for imposing a 13½ year determinate term with five years post-release supervision. *See* L 2005, ch 643, § 1. Also, "the court erred in stating that the original sentence would stand before affording defendant an opportunity to exercise his right to appeal and to withdraw his application following that appeal (*see* [L 2005, ch 643, § 1])." Order reversed and matter remitted for further proceedings. (County Ct, Onondaga Co [Walsh, J])

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

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

People v Mills, No. KA 06-00536, 4th Dept, 11/9/2007

The defendant was a passenger in a car that was parked behind several commercial buildings. The defendant got into an argument with another passenger and they later fought outside the car. When a group of men gathered around the fight, the defendant got scared that he would be attacked, so he got into the car and drove away. He was convicted of third-degree criminal possession of stolen property, second-degree unauthorized use of a motor vehicle, and second-degree aggravated unlicensed operation of a motor vehicle.

Holding: The court improperly denied the defendant's request for a justification charge. "Considering the evidence in the light most favorable to defendant, we conclude that there is a reasonable view of the evidence that defendant's conduct was justified '[u]nder the "choice of evils" theory of Penal Law § 35.30(2)' as a means to avoid an imminent attack (*People v Maher*, 79 NY2d 978, 981 . . .)." The evidence does not support the aggravated unlicensed operation conviction as it was "legally insufficient to establish that defendant operated the vehicle 'upon a public highway' (Vehicle and Traffic Law § 511(1)(a) . . .)." Judgment reversed, new trial on counts one and two of the indictment granted, and count three dismissed. (County Ct, Ontario Co [Reed, J])

Counsel (Right to Counsel) (Waiver) **COU; 95(30) (40)**

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

Matter of Bobi Jo B. v Jerry L. W., No. CAF 06-02792, 4th Dept, 11/9/2007

Less than two weeks before a custody trial, the petitioner mother told the court that her attorney would not represent her for the fee that they previously agreed upon and she asked for a 30-day adjournment so that she could hire a new attorney. The petitioner also signed a consent to change attorney form that stated that she was substituting an unknown attorney for her prior attorney. The court denied the adjournment. The day of the trial, the petitioner appeared without counsel and again asked for an adjournment. The court denied that request.

Holding: The court abused its discretion in denying the petitioner mother's request for an adjournment of the trial and requiring her to proceed without counsel. *Cf Matter of Matthew K. v Susan O.*, 37 AD3d 1119 *lv den* 8 NY3d 811. The petitioner did not request adjournments to delay the case, *see gen Lindenman v Lindenman*, 288 AD2d 352, and she made diligent efforts to hire a new attorney. *Cf Barnaby v Barnaby*, 259 AD2d 870, 871. By signing the consent to change attorney form, the petitioner did not knowingly, willingly, and voluntarily waive her right to counsel. *See Matter of Meko M.*, 272 AD2d 953. Order reversed and new trial granted. (Family Ct, Steuben Co [Mattison, JHO])

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

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

People v Primm, No. KA 05-02216, 4th Dept, 11/9/2007

Holding: The defendant's appellate counsel filed a brief pursuant to *People v Crawford* (71 AD2d 38) and asked to be relieved as counsel, claiming no nonfrivolous issues existed to raise. A review of the record reveals an issue as to whether the defendant's guilty plea was knowing, voluntary, and intelligent because the court failed to advise the defendant at the plea allocution that his sentence would include a term of post-release supervision. Motion granted and new counsel to be assigned to brief this issue and any other issues that counsel may find. (Supreme Ct, Erie Co [Tills, AJ]) ⚖

Defender News *(continued from page 7)*

alcohol impairment; finding that the test is scientific in nature; and remanding for a *Frye* hearing).

Penal Law 60.35 Fees—*People v Brian L.*, 842 NYS2d 874 (City Ct, Jefferson Co 2007)

Judge James C. Harberson, Jr. concluded that Penal Law 60.35 fees cannot be assessed against a defendant who has a physical and / or mental disability that prevents him from ever engaging in income-producing activities. When the legislature amended CPL 420.35(2) in 1995, the fee waiver for indigent defendants was eliminated. By amending the statute, the underlying premise of the statute became that all defendants could pay the total fees within 60 days by making a reasonable effort, which is a false premise. Assessing these fees against defendants who are permanently unable to earn income violates their Fourteenth Amendment due process rights. The court granted the defendant a hearing to determine if his disabilities permanently bar him from engaging in income-producing activity.

If you know of a lower court decision that you think should be included in the next issue of the *REPORT*, please contact Susan Bryant at the Backup Center at (518) 465-3524 or sbryant@nysda.org.

New Rule for Law Guardians in New York State

On October 17, 2007, the Rules of the Chief Judge of the State of New York were amended to add section 7.2, "Function of the attorney for the child." Of particular note, subsection c provides that "[i]n juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child." The rule also reminds law guardians that they are subject to the same ethical requirements as all attorneys.

RecentX Software Donation Increases NYSDA Staff Productivity

Productivity on your computer can be enhanced in many ways, but saving keystrokes and time by not having to hunt and drill down through seemingly endless levels of subdirectories for documents, folders, websites, Favorites, and programs has to be on the top of the list. NYSDA staff, through a generous donation of an application program called RecentX, is now realizing increased productivity with quicker and easier access to our network computer resources.

RecentX, from Conceptworld Corporation, is a one-click, fast way of getting to documents, folders, programs and websites that you have previously accessed. It dramatically expands and improves upon the shortcut access provided by Windows' "Recent Documents" or Word's File History. According to its website, Conceptworld "developed this software because like you, even we were annoyed with the tedious and hierarchical way of accessing recent documents, recent folders, recent files, recent programs, websites & bookmarks (Favorites) in Windows".

NYSDA has been using it for about two months now and the staff who use it are quite impressed with the simple but elegant solution to the very limited amount of "history" that Windows or Microsoft applications provide. ⚖

Job Opportunities *(continued from page 7)*

services, civil rights, poverty law or federal litigation. Previous supervisory experience is preferred; Spanish fluency is highly desirable. The Managing Attorney will supervise all Staff Attorneys, Legal Assistants, Secretaries and Interns in the Buffalo office, and report to the Executive Director. He / she will establish the effectiveness of the office and collaborate with other PLS staff throughout the state. Duties include: planning and coordinating office administration; overseeing the financial management of the office; conducting or supervising periodic case reviews; and establishing office systems that assure quality representation. [*Ed. note: for more info, see the full notice posted on www.nysda.org.*]

To apply, please send cover letter, résumé, writing sample, and at least three (3) references by mail, fax or email to: Susan Johnson, Prisoners' Legal Services of New York, 114 Prospect Street, Ithaca, NY 14850, (607) 273-2283, fax (607) 272-9122, email sjohnson@plsny.org (Word or WP format).

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