



# Public Defense Backup Center REPORT

Volume XXIV Number 1

January–February 2009

A PUBLICATION OF THE DEFENDER INSTITUTE

## Defender News

### National Research Council Finds Serious Deficiencies in Forensic Science

On February 18, 2009, the National Research Council released its report, *Strengthening Forensic Science in the United States: A Path Forward*. The Council’s Committee on Identifying the Needs of the Forensic Science Community concluded that “with the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown able to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.” (<http://tinyurl.com/amyx74>.) The full report is available at [www.nap.edu/catalog.php?record\\_id=12589](http://www.nap.edu/catalog.php?record_id=12589).

The Committee found that substantial research is needed to validate basic premises and techniques, assess limitations, and discern the sources and magnitude of error in non-DNA forensic disciplines. Committee findings regarding specific types of forensic evidence include: claims that fingerprint analysis has a zero error rate are not plausible and “ACE-V [Analysis, Comparison, Evaluation and Verification method] does not guard against bias; is too broad to ensure repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results”; “[a] fundamental problem with toolmark and firearms analysis is the lack of a precisely defined process” and “the scientific knowledge base for toolmark and firearms analysis is fairly limited”; and there is no evidence that microscopic hair analysis alone can reliably associate a hair with a particular individual.

### Admissibility of Forensic Science Evidence

“[T]here are serious issues regarding the capacity and quality of the current forensic science system; yet, the courts continue to rely on forensic evidence without fully understanding and addressing the limitations of different forensic science disciplines. . . . [E]very effort must be made to limit the risk of having the reliability of certain forensic science methodologies judicially certified before the techniques have been properly studied and their accuracy verified.”

The Committee concluded that admission and reliance on forensic evidence in criminal trials should be guided by two criteria: “the extent to which the forensic science discipline is founded on a reliable scientific methodology that lets it accurately analyze evidence and report findings; and the extent to which the discipline relies on human interpretation that could be tainted by error, bias, or the absence of sound procedures and performance standards.” Testimony regarding forensic science lab reports must clearly describe the limits of the analysis: “The simple reality is that interpretation of forensic evidence is not infallible—quite the contrary, said the [C]ommittee. Exonerations from DNA testing have shown the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis.” Despite these conclusions, the Committee did not take a position on whether courts should review past convictions.

### Committee Recommendations

The Committee recommends the establishment of a new, independent National Institute of Forensic Science to lead research efforts, establish and enforce standards, develop standardized terminology

### Contents

Defender News.....	1
Conferences & Seminars.....	6
From My Vantage Point.....	7
Access to Justice Hearing Testimony.....	8
Job Opportunities .....	11
Case Digest:	
NY Court of Appeals.....	12
Third Department.....	15
Fourth Department.....	27

INSIDE:  
APPLICATION  
FORM  
DEFENDER INSTITUTE  
BASIC TRIAL SKILLS PROGRAM  
June 7–13, 2009

and reporting of results, and oversee educational standards. The Committee also recommends that public forensic laboratories be independent from or autonomous within police departments and prosecutors' offices to avoid conflicts between the differing missions of forensic science labs and law enforcement agencies.

### **Reaction to the Report**

Links to news reports about the NRC report are available on the Innocence Project's blog at <http://www.innocenceproject.org/news/Blog.php>. In an op-ed piece, Jennifer Mnookin, law professor and vice-dean of UCLA Law School, argued that "[a]t a bare minimum, judges should immediately prohibit experts from testifying to impossibilities such as 'an error rate of zero' or asserting that they are capable of making 100% certain identifications. In other cases, judges would be well advised to throw out forensic science altogether—not forever, but until adequate research establishes, for example, that the conventional wisdom about evidence of arson is empirically valid, or until fingerprint and ballistics experts provide adequate proof that their real-world error rate is reasonably low. Courts should require forensic experts to back up their testimony with empirical evidence that they can do what they claim to be able to do." ([www.latimes.com](http://www.latimes.com), 2/19/2009.)

Despite the lack of recommendations regarding how the criminal justice system should deal with past, current, and future cases (in the near-term) involving forensic science, members of the defense community should use the Committee's findings to consistently argue against the introduction of forensic science evidence and testimony. Defense counsel pursuing forensic evidence challenges can contact the Backup Center for assistance and resources.

### **Study of Juror Response to Forensic Science Testimony Begins**

Arizona State University received a grant from the National Institute of Justice to study how jurors respond to a variety of forensic identification evidence, including fingerprints, toolmarks, handwriting, and tire tracks. ([http://asunews.asu.edu/20090108\\_justicegrant](http://asunews.asu.edu/20090108_justicegrant).) The study is expected to last two years and will be run by Professor Dawn McQuinston-Surrett and law professors Jonathan "Jay" Koehler and Michael Saks from the Sandra Day O'Connor College of Law. "The need for this type of research has been made salient in recent years by challenges to the accuracy of some of the forensic sciences, such as fingerprint analysis, and also by a realization that faulty forensic identification evidence sometimes plays an important role in the conviction of innocent people," notes McQuinston-Surrett, who is the director of the Legal Psychology Research Laboratory at ASU.

### **Sentencing Commission Issues Final Report**

Tasked with reviewing New York's sentencing laws and recommending sentencing reforms, the Commission on Sentencing Reform issued its final report in early February. ([http://criminaljustice.state.ny.us/pio/csr\\_report2-2009.pdf](http://criminaljustice.state.ny.us/pio/csr_report2-2009.pdf).) The 256-page report discusses ways to simplify sentencing laws and offers various recommendations including expanding re-entry efforts, creating a system of graduated sanctions for parole violations, expanding eligibility for the Shock Incarceration Program, improving Willard Drug Treatment Campus programs, and establishing a permanent sentencing commission.

The Commission recommends adopting a primarily determinate sentencing system and proposes specific determinate sentencing ranges for more than 200 non-violent, non-sex, non-drug felony offenses. Although the Commission concluded that community-based substance abuse treatment works and must be available throughout the state to ensure that all suitable candidates are given the opportunity for treatment, due to disagreement among its members, the Commission did not provide a clear path for reforming the state's failed drug sentencing policies. Of the several reform options discussed, a majority of Commission members supported the judicial diversion model, which would allow judges to offer diversion to certain drug-addicted, first and second non-violent felony offenders without prosecutorial consent. Offenders would receive 12 to 24 months of drug treatment and would be supervised by the local probation department (first-time offenders) or the Division of Parole (second felony offenders).

#### **Public Defense Backup Center REPORT**

A PUBLICATION OF THE DEFENDER INSTITUTE

Volume XXIV Number 1

Jan-Feb 2009

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>. All rights reserved. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that its contents do not constitute the rendering of legal or other professional services. All submissions pertinent to public defense work in New York State and nationwide are welcome.

THE REPORT IS PRINTED ON RECYCLED PAPER

While some legislative leaders consider the report a first step toward drug law reform, Assembly Speaker Sheldon Silver offered sharp criticism and some Democratic legislators indicated that the recommended reforms do not go far enough. (www.nytimes.com, 2/3/2009.) In a letter to Commission Chair Denise O'Donnell, Silver expressed disappointment with the report and characterized the report as "a historic missed opportunity to advance meaningful reform of New York's antiquated 'Rockefeller-era Drug Laws'." Silver indicated that drug law reform must include increased judicial discretion, elimination of mandatory minimum sentences for class B felony drug offenses and second time, non-violent drug offenders, and a focus on probation, alternatives to incarceration, and treatment. (<http://assembly.state.ny.us/Press/20090203/index.pdf>)

NYSDA's Executive Director, Jonathan E. Gradess, offered broader criticism of the report and the underlying assumptions of the state's sentencing laws. In his February 11 op-ed piece, which was originally published in the *Times Union* and is reprinted in this issue's *From My Vantage Point* column, Gradess argued that the presumption of incarceration must be eliminated, and recommended returning full judicial discretion to sentencing judges.

## ***Court of Appeals Reaffirms Constitutionality of Persistent Felony Offender Law***

In *People v Quinones*, No. 14, 2009 Slip Op 01318 (2/24/2009), the Court of Appeals held that New York's persistent felony offender statute does not violate the Sixth Amendment. See also *People v Rivera*, 5 NY3d 61 cert den 546 US 984 (2005). The Court rejected the defendant's argument that *Cunningham v California*, 549 US 270 (2007), renders the persistent felony offender sentencing scheme unconstitutional. The Court found critical the distinction between New York's sentencing scheme and those held unconstitutional in *Cunningham*, *Apprendi v New Jersey*, 530 US 466 (2000), *Ring v Arizona*, 536 US 584 (2002), *Blakely v Washington*, 542 US 296 (2004), and *United States v Booker*, 543 US 220 (2005). While the unconstitutional schemes "effectively provided for judicial factfinding of an element(s) of an offense as a prerequisite to enhancing a sentence beyond the relevant sentencing range . . .", New York's sentencing scheme subjects defendants to enhanced sentences based solely on the existence of two prior felony convictions and it is only after eligibility is determined that judges have the discretion to choose the appropriate sentence within a sentencing range prescribed by statute. A full summary of the *Quinones* decision will be in the next issue of the *REPORT*.

Those interested in more information on challenges to New York's persistent felony offender sentencing scheme should read Andrew C. Fine's practice tip article,

*Preliminary Assessment of Cunningham v California's Impact on Persistent Felony Offender (PFO) Provisions*, published in the Jan-Feb 2007 issue of the *REPORT* ([www.nysda.org/07\\_Jan-Feb\\_2007\\_REPORT.pdf](http://www.nysda.org/07_Jan-Feb_2007_REPORT.pdf)), and a recent post on the Sentencing Law and Policy blog (<http://preview.tinyurl.com/dmsbtl>).

## ***Sex Offense Updates—SOMTA and Residency Restrictions***

### ***OMH Releases Second Annual Report on SOMTA***

In January 2009, the NYS Office of Mental Health (OMH) issued its second annual report on the implementation of Mental Health Law article 10, covering the period between November 1, 2007 and October 21, 2008. (<http://preview.tinyurl.com/csp5xm>.) The report provides details about OMH's review process and gives some clues as to who may be referred for civil management: individuals whose cases were referred to the Attorney General's Office have "more extensive sexual offense histories, more frequent incarceration, higher risk scores, and were less likely to have parole time remaining on their sentences than those not referred for civil management." Notable statistics from the report include: 5.6% of the individuals referred to OMH for review did not have a conviction for a qualifying offense, *ie.*, they were not subject to article 10; 9.3% (139) of eligible, referred individuals were recommended for civil management; 80% of the 56 individuals who have been civilly committed agreed to confinement without a trial. Of the individuals who were not referred for civil management, 17% were rearrested during their first year of release, but only 2% were rearrested for a sexual offense, and OMH remarked in a footnote that "[i]t is worth noting that sexual recidivism appears to have decreased over the past few decades."

To reduce the cost of article 10 proceedings, OMH suggests using video conferencing for probable cause hearings. The report refers to a 2008 OCA report authored by former Chief Judge Kaye and Chief Administrative Judge Pfau which recommended greater use of video conferencing, even when the defendant opposes such use. The OCA report is available at <http://preview.tinyurl.com/b9bea5>.

The report discusses the limited use of strict and intensive supervision and treatment (SIST), which is an alternative to civil confinement. "Housing and treatment availability remain significant challenges to SIST plan development. A large portion of counties and municipalities throughout the State have residency restrictions for sex offenders. While such restrictions are intended to improve public safety, research overwhelmingly indicates that residency restrictions neither reduce recidivism nor increase public safety. These findings are not surprising

given that unsuitable housing in locations that are remote from social services, employment opportunities, and support systems can interfere with the treatment and supervision of sex offenders.”

### **Residency Restrictions: Effectiveness Challenged; Preemption of Local Laws**

Sex offender residency restrictions have received increased attention in the past several months, with the release of new reports challenging the effectiveness of such restrictions and new decisions holding that New York State law preempts local restrictions. Those interested in information about recent effectiveness studies can read:

Jill Levenson, Paul Zandbergen & Timothy Hart, *Residential Proximity to Schools and Daycare Centers: Influence on Sex Offense Recidivism—An Empirical Analysis* (Dec. 2008) (available at <http://preview.tinyurl.com/d7rvkqj>);

G. Duwe, W. Donnay & R. Tewksbury, *Does Residential Proximity Matter? A Geographical Analysis of Sex Offense Recidivism*, *Criminal Justice and Behavior* 35(4), 484 (2008); and

M. Meloy, S. Miller & K. Curtis, *Making Sense out of Nonsense: The Deconstruction of State-Level Sex Offender Residence Restrictions*, *American Journal of Criminal Justice* 33(2), 1066-2316 (2008).

On January 22, 2009, Rockland County Supreme Court Judge William A. Kelly held that state law preempted Rockland County’s sex offender residency restriction law (Local Law No. 1 of 2007). *See People v Oberlander*, NYLJ, 1/30/2009. The defendant had been charged with a probation violation for violating the county law that prohibited sex offenders from residing, working, or loitering in a child safety zone, which is defined as “one thousand feet of the property comprising a public or private, elementary, or middle or high school, child care facility, park, playground, public or private youth center or public swimming pool.” The court noted New York’s detailed legislative scheme for sex offender registration, and discussed the residency provisions in the Sex Offender Registration Act, which regulate present and ongoing conduct of sex offenders, and Chapter 568 of the Laws of 2008, which gives local probation departments authority to approve housing for sex offenders on probation and requires those departments to evaluate housing using five factors, not bright line linear measurements. Judge Kelly concluded: “As the State has expressed its intention to

preempt the area, and, the ordinance conflicts with State law, Local Law No. 1 of 2007 is invalid. A Violation of Probation based upon such law cannot be maintained.” The decision cites NYSDA Staff Attorney Al O’Connor’s article *State Preemption of Local Sex-Offender Residency Laws*, published in the *New York Law Journal* on November 24, 2008.

Following on the heels of *Oberlander*, Albany City Court Judge Thomas K. Keefe granted the defendant’s motion to dismiss the charge that he violated Albany County’s residency law, Law No. 8 for 2006. *See People v Blair*, 2009 NY Slip Op 29068 (2/18/2009). “The State’s legislative pronouncements to date, unquestionably establish, to the Court’s satisfaction, that the regulation and management of sex offenders (including sex offender residency restrictions) is the exclusive province of the State, and thus, Local Law No. 8 is preempted by State Law and will not be given effect.”

Reaction to the *Oberlander* and *Blair* decisions has been mixed. On January 28, Senate Majority Leader Malcolm Smith and Senator Craig Johnson introduced a bill, S.1300, that would prohibit sex offenders from residing within 1000 feet of any school building regularly used for instructional purposes, a child day care, or a park for the greater of 10 years or the duration of probation, parole, conditional release, or post-release supervision. Several sex offender residency bills have also been introduced in the Assembly, including A.3662, A.3906, and A.5236. Based on the *Oberlander* decision, the Ulster County legislature has decided not to go forward with a proposed sex offender residency law. ([www.dailyfreeman.com](http://www.dailyfreeman.com), 2/18/2009.) But the Town of Tully in Onondaga County adopted a local residency law on February 11. ([www.syracuse.com](http://www.syracuse.com), 2/15/2009.) Nassau and Suffolk counties have indicated that they will continue to enforce their residency laws. ([www.newsday.com](http://www.newsday.com), 1/27/2009.) And the Albany County District Attorney’s office has stated that it will prosecute violations of the county’s residency law “unless and until the law is changed” and Albany City police will continue to arrest violators. ([www.timesunion.com](http://www.timesunion.com), 2/20/2009.)

### **Wrongful Conviction Task Force Preliminary Report Released**

The New York State Bar Association’s Task Force on Wrongful Convictions has issued a preliminary report detailing the causes of wrongful convictions and suggesting criminal justice reforms. The report is available at <http://tinyurl.com/dyf2fm>. The Task Force’s conclusions are based on its review of 53 wrongful convictions in New York State. Task Force Chair, Criminal Court Judge Barry

M. Kamins, commented: "If you're dealing in human lives, and 53 people are innocent and serving time for crimes they didn't commit, that is unacceptable. One is too many, and 53 in New York is unacceptable." (www.nytimes.com, 1/31/2009.)

Six primary causes of wrongful conviction were identified: errors by government actors (prosecutors, law enforcement, and judges); misidentification of the accused; mishandling of forensic evidence; use of false confessions; use of jailhouse informants; and errors by defense counsel, in particular the failure to fully investigate or to offer alternative theories and/or suspects. Misidentification, government actor error, and errors in handling or preservation of forensic evidence occurred with the highest frequency.

The Task Force proposes improvements in *Brady* disclosure, including pre-trial conferences to resolve turn-over disagreements and a statewide procedure for identifying and reviewing intentional and reckless *Brady* and truthful evidence rule violations; improved identification procedures and evidence, including double blind and sequential identifications and eyewitness identification expert testimony and jury instructions; mandatory standards for collecting, processing, evaluating and storing forensic evidence and forensic science training for prosecutors, defense attorneys, and judges; and pretrial reliability hearings and corroboration of informant testimony. Defense practice recommendations include: adoption of representation standards; assigned counsel plan administrators must scrutinize attorneys seeking assigned counsel appointments, and should be given resources to enable them to monitor attorney performance; requiring criminal defense attorneys to take a certain number of CLE hours devoted to subjects relevant to criminal defense representation; and increasing resources for organizations that currently operate a resource center for public defenders and assigned counsel. The recommendations do not include enforcement of defense representation standards, however.

After the report was released, the Task Force held two public hearings. NYSDA's Executive Director Jonathan E. Gradess testified at the February 24 hearing in Albany. His testimony stressed the importance of well-resourced public defense services in preventing wrongful convictions. He urged the Task Force to add to its many positive recommendations creation of an Independent Public Defense Commission heading a statewide, fully and adequately state-funded public defense system. Gradess noted that the State Bar is already on record supporting the Kaye Commission's recommendation of this reform.

The Task Force will present its report to the NYSBA House of Delegates on April 4, which will vote on whether to adopt it.

## ***New Law Requires Prompt Judicial Response to Probation Violation Charges***

On January 27, Governor Paterson signed into law Chapter 652, which amends portions of Criminal Procedure Law sections 410.30, 410.40, 410.60, and 410.70, as well as Executive Law section 221. (www.ny.gov/governor/press/press\_0130091.html.) The new law requires a court to make a decision on a probation officer's request for a declaration of delinquency within 72 hours of receipt, and if a probation officer requests a probation warrant, the court must issue or deny the warrant or take other lawful action including issuing a notice to appear within 72 hours. When the court issues a notice to appear, the notice must direct the defendant to appear within 10 business days of the order. If the court issues a probation warrant under CPL 410.40, it must be entered into the statewide law enforcement electronic criminal justice network within 48 hours of receipt by the police or peace officer to whom it is addressed if the probationer has not been arrested by that time. Chapter 652 takes effect on November 1, 2009.

## ***Recent Second Circuit Decisions***

### ***Reasonable Suspicion of Traffic Violation Sufficient for Stop***

In *United States v Stewart*, 551 F3d 187 (2d Cir 2009), the Second Circuit reversed the district court's order granting the defendant's suppression motion. The police stopped a livery cab that was at a red light after allegedly seeing the cab's front wheels encroach on the crosswalk, a violation of Vehicle and Traffic Law. One of the officers asked the defendant, a passenger in the cab, to show his hands. The defendant complied, but then hid his right hand behind himself, prompting the officer to order him out of the car. When the defendant did not promptly comply with the order to place his hands on the trunk of the cab, the officer forced his hands on the trunk and the defendant told the officer he had a gun and the officer found a gun in the defendant's right rear pocket.

The district court concluded that there was no traffic violation and held that the defendant's Fourth Amendment rights were violated because the officers did not have probable cause to believe that the cab violated the state's traffic law and did not have a reasonable suspicion that "criminal activity may be afoot." The Second Circuit concluded that the district court applied the wrong legal standard. "[W]e now hold unambiguously that the reasonable suspicion of a traffic violation provides a sufficient basis under the Fourth Amendment for

*(continued on page 35)*

# Conferences & Seminars

**Sponsor:** National Defender Investigator Association  
**Theme:** 2009 NDIA National Conference  
**Dates:** April 2–3, 2009  
**Place:** Daytona Beach, FL  
**Contact:** NDIA: tel (860) 635-5533; email [ndia@cox.net](mailto:ndia@cox.net); website [www.ndia.net](http://www.ndia.net)

---

**Sponsor:** National Association of Criminal Defense Lawyers & 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](mailto:gerald@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

---

**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 [Andrew.Askland@asu.edu](mailto:Andrew.Askland@asu.edu); website <http://LST.law.asu.edu>

---

**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](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)**

---

**Sponsor:** New York State Bar Association  
**Theme:** Family Court Practice—Custody  
**Dates:** April 20–21, 2009  
**Places:** April 20: Albany; April 21: Buffalo, Melville, New York City, Rochester, Syracuse, and Westchester  
**Contact:** NYSBA: tel (518) 463-3200; website [www.nysba.org](http://www.nysba.org)

**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](mailto:akvile@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

---

**Sponsor:** New York County Lawyers' Association (NYCLA)  
**Theme:** Criminal Trial Advocacy Institute: Criminal Defense Practice, Learning the Basics  
**Dates:** April 23–24, 2009  
**Place:** NYCLA, New York City  
**Contact:** NYCLA: tel (212) 267-6646; website [www.nycla.org](http://www.nycla.org)

---

**Sponsor:** New York State Bar Association  
**Theme:** DWI on Trial—The Big Apple IX Seminar  
**Dates:** May 7–8, 2009  
**Place:** New York City  
**Contact:** NYSBA: tel (518) 463-3200; website [www.nysba.org](http://www.nysba.org)

---

**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](mailto:imickenberg@nycap.rr.com)

---

**Sponsor:** **New York State Defenders Association**  
**Theme:** **Defender Institute Basic Trial Skills Program**  
**Dates:** **June 7–13, 2009**  
**Place:** **Troy, NY**  
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)**

---

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

# From My Vantage Point

By Jonathan E. Gradess\*

[**Ed. Note:** This article, a reaction to the New York State Sentencing Commission's final report, was originally published as an op-ed in the Times Union on February 11, 2009. A transcript of Jonathan Gradess' July 18, 2007 testimony before the Sentencing Commission is available at [www.criminaljustice.state.ny.us/legalservices/sentencingreform.htm](http://www.criminaljustice.state.ny.us/legalservices/sentencingreform.htm).]

## MAKE JAIL TIME A LAST RESORT

The recent report of the New York State Sentencing Commission, merely toying with sentencing reform, mirrors our past rather than breaking new ground. The Legislature should reject the report, send it to the State Archives, and begin anew.

Despite the best efforts of many administrators, prisons are punitive, negative, alien institutions that deliberately deprive people of normal experience. Prisoners are led away from accountability and learn to live with a false façade. They absorb massive unfairness without recourse and must obey strict rules without explanation. Prison terms are too long, damaging both low- and high-risk prisoners. The Sentencing Commission recommendations would continue this system and its policies.

New York is trapped in a time warp of mandatory sentencing. We have a few programs that do not involve prison, which we thoughtlessly call "alternatives to incarceration." The very words suggest that a presumption of incarceration must be overcome by one seeking community treatment. Our system sentences thousands of people to prison who do not need to be there.

In any reform, there should be an expansion of community reintegration for offenders, and sentences that reflect the genuine needs of victims. Offenders should be held accountable, not "warehoused." By missing this, the Sentencing Commission has merely regifted the present model.

While the pretty ribbons—the suggestion of some graduated sanctions, a call to end plea-bargaining restrictions and a few other items—are noteworthy, the total effort is trapped in a history that should be recalled.

For a decade, beginning in 1960, a state commission studied our state's criminal justice system and made recommendations for revising our penal law and criminal procedure law. Between 1967 and 1971, the Legislature revised those statutes accordingly. These two statutes, read together, allowed probation or other community-based treatment as a sentence for any offense less than murder or kidnapping, and created procedures to facilitate non-prison sentences. Pre-sentence reports by probation, the defense and prosecution, and presentence con-

ferences and hearings held by judges were designed to foster creative accountable sentences.

In less than two years, this environment, rich with opportunity to decide individual cases based on individual circumstances, came to an abrupt halt. On Sept. 1, 1973, new mandatory sentencing procedures came into effect as a result of an Albany political compromise. It is that compromise and the effect of the Sentencing Commission's continued unwillingness to undo it that is really before the Legislature.

We hear so many people talk about the "Rockefeller Drug Laws" that we forget how long they have been here, how many leaders have watched them continue to inflict harm, how little has been done to undo them. They're really the Rockefeller-Wilson-Carey-Cuomo-Pataki-Spitzer-Paterson drug laws.

Gov. Nelson Rockefeller, who died 30 years ago, is not responsible for our current dilemma. We are.

The Rockefeller Drug Law compromise came about after Rockefeller had traveled to Japan, observed how harshly the Japanese dealt with drugs and thought New York should try the idea. He disliked the idea of a mandatory second-felony offender law championed by then Dominick DiCarlo, chair of the Assembly Codes Committee. DiCarlo didn't like the uniform paste of mandatory drug laws. They compromised and passed both measures together.

Overnight, based on the Rockefeller/DiCarlo compromise, the Legislature fashioned a new scheme of mandatory sentencing. In one swoop, it undid the sentencing blueprint that had been laid out after 10 years of study by the Temporary State Commission on Revision of the Penal Law and Criminal Code.

Although many are aware of the evils and blatant unfairness of the mandatory drug laws, few realize that the second-felony offender law in many respects has been worse. It, too, has trapped thousands of men and women in prison who should have been able to receive probation or another non-prison sentence that would benefit them and society.

Since 1972, we have taken a prison system containing 12,000 men and women and built a system to house 70,000. Along the way, we starved the other elements of sentencing—probation, drug treatment and community supervision. Having drained these alternatives of resources, we called them "unavailable," or worse, urged they were ineffectual.

Since 1973, mandatory sentences have proliferated, depriving judges of their power and independence and handing prosecutors nearly unlimited authority in the courtroom. Today, 75 percent to 80 percent of prison commitments are mandatory sentences either because of the statutory charge or through plea agreements. The prosecutor

(continued on page 11)

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

# Access to Justice Hearing Testimony

## **Thomas Giovanni's Testimony Before the New York State Assembly Standing Committees on Codes, Judiciary, Government Operations, and Correction**

[*Ed Note: Thomas Giovanni, Supervising Attorney at the Neighborhood Defender Service of Harlem (NDS), testified during the Access to Justice hearing in Albany on February 24, 2009. NDS is a provider of public defense services in New York City. Mr. Giovanni's written testimony, reprinted with permission, provides a good reminder of the public defense system's long-standing problems and the need for reform.*]

### **THOMAS GIOVANNI'S TESTIMONY CONCERNING INDIGENT CRIMINAL DEFENSE**

#### **A. WHO I AM**

I am Thomas Giovanni. I am a graduate of Morehouse College, an Historically Black College in Atlanta, GA, and a graduate of the Georgetown University Law Center. I began employment with the Neighborhood Defender Service of Harlem (NDS) in September of 2001. I was promoted to supervising attorney in 2005. I have personally represented well over 1500 individuals in the Criminal and Supreme Courts of Manhattan, New York.

#### **B. THE NEIGHBORHOOD DEFENDER SERVICE OF HARLEM**

NDS is a community-based, holistic public defender that has provided free representation to Harlem residents for nearly twenty years. When the office is fully staffed, we have 10 full-time Staff Attorneys, 3 Investigators and 3 Social Workers. NDS represents approximately 4000 clients per year, pursuant to a contract with the City of New York. Our Staff Attorneys carry a mixed caseload of misdemeanors and felonies. Staff Attorneys have case-loads from the high 80's to the low 100's.

At NDS, we believe that we improve our community by providing the best criminal defense we can, and by helping clients to avoid future involvement in the criminal justice system. The former we do by hiring, training and supporting the best attorneys we can. The latter we do by purposefully seeking to address what causes a client to come into contact with the criminal justice system, and attempting to reduce or eliminate that cause, whether it is lack of educational opportunities, family connections, addiction services, employment training or mental health needs.

#### **C. THERE IS NO "CRISIS" IN THE CRIMINAL DEFENSE SYSTEM**

The criminal justice system has many problems, but

to use the word "crisis" tends to suggest that the problems we are discussing today are or were, in any sense, unforeseen, unknown or unknowable, or that in some way, the situation has gone from acceptable to untenable. These are all false notions. By and large, the situation for public defenders has never been acceptable; the harms done to the indigent people subjected to the system should always have been untenable to people of intelligence and good conscience.

Forty-six years after *Gideon*, with millions of dollars spent by a multitude of local, state, and federal authorities, private foundations, research groups and think tanks, all tracking data, conducting seminars, forming commissions, creating policies, taking testimony and creating or repealing legislation-and then to begin the cycle again, we know what is happening. We've known for decades. The question is as it has always been: What are we going to do about it?

#### **D. A LACK OF SYMPATHY DRIVES THIS SYSTEM MORE THAN A LACK OF INFORMATION**

Discussing criminal justice problems as if there is simply a recently-revealed "crisis" or some kind of information deficit, contributes more to the problems than it does to the solutions. Recognition addresses the need of something hidden: more information is the solution to the lack of information, but neither of those are solutions to the problems of our criminal justice system. We must first acknowledge that those of us who work in this field already know what the problems are, because we do. A small thought experiment will illustrate:

Suppose you were to receive a phone call at 7 a.m., from a dear loved one, your grandmother perhaps. She tells you that there's bad news and there's good news. The bad news is that she's been falsely arrested and is being held for arraignment in the local courthouse. She's charged with a very serious crime, but she tells you she didn't call asking for any particular help, but just to let you know where she was in case you checked in on her. The good news, she tells you, is that she knows everything will be straightened out in just a few hours, because she's just been told a few minutes ago that her public defender is on the way.

So: How many of us would rollover and go back to sleep, confident in the knowledge that the government-appointed attorney is well-trained, properly supported by investigation services and social workers, AND not so overburdened with many many other clients, that he or she will be able to do everything we would want done to defend Grandma?

How many of us would race down to the courthouse, and be on the phone, furiously trying to get a private attorney to represent Grandma?

If you're in the second group, you know our public defender system has failed.

We all have a valuation for our own liberty: infinity. If any of us in this room were charged with a crime, we would fight the government with everything we had, and much that we didn't have. We would empty all of our accounts—including our children's college fund—to stay out of prison. We would borrow and beg from friends and family, to secure the best defense we could; the best attorney, the best investigator, and (God forbid) the best mitigation specialist, to ensure that our time in the cage would be as brief as possible. We would do this whether we were factually guilty or innocent. Probably spend more money if we were guilty.

So why is it that when we discuss the identical need for quality defense for the indigent accused (who are disproportionately black, brown or poor) we begin talking about expense and "efficiency"? Either we must have much more faith in the system than I think we do, or we must place much less value in the lives of the indigent accused than we say we do.

The solutions are simple:

1. fewer cases (decriminalization of various categories of crime, reduction in overly-aggressive police practices, where needed)
2. more public defenders
3. fewer clients per public defender.

Solution #3 is what I focus on today.

#### **E. DOES GIDEON'S LEGACY NEED TO BE LEGISLATED MALPRACTICE?**

*Gideon* mandated that every person unable to afford an attorney be appointed one, at the government's expense. Very quickly, that directive came to mean that *every hundred (or more) people* unable to afford an attorney will be appointed an attorney—*just one*.

Defender offices don't set the number of clients each attorney will have. That decision is made when the legislation funding the public defender office is written, or the contract with the defender's office is signed. And every year or so, when the legislation is renewed, or the contract is reviewed, the ratios are known, the situation is understood, by both parties to the contract. Everyone involved knows how many clients will be served, and by how many attorneys. Where that ratio is 100:1 or worse, you have clear cases of what I describe as "legislated malpractice." I am not limiting myself to a legalistic definition of "malpractice," such as might be used by a State Bar disciplinary committee. I mean to discuss a more practical, real-world understanding of the serious lack of communication, general information gathering and investigation that are endemic to the system, and that ought to be part of the definition of malpractice, but which are allowed today, so long as those conditions are limited to the indigent accused. I'm speaking of the conditions that would

get us out of bed to go rescue Grandma in the hypothetical above.

Obviously, a major difficulty in delivering effective representation is the number of clients each individual defender is forced by legislation or contract to represent. No matter how competent or committed a defender is, at some point, the number of clients overwhelms the defender's ability to do the job. Yet in city after city, county after county, state after state, the legislatures set the conditions for public defender offices such that malpractice is the only possible result.

Sometimes we public defenders dance around this difficult truth: we commit malpractice every day. We don't want to say anything negative about ourselves, or each other, so we often end up saying things like "My office is fine, because we're all brilliant, dedicated people who manage to get it done at a high level, but I understand that in [the other jurisdiction] things are horrible..." At one point in my career, I had one hundred and forty-five open cases. That's a high number for New York County, but hardly the highest ever. It's not even a very high number for some of the other counties in New York, from what I've heard from talking with other defenders. Let me be clear: there is no way to provide effective individual criminal representation for a hundred people at a time. I have known some exceptional attorneys, and there isn't one who could do it. The point is not that the attorneys forced to represent hundreds of people aren't incredibly capable, dedicated individuals, because they are. The point is that even incredibly capable, dedicated individuals can be stretched too thin. When caseloads are at proper levels, they provide quality services for the people of their community.

Think of it the same way you might think of firemen, or policemen. One fireman can't stop a forest fire, any more than one officer can stop a riot. Why should one public defender be able to represent a hundred people?

None of us are happy carrying a hundred or more cases. We don't do this work because we like to lose, because we like not knowing our clients by name. We do not relish the plea discussions had hastily in the back of courtrooms, with other clients sitting right next to us as we talk about incredibly sensitive issues. But this is the structure that has been legislated and contracted into existence. And this is the system we continue to create, every time we pass a budget or set a standard that requires too few attorneys to represent too many clients.

This overburdening has many detrimental effects on representation:

- Potential defenses are not investigated
- Mental health problems are missed or misunderstood (and therefore left to the Department of Corrections to handle)
- Investigation is not done

- Witnesses are not located
- Testimony and other evidence introduced at trial is not properly challenged
- Judicial error is not challenged at trial, and errors are unpreserved for appeal
- Clients lose confidence in the criminal justice system, and government in general, watching their advocates being spread too thin, and then having the government obtain a plea. Whether the plea is ultimately a good idea or not, the process by which a person arrives there is extremely important.
- The public's confidence in the criminal justice system is eroded when they see a system that operates with such debilitating caseloads placed on defenders.

These issues should deeply disturb anyone who understands that the *sine qua non* of an “adversarial system” is that the district attorney must have a true adversary, which, in many jurisdictions, they do not, in large part because of the caseloads defenders carry.

## **F. IF THE GOVERNMENT INTENDS TO PUT A PERSON IN A CAGE, IT SHOULD BE DIFFICULT AND EXPENSIVE**

If one reads the Federal and State Constitutions, one comes away with the impression that in America, it would be very difficult for the government to take an individual's Liberty. However, in practice, we can see that the protection of the value of Liberty for indigent Americans comes in a distant second to concerns about efficiency or expense, as if those were values of Constitutional significance.

And we should be clear with ourselves what it is that we are discussing: the government is attempting to place a human being in a cage. The government does so because the government believes that the person has done something detrimental to the well-being of society, as that well-being is defined in our laws. We talk of individuals being “remanded to the custody of the Department of Corrections.” We talk of individuals being “incarcerated,” which isn't inaccurate, but fails to capture the full truth. We're talking about putting people in cages. Disproportionately black, brown and poor people—in cages. Put there by the government. Should that process of caging people be quick, or cheap? For those of means, that process is neither quick nor cheap.

When considering the expense of a fair criminal justice system, consider clean water in America. We have made choices, at the federal and state and local levels, for decades and decades, that show our belief that every American is entitled to clean, healthy water. We chlorinate, we fluoridate, we separate waste from potable water. We don't allow open sewage to flow through our streets.

That costs money. Many countries prioritize their spending differently. Producing the quality of water America requires must cost many times over what it costs in many other nations that do not have priorities the same as ours.

And we don't differentiate based on race or class in delivering that clean water. We don't have one tap for nice people, and one tap for “bad guys.” Everyone gets the same, good quality water, just because they are in America. And we all pay for that, countless millions of dollars in every city, every state, every year.

To look at the laws and to listen to the speeches our lawmakers give about the value of Liberty, and the importance of our criminal justice system, you would think that a person's right to be free ranked at least as high as the person's right to drink decent tap water.

However, what you see when you consider the criminal justice system is a system with two distinctly different taps: one for the rich and one for the poor. Decent quality product—a fair criminal justice system—comes out of the Rich Tap, which is why you see a fair mix of convictions and acquittals when people have private attorneys. But for the vast majority of those whose Liberty the government challenges, those unable to afford an attorney of their own, the Poor Tap delivers to them a deficient, unhealthy product, which none of us would willingly drink.

## **G. CONCLUSION**

If we truly mean what we have written in our Federal and State Constitutions, then we will make every effort to turn off and shut off that Poor Person's Tap, and let every person drink from the same source of good, clean, (fair) Justice. It is a matter of getting our actual practice in line with our stated values. If a fair criminal justice system is every person's right, and if this right is a core American value, as we say it is, then our delivery and protection of that right should look very different.

In closing, I would like to leave you with another small thought experiment: PUBLIC DEFENDERS FOR PUBLIC SERVANTS. What if every public servant (fireman, policeman, school principal, legislator: anyone receiving a government paycheck) charged with a crime related to his or her official duties were required to defend the case with a public defender, chosen at random from their home county? Even though such cases would make up a tiny minority of the public defender caseload, what caseload maximums would be legislated or contracted in that environment? I can imagine sweeping changes.

Thank you for your attention. NDS and I appreciate the opportunity to add our voice to those speaking about these very important issues, and we look forward to participating in the discussion and seeking to find solutions together. ♡

The New York State Association of Criminal Defense Lawyers (NYSACDL) is seeking an **Executive Director**. NYSACDL is a statewide membership bar association of approximately 800 members. We are an affiliate of the National Association of Criminal Defense Lawyers. The Executive Director's responsibilities will include forwarding the mission of the Association through implementing Board policies and recommending actions the Association can take to forward its agenda. Day-to-day operation of the Association by the Executive Director will include: coordinating and assisting in planning CLE programs; interacting with members and recruiting new members; public relations work, including drafting written positions for approval by the Board or President and developing strategies to educate the public regarding pressing issues in the criminal justice system; organizing the records of the Association; organizing and updating the website; obtaining grants; coordinating weekend events, including a possible Trial College; working with the Legislative Committee and lobbyist to assist in commenting on legislation; maintaining relationship with NACDL; and supervising administrative staff. Applicants must have knowledge and experience dealing with criminal justice issues from a defense-oriented perspective. It is not required that applicants have a law degree, but we encourage attorneys to apply. The position may be full-time or part-time depending upon the applicant. We encourage applicants from anywhere in New York State. Applications (cover letter and résumé) should be sent by email to [EmploymentCommittee@nysacdl.com](mailto:EmploymentCommittee@nysacdl.com).

The Oneida County Public Defender-Criminal Division is accepting applications for **Assistant Public Defender (Criminal Division) — 3rd Assistant**.

**Job Listings are  
also available at  
[www.nysda.org](http://www.nysda.org)  
Job Opportunities  
(under NYSDA  
Resources)**

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

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 [fnebus@ocgov.net](mailto:fnebus@ocgov.net). For more information, visit [www.oneidacounty.org](http://www.oneidacounty.org).

The Mid-Atlantic Innocence Project (MAIP) seeks a **Virginia DNA Staff Attorney** to coordinate MAIP's involve-

ment in a groundbreaking project in which the Commonwealth of Virginia is performing post-conviction DNA testing in nearly 1,000 old cases in which biological evidence was saved by the state crime laboratory between 1973 and 1988. Duties include: working with pro bono lawyers at an area law firm to screen the innocence claims; recruiting, training and supervising pro bono lawyers who will co-counsel with MAIP in the representation of the defendants whose cases we accept; co-counseling with those firms in the representation; managing a panel of DNA experts who are reviewing the cases; working with the Virginia State Bar to help train and monitor the pro bono lawyers notifying defendants; when exonerations do occur, helping to coordinate post-exoneration services and compensation, studies of the causes of wrongful conviction in those cases, and media coverage; and working with the Executive Director to ensure that any systematic problems with the testing or process are exposed and addressed by the relevant Commonwealth agencies. Qualifications: J.D.; excellent writing and editing skills; excellent organizational skills; ability to communicate with a diverse group of people, including prisoners, law firm attorneys, and state officials; criminal law or litigation experience preferred; ability to juggle multiple tasks; ability to travel within the Commonwealth of Virginia; some understanding of DNA testing methodologies a plus, but not required; Virginia Bar membership or willingness to take the Virginia Bar preferred. Salary CWE. Position open until filled. To apply, send résumé, cover letter, writing sample, and three references via mail or email to Shawn Armbrust, Executive Director, Mid-Atlantic Innocence Project, 4801 Massachusetts Ave, NW, Washington, DC 20016; email [sarmbrust@exonerate.org](mailto:sarmbrust@exonerate.org). For more information, visit [www.exonerate.org](http://www.exonerate.org). ☞

### **From My Vantage Point** (continued from page 8)

is now the courtroom manager, the defense is the supplicant and the judge is the rubber stamper. This must change.

The Legislature should abolish all mandatory sentences and return full judicial discretion to judges. Prison sentences should be uniformly shorter, and non-incarcerative sentences should be available for every offense. Prison should be viewed and used as a last resort. The

presumption of incarceration that has emerged should be replaced with meaningful procedures to fashion appropriate non-prison sentences. A continuum of non-incarcerative, treatment oriented, graduated sanctions should replace the simple "in" or "out" decision that currently characterizes sentencing. We should impose all sentences with an eye toward making people productive. ☞

The following is a synopsis of recent case law of interest to the public defense community. The index headings appearing before each case are from the Association's Subject Matter Index. These case briefings are not exhaustive, nor are they designed to replace a careful reading of the full opinion.

Citations to the cases digested here can be obtained from the Backup Center as soon as they are published.

## New York State Court of Appeals

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

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

People v Buss, 11 NY3d 553 (2008)

In 1983, the defendant was sentenced to consecutive terms of two to six years for sexual abuse and assault. In 1987, while on parole, he pleaded guilty to attempted second-degree murder and was sentenced to 10 to 20 years' imprisonment. When he was released in 2002, the Board of Examiners of Sex Offenders determined that he must register under the Sex Offender Registration Act (SORA), concluded he was a presumptive level II risk, but recommended an upward departure. The court rejected the defendant's argument that he did not have to register because his sex abuse sentence was due to expire before SORA's effective date, and adjudicated him a level III risk. The Appellate Division affirmed.

**Holding:** The court properly concluded that the defendant was subject to SORA. The defendant's 1987 sentence ran consecutively to the undischarged part of his 1983 sentence (see Penal Law 70.25 [2-a]), and thus he was still serving his sex abuse sentence when SORA became effective in 1996. Penal Law 70.30 provides different methods for calculating concurrent and consecutive sentences, but both involve making two sentences into one. "We hold that for SORA purposes a prisoner serving multiple sentences is subject to all the sentences, whether concurrent or consecutive, that make up the merged or aggregate sentence . . ." This serves SORA's primary goals, including protecting the public from the danger of sex offender recidivism. See *People v Stevens*, 91 NY2d 270, 275. Order affirmed.

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

Sentencing (Hearing) (Persistent Violent Felony Offender) SEN; 345(42) (59)

People v Diggins, 11 NY3d 518 (2008)

The defendant was convicted of attempted second-degree murder and related charges. Four months before sentencing, the prosecution served the defendant with a

predicate felony conviction statement setting forth two predicate violent felony convictions. At sentencing, defense counsel argued that the 2004 conviction was obtained in violation of the defendant's Sixth Amendment right to counsel because the defendant was tried in absentia and his attorney completely failed to participate in the trial, and requested an adjournment to file motions. The court denied the request and sentenced him as a persistent violent felony offender to 25 years to life. The Appellate Division affirmed.

**Holding:** The court did not abuse its discretion in denying defense counsel's request for an adjournment. The court must hold a hearing when the defendant controverts an allegation in the prosecution's predicate conviction statement at the preliminary examination (see CPL 400.15[5]), and the court must adjourn the hearing if the defendant does not receive the statement at least two days before the preliminary examination. See CPL 400.15(6). However, because the defendant received the statement more than two days before the preliminary examination, it was in the court's discretion whether to grant an adjournment. See *Matter of Anthony M.*, 63 NY2d 270, 283. Despite having received the statement four months before sentencing, defense counsel did not get an affidavit from the attorney in the 2004 case or secure that attorney's live testimony and there was no indication that he made any effort to obtain the trial transcript. And it is not clear that the prior attorney provided ineffective assistance. See *People v Aiken*, 45 NY2d 394, 399. Order affirmed.

Evidence (Sufficiency) EVI; 155(130)

Robbery (Elements) (Evidence) (Instructions) ROB; 330(15) (20) (25)

People v Ford, 11 NY3d 875 (2008)

The defendant was convicted of two counts of first-degree robbery for two incidents. The court denied the defendant's motion to sever the trials. The Appellate Division affirmed the severance motion denial, but reduced the convictions to third-degree robbery, concluding that while the charge given alerted the jury to the actual possession element, the evidence was legally insufficient, and remitted for resentencing.

**Holding:** The first-degree robbery charge failed to notify the jury of the actual possession element of the offense. "[I]t is not enough for an 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." Although the actual possession element is not explicit in the statute, it is a necessary element of the crime. See *People v Pena*, 50 NY2d 400, 407. Because the defendant did not object to the charge, the legal sufficiency argument is viewed in light of the charge as given. See *People v Sala*, 95 NY2d 254. This

## NY Court of Appeals *continued*

Court's recent decision in *People v Jean-Baptiste* (11 NY3d 539) does not apply because the defendant's legal sufficiency objection related to the inadequacy of the evidence, not an interpretation of an element of the offense, and the court's denial did not clearly indicate whether it was based on legal sufficiency or a belief that proof of actual possession was unnecessary. Using the charge given, the evidence is legally sufficient to support the first-degree robbery convictions. During the robbery, the defendant stated "I got a knife," while moving his hands toward his pants pocket. This provided sufficient evidence that the defendant "used or threatened the immediate use" of a knife in the course of the robbery, as instructed by the court. The court properly denied the severance motion as the defendant failed to show good cause for severance under CPL 200.20(3)(a). Order modified, first-degree robbery conviction reinstated, matter remitted, and order affirmed as modified.

**Dissent in Part:** [Jones, J] The jury charge was correct; the instructions made it clear that the prosecution had to prove actual possession of the knife. The defendant preserved his legal sufficiency argument and did not have to separately object to the jury charge. *See Jean-Baptiste*, 11 NY3d 539. There was insufficient evidence that the defendant actually possessed a knife.

---

Narcotics (General) (Penalties)                      NAR; 265(27) (55)

Sentencing (Resentencing)                              SEN; 345(70.5)

*People v Mills*, 11 NY3d 527 (2008)

In 1995, defendant Mills pleaded guilty to a class A-II controlled substance felony and was sentenced to three years to life in prison. In 2006, the court granted his application under the Drug Law Reform Act of 2005 (*see* L 2005, ch 643) (2005 DLRA), and resentenced him to an eight year determinate prison term and five years' post-release supervision. The court later granted the prosecution's motion to set aside the sentence and resentenced Mills to the original indeterminate term. The Appellate Division affirmed. In 1999, defendant Then pleaded guilty to a class A-II controlled substance felony and was sentenced to five years to life. He was paroled in 2002, but was rearrested and pleaded guilty to a new class A-II controlled substance felony in 2003. He was sentenced to six years to life for that offense, his parole was revoked, and he received a time assessment of almost six months for the violation. The court granted Then's two DLRA 2005 resentencing applications and resentenced him to five years' imprisonment and a five-year period of post-release supervision for the 1999 conviction and a concurrent term of six years' imprisonment and a five-year period of post-release supervision for the 2003 conviction. The Appellate

Division reversed and reinstated the original sentence on the 1999 offense.

**Holding:** Defendants are eligible for resentencing under the 2005 DLRA if they are in custody convicted of a Penal Law article 220 class A-II felony offense and are more than 12 months from being an eligible inmate, as defined in Correction Law 851(2). *See* L 2005, ch 643, § 1. An eligible inmate is an inmate who will become eligible for parole or conditional release within two years. *See* Correction Law 851 (2). Therefore, to be eligible for resentencing under the 2005 DLRA, class A-II felony drug offenders must not be eligible for parole within three years of their resentencing applications. *See People v Bautista*, 26 AD3d 230, 230 *app disp* 7 NY3d 838. In addition to the clear statutory language, the legislative history and policy considerations support this conclusion; the law was intended as a remedy for those serving the longest sentences. Because the Parole Board must give Mills a parole hearing every two years, he is not more than 12 months from being an eligible inmate, and thus is not eligible for resentencing. Defendant Then is ineligible for resentencing on his 1999 conviction because he was not more than three years from parole eligibility for that offense. That his 2003 conviction made him ineligible for parole for more than three years at the time of his application is irrelevant. When he was paroled on the 1999 conviction, he became ineligible for resentencing for that conviction. *See People v Hardy*, 49 AD3d 779, 779-780. Orders affirmed.

---

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

*People v Collado*, 11 NY3d 888 (2008)

**Holding:** "Because Supreme Court failed to pronounce the term of defendant's mandatory post-release supervision in his presence, this matter must be remitted to Supreme Court for a resentencing proceeding (*see People v Sparber* 10 NY3d 457, 469-471 [2008])." Order modified and matter remitted for resentencing.

---

Robbery (Degrees and Lesser                              ROB; 330(10) (20) (25)  
Offenses) (Evidence)  
(Instructions)

*People v James*, 11 NY3d 886 (2008)

The defendant was charged with first- and second-degree robbery. The court denied his request to charge the jury on third-degree robbery as a lesser included offense of first-degree robbery. The defendant was convicted of both robbery counts. The Appellate Division affirmed.

**Holding:** While third-degree robbery is a lesser included crime of first-degree robbery, no reasonable view of the evidence would support a finding that the defen-

NY Court of Appeals *continued*

dant committed the lesser, but not the greater, offense. See *People v Van Norstrand*, 85 NY2d 131, 135. The trial testimony established that the defendant and three companions approached the complainant. Two of the companions, Scott and Flores, crossed the street to act as lookouts and the defendant and his other companion, Davis, backed the complainant into a wall. The defendant pressed his hip into the complainant's waist, revealing what the complainant said was a gun. Davis and the defendant took money and an iPod from the complainant. Scott testified that he did not see the defendant display a gun, but that he did hear Davis tell the complainant that the defendant had a gun. The complainant testified that the defendant had a gun, and no reasonably-viewed evidence contradicted that testimony. While Scott testified that he did not see the defendant with a gun, he also testified that he overheard Davis tell the complainant that the defendant had a gun. Order affirmed.

Search and Seizure (Appellate Review) (Stop and Frisk) SEA; 335(5) (75)

*People v Silvestry*, 11 NY3d 902 (2009)

**Holding:** "Whether the circumstances of a particular case rise to the level of reasonable suspicion is a mixed question of law and fact, beyond our review if the determination is supported by the record. Here record evidence supports the lower courts' determination that the police lacked such suspicion (*People v DeBour*, 40 NY2d 210 [1976])." Order affirmed.

Speedy Trial (Cause for Delay) (Demand for Trial) (Due Process) SPX; 355(12) (20) (25)

*People v Romeo*, No. 7, 2/11/2009

The defendant was a suspect in a 1985 Suffolk County murder. Before surrendering to authorities in 1987, he fled to Canada and killed a police officer. He was later arrested in Boston and held on a Canadian warrant. A Suffolk County grand jury indicted him and the prosecution filed a warrant to detain him in the United States. The defendant immediately began asserting his speedy trial rights. The Suffolk County prosecutors allowed Canadian authorities to take the defendant without assurances for his immediate return to New York. The defendant was convicted of murder in Canada and received a twenty-five year prison term. The Suffolk County prosecutors did not seek extradition. In 1999, the defendant moved to dismiss the indictment, which the court denied. The defendant was arraigned in Suffolk County in 2006, and later pleaded guilty to first-degree manslaughter. On appeal,

he claimed that his constitutional speedy trial rights were violated. The Appellate Division reversed the conviction.

**Holding:** The defendant's right to a speedy trial was violated by the 12 to 19 year delay in bringing him to trial. See *People v Taranovich*, 37 NY2d 442, 444. The extent of the delay, a critical factor, was extraordinary. See *Doggett v United States*, 505 US 647, 658 (1992). The prosecution failed to make the necessary diligent, good faith efforts to secure the defendant's presence in New York for arraignment and trial. See *Smith v Hooey*, 393 US 374, 383 (1969). Although the defendant was charged with murder, the level of the offense does not trump the defendant's speedy trial rights. The delay and the defendant's incarceration in a foreign prison impaired his ability to consult with counsel, participate in his defense, contact witnesses, and prepare a mental disease or defect defense. Order affirmed.

Speedy Trial (Cause for Delay) (Prosecutor's Readiness for Trial) (Statutory Limits) SPX; 355(12) (32) (45)

*People v Rouse*, No. 8, 2/11/2009

**Holding:** Because the 30-day time period from October 5 to November 4 is chargeable to the prosecution, the prosecution did not satisfy its statutory readiness obligation. A period during which a defendant is without counsel through no fault of the court is excluded from the speedy trial time. See CPL 30.30(4)(f). Here, the court appointed substitute counsel for the codefendant on October 5; therefore, the codefendant had counsel during the adjournment period requested by the prosecution. The speedy trial statute does not require the court to determine whether counsel was sufficiently familiar with the case in order for the defendant to be considered with legal representation. Order reversed and indictment dismissed pursuant to CPL 30.30.

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

*People v Taveras*, No. 2, 2/11/2009

The defendant, an assistant principal, was charged with third-degree criminal sexual act for an oral sex act with a student and falsifying business records with the intent to conceal the sexual act. He pleaded guilty to third-degree criminal sexual act and four counts of first-degree falsifying business records and was sentenced to an aggregate term of four to twelve years in prison with the sentence on two of the business record counts and the sexual act count running consecutively to one another and concurrently with the remaining sentences. The Appellate Division affirmed the sentence.

**Holding:** Consecutive sentences are not permitted where a single act constitutes one of the offenses and is a material element of the other. See Penal Law 70.25(2);

## NY Court of Appeals *continued*

*People v Laureano*, 87 NY2d 640, 643. The statutory definition of falsifying business records does not render the criminal sexual act offense “a necessary component in the legislative classification and definitional sense” (*People v Day*, 73 NY2d 208, 211 [1989]).” The criminal sexual act did not automatically become a material element of first-degree falsifying business records because the prosecution relied on the “intent to conceal” prong of the statute. Falsifying business records is elevated to a first-degree offense through an enhanced intent requirement, “intent to commit another crime or to aid or conceal the commission thereof,” not an additional actus reus element. There is no indication that the Legislature intended to authorize consecutive sentences when a defendant makes a false entry with the intent to commit or aid in the commission of another crime, but not when the defendant performs the same act with the intent to conceal an entirely separate crime. Because the statutory elements of the criminal sexual act and falsifying business records offenses are distinct and since there is no evidence that the Legislature intended the definitions to be interdependent, consecutive sentences are not forbidden. Order affirmed.

Witnesses (Cross Examination) WIT 390(11) (12)  
(Defendant as Witness)

*People v Williams*, No. 22, 2/11/2009

The court’s *Sandoval* ruling (*People v Sandoval*, 34 NY2d 371) allowed the prosecution to elicit from the defendant that he had one felony conviction and 45 misdemeanor convictions, but not to go into the underlying facts or circumstances of the convictions. The Appellate Division affirmed the defendant’s conviction.

**Holding:** While the court may have been more discriminating in its *Sandoval* ruling, it did not abuse its discretion. See *People v Walker*, 83 NY2d 455, 458. *Sandoval* rulings are largely, if not completely, discretionary determinations for trial courts and fact-reviewing intermediate appellate courts, and review by this Court is generally not warranted. See *People v Mattiace*, 77 NY2d 269, 274. Order affirmed.

## Third Department

Arson (Defrauding Insurance) ARS; 40(21) (30) (35) (48)  
(Evidence) (Expert  
Evidence) (Investigations)

Evidence (Weight) EVI; 155(135)

*People v Richardson*, 55 AD3d 934, 865 NYS2d 138  
(3rd Dept 2008)

**Holding:** A fire at the defendant’s home caused severe damage to the rear of the building. The two fire investigators said they had excluded all accidental causes, but neither could pinpoint the actual cause of the fire. They failed to determine why several circuit breakers were tripped at the time of the fire. While motive is not an element of arson, it cannot be ignored (see *People v Cushner*, 46 AD3d 1121, 1123 *lv den* 10 NY3d 809), because the case is based entirely on circumstantial evidence. See *People v Lewis*, 275 NY 33, 40. Despite the debts he had, the defendant’s financial situation was not dire. He owned his house outright, was renovating it, and did not remove any personal items before the fire. Compare *People v Beyor*, 272 AD2d 929, 930 *lv den* 95 NY2d 832. The increased insurance he bought a month earlier was consistent with previous policies and did not cover the loss sustained. Due to the lack of proof on the issue of motive and the questionable basis for the conclusion that all accidental causes were excluded, the jury was not justified in convicting the defendant. Judgment reversed and indictment dismissed. (Supreme Ct, Albany Co [Lamont, JJ])

**Dissent:** [Carpinello, J] “[The] defendant’s financial motive, his opportunity to set the fire, expert testimony that petroleum distillate was found at the origin of the fire and evidence that no one else had access to the premises compel the conclusion that the jury’s verdict was adequately supported by the weight of the evidence . . . .”

Probation and Conditional PRO; 305(5) (20) (25) (30)  
Discharge (Conditions  
and Terms) (Hearing)  
(Modification) (Revocation)

*People v DeMoney*, 55 AD3d 953, 865 NYS2d 153  
(3rd Dept 2008)

**Holding:** The court erred in finding that the defendant violated the terms of his probation that required him to stay away from places where children under the age of 17 congregate and barred him from being responsible for the care of a child under the age of 17 without prior permission. The violation hearing evidence consisted solely of the hearsay testimony of a caseworker regarding what the defendant’s children told her. There was no other evidence that the defendant was alone with his minor daughter one time and with his minor son twice, once at a public park. Compare *People v Bower*, 9 AD3d 603 *lv den* 3 NY3d 704. While hearsay evidence is admissible at a probation violation hearing and can be considered along with other evidence, “the court cannot conclude that a defendant violated probation without ‘a residuum of competent legal evidence’ (*People v Machia*, 96 AD2d 1113, 1114 . . .).” Although the court may expand or modify the conditions of probation any time before the sentence terminates (see CPL 420.10[1]), the court’s decision to expand the defendant’s probation conditions to prevent him from living

Third Department *continued*

with his children is not supported by the record. Order reversed and probation violation petition dismissed. (County Ct, Otsego Co [Coccoma, J])

Assault (Defenses) (Instructions) (Lesser and Included Offenses) ASS; 45(20) (45) (50)

People v Ryan, 55 AD3d 960, 865 NYS2d 146 (3rd Dept 2008)

The defendant was convicted of second-degree assault, but was acquitted of first-degree assault and fourth-degree criminal possession of a weapon.

**Holding:** The court erred in denying the defendant’s request for a lesser included offense charge of reckless third-degree assault (Penal Law 120.00[2]). That offense is a lesser included offense of first-degree assault, and the elements of the offense, *ie*, recklessness and physical injury, were present in the other lesser included offense charges that the court submitted to the jury at the prosecution’s request. The prosecution implicitly conceded the elements should have been charged, and “the court concluded that a reasonable view of the evidence supported a finding that defendant committed the lesser but not the greater offense.” Although requests for lesser included offense charges should be made before summation, because the defendant requested the charge before the jury retired to deliberate, the court erred in denying the request as untimely. *See People v Hanley*, 87 AD2d 850, 851. The court correctly rejected the defendant’s request for a justification defense charge and denied his motion to suppress his oral and written statements to the police. Judgment reversed and matter remitted for a new trial. (Supreme Ct, Albany Co [Lamont, J])

Probation and Conditional Discharge (Conditions and Terms) (Decisionmaking) (Termination) PRO; 305(5) (8) (35)

People v Welch, 55 AD3d 952, 865 NYS2d 151 (3rd Dept 2008)

**Holding:** The court properly terminated the defendant’s probation. The defendant was originally sentenced to five years of probation, the terms of which were amended on consent to require the defendant to participate diligently in a drug treatment program. Termination for the treatment program would result in a prison sentence of 1 1/3 to 4 years. Eleven days before the five-year term was to expire, the probation department filed a violation petition alleging that the defendant failed to satisfy all the requirements of the drug treatment court. The court’s declaration of delinquency was issued in compli-

ance with CPL 410.30 and was based on the information set forth in the petition, and the declaration tolled the probation period. *See Penal Law 65.15(2); People v Mills*, 45 AD3d 892, 895 *lv den* 9 NY3d 1036. The violation petition was later amended after the defendant failed to report to his probation officer on a date that was after the five-year period would have expired absent tolling. The failure to appear is a significant probation violation and provided ample support for the court’s decision to terminate probation. *See People v Provost*, 35 AD3d 899, 900. The 1 1/3 to 4 year prison sentence is overly harsh given the defendant’s successful completion of all but 11 days of his five-year probation term; the term is reduced to the legally minimum term of one to three years. *See CPL 470.15(2)(c); (6)(b)*. Judgment modified, sentence reduced, judgment modified as affirmed, and matter remitted for further proceedings. (County Ct, Warren Co [Hall, Jr., J])

Narcotics (Marijuana) (Possession) NAR; 265(40) (57)

People v Dan, 55 AD3d 1042, 866 NYS2d 382 (3rd Dept 2008)

The defendant was convicted of first-degree criminal possession of marijuana.

**Holding:** The court erred in charging the automobile presumption and in denying the defendant’s motion to set aside the verdict on that ground. Based on the clear statutory language of the automobile presumption (Penal Law 220.25[1]), the presumption does not apply to marijuana. *See eg People v Gabbidon*, 40 AD3d 776, 777. The automobile presumption deals with the presence of a controlled substance in an automobile, and Penal Law 220.00(5) specifically excludes marijuana from the definition of a controlled substance. Because the statutory language is clear and unambiguous, it is inappropriate to interpret or construe it (*see Matter of McCulloch v New York State Ethics Commn*, 285 AD2d 236, 239); thus, provisions of other statutes may not be considered. Even assuming the Legislature erred in failing to amend the automobile presumption when it amended the definition of controlled substance in 1977, the Court cannot correct such an error because there are no clear ambiguities in the statute. *See Meltzer v Koenigsberg*, 302 NY2d 523, 525. If the Legislature intended to include marijuana within the automobile presumption, it could have addressed the issue within the past 20 years. Judgment reversed and matter remitted for new trial. (Supreme Ct, Albany Co [Lamont, J])

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

Sentencing (Appellate Review) (Resentencing) SEN; 345(8) (70.5)

People v Ogborn, 55 AD3d 1054, 865 NYS2d 746 (3rd Dept 2008)

**Third Department** *continued*

In February 2007, the defendant was convicted of two counts of first-degree sodomy for conduct occurring in 1997. The court originally sentenced him to 15 years on each count, to run consecutively, and five years of post-release supervision, but in May 2007, the court vacated the original sentence because it was not authorized by law in 1997. The court resentenced the defendant to two consecutive prison terms of 8¾ to 17½ years.

**Holding:** Because the defendant failed to appeal his resentencing, issues surrounding the resentencing cannot be reviewed. *See People v Kuras*, 49 AD3d 1196, 1197 *lv den* 10 NY3d 866. “[A]lthough defendant correctly argues that the aggregate term of the two indeterminate terms was not authorized, it is the duty of the Department of Correctional Services to administratively recalculate the sentence to the legally permitted limit of 15 to 30 years and no modification is required by this Court (*see* Penal Law § 70.30[1] [e] [I]; *People v Moore*, 61 NY2d 575, 578 . . .).” If the Department has not made that calculation, the proper remedy is for the defendant to commence a CPLR article 78 proceeding. *See eg Matter of Patterson v Goord*, 299 AD2d 769. Judgment affirmed. (County Ct, Delaware Co [Becker, JJ])

---

Evidence (Sufficiency)	EVI; 155(130)
Sex Offenses (Corroboration) (General) (Sexual Abuse)	SEX; 350(2) (4) (27)

*People v Porlier*, 55 AD3d 1059, 865 NYS2d 732 (3rd Dept 2008)

**Holding:** The defendant’s first-degree rape conviction (count 12) must be reduced to attempted first-degree rape because the evidence is insufficient to establish the required element of penetration. *See People v Carroll*, 95 NY2d 375, 383-384. The complainant’s testimony was that the defendant tried to have sex with her and that his penis made contact with her vagina. Counts 1, 2, and 4 (first-degree sexual abuse and first-degree criminal sexual act) are not supported by legally sufficient evidence because the convictions are based on the defendant’s written confession without any other proof that the crimes were committed. *See CPL 60.50; People v Morgan*, 246 AD2d 686, 686 *lv den* 91 NY2d 975. The evidence supporting count 3 (first-degree sexual abuse) is insufficient to establish that the complainant was under 11 years of age at the time of the conduct. The complainant testified about dates that were after she turned 11 and the defendant’s confession was vague regarding the time periods. Thus, the conviction must be reduced to second-degree sexual abuse. Judgment modified, convictions for counts 1, 2, 3, 4, and 12 reversed, conviction under counts 3 and 12 reduced, sentences vacated, matter remitted for resentencing on

counts 3 and 12, and judgment affirmed as modified. (County Ct, Washington Co [Hall, Jr., JJ])

---

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

*People v Fitzgerald*, 56 AD3d 811, 867 NYS2d 234 (3rd Dept 2008)

The defendant pleaded guilty to first-degree criminal contempt in satisfaction of the indictment. Before sentencing, he hired new counsel and moved to withdraw the plea.

**Holding:** The court erred in denying the defendant’s motion without a hearing concerning whether his attorney gave him incorrect information about his potential sentence exposure. The defendant’s argument survives his appeal waiver and was preserved by his motion to withdraw the plea. *See People v McCann*, 289 AD2d 703, 703. The defendant argued that his former attorney incorrectly advised him that he faced 10 years in prison if convicted of all the charges, but faced 2 to 4 years if he accepted the plea offer, and that he pleaded guilty solely to avoid the potential 10 year sentence. In an affidavit, the defendant’s former counsel flatly denied the allegations. Thus, a factual question exists that should have been decided after a hearing. “While it is true that misinformation or incorrect advice about the maximum sentence is not necessarily dispositive, it would be a factor for the court to consider on defendant’s motion (*see People v Garcia*, 92 NY2d 869, 870 . . .).” Unlike in *People v Ramos* (63 NY2d 640), the defendant did not have an opportunity to mention at his plea colloquy the advice he received regarding the maximum possible sentence. Judgment reversed and matter remitted for further proceedings. (County Ct, Franklin Co [Main, Jr., JJ])

**Dissent:** [Lahtinen, J] “[I]n light of the clear allocution admitting guilt and there being nothing indicating that the plea was baseless, I am unpersuaded that this is one of the rare instances in which the failure to conduct an evidentiary hearing constituted an abuse of discretion requiring reversal as a matter of law.”

---

Sentencing (Concurrent/Consecutive) (Restitution)	SEN; 345(10) (71)
--	-------------------

*People v Denno*, 56 AD3d 902, 867 NYS2d 278 (3rd Dept 2008)

**Holding:** The court properly exercised its discretion in ordering reparation of \$728.11, the actual amount the mother of one of the complainants spent to travel from Texas to appear and address the court before sentencing. The mother had an absolute right to appear and address the court about the impact the crime had on her son. *See*

Third Department *continued*

CPL 380.50(2)(a)(2), (2)(b). Penal Law 60.27(1) authorizes reparation for out-of-pocket loss caused by the defendant's crime. While the parties did not provide a New York case on point, other jurisdictions have allowed similar expenses under their restitution/reparation statutes. *See eg People v Lassek*, 122 P3d 1029, 1036 (Col 2005); *State of Idaho v Doe*, 103 P3d 967, 974 (2004); *State of Arizona v Madrid*, 85 P3d 1054, 1056-1058 (2004); *United States v Pizzichiello*, 272 F3d 1232, 1240-1241 (9th Cir 2001) *cert den* 537 US 852 (2002); *Matter of J.A.D.*, 603 NW2d 844, 847 (Minn 1999). The modest reparation ordered by the court is consistent with New York's long-standing policy of promoting and encouraging the use of restitution to pay for losses caused by criminal conduct. *See People v Horne*, 97 NY2d 404, 412. The court correctly directed the sentences for the two counts to run consecutively as the plea allocution included facts that showed separate and distinct acts against two children. *See People v Lanfair*, 18 AD3d 1032, 1033-1034 *lv den* 5 NY3d 790. Judgment affirmed. (County Ct, Essex Co [Meyer, JJ])

Probation and Conditional Discharge (Conditions and Terms) (Decisionmaking) (Termination) PRO; 305(5) (8) (35)

*People v Garner*, 56 AD3d 951, 868 NYS2d 332 (3rd Dept 2008)

The defendant was originally sentenced to six months in jail and 10 years of probation. The terms of his probation included maintaining full-time verifiable employment, reporting as directed to his probation officer, fully cooperating with sex offender counseling, and informing his probation officer when he established any significant relationship.

**Holding:** The court correctly concluded that the defendant's probation violations were proven by a preponderance of the evidence. *See CPL 410.70(3); People v Provost*, 35 AD3d 899, 900. The testimony of a clinical psychologist regarding the defendant's progress in the treatment program constituted hearsay, and is insufficient by itself to establish a probation violation. *See People v Spragis*, 5 AD3d 814, 814-815 *lv den* 2 NY3d 807. However, hearsay evidence is admissible and may be considered with other evidence in a violation hearing. The court relied upon the psychologist's testimony and proof from the defendant's probation officer that the defendant failed to report as scheduled on six occasions, did not disclose a significant relationship, had pornographic pictures on his computer in violation of the treatment program's requirements, and that his pay stubs did not show full-time employment. The defendant's new sentence, 25 years

imprisonment and five years of post-release supervision, is harsh and excessive and is reduced in the interest of justice. *See eg People v Cruz*, 41 AD3d 893, 897 *lv den* 10 NY3d 933. Under the circumstances, a sentence of 10 years and five years of post-release supervision is appropriate. Judgment modified, sentence reduced, and judgment affirmed as modified. (Supreme Ct, Rensselaer Co [Griffin, JJ])

Probation and Conditional Discharge (Conditions and Terms) PRO; 305(5)

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

*People v McElhearn*, 56 AD3d 954, 868 NYS2d 786 (3rd Dept 2008)

As a condition of his probation, the defendant was prohibited from having computers or access to computers and the probation department was to inspect his home once a month to ensure that no computers were present.

**Holding:** Although the provision regarding computers in his home was not set forth in the written orders and conditions of probation (*see CPL 410.10[1]*), the sentencing transcript shows that the court advised the defendant of the restriction. Therefore, the defendant was aware of the precise condition imposed. "[A]lthough the better practice is to provide defendant with a written copy of all conditions of probation, defendant's sentence was not rendered invalid by the procedure employed by the County Court here (*see People v Hurst*, 197 AD2d 730, 730 . . .)." The defendant's argument that the condition is so vague as to render it unenforceable is without merit. The defendant's appeal waiver bars him from challenging the condition as an abuse of discretion and as unduly harsh. *See gen People v Lopez*, 6 NY3d 248, 255-256. Judgment affirmed. (County Ct, St. Lawrence Co [Richards, JJ])

Confessions (Co-defendants) (Instructions) CNF; 70(15) (40)

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

*People v Pinto*, 56 AD3d 956, 868 NYS2d 338 (3rd Dept 2008)

**Holding:** The defendant's right of confrontation was violated when, at a joint trial, the court allowed a police officer to read an insufficiently redacted written statement of the codefendant, who did not testify. *See Richardson v Marsh*, 481 US 200, 207-208 (1987). A confession that facially implicates the defendant cannot be used at a joint trial unless it can be effectively redacted so that the jury would not interpret it as incriminating the nonconfessing defendant. *See People v Wheeler*, 62 NY2d 867, 869. Although the defendant's name was removed, neutral pronouns were

**Third Department** *continued*

added, and the court gave a limiting instruction, the description of the events contained numerous incriminating references to another participant. After reading the statement, the officer testified that he investigated the accuracy of the statement by viewing surveillance tapes at the restaurant mentioned in it to see if he could identify the defendant. And the prosecutor's opening statement made clear that the defendant and the codefendant were the only participants in the crime. Because these errors made it inconceivable that the jury could have thought that the codefendant's confession referred to someone other than the defendant, the statement was insufficiently redacted to be admissible in the joint trial. The other evidence was not overwhelming; the court had to give an *Allen* charge because at least one juror disagreed with the initial guilty verdict against the defendant. Thus, a second jury is necessary to avoid violating the defendant's confrontation rights. *See gen People v Ricardo B.*, 73 NY2d 228, 232-235. Judgment reversed and matter remitted for a new trial. (County Ct, Albany Co [Herrick, J])

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

Juveniles (Right to Counsel) JUV; 230(130) (135)  
(Support Proceedings)

*Matter of Broome County Dept of Social Services v Basa*, 56 AD3d 1092, 869 NYS2d 636 (3rd Dept 2008)

In a support order violation proceeding, the respondent was initially represented by assigned counsel. The court sentenced him to six months in jail, but later suspended the sentence and ordered the respondent to resume paying support. After he failed to appear for a scheduled hearing, the respondent was arrested and appeared without counsel. Based on a limited inquiry into his earnings, the court said he was not eligible for assigned counsel. When he appeared again without counsel, the court told him about his right to counsel. The respondent said that he wanted an attorney and agreed to an adjournment so he could retain counsel. On the adjourn date, the respondent said he could not afford counsel. Without further inquiry into his right to representation, the court found the respondent in violation of the support order and reinstated the jail sentence.

**Holding:** The court erred in sentencing the respondent to a period of incarceration without conducting a thorough inquiry, including an investigation of assigned counsel eligibility, to assure that the respondent understood his rights and knowingly, intelligently, and voluntarily waived those rights. *See Matter of Broome County Dept of Social Servs v Mitchell*, 46 AD3d 1034, 1034. The record does not show that the respondent knowingly and

intelligently waived his right to counsel. *See People ex rel Foote v Lorey*, 28 AD3d 917, 918-919 *lv dismiss* 7 NY3d 863 *lv den* 8 NY3d 803. Order reversed and matter remitted for a new hearing. (Family Ct, Broome Co [Pines, J])

Larceny (Elements) (Evidence) LAR; 236(17) (25) (40) (80)  
(Grand Larceny) (Value)

*People v Loomis*, 56 AD3d 1046, 867 NYS2d 772  
(3rd Dept 2008)

**Holding:** The defendant's conviction is not supported by the weight of the evidence. Fourth-degree grand larceny requires that the value of the stolen property exceed \$1,000 (*see Penal Law 155.30(1)*), and value is based on market value at the time and place of the crime or replacement cost. *See Penal Law 155.20(1)*. Value cannot be established by conclusory statements or rough estimates (*see People v Gonzalez*, 221 AD2d 203, 204), and to satisfy the value element, a witness's testimony must indicate the basis of knowledge for the statement of value. *See People v Lopez*, 79 NY2d 402, 404. The complainant, the only witness who gave testimony regarding value, stated that the items were worth approximately \$3,600, but did not indicate whether he was familiar with valuing stolen items and whether the estimated value was based on the original purchase price, current market value, replacement cost, or some other basis. Also, the testimony did not describe the value of any individual item. "As a result, the jury could not 'reasonably infer, rather than merely speculate that the value of the stolen [items] exceeded the statutory threshold' (*People v Vandenburg*, 254 AD2d 532, 534 [1998], *lv denied* 93 NY2d 858 [1999] [internal quotation marks and citations omitted] . . .)." Judgment modified, conviction reduced to petit larceny, sentence vacated, matter remitted for resentencing, and judgment modified as affirmed. (County Ct, Washington Co [McKeighan, J])

Prisoners (Crimes) (Rights Generally) PRS I; 300(10) (25)

Search and Seizure (Prisoners) SEA; 335(59)

*People v McKanney*, 56 AD3d 1049, 867 NYS2d 578  
(3rd Dept 2008)

**Holding:** The court properly denied the defendant's motion to suppress without a hearing. *See CPL 710.60(3)*. The defendant was charged with promoting prison contraband for possessing a sharpened metal blade wrapped in electrical tape. After receiving two anonymous tips from another inmate that the defendant had a weapon in his rectal cavity, facility employees conducted a strip search and a metal detector search. When no contraband was discovered, an x-ray examination of the defendant's pelvis was ordered, revealing the presence of a metal object. The blade was recovered after a one-on-one contraband watch. The Fourth Amendment rights of inmates

Third Department *continued*

are tempered by the fact of incarceration and the importance of facility safety and security. *See Hudson v Palmer*, 468 US 517, 527-530 (1984); *People v Mendoza*, 50 AD3d 478, 479. An x-ray search of an inmate does not violate the Fourth Amendment if there is a reasonable suspicion that the inmate is secreting contraband. *See Sanchez v Pereira-Castillo*, 573 F Supp 2d 474, 485 (D PR 2008). Based on all the circumstances, including that the defendant was serving a sentence for murder at a maximum security prison, the security danger caused by inmates concealing weapons in body cavities (*see Bell v Wolfish*, 441 US 520, 559 [1979]), the two tips, and the lack of repeated x-rays, the examination did not violate the reasonable test. And the x-ray result afforded reasonable suspicion for the one-on-one watch. Judgment affirmed. (County Ct, Chemung Co [Hayden, JJ])

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

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

*People v Morton*, 56 AD3d 1054, 868 NYS2d 359 (3rd Dept 2008)

The jury found the defendant guilty of criminal sale and criminal possession of a controlled substance. Later, he waived his right to appeal.

**Holding:** The defendant’s appeal waiver is invalid as it was not knowing, intelligent, or voluntary. *See People v Holman*, 89 NY2d 876, 878. The court failed to explain the legal effect of the waiver or confirm that defense counsel did so. *See People v Govan*, 199 AD2d 815, 816 *lv den* 83 NY2d 853. In response to the defendant’s question about the consequences of refusing to waive the right to appeal, the court stated that it was going to “‘impose a sentence’ and ‘proceed’ anyway,” which the defendant took to mean that he would receive a harsher sentence without a waiver. The written waiver did not cure the oral waiver’s deficiencies because the document applied to a waiver after a guilty plea rather than a post-jury conviction waiver. Because the waiver is invalid, the defendant’s legal insufficiency and weight of the evidence arguments can be considered. However, these arguments fail. Although the cocaine purchaser could not identify the defendant as the seller, he described the seller as a black male with curly hair who was wearing a tan jacket, and the defendant had shoulder length dreadlocks and was wearing a tan jacket when he was arrested a few minutes after the sale. The testimony of the two police officers who watched the sale and knew the defendant filled the evidentiary gap. Despite the discrepancies regarding the exact amount of cash found on the defendant and the exact distance between the officers and the transaction,

the verdict was not against the weight of the evidence. Judgment affirmed. (County Ct, Schenectady Co [Drago, JJ])

Identification (In-court) (Photographs) IDE; 190(24) (35)

Witnesses (Credibility) (Direct Examination) (Police) WIT; 390(10) (15) (40)

*People v Allah*, 57 AD3d 1115, 868 NYS2d 822 (3rd Dept 2008)

**Holding:** The court erred in concluding that the police officer’s identification of the defendant from a single computer picture was confirmatory. The identification was not one of the two recognized kinds of confirmatory identification; the officer did not know the defendant well, and the identification was not made by an undercover officer who participated in a planned buy-and-bust operation in order to confirm that the right suspect was arrested. *See People v Boyer*, 6 NY3d 427, 431-432. Even if the viewing was impermissibly suggestive, the officer’s in-court identification did not need to be suppressed because it had an independent source untainted by the identification procedure. *See People v Perez*, 74 NY2d 637, 638. The officer’s testimony provided clear and convincing evidence that the traffic stop observations, while brief, provided an independent source for the in-court identification. *See People v Schiffer*, 13 AD3d 719, 720. The officer’s testimony during the prosecution’s direct case regarding the photograph identification was not prohibited because defense counsel opened the door by preemptively raising the issue during voir dire. *See People v Massie*, 2 NY3d 179, 182-184. While the prosecution should not have been allowed to bolster the officer’s testimony before his credibility was directly challenged on cross-examination, any error was harmless. *See People v Crimmins*, 36 NY2d 230, 241-242. Judgment affirmed. (County Ct, Rensselaer Co [Jacon, JJ])

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

*People v Baggett*, 57 AD3d 1093, 868 NYS2d 423 (3rd Dept 2008)

**Holding:** The court erred in denying the defendant’s motion to suppress written statements and an audio recording during which he admitted to committing certain crimes. The prosecution did not meet its initial burden of proving that the statements were voluntary. *See People v Rosa*, 65 NY2d 380, 386. At the time the defendant made the first incriminating statement, a reasonable, innocent person would not have felt free to leave. *See*

**Third Department** *continued*

*People v Paulman*, 5 NY3d 122, 129. Around midnight, the police pulled over the car the defendant was riding in, even though no traffic violations were committed. The police asked the defendant to come with them to the station, and the driver was allowed to leave. The defendant was transported in a marked police car, but was not handcuffed. He waited in an interview room, and when the questioning started, the door was closed. The police told him the information they had, including an accusation against him by an associate. After he denied stealing anything, the questioning continued. The police did not administer *Miranda* warnings until the defendant finally admitted that he stole a bicycle. The pre-*Miranda* questions were accusatory in nature, and intended to elicit an incriminating response. See *People v Payne*, 41 AD3d 512, 513 *lv den* 10 NY3d 814. Although the other statements were made after the *Miranda* warnings, they were tainted by the prior admission and there was no significant break in the questioning. Judgment reversed, motion to suppress granted, and matter remitted for further proceedings. (County Ct, Ulster Co [Bruhn, JJ])

Narcotics (Marijuana) NAR; 265(40)

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

*People v Gaines*, 57 AD3d 1120, 869 NYS2d 646 (3rd Dept 2008)

**Holding:** The court erred in granting the defendant's motion to suppress evidence seized from his car. An officer pulled the defendant's car over after he witnessed several traffic violations. When he approached the car, the officer smelled a strong odor of marijuana. Based on the odor, the traffic violations, and the defendant's "glossy" eyes, the officer asked the defendant to get out of the car. When the officer returned to the car, he again smelled the odor and he saw an open duffle bag on the passenger seat. Protruding from the bag was a plastic bag containing smaller bags full of a green leafy substance that looked and smelled like marijuana. When the officer reached into the bag, he found an assault rifle and ammunition. The court did not credit the officer's testimony regarding, among other things, the location of the duffle bag. However, the court did credit the officer's testimony that he smelled the marijuana odor before the search. Because of the officer's training and experience in drug detection, smelling the marijuana odor gave him probable cause to search the car. See *People v Chestnut*, 43 AD2d 260, 261 *affd* 36 NY2d 971, 973. Order reversed, motion to suppress denied, and matter remitted for further proceedings. (County Ct, Rensselaer Co [Jacon, JJ])

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

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

*Matter of State of New York v Randy M.*, 57 AD3d 1157, 870 NYS2d 490 (3rd Dept 2008)

The defendant was convicted of a sex offense and received a prison sentence without post-release supervision (PRS). The Department of Corrections (DOCS) administratively imposed PRS when he was released, and the respondent was reincarcerated in August 2007 for violating the conditions of the PRS. DOCS notified the Office of Mental Health (OMH) and the Attorney General that the respondent may be a detained sex offender who was nearing his anticipated release date. See Mental Hygiene Law (MHL) 10.05(b). The Attorney General obtained a securing order from the Erie County Supreme Court, and on the same day, the Kings County Supreme Court resentenced the respondent to his original sentence plus five years of PRS and held that DOCS could not validly impose any part of the sentence. The Attorney General filed a sex offender civil management petition (see MHL 10.06[a]), and secured an ex parte order authorizing DOCS to retain the respondent pending a probable cause hearing. The respondent filed a habeas corpus petition seeking immediate release. The court granted the petition in part, but ordered him held pending the probable cause hearing, and denied his motion to dismiss the civil management petition.

**Holding:** The court erred in denying the motion to dismiss the civil management petition and denying his release. "Because respondent was not lawfully in the custody of an agency with jurisdiction and was not a detained sex offender, he was entitled to dismissal of the civil management proceeding and should immediately be released." DOCS had no authority to impose PRS (see *Matter of Garner v New York State Dept of Correctional Servs.*, 10 NY3d 358, 362), and the respondent could not be incarcerated for violating an improperly imposed term of PRS. See *People ex rel Gerald v Kralik*, 44 AD3d 804, 805. The resentencing did not retroactively cure the illegal PRS; the respondent could not be punished for violating PRS until after the court imposed it. See *People ex rel Benton v Warden*, 20 Misc 3d 516, 521. Order in civil management proceeding reversed, motion granted, and petition dismissed, and habeas corpus order modified, writ granted, and DOCS and OMH ordered to immediately release Randy M. (Supreme Ct, Ulster Co [Zwack, JJ])

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

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

Third Department *continued*

**Matter of Walton v NYS Dept of Correctional Services,**  
57 AD3d 1180, 869 NYS2d 661 (3rd Dept 2008)

The petitioners are recipients of collect telephone calls from inmates at Department of Correctional Services (DOCS) facilities. They filed a lawsuit to prevent DOCS from collecting the 57.5% commission it received under its contract with MCI Worldcom Communications, Inc. (MCI). The trial and appellate courts dismissed the petitioners' constitutional claims, but the Court of Appeals reinstated them, concluding that they were timely. *See Walton v NYS Dept of Correctional Servs*, 8 NY3d 186.

**Holding:** The court properly held that the constitutional claims failed to state a cause of action. The commission paid to DOCS is not an unauthorized tax; it is "akin to that paid by payphone operators to premises owners for the right to install and maintain payphones on the owners' property." That the company passed along those expenses to its customers does not make it a tax. *See Valdez v State*, 54 P3d 71, 77 (NM 2002). Even assuming it is a tax, the petitioners cannot receive a refund because they did not allege that they paid their bills under protest or duress. *See Video Aid Corp v Town of Wallkill*, 85 NY2d 663, 666-668. The commissions did not violate the petitioner's free speech and association rights. Inmates must be provided with a reasonable opportunity to communicate with those outside the facility (*see Overton v Bazzetta*, 539 US 126, 135 [2003]); however, inmates are not entitled to pay a particular rate for telephone calls because the loss of cost advantages do not implicate fundamental free speech values. *See Matter of Montgomery v Coughlin*, 194 AD2d 264, 267 *app dism* 83 NY2d 905. The petitioners did not allege that the charged rates resulted in a denial of the ability to communicate by telephone or otherwise. Because the petitioners have complete control over whether to accept inmate calls and pay money for those calls, there is no taking of property. *See McGuire v Ameritech*, 253 F Supp 2d 988, 1004 (SD Ohio 2003). The petitioners' equal protection rights were not violated as they did not show that their fundamental rights were infringed or that they were treated differently from similarly situated individuals. *See Daleure v Commonwealth of Kentucky*, 119 F Supp 2d 638, 691 (WD Ky 2000) *app dism* 269 F3d 540 (6th Cir 2001). Judgment affirmed. (Supreme Ct, Albany Co [Ceresia, Jr., J])

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

**People v Zayas**, 57 AD3d 1179, 870 NYS2d 495  
(3rd Dept 2008)

The Board of Examiners of Sex Offenders completed a risk assessment instrument and classified the defendant as a level III risk. After a hearing, the court adopted the

Board's recommendation with a minor reduction in the number of points assessed and adjudicated him a level III offender.

**Holding:** The court failed to issue an order setting forth its findings of fact and conclusions of law, as required by Correctional Law 168-n(3), which prevents meaningful appellate review of the level III designation. The court issued a single-page form order setting forth the level III adjudication and referring to the findings of fact and conclusions of law made on the record. A review of the hearing minutes shows that the court addressed three of the nine categories for which the Board assessed points and did not issue findings of fact or conclusions of law as to the other six categories. *See People v Marr*, 20 AD3d 692, 693. The matter must be remitted for compliance with the statutory mandates and this decision. Order reversed and matter remitted for further proceedings. (County Ct, Rensselaer Co [Jacon, J])

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

**People v Devone**, 57 AD3d 1240, 870 NYS2d 513  
(3rd Dept 2008)

The police pulled over the car in which the defendant was a passenger for a traffic violation. Because of the evasive and incorrect statements given by the codefendant driver, the police had the narcotics-detecting dog that was with them walk around the car. The dog alerted and when it was let into the car, the dog scratched at the armrest console where the police found cocaine.

**Holding:** The court erred in granting the defendant's motion to suppress. Because the canine sniff did not prolong the lawful traffic stop, the defendant's Fourth Amendment rights were not violated. *See Illinois v Caballes*, 543 US 405, 408-410 (2005). Although the Court of Appeals has held that the use of a canine sniff at a person's home requires reasonable cause (*see People v Dunn*, 77 NY2d 19, 26 *cert den* 501 US 1219 [1991]), because individuals in a car have a diminished expectation of privacy, the same test does not necessarily apply. *See gen People v Moore*, 6 NY3d 496, 498-499. The Court of Appeals recently affirmed a Fourth Department decision that a canine sniff of a car's exterior after a lawful traffic stop was not an unlawful search and seizure. *See People v Estrella*, 10 NY3d 945 *affg* 48 AD3d 1283 *cert den* \_\_ US \_\_ [Nov 17, 2008]). That decision did not discuss the need for reasonable suspicion, founded suspicion, or any other quantum of proof indicating possible criminal conduct beyond a lawful stop. "[T]he presence of a founded suspicion is sufficient to permit a canine sniff of the exterior of a car that has been lawfully stopped and not unreasonably delayed." Order reversed, motion denied, and matter

**Third Department** *continued*

remitted for further proceedings. (County Ct, Schenectady Co [Drago, J])

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

**People v Gonzalez**, 57 AD3d 1220, 870 NYS2d 529 (3rd Dept 2008)

**Holding:** The court erred in denying the defendant's motion to suppress. The police arrested the defendant after he approached a confidential informant and asked "what do you need? I can get you whatever you need." At the police station, the police conducted a strip search, and after repeated demands to bend over and spread the cheeks of his buttocks, the defendant complied. The police spotted a small plastic bag protruding out of his rectum, which contained cocaine. To conduct a strip search, the police must have a reasonable suspicion that the arrestee is concealing evidence underneath clothing. A visual body cavity search requires a specific, articulable factual basis to believe that the arrestee hid evidence in a body cavity. *See People v Hall*, 10 NY3d 303, 310-311 *cert den* \_\_ US \_\_, 129 S Ct 159. The police may not routinely conduct visual body cavity searches as part of all drug arrests or under a blanket policy that requires such searches of all persons suspected of certain crimes. The police did not have the requisite specific, articulable factual basis for conducting a visual cavity search of the defendant. While the defendant's statement could indicate his involvement in the drug trade, it did not indicate that he actually had narcotics at the time, and the record does not contain other evidence that would lead the police to reasonably suspect that he had evidence concealed in a body cavity. Judgment reversed, motion to suppress granted, and matter remitted for further proceedings. (County Ct, Schenectady Co [Drago, J (suppression motion); Catena, J (trial and sentence)])

**Grand Jury (General) (Procedure)** GRJ; 180(3) (5)

**People v Huntington**, 57 AD3d 1238, 869 NYS2d 702 (3rd Dept 2008)

**Holding:** The court correctly dismissed the first-degree assault, first-degree coercion, and first-degree unlawfully dealing with a child charges. The prosecution charged the defendant with first-degree assault under Penal Law 120.10(3), an element of which is the culpable mental state of depraved indifference. The prosecutor did not specifically instruct the grand jury on the meaning of depraved indifference. While specific instructions on elements that have an obvious meaning are not required (*see*

*People v Levens*, 252 AD2d 665, 666 *lv den* 92 NY2d 927), depraved indifference does not have a common or obvious meaning. *See People v Feingold*, 7 NY3d 288, 296. Because there was no appropriate instruction on that element, the grand jury's integrity in deliberations was impaired when it considered the assault charge. Regarding the two coercion and the two unlawfully dealing with a child charges, the prosecution read the Penal Law sections defining those offenses without referencing any of the facts related to the location of the offenses or the complainants involved, and the instructions for the two counts of each offense were identical. It was impossible for the grand jury to differentiate which evidence supported which charges; therefore, it could not intelligently decide whether the defendant committed a crime and whether there was legally sufficient evidence to establish the essential elements of the crime. *See People v Calbud, Inc*, 49 NY2d 389, 394-395. Order affirmed. (County Ct, Essex Co [Meyer, J])

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

**Juries and Jury Trials (Discharge)** JRY; 225(30)

**People v Lapage**, 57 AD3d 1233, 871 NYS2d 429 (3rd Dept 2008)

**Holding:** The court improperly discharged a sworn juror as grossly unqualified over the defendant's objection, depriving him of his right to a fair trial. The juror informed the court that he recognized the defendant's mother, who was a trial witness, because she bought geese from his farm two years earlier. But the juror did not think that the experience would affect his ability to be fair and impartial and he thought that he could assure the parties that he could consider the witness's credibility and decide the case without reference to the prior experience. To discharge a juror as grossly unqualified over a defendant's objection, the court must conduct a probing inquiry and assess the knowledge acquired by the juror and its importance and bearing on the case, and conclude that it is obvious that the juror would be unable to render an impartial verdict. *See People v Buford*, 69 NY2d 290, 298-299. The court may not speculate as to the juror's possible partiality based on equivocal responses. Here, the court conducted a limited inquiry and its decision was speculative. *See People v Anderson*, 70 NY2d 729, 730. The juror's responses to the court's inquiry, taken as a whole, were not equivocal, and the juror's brief contact with the witness two years earlier does not constitute such a close personal or business relationship that would render the juror grossly unqualified to continue serving in the case. *See People v Telehany*, 302 AD2d 927, 928. Judgment reversed and matter remitted for a new trial. (County Ct, Franklin Co [Richards, J])

Third Department *continued*

Witnesses (Credibility) (Direct Examination) WIT; 390(10) (15)

People v Mitchell, 57 AD3d 1308, 871 NYS2d 445 (3rd Dept 2008)

**Holding:** The court erred in allowing the prosecution to impeach its witness using the witness’s prior inconsistent statement. The primary trial issue was identity and the witness was one of the two eyewitnesses to the crime. The witness had told the police that the defendant was the perpetrator. Before the witness testified at trial, the prosecution told the court that the witness stated that he would recant his prior statement if forced to testify. The court allowed the prosecution to call the witness and the prosecution did not elicit testimony regarding any material issue other than the perpetrator’s identity. When the witness denied that the defendant was the perpetrator, the prosecution immediately impeached him using his prior statement, which was later entered into evidence. The prosecution’s primary purpose in calling the witness was to present the otherwise inadmissible prior statement to the jury. The court improperly allowed the prosecution to go through the prior statement in detail and rehash testimony that did not contradict the witness’s trial testimony, thereby bolstering critical testimony of other prosecution witnesses. See *People v Jones*, 126 AD2d 974, 974 *lv den* 69 NY2d 1005, 70 NY2d 649. The court’s limiting instruction did not render the error harmless. Because the evidence of the defendant’s guilt is not overwhelming, it cannot be concluded that there is no reasonable possibility that the error might have contributed to the conviction. See *People v Fitzpatrick*, 40 NY2d 44, 53. Judgment reversed and matter remitted for a new trial. (County Ct, Ulster Co [Jacon, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles]) SEA; 335(10[a])

Traffic Infractions (General) TFI; 372(15)

People v Davis, \_\_ AD3d \_\_, 870 NYS2d 602 (3rd Dept 2009)

A police officer saw the right front tire of the defendant’s vehicle drive partially on the fog line three or four times, which the officer believed violated Vehicle and Traffic Law 1128(a). During the traffic stop, the officer discovered narcotics. After a suppression hearing, the judicial hearing officer concluded that the defendant’s actions did not constitute a violation of section 1128(a) as a matter of law, and the court adopted the hearing officer’s recom-

mendation. The hearing officer noted the lack of New York case law on fog line encroachments and reviewed decisions from other jurisdictions interpreting similarly worded statutes.

**Holding:** The court correctly granted the defendant’s motion to suppress because the officer did not make a valid traffic stop. “[W]e decline to hold that fog line encroachment can never be the basis for a valid traffic stop as a matter of law. However, in this case, we are mindful that [the officer] only testified as to brief contacts with the fog line prior to the stop. He did not indicate that, for example, defendant was weaving, driving erratically or even that he drove onto the shoulder of the road (see *People v Parris*, 26 AD3d 393, 394 [2006], *lv denied* 6 NY3d 851 [2006]).” The suppression court’s factual findings are accorded great deference and should not be disturbed unless they are clearly erroneous. See *People v Johnson*, 17 AD3d 932, 933 *lv den* 5 NY3d 790. Order affirmed. (County Ct, Schenectady Co [Drago, J])

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

Sentencing (Credit for Time Served) SEN; 345(15)

Matter of Ramos v Goord, \_\_ AD3d \_\_, 870 NYS2d 629 (3rd Dept 2009)

After the defendant was indicted in Westchester County, he fled the jurisdiction and was arrested in the Dominican Republic, where he was held for four months pending extradition.

**Holding:** The court correctly dismissed the petitioner’s CPLR article 78 proceeding. The petitioner sought review of a Department of Correctional Services (DOCS) decision denying him jail time credit for the time he was incarcerated in the Dominican Republic. Penal Law 70.30(3) does not distinguish between inmates detained in New York and inmates detained elsewhere, but in order to get jail time credit for time spent in federal custody, another state’s custody, or another country’s custody, the inmate must provide a certified record of that detention. See *Matter of Guido v Goord*, 1 NY3d 345, 349 n3; Correction Law 600-a. Because the petitioner has not produced a certified record of his detention in the Dominican Republic, DOCS must follow the petitioner’s commitment papers that reflect jail time credit for the 736 days he spent in the Westchester County jail. See *Matter of Murray v Goord*, 1 NY3d 29, 32. Judgment affirmed. (Supreme Ct, Ulster Co [Connolly, J])

Guilty Pleas (Vacatur) GYP; 181(55)

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

People v Smith, \_\_ AD3d \_\_, 871 NYS2d 452 (3rd Dept 2009)

Third Department *continued*

**Holding:** The court erred in sentencing the defendant to consecutive prison terms of one to three years for two counts of possessing a sexual performance of a child. In order to impose consecutive sentences, the prosecution had to show through the indictment or the facts adduced at the plea allocution that the defendant obtained the images at issue at separate and distinct times. *See People v Lynch*, 291 AD2d 582, 583. The indictment contains identical language and the same offense date for the two counts and the defendant's plea allocution did not establish that he received the images at different times. Therefore, consecutive sentences were not authorized. *See People v Dean*, 8 NY3d 929, 931. Because the record shows that the parties believed that the defendant would receive an aggregate sentence of two to six years, the defendant's guilty plea is vacated and the matter is remitted for further proceedings. Judgment reversed, guilty plea vacated, and matter remitted for further proceedings. (County Ct, Broome Co [Daley, JJ])

---

Domestic Violence (General)	DVL; 123(10)
Juveniles (Neglect)	JUV; 230(80)

Matter of Xavier II, Nos. 101900, 502797, 3rd Dept, 1/8/2009

**Holding:** The court properly concluded that the respondent neglected her three children. To establish neglect, the petitioner must show, by a preponderance of the evidence, that the child's physical, mental, or emotional condition was harmed or is in imminent danger of harm because of the parent's failure to exercise a minimum degree of care. *See Family Court Act 1012(f)(i)(B); Nicholson v Scoppetta*, 3 NY3d 357, 368. A single incident can establish such imminent danger. *See Matter of Aiden L.*, 47 AD3d 1089, 1090. The record shows that the respondent's boyfriend grabbed the respondent's neck, pulled her hair, and covered her mouth while she was holding her then two-and-a-half-year-old child. The police subdued him with pepper spray after he yelled and cursed at them and dented a police car door. After the petitioner got a no-contact order of protection for the respondent and her children, the respondent had it modified to prohibit only harassment. The respondent declined domestic violence counseling and began living with her boyfriend again. The respondent had a history of drug abuse, was discharged from parenting classes for absenteeism, and did not seek prenatal care during her third pregnancy. Because the evidence did not show that the domestic violence issues have been adequately addressed and since the respondent has not recognized the imminent threat that her boyfriend poses to the children, the court's neglect finding has proper record support. Appeal of tempo-

rary removal order dismissed as moot and order determining neglect affirmed. (Family Ct, Broome Co [Connerton, JJ])

---

Driving While Intoxicated (Driver's License Revocation or Suspension)	DWI; 130(10)
---	--------------

Matter of Vanderminden v Tarantino, \_\_ AD3d \_\_, 871 NYS2d 760 (3rd Dept 2009)

**Holding:** The court properly dismissed the CPLR article 78 petition. The petitioner, a Vermont driver's license holder, was arrested for driving while intoxicated and a breath test showed that his blood alcohol content (BAC) was 0.14%. After a *Pringle* hearing (*Pringle v Wolfe*, 88 NY2d 426 *cert den* 519 US 1009 [1996]), pursuant to Vehicle and Traffic Law (VTL) 1193(2)(e)(7), the respondent judge suspended the petitioner's license pending prosecution. Although the criminal case is over, the appeal is not moot because the legal issues arise frequently and are likely to evade review. *See Matter of Hearst Corp v Clyne*, 50 NY2d 707, 714-715. Article 31 of the VTL is a comprehensive statute that addresses drunk driving (*see People v Prescott*, 95 NY2d 665, 659), and section 1193 provides the exclusive criminal penalties and civil sanctions applicable to such offenses. "The role of [the prompt suspension] provision would be undermined, and its application rendered arbitrary, if it is interpreted to allow the holder of an out-of-state license to continue driving in New York when, under the same circumstances, the holder of a New York license would be prohibited from driving." Because the Legislature did not intend such an anomalous result, courts may suspend the driving privileges of out-of-state licensees under section 1193(2)(e)(7). The respondent correctly precluded the petitioner from questioning police witnesses about the calibration of the breath test device, the administration of the test, and matters relating to probable cause for the arrest during the *Pringle* hearing, as these issues are beyond the scope of the hearing. Judgment affirmed. (Supreme Ct, Warren Co [Aulisi, JJ])

---

Evidence (Exhibits) (General)	EVI; 155(55) (60)
Instructions to Jury (Theories of Prosecution and/or Defense)	ISJ; 205(50)

People v Francis, No. 100050, 3rd Dept, 1/22/2009

Three days after two housing officers told the defendant to leave the premises of a housing project and not return, they saw a person they believed was the defendant at the project. When they approached the person, he fled, allegedly dropping cash, cocaine, and a cell phone. The defendant was later arrested.

Third Department *continued*

**Holding:** The court deprived the defendant of his right to a fair trial by allowing the prosecution to refer during summation to the specific contents of the cell phone that were not introduced into evidence. When seeking to admit the phone itself into evidence, the prosecution said the phone would be used to display pictures of the defendant that were on it. No witnesses testified regarding the phone's contents. Thus, it was improper for the prosecutor, during summation, to tell the jury about specific dates and times of calls logged on the phone and to invite the jury to look at the phone's contents during deliberations. *See People v Givans*, 45 AD3d 1460, 1462. Defense counsel did not open the door by pointing out during summation that the prosecution did not introduce the contents of the phone into evidence, and the court did not cure the error by reopening summations to allow defense counsel to comment on the phone's contents. The error was not harmless because the defendant's theory of the case was that he did not drop the phone on the date alleged because the officers took it during the encounter three days earlier. This defense would have been undermined if the jury attributed to the defendant any calls made during that three-day period. It is significant that the jury asked whether it could consider as evidence the times and dates of calls and messages on the phone. Judgment reversed and matter remitted for new trial. (Supreme Ct, Rensselaer Co [Czajka, J])

Search and Seizure (Consent [Advice of Rights] [Coercion and Other Illegal Conduct] (Warrantless Searches) SEA; 335(20 [a] [f]) (80)

*People v Madden*, \_\_ AD3d \_\_, 871 NYS2d 766 (3rd Dept 2009)

After receiving an anonymous tip about drug dealing, three officers went to the 16-year-old defendant's hotel room at 1:15 a.m. The defendant agreed to let them look around. Although there was no criminal activity or drugs in plain view, the officers searched her purse allegedly on consent and found marijuana. They allegedly handcuffed her and threatened a dog sniff if she did not sign a consent-to-search form. She signed the form, and the police found crack cocaine.

**Holding:** The court erred in applying the level 2 common-law right to inquire standard in *People v De Bour* (40 NY2d 210), to resolve the suppression motion. *De Bour* applies to fast-moving street encounters (*see People v Moore*, 6 NY3d 496, 499), not hotel room searches. *See eg People v Oldacre*, 53 AD3d 675, 677. The key question is whether an exception to the warrant requirement, such as voluntary consent, applies. *See People v Gonzalez*, 39 NY2d

122, 127. Since the court did not reach the issue of voluntary consent, the matter must be remitted. The court should consider, among other things, the defendant's age, her prior contact with police, and whether she was adequately advised of her right to refuse consent. Order reversed, motion denied, and matter remitted for further proceedings. (County Ct, Tompkins Co [Rowley, J])

**Concurrence:** [Kane, J] A *De Bour*-type analysis should be applied to residential searches; police investigation of criminal activity at a residence should be limited to when there is a founded suspicion of criminality at that residence. Without this analysis, the police would be allowed to knock on any door at any time and request consent to search homes for any or no reason, and the courts could only review the consent granted after such an initial intrusion.

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

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

Narcotics (Marijuana) (Possession) NAR; 265(40) (57)

*People v Trank*, No. 101615, 3rd Dept, 1/29/2009

The defendant was charged with first-degree promoting prison contraband for attempting to bring more than 19 grams of marijuana into a correctional facility. Although she knew that there was a case pending before the Court of Appeals that could clarify the elements of the offense, the defendant pleaded guilty to attempted first-degree promoting. Six months after sentencing, the Court of Appeals held that a small amount of marijuana, generally less than 25 grams, is not dangerous contraband. *See People v Finley*, 10 NY3d 647, 657-658.

**Holding:** Failure to allege the amount of marijuana possessed is not a jurisdictional defect. Although possession of a small amount of marijuana cannot be possession of dangerous contraband, the indictment did not specify the amount, and possession of larger amounts of marijuana could constitute possession dangerous contraband. Because the defect was not jurisdictional, the defendant waived it by pleading guilty. *See People v Iannone*, 45 NY2d 589, 600. During her plea, the defendant acknowledged that she fully discussed the case with defense counsel, and she chose to plead to a reduced charge in light of the law at the time (*see People v Martinez*, 34 AD3d 859), instead of gambling on the possibility of a helpful Court of Appeals decision. The defendant is bound by that decision, even though the crime charged would have been reduced after the *Finley* decision. "We do not have jurisdiction to reduce the charge to a misdemeanor in the interest of justice, and we decline to exercise our interest of justice jurisdiction to reduce defendant's sentence." Judgment affirmed. (County Ct, Chemung Co [Hayden, J])

## Fourth Department

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

Sentencing (Enhancement) (Hearing) SEN; 345(32) (42)  
*People v Ayen*, 55 AD3d 1305, 864 NYS2d 591 (4th Dept 2008)

**Holding:** The court properly imposed an enhanced sentence based on the defendant's arrest on an unrelated matter between his plea and sentencing. *See People v Semple*, 23 AD3d 1058 *lv den* 6 NY3d 852. The court's warning at the plea proceeding that the defendant would receive an enhanced sentence if he committed any new crimes or got into any other trouble with the law was not unclear or ambiguous. *See gen People v Coleman*, 266 AD2d 227 *lv den* 94 NY2d 946. The court gave the defendant an opportunity to dispute the charges, and the defendant admitted that he was arrested after the police found a gun in the car in which he was a passenger. Contrary to the defendant's argument that his arrest was improper because the gun belonged to the car's owner, there was a legitimate basis for the arrest under the automobile presumption. *See Penal Law 265.15(3)*. Judgment affirmed. (County Ct, Jefferson Co [Martusewicz, JJ])

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

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

Family Court (General) FAM; 164(20)

*Matter of Dennis K. A., III*, 55 AD3d 1422, 864 NYS2d 656 (4th Dept 2008)

**Holding:** The respondent appeals from an order terminating his parental rights on the basis of abandonment (*see Social Services Law 384-b[4][b]*). The respondent's appellate counsel filed a brief asking to be relieved as counsel, claiming no nonfrivolous issues exist to be raised. *See Matter of Jordan S.*, 179 AD2d 1091. Because the petitions only allege that the children were permanently neglected (*see Social Services Law 384-b[4][d]*), a nonfrivolous issue exists as to whether the Family Court's determination violated the father's right to due process. Motion to relieve counsel granted and new counsel is assigned to brief this issue and any other issues that counsel may find. (Family Ct, Wyoming Co [Griffith, JJ])

Double Jeopardy (Collateral Estoppel) DBJ; 125(3)

Juveniles (Abuse) JUV; 230(3)

*Matter of Derrick C.*, 55 AD3d 1320, 864 NYS2d 345 (4th Dept 2008)

**Holding:** In a Family Court article 10 proceeding, the court concluded that the respondent sexually abused his son and derivatively abused his two daughters. The court properly gave collateral estoppel effect to the respondent's guilty plea to sexual abuse in the parallel criminal action. *See Matter of Suffolk County Dept of Social Servs v James M.*, 83 NY2d 178, 182-183; *Matter of Mark H.*, 259 AD2d 1040. Order affirmed. (Family Ct, Jefferson Co [Hunt, JJ])

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

Sentencing (Pronouncement) SEN; 345(70)

*People ex rel Henderson v NYS Department of Correctional Services*, 55 AD3d 1416, 864 NYS2d 621 (4th Dept 2008)

**Holding:** The court erred in denying the defendant's petition for a writ of habeas corpus. Although habeas corpus is not available because the defendant has been released from custody and restored to post-release supervision, the matter is converted to a CPLR article 78 proceeding in the nature of prohibition. *See CPLR 103(c)*; *People ex rel Eaddy v Goord*, 48 AD3d 1307, 1308. At sentencing, the court did not impose a period of post-release supervision. Because only a sentencing court may impose post-release supervision, the respondent may not do so. *See Matter of Garner v New York State Dept of Correctional Servs.*, 10 NY3d 358, 360. Judgment reversed, habeas corpus proceeding converted to a CPLR article 78 proceeding, petition granted, judgment granted in favor of the petitioner, and respondent prohibited from imposing a period of post-release supervision. (Supreme Ct, Wyoming Co [Dadd, AJ])

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

Juveniles (Delinquency) JUV; 230(15)

*Matter of Jenna V.*, 55 AD3d 1341, 864 NYS2d 637 (4th Dept 2008)

The respondent was adjudicated a juvenile delinquent based upon the finding that she committed acts that, if committed by an adult, would constitute second- and third-degree assault. *See Penal Law 120.05(10)(a)*, 120.00(1).

**Holding:** The evidence is legally insufficient to support the second-degree assault finding because it does not establish that the respondent intended to cause physical injury to her teacher. *Cf Matter of Manny P.*, 33 AD3d 330. Penal Law 120.05(10)(a) provides: "Acting at a place the person knows, or reasonably should know is on school grounds and with intent to cause physical injury, he or she: (a) causes such injury to an employee of a school or public school district." The evidence is legally insufficient

Fourth Department *continued*

to show that the respondent's intended target was the teacher. Although the statute does not expressly require that a respondent act with intent to cause physical injury to a school employee, "the reasoning underlying the doctrine of transferred intent does not apply to this crime." The evidence established that the respondent, intending to cause physical injury to another student, caused injury to her teacher; this is sufficient to support the third-degree assault finding. *See gen People v Bleakley*, 69 NY2d 490, 495. Order modified by vacating the provision adjudicating the respondent a juvenile delinquent on count one, count one of the petition dismissed, and order affirmed as modified. (Family Ct, Monroe Co [O'Connor, J])

Confessions (*Huntley* Hearing) CNF; 70(33)

Double Jeopardy (Collateral Estoppel) DBJ; 125(3)

*People v Martin*, 55 AD3d 1317, 865 NYS2d 162 (4th Dept 2008)

The defendant took a camping trailer from a business in Steuben County and moved it to property in Yates County. The defendant pleaded guilty to third-degree criminal possession of stolen property in Yates County after the Yates County Court denied his motion to suppress the written statement he gave to the police in that county.

**Holding:** The Steuben court properly refused to suppress the defendant's written statement without a hearing on the basis of collateral estoppel. Collateral estoppel applies in criminal cases where "there is 'identity of parties[,] identity of issues[,] a final and valid prior judgment and a full and fair opportunity to litigate the prior determination' (*People v Aguilera*, 82 NY2d 23, 29-30)." By not moving to withdraw his plea or to vacate the judgment of conviction, the defendant failed to preserve for review his contention that his plea was not knowingly, voluntarily, and intelligently entered. *See People v Aguayo*, 37 AD3d 1081 *lv den* 8 NY3d 981. Judgment affirmed. (County Ct, Steuben Co [Furfure, J])

Double Jeopardy (Collateral Estoppel) DBJ; 125(3)

Family Court (General) FAM; 164(20)

Juveniles (Custody) JUV; 230(10) (60) (80) (145)  
(Hearings) (Neglect)  
(Visitation)

*Matter of Michael P.T. v Susan M.-T.*, 55 AD3d 1323, 865 NYS2d 797 (4th Dept 2008)

**Holding:** The court erred by relying on evidence adduced at a Family Court article 10 hearing to grant the

petitioner father's motion for summary judgment and award him sole custody without a hearing. *See Matter of Merrick T.*, 55 AD3d 1424. Custody and visitation determinations usually should be made after a full evidentiary hearing. *See Matter of Kenneth M. v Monique M.*, 48 AD3d 1174, 1174-1175. Collateral estoppel does not preclude the respondent mother from contesting the issues of custody and visitation because the issues are not identical to the issue of neglect in the prior proceeding and "the mother and the Ontario County Department of Social Services, the petitioner in the prior proceeding, 'do "not share actual or functional identity as parties"' (*Ralph M. v Nancy M.*, 280 AD2d 995, 996, quoting *Matter of Juan C. v Cortines*, 89 NY2d 659, 667)." The court incorrectly relied on *Matter of Woodruff v Adside* (26 AD3d 866) in concluding that the neglect determination established that the mother was incapable of fulfilling her obligations as a custodial parent and that a hearing was unnecessary. Because the mother in *Woodruff* was incarcerated and for other reasons, that case is distinguishable. Order reversed, summary judgment motion denied, cross petition reinstated, matter remitted for a hearing on the amended petition and cross petition, and pending a new determination, the petitioner shall retain sole custody of the parties' children. (Family Ct, Seneca Co [Bender, J])

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

Plea Bargaining (General) PLE; 284(10)

Sentencing (Enhancement) SEN; 345(32)

*People v Povoski*, 55 AD3d 1221, 864 NYS2d 586 (4th Dept 2008)

The defendant was convicted of several offenses in Ontario County Court. Later he pleaded guilty in Monroe County to two indictments charging him with unrelated offenses. As part of the plea, the defendant waived his right to appeal the Ontario County judgment.

**Holding:** The defendant's appeal waiver was effective. Allowing a defendant to waive the right to appeal from judgments of more than one conviction as part of a negotiated plea is not offensive, constitutionally, statutorily, or as a matter of policy. *See People v Holmes*, 294 AD2d 871 *lv den* 98 NY2d 730. The defendant's appeal waiver does not prevent him from challenging his sentence on the ground that the court allegedly penalized him for exercising his right to a trial. However, the defendant's argument lacks merit; that the sentence imposed was greater than the sentence offered during plea negotiation does not prove that the court punished the defendant for exercising his right to a trial. *See People v Irrizarry*, 37 AD3d 1082, 1083 *lv den* 8 NY3d 946. Judgment affirmed. (County Ct, Ontario Co [Doran, J])

Fourth Department *continued*

Informants (General) INF; 197(20)

Witnesses (Credibility) (General) WIT; 390(10) (22)

People v Santana, 55 AD3d 1338, 865 NYS2d 452  
(4th Dept 2008)

**Holding:** The court properly allowed the prosecution to present testimony from the jailhouse informant's attorney. The only preserved challenge to the evidence was that the testimony was directed at collateral issues; that argument lacks merit. *See gen People v Aska*, 91 NY2d 979, 981. Other arguments against the testimony, even if preserved for review, also lack merit. The attorney did not testify that she or the prosecutor believed the informant or his statements about the defendant's crimes was credible. The attorney merely testified that the informant's cooperation agreement required him to provide truthful cooperation in order to get a downward departure of his federal sentence. This testimony was given prior to the informant's testimony; thus, the attorney could not and did not give an opinion about whether the informant provided truthful cooperation. The testimony did not violate the Confrontation Clause or the advocate-witness rule (*cf United States v Roberts*, 618 F2d 530 [9th Cir 1980]), nor did it usurp the jury's function in assessing credibility. *See People v Hayes*, 226 AD2d 1055, 1056 *lv den* 88 NY2d 936. Because the defendant raised issues regarding the informant's motive for testifying and his credibility, the court properly allowed the prosecutor to elicit testimony about the cooperation agreement. Judgment affirmed. (County Ct, Onondaga Co [Fahey, J])

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

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

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

People v Shampine, 55 AD3d 1423, 864 NYS2d 339  
(4th Dept 2008)

**Holding:** The defendant's appellate counsel filed a brief pursuant to *People v Crawford* (71 AD2d 38) and asked to be relieved as counsel, claiming no nonfrivolous issues existed to raise. A review of the record reveals a nonfrivolous issue of whether the court erred in denying the defendant's request for a downward departure from his presumptive risk level. Motion granted and new counsel to be assigned to brief this issue and any other issues that counsel may find. (County Ct, Jefferson Co [Martusewicz, J])

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

Counsel (*Anders* Brief)

COU; 95(7)

People v Spencer, 55 AD3d 1424, 866 NYS2d 842  
(4th Dept 2008)

**Holding:** The defendant's appellate counsel filed a brief pursuant to *People v Crawford* (71 AD2d 38) and asked to be relieved as counsel, claiming no nonfrivolous issues existed to raise. A review of the record shows that the defendant moved prior to sentencing to withdraw his plea, which raises the issue of whether the court abused its discretion in denying the defendant's motion. Motion granted and new counsel to be assigned to brief this issue and any other issues that counsel may find. (County Ct, Jefferson Co [Martusewicz, J])

Juveniles (Neglect)  
(Representation)  
(Right to Counsel)

JUV; 230(80) (125) (130)

Matter of Tiajianna M., 55 AD3d 1321, 867 NYS2d 287  
(4th Dept 2008)

**Holding:** The court properly denied the portion of the law guardian's motion seeking to preclude the petitioner Department of Social Services from interviewing her client without her consent or outside her presence, absent an emergency. The petitioner has the right to interview the client without notice to and outside the presence of the law guardian for the purpose of ensuring the safety of the client and the other children living in the respondents' home. The court correctly restricted the scope of questioning to matters involving the client's safety, which "would preclude, if appropriate, any statements made by the child that might be against her interest." The record shows that the court previously found that the respondents, the client's mother and the mother's boyfriend, neglected the client and her siblings. Regarding the most recent Family Court article 10 petition, the mother made an admission of neglect and the court granted a one-year adjournment in contemplation of dismissal (ACD). The ACD required the respondents to allow the petitioner's caseworker to examine and interview the children privately, and the law guardian agreed to that requirement. "Although the child has a constitutional and statutory right to legal representation of her interests in the proceedings on the neglect petition (*see generally Matter of Jamie TT.*, 191 AD2d 132, 135-137), we conclude that the court properly balanced that right against the statutory requirement [*see Family Court Act 1039(c)*] that the child and the mother remain under the petitioner's supervision during the period of the ACD." The petitioner is not required to comply with Code of Professional Responsibility DR 7-104(a)(1) (22 NYCRR 1200.35[a][1]) because that rule applies only to attorneys. Order affirmed. (Family Ct, Erie Co [Szczur, J])

Fourth Department *continued*

Sentencing (Appellate Review) (Excessiveness) (Presentence Investigation and Report) SEN; 345(8) (33) (65)

People v Tolliver, 55 AD3d 1302, 865 NYS2d 423 (4th Dept 2008)

**Holding:** The defendant's appeal waiver does not cover his challenge to the severity of his sentence because he waived his right to appeal before the court advised him of the maximum sentence that could be imposed. See *People v Mingo*, 38 AD3d 1270, 1271. Nevertheless, the sentence is not unduly harsh or severe. The defendant failed to preserve for review his argument about the alleged inaccuracy in the presentence report (see CPL 470.05(2); *People v Karlas*, 208 AD2d 767), and it is not reviewed as a matter of discretion in the interest of justice. Judgment affirmed. (Supreme Ct, Erie Co [Buscaglia, AJ])

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

Evidence (Best and Secondary Evidence) (General) EVI; 155(5) (60)

People v Williams, 55 AD3d 1398, 864 NYS2d 611 (4th Dept 2008)

**Holding:** The court correctly denied the defendant's request to charge third-degree assault as a lesser included offense. The evidence, when viewed in the light most favorable to the defendant (see *People v Martin*, 59 NY2d 704, 705), does not support a finding that the defendant failed to perceive the substantial and unjustifiable risk of physical injury to the complainant when he chased her and swung at her head with the butt of a long gun. See *People v Arzu*, 240 AD2d 217 *lv den* 90 NY2d 938. The prosecution provided a sufficient foundation for the admission of tape recordings of conversations between the defendant and the complainant and the defendant and the complainant's boyfriend that occurred while the defendant was incarcerated. See *gen People v Ely*, 68 NY2d 520, 527-528. The complainant testified, without contradiction, that she was familiar with the defendant's voice and was able to recognize it. See *People Arena*, 48 NY2d 944, 945. With regard to both conversations, the content of the recordings established the defendant's identity as the caller, and the testimony of the person in charge of maintaining the jail's recording system established their authenticity as complete and accurate reproductions of the conversations and that the recordings had not been altered. Judgment affirmed. (County Ct, Monroe Co [Keenan, J])

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

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

People v Wosu, 55 AD3d 1253, 865 NYS2d 411 (4th Dept 2008)

**Holding:** The court erred in denying the defendant's CPL 440.10 motion without an evidentiary hearing to explore nonrecord facts that may support her ineffective assistance of counsel argument. Because the defendant relied solely on the federal constitution in support of her motion, the court properly applied the test set forth in *Strickland v Washington* (466 US 668 [1984]). The defendant was convicted of multiple counts of sex offenses that occurred during a one-month period. By presenting an alibi defense as to a six-day portion of that month, defense counsel failed to present any meaningful defense as to the remainder of the month. The defendant relies heavily on a Second Circuit decision in her co-defendant's habeas corpus proceeding based on ineffective assistance of counsel. See *Eze v Senkowski*, 321 F3d 110 (2d Cir 2003). The defendant alleges that she and her two codefendants presented a unified defense at trial, and the same deficiencies in the representation provided to her codefendant Eze were present in the representation provided to her. Order reversed and matter remitted for a hearing pursuant to CPL 440.30(5). (Supreme Ct, Erie Co [Kloch, Sr., AJ])

**Dissent:** [Smith, JP & Peradotto, J] In contrast to the defense offered by her codefendants, the defendant presented an alibi defense and argued that if any abuse occurred, she was not a party to it. By presenting an alibi defense, defense counsel had little incentive to challenge evidence about the alleged abuse, and such efforts could have undermined the alibi defense. Since defense counsel is deceased, nonrecord facts cannot contradict the record evidence that defense counsel provided effective assistance of counsel.

Accusatory Instruments (Amendment) (Variance of Proof) ACI; 11(5) (20)

Evidence (Sufficiency) EVI; 155(130)

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

People v Young, 55 AD3d 1234, 864 NYS2d 584 (4th Dept 2008)

**Holding:** The indictment provided the defendant with fair notice of the charge against him. See *People v Rivera*, 84 NY2d 766, 770-771. Although the indictment charged the defendant as a principal, because there is no legal distinction between liability as a principal and criminal culpability as an accomplice, the accessorial liability instruction did not introduce a new theory of culpability

**Fourth Department** *continued*

that was inconsistent with the indictment. Therefore, the court properly instructed the jury regarding both theories based on the evidence presented at trial. *See People v Dixon*, 261 AD2d 833 *lv den* 93 NY2d 1017. Even though there were discrepancies between the complainant's trial testimony, grand jury testimony, and prior written statement, the trial testimony was not incredible and unbelievable (*see People v Wallace*, 306 AD2d 802, 802-803), and the jury's resolution of credibility issues is entitled to deference. *See gen People v Bleakley*, 69 NY2d 490, 495. Even if a different verdict would not have been unreasonable, the jury's verdict was justified. *See People v Danielson*, 9 NY3d 342, 348. Judgment affirmed. (County Ct, Erie Co [Troutman, JJ])

**Evidence (General)** **EVI; 155(60) (80) (106)**  
**(Instructions) (Prejudicial)**

**Juries and Jury Trials** **JRY; 225(30) (37)**  
**(Discharge) (General)**

**People v Bassett**, 55 AD3d 1434, 866 NYS2d 473  
(4th Dept 2008)

**Holding:** The court did not abuse its discretion in denying the defendant's motion for a mistrial after one of the jurors was dismissed. *See gen People v Toland*, 2 AD3d 1053, 1055 *lv den* 2 NY3d 808. The court's use of paper ballots to inquire whether the impartiality of any of the remaining jurors was affected by statements made by the discharged juror and whether the jurors wanted to speak to the court individually was equivalent to individual interviews of the jurors (*see People v Buford*, 69 NY2d 290, 299), and was sufficient to protect the defendant's right to a fair trial. *See People v Knorr*, 284 AD2d 411, 412 *lv den* 96 NY2d 903. The court properly admitted testimony about the defendant fondling himself in the presence of a friend of the complainant's sister at the complainant's house and the defendant's alleged assault of the complainant's mother. This evidence was admissible to complete the narrative of the events charged in the indictment and provided necessary background evidence, and the assault evidence was admissible to explain the complainant's delay in reporting the ongoing sexual conduct. *See People v Bennett*, 52 AD3d 1185, 1187. And the court gave an appropriate limiting instruction after the testimony was given to reduce the possible prejudice to the defendant. *See People v Johnson*, 45 AD3d 606 *lv den* 9 NY3d 1035. The court correctly denied the defendant's request for the complainant's counseling records and his request to have the counselor testify at trial. An in camera review of the records showed that they did not relate to the defendant's crimes (*see gen People v Tissois*, 72 NY2d 75), and examination of privileged records and eliciting testimony from the

counselor to impeach the general character of the witness is an impermissible use of confidential material. Judgment affirmed. (Supreme Ct, Erie Co [Fricano, JJ])

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

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

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

**People ex rel Griffin v NYS Division of Parole**,  
55 AD3d 1452, 866 NYS2d 843 (4th Dept 2008)

**Holding:** The court originally imposed a three-year period of post-release supervision, but later issued an amended sentence and commitment increasing the period of post-release supervision to five years. Because the petitioner could have raised the issue of whether the amended sentence was lawfully imposed on direct appeal or through a post-judgment CPL 440 motion, habeas corpus relief is not available. *See People ex rel Elkady v Conway*, 41 AD3d 1176 *lv den* 9 NY3d 809. The respondent Department of Correctional Services properly adhered to the amended sentence and commitment. *See Matter of Garner v New York State Dept of Correctional Servs*, 10 NY3d 358, 362. Assuming that the court erred in amending the sentence without affording the petitioner the opportunity to appear with counsel at the time of resentencing (*see People v Johnson*, 19 AD3d 1163, 1164 *lv den* 5 NY3d 829), the remedy would be to modify the judgment by vacating the sentence and remitting the matter for resentencing at which time the petitioner would be given the opportunity to appear with counsel, which the petitioner has expressly rejected. The original sentence cannot be reinstated because the three-year term of post-release supervision may be illegal, which cannot be determined on the record presented. *See Penal Law 70.02(1)(c); 70.45 [former (2)]; see gen People v Gibson*, 52 AD3d 1227. Judgment affirmed. (Supreme Ct, Wyoming Co [Dadd, AJ])

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

**Confessions (Evidence)** **CNF; 70(30) (33) (50)**  
**(Huntley Hearing)**  
**(Voluntariness)**

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

**People v Williams**, 55 AD3d 1449, 865 NYS2d 468  
(4th Dept 2008)

**Holding:** The court correctly denied the defendant's motion to dismiss the counts of criminal sexual act, sexual abuse, and endangering the welfare of a child for lack of specificity as to the time and date of the incidents underlying those crimes. The indictment adequately pro-

Fourth Department *continued*

vided the defendant with full notice of the charges against him. *See* CPL 200.50(7)(a). The indictment specified an 18-day time period during which the alleged abuse occurred, which is sufficiently specific. The complainant was 11 years old at the time of the alleged abuse, and despite the prosecution’s efforts, the complainant could not narrow the time period. *See People v Roman*, 43 AD3d 1282, 1283 *lv den* 9 NY3d 1009. The court properly denied the defendant’s motion to suppress his oral and written statements, as the *Huntley* hearing record shows that the statements were knowing, intelligent, and voluntary. That the defendant testified for the first time at trial that he was having a diabetic episode during the interrogation cannot be considered on appeal because the testimony was not before the suppression court and the defendant has not shown that this fact could not have been discovered with reasonable diligence before the court decided the motion. *See People v Taylor*, 206 AD2d 904, 904-905 *lv den* 84 NY2d 940. The defendant was not denied effective assistance of counsel at his sentencing. Although the defendant had a different attorney at sentencing and the attorney did not meet with him before sentencing, defense counsel provided meaningful representation by arguing for leniency based upon various factors favoring the defendant. *See gen People v Baldi*, 54 NY2d 137, 147. Judgment affirmed. (Supreme Ct, Monroe Co [Sirkin, AJ])

Appeals and Writs (Prosecution, Appeals By) APP; 25(70)

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)  
*People v Aldrich*, 56 AD3d 1228, 867 NYS2d 610 (4th Dept 2008)

**Holding:** The court erred in assessing points under the risk assessment instrument categories of “sexual contact with victim” and “release with supervision.” Because there was no evidence of actual sexual intercourse between the defendant and the complainant, the court incorrectly assessed 25 points for attempted sexual intercourse. The court improperly assessed five points under the release with supervision category because the defendant was released under the supervision of “a probation or parole officer who oversees a sex offender caseload or who otherwise specializes in the management of such offenders’ . . . .” *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, at 17 (2006). Because those points were erroneously assessed, the court should have adjudicated the defendant a level one risk. The court correctly concluded that the prosecution failed to establish by clear and convincing evidence that the defendant should be assessed 20 points for physical helplessness. Because the prosecution did not file a cross

appeal, the argument that the court should have granted an upward departure to a level three based on the defendant’s history of abuse and drug use is not considered. *See gen Koch v Consolidated Edison Co of NY*, 62 NY2d 548, 562 n 10 *rearg den* 63 NY2d 771 *cert den* 469 US 1210. Order modified by determining that the defendant is a level one risk and order modified as affirmed. (County Ct, Ontario Co [Kocher, JJ])

Driving While Intoxicated (General) DWI; 130(17)

Sentencing (Appellate Review) SEN; 345(8) (10) (70.5)  
 (Concurrent/Consecutive)  
 (Resentencing)

*People v Backus*, 56 AD3d 1119, 867 NYS2d 290 (4th Dept 2008)

**Holding:** The court erred in sentencing the defendant to two one-year concurrent definite terms for second-degree vehicular assault and a consecutive one-year definite term for driving while intoxicated. The consecutive portion of the sentence is illegal because driving while intoxicated is a material element of second-degree vehicular assault. *See* Penal Law 70.25(2); *see gen People v Hamilton*, 4 NY3d 654. Since the sentence was imposed pursuant to a plea agreement, the case should be remitted for resentencing or consideration of a motion to vacate the plea and set aside the conviction, should the prosecution choose to file such a motion. *See People v Irwin*, 166 AD2d 924, 925. Judgment modified by vacating the sentence, judgment affirmed as modified, and matter remitted for further proceedings. (County Ct, Onondaga Co [Aloi, JJ])

**Dissent in part:** [Centra, J & Gorski, JJ] Despite the plea agreement, this Court should correct the illegal sentence by directing that the sentences run concurrently. *See People v Taylor*, 197 AD2d 858. The defendant has already served a one-year definite term, and “[a]lthough it is implicit in CPL 430.10 that a court has the power to correct an illegal sentence even if the defendant has begun serving it, a court may not alter a sentence that ‘is in accordance with law’ once it is being served . . . .”

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

Insanity (Evidence) (Psychiatrists and Psychologists) ISY; 200(25) (50)

*People v Coombs*, 56 AD3d 1195, 867 NYS2d 322 (4th Dept 2008)

**Holding:** The court correctly granted the defendant’s CPL 330.30 motion to set aside the verdict as to the assault on a police officer count based on legally insufficient evidence. *See gen People v Campbell*, 72 NY2d 602, 604-605. Penal Law 120.08 requires that the defendant cause serious physical injury to the same police officer whom he is

Fourth Department *continued*

attempting to prevent from performing his or her lawful duty. The evidence showed that the defendant acted with intent to prevent certain officers from entering the hotel room through a door, but that a different officer was injured while attempting to enter the room through a window. The second-degree assault convictions are supported by legally sufficient evidence. The testimony showed that the defendant struck a police officer's nose with a piece of wood, causing injury. The officer's testimony and his medical records sufficiently establish that he suffered substantial pain and thus had physical injury within the meaning of Penal Law 10.00(9). *See People v Gerecke*, 34 AD3d 1260, 1261 *lv den* 7 NY3d 925, 927. The verdict is not against the weight of the evidence. Because conflicting expert testimony was presented at trial regarding whether the defendant suffered from a mental disease or defect at the time of the offense, the question is primarily left to the trier of fact, who has the right to accept or reject the opinion of any expert. *See People v Hernandez*, 46 AD3d 574, 576 *lv den* 11 NY3d 737. Judgment affirmed. (County Ct, Genesee Co [Noonan, J])

Evidence (Weight) EVI; 155(135)

Weapons (Evidence) (Firearms) WEA; 385(20) (21)

*People v Johnson*, 56 AD3d 1191, 867 NYS2d 319  
(4th Dept 2008)

The defendant was convicted of third-degree criminal possession of a weapon under former subdivision (4) of Penal Law 265.02.

**Holding:** The defendant failed to preserve for review the argument that his conviction was not supported by legally sufficient evidence. However, the verdict is against the weight of the evidence. *See gen People v Bleakley*, 69 NY2d 490, 495. Penal Law 265.02 former subdivision (4) required that the firearm was both operable and loaded with live ammunition. *See People v Shaffer*, 66 NY2d 663, 664. The firearm examiner testified that he test-fired the handgun and found it to be operable. However, he did not test-fire the single cartridge found in the handgun, but gave speculative opinion testimony that he did not see any problems with the cartridge. The jury's finding beyond a reasonable doubt that the ammunition was live is against the weight of the evidence. Judgment modified by reversing the third-degree criminal possession of a weapon conviction, that count of the indictment dismissed, and judgment affirmed as modified. (Supreme Ct, Erie Co [Rossetti, AJ])

Evidence (Sufficiency) EVI; 155(130)

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

*People v LaGasse*, 56 AD3d 1151, 867 NYS2d 602  
(4th Dept 2008)

**Holding:** The defendant's second-degree murder conviction is not supported by legally sufficient evidence that the defendant acted with depraved indifference. *See People v Swinton*, 7 NY3d 776, 777 *rearg den* 7 NY3d 864. The decedent died from a subdural hematoma and brain injuries caused by blunt-force trauma that was consistent with being hit with fists. The defendant testified that he struck the decedent several times in the head after an argument, but that when he left the house, they had reconciled and the decedent was fine. Other evidence established that there was a struggle, there were blood spatters in one room and a pool of blood in another room, and the decedent was found in a small pool of blood in a third room. Viewing in the light most favorable to the prosecution, the evidence does not support the conclusion that the decedent's death was caused by abandoning a helpless and vulnerable person in circumstances in which he is likely to die (*see People v Mancini*, 7 NY3d 767), nor does it show torture or a brutal, prolonged course of conduct against a particularly vulnerable person. *See People v Suarez*, 6 NY3d 202, 212. While the jury could have found that the defendant intended to kill the decedent or merely cause him serious injury, the defendant's actions do not show a depraved indifference to the decedent's fate. The defendant can be retried on the remaining counts of the indictment. *See Matter of Suarez v Byrne*, 10 NY3d 523, 541 *rearg den* 11 NY3d 753. Judgment reversed, count one of the indictment dismissed, and new trial granted on counts two and three. (County Ct, Oneida Co [Dwyer, J])

Counsel (Competence/  
Effective Assistance/  
Adequacy) (Duties) COU; 95(15) (20)

Misconduct (Juror) MIS; 250(12)

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

*People v Mosley*, 56 AD3d 1140, 867 NYS2d 289  
(4th Dept 2008)

**Holding:** The court erred in denying the defendant's CPL 440.10 motion to vacate the judgment of conviction without a hearing on the issues of juror misconduct and ineffective assistance of counsel. Because the defendant presented sworn allegations that he learned after the verdict that a juror failed to disclose that she was the mother of the defendant's former girlfriend and that she knew the

Fourth Department *continued*

defendant, a hearing as to whether the juror’s alleged misconduct prejudiced a substantial right of the defendant was necessary. *See People v Saxton*, 32 AD3d 1286, 1287. The defendant presented an affidavit from his brother that stated that the defendant was not responsible for the assault and the motion papers showed that defense counsel did not call him as a witness despite his willingness to testify. Since a failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel (*see People v Nau*, 21 AD3d 568, 569), the court should have conducted a hearing on this issue and given defense counsel an opportunity to explain his alleged failure to investigate or to call the defendant’s brother or to give a tactical explanation for the decision. *See People v Castricone*, 224 AD2d 1019, 1020. Appeal held and matter remitted for further proceedings. (County Ct, Chautauqua Co [Ward, JJ])

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

*People v Motley*, 56 AD3d 1158, 867 NYS2d 809  
(4th Dept 2008)

The defendant was initially sentenced as a second felony offender to consecutive five-year determinate terms of imprisonment and a three-year period of post-release supervision, but was later resentenced to a five-year period of post-release supervision. The court resentenced the defendant for a second time, finding that he was not a second felony offender and imposing a three-year period of post-release supervision. At that resentencing, the defendant made a *pro se* CPL 440.10 motion to withdraw his plea and he objected to the court’s not finding that he was a second felony offender.

**Holding:** The court erred in its second resentencing of the defendant. Criminal Procedure Law 400.21 requires a court to sentence a defendant with a predicate felony conviction as a second felony offender, and the court cannot circumvent this requirement when it is inclined to extend leniency to a defendant. *See People v Scarbrough*, 66 NY2d 673 *revg on dissenting mem of Boomer, J*, 105 AD2d 1107, 1107-1109. Therefore, the defendant must be sentenced as a second felony offender. Because the defendant was convicted of two class D violent felonies and given his second felony offender status, a five-year period of post-release supervision is mandatory. *See Penal Law 70.45* [former (2)]. Upon remand, the defendant must be given an opportunity to withdraw his plea or to be resentenced as a second felony offender. *See People v Barber*, 31 AD3d 1145, 1146. Resentence reversed and matter remitted for further proceedings. (County Ct, Oneida Co [Dwyer, JJ])

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

Sentencing (General) (Resentencing) SEN; 345(37) (70.5)  
*People v Rogers*, 56 AD3d 1173, 867 NYS2d 812  
(4th Dept 2008)

The defendant was originally convicted of second-degree murder and first-degree robbery and the court sentenced him to a determinate term of imprisonment of 20 years on the robbery count and an indeterminate term of 20 years to life on the murder count. This Court reversed the conviction and remanded for a new trial; the defendant was convicted of first-degree robbery and was sentenced to a determinate term of 25 years.

**Holding:** The court erred in increasing the defendant’s sentence on the robbery count after retrial. The resentence meets the threshold test for vindictiveness because it is more severe than the original sentence. *See People v Cahill*, 46 AD3d 1455, 1456. Other factors giving rise to a presumption of vindictiveness include that a greater sentence was imposed without any new information about the defendant (*see People v Van Pelt*, 76 NY2d 156, 161), and the court’s statement at resentencing that, despite the murder acquittal, it “‘felt constrained to impose the sentence because a death was involved.’” The record does not provide any objective information sufficient to rebut the presumption of vindictiveness. *See People v Jenkins*, 38 AD3d 566, 567-568 *lv den* 8 NY3d 986. The defendant failed to preserve for review his legal insufficiency and inconsistent verdict arguments. Judgment modified by vacating the sentence, judgment modified as affirmed, and matter remitted for resentencing. (County Ct, Niagara Co [Broderick, Sr., JJ])

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

Sentencing (Presentence Investigation and Report) SEN; 345(65)

*People v Simpson*, 56 AD3d 1209, 866 NYS2d 920  
(4th Dept 2008)

**Holding:** “The contention of defendant that County Court erred in refusing to expunge or modify the presentence report is encompassed by his valid waiver of the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 255). The information contained in the presentence report that was provided to the probation officer by an official at the Cattaraugus County Jail ‘does not involve a right of constitutional dimension going to “the very heart of the process”’ (*id.*).” Judgment affirmed. (County Ct, Cattaraugus Co [Himelein, JJ])

**Fourth Department** *continued*

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

Instructions to Jury (Missing Witnesses) ISJ; 205(46)

*People v Thomas*, 56 AD3d 1241, 867 NYS2d 595  
(4th Dept 2008)

**Holding:** The court erred in denying the defendant's request to charge third-degree assault as a lesser included offense. That crime is a lesser included offense of the crime of which the defendant was convicted. *See gen People v Green*, 56 NY2d 427, 432 *rearg den* 57 NY2d 775. There is a reasonable view of the evidence that the defendant did not intend to cause the complainant physical injury but instead acted recklessly, creating a substantial and unjustifiable risk that the complainant would be physically injured. *See* Penal Law 15.05(3); *see gen People v Daniel*, 37 AD3d 731, 732 *lv den* 9 NY3d 864. The court correctly denied the defendant's request for a missing witness charge regarding two individuals who were in the room where the assault occurred. The defendant failed to establish that those individuals knew about the assault by the defendant (*see People v Mobley*, 49 AD3d 1343, 1344), because the record shows that they were involved in other altercations occurring in the room. Judgment reversed and new trial granted. (County Ct, Monroe Co [Geraci, Jr., JJ])

Evidence (Instructions) (Prejudicial) (Uncharged Crimes) EVI; 155(80) (106) (132)

Sex Offenses (General) (Sexual Abuse) SEX; 350(4) (27)

*People v Workman*, 56 AD3d 1155, 868 NYS2d 430  
(4th Dept 2008)

**Holding:** The defendant's first-degree course of sexual conduct against a child conviction is not supported by legally sufficient evidence. The evidence showed that he did not engage in any act other than forcible touching before the complainant was 11 years old, which is not one of the enumerated acts of sexual conduct in Penal Law 130.75(1)(a). This unpreserved issue is reached in the interest of justice. The court erred in admitting, as prompt outcry, the testimony of the complainant's boyfriend regarding her disclosure of the abuse two years after it ended; the evidence showed that the complainant was living away from the defendant for some time before the disclosure and there were no threats preventing her from disclosing the abuse. *See gen People v Kornowski*, 178 AD2d 984, 984-985 *lv den* 89 NY2d 1096. However, the error was harmless since it mirrored other admissible testimony. The testimony regarding instances of uncharged sexual

abuse, while not admissible to show bad character or propensity towards crime, is admissible to complete the narrative and to provide needed background. *See People v Bassett*, 55 AD3d 1434, 1436. The complainant's brother testified that the complainant disclosed the abuse to him after he confronted the defendant about an uncharged incident. The complainant testified about prior uncharged acts that put into context her failure to timely disclose the abuse and showed that the abuse was ongoing and escalated. By repeatedly instructing the jury that the evidence was admissible solely to establish when the abuse occurred, the court minimized any prejudice. *See gen People v Barner*, 30 AD3d 1091, 1092 *lv den* 7 NY3d 809. Judgment modified by reversing the first-degree course of sexual conduct against a child conviction, judgment affirmed as modified, and matter remitted for resentencing on remaining counts. (County Ct, Niagara Co [Broderick, Sr., JJ]) ⚖️

**Defender News** *(continued from page 5)*

law enforcement officers to make a traffic stop." The Court rejected the defendant's argument that, pursuant to *Whren v United States* (517 US 806 [1996]), probable cause is necessary to stop a car for a traffic violation, noting that the *Whren* Court did not address whether reasonable suspicion is sufficient and nothing in the decision conflicts with a reasonable suspicion standard. The court remanded for a determination on reasonable suspicion, remarking that mistake of fact does not undermine reasonable suspicion.

**Second Amendment Not Violated by Penal Law §§ 265.00—265.02**

Plaintiff-appellant Maloney sought a declaration that Penal Law sections 265.00 through 265.02 are unconstitutional to the extent that they punish possession of nunchakus in one's home. The plaintiff had been arrested for possession of nunchakus; the possession charge was dismissed and he eventually pleaded guilty to disorderly conduct and agreed to the destruction of the nunchakus. The Second Circuit, in *Maloney v Cuomo*, No. 07-0581-cv, 2009 US App LEXIS 1402 (2d Cir 1/28/2009), affirmed the district court's judgment dismissing the complaint, holding that sections 265.00 to 265.02 do not violate the Second Amendment. Citing *Presser v Illinois*, 116 US 252 (1886), the Second Circuit concluded that the Supreme Court's decision in *Heller v District of Columbia*, 128 S Ct 2783 (2008), does not invalidate the long-standing principle that the Second Amendment applies only to limitations the federal government seeks to impose on that right. The court also held that the ban on possession of nunchakus imposed by section 265.01 does not violate the Fourteenth Amendment, since there is a rational basis for that ban. ⚖️

Non-Profit Organization  
U.S. Postage  
**PAID**  
Albany, NY  
Permit No. 590

## NYSDA Membership Application

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

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

Name \_\_\_\_\_ Firm/Office \_\_\_\_\_

Office Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_ Zip \_\_\_\_\_

Home Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_ Zip \_\_\_\_\_

County \_\_\_\_\_ Phone (Office) (\_\_\_\_) \_\_\_\_\_ (Fax) (\_\_\_\_) \_\_\_\_\_ (Home) (\_\_\_\_) \_\_\_\_\_

E-mail Address (Office) \_\_\_\_\_ E-mail Address (Home) \_\_\_\_\_

**At which address do you want to receive membership mail?**  Office  Home

Please indicate if you are:  Assigned Counsel  Public Defender  Private Attorney  
 Legal Aid Attorney  Law Student  Concerned Citizen

*Attorneys and law students please complete:* Law School \_\_\_\_\_ Degree \_\_\_\_\_

Year of graduation \_\_\_\_\_ Year admitted to practice \_\_\_\_\_ State(s) \_\_\_\_\_

I have also enclosed a tax-deductible contribution:  \$500  \$250  \$100  \$50  Other \$ \_\_\_\_\_

Checks are payable to **New York State Defenders Association, Inc.** Please mail coupon, dues, and contributions to: New York State Defenders Association, 194 Washington Ave., Suite 500, Albany, NY 12210-2314.

To pay by credit card:  Visa  MasterCard  Discover  American Express

Card Billing Address: \_\_\_\_\_

Credit Card Number: \_\_\_\_\_ Exp. Date: \_\_\_\_ / \_\_\_\_

Cardholder's Signature: \_\_\_\_\_