



# Public Defense Backup Center REPORT

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## Defender News

### Law Creates New DWI Offense and Mandates Ignition Interlocks

Governor Paterson signed a bill that makes it a class E felony to drive while intoxicated with a child 15 years of age or younger in the car. Chapter 496 changes the title of Vehicle and Traffic Law 1192(2-a) to aggravated driving while intoxicated, moves the current language of that section to 1192(2-a)(a), and creates subparagraph (b) for this new offense. Penal Law 120.04 (first-degree vehicular assault), 120.04-a (aggravated vehicular assault), 125.13 (first-degree vehicular manslaughter), and 125.14 (aggravated vehicular homicide) are also amended to incorporate this new offense.

If the defendant is the parent, legal guardian, or custodian of the child in the vehicle, the police must file a report with Child Protective Services under Social Services Law article 6, title 6. These VTL and Penal Law amendments took effect on December 18, 2009.

Beginning on August 15, 2010, courts will be required to sentence defendants convicted of a violation of VTL 1192(2), (2-a), or (3) to probation or conditional discharge, a condition of which must be the installation and maintenance of an ignition interlock device in any car owned or operated by the defendant for the duration of the probation or conditional discharge or six months, whichever is longer. The Board of Parole must order the use of ignition interlock devices as a condition of release for persons who have been convicted of Penal Law 120.03, 120.04, 120.04-a, 125.12, 125.13, or 125.14 or a felony defined in VTL 1193(1)(c). The cost of installation and maintenance must be paid by the defendant unless the court finds that the person is financially unable to afford the cost; in such cases, the court may waive the cost or impose the cost pursuant to a payment plan.

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### Forensics News

#### State Inspector General Finds Serious Misconduct in State and County Forensic Labs

In December, the New York State Inspector General, Joseph Fisch, issued three reports on serious misconduct in state and county forensic laboratories. The first report is a review of Fisch's investigation of the trace evidence section of the New York State Police Forensic Investigation Center. The trace evidence section is responsible for the examination of fibers, arson residue, footwear impressions, glass, hair, and similar evidence. The other two reports, released days later, discussed investigations of misconduct at the Monroe County Public Safety Laboratory and the Erie County Department of Central Police Services Forensic Laboratory regarding drug testing in criminal cases. All three reports are available at [www.ig.state.ny.us/reports/reports.html](http://www.ig.state.ny.us/reports/reports.html).

The State Police report focuses on the misconduct of one particular trace evidence analyst, Garry Veeder, over a 15 year period, as well as the inadequate supervision of Veeder, the lack of

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**Please Join Us for NYSDA's  
43rd Annual Meeting in  
Saratoga Springs**

**July 25–27, 2010 at the  
Gideon Putnam Resort**

*Make your hotel reservations early:*  
**866-890-1171**

or **[www.gideonputnam.com](http://www.gideonputnam.com)**

**[Saratoga Racing Season Starting  
Early This Year (Friday, July 23)]**



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## ***NACDL Releases Preliminary Statement and Recommendations on Strengthening Forensic Science***

In November 2009, the National Association of Criminal Defense Lawyers (NACDL) released a report, *NACDL Preliminary Position Statements and Recommendations on Strengthening Forensic Science*. ([www.nacdl.org/public.nsf/NewsReleases/2009mn29?OpenDocument](http://www.nacdl.org/public.nsf/NewsReleases/2009mn29?OpenDocument).) The report focuses on seven critical issues: 1) establishing a central, science-based federal agency; 2) creating a culture of science within the forensic community; 3) conducting research regarding the accuracy, reliability, and validity of forensic science theories and techniques and their limitations and measures of uncertainty; 4) educating attorneys and judges about the fundamentals of science, statistics, and forensic science practices; 5) requiring transparency in the forensic science community; 6) providing increased disclosure of information relevant to forensic science evidence; and 7) providing the defense with funding to obtain help from scientific experts for confidential consultation and testing of evidence. The federal agency would oversee forensic science programs in the United States, including establishing and enforcing standards for accreditation of forensic science labs and certification of forensic examiners and distributing federal forensic science funds. NACDL has asked scientists from around the country to review and comment on the report.

## ***The Supreme Court Decides Not to Reverse its Six-Month Old Decision on the Confrontation Clause and Lab Analysts***

On January 25, 2010, the U. S. Supreme Court ended speculation that it would reverse its June 2009 decision in *Melendez-Diaz v. Massachusetts* (129 S Ct 2527). As reported in the June-August 2009 issue of the *REPORT*, the Supreme Court, in a 5-4 decision, held that the Confrontation Clause of the Sixth Amendment requires that defendants be confronted with the testimony of lab analysts. But just days later, the Court granted *cert* in *Briscoe v. Virginia*. ([http://www.nysda.org/09\\_June-Aug\\_REPORT.pdf](http://www.nysda.org/09_June-Aug_REPORT.pdf).) Two weeks after oral arguments in *Briscoe*, the Court issued a one-sentence decision “vacat[ing] the judgment of the Supreme Court of Virginia and remand[ing] the case for further proceedings not inconsistent with the opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. — (2009).”

## ***Court of Appeals Interprets Melendez-Diaz in DNA Case***

In *People v. Brown* (13 NY3d 332 [2009]), the Court of Appeals held that the defendant’s Sixth Amendment right of confrontation was not violated by the introduction of a private laboratory’s DNA report through the testimony of

an Office of the Chief Medical Examiner (OCME) biologist because the report was not testimonial. The private lab’s report consisted of machine-generated graphs, charts and numerical data and did not contain any conclusions, interpretations, or comparisons. And, unlike in *Melendez-Diaz*, the testifying biologist was the analyst who compared and found a match between the defendant’s DNA profile and the profile the private lab found in the complainant’s rape kit. The Court also held that the private lab’s report could be admitted under the business records rule, CPLR 4518. A full summary of the decision is available on page 12.

## ***Third Department: Cortland County Conflict Attorney’s Office Violates State Law***

The Third Department, in *Goehler v. Cortland County* (890 NYS2d 660 [3d Dept 11/25/2009]), affirmed the Supreme Court’s decision declaring Cortland County’s Local Law No. 1 null and void. The Cortland County Legislature enacted the law in 2006; it established a Conflict Attorney’s Office and put in place a new procedure for assigning counsel to eligible defendants and Family Court respondents. In response, judges of the Family, County, and Surrogate’s Courts of Cortland County issued a standing decision stating that the local law violated County Law 722 and the Municipal Home Rule Law, and members of the county’s assigned counsel plan later filed suit against the county on the same grounds.

The Court found that Local Law No. 1 violated Municipal Home Rule Law 11(1)(e), which prohibits the adoption of a local law that supersedes a state statute if the local law applies to or affects the courts, because it affected the courts’ power and discretionary duty to assign counsel to eligible litigants. *See People ex rel Williams v. La Vallee*, 19 NY2d 238, 241. Additionally, the court held that Local Law No. 1 violated County Law 722 because it did not conform to one of the four exclusive methods for providing counsel to eligible litigants. “Specifically, a conflict attorney appointed by the County Legislature is not authorized by section 722, which mandates that a county enact a plan for providing counsel to indigent litigants that ‘shall conform’ to one of four [stated] options . . . .” (emphasis in original).

In a footnote, the Court stated: “The fundamental problem with Local Law No. 1 is that it was enacted in contravention of the procedures set out in County Law § 722. We take no position on the separate issue of whether the local law’s substantive provisions would be permissible if adopted in accordance with that statute—i.e., if they were contained in a county bar association plan that was approved by OCA.” The decision included two other footnotes indicating that the County defendants waived their

claim that the plaintiffs lacked standing to commence the action and that OCA's rejection of an earlier amendment to the assigned counsel plan that would have allowed the Public Defender to administer the plan was not before the Court.

During the December 4, 2009 Chief Defender Convening in Menands, the attendees discussed *Goehler* and how the decision may affect existing and proposed conflict defender offices throughout New York. The Chiefs established a committee to examine the matter.

As part of the proposed 2010-2011 Executive Budget, Governor Paterson has proposed amending County Law articles 18-A and 18-B to authorize the creation of conflict defender offices across the state. The proposal appears in Part F of the Public Protection and General Government (PP&GG) Article VII bill. (<http://publications.budget.state.ny.us/eBudget1011/fy1011artVIIbills/PPGGArticleVII.pdf>.) According to the Memorandum in Support of the bill, the "proposal would provide local mandate relief by offering counties the flexibility to create cost-effective representation for indigent defendants who cannot be represented by the public defender's office due to a conflict of interest." ([http://publications.budget.state.ny.us/eBudget1011/fy1011artVIIbills/PPGG\\_ArticleVII\\_MS.pdf](http://publications.budget.state.ny.us/eBudget1011/fy1011artVIIbills/PPGG_ArticleVII_MS.pdf).) The proposal does not include any provisions that ensure that this method of "cost-effective representation" will offer clients quality representation.

## **2010–2011 Proposed Executive Budget Released**

On January 19, 2010, Governor Paterson released his 2010-2011 proposed executive budget. The budget includes a number of proposals that would impact criminal defense and adult Family Court representation, including a proposal that could result in broad changes to public defense in New York State. NYSDA is in the process of reviewing these proposals. The Article VII bills, memoranda in support, and the appropriation bills are available at [http://publications.budget.state.ny.us/eBudget1011/1011\\_budgetLegislation2.html](http://publications.budget.state.ny.us/eBudget1011/1011_budgetLegislation2.html).

## **Statewide Examination of Public Criminal Defense and Amendments to ILSF Proposed**

Part E of the PP&GG Article VII bill calls for the creation of an Office of Indigent Defense (Office) and an Indigent Defense Board (Board), housed in the Division of Criminal Justice Services, and would make significant changes to the Indigent Legal Services Fund (ILSF). The Office would: examine the current state of public criminal defense representation; recommend ways to enhance the provision of such representation; recommend how the ILSF, or at least a portion of it, should be distributed; and execute decisions of the Board. The Office would be head-

ed by a Director, to be appointed by and serve at the pleasure of the governor, and the Commissioner of DCJS would appoint the Office's staff "in consultation with" the Director.

The Board would consult with and advise the Office, evaluate existing public defense programs and determine the type or representation that should be provided to public defense clients, accept, reject or modify the Office's recommendations regarding the distribution of money from the ILSF, and advise the governor and the legislature and make recommendations about the provision of public defense representation in New York. The Board would be chaired by the Chief Judge of the Court of Appeals and the remaining eight members would be appointed by the governor as follows: one recommendation each from the temporary president of the Senate and the speaker of the Assembly; one from a list of four nominees submitted by the New York State Bar Association; two from a list of four nominees submitted by the New York State Association of Counties; one appointed by the governor who has at least five years of experience in a public defender's office; and two appointed by the governor.

The Office would receive \$3 million in 2010-2011 and an additional \$7 million would be added to the ILSF; the \$10 million would come from increases in filing and motion fees in civil cases. The bill proposes eliminating the current structure for distribution of the ILSF, including the maintenance of effort provisions, and instead distributing \$40 million of the ILSF to New York City and giving the Office and the Board the responsibility for deciding how to distribute the remainder of the ILSF, which may include the use of grants. The responsibilities of the Office and the Board do not include an examination of representation provided to adult Family Court clients.

## **Other Budget Proposals**

The proposed budget includes a number of other relevant proposals, including:

- DNA sample collection: would expand sample collection to include all persons convicted of a Penal Law felony or misdemeanor, adjudicated and sentenced as a youthful offender for a Penal Law felony or misdemeanor, or required to register as a sex offender pursuant to Corrections Law article 6-C; define who is responsible for collecting DNA samples; and create a new crime of failure to provide a DNA sample (class A misdemeanor);
- Presentence reports: would allow the court to impose a sentence of imprisonment or aggregate consecutive sentences of imprisonment of up to 180 days without a presentence report; for youthful offenders, the court would no longer need a presentence report in a misdemeanor case if it imposes a term of probation or imprisonment or aggregate term up to 180 days;

- Electronic appearances in certain criminal court proceedings: the electronic appearance pilot project in CPL 182.20 would be expanded to all counties and the requirement that the defendant consent to an electronic appearance would be eliminated;
- Electronic appearances in certain Family Court and Sex Offender Management and Treatment Act (SOMTA) proceedings: in Family Court, under certain circumstances, the court could allow a party or interested person to attend or a witness to testify by electronic means; in SOMTA cases, upon good cause shown, the court could allow the respondent or a witness to make an electronic appearance in a proceeding other than a trial and would not be prohibited from allowing such an appearance at trial upon good cause shown and the consent of the parties;
- Probation detainer warrant program: the program in CPL 410.92 would be expanded to all counties;
- The District Attorney and Indigent Legal Services Attorney Loan Forgiveness Program (Education Law 679-e) would be amended to specifically limit eligibility to New York State residents and grandfather in district attorneys who previously received program awards, but became ineligible after the law was amended in 2009 to limit eligibility to attorneys who have not be admitted to practice in New York State for more than 11 years;
- The number of members of the Board of Parole would be reduced from 19 to 13;
- The Division of Probation and Correctional Alternatives, the Crime Victims Board, and the Office for the Prevention of Domestic Violence would be merged into the Division of Criminal Justice Services; and
- The circumstances in which the Family Court can order an investigation by Child Protective Services would be limited to cases in which there is reasonable cause to suspect child abuse or neglect; according to the Memorandum in Support of the Education, Labor and Family Assistance Article VII bill, local social services districts have indicated that Family Court-ordered “child protective services investigations are frequently ordered with little or no underlying child safety concern and that these orders are diverting resources from cases where there is an actual allegation of abuse or neglect.”

## ***Wrongful Conviction Task Force Releases Status Report***

The New York State Justice Task Force released its first status report in December. ([www.law.com](http://www.law.com), 12/28/2009.)

The Task Force, created by Chief Judge Lippman in May 2009, will examine six issues that arise in wrongful conviction cases: forensic evidence; identification procedures; reliability of admissions by the accused; government practices; reliability of biased and interested witnesses; and defense practices. The Task Force has already created subcommittees to review forensic evidence and identification procedures. The forensics subcommittee is reviewing the accreditation of labs and the certification of scientific expert witnesses; the collection, preservation, and retention of evidence; and access to forensic evidence, including pre-trial and post-conviction access. The identification subcommittee was formed in early December. Seymour W. James, Jr., Attorney in Charge of The Legal Aid Society’s Criminal Practice and a member of the NYSDA Board of Directors, is a member of the forensics and identification subcommittees.

The Task Force will not review cases in which the judgment of conviction is still in effect, and letters sent to the Task Force regarding such cases are being forwarded to the Task Force’s Special Counsel, Davis, Polk & Wardwell. New cases presented to the Task Force involving an alleged wrongful conviction will be reviewed by the screening committee to determine whether the cases fit within the scope of the Task Force. Several cases are currently under consideration, including *People v Bermudez*, 2009 NY Slip Op 52302U, 2009 NY Misc LEXIS 3099 (Supreme Ct, New York Co November 9, 2009), and *People v Bozella*, 2009 NY Slip Op 52099U, 2009 NY Misc LEXIS 2881 (County Ct, Dutchess Co October 14, 2009).

## ***Court of Appeals to Hear Arguments in the NYCLU Lawsuit***

On March 23, 2010, the New York Court of Appeals will hear arguments in the New York Civil Liberties Union lawsuit against the state and five counties for their failure to provide meaningful and effective public defense representation. In July 2009, the Third Department, in a 3-2 decision, reversed the Albany County Supreme Court’s denial of the defendant’s motion to dismiss and dismissed the plaintiffs’ complaint. *See Hurrell-Harring v State of New York*, 883 NYS2d 349 (3d Dept 2009). ([www.nysda.org/09\\_June-AugREPORT.pdf](http://www.nysda.org/09_June-AugREPORT.pdf))

The NYCLU’s plaintiffs-appellants’ brief and reply brief are available at <http://www.nyclu.org/node/1807>. NYSDA submitted an amicus brief in support of the plaintiffs’ appeal, which was written by Staff Attorney Al O’Connor. Some others submitting amicus briefs in support of the plaintiffs include:

- National Association of Criminal Defense Lawyers and Moskowitz, Book & Walsh, LLP (joined by the New York State Bar Association, New York State Association of Criminal Defense Lawyers, New York

County Lawyers' Association, law centers at Fordham University School of Law, Cardozo School of Law, Pace University School of Law, and CUNY School of Law, and 40 New York law professors);

- The Fund for Modern Courts (brief by Wilkie, Farr & Gallagher, LLP); and
- Brennan Center for Justice and Richards, Kibbe & Orbe LLP (signed by 62 former New York prosecutors).

## **Public Defender Loan Forgiveness**

### **John R. Justice Prosecutors and Defenders Incentive Act**

President Obama recently signed the Consolidated Appropriations Act of 2009, which includes \$10,000,000 in funding for the John R. Justice Prosecutors and Defenders Incentive Act (PL 110-315, § 951). The Act will provide student loan relief to full-time state and local prosecutors and public defenders. Attorneys receiving loan repayment assistance under the Act must sign a written agreement promising to remain employed as a prosecutor or public defender for at least three years, unless involuntarily discharged. Now that an appropriation has been made for the program, the U.S. Department of Justice must adopt regulations governing the administration of the program. The Backup Center will notify the public defense community when the program is implemented. More information about Act, including information on eligibility criteria, loans that qualify for the program, and the terms of the written agreement, is available at [www.nlada.org/Defender/Defender\\_ACCD/John%20R%20Justice](http://www.nlada.org/Defender/Defender_ACCD/John%20R%20Justice).

### **Loan Forgiveness in New York State**

As previously discussed in the *REPORT*, in 2009, New York State expanded the district attorney loan forgiveness program to include public defense and civil legal services attorneys. In 2009, 269 public defense and civil legal services attorneys applied for loan forgiveness. Most, if not all, applicants who were found to be eligible for the program received payment from the New York State Higher Education Services Corporation by early December. Recipients with questions about the tax implications of loan forgiveness payments should contact the New York State Division of Taxation and Finance. NYSDA is interested in receiving comments about the eligibility criteria and the application process from public defense attorneys and employers; comments should be sent to Staff Attorney Susan Bryant at the Backup Center.

The proposed 2010-2011 executive budget includes an appropriation of \$2,700,000 for the loan forgiveness pro-

gram. As mentioned above, Governor Paterson has also proposed an amendment to the Loan Forgiveness Law, Education Law 679-e. The application deadline for 2010 is expected to be October 1, 2010. The Backup Center will notify the public defense community when the applications are made available.

## **NYSDA's Executive Director Testifies About the Future of Civil Legal Services in New York State**

On January 7, 2010, Jonathan Gradess, NYSDA's Executive Director, testified before the New York State Senate Standing Committees on Crime Victims, Crime and Corrections, Judiciary, Codes, and Veterans and Military Affairs about IOLA and the Future of Civil Legal Services in New York State. Gradess testified that public defense clients are often the same people who need civil legal services, and that the fragmentation of legal assistance prevents these individuals from getting the legal help they need. He described an idea that NYSDA put forward in a 1985 article for *The Defender*: "a new public advocacy model that would maximize the interaction between civil and criminal units of offices offering legal services to the poor." This entity "would be a stable, state-level entity that could function as an advocate for poor people's legal services in criminal and civil matters, oversee delivery of such legal services, and be the conduit for disbursing funds (to legal services programs, legal aid offices, volunteer lawyer programs, etc.) with real client accountability." He also urged the State to replace funding for civil legal services lost due to a decline in IOLA. Gradess' written testimony is available on NYSDA's website at [www.nysda.org](http://www.nysda.org).

## **Training on Immigration Consequences of Criminal Convictions**

Joanne Macri, Director of NYSDA's Criminal Defense Immigration Project (CDIP), has been providing training at public defense offices and county bar associations throughout the state regarding the immigration consequences of criminal convictions. Attorneys with questions about immigration consequences are encouraged to contact her at 716-913-3200 or by calling the Backup Center. Working with NYSDA's CDIP is the Immigrant Defense Project (IDP), which also offers valuable information and assistance to attorneys about these issues; the IDP can be reached at 212-725-6422 or [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org). ☺

# Conferences & Seminars

**Sponsor:** National Legal Aid & Defender Association  
**Theme:** Life in the Balance 2010  
**Dates:** March 6-9, 2010  
**Place:** Nashville, TN  
**Contact:** NLADA: tel (202) 452-0620; website [www.nlada.org](http://www.nlada.org)/  
Training

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**Sponsor:** **New York State Defenders Association**  
**Theme:** **24th Annual Metropolitan Trainer**  
**Date:** **March 13, 2010**  
**Place:** **NYU Law School, New York City**  
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249;**  
**email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)**

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**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** DWI Update: Effective Representation and Successful Defenses  
**Date:** March 20, 2010  
**Place:** Buffalo, NY  
**Contact:** NYSACDL: tel (212) 532-4434; website [www.nysacdl.com](http://www.nysacdl.com)

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**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Making Sense of Science III: Forensic Science & the Law  
**Dates:** March 26-27, 2010  
**Place:** Las Vegas, NV  
**Contact:** NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email [gerald@nacdl.org](mailto:gerald@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

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**Sponsor:** **New York State Defenders Association**  
**Theme:** **Criminal Defense Tactics and Techniques XII**  
**Date:** **April 10, 2010**  
**Place:** **Rochester, NY**  
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249;**  
**email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)**

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**Sponsor:** New York State Bar Association  
**Theme:** Practical Skills—Family Court Practice  
**Dates:** April 13-14, 2010  
**Places:** April 13: Albany, New York City, Mt. Kisco, and Rochester;  
April 14: Amherst, Melville, and Syracuse  
**Contact:** NYSBA: tel (518) 487-5600; website [www.nysba.org](http://www.nysba.org)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Litigating Non-DNA Post-Conviction Innocence Cases  
**Date:** April 15, 2010  
**Place:** Atlanta, GA  
**Contact:** NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email [gerald@nacdl.org](mailto:gerald@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

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**Sponsor:** **New York State Defenders Association**  
**Theme:** **Family Court Trainer**  
**Date:** **April 24, 2010**  
**Place:** **Rochester, NY**  
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249;**  
**email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)**

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**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Rock & Roll Defenses: Singing the Tune of Victory in Street Crime Cases  
**Dates:** April 28-May 1, 2010  
**Place:** Memphis, TN  
**Contact:** NACDL: tel (202) 872-8600 x232 (Viviana Sejas); email [viviana@nacdl.org](mailto:viviana@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

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**Sponsor:** National Defender Training Project  
**Theme:** 2010 Public Defender Trial Advocacy Program  
**Dates:** June 4-9, 2010  
**Place:** Dayton, OH  
**Contact:** NDTP (Ira Mickenberg): tel (518) 538-6730; email [imickenberg@nycap.rr.com](mailto:imickenberg@nycap.rr.com)

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**Sponsor:** **New York State Defenders Association**  
**Theme:** **Defender Institute Basic Trial Skills Program**  
**Dates:** **June 13-19, 2010**  
**Place:** **Troy, NY**  
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249;**  
**email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)**

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**Sponsor:** **New York State Defenders Association**  
**Theme:** **43rd Annual Meeting & Conference**  
**Dates:** **July 25-27, 2010**  
**Place:** **Saratoga Springs, NY**  
**Contact:** **NYSDA: tel (518) 465-3524; fax (518) 465-3249;**  
**email [dgeary@nysda.org](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)**

# Job Opportunities

The Legal Aid Society seeks a **Prison Advocacy Staff Attorney**. The Criminal Practice of the Legal Aid Society has a temporary opening for an attorney to do cutting edge habeas corpus and Article 78 work challenging prison disciplinary determinations and other regulatory deprivations of the rights of individual prisoners. The staff attorney will handle the "Writ Calendar" at Rikers Island Judicial Center representing inmates on their pro se petitions, will file amended petitions in appropriate cases and can organize and direct test case and affirmative litigation surrounding issues of prison discipline and classifications. The attorney will work with the assistance of the Special Litigation Unit and the Prisoners' Rights Project and will work with an experienced paralegal. The attorney will be based in both Rikers Island and New York County. Essential duties: responsible for handling all case appearances, motion practice, negotiations, and hearings in their cases and directing investigations. Qualifications: strong writing skills; broad knowledge of criminal law and strong constitutional and civil rights background necessary; knowledge of habeas and Article 78 practice and disciplinary rules and procedures a plus; interest in civil rights and the ability to work independently; access to an automobile a plus. To apply, send résumé and cover letter to: LBerrios@legal-aid.org or fax to (646) 616-4072. EOE. Women, people of color, gays and lesbians, transgender people, veterans, and people with disabilities are encouraged to apply. For more information, visit [www.legal-aid.org/en/las/careers.aspx](http://www.legal-aid.org/en/las/careers.aspx).

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@silnyc.org](mailto:ngoldhill@silnyc.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](http://www.legalservicesnyc.org).

The National Legal Aid and Defender Association seeks a **Vice President of Defender Legal Services**. The Vice President for Defender Legal Services reports to the President and CEO of NLADA and is responsible for the overall vision and leadership of the DLS Division: demonstrates a commitment to NLADA's mission; leads the division in strategic thinking and planning; leads resource development strategies by increasing funding and program initiatives; maintains a respect for diversity, collaboration, and inclusion for the defender departments, public defender member groups, and client groups; and maintains an attitude of innovation and entrepreneurship for the division and NLADA. The Vice President is also responsible for client members for DLS, leading the Client Policy Group, creating programs and leadership opportunities for clients and identifying funding which supports the client initiative. Experience and Education: ten years of overall experience in the provision of legal assistance and the management of a program that provides civil and/or criminal defense services to indigents; five years of experience managing a legal services program or substantial unit within a legal services program; ten years of supervising and

managing a staff; ten years of progressively responsible supervisory, budgetary, and administrative experience; and attorney admitted to practice before the highest court of a state, the District of Columbia, the Virgin Islands, or the Commonwealth of Puerto Rico. To apply, send a cover letter, résumé, and salary requirements to Persephone Robinson, Human Resources, [p.robinson@nlada.org](mailto:p.robinson@nlada.org). Applicants accepted until the position is filled. Candidates who do not have all the required information will not be considered. Candidates are also requested to state where they viewed the job advertisement in their applications. Only candidates selected for an interview will be notified. EOE. For more information, visit [www.nlada.org/Jobs/Job\\_Search\\_Detail?job\\_id=job\\_1005832](http://www.nlada.org/Jobs/Job_Search_Detail?job_id=job_1005832).

The Virginia Indigent Defense Commission is accepting applications for the position of **Deputy Capital Defender** in the Office of the Capital Defender for Southeastern Virginia. The Deputy Capital Defender reports to the Capital Defender and is employed at will. Qualifications: licensed attorney who is either admitted, or eligible for admission, to the Virginia State Bar; significant criminal defense experience; commitment to working with clients in poverty; commitment to excellent in the provision of capital defender services; creativity and energy in approaching indigent defense and capital representation; strengths in team work, client relations, and relationship building; skill and experience in written and oral advocacy; and a valid driver's license, with the ability and willingness to travel within and without the state, including travel to courts and various correctional institutions. Preferred qualifications: experience in capital defense work; qualified to serve as counsel or co-counsel in capital trials; experience or training concerning mental health issues associated with the criminal justice system; experience working with disadvantaged client groups; computer literacy, including but not limited to, the use of Microsoft Office applications, as well as spreadsheet, database programs, and case management software; and Spanish language fluency. To apply, send a completed state application, cover letter with attached legal writing sample, résumé, and references online to Virginia State Job's website, [jobs.virginia.gov](http://jobs.virginia.gov). For more information, visit [www.indigentdefense.virginia.gov/career.htm](http://www.indigentdefense.virginia.gov/career.htm). ♪

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

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

## United States Supreme Court

Death Penalty (States [Indiana]) DEP; 100(155[o])

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

Corcoran v Levenhagen, 558 US \_\_, 130 Sct 8 (2009)

The petitioner was convicted of capital murder in Indiana. After unsuccessfully pursuing state post-conviction relief, he filed a federal habeas petition, arguing: (1) the trial court committed various errors at the sentencing phase; (2) his sentence violated the Sixth Amendment; (3) Indiana's capital sentencing statute was unconstitutional; (4) the prosecution committed misconduct at sentencing; and (5) he should not be executed because he suffers from a mental illness. The District Court granted the motion based on the Sixth Amendment violation, ordered the state court to resentence him to a penalty other than death, and considered the other arguments moot. The Circuit Court reversed and, without mentioning the other sentencing claims, remanded for reinstatement of death sentence. The petitioner sought rehearing, arguing that the district court should be allowed to consider his other claims, but the Circuit Court denied rehearing without referring to the undecided claims.

**Holding:** The Circuit Court erred in disposing of the petitioner's other claims without providing an explanation. The court should have allowed the district court to review those claims or explained why it was not necessary. Nothing in the court's decision suggested that the claims were waived or that they were frivolous. Judgment vacated and case remanded.

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

Death Penalty (Penalty Phase) (States [Ohio]) DEP; 100(120) (155[jj])

Bobby v Van Hook, 558 US \_\_, 130 Sct 13 (2009)

The respondent was convicted of capital murder and sentenced to death. During the penalty phase, his defense counsel called eight mitigating witnesses. The conviction was affirmed on appeal and the state courts denied post-conviction relief. The district court denied the respondent's federal habeas petition, but a panel of the Circuit

Court reversed, finding that his confession was unconstitutionally obtained. The en banc court vacated the ruling and remanded to the panel to consider his other claims. The panel granted habeas relief, concluding that he received ineffective assistance of counsel during the penalty phase, but the en banc court again vacated the panel's opinion and remanded for the panel to revise its opinion. Relying on the 2003 ABA death penalty representation guidelines, the panel granted habeas relief on the ground that his attorneys were deficient in investigating and presenting mitigating evidence.

**Holding:** The court erred in applying the 2003 ABA guidelines to the representation the respondent received 18 years earlier. "Restatements of professional standards . . . can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." *Strickland v Washington*, 466 US 668, 688 (1984). The ABA standards in effect at the time of the respondent's trial described defense counsel's duty to investigate the mitigating circumstances in general terms; in contrast, the 2003 guidelines provide an extensive discussion of the duty to investigate mitigating evidence. The court incorrectly treated the guidelines as "inexorable commands" that defense counsel must follow, instead of as evidence of what reasonably diligent attorneys would do. The respondent's attorneys started their mitigation investigation not long after his indictment, contacting family members, expert witnesses, and the Veteran's Administration, and the scope of the investigation was not unreasonable. Even if the respondent's attorneys were deficient by not investigating further, he did not suffer any prejudice. The affidavits of witnesses who were not interviewed show that their testimony would not have added anything of value. Judgment reversed and case remanded.

**Concurrence:** [Alito, J] "It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination."

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

Death Penalty (Penalty Phase) (States [California]) DEP; 100(120) (155[e])

Wong v Belmontes, 558 US \_\_, 130 Sct 383 (2009)

The respondent was convicted of murder and sentenced to death. His conviction was affirmed on appeal and during state collateral review. The district court denied his federal habeas petition, but the Circuit Court reversed because of instructional error. This Court reversed and remanded. On remand, the Circuit Court

US Supreme Court *continued*

held that the respondent received ineffective assistance of counsel during the penalty phase.

**Holding:** Even assuming that his attorney’s performance was constitutionally deficient, the respondent failed to show prejudice. To prevent the prosecution from introducing evidence that the respondent admitted to committing another murder, his attorney obtained a court order that allowed the prosecution to tell the jury only that the respondent was convicted of being an accessory after the fact to voluntary manslaughter. The court told the respondent’s attorney that evidence of the other murder could be introduced for rebuttal or impeachment purposes. In determining whether there is a reasonable probability that the jury would have rejected a capital sentence, this Court must examine and compare the entire body of mitigating evidence that could have been presented against the entire body of aggravating evidence, including evidence of the other murder. Some of the mitigating evidence that could have been introduced was cumulative, and had his attorney introduced certain mitigating evidence, it would have opened the door to the additional aggravating evidence. Judgment reversed and case remanded.

**Concurrence:** [Stevens, J] The attorney’s failure to present additional mitigating evidence probably did not affect the outcome of the trial since the jury’s mistaken understanding of the law based on then-permissible instructions would have prevented them from giving the additional evidence “any weight at all.”

Counsel (Competence/Effective Assistance/Adequacy)	COU; 95(15)
Death Penalty (Penalty Phase) (States [Florida])	DEP; 100(120) (155[jj])

Porter v McCollum, 558 US \_\_, 130 Sct 447 (2009)

The petitioner, a decorated Korean War veteran, was convicted of first-degree murder and sentenced to death. He represented himself, with standby counsel, during the pretrial proceedings and the beginning of the trial. After he pleaded guilty, the court granted his request for counsel and appointed his standby counsel. His attorney presented inconsistent mitigating testimony and did not put on evidence related to his mental health. During a state post-conviction evidentiary hearing, the petitioner presented evidence of his abusive childhood, heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity. The state courts denied the post-conviction petition, finding that he was not prejudiced by the failure to introduce that evidence. The district court granted his habeas petition, concluding that his attorney’s fail-

ure to discover and present certain mitigating evidence violated his right to counsel. The circuit court reversed.

**Holding:** The petitioner’s counsel was deficient, the petitioner was prejudiced by the deficient performance, and the state court unreasonably applied *Strickland v Washington* (466 US 668 [1984]) in rejecting his ineffective assistance claim. See 28 USC 2254(d). The petitioner’s attorney failed to satisfy the prevailing professional norms at the time of the trial, which required a thorough investigation of the petitioner’s background. See *Williams v Taylor*, 529 US 362, 396 (2000). Counsel had one short meeting with him regarding the sentencing phase, did not obtain his school, medical, or military service records or interview his family, and ignored relevant avenues for investigation of which he should have been aware. See *Wiggins v Smith*, 539 US 510, 524, 525 (2003). Even if the petitioner was fatalistic or uncooperative, his counsel was required to conduct a mitigation investigation. See *Rompilla v Beard*, 545 US 374, 381-382 (2005). Had the petitioner’s attorney been effective, he would have presented evidence of the petitioner’s heroic military service, his struggles to regain normality when he returned home, his childhood physical abuse, and his brain abnormality, difficulty reading and writing, and limited education. See *Penry v Lynaugh*, 492 US 302, 319 (1989). There is a reasonable probability that the sentence would have been different had the attorney presented this mitigating evidence. Judgment reversed and case remanded.

Search and Seizure (Entries and Trespasses) (Warrantless Searches)	SEA; 335(35) (80)
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Michigan v Fisher, 558 US \_\_, 130 Sct 546 (2009)

Police officers responded to a complaint that a man was going crazy inside a house. Upon arrival, they found a damaged truck, broken house windows, and blood on the truck’s hood, the clothes inside of it, and on a door to the house. Through a window, they saw the respondent screaming and throwing things. After he refused to open the door, demanded they get a search warrant, and ignored their questions, one officer pushed the front door open and went inside. When the officer saw the respondent pointing a gun at him, the officer withdrew. The respondent was charged with assault with a dangerous weapon and possession of a firearm. The trial court granted his motion to suppress the evidence obtained as a result of the illegal entry. The state court of appeals affirmed. The Michigan Supreme Court denied leave to appeal.

**Holding:** The officer’s entry did not violate the Fourth Amendment because it fell within the exigent circumstances exception to the warrant requirement. The police may enter a home without a warrant to render emergency aid to an injured occupant or to protect an occupant from imminent injury, so long as there is an

US Supreme Court *continued*

objectively reasonable basis for believing such aid is necessary. See *Brigham City v Stuart*, 547 US 398, 403, 404-405 (2006); *Mincey v Arizona*, 437 US 385, 392 (1978). The officers responded to a report of a disturbance and upon their arrival found a tumultuous situation in the house. They also found signs of a recent injury and they witnessed the respondent's violent behavior. It was objectively reasonable to believe that the respondent hurt himself and needed treatment that his rage prevented him from providing or that he was about to hurt or already did hurt someone else. Judgment reversed.

**Dissent:** [Stevens, J] Even assuming the trial court erred in granting the suppression motion, the Court should not “micromanag[e] the day-to-day business of state tribunals making fact-intensive decisions of this kind. We ought not usurp the role of the factfinder when faced with a close question of reasonableness of an officer's actions, particularly in a case tried in a state court.”

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

Forfeiture (General) FFT; 174(10)

*Alvarez v Smith*, 558 US \_\_, 130 Sct 576 (2009)

Six individuals filed a federal civil rights action against the city of Chicago, its police superintendent, and the state's attorney alleging that the state's failure to provide a speedy hearing after the police seized their property violated the federal Due Process clause. The plaintiffs claimed that the police, upon their arrests, seized their cars or cash without a warrant. The police still had custody of the property when the suit was filed. The district court granted the defendants' motion to dismiss. The circuit court reversed and remanded. After the Supreme Court granted certiorari, the circuit court recalled its mandate. At oral argument, both sides confirmed that the parties no longer disputed the ownership or possession of the property.

**Holding:** Because there is no longer an actual controversy between the parties, this Court does not have the authority to decide the case. See US Const, Art III, § 2; *Preiser v Newkirk*, 422 US 395, 401 (1975). The issue of the legality of the State's hearing procedures is moot because it is not part of an actual controversy about the plaintiffs' particular legal rights. See *Lewis v Continental Bank Corp*, 494 US 472, 477 (1990). It is irrelevant that the plaintiffs sought certification as a class; even if the class might contain members who have continuing ownership disputes, the district court denied the certification motion and the plaintiffs did not appeal that denial. Because this case falls within the category of mootness through “happenstance,” vacatur is appropriate. See *US Bancorp Mortgage Co v*

*Bonner Mall Partnership*, 513 US 18, 26 (1994). This decision does not prevent the plaintiffs from bringing a claim for damages against the defendants. See *United States v Munsingwear, Inc*, 340 US 36, 40 (1950). Judgment vacated and case remanded with instructions to dismiss.

**Concurrence in Part, Dissent in Part:** [Stevens, J] Although the case is moot, the judgment should not have been vacated because the defendants' action caused the mootness and they failed to show equitable entitlement to vacatur. See *Bancorp*, 513 US at 26. And vacatur is not appropriate because the Court was hasty in granting certiorari.

Appeals and Writs (Scope and Extent of Review) APP; 25(90)

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

*Beard v Kindler*, 558 US \_\_, 130 Sct 612 (2009)

The respondent was convicted of capital murder. The trial court dismissed his postverdict motions because he escaped from prison before the motions were decided. When he was back in custody, the respondent moved to reinstate his motions. The trial court denied the motion, concluding that the dismissal was not an abuse of discretion, and the state supreme court affirmed. The respondent's state habeas petition was denied. The district court granted the respondent's federal habeas petition, concluding that the state's fugitive forfeiture rule did not provide an adequate basis to bar federal review of his claims and that he was sentenced based on unconstitutional jury instructions and that the prosecutor improperly introduced an aggravating factor at sentencing. The circuit court affirmed.

**Holding:** Discretionary procedural rules, such as Pennsylvania's fugitive forfeiture rule, are not automatically inadequate to bar federal habeas review. Adequacy is based on whether the state rule is firmly established and regularly followed. See *Lee v Kemna*, 534 US 362, 376 (2002). “[A] discretionary rule can be ‘firmly established’ and ‘regularly followed’—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others. See Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1140 (1986) . . . .” If discretionary procedural rulings were automatically inadequate, it is likely that many states would choose to withhold discretion to preserve the finality of state court judgments, which would be detrimental to criminal defendants. Judgment vacated and case remanded.

**Concurrence:** [Kennedy, J] “It is most doubtful that, in light of its underlying purposes, the adequate state ground doctrine ought to prevent a State from adopting, and enforcing, a sensible rule that the escaped felon forfeits any pending postverdict motions.” And this Court cannot and should not require federal courts to disregard a state procedural rule that was not explicit before the case

**US Supreme Court** *continued*

in which it was first announced, without proof of “a purpose or pattern to evade constitutional guarantees.”

**New York Court of Appeals**

Evidence (Business Records)	EVI; 155(15)
Forensics (General)	FRN; 173(10)
Witnesses (Confrontation of Witnesses) (Cross Examination) (Experts)	WIT; 390(7) (11) (20)

**People v Brown**, 13 NY3d 332, 890 NYS2d 415 (2009)

The Office of the Chief Medical Examiner (OCME) sent a rape kit to a private subcontractor, Bode Technology, for testing. Bode produced a DNA report containing characteristics that were entered into the Combined DNA Index System. A database search registered a cold hit linking the defendant’s DNA to the rape kit profile. An OCME forensic biologist then compared the defendant’s DNA to the rape kit profile and concluded that they were a match. She then testified about her experience and the testing protocols used by all accredited labs, including Bode. The court denied defense counsel’s objection to the introduction of the Bode report as a business record. The defendant was convicted of first-degree sodomy and other offenses. The Appellate Division affirmed.

**Holding:** The defendant’s Sixth Amendment right to confrontation was not violated by the introduction of the Bode report through the testimony of the OMCE biologist because the report was not testimonial. Unlike *Melendez-Diaz v Massachusetts* (129 SCt 2527 [2009]), the prosecution called the forensic biologist who performed the actual analysis of the defendant’s DNA profile and the profile found in the rape kit. The Bode report “was not ‘testimonial’ under such circumstances because it consisted of merely machine-generated graphs, charts and numerical data. There were no conclusions, interpretations or comparisons apparent in the report since the technicians’ use of the typing machine would not have entailed any such objective analysis.” See *People v Meekins*, 10 NY3d 136. There is no evidence that the results of the Bode testing could have been tainted by a pro-law enforcement bias to inculcate the defendant; the report was generated before the defendant was a suspect; OCME and Bode are not law enforcement entities; and the OCME witness testified that any incompetence by Bode technicians would not have led to charges against the defendant. The OCME witness’ testimony provided a sufficient basis for introducing the report under the business records rule, CPLR 4518. The witness testified that she relied on the Bode report as a matter of practice, she was familiar with Bode’s proce-

dures and protocols, and that those procedures were reliable, Bode had a duty to create such reports, and the reports were made contemporaneously and in the regular course of business. See *People v Cratsley*, 86 NY2d 81, 89. Order affirmed.

Misconduct (Prosecution)	MIS; 250(15)
Witnesses (Credibility)	WIT; 390(10)

**People v Colon**, 13 NY3d 343, 890 NYS2d 424 (2009)

At the defendants’ joint murder trial, two prosecution witnesses testified that the defendants admitted they were involved in the shooting. The first witness, Vera, testified that the only benefit he received for his testimony was a plea deal in his misdemeanor drug case, which allowed him to plead to disorderly conduct and avoid jail time for a probation violation. He also testified on direct that the prosecutor was not involved in the resolution of his 1992 felony drug charges. The second witness, Core, was facing life imprisonment in a murder case and had pending federal drug conspiracy charges. He testified that he signed cooperation agreements with the state and federal prosecutors hoping to receive reduced sentences in those cases. Core also testified that he had committed numerous murders and had lied to a grand jury in another case. During summation, the prosecutor repeated Vera’s statements about the benefit he received for his testimony and stressed that she had nothing to do with his felony drug case. During a later CPL 440.10 hearing, the prosecutor admitted to helping relocate Vera’s grandparents, being involved with Vera’s felony drug case on two occasions, and having knowledge of Vera’s gun possession for which he was not arrested or prosecuted. The prosecution also produced handwritten notes relating to her interviews of two women who claimed to know who participated in the shooting; these notes were not disclosed to the defense prior to trial. The court denied the motion and the Appellate Division affirmed.

**Holding:** The prosecutor breached her duty to correct Vera’s knowingly false or mistaken material testimony. See *People v Steadman*, 82 NY2d 1, 7. The prosecutor herself elicited the incorrect testimony, failed to correct it, and compounded the errors by repeating and emphasizing the misinformation during summation. Because there is a reasonable possibility that the errors affected the jury’s verdict (see *People v Vilardi*, 76 NY2d 67, 77), the defendants are entitled to a new trial. See *People v Pressley*, 91 NY2d 825, 827. Vera was one of only two witnesses who connected the defendants to the shooting, and the other witness had serious credibility problems. Because jurors may question the veracity of a witness who received a benefit for testifying, witnesses must be truthful about the receipt of such benefits and the prosecution “must be vigilant to avoid misleading the court or jury.” The prosecution

## NY Court of Appeals *continued*

should have turned over the two interview notes to defense counsel. Orders reversed, CPL 440.10 motions granted, convictions and sentences vacated, and a new trials ordered.

Housing (Homeless) HOS; 186(20)

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

*People v Alemany*, 13 NY3d 424, \_\_ NYS2d \_\_ (2009)

At the defendant's Sex Offender Registration Act (SORA) risk assessment hearing, the prosecution successfully sought to have him classified as a level two risk, based on a total Risk Assessment Instrument (RAI) score of 75 points. That score included 10 points for risk factor 15, inappropriate living situation. A pre-arraignment interview report and the presentence report stated that the defendant had been homeless for two years, was unemployed, was unable to provide the name of a shelter where he was living, and appeared to have minimal community ties. The Appellate Division reduced the defendant's classification to level one.

**Holding:** Courts may properly assess points under risk factor 15 "where there is clear and convincing evidence that the defendant is undomiciled and lacks any history of living in shelters or community ties." This is not a per se rule that requires an assessment of points for all homeless sex offenders; courts must examine each case individually. The commentary to the SORA Guidelines expands on the meaning of "inappropriate," noting that sex offenders' "likelihood of reoffending increases when their release environment gives them access to victims or a reduced probability of detection." Offenders with no address, who do not live in shelters or participate in community programs, and are unemployed present a reduced probability that law enforcement will be able to discover or investigate future crimes, to connect them to those crimes, or to apprehend them. The hearing record provides clear and convincing evidence that the defendant's living situation falls within risk factor 15. Defense counsel's understanding that the defendant was advised to go to the Bellevue men's shelter upon release does not negate the uncertainty of the defendant's living situation. Order reversed and order of the Supreme Court reinstated.

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

Harmless and Reversible Error (Harmless Error) HRE; 183.5(10)

*People v Gillyard*, 13 NY3d 351, \_\_ NYS2d \_\_ (2009)

The defendant was convicted of second-degree robbery, fourth-degree grand larceny, and first- and second-degree criminal impersonation based on two incidents in which he impersonated a police officer. Over defense counsel's objections, the court granted the prosecution's *Molineux* application (*People v Molineux*, 168 NY 264), and allowed testimony that the defendant was found in possession of a handcuff key while he was incarcerated pending trial. The court denied the defendant's motion to set aside the verdict. The Appellate Division affirmed.

**Holding:** The court erred in admitting the handcuff key evidence because its probative value was outweighed by its potential for prejudice. *See People v Richardson*, 137 AD2d 105, 108. The defendant's familiarity with handcuff keys has little relevance to the case. During the first incident, the defendant did not use the handcuffs on the complainant and the complainant's testimony made it clear that the evidence was not relevant to show that he was convincing as a police officer. Handcuffs were not involved in the second incident; the police found toy handcuffs in the defendant's car during a search. However, admission of the key was harmless error in light of the overwhelming evidence of guilt. *See People v Crimmins*, 36 NY2d 230, 241-242. Order affirmed.

Trial (Summations) TRI; 375(55)

Witnesses (Cross Examination) (General) WIT; 390(11) (22)

*People v Henderson*, 13 NY3d 844, \_\_ NYS2d \_\_ (2009)

The defendant was convicted of attempted first-degree assault for attacking a fellow inmate at Rikers Island. Two guards testified that they saw the defendant attack the other inmate. At trial, the inmate testified for the defendant and denied that the defendant was involved. On cross-examination, the prosecution challenged the veracity of the inmate's testimony. The inmate admitted that he signed a written statement asserting that he did not know who attacked him and that he was in a holding cell with the defendant a week before his testimony, after which he spoke to defense counsel for the first time. When the prosecution asked him a question about inmates who testify against other inmates, he insisted that he was not intimidated by the defendant. The court denied the defendant's motion to set aside the verdict and his CPL 440.10 motion. The Appellate Division affirmed the judgment and 440.10 order.

**Holding:** The prosecutor's cross-examination questions reasonably challenged the inmate's credibility and motives for his testimony, including intimidation or fear of reprisal. The timing of the inmate's decision to testify for the defendant was relevant in this regard. And the prosecutor's summation comments were a fair response to defense counsel's closing argument, in which he asked

NY Court of Appeals *continued*

why none of the inmates in the room said that the defendant was involved in the incident. The prosecutor suggested other possible reasons other than the defendant's innocence, including fear or retaliation or adherence to a code of silence. Order affirmed.

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

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

Walton v New York State Department of Correctional Services, 13 NY3d 475, \_\_ NYS2d \_\_ (2009)

Between 1996 and 2007, the respondent, Department of Correctional Services (DOCS), contracted with MCI Worldcom Communications (MCI) for the provision of telephone services in state prisons. MCI charged recipients of inmate collect calls a certain rate and paid a percentage of the revenues generated on each call to DOCS as a commission. The petitioners, family members and legal services providers of inmates incarcerated in DOCS facilities, brought a combined declaratory judgment and CPLR article 78 action alleging that the commission constituted an illegal tax or fee, amounted to a government taking without just compensation, and violated the petitioners' equal protection and free speech and association rights. The court dismissed the complaint and the Appellate Division affirmed.

**Holding:** The petitioners failed to state cognizable claims under the New York State Constitution. The commission DOCS received was not an illegal tax or fee imposed on MCI because it was part of a permissible category of government activity, *ie*, contractual arrangements with the private sector. And the commission was not transformed into a tax when MCI passed the cost on to call recipients. That DOCS did not compel the petitioners to purchase services from MCI and DOCS' inability to collect the commission from the call recipient support the conclusion that it was not a tax. And the petitioners' claim would be barred because they failed to pay the rate under protest. *See Video Aid Corp v Town of Wallkill*, 85 NY2d 663. The takings claim fails because the petitioners were not compelled to pay anything to DOCS or MCI, nor was their property confiscated by the state. And the petitioners received telephone services in exchange for their payments, which were not exorbitant from a market perspective. The free speech and association claims were properly dismissed because the petitioners did not allege that the commission was so high that it substantially impaired the limited right of inmates to contact and associate with family or legal service providers and that the commission did not have a reasonable relationship to legitimate penological aims. The equal protection claim was properly dis-

missed because there was no showing that DOCS treated two similarly-situated classes of individuals differently; there is no category of individuals similarly situated to the petitioners. Order affirmed.

**Concurrence:** [Read, J] The petitioners' claims were barred by the filed rate doctrine. *See Arkansas Louisiana Gas Co v Hall*, 453 US 571, 577-578 (1981).

**Dissent:** [Smith, J] The petitioners' constitutional claims were meritorious. "[W]here, as in this case, the State has leveraged its police power for a profit, enough coercion is present to make the transaction involuntary—a tax, not an innocent marketplace exchange."

Lesser and Included Offenses (Definition) (General) LOF; 240(5) (7)

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

People v Davis, No. 172, 11/24/2009

The defendant was charged with third-degree criminal sale of a controlled substance. The court instructed the jury on the defendant's agency defense, but declined to charge seventh-degree criminal possession of a controlled substance as a lesser included offense. The jury convicted the defendant and the Appellate Division affirmed.

**Holding:** Seventh-degree possession is not a lesser included offense of third-degree sale of a controlled substance, even when an agency defense is charged. A comparison of the two statutes shows that it is possible to commit the sale offense without committing the possession offense. *See People v Glover*, 57 NY2d 61, 63. Possession requires physical possession or dominion or control over the drugs, but "[o]ne need not have dominion or control over a drug in order to offer to sell it to someone else." An ability to proceed with the sale does not require proof of possession. *See People v Mike*, 92 NY2d 996, 998-999. This Court will not create an exception to the *Glover* rule in agency defense cases. Prosecutors have the discretion to decide whether to charge a defendant with possession initially. Order affirmed.

**Dissent:** [Jones, J] An exception to *Glover* is warranted in agency defense cases. *See People v Miller*, 6 NY3d 295. While it is theoretically possible to commit third-degree sale without also possessing the drugs, the chance of that happening is remote. Also, if the possession offense is not charged, the agency defense is undermined. And, since the agency defense requires a defendant to admit possession (*see People v Lam Lek Chong*, 45 NY2d 64, 74), a jury with only one choice may, "out of a belief that the defendant should be criminally liable for the offense admitted to, convict the defendant of a greater crime than the one actually committed."

NY Court of Appeals *continued*

Misconduct (Juror) MIS; 250(12)

Post-Judgment Relief (CPL § 440 Motion) (General) PJR; 289(15) (20)

People v Samandarov, 13 NY3d 433, \_\_ NYS2d \_\_ (2009)

The defendant was convicted of attempted murder. The court denied the defendant's CPL 330.30 motion to set aside the verdict based on juror misconduct and his later CPL 440.10 motion to vacate based on the prosecution's *Rosario* violation. The Appellate Division affirmed the conviction and the order denying the 440.10 motion.

**Holding:** The court acted within its discretion when it denied without a hearing the defendant's CPL 330.30 and 440.10 motions. The 330.30 motion was based on newspaper reports that the jurors knew there may be a connection between the attempted murder and the murder of the complainant's cousin and that those incidents may be tied to mob activities, as well as defense counsel's affidavit that the jury foreperson told his coworkers that the jurors talked about the defendant's mob involvement throughout the trial. Putting aside hearsay issues, while the evidence may have shown that the jurors speculated about the mob connections, it fails to show that the jurors received from outside the courtroom information about these issues. Therefore, there was no basis for impeaching the verdict. *See Alford v Sventk*, 53 NY2d 743, 744. The court did not abuse its discretion in denying the 440.10 motion without a hearing. The defendant alleged that the prosecution failed to disclose eyewitness interview notes and presented an affidavit from that witness in support of that allegation; however, that affidavit contained inconsistencies and the prosecution presented another affidavit from the witness explaining why the first affidavit was incorrect, as well as affidavits from the prosecutor and two district attorney office employees who confirmed the witness' second account. The court reasonably found that the prosecution's evidence that the witness was simply mistaken in his first affidavit was strong enough to make a hearing unnecessary. Order affirmed.

**Dissent in Part:** [Lippman, J] A hearing on the 440.10 motion was required because there were conflicting affidavits on a material matter and the credibility issues could not be summarily resolved. *See CPL 440.30*. Since the defendant articulated a factual basis for his assertion that the prosecutor committed a *Rosario* violation, the court had to determine whether the material existed (*see People v Poole*, 48 NY2d 144, 149), and it does not appear that the truth of the factual basis can be tested other than by an evidentiary hearing.

Juries and Jury Trials (Deliberation)

JRY; 225(25)

People v Tabb, 13 NY3d 852, \_\_ NYS2d \_\_ (2009)

**Holding:** "During deliberations, the jury sent a note to the trial court that asked for direction on, or an explanation of, 'the legal definition of self defense.' Nothing in the record indicates that the court informed defense counsel and the prosecutor about the contents of the note. In the absence of record proof that the trial court complied with its core responsibilities under CPL 310.30, a mode of proceedings error occurred requiring reversal (*see e.g. People v Kisoan*, 8 NY3d 129, 135 [2007]; *People v O'Rama*, 78 NY2d 270, 277 [1992])." Order reversed and new trial ordered.

Misconduct (Prosecution)

MIS; 250(15)

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

Trial (Summations)

TRI; 375(55)

People v Riback, 13 NY3d 416, \_\_ NYS2d \_\_ (2009)

The defendant, a pediatric neurologist, was charged with criminal conduct involving sexual contact with 14 of his young male patients. The jury convicted the defendant of 12 felonies and 16 misdemeanors. The court denied the defendant's CPL 440 motion. The Appellate Division affirmed the conviction and the denial of the 440 motion.

**Holding:** The court erred in allowing the prosecution's expert to define the term pedophilia and the central characteristics of pedophilia. The prosecutor used this testimony as a springboard for going beyond the evidence and the bounds of fair comment during his summation. The prosecutor linked the defendant to the word pedophilia. He also suggested that the defendant abused dozens of children, but that those crimes were not charged because the parents were understandably unwilling to put their children through a trial, despite the lack of evidence to support this suggestion and its irrelevance to the charges. And the prosecutor said that the jury only had to believe one of the child accusers in order to believe them all, which conflicted with the jurors' obligation to consider the defendant's guilt or innocence as to each individual charge. Although the court repeatedly sustained defense counsel's objections during the summation and directed the jury to disregard parts of it, "[a]fter a certain point, though, the cumulative effect of a prosecutor's improper comments during summation may overwhelm a defendant's right to a fair trial (*see People v Calabria*, 94 NY2d 519, 523 [2000])." And there is a reasonable possibility that the prosecutor's misconduct contributed to the verdict. Order reversed and new trial ordered.

NY Court of Appeals *continued*

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

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

People v Sanchez, 13 NY3d 554, \_\_ NYS2d \_\_ (2009)

The defendant, Sanchez, and his two friends had a disagreement with two men, the accusers in the first case. Sanchez attacked one of the accusers and one of his friends attacked the other man. Both accusers were also attacked by at least one of Sanchez’s other friends. All three were charged with gang assault, Penal Law 120.06, 120.07. The court instructed the jury that aiding persons did not have to share the principal’s specific criminal intent and that acquittal of one of the defendants did not require acquittal of all three. The jury convicted Sanchez and one codefendant of second-degree gang assault, but acquitted the other codefendant of that charge. The Appellate Division affirmed. In a separate case, the defendant, Mynin, and three others struggled with the decedent and the decedent was shot. The court instructed the jury that fewer than three people could be convicted of gang assault and that it is unnecessary for three or more of the defendants to have intent to cause physical injury. The jury convicted Mynin of second-degree gang assault, but acquitted the codefendants of all charges. The Appellate Division affirmed.

**Holding:** In a gang assault prosecution, the two or more persons actually present who aid the defendant do not need to share the defendant’s criminal intent. This does not mean that no mens rea is required of the aider; that issue is not before this Court. The element of “aided by two or more persons actually present” was modeled on the second-degree robbery statute, Penal Law 160.10(1), which requires that the defendant be “aided by another person actually present.” The robbery statute previously required that the defendant be aided by an accomplice. By eliminating the accomplice requirement, the legislature clearly intended to establish that the aider does not need to share the specific intent and culpability required for accomplice liability. The gang assault statute refers only to the defendant’s intent and not to his aiders. The aiders must be present and render aid to the defendant. And the statute’s legislative history supports this interpretation. The jury instructions in both cases were proper, and the verdict against Sanchez was supported by the evidence. Orders affirmed.

**Concurrence:** [Smith, J] For a gang assault conviction, the aiders must have at least the mental state required for a fourth-degree criminal facilitation conviction. See Penal Law 115.00(1). The courts charged that the aiders had to be “ready, willing and able” to help the defendant commit

the crime; willingness to help is a more culpable mental state than is necessary for a conviction.

**Dissent:** [Jones, J] The gang assault statutes require that all persons involved in the assault have the specific intent to cause physical injury. By not specifically negating the requirement of mental culpability, the legislature did not remove the requirement that “culpable mental states must be proven together with an ‘actus reus’ in order to constitute a crime.” See Penal Law 15.05.

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

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

People v Simms, No. 156, 12/1/2009

During the polling of the jury, juror no. 10 answered, “Well, it is my verdict, although I feel like I was pressured to make that decision.” When the court asked what she meant by the word “pressured,” the juror explained that the other jurors were standing up and yelling at her and “[a]fter eight hours of that you have to give in.” The court denied the defendant’s mistrial motions and his CPL 330.30 motion to set aside the verdict, concluding that it did not have jurisdiction to grant the motion because the claim was unpreserved. The Appellate Division reversed and ordered a new trial.

**Holding:** The juror’s response was unsure enough to require further inquiry, which the court did. See *People v Mercado*, 91 NY2d 960, 963. The court, however, erred in failing to “clear up whether there was ‘duress [arising] out of matters extraneous to the jury’s deliberations or not properly within their scope, although perhaps occurring within the jury room’ ([*People v Pickett*, 61 NY2d [773] at 775). Trial judges may not ‘violat[e] the secrecy of the jury deliberations’ (*id.* at 774), by they must insure that a verdict is not the product of actual or threatened physical harm. Further, the trial judge never dispelled the ambiguity created by juror number 10’s multiple responses during the jury poll by simply asking her, for example, whether she found defendant guilty beyond a reasonable doubt based on the evidence.” Order affirmed.

**Concurrence:** [Smith, J] While it was necessary for the court to question the juror about her equivocal response, the juror’s answer was sufficient to resolve the problem. The juror’s description of pressure made it clear that she was not coerced, but simply decided to give in to the other jurors’ strongly-expressed views, which is not enough to taint the verdict. Reversal is warranted, however, because the court erred in prohibiting attorney-client communications during a weekend break.

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

## NY Court of Appeals *continued*

Statute of Limitations (Computation of Period) (Tolling Of) SOL; 360(10) (20)

People v Ramos, No. 215, 12/15/2009

**Holding:** The five-year statute of limitations did not bar the prosecution. See CPL 30.10(2)(b). “Although the indictment was nearly 10 years after the incident, defendant’s whereabouts were ‘continuously unknown and continuously unascertainable,’ despite the reasonable diligence of the detectives assigned to the case, until his DNA profile from the rape kit taken from the victim was matched to DNA evidence taken from defendant pursuant to a subsequent incarceration (CPL 30.10[4][a][ii]; see also Executive Law §§ 995[7], 995-c[3]; *People v Seda*, 93 NY2d 307, 311 [1999]; *People v Brown*, \_\_ NY3d \_\_, 2009 Slip Op 08475 [2009]).” The defendant failed to preserve for review his claims that the extension of the statute of limitation in this case constituted an *ex post facto* law and that his sentencing as a persistent felony offender violated his due process rights. Order affirmed.

Trial (Confrontation of Witnesses) (General) TRI; 375(5) (15)

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

People v Wrotten, No. 199, 12/15/2009

After a hearing, the court found that because the 85-year-old accuser, who was living in California, was frail, unsteady on his feet, and had a history of coronary disease, he could not travel to New York without endangering his health; therefore, he was unavailable and could testify via video at trial. The defendant was convicted of second-degree assault. The Appellate Division reversed.

**Holding:** The court did not err in permitting the adult accuser living in another state to testify using real-time, two-way video after it found that his age and poor health prevented him from travelling to New York for the trial. The court’s inherent powers and Judiciary Law 2-b give the court the authority to fashion a procedure such as this one because it is consistent with constitutional, statutory, and decisional law. See *People v Ricardo B.*, 73 NY2d 228, 232-233. There is no explicit statutory prohibition regarding two-way televised testimony at trial, nor is there statutory authority that evinces a legislative policy proscribing such testimony. The defendant’s federal and state confrontation rights were not unconstitutionally impaired. See *Maryland v Craig*, 497 US 836, 850 (1990); *People v Cintron*, 75 NY2d 249, 253. All of the other elements of the confrontation rights were preserved in this case. The decision to excuse a witness’ presence in the courtroom should be weighed carefully; since it is an exceptional pro-

cedure to be used only in exceptional circumstances, it must be based on a case-specific finding of necessity. Since the Appellate Division did not address whether the court’s finding of necessity was based on clear and convincing evidence, that issue is not decided. Order reversed and case remitted for further proceedings.

**Dissent:** [Jones, J] Because there is no express legislative authorization permitting the complainant to testify via live two-way television, the court lacked the authority to admit the testimony. The exhaustive nature of the legislature’s grant of authority permitting courts to receive televised testimony under specific limited circumstances (see CPL article 65), provides a strong inference that the legislature intended to exclude such testimony under other circumstances; therefore, Judiciary Law 2-b(3) cannot be the basis for judicial authority to receive such testimony.

**Dissent:** [Smith, J] The defendant’s confrontation right was denied and there was no adequate excuse for the denial. Unlike *Craig* and *Cintron*, the harm to be prevented, protecting the health of an elderly witness from the stress of travel, could have been avoided without depriving the defendant of her confrontation right. “New York cannot deprive defendant of her constitutional right by its Legislature’s choice not to provide for a way of accommodating both that right and the witness’s legitimate interest.”

Trial (Confrontation of Witnesses) (Mistrial) TRI; 375(5) (30)

Witnesses (Credibility) (Cross Examination) (General) WIT; 390(10) (11) (22)

People v Hilts, No. 202, 12/17/2009

The defendant’s first trial ended in a hung jury. The prosecution’s main witness at that trial was a police informant. The informant did not appear for the second trial and the court allowed the prosecution to introduce his previous testimony, pursuant to CPL 670.10. The Appellate Division affirmed.

**Holding:** The defendant had a full and fair opportunity to cross-examine the informant at the first trial. The only information that existed at the time of the first trial that the prosecution did not disclose to the defendant was a conversation between the informant and the prosecutor, in which the informant asked the prosecutor for help in disposing of an unrelated criminal case. The prosecutor told the informant that, after the defendant’s trial, he would “revisit” the request with the office prosecuting that case. “Considering the large quantity of evidence impeaching the informant’s credibility that defendant had available—and used—at the first trial, the informant’s request and the prosecutor’s noncommittal response were immaterial as a matter of law.” And the record supports

NY Court of Appeals *continued*

the court’s finding that the prosecution could not locate the informant with due diligence. Order affirmed.

Counsel (Conflict of Interest) COU; 95(10)  
 Sentencing (Hearing) (Persistent Violent Felony Offender) SEN; 345(42) (59)

*People v Konstantinides*, No. 198, 12/17/2009

When the police tried to arrest the defendant, he forced G.T. to drive him away. He later fled on foot and fired a gun at the pursuing officers. An attorney, the defendant’s former employer, joined his other attorney for the trial. At trial, the prosecution told the court that L.T., G.T.’s wife, said that the defendant and his second attorney called her to try to get G.T. to testify that the gun was his and that the attorney offered her a bribe and threatened her. The prosecution asked the court to disqualify the attorney and stated that if the defendant pursued this defense, the attorney would be a possible witness. No further discussion about the matter appeared in the record and the attorney continued to represent the defendant. The defendant was convicted of criminal possession of a weapon, but was acquitted of kidnapping and the court dismissed the other charges. At sentencing, the court denied without a hearing the defendant’s challenges to the persistent violent felony offender statement. The Appellate Division affirmed.

**Holding:** The defendant failed to establish that the attorney’s conflict of interest operated on the defense. See *People v Ortiz*, 76 NY2d 652, 657. The defendant was told of the potential conflict and neither he nor his other attorney objected to the representation. Despite the prosecutor’s allegations, the defense pursued the claim that it was G.T.’s gun, and the first attorney was conflict free and actively participated throughout the trial. See *People v Jacobs*, 6 NY3d 188, 190. The court’s failure to place on the record the discussions that must have taken place after the prosecutor’s request (see *People v Gomberg*, 38 NY2d 307, 312) did not relieve the defendant of his burden of proving that the conflict operated on the defense. See *eg People v Smart*, 96 NY2d 793, 795. This Court will not create a *per se* rule mandating reversal when a defense attorney is accused of criminal misconduct directly related to the representation of the defendant. The court properly denied without a hearing the defendant’s constitutional challenges to one of the predicate felony convictions because his allegations were unsupported by facts. See *People v Gordon*, 251 AD2d 93. Order affirmed.

**Dissent in Part:** [Smith, J] The court failed to determine whether the conflict operated on the representation. See *People v Ennis*, 11 NY3d 403, 409-410. The record is silent as to whether the defense might have called certain

witnesses or asked certain questions or pursued particular strategies if defense counsel’s personal interests were not threatened. The defendant cannot be blamed for his other attorney’s failure to attack his colleague. Because the record shows the conflict and the court’s error in failing to deal with it, the defendant is entitled to a hearing on the issue.

Third Department

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

Sentencing (Restitution) SEN; 345(71)

*People v Doris*, 64 AD3d 813, 881 NYS2d 674 (3rd Dept 2009)

**Holding:** The court did not err in ordering the defendant to pay restitution even though restitution was not part of the negotiated plea agreement. The defendant’s waiver of appeal does not preclude consideration of the defendant’s challenge to the post-plea restitution order. See *People v Nichols*, 276 AD2d 832, 832. The issue of restitution was raised for the first time at sentencing. However, the record shows that the defendant willingly accepted the enhanced sentence. See *People v Esquivel*, 261 AD2d 649, 649. At sentencing, defense counsel initiated the discussion, stated that the defendant understood that his sentence would include restitution, and told the court that the defendant was not requesting a restitution hearing. The defendant personally repeated that understanding and he reiterated his commitment to pleading guilty. Judgment affirmed. (County Ct, Ulster Co [McDonough, J])

Sentencing (Restitution) SEN; 345(71)

*People v Henry*, 64 AD3d 804, 881 NYS2d 701 (3rd Dept 2009)

**Holding:** The court did not err in determining whether the defendant had a legal obligation to make restitution and setting the amount of restitution without considering the defendant’s ability to pay at the time of sentencing. See Penal Law 60.27; *People v Holmes*, 300 AD2d 1072, 1073. This is a departure from current case law from this Court (see *People v Coston*, 55 AD3d 943, 947 *lv den* 11 NY3d 924; *People v Durant*, 41 AD3d 976), and those cases should no longer be followed. The defendant failed to request a restitution hearing and did not raise any issues regarding his ability to pay. The court properly relied on the information in the presentence report regarding the complainants’ losses in determining the amount to be paid. Penal Law 60.27 does not require the court to consider the defendant’s ability to pay when it imposes a nonprobationary sentence that includes, as a significant component, a period of incarceration. “Such a require-

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ment would, in effect, remove restitution as a viable sentencing option in many instances where serious harm has been inflicted upon the victim and a period of incarceration will be imposed as part of a defendant's sentence." Under CPL 420.10(5), the defendant may ask to be resentenced if it is later determined that he is unable to pay the restitution as ordered. Judgment affirmed. (County Ct, Albany Co [Herrick, J])

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

**People v Travis**, 64 AD3d 808, 882 NYS2d 530  
(3rd Dept 2009)

**Holding:** The court erred in ordering restitution without a hearing. At sentencing, because the court did not have information from the corporate complainant regarding its losses, it sentenced the defendant to the agreed upon prison term, but left the restitution issue open for two weeks. The court later issued a restitution order, the amount of which was based on a short letter from the corporation's counsel setting forth the damages allegedly sustained. The corporation did not provide detailed information about the loss or how it was computed. The court did not give the defendant an opportunity to contest the amount. Under these circumstances, the matter must be remitted for a restitution hearing. *See* Penal Law 60.27(2). The court is not required to consider the defendant's ability to pay when the defendant's sentence includes, as a significant component thereof, a period of incarceration. *See People v Henry*, 64 AD3d 804. Judgment modified by reversing the restitution order, matter remitted for a restitution hearing, and judgment affirmed as modified. (County Ct, Sullivan Co [LaBuda, J])

**Concurrence:** [Mercure, JP] Pursuant to this court's long-standing precedent (*see People v Frisco*, 221 AD2d 779, 780), the court should consider the defendant's ability to pay upon remittal. The statements to the contrary in *Henry* are dicta and "the suggested departure from our precedent [is] misguided." And the newly proposed test for determining when to consider a defendant's ability to pay, *ie*, whether the sentence includes, as a significant component, a term of incarceration, is unworkable.

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

**People v Crowley**, 64 AD3d 918, 881 NYS2d 727  
(3rd Dept 2009)

**Holding:** Meaningful appellate review of the court's sex offender classification is not possible because the court failed to issue a written order setting forth its findings of fact and conclusions of law, as required by Correction Law (Corr Law) 168-n(3). *See People v Zayas*, 57 AD3d 1179,

1179-1180. The defendant was convicted of a felony sex crime in Florida, which was based on the age difference between the defendant, who was 38 years old, and the complainant, who was 17 years old. Because the defendant had to register as a sex offender in Florida, he had to register in New York when he moved to this state. *See* Corr Law 168-a(1), (2)(d)(ii). The Board of Examiners of Sex Offenders determined that he was presumptively a level II offender, but recommended a downward departure because the defendant's conduct would not constitute a crime in New York and that, while there was some evidence of coercion, there did not appear to be any force involved. The prosecution sent a letter opposing the downward departure, but did not provide the required reasons for its opposition. *See* Corr Law 168-n(3). The defendant advocated in favor of the downward departure recommendation, but did not challenge the Board's assessment of points in the risk assessment instrument. The court stated that, based on the defendant's history of drug and alcohol abuse, it believed that the defendant would reoffend if he were drunk again and offered the defendant an opportunity to get a drug and alcohol evaluation. The defendant refused. The court designated him a level II risk based on his refusal to address his substance abuse history. The court failed to discuss the Board's reason for recommending a downward departure. Order reversed and matter remitted for further proceedings. (County Ct, Rensselaer Co [Jacon, J])

**Counsel (Competence/Effective Assistance/Adequacy) (Duties)** COU; 95(15) (20)**Post-Judgment Relief (CPL § 440 Motion)** PJR; 289(15)

**People v Hampton**, 64 AD3d 872, 883 NYS2d 338  
(3rd Dept 2009)

The defendant was convicted of first-degree burglary, first-degree criminal use of a firearm, third-degree criminal mischief, and second-degree aggravated harassment.

**Holding:** The court erred in denying the defendant's CPL 440.10 motion without a hearing. *See People v Reynolds*, 309 AD2d 976, 976-977. In support of his motion, the defendant asserted that during his first meeting with his attorney, he said that his daughter told him that the accuser attempted to have sex with her and that this is why he went to the accuser's house. Defense counsel allegedly told the defendant that he had an "excellent" defense of extreme emotional disturbance and that he could not be convicted of possession of a weapon because no weapon was found. When the court questioned defense counsel about the latter allegation, "counsel responded, 'the charge says that he possessed a weapon. There's no weapon here.'" The defendant's allegations and counsel's statements strongly imply that counsel had a fundamental misunderstanding of the proof needed for

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a weapons conviction (*see eg People v Miller*, \_\_ AD3d \_\_, \_\_, 2009 NY Slip Op 04305, \*2), and the availability of the extreme emotional disturbance affirmative defense, which only applies to intentional murder. *See* Penal Law 125.25(1)(a), 125.27(2)(a). The defendant alleged that he rejected a plea offer based on counsel’s erroneous representations. He also claimed that his attorney refused to allow him to testify at trial and that counsel failed to tell him about his right to testify before the grand jury, investigate the case, confer with him before the trial, and adequately prepare for trial. And the defendant’s affidavit discusses his proposed testimony and how it may have undermined the accuser’s credibility. Judgment affirmed, order denying the CPL 440 motion reversed, and matter remitted for further proceedings. (County Ct, Broome Co [Smith, J])

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

Evidence (Sufficiency) EVI; 155(130)

*People v Lettley*, 64 AD3d 901, 882 NYS2d 577 (3rd Dept 2009)

**Holding:** The evidence was legally insufficient to support the defendant’s conviction for nine counts of first-degree placing a false bomb or hazardous substance. The defendant did not preserve the particular claim, but it is reviewed in the interest of justice. *See* CPL 470.15(3)(c). The defendant, an inmate, sent letters to several agencies, including the Federal Bureau of Investigation, nonprofit organizations, and the office of an elected official, each of which contained a packet of a white powdery substance that later proved to be foot powder. He put his name, return address, and prisoner number on each letter. When questioned by a Department of Correctional Services’ inspector, the defendant admitted to sending the letters. The prosecution failed to present evidence that the locations where the letters were received fit within the statutory definition of public building or public place. However, the evidence was legally sufficient to convict the defendant of the lesser included offense of second-degree placing a false bomb or hazardous substance, which does not contain the public building or public place element. Judgment modified by reducing the convictions from first- to second-degree placing a false bomb or hazardous substance, sentences vacated, matter remitted for resentencing, and judgment affirmed as modified. (County Ct, Washington Co [McKeighan, J])

Lesser and Included Offenses (Definition) (General) LOF; 240(5) (7)

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

*People v Beauharnois*, 64 AD3d 996, 882 NYS2d 589 (3rd Dept 2009)

**Holding:** The defendant’s conviction for first-degree course of sexual conduct against a child (count 2) should be dismissed as a lesser included offense of predatory sexual assault against a child (count 3). The subdivision charged in count 2, Penal Law 130.75(1)(b), requires that over a period of not less than three months, the defendant, being 18 years old or more, engaged in two or more acts of sexual conduct, which include at least one act of sexual intercourse, oral or anal sexual conduct, or aggravated sexual conduct, with a child less than 13 years old. The predatory sexual assault count required that the defendant, being 18 years old or more, committed first-degree course of sexual conduct against a child and the complainant is less than 13 years old. *See* Penal Law 130.96. Under the circumstances, the defendant’s commission of first-degree course of sexual conduct was an element of the predatory sexual assault count, and the crimes as charged have essentially the same elements. Because it was impossible to commit the predatory sexual assault crime without committing, by the same conduct, first-degree course of sexual conduct, the latter crime is a lesser included offense of the former. *See* CPL 1.20(37); *People v Miller*, 6 NY3d 295, 302-303. Endangering the welfare of a child is not a lesser included offense of either of those two crimes because it requires proof of an element or fact that is not required for the greater crimes. *See People v Green*, 56 NY2d 427, 431. Judgment modified by reversing first-degree course of sexual conduct against a child conviction, count dismissed and sentence imposed thereon vacated, and judgment affirmed as modified. (Supreme Ct, Clinton Co [Lawliss, J])

Homicide (Manslaughter [Defenses]) (Mental Condition) HMC; 185(30[g]) (35)

Insanity (Defense Of) (Psychiatrists and Psychologists) ISY; 200(10) (50)

*People v Hartman*, 64 AD3d 1002, 883 NYS2d 361 (3rd Dept 2009)

The court allowed defense counsel’s late filing of the notice of intent to offer the defense of mental disease or defect, but denied defense counsel’s request for an adjournment of the trial because her psychiatric expert witness was not available.

**Holding:** The court abused its discretion in denying defense counsel’s adjournment request. Defense counsel moved for an adjournment on Thursday and the trial was scheduled to begin the following Monday. Defense counsel explained why her request was delayed, including the

**Third Department** *continued*

unexpected rescheduling of the trial from September to June, her efforts to expedite the expert's evaluation, and her investigation of other pertinent information. While defense counsel did give the prosecution a copy of the report shortly after she received it, she did not indicate that she planned to present the expert's testimony at trial. Defense counsel exercised diligence and good faith in attempting to expedite the expert's evaluation. "It should also be noted that defendant herself was in no way responsible for the unavailability of the witness or the delay in informing the court (*compare People v Singleton*, 41 NY2d [402.] at 406). Under these circumstances, denial of the request for an adjournment had the disproportionate effect of punishing defendant for her counsel's dereliction by depriving her of a defense." The court failed to determine whether the expert's testimony would have been material and favorable to the defendant. *See People v Foy*, 32 NY2d 473, 476. Defense counsel's argument showed that the proposed testimony would arguably have been material and favorable and that the testimony was not cumulative. Judgment reversed and matter remitted for a new trial. (County Ct, Madison Co [McDermott, JJ])

**Fourth Department**

Accusatory Instruments (Sufficiency)	ACI; 11(15)
Assault (General)	ASS; 45(27)
Grand Jury (General)	GRJ; 180(3)

*People v Gianni*, 64 AD3d 1176, 881 NYS2d 757  
(4th Dept 2009)

**Holding:** The court properly concluded that the grand jury evidence was legally insufficient to establish second-degree assault or attempted second-degree assault. *See* CPL 210.20(1)(b). "Here, it is undisputed that, when defendant moved a humidification tube inserted into her child's neck, water entered the tracheostomy hole and caused the child to cough, gag, turn red and experience reduced oxygen levels." When the evidence is viewed in the light most favorable to the prosecution (*see People v Jennings*, 69 NY2d 103, 114), it is clear that the prosecution failed to present prima facie proof that the defendant caused or attempted to cause physical injury to her child. *Cf People v Sylvester*, 254 AD2d 711, 712. Order affirmed. (County Ct, Onondaga Co [Fahey, JJ])

Admissions (Interrogation) ( <i>Miranda</i> Advice)	ADM; 15(22) (25)
Search and Seizure (Consent [Evidence and Burden of Proof])	SEA; 335(20)[k])

*People v Mejia*, 64 AD3d 1144, 882 NYS2d 621  
(4th Dept 2009)

**Holding:** The court erred in denying the defendant's motion to suppress his statements to the police. The testimony of the police officers, which the court credited, established that the defendant was in custody during the interrogation. The officers, who knew that a codefendant implicated the defendant in the murder, went to the defendant's home and asked him to go with them to the police station. The defendant agreed, but the police frisked and handcuffed him and they did not remove the handcuffs until he was in a secure interview room. And the defendant was escorted when he needed to use the bathroom. The police questioned the defendant, but did not administer *Miranda* warnings until he made incriminating statements. "[A] reasonable person, innocent of any crime, would have believed under those circumstances that he or she was in custody (*see People v Rhodes*, 49 AD3d 668, 669, *lv denied* 10 NY3d 938 . . .)." The court properly denied the defendant's motion to suppress his sneakers. The court credited the police officers' testimony that, when they got to the defendant's house, the defendant asked his mother for his sneakers and she gave the sneakers to an officer. Thus, the police lawfully obtained the sneakers from his mother. Judgment reversed, motion to suppress statements granted, and new trial granted on counts one through four, six, and seven of the indictment. (County Ct, Erie Co [DiTullio, JJ])

Appeals and Writs (Briefs) (Counsel)	APP; 25(15) (30)
Counsel ( <i>Anders</i> Brief)	COU; 95(7)
Sentencing (General)	SEN; 345(37)

*People ex rel Powell v New York State Department of  
Correctional Services*, 64 AD3d 1201, 882 NYS2d 614  
(4th Dept 2009)

**Holding:** "In denying relator's habeas corpus petition, Supreme Court held that '[u]pon his release to post-release supervision, the balance of the maximum term on his indeterminate sentence was properly held in abeyance pursuant to Penal Law § 70.45(5)(a).' However, relator's indeterminate sentence arose from a crime committed in 1997, prior to the effective date of Penal Law § 70.45. Thus, a nonfrivolous issue exists as to whether this provision was properly applied." Case held, decision reserved, motion to relieve counsel granted, and new counsel assigned to brief this issue and any other issues counsel's review of the record may disclose. (Supreme Ct, Wyoming Co [Dadd, JJ])

Article 78 Proceedings (General)	ART; 41(10)
Constitutional Law (General)	CON; 82(20) (55)

Fourth Department *continued*

(United States Generally)

Religious Freedom (General) RLG; 328(10)

Matter of Pratt v Hogan, 64 AD3d 1183, 882 NYS2d 616 (4th Dept 2009)

**Holding:** The court erred in dismissing the petitioner’s CPLR article 78 petition based on the respondents’ objections in point of law. *See gen* CPLR 7804(f). The petitioner, who is civilly confined pursuant to Mental Hygiene Law article 10, commenced the article 78 proceeding alleging that the respondents violated his constitutional rights because he is an atheist and is required to attend treatment programs that have religious-based content. The petitioner did not need to exhaust his administrative remedies prior to commencing the proceeding because he alleged a violation of his constitutional rights. *See gen* *Watergate II Apts v Buffalo Sewer Auth*, 46 NY2d 52, 57. The petitioner alleged that his sex offender treatment program includes dialectical behavior therapy, which uses “skills based on Eastern philosophy and spiritual training, which are compatible with most Western contemplative and Eastern meditation practices.” And he alleged that he must participate in Alcoholics Anonymous, which has religious-based content. *See gen* *Matter of Griffin v Coughlin*, 88 NY2d 674, 677. The respondents concede that the legal objections in their answer do not address the petition’s allegations; instead, the objections address the constitutionality of Mental Hygiene Law article 10, which the petitioner did not contest. Judgment reversed and petition reinstated. (Supreme Ct, Oneida Co [Shaheen, J])

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

People v Jackson, 64 AD3d 1248, 883 NYS2d 684 (4th Dept 2009)

**Holding:** The defendant’s plea was not knowingly, intelligently, and voluntarily entered. Although the defendant did not preserve the issue by moving to withdraw his plea or to vacate the conviction, it is reviewed as a matter of discretion in the interest of justice. *See* CPL 470.15(6)(a). Pursuant to the plea agreement, the defendant retained his right to appeal. The record does not show that the defendant knew that he forfeited other rights by pleading guilty, including his right to argue that he was denied his statutory right to a speedy trial. *See gen* *People v O’Brien*, 56 NY2d 1009, 1010. This court would vacate the plea and remit to the trial court to give the defendant an opportunity to withdraw his plea (*see gen* *People v Morbillo*, 56 AD3d 694 *lv den* 12 NY3d 786, 788); however, because the defendant expressly rejected that

relief, the judgment is affirmed. *See People v Dean*, 52 AD3d 1308 *lv den* 11 NY3d 736. The court did not coerce the defendant’s plea. Although the court made statements similar to those that were deemed to be coercive in *People v Flinn* (60 AD3d 1304), it also had an extensive discussion with the defendant about the consequences of pleading guilty before the plea colloquy, unlike in *Flinn*. The court told the defendant he could enter an *Alford* plea and gave him a chance to discuss the plea offer with his family. And the court explained that although he raised some good arguments, they would have to be raised at trial. Thus, the defendant’s reliance on *Flinn* is misplaced. Judgment affirmed. (County Ct, Jefferson Co [Martusewicz, J])

Search and Seizure (Warrantless Searches) SEA; 335(80)

People v Liggins, 64 AD3d 1213, 883 NYS2d 415 (4th Dept 2009)

**Holding:** The court erred in denying the defendant’s motion to suppress the evidence seized from his apartment after a warrantless entry. The exceptions to the Fourth Amendment’s warrant clause do not apply. *See People v Molnar*, 98 NY2d 328, 331-332. The prosecution failed to establish that the police had reasonable grounds to believe that there was an emergency and an immediate need for their help to protect life or property. *See People v Mitchell*, 39 NY2d 173, 177 *cert den* 426 US 953 (1976). They responded to a report of shots fired at the defendant’s apartment building, but there was no evidence of the timing or source of the report, a description of the perpetrator, or the existence of a possible victim. *See People v Garrett*, 256 AD2d 588, 589 *lv den* 93 NY2d 922, 924. And they failed to show a reasonable basis to connect the emergency with the area searched. Shell casings were found outside the building and a resident said that there was an argument in the defendant’s apartment just before the shooting, but she did not say who was involved in the argument or what it was about. The police knocked on the apartment door for several minutes and they entered after the codefendant opened the door and said she was there alone. Other than the vague, undetailed report of an argument, the officer had no basis “to believe that ‘the trouble started in’ defendant’s apartment.” Judgment reversed, motion to suppress granted, indictment dismissed, and matter remitted. (County Ct, Oneida Co [Dwyer, J])

**Dissent:** [Peradotto, J & Carni, J] Given the nature and specificity of the report, the quick police response, the location of the shell casings, and the resident’s statements, the court properly concluded that the warrantless entry was justified by the emergency exception. *See People v DePaula*, 179 AD2d 424, 426.

Probation and Conditional Discharge (General) (Revocation) PRO; 305(18) (30)

**Fourth Department** *continued*

**People v Patel**, 64 AD3d 1246, 881 NYS2d 793  
(4th Dept 2009)

The defendant admitted that he violated his probation by travelling to India, without the probation department's consent, to be with his dying grandfather. The court revoked the defendant's probation and sentenced him to a definite term of incarceration of 120 days and continued probation with electronic monitoring.

**Holding:** The court did not abuse its discretion in revoking the defendant's probation. However, this court can substitute its own discretion for that of the trial court. *See People v Suitte*, 90 AD2d 80, 86. Given the compelling mitigating factors, the judgment is modified as a matter of discretion in the interest of justice and the original sentence of probation is continued. Judgment modified by vacating that part revoking the sentence of probation and imposing sentence and by continuing the sentence of probation originally imposed and judgment affirmed as modified. (County Ct, Genesee Co [Noonan, JJ])

**Dissent:** [Scudder, PJ & Smith, J] The sentence imposed by the court was not so unduly harsh and severe as to warrant interference with the court's discretion. Despite the probation department's denial of his travel request, the defendant went to India and did not return until two months after his grandfather died, and he contacted his probation officer only once while he was there. "[T]he majority has in effect permitted defendant to violate the conditions of his probation without consequence."

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Accomplices (Corroboration)	ACC; 10(20)
Sentencing (Concurrent/Consecutive)	SEN; 345(10)

**People v Reome**, 64 AD3d 1201, 883 NYS2d 419  
(4th Dept 2009)

**Holding:** The accomplice's testimony was sufficiently corroborated. *See* CPL 60.22(1). The prosecution satisfied its burden by offering nonaccomplice evidence that tended to connect the defendant to the crime. *See People v Besser*, 96 NY2d 136, 143-144. The accuser's testimony about the number of attackers and the method of the attack are in line with the accomplice's narrative, providing the requisite corroboration. While the record does not show that the court imposed a harsher sentence because he elected to proceed to trial (*see People v Shaw*, 124 AD2d 686, 686 *lv den* 69 NY2d 750), under the circumstances, the sentence is unduly harsh and severe. Judgment modified by directing that the sentences shall run concurrently and judgment affirmed as modified. (County Ct, Onondaga Co [Walsh, JJ])

**Dissent:** [Hurlbutt, JP & Martoche, J] At trial, the accuser did not identify or describe the four attackers.

DNA evidence implicated three of the attackers, including the accomplice, but not the defendant. Thus, the accomplice's identification of the defendant as one of the attackers required corroboration. The defendant's association with his codefendants cannot establish that he engaged in criminal activity. *See People v Marmulstein*, 109 AD2d 948, 949. The purported evidence of consciousness of guilt, *ie*, the defendant's nervousness when he was approached by the police and the fact that he vomited several times when he was having his buccal swab taken for DNA testing, was weak and did not constitute corroboration. *See People v Moses*, 63 NY2d 299, 309.

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Search and Seizure	SEA; 335(15[k]) (70)
(Automobiles and Other Vehicles [Investigative Searches]) (Standing to Move to Suppress)	

**People v Rosario**, 64 AD3d 1217, 881 NYS2d 788  
(4th Dept 2009)

**Holding:** The defendant forfeited his right to challenge the validity of the canine sniff of the exterior of the codefendant's car because he pleaded guilty before the court issued a final ruling on his claim. *See People v Fernandez*, 67 NY2d 686, 688. Criminal Procedure Law 710.70(2) does not apply since the court did not issue a final order. The defendant, a passenger in the codefendant's car, did not have standing to contest the canine sniff because he failed to show that he had a reasonable expectation of privacy in the car or the drugs seized therefrom. *See gen People v Tejada*, 81 NY2d 861, 862. And the record does not show that the crime charged was based solely on the Penal Law 220.25(1) statutory presumption. Judgment affirmed. (Supreme Ct, Monroe Co [Sirkin, AJ])

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Juveniles (Delinquency-Procedural Law)	JUV; 230(20)
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**Matter of Tyler D.**, 64 AD3d 1243, 881 NYS2d 787  
(4th Dept 2009)

**Holding:** The respondent's admission to the underlying act was defective because the court failed to comply with Family Court Act 321.3(1) by conducting an adequate allocution of his mother. *See Matter of Andrew J.S.*, 48 AD3d 1224. Although the issue was not preserved, preservation was not required because the statute's requirements are mandatory and nonwaivable. *See Matter of Florence V.*, 222 AD2d 991, 992. The petition is not dismissed because the period of the respondent's placement has not expired. *Cf Matter of Sean R.P.*, 24 AD3d 1200, 1201 *lv den* 6 NY3d 711. Order reversed, June 27 order vacated, and matter remitted for further proceedings on the petition. (Family Ct, Oswego Co [Roman, JJ]) ⚖

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