NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXIII Number 5 November–December 2008

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Updated CrimeTime Program Now Available From NYPTI

CrimeTime, a free sentencing program created by the late George Dentes (former Tompkins Co District Attorney), has been acquired and updated by the New York Prosecutors Training Institute (NYPTI). It is now available on the NYPTI website at http://crimetime.nypti.org/. To access the program, you must enter a valid email address under the Disclaimers section at the bottom of the homepage. From the main search screen, you can search by all laws, Penal Law (PL), or Vehicle and Traffic Law (VTL), using a keyword or section number, *e.g.*, assault (note that inconsistent use of dashes can impede searching by degree: assault 2nd vs assault-3rd) or 120.00. The statute's name links to the text of the statute and the "select the crime" button will lead you through the sentencing analysis. In order to view the final result, you must disable your web browser's popup blocker. The program's help guide is available at http:// www.crimetime.nypti.org/CrimeTimeHelp.aspx. The 2005 version of CrimeTime is still available on the Tompkins County web site, at www.tompkins-co.org/distatto/ CrimeTime.html.

NYSDA's Immigrant Defense Project Becomes Independent Office

In response to the devastating 1996 federal immigration laws, the Association has administered what is today known as the Immigrant Defense Project (IDP). Initiated by Manny Vargas, the Project's fundamental goal was to ensure effective criminal defense representation for immigrants. Over the intervening 12 years, NYSDA's IDP published outstanding practice tools, including its *Representing Immigrant Defendants in New York, 4th edition*, responded to tens of thousands of legal hotline requests, educated and built the capacity of community-based organizations and service providers, wrote and coordinated amicus briefs, and undertook legislative and policy work concerning the rights of immigrants who have interacted with the criminal justice system. It has become a nationally recognized leader on the protection of immigrant defendants' rights.

At this stage in the development of its work, a growing national work focus, and a desire to pursue funding opportunities beyond its original mission, IDP has become an independent office being fiscally sponsored by the Fund for the City of New York.

At the same time, NYSDA in collaboration with IDP, through the work of former IDP director, Joanne Macri, will continue to assist defense counsel in minimizing the immigration consequences of criminal convictions. NYSDA will establish an upstate office to work directly with bar associations and academic institutions, the private bar, and defender offices in organizing statewide strategies and regional trainings on immigration consequences relating to contact with the criminal justice system. NYSDA will also collaborate with local and state organizations to investigate and address complaints of abuses during public transportation inspections and home raids, and we will work with state and city correctional facilities to provide trainings and *pro se* materials to help detained immigrants understand their immigration rights, and provide legal support in high-impact immigration cases originating in upstate communities. We hope to operate a hotline utilizing trained clinical law students to answer basic questions.

With these changes, NYSDA expects that there will be an expansion of resources available to defense counsel dealing with immigration issues. Already this month, NYSDA and the IDP have conducted joint training at a defender office and will continue to closely collaborate whenever possible to enhance the services provided to public defense attorneys and their clients. The new IDP website is: www.immigrantdefenseproject.org. If you have any questions about this development, please contact the Backup Center.

Contents

Breathalyzer Warnings Given to Non-English Speaking Defendant Insufficient; Violated Equal Protection and Due Process

In *People v Garcia-Cerpo*, 2008 NY Misc LEXIS 6150, 240 NYLJ 85 (Sup Ct, Bronx Co Oct 23, 2008), the court held that because the police failed to give sufficient warnings in "clear and unequivocal language," the defendant did not persistently refuse the breathalyzer test. At the police station, the defendant watched a video of a verbatim Spanish interpretation of Vehicle and Traffic Law 1194(2)(f). In response to the final question on the tape of whether he consented to the breathalyzer test, the defendant stated "no drogas, no drogas," which means "no drugs, no drugs." The police interpreted this statement as a refusal and did not make any other attempt to explain the consequences of a test refusal. After reviewing a videotape of what transpired at the station, the court concluded that the defendant's statement, and his facial expressions and body language show that he did not understand his choices and was utterly confused. Citing *People v Camagos*, 160 Misc 2d 880 (Crim Ct, Queens Co 1993) (concluding that a simple "no" does not amount to a persistent refusal under section 1194), the court found that the defendant's refusal was not persistent.

The court held that the police procedure of affording English speaking arrestees both a breathalyzer and a physical test, but affording non-English speaking arrestees only a breathalyzer test has no rational basis and is inherently discriminatory against non-English speaking individuals, and thus violated the defendant's equal protection rights. The court also concluded that since the burden of using an interpreter to assist with communication in these situations did not outweigh the defendant's right to a fair trial, opportunity to defend himself, and access to potentially exculpatory evidence, the procedure violated the defendant's procedural due process rights. The Court "strongly suggest[ed], that the New York City Police Department re-examine their established procedure of administering the statutory warnings of V.T.L. § 1194(2)(f) to non-English speaking defendants in order to comply with the mandates of the due process and equal protection clauses of the Constitution of the United States and the Constitution of the State of New York."

Jury Charge That Tracked First-Degree Robbery Statute Lacks Element of Actual Possession

The Court of Appeals has held that a jury charge that tracks the statutory language in Penal Law 160.15(3) is insufficient because the statute itself does not explicitly include the element of "actual possession" of a dangerous instrument. *See People v Ford*, No. 210 (Dec. 17, 2008). The jury charge set forth three elements: the defendant forcibly stole property from the complainant; in the course of the commission of the crime or in the immediate flight therefrom, the defendant used or threatened the immediate use of a knife; and under the circumstances the knife was a dangerous instrument. The Court of Appeals held that "[m]ore than a subtle verbal cue was necessary for the jury to be put on notice of its obligation to decide whether defendant actually possessed a knife; it is not enough for the instruction merely to imply the elements of a crime. Simply put, the charge in this case did not use the term 'actual possession,' or in any other way convey that requirement to the jury." However, because the defendant failed to object to the charge, the court analyzed the evidence using the charge given and concluded that there was legally sufficient evidence to support the conviction.

Judge Jones, dissenting in part, concluded that the charge was correct; the charge setting forth the three elements plus the instruction given as to the definition of "dangerous instrument" makes it clear that the prosecution had to prove that the defendant actually possessed a knife. A full summary of the case will be in the next issue of the *REPORT*.

Recent Family Law Decisions Summarized

The Case Digest that appears in each issue of the *REPORT* includes summaries of selected family law decisions from the Appellate Divisions and the Court of Appeals. In this issue, the cases summarized address mat-

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A PUBLICATION OF THE DEFENDER INSTITUTE
Volume XXIII Number 5 **Nov–Dec 2008**

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.

ters such as: abuse and neglect (*Matter of Shaun B.* [p. 16]; *Matter of Yahnlis M.* [p. 18]); parental rights and permanent neglect (*Matter of Johnny G.* [p. 20]); the right to counsel (*Matter of Shepherd, Jr. v Moore-Shepherd* [p. 21]; *Matter of McGregor v Bacchus* [p. 23]); and custody and visitation (*Matter of Christopher H. v Lisa H.* [p. 22]; *Matter of Peroglu v Baez* [p. 22]); (*Matter of Gilchrest v Patterson* [p. 26]).

If you are aware of a recent trial or appellate level family law case that may be of interest to the public defense community, please contact Editor Susan Bryant at the Backup Center at (518) 465-3524 or sbryant@nysda.org.

Sex Offense Update

Settlement in Sex Offender Treatment Program Class Action Suit

In November, Northern District of New York Judge David N. Hurd accepted a settlement in *Donhauser v Goord*, 01-cv-1535, a class action lawsuit that accused New York State of violating the Fifth Amendment rights of inmates who participate in sex offender treatment programs. (www.law.com, 10/10/2008.) The Department of Corrections' revised sex offender counseling and treatment program guidelines, which incorporate the settlement terms are available at www.docs.state.ny.us/ProgramServices/SOCTP_Guidelines_Nov08.pdf.

Under the settlement, participating inmates do not have to admit the commission of particular crimes and need not provide specific information such as the dates, times, and places of offending behavior. However, participants must openly discuss the behavior that led to their incarceration and referral to the program, demonstrate acceptance of responsibility that resulted in the conviction, and demonstrate an understanding of their sexual offending behavior and cycle of abuse. No written or oral statement made by a participant as part of the treatment services rendered in the program may be used against that inmate in a subsequent criminal proceeding, as defined in the waiver form, and participants may not reveal information disclosed by another inmate in group therapy or otherwise disclosed in the program. Members of the treatment team who are mandatory child abuse and maltreatment reporters under Social Services Law 413 still must comply with such reporting laws.

Proposed Regulation Governing Disclosure of Registered Sex Offender Internet Identifiers to Authorized Internet Entities

In mid-December, the Division of Criminal Justice Services (DCJS) proposed a regulation that would establish a fee-based subscription service to provide registered sex offender Internet identifiers to authorized Internet entities. (www.dos.state.ny.us/info/register/2008/dec17/pdfs/rules.pdf.) Pursuant to Correction Law 168-b(10), DCJS must disclose registered sex offender Internet identifiers to Internet entities to allow such entities to prescreen or remove sex offenders from its services or advise law enforcement or other governmental entities of potential violations of law or threats to public safety. Authorized Internet entities are defined as businesses, organizations, and other entities that provide or offer a service over the Internet that permits persons under the age of eighteen to access, meet, congregate, or communicate with other users for the purpose of social networking; the definition excludes general email services. The fee for the service is based on the number of registered users and ranges from $100 to $2,000 per month.

New Attorney Rules of Professional Conduct Effective April 1, 2009

In December, the Appellate Divisions of the New York State Supreme Court adopted Rules of Professional Conduct that will replace the New York Code of Professional Responsibility on April 1, 2009. (www.nycourts.gov/press/pr2008_7.shtml.) The Rules, which follow the format of the American Bar Association's Model Rules of Professional Conduct, can be found at www.nycourts.gov/rules/jointappellate/NY Rules of Prof Conduct.pdf. Changes include: Rule 1.2- requires a lawyer to abide by a client's decision, after consultation with the lawyer, as to a plea, whether to waive a jury trial, and whether the client will testify; Rule 1.4- requires a lawyer to keep the client reasonably informed about the status of the matter, promptly comply with a client's reasonable requests for information, and promptly inform the client of material developments in the matter, including plea offers; and Rule 4.3- if a lawyer knows or reasonably should know that the interests of an unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client, the lawyer may not give legal advice to such person other than the advice to secure counsel.

Other rules of interest to the public defense community include Rule 1.11 (special conflicts of interest for former and current government officers and employees), which differs from the current DR 9-101; Rule 1.14 (client with diminished capacity); Rule 3.3 (conduct before a tribunal); Rule 3.8 (special responsibilities of prosecutors and other government lawyers); and Rule 6.1 (voluntary pro bono service). A recommendation that would have required prosecutors to investigate cases where DNA and other evidence establish a strong suspicion that the convicted defendants are innocent was not adopted.

Gideon Day Set for March 18, 2009 in Albany

This year's Gideon Day will be based in the Well of the Legislative Office Building in Albany on Wednesday, March 18, 2009. This event, which marks the exact 46th anniversary of the *Gideon v Wainwright* decision, will focus on the need for an Independent Public Defense Commission. The New York Justice Fund's Campaign for an Independent Public Defense Commission, the event sponsor, invites public defenders, legal aid lawyers, assigned counsel attorneys, members of the Campaign, the client community, and other supporters to participate. To register, visit www.newyorkjusticefund.org/gideon. htm. For more information about the event and the Campaign, visit www.newyorkjusticefund.org/campaign.htm or contact Katie Blackburn, Upstate Community Organizer at (518) 465-0519 kblackburn@new yorkjusticefund.org or Keith L. Kinch, Downstate Community Organizer at (917) 604-1396 or kkinch@newyork justicefund.org.

ABA Issues List of Suggested Criminal Justice System Improvements

In late 2008, the American Bar Association released a list of 10 criminal justice system improvements, which is intended to provide guidance to President-elect Barack Obama's administration. The list primarily focuses on federal criminal justice reform, but does include some reforms that would directly impact state and local criminal justice systems. Most of the recommendations relate to sentencing and reentry issues, prison reform legislation, federal habeas corpus reform, and juvenile justice reform.

Of particular interest to our community is a recommendation to provide federal funding for public defense services at the federal, state, and local levels and to establish a National Center for Public Defense Services. Noting the nationwide failures in the public defense system and the lack of federal support for state-based public defense services, the ABA recommends that the federal government provide funding for public defense services in criminal and juvenile delinquency proceedings in an amount comparable to support provided to the prosecution function. States receiving funds would have to create and implement standards that are consistent with the ABA's *Ten Principles of a Public Defense Delivery System*. The proposed National Center for Public Defense Services would be an independent authority that would provide public defense training programs and administer the federal funds for state public defense systems. Increased federal funding for state death penalty representation is also recommended. The list of recommendations is available at www.abanet.org/poladv/transition/2008dec_crimjustice.pdf

Federal DNA Data Collection Expanded to Include Arrestee DNA

The US Department of Justice recently amended the regulations governing DNA sample collection by the federal government. *See* 28 CFR Part 28. The language of the regulations and a discussion of its background and purposes are published in the Federal Register at 73 FR 74932, which is available at www.gpoaccess.gov/fr/index.html. The amended regulations, effective January 9, 2009, direct federal agencies that arrest or detain individuals or supervise individuals facing charges to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. Unless otherwise directed by the Attorney General, agencies may limit DNA collection to individuals from whom it collects fingerprints. DNA samples must be sent to the FBI for analysis and entry into the Combined DNA Index System (CODIS). The new rule may add 1.2 million samples a year to CODIS. (www.washingtonpost.com, 4/17/2008.)

Non-United States persons are defined as persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 9 CFR 1.1(p). The regulations do not require collection of DNA samples from aliens lawfully in or being processed for lawful admission to the United States; aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings; aliens held in connection with maritime interdiction; and aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations.

Expungement of DNA information collected by the federal government is governed by 42 USC 14132(d), which requires that the FBI expunge from CODIS the DNA information of a person when the charges against that person are dismissed, charges are not filed within the applicable time period, that person is acquitted, or that person's conviction has been overturned. Instructions on the expungement process are available at www.fbi.gov/hq/lab/html/expungement.htm.

Mental Health News

OMH Adopts New Regulation Governing Housing of CPL 730.40 Patients

In an effort to settle a class action lawsuit which alleges that the Office of Mental Health (OMH) often sends patients in its custody pursuant to CPL 730.40 to a secure facility without a hearing or other due process prior to the designation, OMH has adopted a new regulation governing such determinations. The regulation, 14

NYCRR 540.5, sets forth procedures for determining whether an individual who has been remanded to OMH custody pursuant to a final order of observation should be placed in a secure facility. Those procedures include a right to object to the placement and periodic reviews of placements. The text of the regulation is published in the July 2, 2008 NYS Register (www.dos.state.ny.us/info/register/2008/jul2/pdfs/rules.pdf), and the notice of adoption is available at www.dos.state.ny.us/info/register/2008/sept10/pdfs/rules.pdf.

SDNY Grants Habeas Corpus-Due Process Rights Violated in Competency Proceedings

Southern District of New York Judge Richard J. Holwell recently granted a habeas corpus petition that raised questions regarding competency proceedings, due process, and the Confrontation Clause. *See Lewis v Zon*, 573 F Supp 2d 804 (SDNY 2008). At the request of the petitioner's counsel, the trial court ordered that the petitioner be examined to determine whether he was competent to stand trial. The two appointed psychiatric examiners concluded that the petitioner was not competent to proceed. The prosecution controverted the findings and retained an expert to conduct a third examination. The prosecution expert concluded that the petitioner was competent. All three experts testified at a competency hearing and the court gave the parties time to submit additional materials. After the hearing, the court ordered a fourth examination, which was conducted by a certified social worker. The social worker found that the petitioner was competent. Without further proceedings, the court held that the petitioner was competent and he was later convicted of second-degree robbery.

Because the petitioner did not have an opportunity to respond to or controvert the evidence relied upon by the court after the close of the competency hearing, the court held that he was not given the reasonable opportunity to demonstrate his lack of competence that is guaranteed by the Due Process Clause. The court declined to decide the role that the Confrontation Clause plays in regulating testimony at competency hearings.

Information Sharing Between Criminal Justice and Mental Health Treatment Systems Recommended-Pilot Program in NYC Announced

In June 2008, the New York State/New York City Mental-Health Criminal Justice Panel released its report and recommendations regarding the care provided to individuals with serious mental illnesses and the treatment of those individuals within the criminal justice system. The Panel's recommendations include improving coordination and oversight within the mental health system, information sharing between the mental health and criminal justice systems, and increasing the number of mental health courts in the state. In response to the report, a New York City alternative-to-detention pilot program is being developed. A press release discussing the implementation of the Panel's recommendations is available at www.state.ny.us/governor/press/press_0612081.html, and the Panel report is available at www.omh.state.ny.us/omhweb/justice_panel_report/report.pdf. The Mental Health Association in New York issued a press release analyzing the report's recommendations and providing suggestions for improvement, which is available at www.mhanys.org/publications/mhupdate/update080612.htm.

Some of the same issues were discussed in the 2008 report, "Improving Responses to People with Mental Illnesses: The Essential Elements of a Specialized Law Enforcement-Based Program," by the Council of State Governments Justice Center and the Police Executive Research Forum, which is available at www.consensusproject. org/downloads/le-essentialelements.pdf.

Wrongful Conviction Investigation Firm Launched

In October 2008, Martin Tankleff, Jay Salpeter, and Rob Seiden announced the creation of Fortress Innocence Group (FIG), an investigation firm focused on investigating potential wrongful convictions. (www.abajournal.com, 10/24/2008.) Martin Tankleff spent more than seventeen years in prison after he was wrongfully convicted of killing his parents. Jay Salpeter, an investigator and former homicide detective, and Rob Seiden, chief executive of Fortress Global Investigations, helped Martin Tankleff get his homicide conviction reversed earlier this year. According to its website, "Fortress reinvestigates cases in which there is no DNA, but compelling evidence of innocence." For more information about FIG, including a new case screening questionnaire, visit http://www.fortressinnocence.com/.

Essex County Deputy Public Defender Recalled to Active Duty-Defending Alleged Unlawful Enemy Combatants in Guantanamo Bay

Brandon E. Boutelle, Essex County Deputy Public Defender, was recalled to active duty to serve as defense counsel for alleged unlawful combatants held in Guantanamo Bay, Cuba. Lieutenant Commander Boutelle is an International/Operational Law Attorney assigned to Navy Reserve Civil Law Support Activity 104, which supports the International and Operational Law Division of the

Office of the Judge Advocate General of the Navy by providing legal and policy advice, research assistance, and training on international and operational law issues to the Department of the Navy and to the Department of Defense.

After graduating from Albany Law School in 2000, Boutelle completed OIS, Naval Justice School, and was assigned to the Naval Legal Service Office (NLSO) onboard the Naval Submarine Base New London in Groton, Connecticut. Between April 2001 and April 2003, Boutelle was stationed at NLSO North Central, Detachment Groton and held the positions of Senior Defense Counsel, Claims Officer, and Legal Assistance Attorney. Boutelle later was the Staff Judge Advocate for Naval Station Ingleside, Texas, a logistics and support base to 47 tenant commands, which comprise the US Navy's Mine Warfare forces. In June 2002, Boutelle left active duty. When his current tour of duty ends, Boutelle will return to the Essex County Public Defender's Office.

DOCS and the Division of Parole Issue Family Guide to Reunification

Recognizing the importance of family support to newly released prisoners, the New York State Department of Corrections and the State Division of Parole have issued *"Coming Home:" A Family's Guide to Reunification*. The brochure encourages families to contact organizations that can assist families with the reentry process, such as the Osborne Association and Prison Families of New York. The brochure highlights important reentry issues such as housing, finances, employment, health conditions, and obtaining personal identification, and provides information about what to expect on the release day, including transportation and the money and clothing provided upon release. Information about the initial contact between the Division of Parole and families is also provided. The brochure is available in English at www.docs.state.ny.us/FamilyGuide/ComingHomeBrochure.pdf, and in Spanish at www.docs.state.ny.us/FamilyGuide/ComingHomeBrochureSpanish.pdf.

Bill That Would Give Court Officers Police Officer Status Vetoed

On December 16, 2008, Governor David Paterson

(continued on page 27)

Job Opportunities

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

The St. Lawrence County Office of the Public Defender is seeking an **Assistant Public Defender** to represent indigent clients in family court on matters ranging from abuse and neglect to child support violations. Applicants must be admitted to the New York State Bar. Newly admitted attorneys will be considered. Salary: $48,000-$66,000 DOE, excellent benefits, and participation in the NYS Retirement System. To apply, send a cover letter and résumé to Brian D. Pilatzke, Public Defender, St. Lawrence County Office of the Public Defender, 48 Court Street, Canton, NY 13617, or email to bpilatzke@co.st-lawrence.ny.us.

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 Oneida County Public Defender-Criminal Division is accepting applications for **Assistant Public Defender (Criminal Division)—3rd Assistant**. Assistant Public Defenders assist the Public Defender in the representation of indigent persons charged with crimes at all stages of a criminal proceeding; keep abreast of all procedures and policies within the Public Defender's Office; and assist the Public Defender in maintaining law files which may be useful in criminal defense work. Applicants must be admitted to the Bar of New York State and have a valid NYS driver's license or submit a valid driver's license with application subject to obtaining a NYS driver's license. To apply, send a complete résumé, including elementary education and all employment, listing employers' addresses and telephone numbers; three references with addresses and telephone numbers; a writing sample; and a certificate of good standing from the Appellate Division of admission to Frank J. Nebush, Jr., Oneida County Public Defender, Criminal Division, 250 Boehlert Center at Union Station, 321 Main Street, Utica, NY 13501; fax (315) 798-6419; email fnebush@ocgov.net. For more information, visit www.oneidacounty.org. ⚖

Conferences & Seminars

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: I Couldn't Do Math So I Went to Law School ... A DNA Guide for Criminal Defense Lawyers
Date: January 24, 2009
Place: New York City
Contact: NYSACDL: tel (212) 532-4434; fax (212) 532-4668; email nysacdl@aol.com; website www.nysacdl.org

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Sponsor: Cayuga County Criminal Defenders (CCCD) and New York State Defenders Association
Theme: Presentence Report: Don't Begin A Sentence Without It ...
Date: January 28, 2009
Place: Auburn, NY
Contact: CCCD (David Elkovitch, Esq.): tel (315) 252-1389

Sponsor: New York County Lawyers' Association
Theme: Are Violation Pleas A Necessary Evil?
Date: January 29, 2009
Place: NYCLA Home of Law, NYC
Contact: NYCLA: email dlamb@nycla.org (write Jan 29 forum in subject line)

Sponsor: National Association of Criminal Defense Lawyers
Theme: Jazzin' Up Your Defense: 2009 Midwinter Meeting & Seminar
Dates: February 25-28, 2009
Place: New Orleans, LA
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

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Sponsor: New York State Defenders Association
Theme: 23rd Annual Metropolitan New York Trainer
Date: February 28, 2009
Place: NYU Law School, New York City
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

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Sponsor: National Legal Aid & Defender Association & National Alliance of Sentencing and Mitigation Specialists (NASAMS)
Theme: Life in the Balance: 2009 & NASAMS 2009 Annual Training: Rebuilding Communities ... One Life at a Time
Dates: March 7-10, 2009
Place: New Orleans, LA
Contact: NLADA: tel (202) 452-0620; fax (202) 872-1031; website www.nlada.org/Training

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Sponsor: National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice
Theme: Making Sense of Science II: 2nd Annual Forensic Science Seminar
Dates: April 3-4, 2009
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

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Sponsor: Center for the Study of Law, Science & Technology, Sandra Day O'Connor College of Law
Theme: Forensic Science for the 21st Century: The National Academy of Sciences Report and Beyond
Dates: April 3-4, 2009
Place: Tempe, AZ
Contact: Andrew Askland: tel (480) 965-2465; email Sandy.Askland@asu.edu; website http://LST.law.asu.edu

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Sponsor: New York State Defenders Association
Theme: Criminal Defense Tactics & Techniques XI
Date: April 4, 2009
Place: Rochester, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

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Sponsor: National Association of Criminal Defense Lawyers
Theme: Defending Difficult Cases: False Confessions & Women and Children as Witnesses
Dates: April 22-25, 2009
Place: Santa Fe, NM
Contact: NACDL: tel (202) 872-8600 x230 (Akvile Athanason); email akvile@nacdl.org; website www.nacdl.org/meetings

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Sponsor: National Defender Training Project
Theme: 2009 Public Defender Trial Advocacy Program
Dates: May 29-June 3, 2009
Place: Dayton, OH
Contact: NDTP (Ira Mickenberg): tel (518) 583-6730; fax (518) 583-6731; email imickenberg@nycap.rr.com

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Sponsor: New York State Defenders Association
Theme: Defender Institute Basic Trial Skills Program
Dates: June 6-13, 2009
Place: Troy, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

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

Defense Practice Tips

Update on Post-Release Supervision Resentencing

By Elon Harpaz*

Pursuant to Chapter 141 of the Laws of 2008, which took effect June 30, thousands of defendants have already been summoned to court to face possible resentencing to the period of post-release supervision (PRS) that should have been pronounced by the sentencing judge, but was instead illegally imposed by the Department of Correctional Services. The vast majority of these defendants have fully served the determinate prison term imposed at sentencing, and have either been reincarcerated for violating conditions of the administratively imposed period of PRS or have been at liberty serving that period under Division of Parole supervision. Thousands more have yet to appear for resentencing, primarily those who remain in custody serving the original prison sentence pronounced in court. Though definitive answers to some questions will have to await resolution in our appellate courts, there are important lessons to be drawn from the proceedings that have already taken place.

First, prosecutors across the state have made ample use of the power the legislature handed them in Penal Law § 70.85 to render the original determinate sentence without PRS a lawful sentence. Prosecutors have exercised this option principally in cases where the defendant would otherwise have a right to plea withdrawal pursuant to *People v Catu*, 4 N.Y.3d 242 (2005), because the plea judge failed to advise the defendant that PRS would be part of the bargain. As a consequence, a great many defendants, perhaps a majority of those whose cases have been resolved thus far, have ended up without post-release supervision and, if they were incarcerated on a PRS violation, have had their liberty restored.

Prosecutors in some cases have declined resentencing to PRS to maintain the defendant's status as a predicate offender on a more recent felony conviction or pending charge. Because a conviction qualifies for predicate purposes only where sentence was "imposed before commission of the present felony," *see e.g.*, Penal Law § 70.04 (1)(b)(ii), resentencing to PRS would render that felony useless for predicate purposes, as the date of resentencing would become the operative sentencing date, resulting in the current felony having been committed before the defendant's sentencing on the prior one. Many defendants would benefit from resentencing to PRS under these circumstances, leading to attempts, largely unsuccessful thus far, to compel resentencing over the prosecutor's objection.

In cases where prosecutors have sought resentencing to post-release supervision, the critical question has been whether a court retains the inherent power to impose PRS even after the judicially pronounced sentence has been fully served. Prosecutors have cited *People v Sparber*, 10 N.Y.3d 457 (2008), in support of that proposition. But, in *Sparber*, the Court of Appeals held only that a sentencing court's inherent power to correct the original illegal sentence by now adding PRS is not limited to the one-year period in which the prosecution can challenge an illegal sentence pursuant to Criminal Procedure Law § 440.40.

The Court of Appeals had no occasion in *Sparber* to consider whether completion of the judicially pronounced sentence serves as an outer temporal limit on the exercise of the court's inherent power to correct an illegal sentence, since all five defendants whose appeals were decided in *Sparber* had served only a fraction of their determinate prison sentences. On the other hand, the petitioner in *Matter of Garner v New York State Department of Correctional Services*, 10 N.Y.3d 358 (2008), decided the same day as *Sparber*, had served the entirety of his prison sentence and advised the court that the resentencing question in his case was different from the one in *Sparber*. The State did not seek resentencing in *Garner*, the question of the court's resentencing power was not briefed on the merits, and the Court of Appeals accordingly did not reach the issue. Instead, the Court dropped a footnote leaving open the possibility that resentencing might be sought, while expressing no opinion as to the outcome of such an application.

That question has now been answered by a number of trial-level courts. As it turns out, though, the answer for some judges may depend not only on whether the defendant has fully served the judicially pronounced sentence, but also on whether the conviction arose from a trial or a plea, and, if the latter, whether the defendant was advised about post-release supervision at the time the plea was entered.

Thus, in *People v Washington*, 21 Misc. 3d 349 (Sup. Ct., New York Co. July 24, 2008 [Bartley, J.]), the court held that resentencing after the defendant had fully served her prison sentence would negate her legitimate expectation of finality in that sentence and thereby violate double jeopardy and due process where the defendant was not advised about post-release supervision at the time she entered her plea of guilty. Though *Washington* expressed no views about whether the outcome might be different if PRS had been mentioned at the plea, it appears, reading the opinion, that the legitimacy of the defendant's expectation of finality in a determinate prison term without PRS stemmed, at least in part, from the failure of the plea court to inform her that post-release supervision would be part of the deal.

* ***Elon Harpaz*** *is a Staff Attorney in the Criminal Appeals Bureau and the Parole Revocation Defense Unit at The Legal Aid Society in New York City. In July 2008, he and his colleague, Kerry Elgarten, received the NYSDA Service of Justice Award for their tireless efforts to secure the rights of prisoners and parolees in post-release supervision litigation.*

In *People ex rel Pamblanco v Warden*, __ Misc. 3d __, 2008 WL 5072758, 2008 NY Misc LEXIS 6934 (Sup. Ct., Bronx Co. Nov. 28, 2008 [Price, J.]), the court reached the same result as in *Washington* in a case where it had specifically advised the defendant at the plea that he would have to serve five years of post-release supervision. The bottom line for the court, notwithstanding the plea allocution, was that it had never sentenced the defendant to PRS and that it was too late, on both constitutional and jurisdictional grounds, to increase the sentence originally pronounced once the defendant had completed serving that sentence.

A more expansive view of the court's inherent authority to correct an illegal sentence is found in *People v Rogers*, 21 Misc. 3d 1131(A), 2008 WL 4916304, 2008 NY Misc LEXIS 6678 (Sup. Ct., Kings Co. Oct. 28, 2008 [Goldberg, J.]). In concluding that it had the power to resentence a defendant who was convicted after trial, the court held that the defendant could never acquire a legitimate expectation of finality in a sentence without post-release supervision because PRS is mandated by law, it had been administratively imposed with court approval prior to *Garner* and *Sparber*, neither of which precluded resentencing, and legislation to accomplish such resentencing was quickly enacted in the wake of those decisions.

While the defendant in *Rogers* had not fully served his prison sentence, a number of judges using similar reasoning have issued unreported decisions upholding the right to resentence defendants who had completed their prison terms. *See People v Noor,* Ind. No. 1285/99 (Sup. Ct., Queens Co. Dec. 4, 2008 [Buchter, J.]) (trial conviction); *People v Perry,* Ind. No. 7692/99 (Sup. Ct., Kings Co. Sept. 23, 2008 [Dowling, J.]) (plea at which the defendant was specifically advised about PRS); *People v Anderson,* Ind. No. 8093/98 (Sup. Ct., New York Co. June 27, 2008 [White, J.]) (plea at which there was no mention of PRS). Unreported decisions have also gone in the defendant's favor in cases arising from trial convictions, *see People v White* (Sup. Ct., Queens Co. Jan. 5, 2009 [Flaherty, J.]), and those arising from pleas at which the defendant was not advised about PRS, *see People v Albergottie,* Ind. No. 6805/01 (Sup. Ct., New York Co. Aug. 4, 2008 [Zweibel, J.]).

It seems likely that the matter will eventually wind up in the Court of Appeals. That may not be for awhile, however, as the Appellate Divisions have yet to consider the merits of this issue. The Fourth Department recently declined to do so, denying a request by the Monroe County Public Defender's Office for a writ of prohibition to prevent resentencing applications from proceeding in that county. In *Matter of Echevarria v Marks*, __ A.D.3d __, 2008 WL 5413894, 2008 N.Y. App. Div. LEXIS 10105 (4th Dept. Dec. 31, 2008), the Fourth Department held on procedural grounds that a writ of prohibition was unavailable because defendants had an adequate remedy at law, namely, a direct appeal to the Appellate Division from any order granting resentencing.

One issue that does appear resolved is the fate of defendants incarcerated for violating the terms of administrative PRS. Even where prosecutors have successfully sought resentencing, defendants have won their freedom, either because the resentencing judge accepted the logic that the defendant could not have violated a period of post-release supervision that was not lawfully in place prior to resentencing or because a judge hearing an application for a writ of habeas corpus subsequently adopted that same logic. *See Matter of State of New York v Randy M.*, __ A.D.3d __, 2008 WL 5170770, 2008 NY App Div LEXIS 9522 (3rd Dept. Dec. 11, 2008) (adopting the reasoning of *People ex rel Benton v Warden*, 20 Misc. 3d 516 (Sup Ct., Bronx Co. 2008), the Third Department held that a defendant "could not validly be punished for violating the terms of post-release supervision until after it was imposed by a court . . . ."). All told, 651 defendants incarcerated for administrative PRS violations, enough to fill a small prison, have already been released since the decision in *Garner*. *See* Daniel Wise, *Third Department is First to Release a Sex Offender on Basis of Invalid Post-Release Supervision Order*, N.Y. L.J., Dec. 16, 2008, at 1.

Perhaps the most unanticipated impact of the resentencing process has been on civil commitment proceedings brought against sex offenders pursuant to Article 10 of the Mental Hygiene Law. An Article 10 proceeding, insofar as relevant here, can only be commenced against a defendant who is currently serving a sentence for a sex crime, either in DOCS custody or under Division of Parole supervision. *See* Mental Hygiene Law § 10.03(g)(1). But, what happens when the State commences an Article 10 proceeding against a defendant who completed his prison sentence and is now incarcerated for a violation of administratively imposed PRS? The answer thus far is that, because administrative PRS is not part of the sentence and because the defendant's incarceration is accordingly unlawful, the Article 10 proceeding is jurisdictionally barred. *See Matter of State of New York v Randy M.*, *supra*; *Matter of State v Robinson*, 21 Misc 3d 1120A, 2008 WL 4694551, 2008 NY Misc LEXIS 6199 (Sup. Ct., Bronx Co. Oct. 15, 2008). Critical to the outcome of both cases was that the resentencing application either resulted in no resentencing to PRS, or in resentencing to a term of PRS that had already expired by the time the Article 10 proceeding commenced.

The battle over PRS resentencing will continue well into 2009, and perhaps beyond. Many more issues than those recounted above have been considered in the course of resentencing applications, and will undoubtedly be raised on appeal. For now, the defense bar can take no small amount of satisfaction in the large number of defendants released from custody because their violations of administrative PRS were invalid, and in the even greater number of defendants who have had their post-release supervision permanently wiped away. ⚖

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

Sentencing (Appellate Review) (Guidelines) (Resentencing) **SEN; 345(8) (39) (70.5)**

Moore v United States, 555 US ___, 129 SCt 4 (2008)

The appellant was convicted of one count of possessing cocaine base with intent to distribute. Based on the amount of crack cocaine, the recommended sentencing range under the United States Sentencing Guidelines was 151 to 188 months in prison. Citing *United States v Booker*, 543 US 220 (2005), the defendant sought a sentence below the sentencing range because of the sentencing disparity between crack and powder cocaine under the Guidelines. The court denied the request, concluding that Congress, not the courts, has the authority to change the guidelines, and sentenced the appellant to 188 months and six years of supervised release. The Eighth Circuit affirmed. While the appellant's certiorari petition was pending, the Supreme Court decided *Kimbrough v United States*, 552 US __, 128 SCt 558 (2007), which held that a sentencing "judge 'may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses' when applying 18 USC § 3553(a), 'even in a mine-run case.' *Id*., at __, __ (slip op., at 2, 21)." The Court granted the appellant's petition, vacated the judgment, and remanded the case for consideration in light of *Kimbrough*. The Eighth Circuit again affirmed the sentence, concluding that the district court chose not to exercise the discretion it had under *Booker*.

Holding: The district court clearly believed that judges do not have discretion to reject the sentencing disparity between crack and powder cocaine. "When the District Court said that '[i]t isn't the judges' but Congress that 'looks at the [G]uidelines and decides whether or not they should be put . . . in force,' the court showed that it did not think it had the discretion later upheld by *Kimbrough*." The Eighth Circuit should have remanded the case for resentencing under *Kimbrough*. No views on how the district court should exercise its discretion at resentencing are offered. Judgment reversed and matter remanded.

New York State Court of Appeals

Records (Access) (General) (Sealing) **REC; 327(5) (25) (40)**

Matter of City of Elmira v Doe, 11 NY3d 799 (2008)

Holding: The City of Elmira brought a special civil proceeding pursuant to CPL 160.50 to vacate a sealing order. The primary issue is whether some of the materials that were sealed constitute "official records" within the meaning of CPL 160.50(1)(c). In the courts below, the parties did not focus on "whether CPL 160.50(1)(c) is a proper basis upon which to obtain sealed documents in this procedural context." Its applicability is accepted without comment for purposes of the appeal as all now agree that CPL 160.50(1)(d) is not applicable. The Appellate Division correctly concluded that some of the sealed records, *ie*, property tags, bags and logs showing the chain of custody of money surrendered by persons arrested by the respondent, and other records generated in the investigations of those arrests, are not official records subject to a CPL 160.50 seal. Order affirmed.

Discovery (General) (Procedure [Subpoena Duces Tecum]) **DSC; 110(12) (30[t])**

Sentencing (Fines) **SEN; 345(36)**

People v Kozlowski, 11 NY3d 223 (2008)

The defendants, former CEO (Kozlowski) and CFO (Swartz) of Tyco, were convicted of first-degree grand larceny and related offenses based on the theft of four multimillion dollar "bonuses." Tyco retained the law firm of Boies, Schiller & Flexner to conduct an internal investigation in anticipation of shareholder derivative suits. In preparation for their second trial, the defendants subpoenaed the law firm seeking the notes from interviews with Tyco directors. On behalf of Tyco, the law firm moved to quash. The court granted the motion and the Appellate Division affirmed the conviction.

Holding: To obtain enforcement of a third-party subpoena, a defendant must show that the materials are likely to be relevant and exculpatory—bearing on the reliability of the evidence or witnesses. *See People v Gissendanner*, 48 NY2d 543, 550. To meet that burden, however, a defendant does not need to show that the documents sought are "actually" relevant and exculpatory. The defendants met their burden under *Gissendanner* by identifying the specific statements sought and proffering "facts that permitted an inference that those statements were reasonably likely to contain material that could contradict the statements of key witnesses for the People." The subpoena was limited to portions of the interview notes that contain the statements made by the directors to the law firm. Since those notes were prepared to assist Tyco with its civil litigation,

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they are conditionally-privileged trial preparation materials and are not protected by the attorney-client or work product privilege. *See* CPLR 3101 (c), (d)(2). The trial court did not abuse its discretion in quashing the subpoena. The court relied on the defendants' failure to explain why they could not have interviewed the witnesses themselves and their inability to show "'undue hardship' that would have prevented them from securing their own 'substantial[ly] equivalent' interviews with the director-witnesses (*see* CPLR 3101[d] [2])." *See also Hickman v Taylor*, 329 US 495, 513 (1947). Tyco's production of historically privileged documents in connection with the grand jury proceeding did not result in a waiver of the privilege as to trial preparation materials prepared in connection with a later internal investigation.

The court did not hold a CPL 400.30 hearing regarding the amount of the fines imposed, but instead relied on facts brought out at trial, including during the defendants' testimony, or conceded in the defendants' "sentencing letters." *See* Penal Law 80.00(1), (3). Assuming that this amounts to a violation of *Apprendi v New Jersey* (530 US 466 [2000]), the error was harmless. *See Washington v Recuenco*, 548 US 212, 220-221 (2006). Order affirmed.

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

People v Smith, 11 NY3d 797 (2008)

At his Sex Offender Registration Act (SORA) risk assessment hearing, the court assessed a total of 90 points and designated the defendant a level two sex offender. Of the 90 points, 20 points were for risk factor seven, which applies when the offense "'was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 12 [2006])." Without those 20 points, the defendant would have been a presumptive risk level one. The Appellate Division affirmed.

Holding: The court failed to adequately set forth its findings of fact and conclusions of law in support of its decision to assess points under risk factor seven, as required by Correction Law 168-n(3). *See People v Kraeger*, 27 AD3d 1160. Order reversed and matter remitted to the trial court to specify its findings of fact and conclusions of law.

Accusatory Instruments (Sufficiency) ACI; 11(15)

Homicide (Felony Murder) (Murder [Intent]) HMC; 185(20) (40[p])

People v Lucas, 11 NY3d 218 (2008)

The defendant was indicted for first-degree murder for intentionally causing the death of the decedent while he was in the course of committing the crime of first-degree kidnapping. The court denied the defendant's motion to dismiss the indictment for facial insufficiency. The defendant pleaded guilty to first- and second-degree murder and waived his right to appeal as to all issues other than insufficiency of the indictment. The Appellate Division affirmed.

Holding: The indictment was facially sufficient and did not violate the prohibition against double-counting set forth in *People v Cahill* (2 NY3d 14). In *Cahill*, the felony underlying the first-degree murder charge was second-degree burglary. Because the crime Cahill intended to commit when he entered the building was the murder itself, "the same criminal intent supported both the murder charge and the aggravating factor, the burglary." "[W]here only one criminal intent, the intent to kill, is shown, defendant's crime has not been 'aggravated' to first degree murder." Here, there are two criminal intents, the intent to kill and the intent to abduct the decedent. It does not matter that the decedent's death was a factual element of both the murder and the predicate felony. Order affirmed.

Dismissal (In the Interest of Justice [*Clayton* Hearing]) DSM; 113(20)

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

Narcotics (Drug Treatment) (Treatment Programs) NAR; 265(14) (60)

People v Jenkins, 11 NY3d 282 (2008)

The defendant pleaded guilty to fifth-degree criminal sale of a controlled substance. The plea agreement contained several conditions, including completion of a residential drug treatment program and no new arrests. If he fulfilled the conditions, the Office of the Special Narcotics Prosecutor (OSN) would join in a motion to dismiss; if he failed to satisfy the conditions, he would be sentenced to a term of imprisonment. The court and the OSN had sole discretion to determine whether the defendant met the conditions. The defendant filed a motion to dismiss in the interest of justice pursuant to CPL 210.40 and *People v Clayton* (41 AD2d 204), arguing that he met all of his obligations, but when the OSN refused to join in the motion because it did not have documentary proof as to some of the conditions, the defendant withdrew the motion and the court granted an adjournment. The defendant began having trouble complying with the conditions and was arrested on domestic violence charges, which were later dismissed. He then entered into a second plea agreement that added several new conditions, including attending

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family counseling sessions. The drug treatment provider terminated him from the program because he failed to appear for more than a month and he was arrested on a bench warrant. The defendant renewed his *Clayton* motion and sought specific performance of the first plea agreement, but later withdrew the renewed motion. The court sentenced the defendant to three and one-half to seven years incarceration. The Appellate Division affirmed.

Holding: The court properly denied the defendant's original *Clayton* motion because the defendant failed to provide documentation to prove that he completed all the conditions. When the defendant was arrested on domestic violence charges, he breached the plea agreement and could have been sentenced to a term of imprisonment. *See People v Figgins*, 87 NY2d 840, 841. The court had the discretion to offer the defendant a second chance at avoiding incarceration and the defendant violated that agreement. The court did not abuse its discretion in sentencing the defendant after he breached the second plea agreement. Although the court could not impose new conditions before the defendant violated the first agreement, the court's recommendation that the defendant attend family counseling was within the court's discretion and was not a new condition since failure to comply would not have been a violation of the agreement. *See People v Avery*, 85 NY2d 503, 507. Order affirmed.

Dissent: [Pigott, J] The defendant substantially complied with the first plea agreement and was entitled to specific performance. *See People v Selikoff*, 35 NY2d 227, 239 *cert den* 419 US 1122 (1975); *People v Danny G.*, 61 NY2d 169, 170, 173. The court failed to make a sufficient inquiry about whether the defendant violated the plea conditions (*see People v Outley*, 80 NY2d 702), and the OSN did not meet its burden of proving the defendant committed a violation. *See People v Milligan*, 40 AD3d 1217.

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

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

People v Jones, 11 NY3d 822 (2008)

Holding: The defendant failed to establish a prima facie case of discrimination under *Batson v Kentucky* (476 US 79 [1986]). In response to the prosecutor's preemptory challenge of an African-American potential juror, defense counsel argued that the challenge was based on race because the juror's "answers were 'neutral' and 'would not give the [prosecutor] any reason to believe that she could [not] be impartial' . . . ." Defense counsel's arguments, without more, are vague and conclusory assertions that do not satisfy the burden required under step one of the *Batson* analysis. *See People v Childress*, 81 NY2d 263, 267-268. Order affirmed.

Ethics (Judicial) **ETH; 150(10)**

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

Matter of Jung, 11 NY3d 365 (2008)

The State Commission on Judicial Conduct sustained five charges of judicial misconduct against Fulton County Family Court Judge David F. Jung and directed his removal from office. The sustained charges alleged violations of litigants' right to be heard and Rules of Judicial Conduct sections 100.1, 100.2(A), and 100.3(B)(1) and (6), and litigants' right to counsel and Rules of Judicial Conduct section 100.3(B)(3). Most of the violations resulted from two longstanding courtroom policies: incarcerated litigants had to specifically ask the court to be produced for proceedings and litigants had a two-week time limit for requesting counsel.

Holding: Removal of the petitioner is justified by his violation of the due process rights of litigants in five custody and support proceedings. "Parents have a[] . . . fundamental interest in the liberty, care and control of their children (*see Stanley v Illinois*, 405 US 645, 651 [1972]; *Matter of Ella B.*, 30 NY2d 352, 356 [1972])." Key to this fundamental interest "and coextensive with the right to be heard in a meaningful matter, is a parent's right to representation of counsel in family offense proceedings." "It is apparent from the record as a whole that petitioner continues to believe that his actions were a permissible exercise of the 'wide discretion' given Family Court judges 'for dealing with the complexities of family life' (Family Court Act § 141). He fails to grasp that with such discretion comes grave responsibilities to the litigants before him as well as to their children." Removal sanction affirmed.

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

People v Johnson, No. 166, 11/24/2008

The defendant was convicted of attempted promoting of a sexual performance by a child for possessing child pornography on his computer and was required to register as a sex offender under the Sex Offender Registration Act (SORA) (Correction Law art 6-C). The court found the defendant to be a level two offender, which made his identity available to the public. *See* Correction Law §§ 168-l(6)(b), 168-q. The Board of Examiners of Sex Offenders assessed a total of 100 points, which is a presumptive level 2. The Appellate Division concluded that 20 of the 100 points were assessed in error, but that the remaining 80 points, including 20 points for risk factor 7 (relationship between offender and victim, because the defendant's crime was directed at a stranger) were proper.

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Holding: Risk factor 7 was designed to address the Legislature's concern about predatory behavior aimed at strangers, which presents a heightened concern for public safety and a need for community notification. Although offenders who possess child pornography and do not have contact with their victims are not as dangerous as those who possess child pornography that features children that they know, risk factor 7 is clearly applicable to the former category of offenders, including the defendant. "It may well be that, in cases involving the possession of child pornography, the absence of a previous relationship between the offender and the child pictured does not normally heighten the risk the offender presents to the community. However, the way for courts to avoid anomalous results is not to distort the plain meaning of the factors, but to exercise their discretion to depart from the result indicated by the risk factors in cases where that result does not make sense." By not asking the court for a downward departure from the point total, the defendant failed to preserve the issue for review. The defendant may petition for an order modifying his risk level. *See* Correction Law 168-o(2). Order affirmed.

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

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

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

People v MacShane, No. 220, 11/24/2008

Holding: The defendant did not establish a prima facie case of discrimination under step one of the three-step protocol in *Batson v Kentucky* (476 US 79 [1986]). A prima facie case is not established by "sketchy assertions" and the fact that the prospective juror showed no reason why the juror could not serve fairly. *See People v Childress*, 81 NY2d 263, 267-268. "[D]efense counsel simply asserted that the prosecutor had eliminated two male prospective jurors 'for no good reason' because 'she wants a female jury.'" Instead of comparing the challenged jurors to similarly-situated unchallenged prospective jurors, identifying factors that would make the challenged juror more likely to be pro-prosecution, or identifying a factor that suggested that the challenges were based on the prospective juror's gender, defense counsel only pointed to a general motive to discriminate that was not related to the challenged jurors. Since the defendant did not meet his burden under step one, the prosecution did not have to provide gender-neutral reasons for the challenges.

The Appellate Term did err by apparently considering a confidential opinion of the Advisory Committee on Judicial Ethics when deciding that the judge did not abuse his discretion as the confidential opinion was not part of the record on appeal. However, the Appellate Term correctly concluded that the judge was not legally disqualified under Judiciary Law 14 and that the judge did not abuse his discretion in denying the defendant's recusal motion. *See People v Moreno*, 70 NY2d 403, 405. Order affirmed.

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

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

People v Naradzay, No. 188, 11/24/2008

The defendant was convicted of attempted second-degree murder, attempted first-degree burglary, and fourth-degree criminal possession of a weapon. The defendant wrote a note detailing his plan to break into a former friend's home and shoot her and her husband in front of the couple's children. He bought a shotgun and borrowed a friend's car to drive to the street where the home was located. A neighbor who saw the defendant take out the gun and lean it against another house called 911. When the police arrived, the defendant approached them and said that he had mental problems. When asked if he had any weapons, the defendant said he had a gun and pointed to its location nearby. After he was handcuffed, the police found the note and shotgun slugs in the defendant's pockets.

Holding: The evidence is sufficient to support the jury verdict. Based on the defendant's conduct and the surrounding circumstances, a rational jury could reasonably conclude that the defendant intended to commit burglary and murder. *See People v Bracey*, 41 NY2d 296, 301. By standing close to the property of the intended targets and having shotgun slugs and a loaded shotgun that could hit a target 100 yards away, the defendant was able to commit the offenses unless interrupted. *See People v Mahboubian*, 74 NY2d 174, 191. The jury was entitled to discredit the defendant's self-serving testimony that he decided to commit suicide instead of murder. The jury might have reasonably concluded that there was no killing here only because police were called and responded quickly.

Dissent in Part: [Jones, J] The defendant's conduct was insufficient to support the attempted murder and burglary convictions since he did not come dangerously near completing the crimes.

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

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

People v Castellano, No. 173, 11/25/2008

NY Court of Appeals *continued*

Holding: "Defendant's argument that the evidence presented at trial was insufficient to support his conviction for depraved indifference murder is unpreserved for this Court's review (*see, People v Hawkins*, __ NY3d __ [decided today]." Order affirmed.

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

Homicide (Manslaughter [Evidence]) (Murder [Degrees and Lesser Offenses] [Evidence]) **HMC; 185(30[d]) (40[g] [j])**

People v George, No. 172, 11/25/2008

Holding: The defendant properly preserved his challenge to legal sufficiency of his depraved indifference murder conviction. *See People v Hawkins*, __ NY3d __ [decided today]. "The Appellate Division properly evaluated defendant's sufficiency challenge in light of our current decisional law on depraved indifference murder (*see People v Jean-Baptiste*, __ NY3d __ [decided herewith])." The evidence was insufficient to establish that the defendant acted with depraved indifference to human life, but the evidence is legally sufficient to establish the lesser included offense of second-degree manslaughter. *See* Penal Law 125.15(1). Order affirmed.

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

Trial (Trial Order of Dismissal) **TRI; 375(60)**

People v Hawkins, No. 175, 11/25/2008

Defendant Hawkins was convicted of depraved indifference murder. At the close of trial, he made a motion for an order of dismissal, arguing that the prosecution failed to establish a prima facie case of depraved indifference murder by not proving that he committed the crime and that he acted with depraved indifference. The court denied the motion and the Appellate Division affirmed the conviction. Defendant Eduardo was convicted of third-degree criminal sale of a controlled substance. At the close of the prosecution's case, the defendant made a motion for a trial order of dismissal arguing that the prosecution failed to establish a prima facie case because the police merely saw three individuals speaking on the street for a few minutes and the defendant looking up and down the block. The court denied the motion, concluding that the totality of the facts was more than sufficient to establish a prima facie case. The Appellate Division affirmed the conviction.

Holding: "To preserve for this Court's review a challenge to the legal sufficiency of a conviction, a defendant must move for a trial order of dismissal, and the argument must be 'specifically directed' at the error being urged (*People v Gray*, 86 NY2d 10, 19 [1995]; *People v Hines*, 97 NY2d 56, 62 [2001])." General motions are insufficient to create a reviewable question of law. *See People v Finger*, 95 NY2d 894, 894.

"[I]t is defense counsel who is charged with the single-minded, zealous representation of the client and thus, of all the trial participants, it is defense counsel who best knows the argument to be advanced on the client's behalf. Viewing the preservation requirement systemically, intermediate appellate court review is potentially comprehensive, including not only law questions but also fact issues and the interest of justice. This Court's second level of review . . . is best accomplished when the Court determines legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court." In Hawkins' case, because the defendant's appellate argument that he acted intentionally, not recklessly, was not presented to the trial court in his motion to dismiss, the motion was insufficient to preserve the argument for this Court's review. The legal sufficiency argument in *Eduardo* is preserved. The trial court prevented defense counsel from specifying his objection and the court clearly knew of and expressly decided the question raised on appeal. *See* CPL 470.05; *People v Prado*, 4 NY3d 725, 726. However, viewing the evidence in the light most favorable to the prosecution, the sufficiency argument lacks merit. A jury could have concluded that the "defendant aided in the sale and shared a community of purpose with his co-defendants to sell cocaine." Orders affirmed.

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

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

Homicide (Manslaughter [Evidence]) (Murder [Degrees and Lesser Offenses] [Evidence]) **HMC; 185(30[d]) (40[g] [j])**

People v Jean-Baptiste, No. 174, 11/25/2008

After seeing his cousin hit in the head with a bottle by the decedent, the defendant drew a gun and pulled the trigger twice. When the gun did not fire, the defendant pulled the trigger a third time and shot the decedent in the chest. The jury acquitted the defendant of intentional second-degree murder, but failed to reach a verdict on the depraved indifference second-degree murder and related charges. The prosecution filed a superseding indictment that added first-degree manslaughter (Penal Law 125.20[1]) to the charges. At defendant's second trial, the court instructed the jury on the elements of depraved indifference as defined by *People v Register* (60 NY2d 270). The jury convicted the defendant of depraved indiffer-

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ence murder. On appeal, the defendant alleged that the evidence was legally insufficient to support the conviction and argued that the new depraved indifference standard set forth in *People v Feingold* (7 NY3d 288), which was decided between the date of his conviction and his appeal, should apply and result in a dismissal of that charge. The Appellate Division, applying *Feingold*, concluded that the evidence was legally insufficient to support depraved indifference murder, but that the evidence was sufficient to establish the lesser included offense of second-degree manslaughter, and modified the judgment accordingly.

Holding: The Appellate Division properly applied the *Feingold* standard for depraved indifference murder, and correctly concluded that the evidence was insufficient to support the depraved indifference conviction. The *Feingold* standard applies to cases brought on direct appeal where the defendant adequately challenged the sufficiency of the proof as to the depraved indifference conviction. *See People v Vasquez*, 88 NY2d 561, 573; *People v Hill*, 85 NY2d 256. The decision in *Policano v Herbert* (7 NY3d 588) rejecting retroactive application does not apply since that case involved a collateral challenge and the defendant's conviction became final before the standard changed. The defendant's trial motion to dismiss for legal insufficiency was specific and anticipated the change in the law brought by *Feingold*. Here, defense counsel did not need to also take an exception to the depraved indifference murder charge. *See Suria v Shiffman*, 67 NY2d 87, 96. And unlike in *People v Dekle* (56 NY2d 835), the defendant's argument on appeal is the same as that raised in his trial motion to dismiss. The Appellate Division properly concluded that there was sufficient evidence to support the lesser included offense of second-degree manslaughter. Order affirmed.

Evidence (Instructions) (Prejudicial) (Relevancy) (Uncharged Crimes) — **EVI; 155(80) (106) (125) (132)**

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

People v Giles, No. 181, 12/2/2008

When the police arrested the defendant for trying to open a locked medical office door with a knife, they found on his person a folding knife, a stolen credit card, and a MetroCard that was purchased using a stolen credit card. Both credit cards were stolen during recent home burglaries, but the defendant was not charged with those burglaries. Prior to his trial, the defendant moved to preclude testimony from the persons whose homes were burglarized. The court denied the motion, allowing detailed testimony about the uncharged burglaries, and gave a limiting instruction that defendant was not charged with burglary or theft of the cards stolen during those burglaries. The defendant was convicted of attempted second- and third-degree burglary, two counts of fourth-degree criminal possession of stolen property, and possession of burglar's tools, and was sentenced as a persistent felony offender to concurrent terms of 20 years to life in prison for each of the four felonies. The Appellate Division affirmed.

Holding: The court erred in failing to give a limiting instruction to cure the potential prejudicial effect of the evidence of the uncharged burglaries on the attempted burglary and possession of burglar's tools counts. The court should have instructed the jury that it could consider the uncharged crimes for the possession of stolen property counts only. Although evidence of uncharged crimes may have some probative value, such evidence cannot be used to show a defendant's bad character or propensity toward committing crime. *See People v Lewis*, 69 NY2d 321, 325. The evidence of the uncharged burglaries should not have been admitted to show that when the defendant attempted to enter the medical office, he presumably intended to commit a theft therein. There was no evidence that he committed those burglaries and thus, the evidence was only relevant to show the defendant's criminal bent or character. *See People v Dales*, 309 NY 97, 101. Because the case is being remitted for a new trial, the defendant's constitutional challenge to his persistent felony offender sentence is not decided at this time. *See Apprendi v New Jersey*, 530 US 466 (2000); *People v Rivera*, 5 NY3d 61. The trial court may, in the exercise of its discretion, consider resentencing the defendant on the two remaining criminal possession of stolen property counts. Order modified by reversing the convictions of attempted second- and third-degree burglary and criminal possession of burglar's tools and remitting for a new trial on those counts.

Double Jeopardy (Jury Trials) (Lesser Included and Related Offenses) (Mistrial) — **DBJ; 125(10) (15) (20)**

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

Matter of Rivera v Firetog, No. 178, 12/2/2008

The defendant was charged with second-degree murder. After a five-day trial, the court instructed the jury on the murder count and the lesser included offenses of first- and second-degree manslaughter. The court advised the jury to consider the first-degree manslaughter count only if it first acquitted on the murder count and to consider the second-degree manslaughter count only if it acquitted on the first-degree manslaughter count. During the delib-

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erations, the jury sent three deadlock notes. On the third day, the jury had asked for clarification of terms related to the manslaughter counts; the court read the instructions for those counts and reminded the jury that it must consider second-degree manslaughter only if it acquitted on the first-degree manslaughter count. On the fourth day, after asking for and receiving a copy of all three charges, the jury sent a note that one of the jurors had travel plans that evening. Although the court agreed with defense counsel that there was an inference that the jury had passed the top count, it denied the defendant's request to ask the jury if they reached a partial verdict and adjourned the case for the weekend. On the sixth day, after receiving further clarification regarding all three charges, the jury submitted a third deadlock note. The court granted the prosecutor's mistrial motion and denied the defendant's request for a partial verdict inquiry. The court denied the defendant's later motion to dismiss the indictment on double jeopardy grounds. The Appellate Division granted the defendant's article 78 petition to prohibit retrial for murder.

Holding: The trial court did not abuse its discretion in declaring a mistrial. While there are no *per se* rules or mechanical formulas that courts must apply before declaring a mistrial, courts should consider certain factors, including the length and complexity of the trial, the length of deliberations, the nature and extent of communications between the jury and the court, the possible effects of requiring further deliberation, and whether the court explored appropriate alternatives. *See People v Baptiste*, 72 NY2d 356, 361; *Matter of Plummer v Rothwax*, 63 NY2d 243, 250-251. The court appropriately reviewed alternatives to a mistrial; the court instructed the jury to continue deliberating after the first deadlock note and gave an *Allen* charge after the second note. Significantly, because the jury requested copies of all three charges on three occasions after it requested clarification of the manslaughter instructions, it is not clear whether the jury reached a verdict on any of the counts. And the court declared a mistrial only after the third deadlock note, determining that further deliberations were futile or may lead to a coerced verdict. A court need not question the jury about the possibility of a partial verdict as a matter of constitutional concern whenever requested by defense counsel. Since the jury did not state that it reached a partial verdict, CPL 310.70(1) did not require the court to inquire about such a verdict. Judgment reversed and petition dismissed.

Dissent: [Pigott, J] The trial court abused its discretion in declaring a mistrial on all counts without inquiring into a partial verdict, particularly since the court twice indicated that there was an inference that the jury had reached a partial verdict. The jury did not know that it could reach a partial verdict and the court's instructions discouraged the jury from informing the court of a partial verdict. The court should have informed the jury of the partial verdict option. *See United States v Dolah*, 245 F3d 98 (2d Cir. 2001).

First Department

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

People v Pearson, 55 AD3d 314, 865 NYS2d 59 (1st Dept 2008)

Holding: "During the plea allocution, the court did not inform defendant of any of the rights that he was waiving as a result of his guilty plea (*see Boykin v Alabama*, 395 US 238 [1969]), and it also neglected to inform him of the enhanced sentence he potentially faced if he failed to successfully complete a period of interim probation (*see People v Achaibar*, 49 AD3d 389 [2008], *lv denied* 19 NY3d 931 [2008]). The court's inquiry consisted of determining that defendant would accept the plea agreement whereby he would undergo a period of 'intensive probation supervision' prior to sentencing, that he was aware that a plea would give him a felony conviction, and that he admit[ed] having possessed an unlicensed firearm. Thus, the record fails to establish that defendant intelligently and voluntarily entered his plea. Although defendant did not preserve these issues, we reach them in the interest of justice in view of the extreme deficiency of the plea allocution (*see People v Colon*, 42 AD3d 411 [2007])." Judgment reversed, plea vacated, and matter remanded. (Supreme Ct, New York Co [Ambrecht, J])

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

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

Matter of Shaun B., 55 AD3d 301, 865 NYS2d 52 (1st Dept 2008)

Holding: The court erred in finding the respondent legally responsible for the care of her boyfriend's child, who sporadically visited the apartment shared by the respondent and her boyfriend. The child was never in the respondent's sole care; the child was always in the care of her father, including when the abuse occurred, at which time the respondent was sleeping. *See* Family Court Act 1012(a); *Matter of R./C. Children*, 303 AD2d 172. The fact-finding hearing did not include evidence from which it reasonably could be concluded that the respondent had reason to believe that her boyfriend might injure the child, nor was there evidence that the respondent was involved in or knew of the child's tibia fracture or a prior shaking incident, which did not happen while the child was in the

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apartment. The respondent did not contribute to the abuse of her boyfriend's child. *See Matter of Miranda O.*, 294 AD2d 940. The derivative findings of abuse and neglect as to the subject children must be reversed. Order reversed, abuse and neglect findings vacated, and petition dismissed. (Family Ct, New York Co [Adams, J])

Concurrence: [McGuire, J] "To the end of seeking to avoid another gross miscarriage of justice like this one, I would not resolve this appeal without underscoring the following: the fundamental and critically important requirement that findings of abuse and neglect must be based on reasonable conclusions from the evidence adduced at a fact-finding hearing, not on the basis of conjecture and speculation that fills evidentiary gaps, applies in all cases."

Juries and Jury Trials (Deliberation) (Hung Jury) **JRY; 225(25) (40)**

People v Kadarko, 56 AD3d 102, 867 NYS2d 32 (1st Dept 2008)

The defendant was charged with five counts each of first-degree and third-degree robbery for incidents that occurred on five dates. The jury found the defendant guilty of one count of first-degree robbery, but was undecided on the remaining counts. During deliberations, the jury sent several notes to the court. After receiving two notes indicating that the jury was split on all counts, the court delivered an *Allen* charge. The court did not read the note into the record nor give counsel an opportunity to comment on the note. After the charge, both sides agreed that the response was appropriate. The third jury note specified the split as to each of the five incidents, but did not indicate which way the splits went. The court did not read the note into the record, but provided a summary without the numbers. Defense counsel asked the court to declare a hung jury, which the prosecution opposed, and the court delivered a second *Allen* charge. The court allowed counsel to read the note after the jury resumed deliberations.

Holding: The court failed to give the defense an opportunity to meaningfully participate in formulating a response to the note. *See People v Kisoon*, 8 NY3d 129, 134. A court gives meaningful notice when it reads a note into the record with counsel present before the jury is brought in, gives counsel an opportunity to suggest a response, tells counsel the court's planned response, and reads the note in open court. *See People v O'Rama*, 78 NY2d 270, 277-278. No special circumstances exist that justify departing from these guidelines. Reversal is required despite counsel's failure to object. Judgment reversed and matter remanded for new trial. (Supreme Ct, Bronx Co [Torres, J])

Dissent: [McGuire, J] The court's error was a technical one and did not affect the fairness of the trial or the conduct of the defense.

Identification (Expert Testimony) (Eyewitnesses) (Lineups) (Photographs) (Sufficiency of Evidence) **IDE; 190(5) (10) (30) (35) (45)**

People v Abney, Nos. 3314/05, 3317, 1st Dept, 10/14/2008

The defendant was convicted of first-degree robbery for holding a knife to a 13-year-old's neck and stealing her necklace on a well-lit subway stairway in mid-afternoon. The detective who interviewed the complainant thought she seemed frightened. Within an hour of the incident, the complainant picked the defendant from a photo array. Several weeks later she identified him in a lineup. He offered the alibi that he was picking up his fiancé's daughter just prior to the incident, presenting a school sign-in/sign-out sheet in support. The fiancé and the child's teacher testified that the fiancé picked up the sheet the day after the incident, more than two weeks before the defendant's arrest.

Holding: The court properly denied the defendant's request to present expert testimony on the reliability of eyewitness identification. Because there was evidence corroborating the identification, the court had discretion as to admitting the testimony under *People v LeGrand*, 8 NY3d 449. *LeGrand's* unusual fact pattern raises a question as to whether *LeGrand's* rule concerning admissibility of eyewitness expert testimony applies where circumstances create much less doubt about the reliability of identification testimony. This need not be addressed here. The corroborating evidence came from the defendant's alibi witnesses. *LeGrand* does not indicate that the corroborating evidence has to be physical or forensic evidence directly linking the defendant to the crime. If denying the defendant's renewed application to present the expert testimony at the close of the prosecution's case was error, the alibi testimony later showed that the decision was not erroneous or was harmless. *Cf People v Kello*, 96 NY2d 740, 744. Judgment affirmed. (Supreme Ct, New York Co [Wetzel, J])

Dissent: [Moskowitz, J] The prosecution's case hinged on the accuracy of the complainant's identification. When the court denied the defendant's renewed application, there was no corroborating evidence connecting him to the crime. The defendant's application satisfied the four *LeGrand* conditions for admission of such testimony.

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Defenses (Battered Spouse Syndrome) **DEF; 105(4)**

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

Matter of Yahnlis M., 55 AD3d 376, 865 NYS2d 214 (1st Dept 2008)

Holding: The court did not deprive the appellant mother of her due process right to present a defense by denying her application to retain an expert psychologist to present a battered woman defense. The court did not abuse its discretion by refusing to admit such expert testimony. *See People v Cronin*, 60 NY2d 430, 433. The mother failed to lay a foundation or offer direct evidence to support the defense. *See People v Bryant*, 278 AD2d 7 *lv den* 96 NY2d 757. Instead, the evidence showed that the children, and not the mother, were subject to physical abuse and emotional harm by the mother's boyfriend, the co-respondent, including the beating that resulted in the death of the children's two-year-old brother. Additional evidence showed that the mother had physically abused the children and that she failed to seek prompt medical attention for her deceased son, not because she was afraid of her boyfriend, but because she was afraid she would be blamed for the incident and that her children would be removed from the home. Order affirmed. (Family Ct, New York Co [Cohen, J])

Counsel (Right to Counsel) (Right to Self-Representation) **COU; 95(30) (35)**

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

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

People v Coppin, 55 AD3d 374, 866 NYS2d 103 (1st Dept 2008)

Holding: By refusing to be brought into the courtroom, the defendant waived his right to be present at the *Sandoval/Molineux* hearing. *See People v Spotford*, 85 NY2d 593, 598-599. Defense counsel told the court that the defendant refused to enter the courtroom for any purpose, including waiving his right to be present. By telling defense counsel to explain to the defendant his right to be present and that the hearing would continue without him if he waived that right, the court did not delegate a judicial function. *See People v Felder*, 17 AD3d 126, 127 *lv den* 5 NY3d 788. The court, not defense counsel, decided that the defendant waived his right to be present. The court properly exercised its discretion when, citing potential danger to the court and Department of Correction personnel, it declined to order defendant forcibly produced to advise him of his right and secure an express waiver. Because the defendant refused to be produced for sentencing, the court was unable to determine whether he wanted to proceed with counsel or *pro se*. *See People v Lineberger*, 98 NY2d 662. Under the circumstances, any violation of the defendant's right to counsel at sentencing had no adverse impact; he is not entitled to a remand for resentencing. *See People v Wardlaw*, 6 NY3d 556, 559-561. Because the court prematurely adjudicated the defendant a level three sex offender, without waiting for a Board of Examiners of Sex Offenders recommendation, that determination must be vacated and a new determination made pursuant to Correction Law 168-l. Judgment modified, sex offender risk level determination vacated without prejudice, and judgment otherwise affirmed. (Supreme Ct, New York Co [Tejada, J])

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

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

People v Montanez, 55 AD3d 372, 866 NYS2d 33 (1st Dept 2008)

Holding: Because the court failed to advise the defendant at his guilty plea that his sentence would include post-release supervision (PRS), the defendant is entitled to have his conviction reversed. *See People v Louree*, 8 NY3d 541, 545-546; *People v Catu*, 4 NY3d 242, 245. "Since PRS was a direct consequence of the guilty plea that defendant actually entered and upon which he was actually sentenced, it is of no moment that the court also offered defendant an opportunity to have the felony plea replaced by a misdemeanor disposition not involving PRS, upon certain conditions that defendant ultimately failed to satisfy." Despite the prosecution's argument for specific performance of the plea agreement, vacatur of the defendant's plea is the appropriate remedy. *See People v Hill*, 9 NY3d 189, 191 *cert den* 128 SCt 2430 (2008). Penal Law 70.85, which allows the defendant to be resentenced to a term of imprisonment without PRS, does not apply because the court explicitly stated the PRS term at the time of sentence. Judgment reversed, plea vacated, full indictment reinstated, and matter remanded. (Supreme Ct, New York Co [Carro, J])

Accomplices (Aiders & Abettors) (Instructions) **ACC; 10(10) (25)**

Assault (Evidence) (General) (Instructions) (Serious Physical Injury) **ASS; 45(25) (27) (45) (60)**

People v Sanchez, __ AD3d __, 866 NYS2d 78 (1st Dept 2008)

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The defendant and two codefendants were charged with first-degree gang assault as to Griffin and attempted first-degree gang assault as to McCormack. Over the defendant's objection, the court instructed the jury that "acquittal of one of the three defendants of gang assault on the count relating to a given victim did not require that the other two defendants also be acquitted of gang assault on that count." The jury convicted the defendant and one of the codefendants (Jurlina) of second-degree gang assault as to Griffin and convicted the other codefendant (Amitrano) of third-degree assault as to McCormack, but acquitted him of all charges related to Griffin.

Holding: The court correctly interpreted the phrase "aided by two or more persons actually present" in Penal Law 120.06. The Legislature adapted this element from the second-degree robbery statute, which requires forcible theft committed by a person while "aided by another person actually present." *See* Penal Law 160.10(1); *see* Senate Mem in Support of L 1996, ch 647, reprinted in 1996 McKinney's Session Laws of NY, at 2582. As held in second-degree robbery cases, "a person may be found to have 'aided' another person's commission of an offense even if the aiding person did not have the intent required to be found guilty of participating in that offense." *See People v Green*, 126 AD2d 105 *affd* 71 NY2d 1006. The jury could conclude, based on the evidence, that Amitrano was present at the scene and aided in the assault on Griffin even if the jury also concluded that he was not guilty of that assault either as a principal or as an accomplice. That the jury found Amitrano guilty of third-degree assault against McCormack shows that he was "actually present" at the scene of the incident. *Cf People v Hedgeman*, 70 NY2d 533, 535-536. And the jury could rationally find that the assault of McCormack "aided" the two other defendants' assault on Griffin, but that the prosecution failed to prove that Amitrano acted with the intent to physically injure Griffin. Thus, the evidence was sufficient to support the defendant's conviction and was not against the weight of the evidence. The defendant failed to preserve the argument that the court's charge on actual presence improperly collapsed the definition of "aid" into the explanation of "actually present." The court did not err in failing to separately define "aid." Even if the evidence showed that Jurlina, and not the defendant, caused Griffin's serious physical injury, the principle of accessorial liability applies to the gang assault statute. The jury could have concluded that by joining the attack on Griffin with the requisite mental culpability, the defendant intentionally aided Jurlina in causing the injury. *See People v Hill*, 52 AD3d 380. Judgment modified, term of imprisonment reduced to six years, and otherwise affirmed. (Supreme Ct, New York Co [Hayes, J])

Burglary (Evidence) (General) **BUR; 65(20) (22)**

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

People v Serrano, 55 AD3d 450, 865 NYS2d 598 (1st Dept 2008)

After a bench trial, the defendant was found guilty of second-degree burglary. The complainant's apartment had been burglarized between noon and 5 pm. At 1:30 pm, a police officer saw the defendant, a homeless man, standing near a dumpster about a block away. The officer saw a group of items on the defendant's person, in a bag he was holding, and on top of the dumpster. The officer allowed the defendant to leave. When the burglary was reported the next day, the officer remembered seeing the defendant with the items. Evidence was also presented that the defendant occasionally got food in the basement of the church-owned building where the burglary occurred.

Holding: The evidence is legally insufficient to support the verdict. Even assuming that a trier of fact could reasonably conclude that the items seen in the defendant's possession were the same items stolen, the defendant's possession had a reasonable innocent explanation. The objects were of very little value; some were on the dumpster. This supports a reasonable inference that the defendant rummaged in the dumpster and found items that the burglar discarded because they were unmarketable. The court had no basis for concluding that the defendant, and not someone else, stole the property. His "connection with the building where the burglary occurred is too equivocal to warrant a different conclusion." Judgment reversed and indictment dismissed. (Supreme Ct, New York Co [Bartley, J])

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

Witnesses (Credibility) **WIT; 390(10)**

People v Colon, 55 AD3d 444, 865 NYS2d 601 (1st Dept 2008)

Holding: The prosecutor improperly failed to disclose notes of interviews with two witnesses who had potentially exculpatory information, failed to disclose that she helped to relocate the grandparents of a prosecution witness, failed to correct that witness's testimony that the only benefit the prosecution promised him was a favorable plea bargain, and misstated the benefits the witness received during her summation. *See Giglio v United States*, 405 US 150 (1972); *Brady v Maryland*, 373 US 83 (1963); *People v Novoa*, 70 NY2d 490, 498. However, there is no reasonable possibility (*see People v Vilardi*, 76 NY2d 67, 77), that these acts and omissions affected the verdict. The interview notes contained multiple layers of hearsay and

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did not appear admissible. *See People v Burns*, 6 NY3d 793, 794. It would be speculative to conclude that disclosure of the notes might have led to admissible exculpatory evidence, and there was no evidence that the witnesses or the sources of their statements, were willing or able to testify at trial. The impeachment value of the information about the relocation would have been cumulative because the jury's knowledge of the favorable plea agreement was more crucial to assessing the witness's credibility. *See People v Sibadan*, 240 AD2d 30, 35 *lv den* 92 NY2d 861. And there was other evidence, including testimony from another witness who identified the defendants as the perpetrators. Order affirmed. (Supreme Ct, New York Co [Corriero, J])

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

People v Alemany, 56 AD3d 251, 867 NYS2d 61 (1st Dept 2008)

Holding: "The evidence established that, at most, defendant's future living situation was uncertain in that, although he was described as homeless at the time of his arrest, upon his release from incarceration under the supervision of the Department of Probation, he was advised to go to the Bellevue men's shelter where he would be assisted by a community organization in trying to find employment. This was insufficient as a matter of law to meet the People's burden of showing, by clear and convincing evidence, that defendant's living situation was inappropriate (*see* Correction Law § 168-n[3]; *People v Ruddy*, 31 AD3d 517 [2006], *lv denied* 7 NY3d 714 [2006]), and defendant should not have been assessed 10 points under risk factor 15 (inappropriate living or employment situation)." Order modified, sex offender risk level reduced from level two to level one, and otherwise affirmed. (Supreme Ct, New York Co [Ambrecht, J])

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

Juveniles (Hearings) (Parental Rights) (Permanent Neglect) **JUV; 230(60) (90) (105)**

Matter of Johnny G., 56 AD3d 251, 867 NYS2d 398 (1st Dept 2008)

Holding: The court properly concluded that the agency failed to meet its burden of proving that the respondent neglected his child for at least one year prior to the filing of the petition. However, it erred in concluding that the agency failed to present evidence to support its allegation that the respondent father is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for his child. *See* Social Services Law 384-b(4)(c). The respondent shoved his six-year-old child during a supervised visit because the child was resistant to coming into the visitation room. The record included a report of a clinical examination that a psychologist completed when the respondent was receiving outpatient psychiatric care. It noted that, two years earlier, another doctor diagnosed the respondent with Schizoaffective Disorder and Borderline Intellectual Functioning/Antisocial Personality traits, and that the respondent had a history of inpatient psychiatric care. It also noted that in the 1980s the respondent was in a coma for a year after a head injury, and he had speech and language impairments at the time of the exam. The report further noted that the respondent was compliant with only one of his two prescribed medicines, became angry during the exam, and was receiving treatment for anger issues. The psychologist could not opine as to whether the respondent met the statutory criteria for mental illness. "The best interests of the child require judicial consideration of the mental illness ground in light of respondent's conduct at the time of the visit, coupled with the psychiatric history noted above." Order modified, first cause of action of the petition reinstated, order otherwise affirmed, and matter remanded for new fact-finding hearing on the mental illness allegation. (Family Ct, Bronx Co [Alpert, J])

Burglary (Elements) (Evidence) (Instructions) **BUR; 65(15) (20) (25)**

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

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

People v Sandoval, 56 AD3d 253, 866 NYS2d 656 (1st Dept 2008)

The defendant was convicted of second-degree burglary and third-degree robbery. At trial, the complainant testified that as she was opening the inner door of her apartment building, the defendant knocked on the outer door, looked at her, and pointed down to the lock. She also testified that the defendant "'looked like he had a look on his face like he belonged there. And so I just opened the door for him'" and that his look did not make her feel afraid. In its jury instructions, the court defined unlawful entry as entry "without permission, no lawful reason to be there." The court also instructed the jury that "[t]he burglary charge has been established."

Holding: Although the defendant failed to preserve for review his arguments that the evidence was legally insufficient to establish that he gained entry into the apartment building by means of trick, artifice, or misrepresentation and that the jury instructions on unlawful entry was improper, those issues are reviewed in the interest of justice. The court's jury instructions deprived

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the defendant of a fair trial. The unlawful entry charge was manifestly incorrect since it effectively relieved the prosecution of its burden of proving that the defendant unlawfully entered the apartment building. *Cf People v Konikov*, 160 AD2d 146, 151 *lv den* 76 NY2d 941. It is doubtful that the defendant could have been convicted of burglary if the jury had been correctly instructed, though that is not decided here. Entry by means of an artifice or trick cannot be established solely by a request to open the door or the absence of a threatening look. "[W]e have grave doubts that a jury reasonably could have concluded on the basis of this unelaborated-upon testimony about the look on defendant's face that the People had proven beyond a reasonable doubt that defendant gained entry into the building by artifice or trick." However, although improbable, it cannot be assumed that the prosecution could not have elicited additional relevant evidence had the defendant made a timely and specific objection to the proof on that issue. "Third, we can conceive of no possible strategic reason that might explain either defense counsel's failure to make such a specific objection focusing on an obvious and critical issue or counsel's failure to protest the highlighted, clearly erroneous instruction. Finally, we of course are troubled by the court's additional instruction to the effect that the elements of the burglary charge 'are established[;] [t]he burglary charge has been established.'" Judgment modified, second-degree burglary conviction reversed, matter remanded for new trial on that charge, and judgment otherwise affirmed. (Supreme Ct, New York Co [McLaughlin, J])

Second Department

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

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

Jurisdiction (General) **JSD; 227(3)**

People v Dikshteyn, 54 AD3d 349, 861 NYS2d 597 (2nd Dept 2008)

Holding: The appellant's motion for leave to prosecute the appeal as a poor person and for the assignment of counsel "is denied, with leave to renew upon proper papers, including the appellant's affidavit setting forth the appellant's full financial situation including (1) all assets, both real and personal, as well as any and all sources of income before conviction, and (2) if on bail before conviction, the amount and source of the bail money, and if bail was the appellant's own money, what happened to the same after conviction." Since the appeal was from a judgment of the Integrated Domestic Violence Part (*see* 22 NYCRR 41.1), a unit of the Supreme Court (*see* 22 NYCRR 200.2[b]), the appeal is properly before this Court and not the Appellate Term of the Supreme Court. Motion denied with leave to renew.

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

People v Gibson, 54 AD3d 350, 863 NYS2d 450 (2nd Dept 2008)

Holding: The court failed to ensure that the defendant, prior to pleading guilty, had a full understanding of the meaning and consequences of his guilty plea. *See Boykin v Alabama*, 395 US 238, 244 (1969); *People v Ford*, 86 NY2d 397, 402-403. The court also failed to tell the defendant that, by entering the plea, he was giving up certain rights, including the right to jury trial, the right to confront his accusers, and the privilege against self-incrimination. Although the court does not have to engage in any particular litany during the plea allocution, here, the record does not show that the defendant voluntarily and intelligently entered the plea. *See North Carolina v Alford*, 400 US 25, 31 (1970). The indictment should be dismissed because the defendant has completed his sentence and the remaining counts of the indictment involve relatively minor offenses. *See People v Flynn*, 79 NY2d 879, 882. Judgment reversed, plea vacated, indictment dismissed, and matter remitted. (Supreme Ct, Queens Co [Rotker, J])

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

Juveniles (Custody) (Right to Counsel) **JUV; 230(10) (130)**

Matter of Shepherd, Jr. v Moore-Shepherd, 54 AD3d 347, 863 NYS2d 57 (2nd Dept 2008)

Holding: The court erred in failing to advise the parties of their right to counsel in the custody proceeding. The court failed to tell the father that he had the right to be represented by counsel and that if he could not afford an attorney, he had the right to seek an adjournment to confer with counsel or an attorney would be appointed for him. At each of the court appearances, the court merely asked the parties, "Are you going to speak for yourself?" The parties, neither of which had counsel, each said that they would be speaking for themselves and the court continued with the custody proceeding without further inquiry. "'[T]his colloquy does not reflect an explicit, informed waiver, by the [father], of his right to counsel, guaranteed by section 262(a)(v) of the Family Court Act,' as it does not show that the father had a 'sufficient awareness of the relevant circumstances and the probable consequences of his waiver' (*Matter of Brainard v Brainard*, 88 AD2d 996, 996; *see Matter of Lawrence S.*, 29 NY2d 206, 208

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. . .).” Appeal of the first August 30 order reversed, appeal of second August 30 order dismissed as abandoned, and matter remitted for a new hearing at which the parties should be fully apprised of their right to be represented by counsel. (Family Ct, Queens Co [Seiden, J])

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

Matter of Christopher H. v Lisa H., 54 AD3d 373, 863 NYS2d 67 (2nd Dept 2008)

In 2006, the father entered an *Alford* plea (*see North Carolina v Alford*, 400 US 25 [1970]), consenting to an order finding that he sexually abused one daughter and thus derivatively neglected the other. The court entered a modified custody and visitation order on consent that authorized supervised visitation beginning upon the recommendation of the children’s therapist, and that directed the father to get a psychological evaluation and follow the therapist’s recommendations, participate in a sex offender treatment program, and complete a parenting program. The father petitioned for a modification of the visitation provision, saying he had completed a parenting program and undergone psychological evaluation. The therapist’s report attached to the petition concluded that, based on a polygraph examination, the father’s denials of the sexual abuse allegations were truthful and thus, he was not an appropriate candidate for specialized sex offender treatment.

Holding: In his petition, the father made an evidentiary showing sufficient to warrant a hearing to determine whether visitation would be in the children’s best interest. *See Matter of Melissa FF.*, 285 AD2d 682. A court may direct a parent to undergo therapy as part of a visitation order if it will serve the best interests of the *See Matter of Cross v Davis,* 298 AD2d 939. However, it was error to dismiss the father’s petition, without a hearing, based on his failure to complete specialized sex offender treatment, given the evidence that the therapist believed he was not an appropriate candidate for such treatment. No finding is made as to the factual basis for the charges he pleaded to or as to the petition itself. Order denying the modification petition reversed, petition reinstated, matter remitted for a new determination following a hearing, and appeal of the order denying the motion for leave to argue dismissed. (Family Ct, Dutchess Co [Amodeo, J])

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

Matter of Peroglu v Baez, 54 AD3d 416, 863 NYS2d 82 (2nd Dept 2008)

After the birth of their first child, the parties agreed that the mother would have residential custody. The parties later reconciled and had a second child in Suffolk County. When they again separated, the mother took the children to her mother’s home and petitioned for sole custody. The father cross petitioned. In violation of the court’s order, the mother enrolled the child in school in Queens. After a hearing, the court awarded custody to the father and substantial visitation to the mother. This Court stayed enforcement of the order and continued residential custody with the mother. The family court awarded the father temporary visitation.

Holding: The court erred in awarding custody to the father. The record shows that both parties are loving parents and neither is unfit. The children’s attorney, noting that both had flaws and good points, recommended that the children remain with their mother in the interest of stability. The father’s house was in foreclosure. The court improperly considered the mother’s work attire in assessing her credibility. The court considered that the mother was married to another man during the parties’ relationship, but did not note the father’s similar issues. And the father’s criminal record, including two felonies, involved serious crimes. The conclusion that the mother was willing to cut the father out of the children’s lives lacked record support. The best interest of the children is to give custody to their mother, who has been their primary caretaker. *See Eschbach v Eschbach*, 56 NY2d 167, 171. The father’s liberal visitation should continue, and a permanent visitation arrangement should be set. Order reversed, mother’s petitions granted, father’s cross petitions denied, and matter remitted for further proceedings before a different judge. (Family Ct, Suffolk Co [Hoffman, J])

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

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

People v Galea, 54 AD3d 686, 863 NYS2d 695 (2nd Dept 2008)

The defendant pleaded guilty to first-degree burglary. During the plea, the court learned that the defendant was on four psychiatric medications, including at least one antipsychotic, and that pending trial, he spent a significant amount of time in a psychiatric hospital. The defendant had a long history of serious mental illness and was hospitalized a number of times, including on the day of the burglary. Three months after the plea, at the request of new counsel, the court ordered a CPL 730.30 examination. The examining psychiatrist and psychologist both determined that the defendant was unfit to proceed. The court ordered a reconstruction hearing, but found unsubstantiated the defendant’s assertion that he lacked the capacity to enter a plea.

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Holding: The court erred in failing to order an examination of the defendant's competency at the time of the plea proceeding pursuant to CPL 730.30(1) and in denying the defendant's motion to vacate his plea. The presumption of competency cannot be rebutted merely by showing a history of mental illness. *See People v Hansen*, 269 AD2d 467. Here, despite defense counsel's statement that the defendant was "doing much better" after his most recent hospitalization, the court had reasonable grounds to question the defendant's competency and should have ordered an examination. *See People v Galandreo*, 293 AD2d 756, 756. The reconstruction hearing evidence was inconclusive; the examining psychiatrist and psychologist could not testify as to the defendant's mental state at the time of the plea, nor could the physician who treated the defendant while he was incarcerated. Because it was impossible to retrospectively determine the defendant's competency at the time of the plea, his plea must be vacated. *See People v Hasenflue*, 48 AD3d 888, 888. Judgment reversed, plea vacated, and matter remitted for further proceedings on the indictment. (County Ct, Nassau Co [DeRiggi, J (plea); Brown, J (sentence)])

Counsel (Right to Counsel) COU; 95(30) (35)
(Right to Self-Representation)

Juveniles (Right to Counsel) JUV; 230(130)

Matter of McGregor v Bacchus, 54 AD3d 678, 863 NYS2d 260 (2nd Dept 2008)

Holding: The court erred in failing to determine whether the appellant validly waived his right to counsel. When the appellant appeared in this family offense proceeding, his assigned counsel questioned whether his financial circumstances made him ineligible for assigned counsel. After conducting an inquiry, the court determined that the appellant was not eligible because he owned his own business. In response, the appellant said that he would represent himself since he could not afford to hire an attorney and the court, without further inquiry, relieved assigned counsel and permitted the appellant to represent himself. As a party to a Family Court article 8 proceeding, the appellant had the right to be represented by counsel. *See* Family Court Act 262(a)(ii); *Matter of Guzzo v Guzzo*, 50 AD3d 687. By not determining whether the appellant understood the value of the right to counsel and the disadvantages of self-representation before allowing him to proceed pro se, the court did not conduct the necessary "searching inquiry" of the appellant. *See People v Slaughter*, 78 NY2d 485, 491. Order of protection reversed, matter remitted for new hearing and determination after a proper inquiry, and pending a new determination, order of protection shall remain in effect as temporary order of protection. (Family Ct, Kings Co [O'Shea, J])

Trial (Mistrial) (Verdicts) TRI; 375(30) (70)

People v Simms, 54 AD3d 691, 863 NYS2d 250 (2nd Dept 2008)

The defendant was convicted of two counts of first-degree robbery. After the verdict, at defense counsel's request, the jury was polled. When juror number 10 was asked whether it was her verdict, she responded, "'[w]ell, it is my verdict, although I feel like I was pressured to make that decision.'" When asked by the court, outside of the presence of the other jurors, what she meant by pressure, she stated that the other jurors were yelling at her and "'[a]fter eight hours of that you have to give in.'" The court brought the other jurors back and accepted the verdict, discharged the jury, and denied the defendant's motion for a mistrial.

Holding: The court conducted an appropriate inquiry to clarify juror number 10's response during polling. *See People v Mercado*, 91 NY2d 960, 963. Because the juror's response to the court's inquiry undercut her initial assertion that the verdict was hers, however, the court erred in accepting the verdict. *See People v Francois*, 297 AD2d 750, 750-751. The verdict was not the acceptable product of the normal interaction of jurors during deliberations. The need for finality of verdicts and the public policy of discouraging post-trial harassment of jurors is not implicated here since the issue arose prior to the court's acceptance of the verdict. *See Dalrymple v Williams*, 63 NY2d 361, 363-364. Judgment reversed and new trial ordered. (Supreme Ct, Kings Co [Carroll, J])

Dissent: [Santucci, J] "[T]he fact that the other jurors may have prevailed upon, persuaded, or simply convinced this juror to vote 'guilty,' does not, in and of itself, impeach their verdict." *See People v Maddox*, 139 AD2d 597, 598.

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

Sex Offenses (General) SEX; 350(4)

People v Burgess, 54 AD3d 870, 863 NYS2d 376 (2nd Dept 2008)

Holding: The defendant was convicted of first- and second-degree attempted disseminating indecent material to minors and attempted endangering the welfare of a child. "The People assert that the injunction issued by the court in *American Libs. Ass'n v Pataki* (969 F Supp 160 [SDNY 1997]) compels them to request vacatur of the defendant's conviction for attempted disseminating indecent material to minors in the second degree. Accordingly, we vacate that conviction and dismiss that count of the

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indictment on the People's request." Judgment modified, conviction of and sentence for attempted second-degree disseminating indecent material vacated, count dismissed, and judgment affirmed as modified. (Supreme Ct, Queens Co [Rosenzweig, J])

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

Prostitution and Related Offenses (Instructions) (Promoting) **PST; 315(15) (25)**

Matter of Cuomo v Hayes, 54 AD3d 855, 864 NYS2d 103 (2nd Dept 2008)

The petitioners seek to prohibit the respondent county court judge from enforcing an order entered in a pending criminal case against the respondents Barabash and Allen. They were indicted for fourth-degree promoting prostitution for operating a tourism business in New York that offered trips abroad for the purpose of having sex with prostitutes. The court granted Barabash's motion to charge the jury that the prosecution must prove that prostitution was illegal in the Philippines. The history of an amendment to the third-degree promoting prostitution statute showed that a business selling prostitution tours could be prosecuted under the fourth-degree promoting prostitution statute. *See* Senate Mem in Support of L 2007, ch 74, 2007 McKinney's Session Laws of NY, at 1602).

Holding: Prohibition is not an appropriate remedy for even an egregious trial error of substantive law or procedure. *See Matter of Blumen v McGann*, 18 AD3d 870. Even if the reviewing court perceives an abuse of power, prohibition is not a matter of right but is in the sound discretion of the court. *See Matter of Rush v Mordue*, 68 NY2d 348, 354. The petitioners seek collateral review of an alleged egregious error of law; a writ of prohibition does not lie against the respondent judge. *See Matter of Holtzman v Goldman*, 71 NY2d 564, 569-570. Contending that the trial court is acting ultra vires based on a legal interpretation of a statute does not justify this extraordinary remedy, even if the error is ultimately nonreviewable by way of appeal. *See Matter of State of New York v King*, 36 NY2d 59, 63. Barabash's motion to dismiss the indictment is not properly before this court. *See* CPL 210.20. Article 78 petition denied and proceeding dismissed, and motion to dismiss the indictment denied.

Juveniles (Custody) (Parental Rights) (Visitation) **JUV; 230(10) (90) (145)**

Matter of Danzy v Jones-Moore, 54 AD3d 858, 863 NYS2d 761 (2nd Dept 2008)

Holding: The court properly awarded custody to the children's maternal aunt and uncle and denied the father visitation. To defeat a parent's superior right of custody, a nonparent has the burden of proving that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other similar extraordinary circumstances. *See Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546. A best interests of the child determination is only reached after the court finds the existence of extraordinary circumstances. *See Matter of Jamison v Chase*, 43 AD3d 467. "[E]xtraordinary circumstances exist here based on the psychological and emotional trauma suffered by the children as a result of the murder of their mother by their stepfather, coupled with the father's lack of an ongoing relationship with the children due to his absence from their lives, whether intentional on his part or not, for approximately three years." The court properly concluded that granting custody to the children's maternal aunt and uncle was in their best interests because they lived in the children's community, were actively involved in their lives while their mother was alive, and provided appropriate care to the children after their mother died. The court did not abuse its discretion in denying visitation to the father when it made its order. Order affirmed. (Family Ct, Suffolk Co [Freundlich, J])

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

Sentencing (Hearing) (Resentencing) (Youthful Offenders) **SEN; 345(42) (70.5) (90)**

People v Lodge, 54 AD3d 875, 863 NYS2d 816 (2nd Dept 2008)

The defendant pleaded guilty to first-degree sexual abuse and waived his right to appeal in exchange for a sentence of six months imprisonment, plus probation. The court agreed to consider whether it would grant the defendant youthful offender treatment and the prosecution promised not to take a position at sentencing as to the youthful offender issue. At sentencing, the prosecution strongly opposed giving the defendant youthful offender treatment. The defendant failed to object and did not seek to withdraw his plea, but defense counsel did strenuously argue for youthful offender treatment, which the court denied.

Holding: The defendant's waiver of his right to appeal does not bar consideration of the prosecution's post-plea conduct. *See People v Stowe*, 15 AD3d 597. Although the defendant failed to preserve the issue, it is reviewed in the interest of justice. "[T]he action of the People in arguing to the court that the defendant should not receive youthful offender treatment, after explicitly promising not to do so, was blatantly unfair and offends our sense of justice and integrity." At resentencing, the

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prosecution "shall abide by its promise to state that they take no position with regard to the granting of youthful offender treatment to the defendant." Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted for resentencing before a different justice. (Supreme Ct, Queens Co [Grosso, J])

Evidence (General) (Hearsay) (Missing Witnesses) **EVI; 155(60) (75) (86)**

People v Steward, 54 AD3d 880, 864 NYS2d 488 (2nd Dept 2008)

The defendant was convicted of third-degree criminal sale and criminal possession of a controlled substance for the sale of crack cocaine to a confidential informant. The prosecution reported that the informant refused to testify because he was threatened by a young male and his brother was threatened by a man, and that the day the defendant learned the identity of the informant, he made six phone calls to three different numbers. The court ordered a *Sirois* hearing (*see Matter of Holtzman v Hellenbrand*, 92 AD2d 405), at which a detective testified about the threats and the calls. The court found the informant's grand jury testimony admissible. Later that day, defense counsel offered to produce the mother of the defendant's children to confirm that the defendant called her on the day in question. When the prosecution noted that at least one of the other two phone numbers belonged to a male, defense counsel offered to identify names corresponding with the other numbers called. The court declined to reopen the hearing.

Holding: The prosecution failed to meet its burden of proving by clear and convincing evidence that the defendant was linked to the threats that caused the informant's unavailability. *See People v Cotto*, 92 NY2d 68, 76. There was no evidence of a prior history of coercion and the defendant's pretrial incarceration limited his ability to arrange such threats. That the defendant made calls to one or possibly two males from jail was insufficient to meet the heavy burden of proof. Further, by refusing to reopen the *Sirois* hearing, the court deprived the defendant of his right to present evidence to refute the contention that he was responsible for the threats. *See People v Johnson*, 93 NY2d 254. The court erred in refusing to admit into evidence a supplemental police report and a prior inconsistent statement of a detective who had the confidential informant under surveillance for which the defendant laid the proper foundation. Judgment reversed and new trial ordered. (County Ct, Nassau Co [Honorof, J])

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

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

People v Pomie, 55 AD3d 630, 865 NYS2d 134 (2nd Dept 2008)

The defendant attacked the complainant for several minutes and then left, returning five minutes later to attack the complainant again. When he left the second time, witnesses came to help the unconscious complainant. The defendant returned a third time and after telling the witnesses that the complainant was "gay" and had made a flirtatious comment to him, he kicked the complainant in the head. The court submitted four counts to the jury, first-degree assault and first-degree assault as a hate crime based on depraved indifference to human life, and second-degree assault and second-degree assault as a hate crime, both of which require intentional conduct. During deliberations, the jury asked the court whether, if it concluded that the defendant acted intentionally, it could find that he acted recklessly. The court responded that it was up to the jury, as the fact-finder, to decide that question and that the court could only give the jury the law that it must apply. Defense counsel did not object to the court's response or to the verdict convicting the defendant of first-degree assault and first-degree assault as a hate crime.

Holding: Although the issues are unpreserved, they reviewed in the interest of justice. The evidence was legally insufficient to support the defendant's conviction, failing to show the rare and extraordinary circumstances necessary to elevate the assault to the level of depravity and indifference to human life. *See People v Russell*, 34 AD3d 850, 851. The court committed reversible error by failing to provide a meaningful answer to the jury's question. *See* CPL 310.10; *People v Kisoon*, 8 NY3d 129. Judgment reversed, sentence vacated, first-degree assault and assault first degree as a hate crime dismissed, and matter remitted for new trial on second-degree assault counts. (Supreme Ct, Kings Co [Dowling, J])

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

People v Powell, 55 AD3d 632, 865 NYS2d 319 (2nd Dept 2008)

Holding: The court erred in failing to conduct a sufficient inquiry pursuant to *People v Hicks* (98 NY2d 185), before concluding that the defendant violated the plea condition requiring him to be truthful with the probation department and imposing an enhanced sentence. When the defendant pleaded guilty to first-degree manslaughter, he admitted that he intentionally killed the decedent by hitting him with a pool cue and stabbing him. After the allocution, he said he understood the conditions in

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question. In his probation interview, the defendant said that the decedent threatened his family and came after him with a machete before he hit the decedent with the pool cue. At sentencing, the prosecution requested the agreed-upon 20 year sentence and the defendant read a statement denying that he committed a crime. The court adjourned the sentencing and said it was considering whether to enhance the sentence based on the statements made to the probation department. At the adjourned sentencing, the court reiterated that it was considering an enhanced sentence because the defendant told the probation department that it was a justified killing. However, the probation report did not state that the defendant was untruthful or that he denied culpability for the crime. The court denied defense counsel's request for a hearing, and after counsel's argument imposed an enhanced 25 year sentence. The court's interpretation of the defendant's statements was not unreasonable, but the defendant deserved an opportunity to present evidence that his statements did not contradict his plea allocution. Judgment modified, sentence vacated, judgment modified as affirmed, and matter remitted for hearing and determination as to whether the defendant violated the plea agreement and for resentencing. (County Ct, Nassau Co [DeRiggi, J])

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

Sentencing (Enhancement) (Fines) **SEN; 345(32) (36)**

People v Rossetti, 55 AD3d 637, 865 NYS2d 318 (2nd Dept 2008)

The defendant pleaded guilty to first-degree assault and driving while intoxicated.

Holding: The court erred in imposing a fine that was not part of the plea agreement. *See People v Sudbrink*, 35 AD3d 635. Because the decision to impose a fine is discretionary (*see* Vehicle and Traffic Law 1193(1)(c)(ii)), on remittitur, the court must either impose the bargained-for sentence without the fine or give the defendant an opportunity to withdraw his plea. *See People v Selikoff*, 35 NY2d 227. The defendant was not denied the effective assistance of counsel. Because the defendant waived his right to appeal, his ineffective assistance of counsel claim can only be reviewed to the extent that the alleged ineffective assistance affected the voluntariness of his plea. *See People v Lopez*, 6 NY3d 248. Contrary to the defendant's argument, defense counsel did object to the enhanced sentence. And the defendant received an advantageous plea and the record does not cast doubt on counsel's apparent effectiveness. *See People v Ford*, 86 NY2d 397. Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted. (County Ct, Putnam Co [Miller, J)

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

Weapons (General) (Possession) **WEA; 385(22) (30)**

People v Douglas, 55 AD3d 750, 865 NYS2d 328 (2nd Dept 2008)

Holding: The court erred in ordering the defendant to register with the New York City Police Department as a gun offender, pursuant to the Gun Offender Registration Act (GORA) (*see* New York City Admin Code 10-601 *et seq*) and comply with the requirements of GORA as a condition of his probation. GORA applies to persons convicted of violating Penal Law 265.02(4) after the effective date of the act, March 24, 2007. The defendant pleaded guilty to violating that section on October 19, 2006, five months before GORA's effective date. Therefore, GORA does not apply to him. *See* New York City Admin Code 10-602(d). Sentence reversed by vacating that portion directing the defendant to register as a gun offender and comply with the requirements of GORA as a condition of probation. (Supreme Ct, Kings Co [Gary, J])

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

People v Aguirre, 55 AD3d 846, 866 NYS2d 293 (2nd Dept 2008)

Holding: The defendant was sentenced, as promised, to a 10-year determinate term of imprisonment. At sentencing, the court stated that the defendant would be subject to a period of post-release supervision by the Parole Board, but did not set the length of the supervision. A note on the order of sentence and commitment signed by the clerk indicates a five-year supervision term. Because the defendant does not want to withdraw her plea, and the court did not pronounce the period of post-release supervision, the case must be remitted for imposing a new sentence that includes a period of post-release supervision. *See People v Sparber*, 10 NY3d 457, 469. Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted for resentencing that includes a period of post-release supervision.

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

Matter of Gilchrest v Patterson, 55 AD3d 833, 866 NYS2d 296 (2nd Dept 2008)

Holding: The court properly denied the mother's custody petition and granted the paternal grandmother's custody petition. A parent's right to custody cannot be

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denied unless a nonparent can demonstrate that the parent relinquished the superior right of custody due to surrender, abandonment, persistent neglect, unfitness, or similar extraordinary circumstances. *See Matter of Bennett v Jeffreys*, 40 NY2d 543, 548. "Here, the paternal grandmother of the now 14-year-old child, who has supported and cared for the child since he was four months old with no contribution from the mother, satisfied her burden of establishing extraordinary circumstances on the basis of an 'extended disruption of custody' during which the mother had 'voluntarily relinquished care and control of the child' to the paternal grandmother (Domestic Relations Law § 72[2][b]; *see Matter of Carton v Grimm*, 51 AD3d 1111, 1113, *lv denied* 10 NY3d 716 . . .)." Because the court is in the best position to evaluate the testimony and the parties, its findings are entitled to great weight. *See Matter of Miller v Shaw*, 51 AD3d 927 *lv den* 11 NY3d 706. The court's determination that the best interests of the child require that she remain with her grandmother has a sound and substantial basis in the record. Order affirmed. (Family Ct, Westchester Co [Davidson, J])

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

People v Stevens, 55 AD3d 892, 867 NYS2d 108 (2nd Dept 2008)

Holding: After a hearing to redetermine the defendant's sex offender risk level (*see Doe v Pataki*, 3 F Supp 2d 456 [SDNY 1998]), the court designated him a level three offender. The court erred in assessing the defendant 15 points for risk factor 11 of the risk assessment instrument (RAI) because there was no evidence presented at the hearing that the defendant abused alcohol or drugs. Thus, the defendant's total score should have been 95 points. The court improperly denied the defendant's request for a downward departure based on his illness. At the hearing, the defendant presented evidence that he suffers from a progressive neurological disease which confines him to a wheelchair. He is unable to use a cane and he cannot do simple tasks, including cooking and showering without assistance. The defendant's testimony that his disease has impaired his ability to experience sexual gratification was not contradicted. "This mitigating factor was not taken into account by either the Commentary to the [Sex Offender Registration Act: Risk Assessment] Guidelines on the individual factors or the RAI. It was also not given sufficient consideration by the court (*see People v Abdullah*, 31 AD3d [515] at 516 . . .)." Because his illness prevents him from taking physical action to pursue sexual desires, he does not pose a significant risk to the community. Order reversed and the defendant is designated a level one sex offender. (Supreme Ct, Suffolk Co [Mullen, J]) ⚖

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vetoed a bill (S5565/A7863) that would have given New York's 4,200 court officers police officer status. (www.law.com, 12/19/2008.) In Veto Message No. 180, Governor Paterson noted that such status should be limited to officers "whose primary responsibilities are to exercise traditional police functions including the investigation and apprehension of criminals." Governor Paterson also expressed concern about the costs associated with police officer status, including increased training and expanded benefits, which the Division of the Budget estimated at tens of millions of dollars. The New York State Supreme Court Officers Association denied that the bill would have resulted in increased state costs.

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