



Public Defense Backup Center
REPORT

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Defender News

Second Half of US Supreme Court Term Brings Highs and Lows

Summaries of the Supreme Court decisions from the second half of the 2008-2009 term begin on page 13. Below are some of the highlights and lowlights from the Court.

Confrontation Clause and Lab Analysts

In a 5-4 decision, the Court held that the Confrontation Clause of the Sixth Amendment requires that defendants be confronted with the testimony of lab analysts. See *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009). Citing *Crawford v Washington* (541 US 36 [2004]), the Court noted that a lab analyst's certificate is testimonial and cannot be admitted unless the analyst was unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the analyst. In his majority opinion, Justice Scalia made several references to the February 2009 report of the National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward*, noting that "[f]orensic science is not uniquely immune from the risk of manipulation" and stressing the importance of cross-examination of forensic analysts. A full summary of the decision appears on p. 22.

Discussion of the potential impact of the decision began immediately after it was released at the end of June, much of it related to the logistical difficulties and the expense of requiring lab analysts to testify at trial. (www.washingtonpost.com, 7/15/2009; www.law.com, 7/20/2009.) In a recent Nassau County driving while intoxicated case, the court sustained the defendant's objection to the admission of the calibration log of the breathalyzer machine used to test his blood-alcohol level as a certified business record and required the prosecution to present live testimony from the lab technicians who performed the calibration. See *People v Mineo*, 02901N-08 (Sup Ct, Nassau Co). (www.law.com, 8/7/2009.)

Just days after *Melendez-Diaz*, the Supreme Court granted *certiorari* in *Briscoe v Virginia* (07-11191), another case involving forensic lab reports and the Confrontation Clause, and some are questioning whether the decision to

grant *cert* is a sign that *Melendez-Diaz* may be reversed. (www.scotusblog.com/wp/new-lab-report-case-granted; <http://newyorkcriminaldefense.blogspot.com/2009/08/crawford-and-lab-reports-settled.html>.) At the state level, the New York Court of Appeals has granted leave to appeal in *People v Brown*, which raises the issue of whether the court properly admitted the results of a DNA test completed by a private lab through the testimony of a medical examiner's office employee. The Second Department, citing *People v Rawlins* (10 NY3d 136 [2008]), held that the DNA evidence was properly admitted as a business record and did not violate the defendant's Sixth Amendment right of confrontation. See *People v Brown*, 50 AD3d 1154 (2d Dept 2008). Lynn Fahey and Steven Bernhard of Appellate Advocates are representing Mr. Brown.

Evidence Gained Through Right to Counsel Violation Admissible for Impeachment Purposes

The Supreme Court has held that the prosecution can use evidence obtained in violation of the defendant's Sixth Amendment right to counsel for impeachment purposes. See *Kansas v Ventris*, 129 S Ct 1841 (2009). In *Ventris*, the defendant was charged with murder. The police planted a jailhouse informant in his cell and the defendant allegedly told the informant that he was the shooter. At trial, the defendant testified that he was not the shooter and the court allowed the prosecution to introduce the informant's testimony to impeach him. The Court accepted as the law of the case the prosecution's concession that there was a Sixth Amendment violation under *Massiah v United States* (377 US 201 [1964]) without affirming that the concession was necessary. It found that the testimony was not automatically inadmissible because the defendant's *Massiah* right was infringed at the time

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of the communication with the informant, not at the time of trial. The Court concluded that the goal of preventing perjury and the minimal deterrent value of exclusion justify using uncounseled statements for impeachment purposes. A full summary of the decision is available at p. 18.

No Constitutional Right to Post-Conviction Access to DNA Evidence

In another 5 to 4 decision, the Court has held that defendants do not have a substantive due process right to post-conviction access to DNA evidence. See *District Attorney's Office for the Third Judicial District v Osborne*, 129 S Ct 2308 (2009). The defendant sought access to DNA evidence to prove his innocence, but Alaska prosecutors refused. The Court concluded that this is an issue for Congress and state legislatures, not the judiciary. Although Alaska does not have a statute governing post-conviction DNA access, the Court held that the state's post-conviction procedures, which are similar to those provided by federal and state statutes, did not violate Osborne's due process rights. The Court found that while Osborne has a liberty interest in demonstrating his innocence using new evidence under state law, due process does not require the extension of certain pretrial rights to protect that liberty interest. A full summary of the decision is available at p. 21.

Attorney General Eric Holder issued a statement in response to the decision, noting that "today's decision is limited: the Court merely spoke about what is constitutional, not what is good policy. And there is a fundamental difference. Constitutional rights are only one part of a fair and full system of justice. Simply because a course of action is constitutional does not make it wise. Nothing in today's decision detracts from the unique power of DNA; indeed, the first line of today's Court opinion emphasized that 'DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.' DNA testing helps ensure that justice is done." (www.usdoj.gov/opa/pr/2009/June/09-ag-604.html).

Correction Law § 24 Violates the Supremacy Clause; Prisoners Can Bring § 1983 Suits Against Correction Officers in State Supreme Court

The Supreme Court, reversing the New York Court of Appeals, held that Correction Law § 24 violates the Supremacy Clause of the United States Constitution because it prohibits state supreme courts from exercising jurisdiction over section 1983 suits against correction officers. See *Haywood v Drown*, 129 S Ct 2108 (2009). The Court found that by preventing prisoners from bringing federal civil rights actions against correctional officers for damages in state court, the state law was "contrary to Congress' judgment that all persons who violate federal rights

while acting under color of state law shall be held liable for damages." A full summary of the decision is available at p. 19.

NYSDA joined in an amicus brief in support of the petitioner that was authored by Prisoners Legal Services' of New York and the Prisoners Rights Project. The brief is available at www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-10374_PetitionerAmCu8LegalSvcOrgsFrank.pdf.

Spotlight Continues to Shine on Forensics & the National Academy of Sciences Report

The National Academy of Sciences' (NAS) February 2009 report and problems with forensic science are not just being discussed by members of the criminal justice community and the United States Supreme Court, they are also receiving mainstream media attention. *Popular Mechanics'* August 2009 cover article was *The Truth About Forensics: Debunking the Shaky Science of Ballistics, Fiber Analysis, Fingerprinting & Other CSI Myths*. (www.popularmechanics.com/technology/military_law/4325774.html.) The article discusses the NAS report, wrongful convictions based on flawed forensics, and the need for scientific examination of forensic disciplines. A second article, *The Truth About 4 Common Forensic Methods*, reviewing fingerprints, ballistics, trace evidence, and biological evidence, appears on the *Popular Mechanics* website at www.popularmechanics.com/technology/military_law/4325797.html. Building on the momentum of the NAS report, the Public Defender Service for the District of

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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.

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Columbia, the Los Angeles County Public Defender, and the Office of Defender Services of the Administrative Office of the United States Courts joined together to help coordinate forensic science evidence challenges. They have established a forensic science working group that is developing model pleadings addressing admissibility, *in limine* arguments, and jury instructions. These materials will be available through the NLADA forensic science website and through other distribution channels in the near future. Attorneys who are handling cases involving forensic science challenges are encouraged to contact the Backup Center for more information.

The NAS report was the topic of Marvin Schechter's presentation at NYSDA's annual meeting in July. Schechter, a member of the NAS committee responsible for the report, educated attendees about the report, the work that went into the report, and offered recommendations for how to use the report in cases involving forensic science. More information about the annual meeting appears on p. 6.

New York Forensic Labs Authorized to Report Partial DNA Matches to Law Enforcement

In June 2009, the New York State Commission on Forensic Science, chaired by Denise O'Donnell, Commissioner of the Division of Criminal Justice Services (DCJS), voted to allow forensic laboratories to report to law enforcement cases where partial matches are found between crime scene DNA and samples in the state's DNA Databank. (www.law.com, 6/24/2009.) From the DCJS press release: "O'Donnell said the new policy addresses the rare case where a routine search of the DNA Databank results in an inadvertent near hit that could greatly limit the pool of potential suspects. She stressed that the new policy will not permit what is often called 'familial searching,' or singling out particular families and actively searching their DNA profiles, as is currently permitted in a small number of states, including California and Colorado." (http://criminaljustice.state.ny.us/pio/press_releases/2009-06-04_pressrelease.html.) Peter Neufeld, a member of the Commission and co-founder of the Innocence Project, voted against the policy. The New York Civil Liberties Union has expressed serious concerns about the new policy: "[T]he proposed partial-match policy poses a direct and immediate threat to privacy and due process rights. New Yorkers must not be considered suspects in crimes just because they *might* share similar DNA to someone in the state databank." (www.nyclu.org/node/2455.)



Patrick Connors presents on the effect of the new New York Rules of Professional Conduct on defense practice at the 42nd Annual Meeting.

Rockefeller Drug Law Reform—Judicial Diversion and Resentencing of Certain Class B Offenders Effective October 7

As reported in the March-May 2009 issue of the *REPORT*, this year's budget included numerous reforms to the Rockefeller Drug Laws. Some reforms were effective immediately, such as new sentencing provisions and the elimination of district attorney consent to Willard parole supervision, while others, *i.e.*, judicial diversion and resentencing of certain Class B drug offenders, take effect on October 7, 2009. Al O'Connor's memo about the reforms is available at www.nysda.org/09_MarchMayREPORT.pdf, and the Center for Community Alternatives has a number of great Rockefeller Reform resources, which can be found at www.communityalternatives.org/publications/tools.html.

The Office of Court Administration and the Department of Correctional Services (DOCS) have issued memoranda discussing the reforms. And more recently, DOCS issued a memo to all correctional facilities with instructions on responding to requests for inmate records in resentencing cases.

First Appellate Term Vacates Plea for Court's Failure to Advise of the Correct Length of License Suspension

In a brief decision, the Appellate Term, First Department, held that a defendant's guilty plea in a VTL 1192 case must be vacated because the lower court incorrectly informed the defendant that her driver's license would be



Bert Nieslanik during her presentation about how to keep control of your cases at the 42nd Annual Meeting.



Marvin Schechter presents on the National Academy of Science's 2009 forensic science report at the 42nd Annual Meeting.

suspended for 90 days; the required length of suspension was 1 year. *See People v Castellini*, 24 Misc 3d 66 (App Term, 1st Dept 2009). “While in some jurisdictions the loss of a driver’s license ‘result[s] from the actions taken by agencies the court does not control,’ and thus is considered a collateral consequence (*People v Ford*, 86 NY2d [397] at 403, citing *Moore v Hinton*, 513 F2d 781 [5th Cir 1975]), the license sanction here involved constituted punishment directly imposed by the court as a result of defendant’s guilty plea (*see Vehicle and Traffic Law* § 1193 [2] [a], [b]), and was thus a direct consequence of the plea. The court’s error is not subject to harmless error analysis (*see People v Hill*, 9 NY3d 189, 192 [2007], *cert denied* 552 US ___, 128 S Ct 2430 [2008]), and renders the plea invalid.”

Sex Offense Updates

Sex Offender Housing Regulations Proposed by Probation, Parole, and OTDA

The Division of Probation and Correctional Alternatives (DPCA), the Division of Parole, and the Office of Temporary and Disability Assistance (OTDA) have released proposed regulations governing housing for level 2 and 3 sex offenders who are under supervision or are in need of temporary housing. Given the problems with finding affordable and appropriate housing for level 2 and 3 offenders, a 2008 law (L 2008, ch 568) required that all three agencies develop housing guidelines for these individuals. The DPCA proposed regulations appear in the June 24 issue of the State Register (www.dos.state.ny.us/info/register/2009/jun24/pdfs/rules.pdf), and the Division of Parole and OTDA proposed regulations appear in the July 15 issue (www.dos.state.ny.us/info/register/2009/jul15/pdfs/rules.pdf).

The proposed regulations track the language of the statute and provide strong statements about state law preemption. From the DPCA proposal: “Sex offender management, and the placement and housing of sex offenders, are areas that have been, and will continue to be, matters addressed by the State. These regulations further the State’s coordinated and comprehensive policies in these areas, and are intended to provide further guidance to relevant state and local agencies in applying the State’s approach.” DPCA’s proposed regulations also note that “[t]he proliferation of local ordinances imposing residency restrictions upon sex offenders, while well-intentioned, have made it more challenging for the State and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders.”

Sex Offender Residency Restrictions in Albany and Rensselaer Counties Held Preempted By State Law

Concurring with decisions out of the Rockland County Supreme Court and the Albany City Court striking down local sex offender residency restrictions, the Rensselaer County Supreme Court struck down the county’s residency restriction law. *See Doe v County of Rensselaer*, 2009 NY Slip Op 51456(U), 2009 NY Misc LEXIS 1772 (Sup Ct, Rensselaer Co 6/29/2009). The court concluded that the local law was preempted by the state’s detailed legislative scheme related to the community management of sex offenders. Two weeks later, the Albany County Supreme Court issued a similar decision in *Wray v County of Albany* (No. 2622-08, [Sup Ct, Albany Co, 7/10/2009]). The court held that Albany County’s 2006 Local Law No. 8 is preempted by the recently enacted state law, L 2008, ch 568.

More information about the Rockland County Supreme Court and Albany City Court decisions is available in the January-February 2009 issue of the *REPORT*. (www.nysda.org/09_Jan-FebREPORT.pdf.)

New and Amended State Court Rules on Domestic Violence and Sex Offense Courts

Earlier this summer, the Rules of the Chief Judge and the Rules of the Chief Administrator of the Courts governing domestic violence courts were amended, and new rules governing sex offense courts were created. (www.law.com, 8/13/2009.) The text of the rules can be found at www.dos.state.ny.us/info/register/2009/aug5/pdfs/courtnotices.pdf and www.nycourts.gov/rules/amendments.shtml.

The amended rules for domestic violence courts govern the establishment of domestic violence parts of superior courts, which hear domestic violence cases pending in criminal courts “if necessary to best utilize available court and community resources for domestic violence cases.”

Sex Offense Parts in Nassau, Orange, Queens, Suffolk, and Westchester counties are now authorized to handle sex-related misdemeanor cases. According to the head of the Unified Court System’s Office of Policy and Planning, Acting Justice Judith Harris Kluger, it is unclear whether those sex offense parts will need additional resources to handle the additional cases. The effect on public defense

organizations in these counties is also unknown. The other existing sex offense courts, located in Erie, Oswego, and Tompkins counties, will not handle misdemeanor cases. The rules also allow the chief administrative judge to establish new sex offense courts in additional counties after consultation with and agreement of the presiding justice of the judicial district in which the court would be located. There are no current plans to create new sex offense courts, however.

Veterans Diversion Treatment Program Announced

On July 7, 2009, Chief Judge Jonathan Lippman announced the creation of the Veterans Project, a diversion project for veterans in Kings, Nassau, and Queens counties. The project is “designed to identify nonviolent veteran offenders and provide outreach, specialized support services and treatment to divert them from incarceration; offer peer support to sustain engagement in services; and facilitate the exchange of information between legal, clinical and community resources.” (www.nycourts.gov/press/pr2009_10.shtml.) Collaborating on the project are the New York state courts, the District Attorney Offices in each of the three counties, the Law and Psychiatry Institute of the North Shore Long Island Jewish Health System, and the Department of Veterans Affairs New York Harbor Health Care System, in association with Touro Law School.



Coaches and participating defenders discuss use of demonstrative evidence at trial during the 2009 Basic Trial Skills Program.



Bob Lonski, recipient of the Wilfred O'Connor Award, and Melissa Reese, recipient of the Kevin M. Andersen Memorial Award at Annual Meeting Awards Banquet.

Missing from the list of collaborators are the public defense providers in those counties. As with other diversion programs and specialty courts, it is critical that defense counsel be involved in planning and implementation of diversion programs for veterans. More information on the role of defense counsel in problem solving courts is available in The American Council of Chief Defenders' Ten Tenets of Fair and Effective Problem Solving Courts (www.nlada.org/DMS/Documents/1019501190.93/document_info) and the National Center for State Courts' Problem-Solving Courts Resource Center (www.ncsconline.org/D_Research/ProblemSolvingCourts/Problem-SolvingCourts.html). Attorneys who have veteran or active military clients or would like to learn more about veterans' initiatives may contact the Backup Center for assistance.

FAMM Seeks Cases for Clemency Project

Families Against Mandatory Minimums (FAMM) is a nonprofit, nonpartisan sentencing reform organization that advocates for the repeal of mandatory minimums at the state and federal level. In response to recent Rockefeller drug law reforms, FAMM is looking for New York state prisoners who they can profile and present to the Governor. FAMM's goal is to encourage the Governor to use executive clemency generously to correct hundreds of harsh, unjust sentences. They are looking for prisoners who: are nonviolent drug offenders who played minor roles in the offense; have no or very few (1-2) nonviolent prior convictions; have Rockefeller drug law mandatory minimums of at least 5 years; accept responsibility for the offense (no innocence claims); and have shown extraordinary rehabilitation and good conduct in prison. FAMM

uses a two-page Profile Form to review cases. Information in the Profile Forms is maintained exclusively by FAMM and kept strictly confidential. FAMM cannot guarantee that it will profile anyone's case, and they do not provide prisoners with legal advice or representation, attorney referrals, or research help. If you have a case that meets FAMM's criteria, complete the Profile Form available at www.famm.org/ProfilesOfInjustice/SubmitAProfile.aspx and send it to: FAMM, Attn: Molly M. Gill, 1612 K Street NW, Suite 700, Washington, DC 20006, or mgill@famm.org.

Basic Trial Skills Program Back and Better Than Ever

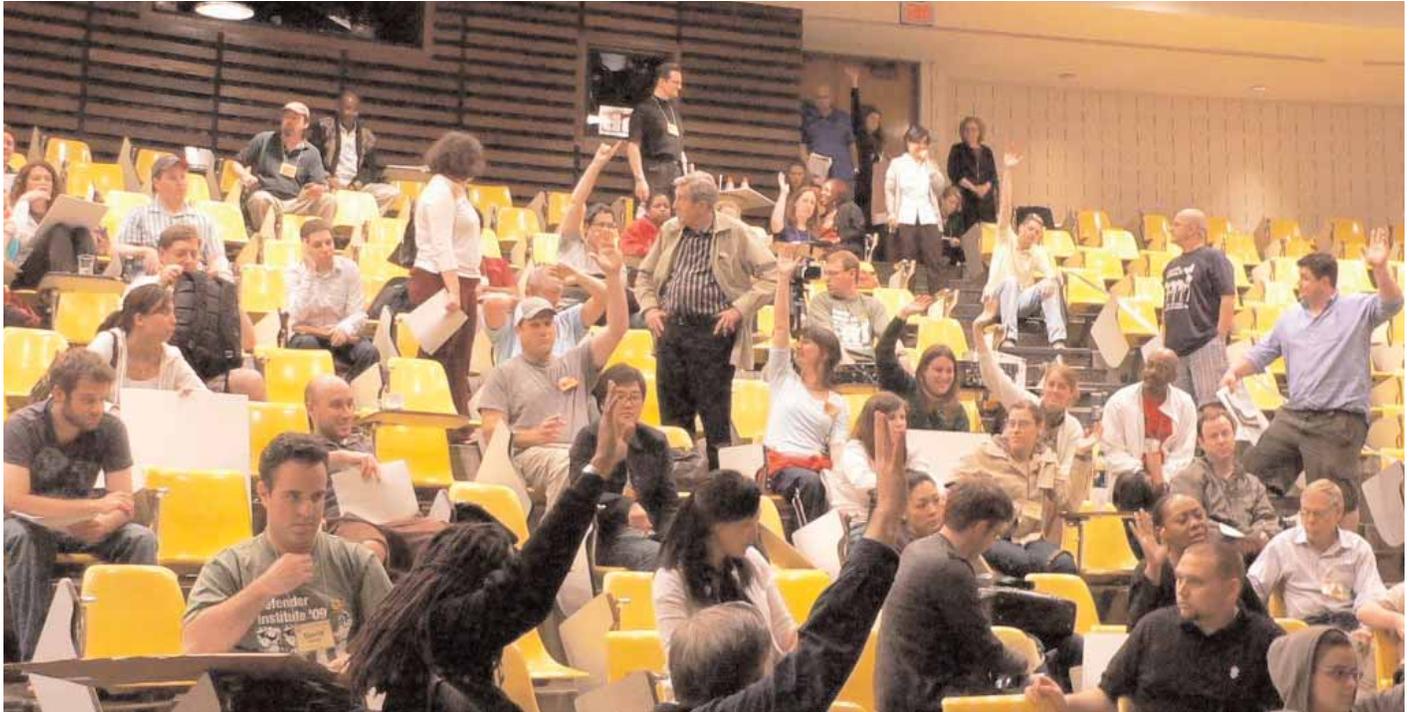
After a one-year hiatus, NYSDA's Basic Trial Skills Program came back this June. Using a newly designed case problem and syllabus, the coaches (experienced trial lawyers and communications coaches) guided more than fifty defenders through the week-long program. The defenders came from all around the state to practice and enhance their trial skills. Through small group exercises, such as client interviewing, direct and cross-examinations, opening and closing arguments, and voir dire, the defenders were able to get immediate feedback from the coaches and their fellow participants. As in years past, client-centered representation was a core element of the program.

42nd Annual Meeting—Timely Training, Networking, and Celebration

This year's annual meeting brought together defenders from across the state for two days of training in



Jerry Ader presents the Kevin M. Andersen Memorial Award to Melissa Reese, an Erie County Assigned Counsel Plan attorney, at the Awards Banquet.



Participating defenders during the 2009 Defender Institute Basic Trial Skills Program.

Saratoga Springs. The CLE presentations dealt with many timely topics, including the impact of the new New York Rules of Professional Conduct on defense practice (presented by Patrick Connors, Albany Law School); the National Academy of Sciences' report on forensic science and how to use it (presented by Marvin Schechter, who served on the NAS committee responsible for the report); the new Rockefeller Drug Laws (presented by Al O'Connor, NYSDA Staff Attorney); and technology tools for criminal defense attorneys (presented by Ken Strutin, NYSDA's Director of Legal Information Services). Ed Nowak (NYSDA's President) and Kent Moston (Attorney-in-Chief, Nassau County Legal Aid Society) educated attendees about many of this year's key decisions from the New York Court of Appeals and the United States Supreme Court. Other sessions focused on particular skills and areas of practice, such as cross-examination of child witnesses (presented by Erik Teifke, Monroe County Public Defender's Office); representing non-English speaking clients (presented by Joanne Macri, Director of NYSDA's Criminal Defense Immigrant Project); and closing and the voice of the story and controlling the reins of your case (both presented by Bert Nieslanik, Colorado Office of Alternate Defense Counsel).

The awards banquet offered attendees a chance to celebrate the accomplishments of fellow defenders. NYSDA's Service of Justice Award was awarded to Robin G. Steinberg, Executive Director of the Bronx Defenders, for "envisioning a future focused on seeing and serving the whole client, for showing that vision to the world, and

for finding a path to get there." The Wilfred O'Connor Award was given to Robert D. Lonski, Administrator of the Assigned Counsel Plan of the Erie County Bar Association Aid to Indigent Prisoners Society, "for exemplifying the client-centered sense of justice, persistence, and compassion that characterized Bill's life." The Genesee County Public Defender's Office presented the Kevin M. Andersen Memorial Award to Melissa Reese, an Erie County Assigned Counsel Plan attorney, for her determined and compassionate representation of public defense clients.

The Chief Defender Convening, held on Sunday, gave chiefs from around the state the opportunity to learn about and discuss the expanded state loan forgiveness program for defenders, The Legal Aid Society's discovery reform proposal, the Independent Public Defense Commission bill (Public Defense Act of 2009, A.8793/S.6002), and defense practice in light of the new New York Rules of Professional Conduct.

Update on Loan Forgiveness and Repayment Programs

The application for the New York State District Attorney and Indigent Legal Services Attorney Loan Forgiveness Program is now available. **The application deadline is October 1, 2009.** Information about eligibility and the application are available at www.hesc.com/content.nsf/SFC/5/District_Attorney_and_Indigent_Legal_

Services_Attorney_Loan_Forgiveness_Program. If you have questions about eligibility or the application process, you should contact the Higher Education Services Corporation's Grants & Scholarships Office at 1-888-697-4372 or scholarships@hesc.org.

This year, the federal government has established two new student loan programs: Income Based Repayment (IBR) and Public Service Loan Forgiveness (PSLF). These programs were part of the College Cost Reduction Access Act of 2007. IBR lowers monthly student loan payments on federally guaranteed student loans for high debt/low income borrowers with "partial financial hardship." Partial financial hardship exists when the amount due on all eligible loans as calculated using the standard 10-year repayment plan exceeds 15% of discretionary income, *i.e.*, adjusted gross income minus 150% of the poverty level based on family size. If you qualify for IBR, your monthly payments are capped at 15% of your discretionary income. Under the PSLF program, borrowers may qualify for loan forgiveness of the remaining balance due on eligible federal student loans after making 120 payments on such loans under certain repayment plans (including IBR and income contingent repayment [ICR]) while working full time for certain public service employers. For more information about these programs, visit <http://studentaid.ed.gov> or www.equaljusticeworks.org.

Two other federal programs, the John R. Justice Prosecutors and Defenders Incentive Act and Loan Forgiveness for Service in Jobs of National Need, have not been funded to date. More information about these programs is available at www.abanet.org/crimjust/members/loan.pdf. The Backup Center will advise the public defense community if and when these programs are funded.



2009 Basic Trial Skills Program coaches Skip Gant (c) and Richard Rich (r) conversing with David Ocasio, a participating defender.



Erik Teifke talks to conference attendees and Jonathan Gradess after his presentation at the 42nd Annual Meeting.

Public Defense News

Divided Third Department Dismisses Lawsuit Challenging Broken Public Defense System

In a 3 to 2 ruling, the Third Department reversed the Albany County Supreme Court's denial of New York State's motion to dismiss, granted the motion, and dismissed the plaintiffs' complaint. *See Hurrell-Harring v State of New York*, 883 NYS2d 349 (3d Dept 2009). The class action suit accusing New York of failing to provide meaningful and effective public defense representation was filed by the New York Civil Liberties Union (NYCLU) on behalf of criminal defendants who are or will be represented by public defenders, legal aid attorneys, and assigned counsel in five named New York counties. The NYCLU plans to appeal to the Court of Appeals. (www.law.com, 7/17/2009.)

The Third Department held that the plaintiffs failed to state a judiciable cause of action, finding that the constitutional right to effective assistance of counsel cannot be "asserted in a civil action to support a claim that seeks to compel other branches of government to allocate additional public resources and intensify administrative oversight of programs that provide indigent criminal defendants with legal assistance in the criminal prosecutions."

Justice Peters, joined by Justice Stein, issued a strong dissent, asserting that the "plaintiffs' allegations . . . set forth clear deficiencies that, without question, implicate plaintiffs' right to counsel under our Federal and State Constitution." The dissent declared: "Concerns about costs, fiscal impact and the difficulty courts may encounter in fashioning and then enforcing particularized remedies appropriate to repair unconstitutional action, while not to be ignored, cannot be sufficient to require us to turn a blind eye to constitutional compliance, despite the majority's position to the contrary . . ."

Michael Whiteman, Chair of the Committee for an Independent Public Defense Commission, issued a state-

ment noting that while the Committee disagreed with the majority's holding, "a systemic judicial remedy has never been our focus. We call for State assumption of the operating and fiscal responsibility to provide public defense services, and will continue to press for Legislative and Executive action; we welcome the majority's implicit call for such action." The Committee will "continue to look to the Legislature and the Governor to remedy the ongoing, massive and pervasive inadequacies of New York's public defense services. We also hope that the plaintiffs will seek review by the Court of Appeals so that the door to the courthouse may be reopened." The full statement, as well as one issued on behalf of the Campaign for an Independent Public Defense Commission, is available at <http://newyorkjusticefund.blogspot.com/2009/07/court-s-decision-does-not-change-need.html>.

ABA House of Delegates Adopts Public Defense Excessive Workload Guidelines

Public defense providers have a new tool to employ when seeking adequate funding and/or considering action with regard to overwhelming workloads. "Eight Guidelines of Public Defense Related to Excessive Workloads" were approved by the American Bar Association's House of Delegates on August 3, 2009, and are available at www.abanet.org/legalservices/sclaid/defender.

This new "detailed action plan" for institutional public defense providers and individual lawyers representing

public defense clients calls for providers to avoid "excessive lawyer workloads and the adverse impact that such workloads have on providing quality legal representation to all clients." The guidelines prescribe supervision "to assure that all essential tasks on behalf of clients" (such as several enumerated in the guidelines) are performed and to determine if excessive caseloads exist. Training on "the professional and ethical responsibilities of representing clients," including the duty to tell appropriate persons in the program about unreasonable workloads, is also required. When excessive caseloads exist, programs or individual lawyers should file motions to stop new case assignments and to withdraw from current cases, as appropriate, when no other adequate alternatives are available. In connection with such motions, programs should resist judicial directions regarding management that improperly interfere with their professional and ethical duties to clients, and appeal when such motions are denied.

The Backup Center commented on a draft version of the standards. Several of our suggestions appear in the adopted version's comments. These include broadening the call for diversionary programs beyond those created by prosecutors and cautioning that potential collateral consequences to clients should be considered before working to reclassify certain offenses as civil infractions to avoid furnishing counsel.

(continued on page 47)



Participating defenders, coaches, NYSDA staff, and other supporters at the 2009 Defender Institute Basic Trial Skills Program.

Job Opportunities

Staten Island Legal Services (SILS) seeks a **Supervising Attorney** for its Family Law Unit. The successful candidate will supervise the family law unit and build litigation capacity in our new, dynamic 15 person office. Opportunity also exists to work with immigration and government benefit units. Family law practice involves representation of domestic violence survivors in proceedings in Family Court, Supreme Court, and the Integrated Domestic Violence Court; community education and outreach to immigrants, and to teens and young people about dating violence; and policy advocacy on issues affecting our clients. Immigration practice includes helping eligible survivors apply for U-Visas or file self petitions under the Violence Against Women Act. In both areas of practice, lawyers work collaboratively with a licensed social worker to address a wide range of client needs including housing, benefits, job training, and language access. We are looking for someone who is interested in both supervising ongoing case work and exploring opportunities for broad impact work—both through policy advocacy and litigation. Requirements: admission to NY Bar or eligibility for admission; minimum of 5 years of family law experience; excellent litigation and oral advocacy, legal writing, organizational and interpersonal, and supervisory skills; bi-lingual Spanish or other language spoken by legal services client communities desirable, but not required. To apply, mail or email a résumé, cover letter, and writing sample to: Nancy Goldhill, Project Director, Staten Island Legal Services, 36 Richmond Terrace, Suite 205, Staten Island, NY 10301, ngoldhill@silsnyc.org. Only candidates selected for interviews will be contacted. No telephone calls. EEO. People of color, women, people with disabilities, gay, lesbian, bisexual, and transgender people are welcome and encouraged to apply. For more information, visit www.legalservicesnyc.org.

The Jacob D. Fuchsberg Law Center of Touro College seeks applications for the position of **Director** of its new Veterans and Service Members Rights Clinic, which will open in the Spring 2010 semester. The position will start in the Fall 2009 semester to permit the Director to plan the Clinic's operation. The position is a clinical faculty appointment on an initial renewable annual contract. The

position is funded for 2 years, with continuation dependant on renewed funding. The clinic will represent veterans and servicemembers in civil claims such as regaining employment after deployment, obtaining relief available to civil defendants under the Servicemembers Relief Act (SMRA), expunging criminal records, housing and employment discrimination, obtaining accommodation for disabilities, military discharge review and upgrade proceedings, and representing veterans in minor criminal matters. The Director will supervise up to ten students, teach a weekly clinic seminar, and may also teach an additional substantive course, available to all students. Minimum qualifications: J.D. or LLM from an accredited law school; admission to the NYS Bar or eligibility for admission; at least 5 years practice experience preferably on behalf of veterans or servicemembers; and interest in teaching and mentoring students. The ideal candidate will have experience in clinical teaching or supervising lawyers and involvement in community education. Salary CWE. To apply, send a cover letter, résumé, writing sample, and the names of 3 references to: Professor Marianne Artusio at MarianneA@tourolaw.edu or Prof. Marianne Artusio, Office of Clinical Programs, Touro Law Center, 225 Eastview Drive, Central Islip, NY 11722. Electronic submission is preferred. Potential candidates with questions regarding the position, their qualifications, or any related matter are encouraged to contact Professor Artusio. EEO. For more information, visit www.wnyc.net/jobpost2/showjob.asp?ID=2727.

The Public Defender Service of the District of Columbia (PDS) is accepting applications for **Trial Attorney** positions for its Fall 2010 Trial Class. PDS provides and promotes quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia and thereby protects society's interest in the fair administration of justice. PDS is a federally funded, independent organization, governed by an eleven-member Board of Trustees. Applications must be submitted via the PDS website: www.pdsdc.org. For information on the program or the application process, email or call Jennifer Thomas, Director of Legal Recruiting, at jenthomas@pdsdc.org or (202) 824-2337. Application deadline October 9, 2009.

The American Civil Liberties Union Foundation of Connecticut (ACLUF-CT) seeks a **Legal Director**. Under the direction of the Executive Director, the Legal Director manages and coordinates the organization's statewide legal program and participates in non-litigation advocacy activities. Although the primary litigation function in the ACLUF-CT's wide range of civil liberties cases will be recruiting and managing cooperating counsel (generally attorneys in private practice who volunteer to handle litigation under the direction of the ACLUF-CT), the Legal Director may also directly handle cases—or supervise the ACLUF-CT's other staff attorney in handling cases—especially in connection with pleading, discovery and emergency hearings and presenting oral arguments in state and federal courts at both the trial and appellate levels. Other duties include: working with the National ACLU litigation team in investigating and developing cases; non-litigation advocacy responsibilities, including public speaking, media interviews and outreach work, researching legal issues related to proposed legislation, and writing press releases, op-eds and newsletter articles and reports; and working with a local legal committee and reporting periodically to the Board of Directors. Qualifications: JD with at least 5 year's experience as a litigator, preferably with federal appellate experience and in complex litigation of constitutional issues; experience in non-profit advocacy or community-based groups is valuable; membership in the Connecticut State Bar (or must pass the next bar examination); strong analytical, writing, and speaking skills; firm commitment to the mission and principles of the ACLU; demonstrated ability to lead, manage, and motivate others; superb organizational skills; commitment to diversity; willingness to work beyond the 9 to 5 hours of the normal work day; and proficiency with computers. Salary DOE; competitive benefits. To apply, submit in digital form, by email, a detailed letter of interest, résumé, writing sample and contact information for three references to ASchneider@acluct.org. The ACLUF-CT is an equal opportunity/affirmative action employer. For more information, visit www.acluct.org/aboutus/employment/. ☺

Conferences & Seminars

Sponsor: National Association of Criminal Defense Lawyers & Southern Center for Human Rights (SCHR)
Theme: Making the Case for Life XII: Mitigation and Jury Selection in Capital Cases
Dates: October 1-3, 2009
Place: Las Vegas, NV
Contact: SCHR: tel (404) 688-1202; fax (404) 688-9440; website www.schr.org/action/attend/mtc2009

Sponsor: **New York State Defenders Association & Appellate Division, Fourth Judicial Department**
Theme: **4th Department Assigned Counsel Family Court Appeals**
Date: **October 3, 2009**
Place: **Rochester, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: National Association of Criminal Defense Lawyers
Theme: DWI Means Defend With Ingenuity
Dates: October 8-10, 2009
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: **New York State Defenders Association, Monroe County Public Defender's Office & Eastman, Thompson, Kasperek & Shiffrin**
Theme: **Evidentiary Foundations: Techniques to Get It In and Keep It Out**
Date: **October 10, 2009**
Place: **SUNY Brockport, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: New York County Lawyers' Association
Theme: Race Law and Criminal Justice: 2009 Update
Date: October 20, 2009
Place: NYCLA, New York City
Contact: NYCLA: tel (212) 267-6646; website www.nycla.org

Sponsor: **New York State Defenders Association & Cayuga County Criminal Defenders (CCCD)**
Theme: **Prosecutorial Misconduct**
Date: **October 28, 2009**
Place: **Auburn, NY**
Contact: **CCCD (David Elkovitch): tel (315) 252-1389**

Sponsor: National Association of Criminal Defense Lawyers
Theme: Stimulate Your Practice: Nouveau Defenses to New Offenses in a Declining Economy
Dates: November 4-7, 2009
Place: Portland, OR
Contact: NACDL: tel (202) 872-8600 x232 (Viviana Sejas); email viviana@nacdl.org; website www.nacdl.org/meetings

Sponsor: American Bar Association Criminal Justice Section
Theme: Second Annual Sentencing Advocacy, Practice and Reform Institute With Special Focus on Reentry
Date: November 6, 2009
Place: Washington, DC
Contact: ABA: tel (202) 662-1519 (Carol Rose); email carolrose@staff.abanet.org; website www.abanet.org/crimjust/home.html

Sponsor: **New York State Defenders Association**
Theme: **Criminal Defense Update**
Date: **November 7, 2009**
Place: **Rochester, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: National Legal Aid and Defender Association
Theme: 2009 Annual Conference: Justice in Times of Challenge & Change
Dates: November 18-21, 2009
Place: Denver, CO
Contact: NLADA: tel (202) 452-0620 x207 (Robin Guyse); fax (202) 872-1031; website www.nlada.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: NACDL's 2nd Annual Defending Drug Cases Seminar
Dates: November 19-20, 2009
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: **New York State Defenders Association**
Theme: **42nd Annual Meeting & Conference**
Dates: **July 25-27, 2010**
Place: **TBA**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Book Review

A Former Insider's Guide to Parole: A Manual for Anyone Trying to Get Out of Prison

By Gerald T. Balone

GTB Speaks, LLC, 2009.

by Alan Rosenthal and Patricia Warth*

Entitled *A Former Insider's Guide to Parole*, Gerald T. Balone's self-published book is just as much about surviving the prison experience with your humanity and sense of hope intact as it is about successfully getting paroled.

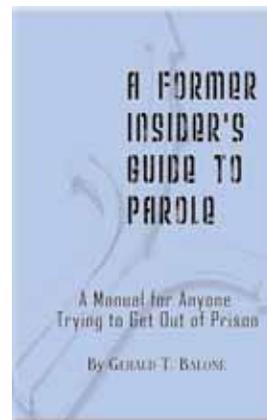
Balone served 37½ years on a 25 to life sentence for convictions stemming from the 1973 burglary-murders of three people in Buffalo. When he initially began his incarceration at age 20, after spending most of his life in Buffalo's foster care system, Balone, by his own admission, was a "cynical, bitter, thickheaded, institutional thug living the prison culture and not doing a darned thing to improve myself or my odds of someday getting out. I flat out didn't care what happened to me." It was not until 18 years into his sentence that Balone decided to "play the game and start attending therapeutic and educational programs," "signing-on" despite his belief that these programs were "worth a bucket of spit." To his surprise, Balone began to buy into this "game," and slowly positive messages began to take-hold. As Balone describes it, "a whole new world opened for" him, and he began to ask himself if he had potential for real change and growth. To his wonderment, Balone discovered that the answer was a resounding "Yes." By the time he was released from prison at age 54 after his seventh appearance before the parole board, Balone had achieved five college degrees, including a Master's Degree in Healthcare Administration and an Urban Ministry Masters from New York Theological Seminary. He had been a facilitator and coordinator for nearly all prison-based programs, the Resident Director of his facility's Pre-Release Center, and a role model to anyone who was ready to reject the myth that change is impossible. His release sent shock waves of hope to many of those in prison who despair about ever being released.

Against the backdrop of his own personal journey, Balone's 100-page book offers eighteen lessons (or chapters) designed to enhance one's potential for being

**Alan Rosenthal, Esq. and Patricia Warth, Esq. are Co-Directors of Justice Strategies at the Center for Community Alternatives (CCA), a private, not-for-profit criminal justice agency with offices in Syracuse and New York City. Justice Strategies, the research, training, public advocacy, and policy division of CCA, provides practice tips for defense attorneys, research briefs, training manuals, and other publications to serve the needs of the field and the public at large.*

released to parole. His lessons are not legal advice, and he quickly warns readers that he was never a "jailhouse lawyer." Rather, these lessons contain Balone's hard-earned wisdom as he pours his heart out in an attempt to share his experiences with the men and women who are locked behind prison walls. It is much more than a book about how to prepare to make parole; it is a book about change and self-improvement.

As attorneys, we have a combined experience of preparing over 100 people for parole board appearances. Balone's book does not overlook any facet of the essential documentation and preparation. For example, Lesson Two outlines the importance that documentation plays at a parole release hearing, and several chapters are devoted to obtaining, reviewing, and where possible, correcting documentation such as rap sheets, pre-sentence reports, disciplinary records, and volunteer, educational, therapeutic and vocational programming. Balone also offers advice on how to respond to the very difficult questions that repeatedly are asked at parole board hearings – questions about responsibility, remorse, rehabilitation, and release plans. Each chapter concludes with a section of questions and advice. After reading this book, we were struck with what an excellent tool it is to



help systematically prepare for a parole release hearing, providing information that is of great value to lawyers and people in prison alike. Balone's insights cannot fail to help anyone meet the harrowing experience of a parole board hearing with more confidence.

The journey of a 19 year old with a fifth grade education whose self-image was that of "a criminal and nothing else" and who "really didn't care about anything or anyone, not even myself," yet who manages to become a counselor, teacher, and motivational speaker with two masters degrees is a lesson in change and how to prepare yourself for a successful and productive reentry and reintegration back into society. For that reason, Balone's book is a gem for anyone who is in prison (even the men and women serving determinate sentences who will never see the parole board), for lawyers who have clients in prison, for individuals who have family members or loved ones in prison, and for anyone who cares about the criminal justice system and believes in the power of hope and transformation.

This manual can be ordered for the very reasonable price of \$20.00, payable to GTB Speaks, LLC. Orders should be mailed to: GTB Speaks, LLC, 1200 William Street, P.O. Box 686, Buffalo, NY 14240-0686. Order forms are available at www.gtbspeaks.com.♠

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

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

United States Supreme Court

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

Federal Law (Crimes) FDL; 166(10)

Weapons (Possession) WEA; 385(30)

United States v Hayes, 555 US __, 129 SCt 1079 (2009)

The respondent was charged with possession of firearms after a misdemeanor crime of domestic violence conviction. He had been convicted of battery and the accuser was his then-wife. The respondent moved to dismiss, arguing that the conviction was not a domestic violence crime because a domestic relationship was not an element of the battery offense. The district court denied the motion and the Court of Appeals reversed.

Holding: A misdemeanor crime of domestic violence is defined as an offense that: is a misdemeanor under federal, state, or tribal law, and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon committed against a person who has a specified domestic relationship with the defendant. See 18 USC 921(a)(33)(A). This definition does not require that the domestic relationship be an element of the misdemeanor offense. It merely requires that the prosecution in the gun possession case prove beyond a reasonable doubt that the offense was committed by the defendant against a spouse or other specified relation. The use of the singular word "element" suggests that Congress intended to describe only one required element, the use of force. See *United States v Meade*, 175 F3d 215, 218 (1st Cir 1999). This interpretation fits with Congress' intent to keep individuals who use force against spouses and other defined relations from possessing weapons. Judgment reversed.

Dissent: [Roberts, CJ] Plain grammatical construction shows that a misdemeanor crime of domestic violence is one that has a domestic relationship element. "If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority."

Defense Systems (Assigned DFS; 104(5) (15) (90)
Counsel Systems) (Caseload)
(Public Defender Systems)

Speedy Trial (Cause for Delay) SPX; 355(12) (30)
(General)

Vermont v Brillon, 556 US __, 129 SCt 1283 (2009)

On July 27, 2001, the respondent was charged in a Vermont court with felony domestic assault. The court held him without bail, assigned a county public defender, and scheduled trial for February 2002. In mid-January, the court denied defense counsel's motion for a continuance. On February 22, defense counsel renewed the motion, citing his heavy workload and the need for further investigation, which was denied. The defendant fired defense counsel and the court granted counsel's motion to withdraw. The next assigned lawyer immediately withdrew because of a conflict. On March 1, the court assigned a third attorney. On May 20, the respondent asked the court to dismiss the attorney for lack of diligence and the attorney moved to withdraw, alleging that the respondent threatened his life. The court granted the motion and assigned a fourth attorney. On August 5, defense counsel requested more time to prepare in view of his caseload. Two months later, the respondent complained about his attorney's unresponsiveness and incompetence. At a hearing on November 26, defense counsel reported that his Defender General's office contract expired in June and they were talking about reassigning the case. The court relieved the attorney and the fifth lawyer was assigned on January 15, 2003. On February 25, the attorney asked for time to prepare, and on April 10, he withdrew due to changes in his firm's contract with the Defender General. The respondent was without counsel until August 1, when a sixth lawyer was appointed. On February 23, 2004, the attorney filed a speedy trial motion, which was denied. After a trial on June 14, the respondent was found guilty and sentenced to 12 to 20 years in prison. The Vermont Supreme Court reversed.

Holding: A balancing test must be used to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. See *Barker v Wingo*, 407 US 514, 529, 530 (1972). Different weights are applied to the different reasons for delay, and the court must consider whether the government or the defendant is more blameworthy. See *Doggett v United States*, 505 US 647, 651 (1992). Delays caused by defense counsel count against the defendant, because counsel, whether privately retained or publicly appointed, is the defendant's agent. See *Polk County v Dodson*, 454 US 312, 318 (1981). Assigned counsel are not usually considered state actors for speedy trial purposes. The respondent's attorneys acted on his behalf, not on behalf of the state, and most of the delay must be attributed to him. If he had not forced the withdrawal of

US Supreme Court *continued*

two of his attorneys, the speedy trial issue would not have arisen, and the effects of these earlier events must be considered in analyzing subsequent delays. While delay resulting from a systemic breakdown in the public defender system could be charged to the state, the Vermont Supreme Court made no such finding and the record does not suggest that institutional problems caused any of the delay. Judgment reversed.

Dissent: [Breyer, J] The writ of certiorari should be dismissed as improvidently granted. Nevertheless, the Vermont Supreme Court has considerable authority to supervise the appointment of public defenders, and it should be given leeway when deciding whether a delay is properly attributed to individual defense counsel or to the Defender General’s Office’s failure to properly to assign counsel.

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

Habeas Corpus (Federal) HAB; 182.5(15)

Knowles v Mirzayance, 556 US __, 129 SCt 1411 (2009)

The respondent confessed to stabbing and shooting the decedent. He pleaded not guilty and not guilty by reason of insanity (NGI), which required a bifurcated trial under California law. After the jury convicted him of first-degree murder, defense counsel advised him to withdraw his NGI plea because he had the burden of proof during the second phase, the jury did not accept the insanity evidence presented during the guilt phase, and his parents were reluctant to testify on his behalf. The respondent agreed to withdraw the plea, but after sentencing, he alleged that counsel’s recommendation constituted ineffective assistance of counsel under *Strickland v Washington* (466 US 668 [1984]). The state courts rejected this claim. The district court denied his federal habeas petition without a hearing. The Court of Appeals reversed and remanded for a determination of whether there were tactical reasons for abandoning the defense. The district court concluded that defense counsel’s performance was not deficient, but concluded that the remand order required the opposite finding because withdrawing the defense provided no tactical advantage. The Court of Appeals affirmed.

Holding: The state court’s denial of the respondent’s ineffective assistance of counsel claim was not “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 USC 2254(d)(1). The Court of Appeals applied a “nothing to lose” standard, which this Court has never used in evaluating *Strickland* claims. It was not unreasonable for the state court to conclude

that counsel’s performance was not deficient when he advised the respondent to drop a claim that had almost no chance of success. “[T]his Court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success.” Even under *de novo* review, the respondent failed to show deficient performance and prejudice. Judgment reversed.

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

Guilty Pleas (Vacatur) GYP; 181(55)

Plea Bargaining (General) PLE; 284(10)

Puckett v United States, 556 US __, 129 SCt 1423 (2009)

In exchange for a guilty plea, the prosecution agreed that the petitioner qualified for a three-level reduction for acceptance of responsibility and promised to request a sentence at the low end of the applicable guidelines range. Sentencing was delayed for three years, and during that time, the petitioner helped another person commit a crime. The probation department recommended against the three-level reduction, and at sentencing, the prosecution withdrew its support for the reduction. Defense counsel did not object to the prosecution’s violation of the plea agreement. The court denied the three-level reduction, but did sentence the petitioner at the low end of the guideline range. The Court of Appeals affirmed.

Holding: When a claim of error is not properly preserved by timely objection, an appellate court may only reverse if the four-pronged definition of plain error is satisfied. See Fed R Crim Proc 52(b); *United States v Olano*, 507 US 725 (1993). The breach of the plea agreement did not retroactively cause the plea to be unknowing or involuntary. “Whether an error can be found harmless is simply a different question from whether it can be subjected to plain-error review.” The petitioner cannot show that the error affected his substantial rights because it is unlikely he would have gotten the benefits contemplated in the agreement anyway. Plain-error review is appropriate in breach of plea agreement cases: it prevents defendants from waiting to see if the sentence is satisfactory before objecting; because the prosecution will not always concede a breach of the agreement, the district court is in the best position to decide the matter in the first instance; some breaches may be curable upon timely objection; and if a breach cannot be cured, the district court can grant immediate relief and avoid the delay and expense of an appeal. Judgment affirmed.

Dissent: [Souter, J] Plain-error review is proper, but the substantial right implicated “is conviction in the absence of trial or compliance with the terms of the plea agreement dispensing with the Government’s obligation to prove its case.” The petitioner is entitled to relief

US Supreme Court *continued*

because defendants who make agreements with the prosecution are entitled to take the prosecution at its word.

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

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

Rivera v Illinois, 556 US __, 129 Sct 1446 (2009)

During jury selection, the petitioner's counsel made a peremptory challenge to prospective juror Deloris Gomez. Illinois law afforded each side seven peremptory challenges. Petitioner's counsel had already used three peremptory challenges; two of the three were exercised against women, one of whom was African-American. Fearing a discriminatory pattern, the court asked counsel to state why he was excluding Gomez. After further proceedings, the court denied the challenge and Gomez was seated and became the foreperson. The appellate court affirmed. The Illinois Supreme Court affirmed, concluding that the error was harmless and declined to reach the petitioner's constitutional arguments.

Holding: "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws." *See Engle v Isaac*, 456 US 107, 121 n21 (1982). There is no freestanding constitutional right to peremptory challenges (*see eg United States v Martinez-Salazar*, 528 US 304, 311 [2000]), and states that choose to provide peremptory challenges have the discretion to design and implement their own systems. *See Ross v Oklahoma*, 487 US 81, 89 (1988). The petitioner was not deprived of his due process right to a fair trial; the jury in his case was impartial for Sixth Amendment purposes. The court's mistaken denial of a state-provided peremptory challenge did not rise to the level of a structural error requiring automatic reversal. *See Washington v Recuenco*, 548 US 212, 218-219 (2006). Judgment affirmed.

Clemency (General) (Procedure for Obtaining) CLM; 68.5(20) (30)

Counsel (Scope of Counsel [Duration]) COU; 95(38[a])

Habeas Corpus (Federal) (General) HAB; 182.5(15) (20)

Harbison v Bell, 556 US __, 129 Sct 1481 (2009)

In 1983, the petitioner was sentenced to death in Tennessee. The federal district court appointed the feder-

al defender's office to represent him in his habeas proceeding. Upon denial of his federal writ, the petitioner requested counsel for state clemency proceedings. The Tennessee Supreme Court held that state law does not authorize appointment of a state public defender as clemency counsel. The federal district court denied the federal defender's application to expand the scope of her representation to include state clemency proceedings. The Court of Appeals affirmed.

Holding: The petitioner's counsel is authorized to represent him in his state clemency proceedings. *See* 18 USC 3599(a)(2), (e). The federal defender was initially appointed under 18 USC 3599(a)(2) to represent the petitioner when he filed his federal habeas petition. Section 3599(e), which sets forth the responsibilities of counsel appointed under 3599(a)(2), includes "represent[ing] the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." The phrase "other clemency" includes the various forms of state clemency. Since state clemency proceedings are available to the petitioner, the clear statutory language provides that his appointed counsel is authorized to represent him in those proceedings. "Subsection (e) emphasizes continuity of counsel, and Congress likely appreciated that federal habeas counsel are well positioned to represent their clients in the state clemency proceedings that typically follow the conclusion of §2254 litigation. Indeed, as the history of this case demonstrates, the work of competent counsel during habeas corpus representation may provide the basis for a persuasive clemency application." This case "underscores why it is 'entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.'" *Hain v Mullin*, 436 F.3d 1168 (CA10 2006) (en banc). Judgment reversed.

Concurrence: [Roberts, CJ] The best reading of 18 USC 3599(e) is that federal counsel is available for state clemency, but not for subsequent state court litigation.

Concurrence: [Thomas, J] Because there is no federal limitation in the text of 3599(e), the law is not limited to federal clemency proceedings.

Concurrence in Part, Dissent in Part: [Scalia, J] Section 3599 should be read as providing federal counsel to capital defendants appearing in a federal forum.

Arraignment (Delay) ARN; 31(5)

Confessions (General) (Interrogation) (Voluntariness) CNF; 70(32) (42) (50)

Corley v United States, 556 US __, 129 Sct 1558 (2009)

The petitioner was arrested in the morning of September 17. Three hours later, he was taken to the hos-

US Supreme Court *continued*

pital for a minor injury. At 3:30 pm, instead of taking him before a federal magistrate in their office building, federal agents took him to their office to question him about a bank robbery. The petitioner signed a *Miranda* waiver and about 9 hours after his arrest, he began an oral confession. He was held overnight and the interrogation recommenced the next morning, ending with a signed confession. Almost thirty hours after his arrest, the petitioner appeared before a magistrate. The court denied his motion to suppress and the Court of Appeals affirmed.

Holding: The court erred in failing to determine whether the oral confession should be treated as having been made within six hours of arrest and whether, under the *McNabb-Mallory* rule (see *McNabb v United States*, 318 US 332 [1943]; *Mallory v United States*, 354 US 449 [1957]), any delay beyond the six hours was justifiable. Under 18 USC 3501(c), a confession is not inadmissible solely because of delay if it is voluntary and was made within six hours of arrest; this provision was designed to modify the *McNabb-Malory* rule. Subsection (a) of 3501, which provides that a voluntary confession is admissible in federal court, was designed to overrule *Miranda* and has no effect on *McNabb-Mallory* or 3501(c). Any other reading would make 3501(c) superfluous. See *Hibbs v Winn*, 542 US 88, 101 (2004). “In a world without *McNabb-Mallory*, federal agents would be free to question suspects for extended periods before bringing them out in the open, and we have always known what custodial secrecy leads to. See *McNabb*, 318 U.S. 332. No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far.” Judgment vacated.

Dissent: [Alito, J] Based on the unambiguous language of 18 USC 3501(a), which “was meant to reinstate the traditional rule that a confession should be excluded only if involuntary . . . ,” the petitioner’s confession may not be suppressed.

Search and Seizure (Arrest/
Scene of the Crime Searches
[Automobiles and other
Vehicles] [Scope])

SEA; 335(10[a] [m])

Arizona v Gant, 556 US __, 129 Sct 1710 (2009)

During an investigation of drug sales at a house, the police learned that the respondent had an outstanding arrest warrant for driving with a suspended license. While at the house making other arrests, the police saw the respondent pull his car into the driveway. He exited, closed the door, and encountered the police 10-to-12 feet from the car. The police arrested and handcuffed him.

After he was put in the back of a patrol car, two officers searched his car and found a gun and a bag of cocaine in the pocket of a jacket on the backseat. The court denied his motion to suppress, concluding that it was a valid search incident to arrest. The Arizona Supreme Court reversed.

Holding: The holding in *New York v Belton* (453 454 [1981]) has been misinterpreted; “*Belton* does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle.” A warrantless search is not *per se* unreasonable if it is a valid search incident to a lawful arrest (see *Weeks v United States*, 232 US 383, 392 [1914]); this exception derives from interests in officer safety and evidence preservation. See *United States v Robinson*, 414 US 218, 230-234 (1973). A search incident to arrest is limited to “the arrestee’s person and the area “within his immediate control”” *Chimel v California*, 395 US 752, 763 (1969). If the arrestee cannot reach the area the police seek to search, the exception does not apply. *Eg Preston v United States*, 376 US 364, 367-368 (1964). “[W]e also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is ‘reasonable to believe that evidence of the offense might be found in the vehicle.’ *Thornton [v United States]*, 541 US [615] at 632 [2004]” Because the respondent did not have access to his car and there was no reason to believe that a search would have uncovered evidence related to the suspended license charge, the search was unreasonable. Judgment affirmed.

Concurrence: [Scalia, J] *Belton* and *Thornton* should be overruled and the search incident to arrest exception should be limited to cases in which the search is intended to find evidence of the crime of arrest or another crime there is probable cause to believe occurred. Despite the lack of certainty that the majority’s artificial narrowing of *Belton* and *Thornton* provides, this is a lesser evil when compared to the dissent’s position.

Dissent: [Breyer, J] Principles of *stare decisis* require continued application of the *Belton* rule. The respondent failed to meet the burden needed to overturn this well-established precedent.

Dissent: [Alito, J] Overruling the *Belton-Thornton* line of cases was unjustified. “The Court’s decision will cause suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law, and although the Court purports to base its analysis on the landmark decision *Chimel* . . . , the Court’s reasoning undermines *Chimel*.”

Death Penalty (Guilt Phase) DEP; 100(85) (120)
(Penalty Phase)

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

US Supreme Court *continued*

Habeas Corpus (Federal) (State) HAB; 182.5(15) (35)

Cone v Bell, 556 US ___, 129 SCt 1769 (2009)

In his capital murder trial, the petitioner raised an insanity defense based on his severe drug addiction. The prosecution aimed to discredit the petitioner's experts by showing that their opinions were solely based on his statements; prosecution witnesses also refuted allegations of drug use and irrational behavior. The jury rejected the insanity defense. Defense counsel urged the jury to consider the petitioner's drug addiction in the penalty phase; the jury found all four aggravating factors and returned a sentence of death. The state appellate courts affirmed and later denied his first post-conviction motion. While his second post-conviction motion was pending, under new state decisional law, the petitioner was allowed access to the prosecutor's file and discovered several undisclosed documents that supported his drug abuse claim. He amended his motion to address this newly discovered evidence. The court denied the motion, finding that the *Brady* issue was previously determined. The state appellate court affirmed. The district court denied his federal habeas petition, concluding that he waived the *Brady* issue. The Court of Appeals affirmed, finding that although he raised the *Brady* claim, it was barred from reaching the merits because the state courts concluded that the claim was previously determined or waived under state procedural law.

Holding: Federal habeas review is not barred because the state court declined to review the merits of the *Brady* claim on the ground that it had done so already. *See Ylst v Nunnemaker*, 501 US 797, 804 n3 (1991). The state court's assertion that it has already reached a decision on a claim provides strong evidence that the claim has been given full consideration and is ripe for federal review under 28 USC 2254(b)(1)(A). The state court declined to hold that the claim was waived by the petitioner's failure to comply with state procedural rules, and "we have no concomitant duty to apply state procedural bars where state courts have themselves declined to do so." The *Brady* claim must be reviewed *de novo*. *See eg Rompilla v Beard*, 545 US 374, 390 (2005). The Court of Appeals erred in failing to thoroughly review the evidence or consider the cumulative effect of the evidence; it also erred by not distinguishing between the materiality of the evidence with regard to guilt and punishment. While it is unlikely that the suppressed evidence would have affected the jury's verdict on the insanity defense, the same cannot be said as to the sentencing recommendation given the lesser standard that applies to mitigation evidence. The district court must review the suppressed evidence as it relates to the sentence. Judgment vacated and matter remanded.

Concurrence: [Roberts, CJ] Remand is appropriate because of the unique circumstances presented. "In considering on remand whether the facts establish a *Brady* violation, it is clear that the lower courts should analyze the issue under the *constitutional* standards we have set forth, not under whatever standards the American Bar Association may have established. The ABA standards are wholly irrelevant to the disposition of this case, and the majority's passing citation of them should not be taken to suggest otherwise."

Concurrence in Part, Dissent in Part: [Alito, J] The petitioner did not fairly present the *Brady* claim to the state appellate court; therefore it is either unexhausted or procedurally defaulted. The matter should be remanded to the Court of Appeals as it is in the best position to evaluate the *Brady* claim in light of the current record.

Dissent: [Thomas, J] The petitioner failed to establish a reasonable probability that, had the evidence been disclosed, his sentence would have been different. *See Kyles v Whitley*, 514 US 419, 435 (1995).

Federal Law (Crimes) (General) FDL; 166(10) (20)

Sentencing (Aggravated Penalties) (Mandatory (Weapons)) SEN; 345(5) (47.5) (80)

Weapons (Firearms) (General) (Possession) WEA; 385(21) (22) (30)

Dean v United States, 556 US ___, 129 SCt 1849 (2009)

During a bank robbery, the petitioner's gun accidentally discharged. He was convicted of armed robbery and possession of a firearm during the robbery. The mandatory minimum for the firearm offense was five years; however, because the firearm discharged, the court imposed a ten-year mandatory minimum sentence. The Court of Appeals affirmed.

Holding: The statute does not require intentional discharge of a firearm. *See* 18 USC 924(c)(1)(A)(iii). The statutory language does not include an intent requirement, and the use of the passive voice indicates that Congress did not mean to require proof of intent. *Cf Watson v United States*, 552 US ___, __ (2007) (slip op at 7). "The sentencing enhancement in subsection (iii) accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible. *See Harris [v United States]*, 536 US 545] at 553 [2002]." Judgment affirmed.

Dissent: [Stevens, J] Because the statute includes a sliding scale of punishment for increasingly culpable conduct, it is clear that Congress intended the discharge provision to apply to intentional discharges only. *See Smith v United States*, 508 US 223, 238 (1993). Assuming there is no evidence of legislative intent, the presumption that criminal provisions include an intent element applies. *See*

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Morissette v United States, 342 US 246, 273 (1952). “The common-law tradition of requiring proof of *mens rea* to establish criminal culpability should thus apply equally to such sentencing factors.”

Dissent: [Breyer, J] The rule of lenity requires that the statute be read to include an intent element.

Confessions (Counsel) CNF; 70(23) (30) (46)
 (Evidence) (Notice of Use at Trial)

Counsel (Right to Counsel) COU; 95(30) (38)
 (Scope of Counsel)

Witnesses (Defendant as Witness) WIT; 390(12)

Kansas v Ventris, 556 US __, 129 Sct 1841 (2009)

The respondent was charged with murder and other crimes. Officers planted a jailhouse informant in the respondent’s cell and the respondent allegedly told the informant that he shot the decedent. At trial, the respondent testified that another person shot the decedent. The court allowed the prosecution to call the informant to testify about the respondent’s prior statement. The jury acquitted the respondent of murder, but convicted him of burglary and robbery. The Kansas Supreme Court reversed.

Holding: The prosecution may use evidence obtained in violation of a defendant’s Sixth Amendment right to counsel for impeachment purposes. Because the prosecution conceded that the statement was not admissible in its case in chief (*see Massiah v United States*, 377 US 201, 206 [1964]), that issue is accepted as the law of the case. Inadmissibility is not automatic; therefore, the exclusionary-rule balancing test must be applied. *See Walder v United States*, 347 US 62, 65 (1954). “[T]he *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation.” Because the constitutional violation has already occurred, the scope of the remedy is the only question. “Our precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle.” The goal of preventing perjury by defendants and the minimal deterrent value of exclusion justify the use of uncounseled statements for impeachment purposes. *See Stone v Powell*, 428 US 465, 488 (1976). Judgment reversed.

Dissent: [Stevens, J] “The use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process—the fairness of which the Sixth Amendment was designed to protect. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984)” The shabby tactics used in this case are intolerable in all cases.

Federal Law (Crimes) (General) FDL; 166(10) (20)

Flores-Figueroa v United States, 556 US __, 129 Sct 1886 (2009)

The petitioner, a Mexican citizen living in the United States, gave his employer counterfeit Social Security and alien registration cards. The US Immigration and Customs Enforcement (ICE) discovered that the numbers on the cards belonged to other people, and the petitioner was charged with aggravated identity theft (18 USC 1028A(a)(1)) and other crimes. The court denied the petitioner’s motion for judgment of acquittal on the identity theft charges. The Court of Appeals affirmed.

Holding: The statutory language and ordinary English usage require the “knowing” element of aggravated identity theft to be applied to every element of the crime. *See United States v X-Citement Video, Inc*, 513 US 64, 79 (1994). The prosecution must prove that the petitioner knew that the “means of identification” belonged to another person. The legislative history does not indicate that Congress intended a contrary reading of the statute, and the potential enforcement problems are insufficient to overcome the ordinary meaning of the statute. Judgment reversed.

Concurrence in Part, Concurrence in Judgment: [Scalia, J] Reversal was warranted on the statutory text alone. It is inappropriate for the Court to suggest that courts ordinarily should apply the word “knowingly” to each element of a crime, and it was unnecessary for the Court to review the statute’s legislative history.

Concurrence in Part, Concurrence in Judgment: [Alito, J] “In interpreting a criminal statute such as the one before us, I think it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense, but it must be recognized that there are instances in which context may well rebut that presumption.”

Criminal Facilitation (Elements) CRF; 98.3(10) (17) (25)
 (General) (Sentence)

Federal Law (Crimes) (General) FDL; 166(10) (20)

Narcotics (Penalties) (Possession) NAR; 265(55) (57) (59)
 (Sale)

Abuelhawa v United States, 556 US __, 129 Sct 2102 (2009)

The petitioner used his cell phone to arrange purchases of small amounts of cocaine. He was charged with misdemeanors for the purchases and felonies for facilitating felony drug sales using his cell phone. The district court denied his motion for acquittal as a matter of law. The Court of Appeals affirmed.

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Holding: The use of a cell phone to make a misdemeanor drug purchase does not amount to the facilitation of felony drug distribution under 21 USC 843(b). The word “facilitate” must be read within the context of the statute. *See United States Nat. Bank of Ore. v Independent Ins. Agents of America, Inc.*, 508 US 439, 455 (1993). “Where a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the conduct of the other.” When the law treats one side of a transaction more leniently, it does not make sense to further punish that person for facilitating the other party’s action, as it “would upend the calibration of punishment set by the legislature” *See Gebardi v United States*, 287 US 112 (1932). A broader reading of “facilitate” would skew the calibration of respective buyer-seller penalties. Judgment reversed.

Civil Rights Actions (USC § 1983 Actions)	CRA; 68(45)
Constitutional Law (United States generally)	CON; 82(55)
Jurisdiction (General) (Subject Matter)	JSD; 227(3) (10)
Prisoners (Access to Courts and Counsel) (Rights generally)	PRS I; 300(2) (25)

Haywood v Drown, 556 US __, 129 Sct 2108 (2009)

The petitioner, a New York State prisoner, filed two 42 USC 1983 actions in state supreme court against correction employees and sought punitive damages and attorney’s fees. The court dismissed the action for lack of jurisdiction, citing Correction Law 24. The New York Court of Appeals affirmed.

Holding: New York’s Correctional Law 24 violates the Supremacy Clause of the United States Constitution because it prohibits trial courts from exercising jurisdiction over prisoners’ 42 USC 1983 suits against correction officers. Under Correction Law 24, prisoners seeking damages from a correction officer must sue the State in the Court of Claims and lose procedural protections and relief available to litigants who bring 1983 actions in state courts of general jurisdiction. New York’s policy of shielding correction officers from liability when sued for damages is not a “‘neutral state rule regarding the administration of the courts,’ *Howlett [v Rose]*, 496 US [356] at 372 [1990].” Therefore, New York is not excused from the default rule that its state courts are presumptively competent to adjudicate section 1983 claims. *See Tafflin v Levitt*, 493 US 455, 458 (1990). That the state law divested the supreme court of jurisdiction over identical federal and state claims does not ensure that the law meets the neutral rule requirement. “[H]aving made the decision to create courts of general jurisdiction that regularly sit to entertain analogous

suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy.” Judgment reversed.

Dissent: [Thomas, J] Neither the United States Constitution nor precedent require New York courts to entertain 1983 actions. *See National Private Truck Council, Inc v Oklahoma Tax Comm’n*, 515 US 582, 587 n4 (1995). “[T]he superiority of federal law as a substantive matter does not trigger an obligation on States to keep their courts jurisdictionally neutral with respect to federal and state-law claims.”

Confessions (Counsel (Interrogation) (<i>Miranda</i> Advice) (Voluntariness)	CNF; 70(23) (42) (45) (50)
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Counsel (Advice of Right to (Attachment) (Right to Counsel) (Scope of Counsel [Entry])	COU; 95(5) (9) (30) (38[b])
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Montejo v Louisiana, 556 US __, 129 Sct 2079 (2009)

The petitioner was arrested for murder and robbery. After he waived his *Miranda* rights, the police interrogated him overnight and he eventually admitted to the crime. At the preliminary hearing, the court appointed counsel; the petitioner did not expressly request counsel. Later that day, two detectives visited him in prison to gain his cooperation in locating the murder weapon. He waived his *Miranda* rights and agreed to go with them. During the trip, he wrote an inculpatory letter of apology to the widow. He met with his attorney for the first time upon his return to the prison. The court allowed the admission of the apology letter, and the defendant was convicted and sentenced to death. The Louisiana Supreme Court affirmed.

Holding: *Michigan v Jackson* (475 US 625 [1986]) is overruled. Under *Jackson*, when a defendant requested counsel at arraignment, any subsequent waiver of the right to counsel was presumed invalid. The same rule applies when an individual invokes the right to counsel during custodial interrogation. *See Edwards v Arizona*, 451 US 477 (1981). When there is no request for counsel, even if the court assigned counsel, the defendant should not be prevented from waiving his Sixth Amendment right to counsel during a custodial interrogation after receiving *Miranda* (*Miranda v Arizona*, 384 US 436 [1966]) warnings. Without *Jackson*, defendants’ Sixth Amendment rights are still protected under *Miranda*, *Edwards*, and *Minnick v Mississippi* (498 US 146 [1990]). “[W]hen the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not ‘pay its way.’ *United States v. Leon*, 468 U.S. 897, 907-908 n6 (1984).” The petitioner should be given an opportunity to argue

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that the letter should be suppressed under *Edwards*. Judgment vacated and case remanded.

Concurrence: [Alito, J] The Court’s decision to overrule *Jackson* is fully supported by the treatment of *stare decisis* in *Arizona v Gant* (556 US __ [2009]).

Dissent: [Stevens, J] “The Court’s decision to overrule *Jackson* is unwarranted. Not only does it rest on a flawed doctrinal premise, but the dubious benefits it hopes to achieve are far outweighed by the damage it does to the rule of law and the integrity of the Sixth Amendment right to counsel. Moreover, even apart from the protections afforded by *Jackson*, the police interrogation in this case violated Jesse Montejo’s Sixth Amendment right to counsel.”

[Ed. Note: Under the New York State Constitution, once criminal charges have been filed, the defendant’s right to counsel indelibly attaches and it cannot be waived outside the presence of counsel. The defendant need not request or retain counsel for this rule to apply. See *People v West*, 81 NY2d 370 (1993); *People v Samuels*, 49 NY2d 218 (1980).]

Death Penalty (Cruelty (Penalty Phase) (Special Circumstances)	DEP; 100(40) (120) (145)
Developmentally Disabled (Defenses) (General)	DSB; 108(15) (30)
Double Jeopardy (Collateral Estoppel) (General) (Punishment)	DBJ; 125(3) (7) (30)

Bobby v Bies, 556 US __, 129 Sct 2145 (2009)

In 1992, the respondent was convicted of aggravated murder in Ohio. Evidence of his mild to borderline mental retardation was introduced as a mitigating factor during the sentencing phase. Upon the jury’s recommendation, the court imposed a death sentence. The state appellate courts affirmed. The state courts denied post-conviction relief, concluding that although the respondent was mildly mentally retarded, existing law did not bar a death sentence. The respondent’s federal habeas petition was pending when the Supreme Court decided *Atkins v Virginia* (536 US 304 [2002]). In response to *Atkins*, the Ohio Supreme Court held that the defendant has the burden of proving mental retardation. See *State v Lott*, 779 NE2d 1011 (2002). The state trial court ordered a full hearing on the respondent’s mental capacity. The respondent moved for summary judgment, arguing that issue preclusion prevented relitigation of his mental capacity; the court denied the motion. The federal district court then

granted his habeas writ and vacated his death sentence. The Court of Appeals affirmed.

Holding: Issue preclusion and the Double Jeopardy Clause do not bar review of the respondent’s mental capacity for *Atkins* purposes. It is not clear that the mental capacity issue was actually determined at trial or on direct appeal. Even so, because the state court’s statements on that issue were not necessary to the judgment affirming his sentence, relitigation is not precluded. See *Ashe v Swenson*, 397 US 436 (1970); Restatement (Second) of Judgments 27, Comment h (1980). “[E]ven if the core requirements for issue preclusion had been met, an exception to the doctrine’s application would be warranted due to this Court’s intervening decision in *Atkins*. Mental retardation as a mitigator and mental retardation under *Atkins* and *Lott* are discrete legal issues.” Because *Atkins* substantially changed the prosecution’s incentive to contest the respondent’s mental capacity, issue preclusion would be unfair. The Double Jeopardy Clause does not apply because the respondent was never acquitted and subjected to re prosecution. The respondent’s mental capacity must first be determined by the state court, after the prosecution has a full and fair opportunity to contest the matter under *Atkins* and *Lott*. Judgment reversed and remanded.

Federal Law (Crimes)	FDL; 166(10)
Instructions to Jury (General)	ISJ; 205(35)
Organized Crime (General)	OGC; 272(10)

Boyle v United States, 556 US __, 129 Sct 2237 (2009)

The petitioner was convicted of participation in the conduct of the affairs of an enterprise through a pattern of racketeering, a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). See 18 USC 1962(c). A loosely organized group with no apparent hierarchy engaged in a series of bank thefts over a ten year period. The petitioner was associated with the group for five years and participated in some of the thefts. The court refused to instruct the jury that the prosecution must prove that the enterprise “‘had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts.’” The Court of Appeals affirmed.

Holding: An association-in-fact enterprise must have a structure, which includes “a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.” There are many elements that are not required, including a hierarchical structure, fixed roles for members, regular meetings, and established rules and regulations. Although an association-in-fact must have certain structural elements, jury instructions do not need to include the term “structure,” so long as the instructions

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adequately express the substance of relevant point. The district court's instructions adequately conveyed the elements of an association-in-fact enterprise. Judgment affirmed.

Dissent: [Stevens, J] The term "enterprise" was intended to "refer only to business-like entities that have an existence apart from the predicate acts committed by their employees or associates." The jury instructions did not properly convey the meaning of that term.

Appeals and Writs (General) APP; 25(35) (50)
(Jurisdiction)

Post-Judgment Relief (General) PJR; 289(20)

United States v Denedo, 556 US ___, 129 Sct 2213 (2009)

The respondent, who was born in Nigeria, enlisted in the Navy and later became a lawful permanent resident. He pleaded guilty to conspiracy and larceny under the Uniform Code of Military Justice. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. Eight years later, the Department of Homeland Security began removal proceedings. The respondent filed a writ of *coram nobis* with the NMCCA, challenging his conviction based on ineffective assistance of counsel. He alleged that he only accepted the plea after his attorney incorrectly assured him that he could not be deported. The writ was denied. The Court of Appeals for the Armed Forces (CAAF) remanded for further review of the ineffectiveness claim.

Holding: "Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect." The writ of *coram nobis* is an extraordinary tool to correct legal or factual error and an application for such a writ is a belated extension of the original proceeding in which the error allegedly occurred. See *United States v Morgan*, 346 US 502, 508 (1954). "Our holding allows military courts to protect the integrity of their dispositions and processes by granting relief from final judgments in extraordinary cases when it is shown that there were fundamental flaws in the proceedings leading to their issuance." Judgment affirmed and case remanded.

Concurrence in Part, Dissent in Part: [Roberts, CJ] The jurisdiction of military courts is limited by statute and cannot be extended by the judiciary. Military courts have no jurisdiction over final court-martial judgments, so they have no jurisdiction over post-conviction petitions for *coram nobis*. See *Clinton v Goldsmith*, 526 US 529, 535 (1999).

Aliens (Deportation) (General) ALE; 21(10) (30)

Federal Law (Crimes) (General) FDL; 166(10) (20) (30)
(Procedure)

Nijhawan v Holder, 557 US ___, 129 Sct 2294 (2009)

The petitioner immigrated to the United States. He was later convicted of conspiring to commit mail fraud, wire fraud, bank fraud, and money laundering. The amount of monetary loss was not an element of the offenses and the jury made no finding on that issue. At sentencing, the petitioner stipulated that the loss exceeded \$100 million. The federal government commenced removal proceedings and the immigration judge held that the conviction met the definition of an aggravated felony because it was an offense that involved fraud or deceit in which the loss exceeded \$10,000. The Board of Immigration Appeals and the Court of Appeals affirmed.

Holding: The monetary threshold requirement does not refer to an element of the fraud or deceit crime. Instead, "it refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion." The government must demonstrate the amount of the loss by clear and convincing evidence. Judgment affirmed.

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

Forensics (General) FRN; 173(10)

Post-Judgment Relief (General) PJR; 289(20)

District Attorney's Office for the Third Judicial District v Osborne, 557 US ___, 129 Sct 2308 (2009)

The respondent was convicted of kidnapping and sexual assault in Alaska. DNA testing, using an inexact method, showed that the respondent's genotype matched semen found at the scene. The state courts denied his post-conviction motion claiming that his attorney was ineffective for not seeking restriction-fragment-length-polymorphism (RFLP) testing and requesting an RFLP test. In a later section 1983 action, the respondent sought access to the DNA evidence for short-tandem-repeat (STR) testing. The district court dismissed the claim, but the Court of Appeals reversed. On remand, the district court granted summary judgment for the respondent and the Court of Appeals affirmed.

Holding: At least in the circumstances of this case, there is no freestanding substantive due process right to DNA evidence. It would not be appropriate to constitutionalize this issue given what appears to be a prompt and considered response by Congress and state legislatures, and because it would force the Court to make policy decisions. Alaska's post-conviction procedures do not violate the respondent's due process rights. Although it does not have a specific post-conviction access to DNA evidence statute, Alaska's courts are dealing with the application of

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existing discovery laws and post-conviction relief to DNA technology. The state's procedures are similar to those provided by federal and state DNA statutes and are not "inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.'" (*Medina [v California]*, 505 US 437] at 446, 448 [1992] . . .)." While the respondent has a liberty interest in demonstrating his innocence using new evidence under state law, the Due Process Clause does not require that certain familiar pretrial rights be extended to protect that liberty interest. States have more flexibility in deciding what procedures are necessary in post-conviction proceedings. See *Pennsylvania v Finley*, 481 US 551, 559 (1987). Judgment reversed.

Concurrence: [Alito, J] To claim a federal constitutional right to perform DNA testing, a state prisoner must file a habeas corpus petition after exhausting state administrative remedies; a section 1983 action is not appropriate. And a defendant who declines DNA testing at trial for tactical reasons has no constitutional right to post-conviction testing.

Dissent: [Stevens, J] "[A]n individual's interest in his physical liberty is one of constitutional significance. That interest would be vindicated by providing postconviction access to DNA evidence, as would the State's interest in ensuring that it punishes the true perpetrator of a crime."

Dissent: [Souter, J] "[W]hile Alaska has created an entitlement of access to DNA evidence under conditions that are facially reasonable, the State has demonstrated a combination of inattentiveness and intransigence in applying those conditions that add up to procedural unfairness that violates the Due Process Clause."

Double Jeopardy (Collateral Estoppel) (Jury Trials) (Mistrial) DBJ; 125(3) (10) (20)

Trial (Mistrial) (Verdicts [Inconsistent Verdicts]) TRI; 375(30) (70[b])

Yeager v United States, 557 US __, 129 SCt 2360 (2009)

The petitioner was charged with securities and wire fraud and insider trading. The jury acquitted on the fraud counts, but failed to reach verdict on the insider trading counts. The court entered judgment on the acquittals and declared a mistrial on the hung counts. The prosecution recharged the petitioner with some, but not all, of the insider trading counts. The petitioner moved to dismiss on double jeopardy grounds. The court denied the motion and the Court of Appeals affirmed.

Holding: The Double Jeopardy Clause bars retrial on the insider trading counts if possession of insider information was a critical issue of ultimate fact in all of the

charges against the petitioner because a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element. The primary question is whether the interest in preserving the finality of the jury's decision on the fraud counts, including its finding that the petitioner did not have insider information, bars retrial on the insider trading counts. See *Crist v Bretz*, 437 US 28, 33 (1978). The hung counts are not part of the issue-preclusion analysis; they are not a relevant part of the record of the prior proceeding and the court would have to guess the reason for the jury's failure to reach a decision. See *Ashe v Swenson*, 397 US 436, 444 (1970). On remand, the Court of Appeals may revisit its factual analysis regarding whether the jury necessarily concluded that the petitioner did not have insider information. Judgment reversed.

Concurrence in Part, Concurrence in Judgment: [Kennedy, J] Because of its misreading of the Double Jeopardy Clause, the Court of Appeals should be required to revisit its factual analysis.

Dissent: [Scalia, J] "Jeopardy is commenced and terminated charge by charge, not issue by issue." Retrial of hung counts is permissible because there is no second prosecution.

Dissent: [Alito, J] Double jeopardy does not preclude retrial on hung counts. Since the majority holds otherwise, the doctrine of issue preclusion must be applied with rigor. "The second trial is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question. Only if it would have been *irrational* for the jury to acquit without finding that fact is the subsequent trial barred." The petitioner has the burden of proving such irrationality.

Forensics (General) FRN; 173(10)

Witnesses (Confrontation of Witnesses) (Cross Examination) (Experts) WIT; 390(7) (11) (20)

Melendez-Diaz v Massachusetts, 557 US __, 129 SCt 2527 (2009)

The petitioner was convicted of cocaine distribution and trafficking in Massachusetts. A substance found during the arrest was sent to the state laboratory for analysis. At trial, the prosecution introduced three certificates of forensic analysis, which stated the weight of the substance and concluded that it was cocaine. The certificates were sworn to before a notary by the state lab analysts. The court overruled the petitioner's objection to the admission of the certificates. The state appellate court affirmed.

Holding: Because there was no showing that the analysts were unavailable to testify and that the petitioner had a prior opportunity to cross-examine them, the petitioner was entitled to be confronted with the state lab ana-

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lysts at trial. See *Crawford v Washington*, 541 US 36, 54 (2004). The certificates are clearly affidavits and thus are testimonial statements. They were made to establish facts about the substance found, they are the functional equivalent to live, in-court testimony (see *Davis v Washington*, 547 US 813, 830 [2006]), and their sole purpose under state law was to provide prima facie evidence about the composition, quality, and weight of the substance. The petitioner had the right to be confronted with the witnesses against him, including the analysts, because they provided testimony that proved a fact necessary for his conviction. While there may be other ways to challenge or verify forensic test results, confrontation is guaranteed by the Constitution. “Forensic evidence is not uniquely immune from the risk of manipulation.” See National Research Council of the National Academies: *Strengthening Forensic Science in the United States: A Path Forward* (Feb 2009). Similar to cross-examination of experts, through confrontation, defendants can examine analysts’ honesty, proficiency, and methods. Even if the certificates qualify as business or official records, because they are testimonial, the analysts must be subject to confrontation. The Confrontation Clause requires that the prosecution present its witnesses; the petitioner’s ability to bring the analysts into court, pursuant to state law or the Compulsory Process Clause, is irrelevant. Judgment reversed.

Concurrence: [Thomas, J] “[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *White v. Illinois*, 502 U.S. 346, 365 (1992)”

Dissent: [Kennedy, J] The Confrontation Clause ensures that the defendant will be confronted with conventional witnesses, such as those who witnessed an event and have personal beliefs regarding an aspect of the defendant’s guilt. Forensic analysts are not conventional witnesses. “The Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of today’s decision, adding nothing to the truth-finding process.”

Civil Rights Actions (USC § 1983)	CRA; 68(45)
Juveniles (General)	JUV; 230(55)
Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause] [Scope]) (Warrantless Searches)	SEA; 335(10 [g] [m]) (80)
Safford Unified School District #1 v Redding, 557 US __, 129 Sct 2633 (2009)	

A middle-school principal confronted the respondent, a 13-year-old student, regarding her alleged distribution of prescription-strength ibuprofen and over-the-counter pain pills in violation of school policy. She denied the allegation and consented to a search of her backpack, which revealed nothing. The principal sent her to the nurse’s office for a further search. She was told to remove her clothing, pull her bra out and shake it, and pull out the elastic on her underpants, which exposed her breasts and pelvic area to some degree. No pills were found. The respondent’s mother sued the school district and school officials. The court granted the petitioners’ motion for summary judgment. The Court of Appeals affirmed, but later, sitting *en banc*, reversed in part, finding that the principal was not entitled to summary judgment.

Holding: The respondent’s Fourth Amendment rights were violated when school officials searched her bra and underpants. A search by school officials must be based on reasonable suspicion and its scope must be reasonably related to the objectives of the search and it cannot be excessively intrusive considering the student’s age and sex and the alleged infraction. See *New Jersey v T.L.O.*, 469 US 325, 341-342 (1985). The information the principal had was sufficient to justify a search of the respondent’s backpack and her outer clothing, but not her undergarments. The respondent had a reasonable subjective expectation of privacy against such a search; her feelings of embarrassment, fright, and humiliation are consistent with the experiences of other young people similarly searched. “[T]he content of the suspicion failed to match the degree of intrusion.” The principal knew that the medications posed a limited threat, and he had no reason to believe that large amounts of the pills were being distributed or that the respondent hid pills in her underwear. The school officials are entitled to qualified immunity, however, because clearly established law did not show that the search violated the Fourth Amendment. See *Pearson v Callahan*, 555 US __, __ (2009) (slip op., at 18). Judgment affirmed in part and reversed in part, and case remanded for consideration of the *Monell v New York City Dept of Social Servs* (436 US 658, 694 [1978]) claim against the school district.

Concurrence in Part, Dissent in Part: [Stevens, J] The school principal is not entitled to qualified immunity. This Court’s holding is based on a simple application of *T.L.O.* and it is irrelevant that other courts have misread our precedents.

Concurrence in Part, Dissent in Part: [Ginsburg, J] The principal’s treatment of the respondent was abusive and it was unreasonable for him to believe that it was allowed under *T.L.O.* Therefore, he is not entitled to qualified immunity.

Concurrence in Part, Dissent in Part: [Thomas, J] The search did not violate the Fourth Amendment. The Court’s “deep intrusion into the administration of public

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schools exemplifies why the Court should return to the common-law doctrine of *in loco parentis* under which ‘the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order.’ *Morse v. Frederick*, 551 U.S. 393, 414 (2007) (Thomas, J., concurring).”

New York State Court of Appeals

Driving While Intoxicated (Chemical Test [Blood or Urine]) (General)	DWI; 130(5) (17)
Evidence (Privileges)	EVI; 155(115)
Homicide (Manslaughter [Evidence] [Instructions]) (Negligent Homicide)	HMC; 185(30[d] [j]) (45)
Search and Seizure (Consent) (Search Warrants)	SEA; 335(20) (65)

People v Elysee, 12 NY3d 100, 876 NYS2d 677 (2009)

The defendant was involved in a four-vehicle accident; one person was killed and several others, including the defendant, were injured. Hospital personnel drew blood samples from the defendant for routine analysis and treatment purposes. Eight hours later, a court ordered a blood sample to be drawn (*see* VTL 1194(3); CPL 690.35, 690.36), and a registered nurse, in the presence of a police officer, drew a set of blood samples. *See* VTL 1194(4)(a). Several days later, a search warrant for the earlier samples was issued and executed. *See* CPL 690.10(4). The trial court denied the defendant’s motion to suppress the earlier samples based on the physician-patient privilege. *See* CPLR 4504. At trial, a forensic toxicologist testified about the defendant’s blood alcohol level at the time of the accident based on reverse extrapolation from the second set of samples, which she confirmed using the earlier samples. The court denied the request of the prosecution and the defense to charge the lesser included offense of criminally negligent homicide and the jury convicted the defendant of second-degree manslaughter and other offenses. The Appellate Division affirmed.

Holding: The court properly denied suppression of the earlier blood samples. Because VTL 1194(2)(a) provides that drivers are deemed to give consent to chemical tests for the purpose of determining alcohol and/or drug content of the blood, the question of whether CPLR 4504 applies to the samples need not be decided. That the court order was issued after the earlier samples were drawn does not preclude seizure of those samples, and seizure is in accord with VTL 1194(3). The court correctly refused to

instruct the jury on criminally negligent homicide as a lesser included offense of second-degree manslaughter. “A person who fails to perceive a substantial and unjustifiable risk by reason of his intoxication acts recklessly rather than with criminal negligence (*see People v Donahue*, 123 AD2d 77, 81-82 [3d Dept 1987] . . .).” In light of the overwhelming evidence of the defendant’s intoxication, there was no reasonable view of the evidence which would support a finding of criminally negligent homicide. *See* CPL 300.50 [1]; *People v Barney*, 99 NY2d 367, 371. Order affirmed.

Due Process (Substantive Due Process)	DUP; 135(40)
New York State Legislation (General)	NYL; 268(10)
Sex Offenses (General) (Sentencing)	SEX; 350(4) (25)
<i>People v Knox</i> , 12 NY3d 60, 875 NYS2d 828 (2009)	

Defendant Knox pleaded guilty to attempted kidnapping for trying to take an eight-year-old girl from a park. Defendant Cintron was convicted of unlawful imprisonment for locking his girlfriend and her two children in her apartment for several days. Defendant Jackson pleaded guilty to attempted kidnapping for abducting and threatening to kill the son of a woman who refused to continue working for him as a prostitute. The trial court ordered all three defendants to register under the Sex Offender Registration Act (SORA) (Correction Law § 168-a *et seq.*), even though there was no proof that their crimes involved any sexual act or motive. The Appellate Division affirmed.

Holding: All three defendants were convicted of offenses requiring registration under SORA. *See* Correction Law 168-a (1). While the offenses committed by the defendants did not involve actual, intended or threatened sexual misconduct, requiring them to register as sex offenders did not violate their substantive due process rights. It is assumed that the defendants have a constitutionally-protected liberty interest in not being required to register under an incorrect label. *See Paul v Davis*, 424 US 693, 701-710, 710 n 5 (1976). But this liberty interest did not amount to a fundamental right. *See Immediato v Rye Neck School Dist.*, 73 F3d 454, 463 (2d Cir 1996). Thus, so long as the legislation is rationally related to legitimate government interests, there is no due process violation. *See Washington v Glucksberg*, 521 US 702, 728 (1997); *Hope v Perales*, 83 NY2d 563, 577. SORA was enacted to protect the community from those who have shown that they are capable of committing sex crimes, and specifically to shelter children from such crimes. “[T]he Legislature had a rational basis for concluding that, in the large majority of cases where people kidnap or unlawfully imprison other people’s children, the children either are sexually assaulted or are in danger of sexual assault. In light of this, it was plainly rational for the Legislature to provide that, as a general rule, people guilty of such crimes should be clas-

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sified as ‘sex offenders.’” The absence of exceptions for cases that do not have a sexual component was a rational decision by the legislature, in view of the small number of such cases, the administrative burden of separating them out, and the risk of overlooking dangerous sex offenders. *See People v Johnson*, 225 Ill 2d 573, 870 NE2d 415 (2007). The court did not abuse its discretion in designating Cintron a level 3 sex offender, given his record of violent conduct, including sexual violence. Orders affirmed.

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

People v Guerrero, 12 NY3d 45, 876 NYS2d 687 (2009)

The defendant pleaded guilty to second-degree murder in exchange for an indeterminate sentence of 19 years to life in prison. At sentencing, the judge pronounced the prison term, but failed to mention the mandatory surcharge of \$150 and a crime victim assistance fee of \$2. The assessments were listed on the “Uniform Sentence and Commitment” sheet and the court worksheet that the judge signed and stamped. The Appellate Division affirmed.

Holding: “[T]he mandatory surcharge and crime victim assistance fee mandated by Penal Law § 60.35(1) are not a part of a sentence within the meaning of sections 380.20 and 380.40 of the CPL; therefore, a judge need not pronounce them in a defendant’s presence during sentencing.” A term of postrelease supervision (PRS) is defined as a part of a determinate sentence, and thus the judge must pronounce the terms of PRS at sentencing. *See People v Sparber*, 10 NY3d 457. An order of protection, however, is not statutorily defined as a component of sentencing. *See People v Nieves*, 2 NY3d 310. While Penal Law 60.35 provides that the mandatory surcharge and crime victim assistance fee are to be levied at sentencing, the statute clearly describes them as distinct from any sentence required or permitted by law. “[T]he fact that this provision is within the Penal Law’s sentencing scheme does not lead to the conclusion that these assessments are component elements of the sentence.” The statute’s legislative history supports this conclusion; the legislature enacted the statute as part of a revenue-raising bill. *See Legislative Memorandum in Support, Governor’s Bill Jacket, L 1982, ch 55, at 6; see also People v Quinones*, 95 NY2d 349, 352. The use of the words “surcharge” and “fee,” instead of penalty, reinforces its non-punitive nature. Order affirmed.

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

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

People v Hoti, 12 NY3d 742, 878 NYS2d 645 (2009)

Holding: “The mandatory surcharge, crime victim assistance fee and DNA databank fee are not components of a defendant’s sentence (*see People v Guerrero* [decided today, [12 NY3d 45]). Accordingly, the court’s failure to pronounce the surcharge and fees prior to the entry of defendant’s plea did not deprive the defendant of the opportunity to knowingly, voluntarily and intelligently choose among alternative courses of action (*cf People v Catu*, 4 NY3d 242, 245).” Order affirmed.

Misconduct (Prosecution) MIS; 250(15)

Trial (Summations) TRI; 375(55)

Witnesses (Credibility) WIT; 390(10)

People v Moye, 12 NY3d 743, 879 NYS2d 354 (2009)

Holding: During summation, the prosecutor “became an unsworn witness by ‘vouch[ing] for the witness with the most favorable testimony for the prosecution by reference to his own pretrial conduct . . . and credibility by virtue of his position in the District Attorney’s office’ (*People v Moye*, 52 AD3d 1, 8 [1st Dept 2008]).” The remarks were not a fair response to defense counsel’s remarks and the trial court’s limiting instruction did not eliminate the prejudice to the defendant. Order affirmed.

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

People v Passino, 12 NY3d 748, 876 NYS2d 700 (2009)

Holding: “The issues raised on appeal were not preserved for this Court’s review. Defendant did not raise any issue under *Miranda v Arizona* (384 US 436 [1966]) at County Court, and that court’s ruling on the *Miranda* issue did not address any of the arguments defendant now makes.” Order affirmed.

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

Sentencing (Persistent Felony Offender) SEN; 345(58)

People v Quinones, 12 NY3d 116, 879 NYS2d 1 (2009)

The defendant was convicted of third-degree burglary, class D felony. The prosecution requested that the court sentence the defendant as a discretionary persistent felony offender; the defendant opposed the motion, arguing that the law was unconstitutional. At sentencing, the trial court concluded that the defendant was a discretionary persistent felony offender based on his four prior

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felony convictions (see CPL 400.20(5); Penal Law 70.10(1)(a)), and finding that a recidivist sentence was appropriate, sentenced him to 18 years to life. The Appellate Division affirmed.

Holding: “In *Apprendi v New Jersey* (530 US 466 [2000]), the Supreme Court held that, ‘[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt’” Under New York law, the court may sentence the defendant as a discretionary persistent felony offender if it finds that the defendant is a persistent felony offender, *ie*, a person who has been convicted of a felony and who has two or more prior felony convictions, and that the defendant’s history and character and the circumstances of his criminal conduct indicate that extended incarceration and lifetime supervision are in the public’s best interest. See CPL 400.20; Penal Law 70.10. The prosecution bears the burden of proving, beyond a reasonable doubt, that the defendant is a persistent felony offender, and the court’s finding as to history and character and circumstances of criminal conduct must be based on a preponderance of the evidence. Unlike the sentencing schemes the US Supreme Court has found unconstitutional (see *Cunningham v California*, 549 US 270 [2007]; *United States v Booker*; 543 US 220 [2005]; *Blakely v Washington*, 542 US 296 [2004]; *Ring v Arizona*, 536 US 584 [2002]), New York’s scheme allows for an enhanced sentence based solely on the defendant’s two prior felony convictions. See *People v Rivera*, 5 NY3d 61, 68 *cert den* 546 US 984; *People v Rosen*, 96 NY2d 329, 355 *cert den* 534 US 899. The court may not consider an enhanced sentence until after the defendant’s eligibility for such a sentence is determined. “[B]y requiring that sentencing courts consider defendant’s ‘history and character’ and the ‘nature and circumstances’ of defendant’s conduct in deciding where, within a range, to impose an enhanced sentence, sets the parameters for the performance of one of the sentencing court’s most traditional and basic functions, *ie*, the exercise of sentencing discretion.” Order affirmed.

Accusatory Instruments (General) ACI; 11(10)

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

People v Bauman, 12 NY3d 152, 878 NYS2d 235 (2009)

The defendants were charged with intentional assault for allegedly causing injury to the accuser by means of “a baseball bat, and/or a frying pan, and/or a vacuum cleaner, and/or a hammer,” and depraved indifference assault for 11 incidents that occurred between August 1, 2004 to April 7, 2005. The depraved indifference count also con-

tained the conjunction “and/or.” The trial court granted the defendants’ motions to dismiss both counts as duplicitous. The Appellate Division affirmed.

Holding: The intentional and depraved indifference assault counts were duplicitous because they charged multiple acts, which make it nearly impossible to determine the specific act as to which the jury could reach a unanimous verdict. See CPL 200.30(1); *People v Keindl*, 68 NY2d 410, 421. The depraved indifference count was not properly pleaded as a continuing crime; “[d]espite the possibility that a jury could find that the entire course of conduct created a grave risk of death, given the ‘and/or’ language, a jury could just as easily find that defendants committed only one of the alleged acts; not only would a single act not be sufficient to establish a course of conduct but we still would not know on which particular act defendant was convicted.” Unlike depraved indifference murder, which can only involve one completed offense, depraved indifference assault can involve multiple incidents of serious physical injury, and thus multiple completed offenses. See *People v Suarez*, 6 NY3d 202. Order affirmed.

Dissent in Part: [Pigott, J] “[T]he pleading of multiple acts under [depraved indifference assault] does not threaten the reliability of a unanimous verdict, because it is defendants’ course of conduct, and whether that conduct is deemed to be reckless and to have created a grave risk of death—and not any singular act—upon which the jury must unanimously agree before defendants may be convicted of depraved indifference assault.”

Appeals and Writs (Question of Law and Fact) APP; 25(75)

Informants (Disclosure) (General) INF; 197(15) (20)

People v Lowe, 12 NY3d 768, 879 NYS2d 25 (2009)

Holding: “The lower courts’ determinations of probable cause, a mixed question of law and fact, are supported by the minutes of the in camera hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]), and are thus beyond our further review. Accordingly, defendant’s motion to suppress was properly denied.” Order affirmed.

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

Narcotics (General) (Possession) NAR; 265(27) (57)

People v Kalin, 12 NY3d 225, 878 NYS2d 653 (2009)

At arraignment, the defendant pleaded guilty to the top count of the misdemeanor complaint, seventh-degree criminal possession of a controlled substance, and

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received time served. The Appellate Term reversed on appeal.

Holding: The defendant did not waive his right to be prosecuted by a misdemeanor information because the court failed to inform him of that right. *See* CPL 100.10(4), 170.65(1), (3). Without such consent, the jurisdictional sufficiency of the complaint must be judged by the standards governing an information. *See People v Weinberg*, 34 NY2d 429, 431. An information must contain a factual section that provides reasonable cause to believe that the defendant committed the offense charged and meet the *prima facie* requirement by “set[ting] forth ‘nonhearsay allegations which, if true, establish every element of the offense charged and the defendant’s commission thereof’ (*People v Henderson*, 92 NY2d 677, 679 . . .).” In the complaint, “the officer asserted that his ‘experience as a police officer as well as [his] training in the identification and packaging of controlled substances and marijuana’ provided the foundation for his conclusion that he had discovered marijuana and heroin in the vehicle.” This is sufficient to satisfy the *prima facie* standard; the accusatory instrument adequately stated that the substances seized were marijuana and heroin and the officer provided an adequate basis for his conclusion. To the extent that *Matter of Jahron S.* (79 NY2d 632), suggests otherwise, that portion of the holding is modified. The officer did not need to attach a lab report or describe what the substances looked like. “While it may be the safer practice for law enforcement to routinely use . . . descriptive phrases, unlike our dissenting colleagues, we would not hold that the absence of such phraseology rendered the information in this case jurisdictionally deficient.” Order reversed.

Dissent: [Ciparick, J] “By holding that the charging instrument here is sufficient to allow a defendant to plead thereunder, and in effect overruling *Jahron S.*, the majority brushes aside the protections that must be afforded to misdemeanor defendants to ensure that such prosecutions do not become routinized or treated as insignificant or unimportant.”

Arrest (Probable Cause) ARR; 35(35)

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

People v France, 12 NY3d 790, 879 NYS2d 36 (2009)

Holding: The court properly denied the defendant’s suppression motion without a hearing. A review of the pleadings, the context of the motion, and defendant’s access to information, show that a hearing was not necessary as there were no issues of fact to resolve before determining whether suppression is required. *See* CPL 710.60(1); *People v Mendoza*, 82 NY2d 415, 426. “Despite

having sufficient information from the felony complaint and the voluntary disclosure form concerning the factual predicate for his arrest, defendant failed to dispute that the victim told the police that he had been robbed by the defendant, that the victim identified him to the police and that defendant admitted possessing a pawn shop receipt for the stolen goods (*cf. People v Bryant*, 8 NY3d 530 [2007]).” The undisputed facts support the court’s decision that there was probable cause for the arrest. Order affirmed.

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

Discovery (*Brady* Material and Exculpatory Information) (Matters Discoverable) (Prior Statements of Witness) (Procedure [Hearing] [Review]) DSC; 110(7) (20) (26) (30[e] [o])

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

People v Contreras, 12 NY3d 268, 879 NYS2d 369 (2009)

The defendant’s wife accused the defendant of holding her captive in her apartment and rape. On the apartment floor, the police found some notes written by the accuser; the notes referred to a romantic relationship and contained erotic and coarse language. Before jury selection, upon the prosecutor’s request, the court reviewed the notes *in camera* and held an *ex parte* hearing to determine whether the notes were *Rosario* material (*People v Rosario*, 9 NY2d 286) or *Brady* material (*Brady v Maryland*, 373 US 83 [1963]). The accuser testified that the notes were about a new relationship and were written a month before the incident; she did not know if the defendant saw them. The judge called defense counsel into the hearing, disclosed the contents of the notes, ordered him not to share the information with his client, and said that the notes were being excluded. The court did not alter its decision after defense counsel’s examination of the accuser about the notes. The Appellate Division affirmed.

Holding: Because there was no evidence that the notes were relevant, the defendant did not have a right to a hearing on the *Rosario* and *Brady* issues. In choosing to hold a hearing, the court erred on the side of caution, and it did not abuse its discretion in deciding how the hearing should be conducted. “Prosecutors and trial judges invite trouble when they push the rules of disclosure to their limit (*see e.g., People v Fuentes*, __ NY3d __, [decided today]). But where, as here, the prosecutor and the court have wisely chosen to give defendant a procedural opportunity he is not strictly entitled to, they should not be penalized for not being still more generous.” The court was justified in preventing the defendant from learning of

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the notes because they were irrelevant and potentially inflammatory. Since the issue was whether the document should be disclosed, an *ex parte* proceeding was authorized. See CPL 240.90(3). The defendant had no right to be present at a noncritical and unnecessary hearing. While attorney-client communication should usually be unrestricted (see *Geders v United States*, 425 US 80 [1976]), the court here did not abuse its discretion in barring defense counsel from disclosing the contents of the notes. See *Perry v Lecke*, 488 US 272, 283-285 (1989). Order affirmed.

Discovery (*Brady* Material and Exculpatory Information) (Procedure [Review]) DSC; 110(7) (30[o])

People v Fuentes, 12 NY3d 259, 879 NYS2d 373 (2009)

Pursuant to an open file discovery agreement, the prosecutor disclosed the accuser’s hospital records. The records introduced by the prosecutor at trial included a one-page hospital psychiatrist consultation note that was not given to the defendant. The psychiatrist noted that the accuser expressed feelings of depression and suicide and had used marijuana. Defense counsel was unaware of the document until summation, at which time counsel moved for a mistrial. The prosecution claimed that the document was privileged and the court removed the note from the records and it was not mentioned or disclosed to the jury. The court reserved decision on the mistrial motion and the jury found the defendant guilty of rape and sodomy. The court denied the defendant’s motion to set aside the verdict. The Appellate Division affirmed.

Holding: The court correctly concluded that the prosecutor did not violate its obligations under *Brady v Maryland* (373 US 83 [1963]) because disclosure would not have changed the outcome of the case. See *Strickler v Green*, 527 US 263, 281-282 (1999); *People v Bryce*, 88 NY2d 124, 128. Because the note states that the accuser did not have a previous psychiatric history and there was no indication that she was suffering from hallucinations or delusions, this case is distinguishable from those in which non-disclosure of a witness’s mental illness constituted reversible error. See *cf People v Rensing*, 14 NY2d 210, 212-214; *People v Dudley*, 167 AD2d 317, 319-321. The value of the information for impeachment was minimal, the prosecution’s case was strong, and the defendant’s version of the incident was implausible. “[W]e do not condone the People’s decision to withhold the document from defendant or their failure to, at a minimum, inform the trial judge about it and request an in camera inspection to determine its admissibility.” Order affirmed.

Dissent: [Jones, J] With diametrically opposed evidence on the question of consent, and in light of the two

days of jury deliberations, credibility was a key issue in the case. Had the record been disclosed, it is likely that defense counsel would have investigated the accuser’s psychological background and history. It cannot be said that the prosecutor’s withholding of the record did not affect the outcome of the trial.

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

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

People v Aleman, 12 NY3d 806, 880 NYS2d 894 (2009)

Holding: During deliberations, the jury sent the judge a note indicating that it was “hopelessly deadlocked” and that some jurors were inclined to acquit because the defendant spent some time in jail. The court reprimanded the jury for not “following the rules” and breaking the promise to abide by the court’s instructions, and sent the jury home to consider whether it would follow the rules, but did not respond to the deadlock statement. The court’s statements “were not balanced by an instruction that jurors must not surrender their conscientiously held beliefs, as recommended in the pattern deadlock charge appearing in the Criminal Jury Instructions (see CJI2d [NY] Deadlock Charge).” While the court must tailor its response to the circumstances, the response must also convey, in tenor and substance, the principles reflected in the pattern charge. See *People v Aponte*, 2 NY3d 304. Order reversed and matter remitted for a new trial.

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

Sentencing (Concurrent/ Consecutive) (Enhancement) (Presence of Defendant and/or Counsel) SEN; 345(10) (32) (59.5)

People v Goldstein, 12 NY3d 295, 879 NYS2d 814 (2009)

The defendant was driving with a suspended license when he was pulled over; when asked for his license, he sped off into a construction zone forcing two flagmen to jump out of the way. The defendant agreed to plead guilty to two counts of first-degree reckless endangerment and one count of first-degree aggravated unlicensed operation of a motor vehicle in exchange for concurrent sentences, the longest of which would be 3½ to 7 years. During the plea allocution, the court told the defendant that he faced consecutive sentences if he was convicted after trial. Regarding the reckless endangerment counts, the defendant did not admit to causing the flagmen to jump out of the way or creating a dangerous situation, but defense counsel stated there was no dispute over the charge. After

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accepting the plea, the court warned the defendant that he would receive a 12 to 48 year sentence if he failed to appear for sentencing. Later, the defendant, with new counsel, moved to withdraw his plea, which the court denied. The Appellate Division affirmed.

Holding: The court correctly informed the defendant about the possibility of consecutive sentences. While the reckless endangerment counts might not have been sufficiently distinct to allow for consecutive sentences (*see gen People v Laureano*, 87 NY2d 640, 644), the unlicensed operation count was sufficiently distinct. The voluntariness of the plea was not affected by the court's post-plea misrepresentation of the total sentence exposure. Because this was a negotiated plea, the defendant need not make specific admissions as to each element of the offense and the court did not need to inquire further merely because the defendant failed to do so. *See People v Lopez*, 71 NYd 662, 666 n2. The allocution was sufficient to show the defendant understood the charges and his willingness to plead to get the benefit of the plea agreement. *See People v Fooks*, 21 NY2d 338, 350. The court did not abuse its discretion when it imposed an enhanced sentence after the defendant failed to appear for sentencing twice; the defendant did not present documentation to support his psychiatric reason for failing to appear and he has a history of failing to appear in license suspension cases. Order affirmed.

Forgery (Elements) (Possession of a Forged Instrument) FOR; 175(10) (30)

Prosecutors (Decisionmaking) PSC; 310(10)

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

People v Mattocks, 12 NY3d 326, 880 NYS2d 888 (2009)

The defendant sold subway rides to customers by using MetroCards with zero values that were bent to take advantage of the backup value information stored in the magnetic strip. The defendant was convicted after trial of second-degree criminal possession of a forged instrument and was sentenced as a second felony offender to 2 to 4 years in prison. The Appellate Division affirmed.

Holding: A MetroCard fits the definition of a "written instrument" under Penal Law 170.00(1). Although creasing the card did not add value, it circumvented the computer operation that would have identified it as a valueless card and made it appear authentic, which fits the definition of falsely altering a written instrument. *See* Penal Law 170.00(6). Therefore, the bent card qualifies as a forged instrument under Penal Law 170.00(7). The legislature did not intend to preempt prosecution of MetroCard crimes under Penal Law article 170 by enacting Penal Law

165.16. *See People v Duffy*, 79 NY2d 611, 614. Section 165.16 was meant to increase the penalty for certain types of illegal MetroCard activity from a violation to a misdemeanor and to keep track of repeat violators. *See* 2005-2006 Exec Budget, Transportation Art VII Legislation, Mem in Support, A 1924 at 10-11. The prosecution has discretion to select between the possible charges, taking into account the defendant's history of MetroCard offenses. The court properly denied the defendant's motion to suppress the MetroCards without a hearing. While the court incorrectly concluded that the defendant lacked standing (*see People v Burton*, 6 NY3d 584, 588-589), the defendant failed to challenge the police officer's allegation that the defendant had been selling swipes. This unchallenged statement was sufficient to establish probable cause for the arrest, rendering a hearing unnecessary. Order affirmed.

Appeals and Writs (Arguments of Counsel) (Briefs) (Counsel) APP; 25(5) (15) (30)

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

People v Borrell, 12 NY3d 365, 881 NYS2d 637 (2009)

Holding: The appellate court erred in granting the defendant's petition for a writ of error coram nobis based on appellate counsel's failure to argue that the court improperly imposed consecutive sentences. Effective assistance of appellate counsel requires that counsel display "a competent grasp of the facts, the law and appellate procedure, supported by appropriate authority and argument" (*People v Stultz*, 2 NY3d 277,] at 285). Appellate counsel need not provide perfect representation; meaningful representation may exist even if counsel fails to raise a potentially meritorious issue. This is not one of the rare cases in which a single error is sufficiently egregious and prejudicial to result in a deprivation of the defendant's constitutional right to effective representation. *See People v Turner*, 5 NY3d 476, 480. The success of the consecutive sentence argument was uncertain, and the defendant failed to show that there was no strategic or other legitimate explanation for counsel's decision not to brief the issue. *See People v Rivera*, 71 NY2d 705, 709. In this consolidated appeal of two judgments, appellate counsel briefed six issues, some of which were successful; under the circumstances it cannot be said that there was no legitimate explanation for counsel's decision not to raise the sentencing issue. Applying the undemanding standard, appellate counsel provided constitutionally adequate representation. Order reversed.

Dissent: [Pigott, J] The appellate court was justified in granting the coram nobis application. *See eg People v Griffin*, 59 AD3d 1106; *People v Rivera*, 52 AD3d 1290. The record shows that appellate counsel's representation was less than meaningful; counsel had ample opportunity to

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raise all the issues, including the sentencing issue, despite the multiple convictions and severe prison term, counsel chose not to argue before the court, and the only two successful issues did not relate to the judgment at issue in this appeal. The court erred in modifying the sentence instead of assigning new counsel and considering the appeal de novo. *See People v Vasquez*, 70 NY2d 1.

Evidence (Prejudicial (Relevancy) (Uncharged Crimes) EVI; 155(106) (125) (132)

Search and Seizure (Automobiles and Other Vehicles) (Warrantless Searches) SEA; 335(15) (80)

People v Leeson, 12 NY3d 823, 880 NYS2d 895 (2009)

The defendant was convicted of sex offenses against a 12-year old female that occurred between mid-August and late October 2003 in Ontario County. The Appellate Division affirmed.

Holding: The court properly exercised its discretion in admitting testimony regarding uncharged sex offenses that allegedly occurred in an adjoining county. A court may admit evidence of prior bad acts when they are relevant to a material issue other than the defendant’s criminal propensity; this is a discretionary decision that requires balancing of probative value and unfair prejudice. *See People v Dorm*, 12 NY3d 16, 19. The uncharged acts involved the same accuser and allegedly occurred during the same time period as the charged offenses. The testimony provided necessary background information about the relationship between the accuser and the defendant and it provided a context for the charged offenses. The warrantless search of the glove compartment of the defendant’s truck, even if unlawful, was harmless because there was no reasonable possibility that the error contributed to the conviction. *See People v Crimmins*, 36 NY2d 230, 241. The police found panties in the glove compartment, but testimony of the accuser and her mother independently established that the accuser was alone with the defendant in his truck and that he bought her panties. Order affirmed.

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

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

Sentencing (Hearing) (Pronouncement) (Resentencing) SEN; 345(42) (70) (70.5)

People v Boyd, 12 NY3d 390, 880 NYS2d 908 (2009)

The defendant pleaded guilty in exchange for concurrent determinate sentences of 12 years. After the plea allocation, at the prosecution’s prompting, the court asked defendant if he knew that his sentence would include a mandatory term of post-release supervision (PRS), without specifying the length of the term, and the defendant responded that he did. The court failed to pronounce the PRS term at sentencing, as required by CPL 380.20 and 380.40. The Appellate Division vacated the plea.

Holding: The court erred in failing to advise the defendant of the specific term of PRS. Under the circumstances, the defendant did not need to make a post-allocation motion to challenge the sufficiency of the plea. *See People v Catu*, 4 NY3d 242; *People v Louree*, 8 NY3d 541. When a sentencing judge fails to pronounce the term of PRS, the remedy is to vacate the sentence and remit for a resentencing hearing at which the judge can make that pronouncement. *See People v Sparber*, 10 NY3d 457; *Matter of Garner v New York State Dept of Correctional Servs*, 10 NY3d 358. The legislature passed Penal Law 70.85, effective June 30, 2008, which was designed to preserve guilty pleas when the prosecution consented to resentencing without PRS. The constitutionality of the new law and its applicability to this case has not been sufficiently developed for this Court’s review. These issues should be considered by the trial court in the first instance. Order modified and matter remitted for further proceedings.

Dissent: [Smith, J] Because the trial court mentioned PRS at the allocation, the defendant had enough information to move to withdraw his plea.

Dissent: [Pigott, J] Penal Law 70.85 is unconstitutional as applied to this case. The failure to inform the defendant of the duration of his PRS amounts to a *Catu* violation, which requires vacatur of the plea; “[n]either the Court nor the Legislature can require a defendant to accept a plea that was unconstitutionally obtained.”

Juveniles (Delinquency—Procedural Law) (Hearings) JUV; 230(20) (60)

Search and Seizure (Motions to Suppress [CPL Article 710]) (Warrantless Searches) SEA; 335(45) (80)

Matter of Elvin G, 12 NY3d 834, 882 NYS2d 671 (2009)

The respondent alleged that the school dean ordered his class to empty their pockets in order to locate an electronic device that interrupted the class. The presentment agency claimed that the dean asked the students to put their bookbags on their desks and the respondent volun-

NY Court of Appeals *continued*

tarily removed a knife from his pocket. The court denied the respondent's motion to suppress without a hearing and the Appellate Division affirmed.

Holding: “[T]he record was insufficiently developed to properly determine whether a search occurred and, if so, whether it was reasonable as a matter of law under the circumstances of this case (*see New Jersey v T.L.O.*, 469 US 325 [1985] . . .).” The court must hold a suppression hearing if the respondent raises a factual dispute on a material issue that must be resolved before the court can make a legal conclusion. *See* CPL 710.60; Family Court Act 330.2(1); *People v Burton*, 6 NY3d 584, 587. Order reversed.

Dissent: [Pigott, J] Even accepting the facts as alleged by the respondent, the dean was justified in ordering the students to empty their pockets. Although his demand constituted a search (*see Matter of Bernard G.*, 247 AD2d 91, 94), there was no Fourth Amendment violation. “School officials had a legitimate interest in ending the disruption of the classroom and the students’ privacy rights were not so invaded by the request that they empty their pockets that respondent’s knife should have been suppressed.” The family court did not err in denying the motion for a suppression hearing because the respondent’s allegations did not “‘lay out a factual scenario which, if credited, would have warranted suppression’ (*People v Mendoza*, 82 NY2d 415, 432 . . .).”

Appeals and Writs (Judgments and Orders Appealable) (Scope and Extent of Review) APP; 25(45) (90)

Narcotics (Penalties) NAR; 265(55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Sevencan, 12 NY3d 388, 881 NYS2d 650 (2009)

Holding: The defendant sought leave to appeal to the Court of Appeals from an Appellate Division order affirming the trial court’s order specifying and informing the defendant of the term of the determinate sentence the court would impose upon resentencing. The 2004 Drug Law Reform Act does not permit an appeal to this Court from such an order; the law only permits an appeal as of right to the Appellate Division. *See* L 2004, ch 738, § 23. “In *People v Bautista*, (7 NY3d 838 [2006]) this Court held that similar language in the 2005 Drug Law Reform Act did not permit an appeal to this Court from an Appellate Division order affirming a denial of resentencing, because the act did not make such an order appealable under Criminal Procedure Law § 450.90 or 470.60, which govern appeals to this Court. The reasoning of *Bautista* applies with equal force to the language at issue in this case.” Application dismissed.

Constitutional Law (New York State generally) (United States generally) CON; 82(25) (55)

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

People v Weaver, 12 NY3d 433, 882 NYS2d 357 (2009)

Without a warrant or stated reason, the police placed a global positioning system (GPS) tracking device inside the bumper of the defendant’s street-parked van. It remained there for 65 days. Ultimately, the defendant was charged with two separate burglaries. Without a hearing, the court admitted GPS data showing that the defendant’s van was in the parking lot of one of the burglarized stores. The jury convicted the defendant of the burglary that involved the GPS readings, but acquitted him of the other burglary. The Appellate Division affirmed.

Holding: “Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual’s whereabouts requires a warrant supported by probable cause.” The Supreme Court has held that because there is no reasonable expectation of privacy in the movements of a car on a public highway, the police may monitor those movements using a beeper. *See United States v Knotts*, 460 US 276 (1983). In comparison to a beeper, GPS is a far more sophisticated and powerful technology that allows for constant tracking and it is not “compatible with any reasonable notion of personal privacy or ordered liberty” While most federal circuit courts have not decided the issue as a matter of federal law, the defendant’s privacy interests ought to be protected as a matter of state constitutional law. *See* NY Const art I, § 12; *People v PJ Video*, 68 NY2d 296; *accord Washington v Jackson*, 150 Wash 2d 251, 76 P3d 217 (2003); *Oregon v Campbell*, 306 Or 157, 759 P2d 1040 (1988). Order reversed.

Dissent: [Smith, J] “The Federal and State Constitutions’ prohibition of unreasonable searches should be enforced not by limiting the technology that investigators may use, but by limiting the places and things they may observe with it.” The police may have violated the defendant’s property rights by attaching the GPS to his van, but they did not violate his privacy rights.

Dissent: [Read, J] The placement and collection of data from the GPS device was not a search under the Federal or State Constitution. It is up to the Legislature to place limits on law enforcement use of GPS technology.

Due Process (General) DUP; 135(7)

Speedy Trial (Burden of Proof) SPX; 355(10) (12) (32)

NY Court of Appeals *continued*

(Cause for Delay) (Prosecutor's Readiness for Trial)

People v Decker, No. 102, 6/9/2009

In 1987, the defendant was a murder suspect, but the prosecution had doubts about the evidence and declined to proceed. In 2002, the case was reopened and after re-interviewing the original witnesses, the prosecution decided to go forward. The court denied the defendant's motion to dismiss based on pre-indictment delay. The Appellate Division affirmed.

Holding: The prosecutor did not deprive the defendant of his due process right to prompt prosecution. See *People v Vernace*, 96 NY2d 886, 888. In 1987, the prosecutor was concerned about witness intimidation and that the witnesses were drug addicts, many of whom had their own convictions or pending criminal cases. The prosecutor chose to reinstitute the proceedings because the witnesses overcame their drug additions and were willing to testify. In determining whether there was undue delay, the court must review several factors: the extent of the delay; the reason for the delay; the nature of the charges; whether there was an extended period of pretrial incarceration; and whether the defense was impaired because of the delay. See *People v Taranovich*, 37 NY2d 442, 445. The delay was lengthy and it is likely that there is some prejudice to the defendant; however, the prosecutor's decision to delay prosecution was made in good faith, the defendant was charged with murder, he was at liberty until after he was indicted, and because he was not arrested in 1987, he did not suffer anguish or public disgrace. See *People v Singer*, 44 NY2d 241, 253 n2. Order affirmed.

Constitutional Law (New York State generally) (United States generally) CON; 82(25) (55)

Due Process (Substantive Due Process) DUP; 135(40)

Juveniles (Detention) (General) JUV; 230(35) (55)

Jiovon A. v City of Rochester, No. 81, 6/9/2009

In 2006, the Rochester City Council established a nighttime curfew for juveniles. The plaintiffs, father and son, filed an action seeking declaratory and injunctive relief. The court granted the defendant's motion to dismiss and the Appellate Division reversed.

Holding: The curfew ordinance violated the United States and New York State Constitutions because it violated minors' substantive due process right of freedom of movement and parents' due process right to control the upbringing of their children. The curfew ordinance must be analyzed using intermediate scrutiny. See *Ramos v Town*

of Vernon, 353 F3d 171, 181 (2d Cir 2003). The defendants failed to show a "substantial nexus between the burdens imposed by this curfew and the goals of protecting minors and preventing juvenile crime." The curfew would not have prevented the incidents cited in support of the ordinance, and the city's crime statistics did not support the objectives of the curfew. The ordinance does not give parents sufficient flexibility or autonomy in supervising their children (*cf Qutb v Strauss*, 11 F3d 488, 495-496 [5th Cir 1993]); in particular, it did not include an exception for parental consent to their children's activity during curfew hours. Order affirmed.

Concurrence: [Grafteo, J] The Family Court Act pre-empts the curfew ordinance. See *Matter of Victor M.*, 9 NY3d 84, 87. Family Court Act 305.2 limits warrantless arrests of children under 16 years of age to cases where they could have arrested a person for a felony or misdemeanor under CPL article 140. However, the curfew ordinance allows the police to take a minor into custody for a violation.

Dissent: [Pigott, J] The fundamental right to travel or movement does not extend to unsupervised minors. Because the ordinance does not impinge on any cognizable constitutional right of minors, it should have been subject to rational basis review. As for the parents' substantive due process rights, the ordinance is narrowly tailored to serve an important governmental interest and thus survives intermediate scrutiny.

Evidence (Hearsay) EVI; 155(75)

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

People v Mingo, 12 NY3d 563, 883 NYS2d 154 (2009)

In defendant Mingo's Sex Offender Registration Act proceeding, the court assessed points under factor one of the Risk Assessment Instrument (RAI) for being armed with a dangerous instrument. In support of that factor, the prosecution presented three internal district attorney office reports. The court denied Mingo's hearsay objection and the Appellate Division affirmed. Defendant Balic was assessed 40 points based on a 1985 assault conviction that was characterized as a sex crime. In support, the prosecutor presented the criminal complaint that was signed under oath by a police officer, which contained hearsay statements made by the 14-year-old accuser to the officer. The court denied Balic's hearsay objection and the Appellate Division affirmed.

Holding: "[H]earsay is reliable for SORA purposes—and, therefore, admissible—if, based on the circumstances surrounding the development of the proof, a reasonable person would deem it trustworthy." Among the factors to be evaluated are: the age of the conviction and efforts made to locate relevant documents; whether proof was corroborated by the nature of the conviction or other

NY Court of Appeals *continued*

record evidence; whether the declarant was under oath or had a duty to accurately report, record, or convey information; and whether circumstances surrounding the making of the statement bear indicia of reliability. Given the importance of accuracy in SORA determinations, in all cases, the prosecution should proffer the best evidence available, keeping in mind that the Legislature did not intend to require that accusers be compelled to appear and testify under oath at SORA hearings. In *Mingo*, the record is insufficient to determine whether the internal reports are reliable hearsay. Although it appears that the prosecution's inability to locate other proof stemmed from the age of the offense and the defendant did not argue that the prosecution failed to make a diligent search, the prosecution did not offer any explanation of how the reports were created, who prepared them, the sources of the information, and the purpose of the reports. In *Balic*, the criminal complaint constitutes reliable hearsay as it was a sworn statement created by an officer who had a duty to report and there is no indication that the officer failed to accurately report the accuser's statements. The court is required to consider "any victim statement" (see Correction Law 168-n[3]), not just sworn statements. The defendant failed to controvert the allegations by offering a different account of the incident and his guilty plea partially corroborated the allegations in the complaint. Order in *Mingo* reversed and matter remanded; order in *Balic* affirmed.

Forgery (Elements) (Evidence) FOR; 175(10) (15) (30)
(Possession of a Forged
Instrument)

People v Bailey, No. 97, 6/11/2009

When the police arrested the defendant for attempted theft of purses in a shopping district, they found three counterfeit ten dollar bills in his pocket. The defendant admitted that he knew the bills were fake. The jury convicted the defendant of first-degree criminal possession of a forged instrument and two counts of attempted grand larceny. The Appellate Division affirmed.

Holding: The forged instrument count was not supported by legally sufficient evidence. Knowledge alone is not enough; "drawing the inference of defendant's intent from his knowledge that the bills were counterfeit improperly shifts the burden to prove intent from the People to the defendant." The defendant's possession of the bills, his presence in a shopping district, and his intent to commit larceny were insufficient to establish intent. "[T]he intent to commit a crime must be specific to the crime charged (see e.g., *People v Morales*, 130 AD2d 366 . . .)." Unlike other forgery law provisions that contain spe-

cific presumptions or inferences of intent by mere possession, there is no statutory presumption regarding counterfeit bills. Order modified by dismissing the forged instrument count, matter remitted for resentencing, and order affirmed as modified.

Dissent: [Pigott, J] "[T]he specific intent required for possession of a forged instrument is a state of mind that may be inferred from defendant's actions and the surrounding circumstances (see e.g. *People v Barnes*, 50 NY2d 375, 381 . . .)." The statute does not require proof that the defendant attempted to use the bills; the prosecution need only show that he possessed the bills with the requisite mental state.

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

Sex Offenses (General) SEX; 350(4)

People v Cano, 12 NY3d 876, __ NYS2d __ (2009)

Holding: "The defendant came 'dangerously near' the commission of crimes when he arrived at the location of what he thought would be a sexual rendezvous with an underage boy. The proof of defendant's intent and extensive preparation followed by his travel to the intended crime scene showed that he was close to achieving his illegal goal and justified his convictions for attempt (*People v Naradzay*, 11 NY3d 460 [2008])." Order affirmed.

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

Counsel (Duties) COU; 95(20)

Judges (General) (Powers) JGS; 215(9) (10)

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

People v Davis, No. 86, 6/11/2009

The defendant was charged with trespassing in a New York City park after dark, a class B misdemeanor. See [56 RCNY] § 1-03(c)(2), 1-07(a). The defendant signed a form consenting to have his case handled by a Judicial Hearing Officer (JHO) and he was convicted after a trial. The Appellate Term affirmed.

Holding: Criminal Procedure Law 350.20, which allows class B misdemeanors to be tried and determined by a JHO "upon agreement of the parties," is constitutional. New York State Constitution article VI, § 15 requires the Legislature to create a single New York City criminal court and requires that judges be city residents appointed by the mayor. This does not restrict the Legislature's ability to create other tribunals with concurrent jurisdiction to hear class B misdemeanors upon consent of the parties. The defendant's jury trial rights are not threatened since, absent consent, the case would have been adjudicated in a bench trial. See CPL 340.40(2). The

NY Court of Appeals *continued*

defendant’s due process right to a fair trial in a fair tribunal was not violated. *See Friedman v State*, 24 NY2d 528, 542. There is no showing that the JHO would lack neutrality (*see Marshall v Jerrico, Inc.*, 446 US 238, 242 [1980]), and the consent requirement adequately protects the defendant’s interest in a fair trial. *See Gomez v United States*, 490 US 858 (1989); *Peretz v United States*, 501 US 923 (1991). The defendant’s due process rights are adequately protected by the various provisions governing selection and retention of JHOs. *See* 22 NYCRR Part 122. The defendant need not personally consent to JHO adjudication. *Compare eg* CPL 270.35(1). The defendant’s representation by counsel is significant and whether to consent is a “‘tactical decision’ best left to the determination of counsel (*cf. Gonzalez v United States*, __ US __, 128 S Ct 1765, 1770 [2008]).” The prosecution need not plead and prove that the exception to the trespass law does not apply. *See People v Devinny*, 227 NY 397, 401; *People v Santana*, 7 NY3d 234, 236. Order affirmed.

Dissent: [Jones, J] Record evidence of a knowing, voluntary and intelligent waiver of the right to a trial by a judge is absent. Elaborate formalities are not required, “[b]ut the waiver must at least be mentioned on the record in defendant’s presence, to provide some assurance that defendant knew he was giving up the right to be tried by a Judge.”

Identification (Eyewitnesses) IDE; 190(10) (33) (50)
 (Misidentification)
 (Suggestive Procedures)

People v Marte, 12 NY3d 583, __ NYS2d __ (2009)

The accuser, who was robbed and shot in the chest, failed to identify a suspect after reviewing hundreds of police photographs. The defendant told the accuser’s 14-year-old sister that he shot someone on her block. She showed her brother the defendant’s picture and based on her statements and his viewing of the photograph, he identified the defendant. Later, he picked the defendant out of a police lineup. The court denied the defendant’s motion to suppress the identification. The Appellate Division affirmed.

Holding: The *per se* rule requiring suppression of an unnecessarily suggestive police-arranged identification of a suspect should not be extended to an identification in which the police are not involved. *See People v Adams*, 53 NY2d 241. “While suggestiveness originating with private citizens can create a risk of misidentification, that risk does not justify an automatic, constitutional rule of exclusion.” The main goals of the *Adams* rule, enhancing the truth finding process and preventing wrongful convictions, are accomplished by their effect on police proce-

dures. *See People v Logan*, 25 NY2d 184, 193. The rule was primarily meant to assure that identifications were not flawed, not to keep flawed identifications from the factfinder, and it is highly unlikely that extending the rule to private citizens would advance this goal as private individuals are not likely to change their conduct based on court decisions governing evidence suppression. “[W]here a case depends wholly or largely on eyewitness identification, the risk of error may be unacceptably large, and we have held that, in a proper case, expert evidence may be introduced about whether eyewitnesses are likely to err (*People v LeGrand*, 8 NY3d 449 [2007]). Perhaps other safeguards would be appropriate in particular cases, and we do not rule out the possibility that a court, in balancing probative value against prejudicial effect, may find some testimony so unreliable that it is inadmissible. The eyewitness testimony in this case was not of that description.” Order affirmed.

Juries and Jury Trials (General) JRY; 225(37)
 Trial (Joinder/Severance of Counts and/or Parties) TRI; 375(20)

People v Almeter, 12 NY3d 591, __ NYS2d __ (2009)

The defendant was charged in separate accusatory instruments with trespass, a violation, and assault, a misdemeanor, based on two contemporaneous events. The charges were processed as one case under a single docket number. Although it was the judge’s practice to decide violations instead of submitting them to the jury along with the misdemeanor offenses, the court did not tell the defendant about the policy until the trial was nearly over. The jury acquitted the defendant of assault, but the court convicted him of trespass. The county court affirmed.

Holding: “It would seem fundamental that a defendant should not be required to guess who the fact finder is at his or her trial. As there was every indication that both charges were being tried by the jury, defendant should have been given notice that that in fact would not be the case, and, since there would be more than one factfinder, of which fact finder would be deciding which charge. This is so, at least in part, because counsel may well determine that a different trial strategy is warranted based upon whether a particular charge is being presented to a judge or to a jury. While the court may have deemed this particular procedure economical, the economy was a false one where the defendant was not timely advised that his charges were to be tried by separate fact finders.” Order reversed and matter remitted to the trial court for further proceedings.

Homicide (Negligent Homicide) HMC; 185(45)
 Motor Vehicles (Reckless Driving) MVH; 260(20)

NY Court of Appeals *continued*

People v McGranham, No. 174, 6/25/2009

The defendant mistakenly drove the wrong way on an exit ramp leading to a parkway. Attempting to correct his error, he made a slow U-turn and collided with a motorcycle, causing the motorcyclist's death. The defendant was sober and was not speeding. The court denied the defendant's motion to dismiss the criminally negligent homicide count. The Appellate Division affirmed.

Holding: "Viewing the evidence in the light most favorable to the People, defendant's motion seeking to dismiss the count of the indictment charging him with criminally negligent homicide must be granted. Defendant's decision to make a U-turn across three lanes of traffic to extricate himself from a precarious situation was not wise, but it does not rise to the level of moral blameworthiness required to sustain a charge of criminally negligent homicide (see *People v Cabrera*, 10 NY3d 370, 378 [2008]). The evidence was sufficient, however, to support the charge that defendant engaged in reckless driving by driving his vehicle 'in a manner which unreasonably interfere[d] with the free and proper use of the public highway, or unreasonably endangere[d] users of the public highway' (Vehicle and Traffic Law § 1212)." Order modified by dismissing the criminally negligent homicide count and order affirmed as modified.

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

Trial (General) TRI; 375(15)

People v Buchanan, No. 101, 6/30/2009

At the defendant's murder trial, because of the seriousness of the charge, the judge ordered him to be fitted with a stun belt that was concealed by his clothes. Despite concluding that the defendant did nothing to warrant the use of the stun belt, the court denied the defendant's objections. The Appellate Division affirmed.

Holding: Under state law, the court may not use a stun belt to restrain a criminal defendant without a specifically identified security reason. The court must make findings on the record showing that the particular defendant requires such a restraint. While the court need not hold a hearing, it "must conduct a sufficient inquiry to satisfy itself of the facts that warrant the restraint. Where it does so, a trial court has broad discretion in deciding whether a restraint is necessary for courtroom security." Order reversed.

Dissent: [Read, J] The trial judge should have made a record citing the reasons for ordering a stun belt restraint. The failure to do so, however, did not violate the presumption of innocence. Since the belt was not visible to the jury and did not compromise the fundamental fair-

ness of the trial or impair his ability to communicate with his attorney or meaningfully participate in his defense, there was not actual prejudice necessitating reversal. See *eg Oregon v Bowen*, 340 Or 487, 496, 135 P3d 272, 279 (2006) *cert den* 549 US 1214 (2007).

Search and Seizure (Automobiles and Other Vehicles [Impound Inventories]) SEA; 335(15[f])

People v Gomez, No. 119, 6/30/2009

The defendant was arrested for driving without a license. Because he was the sole occupant of the car, the police impounded it. At the scene, the officers searched the car, finding drugs and paraphernalia in the closed trunk. During a second search at the police station, empty plastic baggies were found in the driver's door panel. The court denied the defendant's motion to suppress and the defendant thereafter pleaded guilty. The Appellate Division reversed.

Holding: The prosecution failed to meet their initial burden of proving that the police conducted a valid inventory search. "[W]hen determining the validity of an inventory search, 'two elements must be examined: first, the relationship between the search procedure adopted and the governmental objectives that justify the intrusion and, second, the adequacy of the controls on the officer's discretion' (*People v Galak*, 80 NY2d [715] at 718-719)." The court may take judicial notice of a standardized search procedure, even if the procedure is not offered into evidence, if a description of what the procedure requires is proffered. Although the NYPD had a standardized, written protocol governing inventory searches and the officer testified that he knew about it, the prosecution did not offer evidence that the police followed those procedures. And the prosecution did not establish when the opening and searching of a closed trunk or door panel would be justified under the protocol. The police failed to produce the necessary meaningful inventory list (see *People v Johnson*, 1 NY3d 252, 256); the voucher form only listed the contraband and the prosecution did not show that no other items were found in the car. An inventory search form is unnecessary if the search is done in accordance with a standardized procedure and the results are recorded in a usable format. Order affirmed.

Third Department

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

Guilty Pleas (*Alford* Plea) (General [Including Procedure and Sufficiency of Colloquy]) (Withdrawal) GYP; 181(5) (25) (65)

Third Department *continued*

People v Ryan, 59 AD3d 751, 872 NYS2d 249
(3rd Dept 2009)

The defendant pleaded guilty to attempted second-degree assault and waived his right to appeal. At sentencing, he moved to withdraw his plea, which the court denied.

Holding: The court abused its discretion in denying the defendant's motion to withdraw his guilty plea. *Cf People v Washington*, 51 AD3d 1223, 1223-1224. While the appeal waiver bars review of the factual sufficiency of the plea (*see People v Sinclair*, 48 AD3d 974, 974), the waiver does not preclude review of the voluntariness of the plea and the defendant preserved that issue by moving to withdraw his plea. *See People v Quinones*, 51 AD3d 1226, 1227 *lv den* 10 NY3d 938. During the plea colloquy, the defendant denied hitting the complainant. When the court questioned him about his denial, it does not appear that the defendant understood that the court was considering his responses as part of the plea; the defendant even expressed confusion during the questioning. While the parties now characterize the plea as an *Alford* plea, the record does not contain any mention of an *Alford* plea and it is not clear that the defendant made the required voluntary and rational choice to enter an *Alford* plea. Judgment reversed, motion granted, and matter remitted. (County Ct, Franklin Co [Rogers, J])

Accusatory Instruments (General) ACI; 11(10)

Evidence (Character and Reputation) (Other Crimes) (Prejudicial) EVI; 155(20) (95) (106)

People v Moore, 59 AD3d 809, 874 NYS2d 283
(3rd Dept 2009)

Holding: The two counts charging the defendant with course of sexual conduct against a child are multiplicitous. The issue, while unpreserved, is reviewed in the interest of justice. To charge a defendant with more than one count of a continuing crime, there must be an interruption in the course of conduct. *See People v Quinones*, 8 AD3d 589, 589-590 *lv den* 3 NY3d 710. There was no interruption in the defendant's alleged course of conduct and the date the prosecution used to separate the two counts did not reflect a change in the child's age; instead, the date used is the effective date of a statutory amendment that increased the victim age from less than 11 to less than 13. "The amendment of the statute after his course of conduct had commenced, with no concomitant showing of a break in that conduct, cannot serve to create two separate crimes with consecutive sentences under these circumstances." After a *Sandoval* hearing, the court ruled that, if the defen-

dant testified, the prosecution could ask minimal questions about the defendant's 2002 marijuana violation as a prior bad act, but could not refer to the violation as a prior crime. Because the prosecution did not tell the court that they planned to introduce the evidence in their direct case, the court did not issue a *Ventimiglia* ruling. In its direct case, the prosecution improperly introduced evidence that the defendant sold marijuana. *See People v Spotford*, 85 NY2d 593, 597. During the defendant's testimony, he tried to explain the marijuana sale, which opened him up to lengthy and prejudicial cross-examination about his marijuana use. The prosecutor questioned other witnesses at length about marginally relevant background information and used that testimony along with the marijuana sale evidence to present the defendant as a bad person. These errors cannot be considered harmless given the proof at trial, which was not overwhelming. *See People v Crimmins*, 36 NY2d 230, 241-242. Judgment reversed, count two of the indictment dismissed, and matter remitted for a new trial on the remaining counts. (County Ct, Albany Co [Breslin, J])

Search and Seizure SEA; 335(10[g]) (40) (70) (80[a])
(Arrest/Scene of the Crime
Searches [Probable Cause])
(Examinations of Personal
Effects) (Standing to Move
to Suppress) (Warrantless
Searches [Abandoned Objects])

People v Savage, 59 AD3d 817, 873 NYS2d 770
(3rd Dept 2009)

Two sheriff's investigators and a detective were at the city bus terminal to conduct a drug interdiction. One of the investigators, Duda, saw the defendant get off a bus carrying a backpack and a plastic bag. The defendant was joined by another passenger and when they walked past the detective, Duda heard the defendant tell his companion "there's the police." After leaving the terminal, the defendant turned around to look at the detective several times. When the detective started talking to a person in the terminal, the defendant picked up his bags and quickly walked to a minivan taxi. Duda approached the van and spoke to the defendant through an open window; he identified himself, explained that they were conducting a drug interdiction, and asked for the defendant's identification and bus ticket. The defendant got his identification from the backpack and handed it over with two bus tickets bearing names different than the names of the defendant and his companion. When asked, the defendant denied having any luggage. Duda removed the bags the defendant had been carrying from the van; the defendant again denied the bags were his and he did not respond when Duda asked if he could open the bags; inside the backpack was male clothing and cocaine.

Third Department *continued*

Holding: The court erred in granting the defendant's motion to suppress the seized drugs. Duda's observations of the defendant, before he approached the van, provided an objective reason for him to ask the defendant general questions about his identity, destination, travel companion, and to see his bus ticket. *See People v Jennings*, 39 AD3d 970, 972 *lv den* 9 NY3d 845. When the defendant produced two tickets with different names and denied having any bags, Duda had a founded suspicion that criminality was afoot, which allowed him to ask questions about who owned the bags under the level-two common law right of inquiry under *People v De Bour* (40 NY2d 210). *See People v Hollman*, 79 NY2d 181, 184-185, 191-193. When the defendant denied ownership, he waived any privacy expectation in the bags and therefore lacked standing to contest the admissibility of the drugs. *See People v Ramirez-Portoreal*, 88 NY2d 99, 110. Order reversed, motion denied, and matter remitted. (County Ct, Albany Co [Herrick, JJ])

Sentencing (Hearing) (Restitution) SEN; 345(42) (71)

People v Wilson, 59 AD3d 807, 872 NYS2d 758 (3rd Dept 2009)

At the restitution hearing, the complainant testified that the safe stolen from his home contained \$10,000 in cash, a bracelet worth approximately \$400, a recently purchased video camera worth \$450, two baseball cards, miscellaneous watches, and paperwork. The defendant admitted that the safe contained approximately \$1,600 in cash, paperwork, and two baseball cards, but denied finding a video camera or jewelry. The court ordered restitution in the amount of \$10,860.

Holding: There is insufficient record evidence to support the amount of the restitution order. The prosecution bears the burden of proving, by a preponderance of the evidence, the complainant's out-of-pocket expenses. *See People v Russell*, 41 AD3d 1094, 1096 *lv den* 10 NY3d 964. The complainant's testimony about the loss was conclusory and unsubstantiated and did not satisfy the prosecution's burden of proof. The prosecution failed to present receipts or invoices for the video camera and bracelet and the complainant did not provide any details about those items, such as the brand name, features, or date of purchase, which would have helped the court estimate the value. Although the complainant testified that the cash represented payments by clients for services rendered and the proceeds from the sale of his boat, the prosecution did not present any testimony from the clients or the purchaser of the boat or documentation to corroborate the complainant's testimony. Judgment modified by reversing the restitution award, judgment affirmed as modified, and matter remitted. (County Ct, Montgomery Co [Catena, JJ])

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

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

People v George, 59 AD3d 858, 873 NYS2d 387 (3rd Dept 2009)

In 2007, the court revoked the defendant's probation and resentenced him to 365 days in jail on his 2004 conviction of third-degree criminal possession of marijuana. Later, in a separate case, pursuant to a negotiated plea agreement, the defendant pleaded guilty to third-degree criminal possession of marijuana and fourth-degree criminal possession of stolen property in exchange for concurrent prison terms of 1½ years plus 1 year of post-release supervision on the drug count and 1½ to 3 years on the property count. At sentencing, the court sentenced the defendant to the promised prison terms, but also ordered that the sentences run consecutive to any undischarged sentence that the defendant owed on the probation violation.

Holding: The defendant is entitled to have his plea vacated. The defendant's appeal waiver does not bar his challenge to the voluntariness of his plea. *See People v Walker*, 47 AD3d 965, 966. His failure to make a postallocution motion to withdraw his plea also does not preclude this challenge because he was not advised prior to sentencing that the new sentences would run consecutive to the probation violation sentence. *See People v Tausinger*, 55 AD3d 956, 957. The record does not contain any mention of the defendant's undischarged sentence at the plea allocution or any time prior to sentencing. Because the defendant did not know the full extent of his sentence, the conviction must be reversed and the plea vacated. *Cf People v Rivera*, 51 AD3d 1267, 1269-1270. Judgment reversed, plea vacated, and matter remitted. (County Ct, Franklin Co [Main, Jr, JJ])

Defenses (Justification) (Self-Defense) DEF; 105(37) (45)

Evidence (Weight) EVI; 155(135)

Homicide (Manslaughter [Evidence] [Defenses]) HMC; 185(30[d] [g])

People v Jones, 59 AD3d 864, 873 NYS2d 773 (3rd Dept 2009)

The decedent repeatedly expressed dislike of the defendant's relationship with Walker and her children. While the defendant was driving Walker and her children to a scheduled visit with the decedent, the decedent called Walker to complain that they were late and made threats toward the defendant. Upon arrival, the decedent ap-

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proached the defendant's car carrying a pipe and demanded that the defendant get out. The decedent put the pipe down. When the defendant got out, the decedent punched him in the face. Walker intervened. The decedent punched her in the face, then picked up a wooden board and hit the defendant in the back of the head. Walker ran in the house and the defendant backed away to his car. The decedent followed and, after stating that he was going to kill him, attacked the defendant with the board, fracturing his arm. The defendant took out a pocket knife and struck the decedent once in the abdomen. The defendant got in his car and after Walker got in, the decedent smashed the board through the driver's side window and the defendant drove away.

Holding: The prosecution failed to prove beyond a reasonable doubt that the defendant was not justified in using deadly physical force against the decedent. *See People v McManus*, 67 NY2d 541, 546-547. Although some of the defendant's testimony was in dispute, certain undisputed facts go to the core of his justification defense: the decedent was the initial aggressor and before the defendant took out the knife, the decedent had repeatedly threatened and assaulted him. The prosecution presented no evidence that the defendant was able to retreat. And the defendant struck the decedent only once, while fending off the decedent's attack and trying to safely leave. *See People v Richardson*, 55 AD3d 934, 935. The defendant failed to raise specific challenges to his conviction for criminal possession of the pocket knife. Judgment modified by reversing the convictions for second-degree manslaughter and second-degree assault, those counts dismissed and sentences imposed thereon vacated, and judgment affirmed as modified. (County Ct, Fulton Co [Giardino, J])

Habeas Corpus (State)	HAB; 182.5(35)
Insanity (Civil Commitment)	ISY; 200(3)
Sex Offenses (General) (Sentencing)	SEX; 350(4) (25)

People ex rel Joseph II v Superintendent of Southport Correctional Facility, 59 AD3d 921, 874 NYS2d 602 (3rd Dept 2009)

In 1999, the petitioner was convicted of first-degree sodomy and attempted second-degree robbery and was sentenced to consecutive sentences of six years and two to four years, respectively. The court did not impose the mandatory five year period of post-release supervision, but the Department of Correctional Services (DOCS) administratively imposed a term of supervision. When the petitioner was released, he was committed to an Office of Mental Health (OMH) facility pursuant to Mental

Hygiene Law (MHL) 9.27. In March 2007, he was returned to DOCS custody for a postrelease supervision violation. In September 2008, pursuant to MHL 10.05(b), DOCS notified OMH and the Attorney General that the petitioner may be a detained sex offender nearing release. The Attorney General filed a civil management petition and the Chemung County Court issued an ex parte order staying his release. In October 2008, the Queens County Supreme Court denied the Attorney General's request that the petitioner be resentedenced to post-release supervision and partially granted the petitioner's habeas corpus petition, finding that he was illegally held pursuant to the administratively imposed post-release supervision. However, the court did not release him because of the existing ex parte order. The petitioner applied for a writ of habeas corpus in Chemung County Supreme Court, which the court denied.

Holding: The court erred in denying the petitioner's application for a writ of habeas corpus. The Attorney General did not properly commence the civil management proceeding. *See MHL 10.03(g)(1); Matter of State of New York v Randy M.*, 57 AD3d 1157. DOCS was not authorized to give notice under MHL article 10 because the petitioner was improperly in DOCS custody when the article 10 proceeding was commenced. *See People ex rel David NN. v Hogan*, 53 AD3d 841 *lv den* 11 NY3d 708. Order reversed, writ of habeas corpus granted, and DOCS ordered to immediately release the petitioner. (Supreme Ct, Chemung Co [O'Shea, J])

Narcotics (Evidence (Possession) (Sale)	NAR; 265(20) (57) (59)
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People v McCoy, 59 AD3d 856, 873 NYS2d 372 (3rd Dept 2009)

Holding: The prosecution failed to present legally sufficient evidence showing that the defendant intended to sell the heroin found in his pocket. An officer arriving to investigate a convenience store clerk's report of drug sales outside saw the defendant exiting the store with a six-pack of beer. The officer had seen the defendant outside the store several times earlier that night and he was familiar with him. The officer accused the defendant of selling drugs; at the officer's urging, the defendant handed over a sock that contained seven small bags of marijuana. The officer searched the defendant and found four small heroin packets in his pocket. The prosecution did not present any direct evidence that the defendant sold or attempted to sell heroin. Neither the clerk nor the officer observed a sale and the clerk could not identify the defendant as the person she saw standing outside the store. The evidence is insufficient to support an inference of the intent to sell. When arrested, the defendant had no cash other than a few coins and there was no evidence that he had a weapon or any paraphernalia normally associated

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with drug sales. *See People v Jones*, 47 AD3d 961, 964 *lv den* 10 NY3d 808, 812. And there was no testimony that the quantity of heroin was inconsistent with personal use. *See People v Patchen*, 46 AD3d 1112, 1113 *lv den* 10 NY3d 814. The evidence is legally sufficient to support a conviction for the lesser included offense of seventh-degree criminal possession. *See* Penal Law 220.03. Judgment modified, third-degree criminal possession of a controlled substance conviction reduced to seventh-degree criminal possession, sentence vacated, matter remitted for resentencing, and judgment affirmed as modified. (County Ct, Washington Co [McKeighan, J])

Counsel (Competence/Effective Assistance/Adequacy) (Right to Counsel) COU; 95(15) (30)

Prisoners (Access to Courts and Counsel) PRS I; 300(2)

People v Scharpf, 60 AD3d 1101, 874 NYS2d 322 (3rd Dept 2009)

Holding: The court properly rejected the defendant's argument that he was deprived of effective assistance of counsel before trial because of the distance between Essex County and the place of his incarceration. Because of overcrowding at the local jail, the defendant was held at a jail in another county, approximately 75 miles from his counsel's office. Although the distance was an inconvenience, the record shows that the defendant had numerous phone conversations and other contact with his attorney and that the county court assisted with the contact by having the defendant held in Essex County for certain stages of the case. "In these circumstances, the inconvenience of a two-hour drive for counsel to visit defendant in jail was not shown to constitute a deprivation of his right to counsel (*see United States v Lucas*, 873 F2d 1279, 1280-1281 [1989]; *United States v Echeverri*, US Dist Ct, ED NY, March 31, 1992, Hurley, J., at 5-6)." Judgment affirmed. (County Ct, Essex Co [Meyer, J])

Accusatory Instruments (General) ACI; 11(10)

Guilty Pleas (Vacatur) GYP; 181(55)

People v Bethea, 61 AD3d 1016, 874 NYS2d 920 (3rd Dept 2009)

Holding: The defendant pleaded guilty to third-degree criminal possession of a weapon (*see* Penal Law 265.02[4]) in satisfaction of an 11-count indictment, and waived his right to appeal. "Penal Law § 256.02(4) was repealed effective November 1, 2006, several months before this indictment was handed up (*see* L 2006, ch 742,

§ 1). Defendant thus pleaded guilty to a nonexistent crime, based on a jurisdictional defect in the indictment and this survives his guilty plea and waiver of appeal (*see People v Case*, 42 NY2d 98, 100 [1977]; *People v Lopez*, 45 AD3d 493, 494 [2007]). Despite defendant's failure to raise the issue in his appellate brief, we reverse his judgment of conviction and dismiss that count of the indictment (*see People v Davis*, 193 AD2d 954, 956 [1993]; *see also People v Lopez*, 45 AD3d at 494)." Judgment reversed, plea vacated, count 2 dismissed, and matter remitted. (County Ct, Schenectady Co [Hoye, J])

Evidence (Sufficiency) EVI; 155(130)

Instructions to Jury (Burden of Proof) (General) ISJ; 205(20) (35)

People v Brown, 61 AD3d 1007, 877 NYS2d 482 (3rd Dept 2009)

Holding: The court erred in rejecting the defendant's request that the jury be instructed that to convict him of second-degree stalking, the prosecution must prove beyond a reasonable doubt that he was convicted of third-degree stalking involving the same complainant within the preceding five years. *See* Penal Law 120.55(2). Although the prosecution's evidence established the existence of the prior conviction, the defendant had the right to refuse to stipulate to it. Therefore, the jury had to be satisfied that it was proven beyond a reasonable doubt. *See People v Flynn*, 79 NY2d 879, 881. The court committed reversible error by concluding that the prior conviction element was not an element for the jury to determine and refusing to submit it to the jury. *See People v Haddock*, 48 AD3d 969, 971.

There was legally insufficient evidence to support the defendant's first-degree criminal contempt conviction. The prosecution failed to present evidence that the defendant, when he placed a telephone call to the complainant, did so with the intent to place her "in reasonable fear of physical injury, serious physical injury or death' (Penal Law § 215.51[b][ii], [iii])." The evidence showed that the defendant called the complainant's home, but not that there was an actual or implied threat that he would physically harm her. Although he should have known that the call would upset her, it does not necessarily mean that he intended to place her in reasonable fear of her safety. The evidence, however, is legally sufficient to support a second-degree criminal contempt conviction. Judgment modified, second-degree stalking conviction reversed, first-degree criminal contempt conviction reduced to second-degree criminal contempt, sentences vacated, matter remitted for a new trial on the stalking count and for resentencing on the contempt count, and judgment affirmed as modified. (County Ct, Rensselaer Co [Nichols, J])

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Homicide (Mental Condition) HMC; 185(35) (40[a] [m])
(Murder [Defenses]
[Instructions])

Instructions to Jury (Missing ISJ; 205(46) (50)
Witnesses) (Theories of
Prosecution and/or Defense)

People v Demagall, 63 AD3d 34, 876 NYS2d 541
(3rd Dept 2009)

Holding: The cumulative effect of the court’s misapprehension of the law and errors resulting therefrom warrants a new trial. The defendant was charged with second-degree murder and asserted an insanity defense. The prosecution’s first forensic psychiatrist, Kleinman, opined that the defendant knew that killing was illegal, but did not appreciate that doing so was wrong. Based on Kleinman’s report, the prosecution consented to the defendant’s entry of a plea of not responsible by reason of mental disease or defect. The court rejected the plea, in part, because it interpreted the law to provide that if the defendant knew that killing was illegal, he necessarily knew it was wrong; this interpretation is incorrect. See *People v Wood*, 12 NY2d 69, 76. However, the refusal to accept the plea does not warrant reversal because the court was not persuaded by some of the evidence that Kleinman accepted in his analysis and it supported its decision by its observations of the defendant, and because the defendant was allowed to present his defense to the jury. See *People v Washington*, 229 AD2d 726, 727 *lv den* 88 NY2d 1025. The court erred in refusing to give a missing witness charge after the prosecution failed to produce Kleinman since the requirements for such a charge had been satisfied. See *People v Savinon*, 100 NY2d 192, 196-201. The court then erred in directing defense counsel to not ask the jury in summation to draw an inference from the failure to call Kleinman. Had the court allowed defense counsel to comment about the failure to call Kleinman, the refusal to give a missing witness instruction would not necessarily have resulted in prejudicial error. See *Goverski v Miller*, 282 AD2d 789, 791. The court further erred when, in response to a jury note asking why it did not hear from Kleinman, it told the jury that it was not permitted to speculate about it. Judgment reversed and matter remitted for a new trial before a different judge. (County Ct, Columbia Co [Czajka, J])

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)
People v Stewart, 61 AD3d 1059, 876 NYS2d 208
(3rd Dept 2009)

Holding: The court erred in classifying the defendant as a level three sex offender. The Board of Examiners of Sex Offenders presumptively classified the defendant as a level two sex offender (90 points assessed), but recommended an upward departure to a level three. The prosecutor joined in the recommendation. The court denied the Board’s recommendation, concluding that there were actually two victims and assessing another 20 points, which raised the presumptive risk level to level three. The court relied on the seven-year-old complainant’s statement that the defendant told her that he sexually abused another child and the defendant’s admission that everything the complainant said he did was true. However, the court’s analysis is flawed because the defendant’s admission was made two months before the complainant’s statement. Therefore, it cannot be used to corroborate the allegation, and the belief of the complainant’s mother that the defendant abused another child is similarly deficient. “In the absence of any reliable evidence to substantiate the finding of multiple victims, the equivocal hearsay evidence relied upon by County Court does not constitute clear and convincing evidence (see *People v Warrior*, 57 AD3d 1471, 1471.)” A review of the record shows that an upward departure may be warranted, and the case is remitted for the court to consider this issue. See *People v Swain*, 46 AD3d 1157, 1159. Order reversed and matter remitted. (County Ct, Rensselaer Co [McGrath, J])

Sentencing (Hearing) SEN; 345(42) (65) (70.5)
(Presentence Investigation
and Report) (Resentencing)

People v Clark, 61 AD3d 1179, 876 NYS2d 564
(3rd Dept 2009)

Holding: The court properly resentenced the defendant. At sentencing, the defendant disputed a factual statement in his presentence investigation report. Despite the dispute, the court relied on the presentence report statement and sentenced the defendant to an aggregate term of 12 years. This court vacated the sentence and remitted for resentencing. See *People v Clark*, 39 AD3d 1091, 1092. To resolve the issue, the sentencing court held a hearing, which lasted several days. It heard testimony from the defendant and the two officers who made the disputed statement. The court granted the defendant’s requests for new counsel and allowed him to reopen the hearing to introduce further evidence. And the court offered the defendant the opportunity to withdraw his plea. The court then denied the defendant’s challenge and resentenced him to an aggregate prison term of 12 years with 5 years post-release supervision. For sentencing purposes, the court is not bound to the facts as stated by the defendant during his plea colloquy (see *People v Farrar*, 52 NY2d 302, 305), and it must consider the presentence report. See *People v Selikoff*, 35 NY2d 227, 238. Because of

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the factual dispute, the court could not rely solely on the officers' account. Due process requires that the court assure itself that its sentencing decision is based on reliable and accurate information, and the defendant must have an opportunity to refute the facts upon which the court may base its decision through a CPL 440.10 hearing or another fair procedure. *See People v Outley*, 80 NY2d 702, 712, 713. The court properly exercised its discretion in holding a hearing, and the hearing complied with due process. Judgment affirmed. (County Ct, Columbia Co [Czajka, J])

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

People v Carroll, 61 AD3d 1273, 877 NYS2d 759 (3rd Dept 2009)

Holding: The court erred in accepting the defendant's guilty plea. *See People v Zabele*, 53 AD3d 685, 686. The defendant was charged with assault for allegedly hitting his former girlfriend's father. Later, the Family Court issued an order of protection directing the defendant not to have telephone contact with his former girlfriend's mother. The defendant allegedly violated the order and was charged with second-degree criminal contempt. He pleaded guilty to the assault and criminal contempt charges. The defendant's appeal waiver and his failure to move to withdraw the plea or vacate the judgment do not preclude review of the voluntariness of his plea. The issue was preserved because the defendant made statements during the plea allocution that negated a material element of the criminal contempt charge. *See People v Lopez*, 71 NY2d 662, 666. When the court asked the defendant whether he understood what he was pleading to, the defendant stated that he had gone to Florida after being released on bail on the assault charges, that he did not understand that he was ordered to not have contact with anyone, and that he was not served with any papers. The defendant's statements raised questions about his awareness of the family court order and its prohibitions and thus whether he had the requisite intent when he tried to speak to his former girlfriend's mother. The court asked the defendant what he meant, but then changed the subject and failed to inquire further about his knowledge of the order or his intent to violate it. Because this was an integrated plea, the defendant's assault conviction must also be reversed. *See People v Ortega*, 53 AD3d 696, 697. Judgment reversed, plea vacated, and matter remitted. (Supreme Ct, Clinton Co [Lawliss, J])

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

Prosecutors (General) PSC; 310(20)

People v Good, 62 AD3d 1041, 877 NYS2d 766 (3rd Dept 2009)

Holding: The court erred in denying the defendant's motion to withdraw his plea because the defendant's right to counsel was violated. Five months into the representation, the defendant's assigned attorney was hired by the district attorney's office that was prosecuting him and the court granted permission for him to withdraw. The court assigned new counsel and two months later, the defendant entered a guilty plea. On the sentencing date, the defendant appeared with retained counsel and moved to withdraw his plea, arguing that the plea was involuntary based on the defendant's illiteracy and certain responses in the plea colloquy and that his second assigned attorney provided ineffective assistance. A special prosecutor was appointed to respond to the motion because the defendant's first attorney now worked for the district attorney's office. *See County Law 701*. The court later denied the motion. Although the conflict of interest issue was not preserved, it is reviewed in the interest of justice. *See CPL 470.15(3)(c); People v Gaines*, 277 AD2d 900. When an attorney who represents a defendant at the initial stages of a criminal proceeding becomes an employee of the district attorney's office that is prosecuting the ongoing case, there is an "unmistakable appearance of impropriety and [the situation] create[s] the continuing opportunity for abuse of confidences entrusted to the attorney during the months of his [or her] active representation of defendant' (*People v Shinkle*, 51 NY2d 417, 420 . . .)." Former clients should not have to depend on the good faith of their former attorneys turned adversaries to protect confidences shared during the prior relationship. *See People v Herr*, 86 NY2d 638, 641. The defendant was not told of the possible conflict and did not waive objection to it. The defendant's retained counsel relied on conversations he had with the first assigned attorney in moving to withdraw the plea, and indicated that the now prosecutor was willing to testify about the knowledge he acquired as defense counsel. Under the circumstances, there was a substantial risk of an abuse of confidence. Judgment reversed, plea vacated, and matter remitted. (County Ct, Broome Co [Smith, J])

Jurisdiction (General) (Personal) JSD; 227(3) (5)

Probation and Conditional Discharge (General) PRO; 305(18)

People v Mitchell, 62 AD3d 1045, 878 NYS2d 817 (3rd Dept 2009)

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Holding: The court correctly held that it did not have jurisdiction to hear the defendant’s CPL article 440 motion. The defendant was convicted in Essex County and sentenced to probation. Because he lived in Franklin County, the court transferred the supervision of his probation from Essex County to Franklin County pursuant to CPL 410.80(1). Section 410.80(2) provides that upon such a transfer, “the appropriate court within the jurisdiction of the receiving probation department shall assume all powers and duties of the sentencing court and shall have sole jurisdiction in the case.” Although the title of the statute is “Transfer of supervision of probationers,” the statutory language clearly provides that the appropriate court in the receiving county receives all powers and duties of the sentencing court. Thus, regardless of the logistical problems that may result, when the Essex County Court transferred probation supervision to Franklin County, it no longer had jurisdiction to hear the defendant’s motion. Order affirmed. (County Ct, Essex Co [Meyer, JJ])

Constitutional Law (United States generally)	CON; 82(55)
New York State Legislation (General)	NYL; 268(10)
Weapons (General) (Possession)	WEA; 385(22) (30)
People v Perkins, 62 AD3d 1160, 880 NYS2d 209 (3rd Dept 2009)	

The defendant was convicted of second- and third-degree criminal possession of a weapon for firing a handgun at the complainant in front of the complainant’s home.

Holding: The defendant’s weapons convictions did not violate his rights under the Second Amendment of the United States Constitution or Civil Rights Law 4. “Defendant’s reliance on *District of Columbia v Heller* (___ US ___, 128 S Ct 2783 [2008]) is misplaced. While the United States Supreme Court concluded in that case that the Second Amendment confers a constitutionally protected individual right to keep and bear arms as a means of self-defense within the home, it also held that the right conferred by the Second Amendment—and, by extension, Civil Rights Law § 4 (see *Chwick v Mulvey*, 2008 NY Slip Op 22486[U], *19 [2008])—is not absolute and may be limited by reasonable governmental restrictions (see *District of Columbia v Heller*, 128 S Ct at 2816).” Because Penal Law article 265 does not completely ban handguns, it is not a “severe restriction” that improperly infringes on the defendant’s Second Amendment rights. The state’s licensing requirement is an acceptable means of regulating firearms possession (see *People v Morrill*, 100 AD2d 927, 927; *People v Ferguson*, 21 Misc 3d 1120[A], 2008 NY Slip

Op 52112[U], *4 [NY City Crim Ct]), and does not violate *Heller* as long as it is not enforced in an arbitrary and capricious manner. Additionally, the defendant’s conduct does not fit within the protections of the Second Amendment and Civil Rights Law 4. Judgment affirmed. (County Ct, Schenectady Co [Drago, JJ])

Probation and Conditional Discharge (Conditions and Terms)	PRO; 305(5)
Sex Offenses (Sentencing)	SEX; 350(25)
People v Brown, 62 AD3d 1209, 879 NYS2d 627 (3rd Dept 2009)	

The defendant was convicted of first-degree unlawfully dealing with a child and endangering the welfare of a child. The court imposed probation conditions requiring him to avoid contact with children under age 18 and refrain from frequenting places where children are likely to congregate without permission from the court or his probation officer. He was also required to successfully complete any form of counseling or treatment, including sex offender treatment, directed by the court or probation.

Holding: The court properly imposed these conditions. “Conditions of probation are appropriate when the court determines that they are ‘reasonably necessary’ to insure that the defendant will lead a law-abiding life or to assist him or her in doing so, or are ‘reasonably related’ to his or her rehabilitation (Penal Law § 65.10(1), (2)(l); see *People v Page*, 266 AD2d 733, 735 . . .).” The court may impose other conditions that are “necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant” (Penal Law § 65.10(5); see *People v Myatt*, 248 AD2d 68, 71 . . .).” The first two conditions relate to both offenses, whether or not they involved sexual activity. Regarding the third condition, the indictment for the endangering count alleged that the defendant had sexual intercourse with the complainant child and gave the complainant an alcoholic beverage. Because that count involved sexual activity, the court did not err in requiring sex offender treatment if directed by the court or his probation officer. Judgment affirmed. (County Ct, Cortland Co [Ames, JJ])

Fourth Department

Juveniles (Delinquency) (Delinquency—Procedural Law) (Persons in Need of Supervision)	JUV; 230(15) (20) (110)
Matter of Felix G., 56 AD3d 1285, 868 NYS2d 452 (4th Dept 2008)	

Holding: The court erred in substituting a petition alleging that the respondent is a person in need of super-

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vision for a petition alleging that he is a juvenile delinquent because it did not obtain the petitioner's consent. See Family Court Act (FCA) 311.4(1). Although the petitioner failed to preserve the issue, it is reviewed in the interest of justice. See *Matter of Yadiel Roque C.*, 17 AD3d 1168, 1169. At the end of the fact-finding hearing, the court failed to determine whether the respondent committed the acts alleged in the petition. See FCA 345.1. The court improperly ordered probation supervision without ordering a probation investigation (see FCA 351.1[2]), and without conducting a dispositional hearing thereafter. See FCA 350.1(2). Order reversed and matter remitted for a new hearing on the petition. (Family Ct, Erie Co [Buchanan, JJ])

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

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

People v Liggins, 56 AD3d 1265, 868 NYS2d 840 (4th Dept 2008)

Holding: The court erred in denying the defendant's CPL 440.10 motion without a hearing because the defendant raised issues of fact in support of his motion. The defendant's appeal waiver encompasses all of his arguments except for his claim that his plea was not voluntary due to ineffective assistance of counsel. See *gen People v Martin [Matthew D.]*, 55 AD3d 1317. The defendant alleged that his attorney "failed to advise him that he had a viable defense based on his age, which would have resulted in the disposition of the charges in Family Court as reckless manslaughter rather than as depraved indifference murder in County Court (see generally *People v Bowman*, 34 AD3d 935, 937, *lv denied* 8 NY3d 844 . . .), and he would not have pleaded guilty to depraved indifference murder had he known of that defense (see *People v Bonilla*, 6 AD3d 1059, 1060)." Further, the defendant argued that from the beginning of the case, his attorney's goal was to dispose of the case, and consequently his attorney failed to pursue a viable challenge to the denial of his right to counsel and failed to request judicial review of the grand jury minutes. Order reversed and matter remitted for a hearing. (Supreme Ct, Oneida Co [Donalty, AJ])

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

Evidence (Sufficiency) EVI; 155(130)

Grand Jury (General) GRJ; 180(3)

People v Raymond, 56 AD3d 1306, 867 NYS2d 643 (4th Dept 2008)

Holding: The court correctly granted the defendant's motion to dismiss count two of the indictment since that count was not supported by legally sufficient evidence. The second-degree manslaughter count alleged that the defendant recklessly caused the death of the decedent by leaving him in the car and not seeking medical or emergency assistance before he was found dead four hours later. The grand jury evidence was legally insufficient to establish causation. The deputy medical examiner testified that the decedent's cause of death was brain swelling resulting from head injuries sustained during the car accident, and that the decedent died more than a few minutes and likely less than an hour from the time of the accident. He opined that the decedent may have survived had he received appropriate medical intervention within that time frame. Based on this testimony, there was no basis for the jury to infer that the death occurred at the beginning or end of the time frame, and the conclusion that the failure to secure assistance caused the death is based on impermissible speculation. See *People v Jackson*, 65 NY2d 265, 272. The prosecution did not establish that the decedent could have gotten medical assistance before the end of the time frame, and the evidence showed that appropriate medical intervention could not have been provided at the accident scene. The prosecution failed to offer evidence regarding how long it took emergency personnel to extricate the decedent from the car once they arrived 20 to 30 minutes after the 911 call, and there was no evidence as to the location of the nearest hospital and whether that hospital had the drug used to reduce brain swelling. Order affirmed. (Supreme Ct, Cayuga Co [VanStrydonck, JJ])

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

Defenses (Affirmative Defenses generally) (Withdrawal) DEF; 105(2) (50)

People v Ervin, 57 AD3d 1398, 871 NYS2d 796 (4th Dept 2008)

Holding: The court erred in refusing to charge the affirmative defense of renunciation. "[T]here is a reasonable view of the evidence by which the jury could have found that [the defendant] established by a preponderance of the evidence that, although he could have completed his commission of the crime of attempted rape, he abandoned his criminal effort to complete the crime of rape 'under circumstances manifesting a voluntary and complete renunciation of his criminal purpose' ([Penal Law] § 40.10 [3]; see *People v Taylor*, 80 NY2d 1, 12 . . .)." The court incorrectly denied the defendant's motion to suppress the statement he made in the police car while on the way to the police station and the written statement he

Fourth Department *continued*

made at the station after he waived his *Miranda* rights. The defendant was in custody in the police car when the officer asked him questions about his life and his church (see *People v Paulman*, 5 NY3d 122, 129), and the prosecution failed to show that this did not constitute interrogation or its functional equivalent. See *Rhode Island v Innis*, 446 US 291, 301 (1980). Further, despite the *Miranda* waiver and questioning by a different officer at the station, because the arresting officer was present throughout the questioning and again asked questions about the defendant's life and his church, there was not a definite, pronounced break in the interrogation. See *People v Chapple*, 38 NY2d 112, 115. Judgment reversed, motion to suppress statements granted, and new trial ordered. (Supreme Ct, Erie Co [Fricano, J (trial and sentence); Wolfgang, J (suppression hearing)])

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

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

Matter of Timmons v Green, 57 AD3d 1393,
871 NYS2d 562 (4th Dept 2008)

The petitioner commenced a CPLR article 78 proceeding seeking to compel the respondent District Attorney to provide certain documents pursuant to the Freedom of Information Law (FOIL) (Public Officers Law art 6).

Holding: The court correctly denied the respondent's pre-answer motion to dismiss. The respondent district attorney's office is subject to FOIL. See *gen Matter of Rivette v District Attorney of Rensselaer County*, 272 AD2d 648, 649. Although the respondent is permitted to designate a records access officer (see Public Officers Law 87(1)(b)(ii); 21 NYCRR 1401.2(a)), it is not relieved of its burden of responding to FOIL requests. The court erred in granting the petition without giving the respondent an opportunity to serve and file an answer (see CPLR 7804(f)), because it is not clear that there is no factual dispute and that there will be no prejudice from the failure to require an answer. See *Matter of Nassau BOCES Cent Council of Teachers v Board of Coop Educ Servs of Nassau County*, 63 NY2d 100, 102. Judgment modified by vacating those parts granting the petition, judgment is affirmed as modified, and respondent granted 20 days to serve and file an answer. (Supreme Ct, Monroe Co [Polito, J])

Sentencing (Hearing) (Restitution) SEN; 345(42) (71)

People v Bunnell, 59 AD3d 942, 872 NYS2d 334
(4th Dept 2009)

Holding: The court improperly delegated its responsibility to conduct the restitution hearing to its court attorney.

The court attorney held a restitution hearing and issued a preliminary fact-finding report. The court affirmed the report and issued a restitution order. The issue is reached *sua sponte*, as a matter of discretion in the interest of justice. See CPL 470.15(6)(a). Upon the defendant's request, the court must conduct a hearing regarding the amount of restitution in accordance with CPL 400.30. See Penal Law 60.27(2). CPL 400.30 does not authorize the court to delegate its responsibility to conduct a hearing to a court attorney or another factfinder. Judgment modified by vacating the amount of restitution ordered, judgment affirmed as modified, and matter remitted for a new restitution hearing. (County Ct, Genesee Co [Noonan, J])

[Ed. Note: On June 19, 2009, the Fourth Department amended its decision in *People v Bunnell* (summarized above) by removing the phrase "as a matter of discretion in the interest of justice" and replacing it with: "We reach this issue *sua sponte*, and we note that preservation is not required inasmuch as the "essential nature" of the right to be sentenced as provided by law' is implicated (*People v Fuller*, 57 NY2d 152, 156). To the extent that *People v Jackson* (23 AD3d 1057, *lv denied* 6 NY3d 814) holds otherwise, it is no longer to be followed." *People v Bunnell*, Motion No. 55/09 (4th Dept, 6/19/09); see also *People v Joseph*, Motion No. 883/09 (4th Dept, 6/19/09).]

Due Process (General) DUP; 135(7) (10)
(Miscellaneous Procedures)

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

People v Erb, 59 AD3d 1020, 872 NYS2d 775
(4th Dept 2009)

Holding: The court violated the defendant's due process rights by determining his sex offender risk level without conducting a hearing, as required by Correction Law 168-n(6). See *gen People v Brooks*, 308 AD2d 99, 105 *lv den* 1 NY3d 502. The defendant's waiver of his right to appear in person and submit materials is not equivalent to a waiver of the right to a hearing. See *gen People v Costas*, 46 AD3d 475 *lv den* 10 NY3d 716. Section 168-n(6) requires that the court conduct a hearing even if the defendant fails to appear at the proceeding without sufficient excuse. Order reversed and matter remitted for further proceedings. (County Ct, Oneida Co [Dwyer, J])

Appeals and Writs (Arguments of Counsel) (Counsel) APP; 25(5) (30)

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

Fourth Department *continued*

People v Griffin, 59 AD3d 1106, 872 NYS2d 302
(4th Dept 2009)

Holding: The defendant alleges “that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, whether defendant received an illegal sentence because of noncompliance with the statutory mandate of CPL 400.21.” This issue may have merit; therefore, this Court’s Dec. 22, 2005 order is vacated and the appeal will be considered de novo. *See People v LeFrois*, 151 AD2d 1046. Motion for a writ of error coram nobis granted and deadline for the defendant’s briefs and records set.

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

Sentencing (Fines) (Hearing) SEN; 345(36) (42)

People v Lanzara, 59 AD3d 936, 873 NYS2d 399
(4th Dept 2009)

Holding: Because the defendant failed to object to the sentencing court’s imposition of a fine without a hearing to determine his ability to pay, he forfeited that challenge. *See People v Callahan*, 80 NY2d 273, 281. The defendant’s valid waiver of his right to appeal encompasses this issue. *See gen Peopel v Hidalgo*, 91 NY2d 733, 737. Judgment affirmed. (County Ct, Lewis Co [Merrell, J])

Juveniles (Support Proceedings) (Visitation) JUV; 230(135) (145)

Matter of Saunders v Aiello, 59 AD3d 1090,
875 NYS2d 656 (4th Dept 2009)

Holding: The court erred in granting the father’s petition to suspend his child support obligation. The father alleged that his two children, ages 14 and 17, abandoned him. The court agreed, finding that the children refused to visit their father or have any substantial contact with him and that the respondent mother was indifferent regarding visitation between the children and their father. Because the younger child was not of employable age, the court could not, as a matter of law, conclude that the child abandoned her father. *See Matter of Gottesman v Schiff*, 239 AD2d 500. Regarding the older child, the evidence does not support the court’s finding of abandonment. The children and their father got into an argument during the children’s last visit in 2005, and the children stayed with a family friend overnight and flew home the next day. The father testified that he left messages for the children on the answering machine at their home and on their personal cell phones, but the children never responded. The

older child’s reluctance to contact her father does not amount to abandonment, and the father did not make a serious attempt to maintain a relationship with his child. *See Radin v Radin*, 209 AD2d 396. The court incorrectly concluded that the mother’s failure to encourage the children to visit their father merited suspension of the father’s support obligation; the mother’s actions did not amount to deliberate frustration of the father’s visitation rights. *See Hiross v Hiross*, 224 AD2d 662, 663. Order reversed and petition dismissed. (Family Ct, Oneida Co [Griffith, J])

Accusatory Instruments (Sufficiency) ACI; 11(15)

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

People v Scerbo, 59 AD3d 1066, 872 NYS2d 763
(4th Dept 2009)

Holding: The court correctly dismissed four counts of the indictment, but erred in dismissing counts 11 and 12. The correctly-dismissed counts, alleging second-degree course of conduct against a child and endangering the welfare of a child, were not supported by legally sufficient evidence. *See People v Manini*, 79 NY2d 561, 568-569. The two complainants testified that the defendant, their teacher, touched them on their inner thighs and stomachs over their clothing, but there was no testimony that would support an inference that the defendant did so to gratify his sexual desire. *See Penal Law 130.80(1)(a), 260.10(1); cf People v Gray*, 201 AD2d 961, 962 *lv den* 83 NY2d 1003; *People v Guerra*, 178 AD2d 434, 435. Although some of the grand jury testimony of a teacher’s assistant was improper, other evidence, including the testimony of another complainant, was sufficient to support counts 11 and 12. The court properly granted the defendant’s motion to set aside the verdict because the jurors were in possession of evidence not introduced at trial. *See People v Arnold*, 96 NY2d 358, 364. Despite being instructed not to rely on special expertise during jury deliberations, the defendant established that two jurors, both educators, told the other jurors that teachers are told never to touch students. This information is beyond the common understanding of the average juror and it relates to a material issue in the case. And at least one juror relied on that information in voting to convict the defendant. Order modified by denying the part of the motion seeking dismissal of counts 11 and 12 of the indictment, counts reinstated, order affirmed as modified, and matter remitted for further proceedings on those counts. (County Ct, Onondaga Co [Walsh, J])

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

Fourth Department *continued*

People v Shapard, 59 AD3d 1054, 872 NYS2d 796 (4th Dept 2009)

Holding: The court erred in imposing the bargained-for sentence without ordering a presentence report. *See gen People v Selikoff*, 35 NY2d 227, 238 *cert den* 419 US 1122 (1975). The defendant pleaded guilty to second-degree assault and agreed that he was properly classified as a persistent felony offender. Because the court was required to impose a term of imprisonment (*see* Penal Law 70.08(3)(c)), a presentence report was required. *See* CPL 390.20(4)(a). The court improperly gave effect to the defendant’s waiver of the presentence report. Judgment modified by vacating sentence, judgment affirmed as modified, and matter remitted for resentencing. (Supreme Ct, Erie Co [Boller, AJ])

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

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

People v Wallace, 59 AD3d 1069, 873 NYS2d 403 (4th Dept 2009)

The defendant was convicted of second-degree murder.

Holding: The court correctly admitted into evidence a sound recording of a rap song and a copy of the song lyrics. At trial, the prosecution established that the defendant played a tape of his favorite rap song, “How I Could Just Kill a Man,” two or three times during two five-minute car rides shortly after the homicide. The song describes a murder committed under circumstances similar to the murder the defendant allegedly committed. The prosecution “sought to shed light on the circumstances under which defendant listened to the song, and thus the rap song was properly admitted as evidence of defendant’s consciousness of guilt (*see generally [People v] Cintron*, 95 NY2d [329] at 332). Moreover, although the lyrics to rap music can at times be violent and inflammatory and thus may be prejudicial to defendants, the court here alleviated any such prejudice by giving an adequate limiting instruction, which the jury is presumed to have followed (*see generally People v Curtis*, 286 AD2d 900, 901, *lv denied* 97 NY2d 728).” By not making appropriate objections to the prosecution’s cross-examination of him about his drug sale activities and his acting experience, the defendant failed to preserve for review his argument that he was denied a fair trial because of these questions. *See* CPL 470.05(2). Judgment affirmed. (County Ct, Erie Co [Drury, J])

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

Witnesses (Child) WIT; 390(3)

People v Kolupa, 59 AD3d 1134, 872 NYS2d 831 (4th Dept 2009)

Holding: Evidence of the defendant’s opportunity, the defendant’s statements to the police, and other witness testimony was sufficient to corroborate the unsworn testimony of the seven-year-old complainant. *See gen People v Groff*, 71 NY2d 101, 109-110. Sentences imposed for attempted first-degree rape and first-degree sexual abuse need not run concurrently. *See gen People v Rosas*, 8 NY3d 493, 496-497. However, the defendant’s consecutive sentences for counts one through four are unduly harsh and severe. Judgment modified by directing that the sentences for counts one through four run concurrently to each other and judgment affirmed as modified. (County Ct, Oneida Co [Donalty, J])

Dissent in Part: [Martoché, JP & Centra, J] The seven-year-old complainant’s unsworn testimony was not sufficiently corroborated. The examining physicians did not find anything of significance in their examination of the child’s genitals, and although the defendant admitted that he exposed himself to the child, there was no evidence that he admitted to committing other physical acts with the child. The defendant’s testimony, while tending to prove the elements of the lesser crimes of conviction, does not establish the elements of the greater crimes. *See People v Guerra*, 178 AD2d 434, 434-435.

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

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

People v Hunter, 60 AD3d 1440, 874 NYS2d 854 (4th Dept 2009)

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 ordering the defendant to pay restitution, which was not part of the plea agreement, without giving him an opportunity to withdraw his plea. Motion granted and new counsel to be assigned to brief this issue and any other issues that counsel may find. (County Ct, Livingston Co [Cohen, J])

Appeals and Writs (Arguments of Counsel) (Counsel) APP; 25(5) (30)

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

Fourth Department *continued*

People v Kahley, 60 AD3d 1438, 874 NYS2d 852
(4th Dept 2009)

Holding: The defendant argues that he was denied effective assistance of appellate counsel because his attorney did not argue on direct appeal that the court failed to comply with the statutory mandates of CPL 310.30. A review of the trial court proceedings shows that this issue may have merit. This Court's May 31, 1996 order is vacated and the appeal will be considered de novo. Motion for a writ of error coram nobis granted and deadline for the defendant's briefs and records set.

Juveniles (Neglect) JUV; 230(80)

Matter of Morgan P., 60 AD3d 1362, 875 NYS2d 401
(4th Dept 2009)

Holding: The court properly found that the petitioner established by a preponderance of the evidence that the respondent mother neglected her daughter. The evidence showed that the respondent "coached" her daughter to allege that her grandfather was sexually abusing her and the child was subjected to several unnecessary medical examinations and experienced extreme anxiety because of the unfounded allegations of sexual abuse. *See gen Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127. Order affirmed. (Family Ct, Erie Co [Griffith, JJ])

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

Matter of Sarah A., 60 AD3d 1293, 874 NYS2d 653
(4th Dept 2009)

Holding: The court violated the respondent father's fundamental due process rights by not conducting a fact-finding hearing or inquest before finding that he permanently neglected and abandoned his daughter. The father's failure to appear for the scheduled fact-finding hearing is irrelevant. The petitioner presented no evidence in support of its petition and the record does not contain any evidence to support the court's findings that the respondent was guilty of some fault and that the petitioner made diligent efforts to strengthen the father-daughter relationship. *See Matter of Kyle K.*, 49 AD3d 1333, 1335 *lv den* 10 NY3d 715; *see also* Social Services Law 384-b(7)(f). Order reversed, motion granted, order of January 2007 vacated, and matter remitted for a hearing on the petition. (Family Ct, Erie Co [Szczer, JJ]) ♪

Defender News (continued from page 9)**Attorney General Holder Speaks Out About Improving the Public Defense System**

On June 24, 2009, United States Attorney General Eric Holder spoke to the American Council of Chief Defenders, a section of the National Legal Aid & Defender Association, about ways the Department of Justice can help improve public defense systems across the country. Attorney General Holder laid out five steps for renewing DOJ's commitment to system improvements: resuming the dialogue between public defense leaders and DOJ that started a decade ago; expanding and sustaining the current national conversation about defense issues by holding regular meetings with the criminal defense bar; ensuring that public defenders are at the table when DOJ meets with other criminal justice stakeholders; expanding DOJ's commitment in collecting accurate and meaningful data on public defense programs, so that it is better equipped to answer questions and provide assistance; and hosting a national conference that will focus on issues related to public defense, including discussions on strategy, development, and innovative collaborations. The text of Attorney General Holder's speech is available at www.usdoj.gov/ag/speeches/2009/ag-speech-090624.html.

District Court Grants Summary Judgment in Rikers Island Strip Search Case

In *McBean v City of New York* (No. 02-cv-5426 (GEL), 2009 US Dist LEXIS 72690 [SDNY 8/14/2009]), the district court granted summary judgment for the plaintiffs, finding that the New York City Department of Corrections violated the plaintiffs' rights by strip searching them upon entry to Rikers Island Correctional Facility without reasonable suspicion that they were hiding contraband. "It is bedrock law that whatever the relevant misdemeanor charge—whether it relates to narcotics or weapons—all misdemeanants have a right not to be strip-searched at intake absent reasonable suspicion. *See Weber [v Dell]*, 804 F.2d [796] at 802-04 [2d Cir 1986] . . ." The court did not reach the issue of whether a misdemeanor narcotics or weapons charge alone provides reasonable suspicion for a search because the defendant conceded that the officers performing the strip searches did not know whether the detainees were facing such charges. However, it did note that there did not appear to be Second Circuit precedent supporting such a proposition. In rejecting the defendant's suggestion that the court find that the plaintiffs were entitled only to nominal damages because their rights were infringed upon in a technical manner, the court concluded "there is nothing 'technical' about being subjected to an unconstitutional strip search." ♪

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