NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXIII Number 3 June–August 2008

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Defender News

Post-Release Supervision Remains in the Spotlight

The Court of Appeals' recent post-release supervision (PRS) decisions, *People v Sparber*, 10 NY3d 457 (2008), and *Matter of Garner v New York State Dept of Correctional Services*, 10 NY3d 358 (2008), have generated significant activity in the courts, the Department of Correctional Services, the Division of Parole, the defense community, and the Legislature. Numerous inmates have been and continue to be released from prison because they were incarcerated for technical violations of terms of PRS that were never orally pronounced by the sentencing court. Now and in the coming months, courts throughout the state will be dealing with possible resentencing of defendants whose terms of PRS were not properly imposed by the courts. [Full summaries of the *Sparber* and *Garner* decisions are available on p. 13.]

On June 30, 2008, Governor Paterson signed a bill that lays out the procedures for PRS resentencing proceedings. *See* L 2008, ch 141, available at http://public.leginfo.state.ny.us/menuf.cgi. The bill provides an orderly process for returning releasees under parole supervision and inmates serving determinate sentences for crimes committed on or after September 1, 1998 to sentencing courts for possible resentencing when commitments are silent about PRS. Of particular note, the bill does not mandate new PRS terms and it expressly authorizes courts to impose determinate sentences without PRS when the district attorney consents to such a disposition, which might occur, for example, when imposition of PRS would trigger a defendant's right to withdraw a guilty plea under *People v Catu* , 4 NY3d 242 (2005). The bill also contemplates that sentencing courts might "otherwise" [new Corrections Law 601-d(5)] choose not to impose PRS. The bill includes a provision for the assignment of counsel under County Law 722.

The possibility of resentencing raises a number of issues; for example:

- Where a defendant had completely served the determinate sentence originally pronounced, defense counsel should argue that the court's power to resentence ended when the pronounced sentence was fully served, both as a matter of double jeopardy and due process. Case law makes clear that there must be a temporal limit on the power to correct even an illegal sentence and that limit is reached when the sentence has been fully served, *i.e.*, when the defendant reaches the maximum expiration date of the determinate sentence without PRS.
- Resentencing *nunc pro tunc* does not retroactively validate a parole violation warrant so as to permit continued incarceration of an administrative PRS violator. *See People ex rel Benton v Warden*, 2008 NY Misc Lexis 2953, 2008 WL 2132803 (Sup Ct, Bronx Co May 21, 2008).
- The court cannot fix bail or otherwise hold a defendant in custody pending consideration of a resentencing application as the defendant is not facing jail time as a result of the resentencing.
- Before resentencing a defendant, the court must offer plea withdrawal to a defendant who was not told about PRS at the time of the plea, pursuant to *Catu*.

[*Ed note: Special thanks to Elon Harpaz, Staff Attorney, The Legal Aid Society, for these practice tips.*]

Criminal defense attorneys with questions about post-release supervision litigation and resentencing can contact NYSDA's Backup Center for assistance and sample pleadings.

Discretionary Forfeiture of Peremptory Challenges

The Court of Appeals has held that when a court determines that a peremptory challenge was used in a discriminatory manner, the court has the discretion to order forfeiture of the challenge. *See People v Luciano*, 10 NY3d 499 (2008). In *Luciano*, the trial court incorrectly

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concluded that forfeiture was mandatory. The Court identified factors that may be considered in determining whether to order forfeiture, including whether the challenged juror is able to be reseated, whether the challenge appears to be part of a pattern of discrimination, and the number of challenges that remain. A full summary of the decision is on p. 15.

Small Amounts of Marijuana Not Dangerous Contraband

In *People v Finley* , 10 NY3d 647 (2008), the Court of Appeals held that small amounts of marijuana do not constitute "dangerous contraband" under Penal Law 205.00(4) and 205.25(2), promoting prison contraband in the first degree. "[T]he test for determining whether an item is *dangerous* contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security . . . ." The inmate appellants, Finley and Salters, were charged with first-degree promoting prison contraband and attempted first-degree promotion, respectively. Finley was accused of possessing three cigarettes, one of which tested positive for marijuana, and Salters was accused of attempting to get 9.3 grams of marijuana. The Court reduced Finley's conviction to second-degree promoting prison contraband and reduced Salters' conviction to attempted second-degree promoting prison contraband. A full summary of this decision is available on p. 16. NYSDA Staff Attorney Al O'Connor argued the case on behalf of Mr. Salters.

Third Department Affirms Warrantless GPS Monitoring

In a 4-1 decision, the Third Department affirmed the denial of the defendant's motion to suppress evidence obtained from a battery operated global positioning system (GPS) device that the police attached under his car's bumper without a warrant. *See People v W eaver*, 860 NYS2d 223 (3d Dept 2008). The court concluded that the defendant did not have a legitimate expectation of privacy under federal or state law that would prohibit such tracking because the information gathered by the device is the same information that could have been gathered by constant visual surveillance by the police. Justice Stein dissented, finding that the warrantless GPS tracking violated the defendant's state constitutional rights because individuals have a reasonable expectation that their every move will not be monitored by a GPS device without their knowledge. *Weaver* is the first decision on the issue from a state appellate court.

Parole Legislative Updates

Discretion Restored to Board of Parole

On July 21, 2008, Governor Paterson signed a bill that restores discretion to the Board of Parole, which was eliminated in 1998, to discharge persons serving life sentences from parole supervision after three consecutive years of unrevoked parole. Senator Dale Volker's sponsor's memo noted that there is no indication of any problems resulting from the exercise of discretion between 1930 and 1988, nor any indication that mandatory lifetime supervision is necessary to promote public safety. The bill, Chap 310 of the Laws of 2008, is available at http://public.leginfo.state.ny.us/menuf.cgi.

New Law Allows Mandatory Termination of Drug Sentences for Presumptive Releasees

On August 5, 2008, Governor Paterson signed into law a bill that clarifies that Executive Law 259-j(3-a) applies to presumptively released parolees. *See* L 2008, ch 486. The law takes effect immediately and applies to persons sentenced to an indeterminate sentence prior to, on or after the effective date, but does not affect the Sept 1, 2009 expiration date of section 259-j(3-a). The 2004 Drug Law Reform Act provided for mandatory termination of drug sentences after three years of unrevoked parole supervision for Class A-I and A-II drug felonies, and two years of unrevoked parole supervision for lesser drug offenses. The Division of Parole has interpreted this law as prohibiting termination of supervision when the parolee was presumptively released by the Department of Correctional Services, and not released by the Board of Parole. And some courts, including the Third Department,

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have agreed with that interpretation. *See Matter of Sweeney v Dennison*, 858 NYS2d 845 (3d Dept 2008), which is summarized on pp. 36–37.

NYC To Begin Recording Inmate Phone Calls; Do Not Record List Being Compiled

In July 2008, the New York City Department of Correction announced that it is testing a telephone recording system that will record all calls made by inmates; the system is expected to be operational by the end of 2008. A new rule authorizing recording exempts calls to attorneys, doctors, clinicians, and clergy. (www.law.com, 7/25/2008). The Department has created a Do Not Record list, which already includes the primary phone numbers of attorneys who are registered with the NYS Office of Court Administration and in good standing, if the phone number is listed in the correct 10-digit format (valid US area code, exchange, and 4 digits). Attorneys who want to add telephone numbers to the list must send a fax on letterhead to the Department's Legal Division (fax number 212-266-1596) with: your OCA number; a copy of your current Certificate of Good Standing or a printout from the OCA website showing that you are in good standing; the telephone number(s) you want to exempt from recording; and a fax number or email address that the Department can use to contact you when your request has been reviewed. Information on the Do Not Record list is available at http://www.nyc.gov/html/doc/html/how/prevent_recording.shtml.

John Jay College Announces Arson Screening Project

Using a $250,000 grant from the JEHT Foundation, John Jay College has established an Arson Screening Project in its Center for Modern Forensic Practice. The Project is designed to screen cases involving claims of wrongful conviction based on the use of a faulty, folk-science of fire indicators over the past 20 years and report to scientists and practitioners the depth and extent of the problem. Leading the Project is James M. Doyle, Director of the Center, along with Dr. Peter D. DeForest, professor of criminalistics at the College, and Peter Diaczuk, the Center's director of forensic science training. For more information about the Project and for an Arson Screening Application for Evidence Review, visit http://www.jjay.cuny.edu/mfp/arson_screening.asp.

Forensic Firearms Identification Scrutinized

At NYSDA's annual meeting, Joan Griffin, a Boston trial attorney, addressed recent challenges to forensic firearms identification, including the challenges she has raised in several federal district court cases. Griffin emphasized the lack of standards in toolmark analysis and the importance of challenging the admission of such "expert" testimony, and she discussed some of the relevant forensic literature, including a recent National Research Council report on the feasibility, accuracy, and technical capability of a National Ballistics Database. The report's executive summary (prepublication) contains several statements that defense counsel should be aware of, including: "Underlying the specific tasks with which the committee was charged is the question of whether firearms-related toolmarks are unique: that is, whether a particular set of toolmarks can be shown to come from one weapon to the exclusion of all others. Very early in its work the committee found that this question cannot now be definitively answered" and "Notwithstanding this finding, we accept a minimal baseline standard regarding ballistics evidence. Although they are subject to numerous sources of variability, firearms-related toolmarks are not completely random and volatile; one can find similar marks on bullets and cartridge cases from the same gun." The executive summary is available at www.swggun.org, and the full report is available for purchase from the National Academies Press (www.nap. edu). Defense counsel interested in firearms and toolmark challenges should visit the National Legal Aid and Defender Association's online forensic library, http://www.nlada.org/Defender/forensics/for_lib?, which has a variety of materials on the subject, and counsel may contact the Backup Center for assistance in locating resources and expert witnesses.

41st Annual Meeting Draws Record Number of Defenders from Around the State

NYSDA held its annual meeting July 20–22, 2008 at the Gideon Putnam Hotel in Saratoga Springs. Over 230 people attended this year's meeting, which offered attendees an opportunity to talk with members of the criminal defense community throughout the state and earn up to 12 CLE credits, including 2 ethics credits. Sessions addressed a variety of subjects, including post-release supervision, computer

Martin Tankleff, who was recently exonerated after spending 17 years in prison, gives the keynote address at the 41st Annual Meeting Awards Banquet.

Joan Griffin talks to conference attendees after her presentation on challenging forensic firearms identification.

and cell phone technology, firearm forensics, ethical issues arising from representation of mentally disabled clients, the Sex Offender Registration Act, federal implications of state practice, and prosecutorial misconduct, as well as updates on US Supreme Court and New York Court of Appeals decisions and New York legislation.

Topics at the Chief Defender Convening, which was held on July 20, ranged from veterans issues to public defense reform.

Awards Banquet Full of Celebration and Calls for Reform

This year, the Kevin M. Andersen Memorial Award was presented to Andre A. Vitale, Monroe County assistant public defender. The Award is given to an attorney in practice for less than 15 years who works in the area of public defense and exemplifies the sense of justice, determination, and compassion that were Kevin's hallmarks. Kevin M. Andersen was a staff attorney with the Genesee County Public Defender's Office. Daniel E. Barry, Jr., staff attorney with the Public Defender Unit of the Legal Aid Bureau of Buffalo, received the Wilfred R. O'Connor Award. That Award is given to an attorney in practice for fifteen or more years who practices in the area of public defense and exemplifies the client-centered sense of justice, persistence, and compassion that characterized the life of Wilfred (Bill) O'Connor, a founding member and former president of NYSDA. The NYSDA Service of Justice Award was presented to Elon Harpaz and Kerry Elgarten, staff attorneys with The Legal Aid Society's Criminal Appeals Bureau and Parole Revocation Defense Unit, for their tireless efforts to secure the rights of prisoners and parolees in post-release supervision litigation.

Recipients of the NYSDA Service of Justice Award- Elon Harpaz (r) and Kerry Elgarten, staff attorneys with The Legal Aid Society, Criminal Appeals Bureau and Parole Revocation Defense Unit.

Martin Tankleff, who was recently exonerated after spending 17 years in prison, delivered the keynote address. Martin called for criminal justice reforms, including videorecording of interrogations, greater access to DNA testing for prisoners, public defense reform, and the creation of a state-wide wrongful conviction commission.

Save the Date

The 42nd Annual Meeting will be held on July 26-28, 2009 at the Gideon Putnam Hotel in Saratoga Springs, NY.

Legislature Provides One-Time ILSF Fix, No Defense Reform

Nine counties at risk of losing their share of Indigent Legal Services Fund (ILSF) money being distributed in 2008 received an extension to May 27 in which to show that they were in compliance with the ILSF's maintenance of effort provisions. (*See* the March-May 2008 issue of the *REPORT*, www.nysda.org). NYSDA assisted counties in analyzing their funding to determine how compliance might be shown.

At the same time, supporters of public defense reform urged the State to include in any legislation ensuring these counties their money a first step toward comprehensive public defense reform. This did not occur.

On May 29—the day before the Comptroller was to have distributed the remainder of the ILSF distribution for 2008—legislation was delivered to the Governor providing one-time relief for any county that had not been able to demonstrate maintenance-of-effort compliance. The bill, which became Chap 108 of the Laws of 2008,

Gary A. Horton (r) presents the Kevin M. Andersen Memorial Award to Andre A. Vitale, Monroe County assistant public defender.

established a formula for paying noncompliant counties a portion of the amount they would have received if compliant. Information on these developments was presented at the Chief Defender Convening held during NYSDA's Annual Meeting and Conference.

New Report Cards Demonstrate Counties Do Not Meet Standards

Also discussed at the Convening were the last three report cards issued by the National Legal Aid and Defender Association (NLADA) as part of a study of the public defense systems in 10 New York counties. (Earlier report cards were described in the *REPORT*, Oct-Dec 2007.) The report cards, released in May, measure provision of defense services in Jefferson, Lewis, and Sullivan counties against the American Bar Association's *10 Principles of a Public Defense Delivery System.* The local

Gary Muldoon during a panel discussion of the Se x Offender Registration Act.

Mark Hosken (r) presents the Wilfred R. O'Connor Award to Daniel E. Barry, Jr., staff attorney with the Public Defender Unit of the Legal Aid Bureau of Buffalo.

press coverage the report cards received, and their presence on the NYSDA website, has contributed to increasing awareness of deficiencies in how New York State currently provides public defense services.

NLADA, which has a contract with NYSDA for this grant-funded study, is currently preparing a final report on the 10 counties. That report is to include recommendations for how individual counties can improve public defense while it remains a mandate on localities by the state.

Court Denies State's Motion to Dismiss Lawsuit Challenging Broken Public Defense System; Five Counties Must Be Added as Defendants

Supreme Court Justice Eugene P. Devine has denied New York State's motion to dismiss the class action lawsuit brought by the New York Civil Liberties Union in November 2007. *See Hurr ell-Harring v State of New Y ork,* No. 8866-07 (Sup Ct, Albany Co Aug 1, 2008), available at http://www.nyclu.org/node/1925. The suit seeks a declaration that systemic deficiencies in the public defense system in Onondaga, Ontario, Schuyler, Suffolk, and Washington Counties violate the plaintiffs' constitutional rights, as well as an injunction requiring the state to provide a system that comports with the New York and United States Constitutions and state statutes.

Justice Devine held that the plaintiffs have standing to bring the suit on behalf of all defendants in those five counties who may be entitled to public defense counsel now and in the future. No class has been certified yet. He also held the complaint states a justiciable cause of action seeking prospective relief, which does not require allegations or proof of ineffective assistance of counsel

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Conferences & Seminars

Sponsor: New York County Lawyers' Association
Theme: Representing Clients with Pending Parole Violations
Date: September 10, 2008
Place: New York County Lawyers' Association, New York City
Contact: NYCLA: tel (212) 267-6646 x245; website www.nycla.org

Sponsor: New York State Defenders Association Immigrant Defense Project, Law Offices of Norton Tooby, National Immigration Project & NYU School of Law Immigrant Rights Clinic
Theme: Crimes and Immigration Law
Dates: September 13, 2008
Place: New York University School of Law, New York City
Contact: Law Offices of Norton Tooby: tel (510) 601-1300; email info@CriminalAndImmigrationLaw.com; website www.NortonTooby.com

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross to Kill: Defense of a Sex Abuse Case
Date: September 13, 2008
Place: Rochester, NY
Contact: NYSACDL: tel (212) 532-4434; email nysacdl@aol.com; website www.nysacdl.com

Sponsor: National Association of Criminal Defense Lawyers
Theme: Winning with DUI: Offense, Defense, and Special Teams
Dates: September 18-20, 2008
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: New York State Defenders Association & Appellate Division, Fourth Judicial Department
Theme: 4th Department Assigned Counsel Criminal Appeals
Date: September 20, 2008
Place: Rochester, 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; email ncadrc@aol.com; website www.falseallegation.org

Sponsor: New York State Defenders Association & Appellate Division, Fourth Judicial Department
Theme: 4th Department Assigned Counsel Family Court Appeals
Date: October 4, 2008
Place: Rochester, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: New York State Defenders Association
Theme: Criminal Defense Update
Date: November 1, 2008
Place: Rochester, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: 1st Annual Defending Drug Cases Seminar
Dates: November 13-14, 2008
Place: Houston, TX
Contact: NACDL: tel (202) 872-8600 x230 (Akvile Athanason); website www.nacdl.org/meetings

Sponsor: National Legal Aid and Defender Association
Theme: Annual Meeting: Creating Change, Achieving Justice
Dates: November 19-22, 2008
Place: Washington, DC
Contact: NLADA: tel (202) 452-0620; website www.nlada.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Last Chance Ethics
Date: December 6, 2008
Place: New York City
Contact: NYSACDL: tel (212) 532-4434; email nysacdl@aol.com; website www.nysacdl.com

Sponsor: National Legal Aid and Defender Association
Theme: Appellate Defender Training
Dates: December 10-14, 2008
Place: New Orleans, LA
Contact: NLADA: tel (202) 452-0620; website www.nlada.org

Sponsor: New York State Defenders Association
Theme: 42nd Annual Meeting & Conference
Dates: July 26-28, 2009
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org ⚖

Job Opportunities

The Jefferson County Public Defender's Office is accepting applications for an **Assistant Public Defender** position. 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 St. Lawrence County Office of the Public Defender is accepting applications for an **Assistant Public Defender** position. Applicants must be admitted to the New York State Bar and have a NYS driver's license or equivalent. Felony trial experience and five (5) or more years criminal law experience preferred. Salary: $42,000-$61,000 DOE. To apply, send a cover letter and résumé to: Brian D. Pilatzke, Public Defender, 48 Court Street, Canton, NY 13617.

Hiscock Legal Aid Society, Syracuse, seeks an **Attorney** to represent adults in Family Court matters, including Abuse/Neglect, Custody/Visitation, and Support Violation cases. High volume caseload. Demonstrated commitment to public interest law and to serving the indigent required. Family Court experience preferred. Admission to New York Bar required. Salary: $36,000 + DOE. Generous benefits. EOE. Persons of color & bilingual persons encouraged to apply. Applicants should send cover letter and résumé, including three references to: President & CEO, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse, NY 13202.

Job Listings are also available at www.nysda.org

Job Opportunities (under NYSDA Resources)

Find: Notices Received After REPORT deadline
Links to More Detailed Information

Prisoners' Legal Services seeks a **Managing Attorney** for its Buffalo 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. Applicants 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 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; handling personnel matters promptly, fairly and appropriately; conducting or supervising periodic case reviews; and establishing office systems that assure quality representation. [*Ed. note: for mor e info, see the notice posted on www.nysda.org*.] 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. Application deadline: Sept 1, 2008. To apply, send cover letter, résumé, writing sample, and at least three (3) references by mail, fax or email to: Karen Murtagh-Monks, Esq., Executive Director, Prisoners' Legal Services of New York, 114 Prospect Street, Ithaca, NY 14850, (607) 273-2283, fax (607) 272-9122, email kmmonks@plsny.org (Word or WP format).

The Committee for Public Counsel Services (CPCS) seeks applications for the position of **Director** of its new Juvenile Defender Department (JDD). The JDD provides legal services to children and youth in juvenile delinquency, youthful offender, and related proceedings. Representation is provided through staff offices located in Roxbury and Worcester and by more than 700 private attorneys statewide. The JDD administrative staff is responsible for management, training, policy advocacy, and development. The Director of the JDD is a member of the CPCS senior management team, which develops and implements agency fiscal, operational, human resource, and legislative policies. Duties include: ensuring the zealous advocacy of children and youth in juvenile delinquency, youthful offender, and related matters in which there is a right to court-appointed counsel; planning for and opening additional staff offices; and collaborating with CPCS's Public Defender and Private Counsel Divisions, and with supervising attorneys and mentors in private practice, to promote compliance with performance standards and certification policies and procedures. Applicants must embrace the principle of zealous advocacy in the representation of children and youth for whom there is a right to court-appointed counsel; have the ability to promote the provision of excellent representation by staff and private counsel; possess strong leadership qualities, and superior analytical, interpersonal, communication, negotiation,

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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.

United States Supreme Court

Death Penalty (Cruelty) (States [Kentucky]) **DEP; 100(40) (155[r])**

Baze v Rees, 553 US __, 128 SCt 1520 (2008)

Petitioners Baze and Bowling were convicted of capital murder and sentenced to death. After unsuccessful direct appeals and collateral actions, they filed suit against state officials challenging Kentucky's method of lethal injection under the Eighth Amendment. Kentucky's lethal injection law provides for the use of a substance or substances that are sufficient to cause death. *See* Ky Rev Stat 431.220(1)(a). The Kentucky Department of Corrections' protocol provides for the use of a three drug cocktail: sodium thiopental, a sedative; pancuronium bromide, a paralytic agent; and potassium chloride, which induces cardiac arrest. The Kentucky state courts upheld the use of the protocol.

Holding: The Kentucky lethal injection protocol does not violate the Eighth Amendment as it does not create a substantial risk of serious harm. *See Farmer v Brennan*, 511 US 825 (1994). The fact that a method of execution will result in pain does not create an objectively intolerable risk of harm that qualifies as cruel and unusual punishment. *See Louisiana ex rel Francis v Resweber*, 329 US 459 (1947). Courts should not determine "best practices" for execution; state legislatures are responsible for choosing execution procedures. *See Bell v Wolfish*, 441 US 520, 562 (1979). A state's refusal to change its method of execution will be deemed cruel and unusual only if the alternative method is feasible, readily implemented, actually significantly reduces a substantial risk of severe pain, and the state has no legitimate penalogical justification for continuing to use its current method. Thirty states and the federal government use the same three-drug protocol and no state uses or has used the one-drug protocol the petitioners have proposed. Given that the protocol is widely tolerated and that the state has implemented several safeguards, the risk that the first drug would not be administered properly is not so substantial as to be considered cruel and unusual punishment. The one-drug alternative suggested here was never presented to state courts. The use of the paralytic agent to preserve the dignity of the procedure as well as hasten death is not unconstitutional. Judgment affirmed.

Concurrence: [Alito, J] The modified protocol proposed by the petitioners would involve participation of medical professionals who are ethically prohibited from such conduct, making it unfeasible. "[P]ublic policy on the death penalty . . . cannot be dictated by the testimony of an expert or two or by judicial findings of fact based on such testimony."

Concurrence: [Stevens, J] Use of the paralytic drug creates an unacceptable risk of excruciating pain and the reasons for its use are not sufficient to justify that risk. Deference should not be given to the three-drug protocol since, in most states, it was selected by unelected correctional officials without specialized medical knowledge and without expert assistance. "[C]urrent decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty." Nonetheless, based on court precedent, the petitioners failed to prove Kentucky's lethal injection protocol violates the Eighth Amendment.

Concurrence: [Scalia, J] The death penalty is a permissible legislative choice and the Constitution expressly authorizes it. Judges cannot substitute their own experience for the experience of state legislatures and Congress.

Concurrence: [Thomas, J] "[A] method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain . . . ." The plurality's standard for reviewing execution methods is not supported by the Constitution or court precedent and will result in more litigation.

Concurrence: [Breyer, J] Nothing in the record or in relevant literature provides sufficient evidence to support the petitioners' claim that Kentucky's protocol poses a significant and unnecessary risk of inflicting severe pain.

Dissent: [Ginsburg, J] The issue is whether the first drug in the protocol adequately anesthetized inmates. Because Kentucky's protocol lacks safeguards to confirm that an inmate is unconscious before injection of the second and third drugs, the case should be remanded for a decision on whether the lack of safeguards "poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain."

Arrest (Appearance Ticket) (Vehicle and Traffic Law) **ARR; 35(3) (50)**

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

Virginia v Moore, 553 US __, 128 SCt 1598 (2008)

US Supreme Court *continued*

Instead of issuing the defendant a summons for misdemeanor driving on a suspended license, as provided by state law, the police arrested him and searched him, finding crack cocaine and $516 in cash. The defendant was charged with possessing cocaine with the intent to distribute. In general, Virginia law does not require the suppression of evidence obtained in violation of state law. The trial court denied the defendant's motion to suppress based on the Fourth Amendment and convicted him of the drug offense. The intermediate court reversed the conviction, but later reinstated it. The state supreme court reversed the conviction, concluding that because the officers should have issued a summons and the Fourth Amendment did not permit a search incident to a citation, the search violated the Fourth Amendment.

Holding: Early case law and legal commentaries do not support the view that the Fourth Amendment was intended to incorporate state arrest statutes. Court precedent provides that if a police officer has probable cause to believe a person committed even a minor crime in his presence, an arrest is constitutionally reasonable. *See Atwater v Lago Vista*, 532 US 318, 354 (2001). This analysis should not change because a state chooses to provide more privacy protections than those provided by the Fourth Amendment. *See Whren v United States*, 517 US 806 (1996). The Fourth Amendment authorizes a search incident to a constitutionally permissible arrest. *See United States v Robinson* , 414 US 218, 235 (1973). Judgment reversed and case remanded.

Concurrence: [Ginsburg, J] Although Virginia chose to provide protections against arrest beyond those required by the Fourth Amendment, it also chose to limit the remedy for a violation of those protections. The Fourth Amendment does not require a state to make an all-or-nothing choice regarding arrest restrictions and remedies for violations thereof.

Attorney/Client Relationship (General) **ACR; 51(20)**

Judges (Powers) **JGS; 215(10)**

Gonzalez v United States, 553 US __, 128 SCt 1765 (2008)

The petitioner was charged with several federal felony offenses. During a bench conference at the beginning of jury selection, the magistrate judge asked the attorneys whether the parties consented to have him preside over jury selection. The petitioner's attorney consented without conferring with his client, who was in the courtroom but did not have an interpreter and did not know what was happening. Jury selection proceeded without objection. A district judge presided over the trial and the petitioner was convicted of all counts. The Circuit court affirmed the conviction.

Holding: The Federal Magistrates Act (28 USC 636(b)(3)) allows for the assignment of additional duties to magistrate judges that are not inconsistent with the Constitution or federal law. A magistrate cannot preside over jury selection in felony cases if defense counsel objects. *See Gomez v United States* , 490 US 858 (1989). Neither federal law nor Article III of the Constitution prevents a magistrate from supervising voir dire, so long as both parties consent. *See Peretz v United States*, 501 US 923, 933 (1991). This rule applies even if the defendant did not hear or understand the discussion regarding consent. Consent to jury selection before a magistrate is a tactical choice that can be made by defense counsel and does not require the defendant's personal, on-the-record approval. "We do not have before us, and we do not address, an instance where the attorney states consent but the party by express and timely objection seeks to override his or her counsel. We need not decide, moreover, if consent may be inferred from a failure by a party and his or her attorney to object to the presiding by a magistrate judge." Judgment affirmed.

Concurrence: [Scalia, J] The majority's use of a tactical-vs-fundamental test is incorrect. The Constitution allows counsel to waive any of the defendant's waivable rights, except the right to counsel. Although not constitutionally required, it may be desirable and prudent to require the defendant to personally waive certain rights. "I do not contend that the Sixth Amendment's right to assistance of counsel prohibits such requirements of personal participation, at least where they do not impair counsel's expert assistance."

Dissent: [Thomas, J] Empowering magistrates to preside over jury selection is an unlawful delegation of authority by Congress. *Peretz* should be overruled. This error can be corrected despite the petitioner's failure to raise a timely objection.

Federal Law (Crimes) **FDL; 166(10)**

United States v Ressam, 553 US __, 128 SCt 1858 (2008)

When the respondent attempted to enter the United States, he submitted a customs declaration form that included incorrect information about his citizenship and his name. During secondary questioning, an official searched his car and found explosives and related items in the trunk. The respondent was convicted of making a false statement to a United States customs official and carrying an explosive "during the commission of" that felony. The Circuit court reversed his conviction for carrying an explosive.

Holding: The defendant's actions clearly fall within the language of 18 USC 844(h)(2) as he was carrying an explosive device when he knowingly made false state-

US Supreme Court *continued*

ments to a customs official. The legislative history shows that Congress did not mean to require that the prosecution show a relationship between the carrying of explosives and the underlying felony. Judgment reversed.

Concurrence: [Thomas, J] The plain language of the statute is sufficient to establish that there is no requirement that the carrying be related to the commission of underlying felony; review of the legislative history is unnecessary.

Dissent: [Breyer, J] The context of the statute shows that the language does not apply to situations where the carrying of explosives is unrelated to the felony. A temporal link between carrying explosives and the underlying felony is insufficient; there must be a showing that the felony facilitated or aided the carrying of explosives.

Federal Law (Crimes) **FDL; 166(10)**

Prior Convictions (General) (Sentencing) **PRC; 295(7) (25)**

Weapons (Possession) **WEA; 385(30)**

United States v Rodriquez, 553 US __, 128 SCt 1783 (2008)

The respondent was convicted of possession of a firearm by a convicted felon. His criminal history included two California burglary convictions and three Washington convictions for delivery of a controlled substance. Washington law provided for a maximum sentence of five years for a first offense and a maximum sentence of 10 years for second and subsequent offenses. The respondent faced a maximum of 10 years for his second and third offenses, but received concurrent sentences of 48 months. The Armed Career Criminal Act (ACCA) sets a mandatory minimum term of 15 years where the defendant has three prior convictions for violent felonies or serious drug offenses. *See* 18 USC 924(e)(1). A serious drug offense is a drug offense where the maximum term of imprisonment is 10 years or more. *See* 18 USC 924(e)(2)(A)(ii). The District Court concluded that the respondent's drug offenses were not serious drug offenses because the length of sentence determination cannot take into account recidivist sentence enhancements. The Circuit court affirmed on appeal.

Holding: In determining whether a drug offense carries a maximum term of 10 years or more, the court must look at the maximum term prescribed by state law, including all applicable recidivist enhancements. The respondent's drug convictions are serious drug offenses because the state law permitted a sentence of up to 10 years. It does not make sense to conclude that the respondent's maximum term is five years since he could have been sentenced to more than five years. The phrase maximum term of imprisonment should be read as it is customarily understood, which is the maximum possible penalty. In most cases it is unlikely that it will be difficult to determine whether a defendant faced a possible recidivist enhancement under state law. Judgment reversed.

Dissent: [Souter, J] The ACCA's language is unclear as to whether the "seriousness" of a drug offense should be determined by the penalty authorized for the basic offense committed by a first-time offender or by the penalty authorized after accounting for possible sentencing enhancements. The rule of lenity should apply because of the unclear language and lack of fair notice of how it would be applied. That Congress intended to rely on various state sentencing structures is open to doubt and requiring courts to master those structures presents a serious practical problem.

Federal Law (Crimes) **FDL; 166(10)**

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

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

United States v Williams, 553 US __, 128 SCt 1830 (2008)

The respondent posted a link to child pornography in a public chat room. A later search of his computer revealed additional child pornography. The respondent pleaded guilty to pandering but reserved the right to challenge the constitutionality of the statute. The district court denied the constitutional challenge and the Circuit court reversed on appeal.

Holding: The pandering statute, 18 USC 2252A as amended by the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, is constitutional as it does not prohibit a substantial amount of protected speech. The Act prohibits a person from knowingly offering or soliciting material or purported material where he or she subjectively believes it is child pornography and his or her actions objectively manifest that belief, or where he or she intends the listener to believe it is child pornography. "[O]ffers to give or receive what is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection. *See Pittsburg Press* [*Co. v Pittsburg Comm'n on Human Relations*, 413 US 376] at 387-389 [1973]." The Act is distinguishable from the unconstitutional statute reviewed in *Ashcroft v Free Speech Coalition* (535 US 234 [2002]), as it does not criminalize possession of material that is legal. The Act is not vague as it presents clear questions of fact that can be answered without making subjective judgments. Judgment reversed.

Concurrence: [Stevens, J] The Act's legislative history shows that Congress intended to prevent pandering, *ie*, the business of providing material that is openly adver-

US Supreme Court *continued*

tised to appeal to a person's sexual interest. It is clear that the Act does not prohibit the advertisement or solicitation of protected material for a lawful and nonlascivious purpose. *Cf Miller v California*, 413 US 15, 24-25 (1973).

Dissent: [Souter, J] The Act prohibits pandering, even where the images are not of real children. However, the First Amendment protects transactions involving material that does not show real children. *See New York v Ferber*, 458 US 747, 763, 764 (1982). By upholding the statute, the majority has undermined the holdings of *Ferber* and *Free Speech Coalition*. The Act eliminates the requirement that the government prove that an existing photo shows a real child, thereby blurring the line between what the government may and may not suppress. There is no support for the government's "fear that skeptical jurors will place traffic in child pornography beyond effective prosecution unless it can . . . allow prosecution whether the pornography shows actual children or not."

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

Federal Law (Crimes) **FDL; 166(10)**

Cuellar v United States, 553 US __, 128 SCt 1994 (2008)

Texas police stopped the petitioner for a traffic infraction as he headed toward the Mexican border. After he consented to a vehicle search, the police found a large amount of cash in a secret compartment of the car. It appeared that efforts were made to cover the smell of marijuana on the cash. The petitioner was convicted of attempted money laundering. *See* 18 USC 1956(a)(2)(B)(i). The Circuit court reversed his conviction, but on rehearing en banc, the court affirmed the conviction.

Holding: While the statute applies to classic money laundering activity, *ie*, taking steps to make funds appear legitimate, it also applies to the transportation of the proceeds of unlawful activity across the border, knowing that such transportation is designed to conceal or disguise the nature, location, source, ownership, or control of the funds. The government failed to prove that the petitioner knew that his transportation of the funds from the United States to Mexico was designed, at least in part to conceal or disguise the nature, location, source, ownership, or control of the funds. Merely hiding funds during transportation is insufficient since how one transports the funds is different from why one moves the funds and evidence of the former, standing alone, is insufficient to prove the latter. Judgment reversed.

Concurrence: [Alito, J] To satisfy the knowledge element, the government could have presented evidence that would allow the jury to infer that (1) the individuals who designed the plan for transporting the funds to Mexico intended to make it more difficult for law enforcement in the United States to determine that the funds were drug proceeds, where the funds were located, where the funds came from, who owned them, or who controlled them, and (2) the person recruited to transport the funds knew that this was the design. The record evidence does not permit an inference beyond a reasonable doubt that the petitioner had such knowledge.

Federal Law (Crimes) **FDL; 166(10)**

Gambling (Elements) (General) **GAM; 178(10) (17)**

United States v Santos, 553 US __, 128 SCt 2020 (2008)

Respondent Santos operated a lottery that was prohibited by state law, and paid his runners and collectors, including respondent Diaz, and winners a portion of the money collected in bets. In their federal prosecution, Santos was convicted of running an illegal gambling business and money laundering and Diaz was convicted of money laundering. The convictions were affirmed. The respondents later collaterally attacked their convictions. The district court vacated the money laundering convictions, concluding that there was no evidence that the underlying transactions involved profits, and the Circuit court affirmed.

Holding: The money-laundering statute prohibits activities involving criminal "proceeds" (*see* 18 USC 1956[a][1][A][i]), but does not define the term. The term has two ordinary meanings, profits or receipts, and the statute makes sense and is not redundant if either meaning is used. Since the statute itself does not provide a reason for choosing one definition over the other, the rule of lenity requires the ambiguity to be resolved in favor of the defense. *See United States v Gradwell*, 243 US 476, 485 (1917). The "profits" definition of "proceeds" must be used as it is always more defendant-friendly. Since the government did not present evidence that the payments upon which the convictions were based, *ie*, respondent Santos' payments to the lottery winners and his employees and Diaz's receipt of wages, were profits, the convictions cannot stand. Based on Justice Stevens' concurring opinion, the holding is limited to the "finding that 'proceeds' mean 'profits' when there is no legislative history to the contrary. It does not hold that the outcome is different when contrary legislative history does exist." Judgment affirmed.

Concurrence: [Stevens, J] The term "proceeds" can have different meanings when referring to different unlawful activities covered by the statute. The legislative history is silent on the definition. The term must be defined as profits, not receipts, for stand-alone gambling ventures, otherwise the money-laundering offense would merge with the operating a gambling business offense, a result that Congress could not have intended.

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Dissent: [Breyer, J] The problem of merger of the illegal gambling and money laundering offenses should not be resolved through the definition of "proceeds." Since the problem is one of sentencing fairness, the Sentencing Commission could amend the sentencing guidelines to tie the offense level for money laundering to the offense level of the underlying offense.

Dissent: [Alito, J] To avoid frustrating Congress' intent, the term "proceeds" must be defined as the total amount brought in, as well as net profit. Other money laundering statutes that use the term "proceeds" define it as "the total amount brought in." Limiting "proceeds" to profits would also hamper or prevent certain prosecutions.

Federal Law (Procedure) **FDL; 166(30)**

Sentencing (Enhancement) (Guidelines) (Hearing) **SEN; 345(32) (39) (42)**

Irizarry v United States, 553 US __, 128 SCt 2198 (2008)

The petitioner pleaded guilty to making a threatening interstate communication. The presentence report (PSR) recommended a sentencing range of 41 to 51 months of imprisonment and stated potential grounds for departure. After hearing from four witnesses and counsel, the judge issued an oral decision and sentenced the petitioner to the statutory maximum of 60 months of imprisonment, which was greater than the maximum under the sentencing guidelines. The petitioner objected to the sentence because the court did not provide notice of the court's intent to upwardly depart, but the court denied the objection. The Circuit court affirmed.

Holding: Rule 32 of the Federal Rules of Criminal Procedure requires that the defendant be given advance notice of any contemplated departure. *See Burns v United States*, 501 US 129 (1991). Since the Guidelines are now advisory, the parties can no longer "place the same degree of reliance on the type of 'expectancy' that gave rise to the special need for notice in *Burns*." The term "departure" refers to non-Guidelines sentences imposed under the Guidelines framework and it cannot be read to apply to 18 USC 3553(a) variances. The record does not show that the parties would have changed their presentations in a material way had the court provided notice of a possible variance. "Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues." Instead of extending the notice requirement to variances, it would be more appropriate for the court to consider granting an adjournment when a party has a legitimate claim of surprise and such surprise was prejudicial. Judgment affirmed.

Concurrence: [Thomas, J] "[N]either Rule 32(h) nor *Burns* . . . compels a judge to provide notice before imposing a sentence at 'variance' with the post-[*United States v*] *Booker* [543 US 220 (2005)] advisory Guidelines . . . ." However, if the Guidelines were mandatory, as required by 18 USC 3553(b), it would be error for the court to depart in a manner not authorized by the Guidelines.

Dissent: [Breyer, J] Variances fit within the Guidelines' definition of departures. The right to comment on matters relating to an appropriate sentence under Rule 32(i)(I)(C) is rendered meaningless if the parties do not have notice of previously unidentified grounds for a variance. Fairness justifies that the parties receive notice regardless of the possible burdens and delay.

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Accusatory Instruments (General) (Variance of Proof) **ACI; 11(10) (20)**

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

People v Mitchell, 10 NY3d 819 (2008)

A witness watched the defendant and the co-defendant pry open the door to a building, enter, and later leave before the police arrived. Two hours later, the witness saw a repetition of the same scenario at the same building. The police arrested them as they left the building. The grand jury heard evidence about both break-ins, but the prosecutor asked that they vote on one count of burglary as to each defendant and did not identify which incident on which they should vote. The grand jury indicted each defendant on only one count of burglary. At trial, the prosecutor alleged that the defendants broke in twice and presented evidence as to both entries. The court then charged the jury that it could convict the defendant on the basis of the first, the second or both entries, provided they was unanimous as to at least one. The jury convicted the defendant on one count of burglary. The defendant argued on appeal that the indictment was deficient because it created speculation about which event was the basis for the jury verdict. The Appellate Division affirmed the conviction.

Holding: The indictment was valid as it charged the defendant with burglary at a specific location and on a particular date. While the prosecutor presented evidence of two burglaries, each offense fit the date, location, and elements specified in the indictment; thus, there was no jurisdictional error. Failure to preserve the issue by objecting to the court's erroneous jury instruction precludes review. Order affirmed.

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

Matter of Garner v NYS Dept of Corr ectional Services, 10 NY3d 358 (2008)

The petitioner pleaded guilty and was sentenced to a determinate prison term. The court did not mention at the plea allocution or at sentencing that there would be a mandatory five-year term of post-release supervision (PRS), and it was not recorded on the commitment order. Four years later, the petitioner learned for the first time that the respondent New York State Department of Correctional Services (DOCS) added a term of PRS to his sentence. The petitioner's PRS was revoked the following year and he was returned to prison. He then filed an Article 78 petition challenging the administratively imposed term of PRS. The trial court denied the petition as time barred, since it was not brought within four months of DOCS's imposition of PRS. The Appellate Division affirmed, finding that DOCS's action was not judicial in nature.

Holding: The petition for a writ of prohibition must be granted. DOCS acted in a judicial capacity and in excess of its jurisdiction when it imposed the PRS. Only the sentencing judge may pronounce the PRS portion of a defendant's sentence. *See* CPL 380.20, 380.40; *People v Sparber*, 10 NY3d 457. "DOCS's imposition of the PRS term contravenes the CPL's express mandate that sentencing is a judicial function and, as such, lies beyond DOCS's limited jurisdiction over inmates and correctional institutions (*see Pirro v Angiolillo*, 89 NY2d 351, 358-359 . . .)." DOCS is bound by the terms of the commitment order. *See Matter of Murray v Goord* , 1 NY3d 29, 32. PRS is a significant punishment component that infringes on a defendant's liberty (*see People v Catu*, 4 NY3d 242, 245), and it is not automatically included in the pronouncement of a determinate sentence. The petitioner has a statutory right to have the sentencing judge impose such a punishment. There is no other remedy to correct the harm suffered by the petitioner as CPL 440.20 only allows challenges to judicially imposed sentences. This holding does not affect any ability the prosecution or DOCS may have to seek resentencing. The constitutional issues raised and the applicability of *Earley v Murray* (451 F3d 71 [2d Cir 2006]) are not addressed. Order reversed, petition granted, and respondent is prohibited from imposing upon the petitioner a period of PRS.

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

People v Sparber, 10 NY3d 457 (2008)

Five defendants sought to have their terms of post-release supervision (PRS) deleted from their sentences because the sentencing courts failed to orally pronounce the PRS at sentencing. Two defendants, Sparber and Thomas, pleaded guilty to violent felony offenses and although the court failed to orally pronounce their terms of PRS, those terms were noted on the commitment sheets. The court had told Thomas during the plea allocution that he was subject to a mandatory five-year term of PRS; in Sparber's case, however, the court did not inform him about the PRS term. The other three defendants, Lingle, Rodriguez, and Ware, were convicted of violent felony offenses after jury trials. In each case, the court did not orally pronounce the PRS term, but the commitment sheet noted the PRS term. All five convictions were affirmed.

Holding: Penal Law 70.00(6) and 70.45(1) mandate that a sentence imposed on a violent felon include a term of PRS. Because PRS is a direct consequence of a guilty plea to a violent felony offense, the court must advise the defendant of the PRS (*see People v Catu* , 4 NY3d 242, 244), and the defendant's plea may be withdrawn if the court fails to do so. Sparber, the only defendant who is entitled to such relief, has disavowed that remedy. The sentencing courts erred in failing to orally pronounce the terms of PRS at sentencing while the defendants were present. *See* CPL 380.20, 380.40; *cf Matter of Hogan v Bohan*, 305 NY 110, 112. This statutory obligation cannot be satisfied by a clerk's notations on a worksheet or commitment sheet, even if the judge endorsed those actions, as the court's sentencing obligations are non-delegable. The appropriate remedy is to vacate the sentences and remit for resentencing hearings at which the courts can make the required oral pronoucements. *See People v Stur gis*, 69 NY2d 816, 817-818. There is no procedural bar to allowing the sentencing judges to correct their sentencing errors. Orders modified by remitting to the sentencing courts for resentencing hearings.

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

Motor Vehicles (Driver's License) (Speeding) **MVH; 260(5) (25)**

People v Cabrera, 10 NY3d 370 (2008)

The defendant, a 17-year-old with a junior "class DJ" license, was driving an SUV with four other teenage passengers down a winding road. Because he did not ensure that all of the passengers buckled their seat belts and he drove with more than two non-family passengers under the age of 21 in the vehicle, the defendant violated his license restrictions. At a sharp curve, the defendant's vehicle swerved and crashed resulting in the deaths of three of the passengers. The trial evidence showed that the defendant was driving too fast when he approached the curve.

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The jury convicted the defendant of three counts of criminally negligent homicide, one count of third-degree assault, and other crimes. The Appellate Division affirmed.

Holding: In order for the defendant to be convicted of criminally negligent homicide, he must have committed an additional affirmative act "to transform 'speeding' into 'dangerous speeding'; conduct by which the defendant exhibits the kind of 'serious[ly] blameworth[y]' carelessness whose 'seriousness would be apparent to anyone who shares the community's general sense of right and wrong' ([*People v*] *Boutin*, 75 NY2d [692] at 696 . . .)." When viewed in the light most favorable to the prosecution, the evidence here did not show the requisite morally blameworthy behavior. "This crash resulted from noncriminal failure to perceive risk; it was not the result of criminal risk creation." Although the defendant's license violations were relevant, the surviving passenger's testimony does not show that the violations caused or contributed to the risk of an accident. Order modified by dismissing the criminally negligent homicide and assault convictions and vacating the sentences imposed thereon, and order affirmed as modified.

Dissent: [Graffeo, J] The evidence showed that the defendant was familiar with the road, that he partially crossed the double yellow line before losing control of the vehicle, and that he did not apply the vehicle's brakes before or during the time he was driving on the curve. Based on this evidence, the jury could have concluded that the defendant was trying to do a racing car-type stunt, which would support the conviction.

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

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

Instructions to Jury (Burden of Proof) **ISJ; 205(20)**

People v Umali, 10 NY3d 417 (2008)

The defendant's trial testimony was not completed in one day and because of a holiday and the court's schedule, the trial was adjourned for four days. Defense counsel did not object when the court ordered counsel not to talk to the defendant about his testimony during the adjournment. A day and a half later, defense counsel asked the court to reconsider its ruling and the court rescinded the order within three hours of the request. The defendant was convicted of first-degree manslaughter. The Appellate Division affirmed.

Holding: The court erred in precluding the attorney-client communications because the ban was for more than a brief duration. *See People v Joseph* , 84 NY2d 995, 997. However, by not objecting to the court's order restricting attorney-client communications when the order was issued, defense counsel failed to preserve the issue for the time period before he challenged the ban. *See People v Narayan*, 54 NY2d 106, 112. After defense counsel's challenge, the court quickly rescinded the order and made sure that defense counsel knew it was rescinded. Because defense counsel still had two and a half days to talk to the defendant and since there is no indication that defense counsel needed additional consultation time, reversal is not required. *See United States v T riumph Capital Gr oup, Inc.*, 487 F3d 124 (2d Cir 2007).

During its instruction on the subjective element of the justification defense, the court erred by stating that the jury should consider whether proof beyond a reasonable doubt existed of the defendant's personal belief that deadly force was necessary. The prosecution had to prove that the defendant did not so believe. However, when viewed in the context of the entire charge, the court correctly informed the jury numerous times that the prosecution had the burden to prove their case, including with regard to its burden to disprove the justification defense. *See People v Drake*, 7 NY3d 28, 33. Thus, "the instructions as a whole could not have misled the jury regarding the applicable burden of proof." Order affirmed.

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

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

People v Azaz, 10 NY3d 873 (2008)

After arguing with his wife, the defendant retrieved a meat cleaver and attacked her. At some point the defendant handed their child to his wife, and continued the attack, cutting the child twice. The defendant was convicted of intentional second-degree murder of his wife and depraved indifference second-degree murder of his son. The Appellate Division affirmed.

Holding: The court properly imposed consecutive sentences. Even assuming that the two blows that resulted in the son's death resulted from acts committed against the mother, the defendant then inflicted additional blows, at least four of which penetrated the wife's skull and brain. "'[T]rial courts retain consecutive sentence discretion when separate offenses are committed through separate acts, though they are part of a single transaction' (*People v Brown*, 80 NY2d 361, 364 [1992])." The defendant failed to preserve for review his argument that his depraved indifference conviction was legally insufficient on a transferred intent theory. The defendant's argument that the court erred in describing the defendant's right to remain silent during voir dire was unpreserved because defense counsel agreed to the court's proposed remedy. Order affirmed.

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

Identification (Lineups) **IDE; 190(30)**

People v Johnson, 10 NY3d 875 (2008)

The defendant was convicted of depraved indifference murder and third-degree criminal possession of a weapon in connection with the shooting death of his brother. The jury acquitted the defendant of intentional murder and second-degree criminal possession of a weapon. The Appellate Division affirmed.

Holding: It is not clear from the Appellate Division's decision whether, when conducting its weight of the evidence review, it assessed the evidence in light of the elements of the crime as charged to the jury, which is required. *See People v Bleakley*, 69 NY2d 490; *see gen People v Danielson*, 9 NY3d 342. The case must be remitted for that assessment. "[W]e express no opinion as to whether the trial judge possessed discretion to impose the conditions on the lineup requested by defendant. Assuming that the trial judge was authorized to do this, she did not abuse her discretion when she denied defendant's application . . . ." Order reversed and matter remitted to the Appellate Division.

Discrimination (Gender) **DCM; 110.5(30)**

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

People v Luciano, 10 NY3d 499 (2008)

During voir dire, defense counsel used eight peremptory strikes, three to strike male jurors and five to strike the remaining women on the panel. The prosecution raised a *Batson* challenge regarding the women jurors. The court accepted three of defense counsel's gender-neutral explanations, but rejected two as pretextual and discriminatory. The court seated the two women and prohibited defense counsel from reusing the two peremptory challenges. The Appellate Division reversed.

Holding: When the court determines that a peremptory challenge was used in a discriminatory manner, the court has the discretion to order forfeiture of those challenges. CPL 270.25, which governs peremptory challenges, was codified prior to *Batson v Kentucky* (476 US 79 [1986]), and does not reflect the current state of the law. That section must be read in light of *Batson* and other constitutional limits on peremptory challenges. "[F]orfeiture does not violate the plain language of the statute because each party began with the proper number of peremptory challenges and exercised the same number of peremptory challenges. The statute makes no promise of permitting litigants to re-use challenges improperly exercised in the first instance." Allowing courts to exercise discretion regarding forfeiture is consistent with *Batson*. Forfeiture signals that discrimination will not be tolerated. "In holding that forfeiture is a permissible remedy, we note that the free exercise of peremptory challenges is a venerable trial tool that should be denied only in rare circumstances." When deciding whether to order forfeiture, the court may consider several factors including whether the challenged juror is able to be reseated, whether the challenge appears to be part of a pattern of discrimination, and the number of challenges that remain. Because the trial judge concluded that forfeiture was mandatory and thus did not exercise the requisite discretion, the defendant is entitled to a new trial. Order affirmed.

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

Homicide (Manslaughter [Evidence]) (Murder [Evidence] [Intent]) **HMC; 185(30[d]) (40[j] [p])**

Matter of Suarez v Byrne, 10 NY3d 523 (2008)

The petitioner was charged with intentional and depraved indifference second-degree murder, first-degree manslaughter, and weapons offenses. As to the intentional murder count, the petitioner asserted the defense of extreme emotional disturbance. The court submitted both murder counts and the manslaughter count to the jury. The court instructed the jury to consider the intentional murder count first, only consider the depraved indifference count if they acquitted the petitioner of intentional murder, and only consider the manslaughter count if they acquitted him of murder. The jury acquitted the petitioner of intentional murder, but found him guilty of depraved indifference murder. That conviction was reversed by the Court of Appeals due to legal insufficiency. *See People v Suarez*, 6 NY3d 202, 216. Upon remand, the Appellate Division held that double jeopardy did not bar retrying the defendant for manslaughter. The Appellate Division denied the petitioner's subsequent Article 78 petition seeking to prohibit the retrial.

Holding: Counts of intentional and depraved indifference murder had to be submitted to the jury in the alternative because they are inconsistent: a person cannot simultaneously act intentionally and recklessly with respect to a death. *See People v Gallagher*, 69 NY2d 525, 529. Unlike in *People v Biggs* (1 NY3d 225), here the intentional manslaughter count was submitted to the jury, but was not considered because of the "acquit-first" instruction and the guilty verdict on the higher count of depraved indifference murder. Since the jury was charged with intentional manslaughter in the first trial, but did not have a full opportunity to consider it, retrial does not violate

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the petitioner's constitutional double jeopardy rights. The jury did not implicitly acquit petitioner of intentional manslaughter when it convicted him of depraved indifference murder. *See Green v United States*, 355 US 184, 191 (1957). A defendant may have different mental states as to different results. A subsequent conviction for intentional manslaughter would not be inconsistent with the original conviction for depraved indifference murder. Judgment affirmed.

Narcotics (Marijuana) (Penalties) (Possession) **NAR; 265(40) (55) (57)**

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

People v Finley, 10 NY3d 647 (2008)

Defendant Salters, a state prison inmate, was convicted of attempted first-degree promoting prison contraband, a class E felony, for trying to get 9.3 grams of marihuana. A prison investigator testified that this amount of marihuana was large enough to be distributed to other inmates, which could endanger the security and safety of staff and inmates. The Appellate Division affirmed. Defendant Finley, also a state prison inmate, was found in possession of three cigarettes, one of which tested positive for marihuana. A prison narcotics expert testified that marihuana is a highly-prized prison commodity that causes negative effects on safety and security. The jury convicted Finley of first-degree promoting prison contraband, a class D felony. The Appellate Division affirmed.

Holding: Small amounts of marihuana do not constitute "dangerous contraband" under Penal Law 205.00(4) and 205.25(2). Not all contraband that can lead to altercations and inmate disobedience is dangerous within the meaning of the statute as such a reading would effectively nullify the misdemeanor offense of second-degree promoting prison contraband. Since the felony offense carries harsher consequences, it is not presumed that the Legislature intended this result. *See People v Giordano* , 87 NY2d 441, 448.

To be dangerous contraband an item's particular characteristics must be such that there is a substantial probability that it will be used in a manner likely to cause death or other serious injury, facilitate escape, or bring about other major threats to institutional safety or security. *See People v Soto* , 77 Misc 2d 427, 429. The small amounts of marihuana in both cases here fall short of this definition. Order in *Salters* modified by reducing the conviction to attempted second-degree promoting prison contraband, order in *Finley* modified by reducing the conviction to second-degree promoting prison contraband, cases remitted for resentencing, and orders affirmed as modified.

Concurrence in part, Dissent in part: [Pigott, J] In *Finley*, the verdict was not supported by legally sufficient evidence. In *Salters*, the evidence at trial was sufficient to demonstrate that the quantity of marihuana that the defendant attempted to possess was dangerous. However, a new trial is required because the judge erred in refusing to charge the lesser-included offense.

Discovery (*Brady* Material and Exculpatory Information) (Matters Discoverable) **DSC; 110(7) (20)**

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

People v Hunter, No. 92, 6/12/2008

The 33 year-old defendant, was convicted of sodomy, but acquitted of rape and sexual abuse. The complainant, a 17 year-old woman, alleged that he raped and assaulted her during a visit to his home. At trial, the defendant claimed that the complainant had consented to their encounter. The credibility of witnesses for both sides and the complainant's reputation for truthfulness was intensely challenged. After the trial, the defendant learned that another man had been indicted for raping the same complainant after the incident involving the defendant. That man claimed that he had consensual sex with the complainant in his home. The prosecution discovered the other case a month before trial, but did not reveal it to defendant. The trial court granted the defendant's CPL 440.10 motion. The Appellate Division reversed.

Holding: The prosecution violated their obligations under *Brady v Maryland* (373 US 83 [1963]) by failing to disclose evidence that the complainant had recently accused another man of rape. The other man's guilty plea to attempted rape three months after the defendant's trial is irrelevant to what the prosecutor's *Brady* obligations were before and at the time of the trial. It is within the trial court's discretion to permit such evidence (*see People v Mandel*, 48 NY2d 952 *cert den* 446 US 949 [1980]), and the court made clear in its 440.10 decision that it would have permitted the defendant to use the evidence, which would not have been an abuse of discretion. Under the circumstances, there is a reasonable probability that had the defendant used the information to impeach the complainant, he would have been acquitted. Order reversed, motion granted, and new trial ordered.

Confessions (*Miranda* Advice) (Voluntariness) **CNF; 70(45) (50)**

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

People v Malaussena, 10 NY3d 904 (2008)

Holding: Declining to suppress the defendant's confessions was not error. Even assuming that he was in

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custody once a detective observed blood on his shoe, any violation of *Miranda v Arizona* (384 US 436 [1966]) did not infect his post-*Miranda* admissions. The defendant voluntarily appeared at the police station to talk to detectives, did not incriminate himself before receiving *Miranda* warnings and had only a brief exchange with the detectives once the interview arguably became a custodial interrogation. "[A]lthough the initial *post-Miranda* interview was conducted by the same detectives and in the same room as the *pre-Miranda* discussions, defendant's decision to disclose the incriminating information was not the function of a continuous chain of events since questioning ceased for approximately four hours before he received *Miranda* warnings and confessed for the first time (*see People v White*, 10 NY3d 286, 292). Consequently, the courts below correctly concluded that the statements were admissible." Order affirmed.

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

People v France, 50 AD3d 266, 854 NYS2d 698 (1st Dept 2008)

Holding: The court properly denied the defendant's motion to suppress physical evidence. Since the reliability of the complainant's identification and statements about the incident were supported by the defendant's statement that he sold the rings that he was accused of stealing, it was not enough for the defendant to deny that he had committed the crime. *See People v Roldan* , 37 AD3d 300 *lv den* 9 NY3d 850. The defendant failed to show that the police acted unreasonably when they relied on the complainant's statements (*see Spinelli v United States* , 393 US 410 [1969]) by disputing that the complainant had identified him or denying that he gave the statement; thus, there was no factual issue that required a hearing. *See People v Mack*, 281 AD2d 194 *lv den* 96 NY2d 903. The defendant had sufficient information about the evidence the police relied upon to establish probable cause for his arrest. Judgment affirmed. (Supreme Ct, New York Co [Goodman, J])

Dissent: [Andrias, J] Because the information provided to the defendant was insufficient, the court should have held a hearing. The prosecution's pleadings do not support the conclusion that the defendant knew at the time of his arrest that he had been identified as the perpetrator and they are unclear regarding the circumstances surrounding the defendant's statement and the identification. And the prosecution did not disclose the complainant's identity. *See People v Bryant*, 8 NY3d 530.

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

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

People v Mattocks, 51 AD3d 301, 855 NYS2d 106 (1st Dept 2008)

The defendant was convicted of second-degree criminal possession of a forged instrument. The defendant was arrested after police saw him use bent MetroCards to swipe riders into the subway in exchange for money, and a search revealed 14 cards and three dollars in cash. Expert testimony showed that bending the magnetic strip of a zero balance card in a certain way can allow a person to enter the subway without paying the fare.

Holding: A bent MetroCard fits within the definition of a falsely altered written instrument (*see* Penal Law 170.00[6]), when it has been altered to make it appear authentic to the scanning device in the turnstiles and allow an individual admission to the subway. *See gen People v Owens*, 12 Misc 3d 600. The defendant had standing to move to suppress the physical evidence based on the allegations that the police found the MetroCards on the defendant. *See People v Burton*, 6 NY3d 584, 589. However, the court correctly denied the motion without a hearing as the complaint included specific allegations regarding the defendant's actions and the evidence found on him after his arrest and the defendant failed to address any of those allegations and only gave a general denial that he engaged in criminal activity when he was arrested. Judgment affirmed. (Supreme Ct, New York Co [Solomon, J (pretrial motion); Kahn, J (trial and sentence)])

Evidence (Other Crimes) (Prejudicial) — **EVI; 155(95) (106)**

Larceny (Lesser and Included Offenses) — **LAR; 236(60)**

People v Parker, 50 AD3d 330, 854 NYS2d 397 (1st Dept 2008)

The defendant was convicted of fourth-degree larceny for stealing money from the complainant after arranging a sham transaction.

Holding: The court incorrectly allowed the prosecution to admit evidence regarding the defendant's conviction for a similar crime to establish the defendant's identity because of a similar modus operandi. The prejudice to the defendant outweighed the probative value of the evidence and the court's limiting instruction did not eliminate that prejudice. And the defendant's identity was not

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actually in issue as the complainant was able to identify him in a lineup after having ample time to view him, he recognized the defendant's voice, and the prosecution presented a record of calls placed by the complainant to the defendant's home. *See People v Condon* , 26 NY2d 139, 142. However, the error was harmless given the strength of the other evidence against the defendant. The court correctly denied the defendant's motion to suppress the lineup identification because the defendant was in lawful custody for a similar crime when he was identified. *See People v Whitaker*, 64 NY2d 347. The court properly declined to charge petit larceny as a lesser included offense of grand larceny, as there was no evidence that the amount allegedly stolen was less than $1,000. Judgment affirmed. (Supreme Ct, New York Co [Goodman, J])

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

Search and Seizure (Automobiles and Other Vehicles [Impound Inventories]) (Motions to Suppress [CPL Article 710]) — **SEA; 335(15[f]) (45)**

People v Gomez, 50 AD3d 407, 859 NYS2d 621 (1st Dept 2008)

After the police arrested the defendant for driving with a suspended license, they impounded his car and conducted a warrantless search that yielded drugs and other evidence in the trunk and in a door panel.

Holding: The court erred in denying the motion to suppress because the inventory search was not valid. The prosecution failed to show that the police conducted the search in accordance with a standardized procedure which limited the conduct of individual officers and that a meaningful inventory list was created. *See People v Johnson*, 1 NY3d 252, 256. The prosecution did not introduce evidence regarding when the police would be justified in opening a closed trunk or a door panel under their patrol guide procedures. *See People v Colon*, 202 AD2d 708 *lv den* 84 NY2d 824. Even if the prosecution showed that the search was conducted in accordance with a reasonable standardized procedure, suppression is required as there was no evidence that the police created an inventory of the items found in the car and one officer testified that he did not think that there was an official form for inventory lists. Judgment reversed, suppression motion granted, plea vacated, and indictment dismissed. (Supreme Ct, New York Co [Carro, J])

Dissent: [McGuire, J] Because the defendant did not raise the specific arguments that he presented in the appeal, the issues are unpreserved and should not be reviewed in the interest of justice.

Assault (General) (Instructions) — **ASS; 45(27) (45)**

Domestic Violence (General) (Spousal Abuse) — **DVL; 123(10) (50)**

Trial (Confrontation of Witnesses) — **TRI; 375(5)**

People v Byrd, 51 AD3d 267, 855 NYS2d 505 (1st Dept 2008)

The defendant was convicted of first- and second-degree assault, but was acquitted of attempted murder. The defendant hit his wife's head on a tile floor and while wearing hard plastic sandals, stomped on her abdomen, breaking her ribs and injuring her pancreas, and refused to let her get medical attention. His wife testified before the grand jury, but she refused to testify at trial.

Holding: The court correctly admitted the wife's grand jury testimony at trial as the prosecution proved by clear and convincing evidence that the defendant's actions induced her unavailability. *See People v Geraci* , 85 NY2d 359, 366-367. During a *Sirois* hearing, the wife testified that she decided on her own not to testify. However, the prosecution presented evidence that the defendant called her from prison more than 400 times, despite an order of protection, and apologized and told her he wanted to keep the family together. And there was testimony that the wife feared the defendant and an expert witness testified that the refusal to testify was consistent with battered person syndrome. The court properly admitted the domestic abuse history and the expert testimony; a *Frye* hearing was not necessary as such testimony is widely accepted in New York, even though this particular use may be a fairly new application of the theory. The court correctly admitted the expert's trial testimony as the average juror would not likely understand why a battered spouse would refuse to testify. *See People v Ellis* , 170 Misc 2d 945, 952-953. The defendant's shod foot could be a dangerous instrument for purposes of first-degree assault (*see eg People v Lev* , 33 AD3d 362), and the evidence supported the conclusion that the way that the defendant used the sandal was readily capable of causing serious physical injury. Judgment affirmed. (Supreme Ct, New York Co [Yates, J])

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

People v George, 50 AD3d 453, 855 NYS2d 501 (1st Dept 2008)

Holding: The court incorrectly denied the defendant's challenge for cause to a prospective juror in a narcotics case. The prospective juror stated that he may be judgmental in a drug case because of his interaction with drug users who have acquired HIV and appeared uncomfortable about sitting on the case. The court failed to elicit

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unequivocal assurance from the prospective juror that he would put aside his personal views and render an impartial verdict. *See People v Johnson* , 94 NY2d 600, 614. The prospective jurors's statements that he "would try to be open-minded" and that he "could probably follow the law" did not provide such assurance, particularly in light of the overall tone of the statements and his failure to fully respond to specific questions regarding his impartiality. Judgment reversed and matter remanded for a new trial. (Supreme Ct, New York Co [Padro, J])

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

Witnesses (Credibility) (Cross Examination) **WIT; 390(10) (11)**

People v Henderson, 50 AD3d 439, 855 NYS2d 490 (1st Dept 2008)

The defendant was convicted of attempted first-degree assault for stabbing a fellow inmate. Two correction officers testified that they saw the defendant stab the inmate, but the inmate-complainant testified that he was attacked by three other inmates whom he could not identify.

Holding: The defendant's right to a fair trial was not violated by the prosecution's cross-examination of the complainant or by remarks he made during summation. The prosecution made an appropriate limited inquiry into whether the complainant may have been intimidated or may legitimately expect reprisal, and the prosecutor's comments during summation regarding the complainant's failure to identify the defendant were proper comments on his credibility and were an appropriate response to defense counsel's rhetorical question of why none of the inmates who were present during the incident said that the defendant was involved. Judgment and order denying the CPL 440.10 motion affirmed. (Supreme Ct, Bronx Co [Seewald, J])

Dissent: [Catterson, J] The conviction should be reversed because the prosecution's comments and insinuations about the intimidation of the complainant substantially prejudiced the defendant. The prosecution did not offer evidence that the complainant was intimidated and instead used the complainant's denials as evidence of witness intimidation.

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

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

People v Wright, 50 AD3d 429, 855 NYS2d 475 (1st Dept 2008)

Holding: The court properly denied the defendant's speedy trial motion. The prosecution's unequivocal statements of readiness were not illusory, even though the prosecution did not yet have forensic evidence and medical records that they introduced at trial. CPL 30.30 does not prevent the prosecution from declaring readiness, even though they are still gathering evidence to strengthen their case. The defendant's argument that the prosecution did not comply with their *Brady* obligation to determine if forensic tests produced exculpatory evidence is irrelevant as "discovery failures have no bearing on the People's readiness (*People v Anderson* , 66 NY2d 529, 543 [1985])." The prosecution's summation statements did not deprive the defendant of a fair trial as they were a fair response to defense counsel's implications during summation that there was collusion among the prosecution's witnesses and collective tailoring of their testimony. *See People v Overlee* , 236 AD2d 133 *lv den* 91 NY2d 976. Judgment affirmed. (Supreme Ct, Bronx Co [Mogulescu, J (speedy trial motion); Gross, J (trial and sentence)])

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) (Vacatur) (Withdrawal) **GYP; 181(25) (55) (65)**

Sentencing (General) (Pronoucement) **SEN; 345(37) (70)**

People v Boyd, 51 AD3d 325, 856 NYS2d 71 (1st Dept 2008)

The defendant pleaded guilty and the court sentenced him to a determinate term of imprisonment, but failed to impose a period of post-release supervision (PRS). At the plea allocution, the court told the defendant that PRS is mandatory, but did not state the duration of such supervision.

Holding: Because the court failed to advise the defendant of the duration of PRS that could or would be imposed, the defendant was deprived of his ability to knowingly, voluntarily, and intelligently choose a course of action, a violation of his due process rights. *See People v Catu*, 4 NY3d 242, 245. The court is constitutionally required to ensure that a defendant fully understands what the plea means and its consequences (*see People v Ford*, 86 NY2d 397, 402-403), and the defendant should not be penalized for the court's failure to fulfill its duty. Since the record clearly shows that the court did not meet its obligation, the defendant must raise the issue on direct appeal and not in a CPL article 440 motion. As the court's omissions resulted in the defendant's incorrect understanding of the consequences of his plea, the defendant must be allowed to withdraw his plea. Judgments reversed, pleas vacated, full indictment reinstated, and matter remitted. (Supreme Ct, New York Co [Grella, J])

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Dissent: [McGuire, J] The defendant's claim is unpreserved and the prudent step would be for the court to defer decision on the appeal until after the Court of Appeals rules on several cases involving similar PRS issues.

Accusatory Instruments (Amendment) (Sufficiency) **ACI; 11(5) (15)**

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

People v Martinez, 52 AD3d 68, 855 NYS2d 522 (1st Dept 2008)

The police collected a semen sample from a complainant who was sexually assaulted. After an investigation and attempts to match the DNA profile to a profile in a DNA databank failed, a grand jury indicted "John Doe," who was identified by the DNA profile. Years later, when the defendant's profile was added to the databank, the system returned a match with the John Doe profile. After he was arrested, the prosecution orally amended the indictment by adding the defendant's name, and the defendant raised no objection to the amendment. The defendant pleaded guilty to attempted rape.

Holding: The defendant's constitutional right to notice was satisfied because the indictment identified him by his DNA markers. Because the notice claim is technical rather than jurisdictional, the defendant waived it by pleading guilty. *See People v Hansen*, 95 NY2d 227, 230-231. At the arraignment, the defendant was told of the charges against him and he received a copy of the indictment; thus, he was on notice that he was the "John Doe" defendant. CPL 200.50 does not require that a defendant be referred to in a particular manner. DNA indictments are now used in a number of states and by the federal government. Had the defendant gone to trial, he would have had an opportunity to examine the lab technician who compared the DNA profiles or to otherwise dispute the conclusion. *See People v Rawlins*, 10 NY3d 136. Problems that may arise with DNA indictments, such as when a DNA sample is so small that the prosecution's initial tests consume the entire sample and the defendant is unable to confirm or to challenge the prosecution's tests, can be dealt with on a case-by-case basis. *See People v Vernace*, 96 NY2d 886, 887. Judgment affirmed. (Supreme Ct, New York Co [Wittner, J])

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

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

People v Cruz, 50 AD3d 490, 855 NYS2d 144 (1st Dept 2008)

The court precluded the defendant's daughter from testifying regarding the events that occurred at the time of the alleged drug sale. She was expected to testify to a scenario that was very different from the one given by an undercover officer.

Holding: The court erred in precluding the testimony of the defendant's daughter. Although her testimony, if believed, would not have made the prosecution's scenario impossible, it did support the defendant's defense and his testimony, and would have made the scenario unlikely. *See People v Cuevas*, 67 AD2d 219, 223-225. Since there was no evidence that the testimony was primarily intended to garner sympathy or that the prosecution was unduly prejudiced, the testimony should not have been excluded as irrelevant. The court incorrectly precluded the testimony as alibi evidence for which the defendant failed to provide notice. As the prosecution concedes, the testimony was not alibi testimony. Even if the daughter was considered an alibi witness, there is no evidence that the failure to provide notice resulted from anything other than defense counsel's good faith belief that notice was not required, and the court should have allowed the testimony after giving the prosecution a reasonable opportunity to prepare. *See* CPL 250.20(3). Judgment reversed and matter remanded for a new trial. (Supreme Ct, New York Co [Wetzel, J])

Aliens (Immigration) **ALE; 21(40)**

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

Matter of Antowa McD. v Wayne McD., 50 AD3d 507, 856 NYS2d 576 (1st Dept 2008)

Holding: The court erred in denying the appellant-child's motion for findings of fact that would enable her to petition for Special Immigrant Juvenile Status. The record "clearly establishes parental abandonment, contains a statement from the mother that she is unable 'to give [appellant] the love and attention she needs,' and clearly establishes that it is appellant's best interests to continue living in her aunt's loving and nurturing home. Family Court's appointment of a guardian constitutes the necessary declaration of dependency on a juvenile court (*Matter of Jose A. Menjivar*, 29 Immig Rptr B2-37 [1994], construing, inter alia, 8 CFR 204.11[a])." Order reversed, motion granted, and matter remanded for an order making the requested findings. (Family Ct, Bronx Co [Cordova, J])

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

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

Misconduct (Judicial) (Prosecution) **MIS; 250(10) (15)**

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People v Raosto, 50 AD3d 508, 856 NYS2d 86 (1st Dept 2008)

Holding: The defendant was deprived of his right to a fair trial because of numerous errors by the court, the prosecution, and defense counsel. The trial judge acted improperly by cross-examining the defendant and defense witnesses in a way that interrupted the flow of the testimony and showed his disbelief of the witnesses. *See People v Ellis* , 62 AD2d 469, 470. The prosecutor committed prejudicial error by improperly impeaching the defendant about not reporting to the police his belief that he was being framed by the arresting officer, by eliciting statements the defendant made that should have been disclosed under CPL 240.20(1)(a), and by impeaching him using statements made by former defense counsel that were not fairly attributed to him. The defendant was deprived of effective assistance of counsel. Defense counsel was careless and inattentive during the trial, he contradicted the testimony of the defense witnesses, he failed to object to the court's and the prosecution's errors, and he elicited inaccurate and prejudicial information about the defendant's prior record. And there was substantial evidence that defense counsel, who was convicted of a felony drug offense soon after the trial, was using heroin throughout the proceedings. No strategic explanations exist for these errors. All of these errors were not harmless. Judgment reversed and matter remanded for a new trial. (Supreme Ct, New York Co [McLaughlin, J])

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

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

People v Price, 51 AD3d 405, 856 NYS2d 483 (1st Dept 2008)

Holding: Defense counsel sought to be relieved as counsel and submitted a brief pursuant to *People v Saunders* (52 AD2d 833), in which he conceded that the defendant was ineligible for resentencing because his resentencing motion was received less than three years from his alleged parole eligibility date. There are potentially nonfrivolous issues regarding when the defendant's resentencing motion should be deemed made and whether merit time reductions on his potential release date change the calculation of his eligibility to apply for resentencing. Appeal held in abeyance and counsel directed to file a supplemental brief. (Supreme Ct, New York Co [Soloff, J])

Evidence (Prejudicial) (Relevancy) **EVI; 155(106) (125)**

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

People v Caban, 51 AD3d 455, 857 NYS2d 118 (1st Dept 2008)

The defendant drove backwards down a one-way street and when she entered the pedestrian right of way against a red light, she struck a pedestrian, who sustained fatal injuries. The defendant was convicted of criminally negligent homicide.

Holding: While the evidence was sufficient to support the verdict, the trial court erred in allowing testimony that the defendant's driver's license was suspended at the time of the incident. The evidence was irrelevant as it was not a necessary background fact and it was not probative on the issue of criminal negligence, and it was sufficiently prejudicial to be reversible error. "Even in a personal injury action arising from a motor vehicle accident, this Court has held that a defendant's 'license suspension was clearly irrelevant to the issues of negligence and proximate cause' and 'could have had no purpose other than to prejudicially influence the jurors' (*White v Molinari*, 160 AD2d 302, 303). This principle would have at least equal applicability in a criminal case . . . ." Judgment reversed and matter remanded for a new trial. (Supreme Ct, New York Co [Goodman, J])

Misconduct (Judicial) (Prosecution) **MIS; 250(10) (15)**

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

People v Moye, 52 AD3d 1, 857 NYS2d 126 (1st Dept 2008)

The jury was unable to reach a verdict in the defendant's first trial. During that trial, defense counsel impeached the prosecution's photographs of the crime scene by showing that the police officers could not have seen the defendant's hand extend out of the car to hand drugs to a codefendant. At retrial, the prosecution presented photographs of a recreation of the scene, in which a police officer played the part of the defendant and extended his hand from a car that was allegedly parked where the defendant's car had been. Police officer Jeselson testified that the officer's hand could be seen from his vantage point; however, the district attorney's office employee who took the photos testified that Jeselson had the car moved to another position because he could not see the officer's hand from the first location. After the defense accused the officer of perjury during summation, the prosecutor responded that Jeselson had no opportunity to frame the defendant since he was personally there when the photos were taken, vouched for Jeselson's credibility, and referred to the integrity of the District Attorney's office.

Holding: Throughout his summation, the prosecutor improperly vouched for witnesses and acted as an unsworn witness. *See People v Lovello*, 1 NY3d 436. Defense counsel properly drew attention to inconsistencies in the

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testimony which related to the visibility issue that led to the prior mistrial, and the prosecutor's statements were not a necessary response. The court erred in overruling defense counsel's objections to the summation and telling the jury that it could accept the prosecutor's argument as to what happened during the recreation. The statements of the prosecutor and the court were highly prejudicial, and are reversible error. Judgment reversed, judgment vacated, and matter remanded for a new trial. (Supreme Ct, New York Co [Bradley, J])

Dissent: [McGuire, J] "I would affirm as I believe the prosecution responded in a restrained manner to a reprehensible and unsupported personal attack on his integrity by defense counsel."

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

People v Tejada, 51 AD3d 472, 857 NYS2d 558 (1st Dept 2008)

Holding: The court properly adjudicated the defendant as a level two sex offender by assessing points for several risk factors. As the defendant's only prior contacts with the victim were internet exchanges for three days, the defendant and victim were clearly strangers at the time of the crime, meaning that the court properly assessed points under the risk factor for relationship with the victim. To the extent that there was any relationship, it was primarily for purposes of victimization, an alternative basis for the assessment. The defendant's admission was sufficient to establish the factor of alcohol abuse. *See People v Reyes,* 48 AD3d 267. Even though it was a matter beyond the defendant's control, the court also properly assessed points under the factor for lack of supervised release. *See People v Lewis,* 37 AD3d 689, 690 *lv den* 8 NY3d 814. Order affirmed. (Supreme Ct, New York Co [Solomon, J])

Sentencing (Mandatory Surcharge) (Pronouncement) **SEN; 345(48) (70)**

People v Harris, 51 AD3d 523, 857 NYS2d 562 (1st Dept 2008)

Holding: "The imposition of mandatory surcharges and fees by way of court documents, but without mention in the court's oral pronouncement of sentence, was lawful. . . . Although fees and surcharges are part of a defendant's sentence for the purpose of appealability and reviewability, . . . they are essentially revenue-raising or cost-shifting devices, . . . and, unlike post-release supervision, are not sentencing components of such significance that they may only be imposed in accordance with CPL 380.20 and 380.40." *See People v Quinones* , 95 NY2d 349, 352. Judgment affirmed. (Supreme Ct, New York Co [Obus, J])

Habeas Corpus (General) (State) **HAB; 182.5(20) (35)**

Sentencing (Mandatory) (Pronouncement) (Resentencing) **SEN; 345(47.5) (70) (70.5)**

People ex rel Lewis v Warden, 51 AD3d 512, 858 NYS2d 141 (1st Dept 2008)

Holding: The court properly concluded that the defendant's sentence did not include post-release supervision and that the post-release supervision term imposed by the Department of Correctional Services (DOCS) was invalid. The sentencing court never pronounced the post-release supervision term at sentencing, as CPL 380.20 and 380.40 require, and DOCS lacks the authority to impose such a term. *See Matter of Garner v New Y ork Dept. of Correctional Servs.*, 10 NY3d 358. "Since the parole warrant alleged a violation of a nonexistent portion of petitioner's sentence, it was not a valid basis for his detention." As a footnote, the "decision is without prejudice to an appropriate application for resentencing . . . ." Order affirmed. (Supreme Ct, Bronx Co [Cirigliano, J])

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

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

People v Gutierrez, 51 AD3d 536, 859 NYS2d 32 (1st Dept 2008)

Holding: The record does not establish any compliance with the statutory mandate of the Drug Law Reform Act (L 2005, ch 643) that "'[t]he court shall offer an opportunity for a hearing and bring the applicant before it' . . . . " The court's order stating that "'substantial justice requires that this motion [for resentencing] be denied' . . ." also does not comply with the requirement of the Act that any such order "'must include written findings of fact and the reasons for such an order' . . . . " Order reversed and matter remanded for a de novo determination. (Supreme Ct, New York Co [Torres, J])

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

People v Edwards, 51 AD3d 540, 857 NYS2d 567 (1st Dept 2008)

The defendant raises issues relating to the voluntariness of his plea and the effectiveness of his counsel's representation. Yet, the defendant also stated that he did not want his plea to be vacated and requests only that the

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court remand for resentencing or make a discretionary reduction in his sentence.

Holding: Neither of the defendant's requested remedies are appropriate. His claims are also without merit, except that the court erred in not informing him of a period of post-release supervision, rendering his plea involuntary. However, as the sole remedy for this error is vacatur, which the defendant refuses, the court is required to remit for resentencing. *See People v Sparber* , 10 NY3d 457. Judgment modified, matter remitted for resentencing that shall impose post-release supervision as mandated by statute, and otherwise affirmed. (Supreme Ct, New York Co [Wetzel, J])

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

People v Otero, 51 AD3d 553, 858 NYS2d 157 (1st Dept 2008)

The court granted the defendant a *Dunaway* hearing on whether an undercover officer's identification of the defendant was the fruit of an unlawful seizure, but denied the defendant's motion to suppress physical evidence.

Holding: The prosecution concedes that the defendant is entitled to a hearing on suppression of money recovered from his person. He is also entitled to a hearing as to suppression of evidence recovered from a jacket found on a windowsill in the defendant's vicinity. The defendant established a reasonable expectation of privacy in the jacket, and the claim as to the jacket is grounded in the same facts and involves the same police witnesses as that regarding the money. *See People v Mendoza* , 82 NY2d 415, 429. As CPL 710.60(3) only permits, not requires, summary denial, judicial economy also militates in favor of a hearing on the full suppression motion despite a perceived pleading deficiency. *See People v Rivera,* 42 AD3d 160, 161. Appeal held in abeyance and matter remanded for a hearing on the defendant's suppression motion. (Supreme Ct, New York Co [Goodman, J])

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

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

People v Williams, __ AD3d __, 858 NYS2d 147 (1st Dept 2008)

Despite defense counsel's assertion of his client's *Antommarchi* right to be present, the defendant was not present during the sidebar questioning of three potential jurors. One was a former coworker of the defendant's, who was seated as a juror. Two others were excused on consent.

Holding: A defendant has a fundamental right to be present at all material stages of trial. A sidebar discussion with a prospective juror regarding the juror's "background, bias and ability to be impartial is considered a material stage of a trial." None of these potential jurors were excused for cause by the court; the defendant's absence was reversible error. *See People v Maher*, 89 NY2d 318, 325. The defendant did not implicitly waive her right to be present by being absent from ten sidebar discussions, four of which involved questions related to juror qualifications and one of which involved the questioning of a sworn juror, not implicating the right to be present. There is no inference from these that the defendant also wished to be absent from conversations touching on partiality. Waiver cannot be inferred from a silent record. *See People v Lucious* , 269 AD2d 766, 767. The prosecution's speculative suggestion that the defendant may have been able to hear what was said because she was seated only 12 feet away is unavailing. A reconstruction hearing is unnecessary because the record does not show that the defendant waived her rights after asserting them in open court. Judgment reversed and matter remanded for a new trial. (Supreme Ct, Bronx Co [Massaro, J])

Dissent in part: [Buckley, J] A reconstruction hearing is necessary to determine whether the sidebar with the coworker was conducted so as to permit the defendant to see and hear the colloquy. Only until after this hearing is conducted, can it be determined if a new trial is necessary. *See People v Davidson*, 210 AD2d 76.

Juveniles (Delinquency) (Hearings) **JUV; 230(15) (60)**

Matter of Jonathan C., 51 AD3d 559, 859 NYS2d 57 (1st Dept 2008)

The judge that presided over the appellant's hearing dismissed the petition against three juveniles whom the appellant allegedly acted in concert with in sexually abusing the victim, but denied the appellant's motion to vacate an order of disposition and adjudicated him a juvenile delinquent upon a fact-finding determination.

Holding: In the interest of justice, "a substantial change in circumstances exists and the appellant should be granted a new fact-finding hearing at which he would be given the opportunity to elicit impeaching testimony introduced at the other three juveniles' hearing (*see* Family Court Act 355.1)." This is so even though it is generally no defense that a co-actor "'has not been prosecuted for or convicted of any offense based upon the conduct in question, or has previously been acquitted thereof' (Penal Law 20.05[2] . . .)." Order reversed, motion granted, juvenile delinquency adjudication vacated, and matter remanded for new fact-finding and dispositional hearings before a different judge. (Family Ct, Bronx Co [Drinane, J])

First Department *continued*

Search and Seizure (Detection) (Warrantless Searches [Plain-view Objects]) **SEA; 335(25) (80[k])**

People v May, Nos. 3627/06, 3256, 3256A, 1st Dept, 5/27/2008

After seeing the defendant's car parked in a no standing zone, police followed the vehicle, believing its occupants to be involved in drug activity. The defendant got out and police questioned the passenger. The defendant returned. When one officer radioed the dispatcher and was unsatisfied with his response of "no hit," he ran a background check and learned that there was an outstanding warrant for the defendant. By then, 40 minutes had passed. The officer asked the defendant to step out of the car, turned on the lights, and saw vials of marijuana. After the men were arrested, cocaine was found on them. The court suppressed both the marijuana and the cocaine.

Holding: The prosecution did not challenge the suppression of the marijuana, agreeing that it was not in plain view when the door was opened, making the search of the car illegal. The court also properly suppressed the cocaine, as the arrest was made after an unlawful detention. While the request for limited information in accordance with a traffic violation was proper, the police lacked the requisite reasonable suspicion that criminal activity was occurring or imminent that is needed to validate the lengthy detention. The detention was based only on a professional hunch, which any minor discrepancies between the defendant and his passenger's responses and the dispatcher's unsatisfactorily brief response cannot substantiate. *See People v Banks*, 85 NY2d 562. The information the officers ultimately received of the warrant also did not "'purge . . . any taint'" caused by the unlawful detention. *See People v Sobotker* , 43 NY2d 559, 565. Orders affirmed. (Supreme Ct, New York Co [Kahn, J])

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

Matter of Miriam M. v Warren M., 51 AD3d 581, 859 NYS2d 66 (1st Dept 2008)

The court granted a two-year order of protection against the respondent and in favor of the petitioner, but refused to include in the conditions of that order that the respondent stay away from the petitioner's domestic partner.

Holding: The court erred in concluding that it was unable to provide relief for the domestic partner because "the Family Court has the authority to impose reasonable conditions when they are 'likely to be helpful in eradicating the root of family disturbance' (*Matter of Leffingwell v Leffingwell*, 86 AD2d 929, 930 . . .), and Family Court Act . . . 842(a) provides that the [court] may order respondent to stay away from 'any . . . specific location,' which under the circumstances should include [the domestic partner] and her place of employment, as it would go toward achieving the purpose of fully protecting petitioner . . . . " Yet, the court did not err in refusing to direct the respondent to refrain from committing a family offense against the domestic partner, as a family offense is defined only as an offense between members of the same family. Under 22 NYCRR 205.74, the court could not order the respondent to refrain from communicating with the domestic partner. As the partner does not fall within the statutory definition of "'member of the same family or household,'" the court also did not err in refusing to make a finding of aggravating circumstances under Family Court Act 827(a)[vii]. Order modified, condition added to the order of protection directing the respondent to stay away from Ms. Diaz and her place of employment, and otherwise affirmed. (Family Ct, Bronx Co [Martinez-Perez, J])

Second Department

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

People v Berry, 49 AD3d 888, 854 NYS2d 507 (2nd Dept 2008)

Holding: The court erred in admitting the detective's testimony about statements made by an individual who did not testify at trial which plainly implied that the defendant was the perpetrator. The court also erred in allowing the prosecutor to comment on the non-testifying witness's statements and in failing to give any curative instruction regarding the evidence. The admission of that testimony violated the defendant's right to confrontation. *See Davis v Washington*, 547 US 813 (2006). The court's ruling on the defendant's objection, which made clear that the court confronted and dealt with the issue, shows that the defendant preserved it for appellate review. *See People v Feingold*, 7 NY3d 288. Because the evidence in this single witness identification case was not overwhelming and based on the record as a whole, "it cannot be said that there is 'no reasonable possibility that the erroneously admitted evidence contributed to the conviction' (*People v Johnson*, 7 AD3d [732] at 733 . . .)." The error was not harmless and the defendant must be given a new trial. Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [Buchter, J])

Appeals and Writs (Counsel) (General) **APP; 25(30) (35)**

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

Second Department *continued*

Search and Seizure (Appellate Review) (Consent [Third Persons, by]) **SEA; 335(5) (20[p])**

People v Borrell, 49 AD3d 890, 855 NYS2d 186 (2nd Dept 2008)

Holding: The defendant moved for leave to reargue his application for a writ of error coram nobis to vacate, on the ground of ineffective assistance of counsel, this Court's prior decision that affirmed his convictions. That motion is granted, the writ or error coram nobis is granted, and the prior appellate decision is vacated and a new decision is substituted therefore. The trial court erred in denying the defendant's motion to suppress physical evidence seized from his apartment. The police had no authority to conduct a warrantless search after the key provided to them by the defendant's estranged wife did not work. *See People v Yalti*, 76 AD2d 847. "[S]ince the evidence of distinctive clothing recovered during the search should also have been suppressed, and the clothing provided significant support for the identification of the defendant as the masked man responsible for the robberies and burglary . . . , the convictions with respect to those counts must be vacated . . . ." Judgment rendered in June 1998 modified, weapons convictions vacated and those counts dismissed, robbery and burglary convictions vacated, motion to suppress physical evidence granted, and matter remitted for a new trial on the remaining counts. Judgment rendered in December 1998 modified by providing that the sentences for counts three and six shall run concurrently with each other, as they arose from a single transaction, and consecutively to the sentences imposed on the remaining counts. (Supreme Ct, Queens Co (Eng, J [June judgment]; Roman, J [December judgment])

Probation and Conditional Discharge (Revocation) **PRO; 305(30)**

People v Almonte, 50 AD3d 696, 855 NYS2d 209 (2nd Dept 2008)

Holding: The court erred in revoking the defendant's sentence of probation without holding a revocation hearing pursuant to CPL 410.70. At the court proceeding regarding the violation, no testimony was adduced (*cf People v Etheridge* , 46 AD3d 835), and the prosecution relied on statements by a probation department representative. The court failed to give the defendant an opportunity to be heard, as required by CPL 410.70(1). Further, the record does not show whether the defendant received prior notice of an "added specification" that the department representative provided to the court at the proceeding. Amended judgment reversed, sentence of imprisonment vacated, and matter remitted for a probation revocation hearing. (Supreme Ct, Kings Co [Holdman, J])

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

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

Matter of Eberhart v Crozier, 50 AD3d 686, 854 NYS2d 747 (2nd Dept 2008)

The petitioner filed a CPLR article 78 petition seeking to compel the respondent, under the Freedom of Information Law (FOIL), to produce certain documents and allow access to a spent bullet that was recovered at his home. In response to the petition, the respondent produced the requested documents and indicated that the petitioner would be permitted access to the bullet.

Holding: The court erred in denying as academic the portion of the petition seeking a copy of the full police department clerk voucher number 95830. The respondent produced a copy of the voucher that did not include the bottom portion of the document, including the property clerk receipt number, but did not claim that the missing information was exempt under FOIL. With regard to the bullet, the respondent now argues that it is not a record within the meaning of FOIL and therefore he is not required to permit access to it. However, because the respondent took a contrary position in the lower court, which induced the court to deny as academic that part of the petition, the argument is not properly before this Court. Judgment modified, provision denying as academic the branch of the petition that sought the production of a complete copy of police voucher deleted and replaced by a provision granting that branch of the petition, judgment affirmed as modified, and ordered that respondent must produce the a complete copy of the voucher within 30 days after service upon him of a copy of the decision and order. (Supreme Ct, Westchester Co [Cacace, J])

Counsel (Advice of Right to) (Right to Counsel) (Waiver) **COU; 95(5) (30) (40)**

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

Matter of Guzzo v Guzzo, 50 AD3d 687, 855 NYS2d 197 (2nd Dept 2008)

Holding: A party in a Family Court Act article 8 proceeding has the right to be represented by counsel. *See* Family Court Act 262(a)(ii). When the respondent initially appeared in response to the family offense petition, he was represented by counsel in the parties' matrimonial action. When he told the court that he could not afford counsel for the family court proceeding, the court allowed him to proceed pro se. The court did not tell the respondent that he had the right to have counsel assigned, nor

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did the court ask the respondent about his financial condition. The court erred by failing to advise the respondent of the risks of self-representation and not conducting an inquiry to determine if the respondent waived his right to counsel knowingly, voluntarily, and intelligently. *See People v Arroyo*, 98 NY2d 101, 103. Thus, the determination on the petition must be reversed. Amended order of protection reversed, matter remitted for a new hearing and determination, and temporary order of protection is reinstated pending the new determination. (Family Ct, Suffolk Co [Hoffmann, J])

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

People v Pendelton, 50 AD3d 659, 855 NYS2d 191 (2nd Dept 2008)

Holding: The prosecution failed to establish by clear and convincing evidence that the court should assess 10 points under risk level factor 10, "Recency of prior felony or sex crime." That factor provides for the assessment of 10 points where the defendant has a prior conviction or adjudication for a felony or sex crime that occurred less than three years before the instant offense. *See Sex Offender Registration Act: Risk Assessment Guidelines* [1997 ed.]. The Commentary to the Risk Assessment Guidelines provides that the three years should be measured without regard to time periods during which the defendant was incarcerated or civilly committed. Because the defendant's earlier conviction was more than three years before the current offense, the prosecution relied on the tolling provision. However, the prosecution failed to provide proof that the defendant's period of incarceration was sufficient to bring his prior crime within the three year time period. Without the 10 points, the defendant's presumptive risk level is reduced from a level three to a level two. Order reversed and the defendant is adjudicated a level two sex offender. (County Ct, Suffolk Co [Hudson, J])

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

People v Curry, 50 AD3d 820, 854 NYS2d 319 (2nd Dept 2008)

Holding: When the court sentenced the defendant to a determinate prison term of three years and a three-year term of post-release supervision, it properly complied with the defendant's plea deal. After sentencing, the court clerk decided that the defendant, a second felony offender, should have received a five-year term of post-release supervision (*see* Penal Law 70.06[6], 70.45[1], [2]), and amended the sentence and commitment form to reflect the longer term. The amended sentence and commitment form was a nullity and had no effect on the judgment. *See People v Duncan* , 42 AD3d 470, 471. The defendant's sentence includes the promised three-year term of supervision. Therefore, the defendant is not entitled to an opportunity to withdraw his plea (*cf People v Catu*, 4 NY3d 242) or to a modification of his sentence. *See People v O'Shea*, 45 AD3d 701. Judgment affirmed. (County Ct, Nassau Co [Carter, J])

Appeals and Writs (General) (Preservation of Error for Review) **APP; 25(35) (63)**

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

People v Gordon, 50 AD3d 821, 855 NYS2d 617 (2nd Dept 2008)

Holding: "We agree with the defendant that certain comments made by the prosecutor during summation exceeded the 'broad bounds of rhetorical comment permissible in closing argument' (*People v Galloway*, 54 NY2d 396, 399), and 'the cumulative effect of such conduct substantially prejudiced' his right to a fair trial (*People v Calabria*, 94 NY2d 519, 523). Insofar as some of these errors were not preserved for appellate review, we review them in the exercise of our interest of justice jurisdiction (*see* CPL 470.15[6][a])." The prosecutor denigrated the defendant's theory of the case by comparing it to a "Hollywood" story and calling it "ridiculous" and "absurd." These types of comments have been frequently disapproved. *See People v Brown*, 26 AD3d 392, 393. The prosecutor repeated these comments throughout the summation, even after the court sustained certain objections. The prosecutor also improperly attacked defense counsel's credibility by accusing him of withholding the truth from the jury. *See People v Pagan*, 2 AD3d 879, 880. Under the circumstances, these errors were not harmless. *See People v Crimmins*, 36 NY2d 230, 241. Judgment reversed and matter remitted for a new trial. (Supreme Ct, Kings Co [Del Guidice, J])

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

Identification (Photographs) (Suggestive Procedures) (*Wade* Hearing) **IDE; 190(35) (50) (57)**

People v Howard, 50 AD3d 823, 854 NYS2d 776 (2nd Dept 2008)

Holding: The court correctly denied the defendant's motion to suppress identification testimony. "At the *Wade* hearing (*see United States v Wade*, 388 U.S. 218 [1967]), the investigating detective described the manner in which the photographic array identification procedure was conduct-

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ed. The evidence adduced at the *Wade* hearing established that the various persons depicted in the computer-generated photo array were sufficiently similar in appearance to the defendant that the pretrial identification procedure was not unduly suggestive (*see People v Ragunauth* , 24 AD3d 472; *People v Malphurs* , 111 AD2d 266, 267-268)." Because the defendant did not move for a trial order of dismissal, he failed to preserve for appellate review his claim that the evidence was legally insufficient to establish his guilt beyond a reasonable doubt. *See* CPL 290.10, 470.05[2]; *People v Dowling*, 28 AD3d 788. A review of that claim in the light most favorable to the prosecution shows that the evidence was legally sufficient and the verdict was not against the weight of the evidence. *See People v Romero*, 7 NY3d 633. Judgment affirmed. (County Ct, Dutchess Co [Dolan, J])

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

Matter of Cockrell v Burke, 50 AD3d 895, 856 NYS2d 212 (2nd Dept 2008)

The appellant mother petitioned for custody of her three children. Six years earlier, upon consent of the children's mother and father, the court awarded custody to the children's maternal grandmother.

Holding: The court correctly denied the mother's petition for custody. With regard to Dawnmarie Cockrell, because she is now 18 years of age, the custody order does not apply. *See Matter of Metcalf v Odums* , 35 AD3d 865. "Where a 'prior order granting custody of a child to nonparents was issued upon consent of the parties, extraordinary circumstances must be established by the nonparents on a subsequent custody application by the parent' ([*Matter of Silverman v Wagschal*, 35 AD3d 747, 748]). Here, the Family Court erred in failing to make this threshold determination . . .)." However, the record is adequate to allow this Court to conclude that extraordinary circumstances exist. *See Matter of Robert G. v Peter I.* , 43 AD3d 1162, 1164. Those circumstances include the mother's history substance abuse, failure to get adequate housing or provide support to the children, and failure to adequately address the children's medical needs. *See Matter of Donahue v Donahue* , 44 AD3d 1042. The court properly concluded that it was in the children's best interest to remain with their grandmother and that conclusion was supported by a forensic evaluator's testimony and report and was consistent with the position of the attorney for the children. Appeal of the order pertaining to Dawnmarie dismissed as academic and order affirmed. (Family Ct, Kings Co [Pearl, J (petition); Weinstein, J (prior custody orders)])

Accomplices (Corroboration) ACC; 10(20)

Guilty Pleas (Vacatur) (Withdrawal) GYP; 181(55) (65)

People v Delgado, 50 AD3d 915, 855 NYS2d 253 (2nd Dept 2008)

The defendant was convicted of criminal sale and possession of a controlled substance for allegedly acting in concert with three co-defendants to sell cocaine. Thereafter, he pleaded guilty to an offense charged in a separate indictment in exchange for a promise that the sentence that would run concurrently with the sentences imposed for the other convictions.

Holding: The court erred in denying the defendant's motion to dismiss the counts related to the cocaine sale. The prosecution failed to present sufficient corroborating evidence to establish the defendant's guilt. The nonaccomplice testimony of the girlfriend of one of the co-defendants did not tend to connect the defendant to the offenses. *See People v Besser* , 96 NY2d 136, 143-144. Although she testified that the defendant was in her boyfriend's apartment the morning of the sale, the testimony did not provide independent evidence that he was in the apartment when the drugs were packaged or that connected him to the drug operation. The defendant should have been allowed to withdraw his guilty plea as the plea was induced by a promise that the sentence would run concurrently with the sentences imposed for the other convictions, which, with the exception of one misdemeanor conviction, have been vacated. *See People v Pichardo*, 1 NY3d 126, 129; *People v Rowland* , 8 NY3d 342. Judgment modified, convictions related to the cocaine sale vacated, those counts dismissed, judgment affirmed as modified, and judgment under the separate indictment reversed, guilty plea and sentence vacated, and matter remitted. (County Ct, Rockland Co [Kelly, J])

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

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

People v Dean, 50 AD3d 1052, 856 NYS2d 649 (2nd Dept 2008)

Holding: Because defense counsel engaged in "an inexplicably prejudicial course" of conduct throughout the trial, the defendant was deprived of her right to a fair trial and the effective assistance of counsel. *See People v Zaborski*, 59 NY2d 863, 865. Defense counsel erroneously assumed the burden of proof during opening statements, an error "so egregious and prejudicial that it contributed to the deprivation of the defendant's right to a fair trial." *See People v T urner*, 5 NY3d 476, 480-481, 484. Counsel failed to object to unduly prejudicial testimony and improper statements by the prosecutor, ask for advanced

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rulings regarding certain evidence, and recognize the strategic significance of acceding to the prosecution's proposed stipulation of facts regarding an important issue. "The foregoing highly prejudicial errors of trial counsel were exacerbated by his badgering of the complaining witnesses and flouting of the judge's rulings, and the 'pitched battles' between defense counsel and the trial judge, some of which were in the presence of the jury. While the trial court's response was, in many respects, understandable and excusable in light of defense counsel's behavior (*see People v Martin* , 33 AD3d 1024, 1024-1025 . . .), the '*fairness of the pr ocess* as a whole' was compromised by the combination of defense counsel's conduct and the response of the trial court (*People v Benevento*, 91 NY2d [708] at 714 [emphasis added] . . . ." Judgment reversed and matter remitted for a new trial before a different judge. (County Ct, Nassau Co [Berkowitz, J])

Juveniles (Adoption) (Parental Rights) (Paternity) **JUV; 230(5) (90) (100)**

Matter of Vanessa Ann G.-L., 50 AD3d 1036, 856 NYS2d 657 (2nd Dept 2008)

Holding: The court erred in concluding that the father's consent to the adoption of his child was not required. The child had been removed immediately after birth, but the initial foster care placement was not for adoption. When the father learned of the child's birth a year later, he filed a petition to establish paternity, which was granted. He started paying child support and commenced supervised visitation. While his custody petition was pending, the petitioner commenced a proceeding to terminate the father's parental rights based on permanent neglect. The petition alleged that the birth mother was willing to surrender the child for adoption on the condition that the foster parents adopt her. A month later, the birth mother died and the petitioner filed a motion for a determination that the father's consent to the proposed adoption was not required. The court incorrectly applied the law with respect to newborns placed for adoption. Domestic Relations Law 111(1)(d) should have been applied since the issue of adoption did not arise until the child was more than six months old. *See Matter of Ericka Stacey B.*, 27 AD3d 245, 246. The father's unrefuted testimony showed that he regularly visited the child, paid child support, and did all that was asked of him and the petitioner failed to present evidence of abandonment under section 111(2)(a). Therefore, the father's consent to the adoption is required. Order reversed and the petitioner's motion denied. (Family Ct, Nassau Co [Zimmerman, J])

Due Process (Notice) **DUP; 135(20)**

Juveniles (Hearings) (Visitation) **JUV; 230(60) (145)**

Matter of Doty v DiAmato, 50 AD3d 1138, 857 NYS2d 633 (2nd Dept 2008)

Holding: The court erred in modifying the prior order granting the appellant father weekend visitation with the parties' two children. The original order was silent as to which parent was responsible for transporting the children for the visits and a dispute arose after the father moved to a new location. The mother filed a petition seeking an order directing the father to do all of the driving for the visits, but did not serve the petition on the father. Without providing the father with notice or an opportunity to be heard on the petition, the court in effect granted the petition and modified the order to require that the father transport the children for his weekend visits. "Imposing this obligation upon the father without affording him notice and an opportunity to be heard was improper (*see Matter of Lucille H.* , 39 AD3d 547)." Order reversed and matter remitted for a new determination on the petition after affording the appellant notice and an opportunity to be heard. (Family Ct, Orange Co [Kiedaisch, J])

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

People v Middleton, 50 AD3d 1114, 857 NYS2d 617 (2nd Dept 2008)

Holding: The court correctly adjudicated the defendant a level three sex offender. The matter had been remitted for a new hearing and determination because it was not possible to determine which of the three risk assessment instruments proffered to the court had been relied upon by the court, and which factors the court considered in reaching its risk level determination. *See P eople v Middleton*, 33 AD3d 777. Contrary to the defendant's argument, the remittal order did not limit the court to a consideration of one of the three instruments that had been proffered at the earlier hearing. The court properly considered the new risk assessment instrument prepared by the prosecution. Order affirmed. (Supreme Ct, Kings Co [Brennan, J])

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

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

People v Miller, 50 AD3d 1161, 855 NYS2d 379 (2nd Dept 2008)

Holding: The court properly granted that branch of the defendant's omnibus motion which was to suppress

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blood test results. "Contrary to the People's contentions, the blood sample at issue was taken from the defendant in violation of Vehicle and Traffic Law § 1194(2)(a)(1) and § 1194(3), and the results of the test were therefore properly suppressed." Order affirmed. (County Ct, Orange Co [Berry, J])

Evidence (General) (Objections) (Prejudicial) **EVI; 155(60) (90) (106)**

Identification (General) (Photographs) **IDE; 190(17) (35)**

People v Jones, 51 AD3d 690, 857 NYS2d 662 (2nd Dept 2008)

Holding: The court erred in allowing the prosecutor to introduce on rebuttal, over the defendant's objection, a statement made by the defendant of which he received insufficient notice under CPL 710.30. By testifying on cross-examination that he did not confess to anyone, the defendant did not open the door to questions about the statement (*cf People v Manohar* , 40 AD3d 1123, 1124), because the statement did not qualify as a confession. The court improperly allowed the prosecutor to ask additional questions about the statement, which went beyond the scope of the direct examination, in order to lay a foundation for the tainted evidence. *See People v Rahming* , 26 NY2d 411, 418. The court erred in denying the defendant's motion to strike testimony regarding a witness's identification of the defendant in a photospread (*see People v Trowbridge*, 305 NY 471), as defense counsel did not open the door to the testimony and it improperly bolstered the eyewitness identification. *See People v Lee* , 22 AD3d 602, 603. The errors were not harmless. *See People v Crimmins* , 36 NY2d 230, 241. Although the issue of the detective's improper opinion testimony was not preserved for review, it will be reviewed in the interest of justice. The court improperly allowed the testimony "because it invaded the jury's 'exclusive province of determining an ultimate fact issue in the case' (*People v Bajraktari* , 154 AD2d 542, 543, quoting *People v Abr eu*, 114 AD2d 853, 854)." Judgment reversed and matter remitted for a new trial. (County Ct, Suffolk Co [Kahn, J])

Counsel (Conflict of Interest) **COU; 95(10)**

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

People v Adeola, 51 AD3d 811, 857 NYS2d 704 (2nd Dept 2008)

Holding: The defendant was denied the effective assistance of counsel because defense counsel's representation of the defendant and his co-defendant created a conflict of interest. The defendant and the co-defendant moved for resentencing under the Drug Law Reform Act of 2004 (L 2004, ch 738). The same attorney represented both defendants at the resentencing hearing. At that hearing, defense counsel argued that the co-defendant was less culpable than the defendant and therefore, deserving of resentencing. The court later denied the defendant's motion for resentencing. The court failed to conduct an inquiry as to whether the defendant was aware of the potential risks involved in the dual representation. *See People v Gomberg*, 38 NY2d 307. And the defendant established that the conduct of his defense was affected by the conflict or that the conflict operated on defense counsel's representation. *See People v Abar*, 99 NY2d 406, 409. Order reversed and matter remitted for the assignment of new counsel and a new determination on the motion. (Supreme Ct, Queens Co [Kron, J])

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

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

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

People v Dennis, 51 AD3d 815, 856 NYS2d 865 (2nd Dept 2008)

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 those related to the court's failure to specify the period of post-release supervision at the time of the defendant's guilty plea. 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 [Mullen, J])

Guilty Pleas (Errors Waived By) **GYP; 181(15)**

Speedy Trial (Statutory Limits) (Waiver) **SPX; 355(45) (50)**

People v Perez, 51 AD3d 824, 856 NYS2d 862 (2nd Dept 2008)

Holding: "By pleading guilty, the defendant forfeited his right to review of his claim that he was deprived of a speedy trial under CPL 30.30 (*see People v O'Brien* , 56 NY2d 1009, 1010). Moreover, the defendant could not validly reserve his right to obtain appellate review of his statutory speedy trial claim by obtaining, when he entered his plea, the consent of the prosecutor and the approval of the court (*see People v O'Brien* , 56 NY2d at 1010; *People v Douglas*, 46 AD3d 698)." Judgment affirmed. (Supreme Ct, Nassau Co [Donnino, J])

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Juveniles (Custody) (Hearings) (Visitation) **JUV; 230(10) (60) (145)**

Matter of Roldan v Nieves, 51 AD3d 803, 856 NYS2d 873; 857 NYS2d 716 (2nd Dept 2008)

Holding: The court erred in granting the father and paternal grandmother's joint petition for permanent custody of the child. The evidence introduced during the abbreviated hearing on the petition was insufficient to make an informed decision about the child's best interests. The court failed to consider the totality of the circumstances and instead based its decision on the finding that the mother was frustrating the father's attempts to visit with the child and testimony about the mother's other children, which was insufficient to justify a change in custody. *See Matter of Fallarino v A yala*, 41 AD3d 714, 715. The court erred in awarding joint custody to the paternal grandmother against the wishes of the mother because there was no showing that extraordinary circumstances existed to justify granting custody to a nonparent. *See Matter of Esposito v Shannon*, 32 AD3d 471, 471-475. The court must hold a new custody hearing and order "such forensic evaluations of the parties and the child and home study reports as may be appropriate." Based on the evidence of the mother's interference with the father's visitation rights, the father shall have temporary sole custody with the mother having supervised visitation and regular telephone contact with the child. Order awarding joint custody reversed, order directing that the joint custody order remain in full force and effect vacated, and matter remitted for a de novo hearing on custody and a new determination on the joint petition. (Family Ct, Nassau Co [Kase, J (custody orders); Aaron, J (motion to vacate)])

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

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

People v Jacobs, 51 AD3d 946, 858 NYS2d 366 (2nd Dept 2008)

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 defendant's CPL 330.30(3) motion to set aside the verdict should have been granted and whether the verdict was against the weight of the evidence. *See People v Danielson*, 9 NY3d 342; *People v Romero*, 7 NY3d 633. 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, Westchester Co [Smith, J])

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

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

Sentencing (Pronouncement) **SEN; 345**

People v Jones, 51 AD3d 947, __ NYS2d __ (2nd Dept 2008)

Holding: The defendant's appellate counsel filed an *Anders* brief (*Anders v California* , 386 US 738 [1967]) and requested to be relieved as counsel. On a prior appeal, this Court granted the defense counsel's motion to be relieved as assigned appellate counsel and assigned new counsel, concluding that potentially nonfrivolous issues may exist with respect to the defendant's sentencing and the court's failure to specify the statutorily mandated period of post-release supervision. "Counsel has now submitted a brief seeking to be relieved of the assignment to prosecute this appeal. Addressing the issue we identified in our prior decision and order, counsel states only that '[t]he Court's failure to specifically utter the period is in the realm of harmless error, as there was no discretion to be applied by the Court regarding the length of the period.' Without passing on the merits, we continue to see the issue as nonfrivolous, and one that should be briefed on behalf of the defendant (*see People v Sparber* , [10] NY3d [457], 2008 NY Slip Op 03946, *7 [2008]; *People v Boyd*, [51] AD3d [325], 2008 NY Slip Op 03402 [1st Dept 2008])." 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, Westchester Co [Zambelli, J])

Homicide (Manslaughter [Definitions]) **HMC; 185(30[a])**

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

People v Neptune, 51 AD3d 949, 857 NYS2d 733 (2nd Dept 2008)

The defendant had lost control of his car and collided with two other vehicles. As a result of the accident, one of the passengers in the defendant's car died. The defendant was convicted of second-degree manslaughter.

Holding: The court erred in charging the jury regarding the definition of the term recklessly. "The Legislature has defined the term 'recklessly' in Penal Law § 15.05(3). The Criminal Jury Instructions utilize the same definition (*see* CJI2d[NY] Penal Law §§ 15.05[3], 125.15[1]). Despite this, in its charge to the jury, the trial court, over defense counsel's objection, repeatedly defined the term 'recklessly' in a manner that substantially deviated from the Penal Law definition and from the CJI pattern charge. Under the circumstances, this constituted error (*cf. People v Simmons*, 221 AD2d 994, 995), which cannot be considered harmless (*see People v Crimmins* , 36 NY2d 230, 237)." Judgment

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reversed and matter remitted for a new trial. (Supreme Ct, Kings Co [Collini, J])

Juveniles (Parental Rights) (Paternity) JUV; 230(90) (100)

Matter of Antonio H. v Angelic W., 51 AD3d 1022, 859 NYS2d 670 (2nd Dept 2008)

Holding: The court correctly denied the putative father Antonio H.'s paternity petition and in effect, directed the entry of an order of filiation adjudicating George H. the father of the child. The court properly applied the doctrine of equitable estoppel based on the best interests of the child. *See Matter of Shondel J. v Mark D.* , 7 NY3d 320, 326. The evidence shows that George H. had a strong father-daughter bond with the child: he has been her primary caretaker for her entire life, except for a brief period in her early infancy; she calls him "daddy"; he has continuously supported her emotionally and financially; he has been held out to the public as her father; and she has formed emotional and psychological bonds to George H.'s family. The appellant, Antonio H., has made no efforts to establish a father-daughter relationship with her. Even though he believed he was the child's biological father and he knew that she primarily lived with George H., he did not petition for paternity until she was over two years old. He did not provide financial support or send her gifts or cards and although he was allowed to visit with the child when she was with her mother, he did not interact with her and even missed visits for a 10-month period. "Consequently, the appellant allowed the subject child to develop a strong bond to George H. as her father." Order affirmed. (Family Ct, Queens Co [Seiden, Ref.])

Constitutional Law (New York State Generally) CON; 82(25)

New York State Legislation (General) NYL; 268(10)

People v Crespi, 51 AD3d 1036, 857 NYS2d 505 (2nd Dept 2008)

Holding: The court granted the defendant's motion to dismiss count one of the indictment, second-degree assault, concluding that Penal Law 120.05(10) was unconstitutional. The court erred in ruling on the constitutionality of the statute without first providing notice to the New York State Attorney General, as required by CPLR 1012(b) and Executive Law 71. Order reversed and matter remitted for a new determination on the issue of whether count one should be dismissed, after notice is provided to the Attorney General and further briefs are submitted on the issue. (County Ct, Orange Co [Freehill, J])

Habeas Corpus (General) (State) HAB; 182.5(20) (35)

Sentencing (General) (Pronouncement) SEN; 345(37) (70)

People ex rel Gerard v Kralik, 51 AD3d 1045, 858 NYS2d 771 (2nd Dept 2008)

Holding: The petitioner's application for a writ of habeas corpus is granted. The petitioner is being held in jail for an alleged post-release supervision violation. However, the sentencing minutes and the court's order of commitment do not mention the imposition of a term of post-release supervision. "The Division of Parole has no authority to impose a period of post-release supervision, or any other component of a sentence (*see Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358). Consequently, because the detainee is currently incarcerated due to his alleged violation of the terms of the post-release supervision improperly added to his sentence by the Division of Parole, the detainee is entitled to immediate release from custody (*see People ex rel. Gerard* [*Colarusso*] *v Kralik*, 44 AD3d 804)."

Juveniles (Disposition) (Parental Rights) JUV; 230(40) (90)

Matter of Shdell Shakell L., 51 AD3d 1027, 858 NYS2d 779 (2nd Dept 2008)

Holding: The court improvidently exercised its discretion in revoking the order of suspended judgment and terminating the mother's parental rights. Although the court correctly concluded that the mother violated some of the terms of that judgment (*see Matter of Amber A.A.*, 301 AD2d 694, 697), revocation of the order of suspended judgment and termination of her parental rights were not in the child's best interests. The hearing testimony showed that the mother was making progress in her drug treatment program, she continued to visit with and have nightly phone calls with the child, she and her son had a loving relationship, and the child did not want to be adopted. Order modified by deleting the provision terminating the mother's parental rights and transferring guardianship and custody of the child to the petitioner for the purpose of adoption, order affirmed as modified, and matter remitted for a new dispositional hearing and a new disposition. (Family Ct, Richmond Co [McElrath, J])

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

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

People v Breazil, __ AD3d __, 860 NYS2d 137 (2nd Dept 2008)

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Holding: The court correctly granted the defendant's CPL 440.10 motion to vacate, suppressed the physical evidence seized from the defendant after his arrest, and ordered a new trial. The police did not have probable cause to arrest the defendant; therefore the arrest was illegal. *See Florida v J.L.* , 529 US 266 (2000). The police received a 911 call of a robbery in progress. The report of the call indicated that there were six males robbing one male, one male had a gun and was wearing all white, and a second male, who was wearing a number three jersey, was on a bike in front of a 24-hour deli. When the police arrived on the scene, they saw the defendant, who was wearing white, on a bicycle. The police placed the defendant against the wall and frisked him; the frisk revealed a handgun. A showup identification was conducted, but the robbery complainant said that the defendant was not involved in the incident. A detective investigating a different offense was notified of the defendant's arrest and the next day, the defendant was brought to the police precinct for a lineup related to that offense. The court erred in suppressing the lineup evidence as any taint because of the defendant's illegal arrest was sufficiently attenuated prior to the lineup. *See W ong Sun v United States*, 371 US 471, 488 (1963). Amended order modified, provision suppressing the defendant's lineup identification deleted, and amended order affirmed as modified. (Supreme Ct, Kings Co [Mangano, Jr., J (CPL 440 motion); Feldman, J (judgment of conviction)])

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

Speedy Trial (Cause for Delay) **SPX; 355(12)**

People v Lindsey, __ AD3d __, 859 NYS2d 486 (2nd Dept 2008)

Holding: The defendant's convictions for second-degree assault and resisting arrest are against the weight of the evidence. Probable cause for the defendant's arrest was based almost entirely on one officer's testimony that he saw the defendant throw a bag of narcotics into an elevator. The jury's decision to acquit the defendant of the drug possession charge shows that it did not find the officer's testimony credible and the record supports that credibility determination. It would not have been unreasonable for the jury to conclude that the "lawful duty" element of second-degree assault and the "authorized arrest" element of resisting arrest were not established beyond a reasonable doubt. "Left only with the physical evidence of the narcotics and the defendant's presence in the building, we find that the jury failed to give its credibility finding the weight it was due with respect to those charges." The defendant was not deprived of a speedy trial. *See* CPL 30.30(1)(a). The court correctly excluded from the time chargeable to the prosecution the two month period during which one of their principal witnesses was medically disabled due to injuries he received during the incident, which prevented him from working or performing ordinary daily activities. *See* CPL 30.30(4)(g)(i); *People v Goodman* , 41 NY2d 888, 889-890. Judgment modified, second-degree assault and resisting arrest convictions and the sentences imposed thereon vacated, those counts dismissed, and judgment affirmed as modified. (Supreme Ct, Kings Co [Chun, J])

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

People v Zephyrin, __ AD3d __, 860 NYS2d 149 (2nd Dept 2008)

Holding: The defendant's convictions are against the weight of the evidence. Acquittal on all of the charges would not have been unreasonable based on the evidence presented during the bench trial and the court failed to give the evidence the weight it should have been given. *See People v Romer o*, 7 NY3d 633. "The testimony of the complainant, the defendant's wife, was contradictory and incredible. Moreover, the complainant's account at trial of what had occurred was not consistent with what she told police officers on the day of the incident. Since there was no evidence to support the defendant's convictions other than the testimony of the complainant, and her testimony not only lacked credibility, but also was contradicted by the testimony of the impartial police officers who were at the scene of the incident, we reverse the conviction as against the evidence (*see People v Giocastr o*, 210 AD2d 254)." Judgment reversed, indictment dismissed, and matter remitted for the purpose of entering an order in its discretion pursuant to CPL 160.50. (Supreme Ct, Queens Co [Morgenstern, J])

Third Department

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

Witnesses (Credibility) (Cross Examination) **WIT; 390(10) (11)**

People v Williams, 50 AD3d 1177, 854 NYS2d 586 (3rd Dept 2008)

Holding: The court erred in denying the defendant's CPL 440.10 motion to vacate the judgment, as the prosecution failed to timely disclose significant exculpatory material under *People v Rosario* (9 NY2d 286) and *Brady v Maryland* (373 US 83 [1963]). During cross-examination of a police officer, defense counsel discovered that two witnesses who testified earlier in the trial had made statements that the officer recorded, which were not disclosed. After reviewing the officer's notes, counsel discovered

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other potentially exculpatory information. The defendant was given a meaningful opportunity to use the material against one of the two witnesses as that witness was recalled the next morning for further cross-examination. *See People v Richard* , 30 AD3d 750, 754 *lv den* 7 NY3d 869. However, the defendant did not have the same opportunity with regard to the second witness since the prosecution failed to produce the witness. Reversal is required as there is a reasonable possibility that the result of the trial would have been different if the material had been disclosed. *See People v Bond* , 95 NY2d 840, 843. The court's instruction that the jury could infer that the second witness would have been "further impeached" had he been cross-examined further and that his testimony would have contradicted that of other prosecution witnesses was an ineffective sanction for the prosecutor's untimely disclosure. Judgment and order reversed, motion to vacate granted, and matter remitted for a new trial. (Supreme Ct, Albany Co [Lamont, J])

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

Impeachment (General) **IMP; 192(15)**

People v Alt, 50 AD3d 1164, 854 NYS2d 591 (3rd Dept 2008)

Holding: The court erred in permitting the prosecution to use statements that the defendant made during his plea allocution in order to impeach his credibility. Although the defendant failed to preserve the issue, it will be reviewed in the interest of justice. The court previously refused to accept the defendant's plea allocution, concluding that some of the statements cast doubt on his guilt. Because the court rejected the plea, it was out of the case and cannot be used by the prosecution, even for the limited purpose of impeachment. *See People v Latham*, 90 NY2d 795, 798-799. "[S]ince defendant's guilt depended largely upon the jury's assessment of his credibility on the very point that was the subject of his statement, we cannot find this error to be harmless (*see People v Montgomery*, 22 AD3d 960, 963 . . .)." Judgment reversed and matter remitted for a new trial. (County Ct, Cortland Co [Campbell, J])

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

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

People v Judson, 50 AD3d 1242, 855 NYS2d 694 (3rd Dept 2008)

Holding: The prosecution failed to present adequate evidence of multiple sexual acts with the same victim to support a finding of a continuing course of sexual misconduct under the Sex Offender Registration Act. The case summary alone is insufficient to satisfy the burden of proving the risk level assessment by clear and convincing evidence when the defendant contests the underlying factual allegations. *See People v Joslyn* , 27 AD3d 1033, 1034. The court is required to hold a hearing on this contested issue, at which time the prosecution can present evidence about that factor. The court also erred in failing to issue an order setting forth its findings of fact and conclusions of law pursuant to Correction Law 168-n(3). Order reversed and matter remitted. (County Ct, Tioga Co [Sgueglia, J])

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

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

People v Richards, 50 AD3d 1329, 857 NYS2d 257 (3rd Dept 2008)

Holding: The court correctly determined that the prosecution presented clear and convincing evidence of forcible compulsion and a continuing course of sexual misconduct. The case summary, presentence investigation report, incident report, investigation notes, and the complainant's sworn statement to the police provided clear and convincing evidence that the defendant used threats to compel the complainant's compliance; thus, the assessment of points for forcible compulsion was proper. *See People v Pratt* , 42 AD3d 592. The record evidence that the incident to which the defendant pleaded guilty was not the only sexual encounter between him and the complainant was sufficient to support the assessment of points for a continuing course of sexual misconduct. Order affirmed. (County Ct, Broome Co [Mathews, J])

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

Trial (Verdicts [Repugnant Verdicts]) **TRI; 375(70[c])**

People v Harris, 50 AD3d 1387, 856 NYS2d 284 (3rd Dept 2008)

After concluding that the jury's partial verdict of acquittal of sexual abuse and conviction of endangering the welfare of a child was repugnant, the trial court provided an expanded jury instruction and directed the jury to resume deliberations. The jury later found the defendant guilty of both crimes.

Holding: The hearing court properly denied the defendant's motion to suppress his statement and apology note. The defendant was fully advised of his rights and knowingly and voluntarily waived those rights before

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questioning, as evidenced by his two written *Miranda* waivers and the testimony of two detectives. *See People v Seymour*, 14 AD3d 799, 801 *lv den* 4 NY3d 856. However, the trial court erred in ruling that the verdict was repugnant, and the original verdict of not guilty of sexual abuse should have been accepted. The jury acquitted the defendant of sexual abuse because they concluded that the defendant's acts did not constitute "sexual contact" as defined in the jury charge. The sexual abuse acquittal did not negate any element of the endangering the welfare of a child counts as they were charged to the jury; therefore, the verdict was not repugnant. *See People v Ramir ez*, 229 AD2d 1012, 1012. Judgment modified, first-degree sexual abuse conviction reversed and count dismissed, and affirmed as modified. (Supreme Ct, Albany Co [Lamont, J (trial)]; County Court, Albany Co [Herrick, J (suppression hearing)])

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

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

People v Gause, 50 AD3d 1392, 856 NYS2d 287 (3rd Dept 2008)

The defendant was convicted of promoting prison contraband for possessing a razor blade. During a general frisk of cells, correction officials removed the defendant from his cell, handcuffed him, and directed him to sit on a metal-detecting BOSS chair. The defendant denied having a metal object, but the chair detected metal, so the officials took him to a frisk room in the special housing unit and advised him that they were going to strip frisk him. In response to an official's question about whether he had anything on him, the defendant admitted that he had a razor blade and voluntarily surrendered it.

Holding: The court erred in denying the motion to suppress as the defendant made his admission without *Miranda* warnings. The circumstances surrounding the defendant's detention and interrogation show that he was under the requisite "'added constraint that would lead a prison inmate reasonably to believe that there has been a restriction on that person's freedom over and above that of ordinary confinement in a correctional facility' (*People v Van Patten*, 48 AD3d 30, 33 . . .)." The public safety exception did not apply because the questioning was intended to elicit incriminating information in furtherance of the strip frisk and not to ascertain a weapon's location for safety purposes. *See eg People v Hope* , 284 AD2d 560, 562. However, the error was harmless as other evidence provided overwhelming proof of his guilt. *See People v O'Connor*, 6 AD3d 738, 740. Judgment affirmed. (County Ct, Chemung Co [Hayden, J])

Appeals and Writs (Arguments of Counsel) (General) **APP; 25(5) (35)**

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

People v Walton, 51 AD3d 1148, 856 NYS2d 316 (3rd Dept 2008)

Holding: The defendant moved for a writ of error coram nobis to vacate this Court's prior decisions, arguing that he was denied effective assistance of counsel during his two prior appeals. This Court reversed the co-defendant's conviction, concluding that the trial court erred in denying a for cause challenge of a potential juror. *See People v Faulkner*, 36 AD3d 1071, 1072-1073. The defendant is entitled to a new trial because the limited voir dire transcript does not disclose whether further questions were asked to ensure that the potential juror could be impartial. The juror informed the trial court that he previously served on a jury that convicted two members of the defendant's family and that this service "might affect him" in the defendant's trial. Judgment reversed and matter remitted for a new trial. (County Ct, Albany Co [Breslin, J])

Sentencing (Hearing) (Presence of Defendant and/or Counsel) (Restitution) **SEN; 345(42) (59.5) (71)**

People v Carter, 51 AD3d 1139, 857 NYS2d 356 (3rd Dept 2008)

An hour after the defendant was scheduled to appear for sentencing, and after defense counsel told the court that the defendant's parents informed him that the defendant was "eight states over," the court sentenced the defendant in absentia.

Holding: The court erred in sentencing the defendant in absentia. The court had told the defendant that his failure to appear could result in an enhanced sentence but had not specifically said that sentencing could proceed in his absence. The defendant therefore did not waive his right to be present for sentencing by failing to appear. Even if he had waived this right, the court was not authorized to proceed in absentia because it failed to take reasonable measures to secure the defendant's attendance. *See People v Parker*, 57 NY2d 136, 142. The court also erred in imposing restitution without holding a hearing to determine the proper amount. *See* Penal Law 60.27(2). Judgment modified, sentence vacated, matter remitted, and judgment affirmed as modified. (County Ct, Cortland Co [Campbell, J])

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

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Reckless Endangerment (Elements) (Evidence) (Sentence) **RED; 326(10) (15) (25)**

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

People v Goldstein, 51 AD3d 1271, 857 NYS2d 817 (3rd Dept 2008)

After the police stopped the defendant's vehicle for a traffic violation, he fled at high speed through a construction zone, causing two flag people to jump out of the way. Prior to his plea, the court told the defendant that if he failed to appear for sentencing, he would lose the benefit of the bargained-for concurrent sentences and after he failed to appear twice, the court sentenced him to concurrent terms for two counts of first-degree reckless endangerment and a consecutive term for aggravated unlicensed operation of a motor vehicle.

Holding: The defendant's plea allocution on the reckless endangerment counts established the necessary element of depraved indifference. The defendant admitted that he drove his large vehicle at a high rate of speed through the construction area where he knew there would be workers. By not denying or repudiating defense counsel's statements that he created a very dangerous situation and that he was aware of the allegations and did not dispute them, the defendant adopted them as his own. *See People v Hadden* , 158 AD2d 856, 857 *lv den* 76 NY2d 847. The court correctly denied the defendant's motion to withdraw his plea. It was not coerced by the court's and defense counsel's references to potential consecutive sentences for the two reckless endangerment counts; consecutive terms were authorized since the prosecution demonstrated that he endangered two individuals at different times and places. *See People v Ramirez*, 89 NY2d 444, 451. Judgment affirmed. (County Ct, Sullivan Co [Ledina, J])

Dissent: [Lahtinen, J] The defendant should have been allowed to withdraw his plea. His denials that he had actually endangered the workers' lives cast doubt on the culpable mental state required for depraved indifference. The court failed to determine whether the defendant agreed with defense counsel's statements. *See People v Nixon*, 21 NY2d 338, 350. The challenge to the voluntariness of the plea survived the waiver of appeal.

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

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

People v Rivera, 51 AD3d 1267, 858 NYS2d 825 (3rd Dept 2008)

Holding: The defendant's conviction must be reversed and his motion to vacate his guilty plea must be granted because he was not advised of the duration of the mandatory period of post-release supervision prior to sentencing. Without such information, the defendant's plea was not knowing, voluntary and intelligent. *See People v Catu*, 4 NY3d 242, 245. Even if the defendant may have known of the existence of post-release supervision, he could not make an informed plea without knowing its duration. *See People v Boyd*, 51 AD3d 325, 2008 NY Slip Op 03402, *4. A postallocution motion is not required when the defendant is not informed of the post-release supervision until sentencing because it is impracticable to expect the defendant to move to withdraw the plea on a ground of which the defendant has no knowledge. *See People v Louree*, 8 NY3d 541, 545-546. Judgments reversed, plea vacated, and matter remitted. (County Ct, Ulster Co [Czajka, J])

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

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

People v Rollins, 51 AD3d 1279, 858 NYS2d 474 (3rd Dept 2008)

Holding: The court erred in imposing consecutive sentences for several counts of criminal possession of a weapon because the defendant's possession of a firearm at various locations throughout the day constituted a continuous course of conduct and a single act. *See* Penal Law 70.25(2); *People v Laureano*, 87 NY2d 640, 643. The court's twin count submission of intentional murder and depraved indifference was harmless, despite the holding in *People v Suarez* (6 NY3d 202), as the jury did not convict the defendant of either charge. The court properly exercised its discretion in submitting the lesser included offenses of first- and second-degree manslaughter as a reasonable view of the evidence supported those charges. *See* CPL 300.50(1); *People v Edwards*, 16 AD3d 226, 227. The court correctly excluded the defense of third parties in its justification charge because that defense was negated by proof that the physical force used was the product of a combat by agreement that was not authorized by law. *See People v Young*, 33 AD3d 1120, 1124 *lvs den* 8 NY3d 921, 925, 929. Judgment modified, sentences for third-degree criminal possession of a weapon under counts 8 and 9 to run concurrent with sentences for third-degree criminal possession of a weapon under counts 6 and 7, and judgment affirmed as modified. (County Ct, Schenectady Co [Eidens, J])

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Admissions (*Miranda* Advice) **ADM; 15(25)**

Search and Seizure (Parolees and Probationers) **SEA; 335(50)**

People v Burry, __ AD3d __, 859 NYS2d 499 (3rd Dept 2008)

After receiving an anonymous tip, the defendant's parole officer searched the defendant's bedroom for drugs, as authorized by his parole agreement. When the officer found a package and asked the defendant about its contents, the defendant admitted it was his heroin.

Holding: The court erred in denying the defendant's motion to suppress the statements he made to his parole officer immediately after the search as the officer failed to administer *Miranda* warnings. Because two police officers blocked the only exit to the bedroom, and given the situation's overall atmosphere and the officer's direct questioning after the drugs were found, the defendant was in custody, *see People v Mitchell* (289 AD2d 776, 778 *lv den* 98 NY2d 653), and his statements were not spontaneous utterances. *See People v Stoesser* , 53 NY2d 648, 650. The court correctly concluded that the seizure was proper. The standard authorization to search that was part of the parole agreement is not an unrestricted consent to all searches. *See People v Huntley*, 43 NY2d 175, 181. However, as the drug search related to the parole officer's duty to prevent parole violations and the anonymous tip coupled with the officer's knowledge of the defendant's recidivist history and drug possession provided reasonable suspicion to support the search, the search was reasonable. *See Florida v J.L.* , 529 US 266, 270-271 (2000). Judgment reversed and matter remitted. (County Ct, Ulster Co [Bruhn, J])

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

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

People v Anthony, __AD3d __, 859 NYS2d 269 (3rd Dept 2008)

Holding: The court erred in adjudicating the defendant a second felony offender the day after he was sentenced. The prosecution failed to file a predicate felony statement prior to sentencing and the record does not reveal any mention of the second felony offender issue prior to the plea allocution or sentencing. Because the defendant had no notice or opportunity to be heard regarding the predicate statement, the prosecution did not substantially comply with CPL 400.21(2). *Cf People v Bouyea*, 64 NY2d 1140, 1142. The defendant never agreed to be sentenced as a predicate offender at the plea allocution and the defendant's admission to the predicate offense after the sentence was imposed did not constitute a waiver of the invalid sentence. *See People v De Fayette*, 16 AD3d 708, 710 *lv den* 4 NY3d 885. Because the defendant did not move to withdraw his plea or to vacate the conviction, he failed to preserve for review his argument that his plea was not knowing, voluntary, and intelligent. *See People v Lopez*, 40 AD3d 1276, 1276. However, since he can raise the issue on remittal for resentencing, corrective action in the interest of justice will not be taken here. Judgment modified, sentence vacated, matter remitted, and judgment affirmed as modified. (County Ct, Broome Co [Mathews, J])

Attorney/Client Relationship (Confidences) **ACR; 51(10)**

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

Statute of Limitations (General) **SOL; 360(13)**

People v Irvine, __ AD3d , __ 859 NYS2d 264 (3rd Dept 2008)

Holding: Three counts of the indictment charging first- and second-degree sexual abuse must be dismissed as the one- and two-year time intervals alleged in the counts were excessive. *See People v Dunton* , 30 AD3d 828, 829 *lv den* 7 NY3d 847. Another count alleging second-degree sexual abuse must be dismissed as time-barred because the statute of limitations expired prior to the filing of the indictment. *See* CPL 30.10(2)(c), (3)(f). Although the defendant failed to preserve these issues, they are reviewed in the interest of justice. The court erred in directing defense counsel to turn over notes that were protected by the attorney-client privilege and allowing the prosecutor to cross-examine the defendant about the contents of the notes, as the defendant did not waive the privilege. *See People v Glenn*, 52 NY2d 880, 881. The notes contained material that was directly contrary to the defendant's primary defense. Under the circumstances, the error was not harmless. *See People v Osorio* , 75 NY2d 80, 86-87. Even if the error was harmless, the defendant was denied effective assistance of counsel because counsel revealed privileged communications without objection and failed to seek dismissal of the sexual abuse counts. *See People v Turner*, 5 NY3d 476, 480-481. Judgment reversed, counts 1, 2, 3, and 7 dismissed, and matter remitted for a new trial on counts 8 and 9. (County Ct, St. Lawrence Co [Rogers, J])

New York State Legislation (General) **NYL; 268(10)**

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

Third Department *continued*

Matter of Sweeney v Dennison, __ AD3d __, 858 NYS2d 845 (3rd Dept 2008)

The petitioner filed an Article 78 proceeding seeking to compel the respondent Chair of the Board of Parole to terminate his sentence pursuant to Executive Law 259-j(3-a). The petitioner had been granted presumptive release and had served more than two years of unrevoked parole.

Holding: The court erred in concluding that Executive Law 259-j(3-a) applied to periods of unrevoked presumptive release. The statute refers to termination of a sentence after a specified period of unrevoked parole. The clear and unambiguous language of the statute demonstrates that it is limited to parolees alone. The Legislature's failure to refer to presumptive release indicates that its exclusion was intended. *See People v Tychanski*, 78 NY2d 909, 911-912. This is not a case of legislative inadvertence that must be cured by the Court in order to prevent inconsistency, unreasonableness, or unconstitutionality in the statute. Judgment reversed and petition dismissed. (Supreme Ct, Albany Co [McNamara, J])

Accomplices (General) (Witnesses) **ACC; 10(22) (35)**

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) (Electronic Searches) (Warrantless Searches [Movable Objects]) **SEA; 335(15[k]) (30) (80[f])**

People v Weaver, 52 AD3d 138, 860 NYS2d 223 (3rd Dept 2008)

The defendant was convicted of burglary and larceny based on testimony of a codefendant's girlfriend and data obtained from a battery operated global positioning system (GPS) device that the police attached under the bumper of his car without a warrant.

Holding: The court correctly concluded that the codefendant's girlfriend was not an accomplice to one of the burglaries because there was no evidence that she had taken any active role in reconnoitering or planning the burglary and she was at home when it was committed. *See People v Thomas* , 33 AD3d 1053, 1054-1055 *lv den* 8 NY3d 885. Her role in other burglaries was insufficient to establish her role in the burglary at issue. The court properly denied the defendant's motion to suppress the evidence obtained from the GPS device as the defendant did not have a legitimate expectation of privacy under federal or state law. Because there is no reasonable expectation of privacy in the publicly accessible undercarriage of a defendant's vehicle (*see New York v Class*, 475 US 106, 112-114 [1986]) or the location of a defendant's vehicle on public streets, the defendant's Fourth Amendment rights were not violated. *See People v Wemette*, 285 AD2d 729, 729-730. The state constitution does not require reversal; the defendant had a diminished expectation of privacy on a public roadway (*see People v Y ancy*, 86 NY2d 239, 246), and the surveillance was of an activity which is readily open to public view. *See People v Reynolds* , 71 NY2d 552, 557. Judgment affirmed and matter remitted. (Supreme Ct, Albany Co [Lamont, J])

Dissent: [Stein, J] The defendant's rights under Article I, section 12 of the state constitution were violated. The defendant had no expectation that his every move would be indefinitely monitored by a GPS device without his knowledge. The ability to acquire enormous amounts of personal information about a citizen makes GPS monitoring distinguishable from being followed by police on public roads.

Fourth Department

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

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

People v Bolling, 49 AD3d 1330, 853 NYS2d 803 (4th Dept 2008)

Holding: The evidence was insufficient to prove the defendant acted with depraved indifference. As the defendant's conduct does not demonstrate utter disregard for the value of human life, his murder conviction must be reduced to second-degree manslaughter. *See People v Suarez*, 6 NY3d 202, 214. The court properly admitted an officer's testimony regarding a statement made by the decedent under the excited utterance exception (*see People v McClary* , 21 AD3d 1427, 1428 *lv den* 5 NY3d 884), and since the statement was made during an ongoing emergency, it was non-testimonial. *See People v Nieves-Andino*, 9 NY3d 12, 15. The defendant's other issues lack merit. Judgment modified, second-degree murder conviction reduced to second-degree manslaughter, sentence vacated, judgment affirmed as modified, and matter is remitted for sentencing on the manslaughter conviction. (County Ct, Monroe Co [Geraci, Jr., J])

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

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

People v Brown, 49 AD3d 1345, 853 NYS2d 815 (4th Dept 2008)

During a pat-down search, the defendant and the correction officer conducting the search got into an altercation, and after the defendant was subdued and handcuffed, a second officer continued the search and found a

Fourth Department *continued*

weapon. An officer took the defendant to an area away from other inmates and questioned him about his actions; the defendant replied, "Yeah, that's right. I did it."

Holding: The court erred in failing to suppress the defendant's incriminating statement. Under the circumstances, he "'could have reasonably believed that his freedom was restricted over and above that of ordinary confinement' (*People v Hope*, 284 AD2d 560, 562) . . . ", therefore *Miranda* warnings were required. The correction officer's inquiry was not purely investigatory in nature, but was likely to elicit evidence of a crime. Admitting the statement was not harmless error. *See People v Alls* , 83 NY2d 94, 104. Regarding his pre-voir dire motion to change venue, the defendant failed to meet his burden of showing "that there is 'reasonable cause to believe that a fair and impartial trial cannot be had' in Wyoming County (CPL 230.20[2])." However, if the voir dire at the new trial demonstrates an impartial jury cannot be drawn, the defendant can make a new application. *See People v Mateo*, 239 AD2d 965. Judgment reversed, motion to suppress the defendant's statement granted, and matter remitted for a new trial on count one. (County Ct, Wyoming Co [Dadd, J])

Burglary (Degrees and Lesser Offenses) (Elements) **BUR; 65(10) (15)**

Trespass (Elements) (General) **TSP; 374(10) (17)**

People v Holmes, 49 AD3d 1349, 853 NYS2d 818 (4th Dept 2008)

Holding: The court properly reduced the first count of the indictment from burglary to criminal trespass. The grand jury evidence was not sufficient to support the burglary charge as the indictment specifically stated that the defendant intended to commit larceny, and the prosecution did not present evidence that would allow the grand jury to infer such intent. The prosecution is bound by their decision to limit the theory to one of larceny. *See gen People v Barnes*, 50 NY2d 375, 379. However, as the prosecution concedes, the court should have reduced the count to third-degree criminal trespass, not second-degree, as the offense did not involve a dwelling. *See* PL 140.10(a), 140.15. Amended order modified, count one of the indictment is reduced from third-degree burglary to third-degree criminal trespass, and amended order affirmed as modified. (County Ct, Monroe Co [Marks, J])

Juveniles (Disposition) (Hearings) (Permanent Neglect) **JUV; 230(40) (60) (105)**

Matter of Kyle K. and Kara K., 49 AD3d 1333, 854 NYS2d 270 (4th Dept 2008)

Holding: The court erred in granting two petitions to terminate the parental rights of the children's father as the findings required for each petition are logically inconsistent. "The father could not be found to be mentally ill to a degree warranting termination of his parental rights and at the same time be found to have failed to plan for the future of the children although physically and financially able to do so (*see generally Matter of Olivia L.,* 43 AD3d 1339, 1340)." Although the children reported that their father engaged in strange behavior, because no witnesses testified that they observed such behavior and since the examining psychologist reported that the psychological tests were inconclusive and the father displayed no symptoms of mental illness, the petitioner failed to establish that the father has a mental illness that prevents him and will for the foreseeable future prevent him from properly and adequately caring for his children. *Cf Matter of August ZZ.*, 42 AD3d 745, 748. The court properly terminated the father's rights on the ground of permanent neglect as he did not complete the required mental health counseling program (*see Matter of Jose R.*, 32 AD3d 1284 *lv den* 7 NY3d 718) and failed to acknowledge the children's educational problems. The court erred in failing to hold the required dispositional hearing. *See Matter of Brian W .*, 199 AD2d 1021, 1021-1022 *app dis* 83 NY2d 952. Order modified, petition based on mental illness dismissed, order affirmed as modified, and matter remitted for a dispositional hearing on the permanent neglect petition. (Family Ct, Erie Co [Szczur, J])

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

People v Largen, 49 AD3d 1347, 855 NYS2d 772 (4th Dept 2008)

Holding: Prior to sentencing, the court agreed to sentence the defendant as a second violent felony offender to seven years, the minimum sentence for a second violent felon who was convicted of a class C violent felony. Although the prosecution failed to establish that the defendant was a second violent felony offender at sentencing, the court sentenced him to the agreed-upon seven-year term, even though the statutory minimum was 3½ years. *See* Penal Law 70.02(3)(b). As the prosecution concedes, the record does not show whether the court knew the extent of its discretion in sentencing the defendant after the prosecution failed to show that he was a second felony offender. *See gen People v Schafer*, 19 AD3d 1133. Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted for resentencing. (County Ct, Erie Co [DiTullio, J])

Fourth Department *continued*

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

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

Matter of the State of New York v Cuevas, 49 AD3d 1324, 853 NYS2d 798 (4th Dept 2008)

Holding: The court exceeded its authority in holding that the respondent and similarly situated individuals who have been held past their release dates at Mid-State Correctional Facility pursuant to Mental Hygiene Law article 10 must be afforded the same rights as inmates held in long-term protective custody in Building 10-2 at Mid-State. Although the respondent has since consented to civil confinement, the appeal is not moot as the judgment applies to all similarly situated individuals held at Mid-State, and the issue is likely to recur, but will ordinarily evade review and is substantial and novel. *See Mental Hygiene Legal Servs. v Ford* , 92 NY2d 500, 506. Detained persons such as the respondent who are placed in protective custody are entitled to the conditions of confinement set forth in the Department of Correctional Services' protective custody regulations (7 NYCRR 330.4, 301.5). However, the respondents are not entitled to the same conditions of confinement as are provided at Building 10-2 because those conditions are more favorable than those required by the regulations. "[P]rison administrators have discretion to place a person eligible for protective custody in administrative segregation, a more restrictive placement, where such placement is 'required for the security of the facility and the safety of the [detained person]' (*Matter of Rifkin v Goord*, 273 AD2d 878, 879)." Judgment reversed, habeas corpus proceeding converted to declaratory judgment action, and amended judgment granted. (Supreme Ct, Oneida Co [Tormey, J])

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

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

People v Hall, 50 AD3d 1467, 856 NYS2d 402 (4th Dept 2008)

Holding: The defendant's plea to first-degree robbery is invalid because the plea allocution was factually insufficient. While the defendant did not preserve this argument, it fits the narrow preservation exception because his factual statements cast significant doubt on his guilt. *See People v Lopez* , 71 NY2d 662, 666. The plea allocution did not show that the unloaded BB gun the defendant used during the alleged robbery was used as a dangerous instrument, thereby negating an essential element of the offense. *See People v W asson*, 266 AD2d 701. The court failed to conduct the required further inquiry to ensure that the defendant understood the charge and that the plea was entered intelligently. The defendant failed to preserve his argument that he was denied effective assistance of counsel, and to the extent that this is based on counsel's failure to negotiate a plea bargain, it is properly raised through a CPL article 440 motion since it involves matters outside of the record. *See People v Ballard*, 13 AD3d 670, 672 *lv den* 4 NY3d 796. Judgment modified, first-degree robbery conviction reversed, plea with respect to that crime vacated, and judgment affirmed as modified, and matter remitted for further proceedings on that count. (Supreme Ct, Monroe Co [Sirkin, AJ])

Admissions (*Miranda* Advice) (Voluntariness) **ADM; 15(25) (35)**

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

People v Hinkley, 50 AD3d 1466, 856 NYS2d 399 (4th Dept 2008)

Holding: The court properly refused to suppress the defendant's statements to the police, as her *Miranda* waiver was made knowingly, voluntarily, and intelligently. Though the defendant contends she was intoxicated when she gave the statements, there is no evidence that she was intoxicated to the degree of mania or that it prevented her from understanding what she was saying. *See People v Schompert*, 19 NY2d 300, 305 *cert den* 389 US 874. Although she failed to preserve her challenge to the factual sufficiency of the plea allocution, her claim fits within the narrow exception to the preservation requirement because the factual recitation as to one of the counts casts significant doubt upon her guilt. *See People v Lopez*, 71 NY2d 662, 666. The court failed to conduct the necessary inquiry about that count to ensure that the plea was knowing and voluntary. Because the plea was entered upon a negotiated agreement, if the defendant does not enter a plea to the same offense upon remittal, the court should consider any motion by the prosecution to vacate the plea and set aside the entire conviction. *See People v Irwin* , 166 AD2d 924, 925. Judgment modified, conviction as to one count of third-degree criminal sale of a controlled substance reversed, plea vacated as to that count, judgment affirmed as modified, and matter remitted for further proceedings. (County Ct, Ontario Co [Reed, J])

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

People v Ireland, 50 AD3d 1592, 857 NYS2d 849 (4th Dept 2008)

Fourth Department *continued*

Holding: The court erred in adjudicating the defendant a level three sex offender as the defendant's alleged failure to accept responsibility was not supported by clear and convincing evidence. The court improperly relied on statements in the presentence report, which was prepared in 1987, the year of conviction, instead of accepting the uncontroverted evidence that the defendant completed a sex offender treatment program and that at the redetermination hearing he appeared to accept responsibility for his acts. After subtracting the 10 points assessed for failure to accept responsibility, the defendant's risk level is reduced to a level two. Order modified, level three sex offender adjudication reduced to level two, and order affirmed as modified. (County Ct, Oneida Co [Dwyer, J])

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

People v Latimore, 50 AD3d 1604, 856 NYS2d 422 (4th Dept 2008)

Holding: The court correctly classified the defendant as a level three sex offender. The defendant did not waive his argument that the court violated his due process rights by relying on the case summary since he objected to the procedures used to generate the summary. *Cf People v Wragg*, 41 AD3d 1273 *lv den* 9 NY3d 809. However, the defendant's argument lacks merit. *Cf People v David W.*, 95 NY2d 130, 138. Even if the court incorrectly assessed additional points for risk factors seven through nine, the court's upward departure to a level three was supported by clear and convincing evidence. *See People v Abdullah*, 31 AD3d 515, 516. Order affirmed. (Supreme Ct, Monroe Co [Geraci, Jr., AJ])

Attempt (General) (Preparation) **ATT; 50(7) (15)**

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

People v Naradzay, 50 AD3d 1489, 855 NYS2d 779 (4th Dept 2008)

The police received a 911 call about a man with a shotgun in a specified area. When they arrived at the location, the defendant approached them and said that he had "mental problems." When the police asked if he had any weapons, the defendant said that he had a shotgun and pointed to its location nearby. After his arrest, the police found a handwritten note that the defendant was carrying which detailed his plan to break into a certain house and kill an acquaintance and her husband. The defendant later told a reporter that he planned to kill the couple.

Holding: The evidence is legally sufficient to support the attempted murder and attempted burglary convictions. The note, the defendant's purchase of a gun and shells, his travel to the neighborhood of the intended targets with the loaded gun and removal of the trigger-lock, and his location at the edge of the targets' property establish the defendant's intent to commit the offenses. His actions show that he had moved beyond mere preparation to the point where he had the power to commit the crimes unless interrupted. *See People v Mahboubian* , 74 NY2d 174, 191. That the defendant had not pointed the gun at the targets or entered their property is not dispositive on the issue of whether the evidence was legally sufficient to support the convictions. Judgment affirmed. (Supreme Ct, Onodaga Co [Brunetti, AJ])

Dissent in Part : [Green, J] Despite the proof of his intent, the defendant did not come very or dangerously near to the commission of the offenses. Courts have found that evidence of conduct that was much closer to murder is legally insufficient to prove attempted murder. *See People v Mendez*, 197 AD2d 485, 485 *lv den* 83 NY2d 807.

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

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

People v Newkirk, 50 AD3d 1591, 856 NYS2d 431 (4th Dept 2008)

The defendant was convicted of two counts of second-degree robbery for the alleged theft of computer monitors from a store. He and an accomplice had each picked up merchandise intending to steal it. When the accomplice was chased by a store employee, the defendant dropped his merchandise. The accomplice hit the employee, causing injury. The defendant offered to help the employee as the accomplice fled.

Holding: "[T]he jury failed to give the evidence the weight it should be accorded on the issue whether defendant shared 'the mental culpability necessary to commit the crime charged,' i.e., the intent to commit a forcible theft ([*People v*] *Carr-El*, 287 AD2d [731] at 733 . . .)." Although the evidence showed that the defendant intended to commit larceny, it did not show that he forcibly stole property (*see gen People v Bleakley* , 69 NY2d 490, 495) or that he helped the accomplice commit the crime. Instead, the evidence showed that as soon as the defendant's accomplice made contact with a store employee, the defendant stayed in the store and discontinued his participation in the larceny by dropping the merchandise he was carrying. After the accomplice punched the employee and drove away with a second accomplice, the defendant offered aid to the employee and then walked away. Judgment reversed, indictment dismissed, and matter remitted. (County Ct, Ontario Co [Doran, J])

Fourth Department *continued*

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

Sentencing (General) (Hearing) (Resentencing) **SEN; 345(37) (42) (70.5)**

People v Peterson, 50 AD3d 1588, 856 NYS2d 430 (4th Dept 2008)

Holding: The court erred by failing to give the defendant an opportunity for a hearing when he was resentenced under the 2005 Drug Law Reform Act (DLRA-2, L 2005, ch 643, § 1). The defendant did not have a chance to present facts or circumstances relevant to imposition of a new sentence. The court further erred by not issuing written findings of fact and the reasons for imposing the new sentence. Order reversed and matter remitted for a new determination of the defendant's application in compliance with DLRA-2, including whether the defendant is ineligible for resentencing. (County Ct, Onondaga Co [Walsh, J])

Appeals and Writs (Notice of Appeal) (Record) (Scope and Extent of Review) **APP; 25(60) (80) (90)**

People v Postula, 50 AD3d 1581, 856 NYS2d 420 (4th Dept 2008)

In August 2003, the defendant was sentenced to probation, but in October 2003 the court revoked that sentence and imposed a definite term of incarceration.

Holding: Because the record does not contain any indication that the defendant took an appeal from the August 2003 judgment, his arguments regarding ineffective assistance of counsel and the validity of his waiver of his right to appeal related to the August judgment cannot be reviewed. Although the defendant's challenge to the severity of the October sentence survived his waiver of the right to appeal, the issue is moot because the defendant has completed serving his sentence. *See People v Parente*, 4 AD3d 793, 794. Appeal dismissed. (County Ct, Niagara Co [Sperrazza, J])

Probation and Conditional Discharge (Conditions and Terms) (Hearing) (Revocation) **PRO; 305(5) (20) (30)**

Sentencing (General) (Incarceration) **SEN; 345(37) (43)**

People v Rollins, 50 AD3d 1535, 856 NYS2d 417 (4th Dept 2008)

Prior to sentencing, the court imposed interim probation supervision, but revoked it at sentencing and imposed a term of incarceration.

Holding: The court incorrectly applied the rules governing a violation of probation hearing to the procedures required for revocation of interim probation supervision. *See* CPL 410.70. As interim probation supervision is imposed prior to sentencing, the presentence procedures of CPL 400.10 apply. The summary hearing conducted by the court was sufficient under CPL 400.10(3) because it was of sufficient depth to allow the court to determine that the defendant failed to comply with the conditions of his interim probation supervision. *See People v Outley* , 80 NY2d 702, 713. Appeal of sentence of incarceration dismissed and judgment affirmed. (County Ct, Niagara Co [Sperrazza, J])

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

Evidence (Best and Secondary Evidence) (Photographs and Photography) **EVI; 155(5) (100)**

Impeachment (of Defendant) **IMP; 192(35)**

People v Vickio, 50 AD3d 1479, 856 NYS2d 764 (4th Dept 2008)

Holding: The defendant failed to preserve his contention that the court erred in admitting evidence of a photograph produced from a surveillance tape in violation of the best evidence rule, and there was no violation. As a police officer testified the photograph was the same as the image he saw on the tape and the tape had been returned to the store it belonged to, the absence or unavailability of the original tape was satisfactorily explained and the innocence of the mishap was established. *See People v Grasso* , 237 AD2d 741, 742 *lv den* 89 NY2d 1035. There was also no *Brady* violation with respect to the photograph, even though the prosecution discovered it only a week before the trial's commencement. The defendant refused an adjournment; his right to a fair trial was not violated because he was given a meaningful opportunity to use the material to cross-examine the prosecution's witnesses or as evidence during his case. *See People v Cortijo* , 70 NY2d 868, 870. The court properly admitted rebuttal testimony and denied the defense's surrebuttal testimony with respect to statements made by the defendant after he testified that he did not recall those statements. Notice is not required where the rebuttal testimony is only offered for impeachment purposes. *See People v Hill* , 281 AD2d 917, 917-918. Judgment affirmed. (County Ct, Steuben Co [Latham, J])

Fourth Department *continued*

Accomplices (Accessories) (Corroboration) (Witnesses) **ACC; 10(5) (20) (35)**

People v Washington, 50 AD3d 1616, 856 NYS2d 404 (4th Dept 2008)

Holding: The court properly refused to submit to the jury the issue of whether the prosecution's principle witness was an accomplice. The witness could not be considered an accomplice as there was no evidence that the witness shared the defendant's criminal intent or was aware that the defendant possessed a weapon. *See People v Beaudet*, 32 NY2d 371, 375. The witness's initial statement to the police that someone other than the defendant was the shooter made her at most an accessory after the fact; therefore, the accomplice corroboration requirement does not apply. *See People v Burgess*, 40 AD3d 322, 322-323 *lv den* 9 NY3d 921. Judgment affirmed. (Supreme Ct, Monroe Co [Affronti, J])

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

Larceny (Defenses) (Instructions) **LAR; 236(15) (50)**

People v Ace, 51 AD3d 1379, 856 NYS2d 792 (4th Dept 2008)

Holding: The court erred in failing to charge the jury that the defendant's claim of right was a defense to the grand larceny charge. Despite the defendant's failure to preserve the issue, it is reviewed in the interest of justice. One of the defendant's coworkers corroborated, in part, the defendant's testimony that his employer instructed him to take the allegedly stolen property to the scrap yard. A reasonable view of the evidence would allow a jury to conclude that the defendant took the property under a claim of right. *See gen People v Moscato*, 251 AD2d 352, 352-353. Because the verdict was not against the weight of the evidence, however, the defendant is not entitled to dismissal of that count. *See gen* CPL 470.20(5). Judgment modified, second-degree grand larceny conviction reversed, judgment affirmed as modified, and matter remitted for a new trial on count one of the indictment. (County Ct, Orleans Co [Punch, J])

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

Assault (General) (Serious Physical Injury) **ASS; 45(27) (60)**

People v Bauman, 51 AD3d 316, 856 NYS2d 801 (4th Dept 2008)

The defendants were charged with one count each of intentional and depraved indifference assault for injuring their roommate over an eight-month period. The intentional assault count alleged that the defendants used several objects to cause serious physical injuries. The depraved indifference assault count alleged that the defendants created a grave risk of death by attacking the complainant with various objects, scalding him with water, depriving him food, and through other acts and omissions. The indictment was dismissed.

Holding: The court properly dismissed the assault counts as duplicitous. The intentional assault statute contemplates a single act; thus, each act that constitutes a crime must be charged in a separate count. *See People v Keindl*, 68 NY2d 410, 417-418 *rearg den* 69 NY2d 823. That count charges several actions which were the product of successive and distinguishable impulses, each of which can support a separate charge. *See People v Okafor e*, 72 NY2d 81, 87. Since there are multiple acts charged in one count, if the jury convicted the defendants of that count, it would be virtually impossible to determine the act or acts as to which the jury reached a unanimous verdict. Depraved indifference assault contemplates reckless conduct creating a grave risk of death causing serious physical injury. Because the indictment alleges multiple serious physical injuries caused by the defendant's alleged acts, that count is also duplicitous. Order affirmed. (Supreme Ct, Monroe Co [Valentino, J])

Dissent in part: [Fahey, J] The depraved indifference assault count is not duplicitous because that crime, like endangering the welfare of a child and depraved indifference murder, can be a continuing crime. Without including multiple incidents it would be impossible to show a prolonged course of conduct.

Evidence (Prejudicial) (Relevancy) (Sufficiency) **EVI; 155(106) (125) (130)**

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

People v Nunez, 51 AD3d 1398, 857 NYS2d 854 (4th Dept 2008)

The defendant began beating the decedent at the home of friends, left with her in a car where the attack continued, dragged her unconscious through her bedroom window, and did not call 911 until the next morning.

Holding: The depraved indifference murder conviction is supported by legally sufficient evidence. The defendant's "failure to summon aid for the victim until the morning after the attack is legally insufficient, by itself, to support the conviction of depraved indifference murder (*see People v Mancini* , 7 NY3d 767, 768 . . .)." However, the defendant's brutal conduct against his girlfriend, including actions that intensified or prolonged her

Fourth Department *continued*

suffering, demonstrate a level of cruelty that establishes the element of depravity. *See People v Suarez*, 6 NY3d 202, 212-213. The court properly admitted evidence of prior acts of domestic violence against the decedent, as it was relevant to the defendant's motion, provided background material, and its probative value outweighed any prejudicial impact. *See People v Alvino* , 71 NY2d 233, 242. The court correctly denied the defendant's motion to suppress evidence seized from the decedent's apartment as the defendant failed to show the requisite legitimate expectation of privacy. The court properly admitted various eyewitness statements recorded by 911; the statements were not testimonial since the witnesses were describing a continuing situation that required police assistance. *See Davis v Washington*, 547 US 813, 822 (2006). Judgment affirmed. (Supreme Ct, Monroe Co [Affronti, J])

Homicide (Felony Murder) (General) **HMC; 185(20) (22)**

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

Trial (Joinder/Severance of Counts and/or Parties) **TRI; 375(20)**

People v Owens, 51 AD3d 1369, 856 NYS2d 793 (4th Dept 2008)

Holding: The court properly refused to direct the prosecution to disclose records regarding a community attitude survey that they commissioned several weeks before jury selection and to investigate possible racial bias in the jury selection process caused by the prosecution's use of the survey. None of the selected jurors took part in the survey, the court allowed unlimited voir dire regarding racial bias, the defendant had his own jury consultant, and the record does not show that any of the jurors was racially biased. Therefore, the defendant was not denied his right to a fair trial. The court did not abuse its discretion in refusing to sever the felony murder counts from the rape counts as rape was the underlying felony for the murder counts, making them similar in law, and the defendant failed to show good cause for severance. *See* CPL 220.20. Penal Law 125.27(1)(a)(vii) is not unconstitutionally underinclusive. Although certain predicate felonies for second-degree felony murder are not predicate felonies for first-degree intentional felony murder, the Legislature's goal in enacting the felony provisions of the first-degree murder—*ie*, limiting the predicate felonies to those that are the most violent and pose a substantial risk of physical injury, is rational. *See gen People v Harris* , 98 NY2d 452, 477. Judgment affirmed. (Supreme Ct, Monroe Co [Egan, J])

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

Sentencing (General) (Pronoucement) **SEN; 345(37) (70)**

People ex rel Foote v Piscotti, 51 AD3d 1407, 857 NYS2d 515 (4th Dept 2008)

Holding: The court erred in denying the writ of habeas corpus based on its incorrect conclusion that post-release supervision (PRS) is mandatory and that nullification of the petitioner's PRS would render his sentence invalid. The Department of Correctional Services (DOCS) lacked authority to add PRS to the petitioner's sentence, even though the sentencing court failed to do so, as CPL 380.20 and 380.40 provide that only a judge may impose a term of PRS. *See Matter of Garner v New York State Dept of Correctional Servs*, 10 NY3d 358. Judgment reversed, writ of habeas corpus sustained, and the respondent is directed to discharge the petitioner from custody forthwith. (County Ct, Wayne Co [Kehoe, J])

Evidence (General) (Hearsay) **EVI; 155(60) (75)**

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

People v Ballerstein, No. KA 07-00546, 4th Dept, 6/6/2008

Holding: The defendant was deprived of his right to a fair trial based on the cumulative effect of the court's evidentiary errors and prosecutorial misconduct. Although the defendant failed to preserve for review certain errors and instances of misconduct, the issue is reviewed in the interest of justice. The court erred in admitting hearsay evidence, including the double hearsay testimony of the medical director of the Child Advocacy Center regarding statements made by the complainant to a nurse when the director was not present, testimony of a witness regarding a videotape he did not view, and excerpts from the complainant's diary. The court incorrectly allowed the director to state his opinion regarding the credibility of the complainant's statements, which intruded on the jury's role in making credibility determinations. *See People v Eberle*, 265 AD2d 881, 882. The prosecutor committed misconduct by vouching for the credibility of the complainant, commenting on the credibility of a person whom he did not intend to call as a witness, introducing evidence the court had precluded him from presenting, circumventing unfavorable court rulings, appealing to the jurors' sympathies during his opening statement, and making irrelevant comments and warning the jury not to let the complainant get lost in the system during his closing statement. "We can only conclude herein that the prosecutor's 'inflammatory [comments had] a decided tendency to prejudice the jury against the defendant' ([*People v*] *Ashwal*, 39 NY2d [105] at 110 . . .)."

Fourth Department *continued*

Judgment reversed and new trial granted. (County Ct, Wyoming Co [Dadd, J])

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

Evidence (Uncharged Crimes) **EVI; 155(132)**

People v Bennett, __ AD3d __, 859 NYS2d 836 (4th Dept 2008)

The defendant was convicted of multiple counts of first- and second-degree rape and first-degree sexual abuse.

Holding: Trial testimony rendered the two first-degree sexual abuse counts duplicitous and the convictions for those counts must be reversed. Although the defendant failed to preserve this issue for review, it is reviewed in the interest of justice. The counts, which were based on the complainant's age and forcible compulsion, arose out of the same conduct that was allegedly committed during a specified time period. The trial evidence, however, showed that there were two criminal acts committed during that time period, making it impossible to determine whether each juror convicted the defendant for the same act. *See People v Dalton*, 27 AD3d 779, 781 *lv den* 7 NY3d 754. The court properly admitted evidence of four prior uncharged instances of domestic violence that the complainant witnessed, as this evidence was relevant to the element of forcible compulsion and her delayed reporting. *See People v Greene*, 306 AD2d 639, 642 *lv den* 100 NY2d 594. The court properly gave the jury a limiting instruction regarding this evidence. Judgment modified, first-degree sexual abuse convictions reversed, those counts of the indictment dismissed without prejudice to the prosecution to re-present appropriate charges under those counts to another grand jury, and judgment affirmed as modified. (County Ct, Niagara Co [Fricano, J])

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

Trial (General) **TRI; 375(15)**

People v Buchanan, __ AD3d __, 859 NYS2d 791 (4th Dept 2008)

Holding: The court's decision to require the defendant to wear a stun belt under his clothing during his trial did not violate his right to due process. While the use of a stun belt that is not visible to the jury is subject to the same scrutiny as visible restraints under *Deck v Missouri* (544 US 622, 632 [2005]), the court's decision did not violate *Deck*'s three fundamental principles. One, the right to be presumed innocent was not implicated; where the belt was not visible, the court's decision did not suggest to the jury that there was a need to separate the defendant from the general public. Two, the use of the belt did not impact the defendant's right to counsel since the belt was not visible and a physician examined the defendant to ensure he was not physically impaired. The defendant failed to allege that his discomfort and fear that the belt would be activated actually prevented from conferring with counsel. Three, as the court ensured the defendant was treated respectfully with regard to the use of the belt, the dignity of the judicial process was upheld. Since the belt was not visible and the defendant failed to show actual prejudice, the court's failure to articulate a justifiable basis for requiring the restraint does not constitute reversible error. Judgment affirmed. (County Ct, Chautauqua Co [Ward, J])

Dissent: [Fahey, J] The conviction must be reversed as the court failed to comply with its affirmative duty to state on the record whether the belt was visible to the jury and erred in not making any individualized determination concerning the need for restraint, saying it had a policy of allowing this in serious cases.

Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches]) (Motions to Suppress [CPL Article 710]) **SEA; 335(15[p]) (45)**

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

People v Colligan, No. KA 05-01868, 4th Dept, 6/6/2008

Holding: The court erred in refusing to suppress evidence seized by the police from the defendant's car. The prosecution failed to present any evidence at the suppression hearing that the police had probable cause to search the car before the search warrant was issued. Although the police did not search the car until they had the search warrant, the police had already seized the car by taking the defendant's car keys and sitting outside with the car before obtaining the warrant. The detention of the car was as invasive as an actual search of the car would have been. *See People v Singleteary* , 35 NY2d 528, 533. The court improperly ordered the defendant to pay restitution without first giving him an opportunity to withdraw his plea, as restitution was not part of the plea agreement. *See gen People v Ponder*, 42 AD3d 880, 882 *lv den* 9 NY3d 925. Judgment reversed, plea vacated, motion to suppress evidence granted, and matter remitted for further proceedings on the indictment. (Supreme Ct, Monroe Co [Sirkin, AJ])

Discovery (General) (Right to Discovery) **DSC; 110(12) (33)**

Due Process (Fair Trial) (General) (Misconduct) **DUP; 135(5) (7) (15)**

Fourth Department *continued*

People v Davis, __ AD3d __, 859 NYS2d 804 (4th Dept 2008)

During jury selection and the trial, the prosecution for the first time disclosed a firearm analysis, a report concerning blood recovered from the clothing of the defendant and the decedent, a medical examiner's report, and five autopsy photographs of the decedent depicting the gunshot wounds. The court denied the defendant's requests for adjournments to review the material and his motion for a mistrial.

Holding: The prosecution's failure to disclose material to the defendant in violation of the provisions of CPL 240.20 significantly prejudiced the defendant. The material was relevant to the defendant's justification defense and the defendant could have used it to determine whether it could lead to information favorable to his case. *See People v DaGata* , 86 NY2d 40, 45. The court failed to cure the prosecution's noncompliance by granting a continuance or taking other appropriate steps authorized by CPL 240.70(1). Because the prosecution's conduct was severe and frequent, the court failed to take appropriate action to dilute the effect of that conduct, and the same result may not have been reached had the conduct not occurred, the defendant was denied due process of law. *See People v Mott* , 94 AD2d 415, 419. Judgment reversed and new trial granted. (County Ct, Monroe Co [Geraci, J])

Kidnapping (Elements) (General) **KID; 235(15) (17)**

Robbery (General) **ROB; 330(22)**

People v Jacobs, __ AD3d __, 859 NYS2d 541 (4th Dept 2008)

Holding: The defendant's kidnapping conviction is precluded by the merger doctrine, as "the restraint and asportation of the victim were 'so much the part of' the attempted robbery and assault of the victim that those crimes could not have been committed without the acts comprising the kidnapping ([*People v*] *Cassidy*, 40 NY2d [763] at 767 . . .)." The defendant's attempted robbery conviction must be reversed. The indictment included one count of attempted robbery, but the prosecution presented evidence of a completed robbery. The jury may have convicted the defendant on an unindicted attempted robbery, which would usurp the grand jury's exclusive power to determine charges. *See People v McNab*, 167 AD2d 858, 858. The defendant's other issues lack merit. Judgment modified, kidnapping and attempted robbery convictions reversed, kidnapping count dismissed, robbery count dismissed without prejudice, and judgment affirmed as modified. (Supreme Ct, Erie Co [Fricano, J])

Parole (Release [Conditions]) (Revocation) **PRL; 276(35[a]) (40)**

People ex rel Jenkins v Piscotti, No. KAH 07-01176, 4th Dept, 6/6/2008

The defendant violated a condition of presumptive release and the court revoked his release and he was incarcerated.

Holding: The court erred in granting a writ of habeas corpus as it incorrectly concluded that the provisions of Executive Law 259-j(3-a) applied to persons on presumptive release, not just parolees. Correction Law 806(7), which states that "any reference to parole and conditional release in this chapter shall also be deemed to include presumptive release," does not apply to Executive Law 259-j(3-a) because they were enacted at different times and do not cross-reference each other. The plain language of Correction Law 806(7) shows that it only applies to that chapter of the Correction Law, and not the Executive Law. Even though the outcome is incongruous, the express language governs. Judicial amendment is inappropriate because it is not clear that the Legislature inadvertently failed to include presumptive releasees in section 259-j(3-a). Judgment reversed and petition dismissed. (County Ct, Wayne Co [Kehoe, J])

Juveniles (Hearings) (Persons in Need of Supervision) **JUV; 230(60) (110)**

Self-Incrimination (Conduct and Silence) (General) **SLF; 340(5) (13)**

Matter of Mercedes M.M., __ AD3d __, 859 NYS2d 550 (4th Dept 2008)

Holding: At the fact-finding hearing in the person in need of supervision proceeding, the court properly advised the respondent of her right to remain silent. However, at the beginning of the dispositional hearing, the court failed to advise the respondent of her right to remain silent. After the respondent's testimony, the court adjudicated her a person in need of supervision and placed her in the custody of the county department of social services. The court committed reversible error. *See Matter of Tabitha E.*, 271 AD2d 719, 720. Family Court Act 741(a) requires that the court advise the respondent of the right to remain silent at the beginning of any hearing under article 7 of the Family Court Act. Order modified by vacating the disposition and matter remitted to Family Court for a new dispositional hearing. (Family Ct, Oneida Co [Shkane, J])

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

Fourth Department *continued*

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

People v Rivera, __ AD3d __, 858 NYS2d 644 (4th Dept 2008)

Holding: "Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, in failing to argue that the court's jury instruction distorted the 'course and furtherance' element of felony murder. Upon our review of the trial court proceedings, we conclude that the issue may have merit." Motion for writ of error coram nobis granted, order of Feb. 1, 1991 vacated, and appeal will be considered de novo.

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

Probation and Conditional Discharge (Revocation) **PRO; 305(30)**

People v Strauts, __ AD3d __, 859 NYS2d 545 (4th Dept 2008)

After the defendant admitted to violating the conditions of his probation, the court revoked the probation sentence and sentenced him to a term of imprisonment.

Holding: The record fails to demonstrate that the defendant's admission that he violated the conditions of his probation was knowingly, voluntarily, and intelligently entered. *See gen People v Lopez*, 71 NY2d 662, 665. When the court asked the defendant whether anyone had threatened him or made promises other than those discussed regarding sentencing, the defendant answered "Yes, sir." The court failed to determine what the defendant meant by his response; therefore, the record does not show whether there were threats or promises that motivated the defendant to make his admission. *Cf People v Muniz*, 156 AD2d 484 *lv den* 75 NY2d 870. Judgment reversed, admission vacated, and matter remitted for further proceedings on the declaration of delinquency. (County Ct, Oswego Co [Hafner, Jr., J])

Juveniles (Abuse) (Disposition) (Neglect) **JUV; 230(3) (40) (80)**

Matter of Derrick C., __ AD3d __, 859 NYS2d 855 (4th Dept 2008)

The court found that the respondent neglected her son and derivatively neglected her daughters.

Holding: The court's findings are supported by a preponderance of the evidence. With regard to the neglect finding, the fact-finding hearing testimony showed that the mother continued to reside with the children's father and refused to believe the father sexually abused her son, even though the father had pleaded guilty to sexual abuse. *See Matter of A.R.* , 309 AD2d 1153, 1154-1155. The derivative neglect findings were proper since the respondent's actions showed that she had a fundamental defect in her understanding of her parental duties and obligations and she created an atmosphere that was detrimental to the well-being of her daughters. The requirement in the order of supervision that the respondent acknowledge her role in the father's sexual abuse of her son was permissible since "[t]he terms and conditions of an order of supervision 'need not necessarily relate to [a parent's] adjudicated acts or omissions' (*Matter of Baby Girl W.*, 245 AD2d 830, 832)." The respondent can comply with that requirement by admitting that the abuse occurred. *See Matter of Jesus JJ.* , 232 AD2d 752, 754 *lv den* 89 NY2d 809. Order affirmed. (Family Ct, Jefferson Co [Hunt, J])

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

Speedy Trial (Cause for Delay) (Consent to Delay) (Prosecutor's Readiness for Trial) **SPX; 355(12) (15) (32)**

People v Manning, No. KA 05-01417, 4th Dept, 6/13/2008

There was over a six month gap between when the felony complaint was filed and when the prosecution announced its readiness for trial. Defense counsel never sought dismissal of the indictment on the ground that the defendant was denied his right to a speedy trial.

Holding: "'It is well settled that a failure of counsel to assert a meritorious statutory speedy trial claim is, by itself, a sufficiently egregious error to render a defendant's representation ineffective' (*People v St. Louis* , 41 AD3d 897, 898 . . .)." Because the defendant made a prima facie showing that the prosecution failed to comply with CPL 30.30(1)(a), the prosecution has the burden of showing that there was sufficient excludable time. *See People v Kendzia*, 64 NY2d 331, 338. While the prosecution now argues that they should not be charged with the time associated with plea negotiations, because defense counsel failed to raise the speedy trial issue and the prosecution did not present evidence on that issue, the record does not show whether defense counsel requested the delay or consented to it. *See People v Jenkins* , 302 AD2d 978, 978 *lv den* 100 NY2d 562. Case held, decision reserved, and matter remitted for assignment of new counsel and for a hearing to determine whether any period of time between the

Fourth Department *continued*

commencement of the criminal action and the prosecution's announcement of readiness for trial is excludable. (County Ct, Onondaga Co [Fahey, J])

Dissent: [Pine, J] The defendant failed to show that there was no legitimate explanation for defense counsel's failure to file a speedy trial motion. Since the record does not show if the motion would have been granted or whether counsel was ineffective, a CPL 440.10 motion is the correct way to develop the record.

Forgery (Elements) (General) FOR; 175(10) (20)

People v Washington, __ AD3d __, 859 NYS2d 845 (4th Dept 2008)

The "defendant ascribed a false [first] name to a property log at the police station setting forth the personal property taken from him upon his arrest."

Holding: The evidence presented to the grand jury and at trial was legally insufficient to support the indictment and the conviction for forgery. The crime of forgery involves a written instrument and Penal Law 170.00(1) requires that the written instrument be "capable of being used to the advantage or disadvantage of some person." A property log does not meet this requirement because it is not used for the purpose of establishing the defendant's identity and is essentially the same as a property receipt. "[A] police station property log is not a written instrument within the meaning of Penal Law § 170.00(1) . . . ." Judgment modified, second-degree forgery conviction reversed, forgery count dismissed, judgment affirmed as modified, and the matter remitted for proceedings pursuant to CPL 470.45. (County Ct, Erie Co [Drury, J])

Dissent in Part: [Lunn, J] The evidence was sufficient to support the forgery conviction as the record shows that the police used the property log for identification purposes. By using a false name when he signed the property log, the "defendant was 'able to at least temporarily hide from the authorities his prior criminal history . . . and his true identity' (*People v Kirk*, 115 AD2d 758, 759, *affd* 68 NY2d 722)." ⚖

Defender News *(continued from page 5)*

that would allow for reversal of a particular criminal conviction. Concluding that the five counties are necessary parties which must be joined as defendants, Justice Devine noted that the suit directly challenges the way that the counties provide public defense services and that injunctive relief without amendments to the County Law "would almost certainly require the respective counties to fund significant increases in attorneys fees, salaries or contracts and investigator and expert witness expenses." District attorneys, criminal defense attorneys, and judges in those counties are not necessary parties, however, since any judgment will not directly impact the criminal prosecutions, any indirect effects are remote and speculative, and no relief is sought against the judiciary. ⚖

Job Opportunities *(continued from page 7)*

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