New York State Defenders Association

Public Defense Backup Center
REPORT

Volume XXIII Number 2 March–May 2008

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Court of Appeals Releases Decisions in Post-Release Supervision Cases

The Court of Appeals held that a term of post-release supervision (PRS) must be pronounced by the court in accordance with CPL 380.20 and 380.40. *See People v Sparber*, Nos. 53, 54, 55, 56, 58 (4/29/2008); *Matter of Garner v New York State Dept of Correctional Services*, No. 57 (4/29/2008) [available at www.nycourts.gov/ctapps/lat-dec.htm.] The court's duties under CPL 380.20 and 380.40 are non-delegable, and neither the court clerk nor the NYS Department of Correctional Services (DOCS) has the authority to add terms of PRS to sentences. In *Sparber*, the Court found that the sentencing courts in the five cases erred by failing to orally pronounce the imposition of mandatory term of PRS at sentencing. To remedy the error, the Court modified the defendants' sentences and remanded the cases for resentencing and an oral judicial pronouncement of PRS. In *Garner*, the Court granted the petitioner's Article 78 petition and prohibited DOCS from imposing upon the petitioner a term of PRS. The court noted that its decision is without prejudice to any ability that the prosecution or DOCS may have to seek resentencing of the petitioner in the proper forum. Criminal defense attorneys are welcome to call the Backup Center to discuss the Court's decisions in *Sparber* and *Garner* and possible strategies for correcting illegally imposed terms of post-release supervision. [A full summary of these decisions will appear in the next issue of the *REPORT*.]

Third Department Holds Failure to Register under SORA is Not a Strict Liability Offense

In *People v Haddock*, 48 AD3d 969 (3d Dept 2008), the Third Department concluded that the lower court erred in refusing to instruct the jury that the prosecution must prove that the defendant *knowingly* failed to comply with the registration requirements of Correction Law 168-t (Sex Offender Registration Act [SORA]). The court refused to assume that the legislature intended a crime with no scienter as the statute lacked specific language regarding that issue and the legislative history did not show a clear intent to create a strict liability offense. The court also noted that the statutory notice provisions throughout SORA indicate that the legislature intended to require a culpable mental state as part of the offense. A full summary of the decision is available on p. 29.

Successful Challenge to Opinions in Pre-Sentence Report

On April 1, 2008, Judge Joseph E. Fahey ordered the probation department to amend or delete portions of the defendant's pre-sentence report (PSR); the court also sealed the original PSR and barred disclosure to any individual or agency without a court order. *See People v Irwin*, No. 07-1381, 2008 NY Misc LEXIS 2044, 2008 WL 1056566 (County Ct, Onondaga Co 4/1/2008). After the defendant pleaded guilty to first-degree attempted criminal sexual act, the court ordered a PSR. In December 2007, defense counsel requested a pre-sentence conference pursuant to CPL 400.10 to resolve discrepancies in the PSR. During a court-ordered hearing, Michael Hungerford, Esq., supervising attorney for Mental Hygiene Legal Services in the Fourth Department, and Kostas Katsavdakis, Ph.D., testified for the defendant.

Mr. Hungerford testified regarding the significance of the PSR in Article 10, Sex Offender Management and Treatment Act (SOMTA) cases, and noted that the case review team and their expert rely heavily on the PSR in making their diagnosis and reaching conclusions about whether a person should be subject to civil management. Dr. Katsavdakis also testified regarding the Office of Mental Health's use of the PSR for civil commitment screening and opined that there

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was not sufficient information to support some of the opinions set forth in the report.

The court concluded that the probation officer did not "possess the qualifications of Dr. Katsavdakis to make the kind of clinical conclusions contained in the 'Commentary' portion of the Report."

OIDS Proposal Fails, Assembly Proposes Limited IPDC

The proposal by former Governor Eliot Spitzer to create an Office of Indigent Defense Services, noted in the last *REPORT*, was rejected by the Legislature. A new proposal in the Assembly (A.9806-B Part Y) did not pass as part of the budget but remains the subject of reform efforts.

That bill would create a Commission that would be selected in a way to insulate it from political influence but would be more limited in scope than the Independent Public Defense Commission (IPDC) envisioned by the Kaye Commission. Under the Assembly plan, the initial duties of the IPDC would include performing a fair and unbiased evaluation of existing public defense systems/providers based on statutory requirements and existing standards, calculating the cost of existing public defense services to localities and the state, evaluating the cost of assuring that standards and best practices are met, comparing the costs of operating the current system at that level to the costs of a plan for state financing and delivery, and comparing the resources available to public defense to the resources available to prosecution and investigation, including but not limited to county attorneys, DAs, parole revocation specialists, child protection agencies and presentment agencies. This IPDC would file a preliminary and final report in the first fiscal year, and an annual report thereafter. See this issue's *From My Vantage Point* for more about reform efforts.

Counties Failing ILSF Maintenance of Effort Get Time Extension

Thirteen counties initially received notice from the Comptroller that they had failed to meet the maintenance-of-effort provisions (MOE) of the Indigent Legal Services Fund (ILSF) and might not receive their share of the 2008 ILSF distribution. The total amount at stake for the nine counties still at risk—Albany, Allegany, Delaware, Fulton, Genesee, Herkimer, Rockland, Washington, and Yates—is nearly $2.8 million. On March 31, a bill delaying distribution of that money to other localities was passed and signed. (L.2008, ch 39). It gives the nine counties a chance to show MOE compliance by May 27. Any funds not distributed by that date are to be distributed among complying localities on May 30. As a result, the Legislature has time to consider a Senate proposal to modify the MOE provisions in an effort to make them less onerous. This proposal is the only part of the rejected OIDS bill to be picked up by either legislative house. (S. 6806—B Part C.)

NYSDA has published a document, "How the Indigent Legal Services Fund Functions: A Preliminary Data Analysis," that sets out in graphs and charts data relating to the ILSF and its MOE provisions. It is available on our website at www.nysda.org. For further discussion, see this issue's *From My Vantage Point*.

2008–2009 Budget Brings New and Increased Surcharges and Fees

As reported by the Center for Community Alternatives, the 2008–2009 state budget includes the following increased fees and new and increased surcharges: (1) Mandatory surcharge for felony convictions—up from $250 to $300; (2) Mandatory surcharge for misdemeanors—up from $140 to $175; (3) Mandatory surcharge for Penal Law violations—up from $75 to $95; (4) Mandatory surcharge for some VTL violations—up from $45 to $55; (5) Crime Victim Assistance Fee for Penal Law and VTL 1192 offenses—up from $20 to $25; (6) new additional surcharge for VTL 1192 offenses—$170; and (7) new additional surcharge for certain VTL violations—$20. [#1-5: effective 7/1/08; #6 & 7: effective 8/1/08]. For more information about the surcharges and fees, visit www.communityalternatives.org/pdfs/nys%20fee%20increase.pdf; for a chart of the surcharges and fees, visit www.communityalternatives.org/pdfs/fees% 20chart.pdf.

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Managing Editor Charles F. O'Brien
Editor Susan C. Bryant
Contributors Stephanie Batcheller, Mardi Crawford, Al O'Connor, Ken Strutin

The *REPORT* is published ten times a year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone 518-465-3524; Fax 518-465-3249. Our Web address is http://www.nysda.org.

Eyewitness Identification Reform Litigation Network Launches Website

The Eyewitness Identification Reform Litigation Network has launched a new website, EyeID.org, which provides resources for members of the defense community to support litigation and legislative reform efforts in the area of eyewitness identification. The resources are available free of charge. The Network is a collaboration between the Innocence Project, the National Legal Aid & Defender Association, the National Association of Criminal Defense Lawyers, and the Public Defender Service for the District of Columbia.

Two Rulings on the Ability of Child Witnesses to Give Sworn Testimony

In *People v Carrington*, No. 07-0637 (County Ct, Westchester Co 3/6/2008), the court dismissed the indictment against the defendant because the grand jury evidence was legally insufficient to support the charges. The sole record evidence connecting the defendant to the offenses was the grand jury testimony of a seven-year-old boy. At issue was whether the child's testimony was sworn or unsworn, and if unsworn, whether there was sufficient corroborating evidence. After a review of the grand jury transcript and a videotape of the testimony, the court concluded that the child did not give an unequivocal answer that he would tell the truth. Despite the child's eventual promise to tell the truth after persistent prodding and leading questions from the prosecutor, the child's demeanor and other statements indicated that he did not appreciate the significance of the oath. Since the child did not give sworn testimony and the prosecution failed to present sufficient corroborating evidence to the grand jury, the court dismissed the indictment, but granted the prosecution leave to represent to another grand jury. (www.law.com, 3/18/2008.)

In another recent decision, however, the Second Department concluded that the trial court properly exercised its discretion in finding that the five-year-old complainant was competent to give sworn testimony. *See People v Mendoza*, 853 NYS2d 364 (2d Dept 2008). The trial court had held that the child's testimony showed that she knew the difference between telling the truth and a lie, she promised to tell the truth, and said that she would be punished by her family and God if she lied. The Second Department noted that even if the court erred in allowing the sworn testimony, reversal was not required as the child's testimony was sufficiently corroborated by other evidence. For a full summary of the decision, see page 27.

22nd Annual NY Metropolitan Trainer Covered Broad Range of Subjects

On March 1, 2008, NYSDA held its annual metropolitan trainer at NYU Law School. Topics included the Admissibility of Fingerprints (Robert Epstein, Assistant Federal Public Defender with the Defender Association of Philadelphia), Ethical Issues in Defense Decision Making (Steven Zeidman, Associate Professor and Director of the Criminal Defense Clinic at CUNY School of Law), Litigating Suppression (Thomas Klein, The Legal Aid Society), Immigration Issues in Criminal Cases (Joanne Macri, Director of NYSDA's Immigrant Defense Project), and Recent Developments in Criminal Law and Procedure (Edward Nowak, President of NYSDA) . For those who could not attend the program, training materials are available from the Backup Center for $25.00.

Award Nominations Sought

Nominations are sought for two awards to be presented at NYSDA's 41st Annual Meeting and Conference in Saratoga Springs, NY. (See p. 5 for conference information.)

Kevin M. Andersen Memorial Award

Kevin M. Andersen was a lifelong public defender. Those who worked with him knew him to have the ability to be angered to his core by injustice, the will to fight ferociously for his client, and the compassion to grant the client the dignity each deserved as a human being despite whatever human frailties they might present. Following his death in 2004, the Genesee County Public Defenders Office created the Kevin M. Andersen Memorial Award to remember and honor his dedication to public defense work. This award is presented to an attorney who has been in practice less than fifteen years, practices in the area of indigent defense, and exemplifies the sense of justice, determination, and compassion that were Kevin's hallmarks. Nominations with supporting materials should be forwarded to the Genesee County Public Defenders Office, One West Main Street, County Building, Batavia NY 14020.

Wilfred R. O'Connor Award

Wilfred R. O'Connor was a founding member and long-time President of the New York State Defenders Association. He served as a legal aid lawyer in Brooklyn and Queens, as director of the Queens Legal Aid office, as a member of Legal Aid's Attica Defense Team, as director of the Prison Legal Assistants Program, and as president of NYSDA from 1978 to 1989. He went on to complete his career as a judge in New York City. His beliefs were clear: every defendant, regardless of race, color, creed or economic status, deserves a day in court and zealous

client-centered representation. The NYSDA Board of Directors created the Wilfred R. O'Connor Award to remember Bill and honor his sustained commitment to the client-centered representation of the poor. This award will be presented to an attorney who has been in practice fifteen or more years, practices in the area of public defense, and exemplifies the client-centered sense of justice, persistence, and compassion that characterized Bill's life. Nominations with supporting materials should be forwarded to the New York State Defenders Association, 194 Washington Avenue, Suite 500, Albany NY 12210-2314.

Cessie Alfonso Receives Lifetime Achievement Award from NLADA

NYSDA congratulates Cessie Alfonso, MSW on being the recipient of the National Legal Aid and Defender Association's 2008 Life in the Balance Achievement Award. The award was given in recognition of her lifelong dedication to justice, human rights, and civil liberties. Through her client-centered representation as a mitigation specialist, she works to protect the marginalized and teach her colleagues, jurors, and judges about diverse frailties of humankind. Cessie was recognized for raising the quality of capital defense representation in America and providing a model for cooperative, team defense that has saved countless lives.

Karen Murtagh-Monks Named Executive Director of Prisoners' Legal Services

Karen Murtagh-Monks has been hired to replace Susan Johnson as Executive Director of Prisoners' Legal Services of New York (PLS). Most recently, Ms. Murtagh-Monks was PLS's Deputy Director and Director of Litigation.

NYSDA, Justice Fund Welcome Melissa Mackey

The Backup Center and the New York State Defenders Justice Fund are pleased to announce that Melissa Mackey will be working for each organization in the capacity of Research Director. She was a researcher and policy analyst with the NYS Division of Criminal Justice Services and had been a criminal justice intern at the Backup Center. Melissa received her masters degree in criminal justice from SUNY Albany's School of Criminal Justice and is a part-time lecturer at the University. She is also a recently-elected member of the Albany City School Board. Her criminal justice experience and enthusiasm make her a great addition to both organizations.

Juvenile Defense News

Law Guardian Caseloads Limited to 150 Cases

On April 1, 2008, Chief Administrative Judge Ann Pfau issued an administrative order creating caseload limits for attorneys who are appointed pursuant to Family Court Act 249 to represent children in family court proceedings. The order provides that such attorneys shall not represent more than 150 children at one time. Caseloads may be adjusted, however, based on several factors, including: differences among categories of cases that comprise the workload of the office covered by the agreement; representation of multiple children in one case; availability and use of support staff; the level of activity required at different phases of the proceeding; and local court practice, including the duration of a case. Legal service providers are responsible for complying with the order and the Office of Court Administration will review caseload management by those providers annually to ensure compliance. Not more than two years from the date of enactment, the Chief Administrative Judge will review the effectiveness of the rule. (www.law.com, 4/2/2008.)

New Juvenile Public Defense Initiative

The MacArthur Foundation has announced the creation of the Juvenile Indigent Defense Action Network to help ensure that young people receive the legal protections to which they are constitutionally entitled by improving the juvenile indigent defense system. (www.modelsforchange.net/.) The Network will be coordinated through the National Juvenile Defender Center (NJDC). Network members will work with national experts to address critical problems common to juvenile indigent defense systems across the country. States, local jurisdictions, and organizations interested in applying for membership should contact Rey Banks at the NJDC at (202) 452-0010 x 107 or rbanks@njdc.info. Application information is available at www.njdc.info/pdf/jidan/jidan_application_and_press_release.pdf. The application deadline is June 6, 2008.

Office of Children and Family Services Announces New Non-Discrimination Policy

In April 2008, Pride Agenda announced that the New York State Office of Children and Family Services has adopted a policy and guidelines that prohibit discrimination against lesbian, gay, bisexual, transgender, and questioning youth in juvenile justice and other facilities that it operates. Pride Agenda worked with several organizations to achieve this result, including the New York

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Conferences & Seminars

Sponsor: New York County Lawyers' Association
Theme: A Perfect Storm: Race, Law, and Criminal Justice
Date: May 20, 2008
Place: New York County Lawyers' Association, New York City
Contact: NYCLA: tel (212) 267-6646 x245; website www.nycla.org

Sponsor: National Defender Training Project
Theme: 2008 Public Defender Trial Advocacy Program
Dates: May 30-June 4, 2008
Place: Dayton, OH
Contact: NDTP (Ira Mickenberg): tel (518) 583-6730; email imickenberg@nycap.rr.com

Sponsor: Dewey & LeBoeuf FASD Advocacy Project
Theme: Fetal Alcohol Spectrum Disorders and the Justice System
Date: June 4, 2008
Place: Dewey & LeBoeuf LLP, New York City
Contact: Dewey & LeBoeuf (Michael Greening): email mgreening@dl.com; website www.deweyleboeuf.com/Events/

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross to Kill: Defense of a Child Sex Abuse Case
Date: June 6, 2008
Place: St. Francis College, Brooklyn, NY
Contact: NYSACDL: tel (212) 532-4434; email nysacdl@aol.com; website www.nysacdl.com

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

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

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2008 Annual Meeting & Seminar: Sculpting the Winning Case on Cross-Examination
Dates: July 30-August 2, 2008
Place: Milwaukee, WI
Contact: NACDL: tel (202) 872-8600 x232 (Viviana Sejas); website www.nacdl.org

Sponsor: The Bryan R. Shechmeister Death Penalty College
Theme: Death Penalty College
Dates: August 2-7, 2008
Place: Santa Clara, California
Contact: Santa Clara University School of Law (Ellen Kreitzberg): tel (408) 554-4724; email ekreitzberg@scu.edu; website www.scu.edu/law/dpc/index.cfm

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

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 ⚖

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Juvenile Justice Coalition, the Sylvia Rivera Law Project, the LGBT Community Center in New York City, Lambda Legal, and the NYS LGBT Health and Human Services Network.

State Commission on Judicial Conduct News and Recent Decisions

The Board of the State Commission on Judicial Conduct has elected the Honorable Thomas A. Klonick as Chair and Stephen R. Coffey, Esq. as Vice Chair. Their two-year terms began on April 1, 2008. (www.scjc.state. ny.us.)

In March and April 2008, the Commission released five decisions regarding the following justices: Shawn W. Minogue, Wilmington Town Court, Essex County (censured for failing to deposit and report official monies as required and presiding over a case against her sister-in-law); David Ray, Brookfield Town Court, Madison County (admonished for convicting defendants of code violations without a trial or guilty plea, based on *ex parte* information); Duane A. Hart, Supreme Court, Queens County (censured for among other things, improperly threatening an attorney with contempt and denying an attorney's request to make a record); Roland A. Beers, Walton Village Court, Delaware County (resignation accepted); and Morris H. Lew, Farmington Town Court, Ontario County (censured for dismissing a friend's wife's speeding charge). Judge Beers was alleged to have violated the rights of defendants and failed to effectuate the defendants' right to counsel, despite having been previously cautioned for such conduct. Judge Beers resigned effective January 31, 2008. All five decisions are available at www.scjc.state.ny.us/Determinations/2008.htm.

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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 Public Defender's Office of Cattaraugus County seeks an **Assistant Public Defender**. Candidates must be law school graduates and members in good standing of the NY State bar, with commitment to undertake cases before Cattaraugus County Family Court. Some night court work may also be required. Strong research and writing skills and a commitment to the representation of individuals who are financially unable to retain counsel required. Ability to work collaboratively with other lawyers and staff necessary. Salary up to $50,000. Great government benefits. EOE. Send cover letter expressing interest with application and/or résumé to: Mark S. Williams, Esq., Cattaraugus County Public Defender, 175 North Union Street—Blue Bird Square, Olean NY 14760; tel (716)373-0004; fax (716)373-3462.

The 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 + D.O.E. Generous benefits. 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. E.O.E. Persons of color and bilingual persons encouraged to apply.

The Justice Program at the Brennan Center for Justice at NYU School of Law is accepting applications for **Counsel** for its Access to Justice Project to work on securing justice system reform. The attorney will run the Brennan Center's Community Oriented Defender Project, working with defenders across the country to obtain racial justice and other reforms. The attorney will also work on additional projects to improve the civil and criminal justice systems. Activities may include advancing public policy campaigns, producing policy analyses, authoring reports, lobbying, litigating, and counseling. Applicants should possess excellent writing and oral communication skills. Prior employment as a public defender or civil legal services attorney is a plus. Litigation experience, public policy advocacy experience, and experience facilitating events are also valued. Applicants must have strong interpersonal skills and the ability to represent the Brennan Center in a variety of public settings. Salary CWE. Applications will be considered on a rolling basis, and a decision will be made as soon as an appropriate candidate is identified. Please send a cover letter, résumé, two writing samples, and the contact information for three references to brennancenterjobs@nyu.edu, with "Justice Counsel" in the subject line. The Brennan Center for Justice is an equal opportunity, affirmative action employer, which welcomes qualified applicants of all races, ethnicities, physical and mental abilities, genders, and sexual orientations, including people who have been previously incarcerated. For more information, visit http://www.brennancenter.org/pages/jobs/.

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

The Federal Public Defender for the Western District of New York is now accepting applications for two **Assistant Public Defender** positions in its Buffalo office. An Assistant Federal Public Defender provides zealous, professional legal representation to indigent persons charged with criminal offenses in the United States District Court and the United States Court of Appeals for the 2nd Circuit. Responsibilities include managing an extensive caseload with cases at varying stages of litigation; preparing pleadings, briefs, and motions; appearing on behalf of clients in court hearings and at other related proceedings; reviewing various documents; developing litigation strategies; meeting with clients, experts, witnesses, family members, and others. All applicants must either be admitted to the State Bar of New York or be a member in good standing of another state bar. Applicants must have strong writing and advocacy skills, the ability to work in a team environment, and must possess effective organization skills and the ability to set priorities. Integrity and a commitment to the representation of individuals who are unable to retain counsel are required. Federal criminal trial experience is highly desirable. To apply, send cover letter, résumé, three references, and writing sample to: Carol Steinbruckner, Branch Admin. Asst., Federal Public Defender's Office, 300 Pearl Street, Suite 450, Buffalo, NY 14202. The position will remain open until filled. No phone calls please. Salary CWE. EOE. Women and minorities are encouraged to apply.

The Metropolitan Public Defender seeks an **Executive Director**. The Metropolitan Public Defender (MPD) is a private, nonprofit law firm committed to providing high-quality criminal defense for indigent clients in Oregon's Multnomah and Washington counties. The Executive Director is the Chief Executive officer responsible for providing strategic leadership for the company by working with the Board of Trustees and the Executive Management Team to establish long-range goals, strategies, plans, and policies. Submission deadline: May 31, 2008. MPD is committed to ensuring equal opportunity in employment without discrimination based upon race, color, religion, sex, age, national origin, physical or mental disability, sexual orientation, or any other basis unrelated to the individual's abilities and qualifications to serve. Minorities and women are encouraged to apply. For more information about the position, applicant requirements, and the application process, visit www.mpdlaw.com/execdirector.htm. ⚖

From My Vantage Point

by Jonathan E. Gradess*

Learning on the Journey to an IPDC

While the journey isn't everything, what happens along the way does affect the journey itself, though not the destination. We still seek an Independent Public Defense Commission (IPDC) overseeing a statewide, fully and adequately state-funded public defense system. But along the way in the first few months of 2008 we encountered washed-out roads and eventful detours that altered our path. Both the barriers and the people who help us surmount them provide new perspectives about where we go next.

New Reform Measures Proposed

My last column discussed former Governor Spitzer's proposed Office of Indigent Defense Services (OIDS). By the time my column was in print, NYSDA had completed a white paper on OIDS (posted on our website), but OIDS soon became largely irrelevant. David Paterson was sworn in as Governor. The Assembly rejected OIDS entirely and proposed instead a step toward real public defense reform—creation of an Independent Public Defense Commission empowered to study costs and other questions, and make recommendations for needed change (A.9806-B Part Y).

The Senate included in its budget a fragment of the OIDS proposal—amendments to the maintenance-of-effort (MOE) provisions of the Indigent Legal Services Fund (ILSF). Those amendments (S. 6806-B Part C) change the fund distribution in two ways. One change, looking back at an average of local money spent over the last three years instead of just the prior year, was intended to make it easier for counties to pass. The second would lower the amount of ILSF money taken from failing counties by changing the all-or-nothing provision of the formula.

The MOE issue took on immediacy when 13 counties learned they were to lose state money. These counties had reported spending less local funds on public defense in 2007 than they did in 2006, thereby failing the threshold MOE provision. These 13 counties received notice that they would not be included in the annual distribution of ILSF funds unless they could refile establishing greater 2007 expenditures or prove that all ILSF money went to improve quality. Nine counties remain at risk.

Campaign for an IPDC Urges Agreement

Although it did not happen immediately, the MOE failures have helped galvanize the defender community and many counties. A few Commission supporters initially dropped their focus on long-term reform to hone in on MOE fixes. Some who had been oblivious to the need for a Commission began to listen when proponents pointed out that MOE problems would disappear if a Commission was administering a state-funded system.

Under pressure to pass a nearly on-time budget, the Legislature and Governor Paterson did not come to agreement on public defense reform. To buy time for the nine counties, a bill was passed giving them until May 27 to show that they could meet the MOE provisions. There is still time to work out an agreement on public defense reform that helps these counties *and* moves toward real reform.

The New York State Defenders Justice Fund, through its Campaign for an Independent Public Defense Commission, has begun lobbying to insist that any legislative waiver of the MOE provisions for the nine counties be accompanied by the passage of A.9806-B Part Y. The bill is posted on the Justice Fund website (www.newyorkjusticefund.org). The Albany *Times Union* has urged the Legislature to pass the bill. (*Patchwork Justice*, 4/27/08) and the Genesee County Legislature has passed a resolution calling for the Commission and ILSF payments to the counties. Additional editorials are anticipated and other support is growing.

Getting it All Together

Meanwhile, NYSDA continues to work with the MOE counties and analyze the MOE provisions themselves. Discussions with county officials have been revelatory. I have received a number of insightful suggestions, such as having counties set their own goals for improving quality, and measuring whether they were able to obtain those goals using ILSF money. I have come to realize that some counties failing the MOE requirements are making strong efforts to improve quality. I have been made more aware of the absurdity of equating quality with the expenditure of as little as "one dollar more" in local funds, and of punishing localities that cannot improve quality by taking away funds needed to make that improvement. The goals of the MOE provisions remain valid, but evidence grows that the provisions themselves are flawed.

The Backup Center just completed "How the Indigent Legal Services Fund Functions: A Preliminary Data Analysis," which can be found on our website. In table form, this document presents information on what is known about the allocation of ILSF monies from 2005 through 2008 in relation to local net expenditures. The data presented establishes a baseline and presents concrete questions that need to be answered. The data also shows that the proposed fixes to the statute either don't work to solve the problem or work a hardship for counties and public defense clients alike.

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

Are Life Sentences Still Possible Under The Reformed Drug Laws?

By Arthur H. Hopkirk*

The provisions of the 2004 Drug Law Reform Act (DLRA) that replaced life sentences for class A-I and A-II drug felonies with determinate sentences received considerable attention within both the criminal justice system and the community at large. *See* L.2004, chapter 738; Penal Law (PL) § 70.71. This article explores whether, despite the headlines arising from the 2004 legislation, life sentences or their functional equivalent may still be imposed for drug offenses in limited circumstances.

Although two recent decisions by the Appellate Division do not directly address the legal issue, the facts of those cases prompt the question of whether a defendant convicted of a drug offense committed on or after January 13, 2005, the effective date for the new sentencing provisions in the 2004 law, may still receive a life sentence as a discretionary persistent felony offender. *See People v. Jones*, 47 AD3d 961 (3d Dept 2008), *lv den* __ NY3d __ (Mar. 20, 2008); *People v. Thacker*, 47 AD3d 423 (1st Dept 2008), *lv den* __ NY3d __ (Mar. 20, 2008). A close reading of the DLRA shows that persistent felony offender sentences pursuant to Penal Law § 70.10 are no longer permitted for drug crimes defined in Penal Law articles 220 (controlled substances) and 221 (marihuana). In contrast, another recent Appellate Division case suggests that a life sentence may still be imposed upon those found to be persistent felony offenders for inchoate crimes such as conspiracy to commit drug offenses. *See People v. Anonymous*, 43 AD3d 806 (1st Dept 2007). Finally, defense lawyers must consider whether, despite the statutory caps that normally limit a defendant's maximum sentencing exposure for non-violent felonies to 30 years, certain defendants convicted of class A drug felonies may be subject to *de facto* life sentences if consecutive determinate sentences are imposed.

Abolition of Discretionary Persistent Felony Offender Sentences for Drug Crimes

As attorneys who regularly practice criminal law in state courts in New York know, Penal Law § 70.10 permits the imposition of a class A-I felony sentence of between 15 and 25 years to life in prison instead of a sentence within the otherwise applicable sentencing range when a defendant previously has been convicted of two qualifying felonies and the judge makes a finding that "the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." Up until passage of the 2004 DLRA, there was no question that defendants convicted of drug-related felonies could qualify for sentencing as a discretionary persistent felony offender pursuant to section 70.10. However, under a provision of the 2004 law that was not well publicized, it appears that those convicted of offenses involving controlled substances or marihuana that are defined in Penal Law articles 220 or 221 may no longer be sentenced as persistent felony offenders.

Statutory Construction

The 2004 Drug Law Reform Act (L. 2004, ch 738) added PL § 60.04, entitled: Authorized disposition; controlled substances and marihuana felony offenses. Penal Law § 60.04(1) states that

> *[n]otwithstanding the provisions of any law,* this section shall govern the dispositions authorized when a person is to be sentenced upon a conviction of a felony offense defined in article two hundred twenty or two hundred twenty-one of this chapter or when a person is to be sentenced upon a conviction of such a felony as a multiple felony offender as defined in subdivision five of this section.

[Emphasis added.]

Penal Law § 60.04(5), governing the sentencing of "multiple felony offenders," provides that "second felony drug offenders" shall be sentenced in accordance with PL § 70.70. A "second felony drug offender" for purposes of the latter section is a "second felony offender," as defined in PL § 70.06, who is currently being sentenced for a drug or marihuana felony other than a class A felony. *See* PL § 70.70(1)(b). Penal Law § 70.06(1)(a) defines a "second felony offender," in relevant part, as someone who has "previously been subjected to one *or more* predicate felony convictions." [Emphasis added.] Notably, the only state prison sentences authorized by PL § 70.70 are determinate sentences, and that section neither contains a sentencing provision for persistent felony offenders nor has a cross-reference to PL § 70.10.

Similarly, PL § 70.71 contains the only authorized prison sentences for class A felony drug offenders regardless of whether they are first-time offenders or predicate felons. *See* PL § 60.04(2). Once again, the only state prison sentences authorized by section 70.71 are determinate sentences and it contains neither a provision for sentencing persistent felony offenders nor a cross-reference to PL § 70.10.

Given that the sentencing provisions contained in Penal Law § 60.04 apply to drug felonies "notwithstanding the provisions of any law" (PL § 60.04(1)), the plain language of the 2004 DLRA supports the conclusion that

* ***Arthur H. Hopkirk*** *is a staff attorney employed by the Criminal Appeals Bureau of The Legal Aid Society in New York City.*

drug felons may no longer receive life sentences as discretionary persistent felony offenders. *See People v. Utsey*, 7 NY3d 398, 404 (2006) (relying upon "plain language" of DLRA to find that new sentencing provisions did not apply to drug offenses committed prior to the effective date of the statute that were not class A felonies); *People v. Finnegan*, 85 NY2d 53, 58, *cert den* 516 US 919 (1995) ("when the 'language is clear and unambiguous, it should be construed to give effect to the plain meaning of [the] words' used").

The conclusion that the Legislature intended to eliminate discretionary persistent felony offender sentences for drug and marihuana felonies defined in Penal Law articles 220 and 221 when it reformed the drug laws in 2004 is fortified by looking at other provisions of the Penal Law. In contrast to the provision on multiple felony offenders in drug cases that contains a cross-reference to PL § 70.70 and omits any reference to PL § 70.10 (*see* PL § 60.04(5)), the provision in PL § 60.05(6) that governs the sentencing of multiple felony offenders in most non-drug cases includes cross-references to other predicate felony sentencing provisions including PL § 70.10, the section governing discretionary persistent felony offender sentencing. Furthermore, as part of the DLRA, the Legislature amended PL § 60.05(1) to clarify that the provisions governing the sentencing of most felons do not apply to dispositions of felony drug offenses covered by PL § 60.04. In a further contrast to PL §§ 60.04(5), 70.70, and 70.71, when the Legislature subsequently enacted another exception to PL § 60.05 that governed sentences for felony sex offenses, it was careful to ensure that the power to sentence a defendant as a discretionary persistent felony offender was reserved through cross-references to PL § 70.10. *See* L.2007, ch 7; PL § 70.80(5)(d), (6).

Thus, as demonstrated by both PL §§ 60.05(6) and 70.80, when the Legislature wanted to include a cross-reference to PL § 70.10 in a statute so as to ensure that a discretionary persistent felony offender sentence could be imposed, it knew how to do so. *See Matter of Robert J.*, 2 NY3d 339, 345 (2004) (stating that "[i]t is clear that the Legislature knew how to include age-restricting language in a juvenile delinquency placement provision when it wanted to do so," and drawing an inference as to legislative intent from the failure to include such an age-based restriction in another statutory provision). The omission of such a cross-reference from PL § 60.04(5) reinforces the conclusion based upon the plain language of the DLRA that life sentences are no longer permitted for drug felonies defined in Penal Law articles 220 and 221.

Recent Appellate Division Decisions

There have yet to be any appellate decisions analyzing whether defendants may be sentenced as discretionary persistent felony offenders for drug felony convictions. However, the facts of two recent Appellate Division decisions suggest that some attorneys are unaware of the potential argument that a sentence imposed pursuant to section 70.10 is no longer legal in drug cases. In addition, these cases provide an opportunity to discuss some of the ramifications for criminal defense practice of the change in the law.

In *People v. Jones*, 47 AD3d 961 (3d Dept 2008), following the seizure of cocaine and heroin in May 2005, subsequent to the effective date of the DLRA, the defendant was convicted of criminal possession of a controlled substance in the first and third degrees and two counts of criminally using drug paraphernalia in the second degree. He was sentenced as a discretionary persistent felony offender to an aggregate term of 25 years to life in prison. *See id.* at 962. On appeal, although challenges were raised and rejected concerning the procedure by which Jones was sentenced as a persistent felony offender (*see id.* at 965),[1] no issue was raised about whether such a life sentence was legal in the aftermath of the DLRA.

In *People v. Thacker*, 47 AD3d 423 (1st Dept 2008), the defendant waived his right to appeal his trial conviction of criminal sale of a controlled substance in the third degree and a misdemeanor "in exchange for a favorable sentence, along with the People's waiver of their right to commence persistent felony offender proceedings." The defendant was sentenced to a determinate prison term of 12 years. *See id.* at 423. Since the factual information in the *Thacker* opinion is sparse, one must examine the defendant's Appellate Division brief and the Department of Correctional Services's website to fully understand what happened. The crime occurred in 2006 after the effective date of the DLRA. The defendant had eight prior felony convictions and 35 misdemeanor convictions. Although at least one of the felony convictions from the early 1980s was for a violent felony, it appears that the parties may have assumed that it was too remote to be used as a predicate felony. Instead, the People filed a predicate felony statement based on Thacker's 2004 conviction of the non-violent felony of attempted burglary in the third degree. On appeal, Thacker attacked the validity of the waiver of the right to appeal as the product of ineffective assistance of counsel. *See id.* at 423. However, Thacker never argued that the waiver was not knowing and voluntary because the threat to adjudicate him as a persistent felony offender was an empty one since a life sentence was no longer available pursuant to PL § 70.10 after the passage of the DLRA.

In sum, if Thacker was ineligible for sentencing as a persistent felony offender, he made a poor bargain. Based upon the assumption that he was otherwise eligible for sentencing as a second felony drug offender whose prior felony conviction was for a non-violent felony, Thacker gave up his right to appeal his trial conviction in exchange for the maximum sentence permitted by PL §§ 70.70 (3)(b)(i) and 70.45(2)(d), twelve years in prison and three years of post-release supervision.

Practice Implications

The *Thacker* and *Jones* decisions provide a useful starting point for exploring the practice implications of the elimination of persistent felony offender sentences in drug cases.

Although waivers of the right to appeal in trial cases such as *Thacker* are a rarity, that case has implications for plea bargaining. Most obviously, defense lawyers should not be fooled by the threat of a persistent felony offender adjudication in a drug case and accept a plea deal premised on such a threat. All things being equal, if the possibility of a life sentence is off the table, attorneys should be able to negotiate a lower sentence than would be available if the prosecutor had a potential discretionary persistent felony offender determination as a bargaining chip. Moreover, without the risk of a life sentence, it will be less dangerous to pursue a suppression hearing or go to trial in a winnable case.

The *Jones* decision raises the question of what an attorney can do if he or she enters a post-DLRA drug case after the defendant has received a life sentence as a discretionary persistent felony offender, or even after the direct appeal is over, and a client's previous attorneys have not argued that such a sentence is illegal under the DLRA. Unlike a failure to follow the proper procedures in sentencing a defendant or a fact-specific challenge to the validity of a purported predicate felony, a claim that a court lacked the power to sentence a defendant as a persistent felony offender because, based on the face of the record, such a sentence was not authorized by the Legislature may be raised as a question of law on direct appeal despite the lack of an objection at sentencing. *See People v. Morse*, 62 NY2d 205, 214 n.2 (1984), *app dis* 469 US 1186 (1985); *People v. Samms*, 95 NY2d 52, 55-58 (2000).

Moreover, if a defendant's direct appeal has already been decided and the issue was not raised on appeal, it may still be possible to vacate an illegal persistent felony offender sentence through a motion made pursuant to Criminal Procedure Law (CPL) § 440.20. In contrast to motions to vacate judgments pursuant to CPL § 440.10, an unjustifiable failure to raise an issue as to the legality of a sentence on direct appeal is not a procedural bar to a successful motion raising the issue pursuant to CPL § 440.20. *Compare* CPL § 440.10(2)(c). As the Staff to the Temporary Commission on Revision of the Penal Law and Criminal Code wrote in 1967 with respect to the draft provision that became CPL § 440.20, unlike the procedure established by the provision that became C.P.L. § 440.10(2)(b)-(c),

> the circumstance that the issue is presently appealable or could with due diligence have been appealed . . . does not authorize the court to refuse to entertain the sentence motion. An illegal sentence, it is believed, should be subject to challenge and rectification in the trial court without compelling the defendant to pursue the more lengthy and cumbersome appellate procedure.[2]

The recent decision of the Court of Appeals in *People v. Taveras*, 10 NY3d 227 (2008), buttresses this legislative history. Although the Court in *Taveras* upheld the Appellate Division's decision to dismiss the defendant's direct appeal for failure to prosecute pursuant to CPL § 470.60(1) after the defendant was tried in absentia and was not captured for many years, Judge Pigott pointed out that the defendant could still raise his argument that his sentence was illegal through a motion made pursuant to CPL § 440.20. *Taveras*, 10 NY3d at 233. The paucity of cases explaining the availability of relief under CPL § 440.20 despite the failure to raise the illegality of a sentence on direct appeal is undoubtedly the product of the clarity of the statutory language and legislative history. However, lawyers practicing in the Third Department, in particular, should be aware of three cases in recent years that failed to recognize the procedural distinctions between motions to vacate judgments pursuant to CPL § 440.10 and motions to vacate illegal sentences pursuant to CPL § 440.20. *See People v. Pratt*, 23 AD3d 770, 771 (3d Dept 2005), *app dis* 6 NY3d 816 (2006); *People v. O'Hanlon*, 13 AD3d 718, 719 (3d Dept 2004); *People v. Pham*, 287 AD2d 789, 790 (3d Dept 2001). In making statements indicating that relief pursuant to CPL § 440.20 was unavailable when the illegality of a sentence could have been raised on direct appeal, the Third Department did not discuss the legislative history or analyze the differences between CPL §§ 440.10(2) and 440.20(2).[3] In light of the Court of Appeals's recent statement in *Taveras* about the availability of relief pursuant to CPL § 440.20, even when the defendant unjustifiably failed to perfect a direct appeal in a timely manner, defense lawyers in the Third Department have a strong basis for arguing that the contrary suggestions in *Pratt*, *O'Hanlon*, and *Pham* are incorrect statements of law that should not be followed.

Therefore, pursuant to CPL § 440.20, it should be possible to raise the issue that persistent felony offender sentences are unauthorized under the DLRA even when the issue was not raised on direct appeal. However, in future cases, there should be no need to wait that long; the issue should be raised during plea bargaining, at sentencing, or on direct appeal.

Life Sentences for Inchoate Crimes Related to Drugs

Since there have not been any appellate decisions either accepting or rejecting the preceding interpretation of the DLRA, a certain humility is required in advising clients on their exposure to sentencing as a discretionary persistent felony offender for drug felonies until the courts weigh in on the question. In contrast, the First Department's recent decision in *People v. Anonymous*, 43

AD3d 806 (1st Dept 2007), gives a firm basis for advising clients charged with inchoate crimes such as felony-level conspiracy to commit drug offenses that they face a potential life sentence as a persistent felony offender if they have two qualifying prior felony convictions.[4]

In *People v. Anonymous*, the Appellate Division held that a defendant who had been convicted of the class A-I felony of conspiracy in the first degree under PL § 105.17[5] during the 1990's was not entitled to be resentenced under the DLRA even though "the conspiracy related to class A drug felonies." 43 AD3d at 806; *see also People v. Caba*, 852 NYS2d 773 (1st Dept 2008). The First Department explained that resentencing for class A-I felonies was "only available to those persons who were convicted of offenses defined in article 220 of the Penal Law (*see* L 2004, ch 738, § 23)." *People v. Anonymous*, 43 AD3d at 806. In support of its conclusion, the Appellate Division wrote that "[i]f the Legislature had intended to include conspiracy to commit drug offenses, it could have inserted the necessary language, and its failure to do so is presumed to be intentional." *Id.* at 807.

The First Department's analysis in *People v. Anonymous* has implications that reach beyond the ineligibility for resentencing of class A-I drug conspirators under the DLRA. First, the decision means that those convicted in the future of the class A-I felony of conspiracy in the first degree where the conspiracy's objective is the commission of a class A drug felony may continue to receive sentences of up to 25 years to life in prison despite the passage of the DLRA. Second, since conspiracy is not defined in either article 220 or 221 of the Penal Law and, therefore, the sentencing provisions of PL §§ 60.04, 70.70, and 70.71 do not apply to it, those convicted of felony-level conspiracy to commit drug offenses may be sentenced to life in prison as persistent felony offenders pursuant to PL § 70.10 in qualifying cases. Moreover, felony-level drug conspirators who receive state prison sentences should be sentenced to indeterminate terms pursuant to PL §§ 70.00 or 70.06, rather than determinate sentences pursuant to PL § 70.70. Finally, the rationale of *People v. Anonymous* would appear to apply with equal force to felony-level criminal solicitation or criminal facilitation of drug offenses.[6] *See* PL articles 100 and 115.

The drafters of the new sentencing provisions governing sex offenses appear to have anticipated the problem identified by the Appellate Division in *People v. Anonymous*. Therefore, the definition of "felony sex offense" for sentencing purposes includes, *inter alia*, felonies defined in article 130 of the Penal Law and felony attempts or conspiracies to commit such crimes. *See* L.2007, ch 7; PL §§ 60.13 and 70.80(1)(a).

Notwithstanding the more careful drafting of the new statutory provisions governing sentences for sex offenses and the statement in *People v. Anonymous* that one could infer legislative intent from the omission of a reference to drug-related conspiracies from the DLRA, since a policy that would allow conspiracy to commit a crime to be punished in some instances more severely than the object crime itself does not make much sense, the failure to include certain inchoate crimes in the new sentencing scheme created by the DLRA is probably the result of an oversight by its drafters. Therefore, legislative action should be taken to explicitly include felony-level conspiracies and attempts[7] to commit drug offenses, and criminal facilitation or solicitation of drug crimes within the scope of the DLRA. Such an amendment would be analogous to the inclusion of felony-level conspiracies and attempts to commit sex offenses in the recent legislation governing sentencing of sex offenders. *See* PL §§ 60.13 and 70.80(1)(a).

Inapplicability of Sentence Capping Statute to Class A Drug Felonies

Another consequence the Legislature probably did not contemplate when it eliminated nominal life sentences for class A drug felonies in 2004 is that defendants charged with class A drug felonies and other consecutive counts now may be subject to a *de facto* life sentence due to the inapplicability of the capping provisions of PL § 70.30. This is a trap for the unwary. In no other instance does New York sentencing law provide for the imposition of determinate sentences and not allow for the capping of consecutive sentences where all of the crimes at issue were committed before the defendant was imprisoned for any of them.

Penal Law § 70.30(1)(e) provides that when consecutive sentences are imposed for crimes that were committed before the defendant was imprisoned for any of them, either the aggregate of the determinate sentences or aggregate maximum term of the indeterminate sentences shall be capped at 20, 30, 40, or 50 years, depending upon the severity of the crimes, unless one of the sentences is imposed for a class A felony. If none of the consecutive sentences are for crimes more serious than a class C felony, the aggregate determinate sentence or aggregate maximum term of indeterminate sentences is capped at 20 years. *See* PL § 70.30(1)(e)(i), (ii). Even if one or more of the consecutive sentences is for a class B felony, the aggregate sentence or aggregate maximum term will be capped at 30 years unless two or more of the crimes are violent felonies and one of those is a class B violent felony. *See* PL § 70.30(1)(e)(iii)-(vii).

Applying these principles, a defendant who received consecutive 15-year determinate sentences for four counts of second-degree robbery, a class C felony, would have his or her nominal 60-year sentence reduced to a 20-year sentence. If consecutive 15-year sentences were imposed for three counts of second-degree robbery and one count of criminal sale of a controlled substance in the third degree, a class B felony (*see* PL § 70.70(4)(b)(i)), the nominal 60-

year sentence would only be reduced to 30 years. However, if the same consecutive 15-year sentences were imposed for three counts of criminal sale of a controlled substance in the third degree and one count of criminal possession of a controlled substance in the first degree, a class A-I felony, the capping rules would not apply at all and the aggregate sentence would be calculated as 60 years. Since the capping provisions of PL § 70.30 do not apply when one of the consecutive sentences is imposed for a class A felony, a defendant could potentially receive a total sentence of hundreds or thousands of years in prison. Even a consecutive sentence of as little as three (3) years for a class A-II felony (*see* PL § 70.71(2)(b)(ii)) could eliminate a defendant's chance to have his or her aggregate sentence reduced through the capping provisions.

For the practicing defense attorney, the capping rules are likely to be most important when advising clients about the risks of going to trial. However, they also must be considered when plea bargaining so that unintended consequences are avoided and so that accurate advice concerning the ramifications of a bargain can be given to clients. Since prosecutors and judges may not always be fully conversant with the intricacies of PL § 70.30, on occasion, one may be able to negotiate a better deal for one's client by persuading one's adversary to allow a client to plead to a count charging a lower degree of crime in exchange for the same nominal sentence as is being offered for a plea to a more serious charge. In some instances, the capping provisions may allow an attorney to negotiate a plea to outstanding charges following a trial conviction with little additional exposure even if the prosecutor insists on a consecutive sentence.[8] The capping provisions should also be considered when making strategic decisions during trial such as whether to ask for a lesser included offense or to concede guilt of a less serious count while contesting a more serious count. However, given the limited number of situations in which there is an opportunity to obtain a charge to a felony-level lesser included offense in drug cases, taking the capping statute into account when making charge requests is more likely to present promising strategic gambits in non-drug cases.

Penal Law § 70.30 excludes those sentenced for class A felonies from the capping provisions because it would make no sense that a defendant serving, for example, a single class A felony sentence for murder or kidnapping or concurrent sentences for those crimes would have a maximum sentence of life in prison while someone serving consecutive sentences for a class A felony and another crime would have his or her sentence capped at less than a life sentence.[9] *See Matter of Roballo v. Smith*, 63 NY2d 485, 488-89 (1984) (excluding from the capping provisions those sentenced to class A-I felony sentences as persistent felony offenders pursuant to PL § 70.10 because capping their consecutive sentences would place them in a better position than those who were sentenced to concurrent life terms). However, now that life sentences for class A drug felonies have been replaced by determinate sentences, that rationale does not justify excluding class A drug felons from the benefit of some capping provision. Applying a capping provision of some sort would not leave those with consecutive sentences better off than those who received concurrent sentences for the same crimes. On the other hand, not applying a capping provision means that non-violent felons with a class A felony drug conviction will be potentially subject to consecutive sentences that in the aggregate amount to a *de facto* life sentence while violent felons will be entitled to have their aggregate sentences capped pursuant to PL § 70.30 as long as they are not sentenced as persistent felony offenders.

The Legislature should amend section 70.30 so that those convicted of class A drug felonies are not excluded from its provisions. Such an amendment would be congruent with the DLRA's policy of not treating drug felons as persistent felony offenders. Simply put, neither nominal nor *de facto* life sentences should be imposed for drug offenses. ⚖

Endnotes

1. The argument that was raised in *Jones* was that the procedure for imposing sentence as a persistent felony offender violates the Sixth Amendment's guarantee of a jury trial. As the Third Department pointed out in *Jones*, 47 AD3d at 965, the Court of Appeals has rejected that argument. *See People v. West*, 5 NY3d 740, 741, *cert den* 546 US 987 (2005); *People v. Rivera*, 5 NY3d 61, *cert den* 546 US 984 (2005); *People v. Rosen*, 96 NY2d 329, *cert den* 534 US 899 (2001). However, defense attorneys should continue to raise such challenges. The New York Court of Appeals recently granted leave to appeal in *People v. Quinones*, 45 AD3d 874, 875 (2d Dept 2007), and is expected to revisit the Sixth Amendment issue in that case. *See People v Quinones*, 2008 NY LEXIS 1023 (Apr. 24, 2008). Moreover, on April 16, 2008, the United States Court of Appeals for the Second Circuit heard several habeas corpus cases in which defendants argued that the New York courts unreasonably applied the United States Supreme Court's decision in *Blakely v. Washington*, 542 US 296 (2004), when the state courts upheld persistent felony offender sentences. *See Phillips v. Artus*, No. 06-3550-pr; *Morris v. Artus*, No. 07-1599-pr; *Portalatin v. Graham*, No. 07-3588-pr; *Washington v. Poole*, No. 07-3949-pr.

2. State of New York, Temporary Commission on Revision of the Penal Law and Criminal Code, *Proposed New York Criminal Procedure Law* (1967), at p. 295. The Staff Comment was to section 225.20 in the 1967 draft. In the final version of the Criminal Procedure Law, that section became CPL § 440.20. Peter Preiser's Practice Commentary to CPL § 440.20 in McKinney's Consolidated Laws of New York (2005), at p. 11, makes the same point about a court's power to consider a motion made pursuant to CPL § 440.20, in contrast to the restrictions contained in CPL § 440.10, even when the argument that a sentence was illegal could have been made on direct appeal, but was not.

3. The statements in the three Third Department decisions are arguably either *dicta* or parts of double holdings that could have

been avoided. Nonetheless, they would be troublesome in the absence of the Court of Appeals's statement in *Taveras*. The Third Department initially was derailed in *People v. Pham*, 287 AD2d at 790, a case in which the defendant had filed a motion pursuant to both CPL §§ 440.10 and 440.20. The Appellate Division carelessly treated the procedural issues as identical under the two statutory sections when they are not. Moreover, with respect to CPL § 440.20, the Third Department's statement that the errors could be raised on direct appeal was *dictum* because the defendant's sentence was vacated as part of the direct appeal from the judgment that had been consolidated with the appeals from the motion made pursuant to CPL §§ 440.10 and 440.20. In turn, in *People v. O'Hanlon*, 13 AD3d at 719, the Third Department cited the decision in *Pham* for the proposition that the CPL § 440.20 motion was properly denied because the challenge to the amount of restitution could have been raised on direct appeal. Yet, once again, it was unnecessary for the Third Department to decide that issue in *O'Hanlon* because it also concluded that a challenge to the amount of restitution did not involve a sentence that "was unauthorized, illegally imposed or otherwise invalid as a matter of law" as required for granting relief pursuant to CPL § 440.20(1). 13 AD3d at 719. Finally, the Third Department in *People v. Pratt*, 23 AD3d at 771, relied on *O'Hanlon* for the proposition that it was proper to deny the CPL § 440.20 motion. Yet, once again, it was unnecessary to reach that procedural issue because the Appellate Division also concluded that the defendant's allegations were insufficient to establish that the sentence was illegal.

4. The requirements for a qualifying prior conviction under PL § 70.10 are slightly different than those under PL §§ 70.04, 70.06, and 70.08. To qualify as a predicate felony under section 70.10(1)(b)(i), a sentence of more than one year in prison must actually have been imposed, rather than merely being authorized. In addition, when evaluating whether the sequentiality requirements are met, the relevant question under section 70.10 is whether, at the time of commission of a subsequent felony, the defendant had been "imprisoned" for a prior felony—a term of art meaning that the defendant had been received by the state prison system, *see* PL § 70.30(1)—rather than whether sentence had been "imposed" upon the defendant for the prior felony. *Compare* PL §§ 70.04(1)(b)(ii), 70.06(1)(b)(ii), and 70.08(1)(b), *with* PL § 70.10(1)(b)(ii), (c). Thus, for example, a felony committed in a local correctional facility after sentencing for another felony, but prior to transfer to the state prison system, will not qualify as an additional "strike" under PL § 70.10, but would qualify under sections 70.04, 70.06, and 70.08. Furthermore, unlike under the other predicate sentencing statutes, some out-of-state crimes, if they led to the imposition of a sentence of more than one year, will qualify as predicate felonies under PL § 70.10(1)(b)(i), even though the conduct would not be a felony in New York and, therefore, a sentence of more than one year could not be imposed in New York. *See People v. Parker*, 41 NY2d 21, 25-27 (1976) (interpreting prior version of PL § 70.06 that was similar to current version of PL § 70.10 in this respect). Finally, unlike under the predicate sentencing provisions of PL §§ 70.04 (1)(b)(iv)-(v), 70.06(1)(b)(iv)-(v), 70.07(3), and 70.08(1)(b), a sentence as a discretionary persistent felony offender may be based on otherwise qualifying prior felony convictions regardless of how many decades ago those convictions occurred. *See* PL § 70.10(1).

5. "A person is guilty of conspiracy in the first degree when, with intent that conduct constituting a class A felony be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct." PL § 105.17.

6. Although attempts, like conspiracies, criminal solicitations, and criminal facilitations, are inchoate crimes (*see* Article 5 of the Model Penal Code, and Title G of the New York Penal Law entitled, "Anticipatory Offenses"), the logic of *People v. Anonymous* does not necessarily apply to attempted drug offenses. A complete discussion of the arguments as to why the new sentencing scheme created by the DLRA should apply to attempted drug offenses and the rationale of *People v. Anonymous* should not apply to such attempts is beyond the scope of this article. However, it appears that New York courts have been universally treating attempted drug felonies as covered by the DLRA's new sentencing scheme. Thus, a decision that attempted drug felonies were not covered by the new statute would upset the settled expectations of both defense lawyers and prosecutors, would be inconsistent with legislative intent, and would greatly complicate plea bargaining in future cases.

Nonetheless, as discussed elsewhere in this article, the new sentencing provisions for felony sex offenses explicitly state that they apply not only to completed sex crimes, but also to felony attempts and conspiracies to commit such crimes. *See* PL §§ 60.13 and 70.80(1)(a). Therefore, if the Legislature decides to pass a new statute to overcome the decision in *People v. Anonymous* and bring felony conspiracies to commit drug crimes, and criminal solicitations or facilitations of such crimes within the sentencing scheme established by the DLRA, it would also be prudent to amend the statute to clarify the Legislature's intent by explicitly stating that felony attempts to commit drug crimes committed after the effective date of the DLRA are covered by the new sentencing scheme.

7. See discussion in endnote 6 concerning desirability of explicitly stating that felony attempts to commit drug offenses are covered by the DLRA.

8. Even if the sentence capping provision may limit in some cases a client's aggregate sentence for a trial conviction and a subsequent guilty plea to an outstanding charge that results in a consecutive sentence, attorneys and clients should be aware of the potential consequences of such a deal in the event of a successful appeal of the trial conviction. It is obvious that one advantage of pleading guilty to an outstanding charge and receiving a sentence that runs concurrently with a sentence imposed for a trial conviction is that the defendant is exposed to little or no additional prison time. However, another advantage of taking a guilty plea in exchange for such a concurrent sentence may be less apparent. Generally, when a sentence is promised to run concurrently as part of a plea deal, a defendant is entitled to vacatur of the plea if the conviction in the other case is reversed unless there is an agreement at the time of the plea that the plea will remain in place regardless of whether the other conviction is reversed. *See People v. Rowland*, 8 NY3d 342, 344-45 (2007); *People v. Pichardo*, 1 NY3d 126, 129-30 (2003); *People v. Fuggazzatto*, 62 NY2d 862, 863 (1984). In contrast, if a defendant pleads guilty to an outstanding charge with the understanding that the sentence will be served consecutively to a sentence

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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

Constitutional Law (United States Generally) — **CON; 82(55)**

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

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

Danforth v Minnesota, 552 US __, 128 SCt 1029 (2008)

At the petitioner's trial, the 6-year-old complainant did not testify, but the jury watched a videotaped interview of the child. On appeal, the Minnesota Court of Appeals, following *Ohio v Roberts* (448 US 56 [1980]), rejected the petitioner's Confrontation Clause argument. After the petitioner's conviction became final, the Supreme Court rejected *Roberts* and announced a "'new rule' for evaluating the reliability of testimonial statements in criminal cases." *See Crawford v Washington*, 541 US 36 (2004). In state post-conviction review, the courts rejected the petitioner's argument that he was entitled to a new trial based on *Crawford*, holding that *Crawford* did not apply retroactively.

Holding: The state court correctly concluded that it was not required to apply *Crawford* to cases that became final before it was decided (*see Whorton v Bockting*, 549 US __ [2007]), but erred in holding that federal law bars it from applying *Crawford* retroactively.

Teague v Lane (489 US 288 [1989]) and *Linkletter v Walker* (381 US 618 [1965]) limited the authority of federal courts to overturn state convictions in habeas proceedings, but did not limit a state court's power to grant relief for violations of a new constitutional rule in state post-conviction proceedings. "[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.' *American Trucking Assns. Inc. v. Smith*, 496 U.S. [167], at 178-179 [1990] (plurality opinion)." Judgment reversed and matter remanded.

Dissent: [Roberts, J] Retroactivity of new federal rules is a question of federal law that is binding on the states. Since the petitioner's conviction became final before *Crawford* and this Court has held that the rule in *Crawford* is not retroactive, state courts cannot apply it retroactively on collateral review. *See Whorton*, 549 US ___.

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

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

Snyder v Louisiana, 552 US __, 128 SCt 1203 (2008)

The petitioner was charged with first-degree murder and faced the death penalty. During phase one of the jury selection, the court screened out potential jurors who had conflicts or commitments preventing service. In phase two, groups of 13 potential jurors were questioned by the prosecution and defense. Of the 85 panelists called, 36 survived challenges for cause, five of whom were black; the prosecution used peremptory challenges to eliminate all five black potential jurors. The petitioner was convicted and sentenced to death. The Louisiana Supreme Court affirmed the conviction and rejected the petitioner's *Batson v Kentucky* (476 US 79 [1986]) argument.

Holding: Because the trial court's decision denying the petitioner's *Batson* claim as to one of the five black jurors, Jeffrey Brooks, was clearly erroneous, the judgment must be reversed. *See Hernandez v New York*, 500 US 352, 369 (1991). *Miller-El v Dretke* (545 US 231, 239 [2005]) requires that the court consider all of the circumstances that bear upon the issue of racial animosity. Because the defendant satisfied step one of the *Batson* test by making a prima facie showing that the prosecution exercised the peremptory challenge on the basis of race, the court must determine whether the prosecution offered legitimate race-neutral reasons for the strike. The prosecution's race-neutral reasons were that Mr. Brooks looked nervous and that his student-teaching commitment might compel him to render a quick verdict of guilt to a lesser offense to avoid a penalty phase. The trial court did not make determinations about Mr. Brooks' demeanor or nervousness, so it cannot be presumed that the trial court credited that assertion. The student-teaching rationale was not supported by the record, which showed that after the dean at Mr. Brooks' school told the court that he did not foresee any problems with a one-week absence, Mr. Brooks did not indicate any further concern. Even if Mr. Brooks wanted a quick resolution, he might have more readily agreed to a first-degree murder verdict if the majority of jurors supported it. The conclusion that the prosecution's reason is implausible is further supported by their acceptance of white jurors who had similar or more pressing commitments. Judgment reversed.

Dissent: [Thomas, J] The trial court's decision is entitled to deference, even though the court did not make specific findings as to each of the prosecution's race-neutral reasons. The trial judge was in the best position to make credibility assessments of potential jurors and the prosecution's motives. The majority improperly speculated about whether the trial court accepted the demeanor explanation and they incorrectly relied on comparisons

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between Mr. Brooks and other white jurors as the comparisons were not presented to the courts below. *Cf Miller-El*, 545 US at 283 (Thomas, J, dissenting).

Aliens (General) **ALE; 21(30)**

Habeas Corpus (Federal) (General) (State) **HAB; 182.5(15) (20) (35)**

Medellin v Texas, 552 US __, 128 SCt 1346 (2008)

After his arrest in Texas, the police did not inform the petitioner, a Mexican national, of his Vienna Convention right to notify the Mexican consulate of his detention. The petitioner was convicted and sentenced to death. In his state postconviction motion, the petitioner raised the Vienna Convention claim for the first time. The court dismissed the motion for failure to raise the issue at trial or on direct appeal, and rejected it on the merits. The federal district court denied his application for federal habeas corpus relief on the same grounds. Pending his application for a certificate of appealability in the Fifth Circuit, the International Court of Justice (ICJ) decided *Case Concerning Avena and Other Mexican Nationals*, 2004 ICJ 12, which held that the United States violated Article 36(1)(b) of the Vienna Convention by failing to inform 51 Mexican nationals, including the petitioner, of their Convention rights. The Fifth Circuit denied the certificate of appealability, concluding that the Convention did not confer individually enforceable rights. The Supreme Court granted certiorari, but later dismissed the petition because, prior to oral argument, President Bush issued a Memorandum directing the states to comply with *Avena* and the petitioner filed a second state postconviction motion. The Texas Court of Criminal Appeals denied the second application for habeas relief as abuse of writ and the Court granted certiorari.

Holding: The Optional Protocol of the Vienna Convention, UN Charter, and the ICJ statute do not create binding federal law in the absence of implementing legislation, which does not exist. "[W]hile the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions."

The President's Memorandum does not make *Avena* binding on state courts. The executive branch lacks the power to unilaterally convert a non-self-executing treaty into a self-executing one—this power belongs to Congress alone. *See Foster v Neilson*, 27 US 253 (1829); *Whitney v Robertson*, 124 US 190, 194 (1888). Judgment affirmed.

Concurrence: [Stevens, J] The treaties at issue do not give the Court authority to enforce the *Avena* decision. Article 94(1) of the UN Charter requires each signatory undertake to comply with ICJ judgments, but does not specify the domestic legal effect of such judgments. *Avena* only obligated the United States to devise its own means of reviewing the decision in the petitioner's case. In view of the international implications of noncompliance, Texas should consider taking further appropriate action.

Dissent: [Breyer, J] Based on the Supremacy Clause, the United States' treaty obligation to comply with the ICJ decision in *Avena* is enforceable in domestic courts without congressional action beyond the Senate's ratification of the relevant treaties. The United States agreed to submit to ICJ jurisdiction, and it is the role of the judiciary to provide further review of the individual cases as required by the ICJ's decision in *Avena*.

New York State Court of Appeals

Sentencing (Aggravated Penalties) (Enhancement) (Persistent Violent Felony Offender) **SEN; 345(5) (32) (59)**

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

People v Leon, 10 NY3d 122 (2008)

The defendant was sentenced as a persistent violent felony offender based on two prior first-degree manslaughter convictions. He contested the second prior conviction, claiming that he was not the Jose Leon identified in the fingerprint records. He argued that under *Crawford v Washington* (541 US 36 [2004]), the sentencing court violated his right to confront the author of the report that concluded that his fingerprints matched the fingerprints from the prior conviction. He also argued that the court violated *Apprendi v New Jersey* (530 US 466 [2000]) by making a finding of fact regarding his identity, which goes beyond the exception for the fact of a prior conviction.

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The Appellate Division affirmed the conviction.

Holding: *Crawford* is limited to testimonial hearsay at trial (*see United States v Luciano* 414 F3d 174, 178-179), and thus, is inapplicable to a sentencing proceeding. Before *Crawford*, affidavits based on fingerprint comparisons were admissible at predicate sentencing hearings and they remain admissible. *See* CPL 60.60[2]; CPLR 4520. The statute that sets the parameters for a predicate sentencing hearing (CPL 400.15[7][a]) does not incorporate the trial right of confrontation. The defendant's *Apprendi* challenge is without merit because the sentencing court can determine basic facts such as the who, what, when, and where of the defendant's prior convictions. *See People v Rivera*, 5 NY3d 61; *United States v Santiago*, 268 F3d 151, 156. Order affirmed.

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

People v Rawlins, 10 NY3d 136 (2008)

In one case, the defendant Rawlins was convicted of burglarizing six businesses. He was connected to the burglaries through latent fingerprint evidence analyzed by three different detectives. One of the detectives, who prepared two fingerprint reports, did not testify at trial, but another detective who reviewed and agreed with the conclusions did testify. The two reports and other fingerprint reports were admitted as business records. The court denied the defendant's motion to set aside the verdict, and the Appellate Division affirmed on appeal. In another case, the defendant Meekins was convicted of sodomy and related offenses. Over his objection, the court admitted as business records the medical examiner's records and a private laboratory's report that identified the DNA profile of a male from the rape kit. Two experts, one from the lab and the other from the medical examiner's office, testified about the reports. The lab expert did not personally conduct the testing; the medical examiner's expert reviewed the DNA profile from the rape kit and the defendant's DNA profile and concluded that the rape kit DNA was from the defendant. The Appellate Division affirmed.

Holding: Determining whether the admission of statements violates the Confrontation Clause requires an analysis of the facts and context of the statements. *See Crawford v Washington*, 541 US 36 (2004). Two factors that play a critical role in the determination are "first, whether the statement was prepared in a manner resembling *ex parte* examination and second, whether the statement accuses defendant of criminal wrongdoing. The purpose of making or generating the statement, and the declarant's motive for doing so, inform these two interrelated touchstones." Merely because a record is admissible as a business record does not mean that it is admissible under the Confrontation Clause. In *Rawlins*, the fingerprint reports prepared by the non-testifying detective were testimonial and thus inadmissible. The reports were inherently accusatory and "fit the classic definition of a 'weaker substitute for live testimony' at trial (*Davis [v Washington]*, 126 S Ct [2266] at 2277 [2006])." However, the admission of the reports was harmless error because another detective testified that he compared the same fingerprints and concluded that they were a match. In *Meekins*, the DNA reports were admissible because they are not testimonial. The private lab's report presented non-identifying graphical information and was not accusatory because it did not determine whether the DNA matched a particular individual's DNA. The lab technicians' testimony was not required as a lab supervisor could testify regarding whether testing protocol was followed. The medical examiner's reports were also admissible because they did not directly link the defendant to the crime; during her testimony, the medical examiner's expert connected the defendant's DNA to the DNA profile provided by the lab. The medical examiner's file included a report from the Division of Criminal Justice Services connecting the defendant's DNA with the DNA profile that was not admissible as a business record because there was no evidence that it was prepared in the ordinary course of business. The error in admitting the document was harmless as it was cumulative of the expert testimony. Orders affirmed.

Concurrence: [Read, J] Both the fingerprint reports and the DNA reports were not testimonial statements. The distinctions between the reports as stated by the majority do not establish why the DNA reports are not testimonial, but the fingerprint reports are.

Juries and Jury Trials (Constitution—Right to) **JRY; 225(20)**

People v Urbaez, No. 35, 3/13/2008

The defendant was originally charged with second-degree aggravated harassment, a class A misdemeanor, and second-degree harassment, a violation, for making a threatening phone call. On the day of trial in the Supreme Court, Bronx County, the prosecution reduced the A misdemeanor to attempted aggravated harassment in the second-degree, a class B misdemeanor. The defendant objected to the reduction arguing that the prosecution did so to deny him of his right to a jury trial. The court permitted the reduction and, after a bench trial, convicted him of both offenses and sentenced him to a conditional discharge with an order of protection.

Holding: The right to a jury trial is reserved for "serious offenses" (*see Callan v Wilson*, 127 US 540 [1888]), and there is no such right when the maximum period of

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incarceration is six months or less. *See Baldwin v New York*, 399 US 66 (1970). Because the maximum jail term for a class B misdemeanor is 90 days, the defendant did not have jury right and CPL 340.40(2) requires bench trials for B misdemeanors in New York City criminal courts. The prosecution did not abuse their discretion in choosing to reduce the charge. *See People v Eboli*, 34 NY2d 281. The defendant was alleged to have made one harassing phone call. The prosecution made a plea offer of a violation with an order of protection and even after the conviction, they did not recommend jail time. By sentencing the defendant to a conditional discharge, the judge also recognized the relatively non-serious nature of the offense. Order affirmed.

Appeals and Writs (General) (Time) **APP; 25(35) (95)**

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

People v Taveras, 10 NY3d 227 (2008)

In one case, defendant Taveras was accused of murder and other offenses arising out of a 1984 incident. Taveras was free on bail and after he failed to appear for trial two times, the court issued bench warrants; after the second non-appearance, the court conducted a hearing pursuant to *People v Parker* (57 NY2d 136, 142), and concluded that he would be tried in absentia. He was convicted and sentenced and defense counsel filed a timely notice of appeal. Eight years later, he was arrested. After state and federal habeas corpus litigation ended, the court appointed appellate counsel who then submitted a brief in connection with the appeal. The Appellate Division granted the prosecution's motion to dismiss the appeal. In a second case, defendant Jones was charged with burglary and robbery offenses in 1987. When he absconded during jury selection, the court issued a bench warrant and, after a *Parker* hearing, the court decided to proceed with the trial. Jones was convicted and sentenced and defense counsel filed a timely notice of appeal. In 2005, he was arrested on the warrant and after he was resentenced because the initial sentence was illegal, he filed a notice of appeal from the judgment on resentencing. The Appellate Division granted the prosecution's motion to dismiss the original appeal.

Holding: These appeals do not implicate the fugitive disentitlement doctrine as the defendants were not fugitives when the prosecution moved to dismiss the appeals. *See Molinaro v New Jersey*, 396 US 365, 365-366 (1970). Instead of moving to dismiss while they were absent, the prosecution waited until the defendants returned and attempted to pursue their appellate rights. However, the Appellate Division did not abuse its discretion in rejecting the defendants' appeals. *See* CPL 470.60(1). An appellate court may consider several factors in deciding such a motion, including whether the defendant's flight interfered with the operation of the appeals process (*see United States v Ortega-Rodriguez*, 507 US 234, 250 [1993]); whether the delay caused by the absence prejudiced the prosecution's ability to prepare for retrial, if ordered (*see People v Parker*, 57 NY2d at 142); the length of the absence; whether the defendant voluntarily surrendered; the importance or novelty of the appellate issues; and the merits of the appeal. In both cases, the prosecution showed that they would suffer prejudice because of the lengthy absences, including that it would be nearly impossible to retry the defendants 18 or more years after the fact. Taveras may challenge his purported illegal sentence in a CPL 440.20 motion and Jones may continue his direct appeal of his resentence. Orders affirmed.

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

People v White, No. 38, 3/20/2008

The police arrested the defendant around 2:00 a.m. for a domestic violence incident; he was intoxicated at the time. The complainant told the arresting officer that he was involved in a murder that occurred a week earlier. After 17 hours in a holding cell, the defendant was placed in a lineup, but the witness could not identify him. Two hours later, two detectives brought him to an office for questioning. The defendant asked why he was put in a lineup and one of the detectives produced a picture of the decedent. The detectives said that the decent was killed either in cold blood or for a reason and they asked the defendant if he wanted to tell his side of the story; he said that he would tell them everything after he got a soda and cigarettes. One detective stayed with the defendant and the other returned about 15 to 20 minutes later with the items. The detective then read the defendant his *Miranda* rights for the first time; he acknowledged them and agreed to speak. Initially he gave an exculpatory statement, but when the detectives accused him of lying and demanded the truth, he confessed that he shot the decedent because the decedent injured him years earlier and robbed him and threatened to kill him on the day of the shooting. After the defendant provided two written statements, the detectives gave him a meal. The court suppressed the defendant's pre-*Miranda* statements, but admitted the post-*Miranda* statements. The Appellate Division affirmed on appeal.

Holding: *Miranda* warnings are only effective if they precede questioning, unless there is "'such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning' ([*People v Chapple*,] 38 NY2d [112,] at 115)." Although the defendant did not give a statement until after the *Miranda* warnings

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were given, the court must determine whether the pre- and post-*Miranda* sessions were part of a continuous chain of events by applying several factors, including the time between the *Miranda* violation and the admission; whether the same personnel were present and involved in questioning; whether there was a change in the location or nature of the interrogation; the circumstances surrounding the violation; and whether, before the violation, the defendant indicated a willingness to talk. *See People v Paulman*, 5 NY3d 122, 130-131. During the brief initial exchange, the defendant did not make incriminating statements. *See People v Kinnard*, 62 NY2d 910, 912. Although there was no change in police personnel or location, the 15-20 minute break after the *Miranda* violation, during which he smoked a cigarette and drank a soda, and his willingness to speak were enough to dissipate the taint. While the police should have given *Miranda* warnings at the outset (*see Missouri v Seibert*, 542 US 600, 617 [2004]), the brief pre-*Miranda* exchange was followed by a definite, pronounced break in the interrogation and thus, due process does not require suppression. *See People v Anderson*, 42 NY2d 35, 41. Order affirmed.

Dissent: [Pigott, J] The defendant's post-*Miranda* statements should have been suppressed as the product of a single custodial police interrogation. The same detectives interrogated him before and after the *Miranda* warnings, one of them remained with the defendant while the other retrieved the soda and cigarettes, the location and nature of the interrogation did not change, and there is no evidence that the defendant wished to speak with the police before the *Miranda* violation occurred.

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

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

People v Windham, No. 42, 3/25/2008

In 1991, the defendant pleaded guilty to robbery and sexual abuse and was sentenced to concurrent terms of four to 12 years and one to three years respectively. He was released on parole in 1996, but was reincarcerated in 1997 for a parole violation. In 2005, the trial court held a sex offender risk level reassessment hearing pursuant to *Doe v Pataki* (3 F Supp 2d 456 [SDNY 1998]), and adjudicated the defendant a level three offender under the Sex Offender Registration Act (SORA) (Correction Law article 6-C). On appeal, the defendant argued for the first time that he was not subject to SORA since he had finished serving the sex abuse portion of his sentence before SORA's effective date, January 21, 1996. The Appellate Division rejected the argument as unpreserved.

Holding: The defendant failed to preserve his claim for appellate review. Because the SORA assessment was not part of his sentence (*see People v Stevens*, 91 NY2d 270, 277), the narrow exception to the preservation rule for challenges to unauthorized or illegal sentences does not apply. *See People v Samms*, 95 NY2d 52. To preserve the question, the defendant had to contest his SORA eligibility during the trial court hearing. Order affirmed.

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

People v Hall, No. 29, 3/25/2008

The defendant was arrested for participating in a drug sale. At the police station, no drugs were found in his clothes so the police asked him to undress and then ordered him to bend over and squat. A string or piece of plastic was discovered hanging out of the defendant's rectum; the defendant refused to remove the object. One of the officers pulled on the string and removed a plastic bag with cocaine. Defendant was charged with possession of a controlled substance. The court granted the motion to suppress and dismissed the indictment. The Appellate Division reversed.

Holding: A strip search requires reasonable suspicion of concealed evidence and the search must be done in a reasonable manner. For a visual cavity inspection, there must be a specific, articulable factual basis supporting a reasonable suspicion to believe hidden evidence exists and the inspection must be conducted in a reasonable manner. *See Bell v Wolfish*, 441 US 520 (1979). To conduct a manual cavity search and remove objects protruding from a body cavity, regardless of whether insertion into the cavity is necessary, absent exigent circumstances, the police must obtain a warrant. *See Schmerber v California*, 384 US 757 (1966); *People v More*, 97 NY2d 209. Blanket policies requiring visual cavity inspections and manual body cavity searches are insupportable, since these searches required particular, individualized facts justifying the intrusion. *See People v McIntosh*, 96 NY2d 521, 525. The police met the requirements for conducting a strip search and visual cavity inspection based on the circumstances, including the defendant's involvement in a hand-to-hand drug sale and that he had to retreat into a building to complete the sale. Since no drugs were found after the strip search, the police had reasonable suspicion to believe that he had drugs hidden in his body. The strip search and visual cavity search were conducted in a reasonable manner, since it was done privately in a cell, without undue force, and by officers of the same gender as the defendant. When the police discovering the string-like object, they had probable cause to believe that the defendant had contraband in his body. Because no exigent circumstances existed, *eg*, destruction of evidence or medical distress, removal of the drugs in the absence of a warrant violated the Fourth Amendment; thus, the drugs must be sup-

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pressed. Order reversed and indictment dismissed.

Concurrence: [Ciparick, J] The rule in *Schmerber* also applies to visual body cavity inspections conducted on an arrestee, since such searches are a visual intrusion beyond the body's surface. *See Fuller v M.G. Jewelry*, 950 F2d 1437, 1449 (9th Cir 1991). The rule in *Bell* applies in prison cases where the need to maintain institutional security was critical, a factor that is absent in pretrial detainee scenarios.

Dissent in Part: [Smith, J] Neither the visual, nor the manual search violated the defendant's constitutional rights. The police saw the object in the defendant's body during a lawful visual cavity search, and there was no need to wait for a warrant before removing it when no invasive procedures were involved.

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Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause (Furtive Conduct) (Observations and State of Mind)]) (Motions to Suppress [CPL Article 710]) — **SEA; 335(10[g (i) (iv)]) (45)**

People v Stephens, 47 AD3d 586, 851 NYS2d 136 (1st Dept 2008)

Holding: The court erred in granting the defendant's motion to suppress evidence recovered after his arrest. The court incorrectly used a frame-by-frame analysis of the defendant's behavior to determine that the police did not have reasonable suspicion that the defendant had committed or was about to commit a crime. The court should have reviewed the totality of the circumstances. *See People v Graham*, 211 AD2d 55, 58 *lv den* 86 NY2d 795. The police were patrolling at night in an area where there had been a number of gunpoint robberies when they saw the defendant and another man walking four to five feet behind a third man. The defendant was holding his right hand against his waistband. When the defendant saw the police, he looked startled, and when the officers approached, he ran away before they could ask him any questions. "These actions taken together, justified the officers' pursuit of the defendant, as well as the recovery of the gun and narcotics (*People v Pines*, 281 AD2d 311 [2001], *affd* 99 NY2d 525 [2002] . . .)." Order reversed, motion denied, indictment reinstated, and matter remitted. (Supreme Ct, New York Co [Wetzel, J])

Juries and Jury Trials (Alternate Jurors) (Discharge) — **JRY; 225(5) (30)**

People v Cruz, 48 AD3d 205, 851 NYS2d 157 (1st Dept 2008)

Holding: The court properly replaced a juror who was ill with an alternate, despite the defendant's objection. On the first day of trial, a sworn juror called the court to report that he was sick. The court told the parties that the juror sounded quite ill with flu-like symptoms. Defense counsel objected to the replacement of the juror, arguing that the court did not have a sufficient basis for concluding that the juror could not become available in a reasonable time. However, defense counsel did not object to the extent of the court's inquiry or suggest further inquiry. Thus, the issue is not preserved. *See People v Danton*, 27 AD3d 354 *lv den* 7 NY3d 754. Alternatively, the claim is rejected on the merits as the court had a sufficient basis to find that the juror's illness would delay the trial for at least two hours and thus had the discretion to discharge the juror. *See* CPL 270.35(2)(a). The court "was under no obligation to delay the trial in hopes that he might have a speedy recovery (*see People v Jeanty*, 94 NY2d 507, 517 [2000])." Judgment affirmed. (Supreme Ct, New York Co [McLaughlin, J])

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

People v Gonzalez, 48 AD3d 226, 849 NYS2d 774 (1st Dept 2008)

Holding: The court correctly adjudicated the defendant a level three sex offender pursuant to the Sex Offender Registration Act (SORA). "The court properly assessed points for the risk factor of failure to accept responsibility. The court had also presided at the time of defendant's guilty plea and sentencing with regard to the underlying sex crime. After a thorough hearing pursuant to *People v Hicks* (98 NY2d 185 [2002]), the court had imposed an enhanced sentence on the ground that defendant had violated his plea agreement by failing to cooperate with the Department of Probation (9 Misc 3d 344 [2005]). The record supports the court's conclusion that, in defendant's situation, this lack of cooperation also amounted to failure to accept responsibility for his crimes, under the applicable risk factor." Order affirmed. (Supreme Ct, New York Co [Ambrecht, J])

Confessions (Interrogation) (*Miranda* Advice) (Voluntariness) — **CNF; 70(42) (45) (50)**

Discovery (General) (Prior Statements of a Witness) — **DSC; 110(12) (26)**

People v Graham, 48 AD3d 265, __ NYS2d __ (1st Dept 2008)

Holding: Eight hours after he received *Miranda* warn-

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ings, the defendant told a detective that he did not want to talk, but the detective told him that there was fingerprint and videotape evidence linking him to the crimes. The defendant responded "charge me with everything, I did everything." The confessions that were admitted at trial were made later, after he asked to speak to the detective, but new warnings were not given. The police should have immediately stopped the interrogation after the defendant said he was unwilling to talk. *See People v Ferro*, 63 NY2d 316, 322 *cert den* 472 US 1007. The further police statements constituted interrogation and were improper. *See People v Kollar*, 305 AD2d 295, 298 *app dis* 1 NY3d 591. Except for two counts, however, the error was harmless; the crimes were established by fingerprints and other compelling evidence. In his CPL 440.10 motion, the defendant showed by a preponderance of the evidence that by failing to turn over one of his statements until after the verdict, the prosecutor violated CPL 240.20(1)(a). The statement could have been used at the suppression hearing and trial to challenge the voluntariness of his statements. Judgment and order denying CPL 440 motion modified, motion to suppress granted, convictions under counts 17 and 18 vacated, remanded for new trial on those counts, and judgment and order affirmed as modified. (Supreme Ct, New York Co [Yates, J])

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

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

People v Villar, 48 AD3d 282, 849 NYS2d 886 (1st Dept 2008)

Holding: The court erred in denying the defendant's motion for resentencing under the Drug Law Reform Act of 2005 (L 2005, ch 643). The court incorrectly concluded that eligibility for resentencing is based on the prison time remaining on the conviction for which resentencing is sought. The defendant is eligible for resentencing because eligibility is determined by the potential release date on his longest prison term. *See People v Paniagua*, 45 AD3d 98 *lv den* 9 NY3d 992. Order reversed and matter remitted for further proceedings on the defendant's motion. (Supreme Ct, New York Co [Zweibel, J])

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

Trial (Verdicts [Motions to Set Aside (CPL § 330 Motions)] **TRI; 375(70[a])**

People v Figueroa, 48 AD3d 324, 851 NYS2d 521 (1st Dept 2008)

Holding: The court correctly denied the defendant's motion to set aside the verdict. After a verdict was reached, the foreperson sent a note to the court stating that he was not "comfortable" reading the verdict. The court talked him outside the presence of the parties and the attorneys. The foreperson said he was uneasy about reading the verdict out loud in a narrative form. After he learned that he would only have to answer the clerk's questions, he was relieved and satisfied. The court then told counsel about the note, stated that they did not discuss the verdict itself, and noted that the foreperson did not express discomfort about the verdict. Neither the defendant nor the co-defendant objected to the court's procedure or asked for additional questioning of the foreperson. The verdict was rendered and when polled, each juror individually agreed with it. The co-defendant moved to set aside the verdict based on the court's failure to follow CPL 310.30 because he was not present when the court responded to the note; the motion included an affidavit from the foreperson stating that he told the court that his unease was due to the other jurors coercing his verdict. However, at a subsequent hearing, he admitted he had not expressed this to the court. Neither the defendant nor his counsel could have made a meaningful contribution to the discussion (s*ee People v Collins*, 99 NY2d 14); the court's interaction with the foreperson regarding the way the verdict would be announced was purely ministerial. The "defendant was required to request a further inquiry of the foreperson or otherwise preserve a claim of error." Judgment affirmed. (Supreme Ct, Bronx Co [Massaro, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles] [Probable Cause]) (Plain View Doctrine) **SEA; 335 (10[a] [g]) (53)**

People v Mobley, 48 AD3d 374, 853 NYS2d 31 (1st Dept 2008)

Holding: The court properly granted the defendant's motion to suppress physical evidence and his statement. The police did not have an objective, credible reason for pulling their car up to the defendant's car to ask why he and his female passenger were at that location. *See People v McIntosh*, 96 NY2d 521, 526-527. The presence of those two individuals in a legally parked car was not suspicious. Although it was a high-crime neighborhood known for drug activity, there was no indication of sexual or drug-related activity. Even if the first approach was justified, after the police questioned both individuals and found nothing suspicious, they had no basis for approaching the car a second time on foot and questioning them again. The police officer's testimony did not support the prosecutor's argument that the second approach was

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merely a continuation of the first. "[T]he ultimate discovery of a firearm in the car was the direct result of the second inquiry, and cannot accurately be characterized as a mere observation, from a lawful vantage point, of contraband in plain view." Order affirmed. (Supreme Ct, Bronx Co [Price, J])

Juveniles (Custody) (Hearings) (Neglect) **JUV; 230(10) (60) (80)**

Matter of Maiea P., __ AD3d __, 853 NYS2d 318 (1st Dept 2008)

Holding: The court erred in awarding custody of the child to the nonparty father as it does not have a sound and substantial basis in the record and is contrary to the totality of the circumstances presented to the court. The court made the custody determination after concluding that the respondent mother derivatively neglected the child. The custody decision is contrary to the expressed wishes of the 12-year-old child; agency records showing that the mother complied with the agency plan and that she had a good relationship the child; recommendations of the law guardian, caseworkers, and mental health experts; evidence that the father interfered with the mother's relationship with the child; and evidence that the child's emotional development was being harmed by her separation from her siblings. *See Eschbach v Eschbach*, 56 NY2d 167, 172-173. Because the child lived with her father for more than six years and there was little evidence about his fitness as a parent, an immediate hearing is required to determine whether a change in custody is in the child's best interests. The hearing should include the results of psychological evaluations of the parents and the residents of each parent's home. Order reversed, matter remanded for an evidentiary hearing and custody determination. (Family Ct, New York Co [Adams, J])

Juries and Jury Trials (Challenges) (Qualifications) (Selection) **JRY; 225(10) (50) (55)**

People v Austin, __ AD3d __, 853 NYS2d 62 (1st Dept 2008)

Holding: The court properly denied defense counsel's for cause challenge of a prospective juror. On her juror questionnaire, the prospective juror indicated that she had a close friend who was employed by the county's district attorney. In response to questioning by the court, the juror stated that she trusted the district attorney more, but since she was aware of that bias, she could be "good about it." In response to the court's question about her ability to evaluate testimony with an open mind, the juror responded: "Yeah, I will be aware of my own biases." In response to defense counsel's questions, the juror stated that "she '[a]bsolutely' would be able to evaluate a witness on the stand 'like anybody else, and sit and listen to what they have to say' and consider if the witnesses made a mistake, no matter who put the witness on the stand. She also agreed that witnesses do not get 'extra credit because they are brought by the DA.'" Through these statements, the juror gave the court and defense counsel "an unequivocal, personal assurance that she would be able to put her bias aside and render an impartial verdict on the evidence . . . . " *See People v Arnold*, 96 NY2d 358, 362. By not inquiring about the juror's friendship with the District Attorney's office employee, the defendant failed to preserve the issue of whether the court erred in failing to make such an inquiry. Judgment affirmed. (Supreme Ct, New York Co [Carro, J])

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

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

People v Quinones, __ AD3d __, 854 NYS2d 5 (1st Dept 2008)

Holding: The court correctly denied the defendant's motion for resentencing under the Drug Law Reform Act of 2005 (DLRA) (L 2005, ch 643). In order to be eligible for resentencing on his class A-II felony conviction, the defendant must be eligible for merit time under Correction Law 803(1)(d). The defendant is serving an indeterminate term of imprisonment for a violent felony offense concurrently with his drug convictions. Therefore, he is not eligible for merit time. *See* Corr Law 803(1)(d)(ii). The defendant failed to preserve for review his present argument that he was eligible for resentencing because the maximum term of his violent felony sentence had expired. Alternatively, the argument is rejected on the merits (*see People v Merejildo*, 45 AD3d 429), since concurrent sentences represent a single punishment that is measured by the sentence for the highest grade offense. *See* Penal Law 70.30(1)(a). Order affirmed. (Supreme Ct, New York Co [Obus, J])

Parole (General) (Release [Considerations for]) **PRL; 276(10) (35[b])**

Matter of Siao-Pao v Dennison, No. 1683, 1st Dept, 3/11/2008

In his plea to murder and robbery, the petitioner admitted that he stabbed a man twice during the robbery. At his parole hearing, he expressed remorse, but said that he unintentionally stabbed the decedent while trying to prevent his codefendant from beating the man. The petitioner had a clean disciplinary record, worked as a paralegal in the prison library, and had future career plans if he was paroled.

First Department *continued*

Holding: The court properly denied the petition to annul the Board of Parole's decision denying parole. The Board's decision shows that it considered the guidelines set forth in Executive Law 259-i. The Board does not need to discuss each of the guidelines in its decision, nor give all of the factors equal weight. *See Matter of King v New York State Div of Parole*, 190 AD2d 423, 431 *affd* 83 NY2d 788. The Board's decision noted that the petitioner's crime represented an escalation of his anti-social behavior and that it considered his institutional achievements and positive disciplinary record, but concluded that his propensity for violence and indifference for the law make him unsuitable for release. Two prior parole decisions worded similarly to the current denial were found on appeal to have properly factored in the guidelines. Order and judgment affirmed. (Supreme Ct, New York Co [Kornreich, J])

Dissent: (Sweeny, J) The Board seems to rely almost exclusively on the seriousness of the petitioner's offenses. Because the decision fails to discuss the other statutory factors, meaningful review is not possible. *See Matter of Wallman v Travis*, 18 AD3d 304.

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

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

Witnesses (Experts) (Police) — **WIT; 390(20) (40)**

People v Torres, __ AD3d __, 853 NYS2d 73 (1st Dept 2008)

Holding: The defendant failed to preserve for review his challenge to the expert testimony of the police detective, despite his general objection, any objections he allegedly made at an unrecorded colloquy, and his post-verdict motion. Alternatively, the court's error in allowing police testimony to the effect that the defendant did not possess heroin only for his personal use, which directly countered the defendant's theory at trial and invaded the province of the jury, (*see People v Salaam*, 46 AD3d 1130, 1131) was harmless. The defendant's conduct independently established his intent to sell. The defendant failed to preserve his claim that his right to present a defense was violated. At the start of the defendant's case, counsel told the court that the defendant's wife was expected to testify that the defendant went out to buy drugs on the day of the incident. However, she was not at the courthouse. The court concluded that her testimony was inadmissible hearsay and that she was unavailable. The defendant did not object to those conclusions, advance a hearsay exception, or ask for a continuance to secure the wife's appearance. The record does not show that the defendant was prevented from taking these actions or that the actions would have been futile. *Compare People v Mezon*, 80 NY2d 155, 161. The wife's expected testimony would not have been particularly exculpatory because the defendant's intent to purchase drugs was not inconsistent with an intent to sell drugs as well. Judgment affirmed. (Supreme Ct, New York Co [Silverman, J])

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

People v Achaibar, __ AD3d __, 853 NYS2d 337 (1st Dept 2008)

Holding: The record fails to establish that the defendant's guilty plea was knowing and voluntary because it is not clear that he was advised of the direct consequences of his plea. *See People v Ford*, 86 NY2d 397, 403. During his plea, the court, prosecution, and defense counsel all agreed that the disposition was an "open D," that the prosecution planned to make a unspecified sentencing recommendation, and that defense counsel expected that recommendation to be probation. The defendant acknowledged that he was pleading guilty to a class D felony, but the record does not reveal any discussion of the meaning of that term or of "open D," or any inquiry to determine whether the defendant understood the range of possible sentencing. Therefore, the plea is invalid. Judgment reversed, plea vacated, indictment reinstated, matter remanded, and appeal of denial of the CPL 440 motion dismissed as academic. (Supreme Ct, New York Co [Zweibel, J])

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

Judges (Powers) — **JGS; 215(10)**

Matter of Fludd v Goldberg, No. 1081, 1st Dept, 3/18/2008

Holding: The court did not have the inherent authority to issue an order authorizing the petitioner's placement in solitary confinement after his criminal proceeding ended. The petitioner was charged with filing false liens against public officials while he was incarcerated on an unrelated offense. While the case was pending, the court issued an order prohibiting the petitioner from filing certain legal documents without leave of court and limiting his communications. After the conviction, the court continued the terms of the earlier order. After the case ended, the petitioner filed new false liens in violation of the court order and was placed in solitary confinement. Because he could not be held in solitary confinement for filing the new liens without a court order, the trial judge issued an ex parte order authorizing confinement and later denied the petitioner's motion for vacatur of the orders. Criminal Procedure Law explicitly prohibits the court from post-

First Department *continued*

judgment interference, including dictating terms of confinement, unless specifically authorized by law. *See* CPL 430.10; *Matter of Van Deusen v Zittell*, 88 AD2d 736. "To allow the court to place the petitioner in solitary confinement because it believes that the petitioner *intends* to commit further harassment is repulsive and contrary to the whole foundation of our penal system." Petition granted and petitioner directed to be released from indefinite confinement in the Special Housing Unit of Wende Correctional Facility.

Dissent: (Saxe, JP) While there is no statutory basis for the court's exercise of jurisdiction, it had the inherent authority to issue the order under these unusual circumstances. Because the Department of Correctional Services could not stop the petitioner's conduct, the court must be able to do so.

Confessions (Interrogation) (*Miranda* Advice) (Voluntariness) — **CNF; 70(42) (45) (50)**

People v Rodriguez, __ AD3d __, 853 NYS2d 346 (1st Dept 2008)

Holding: The court properly denied the defendant's motion to suppress his statements. The defendant was taken to the precinct and given *Miranda* warnings. In response to questioning about an unrelated crime, the defendant said that he did not want to answer any more questions. "This 'desire to avoid certain areas of inquiry' was not 'an unequivocal assertion of [defendant's] right to remain silent' (*People v Morton*, 231 AD2d 927, 928 [1996], *lv denied* 89 NY2d 944 [1997])." Alternatively, the confession was admissible because they were made to a second detective six hours later and after a new set of *Miranda* warnings, which is sufficiently attenuated from the defendant's earlier invocation of his right to silence. Four hours after his first confession, while being interviewed by a third detective, the defendant said that he did not want to talk to that detective. Three hours later, the defendant was taken to the prosecutor's office where he gave a videotaped confession. That confession was also admissible because it was sufficiently attenuated from the third interrogation. *See eg People v Rodriguez*, 231 AD2d 477, 478 *lv den* 89 NY2d 1099. Judgment affirmed. (Supreme Ct, New York Co [Zweibel, J])

Second Department

Identification (Expert Testimony) (Eyewitnesses) — **IDE; 190(5) (10)**

People v Gonzalez, 47 AD3d 831, 849 NYS2d 635 (2nd Dept 2008)

The defendant was convicted of third-degree robbery based on the complainant's identification; after the incident, the complainant described the perpetrator as a well-built, dark-skinned Hispanic male in his mid-30s who weighed about 150 pounds and was about 5 feet, 9 inches tall. The complainant picked the defendant's photograph out of a photo array and identified him during a lineup. The defendant is a tan-skinned Hispanic male who weighs more than 200 pounds and is 5 feet, 9 inches tall, and has a distinctive goatee and a tattoo covering his right forearm.

Holding: The court erred in denying the defendant's motion in limine to present expert testimony on the reliability of eyewitness identification testimony. The motion court denied the motion without holding a *Frye* hearing (*Frye v United States*, 293 F 1013), but granted leave to renew the motion before the trial court. On renewal, the trial court adhered to the motion court's decision denying the motion. The defense at trial was that the defendant was home with family and a friend the entire day of the robbery. "[I]n light of *People v LeGrand* (8 NY3d 449, 452), it was an error, under the circumstances of this case, for the trial court to deny the defendant's motion for leave to present expert testimony concerning the reliability of eyewitness identification." Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [Braun, J (motion in limine); McGann, J (trial)])

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

Sentencing (Enhancement) — **SEN; 345(32)**

People v Muhammad, 47 AD3d 951, 851 NYS2d 601 (2nd Dept 2008)

Holding: The court erred in imposing an enhanced sentence on the defendant based on his failure to report to the probation department and to appear on the scheduled sentencing date. The plea proceeding transcript does not indicate that the defendant was told or understood that if he did not maintain contact with the probation department or appear on the sentencing date, the court could impose a more severe sentence than the one to which he agreed at the time of his guilty plea. The defendant is not entitled to specific performance of the sentencing portion of the plea agreement (*see People v Stewart*, 32 AD3d 403), but the court cannot impose an enhanced sentence without first giving the defendant an opportunity to withdraw his guilty plea. *See People v Brothers*, 20 AD3d 486, 486-487. The defendant's waiver of his right to appeal does not apply to the imposition of the enhanced sentence. *See People v Dickerson*, 208 AD2d 946. Judgment reversed, sentence vacated, and matter remitted to allow the defendant to withdraw his guilty plea. (County Ct, Suffolk Co [Braslow, J])

Second Department *continued*

Extradition (General) **EXT; 160(24)**

Speedy Trial (Cause for Delay) (Waiver) **SPX; 355(12) (50)**

People v Romeo, 47 AD3d 954, 849 NYS2d 666 (2nd Dept 2008)

In November 1985, the defendant killed a man in Suffolk County. In March 1987, the defendant fled to Canada and killed a constable. That same month, he was arrested for the Canadian killing in Boston and indicted for the Suffolk County killing. Suffolk County agreed to allow the Canadian case to be tried first; the defendant objected, asserting his constitutional right to a speedy trial and seeking to be produced in Suffolk County for arraignment. His motion was denied. He was convicted of the Canadian murder and sentenced in 1987, but Suffolk County did not seek extradition. In July 1999, the defendant's motion to dismiss the Suffolk County indictment on constitutional and statutory speedy trial grounds was denied. In June 2003, after an amendment to the applicable treaty, the prosecution sought extradition and in November 2005, the defendant was arraigned. In February 2006, he pleaded guilty to first-degree manslaughter without renewing his speedy trial claim.

Holding: The defendant's plea and appeal waiver did not bar him from asserting a constitutional speedy trial claim on appeal. He did not need to reassert his claim when he pleaded guilty; the court already denied his argument in 1999. *See People v Love*, 236 AD2d 488, 489. The 12-year delay is extraordinary, and prejudiced the defendant. The delay was due to prosecutors' decision to defer prosecution despite the defendant's presence in the United States, their mistaken belief that they could obtain the defendant's presence after the Canadian trial was completed, and their failure to request extradition. *See United States v Pomeroy*, 822 F2d 718, 721-722. These facts outweigh the two factors in *People v Taranovich* (37 NY2d 442) *i.e.*, the seriousness of the charges and that the defendant was not incarcerated on those charges at all. Judgment reversed, indictment dismissed, and matter remitted. (County Ct, Suffolk Co [Kahn, J])

Statute of Limitations (Burden of Proof) (Computation of Period) (Tolling of) **SOL; 360(5) (10) (20)**

People v Karimzada, 48 AD3d 482, 851 NYS2d 624 (2nd Dept 2008)

Holding: The court properly concluded that the defendant's prosecution was not barred by the statute of limitations. "Contrary to the People's contention, since they affirmatively agreed, at the start of the proceedings before the Supreme Court, that the question of untimeliness was appropriately raised as an issue for trial, they cannot now dispute the propriety of its treatment as a trial issue (*see People v Chavis*, 91 NY2d 500, 506)." After a nonjury trial, the court concluded that the prosecution proved beyond a reasonable doubt that the defendant's whereabouts were continuously unknown and unascertainable by the exercise of due diligence (*see* CPL 30.10(4)(a)(ii)), and thus the statute of limitations was tolled for a period of time sufficient to render the prosecution timely. Assuming that the prosecution had to sustain that burden of proof, the prosecution did prove beyond a reasonable doubt that the defendant's whereabouts were unknown and unascertainable until his DNA profile from a rape kit was matched to a DNA profile in the CODIS databank. *See People v Seda*, 93 NY2d 307, 312 Judgment affirmed. (Supreme Ct, Queens Co [Aloise, J])

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

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

Matter of Pereira-Marshall v Marshall, 48 AD3d 574, 852 NYS2d 233 (2nd Dept 2008)

In a family offense proceeding, the court concluded that the respondent ex-husband had committed acts constituting disorderly conduct and third-degree menacing. At the dispositional hearing, the court found the existence of aggravating circumstances, namely the use of a dangerous instrument against the petitioner, which it concluded were sufficient to justify a five-year order of protection. *See* Family Court Act 827(a)(vii), 842.

Holding: The court's finding of aggravating circumstances is inconsistent with its finding that the respondent committed acts that constituted third-degree menacing and not second-degree menacing. The court may find, after a dispositional hearing, that the respondent used a dangerous instrument against the petitioner, even if it implicitly rejected that claim after the fact-finding hearing, because the parties are free to submit additional evidence at the dispositional hearing that shows the existence of an aggravating circumstance. *See Matter of Kristine Z. v Anthony C.*, 21 AD3d 1319. However, no such evidence was presented in this case to support the aggravated circumstances finding. Order of disposition modified by deleting the provisions which found the existence of aggravating circumstances, order of protection term set at two years, and order affirmed as modified. (Family Ct, Kings Co [Olshanksy, J])

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

Identification (General) (Lineups) **IDE; 190(17) (30)**

Second Department *continued*

People v Sumpter, 48 AD3d 596, 852 NYS2d 216 (2nd Dept 2008)

Holding: The hearing court erred in denying the defendant's motion to suppress lineup identification testimony. The police violated the defendant's right to counsel by conducting a lineup without first telling the defendant's attorney and giving the attorney a reasonable opportunity to participate. *See People v LaClere*, 76 NY2d 670. The error is not harmless because the evidence of the defendant's guilt without the erroneously admitted identification testimony was not overwhelming. A new trial is required. *See People v Crimmins*, 36 NY2d 230. However, dismissal of the indictment is not warranted. *See People v Wolters*, 41 AD3d 518. Judgment reversed, motion to suppress lineup identification testimony granted, and new trial ordered. (Supreme Ct, Kings Co [Starkey, J (hearing); Reichbach, J (trial)])

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

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

Matter of Bartley v Bartley, 48 AD3d 678, 852 NYS2d 326 (2nd Dept 2008)

Holding: The court erred in concluding that the petitioner proved by a preponderance of the evidence that the respondent committed acts constituting disorderly conduct. The record evidence and testimony shows that while the respondent "was clearly upset with the petitioner during and after the event celebrating their daughter's college graduation, and demonstrated poor judgment in confronting the petitioner in the upstairs of the marital home and in arguing with her and three others in the kitchen, he barely raised his voice, he did not threaten the petitioner, and his conduct did not cause those involved in the argument to leave the home (*see* Family Ct Act §§ 812, 832; Penal Law § 240.20; *cf. Matter of Rankoth v Sloan*, 44 AD3d 863 . . .)." Order of disposition reversed, order of protection vacated, and proceeding dismissed. (Family Ct, Orange Co [Bivona, J])

Sentencing (Hearing) (Resentencing) (Second Felony Offender) **SEN; 345(42) (70.5) (72)**

People v Williams, 48 AD3d 715, 852 NYS2d 298 (2nd Dept 2008)

Holding: The defendant may have been improperly adjudicated a second felony offender. Although he failed to preserve the issue for appellate review (*see* CPL 470.05(2)), it will be reviewed in the interest of justice. *See People v Murdaugh*, 38 AD3d 918, 919. The defendant contends that the predicate violent felony conviction was imposed more than 10 years before he committed the instant offense and that the prosecution failed to prove that the 10-year period was tolled. He asserts that the 212-day period of incarceration that he served during that time was for a crime for which he was ultimately acquitted. *See* Penal Law 70.04(1)(b)(iv); *People v Dozier*, 78 NY2d 242, 250. The record is incomplete regarding how the 212-day period was apportioned between the prior violent felony offense and the crime for which the defendant was acquitted. Thus, the matter must be remanded for a hearing on the issue and then resentencing. Judgment modified by vacating the sentence, judgment affirmed as modified, and matter remitted for resentencing. (Supreme Ct, Kings Co [Goldberg, J])

Sex Offenses (Psychiatric Exam) (Sentencing) **SEX; 350(20) (25)**

People v Chandler, 48 AD3d 770, 853 NYS2d 131 (2nd Dept 2008)

Holding: The court adjudicated the defendant a level three sex offender under the Sex Offender Registration Act (SORA). The court failed to set forth findings of fact and conclusions of law that supported its determination that the defendant's mental condition met the requirements of the fourth override factor. *See* Correction Law 168-n(3). In its case summary, the Board of Examiners of Sex Offenders recommended an upward departure from level two to level three because the defendant had been diagnosed by the New York State Department of Corrections, Mental Health Unit as suffering from impulse control disorder and mild mental retardation. In order for the fourth override factor to apply, there must be a clinical assessment that the defendant has a psychological, physical, or organic abnormality that decreases the ability to control impulsive sexual behavior. *See* SORA Risk Assessment Guidelines and Commentary, 3-4, 19 [2006 ed]. "[W]hile the record reveals that the defendant has a history of mental illness, there was no clinical assessment stating that it was of a kind that 'decreases his ability to control impulsive sexual behavior.'" Thus, the court's adjudication was not supported by clear and convincing evidence. *See People v Kraus*, 45 AD3d 826. Because the diagnosis may have constituted some evidence that impulse control disorder is causally related to a risk of reoffense, the matter must be remitted for a further hearing on that issue. Order reversed and matter remitted for a reopened hearing and a new determination in accordance therewith. (County Ct, Suffolk Co [Doyle, J])

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

Second Department *continued*

Jurisdiction (Personal) **JSD; 227(5)**

Matter of Cruz v Cruz, 48 AD3d 804, __ NYS2d __ (2nd Dept 2008)

Holding: The court erred in dismissing the visitation proceedings based on improper venue. However, the proceedings should have been dismissed because the court lacked personal jurisdiction over the respondent mother. The petitioner father sought permission to serve the respondent by publication because he did not know her current address. Family Court Act does not authorize service by publication in a visitation proceeding. Visitation proceedings are governed by Domestic Relations Law 240 or the law applicable to habeas corpus proceedings commenced in the Supreme Court. *See* Family Court Act 651(b). In habeas proceedings, for good cause shown, the court may dispense with the usual methods of service and authorize service in another manner that the court finds is reasonably calculated to give notice to the individual of the proceeding. *See* CPLR 7005. Service by publication is not a manner reasonably calculated to give notice. The petitioner failed to provide the court with any information that it could use to determine an alternative method of service. Order affirmed. (Family Ct, Suffolk Co [Lynaugh, J])

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

Robbery (Defenses) (Degrees and Lesser Offenses) (Instructions) **ROB; 330(5) (10) (25)**

People v Fredericks, 48 AD3d 827, 851 NYS2d 651 (2nd Dept 2008)

The defendant was convicted of several counts of first-degree robbery, attempted first-degree robbery, and second-degree robbery, among others. Many of the complainants identified a BB gun recovered from the defendant's backpack as the gun he displayed during the robberies.

Holding: Defense counsel failed to request, and expressed confusion regarding the prosecution's request for, a jury instruction on the affirmative defense to first-degree robbery—that the BB gun displayed was not a loaded weapon capable of producing death or serious physical injury. The affirmative defense would have distinguished between first- and second-degree robbery; instead, the jury charges for each offense were almost identical. Defense counsel's failures constitute ineffective assistance of counsel. *See People v Layton*, 302 AD2d 408. No trial strategy justifies defense counsel's failures as to the affirmative defense. *See People v Lyde*, 98 AD2d 650, 651. The court compounded defense counsel's error by charging the jury on second-degree robbery as a lesser-included offense of first-degree robbery, but not instructing them regarding the affirmative defense to first-degree robbery. *See People v Gillard*, 72 NY2d 877, 878. A jury question showed that the jury was confused regarding the almost identical charges. The prosecution consented to forego a new trial to correct the error. Judgment modified, convictions reduced, judgment affirmed as modified, and matter remitted for resentencing. (Supreme Ct, Kings Co [Dowling, J])

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

People v Liguori, 48 AD3d 773, 854 NYS2d 140 (2nd Dept 2008)

Holding: The court properly adjudicated the defendant a level two sex offender under the Sex Offender Registration Act (SORA), although the basis for the determination was incorrect. The defendant's 1985 out-of-state robbery conviction supports the assessment of 30 points under risk factor 9 (prior offenses), and cannot be the basis of an upward departure. However, an upward departure to level two is supported by the circumstances underlying the defendant's 1997 harassment conviction, including the proximity of time between that offense and the sex offense which was the basis for the risk assessment, and the child pornography images found on the defendant's computer at the time of his arrest for the sex offense. These aggravating factors are not otherwise adequately taken into account by the SORA guidelines. *See People v Turner*, 45 AD3d 747. Order affirmed. (County Ct, Suffolk Co [Hinrichs, J])

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

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

People v Ferraro, Nos. 2005-02258, 2005-02259, 2nd Dept, 3/4/2008

Holding: Although the defendant pleaded guilty to first-degree bail jumping and did not move to withdraw his plea or vacate his conviction, his factual recitation negated an essential element of that offense. Under the circumstances, the defendant did not need to preserve the issue. *See People v Lopez*, 71 NY2d 662, 665-666. The prosecution concedes that an error was made; the judgment must be reversed. With regard to his burglary conviction, the defendant failed to preserve his challenge to the legal sufficiency of the evidence because defense counsel made only a general motion to dismiss that indictment and did not provide specific facts or grounds for the dismissal. *See* CPL 470.05(2). Even if the issue was preserved, the evi-

Second Department *continued*

dence was legally sufficient to establish the defendant's guilt and the verdict was not against the weight of the evidence. Judgment of third-degree burglary affirmed, judgment of first-degree bail jumping vacated, plea vacated, and matter remitted. (County Ct, Suffolk Co [Gazzillo, J])

Witnesses (Child) (Direct Examination) WIT; 390(3) (15)

People v Mendoza, __ AD3d __, 853 NYS2d 364 (2nd Dept 2008)

Holding: The court properly exercised its discretion in concluding that the five-year-old complainant was competent to give sworn testimony. The examination of the child showed that she knew the difference between telling the truth and telling a lie, she promised to tell the truth, and said that she would be punished by her family and by God if she lied. *See* CPL 60.20(2); *People v Nisoff*, 36 NY2d 560, 566. Even if the court erred in permitting the sworn testimony, the complainant could have been permitted to testify as an unsworn witness because her testimony was sufficiently corroborated by other evidence. *See People v Groff*, 71 NY2d 101, 109-110. Thus, reversal is not required. *See People v McIver*, 15 AD3d 677, 678. Given the complainant's age and the nature of the crimes, the court properly exercised its discretion by allowing the prosecutor to ask the complaint leading questions. *See People v Celdo*, 291 AD2d 357. Judgment affirmed. (Supreme Ct, Suffolk Co [Pastoressa, J])

Third Department

Narcotics (Penalties) NAR; 265(55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Williams, 48 AD3d 858, 850 NYS2d 717 (3rd Dept 2008)

Holding: The court correctly denied the defendant's motion for resentencing under the Drug Law Reform Act of 2005 (DLRA 2005) because the defendant did not satisfy the third criteria, merit time eligibility under Correction Law 803(1)(d). Under 803(1)(d)(iv), a merit time allowance can be withheld if an inmate commits a serious disciplinary infraction, which is behavior that results in the imposition of disciplinary sanctions that total 60 or more days in the special housing unit and / or keeplock. *See* 7 NYCRR 280.2(b)(3). Because his disciplinary infractions met the definition of serious disciplinary infractions, the defendant is not eligible for a merit time allowance (*see People v Paniagua*, 45 AD3d 98, 106-107 *lv den* 9 NY3d 992), and therefore, he is not eligible for resentencing under DLRA 2005. "Recognizing the Second Department's holding in *People v Sanders* (36 AD3d 944 [2007], *lv dismissed* 8 NY3d 927 [2007]), we echo the First Department in *People v Paniagua* (45 AD3d at 107-108) that '[n]othing in [DLRA 2005] or Correction Law § 803(1)(d) suggests that the Legislature intended such a narrow meaning to "eligibility requirements"' (*id.* at 107-108) and, for that reason, we decline to follow *Sanders*." Order affirmed. (Supreme Ct, Albany Co [Lamont, J])

Discovery (*Brady* Material and Exculpatory Information) (Witnesses) DSC; 110(7) (35)

People v Griffin, 48 AD3d 894, 851 NYS2d 718 (3rd Dept 2008)

Holding: The prosecution complied with their disclosure obligations under *Brady [v Maryland* (373 US 83 [1963])] and CPL 240.45. In response to the defendant's generalized request, the prosecution correctly provided him with conviction information about their witnesses that was contained in their records and was disclosed by the witnesses themselves. The prosecution is only required to disclose known judgments of conviction. *See* CPL 240.45(1); *People v Graham*, 289 AD2d 417, 418 *lv den* 97 NY2d 754. The defendant failed to show that the witnesses' rap sheets would have revealed additional convictions beyond those disclosed during cross-examination. The record shows that there is no reasonable probability that the defendant would have received a more favorable verdict if such convictions were disclosed. *See People v Ingraham*, 274 AD2d 828, 829-830. The court correctly denied the defendant's CPL 440.10 motion because the prosecution did not violate *Brady* by failing to disclose a plea bargain with one of their witnesses. The prosecution disclosed a prior plea agreement with the witness, which was no longer in effect because the witness absconded. Merely because the witness received a sentence that was similar to the one set out in the agreement does not show prosecutorial misconduct or concealment of another agreement. Judgment and order affirmed. (County Ct, Broome Co [Smith, J])

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

People v Hasenflue, 48 AD3d 888, 851 NYS2d 674 (3rd Dept 2008)

Holding: The court erred in concluding that the prosecution established by a fair preponderance of the evidence that the defendant was competent to stand trial in 2003. In 2005, the matter was remanded for a reconstruction hearing because the court erred by proceeding to trial before a CPL article 730 exam was conducted. *See People v Hasenflue*, 24 AD3d 1017. Before trial, the defendant refused to cooperate with the two examining psycholo-

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gists. At the reconstruction hearing, the defendant's stand-by trial counsel, the trial judge, the prosecutor, and the two psychologists testified. Based on their review of his mental health records from the 1980s, the prosecution's file, and article 730 examination reports from previous proceedings in 1995 and 2001, the psychologists opined that the defendant was competent. The defendant's competence could not be determined through a reconstruction hearing since there were no contemporaneous psychiatric examinations of his competency at the time of trial. *See Pate v Robinson*, 383 US 375, 387 (1966); *People v Peterson*, 40 NY2d 1014. The defendant's observed demeanor at trial and his self representation, while relevant, are insufficient to establish his competence. Judgment reversed and matter remitted for a new trial. (County Ct, Ulster Co [Bruhn, J])

Appeals and Writs (Judgments and Orders Appealable) (Preservation of Error for Review) **APP; 25(45) (63)**

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

People v Lewis, 48 AD3d 880, 851 NYS2d 295 (3rd Dept 2008)

Holding: "[A] defendant need not move to vacate the judgment of conviction in order to preserve the argument that the [appeal] waiver, as manifested on the record, was deficient." The previous line of cases on this issue, including *People v Sawyer*, 41 AD3d 1089, 1090 *lv den* 9 NY3d 926, will no longer be followed. The defendant need not file a CPL article 440 motion to preserve a facial attack on the waiver because an appeal waiver is valid only if the record shows that it was made knowingly, intelligently, and voluntarily. *See People v Lopez*, 6 NY3d 248, 256. Upon a review of the record, however, the defendant's waiver was knowing and voluntary. The court's admonitions and his written waiver of appeal informed him of his rights. *See People v Ramirez*, 42 AD3d 671, 671. Further, the written waiver that he signed in open court stated that he was waiving his appeal right in exchange for the plea and sentencing agreement, explained the appellate process, and stated that defense counsel fully advised him of his rights and the consequences of waiving the right to appeal. The record does not support the defendant's argument that his plea was involuntary. Judgment affirmed. (County Ct, Sullivan Co [LaBuda, J])

Grand Jury (Procedure) (Witnesses) **GRJ; 180(5) (15)**

People v Revette, 48 AD3d 886, 851 NYS2d 299 (3rd Dept 2008)

Holding: The indictment must be dismissed. One of the grand jurors was the spouse of one of the deputy sheriffs who investigated the crime and testified before the grand jury. Although the procedures governing grand juries do not provide for a challenge to a juror based on the juror's relationship to a witness (*see* CPL 190.20(2)(b); Judiciary Law 510), a close relationship raises the risk of potential prejudice. *See State v Penkaty*, 708 NW2d 185, 198 (Minn 2006); *People v Cipolla*, 163 Misc 2d 144, 145. The prosecutor, who was aware of the relationship, "should ensure fairness and, if there is any doubt with regard thereto, bring the potential bias to the attention of the court or otherwise excuse the grand juror (*see People v La Duca*, 172 AD2d 1054, 1055 . . .)." The defendant does not need to show actual prejudice. *See People v Sayavong*, 83 NY2d 702, 709. The transcript showed that the grand juror did not clearly state that she was able to remain fair under the circumstances and the prosecutor did not follow through on his suggestion that they revisit the impartiality issue before deliberations. "Further, the actual number of grand jurors voting to indict defendant is not recorded, leaving to speculation the potential significance of the single vote of this grand juror." Judgment reversed and indictment dismissed with leave to represent to another grand jury. (County Ct, Cortland Co [Ames, J])

Appeals and Writs (General) (Record) **APP; 25(35) (80)**

Transcripts (General) (Procedure) **TSC; 373.5(20) (30)**

People v Russell, 48 AD3d 900, 852 NYS2d 411 (3rd Dept 2008)

Holding: As part of his appeal, the defendant argues that the court failed to instruct the jury regarding the definitions of reasonable doubt, burden of proof, and the presumption of innocence. As originally compiled, the transcript did not include those jury instructions. After the prosecution contacted the court reporter who transcribed the proceedings, the court reporter submitted an eight-page excerpt that included the missing jury instructions. In a letter, the court reporter explained that his stenographic machine lost power during the jury instructions and when he compiled the transcript, he mistakenly omitted the jury instructions that were given during that power loss. The defendant promptly objected to the authenticity of the excerpt, noting that the original transcript flows seamlessly and is not cut off in the middle of a word, sentence, or charge as might be expected if the machine lost power. Thus, the trial court must determine whether the instructions in the excerpt were actually given. *See People v La Motte*, 276 AD2d 931, 932. Decision withheld and matter remitted to settle the record. (County Ct, Warren Co [Berke, J])

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

Juveniles (Delinquency) (Disposition) (Jurisdiction) **JUV; 230(15) (40) (70)**

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

Matter of Shane EE. 48 AD3d 946, 851 NYS2d 711 (3rd Dept 2008)

Holding: The petition was sufficient to confer jurisdiction on the court as the alleged facts address all of the elements of second-degree aggravated harassment. *See* Penal Law 240.30(3). The respondent's racial and gender-based epithets and threatened physical attacks are not protected speech under the First Amendment as they were "so personally and racially offensive that it was 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace' (*Chaplinsky v New Hampshire*, 315 US 568, 574 [1942] . . .)." The court's delinquency determination was supported by legally sufficient evidence and was not against the weight of the evidence as the racial and gender-based character of the words used provide sufficient circumstantial evidence of motivation by bias or prejudice (*see People v Marino*, 35 AD3d 292, 293), and the respondent's statements constitute threats of harmful physical contact. The statute does not require that the complainant have particular feelings in response to the threats. *Compare* Penal Law 240.30(3) *with* Penal Law 120.14. The court appropriately determined that the respondent required some form of supervision or treatment and followed the probation department's recommendation of a conditional discharge with substantial community service. *See* Family Court Act 352.1, 352.2(1)(a). Order affirmed. (Family Ct, Tompkins Co [Sherman, J])

Sentencing (Concurrent/ Consecutive) (Pronoucement) (Second Felony Offender) **SEN; 345(10) (70) (72)**

People ex rel Gill v Greene, 48 AD3d 1003, 852 NYS2d 457 (3rd Dept 2008)

Holding: The court erred in denying the petitioner's application for a writ of habeas corpus. Because the petitioner was conditionally released on parole, habeas corpus relief is not available, but the proceeding is converted to a CPLR article 78 proceeding. *See* CPLR 103(c). The petitioner was sentenced as a second felony offender, but the sentencing court was silent as to whether the sentences should run consecutively or concurrently with his prior sentences. The Department of Correctional Services (DOCS) calculated the sentences as running consecutively. Although Penal Law 70.25(2-a) requires a sentencing court to order consecutive sentences for a second felony offender, the court did not do so. DOCS does not have the authority to correct the court's error. *See Matter of Dreher v Goord*, 46 AD3d 1261, 1262. Instead, DOCS should have informed the prosecution or the sentencing court of the error and allowed the sentence to be corrected judicially. *See* Correction Law 601-a. Judgment reversed, petition converted to an article 78 proceeding, and petition granted to the extent of annulling DOCS's determination that the petitioner's sentences run consecutively. (Supreme Ct, Washington Co [Berke, J])

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

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

People v Haddock, 48 AD3d 969, 852 NYS2d 441 (3rd Dept 2008)

Holding: The court erred in refusing to instruct the jury that the prosecution must prove that the defendant knowingly failed to comply with the registration requirements of the Sex Offender Registration Act (SORA) (Correction Law 168-t). Although 168-t does not set forth a required culpable mental state, a culpable mental state may be required. *See* Penal Law 15.15(2). Unless the legislature clearly intended to create a strict liability offense, a strict liability offense should not be adopted. *See People v Coe*, 71 NY2d 852, 855. Relevant considerations in determining whether there is clear legislative intent include the legislative history, the provisions of the legislation as a whole (*see People v Nogueros*, 42 NY2d 956, 956-957), the severity of the penalty, and the public harm being protected against. *See Morissette v United States*, 342 US 246, 255-257 (1952). Given the lack of specific language in the statute or its legislative history and the nature of the penalty, it is not clear that the legislature intended it to be a strict liability offense. Further, the statutory notice provisions indicate an intent to require a culpable mental state. The defendant objected before and after the charge and requested that the charge include a knowledge requirement. Although the prosecution presented ample evidence of knowledge, this was not harmless error. *See People v Rowland*, 14 AD3d 886, 887. Judgment reversed and matter remitted. (County Ct, Albany Co [Breslin, J])

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

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

People v Karika, 48 AD3d 980, 851 NYS2d 731 (3rd Dept 2008)

The defendant, age 23, was convicted of first-degree criminal sexual act and first-degree sexual abuse based on the accusations of the 13-year-old complainant, and was sentenced to a five year term of imprisonment with peri-

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ods of postrelease supervision.

Holding: The defendant was deprived of a fair trial based on the court's statements to the jury pool. Before jury selection started, the judge recounted a recent out-of court conversation he had and told the jury pool that if a person committed a crime (the same crime as the defendant was charged with) without meaning to or knowing what the law is, he would give the person an unconditional or conditional discharge. During the charging conference, the court denied the defendant's request for a curative instruction, which request preserved the issue for appeal. These statements erroneously suggested to the potential jurors that the court could impose such a sentence if they convicted the defendant of the crimes charged. The jury "certainly could have believed that if defendant were convicted, he would not have been sent to prison, leading them 'to a scrutiny of the evidence less close than that to which defendant was entitled' (*People v Morris*, 39 AD2d 750, 751 . . .)." Because the court did not give a curative instruction and the proof of the defendant's guilt was not overwhelming, the error was not harmless. *See People v Reilly*, 19 AD3d 736, 737-738. Judgment reversed and matter remitted. (County Ct, Tioga Co [Sgueglia, J])

Evidence (Newly Discovered) EVI; 155(88)

People v Lackey, 48 AD3d 982, __ NYS2d __ (3rd Dept 2008)

Holding: The court did not abuse its discretion in granting the respondent's CPL 440.10 motion based on newly discovered evidence. The respondent was convicted of sexual abuse and three months later, the complainant was convicted of filing a false statement for falsely alleging a subsequent sexual assault. The newly discovered evidence meets the six-part test for vacatur under CPL 440.10(1)(g). *See People v Priori*, 164 NY 459, 472. The evidence was discovered after trial and could not have been discovered before trial and it would have been admitted at the respondent's trial because it was false and was sufficiently similar to the complaint in his case to suggest a pattern of false complaints. *See People v Hunter*, 41 AD3d 885, 888 *lv gntd* 9 NY3d 845. As to the false complaint, the complainant admitted that her injuries were self-inflicted and that she may have been hallucinating when it allegedly occurred. The false complaint could not only be used to impeach the complainant, but could support a different defense theory (*see People v Santos*, 306 AD3d 197, 198 *affd* 1 NY3d 548), and it is not cumulative and is material because it provides a substantial basis for attacking the complainant's testimony as potentially based on hallucinations. "Although defendant's statement to police was strong evidence against him, he presented expert testimony at trial that he was borderline mentally retarded and prone to suggestiveness; such evidence may well have been more persuasive, and his statement less so, if this new evidence was presented . . .)." Order affirmed. (County Ct, Madison Co [DiStefano, J])

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

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

People v O'Halloran, 48 AD3d 978, 852 NYS2d 471 (3rd Dept 2008)

The defendant was convicted of sodomy and endangering the welfare of a child for sexually abusing the complainant, who was less than 14 years of age at the time. The complainant made the allegations more than four years later while the police were questioning him about sexual contact with a minor female.

Holding: The court denied the defendant's CPL 330.30 motion to set aside the verdict finding that the prosecution did not fail to disclose *Brady* material. On appeal the defendant contends that this ruling was error and that he was denied the effective assistance of counsel. While the prosecution did withhold several of the complainant's statements, those statements were not included in the record, even though the court reviewed them in deciding the motion. Because the defendant had the obligation to prepare a complete appellate record (*see People v Olivo*, 52 NY2d 309, 320), and there is no evidence showing that he attempted to have them included in the record, meaningful appellate review is not possible. *Cf People v Janota*, 181 AD2d 932, 934-935. The defendant received effective assistance of counsel as the "defendant's counsel did call the jury's attention to the victim's prior bad acts, his potential motive to fabricate and his having received no jail time for his sexual offense . . . ." Judgment affirmed. (County Ct, Broome Co [Smith, J])

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

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

Matter of Vaello v Parole Board Division of State of New York, 48 AD3d 1018, 851 NYS2d 745 (3rd Dept 2008)

Holding: The court properly granted the petitioner's CPLR article 78 petition to vacate the Board of Parole's decision denying his parole release and directed the Board to hold a new hearing. While the Board's release determinations are discretionary and entitled to deference, the decisions must comply with the factors set forth in Executive Law 259-i. *See Matter of Mendez v New York State Bd of Parole*, 20 AD3d 742. In denying parole, the Board

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listed the petitioner's present and past convictions and summarily concluded that he is a poor candidate for release. The Board failed to present a statutory rationale for its decision. *See Matter of Prout v Dennison*, 26 AD3d 540, 541. In order to review an administrative decision, the court must know the reasons for the decision; without that information, the court is left to guess those reasons based on vague, inconclusive language. *See Matter of Millpond Mgt Inc v Town of Ulster Zoning Bd of Appeals*, 42 AD3d 804, 805. Because the Board did not issue a decision that is consistent with the statutory criteria, the court properly ordered a new hearing. Judgment affirmed. (Supreme Ct, Albany Co [Donohue, J])

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

Evidence (Exclusionary Rule Exceptions) (Prejudicial) (Uncharged Crimes) **EVI; 155(54) (106) (132)**

People v Westerling, 48 AD3d 965, 852 NYS2d 429 (3rd Dept 2008)

Holding: The court erred in permitting the prosecution to introduce evidence of certain domestic violence incidents between the defendant and the complainant. Most of the prior domestic violence incidents fit within the two-part exception to *People v Molineux* (168 NY 264) as those incidents were relevant to show the defendant's intent, the complainant's state of mind and possible reasons for recanting her statement, and to provide background information regarding their relationship. However, the court erred in admitting evidence of unparticularized acts of physical and verbal abuse over a three-year period and all 19 saved telephone messages the defendant left for the complainant; the court failed to conduct the proper balancing of probative value and prejudice. Police testimony corroborating what the complainant said concerning prior bad acts was prejudicial and lacking probative value. The court magnified the potential for prejudice by failing to "provide the jury with 'thorough and repeated cautionary instructions' regarding the limited purpose of such evidence as this extensive testimony was introduced (*People v Steinberg*, 170 AD2d [50] at 74 . . .)." The final jury instructions did not cure this deficiency. These errors seriously infringed on the defendant's ability to receive a fair trial. *See People v Wlasiuk*, 32 AD3d 674, 678. Judgment reversed and matter remitted. (County Ct, Tompkins Co [Sherman, J])

Sentencing (Concurrent/ Consecutive) (Resentencing) **SEN; 345(10) (70.5)**

People v Hilliard, __ AD3d __, 853 NYS2d 198 (3rd Dept 2008)

After the first trial, the court imposed concurrent sentences for six offenses and a consecutive sentence for a seventh offense, resulting in an aggregate sentence of 26-1/3 years to life. The convictions were reversed on appeal and the defendant was again convicted of all the offenses. However, the same judge imposed concurrent sentences for five of the offenses and consecutive sentences for the other two for an aggregate sentence of 41-1/3 years to life.

Holding: Because the defendant received a longer sentence from the same judge after his retrial, the second sentence is presumed vindictive. *See People v Young*, 94 NY2d 171, 176; *North Carolina v Pearce*, 395 US 711 (1969). In order to rebut that presumption, the court must state on the record reasons for enhancing the defendant's sentence that are based on objective information about identifiable conduct by the defendant occurring after the original sentencing. The court's stated reason, namely that the incarcerated coconspirators had to testify again, placing them in jeopardy, did not rebut the presumption because it was attributable to the trial court's error and not the defendant. *See People v Van Pelt*, 76 NY2d 156, 161-162. Thus, the change from a concurrent sentence to a consecutive sentence must be reversed. Judgment modified by directing that the second-degree criminal possession of a weapon sentence shall run concurrently with the other sentences, and as modified, judgment affirmed. (County Ct, Sullivan Co [LaBuda, J])

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

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

People v Whalen, __ AD3d __, 852 NYS2d 482 (3rd Dept 2008)

As part of the defendant's rape conviction for his sexual relationship with one of his biological daughters, the court issued a CPL 530.12 permanent order of protection that prohibited him from contacting that daughter and her "other and immediate family" for 11 years. The court denied the defendant's motion to modify the order of protection to allow him to have contact with his other biological daughter, the complainant's half-sister.

Holding: The defendant had the right to appeal the original order of protection as part of the judgment of conviction. *See People v Konieczny*, 2 NY3d 569. However, CPL 450.10 does not authorize an appeal as a matter of right from a separate order seeking to modify the original order of protection. Appeal dismissed. (County Ct, St. Lawrence Co [Rogers, J])

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

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People v Armstrong, __ AD3d __, 853 NYS2d 219 (3rd Dept 2008)

The defendant was arrested for driving while intoxicated and for violating his probation. At defense counsel's request, the court ordered the defendant to undergo a CPL article 730 competency examination. After one psychiatrist evaluated the defendant and concluded that he was competent to stand trial, the defendant entered into a plea agreement, admitted that he violated his probation, and pleaded guilty to driving while intoxicated.

Holding: The court erred in permitting the defendant to enter a guilty plea before the two examinations required under CPL 730.20(1) were conducted. It is sometimes possible to conduct a reconstruction hearing as to the defendant's competency where the two-examination requirement was not met, but one contemporaneous examination was conducted. *See People v Armlin*, 37 NY2d 167, 172-173. However, it is not possible in this case as the one report is cursory and wholly conclusory and the record does not otherwise show that a meaningful reconstruction hearing could be conducted. *Cf People v Mulholland*, 129 AD2d 857, 859. Judgments reversed, plea vacated, and matter remitted. (County Ct, Essex Co [Meyer, J])

Parole (General) (Release [Consideration for]) **PRL; 276(10) (35[b])**

Sentencing (Pre-sentence Investigation and Report) **SEN; 345(65)**

Matter of Gutkaiss v People, __ AD3d __, 853 NYS2d 677 (3rd Dept 2008)

Holding: The court erred in denying the defendant's application for a copy of his presentence investigation report. Presentence reports are confidential, but may be disclosed where required or permitted by statute or when the court specifically authorizes it. *See* CPL 390.50(1). When not specifically authorized by statute, a petitioner may be entitled to the report based on a proper factual showing of need. *See Matter of Shader v People*, 233 AD2d 717, 717. The defendant made a sufficient factual showing as he requested the report in order to prepare for his upcoming Board of Parole hearing and the Board must consider the report in determining his request for release. *See* Executive Law 259-i(1)(a), (2)(c). Thus, he is entitled to a copy of the report after an in camera review and any redactions that the court deems appropriate. Order reversed and matter remitted. (County Ct, Washington Co [Berke, J])

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

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

People v Baptiste, __ AD3d __, 853 NYS2d 719 (3rd Dept 2008)

The defendant's depraved indifference murder conviction became final on April 25, 2004. Thereafter, he filed a CPL 440.10 motion to vacate his conviction.

Holding: The court properly denied the defendant's CPL 440.10 motion. The new law on depraved indifference murder does not apply retroactively to cases that became final before the rule change, and at least not before the decision in *People v Hafeez* (100 NY2d 253). *See Policano v Herbert*, 7 NY3d 588. Because the decision in *People v Payne*, 3 NY3d 266, decided on October 19, 2004, "was 'the point of no return'—the first case that was irreconcilable with [*People v] Sanchez* [98 NY2d 373]—it marks the cut-off date for retroactive application of the new rule." Neither *Hafeez* nor *People v Gonzalez* (1 NY3d 464), which were decided before the defendant's conviction became final, represent a departure from the underpinnings of depraved indifference murder as set forth in *People v Register* (60 NY2d 270) and *Sanchez*. They did not depart from the previously established objective analysis nor did they hold, as did subsequent cases, that "regardless of recklessness, depravity is not present absent an evil frame of mind, which can be evinced only in the specific factual circumstances now recognized by the Court . . . ." *Payne* adopted that approach and is the first decision "in which the Court declined to treat the question of whether the defendant acted with a reckless state of mind as 'a classic matter for the jury' (*Policano v Herbert*, 7 NY3d at 599)." Order affirmed. (County Ct, Schenectady Co [Drago, J])

Fourth Department

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles] [Probable Cause] [Time]) (Standing to Move to Suppress) **SEA; 335(10[a] [g] [p]) (70)**

People v Black, 48 AD3d 1154, 851 NYS2d 757 (4th Dept 2008)

Holding: The court correctly denied the defendant's motion to suppress. In response to a 911 call about a man with a gun, police officers went to the specified intersection and found two complainants who said that they had been robbed. The complainants provided detailed descriptions of the perpetrators and one of them indicated that the perpetrators may be in a taxicab less than a block away. The officers stopped a nearby taxicab, removed the defendant and another suspect from the cab,

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and found a gun in the cab. Contrary to the prosecution's contention, the defendant had standing to contest the legality of the stop because he was a passenger in the car. *See People v Millan*, 69 NY2d 514, 516. However, the police had the requisite reasonable suspicion to stop the vehicle because they stopped the car in the early morning during a rainstorm in an area with little activity and they saw the cab less than a block away from the intersection within 10 to 15 minutes after the crime occurred. *See People v Van Every*, 1 AD3d 977, 978-979 *lv den* 1 NY3d 602. Judgment affirmed. (County Ct, Erie Co [Pietruszka, J])

Juveniles (Custody) (Hearings) (Parental Rights) **JUV; 230(10) (60) (90)**

Matter of Anthony R. v Erie County Children's Services, 48 AD3d 1175, 850 NYS2d 779 (4th Dept 2008)

Holding: The court erred in denying the father's custody petition without a hearing to determine the best interests of the child. "The court summarily dismissed the petition based on the father's prior consent to be recognized as a 'noticed' father with respect to the child's prospective adoption. That was error, inasmuch as there was an order of filiation in effect and, indeed, the record establishes that respondent withdrew its petition to terminate the father's parental rights. Thus, the father has standing to seek custody of his child despite his status as a 'noticed' father with respect to the prospective adoption (*see generally Matter of LaCroix v Deyo*, 113 Misc 2d 89, 91-92, *affd* 88 AD2d 1077, *appeal dismissed* 57 NY2d 759) . . . ." Order reversed, petition reinstated, and matter remitted for a hearing on the petition. (Family Ct, Erie Co [Maxwell, J])

Sentencing (Concurrent/ Consecutive) (Youthful Offenders) **SEN; 345(10) (90)**

People v Christopher T., 48 AD3d 1131, 850 NYS2d 797 (4th Dept 2008)

The court adjudicated the defendant a youthful offender with respect to count one of the superior court information, but convicted him of counts three and four of the same information, and sentenced him to 1-1/3 to 4 years of imprisonment to run concurrently with the sentence imposed on count one.

Holding: The court did not err in accepting the defendant's waiver of his right to appeal. The court need not engage in any particular litany when accepting an appeal waiver (*see People v Ludlow*, 42 AD3d 941), and the record shows that his waiver was knowing, voluntary, and intelligently entered. *See People v Hidalgo*, 91 NY2d 733, 737. A challenge to the legality of a sentence is not barred by an appeal waiver and it is reviewed despite his failure to raise it at sentencing or on appeal. *See People v Davis*, 37 AD2d 1179, 1180 *lv den* 8 NY3d 983. The defendant's sentence is illegal. The court erred in adjudicating him a youthful offender with respect to count one, but not with respect to counts three and four. Because he was convicted of two or more crimes set forth in separate counts of the information and he was adjudicated a youthful offender on one of those counts, the court must adjudicate him a youthful offender on all other counts. *See* CPL 720.20(2); *People v Huther*, 78 AD2d 1011. Since he is a youthful offender, the court cannot impose consecutive sentences in excess of four years. *See* Penal Law 60.02(2); *People v Ralph W.C.*, 21 AD3d 904, 905. Judgment reversed, conviction deemed vacated and replaced by youthful offender finding, sentences for counts three and four to run concurrently with sentence for count one, and adjudication affirmed as modified. (County Ct, Erie Co [D'Amico, J])

Admissions (General) (Interrogation) (*Miranda* Advice) **ADM; 15(17) (22) (25)**

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

People v Davis, 48 AD3d 1086, 850 NYS2d 307 (4th Dept 2008)

Holding: The court properly denied the defendant's motion to suppress the statements he made to the police after his alleged de facto arrest without probable cause. The defendant and his sister willingly went to the police station with the investigators. The defendant waived his *Miranda* rights, and was not handcuffed, did not ask to leave, and was questioned for one hour. "Although the questioning during that time may have been accusatory, that fact alone did not render the interrogation custodial in nature (*see generally People v Lunderman*, 19 AD3d 1067, 1068-1069, *lv denied* 5 NY3d 830 . . .)." Even so, the police had probable cause to arrest him before he made the inculpatory statements. *See gen* CPL 140.10(1)(b). The court erred in precluding the defendant from presenting evidence regarding his inability to read. The court incorrectly treated the evidence as psychiatric evidence for which CPL 250.10 notice was required; the evidence did not relate to a condition bearing on his mental state. *See People v Brown*, 4 AD3d 886, 888 *lv den* 3 NY3d 637. However, the error was harmless because the defendant showed his reading ability during his testimony. *See gen People v Crimmins*, 36 NY2d 230, 241-242. "[W]e decline defendant's request that we disavow our prior decisions holding that there is no requirement that the police electronically record interrogations." Judgment affirmed. (Supreme Ct, Monroe Co [Sirkin, AJ])

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

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

People v Lavilla, __ AD3d __, 849 NYS2d 746 (4th Dept 2008)

The defendant moved pursuant to CPL 440.20(1) to set aside the post-release supervision portion of his sentence as illegally imposed or, alternatively, for an order stating that his sentence does not include a period of post-release supervision. The court denied the motion. On appeal, the defendant's brief limited his challenge to the alternative request for relief.

Holding: The court correctly denied the defendant's alternative request for relief. "Pursuant to CPL 440.20(1), a court in which the judgment of conviction was entered may set aside the sentence on specified grounds and, if defendant had sought to set aside his sentence or withdraw his plea, we would be compelled to permit him to do so (*see People v Hill*, 9 NY3d 189)." However, CPL 440.20(1) does not authorize the court to issue an order such as the one sought in the defendant's alternative request for relief. Order affirmed. (Supreme Ct, Monroe Co [Fisher, J])

Assault (Evidence) (General) **ASS; 45(25) (27)**

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

People v Ortiz, 48 AD3d 1112, 851 NYS2d 784 (4th Dept 2008)

Holding: The court erred in granting the defendants' motion to the extent that it sought to reduce the indictments from assault in the third degree as a hate crime to assault in the third degree. The court incorrectly determined that the grand jury evidence was legally insufficient to establish the hate crime element of the charge. When viewed in a light most favorable to the prosecution, if not explained or contradicted, the grand jury evidence would warrant a conviction for third-degree assault as a hate crime. *See People v Bello*, 92 NY2d 523, 525-526. The grand jury evidence showed that the defendants did not know the complainants; the complainants did not provoke the attack; the defendants beat the complainants after they asked about the complainants' relationship; they made derogatory comments about the complainants' sexual orientation; and they spat on one of the complainants as the complainants fled the scene. Order reversed, motion denied, indictments reinstated, and matter remitted. (County Ct, Monroe Co [Geraci, Jr., J])

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

People v Torres, 48 AD3d 1043, 849 NYS2d 846 (4th Dept 2008)

Holding: The court erred in imposing a five-year period of post-release supervision for one count of second-degree attempted robbery, a class D violent felony. *See* Penal Law 70.02 [former (1)(c)], 70.45 [former (2)]; *People v Clinkscales*, 35 AD3d 1266. Because it is not clear from the record whether the court intended to impose the maximum period of supervision, the matter must be remitted for resentencing. *See People v Bowden*, 15 AD3d 884 *lv den* 4 NY3d 851, 5 NY3d 786. Judgment modified, sentence vacated, and matter remitted for resentencing. (County Ct, Monroe Co [Connell, J])

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

People v Tabor, 48 AD3d 1096, 849 NYS2d 852 (4th Dept 2008)

Holding: The court erred in summarily denying the defendant's request to proceed pro se. A defendant may proceed pro se if the defendant makes a timely and unequivocal request, makes a knowing and intelligent waiver of the right to counsel, and has not acted in a way that would prevent the fair and orderly exposition of the issues. *See People v McIntyre*, 36 NY2d 10, 17. A review of the record shows that all three factors were satisfied. *See People v Ward*, 205 AD2d 876, 877 *lv den* 84 NY2d 873. Judgment reversed and new trial granted. (County Ct, Oneida Co [Donalty, J])

Arraignment (General) **ARN; 31(10)**

Counsel (Attachment) (Right to Counsel) **COU; 95(9) (30)**

People v Green, 48 AD3d 1056, 849 NYS2d 826 (4th Dept 2008)

Holding: The defendant failed to preserve for appellate review his argument that he was denied his right to counsel at arraignment. *See* CPL 470.05(2). Further, even if the error survived the defendant's guilty plea, reversal is not required. *See gen People v Hansen*, 95 NY2d 227, 230-232. The court arraigned the defendant while he was hospitalized after his arrest and before he had counsel; the court entered a plea of not guilty on his behalf and stated on the record that it would appoint counsel for the defendant and arrange for counsel to talk to the defendant's family. The defendant did not lose any rights or suffer any prejudice because he did not have counsel at his arraignment since whatever defense counsel could have done at arraignment, counsel could do thereafter. *See People v Combs*, 19 AD2d 639, 639. Judgment affirmed. (County Ct,

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Onondaga Co [Aloi, J])

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

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

Matter of Wayne T.I. v Latisha T.C., 48 AD3d 1165, 851 NYS2d 314 (4th Dept 2008)

Holding: After the court issued an order awarding the petitioner attorney's fees, the respondent Onondaga County Department of Social Services moved to reargue, which the court denied. The court also denied the Department's amended motion to reargue, renew, and resettle the original order. The Department never perfected an appeal of the original order. The Department's appeal of the order denying its amended motion must be dismissed. A party cannot appeal the denial of a motion to reargue. *See Empire Ins Co v Food City*, 167 AD2d 983. Because the amended motion does not offer new facts that were unavailable at the time of the prior motion or a valid excuse for not presenting those allegedly new facts in the prior motion, the amended motion is one for reargument, not for leave to renew, which is not appealable. *See gen Pfeiffer v Jacobowitz*, 29 AD3d 661, 662. Finally, that portion of the amended motion seeking leave to resettle the original order is not appealable because the Department sought substantive changes in that order. *See Brooklyn Union Gas Co v Interboro Asphalt Surface Co*, 303 AD2d 532, 536 *lv den* 100 NY2d 506. Appeal dismissed. (Family Ct, Onondaga Co [Hedges, J])

Juveniles (Hearings) (Representation) (Visitation) — **JUV; 230(60) (125) (145)**

Matter of Christina M.M. v Shondell R.B., 48 AD3d 1202, 850 NYS2d 763 (4th Dept 2008)

The petitioner mother filed a petition seeking to terminate visitation between the respondent father and the parties' 10-year-old daughter. The respondent is incarcerated based on his first-degree arson conviction.

Holding: The court erred in granting the petitioner mother's motion for summary judgment without a hearing. The court did not have sufficient information to allow it to conduct an independent, comprehensive review of the best interests of the child. *See Matter of Kenneth H. v Barbara G.*, 256 AD2d 1029, 1029. The record does not provide any information about the circumstances of the arson offense, which is relevant to whether the father poses a risk to his child and whether visitation is appropriate. *See Matter of Steven M. v Meghan M.*, 43 AD3d 1349, 1349-1350. "We further note that, although the Law Guardian was present when the parties appeared for argument of the mother's motion for summary judgment, the record does not reflect any advocacy on behalf of the child." Order reversed, motion denied, and matter remitted for a hearing on whether visitation with the respondent is in the best interests of the child. (Family Ct, Onondaga Co [Klim, J])

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

Guilty Pleas (*Alford* Plea) (Errors Waived By) (General [Including Procedure and Sufficiency of Colloquy]) — **GYP; 181(5) (15) (25)**

People v Delarosa, 48 AD3d 1098, 851 NYS2d 775 (4th Dept 2008)

Holding: By not moving to withdraw his plea or vacate the judgment of conviction, the defendant failed to preserve for appeal his challenge to the voluntariness of his plea. *See People v Aguayo*, 37 AD3d 1081 *lv den* 8 NY3d 981. The defendant's *Alford* plea, however, did not bar him from arguing on appeal that the prosecution failed to disclose exculpatory evidence before the plea. *See gen People v Hansen*, 95 NY3d 227, 230-231. *Brady* material must be disclosed in time for its effective use at trial or at a plea proceeding. *See People v Reese*, 23 AD3d 1034, 1036 *lv den* 6 NY3d 779. "[I]t would undermine *Brady's* disclosure requirements if a defendant were deemed to have waived a *Brady* issue by entering an *Alford* plea without the knowledge that the People possessed exculpatory evidence." However, the prosecution did not violate its *Brady* obligations by failing to disclose to the defendant a witness's written statement because it was duplicative of statements made by the witness during a recorded 911 call that was disclosed before the plea. *See People v Doshi*, 93 NY2d 499, 506. Judgment affirmed. (County Ct, Ontario Co [Reed, J])

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

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

People v Aaron V., 48 AD3d 1200, 850 NYS2d 790 (4th Dept 2008)

Holding: The defendant correctly asserts in his supplemental brief that the court should have granted dismissal of the third-degree sexual abuse charge because that count of the indictment was facially defective. The 12-month period set forth was unreasonable. *See People v Beauchamp*, 74 NY2d 639, 641. The complainant was 13 or 14 years old during the time alleged and therefore capable of discerning seasons, school events, birthdays and other specific incidents that would help narrow the time spans.

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See People v Keindl, 68 NY2d 410, 420. The four-and-a-half-month time period set out in the first count, charging first-degree rape, was not excessive given the nature of the offense and the complainant's age. *See People v Watt*, 84 NY2d 948, 950-951. The court properly admitted evidence of the defendant's prior sexual misconduct with the complainant, as it was relevant to establishing forcible compulsion. *See People v Chase*, 277 AD2d 1045 *lv den* 96 NY2d 733. Judgment affirmed, adjudication reversed, motion to dismiss count three of the indictment granted, and count three dismissed. (County Ct, Ontario Co [Doran, J])

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

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

People v Whyte, 48 AD3d 1040, 850 NYS2d 316 (4th Dept 2008)

Holding: The court properly declined to grant the defendant's request to suppress evidence. Even if evidence was obtained in violations of the physician-patient privilege, suppression of that evidence is not required. *See People v Greene*, 9 NY3d 277, 280. Statements recorded by police when the defendant spoke by phone with the complainant's mother were not obtained in violation of the right to counsel, as no formal proceedings had commenced and the matter had not otherwise progressed from an investigatory to an accusatory stage. *See People v Samuels*, 49 NY2d 218, 221. Nor were the statements obtained in violation of the defendant's right against self-incrimination, even though the mother did not tell him police were recording the conversation. *See People v Lee*, 277 AD2d 1006, 1007 *lv den* 96 NY2d 785. The pre-trial motion to preclude admission of the defendant's notebook was time barred under Criminal Procedure Law 255.20(1). No good cause was shown for failing to make the motion within the statutory 45-day post-arraignment period. *See* Criminal Procedure Law 255.20(3); *People v McQueen*, 307 AD2d 765, 766 *lv den* 100 NY2d 622. The defendant also failed to support his claim that the attorney-client privilege protected the notebook entries in question. There was no evidence that they were made at the direction of counsel or even that an attorney-client relationship existed at the time. Judgment affirmed. (County Ct, Ontario Co [Doran, J])

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

Larceny (Elements) (Evidence) (Intent) (Petty Larceny) LAR; 236(17) (25) (55) (65)

People v Camelo, 48 AD3d 1303, 852 NYS2d 533 (4th Dept 2008)

Holding: The defendant's convictions for second-degree burglary and petit larceny are against the weight of the evidence. The weight of the evidence shows that the defendant took some of his girlfriend's property from their apartment, but that he voluntarily returned them a short time later; thus, the evidence weighs heavily in favor of the conclusion that he did not intend to permanently withhold the property from her. *See* Penal Law 155.00(3), 155.05; *see gen People v O'Reilly*, 125 AD2d 979. Because there was no evidence that the defendant intended to commit another crime when he entered the apartment, the burglary conviction is also against the weight of the evidence. *Cf People v Lewis*, 5 NY3d 546, 551-552. Judgment modified, second-degree burglary and petit larceny convictions reversed, counts one and two of the indictment dismissed, judgment affirmed as modified, and matter remitted. (County Ct, Oneida Co [Dwyer, J])

Sex Offenses (Sentencing) SEX; 350(25)

People v Di John, 48 AD3d 1302, 853 NYS2d 242 (4th Dept 2008)

Holding: The court correctly adjudicated the defendant a level three sex offender under the Sex Offender Registration Act (SORA). The court properly assessed 20 points under risk factor four, continuing course of sexual conduct, because, as reported in the presentence report, the defendant admitted to sexually assaulting the complainant during December 2003, February 2004, and March 2006. *See* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 10 (Nov. 1997). The court also properly assessed 15 points under risk factor 15, inappropriate living situation, because the presentence report showed that the defendant lived with his four-year-old son and 10-year-old stepson. The court properly exercised its discretion in denying the defendant's request for an adjournment in order to present expert testimony challenging the scientific validity of the risk assessment instrument. In a SORA proceeding, the court must grant an adjournment if there is a dispute between the parties about the determinations so that either party can obtain relevant materials from the Board of Examiners of Sex Offenders or any state or local facility, hospital, or governmental body. *See* Correction Law 168-n(3). Because the adjournment did not fall within this provision, deciding whether to grant an adjournment was in the court's sound discretion. *See gen Matter of Anthony M.*, 63 NY2d 270, 283. The court properly exercised its discretion. Order affirmed. (County Ct, Steuben Co [Latham, J])

Search and Seizure SEA; 335(10[g]) (15[k]) (65[a])

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(Arrest/Scene of Crime Searches [Probable Cause])
(Automobiles and Other Vehicles [Investigative Searches])
(Search Warrants [Affidavits, Sufficiency of])

People v Estrella, 48 AD3d 1283, 851 NYS2d 793 (4th Dept 2008)

The defendant was stopped while driving his car, which had Georgia plates, because the car had a heavily tinted rear window. The police concluded that he had violated a Georgia law, which was later found to have been declared unconstitutional several months earlier. The police used a narcotics-detection dog to sniff the exterior of the car. The dog had been certified, but the certification expired a month earlier and was not renewed until two weeks later. When the dog gave a positive identification, the police obtained a search warrant and discovered narcotics.

Holding: The court correctly denied the defendant's motion to suppress the seized evidence. The officer had probable cause to stop the car because he believed that Vehicle and Traffic Law 375(12-a) had been violated. *See People v Robinson*, 97 NY2d 341, 349-350. At the time of the stop, the officer knew only that the car was being driven on a public highway and that the window may have been too heavily tinted. "[I]t is unreasonable to require that police officers be familiar with the equipment requirement laws of every state, and presumably other countries, in order to effectuate a proper stop for a violation of New York State law." The court correctly denied his request for a hearing to challenge the veracity of the search warrant affidavit (*see Franks v Delaware* [438 US 154 (1978)]) because even though the affiant made a misstatement about the dog's certification, he failed to show that it was a deliberately falsified allegation used to demonstrate probable cause. Judgment affirmed. (County Ct, Monroe Co [Renzi, J])

Dissent: [Lunn & Green, JJ] Reliance on a Georgia statute that had been invalidated was a mistake of law, not of fact, which cannot justify the stop and search and seizure. *See People v Smith*, 1 AD3d 965. There is no public policy reason for not requiring police officers who stop cars based solely on equipment violations to be familiar with other states' equipment laws.

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

Juveniles (Abuse) (General) — **JUV; 230(3) (55)**

Matter of Hattie G. v Monroe County Dept of Social Services, 48 AD3d 1292, 851 NYS2d 324 (4th Dept 2008)

After her 14-year-old daughter stayed out overnight without permission, the petitioner hit her in the legs and buttocks with a plastic toy whiffle bat and accidentally struck her on the head, causing a small welt under her eye. School officials notified the Central Register of Child Abuse and Maltreatment. After an investigation, the county department of social services (DSS) issued an indicated report concluding that the petitioner maltreated her daughter. The petitioner brought this CPLR article 78 proceeding.

Holding: The respondent designee of the Office of Children and Family Services incorrectly denied the petitioner's request to amend the indicated child abuse and maltreatment report and to preclude the dissemination of the report to appropriate providers and licensing agencies under Social Services Law 424-a(2)(d), (e). DSS failed to establish by a fair preponderance of the evidence that the petitioner maltreated her daughter by using excessive corporal punishment and that such punishment impaired or was in imminent danger of impairing her daughter's physical condition, such as by substantially diminishing her physical growth. *See* SSL 412(2)(a)(i). The record does not show that the daughter required medical treatment or that the petitioner used corporal punishment at other times, and the evidence that her daughter was doing well and intended to graduate from high school was uncontroverted. Determination annulled, petition granted, and matter remitted to the respondent for compliance with SSL 424-a(2)(d), (e).

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

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

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

People v Hawkins, 48 AD3d 1279, 851 NYS2d 789 (4th Dept 2008)

Holding: The defendant failed to preserve for review the issue of the sufficiency of the evidence in support of his depraved indifference murder conviction because defense counsel did not present an argument specifically directed at the alleged error. *See People v Gray*, 86 NY2d 10, 19. At trial, defense counsel moved to dismiss based on the prosecution's failure to prove a prima facie case because they did not prove that the defendant was the perpetrator and that he acted with depraved indifference. That argument does not make clear whether it is directed at insufficient proof of the element of recklessness or the depraved indifference factual setting in which the murder

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took place. By failing to object to the court's ultimate *Sandoval* decision (*People v Sandoval*, 34 NY2d 371), he did not preserve for review his argument that the court abused its discretion by allowing the prosecution to question him about the existence of two of his four prior burglary convictions, but not the underlying facts. Judgment affirmed. (Supreme Ct, Monroe Co [Affronti, J])

Dissent in part: [Scudder, PJ & Green, J] The defendant preserved his sufficiency argument because the original objection specifically referred to whether he acted with depraved indifference, which the court would have known was an objection regarding the state of mind and conduct of the perpetrator. *See People v Payne*, 3 NY3d 266 *rearg den* 3 NY3d 767.

Evidence (Common Plan or Scheme) (Exclusionary Rule Exceptions) (Uncharged Crimes) — **EVI; 155(30) (54) (132)**

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

People v Leeson, 48 AD3d 1294, 850 NYS2d 815 (4th Dept 2008)

Holding: The court properly denied the defendant's motion to suppress the evidence seized from his truck as the police relied in good faith on the apparent capability of his mother to consent to the search. The circumstances reasonably indicated that his mother had the necessary degree of control and authority over the premises and the truck that was on the premises. *See People v Martinez*, 298 AD2d 897, 898 *lv den* 98 NY2d 769 *cert den* 538 US 963 *reh den* 539 US 911. The court properly allowed the prosecution to present testimony about two similar acts of sexual contact between the defendant and the complainant in another county under the common scheme or plan exception, and to complete the narrative of the events and provide necessary background information. Those acts supported the prosecution's theory that the defendant planned to bring the complainant to secluded locations where they would be alone so that he could engage in sexual activity with her. Judgment affirmed. (County Ct, Ontario Co [Reed, J])

Dissent: [Centra & Lunn, JJ] The court erred in admitting the testimony regarding the uncharged acts because it was only relevant to show the defendant's propensities and to enhance the complainant's credibility. *See People v Kise*, 273 AD2d 849. The common plan exception does not apply because "[a] defendant charged with sex crimes would rarely, if indeed ever, engage in such conduct in a public venue but, rather, the defendant would choose a secluded location . . . ." The error was not harmless; the jury acquitted the defendant on 28 of 32 charges.

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

People v Mc Cloud, 48 AD3d 1248, 851 NYS2d 814 (4th Dept 2008)

Holding: The court correctly granted the defendant's renewed motion to dismiss the indictment on constitutional speedy trial grounds. The defendant was arrested for murder on Feb. 6, 2002 and was indicted on July 11, 2002. On Sept. 25, 2002, the only eyewitness who could identify the defendant was murdered by an associate of the defendant. However, because the prosecution failed to establish by clear and convincing evidence that the defendant was involved in procuring the witness's unavailability (*see People v Geraci*, 85 NY2d 359, 368), they could not introduce the witness's grand jury testimony in their case-in-chief. Although the court released the defendant on his own recognizance in March 2003 because the prosecution advised that they could not proceed to trial, the defendant remained incarcerated on an unrelated charge. The court denied the defendant's first speedy trial motion on Aug. 12, 2003, but granted the renewed motion on Jan. 20, 2004, after the prosecution again stated that it was unable to proceed to trial. Even though the defendant was incarcerated because of another charge and the prosecution could not proceed because of the eyewitness's murder, the court properly concluded that the prosecution was no closer to obtaining new evidence in January 2004 than they were in March 2003. *See People v Taranovich*, 37 NY2d 442, 445. In fact, the prosecution did not show that they made any further efforts after March 2003 to obtain the cooperation of the defendant's associates in order to prove that the defendant was involved in the murder of the eyewitness. Order affirmed. (Supreme Ct, Monroe Co [Egan, J])

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

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

People ex rel Burch v Goord, 48 AD3d 1306, __ NYS2d __ (4th Dept 2008)

Holding: The court erred in denying the petitioner's application for a writ of habeas corpus. The petitioner was sentenced to a two-year determinate term of imprisonment. Although the court did not impose a period of postrelease supervision, the respondent Department of Correctional Services (DOCS) imposed a three-year period of supervision. The petitioner was declared delinquent by the Division of Parole and has been imprisoned since July 2005. Because the court did not impose postrelease supervision, the petitioner's sentence has no supervision

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component. *See Earley v Murray*, 451 F3d 71, 76 *reh den* 462 F3d 147. Because postrelease supervision is a direct consequence of conviction (*see People v Catu*, 4 NY3d 242, 244), the court must expressly impose it. "To the extent that our prior decisions in *[People v] Hollenbach* [307 AD2d 776 *lv den* 100 NY2d 642] and *[People v] Crump* [302 AD2d 901 *lv den* 100 NY2d 537] hold otherwise, they are no longer to be followed (*see People ex rel. Eaddy v Goord*, [48] AD3d [1307] [Feb. 20, 2008])." Judgment reversed, writ granted, and the respondent is directed to discharge the petitioner from custody. (Supreme Ct, Wyoming Co [Dadd, AJ])

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

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

People ex rel Eaddy v Goord, 48 AD3d 1307, __ NYS2d __ (4th Dept 2008)

Holding: The court erred in denying the petitioner's application for a writ of habeas corpus. The petitioner was sentenced to a six-year determinate term of imprisonment. Although the court did not impose a period of postrelease supervision, the respondent Department of Correctional Services (DOCS) imposed a five-year period of supervision. The petitioner was declared delinquent by the Division of Parole and was reincarcerated; he has since been released from prison. Although the petitioner is no longer eligible for a writ of habeas corpus because he has been released (*see People ex rel Murray v Bartlett*, 89 NY2d 1002), the proceeding is converted into a CPLR article 78 proceeding in the nature of prohibition. *See* CPLR 103(c). For the same reasons set forth in *People ex rel Burch v Goord*, [48] AD3d [1306] [Feb 20, 2008], the judgment must be reversed. Judgment reversed, petition converted to a CPLR article 78 proceeding, petition granted, and respondent prohibited from adding a period of postrelease supervision to the defendant's sentence. (Supreme Ct, Wyoming Co [Dadd, AJ])

Search and Seizure (Electronic Searches) (Motions to Suppress [CPL Article 710]) **SEA; 335(30) (45)**

People v Barbosa, __ AD3d __, 853 NYS2d 758 (4th Dept 2008)

Holding: The court properly granted the defendants' motions to suppress all evidence obtained as a result of eavesdropping warrants. The affidavits that the police submitted in support of the warrants did not show that "'normal investigatory procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ' (CPL 700.15[4] . .)." The record demonstrates that when the police applied for the warrants, their investigatory efforts were minimal, "their investigation was of short duration (*see [People v] Fonville*, 247 AD2d [115] at 122; *[People v] Candella*, 171 AD2d [329] at 332), and there was a lack of demonstrated impediments to further 'normal investigative procedures' (CPL 700.15[4] . . .)." Order affirmed and indictment dismissed. (County Ct, Monroe Co [Connell, J])

Appeals and Writs (Judgments and Orders Appealable) (Preservation of Error for Review) **APP; 25(45) (63)**

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

People v Braswell, KA 04-02860, 4th Dept, 3/14/2008

Holding: The defendant's waiver of his right to appeal is invalid as the record shows that the court failed to conduct an adequate colloquy to ensure that it was a knowing and voluntary choice. *See People v Thousand*, 41 AD3d 1272 *lv den* 9 NY3d 927. The defendant did not need to preserve this issue for review. *See People v Thorpe*, 269 AD2d 843 *lv den* 94 NY2d 953. The record shows that the only reference to the appeal waiver was a statement by the prosecutor that the defendant waived that right. The court erred in imposing restitution, which was not part of the plea agreement. Although the defendant failed to preserve this issue, it will be reviewed as a matter of discretion in the interest of justice. *See* CPL 470.15(6)(a). The court must impose the promised sentence or give the defendant an opportunity to withdraw his plea. Because his appeal waiver is invalid, his argument that the court erred in denying his motion to suppress his pre-*Miranda* statement is reviewable. *See gen People v Kemp*, 94 NY2d 831, 833. However, since that statement was not incriminating, the court correctly denied the motion. Even assuming that it was incriminating, his later written statement was admissible as there was a sufficiently definite, pronounced break in the interrogation to remove the taint from the *Miranda* violation. *See People v Paulman*, 5 NY3d 122, 130-131. Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted for further proceedings. (Supreme Ct, Monroe Co [Valentino, J])

Search and Seizure (Search Warrants [Affidavits, Sufficiency of] [Issuance] [Suppression]) **SEA; 335(65 [a] [k] [p])**

People v Fulton, KA 06-03775, 4th Dept, 3/14/2008

Holding: The court properly granted the defendants'

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motions to suppress the evidence seized during the execution of the search warrant. The warrant did not meet the constitutional and statutory requirements of particularity with regard to the description of the place to be searched. *See* US Const 4th Amend; NY Const, art I, § 12; CPL 690.15(1)(a), 690.45(5). Although the police had information regarding drug activity at a specific apartment within a multi-family dwelling, the warrant authorized a search of the entire premises, including storage areas and curtilage, and it did not specify the specific apartment by number or occupant. *See People v Henley*, 135 AD2d 1136, 1137 *lv den* 71 NY2d 897. Order affirmed and indictment dismissed. (County Ct, Monroe Co [Renzi, J])

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

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

People v Fardan, __ AD3d __, 852 NYS2d 861 (4th Dept 2008)

Holding: The court erred in denying the defendant's CPL 440.10 motion as the court lacked jurisdiction to hear the motion. "[T]he Justice who denied the motion was disqualified by reason of the fact he was District Attorney of Oneida County at the time of defendant's conviction (*see* Judiciary Law § 14; *People v Clement*, 26 AD2d 968 . . .)." Order reversed and matter remitted for further proceedings before a different justice. (Supreme Ct, Oneida Co [Donalty, AJ])

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

People v Hall, KA 06-00399, 4th Dept, 3/14/2008

Holding: The court erred in denying the defendant's timely and unequivocal motion to proceed pro se because the court did not make the appropriate inquiry required by *People v McIntyre* (36 NY2d 10, 17). The court did not provide an appropriate basis for denying the motion; the court appears to have denied the motion because of the defendant's ignorance of legal terminology. "A court may not properly deny a defendant's request based on the court's perception that the defendant's 'legal skills [are] wanting' (*People v Ryan*, 82 N2d 497, 507)." The defendant's single interruption of the court at a pretrial appearance that took place after the court denied his motion, does not justify the denial of his request to proceed pro se since it was not calculated to undermine, upset, or unreasonably delay trial progress. *See People v Schoolfield*, 196 AD2d 111, 117 *lv dismd* 83 NY2d 858 *lv den* 83 NY2d 915. And the court cannot validate the erroneous denial by citing to the post-denial interruption. Judgment reversed and new trial granted. (County Ct, Ontario Co [Reed, J])

Appeals and Writs (Judgments and Orders Appealable) (Preservation of Error for Review) **APP; 25(45) (63)**

Sentencing (Persistent Violent Felony Offender) **SEN; 345(59)**

People v Hamilton, KA 06-02431, 4th Dept, 3/14/2008

Holding: The court erred in sentencing the defendant as a persistent violent felony offender. Although the defendant waived his right to appeal, the waiver was not valid because the court did not conduct a sufficient inquiry to ensure that the waiver was a knowing and voluntary choice. *See People v Brown*, 296 AD2d 860 *lv den* 98 NY2d 767. The defendant preserved for review only one of the two grounds he raised on appeal in support of his sentencing argument. However, as a matter of discretion in the interest of justice, both grounds are considered. Although the sentences for his prior convictions fell outside the 10-year time limit, the court did not make a determination that the tolling provision applied (*see* PL 70.04 (1)(b)(v)), and the court failed to determine whether the prior convictions in other jurisdictions qualify as violent felony offenses under New York law. *See gen People v Muniz*, 74 NY2d 464, 467-470. Further, the prosecution failed to establish the defendant's periods of incarceration (*see People v Gines*, 284 AD2d 134), and did not list the applicable sentences for tolling purposes. *See* CPL 400.15(2), 400.16(2). On remand, the prosecution may move to vacate the plea and set aside the conviction (*see People v Irwin*, 166 AD2d 924, 925), or withdraw their consent to the defendant's waiver of indictment, which consent was conditioned on the court's imposition of the agreed-upon sentence. *See* CPL 195.10(1)(c). Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted. (County Ct, Erie Co [DiTullio, J])

Sentencing (Enhancement) (Restitution) **SEN; 345(32) (71)**

People v Maliszewski, __ AD3d __, 853 NYS2d 792 (4th Dept 2008)

Holding: The court erred in enhancing the defendant's sentence based on his failure to pay one-half of the restitution he owed from previous convictions. The plea agreement provided that the court would impose an indeterminate term of incarceration of two (2) to four (4) years if the restitution was paid at the time of sentencing and a term of three (3) to six (6) years if it was not paid. Because the defendant did not pay the specified restitution, the court imposed the enhanced sentence of three to six years.

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The enhanced sentence was erroneous because restitution can be based only on the underlying offense for which the defendant was convicted or another offense that is part of the same criminal transaction or is contained in another accusatory instrument that is disposed of by a guilty plea. *See People v Visser*, 256 AD2d 1106, 1107. The court also erred in imposing restitution for the instant offense without holding a hearing on the issue of restitution. *See* CPL 400.30; *People v Dibble* [appeal No. 2], 277 AD3d 969, 970. The defendant did not admit to the amount of the loss and the record does not sufficiently support the court's finding on the amount of the loss. Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted for resentencing and a restitution hearing. (County Ct, Oswego Co [Hafner, Jr., J])

Juveniles (Custody) JUV; 230(10)

Matter of Michael P. v Judi P., CAF 05-00707, 4th Dept, 3/14/2008

Holding: The court erred in awarding primary physical custody to the children's respective fathers as it is not in the children's best interests. Previously, the respondent had primary physical custody of her son for 10 years based on an existing agreement between her and the child's father, Ronald W., and she had primary physical custody of her daughter based on an informal arrangement between her and the child's father Michael P. In order to change an existing custody arrangement, the petitioner must show a change in circumstances that reflects a real need for change to ensure the best interests of the child. *See Matter of Irwin v Neyland*, 213 AD2d 773. The record shows that the son had no behavioral issues and was doing well in school when he lived with his mother, but was unhappy and not performing well in school when he lived with his father. In awarding custody to the fathers, the court expressed concern about the respondent's association with known criminals, but did not hold the fathers equally responsible for their allowing the children to be around persons with criminal backgrounds. Also, the respondent testified at the hearings that she stopped associating with those individuals since the court granted temporary custody to the fathers. Because of Michael P.'s work schedule, he relied on his girlfriend, who is married to another man, to care for his daughter. The testimony also suggests that he has drinking and gambling problems. By allowing the mother to have primary physical custody, the siblings will again reside in the same household. *See Eschbach v Eschbach*, 56 NY2d 167, 173. Order modified, primary physical custody awarded to the respondent, paragraphs 7 to 10 of the order vacated, order affirmed as modified, and matter remitted to fashion an appropriate visitation schedule. (Family Ct, Oneida Co [Griffith, J])

Grand Jury (Procedure) (Witnesses) GRJ; 180(5) (15)

People v Pattison, __ AD3d __, 854 NYS2d 266 (4th Dept 2008)

Holding: The court erred in denying the defendant's motion to dismiss the indictment based on a violation of his right to testify before the grand jury without conducting a hearing to determine whether the prosecutor provided adequate notice of the time and place of the grand jury proceeding. The record shows that defense counsel promptly provided the prosecutor with a written notice of the defendant's intent to testify. In correspondence with the defense attorney, the prosecutor indicated that the grand jury will convene in the middle of January 2003. This notice did not satisfy the statutory requirement that the prosecution notify the defendant that he would be heard by the grand jury at a given time and place. *See* CPL 190.50(5)(b). And the record does not contain any evidence that the prosecutor provided oral notice of that information. Case held, decision reserved, and matter remitted for a reconstruction hearing. (County Ct, Chautauqua Co [Ward, J])

Juries and Jury Trials (Challenges) (Qualifications) (Selection) JRY; 225(10) (50) (55)

People v Payne, __ AD3d __, 853 NYS2d 791 (4th Dept 2008)

Holding: The court committed reversible error in denying the defendant's challenge for cause a prospective juror. Because the defendant exhausted his peremptory challenges, the issue can be reviewed. *See* CPL 270.20(2). Although the prospective juror provided appropriate responses to questions from the court and the prosecution, when questioned by defense counsel, she made equivocal statements, including "that there was a possibility that her experiences and sensitivity to violence would affect her response to testimony, and that she questioned whether she would be a good juror for the case." After she made those equivocal statements, she was not questioned further and she did not state unequivocally on the record that she can be fair. Under the circumstances, the juror should have been excused. *See People v Arnold*, 96 NY2d 358, 362. Judgment reversed and new trial granted. (Supreme Ct, Erie Co [Wolfgang, J])

Evidence (Exclusionary Rule) (Other Crimes) (Prejudicial) EVI; 155(53) (95) (106)

People v Pittman, KA 06-01054, 4th Dept, 3/14/2008

The defendant was convicted of first-degree attempt-

Fourth Department *continued*

ed murder and weapons possession crimes based on an incident in which he fired a handgun at a police officer. In 1998, he was convicted of second-degree attempted criminal possession of a weapon based on an incident in which he attempted to shoot a police officer.

Holding: The court committed reversible error in allowing the prosecution to introduce evidence of the 1998 conviction as it was not relevant under any of the *Molineux* (*People v Molineux*, 168 NY 264) exceptions. It was not probative on the issue of identity because his conduct was not sufficiently unique (*see People v Beam*, 57 NY2d 241, 252), nor motive as there was no evidence that the 1998 incident provided the motive for the current offense (*see gen People v Namer*, 309 NY 458, 462), nor intent since, if the prosecution proved that the defendant fired at the officer, intent could be easily inferred from that act. *See People v Alvino*, 71 NY2d 233, 242. Even assuming that it was probative of an issue other than criminal propensity, the potential for prejudice outweighed the probative value. *See gen People v Hudy*, 73 NY2d 40, 55. Judgment reversed and new trial granted on counts two through five of the indictment. (County Ct, Erie Co [D'Amico, J])

Dissent: [Smith, JP] The evidence was admissible to prove identity because the defendant had a sufficiently unique modus operandi. The potential for prejudice was limited by the court's observation of the necessary procedural safeguards and the prior notice to the defendant that the evidence would be used against him. *See People v Toland*, 284 AD2d 798, 805 *lv den* 96 NY2d 942.

Larceny (Elements) (Evidence) (Intent) — **LAR; 236(17) (25) (55)**

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

People v Spencer, __ AD3d __, 852 NYS2d 859 (4th Dept 2008)

Holding: The evidence is legally insufficient to support the defendant's second-degree robbery conviction. Although the defendant did not preserve the issue for review, it is reviewed as a matter of discretion in the interest of justice. The conviction was based on an incident in which the defendant searched the complainant for the sole purpose of determining whether the complainant had an audio transmitting device and was a "snitch" and then broke the pager that was in the complainant's pocket. In order to be guilty of robbery, the defendant must be guilty of larceny and to commit larceny, a person must, with intent to deprive another of property or to appropriate property to herself or a third person, wrongfully take, obtain, or withhold the property from an owner thereof. *See* PL 155.05(1). "[D]efendant engaged in conduct that 'is clearly and unequivocally within the realm of criminal mischief—*not* larceny' (*People v Misevis*, 138 Misc 2d 1097, 1099)." Also, because her threatened use of force to get the complainant to submit to the search was not for the purpose of preventing or overcoming resistance to a larceny or to compel the complainant to engage in conduct that aided in the commission of a larceny, the enumerated consequences element of robbery was not satisfied. *See People v Smith*, 79 NY2d 309, 312. Judgment modified, robbery conviction reversed, count three of the indictment dismissed, judgment affirmed as modified, and matter remitted for proceedings pursuant to CPL 470.45. (County Ct, Niagara Co [Broderick, Sr., J])

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

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

People v Tribunella, KA 05-01146, 4th Dept, 3/14/2008

Holding: The court committed reversible error in denying the defendant's request for an intoxication charge. "Viewing the evidence in the light most favorable to the defendant, as we must (*see [People v] Gaines*, 83 NY2d [925] at 926-927), we conclude that he established his entitlement to the charge. The testimony that defendant left a bar shortly before it closed for the night, was 'extremely intoxicated,' smelled of alcohol, was at times incoherent, and was physically impaired by his intoxication was sufficient to meet the 'relatively low threshold' for entitlement to an intoxication charge (*People v Rodriguez*, 76 NY2d 918, 920 . . .)." Judgment reversed and new trial granted. (Supreme Ct, Monroe Co [Affronti, J])

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

People v Waleski, KA 07-00904, 4th Dept, 3/14/2008

Holding: The court erred in accepting the Board of Examiners of Sex Offenders' recommendation of an upward departure from the defendant's presumptive risk level of one to a level two risk based on his failure to address his use of alcohol and marihuana. Because the defendant was assessed the maximum points for his history of alcohol and substance abuse in the risk assessment instrument, the court's upward departure was not authorized. *See People v Perkins*, 35 AD3d 1167, 1168. Further, the defendant participated in a sex offender treatment program while he was incarcerated. Therefore, the court's determination is not supported by clear and convincing evidence. *See* Correction Law 168-n(3); *cf People v Carswell*, 8 AD3d 1073 *lv den* 3 NY3d 607. Order modified, defendant is adjudicated a level one risk, and order affirmed as modified. (County Ct, Genesee Co [Noonan, J]) ⚖

Defender News *(continued from page 5)*

Recent Case Highlights Right to Counsel Problem

In a recent decision, Justice Thomas F. Liotti concluded in *dicta* that County Law article 18-B violates the Sixth Amendment right to counsel because it does not authorize the appointment of counsel in traffic infraction cases, despite the possibility of jail time up to 15 days per violation. *See People v Quiroga-Puma*, No. LX6701631, 2008 NY Slip Op 50490(U) (Justice Ct, Village of Westbury, Nassau Co 3/12/2008). Justice Liotti recommended that the legislature amend article 18-B to specifically allow justice courts to appoint counsel in violation cases. "No one charged with a violation and who is *in forma pauperis* and where there is a possibility of jail should be denied the assignment of effective counsel." *See also People v Florcke*, 120 Misc 2d 273 (App Term, 2d Dept 1983) (holding that the court must advise a defendant charged with a violation for which a period of incarceration is authorized that, if eligible, she is entitled to assigned counsel); *Matter of Davis v Shepard*, 92 Misc 2d 181 (Sup Ct, Steuben Co 1977) (holding that CPL 170.10(3)(c) provides defendants charged with violations with the right to assigned counsel and notes that in traffic infraction cases, if there is a possibility of a sentence of imprisonment which is not waived by the court, defendants would be entitled to assigned counsel).

FAMM Seeks Commutation Cases from New York

Families Against Mandatory Minimums (FAMM), a nonprofit, nonpartisan sentencing reform organization, is launching a Commutation Project campaign in New York. The Commutation Project pairs nonviolent drug offenders serving excessive sentences with pro bono lawyers who help the offender file and raise support for a petition for a commutation of sentence. When possible, FAMM also provides suggestions and support-raising help to those who have already filed commutation requests. FAMM seeks case referrals that fit some or most of the following criteria: non-violent drug offender; no gun involved; played a minor role in the offense; first-time offender or very few (1-2) nonviolent prior convictions; excessive sentence: Rockefeller Drug Law mandatory minimums, sentence over five years for a first-time offender, long drug sentence with no parole eligibility; prisoner accepts responsibility for the offense; sentence of at least 10 years; prisoner has served at least half of his/her sentence; prisoner is not eligible for parole for at least one year; prisoner has shown extraordinary rehabilitation and good conduct in prison; and all legal remedies have been exhausted, no pending cases or motions. FAMM is a small organization with limited resources and can work on only a very small number of clemency cases each year. FAMM does not provide prisoners with legal advice or representation and cannot guarantee that anyone who seeks clemency will receive it. To refer a case to FAMM, send a completed Case Summary Form (available at www.famm.org/Repository/Files/case%20summary.pdf) to FAMM, Attn: Molly M. Gill, 1612 K Street NW, Suite 700, Washington, DC 20006 or fax to (202) 822-6704. ⚖

From My Vantage Point *(continued from page 7)*

If the Independent Public Defense Commission proposed by the Assembly is brought into being to conduct the studies set out in the bill, many of the questions raised by the ILSF data can be answered by an entity the defense community and the State can both trust. Those answers will then provide the basis for deciding how best to move from a State study commission to full State takeover.

When core questions such as the impact of meeting standards, the ultimate cost of a state takeover, and whether there is defense/prosecution disparity are answered, I believe the paralyzing fear of change will subside, and support for reform will grow. While the route is not what I imagined a year ago, I continue to believe that we will arrive at a statewide, fully and adequately state-funded public defense system headed by an Independent Public Defense Commission. ⚖

Defense Practice Tips *(continued from page 13)*

imposed for a trial conviction, vacatur of the plea may not be available if the trial conviction is subsequently reversed. *People v. Hemphill*, 229 AD2d 324 (1st Dept), *lv den* 88 NY2d 1021 (1996).

9. The exception to the sentence capping provision was added in 1978 as part of the amendment to PL § 70.30(1)(b) that provided that the minimum terms of consecutive indeterminate sentences should be added together to arrive at a new aggregate minimum term. *See* L.1978, ch 481, § 24. Until 1978, consecutive life sentences would not result in a defendant serving any more time than concurrent life sentences before becoming eligible for parole and, therefore, there was no reason for judges to impose consecutive life sentences. Under the version of PL § 70.30(1)(b) enacted in 1965 (L.1965, ch 1030), when consecutive sentences were imposed, the maximum terms were added together to arrive at an aggregate maximum term, but the minimum terms merged together and were satisfied by service of the minimum term with the longest unexpired time to run. It was only in 1978, when the law was amended so that minimum terms of consecutive sentences would be added together to form a longer aggregate minimum sentence, that judges had a basis for imposing consecutive life sentences and an exception to the capping provision for class A felonies was needed to ensure that the aggregate maximum term of consecutive life sentences was not reduced to less than life in prison.

NYSDA Membership Application

I wish to join the **New York State Defenders Association** and support its work to uphold the Constitutional guarantees of all citizens accused of crimes to legal representation and to advocate for an effective system of public defense representation for the poor.

Enclosed are my membership dues: ☐ $75 Attorney ☐ $15 Law/Other Student/Inmate ☐ $40 All Others

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